

BEFORE THE COURT OF THE JUDICIARY OF ALABAMA



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

JUDICIAL INQUIRY COMMISSION'S OBJECTION
TO CIVIL MEDIATION PROCEEDINGS

Comes now the Judicial Inquiry Commission ("the Commission") and respectfully objects to the ordered civil mediation proceedings before a third-party mediator. The Commission objects on the ground there is no legal authority for third-party mediation or third-party alternate dispute resolution of the charges in a Complaint filed by the Judicial Inquiry Commission in the Court of the Judiciary, and, in fact, all authority is to the contrary.

1. Rule 10 of the Rules of Procedure of the Judicial Inquiry Commission provides the exclusive¹ means of alternate dispute resolution of either a complaint under investigation by the Commission or a Complaint filed by the Commission in the Court of the Judiciary. That Rule provides:

¹Public Bldg. Auth. v. St. Paul Fire & Marine Ins. Co., 2010 Ala. LEXIS 198 (Ala. Oct. 8, 2010): "The legal maxim *expressio unius est exclusio alterius unius est exclusio alterius* (the expression of one thing is the exclusion of another) is frequently applied to aid courts in interpreting statutory language."

Rule 10. Alternative dispute resolution.

A. At any time during the pendency of a charge or investigation but more than 10 days before the trial, the judge being charged or investigated may demand, and the whole commission must conduct, a hearing before the whole commission to discuss the charge or suspected conduct and to attempt to resolve the charge or investigation on terms to be presented by joint motion to the Court of the Judiciary. A majority of the commission may bind it to any such resolution. Any such resolution reduced to writing and signed by the judge and a majority of the commission shall bind the judge and the commission unless and until the proposed resolution is rejected by the Court of the Judiciary.

2. Rule 10, as promulgated by the Alabama Supreme Court, recognizes and accords the confidentiality to proceedings before the Commission required by Section 156 of the Constitution of Alabama. Section 156 provides, in pertinent part:

All proceedings of the commission shall be confidential except the filing of a complaint with the Court of the Judiciary.

3. Mediation or alternate dispute resolution before the Commission is a "proceeding of the commission" and cannot, consistent with Section 156 of the Constitution, involve a third-party mediator.

4. Rule 10 provides a means for the Commission to conduct an alternate dispute resolution hearing to attempt to resolve the allegations and charges before the Commission or made the subject of a Commission Complaint. It requires the Commission and the Judge to meet and

thoroughly discuss the charges and to attempt to come to a resolution – all while preserving the confidentiality of that proceeding that is required by the Constitution.

5. In promulgating Rule 10, the Alabama Supreme Court recognized the conflict inherent in the confidential nature of proceedings before the Commission and the duties of the Commission, on the one hand, and the public nature and jurisdiction of the of the Court of the Judiciary, on the other. The more limited ADR procedure in Rule 10 recognizes the confidentiality mandate and distinctive prosecutorial authority of the Commission and preemptively provides an exclusive and limited means for alternate dispute resolution. Mediation outside of Rule 10 is contrary to the confidentiality requirement of Section 156 of the Alabama Constitution which, in effect, prohibits such a process.

6. Rule 10 of the Rules of Procedure of the Alabama Court of the Judiciary does not authorize court-ordered, third-party mediation in a judicial disciplinary proceeding. That Rule provides the following:

The process and procedure before the Court shall be as simple and direct as reasonably may be. *Except where inappropriate, or otherwise provided for by these rules,* the provisions of the Alabama Rules of Civil Procedure and the rules of evidence used in civil cases in Alabama shall govern proceedings before the Court, but the allegations of the complaint must be proved by clear and convincing evidence.

7. Because Rule 10 of the Rules of Procedure of the Judicial Inquiry Commission covers both investigations before the Commission and extends after the Commissions

filing of a Complaint in the Court of the Judiciary (up to 10 days prior to trial), mediation as covered by the Rules of Civil Procedure is both inappropriate and otherwise covered.

8. Further, the Commission and Judge Warner are not private party civil litigants for whom the Rules of Civil Procedure were designed and adopted; the Commission is a representative of the people of Alabama, charged with a constitutional duty that is more akin and similar to that of a grand jury and a prosecutor.²

9. Mediation, as it is conducted between ordinary civil litigants, is therefore not an appropriate means of resolving Complaints before the Court of the Judiciary. Some facets or elements of third-party alternate dispute resolution, and mediation in particular, are contrary to and undercut the policies that underlie the Judicial Article's carefully constructed procedure for judicial discipline. For instance, while mediations between private civil litigants can result in confidential and undisclosed settlements, resolutions of judicial disciplinary proceedings may not be confidential and undisclosed.³ Mediation involving private parties can involve a third party as the mediator; mediation before the Judicial Inquiry Commission cannot.

²Section 156, Constitution of Alabama, see also Matter of Samford, 352 So.2d 1126 (Ala. 1977).

³Section 157, Constitution of Alabama. (The Court of the Judiciary acts only "after notice and public hearing.")

