

IN THE MATTER OF
THE HONORABLE PAMELA J. WHITE

* IN THE
* COURT OF APPEALS
* OF MARYLAND
* Misc. No. 5
* September Term, 2016

Filed

MAY 04 2017

**Bessie M. Decker, Clerk
Court of Appeals
of Maryland**

* * * * *

MOTION TO COMPEL

Pursuant to Maryland Rule 8-431(b), the Honorable Pamela J. White, through undersigned counsel, moves this Court for an order compelling the Commission on Judicial Disabilities ("the Commission") to disclose to her and to file with the record of this case in this Court any and all material and information that was disclosed to the Commission or Judicial Inquiry Board ("the Board") concerning her or the complaints against her but that the Commission has withheld from her and from the record it filed in this Court.

This Court issued a per curiam opinion in this case on February 22, 2017 directing "the Commission to file [with this Court] the record of the proceedings concerning its charges against Judge White, including that part of its record relating to the pre-charging period for which Judge White waives confidentiality." Slip Op. at 22-23. Judge White submitted a broad written waiver of confidentiality to the Commission on March 7, 2017, a copy of which was filed with the Clerk of this Court.

The Commission filed a record in this Court on April 5, 2017, and it was disclosed to Judge White for the first time on April 6. The record the Commission filed includes,

among other things, the record of proceedings before the Board. These proceedings were conducted entirely *ex parte*, and these materials were not disclosed to Judge White before being filed in this Court. As filed, the Board's record has been heavily redacted. Counsel for the Commission has represented that much of the redactions protects information relating to investigations and proceedings concerning judges other than Judge White. But, the redactions also conceal information and documents concerning Judge White that were presented in secret to the Board and later the Commission and that still have not been disclosed to her.

These improper redactions are now known to include an eight-page memorandum that Investigative Counsel apparently presented to the Board on or about June 10, 2015, apparently dated May 19, 2015, the day after Judge White filed her initial response to the two complaints disclosed to her in April 2015. This memorandum appears in the record in completely redacted form at BR.176-83. They also include an eleven-page memorandum that Investigative Counsel apparently presented to the Board on or about November 18, 2015 in response to the Board's request for information on an undisclosed subject at its meeting on November 10, which appears in the record in almost completely redacted form at BR.548-58.

Judge White's only notice that the May 19 memorandum may have existed was that the Board's December 11, 2015 Report to the Commission stated that it had reviewed Investigative Counsel's May 19 memorandum. The Board's report apparently included a memorandum as an attachment, because it stated that "No information has been deleted from the attached Memorandum." BR.596-97. The Board's Report is attached here as

Exhibit A, including the eight attached redacted pages that Judge White can only assume represent the May 19 memorandum. Judge White had no notice that November 18 memorandum existed until the record was filed in this Court. The eleven redacted pages representing the November 18 memorandum are attached here as Exhibit B. Judge White requested copies of the memoranda from Investigative Counsel and as part of her May 20, 2016 motion to dismiss the charges against her. *See* CR.495. Still, neither of these memoranda have been disclosed to Judge White.

After the record was filed in this Court, Judge White repeated her requests, through counsel, that the Commission produce the memoranda. The Commission again declined, citing "work product and deliberative material privilege." This correspondence is provided here as attachments to Exhibit C, counsel's certification that, despite good faith attempts, the opposing attorneys are unable to reach agreement on this disputed issue without this Court's intervention. *See* Rule 2-431.

These memoranda formed part of the record the Board considered in recommending to the Commission "that charges be authorized for filing, unless Judge White consents to a Private Reprimand," and part of the record¹ the Commission considered in finding probable cause for the issuance of charges under Rule 18-407(a). The Board's Report itself contains no "proffer of evidence that the Board has determined would be likely to be admitted at a plenary hearing," as Rule 18-404(j)(2) requires. Although Judge White has never been provided the attachments to the Board's Report,

¹ *See* Rule 18-401(e) ("Commission Record' means all documents pertaining to the judge who is the subject of charges that are filed with the Commission or made available to any member of the Commission.").

and thus does not know whether the withheld materials may contain such proffer, the Board's Report alone is plainly insufficient and cannot satisfy Rule 18-404(j)(2).

Investigative Counsel has claimed that these memoranda are protected from disclosure under Rule 18-409, but this argument is without merit. First, Rule 18-409 is captioned "public access." It protects against disclosure to the public at large, not to the judge who is the subject of Investigative Counsel's investigation or proceedings before the Board or the Commission. The rule is meant to protect a judge's reputation by limiting the public's access, not to inhibit the judge's ability to defend her reputation against attack by denying her access to the materials submitted to the Board or the Commission as part of their consideration of her case.

