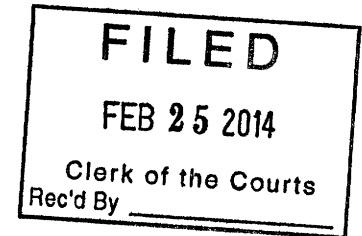


**IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT**

**IN RE: THE HONORABLE LU ANN BALLEW  
CHILD SUPPORT MAGISTRATE  
FOURTH JUDICIAL DISTRICT  
COCKE COUNTY, TENNESSEE**



**Docket No. M2013-02345-BJC-DIS0-FC**

**File No. B13-5426**

**PRETRIAL STATEMENT OF DISCIPLINARY COUNSEL,  
TENNESSEE BOARD OF JUDICIAL CONDUCT**

Timothy Discenza, Disciplinary Counsel for the Tennessee Board of Judicial Conduct, for pretrial statement in this action, would state of follows:

**Background**

This matter is brought pursuant to and in accordance with the provisions of the Board of Judicial Conduct (hereinafter "Board") statute, Tennessee Code Annotated § 17-5-301, *et. seq.* The Board has filed formal charges against the Honorable Lu Ann Ballew, Child Support Magistrate, of the Fourth Judicial District, Cocke County, Tennessee.

**Jurisdiction**

The Honorable Lu Ann Ballew, at all times relevant herein, was a Child Support Magistrate, of the Fourth Judicial District, Cocke County, Tennessee, having been appointed to that position. Therefore, Magistrate Ballew is subject to judicial discipline by the Board of Judicial Conduct pursuant to Tennessee Code Annotated § 17-5-102.

**Facts**

The parties have entered into Stipulated Facts, the original of which have been filed with the Clerk of the Supreme Court. A copy is attached hereto as Exhibit "A."

## **Tennessee Board of Judicial Conduct**

The Board of Judicial Conduct, formerly the Court of the Judiciary, is by legislative creation tasked with a diverse spectrum of responsibility by the specific legislative intent of T.C.A. § 17-5-101, including:

It is expressly declared to be the legislative intent in the enactment of this chapter to:

- (1) Provide an orderly and efficient method for making inquiry into:
  - (A) The physical, mental and moral fitness of any Tennessee judge;
  - (B) The judge's manner of performance of duty;
  - (C) The judge's commission of any act calculated to reflect unfavorably upon the judiciary of the state or bring the judiciary into disrepute or that may adversely affect the administration of justice in the state...
- (2) Provide a process by which appropriate sanctions may be imposed...

The Board of Judicial Conduct statute “shall be liberally construed to accomplish the declared purposes and intents...” T.C.A. § 17-5-103. The entire Board of Judicial Conduct statutory framework, most recently revamped in 2012, provides the mechanics of addressing complaints brought under the statute, from origination of the complaint through and including the imposition of a diverse menu of outcomes, *infra*.

“Misconduct” of judges is broadly inclusive of the following panoply of offenses capable of being recognized by the Board:

### T.C.A. § 17-5-302. Misconduct

Offenses of which the board may take cognizance shall include the following:

- (1) Willful misconduct relating to the official duties of the office;
- (2) Willful or persistent failure to perform the duties of the office;
- (3) Violation of the code of judicial conduct as set out in Tenn. Sup. Ct. R. 10;
- (4) The commission of any act constituting a violation of so much of the Tennessee Rules of Professional Conduct as set out in Tenn. Sup. Ct. R. 8 as is applicable to judges;
- (5) A persistent pattern of intemperate, irresponsible or injudicious conduct;

- (6) A persistent pattern of discourtesy to litigants, witnesses, jurors, court personnel or lawyers;
- (7) A persistent pattern of delay in disposing of pending litigation; and
- (8) Any other conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice.

Charges of misconduct must be established by “clear and convincing” evidence, T.C.A. § 17-5-308 (d).

Upon a finding of misconduct, the Board of Judicial Conduct may impose discipline in accordance with the provisions of T.C.A. § 17-5-301. Powers and duties of the board of judicial conduct and disciplinary counsel, as follows:

...(f) The board has the power to impose any or any combination of the following sanctions:

- (1) Suspension without impairment of compensation for such period as the board determines;
- (2) Imposition of limitations and conditions on the performance of judicial duties, including the issuance of a cease and desist order;
- (3) Private reprimand or private censure by the investigative panel; provided, that a private reprimand or private censure, whether imposed by the board or by an investigative panel, may be used in subsequent proceedings as evidence of prior misconduct solely upon the issue of the sanction to be imposed;
- (4) Entry into a deferred discipline agreement;
- (5) Public reprimand or public censure; and
- (6) Entry of judgment recommending removal of the judge from office.

