

Appendix "A"

Details and Specifics of the Complaint

I. Summary of the Relevant Facts

On December 21, 2006 at 4:37 p.m., then Kansas Attorney General Phill Kline filed a criminal complaint with thirty (30) criminal counts against defendant, George R. Tiller, an abortionist, alleging that Tiller violated K.S.A. 65-6703 by performing unlawful late term abortions, and failing to report the justifications for such late term abortions. See, "Complaint / Information" against George R. Tiller," at Exhibit "A." The Attorney General's Complaint was opposed by the defendant in that action and by the District Attorney for the County of Sedgwick, Ms. Nola Tedesco Foulston. See District Attorney Foulston's "Supporting Legal Authority in Connection With the State of Kansas Journal Entry of Dismissal," at Exhibit "B."

District Attorney Foulston represented herself in her official capacity in the criminal action before Judge Clark. Prior to the filing of the above Complaint, Foulston made the maximum financial contribution allowed by law (\$500.00) to the political campaign of Judge Paul Clark (K.S.A. 25-4153(2)). See, Schedule A of campaign receipts for "Paul W. Clark" at Exhibit "C." Defendant Tiller was represented in the criminal action by lead attorney Don Monnat of the Firm of Monnat & Spurrier. See "Transcript of Motion for Emergency Reconsideration," dated December 27, 2006 at Exhibit "D," and the December 26, 2006 scheduling order of Judge Clark at Exhibit "E." Attorney Monnat's law firm, Monnat & Spurrier, made the maximum financial contribution allowed by law (\$500.00) to the political campaign of Judge Paul Clark (K.S.A. 25-4153(2)). See, Schedule A of campaign receipts for "Paul W. Clark" at

Exhibit "F," (Hereafter, District Attorney Foulston and Don Monnat, attorney for defendant/abortionist Tiller, are referred to as "Funding Attorneys.")

Within approximately four office hours after receiving the above Complaint Judge Clark ruled in favor of the Funding Attorneys. It appears from the record that no written "Motion to Dismiss" was filed. Rather, the record contains what appears to be a document prepared by District Attorney Foulston, provided to Judge Clark, and signed by Foulston and Clark without notice to the Attorney General. See Exhibit "G" "Journal Entry of Dismissal" of Judge Clark, December 22, 2006.¹ Not only were the non-funding attorneys not provided with "written disclosure of the information" before such ruling, but they were denied notice of the very fact that the judge was receiving *ex parte* arguments from Foulston, and were further denied by the Court the opportunity to respond to the arguments of the Funding Attorneys.²

Thereafter, the non-funding attorneys asked Judge Clark to re-consider his ruling. See "Motion for Emergency Reconsideration," and "Memorandum on Motion for Emergency Reconsideration," respectively Exhibits "H" and "I." On December 26, 2006, Judge Clark issued a written order defining the issue in the case and set the case for a hearing on that issue. See Exhibit "E." In such order, Judge Clark specifically notified

¹ It remains unclear how Clark and Foulston came to agree upon the terms of the "Journal Entry of Dismissal," whether they spoke officially or unofficially about such idea, how Foulston gained a hearing with Judge Clark without a documented request for the same and without any notice to the then prosecuting attorney, the Attorney General. These are issues that would likely be included in this honorable Commission's investigation of this matter.

² This extraordinary denial of due process was rendered "not appealable" due to the cessation of Attorney General Kline's tenure, the termination of his special prosecutor, Don McKinney, and the decision of the remaining parties to not present those issues on appeal. Complainant does not ask this honorable Commission to address those appealable – but non-appealed – issues, but rather to perform its exclusive function of enforcing the Judicial Canons. However, it is necessary for this Commission to understand the extraordinary circumstances surrounding this matter and the heightened duty of Judge Clark to take reasonable steps to exclude the appearances of partiality that he created.

both Funding Attorneys and the non-funding attorneys of the hearing, but again failed to disclose his relationship with the Funding Attorneys.

On December 27, 2006, Judge Clark held a public hearing on the "Motion for Emergency Reconsideration" with appearances and arguments from all attorneys of record and again failed to disclose on the record his funding relationship with the Funding Attorneys. At the conclusion of such hearing, Judge Clark again ruled in favor of the Funding Attorneys. See Exhibit "E."

The case proceeded on appeal to the Kansas Supreme Court where Foulston's motion for voluntary dismissal was granted without explanation. See Exhibit "J." The fact that the Kansas Supreme Court was unable to address the apparent denial of due process in that case due to the presumptive lack of standing has no bearing upon the issue of whether Judge Clark engaged in misconduct by repeatedly failing to disclose on the record his relationship with the Funding Attorneys. In fact, even if the Supreme Court had addressed the merits and procedures in that case and affirmed Judge Clark's rulings, such affirmance would have no bearing on the question of whether Judge Clark failed to disclose his relationship with the Funding Attorneys. The issue of Judge Clark's failure to disclose is distinct from the issue in the Tiller criminal case, and Judge Clark's failure to disclose is properly and timely presented to this honorable Commission.