Nor are Investigative Counsel's memoranda protected as "work product" under Rule 18-409(a)(4). First, as the party asserting work product protection, Investigative Counsel would bear the burden of proving such protection applies. *See, e.g., Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 350 (1999). "This burden cannot be met by conclusory allegations or mere assertions." *Id.* Second, any work product protection that may have attached to the memoranda was waived when they were intentionally disclosed to the Board and then to the Commission – *i.e.*, the tribunal that recommended charges against Judge White and the tribunal that adjudicated those charges – in adversarial proceedings. "Once voluntarily disseminated, the product is no longer protected by the attorney work product doctrine." *See, e.g., Diggs & Allen v. State*, 213 Md. App. 28, 78 (2013), *aff'd*, 440 Md. 643 (2014); *see also United States v. Nobles*, 422 U.S. 225, 239 (1975) ("The

privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived.").

The Commission raised the "deliberative material privilege" for the first time after the record was filed in this Court. It is impossible for Judge White or this Court to assess the applicability of the executive or deliberative process privilege based on the Commission's bare, *ipse dixit* assertion. Indeed, this privilege cannot be raised by bare assertion. *See, e.g., Hamilton v. Verdow*, 287 Md. 544, 566-67 (1980); *see also Md. Bd. of Physicians v. Geier*, 451 Md. 526, 565-70 (2017). Accordingly, the Court should disregard this argument.

The Board's and Commission's Records also disclose that Investigative Counsel discussed Judge White's matters at multiple meetings of the Board and the Commission, all of which were conducted *ex parte*. The Records do not disclose what information, if any, Investigative Counsel presented orally to the Board or the Commission. For the same reasons she is entitled to disclosure of all documents presented to the Board or the Commission, Judge White is entitled to disclosure of all information presented orally or by any other means.

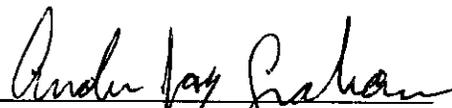
This motion is not based on empty suspicion. Judge White learned in April 2016, after charges had been filed, that Investigative Counsel had presented to the Commission at some unknown prior date an April 21, 2015 complaint against her that had never before been disclosed. CR.31-52. This was a third complaint filed by the same attorney, the Reverend Rickey Nelson Jones, Esquire. This complaint was materially different from the first two complaints, because it falsely alleged racial discrimination. Without

notice of what information was presented to the Board or Commission in her absence, it remains impossible for Judge White to address or respond to it. Judge White's being denied access to any material or information submitted to the tribunals below is fundamentally unfair and is a denial of procedural due process.

Although the Commission has raised the possibility of *in camera* review, that would not be satisfactory or appropriate, as it would only continue the Board and the Commission's unfair practice of conducting proceedings *ex parte* and under their own misconception of "confidentiality."

WHEREFORE, Judge White requests that this Court enter an order compelling the Commission to disclose to her and to file as part of the record of this case in this Court all materials or information presented or in any way disclosed to the Judicial Inquiry Board or the Commission that have not yet been produced to her.

Respectfully submitted,



Andrew Jay Graham
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Counsel for Judge Pamela J. White

Dated: May 3, 2017

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This paper contains 1,450 words, excluding the parts of the paper exempted from the word count by Rule 8-503.
2. This paper complies with the font, spacing, and type size requirements stated in Rule 8-112.



Louis P. Malick

Certificate of Service

I HEREBY CERTIFY that on this 3rd day of May, 2017, copies of the foregoing Motion to Compel were sent by hand delivery and electronic mail to:

Bruce L. Marcus, Esquire
Marcus Bonsib, LLC
Capital Office Park
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
bmarcus@marcusbonsib.com

Counsel for Maryland Commission on Judicial Disabilities



Louis P. Malick

EXHIBIT A



**STATE OF MARYLAND
COMMISSION ON JUDICIAL DISABILITIES
P.O. Box 340
Linthicum Heights, MD 21090-0340**

Carol A. Crawford, Esquire
Executive Director/Investigative Counsel

Gary J. Kolb, Esquire
Executive Secretary

Tanya C. Bernstein, Esquire
Assistant Investigative Counsel

REPORT OF THE JUDICIAL INQUIRY BOARD

TO: Commission on Judicial Disabilities ("Commission") Members
FROM: Judicial Inquiry Board ("Board")
DATE: December 11, 2015
RE: CJD 2014-114 White/Jones

The Board, pursuant to Rule 16-805(j), provides the following Report, including recommendation, to the Commission Members, as follows:

The Board Members previously reviewed the information in Ms. Bernstein's Memorandum, including recommendation and attachments (complaints, audio CDs of the hearings, and Judge's response), dated May 19, 2015. Ms. Crawford advised the Board of conversations with Mr. Graham.

