

BEFORE THE JUDICIAL INVESTIGATION COMMISSION OF WEST VIRGINIA

IN THE MATTER OF
MAGISTRATE WARD HARSHBARGER, III
MAGISTRATE FOR KANAWHA COUNTY

COMPLAINT NO. 02-2015

PUBLIC ADMONISHMENT OF MAGISTRATE WARD HARSHBARGER, III

The matter is before the Judicial Investigation Commission upon a complaint filed on January 8, 2015, setting forth certain allegations against Ward Harshbarger, III, Magistrate for Kanawha County (hereinafter "Respondent"). In the Complaint, it was alleged that Respondent engaged in *ex parte* communication with both parties in a civil suit at separate times and failed to timely enter a judgment in the matter in violation of the Code of Judicial Conduct.

Upon receipt of the complaint, an investigation was conducted pursuant to the Rules of Judicial Disciplinary Procedure. After a review of the complaint, the Respondent's written reply, the information and documents obtained from the investigation and the pertinent Canons contained in the Code of Judicial Conduct, the West Virginia Judicial Investigation Commission (hereinafter "Commission") found probable cause to believe that Respondent violated Canons 1A, 2A, 3B(2), 3B(7), and 3B(8) at its May 22, 2015 meeting and orders that he be publicly admonished pursuant to Rules 1.11 and Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure, as set forth in the following statement of facts and conclusions:

STATEMENT OF FACTS

Respondent became a Magistrate on January 1, 1981, and has continuously served in that capacity since that time. Respondent has been the subject of judicial discipline on three prior occasions. In 1984, the Supreme Court censured Respondent for neglect of duty in violation of Canon 3 of the West Virginia Judicial Code of Ethics which provided in pertinent part that "the judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law." See *In re Harshbarger*, 173 W. Va. 206, 314 S.E.2d 79 (1984). In 1994, the Supreme Court

admonished Respondent for a violation of Canon 2A of the current Code of Judicial Conduct in *In re Harshbarger*, 192 W. Va. 78, 450 S.E.2d 667 (1994). In 2014, Respondent was censured and fined for violating Canons 2A, 3A, 3B(1), 3B(2), 3B(7), 3B(8), and 3C(2) of the Code of Judicial Conduct. See *In the Matter of Harshbarger*, Supreme Court No. 14-0306 (WV 5/27/2014).

In May 2014, Timothy Johnson agreed to purchase a 2003 Cadillac Escalade from Abderhmane Eloirzazi for approximately \$5,700.00. In furtherance of the sale, Mr. Johnson gave Mr. Eloirzazi \$1,000.00 as an initial down payment. On or about June 18, 2014, Mr. Johnson gave Mr. Eloirzazi an additional \$2,350.00. On the same day, Mr. Eloirzazi gave possession of the vehicle to Mr. Johnson. However, Mr. Eloirzazi never gave Mr. Johnson a bill of sale or the title to the vehicle. At some point Mr. Eloirzazi requested final payment, and Mr. Johnson refused until he received title to the vehicle. Meanwhile, Mr. Johnson had taken the vehicle to MAACO for repair.

Seemingly at a standstill over the title and remaining payment, Mr. Eloirzazi texted Mr. Johnson on or about June 23, 2014, and told him that he would refund his money and sell the car to someone else. Mr. Johnson agreed to the proposition. When he had not received his money, Mr. Johnson texted Mr. Eloirzazi on July 1, 2014, and demanded that he repay him \$3,350.00 or meet him at DMV and sign the title over in a clerk's presence. Later that same day, Mr. Eloirzazi and his friend, Dwight Ford, went to Kanawha Magistrate Court and filed suit against Mr. Johnson.

According to Mr. Eloirzazi, the two men met with Respondent at the courthouse and discussed the situation before filing suit. Mr. Eloirzazi said Respondent told them to file the lawsuit. However, he does not remember any conversation about re-taking possession of the vehicle. Mr. Ford stated that the two men went straight to the Magistrate Clerk's Office and filed suit when they got to the Courthouse. According to Mr. Ford, the two men had a discussion with Respondent about re-taking possession of the vehicle at a later date. Mr. Ford told the JIC Investigator the following:

They went to Magistrate Harshbarger and explained the whole situation to him. They picked Magistrate Harshbarger because he was the first Magistrate they came across

who was not busy. Magistrate Harshbarger listened and asked Ford if the parties had any possibility of working the situation out. When Ford said no, Magistrate Harshbarger then said that the only way to work it out would be in court. Magistrate Harshbarger did not give them permission or tell them that it was ok to get the car. Ford explained the dispute, relating that [Mr. Eloirzazi] still had the title and that the MAACO manager was going to start charging a fee if the vehicle was not removed right away. Ford also explained that Johnson would not respond to calls from either Ford or the MAACO shop. In retrospect, Ford was trying to let the Magistrate play "Devil's Advocate." Ford was pretty sure they had the right to take the vehicle based on having the title and Johnson's abandoning the vehicle at MAACO.

