



IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:

MARVIN W. WIGGINS  
CIRCUIT JUDGE  
FOURTH JUDICIAL CIRCUIT

\*  
\*  
\*  
\*  
\*

CASE NO. 54

ORDER ON MOTION TO DISMISS

A public hearing was held on the record on January 6, 2020, to address several motions filed by respondent judge Marvin W. Wiggins, including a motion to dismiss the complaint for alleged non-compliance by the Judicial Inquiry Commission ("JIC") with JIC Rule 6. Under Court of the Judiciary ("COJ") Rule 9, the Chief Judge must decide "all procedural and evidentiary questions." After further research and deliberation, it appears that the motion to dismiss must be denied based in part on Steensland v. Alabama Judicial Inquiry Commission, 87 So. 3d 535 (2012) and Moore v. Judicial Inquiry Commission, 234 So. 3d 458, 477-80 (Ala. 2017). In Moore, the respondent judge argued on appeal to the Supreme Court, among other things, that he had been adjudicated guilty by the COJ of a charge (Count VI) that did not directly emanate from a verified complaint filed in the JIC pursuant to JIC Rule 6(A), and that the investigation and notification procedures specified in JIC Rule 6(C-D) had not been followed by the JIC with respect to that count. The Supreme Court held that the lack of a specific JIC Rule 6A verified complaint related to Count VI was not a jurisdictional defect to the presentation of that count to the COJ, and that any alleged deficiencies in following the other provisions of Rule 6 did not constitute reversible error for reasons including that the respondent judge did not demonstrate any prejudice before the COJ as required by JIC Rule 19. I also note that some of the issues raised in the present motion to dismiss are similar to those raised by the respondent

judge in a motion to dismiss in COJ case number 50. Although I was not on the COJ at that time, I have reviewed materials from that case that are publicly available on the COJ website, e.g., Motion to Dismiss dated September 15, 2017; Brief in Support dated October 11, 2017; Response in Opposition dated October 18, 2017. The motion to dismiss in COJ 50 was denied by an order dated October 25, 2017. Although the ruling in COJ 50 was not reviewed by the Alabama Supreme Court and may not be binding upon a successor Chief Judge of the COJ, it at least has precedential value in assessing the motion to dismiss in this case.

Therefore, the motion to dismiss is denied. But I am not certain this ruling addresses all of the questions related to the motion that may arise at trial in other contexts and which may require "procedural and evidentiary rulings," including those I attempted to articulate at the hearing on January 6, perhaps inadequately so. The following is meant only to express some questions that may be presented so that the parties can be prepared to present their positions if required. To understand the issues, it is necessary to review certain matters from COJ case number 51. That case began with the filing of a complaint by the JIC in the COJ on May 17, 2019, against Judge Wiggins containing multiple charges of allegedly unethical conduct in five counts. All of the charges in the COJ 51 complaint arose out of allegations made within or related to a verified complaint that had been filed in the JIC by an attorney pursuant to JIC Rule 6(A) ("the JIC Rule 6A verified complaint"). JIC Rule 6 has been described by the Supreme Court as imposing a "veritable laundry list of mandatory, investigation-related duties ... upon the JIC." Steensland v. Alabama Judicial Inquiry Commission, 87 So. 3d 535, 541 (2012). It provides, in relevant part, as follows:

"A. Proceedings may be instituted by the commission only upon a verified complaint filed either by a member of the public or by a member of the commission or the commission's staff.

"B. Within 70 days after a complaint is filed with the commission, the commission may dismiss the complaint if it determines, based on a preliminary review limited to the complaint and to public records available on the Internet, that the complaint is not worthy of further action. A complaint shall become void if the commission fails to meet for a vote on whether to investigate the complaint within the 70 days allowed or if, upon the vote at a duly called meeting, fewer than a majority of all members of the commission vote to investigate it. If the complaint is dismissed after such preliminary review, the judge who was the subject of the complaint shall not be notified of the filing of the complaint.

"C. If a complaint is not dismissed on preliminary review pursuant to Rule 6.B., the commission, within 14 days of its decision to conduct some investigation of the complaint, and in no event more than 84 days after a complaint is filed, shall serve upon the judge who is the subject of the complaint copies of the complaint and all other documents or other materials of any nature whatsoever constituting, supporting, or accompanying the complaint, or accumulated by the commission before such service upon the judge. Further, the commission shall advise the judge of those aspects of the complaint that it then considers worthy of some investigation.

