



NAMAN HOWELL
SMITH & LEE^{PLLC}
ATTORNEYS AT LAW

January 29, 2016

(BY HAND DELIVERY)

Mr. Chad Childers
Attorney at Law
Administrative Attorney
Office of Chief Disciplinary Counsel
1414 Colorado Street
Austin, Texas 78711

COPY

Re: 201507089, Steven Gregory White
(complaint of Ty Clevenger)

Mr. Childers:

We represent Mr. Steven Gregory White in regard to the above matter.

The classification letter finding that the complaint of Mr. Clevenger alleges professional misconduct of Mr. White is dated December 30, 2015. Notice of classification was received by Mr. White after January 1, 2016.

The following, together with attachments, will constitute Mr. White's timely initial response to the complaint under the provisions of Rule 2.10, *Texas Rules of Disciplinary Procedure* ("TRDP").

At the onset, several facts regarding the complaint and its contents must be noted as background for response to the complaint:

First, it should be noted that Mr. Clevenger is a person who is not personally known to Mr. White. Mr. White has never represented Mr. Clevenger in any matter, has no personal relationship to Mr. Clevenger, and has never spoken to or corresponded with Mr. Clevenger in regard to his representation of Judge Smith.

Second, it should be noted that Mr. Clevenger is not an attorney involved in the litigation cited by Mr. Clevenger as the basis of his complaint, as shown on the face of his complaint, and

does not purport to represent any person, entity, or attorney involved in the litigation cited in his writing.

Third, it should be noted that Mr. Clevenger apparently was sanctioned by Judge Smith in a wholly unrelated matter in which Mr. Clevenger was an attorney as shown by Exhibit "1", and has been the object of other court orders in which similar orders were made, as shown by the attachments to Exhibit "1". In many such instances of court rulings against him, as in this instance, Mr. Clevenger began to prosecute a myriad of complaints and other degrading accusations in the public media against the ruling judges, attorneys, witnesses, and other participants in such matters, and Judge Smith in the public media (examples attached as Exhibit "2"), and, finally, before the Judicial Council of the Fifth Circuit (the "Judicial Council"). Mr. Clevenger's history of complaints and vexatious litigation and postings can properly be described as one of tying unrelated positions and assumptions together and making those as public as possible. Mr. Clevenger's possible motivation of retaliation against anyone with whom he does not agree in this matter cannot be discounted, based on his past conduct.

Fourth, Mr. White was retained by Judge Smith to represent him in proceedings before the Judicial Council. As shown below, Mr. White discharged his ethical duties to his client within the letter and spirit of the *Texas Disciplinary Rules of Professional Conduct* ("TRDPC"), and without any violation of those rules.

The Ethical Duties of Mr. White in representing Judge Smith

Mr. White was bound to provide Judge Smith with diligent counsel. Rule 1.01, TRDPC.

Mr. White was bound to abide by the decisions of Judge Smith concerning the objectives and general methods of representation. Rule 1.02, TRDPC.

Mr. White was bound to preserve the confidentiality of Judge Smith as required by the proceedings and the instructions of the client. Rule 1.05, TRDPC.

Mr. White was bound to follow the rules of the tribunal before which he practiced in this matter—the Judicial Council. Rule 3.04, TRDPC.

In regard to the first two ethical duties of Mr. White cited above, there does not appear to be any complaint.

In regard to the last two ethical duties of Mr. White, a fair construction is that Mr. Clevenger's writing complains Mr. White did not violate either, or both, of those ethical duties to Judge Smith, and to the tribunal.

Analysis of the Lack of Factual Allegations Supporting Classification and Investigation of the Complaint

Writings complaining of attorney conduct must be supported by clear facts that support some violation of the TRDPC, under the commonly used construction of Rule 2.10, TRDP. In evaluating whether there are facts alleged which support any finding of a violation of the TRDPC, the writing must be examined from its “four corners”, considering whether the allegations are conclusions only, are not contradictory within (and between) the various allegations, or contain facts, which, if taken as true, render the complaint unsupported factually.¹

Using those standards of review, which are practiced by your office, and any realistic standard of review of the writing of Mr. Clevenger, as to the facts underlying any ethical requirement of disclosure of his personal representation by Mr. White to opposing counsel in cases pending in Judge Smith’s court, is the fact that Judge Smith, himself, bore the duty to provide the disclosure—not Mr. White. Only Judge Smith can make the full disclosure under the provisions of 28 U.S.C. §455(e) (which permits the waiver of possible grounds for recusal after a full disclosure), attached as Exhibit “3”.² The Order of the Judicial Council, Exhibit “4”, makes clear that the duty of disclosure of the attorney-client relationship was that of Judge Smith. The “Statement of Tammy L. Hooks”, attached hereto as Exhibit “5”, clearly demonstrates that Judge Smith recognized his responsibility under law in this regard, and did, in point of fact, make arrangements for the disclosure of his representation by Mr. White to opposing counsel in matters pending in his court.