(g) For purposes of this part, the following definitions apply:

- (1) “Deferred discipline agreement” means a response to misconduct that is minor and can be addressed through treatment, training or a rehabilitation program under which the judge agrees with the recommendation of the investigative panel of the board to undergo evaluation or treatment, or both, participate in educational programs or take any other corrective action. Other disciplinary sanction arising from the same conduct is suspended during the term of a deferred discipline agreement, and no further sanction will be imposed upon the successful completion of the deferred disciplinary agreement by the judge. Failure to comply with the disciplinary agreement authorizes the disciplinary counsel to proceed with other appropriate action;
- (2) “Private censure” means a written finding that the conduct of the judge or justice violates a rule of judicial conduct, detrimentally affects the integrity of the judiciary or undermines public confidence in the administration of justice and requiring a judge or justice to appear

personally before the board. A private censure is stronger than a private reprimand and may include a requirement that the judge or justice follow a specified course of corrective action;

(3) "Private reprimand" means a letter that details the finding of judicial misconduct and enumerates the reasons that such conduct is improper or brings discredit upon the judiciary or the administration of justice;

(4) "Public censure" is identical to a private censure except that the written finding is released to the press; and

(5) "Public reprimand" is identical to a private reprimand except that the letter is released to the press.

(h) No sanction imposed by the board shall violate the prohibition of article VI, § 7 of the Tennessee Constitution.

(i) The criteria to be considered by the board or the investigatory panel in determining the sanction or combination of sanctions appropriate for the level of culpability involved in the judge's misconduct include the following:

(1) Whether the misconduct is an isolated instance or evidences a pattern of conduct;

(2) The nature, extent and frequency of occurrence of the acts of misconduct;

(3) Whether the misconduct occurred in or out of the courtroom;

(4) Whether the misconduct occurred while the judge was acting in an official capacity;

(5) Whether the judge has acknowledged or recognized the occurrence, nature and impropriety of the acts;

(6) Whether the judge has evidenced an effort to change or modify conduct;

(7) The judge's length of service on the bench;

(8) Whether there have been prior complaints about the judge, except where prior complaints have been found frivolous, unfounded or without jurisdiction pursuant to § 17-5-305;

(9) The effect of the misconduct upon the integrity of, and respect for, the judiciary; and

(10) The extent to which the judge exploited the judicial position for personal gain or satisfaction.

### **Issues**

The primary issues for determination of the Hearing Panel are:

1. Did Magistrate Ballew violate the Code of Judicial Conduct by her actions as described in the Stipulation, and as alleged in the Formal Charges, specifically as to the following Canons:

**CANON 1 — A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.**

**RULE 1.1 Compliance with the Law**

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

**RULE 1.2 Promoting 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.

**Comment**

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

**CANON 2 — A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.**

## **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.

### **Comment**

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

## **RULE 2.3 Bias, Prejudice, and Harassment**

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

### **Comment**

[1] A judge who manifests bias or prejudice in a proceeding impairs the

fairness of the proceeding and brings the judiciary into disrepute...

### **Rule 2.10 Judicial Statements on Pending and Impending Cases**

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

## **Argument**

### **1. The nature of the Code and Board of Judicial Conduct.**

The General Assembly has recognized that the Tennessee Supreme Court has "general supervisory control over all the inferior courts of the state," T.C.A. § 16-3-501 (2009), and that this inherent, plenary power derives from the common law and not from the General Assembly. T.C.A. §§ 16-3-502 to -503 (2009). In that role, the Supreme Court has the inherent power to adopt the ethics rules for judges and to determine how judges should be disciplined for violation of those rules. Tennessee Supreme Court Rule 10, the Code of Judicial Conduct, is the set of rules by which judicial conduct is to be determined. *In Re Bell*, 344 S.W. 3d 304 (Tenn. 2011).

In terms of interpretation and construction, while it has been held that a Code of Judicial Conduct, situated as they are within the Rules framework of the Supreme Court, are capable of conventional rules of statutory interpretation, including but not limited to adherence to "plain and unambiguous language" and discernment of the intent of the drafter, *In re Carney*, 79 A. 3d 490, at 506-506 (Penn. 2013), the Code itself provides

direct interpretive guidance in its “Scope” section:

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. The Comments should be read in conjunction with the Rules and as aids to the interpretation and application of the Rules. When a Comment contains the term “must,” it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue. *Supreme Court of Tennessee Rule 10, Code of Judicial Conduct*.