Respondent does not recall the conversation. Nonetheless, Respondent told the JIC investigator that it was conceivable that he had a similar conversation with someone about a dispute while sitting in Day Court because people often discuss their problems there. Respondent acknowledged that in a similar situation he may counsel someone to file suit and to go ahead and take possession of the vehicle if he or she were the legal owner. Respondent stated that he would not have heard the problem or offered an opinion if suit had already been filed and he was the appointed judge for fear of having improper *ex parte* communication.

On or about August 8, 2014, Mr. Ford sent Mr. Johnson a text message advising him that they had retrieved the vehicle from MAACO:

Tim the magistrate ask me when could you have it paid off. I said I don't know and we tried calling you from the courthouse and we told them that we would not drive it. [W]e talk to u to see. [H]e ask me when the last time you had paid and we told them will wait until we here from u. [H]e only got the car because the owner said if he didn't have 2800 to fix it to come get it because he could not contact you. [H]e ask the judge to go get it and he said yes because the . . .

Respondent was ultimately assigned the case. Mr. Johnson filed his answer and a counterclaim against Mr. Eloirzazi on August 11, 2014. On October 7, 2014, Mr. Johnson filed a motion asking to add Mr. Ford to his counterclaim. A hearing was set for October 29, 2014. On the appointed day, Mr. Johnson appeared with his attorney, Trent Redman, Esquire, but Mr. Eloirzazi and Mr. Ford failed to appear. Respondent issued a ruling from the bench in which he dismissed the civil complaint against Mr. Eloirzazi, awarded Mr. Johnson \$3,350.00 on his counterclaim and gave Attorney Redman \$10.00 in

attorney fees from Mr. Eloirzazi and Mr. Ford. On the case file jacket, Respondent wrote, "10/29/14 @ 9:45 a.m. Dismiss No Show PH to Tim Johnson Judgement against Abderahmane Eloirzazi and Third Party Dwight Ford for 3350 + 10 Atty Fee." However, Respondent never reduced the judgment to a written order even though Attorney Redman had submitted a proposed Final Judgment and Order for his signature on October 31, 2014.

Respondent claimed he did not enter a final order in the case because Attorney Redman wanted to appeal the attorney fee award to Circuit Court. He said that Attorney Redman's appeal would be interlocutory and therefore had to be decided before judgment was officially rendered. Respondent said he intended to keep the case open and not enter a judgment pending the outcome of the appeal.

On November 3, 2014, Mr. Eloirzazi and/or Mr. Ford went to Day Court and spoke with Respondent and explained why they did not attend the October 29, 2015 hearing. Respondent said he tried to explain that they needed to file a Motion to Set Aside Judgment. At some point though, Respondent drafted the document for them on a form Motion.

Respondent admitted to writing all pertinent information contained on the Motion to Set Aside Judgment. Respondent did not mark whether the motion was granted or denied, but did indicate that the case should be set for hearing. Respondent told the JIC Investigator that he did not grant the Motion but merely gave Mr. Eloirzazi a hearing to address the issue. Yet, Respondent's assistant wrote on the case file jacket "Motion to Set Aside Judgment" and "Reset Case." The matter was reset for January 27, 2015, at 9:30 a.m.

Meanwhile, according to Mr. Johnson and his friend, Mark Gomez, they kept calling the Magistrate Clerk's Office to get a copy of the final order reflecting the outcome of the October 29, 2014 hearing. They said the magistrate clerks kept telling them that no order had been entered. When they were able to talk to Respondent's assistant, they say that she advised them that the judgment had been set aside and gave them the date of the new hearing.

On January 8, 2015, Mr. Johnson filed the instant ethics complaint against Respondent. On the same day, Mr. Johnson also filed a Motion to Disqualify Respondent in the underlying civil suit. On January 12, 2015, the Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County granted Mr. Johnson's motion, and the case was reassigned to the Honorable Jack Pauley, Magistrate for Kanawha County. The matter was then rescheduled for hearing to March 27, 2015. On March 24, 2015, Mr. Johnson moved to have the case transferred, Magistrate Pauley granted the request, and the matter is now pending before Circuit Court.

