

IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: THE HONORABLE GLORIA DUMAS,
JUDGE, GENERAL SESSIONS COURT
METROPOLITAN NASHVILLE and
DAVIDSON COUNTY, TENNESSEE, Division IV

Docket No. M2009-01938-CJ-CJ-CJ

Complainant: JOSEPH S. DANIEL, in the exercise of his duties as
Disciplinary Counsel, and at the direction of an Investigative Panel of the
Tennessee Court of the Judiciary.

File No. 08-3487

RESPONSE TO MOTION FOR PROTECTIVE ORDER AND MOTION TO
QUASH NOTICE OF DEPOSITION

Comes the Respondent in this matter, Judge Gloria A. Dumas, by and through counsel, and hereby Responds to Disciplinary Counsel's Motion for a Protective Order and Motion to Quash Notice Of Deposition of Joseph S. Daniel. Mr. Daniel, as evidenced by the pleadings and written discovery of this matter, **is the complainant against Judge Dumas**. Despite his status as the complainant, Mr. Daniel through his filings is taking the position that Judge Dumas cannot discover the actual complainant's grievance against her, based primarily on his status as a licensed attorney and as Disciplinary Counsel.¹ Mr. Daniel's stance is analogous to an attorney filing a lawsuit on his own behalf then

¹ It should be noted that Mr. Daniel's duties as Disciplinary Counsel will terminate on either July 1, 2010 or June 30, 2010. Counsel has been advised that newly-appointed Disciplinary Counsel and/or Assistant Disciplinary Counsel, NOT Mr. Daniel, will act as trial counsel in this case.

refusing to allow himself to be deposed because he is an attorney - this position is untenable and in violation of standard, black letter discovery rules.

Judge Dumas respectfully requests that this Court issue an Order DENYING Mr. Daniel's requested relief. In support thereof, Judge Dumas would show the Court as follows:

1. On June 7, 2010, Judge Dumas served Mr. Daniel with a Notice of Deposition, wherein Judge Dumas intended to take Mr. Daniel's deposition on June 21, 2010 pursuant to the Tennessee Rules of Civil Procedure.

2. Mr. Daniel filed a Motion for Protective Order and Motion to Quash Notice of Deposition on June 15, 2010.

3. Public matters pending before the Tennessee Court of the Judiciary are governed by the Tennessee Rules of Civil Procedure. Tenn. Code Ann. §17-5-301(b).

4. Tenn.R.Civ.P. 26.01 provides that "parties may obtain discovery by one or more of the following methods: depositions upon oral examination...." Tenn.R.Civ.P. 26.02(1) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Tenn.R.Civ.P. 30.01 provides that "after the commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination."

5. Mr. Daniel is the complainant in this matter. There is no other complainant named or known of by the respondent. He has identified himself as such on the face of the Formal Complaint. Further, in the deposition of Mr.

Daniel's private investigator, James LaRue, LaRue testified that he was not aware of any individual making a formal complain against Judge Dumas (LaRue Deposition at 38-39)

6. Judge Dumas is absolutely entitled to discover the underlying facts upon which the complainant is basing his accusations.

7. In his Motion opposing the taking of his deposition, Mr. Daniel adopts a "shotgun approach," baldly alleging that the mere taking of his deposition² is barred because of the attorney/client privilege, the attorney work product doctrine, the prohibition against "annoyance, embarrassment, oppression, or undue burden and expense," the rules governing discovery of trial preparation materials, the creation of a potential ethical dilemma, and the creation of bad precedent. As Mr. Daniel offers no facts, support or showing for any of these blanket excuses other than his mere conclusory statements, Judge Dumas submits that Mr. Daniel has failed to make any showing as to why his attempt to withhold his investigative findings from Judge Dumas should be granted, and therefore his Motion be summarily denied. However, even if the Court were to find that Mr. Daniel's Motion meets the requisite threshold to be considered, none of his excuses allow him to escape deposition.

- a. Attorney/Client Privilege. Mr. Daniel as Disciplinary Counsel has no client. Thus, there is no privilege to protect. Assuming Mr. Daniel would argue that he has an attorney/client relationship with the complainant, he is the complainant. It is axiomatic that Mr.

² Further illustrating the unreasonableness of Mr. Daniel's position is the fact that he has not requested that certain matters not be inquired into. Instead, he takes the position that despite his status as the complainant that the Court should protect against the very occurrence of his deposition.