The Canons violated by Magistrate Ballew, *supra.*, offer plain and unambiguous language requiring a conclusion that ethics violations were committed by her in multiple instances.

## **2. Religious Bias.**

No Tennessee cases appear available and in point addressing the issues presented in this matter by Magistrate Ballew’s conduct. With respect to the religious bias and introduction of her views into pending litigation, a sampling of decisions throughout the country indicate that indeed, judicial discipline authorities have uniformly recognized that such behavior falls well short of acceptable conduct, resulting in diverse imposition of sanctions.

In *Inquiry Concerning a Judge re William Singbush*, 93 So. 3d 188 (Fla. 2012), the Supreme Court of Florida reviewed a disciplinary proceeding against a Judge



embracing multiple charges. Among the elements of the charges, Judge Singbush made a statement which introduced religion and religious beliefs into his decision-making process. His specific statement was as follows:

I don't know of anybody that's made a mistake--and except for perhaps one, and for that we murdered him. You know, he was faultless and we murdered him for it. That's not politically correct but I happen to believe in God.... Christ is the intercessor.

In affirming a finding of the Judicial Qualification Commission below, a finding which required as does Tennessee's law, "clear and convincing evidence" to sustain a disciplinary sanction, the Florida Supreme Court determined that the injection of religion into the determination of a case violated the provisions of Canon 1 of the Code of Judicial Conduct, stating,

**Thus, a judge must strive to enforce high standards of conduct by always personally observing those standards so that the integrity of the judiciary may be preserved. As the commentary to Canon 1 explains:**

**Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law. *Singbush, supra., at 93 So. 3d 193.***

In another Florida case, *Huitt v. Hsia, 848 So. 2d 459 (Fla. App. 2003)*, the Court of Appeals reversed a trial court refusal to disqualify a domestic relations commissioner, holding that a litigants would reasonably fear bias in that the commissioner "...stated in her report that a factor in her recommendation in favor of the mother was the mother's religious beliefs and the father's lack thereof.

The appellate court determined a Canon violation appeared to have occurred, relying upon Canon 3 B(5):

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including ... bias or prejudice based upon ... religion.... This section does not preclude the consideration of ... religion ... when [it is an] [ ] issue[ ] in the proceeding. *Huitt, supra, at 848 So. 2d 459.*

A judge in *State of Nebraska Commission on Judicial Qualifications v. Empson*, 562 N.W. 2d 817 (Nebraska 1997), was charged with multiple violations, including that he disseminated religious materials to jurors, in the courthouse and following a jury trial. The Supreme Court of Nebraska upheld the imposition of discipline on the religious violation, determining:

As a general matter, we find it inappropriate for a judge, as an authority figure, to disseminate religious materials in the courthouse with the intent of impressing his or her beliefs on the recipients. Despite the fact that the Hunt trial was over and the jurors had been excused, the question and answer session in which the religious pamphlets were dispersed proceeded with the jurors remaining in the jury box. More troubling are respondent's remarks that he got to "witness" and "minister" to the jurors. The fact that respondent had completed his judicial "duties" at the time of the discussion is immaterial in determining whether his conduct was appropriate. See *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984). While respondent is free to practice his religion as he chooses, his attempts to express his personal views on persons within the confines of the courthouse are violative of Canons 1 and 2 of the Code of Judicial Conduct and § 24-722(6). *Empson, supra at 562 N.W. 2d 830.*

The next year (1998), the Nebraska Supreme Court in *State v. Pattno* reversed a criminal sentencing decision and remanded for resentencing by another judge due to the trial judge having read biblical passages during the sentencing hearing disparaging the defendant's lifestyle, holding that "...relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process," and hence resulted in a finding of bias. *State v. Pattno*, 579 N.W. 2d 503, at 509.

Perhaps the leading case on the issue of religious injection into the duties of a judge is *Judicial Inquiry and Review Board of the Supreme Court of Pennsylvania v. Fink*, 532 A. 2d 358 (Penn. 1987). Among the various charges lodged against the judge in *Fink*, was the inclusion of a bizarre incident where the judge interrupted a delinquency hearing and called for an in-chambers conference with the probation officer, the community mental health director, and a guidance counselor. At this meeting, Respondent suggested that the boy might be possessed by demons and that a local priest should examine him to determine whether an exorcism was required. Respondent then called a separate meeting with the boy's parents and told them the same thing.

