

BEFORE THE JUDICIAL INVESTIGATION COMMISSION OF WEST VIRGINIA

**IN THE MATTER OF
THE HONORABLE ERIC H. O'BRIANT
JUDGE OF THE 7TH JUDICIAL CIRCUIT**

COMPLAINT NO. 41-2017

AMENDED PUBLIC ADMONISHMENT OF JUDGE ERIC H. O'BRIANT

The matter is before the Judicial Investigation Commission upon a complaint filed by Richard Ojeda setting forth certain allegations against the Honorable Eric H. O'Briant, Judge of the 7th Judicial Circuit (hereinafter "Respondent"). Complainant alleged that Respondent improperly and unnecessarily usurped the power of the Supreme Court of Appeals of West Virginia by authorizing an unlicensed individual to practice law in the Magistrate Court of Logan County 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 Rules contained in the Code of Judicial Conduct, the West Virginia Judicial Investigation Commission (hereinafter "Commission"), at its June 23, 2017 meeting, found probable cause to believe that Respondent violated Rules 1.1, 1.2, 2.2, 2.5(A), and 2.13(A)(2) and orders that he be publicly admonished pursuant to Rules 1.11 and 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 Circuit Court Judge in Logan County on or about April 20, 1987, and has served continuously in that capacity since that time. Joshua T. Thompson¹ graduated from the

¹ Mr. Thompson is the first cousin of Attorney Shana O'Briant Thompson's husband. Ms. Thompson is Respondent's daughter. The Code of Judicial Conduct defines nepotism as "the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner or the spouse or domestic partner of such relative." Third-degree of relationship by definition includes "great-grandparent,

University of Connecticut School of Law in May 2016. As of the date of this admonishment, Mr. Thompson is not licensed to practice law in any state or federal court in the United States. He plans to take the West Virginia Bar Examination in July 2017. Since late August or early September 2016, Mr. Thompson has continuously worked as a paralegal at the Logan, West Virginia law firm of Wolfe, White & Associates.

On September 12, 2016, Respondent reviewed and entered an Order which provided in pertinent part:

Mr. Joshua T. Thompson, holder of a Juris Doctor but not a member of the West Virginia Bar, is currently working with Wolfe, White & Associates in Logan, West Virginia. Under supervision of Attorneys Steven B. Wolfe and J. Christopher White, Mr. Thompson asks permission to represent clients of Wolfe, White & Associates before the Magistrate Court of Logan County.

THEREFORE, pursuant to the power conferred upon me by Article VIII, Section 6, of the West Virginia Constitution, and pursuant to the provisions of West Virginia Code § 50-4-4a, I hereby designate and do **THEREFORE ORDER** that Mr. Joshua T. Thompson is permitted to appear and advocate for clients of Wolfe, White & Associates before the Magistrate Court of Logan County.

Importantly, the two provisions cited in the Order did not give Respondent the authority to enter the Order. Article VIII, § 6 sets forth the jurisdiction, authority and powers of a Circuit Court Judge:

Circuit courts shall have control of all proceedings before magistrate courts by mandamus, prohibition and certiorari.

Circuit courts shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increased by the Legislature; of all civil cases in equity; of proceedings in habeas corpus, mandamus, quo warranto, prohibition and certiorari; and of all crimes and misdemeanors. On and after January one, one thousand nine hundred seventy-six, the Legislature may provide that all matters of probate, the appointment and qualification of personal representatives, guardians, committees and curators, and the settlements of their accounts, shall be vested exclusively in circuit courts or their officers, but until such time as the Legislature provides otherwise, jurisdiction in such matters shall remain in the county commissions or tribunals existing in lieu thereof or the officers of such county commissions or tribunals.

grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great grandchild, nephew, and niece.” It does not include cousins.

Circuit courts shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedeas is allowed by law to the judgment or proceedings of any magistrate court, unless such jurisdiction is conferred by law exclusively upon an intermediate appellate court or the supreme court of appeals.

Circuit courts shall also have such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law.

Subject to the approval of the supreme court of appeals, each circuit court shall have the authority and power to establish local rules to govern the court.

Subject to the supervisory control of the supreme court of appeals, each circuit court shall have general supervisory control over all magistrate courts in the circuit. Under the direction of the chief justice of the supreme court of appeals, the judge of the circuit court, or the chief judge thereof if there be more than one judge of the circuit court, shall be the administrative head of the circuit court and all magistrate courts in the circuit.

W. Va. Code § 50-4-4a involves certain appearances by parties, agents or attorneys in civil cases:

Any party to a civil action in a magistrate court may appear and conduct such action in person, by agent or by attorney. Appearance by an agent or attorney shall have the same effect as appearance by the party represented, and the appearance by an agent shall not constitute the unlawful practice of law. No magistrate may act as such agent or attorney.