"D. Every six weeks after serving the judge pursuant to Rule 6.C., the commission shall serve on the judge being investigated copies of all materials of any nature whatsoever not already served upon him or her tending to establish that the conduct either did or did not occur or that the investigation is or is not still appropriate, and shall serve upon the judge a full statement of whether the commission intends to continue the investigation and any modification of the previous advice as to aspects of the complaint that it then deems worthy of some investigation. The chairman or acting chairman may extend any deadline arising under this subdivision for up to 21 days in the event that exigent circumstances prevent the commission from complying with such deadline. As soon as practicable after any such extension is made, the chairman or acting chairman, or his or her designee, shall notify in writing the judge to whom the materials and statement are to be provided of the extension and shall describe the exigent circumstances necessitating the extension. "

A scheduling and discovery order was entered. On July 2, 2019, an order was entered setting the trial of COJ 51 for September 11-12, 2019.

At some point while COJ 51 was pending, the JIC decided to "expand" its investigation of Judge Wiggins beyond the acts and/or conduct contained within or related to the JIC Rule 6A verified complaint. On August 21, 2019, the JIC filed a motion with the COJ asking for a

continuance of the September 11-12 trial. In the motion, the JIC alleged that it had "discovered new evidence," that it needed "additional time to investigate and/or determine if the complaint [in COJ 51] should be amended," and that "[a]dditional discovery is required and cannot be completed before the previously-ordered discovery deadline." Judge Wiggins objected to the motion to continue. On August 26, 2019, I entered an order continuing the September 11-12 trial at the request of the JIC, as well as addressing discovery disputes and other matters.

A hearing was held on the record on September 11 to address many different issues, and on September 16, 2019, I entered an order addressing those issues. On September 23, 2019, I entered an order re-setting the case for trial to be held on November 18-20, 2019.

On October 24, 2019, the JIC filed a motion seeking to amend the COJ 51 complaint to add additional counts or charges against Judge Wiggins. See Ala. R. Civ. P. 15(a) (leave of court is required to amend a complaint unless the amendment is made more than 42 days from the first trial setting); COJ Rule 10 (The Rules of Civil Procedure apply to COJ proceedings "[e]xcept where inappropriate, or as otherwise provided.") Judge Wiggins objected, and a hearing was held on the record on November 6, 2019. At that hearing, the JIC stated that it had "expanded" the scope of the investigation beyond the JIC Rule 6A verified complaint to "include incidents of pattern and practice." The JIC also stated that the allegations in the proposed amended complaint were relevant to "rebut" any assertion of Judge Wiggins that his conduct alleged in the COJ 51 complaint was isolated. The JIC also argued that the matters in the proposed amended complaint were relevant to what sanction should be imposed against Judge Wiggins if he was found to have committed any of the acts alleged in the COJ 51 complaint.

The acts or conduct alleged in the counts JIC sought to add in the amended complaint did not emanate from a verified complaint filed by the public, the commission, or a member of the

commission staff as required by Rule 6A, nor after compliance with the notification and other procedures of Rule 6B-D. Moore v. Judicial Inquiry Commission, supra, and Steensland v. Alabama Judicial Inquiry Commission, supra, seem to establish, however, that once a JIC Rule 6A verified complaint is filed in the JIC against a judge, the "jurisdiction" (as that term is used by the Supreme Court) of the JIC is invoked, and it may thereafter expand the scope of its investigation beyond the parameters of the Rule 6A verified complaint and ultimately bring charges against a judge in the COJ for matters discovered that were not within the verified complaint. A question however, is what is the proper use or purpose of the evidence that would be presented on the proposed amended charges? Based on the reasons expressed for the amendment, the allegations within the proposed amended complaint were intended to be used as "character" evidence. Trials before the COJ are governed by the Alabama Rules of Evidence as applicable to civil cases. COJ Rule 10. Character evidence, which includes other acts or conduct as well as reputation and opinion, is not admissible in civil cases to show conformity therewith except where assaultive conduct is alleged. Ala. R. Evid. 404(a); 404(a)(2)(B). Alabama law will permit, however, other acts or conduct to be used in a civil trial to establish, if relevant, a "pattern" or "practice." The Supreme Court analyzes the admission of pattern and practice acts or conduct as character evidence under Ala. R. Evid. 404(b):

"Any analysis of 'pattern-or-practice' evidence must begin with this controlling rule of evidence:

'Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ....'

Ala. R. Evid. 404(b)."

