

BEFORE THE COURT OF THE JUDICIARY OF ALABAMA



In the Matter of)
PATRICIA D. WARNER,)
Retired Circuit Judge of) Court of the Judiciary
The Fifteenth Judicial)
Circuit of Alabama) Case No. 40

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

COMES NOW the Judicial Inquiry Commission of Alabama ("the Commission"), by and through counsel, and in further support of the Commission's Motion for Protective Order filed on August 12, 2011, respectfully offers the Court the following:

1. In support of Warner's demand to depose the Judicial Inquiry Commission, Warner employs pejorative phrases¹ and provocative adjectives and adverbs² that are inappropriate in a proceeding of this stature.

2. The Commission, composed of two circuit judges, a district court judge, two members of the

¹ For example, Respondent accuses the Commission of "running from the charges it has made." See, Respondent's Response to AJIC's Motion for Protective Order, p.1.

² For example, Respondent uses the terms "frivolous motion," "falsely presents," and "scurrilous charges." Id.

Alabama State Bar, and three lay persons³ decline to reply in kind, and instead will seek only to aid the Court in resolving the novel issue of whether a judge may depose the Commission pursuant to Rule 30(b)(6) of the Alabama Rules of Civil Procedure.

The Commission's proceedings are constitutionally mandated to remain confidential

3. At the outset, the Commission is aware of no direct legal precedent from either this Court or the Supreme Court of Alabama in which either court has held a judge may depose the Commission when the Commission is prosecuting the judge before the Court of the Judiciary. No Alabama court has ever found a judge possesses an extraordinary right to depose the Commission, and indeed, no such right exists.

4. The confidentiality provision in Article VI, Section 156 of the Constitution of Alabama prohibits the Commission from being deposed concerning its proceedings involving the investigation and prosecution of a judge for unethical conduct or misconduct. Section 156(b) of the Constitution provides:

³The appellate court judge serving on the Commission has recused from this matter.

The commission shall be convened permanently with authority to conduct investigations and receive or initiate complaints concerning any judge of a court of the judicial system of this state. The commission shall file a complaint with the Court of the Judiciary in the event that a majority of the members of the commission decide that a reasonable basis exists, (1) to charge a judge with violation of any Canon of Judicial Ethics, misconduct in office, failure to perform his or her duties, or (2) to charge that the judge is physically or mentally unable to perform his or her duties. All proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary. The commission shall prosecute the complaints.

Alabama Const. Art. VI, Sec. 156 (b) (2011)
(emphasis added).

5. Because the Alabama Constitution requires the "proceedings of the commission" to be kept confidential, there is no basis for any argument that a judge may delve into the Commission's proceedings⁴ while the Commission is prosecuting that judge before the Court of the Judiciary. Because the Commission's proceedings are confidential and constitutionally

⁴ Proceedings include collegial deliberations and attorney communications, staff communications, and investigation decisions and results.

privileged, a judge may not depose members of the Commission about those confidential proceedings. Nothing in Section 156 limits the temporal scope of the confidentiality afforded to the Commission's proceedings.

6. On the other hand, Section 156 does not mandate that the evidence accumulated by the Commission be kept confidential from the judge after the Commission files a formal charge in the Court of the Judiciary. To the contrary, once a complaint is filed in the Court of the Judiciary, any entitlement the judge may have to evidence under the Alabama Rules of Civil Procedure from the Commission is already provided for in the Commission's Rules of Procedure. See Ala. R. P. Judiciary Inquiry Comm'n Rule 6 and 7.

7. Pursuant to Rule 6 of the Commission's Rules of Procedure, the Commission has already provided Warner all documents and other materials the Commission has accumulated during its investigation, other than the Commission's attorney's notes, which are protected by the attorney-client privilege and/or work-product doctrine. See Ala. R. P. Judiciary Inquiry Comm'n Rule

6.C and 6.D; see also ALA.R.Civ.P. 26(b)(3) ("[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . .").

