ORIGINAL

IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: **THE HONORABLE JOHN A. BELL**
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

Docket No. M2009-02115-CJ-CJ-CJ

COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508

RESPONSE TO MOTION FOR PROTECTIVE ORDER

NOW INTO COURT comes The Honorable John A. Bell, Judge, General Sessions Court, Cocke County, Tennessee ("Judge Bell"), and submits his response to Disciplinary Counsel's Motion for Protective Order:

I. INTRODUCTION

Predictably, Disciplinary Counsel J.S. Daniel seeks to escape becoming a witness in these proceedings which have – the evidence at this stage demonstrates[1] – been primarily driven by him. Following receipt of Disciplinary Counsel's motion, Judge Bell's counsel agreed to postpone the noticed deposition to permit the Court to resolve the motion. In response to Judge Bell's notice, Disciplinary Counsel has issued a blanket refusal to being deposed and to Judge Bell's document requests. At bottom, the Court should permit Judge Bell's counsel to depose Disciplinary Counsel because Mr. Daniel became a witness by his own affirmative conduct throughout this investigation. Put simply, Mr. Daniel investigated Pleau's allegations, which was, as Judge Bell will demonstrate, merely part of his statutory duties, not work "in anticipation of litigation."

---

[1] *See* Judge Bell's Statement of Undisputed Facts.

Insofar as the document requests are concerned, the Court's own annual statistics demonstrate that Disciplinary Counsel grossly exaggerates the "burden" imposed in compiling the information. *See* Motion, at ¶4 ("Daniel is directed to bring an astonishing number of files . . . .).[2]

Far from acting in bad faith, Judge Bell merely desires an opportunity to uncover relevant facts from what happens to be a very important witness. In the end, try as he may to claim he has not made himself a witness in these proceedings, the facts as they have been developed make clear that not only is Mr. Daniel a witness, but his testimony is vital to Judge Bell's defense in these proceedings.

To illustrate, Mr. Daniel's personal investigation into Pleau's allegations included speaking with Pleau and corresponding with Judge Bell. Later, Mr. Daniel also engaged the services his investigator, James LaRue. Eventually, Mr. Daniel's investigation expanded beyond Pleau's complaint to include the issue of whether Judge Bell attempted to induce Pleau to dismiss his disciplinary complaint. In furtherance of that investigation, Mr. Daniel personally interviewed witnesses, including Judge Bell's attorney, Tom Testerman. As described below, the investigation undertaken by Mr. Daniel is directly related to Judge Bell's affirmative defenses and his testimony is therefore required.

Still other reasons require Mr. Daniel's testimony. For instance, on October 13, 2009, Formal Charges signed by Mr. Daniel were filed. Those charges include specific references at ¶11 to the July 16, 2009 interview of Mr. Testerman conducted by Mr. Daniel. To be certain, this particular

---

[2]For example, the August 26, 2009 Annual Report of the Court of Judiciary indicates that there were thirteen (13) complaints filed in the preceding year concerning a judge's "delay," merely four (4) percent of the total complaints filed. In only two of the thirteen cases did the judge receive a warning or other discipline. *See* August 26, 2009 Annual Report of the Court of Judiciary.

interview is not only important to Disciplinary Counsel's case, but it is central to certain affirmative defenses of Judge Bell, *i.e.*,"all formal charges should be dismissed to the extent such charges are based upon information wrongfully obtained by Disciplinary Counsel or representatives with the Court of the Judiciary office." *See* Amended Answer, ¶23.

And that isn't all. The Formal Charges also reference, at ¶ 6, Judge Bell's utilization of Rule 60.01 of the Tenn. R Civ. P. and Tenn. Code Ann. §16-15-727 to address the issue of lack of service of the June 27, 2008 judgment in Pleau's first lawsuit. Significantly, a key component to Judge Bell's defense will be that the use of Rule 60.01 was actually conceived by Mr. Daniel, not Judge Bell. *See* Amended Answer ¶21 ("Disciplinary Counsel is estopped from charging Judge Bell with judicial offenses for which he merely followed the or adhered to ... the instructions and suggestions of representatives of the Court of the Judiciary Disciplinary office), and Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, ¶23 ("In addition, Mr. Daniel and Judge Bell also spoke at least once during that time via telephone. Mr. Daniel told Judge Bell that he should consider Rule 60 of Tennessee Rule of Civil Procedure and its application to general sessions court to address the issues regarding service of Judge Bell's June 27, 2008 order.")