The only case and the only attorney about which Mr. Clevenger alleges a failure to disclose is Attorney Keith Langley in the case of *United States, et al v. Travelers Casualty, et al.*,

¹ From presentations regarding classifications of writings presented by the Office of Chief Disciplinary Counsel (and, formerly, General Counsel) to persons serving in the disciplinary system of the State Bar of Texas, which were attended by, and practiced under, by the undersigned.

² 28 USC §455 is the portion of the code that addresses the disclosure in 455(e). Under that provision, a judge is not permitted to preside over a case under some circumstances, but he may seek a waiver of any apparent grounds for recusal if he fully discloses the facts: “...(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification. The judge *must* recuse under 455(b) which includes circumstances in which the judge: 1. knows of actual bias or prejudice; 2. knows the facts or evidence; 3. was involved in the case when in private practice; 4. has expressed a prior opinion on a matter involved before he was a judge; 5. has an interest in the outcome of the case; or 6. is related to the parties. The broader provision of the statute, 455(a) - requires recusal when a judge’s impartiality may be reasonably questioned. In that instance, the Judge may ask the parties to waive the grounds under 455 (a), but the request for a waiver must be preceded by a full disclosure on the record of the basis for disqualification.

The disclosure in this matter does not appear “on the record”, but was apparently made informally based on the allegations of the Motion to Recuse. That disclosure of the judge was limited by the obligation of confidentiality under the Judicial Council rules, which Mr. White was bound to follow. See also: the monograph from the Federal Judicial Center (2010), entitled *Judicial Disqualification: An Analysis of Federal Law* Second Edition. which analyzes the statutes regarding recusal, supporting the previous summary.

No. 6:14-cv-00427.³ In order for a writing to state an ethical complaint under the TRDP, there must be facts alleged showing a violation of a Rule of the TRDPC.

The actual facts of the matter of the case and the words and actions of the attorney alleged by Mr. Clevenger show quite the opposite occurred with regard to that case. Mr. Langley's actual Motion to Recuse was attached to Mr. Clevenger's writing, and must be read as the operative facts to in regard to Mr. Clevenger's writing.

In regard to the specific factual allegation of Mr. Clevenger in his writing, attached is Exhibit "6", entitled International Fidelity Insurance Company's (referred to as "IFIC" in the Motion to Recuse (the "Motion to Recuse"). Upon the filing of the Motion to Recuse, Judge Smith granted the Motion to Recuse, without requiring hearing. In that Motion to Recuse, the actual facts that bear on the issue alleged by Mr. Clevenger are rather clearly stated:

1. Mr. Langley was, in point of fact, advised of Mr. White's representation of Judge Smith. *"...(the party has recently learned that counsel for six parties in this case, Greg White, represents the Honorable Walter S. Smith, Jr., in a concurrently pending proceeding...and has been counsel for six litigants in this case for at least 11 months⁴...(and)*
2. *...The Attorney-Client Relationship* (of Judge Smith to Mr. White) *came to the attention of counsel for IFIC in the last week, and inquiry was made immediately to confirm the existence of the Attorney-Client Relationship, including a call to White this week, and confirmation of the Attorney-Client Relationship. **IT IS NOT NECESSARY FOR IFIC TO ALLEGE OR EVEN SUGGEST THAT THIS COURT HAS ACTED IMPROPERLY....**"*

(Motion to Recuse, page 2, "Summary" paragraph and paragraph 2, emphasis and explanation added)

What is properly taken from a reading of the Motion to Recuse as the clear facts of this allegation by Mr. Clevenger are, therefore:

1. It is admitted by Mr. Clevenger and confirmed in the Motion to Recuse that disclosure was made to Mr. Langley of the attorney-client relationship of Mr. White to Judge Smith.

³ In making the connection to Mr. Langley, it is important to understand the facts from Mr. White's Memorandum attached hereto as Exhibit "8"), which are: that Mr. White was representing a company – Balfour-Beatty – as local counsel in a case involving Penick-Nordic. Mr. Langley was not an attorney in that case. After Mr. White undertook the representation of Judge Smith, Balfour-Beatty was a party Defendant in the case involving Mr. Langley, to which reference is made in Mr. Clevenger's writing.