8. With regard to the witnesses who have testified before the Commission, pursuant to Rule 7 of the Commission's Rules of Procedure, the Commission has timely provided Warner copies of all subpoenas issued to such witnesses, and Warner is fully aware of every witness who has testified before the Commission. In addition, the Commission provided Warner the name and contact information of the court reporter who recorded the witnesses' testimony before the Commission. In instances where the Commission requested a transcript of a witness's testimony, the Commission timely served Warner with a copy of the transcript it obtained. In those instances where the Commission did not order a transcript of a witness's testimony before the Commission, the Commission timely informed Warner she could order a transcript directly from the court reporter.

9. As such, the Commission has fully complied with Rules 6 and 7, and Warner has no right to depose the Commission concerning the Commission's investigation, proceedings, or deliberations. The issue in this matter is not the Commission's deliberative process. Instead, the issue is whether Warner engaged in the multiple acts of unethical conduct complained of by Alabama citizens and alleged in the Commission's the complaint.

10. Furthermore, it is important to note there is a significant distinction between (a) the evidence the Commission gathered during its investigation and (b) the "proceedings of the Commission," which are made confidential by Section 156. Nowhere in the Court of the Judiciary's Rules of Procedure or in the Commission's Rules is there any provision giving judges the right to breach the constitutionally mandated confidentiality of the Commission's proceedings and to delve into the Commission's deliberative processes.

Nevertheless, this is exactly what Warner is attempting to do by deposing the Commission.⁵

11. Warner has no need to depose the Commission about the evidence the Commission gathered and the evidence upon which the charges will ultimately be tried because the Commission is already required by Rule 6 to produce every piece of that evidence to Warner, and the Commission has complied with that mandate, and will continue to do so throughout the discovery process.

12. The majority of Warner's topics for deposition, which are listed in the numbered paragraphs

⁵The deposition notice filed by Respondent includes 24 numbered paragraphs stating the topics upon which Respondent proposes to depose the Commission. Many of these paragraphs concern fragmented or smaller sub-portions of the evidence that has already been produced to Respondent.

However, many of the topics listed in these paragraphs plainly seek to pry into the Commission's and its staff's deliberative processes, e.g., "¶2. AJIC's consideration of Warner's response to each complaint;" "¶6. AJIC's decision as to what materials and documents were given to Warner;" "¶8. How the evidence in each count supports each charge;" and "¶11. How the complaints received by AJIC relate to the counts and charges in the complaint."

Even if the Rules expressly gave a judge the right to depose the Commission, these paragraphs and others seek information that would plainly be covered by the work-product privilege and/or the attorney-client privilege. Should the Court take the extraordinary step of allowing the depositions Warner seeks, the Commission reserves the right to assert these and other objections as to the scope of the depositions proposed in these paragraphs.

of Warner's deposition notice, concern the Commission's deliberative processes.⁶ Warner proposes to delve into the Commission's deliberative decisions made in the course of filing formal charges against Warner, e.g., how or why the Commission or its counsel decided to conduct the investigation, why the Commission chose to make this or that particular charge, how or why the Commission believes this or that piece of evidence supports a particular charge, etc. Such inquiries should not be allowed under any circumstances.

Section 156 applies to proceedings before the Court of the Judiciary.

13. Warner further attempts to circumvent the constitutional prohibition of Section 156 by arguing "the proceedings" now in progress are in the Court of the Judiciary and therefore Section 156 no longer applies. However, it is not the proceedings in *this* Court about which Warner seeks to depose the Commission. Instead, Warner seeks to depose the

⁶ The 24 topics listed in the deposition notice also plainly include, almost exclusively, "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," which Rule 26(b)(3), A.R.C.P., requires courts to protect from disclosure.

Commission about the Commission's proceedings and decision-making process that ultimately resulted in the Commission filing charges against Warner in this Court. To the extent relevant, the support for these decisions appears in the allegations of the complaint filed in this court.

