

# Memorandum

January 27, 16

To: Ben Selman  
Naman Howell Smith & Lee  
400 Austin Ave., Ste. 800  
Waco, Texas 76701

From: Greg White  
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In Re: *Disciplinary Complaint*

This memorandum is my narrative regarding my representation of Judge Smith in the Judicial Conduct Complaint lodged against him – particularly as it relates to my representation of other clients in Judge Smith's court while I was representing him. This is, in my view, the core of the Complaint referenced above. I am also providing a flash drive with a group of documents relevant to the matter. I have retained my e-mail communications about this matter, but I know that I routinely received, and then deleted text communications from Judge Smith. I don't recall any text message that relates to this matter at all.

## The Beginning

The Complaint against Judge Smith was transmitted to him by letter dated in September, 2014. I received a call from attorney John Palmer, a former law clerk for Judge Smith, after the Complaint was filed. He told me (in a very general way) that Judge Smith would like to speak with me about this. I was under the impression that I would be asked to write a supporting letter or to speak in support of the Judge, but when I arrived at the Judge's chambers, it was clear to me that Judge Smith wanted me to provide advice and analysis on the matter.

Judge Smith's first concern was the time that had passed since the events described in the Complaint. It was 2014, and the Complaint concerned events in 1998.

In Federal Court, much litigation is met with an immediate Motion to Dismiss. Whether a Motion to Dismiss is based on a pure law question, or (more recently) the improbability that the facts would lead to a verdict for the Plaintiff, it is quite common to request that a federal judge first examine the legal or factual sufficiency of the pleadings before addressing what actually happened. I tell you that so that you can better understand why the papers I have supplied don't really attempt to address whether the Complaint states the truth. In many federal cases, the truth is unimportant at this early stage. What matters is the sufficiency of the pleadings, and whether they can be addressed by adversary litigation.

I left the Judge's office with a copy of the Complaint, and a copy of the Rules applicable to Judicial Conduct Complaints, with the assignment of figuring out the possibility of arguing for immediate dismissal. I must say that I was not sure whether I was writing as Judge Smith's lawyer, or whether I was ghost-writing for Judge Smith. I am sure I had an attorney-client relationship, but unsure how formal my representation would be.

### *The Motion to Dismiss*

I prepared the Motion to Dismiss in draft form, and presented it to Judge Smith for his review. It was during this review that the Judge asked me to sign the Motion as his attorney. I want to be clear, here. I knew from the first instance that I had an attorney / client relationship with Judge Smith. But, it was certainly not immediately apparent to me whether the relationship would be a formal appearance on Judge Smith's behalf, or whether it would be a more limited role. The task, at this point, was to prepare something that would set forth the Judge's position accurately and fairly – hoping for an early dismissal of the Complaint.

One statement in the Motion to Dismiss bears mention. After talking to Judge Smith, I was under the impression that *he* believed that the young lady involved might have acted in a way to suggest her willingness to participate in a personal relationship – that she was the aggressor. I wrote that in the Motion to Dismiss – characterizing it as Judge Smith's "memory". His memory came from a lawyer-friend of Judge Smith's while Judge Smith's divorce was pending. During the divorce, there were apparently "threats" to make this woman's complaint a public matter. The lawyer suggested that they could respond to the threatened publicity by proving that the woman was married to a Waco Firefighter – who were then threatening litigation in Judge Smith's court against the City of Waco. That suggestion to Judge Smith stuck with him, and he suggested it to me.

After the Motion to Dismiss was filed, a more careful examination of the docket in the litigation between the firefighters and the City of Waco revealed that the suggestion was not likely to be true, since the Case was filed long after the events.

I called my administrative contact at the Fifth Circuit to see when we would be able to file additional papers. I was told to wait until the Court asked for our response. During the investigation, the investigator told me that he knew that the woman was not an aggressor, and I acknowledged to the investigator that we had misstated that, and wished to correct it.

The Fifth Circuit said that Judge Smith hindered or extended the time and cost of the investigation, but it is really just as much their investigator's fault as anyone else. Had he asked for a statement on this, we would have willingly given it.

### *The Formal Disclosure of My Representation*

The Motion to Dismiss did not receive any formal comment from the Fifth Circuit. So, having filed papers as the lawyer for Judge Smith, I had a conversation with Judge Smith on the day that he approved the final draft of the Motion. He asked me to talk with Tammy Hooks, his career law clerk about my current cases. I only had four cases in Judge Smith's court.

In one case *Kirkpatrick v. United States*, I was represented a man who had been charged with a felony in State Court, but had received deferred adjudication, and had successfully completed it. He was curious about whether he could possess a firearm. The case law was unclear. I sued for him to obtain a declaratory judgment about the law. The United States Attorney in Austin was representing the government.

I represented a company out of Palestine, Texas in a case styled *Palestine Water Well Service v. Washington International Insurance Company*. That case began in Bell County, and I was assisting a lawyer from Palestine and Jack Crews. It was a construction dispute that progressed in Bell County until the bonding company (Washington International) intervened. Washington International settled the case out from under Palestine Water Well, and did so in a way that just heated up the dispute. Palestine Water Well sued Washington International, and Washington International removed the case to Judge Smith's court. In Judge Smith's court, the case was not about the construction contract, but about whether the settlement was reasonable.

