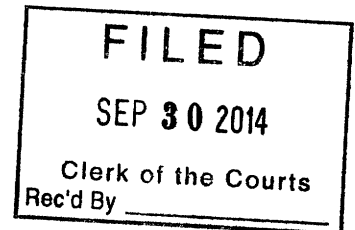


IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT

**IN RE: THE HONORABLE JOHN A. DONALD
GENERAL SESSIONS JUDGE
SHELBY COUNTY, TENNESSEE**

Docket No. M2013-02204-BJC-DIS-FC

File No. 11-4762



**PRETRIAL STATEMENT OF DISCIPLINARY COUNSEL,
TENNESSEE BOARD OF JUDICIAL CONDUCT**

Timothy Discenza, Disciplinary Counsel for the Tennessee Board of Judicial Conduct*, for pretrial statement in this action, would state as follows:

Background

This matter is brought pursuant to and in accordance with the provisions of the Board of Judicial Conduct (hereinafter "Board") statute, Tennessee Code Annotated § 17-5-301, *et. seq.* The Board has filed formal charges against John A. Donald, General Sessions Judge, Shelby County, Tennessee.

Jurisdiction

John A. Donald, at all times relevant herein, was a General Sessions Judge in Shelby County, Tennessee, having been elected to that position. Therefore, Judge Donald is subject to judicial discipline by the Board of Judicial Conduct pursuant to Tennessee Code Annotated § 17-5-102.

*This case began in 2011 in the Tennessee Court of the Judiciary. On July 1, 2012, the Tennessee Court of the Judiciary became the Board of Judicial Conduct.

Facts

The salient facts in this action are as follows:

A. On or about October 17, 2011, David Gold, an attorney practicing in Shelby County, Tennessee filed a complaint with the Tennessee Court of the Judiciary, the predecessor agency of the Tennessee Board of Judicial Conduct, against Judge Donald, the respondent, alleging violations by Judge Donald of the Tennessee Code of Judicial Conduct that was then in effect. This complaint is attached as exhibit A to this formal charge.

B. On or about October 23, 2011, Judge Donald was sent a copy of the complaint and asked to respond to the complaint.

C. On or about December 2nd, 2011, Judge Donald responded to Mr. Gold's complaint by letter to the Disciplinary Counsel to the Tennessee Court of the Judiciary.

D. On or about December 7, 2011, Judge Donald, in retaliation for the filing of a complaint with the Tennessee Court of the Judiciary against him, wrote a letter of complaint to the Tennessee Board of Professional Responsibility, making a complaint against David Gold, and asking the Board to investigate another attorney who had been associated with David Gold and who was listed by David Gold as a witness to Mr. Gold's complaint against Judge Donald.

E. On or about November 15, 2012, the Tennessee Board of Professional Responsibility advised David Gold that after inquiry of the matter brought to their attention by Judge Donald, the matter was dismissed.

In ultimately responding to Requests for Admission propounded to Judge Donald in this case, Judge Donald did admit as facts herein, the following:

1. That you (Judge John A. Donald) were at all times relevant herein (as described in the original Complaint in this action), a full time judge of the General Sessions Court of Shelby County, Tennessee, as described in TCA Section 16-15-502.

2. That at all times relevant to the Complaint filed in this action, the Judicial Canons of Ethics or Code of Judicial Conduct applied to you (Judge John A. Donald).

3. That at all times relevant to the Complaint filed in this action, you (Judge John A. Donald) were subject to judicial discipline by the Board of Judicial Conduct pursuant to Tennessee Code Annotated § 17-5-102.

4. That on or about October 17, 2011, David Gold, an attorney practicing in Shelby County, Tennessee filed a complaint with the Tennessee Court of the Judiciary, the predecessor agency of the Tennessee Board of Judicial Conduct, against you (Judge John A. Donald), alleging violations by you of the Tennessee Code of Judicial Conduct that was then in effect. This complaint was attached as exhibit A to the formal charge or complaint filed in this action.

5. That on or about October 23, 2011, Judge Donald was sent a copy of the complaint of David Gold referenced in the previous Request No. 4 and asked to respond to the complaint, and that you (Judge John A. Donald) received the complaint and letter of Disciplinary Counsel seeking your response prior to November 15, 2011.

6. That on or about December 2nd, 2011, you (Judge John A. Donald) responded to Mr. Gold's complaint by letter to the Disciplinary Counsel to the Tennessee Court of the Judiciary.

7. That on or about December 7, 2011, you (Judge John A. Donald) wrote a letter of complaint to the Tennessee Board of Professional Responsibility, making a complaint against David Gold, and asking the Board to investigate another attorney who had been associated with David Gold and who was listed by David Gold as a witness to Mr. Gold's complaint against you.