He also had been found to regularly engage in religious commentary during Court hearings of various natures, and admittedly favored criminal defendants who professed a belief in Christianity.

As a portion of multiple findings of ethics violations resulting in removal from office, the Pennsylvania Supreme Court eloquently and forcefully described the import of the subject matter of religion and judicial conduct:

Our system of government is grounded on individual freedom to participate or not participate in religious activity. And this freedom extends, needless to say, to those involved in civil and criminal litigation. When a judge of a Court of Common Pleas openly indicates a personal affinity for persons of the Christian faith, as opposed to persons of no religious faith or persons of non-Christian faith, he has affixed the imprimatur of state approval on a particular type of religious belief. This is the stuff of oppression, not freedom, and it will not be tolerated in this Commonwealth.

Only last year, although in a different and less egregious context than this case, we stated:

Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate. *See The*

*Papers of William Penn*, Vol. I (Dunn & Dunn, University of Pennsylvania Press), pp. 51-52, 90-93, 268, 280, 452, 511. In general, thus, our Commonwealth is neutral regarding religion. It neither encourages nor discourages religious belief. It neither favors nor disfavors religious activity. A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and whether he practices a religion is strictly and exclusively a private matter, not a matter for inquiry by the state. *Commonwealth v. Eubanks*, 511 Pa. 201, 206, 512 A.2d 619 (1986).

Thus, the legal determinations mirror and often elaborate upon the plain and unambiguous meaning of Canon. The statements and decision of Magistrate Ballew constituted an impermissible religious bias and proper sanctions should result.

### **3. Comment in Pending Cases.**

Magistrate Ballew also violated the Code of Judicial Conduct by here stipulated decision to grant an interview or interviews with the media while the underlying case was still pending, although on appeal to the Circuit Court. Rule 2.10 Judicial Statements on Pending and Impending Cases, *supra.*, would appear to be plain and direct in its prohibition. *Alfini, et. al. Judicial Conduct and Ethics, (2007). Section 10.06D, "Comments on Pending Cases."*

In *Broadman v. Commission on Judicial Performance, 959 P.2d 715 (Cal.1998)*, the trial judge was interviewed by several television stations and magazines about two cases in which he had ordered use of a contraceptive device as a condition of probation for two (2) defendants.

In upholding an imposition of discipline, the California court rejected the judge's First Amendment defense, and went on to note the purpose of the rule, stating in detail:

Judges, by contrast, cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law (see Preamble, Cal.Code Jud. Ethics) who apply the law uniformly and consistently. Because judges are both "highly visible member[s] of government" (*ibid.*) and neutral decision makers in all court proceedings, their public comments will be received by the public as more authoritative than those of lawyers. And because judges have this greater influence over public opinion, inappropriate public comment by judges poses a much greater threat to the fairness of judicial proceedings than improper public comment by lawyers.

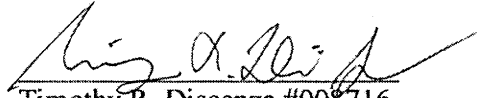
A judge's public comment on a pending case threatens the state's interest in maintaining public confidence in the judiciary whether or not the case to which the comment is directed is pending before the commenting judge. When the case is pending before the commenting judge, the public may perceive the comment as indicating that the judge has prejudged the merits of the controversy or is biased against or in favor of one of the parties. (Rothman, Cal. Judicial Conduct Handbook (1990) § 160.550, p. I-39.) *When the case is pending before a judge other than the commenting judge, the public may perceive the comment as an attempt to influence the judge who is charged with deciding the case. (Ibid.) Such comments may also create the public impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties. (emphasis added).*

The public statements by Magistrate Ballew most certainly fall within both the letter and the spirit of the Code and should be recognized as a patently violative ethical failure.

### Conclusion

For the foregoing reasons, Disciplinary Counsel seeks A) a finding of judicial misconduct by Magistrate Ballew pursuant to the provisions of the Board of Judicial Conduct statute, *supra.*, and B) authorized sanctions to be imposed.

This the \_\_\_ day of February, 2014.



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#### Certificate of Service

I certify that a true and exact copy of the foregoing PRETRIAL STATEMENT OF DISCIPLINARY COUNSEL, TENNESSEE BOARD OF JUDICIAL CONDUCT was mailed, delivered, and/or transmitted by email to Mr. D. Vance Martin and Mr. Brent R. Laman, Counsel for Lu Ann Ballew, FINKELSTEIN, KERN, STEINBERG & CUNNINGHAM, 1810 Ailor Avenue, Knoxville, TN 37291, on this the 25 day of February, 2014.