14. Further, as a matter of textual interpretation, the confidentiality of the Commission's proceedings mandated by Section 156 does not depend upon whether or not the Commission has filed a complaint in the Court of the Judiciary. There is nothing in Section 156 that states or even suggests the confidentiality it prescribes for proceedings somehow disappears once a formal complaint is filed in this Court. Section 156 is not so gossamer or ephemeral; it does not say and may not reasonably be read to mean, as Warner urges, that once the Commission files a complaint in the Court of the Judiciary, the confidentiality prescribed by Section 156 ceases to exist. Indeed, Section 156 prescribes completely to the contrary, stating all proceedings are confidential "except the filing of the complaint in the Court of the

Judiciary." It is for this reason that the Commission always applies the "full fact pleading" principal to the content of the complaint.

15. The Commission respectfully submits the Court may not abrogate the confidentiality provision of Section 156 by authorizing judges to depose the Commission.

Rule 10 of this Court's Rules does not permit depositions of the Commission.

16. Warner trumpets Rule 10 of this Court's Rules and its limited incorporation of the Alabama Rules of Civil Procedure to circumvent the constitutional confidentiality mandate. In doing so, Warner gives short shrift to the limitation contained in Rule 10: "except where inappropriate."

17. Given the differences between most civil litigation for which the Rules of Civil Procedure were written and the prosecution of charges in the Court of the Judiciary, deposing the Commission is singularly inappropriate.

18. The Commission is charged by Section 156 of the Alabama Constitution with receiving or initiating complaints against state judges for conduct arising out

of or affecting the performance of their judicial duties, investigating those complaints, and where warranted, filing and prosecuting formal charges against judges before this Court. As such, the Commission is a body that is without an exact analogue in civil or criminal litigation. However, the Commission's function, purpose, and work most closely parallel those of a grand jury or a prosecuting attorney; and the Commission has few parallels with the functions, purposes, or work of civil litigants. Accordingly, in analyzing whether judges should be allowed to depose the Commission, the issue of whether criminal defendants are allowed to depose the district attorney or the grand jury that returned an indictment in the course of their criminal prosecution is the more pertinent inquiry.

19. Not surprisingly, the Commission's legal research failed to locate any Alabama cases ruling on whether a criminal defendant may take the deposition of the policeman who arrested him, the grand jury that indicted him, or the district attorney who prosecutes him.

20. Further, in assessing the fairness of disallowing judges to depose the Commission, note that the interests of judges before the Court of the Judiciary are more than adequately protected by this Court's and the Commission's Rules, such as providing the judge an "open file" during the Commission's entire investigation. In fact, no other jurisdiction has such liberal provisions. Most pertinently, judges are not required to "stab in the dark" at what the Commission's charges will be based upon: judges are not required to compose interrogatories and requests for production they hope will encompass all of the evidence the Commission has gathered in its investigation. Rather, unlike ordinary civil litigants, judges are provided, as mandated by the Supreme Court in Rules 6 and 7, to the evidence acquired by the Commission in its investigation and the initial production of such evidence is timely updated with all subsequently acquired evidence as long as the investigation continues. In these circumstances, the Commission respectfully submits that the right to depose the Commission is not only inappropriate, it is completely

unnecessary as all relevant evidence has been or will (as it is gathered) be produced to the Warner.

21. There is a further and more prosaic, but practical argument to be made on behalf of the Commission. If judges are permitted to depose the Commission, then this Court may fully expect that the standard operating procedure for counsel for judges in all future proceedings in this Court will be to notice the depositions of the Commission members. Instead of focusing the inquiry on whether or not the judge committed the acts alleged in the complaint, the focus would shift to why the Commission decided to prosecute this particular judge, regardless of whether the judge actually engaged in the alleged unethical conduct or misconduct. Simply put, why the Commission charges a particular judge is stated on the face of complaints filed in the Court of the Judiciary and relevant law. How or why, other than the facts stated in the complaint, have no bearing on whether the judge committed the acts charged and are completely irrelevant to the case before this Court. The Commission has already stated why it decided to file

charges against Warner; that information is set out in the Commission's complaint. The focus in this matter should now squarely turn on whether the Commission's allegations against Warner are supported by clear and convincing evidence, as required by Article VI, Section 157 of the Alabama Constitution.