CONCLUSIONS

The Commission, by a vote of 6-0,¹ determined that probable cause does exist in the instant complaint and that Ward Harshbarger, III, Magistrate for Kanawha County, violated Canons 1A, 2A, 3B(2), 3B(7) and 3B(8) of the Code of Judicial Conduct which provide in pertinent part:

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.

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, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Canon 3:

A judge shall perform the duties of judicial office impartially and diligently.

¹ The Commission consists of six judicial officers and three lay members. Two judicial officers and one lay member were not in attendance at the May 22, 2015 meeting.

B. Adjudicative responsibilities.

(2) A judge shall be faithful to the law and maintain professional competence in it. . . .

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding. . . .

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

The Commission further determined that formal discipline was not appropriate under the circumstances. However, the Commission found that the violations were serious enough to warrant a public admonishment. The Preamble to the Code of Judicial Conduct states:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to the American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. . . . Good judgment and adherence to high moral and personal standards are also important.

The Commentary to Canon 3B(8) emphasizes the importance of conducting judicial business in a timely and responsible manner:

In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interest of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. . . . Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court, and expeditious in determining matters under submission and to insist that court officials, litigations and their lawyers cooperate with the judge to that end.

The failure of a judge to promptly and efficiently dispose of the business of the court when there is no valid reason for the delay reflects adversely on the entire judicial system. Prompt and efficient disposition of cases is important to litigants, necessary to prevent backlogs, essential to the proper administration of justice and necessary to promote the public's confidence in the integrity of the

judiciary. Respondent has 34 years of experience on the bench and should know better than to delay entry of an order on the pretext that the attorney wants to appeal his fee. Such an appeal could never take place until a final order has been entered because of the long standing maxim that "a court can only speak through its orders." *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 671, 535 S.E.2d 727, 736 (2006). See also *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91 (2006); and *State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992).

It is also clearly improper for a judicial officer to have *ex parte* communication about substantive issues such as whether to file a civil complaint or retrieve an automobile. Communication limited strictly to procedural matters, such as scheduling a hearing, is permissible. However, any discussion of facts, factors or opinions that might tend to influence a court's determination as to the outcome of a case should take place in the presence of all litigants. Improper *ex parte* communications deprives absent parties of an opportunity to respond, may imply bias for a litigant, or may insinuate improper influence. Moreover, the information gleaned may be imprecise or incomplete. Finally, a judge has a duty to try to minimize the number of cases in which he or she is disqualified. If a judge permits improper *ex parte* communication concerning any matter that may be the subject of a judicial proceeding, such action could necessitate disqualification just as it did in the case complained of here.

Respondent also should know better than to prepare a Motion to Set Aside Judgment for a litigant. By doing so, Respondent gave the impression that he was biased in favor of Mr. Eloirzazi and Mr. Ford. Under our Code of Judicial Conduct, a judge can provide procedural accommodations that afford a pro-se litigant an opportunity to have his or her case fairly heard without raising questions about a judge's impartiality. However, a judge overreaches when he or she provides judicial assistance in the preparation of a pleading:

In assisting a person in preparing a petition to initiate a summary proceeding, the justice would necessarily consider an *ex parte* communication from the proposed litigant and would receive factual information, the accuracy of which could not be contested by the

adversary party. For this reason, it would be improper for a justice to provide such assistance to a petitioner.

New York Judicial Ethics Advisory Opinion 1988-36 (town justice precluded from assisting people in the preparation of petitions and notices in summary proceedings to recover possession of real property because it does not accord every party with a legal interest in the matter a full right to be heard). *See also In the Matter of Fouty*, Complaint No. 12-2010 (Kanawha County Magistrate admonished for helping a friend write a peace bond).

Based upon the foregoing, it is the decision of the Judicial Investigation Commission that Magistrate Ward Harshbarger, III, be disciplined. Accordingly, the Judicial Investigation Commission hereby publicly admonishes Magistrate Harshbarger for his conduct as fully set forth in the matters asserted herein and warns him to refrain from engaging in similar behavior in the future.

Pursuant to Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure, the Respondent has fourteen (14) days after receipt of the public admonishment to file a written objection. If the Respondent timely files an objection, the Judicial Investigation Commission shall, pursuant to the Rule, file a formal charge with the Clerk of the Supreme Court of Appeals of West Virginia.



Ronald E. Wilson, Chairperson
Judicial Investigation Commission

6-4-15

Date

REW/tat