I represented Balfour Beatty / McCarthy Joint Venture in the other two cases. I was local counsel for a law firm in Atlanta, GA – where McCarthy is apparently headquartered. Both cases involved disputes over the construction project to remodel / rebuild Darnell Hospital at Fort Hood. In one case, the primary opposing party was Penick Nordic Joint Venture (T.B. Penick and Sons). John Palmer was their local counsel – for a law firm in California. There were a number of other parties in that case, and it had progressed substantially before the Judicial Conduct Complaint was filed. I think that Ms. Hooks remembered this case very well. The Scheduling Order had recently been modified, and the parties were very obviously in the process of preparing to file dispositive motions.

I filed the Motion to Dismiss on October 15, 2014. Balfour Beatty was sued in the second case on October 29, 2014 by E.J. Smith Construction Company over the same project. By November 17, 2014, I helped file a third party complaint against EJ Smith and other parties in that case. I was again local counsel for Balfour Beatty.

When I was filing the Motion to Dismiss, I met with Tammy Hooks to talk to her about my pending cases. She seemed familiar with all of them. She called on the *Kirkpatrick* case, and told me that the Government had not notified her of any objection to Judge Smith continuing.<sup>1</sup> She called on *Palestine Water Well*, and I got a call from the opposing lawyer. He said that the Court had called and notified him of my representation of Judge Smith personally. He asked me what it was about. I asked him for some time to consider what, if anything, I could say. On January 14, 2015, I sent him an e-mail saying:

In the fall of 2014, a complaint was filed with the Judicial Conference of the 5th Circuit against Judge Smith. In the Judge's view, the complaint is totally without merit, but he eventually thought it prudent to retain counsel and to file responsive papers. He asked me to do that for him, and I continue to represent him in that matter. I am bound, by confidentiality provision in the Rules of the Judicial Conference, not to provide further information. However, Judge Smith has authorized me to provide this information to you, and I have consulted with the Conference's office, and understand that disclosure to this degree is not a problem.

The lawyer filed a Motion to Recuse, and Judge Smith immediately recused himself.

In the first Balfour Beatty case (involving T.J. Pennick), Tammy told me, and John Palmer confirmed, that the TJ Pennick folks had no objection to my continuing as local counsel. Although I did not speak to any of the other lawyers in that case, I received no inquiries, and was assured by Tammy that there were no objections. That case settled at mediation before the investigation was complete in the Judicial Conduct Complaint.

In the second Balfour Beatty case (involving EJ Smith), the Atlanta lawyers were handling everything, although I was periodically assisting in the electronic filing until they got registered with the system. Eventually, two of them were formally admitted to the Western District. My name continued to appear on the pleadings as counsel, but I had little, if anything, to do with the substance of any of the pleadings, since the Atlanta firm had (by now) become very familiar with the local rules and procedures. In fact, when I first filed a paper in this case, I got a call from the opposing lawyer (Keith Langley – who represented a bonding company). At the very beginning of that call, I told him that I had

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<sup>1</sup> As an aside, there were dispositive motions filed in that case. Although the US Attorney had not voiced any objection, I felt extremely uncomfortable asking Judge Smith to rule on the ultimate merits of that case. I purposely allowed the case to be dismissed, knowing that I could refile it in Austin – which I did. The District Court in Austin dismissed the case on the merits, but when it went up on appeal, the Government lawyers from the Justice Department that handles appeals acknowledged that my reading of the law was correct and the case settled on terms very satisfactory to my client.

no authority to speak on the case. I gave him the name of the Atlanta lawyer, and he acknowledged that he had been discussing this case with that lawyer over that past months. Eventually, there were some early motions in that case that Judge Smith ruled on. Apparently, the Florida lawyer did not like those rulings, so in October of 2015, he asked me if I was representing Judge Smith, and I said yes. He immediately filed a Motion to Recuse, and Judge Smith immediately recused. I never heard from Tammy – one way or another - about whether she had contacted lawyers on this case, and never heard anything from the lawyers until the inquiry in October of 2015. Frankly, I had assumed three things. First, I thought my role was so limited that my representation made no difference to anyone. Second, I thought that Tammy was calling people in my cases. Third, I knew that I was bound by confidentiality (both by rule, and by my client's instruction) not to volunteer that Judge Smith was the subject of a Judicial Conduct Complaint or that I was his lawyer.

### Conclusion

Judge Smith was very clear in his attitude about this matter. He wanted to minimize public information about this Complaint. He correctly believed that the Rules of the Judicial Conference required him to keep the matter confidential. He also justifiably believed that until the Fifth Circuit ruled on his Motion to Dismiss, there was a legitimate belief that they would dismiss the Complaint, and it would be at an end. And, the fact that the Judge himself was not in a position to respond publically to the allegations in the Complaint justifies his reliance on the confidentiality rules as being inviolable.

Judge Smith was also firm in his belief that the Complaint was so old as to be legally stale, even if not barred by a limitations period. The Complaint was about a part of his life that I know he was not proud of, but that he had worked very hard to overcome. He changed from being very unhappy in marriage to being *very* happy in his marriage. He also had given 30 years of very honorable service in his job – including an enviable record of review in the Fifth Circuit. He was widely respected in the legal community, and was said to be the best Chief Judge of the Western District when he served in that capacity. The only respect that he was asking for was to allow the process to run its course in private until it was complete.

I am hopeful that I have provided you sufficient information, but please let me know if you need anything else.

Sincerely,



Greg White