22. The Commission respectfully suggests that the Court should be very circumspect about what its ruling on this issue will portend for the distortion of the process of judicial discipline established in the Constitution and court rules. Warner's demand to take the Commission's deposition is nothing less than an attempt to subvert the disciplinary process, to turn the tables, and make the accuser the accused.

Rule 10 establishes two exceptions to the application of the Civil Rules, not one exception.

23. Warner acknowledges Rule 10 of the Rules of Procedure for the Court of the Judiciary provides for two different limitations on the applicability of the Rules of Civil Procedure to proceedings in this Court: that the Civil Rules do not apply, first, "where inappropriate," and second, when "otherwise provided for by [the Court of the Judiciary's] rules."

24. Warner then, however, makes an argument that conflates the two limitations into one by eliminating any field of operation for the first. Specifically, by arguing that, "Surely, if the deposition of the Commission was inappropriate, the Rules of Court of the Judiciary would have so indicated" (quoting Warner's Response, pages 2 and 3), Warner would have the Court adopt the policy that unless a provision in the Civil Rules is specifically exempted by express provision in the Court of the Judiciary's procedural rules, that provision in the Civil Rules is "appropriate" to be applied in this Court's adjudication. Warner's argument eliminates the possibility that a provision in the Civil Rules could be "inappropriate" for proceedings in the Court of the Judiciary unless its express exclusion was "otherwise provided for by the Court's rules." The effect of this argument is that while Rule 10 provides for two exceptions to the applicability of the Civil Rules, Warner would have the Court recognize only one of them.

25. The implications of this interpretation would result in some absurdities. For example, the

Commission's Rules do not specifically exclude counter-claims (Rule 13, A.R.C.P), third-party claims (Rule 14, A.R.C.P.), class actions (Rule 23, A.R.C.P), or the substitution of the judge's executor, upon the judge's death (Rule 25, A.R.C.P.), to name just a few provisions in the Civil Rules where their applicability is not specifically excluded in the Commission's Rules. That omission, according to Warner, means these Rules' applicability to proceedings in this Court is not "inappropriate," and accordingly, these apply to proceedings before this Court.

26. The Commission suggests the inapplicability of the above-cited Civil Rules, like the inapplicability of Rule 30(b)(6) to the noticed depositions of the Commission, arises not because the Commission's Rules "otherwise provide," but because they are "inappropriate" for proceedings in this Court. Because the Commission itself was not a witness to any of the matters alleged in the complaint, the deposition of the Commission would serve no purpose in these proceedings.

Rule 5(c) and the distinction between obligation to disclose and right to depose.

27. Warner next argues the provisions of Rule 5(c) of the Commission's Rules, which states that the Constitution's mandate of confidentiality shall not restrict the Commission's obligation to "communicate with" and "disclose information" to the judge, are the equivalent of and mean that Warner may take the deposition of the Commission.

28. It is important to note, however, that Warner's highly questionable interpretation of court rules may not limit, vary, displace, or require a result contrary to the Constitution's requirement of "confidentiality." In short, if Rule 5(c) conflicts with the confidentiality mandate found in Section 156, the constitutional provision for confidentiality trumps any procedural rule. Additionally, the Commission is confident this Court is fully capable of distinguishing between, on one hand, Rule 5(c)'s "obligations" placed on the Commission to "disclose information" to Warner and to "communicate" with Warner and, on the other hand, the alleged right of the Warner to place members of the Commission under oath and depose them concerning

the Commission's proceedings and deliberations. The former obligations to disclose information and communicate with Warner are expressly provided for in some detail in Commission Rules 6.C. and 6.D., while *absolutely no* provision or even mention is made for the latter alleged "obligation," to be deposed by Warner. No legal authority supports Warner's contention that when the Commission was formed and empowered, the citizens of Alabama intended Commission members to be subjected to depositions from the very judges the Commission is prosecuting.