The Board Members previously concluded, after further extensive discussion of the facts in this case and Judge White's response, that Judge White's use of profanity in this case, by itself, however ill advised, may not constitute sanctionable conduct. However, the Board Members were very concerned and concluded that Judge White had committed sanctionable conduct by failing to disqualify herself from the October 31st hearing after repeatedly stating in the October 15th hearing that she was recusing herself from "any further proceedings in this case" because she cannot believe anything that the [complainant] tells me" and thereby "cannot be impartial" and "I am personally biased or prejudiced concerning [complainant] and his conduct." She then compounded her sanctionable conduct by finding the complainant in contempt. The Board Members further concluded that such sanctionable conduct warranted some form of discipline and, if Judge White consented, a Private Reprimand would be an appropriate disposition under the circumstances of the totality of this case. If she did not consent, the Board Members concluded that the only other appropriate disposition under the circumstances, pursuant to the Maryland Rules, would be the authorization for filing charges.

Upon being advised by Ms. Crawford that Judge White would not consent to a Private Reprimand, the Board Members discussed the above and concluded that, if Judge White does not consent to a Private Reprimand, the facts warrant formal proceedings involving charges, upon a determination of probable cause by the Commission.

Upon Motion and Second, the Board Members, by majority vote, recommend to the Commission Members, that charges be authorized for filing, unless Judge White consents to a Private Reprimand, upon a finding by the Commission Members of probable cause to believe that Judge White has committed sanctionable conduct in regard to CJD 2014-114 White/Jones.

No information has been deleted from the attached Memorandum.

Submitted by and on behalf of the Board by the undersigned on this 11th day of December, 2015.



Gary J. Kolb
Executive Secretary

GJK:lz

EXHIBIT B



STATE OF MARYLAND
COMMISSION ON JUDICIAL DISABILITIES
P.O. Box 340
Linthicum Heights, MD 21090-0340

Carol A. Crawford, Esquire
Executive Director/Investigative Counsel

Gary J. Kolb, Esquire
Executive Secretary

Tanya C. Bernstein, Esquire
Assistant Investigative Counsel

Memorandum

November 18, 2015

To: Judicial Inquiry Board
From: Tanya C. Bernstein, Assistant Investigative Counsel 
Re: Supplemental Memorandum – CJD 2014-114 White/Jones

Per your request at the November meeting, attached please find information relative to 

EXHIBIT C

IN THE MATTER OF
THE HONORABLE PAMELA J. WHITE

* IN THE
* COURT OF APPEALS
* OF MARYLAND
* Misc. No. 5
* September Term, 2016

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CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that counsel for the Commission on Judicial Disabilities ("the Commission") and I engaged in good faith attempts to resolve this dispute, as reflected in my letter of April 7, 2017, attached here as **Exhibit 1**, and counsel for the Commission's April 18, 2017 response, attached here as **Exhibit 2**. Despite these good faith attempts, we are unable to reach agreement on the disputed issues.

Respectfully submitted,

Dated: May 3, 2017


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ALSO ADMITTED IN NY AND DC

April 7, 2017

VIA ELECTRONIC AND U.S. MAIL

Bruce L. Marcus, Esquire
Marcus Bonsib, LLC
Capital Office Park
6411 Ivy Lane
Suite 116
Greenbelt, Maryland 20770
bmarcus@marcusbonsib.com

Re: *In the Matter of Judge Pamela J. White*
Court of Appeals of Maryland, September Term, 2016, Misc. No. 5

Dear Mr. Marcus:

I am in receipt of an electronic copy of the record filed in the Court of Appeals ("the Record") on behalf of the Commission on Judicial Disabilities ("the Commission") in the above captioned matter. I write to identify serious deficiencies in the Commission's submission, which I hope we can resolve without involving the Court.

Your April 5 letter to the Clerk of Court acknowledges certain redactions the Commission has made in the Record, denoted by "blank Bates-stamped pages." The Commission asserts that such documents are "investigative counsel memoranda protected by the attorney work product privilege" and cite as authority for those redactions Maryland Rule 18-409(a)(4). As Judge White made clear to the Commission in the proceedings below, even assuming that any work product or other protection ever attached to these materials, such protection was waived the moment the materials were disclosed (albeit *ex parte*) to the Judicial Inquiry Board or the Commission, the two tribunals that rendered decisions in this matter. Accordingly, I ask that the Commission reconsider its assertion of work product protection and produce these materials to me and the Court of Appeals as soon as possible.