Morris v. Laster, 821 So. 2d 923, 926 (Ala. 2001).

As is apparent from the term "other ... wrongs, or acts..." in Rule 404(b), such evidence is extrinsic to the matters raised by the pleadings or indictment because it is, by definition, "other" evidence. It is evidence often referred to as being "collateral" to the proceedings. See, e.g., Morris v. Lester, supra at 926 ("The basic intent of Rule 404(b) is to exclude collateral character evidence, which ordinarily is likely to prejudice the jury and confuse the issues.") Furthermore, while the burden of proof of evidence required under COJ Rule 10 to adjudicate a judge guilty of unethical conduct to support a sanction is "clear and convincing," the burden of proof of 404(b) evidence in Alabama is much lower. See, e.g., Brownlee v. State, 197 So. 3d 1024, 1036-37 (Ala. Crim. App. 2015); (indicating the proof need only be "sufficient" to conclude that the act occurred); Scott v. State, 163 So. 3d 389, 429-431 (Ala. Crim. App. 2012); (indicating "sufficiency" as the applicable burden of proof and not beyond a reasonable doubt, clear and convincing, or preponderance of the evidence); See also C. Gamble and R. Goodwin, McElroy's Alabama Evidence § 69.02(4) (6th ed. 2009) (describing beyond a reasonable doubt and clear and convincing proof as "more strict than that applied in the courts of Alabama" for 404(b) evidence). Although most of the cases construing Ala. R. Evid. 404(b) are criminal proceedings, the rule is the same for both civil and criminal proceedings.

Thus, the JIC wanted to amend the complaint in COJ 51 to introduce "other" acts under Ala. R. Evid. 404(b). Under Steensland v. Alabama Judicial Inquiry Commission, it seems JIC would not be absolutely precluded from including other charges within a complaint that are not based on or arising from a verified JIC Rule 6A complaint for purposes of showing "pattern or practice." In Steensland, a complaint containing around 60 charges was filed in the COJ by the JIC against a judge. The proceedings had been initiated after four people filed verified JIC Rule

6 complaints against the judge in the JIC referencing certain acts or conduct. Charges 1-35 of the COJ complaint included the acts or conduct related to those four complaints. Charges 36-60, however, referred to alleged acts or conduct that did not arise from the allegations made in the four JIC Rule 6 complaints. The Supreme Court held that the additional acts or conduct had been, by agreement, introduced and used by the COJ to show a "pattern and practice." Id. at 542-43. Importantly for the present analysis, the Supreme Court observed that the order entered by the COJ adjudicating the judge guilty of unethical conduct was specifically not based on the "pattern and practice" charges but "was expressly based on the conduct charged in the four complaints filed with the JIC ... which include charges 1-35." Id. at 543. Therefore, the sanction imposed by the COJ in Steensland was based on an adjudication of guilt for counts brought after compliance with JIC Rule 6 and proven by clear and convincing evidence, and expressly not based on counts brought for the purposes of "pattern and practice" for which JIC Rule 6 was not followed. Of course, Steensland did not involve question of amending a complaint shortly before a scheduled trial.

In seeking to amend the complaint in COJ 51, the JIC also suggested that the additional acts or conduct would be relevant to what sanction should be imposed if Judge Wiggins was adjudicated guilty of the matters charged in the existing complaint. For purposes of analysis only and not as a holding, I think JIC has a good point here. As noted, since COJ proceedings are governed by the Rules of Evidence applicable in civil and not criminal proceedings, neither the judge nor JIC may introduce character evidence for conformity purposes. But if a judge is adjudicated guilty by clear and convincing evidence of a properly charged count that emanated from a JIC Rule 6 process, then the COJ has a range of sanctions to consider. In criminal cases, the Rules of Evidence are not applicable to sentencing proceedings and character evidence is not

excluded at that point. Ala. R. Evid. 1101(b)(3). COJ sanctions are not criminal sentences and the proceedings are expressly made subject to the Rules of Evidence in civil, not criminal cases. Thus, the Rules of Evidence continue to apply to the process of COJ sanctions. But if we consider that the judge's character has become relevant after adjudication of guilt for purposes of determining a sanction, and character is now "at issue" as that term is used in the Rules of Evidence, then other acts and conduct as well as reputation or opinion would become admissible for that specific purpose and could be presented both by the JIC and the respondent judge. Ala. R. Evid. 405(b). This is because the evidence is no longer being offered for conformity as prohibited by 404(a) nor for "other" purposes under 404(b), but for a relevant fact of consequence to be decided for the purpose of imposing a sanction. A prior adjudication of the COJ against the judge falls into the same category.