8. That on December 7, 2011, the letter that you (Judge John A. Donald) wrote to the Board of Professional Responsibility referenced in previous Request No. 7, designated as Exhibit No. 2 to your deposition November 26, 2013 is a true and exact copy of the letter that you wrote to the Board of Professional Responsibility concerning David Gold.

9. That on January 26, 2012, you (Judge John A. Donald) wrote another letter to the Board of Professional Responsibility suggesting to that Board another area of investigation against Mr. Gold by that Board, and that such letter, designated as Exhibit

No. 4 to your deposition November 26, 2013 is a true and exact copy of the letter that you wrote to the Board of Professional Responsibility concerning David Gold.

Tennessee Board of Judicial Conduct

The Board of Judicial Conduct, formerly the Court of the Judiciary, is by legislative creation tasked with a diverse spectrum of responsibility by the specific legislative intent of T.C.A. § 17-5-101, including:

It is expressly declared to be the legislative intent in the enactment of this chapter to:

- (1) Provide an orderly and efficient method for making inquiry into:
 - (A) The physical, mental and moral fitness of any Tennessee judge;
 - (B) The judge's manner of performance of duty;
 - (C) The judge's commission of any act calculated to reflect unfavorably upon the judiciary of the state or bring the judiciary into disrepute or that may adversely affect the administration of justice in the state...
- (2) Provide a process by which appropriate sanctions may be imposed...

The Board of Judicial Conduct statute “shall be liberally construed to accomplish the declared purposes and intents...” T.C.A. § 17-5-103. The entire Board of Judicial Conduct statutory framework, most recently revamped in 2012, provides the mechanics of addressing complaints brought under the statute, from origination of the complaint through and including the imposition of a diverse menu of outcomes, *infra*.

“Misconduct” of judges is broadly inclusive of the following panoply of offenses capable of being recognized by the Board:

T.C.A. § 17-5-302. Misconduct

Offenses of which the board may take cognizance shall include the following:

- (1) Willful misconduct relating to the official duties of the office;
- (2) Willful or persistent failure to perform the duties of the office;
- (3) Violation of the code of judicial conduct as set out in Tenn. Sup. Ct. R. 10;

- (4) The commission of any act constituting a violation of so much of the Tennessee Rules of Professional Conduct as set out in Tenn. Sup. Ct. R. 8 as is applicable to judges;
- (5) A persistent pattern of intemperate, irresponsible or injudicious conduct;
- (6) A persistent pattern of discourtesy to litigants, witnesses, jurors, court personnel or lawyers;
- (7) A persistent pattern of delay in disposing of pending litigation; and
- (8) Any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice.

Charges of misconduct must be established by “clear and convincing” evidence, T.C.A. § 17-5-308 (d).

Upon a finding of misconduct, the Board of Judicial Conduct may impose discipline in accordance with the provisions of T.C.A. § 17-5-301. Powers and duties of the board of judicial conduct and disciplinary counsel, as follows:

- ...(f) The board has the power to impose any or any combination of the following sanctions:
 - (1) Suspension without impairment of compensation for such period as the board determines;
 - (2) Imposition of limitations and conditions on the performance of judicial duties, including the issuance of a cease and desist order;
 - (3) Private reprimand or private censure by the investigative panel; provided, that a private reprimand or private censure, whether imposed by the board or by an investigative panel, may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed;
 - (4) Entry into a deferred discipline agreement;
 - (5) Public reprimand or public censure; and
 - (6) Entry of judgment recommending removal of the judge from office.
- (g) For purposes of this part, the following definitions apply:
 - (1) “Deferred discipline agreement” means a response to misconduct that is minor and can be addressed through treatment, training or a rehabilitation program under which the judge agrees with the recommendation of the investigative panel of the board to undergo evaluation or treatment, or both, participate in educational programs or take any other corrective action. Other disciplinary sanction arising from the same conduct is suspended during the term of a deferred discipline agreement, and no further sanction will be imposed upon the successful completion of the deferred disciplinary agreement by the judge. Failure to

comply with the disciplinary agreement authorizes the disciplinary counsel to proceed with other appropriate action;

(2) "Private censure" means a written finding that the conduct of the judge or justice violates a rule of judicial conduct, detrimentally affects the integrity of the judiciary or undermines public confidence in the administration of justice and requiring a judge or justice to appear personally before the board. A private censure is stronger than a private reprimand and may include a requirement that the judge or justice follow a specified course of corrective action;

(3) "Private reprimand" means a letter that details the finding of judicial misconduct and enumerates the reasons that such conduct is improper or brings discredit upon the judiciary or the administration of justice;

(4) "Public censure" is identical to a private censure except that the written finding is released to the press; and

(5) "Public reprimand" is identical to a private reprimand except that the letter is released to the press.