The notes immediately following W. Va. Code § 50-4-4a cite *State ex rel. Frieson v. Isner*, 168 W. Va. 758, 285 S.E.2d 641 (1981) clearly provide in pertinent part:

Appearance by lay agent. – Appearance of a party in magistrate court by lay agent is authorized only when such appearance is an incident of the party’s desire to appear pro se.

Laymen not authorized to represent parties. – This section does not purport to authorize laymen to represent parties in magistrate court on a regular basis or to engage in such activity as a business or for pay.

Mr. Thompson spent the next three months appearing in Logan Magistrate Court representing defendants in criminal cases. Attorney Wolfe was present for the majority of the proceedings. However, on at least two occasions, Mr. Thompson appeared in Court by himself and represented individuals in plea hearings. Mr. Thompson also inappropriately signed pleadings as an attorney. For example, in *State v. Earnest*, Logan County Magistrate Court Case No. 16-M23M-02093, Mr. Thompson filled out and signed a Motion to Continue the criminal case as attorney for the defendant

on November 15, 2016. In *State v. Lester*, Logan County Magistrate Court Case No. 16-M23M-03012, Mr. Thompson also filled out and signed a Motion to Continue as attorney for the defendant.

On or about December 5, 2016, Respondent entered an Administrative Order retracting Mr. Thompson's permission to advocate on behalf of clients in Magistrate Court.² The Order provided in pertinent part:

Whereby Joshua T. Thompson by Order of this Court dated September 12, 2016 was granted limited permission to represent clients of his employer, Wolfe, White & Associates, under supervision in the Magistrate Court of this county and whereby it is now determined that the limited permission was based upon a misinterpretation of the law, it is Therefore, ADJUDGED, ORDERED, and DECREED that the September 12, 2016, Order is rescinded and that Joshua T. Thompson is no longer permitted to appear and advocate for clients of Wolfe, White & Associates before the Magistrate Court of this county.

Respondent hand-delivered the Order to Mr. Thompson and Attorneys Wolfe and White on the same day. He also spoke to the attorneys about notifying clients that Mr. Thompson was not licensed to represent them, and they agreed to do so in a timely manner.

On April 21, 2017, the instant ethics complaint was filed against Respondent. By letter dated May 1, 2017, Respondent replied to the allegations contained in the complaint. Respondent stated that in August 2016, he was advised that Mr. Thompson had been employed by Wolfe, White & Associates as a paralegal. In late August or early September 2016, Respondent had a conversation with Attorney Wolfe:

I told Mr. Wolfe that if he, meaning his firm, and Mr. Thompson wanted to have Mr. Thompson appear on behalf of "Court appointed lawyer" cases in Magistrate Court Mr. Wolfe would have to obtain permission of the West Virginia Supreme Court of Appeals under the same rule that he had practiced when he was a law student at the West Virginia College of Law (Which I believe was in 2011.) I did not specifically refer to Rule 10.0 of the Rules for Admission to the Practice of

² Earlier that same day, JIC Counsel contacted Respondent by telephone and informed him of her belief that the September 12, 2016 Order was improper. Counsel told Respondent that if he entered an Order that same day countermanding the September 12, 2016, complaint she would not file an ethics complaint against him. Counsel also informed Respondent that if a member of the public subsequently filed a complaint it would be investigated and the Commission would be free to take whatever action it deemed appropriate. The conversation was memorialized in a December 5, 2016 email to Respondent.

Law but only generally based upon my personal knowledge that Mr. Wolfe had previously worked in the Logan County Prosecuting Attorney's Office as a law student.³

Respondent did not prepare the Order. Instead, it was prepared by Mr. Thompson and reviewed by Attorney Wolfe. No hearing was held before Respondent signed the Order.

Respondent stated:

I believed that Mr. Thompson had obtained limited permission of the West Virginia Supreme Court of Appeals pursuant to Rule 10.0 and I signed the order and gave it to Mr. Wolfe to file in the Circuit Court Clerk's Office. I told him at that time that either he or Mr. White would have to personally be present in the courtroom to appear with Mr. Thompson if Mr. Thompson was appearing on behalf of a client; that he or Mr. White would have to countersign any pleadings Mr. Thompson signed; that any appearance should be limited to defendants charged with misdemeanors; and that questions about whether Wolfe, White & Associates could bill for other paralegal services performed by Mr. Thompson should be referred to the Public Defender Services office however Wolfe, White & Associates could not bill for any of Mr. Thompson's time spent appearing in court where Mr. Wolfe or Mr. White also appeared on behalf of a client.⁴