⁴ The representation of the clients in the pending case in Judge Smith's court preceeded the representation of Judge Smith by Mr. White by a lengthy period of time. Reference is made to Exhibit "7", the memorandum of Mr. White to the undersigned. Mr. White's narrative in that Exhibit regarding his position as "local counsel" status in regard to that representation is explained at page 4 of that memorandum.

2. It is admitted by Mr. Clevenger and confirmed in the Motion to Recuse that Mr. Langley confirmed that disclosure.

3. It is admitted by Mr. Clevenger and confirmed in the Motion to Recuse that Mr. Langley filed a Motion to Recuse about a week after confirming the relationship facts that he had received which Motion to Recuse specifically stated that it was not grounded in any complaint, or fact alleged, of any impropriety on the part of anyone, including Mr. White.

4. It is admitted by Mr. Clevenger and confirmed by the record following the filing of Motion to Recuse that Judge Smith promptly granted the Motion to Recuse.

The Motion to Recuse demonstrates facts contrary to any allegation of ethical violation by Mr. White that Mr. Clevenger attempts to make. Certainly, the Motion to Recuse is absolutely devoid of any fact, or even a suggestion that Mr. White acted improperly—or did anything which rose to level of a factual allegation of unethical conduct proscribed by, or related to any provision of the TRDPC. The inevitable conclusion of the reading of Mr. Clevenger's writing is that his writing, taken as a whole, demonstrates only facts contrary to any ethical violation by Mr. White.

The conclusion of a complete reading of the writing of Mr. Clevenger is that he has alleged facts contrary to any breach of any ethical duty owed by Mr. White in that the only person in the only case alleged by Mr. Clevenger to have any factual relationship to Mr. Clevenger's complaint was informed of the fact of the attorney-client relationship of Mr. White and Judge Smith. One can only conclude that Judge Smith bore his duty and his commitment to Mr. White to make disclosure of the attorney-client relationship, as set out above, and that the attorney actually involved makes no factual complaint about the process involved in regard to any violation of any ethical rule by Mr. White.

Absent any suggestion of any fact of misconduct on the part of Mr. White in the only instance cited by Mr. Clevenger, the classification of the writing is absolutely without any factual basis.

Legal Analysis of the Invalidity of the Writing to support any Complaint

With those facts in mind, it is required by the TRDP that the writing by Mr. Clevenger, to be classified as a complaint, must make an allegation amenable to some identifiable Rule of the *Texas Disciplinary Rules of Professional Conduct* ("TRDPC"). There is no reference to any Rule, or Rules, of the TRDPC under which the writing of Mr. Clevenger was classified.

In face of the absolute requirement that Mr. White's conduct in regard to his client in this instance in order to be classified as "unethical" must be connected to a duty imposed by some identifiable Rule of the TRDPC, the complaint wholly fails and is devoid of any fact stating a violation of any identifiable Rule.

By way of analysis, Mr. Clevenger complains that Mr. White failed to disclose to one litigant in one matter pending in Judge Smith's court that Mr. White was personally representing Judge Smith.

There is no allegation by Mr. Clevenger of any ethical duty that Mr. White was under to make such a disclosure, nor was there any such duty. Mr. White would have violated the instructions of, and ethical duties owed to, the client; and the rules of the tribunal in which he was practicing had *he* made such a disclosure.

In regard to the duties owed the client, Judge Smith specifically directed Mr. White to maintain his confidence about representation of Judge Smith by Mr. White and of the nature of the action itself.⁵ In point of fact, Mr. White's conduct in this matter is an example of a dedicated, diligent attorney providing quality representation to a client subjected to a proceeding bounded by specific rules of confidentiality, further bound by the Rule of Confidentiality of Information, as set forth in Rule 1.05, TRDPC, specifically directed by the client. In the face of Mr. Clevenger's repeated efforts to have the public media "try" the client based on Mr. Clevenger's course of repeated public comments, Mr. White held the confidence of the client until released from that confidence by the Rules of the forum in which Mr. White was practicing. In this regard, every client is entitled to competent, diligent, loyal counsel who works within the rule of law and the instructions of the client—without regard to the low or high station of the client.

In addition to the confidence required of Mr. White by his client, Mr. White is bound to the forum's Rule of Confidentiality as contained in the *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, (the "Judicial Council Rules") which are attached hereto as Exhibit "9", and made a part hereof. Reference is specifically made to Article VII., *Miscellaneous Rules*, Rule 23. *Confidentiality*, paragraph (a), (at page 35) and *Commentary on Rule 23*, second full paragraph, at page 36.

