

IN THE ALABAMA COURT OF THE JUDICIARY

IN THE MATTER OF:

TRACIE TODD
CIRCUIT JUDGE,
BIRMINGHAM DIVISION
CRIMINAL DIVISION
JEFFERSON COUNTY, AL

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CASE NO. 58

FILED

NOV - 3 2021

COURT OF THE JUDICIARY
Rebecca C. Oates
Secretary

JUDICIAL INQUIRY COMMISSION'S OBJECTION TO NOTICE
OF EXPERT TESTIMONY AND MOTION TO EXCLUDE

COMES NOW, the Judicial Inquiry Commission (hereinafter "the Commission") and hereby objects to Judge Todd's Notice of Expert Testimony filed today, November 3, 2021, and further objects to Judge Todd calling Professor Abbe Smith as an expert witness and moves to exclude her testimony from the trial scheduled before this Honorable Court to begin on November 15, 2021, for two reasons: (1) the testimony is improper and unnecessary; and (2) the late notice violates this Court's scheduling order and prejudices the Commission. As grounds for its opposition and motion to exclude, the Commission states as follows:

1. First, allowing a judicial ethics expert to testify as to her legal conclusions and the application of legal definitions to the facts of this case is entirely improper and invades the province of this Court, as set out in the Alabama Constitution.

2. The Court of the Judiciary is the ultimate body created by the Alabama Constitution holding jurisdiction over the matters alleged in the Complaint. Ala. Const. 1901, Art. VI, § 157. Accordingly, this Court bares the sole responsibility for the discipline of judges who are charged with the administration of justice in this State, and this case is properly before this Court to consider whether Judge Todd has violated the Alabama Canons of Judicial Ethics. See Ala. Const. 1901, Art. VI, § 157(a).

3. As the authority to apply the Canons of Judicial Ethics to the facts of this case lies with this Court under the Alabama Constitution, it would be “an improper delegation of decision-making authority to defer to an outside expert’s opinion.” Greenstein and Scheckman, The Judicial Ethics Expert, 33 Judicial Conduct Reporter 1, 11 (Spring 2011).

4. Moreover, because this Court is a disciplinary body composed of not only judges and lawyers but also lay people, a legal expert in judicial ethics has the potential to confuse the issues and exert undue influence on the decision-making process of this Court. See id. at 10. The questions presented to this Court “may be answered as competently by those without formal legal training as by those with such training.” Id.

5. “By relying on its members’ own expertise as representatives of the public and legal community, rather than the opinions of experts, a judicial conduct commission fulfills its official public responsibility to formulate the appropriate ethical standards for its state. Any questions that judicial conduct fact-finders may have concerning the standards to apply are best addressed through briefing by the counsel who are presenting and defending the charges against the judge.” Id. at 1.

6. This understanding of the impropriety of permitting an expert in judicial ethics to testify during the upcoming hearing comports with what the Alabama Supreme Court has consistently said about parties offering witnesses who are experts in an area of the law: “Generally, a witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition.” DISA Indus., Inc. v. Bell, 272 So. 3d 142, 153 (Ala. 2018) (quoting Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 852 (Ala. 2002)).

7. Presumably, that is precisely what Professor Abbe Smith would testify about. Professor Smith would offer a legal conclusion that the conduct alleged does not violate the Alabama Canons of Judicial Ethics. That is the ultimate issue to be answered by this Court.

8. Second, this notice should be rejected by this Court because it comes too late.

9. On September 10, 2021, this Court entered its Amended Scheduling Order requiring parties to submit potential witness lists by September 17, 2021, requiring depositions to be completed by October 22, 2021, and requiring completion of all discovery by October 30, 2021.

10. Judge Todd's list of potential witnesses named 60 individuals but failed to include Professor Smith.

11. We are past the deadline for depositions and, indeed, past the deadline for all discovery to be complete.

12. The Commission would suffer prejudice if Professor Smith were permitted to testify—especially at this late stage—because she was noticed only six business days before trial.

13. Furthermore, even if Professor Smith were available to sit for a deposition at this late stage, the Commission is engaged in other trial preparations and has no opportunity to prepare for or take her deposition or to obtain its own expert at this point.

WHEREFORE, premises considered, because the testimony would be improper and unnecessary and because Judge Todd's late notice

violates this Court's scheduling order and prejudices the Commission, the Commission respectfully requests that this Honorable Court disallow testimony from Judge Todd's expert Professor Abbe Smith.

Respectfully submitted this the 3rd day November, 2021.

/s/ Elizabeth C. Bern

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/s/ John A. Selden

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 3rd day of November, 2021, electronically filed the foregoing with the Court of the Judiciary, and that I have further served a copy upon the following by placing same in the United States Mail, postage prepaid and properly addressed and/or via email as follows:

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