10. Further, the process of court-ordered third party mediation erodes the distinction between the two types of judicial disciplinary systems available when Alabama selected its two-tiered system of discipline.

11. The two systems are (a) a two-tier system, like Alabama's, where the investigatory and charging functions are carried out by one governmental body and the fact finding and sanctioning functions are determined by another such body, and (b) a single-tier system in which the investigative, charging, and fact-finding decisions and sanctions recommendations are all made by a single body, that in turn, files written fact findings and sanctions recommendations to the sanction-rendering court.

12. The people of Alabama could have chosen the latter single-body model, but did not. Instead our Constitution provides for a two-tiered system. These two bodies – the Commission and the Court of the Judiciary – have different standards of proof. The Commission must file charges when it finds facts to exist that create a reasonable cause to believe a judge has committed a chargeable act. The Court of the Judiciary must find in a public trial that these charges are supported by clear and convincing evidence. Of course, the Commission in making its reasonable cause determination is cognizant of the standard of proof it must meet before this Court.

13. No other judicial disciplinary body in this country recognizes or uses third party mediation as a

process for resolving judicial disciplinary issues⁴; nor is such a procedure used in lawyer discipline in Alabama.

14. The Commission stands ready, willing, and able to conduct an alternate dispute resolution pursuant to Rule 10, on either November 18, 2011, or December 9, 2011, at which time the whole Commission will be available to discuss with Judge Warner and her counsel " *the charge . . . and to attempt to resolve the charge . . . on terms to be presented by joint motion to the Court of the Judiciary.*"

15. In the interest of timely disposition of this matter, the Commission requests Judge Warner to notify the Court and the Commission within seven days of this filing of the date she selects to appear before the whole Commission for the Rule 10 hearing.

16. At the direction of the Chief Judge of the Court of the Judiciary, the Commission will consider filing an amendment of the Complaint that adds a "prayer for relief." However, under the Commission's Rules, any amendment of a Complaint must be considered and approved by the whole Commission at a duly called meeting, with three days' notice given to all members. Notice has been given and that meeting will be held Tuesday, November 1, 2011, and the Commission's action filed with the Court on Wednesday, November 2, 2011.

WHEREFORE, ABOVE-PREMISES CONSIDERED, the Judicial Inquiry Commission respectfully requests that the Court of the Judiciary order and direct that mediation of the

⁴See the attached letter of Cynthia Gray, Director of the American Judicature Society's Center for Judicial Ethics.

charges against Judge Warner not be held or required, and to direct or allow the Commission, acting pursuant to Rule 10 of the Commission's Rules of Procedure, to hold a Rule 10 hearing before the Commission on either November 18, 2011, or December 9, 2011, as selected by Judge Warner, to attempt to resolve this case. Such a resolution, if reached, will be presented to this Court by a joint Motion of the Commission and Judge Warner for the Court's consideration in a public hearing.

The Commission further respectfully requests that the Court allow it an opportunity, if necessary, to object to any proposed third party mediators after the Court determines whether it will order the Commission and Judge Warner to conduct mediation before a third party mediator.

Respectfully submitted,

/s/Richard Trewhella
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Commission

OF COUNSEL:

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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 28th day of October, 2011:

Charles A. Dauphin, Esq.
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/s/Richard Trewhella
OF COUNSEL

October 28, 2011

The Honorable Judges
Alabama Court of the Judiciary

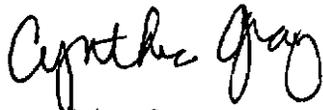
Your Honors:

This letter is to provide my knowledge of the use of third-party mediation in the context of judicial discipline. I do so with knowledge that it may be used in a judicial disciplinary proceeding pending in the Alabama Court of the Judiciary.

By way of introduction, I graduated from and was awarded a J.D. degree from Northwestern University School of Law in 1980. I am licensed to practice law in the State of Illinois. Since 1990, I have been the Director of the American Judicature Society's Center for Judicial Ethics, a national clearinghouse for information on judicial ethics and judicial discipline issues. As the Director of the Center for Judicial Ethics, some of my duties, activities and responsibilities are: review cases and advisory opinions issued by judicial ethics and judicial discipline boards, commissions, courts, and other bodies, and write weekly summaries available to on-line subscribers at <http://www.ajs.org/ethics>; answer requests for information and advice about judicial ethics and judicial discipline from judicial disciplinary counsel, staff, and boards and commissions from across the nation; write and edit *The Judicial Conduct Reporter*, a widely acknowledged and cited authority on judicial ethics and judicial discipline; and frequently speak, lecture, and make presentations across the country at judicial education programs on judicial ethics and discipline.

In the 21 years I have been Director of the Center for Judicial Ethics, I am unaware of any instance where a judicial discipline court, commission, or board ordered or directed that a judicial disciplinary case, charges, or complaint against a judge be mediated or submitted for alternate dispute resolution before a third party, i.e., a non-governmental entity or person without a statutorily or constitutionally prescribed role in a state's system of judicial discipline.

Sincerely,



Cynthia Gray
Director