The strict confidentiality rule of the forum is quite simply: "...*The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee is confidential...*" Rule 23(a), Judicial Council Rules. That rule is a complete sentence and directive within itself, without limitation and binds all participants before the forum. To require Mr. White to contact counsel with regard to his representation of Judge Smith is to violate the rule of the forum in which Mr. White was practicing, in addition to the specific instructions of the client.

In commentary on the forum's rule of confidentiality, it is clear that the rule bound Mr. White—in addition to the instructions of the client:

"...The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "BY ANY PERSON IN ANY PROCEEDING," with enumerated exceptions (under the rule, none of which apply). 28 U.S.C. §360(a). Three questions arise: Who is bound by the

⁵ See the memorandum of Mr. White, Exhibit "7" is attached hereto for discussion of the instructions of his client.

confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement....

With regard to the second question, RULE 23(A) APPLIES THE RULE OF CONFIDENTIALITY BROADLY TO CONSIDERATION OF A COMPLAINT AT ANY STAGE...."

(Commentary on Rule 23, page 35, Exhibit "4", emphasis and explanation added)

In the clear mandate of Rule 23, as explained in the Commentary, Mr. White was required to keep and not disclose the confidences of Judge Smith. As shown by Exhibit "2" attached hereto, Judge Smith specifically directed Mr. White to keep confidential the representation of Judge Smith.

Summary

There are no facts alleged by Mr. Clevenger which support the classification. In the absence of alleged facts supporting the complaint, there can be no classification and the complaint must be dismissed.

The law of this complaint is that Mr. White was bound by instructions of confidentiality from his client, Judge Smith, and the clear duty of Judge Smith to make the disclosure of the relationship in any applicable case. Those instructions of Judge Smith to Mr. White to maintain the confidentiality of the court and allow the court to arrange for the disclosures required of the court, were clearly appropriate under the Law of the Forum cited herein. Mr. White sought to maintain the lawful objective of his client under the Law of the Forum cited. In this, Mr. White acted in the highest tradition of service of the Bar to our clients. In this, Mr. White cannot be said to have violated any ethical standard.

Put more succinctly, there is no demonstration of Just Cause in the allegations of the writing submitted by Mr. Clevenger, and the overwhelming weight of fact and law is that there is no Just Cause associated with the complaint of Mr. Clevenger under the provision of Rule 2.12, TRDP, no reason to classify the writing of Mr. Clevenger under the facts or the law, and every reason to dismiss this matter as an inquiry without hearing.

Requests

The State Bar website identifies Mr. Clevenger as a Texas attorney. Based on his past behavior of using the public media to make frequent statements regarding attorneys and judges

January 29, 2016

who are be involved in any matter in which he is involved, it is requested that Mr. Clevenger be instructed that this matter is confidential, that Mr. White does not waive confidentiality, and that Mr. Clevenger has a duty to maintain the confidentiality of the proceeding.

Mr. White requests that your office commit this matter to investigation under the provisions of Rule 2.12, TRDP, and after investigation, make a finding that there is no Just Cause to support the writing, dismissing the writing as an inquiry.

Mr. White requests a Summary Disposition Panel be constituted under the provisions of Rule 2.13, TRDP, to review this matter prior to the submission of this matter to scheduling.

Mr. White requests that if additional information is needed by your office concerning this matter, that I be advised of that request, and the information, to the extent it exists, will be submitted.

Mr. White requests dismissal of the complaint.

Should you wish to discuss this matter at any time, my direct dial telephone number is 254-755-4242. My electronic mail address is selman@namanhowell.com.

We look forward to working with your office.

Kindest Regards,

NAMAN HOWELL SMITH & LEE, PLLC

By:



Ben Selman

BS/bm
Enc.

Exhibit _____

Statement of Tammy L. Hooks

My name is Tammy L. Hooks. I have served as Law Clerk to Judge Walter Smith since 1988. During the pendency of the complaint of Ty Clevenger against Judge Smith, before the Judicial Council of the Fifth Circuit, and immediately upon engagement of Mr. Greg White by Judge Smith to represent him in the proceedings of that complaint, I received instructions from Judge Smith regarding contact with counsel with pending cases in which Attorney Greg White was involved as counsel. I advised Mr. White that contact would be made by the court with opposing counsel in cases in which Mr. White was counsel in Judge Smith's court, and that Mr. White did not have to contact opposing counsel in cases pending in Judge Smith's court in regard to the question of his representation of Judge Smith.

A handwritten signature in black ink, appearing to read "Tammy L. Hooks", written over a horizontal line.

Tammy L. Hooks

Jan. 27, 2014

Memorandum

January 27, 16

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

From: Greg White
4300 West Waco Drive
Suite B2-283
Waco, Texas 76710

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.¹ 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

¹ 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