Finally, Judge Bell asserts affirmative defenses on constitutional grounds, namely the "equal protection guaranteed by the state and federal constitutions requires that all formal charges should be dismissed to the extent such charges are the selective prosecution of actions and/or inactions by Judge Bell that are consistent with the conduct of other judges in Tennessee who have not been investigated or charged by Disciplinary Counsel." Amended Answer, ¶22. All of these affirmative defenses remain viable defenses available to Judge Bell.

Mr. Daniel has deposed Judge Bell. Judge Bell was examined regarding these affirmative defenses. To be just and fair, and to rightly permit Judge Bell's counsel to discover relevant non-protected information from Mr. Daniel, Judge Bell should be granted the same right to depose Mr. Daniel in order to develop additional facts to support these critical defenses.

II. DISCIPLINARY COUNSEL'S MOTION FAILS TO MAKE A THRESHOLD SHOWING TO BAR HIS DEPOSITION AND DOCUMENT PRODUCTION..

Disciplinary Counsel invokes the attorney-client privilege and work-product doctrine, argues that Judge Bell merely seeks to annoy him or put him to undue burden or expense, argues that Judge Bell's requests are "frivolous or unfounded," that this Court can permit him to do pretty much want he desires to do since it has "full authority to adopt rules regulating the practice and procedure before the court," and that permitting such discovery would violate the Court's confidentiality rule. Disciplinary Counsel also maintains that Judge Bell's counsel are on a "fishing expedition."

The crux of the matter before the Court. In a nutshell, Disciplinary Counsel's positions – all of them – are collectively but one more example of the heavy-handedness being utilized in this particular proceeding. The issue before the Court is really a simple one: does Mr. Daniel possess information relevant to this case, and if so, is that information privileged? Mr. Daniel would have the Court adopt as a rule the premise that Disciplinary Counsel is off-limits for discovery purposes, no matter what relevant evidence or information is in his possession. The adoption of such a prejudicial rule – that Disciplinary Counsel is discovery-proof regardless of his actions – must not be condoned by this Court.

Mr. Daniel possesses relevant discoverable information. At the outset, there can be no reasonable dispute that Mr. Daniel possesses relevant information in view of his investigation into

Pleau's complaint and the subsequent investigation into Mr. Testerman's communications with Pleau on Judge Bell's behalf.[3] Once this fact is accepted, it is thus incumbent upon Mr. Daniel to establish good cause for a protective order. Tenn. R. Civ. 26.03. The rule clearly contemplates that the burden on the issue of a protective order is on the person seeking the order and not the person seeking to obtain discovery.

Mr. Daniel must demonstrate sufficient good cause for a protective order. Whether to grant a protective order on the facts of a particular case is a matter committed to the discretion of the court. *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. 1985). Here, entry of a protective order barring any discovery from Mr. Daniel will impose a handicap upon Judge Bell's ability to prepare or present his defense. Accordingly, such an order should require a commensurately greater showing of good cause than would be required for a non-obstructive order.

At every turn, Disciplinary Counsel mis-characterizes Judge Bell's requests. Judge Bell does not seek the litigation "work product" of Mr. Daniel. Rather, he seeks only material relating to Mr. Daniel's investigation of him. It is Mr. Daniel's burden, after all, to prove that his investigation was work product – in other words, that it was done "in anticipation of litigation." *State ex. rel. Flowers v. Tennessee Trucking Association Self Insurance Group Trust,* 209 S.W.3d 602, 617 n. 15 (Tenn. Ct. App. 2006. Disciplinary Counsel's motion not only fails to demonstrate good cause for a protective order, but it also does not satisfy this burden.

Mr. Daniel's work-product argument. Disciplinary Counsel's primary ground for its motion is the work-product doctrine. The work product doctrine is found in Rule 26.02(3) in the Tennessee

---

[3]To be sure, Judge Bell does face the initial requirement of demonstrating (1) that the material sought is relevant to the pending action, (2) that the material is not otherwise privileged, and (3) that the material sought consists of documents or tangible things.

Rules of Civil Procedure. Specifically, the Rule provides as follows:

> Trial Preparation: Materials. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Several public policy reasons have been given for recognition of the work product doctrine. For instance, one policy underlying this doctrine "is that attorneys preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant and to use the relevant facts to plan and prepare their strategy without undue and needless interference." *State ex*

rel Flowers, 209 S.W.3d at 617. This doctrine extends beyond confidential communications between the attorney and client to encompass "any document prepared in anticipation of litigation by or for the attorney." *State ex rel Flowers,* 209 S.W.3d at 617.