If the Commission intends to stand on its assertion of work-product protection, I ask that it provide, as soon as possible, sufficient factual information describing the withheld material for Judge White and the Court to assess the applicability of the claimed

Bruce L. Marcus, Esquire
April 7, 2017
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protection from disclosure. Although Investigative Counsel has made a bald assertion of work product privilege concerning these materials, Judge White has never been provided the factual information necessary to support such assertion, as Maryland Rule 2-402(e)(1) requires.

The Commission also has made other redactions, which I assume have been accomplished by "black-outs" instead of by inserting blank Bates-stamped pages. The Commission cites as authority for these redactions Maryland Rules 18-404, 18-405, and 18-409(a)(2) and (4). I ask that the Commission confirm, as soon as possible, that these redactions shield only material relating to matters concerning judges other than Judge White.

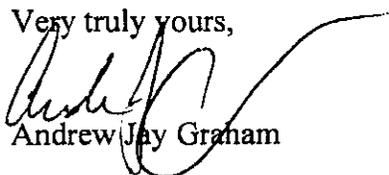
To the extent that the redacted material has anything to do with Judge White or complaints concerning Judge White, the redactions are improper. Maryland Rule 18-409, titled "Public Access," protects certain documents or information from disclosure to the outside world. It does not bar disclosure to the judge who is the subject of the document or information. Even if it did, on March 7, 2017, Judge White submitted to the Commission a broad waiver of confidentiality, as the Court directed in its February 22, 2017 Opinion. I ask that all redacted information that pertains in any way to Judge White be produced to Judge White and the Court of Appeals as soon as possible.

If the Commission intends to stand on these redactions, I ask that it provide, as soon as possible, sufficient factual information describing the withheld material for Judge White and the Court to assess the applicability of the claimed protection, as Maryland Rule 2-402(e)(1) requires.

The Commission's continued pattern of secrecy and non-disclosure to Judge White is, indeed, part of the reason why she was denied due process. The information that the Commission continues to withhold from Judge White, and now from the Court of Appeals, is likely material to her claims, which the Court cannot adequately decide without a full and complete record.

Although I am hopeful that we can resolve this dispute ourselves without the Court of Appeals' intervention, please accept this letter as a good faith attempt at resolution.

Very truly yours,



Andrew Jay Graham

cc: The Honorable Pamela J. White

MARCUSBONSIB, LLC

ATTORNEYS AT LAW
CAPITAL OFFICE PARK

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**ALSO ADMITTED IN DC*

April 18, 2017

Via Email and First Class Mail

Andrew Jay Graham, Esquire
Kramon & Graham, P.A.
One South Street, Ste 2600
Baltimore, MD 21202

Re: *In the Matter of Judge Pamela J. White*
Misc. No. 5, September Term, 2016

Dear Mr. Graham:

I am in receipt of your letter dated April 7, 2017, in which you raise questions regarding the record filed in the Court of Appeals by the Commission on Judicial Disabilities (the "Commission") in this matter. Please allow this correspondence to serve as the Commission's response to the two categories of perceived deficiencies identified in your letter.

With respect to the redactions evidenced by blank Bates-stamped pages, the Commission maintains that the redacted investigative counsel memoranda is protected as work product and deliberative material privilege and respectfully refers to the Commission's April 5, 2017 letter to the Clerk of the Court for the grounds and authority cited therein.

Second, with respect to the selective redactions in the record denoted by "black-outs," this will confirm that, with one exception, all such redactions shield material relating to other matters before the Commission, the office address of the Commission, and/or the email addresses of members of the Commission and/or its staff. The one exception, at BR548, is a "black-out" redaction of material referring to the content of an investigative counsel memoranda. This redaction was made in accordance with the Commission's position stated above regarding investigative counsel memoranda.

Please note that, as stated in our April 5, 2017 letter to the Clerk of the Court, the Commission is prepared to seek both a protective order limiting disclosure and in camera review, in the event Judge White elects to seek Court intervention with respect to the privileged material.

MARCUSBONSIB, LLC

Andrew Jay Graham, Esquire
April 18, 2017
Page 2

Thank you for your customary courtesy and consideration.

Sincerely,

A handwritten signature in black ink, appearing to be "Bruce L. Marcus", with a long horizontal flourish extending to the right.

Bruce L. Marcus