(h) No sanction imposed by the board shall violate the prohibition of article VI, § 7 of the Tennessee Constitution.

(i) The criteria to be considered by the board or the investigatory panel in determining the sanction or combination of sanctions appropriate for the level of culpability involved in the judge's misconduct include the following:

(1) Whether the misconduct is an isolated instance or evidences a pattern of conduct;

(2) The nature, extent and frequency of occurrence of the acts of misconduct;

(3) Whether the misconduct occurred in or out of the courtroom;

(4) Whether the misconduct occurred while the judge was acting in an official capacity;

(5) Whether the judge has acknowledged or recognized the occurrence, nature and impropriety of the acts;

(6) Whether the judge has evidenced an effort to change or modify conduct;

(7) The judge's length of service on the bench;

(8) Whether there have been prior complaints about the judge, except where prior complaints have been found frivolous, unfounded or without jurisdiction pursuant to § 17-5-305;

(9) The effect of the misconduct upon the integrity of, and respect for, the judiciary; and

(10) The extent to which the judge exploited the judicial position for personal gain or satisfaction.

Issues

The primary issues for determination of the Hearing Panel are:

1. Did Judge John A. Donald violate the Code of Judicial Conduct by his actions of retaliation against the person filing a judicial misconduct complaint against Judge Donald as alleged in the Formal Charges, specifically as to the following Canons:

In pertinent part, the Code of Judicial Conduct, by and through its Canons, provided as follows:

CANON 1 — A Judge Shall Uphold the Integrity and Independence of the Judiciary

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2 — A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary. —Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept

restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

Argument

1. The nature of the Code and Board of Judicial Conduct.

The General Assembly has recognized that the Tennessee Supreme Court has "general supervisory control over all the inferior courts of the state." T.C.A. § 16-3-501 (2009), and that this inherent, plenary power derives from the common law and not from the General Assembly. T.C.A. §§ 16-3-502 to -503 (2009). In that role, the Supreme Court has the inherent power to adopt the ethics rules for judges and to determine how judges should be disciplined for violation of those rules. Tennessee Supreme Court Rule 10, the Code of Judicial Conduct, is the set of rules by which judicial conduct is to be determined. *In Re Bell*, 344 S.W. 3d 304 (Tenn. 2011).

In terms of interpretation and construction, while it has been held that a Code of Judicial Conduct, situated as they are within the Rules framework of the Supreme Court, are capable of conventional rules of statutory interpretation, including but not limited to adherence to "plain and unambiguous language" and discernment of the intent of the drafter, *In re Carney*, 79 A. 3d 490, at 506-506 (Penn. 2013).

The Canons violated by Judge Donald, *supra.*, offer plain and unambiguous language requiring a conclusion that ethics violations were committed by him in multiple instances in this action.

2. Retaliation

Disciplinary Counsel is not aware of any Tennessee decisions specifically addressing the question of judicial retaliation. The concept of “retaliation” has, however, been addressed on multiple occasions in varying legal contexts.

Fundamental dictionary definitions express the concept of “retaliation” in both traditional and understandable terminology, such as as Black's Law Dictionary description:

“[Retaliation is that] which requires the infliction upon the wrongdoer of the same injury which he has caused *to another*. Expressed in the Mosaic law by the formula, ‘an eye for an eye; a tooth for a tooth.’ etc. In modern international law, the term describes the rule by which one state may inflict upon the citizens of another *7 state death, imprisonment, or other hardship, in retaliation for similar injuries imposed upon its own citizens.” (Emphasis added.) Black's Law Dictionary 822 (5th ed. 1979).

By way of example, in an employment matter, the Court of Appeals in *White v. Empire Exp., Inc.*, 395 S.W.3d 696 (Tenn. App. 2012), relied on a standard dictionary definition, stating that to “retaliate” is to “to return the like for: repay or requite in kind (as an injury) ... [or] to put or inflict in return.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1938 (1993 Unabridged). *White*, at 395 S.W. 3d 725.

A Tennessee case on retaliatory discharge involving an attorney who had reported his supervisor for filing a Board of Professional Responsibility complaint alleging an unauthorized practice of law is certainly instructive. In *Crews v. Buckman Laboratories*

Intern., Inc., 78 S.W.2d 852 (Tenn. 2002). the Tennessee Supreme Court. recognized the “important public policy” inherent in preventing the unauthorized practice of law, holding that the interest of the public was such in the factual circumstances of the case that the tort of retaliatory discharge was readily available to the plaintiff, reversing determinations that had been made by the trial court and the intermediate Court of Appeals, noting.