Daniel cannot assert an attorney/client relationship with himself. See Tenn. Code Ann. §23-3-105; Vance v. State, 230 S.W.2d 987 (Tenn. 1950). Additionally, should by some reason currently unknown to the respondent, Mr. Daniel has an appropriate attorney/client privilege to assert, he could simply do so at the deposition. Attorney-client privileges properly asserted may form the basis for refusing to answer a question but should never be the basis for a Motion to Quash.

- b. Attorney Work Product Doctrine. Judge Dumas does not seek attorney work product which has been defined as “documents and papers of an attorney prepared by the attorney or some other person in his behalf in anticipation of litigation or in preparation for trial. Arnold v. City of Chattanooga, 19 S.W.3d 779 (Tenn. Ct. App. 1999). Judge Dumas seeks to determine the facts upon which the complainant has based his accusations and to discover any and all discoverable facts to which the plaintiff has knowledge. If Mr. Daniel is asked about anything covered by the doctrine, the place to object is at the deposition. The doctrine does not provide a blanket privilege against all discovery, nor does it form a basis to quash the subpoena.
- c. Annoyance, embarrassment, oppression, or undue burden and expense. The taking of a single deposition of the complainant is not annoying, embarrassing, oppressive, or unduly burdensome or expensive. Mr. Daniel is the formal accuser of Judge Dumas.

Judge Dumas is entitled to take his deposition. This objection may be applicable, for example, when a party seeks to discover voluminous information that is relevant only to a collateral issue. This objection does not apply to the deposition of the accuser.

- d. Trial preparation materials. Although unclear on its face, Judge Dumas assumes that the “requisite burden” referenced in paragraph 4 of Mr. Daniel’s Motion refers to trial preparation materials as identified in Tenn.R.Civ.P. 26.02(3). The rule referenced by Mr. Daniel does not apply to deposition testimony. Tenn.R.Civ.P. 26.02(3) provides that a party may discover documents and tangible things otherwise discoverable provided the party makes a showing of need. The face of the rule limits the required showing to documents and tangible things (not oral testimony) that are prepared in anticipation of litigation. See discussion under Paragraph b., above.
- e. Ethical dilemma. Respondent knows of no ethical dilemma presented by the accuser being confronted by the accused. In the event that Mr. Daniel finds himself in an ethical dilemma, it is one of his own creation. Mr. Daniel elected to act as the complainant in this matter. Mr. Daniel chose, apparently, to bring this Complaint on hearsay reports without a single individual having filed a complaint. The ethical rules are not meant to be applied to shield parties from discovery obligations. Judge Dumas should not be

penalized from discovering facts in this matter to protect Mr. Daniel from his own perceived ethical conflict.

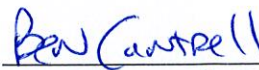

- f. Creation of bad precedent. Judge Dumas respectfully submits that the danger of bad precedent would come from refusing to allow the deposition of a complainant in a civil proceeding. Confrontation of witnesses is essential to a fair trial in our system of jurisprudence. Mr. Daniel has made himself a witness in these proceedings.

8. The deposition of Mr. Daniel's investigator, James LaRue, further necessitates that Judge Dumas be permitted to depose Mr. Daniel. LaRue's deposition makes clear that he has no independent decision making in the steps of any investigation and that he only investigates tasks specifically assigned to him by Mr. Daniel even if he feels he has leads that are important. He often did not make reports of his investigations (LaRue Deposition at 40, 42, 97-99, 102), did not include all of the information that he collected in his reports (LaRue Deposition at 40, 65-66, 72, 75, 106-107), and made additional oral reports to Mr. Daniel (LaRue Deposition at 65-66, 72, 106-107).


9. Clearly, LaRue's investigation is sorely lacking. The incompetence of LaRue's investigative techniques require that Judge Dumas be allowed to depose Daniel to determine exactly what LaRue reported, exactly what LaRue was tasked to do, and what other evidence Mr. Daniel collected without LaRue.

For the reasons outlined above, Judge Dumas respectfully requests that this Court DENY Mr. Daniel's Motion and permit the deposition of Mr. Daniel to be taken.

Respectfully submitted this 2 day of July, 2010.

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CERTIFICATE OF SERVICE

This is to certify that I have served a true and correct copy of the foregoing document upon Patrick McHale, Assistant Disciplinary Counsel, 503 North Maple Street, Murfreesboro, Tennessee 37130 by depositing same in the U.S. Mail along with sufficient postage thereon to insure delivery.

This 2 day of July, 2010.