Therefore, in my view, the acts and conduct contained in the proposed amendment in COJ 51 could have possibly been admissible for purposes of character evidence (although the admissibility was not assured based on Alabama's rather strict view of 404(b) evidence). But I ultimately determined that the motion to amend the complaint in COJ 51 should not be granted based on the procedural and jurisdictional issues discussed above and other reasons which were expressed at the hearing on November 6. Although there was certainly no evidence of intentional delay by the JIC nor any improper motive, amending the complaint would lead to another continuance of the trial and further delays. First, there would certainly be requests for additional discovery and other motions raising procedural and/or more discovery issues. Second, the trial had been scheduled to be held over a three day period because of the large number of witnesses each side claimed would be called to testify. Permitting the amendment would increase the number of witnesses because new acts and conduct were being alleged, and

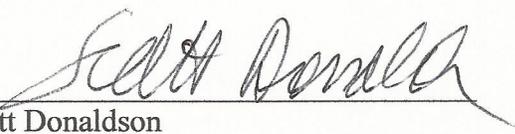
therefore, increase again the estimated number of days of trial time required. Based on scheduling issues, it was not possible to extend the trial past November 20 and another date in the future would have to be found that extended beyond three days. I noted some of the difficulties encountered in scheduling and re-scheduling the availability of the nine members of the Court for multiple days in view of their other responsibilities and duties, and that the judges were ready and prepared to try the case on the scheduled dates. Court of Judiciary Rule 8 requires that a trial be held "as expeditiously as possible" particularly since the filing of a JIC complaint leads to the automatic suspension of a respondent judge from performing any duties, and the trial had already been continued once at the request of the JIC. Although I was not a member of the Court for prior trials, it appeared to me that the average time between filing a JIC complaint until trial in the COJ had historically been around four months, except in COJ 50 where the amended complaint had been permitted to be filed. In that case, the length of time between the complaint and trial was approximately 14 months. Therefore, for all of these reasons, I entered an order on November 6, 2019, denying the motion to amend the complaint so that the trial on the complaint could be held as scheduled, among other orders.

Late in the day on November 15, 2019, the Friday before the Monday the trial of COJ 51 was scheduled to begin, the JIC filed the present complaint commencing COJ Case number 54. The five counts and eight charges in this complaint are the same as those in the proposed amendment to the complaint in COJ 51. They are apparently not based on nor arise from acts or conduct raised in any Rule 6A verified complaint, but arose from the "expansion" of the investigation of Judge Wiggins beyond the parameters of the Rule 6A verified complaint in COJ 51. As written, JIC Rule 6 appears to express the intent of the Supreme Court that before a judge can be sanctioned for acts or conduct including but not limited to the extraordinary sanction of

removal from office, the "mandatory" process established in JIC Rule 6 must be followed. If that is an accurate interpretation, "other" acts or charges not emanating from the JIC Rule 6 process can be used, if at all, as character evidence, but could not independently support an adjudication of guilt. In other words, the JIC can expand an investigation beyond the parameters alleged in a verified complaint, but if it wishes to use newly discovered acts or conduct substantively and seek sanctions against the judge for those charges and not collaterally, it would file its own additional complaint under Rule 6A alleging those acts or conduct and proceed accordingly. Steensland appears to suggest that interpretation, while Moore v. Judicial Inquiry Commission appears to at least implicitly reject it. As noted, both Steensland and Moore appear to authorize the JIC to file charges with the COJ against a judge that did not emanate from a JIC Rule 6A verified complaint when included with charges that are traceable to such a verified complaint. But these charges stand alone, i.e., are not traceable to a verified Rule 6A complaint. Does this cause the analysis to be different? And is there any different analysis for charges based on acts or conduct that allegedly occurred after a complaint was filed in the COJ?

These questions are not raised for the parties to address at this time, nor perhaps at any further stage of this case beyond the motion to dismiss. But in conjunction with addressing the present motion, I note that JIC Rule 6 presents interesting questions in the judicial discipline process in this state. Whether the Rule is wise or awkward or amenable to amendment are not proper issues for this Court to address.

ORDERED this the 15th day of January, 2020.

  
\_\_\_\_\_  
Scott Donaldson  
Chief Judge, Alabama Court of the Judiciary