It cannot seriously be questioned that many of the duties imposed upon lawyers by the Tennessee Code of Professional Responsibility represent a clear and definitive statement of public policy. Indeed, we have previously expressly recognized that specific "provisions of the Code of Professional Responsibility, promulgated by the Supreme Court and authorized by the Tennessee Constitution and statutes, reflect public policy..." *Swafford v. Harris*, 967 S.W.2d 319, 322 (Tenn.1998) (addressing Disciplinary Rule 7-109(C)); *see also Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 531 (Tenn.1991) (addressing Canon 2 and Disciplinary Rule 2-108).

Similarly, in the instant case, the initial complainant Mr. Gold, in filing a judicial misconduct case was pursuing simply the statutorily directed method for addressing just such claims. *T.C.A. § 17-5-101, et. seq.* The intent of the statute is pristine in its language and directive that the statute is designed to provide “an orderly and efficient method for making inquiry into... (B) The judge's manner of performance of duty; C) The judge's commission of any act calculated to reflect unfavorably upon the judiciary of the state or bring the judiciary into disrepute or that may adversely affect the administration of justice in the state.” The very construct of “retaliation” as practiced in this matter by Judge Donald not only presents a textbook-definition meaning, *supra.*, but moreover, constitutes action specifically undermining the very legislative intention.

Indeed, Mr. Gold, not only was engaging in protected conduct in filing a judicial ethics complaint, under the current Rules of Professional Conduct, he may have been

required to do so, given the specific guidance of the attorney rules:

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

... (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct...

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

To suggest that a Judge, as did Judge Donald, may retaliate against an individual for airing a judicial conduct complaint would most certainly frustrate the public policy expressly articulated by the statute, and further, serves to impose a definitive chilling effect on the members of the public who may be considering just such an action.

Squarely meeting the basic meaning of "retaliation," Judge Donald, by direct and practically immediate reaction sought to impose "the infliction upon the wrongdoer of the same injury which he has caused *to another*, expressed in the Mosaic law by the formula, 'an eye for an eye; a tooth for a tooth, *supra*.'" Or, perhaps, Judge Donald undertook to "to return the like for: repay or requite in kind (as an injury) ... [or] to put or inflict in return." *supra*, by filing an attorney Board of Professional Responsibility to "return the like for" or "repay or requite in kind" for Gold filing a Court of Judiciary complaint against Donald.

Nationally, case law recognizes the ethical breach committed by a Judge for a retaliatory act against an individual.

For example, *In Matter of Danikolas*, 838 N.E. 2d 422 (Ind. 2005), the Judge had

fired a judicial magistrate for testifying against the Judge in a prior judicial misconduct proceeding. In upholding a finding of discipline, the Indiana Supreme Court observed, with respect to the retaliation element of the charges, observed:

Specifically, Judge Danikolas's retaliatory discharge of Magistrate Sakelaris constitutes willful misconduct and an abuse of the power of his judicial office to advance a private vendetta, and is prejudicial to the administration of justice. As we noted in *In re Boles*, 555 N.E.2d 1284, 1288 (Ind.1990), **“The use of judicial power as an instrument of retaliation is a serious violation of the Code of Judicial Conduct.” (emphasis supplied)** See also *In re Buchanan*, 100 Wash.2d 396, 669 P.2d 1248 (1983) (holding judge violated, *inter alia*, Judicial Canons 1 and 2(A) by discharging court employees in retaliation for their participation in the Washington Judicial Conduct Commission's case against the judge).

In re Carmelo J. Tavormina, 1989 WL 509569 N.Y.Com.Jud. 1989, involved a host of charges against a Judge, however, the New York Commission plainly noted that “Standing alone, his continued verbal abuse of an attorney, in retaliation for exercising her legal right to make a judicial misconduct complaint, constituted misconduct.” In the instant case, one could reasonably surmise that Judge Donald's retaliation, striking at the very heart of Gold's professional life, particularly given Gold's prior BPR struggles, constitutes a malevolent degree of retaliation far in excess of “continued verbal abuse.”

Conclusion

For the foregoing reasons, Disciplinary Counsel seeks a) a finding of judicial misconduct by Judge John A. Donald pursuant to the provisions of the Board of Judicial Conduct statute, *supra.*, and b) authorized sanctions to be imposed.

This the 30thday of September, 2014.

Timothy R. Discenza by Patrick McHale

Timothy R. Discenza #008716
Disciplinary Counsel
Tennessee Board of Judicial Conduct
P.O. Box 50356
Nashville, Tennessee 37205

Patrick J. McHale

Patrick J. McHale, # 004643
Assistant Disciplinary Counsel

Certificate of Service

I hereby certify that a true and exact copy of the foregoing was mailed, sent by email or delivered to the following:

Hon. John A. Donald
General Sessions Judge
140 Adams Avenue, Suite 110
Memphis, Tennessee 38103

This the 30th day of September, 2014.

Patrick J. McHale

Patrick J. McHale, Assistant Disciplinary Counsel