Rule 4's "privilege" for defamation actions.

29. Warner next argues that Rule 4 of the Commission's Rules of Procedure somehow supersedes and defeats – apparently by implication – the constitutional mandate of confidentiality contained in Section 156. Rule 4 of the Commission's Rules states, "All papers filed with and proceedings before the commission shall be privileged in any action for defamation." Respondent's reasoning is flawed for a number of reasons, not the least of which is that confidentiality of the papers and proceedings of the

Commission rests on much firmer footing than one of the Commission's Rules of Procedure. In addition, as will be shown, "privilege," in the context it is used in Rule 4, does not mean "confidential."

30. Aside from the fact that Warner's questionable interpretation of court rules may not limit, vary, displace, or require a result contrary to the Constitution's express mandate of "confidentiality," Warner has badly misread Rule 4 and fails to appreciate the distinction between "privileged" and "confidential" when used in their respective contexts herein.⁷

31. As the Court knows, the word "privilege," when used in the context of libel law, means the communication or disclosure of information may not be the basis of a civil claim for libel or slander. In O'Barr v. Feist, the Alabama Supreme Court stated:

"An absolutely privileged
communication is one in respect of which,
by reason of the occasion on which, or

⁷ As best the Commission understands the argument here, Warner's counsel argues that because it is Rule 4 (and not Section 156) that creates the confidentiality of the "papers" and of the "proceedings before the Commission," and because that Rule's application is limited to defamation actions, therefore the Commission's "papers" and "proceedings" are not confidential herein since this is not a defamation action.

the matter in reference to which, it is made, no remedy can be had in a civil action, however hard it may bear upon a person who claims to be injured thereby, and even though it may have been made maliciously, and is false."

292 Ala. 440, 445, 296 So. 2d 152, 156 (1974) (quoting 50 Am. Jur. 2d Libel and Slander § 193, p. 696).

32. Rule 4 appears to have been written in recognition that, despite the fact the Commission's proceedings and the "papers" it accumulates or generates during the investigatory phase of its work are confidential, trials before the Court of the Judiciary are public and the introduction of some of the "papers" and disclosure of some of those "proceedings" that were "confidential" when in the breast of the Commission will unavoidably be made public at that trial. For that reason, Rule 4 exists. It makes disclosure of those proceedings before the Commission and papers "privileged," i.e., in this context, that they are not actionable and may not be the basis for a claim of libel or slander. It does not mean these papers are "confidential," since some of them will be introduced into the public trial before the Court of the Judiciary. Warner's argument either

ignores or fails to grasp the distinction between "privileged" and "confidential" when used respectively in Rule 4 and Section 156.

Conclusion

33. Warner has failed to assert a logical argument for the abrogation of the confidentiality provisions established by Section 156, and because there is no authority or any reasonable basis for Warner to be allowed to depose the Commission, the Commission requests the Court grant the Commission's motion for a protective order and strike Warner's notice of the Commission's deposition.

WHEREFORE, ABOVE-PREMISES CONSIDERED, the Commission respectfully requests this Honorable Court enter a protective order striking Warner's Notice of 30(b)(6) Deposition by Video of Alabama Judicial Inquiry Commission.

Respectfully submitted,

/s/Richard Trehella
RICHARD E. TREWHELLA, JR. (TRE010)
Counsel for the Judicial Inquiry
Commission

OF COUNSEL:

CARR ALLISON
100 Vestavia Parkway
Birmingham, AL 35216
(205) 822-2006
(205) 822-2057 (facsimile)
rtrewhella@carrallison.com

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing pleading upon all counsel of record in this cause via electronic mail and by placing a copy of same in the United States mail, postage prepaid, addressed as follows on this the 6th day of September, 2011:

Charles A. Dauphin, Esq.
Baxley, Dillard, Dauphin, McKinght, James
2008 Third Avenue South
Birmingham, AL 35223
cdauphin@baxleydillard.com

/s/Richard Trewhella
OF COUNSEL