II. Judge Paul W. Clark's Actions Amounted to Gross Judicial Misconduct

The Code of Judicial Conduct requires that a judge disqualify himself "in a proceeding in which the judge's impartiality might reasonably be questioned" Canon 3(E)(1). The Commentary to the Canon states that a "judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to

the question of disqualification, even if the judge believes there is no real basis for disqualification."³ Furthermore, later Commentary provides that while judges are not prohibited from receiving contributions from attorneys, "campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E." Commentary to Canon 5(C)(2).⁴

The noble purpose of the Kansas Code of Judicial Conduct is stated in its preamble:

"Intrinsic to all sections [including all Canons] of this Code are the precepts that judges, individually and collectively, must ***respect and honor the judicial office as a public trust*** and strive to ***enhance and maintain confidence in our legal system.***"

(Emphasis added.) As the below Canons make clear, the high honor of serving as a judge in the State of Kansas comes with certain duties. Those duties include the requirement that a judge in the State of Kansas implement steps to not just remedy "actual" impartiality, but also take great care to eliminate circumstances that might cause the appearance of partiality.

Public trust in the legal system is at the very least subjected to grave jeopardy when a judge hides his political and financial ties to parties. Judge Clark's lack of

³"The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action. When 'should' or 'should not' is used, the text is hortatory and a statement of what is or is not appropriate conduct but not a binding rule under which a judge may be disciplined. When 'may' is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions." Code of Judicial Conduct, preamble, para. 2.

⁴ In *Kansas Judicial Watch v. Stout*, 440 F. Supp 1209 (D. Kan. 2006), the United States District Court for the District of Kansas enjoined the enforcement of certain provisions of the Canon 5C(2) in order to ensure that judges were free to engage in campaign related speech in answering "candidate questionnaires." However, the injunction specifically did not contemplate the enforcement of the provision in this case that involves notifications concerning campaign contributions. Moreover, even if the court had struck down the applicable portion of Canon 5C(2) and its Commentary, such order would not effect Canons 3E. Canons 5A and 5C, while instructive in understanding the meaning of Canon 3E, are not necessary to prove a violation of Canon 3E.

discretion does damage to public trust in the offices of all Kansas judges, and that damage is magnified in this case because of the heightened public scrutiny that accompanied – and continues to accompany – the subject case and ongoing facts. This heightened level of public scrutiny increased the burden on Judge Clark to further the noble purpose that is stated in the preamble of the Canons and is intrinsic in all of the Canons.

It appears from the facts that Judge Clark violated Canon 3(E)(1) which mandates that a judge must disqualify himself when the judge's impartiality might be questioned. Furthermore, the Commentary to Canon 3(E)(1) provides that a judge should disclose on the record information that the judge believes the parties might consider relevant, even if the judge believes no real basis for disqualification exists.

Canon 3(E)(1) states:

"A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where (a) a judge has a personal bias or prejudice concerning a party or a party's lawyer."

The Funding Attorneys had both financial and political ties to Judge Clark. Accordingly, it is certainly reasonable for the public to question Judge Clark's impartiality, especially given the heightened public scrutiny, his quick overnight ruling, and his denial of notice and due process to the non-funding attorneys. The Commentary to Canon 3E is instructive in understanding the seriousness of the issue and the necessity that a Judge disclose any apparent impartiality "on the record."

The Commentary to Canon 3E provides:

"Under this rule, *a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3(E)(1) apply.* For example, if a judge were in

the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

"A judge should *disclose on the record information that the judge believes the parties or their lawyers might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification.*"

(Emphasis added.)

Consistent with the goal of the Canons which is to enhance and maintain public trust and confidence in the legal system, the Canons are designed to not only remedy actual partiality but to inform the parties of instances that they might consider relevant to the question of partiality. After all, the judge's opinion of his own impartiality – or lack thereof – is irrelevant when it comes to preserving "public" trust and confidence in the judiciary.

The issue of campaign contributions is specifically addressed at Canon 5(C)(2). The Canon Commentary to Canon 5(C)(2) specifically refers to the disclosure requirements in Canon 3(E) and affirmatively raises the fact pattern of political funding. The Canon Commentary states:

"Though not prohibited, *campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E.*"

(Emphasis added.)⁵ Judge Clark failed to disclose these campaign contributions on at least three separate occasions.

⁵The Canons provide that "knowledge" may be inferred from circumstances. The circumstances in this case – Clark's own campaign finance records – infer that Judge Clark had knowledge of his funding relationship with the Funding Attorneys.

Conclusion

Judge Clark was not prohibited from receiving political monies from the Funding Attorneys. However, given the suggestive and enhanced circumstances in this case, it certainly appears that Judge Clark had a duty commensurate with the honor of serving as a judge in the State of Kansas to disqualify himself and/or to disclose that funding relationship on the record.

The circumstances in this case raise substantial suggestions of impartiality: (1) Judge Clark received political funding with not one but two attorneys in this case, (2) Judge Clark engaged in a highly suggestive and quick overnight dismissal in favor of the Funding Attorneys and against the non-funding attorney; and (3) Judge Clark issued such ruling without informing the non-funding attorneys of the new Funding Attorneys' participation in the case, without informing the non-funding attorneys of the Funding Attorneys' request for dismissal, and without providing the non-funding attorneys with the opportunity to present arguments in opposition to the Funding Attorneys.

Judge Clark compounded the problem when he failed on three separate occasions to "disclose on the record" his relationship with the Funding Attorneys. Judge Clark's receipt of contribution was not the problem. The problem occurred when he repeatedly failed to disclose those contributions on the record.

For the sake of the public trust in the legal system Judge Clark's misconduct should not be left unaddressed. Accordingly, Complainant respectfully requests that this honorable Commission investigate the conduct of Judge Clark, take appropriate disciplinary action, and thereby preserve and protect the public trust in the judicial system of the State of Kansas.