Work-product rule elements. In order to qualify as work product, the party seeking protection must establish the following three elements: (1) that the material sought is tangible, (2) that the documents were prepared in anticipation of litigation or trial, and (3) that the documents were prepared by or for legal counsel. Tenn. R. Civ. P. 26.02(3); *State ex rel Flowers,* 209 S.W.3d at 617 n. 15.

Not "in anticipation of litigation." Here, the information being sought from Mr. Daniel concerns the actions taken by him and facts discovered by him during the course of his investigation into Pleau's disciplinary complaint – prior to any decision by the Investigative Panel to authorize formal charges. This information was developed not "in anticipation of litigation," but merely during the course of Mr. Daniel's statutory period of "preliminary investigation" to determine whether to seek authority to conduct a "full investigation" from the Investigative Panel. *See* Tenn. Code Ann. § 17-5-304. Disciplinary Counsel's authority to conduct a preliminary investigation and then a full investigation cannot – as a matter of common sense – equate to work performed "in anticipation of litigation" since at this stage litigation is not being anticipated at all, since dismissal prior to litigation remains a real and viable alternative.

The Court's own statistics contradict Mr. Daniel's anticipation of litigation defense. This conclusion is buttressed by the fact that according to this Court's own statistics, during the 2008-09 fiscal year, a total of 348 complaints were filed against judges, of which 330 (95%) were either summarily dismissed, dismissed after a preliminary investigation, or "dismissed by Panel after appeal."

In other words, a maximum of 5% of the complaints actually resulted in "litigation." Thus, Mr. Daniel's investigation efforts was in fulfilling his statutory duty, not in anticipation of what turns out to be dismissed complaints 95% of the time, or at least until the Investigative Panel authorizes Formal Charges.[4]

Burden to establish privilege not met. Disciplinary Counsel's Motion for Protective Order and Motion to Quash to Notice of Deposition ("Motion for Protective Order") wrongly assumes that Judge Bell has the burden of disproving that the documents and Mr. Daniel's testimony are not privileged. In fact, as the Court knows, it is generally held that the party asserting a privilege has the burden of proving that the privilege is applicable. Neil P. Cohen, et al., *Tennessee Law of Evidence,* § 5.01[4](d) (5th ed. 2005). Mr. Daniel has not met this burden.

Mr. Daniel has failed to satisfy his burden to be excused from responding to Judge Bell's document requests. Finally, to the extent Mr. Daniel argues that Judge Bell's document requests are burdensome, there has been no satisfactory showing of such a burden. For instance, Mr. Daniel provides no description of the number of files involved. Insofar as Mr. Daniel claims he can not "segregate what in his file . . . for purposes of asserting his rights," *see* Motion, ¶4, Mr. Daniel ignores the fact that it is he who has the burden of proof on the issue, not Judge Bell. No cases are cited by Mr. Daniel to support this "reason" to refuse to produce otherwise discoverable documents. Morever, the hearing was continued until March 3, 2010, and Mr. Daniel has not supplemented his

---

[4]In addition, any privilege regarding Mr. Daniel's investigative material would appear to have been waived by disclosure of that information to the Tennessee Bureau of Investigation and the Tennessee Attorney General.

motion. Lastly, evidence regarding charges filed against other judges for "decisional delay" is relevant to: (I) Judge Bell's guilt or innocence, (ii) Judge Bell's affirmative defense, (iii) the appropriate sanction, if any, which may be imposed by the Court.

WHEREFORE, Judge Bell respectfully asks the Court to deny a protective order and order Disciplinary Counsel to schedule a mutually agreeable date to depose Mr. Daniel and produce the documents requested.

Respectfully submitted, this 1st day of March, 2010.

Gordon Ball
Allen McDonald
Ball & Scott Law Offices
550 W Main Street, Suite 601
Knoxville, TN 37902
Telephone: (865) 525-7028

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following by United States Mail, first class postage prepaid, and by electronic mail, upon:

Joseph S. Daniel
tlawdaniel@comcast.net
Disciplinary Counsel
Patrick J. McCall
patrickjmchale@gmail.com
Assistant Disciplinary Counsel
Court of the Judiciary
503 North Maple Street
Murfreesboro, Tennessee 37130

This 1st day of March, 2010.

Gordon Ball