³In his June 8, 2017 sworn statement, Attorney Wolfe said that he had two very short discussions with Respondent about the Order prior to its entry. Attorney Wolfe said he first raised the issue of Mr. Thompson appearing in Magistrate Court with Respondent. Attorney Wolfe said that he never discussed Rule 10 of the Rules for Admission to the Practice of Law with Respondent. In a June 7, 2017 sworn statement and in a June 9, 2017 telephone interview, Mr. Thompson and Mr. Wolfe also stated they never spoke about Rule 10 with Respondent. Rule 10 would not have been applicable, anyway, as Mr. Thompson did not meet the Rule's requirements. For example, Rule 10.1(a) provides that "[i]n order to make an appearance pursuant to this rule, the law student must: Be enrolled in a law school approved by the American Bar Association, or its equivalent, or have graduated from such school within the last six months, **provided the student complies with Rule 10.2(a)** (emphasis added). Rule 10.2(a) states:

The law school dean or his or her designee shall certify that the student has complied with 10.1(a), (b) and (c), and the certification: (a) Shall be filed with the Clerk of the Supreme Court of Appeals and unless, it is sooner withdrawn, it shall remain in effect until June 15th for a student sitting for the February bar examination, until November 15th for a student sitting for the July bar examination, until a student has been notified that he or she has not achieved a passing score on the bar examination, or until the student has been licensed to practice law in the Courts of this State and has registered as a member of the West Virginia State Bar, whichever is earlier. In order to be eligible for appearance under this rule, the law student must sit for the bar examination immediately following his or her graduation from law school.

Importantly, no certification was ever filed with the Supreme Court. Moreover, Rule 10.2 contemplates Mr. Thompson taking the West Virginia Bar Examination. In July 2016 and February 2017, he only took the North Carolina Bar. Mr. Thompson will take the West Virginia Bar Examination for the first time in July 2017, some fourteen months after graduating from law school.

⁴ In their sworn statement or telephone interview, Attorneys Wolfe and White and Mr. Thompson denied ever discussing with Respondent the parameters within which Mr. Thompson could practice in magistrate court.

CONCLUSIONS

The Commission, by a vote of 7-0,⁵ determined that probable cause does exist in the instant complaint and that the Honorable Eric H. O'Briant, Judge of the 7th Judicial Circuit, violated Rules 1.1, 1.2, 2.2, 2.5(A), and 2.13(A)(2) of the Code of Judicial Conduct which provide in pertinent part:

Rule 1.1 Compliance With the Law

A judge shall comply with the law, including the West Virginia Code of Judicial Conduct.

Rule 1.2 Confidence in the Judiciary

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

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.5 Competence, Diligence and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

Rule 2.13 Administrative Appointments

(A) In making administrative appointments, a judge:
(1) shall avoid . . . unnecessary appointments.

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.

Judges' Orders reflect outcomes of judicial proceedings and can change lives for better or for worse. It is a common and accepted practice in West Virginia for attorneys to prepare drafts of proposed orders - but it is the judge who is ultimately responsible for its contents. The buck stops with the judge. Therefore, judges have an obligation to ensure that the contents of the orders are

⁵ The Commission consists of six judicial officers and three lay members. One judicial officer and one lay member were not in attendance at the June 23, 2017 meeting.

correct before affixing their signatures to the document. In this case, Respondent clearly abrogated his duty in signing the Order which improperly allowed Mr. Thompson to practice in Logan Magistrate Court.

A review of the law by Respondent would have revealed that Mr. Thompson was not able to practice law without a valid license. That examination of the law would also have made the judge aware that he did not have the authority to confer such a privilege upon Mr. Thompson. Thus, it is evident to the Commission that Respondent failed to use due diligence when he failed to conduct an adequate research and analysis before signing the order. Respondent is a respected judge with 30 years of experience on the bench and he should know better than to take such an order at face value.

Based upon the foregoing, it is the decision of the Judicial Investigation Commission that the Honorable Eric H. O'Briant, Judge of the 7th Judicial Circuit be disciplined. Accordingly, the Judicial Investigation Commission hereby publicly admonishes Judge O'Briant 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.⁶

⁶ The Commission dismissed as unfounded an allegation by Complainant that Respondent engaged in improper conduct by appearing alone in the Magistrate Clerk's Office after normal work hours to review files associated with Mr. Thompson. The Commission found that Respondent had authority to be in the Clerk's Office after hours and had been reviewing files in reference to a FOIA request received by the Clerk's Office pertaining to Mr. Thompson and cases he worked on following the entry of the September 12, 2016 Order. Respondent explained it best in his May 1, 2017 reply to the ethics complaint:

After the files remained in the Clerk's office for several days after Mr. Stratton's five (5) day demand had been met and he had not responded I did go to the Clerk's Office to review the files. I have security clearance to go to the Magistrates' Office after hours because on occasion I have had to cover the on-call Magistrate's duties due to emergencies. Mr. Stratton had indicated to Ms. Briggs that he was looking for cases where Thompson had appeared. Any issues related to Thompson were my responsibility not the Clerk's. I reviewed the files many of which did not include any evidence that Thompson had appeared. I only found three (3) cases among the documents requested by Stratton. . . . I went back after hours because I did not have time to review the files and had not reviewed the files early in the day contrary to the allegations in your letter.

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

July 5, 2017
Date

REW/tat