

**IN THE SUPREME COURT OF THE
STATE OF FLORIDA**

INQUIRY CONCERNING A JUDGE,
THE HONORABLE DENNIS BAILEY
JQC NO. 2018-352

SC18-_____

FINDINGS AND RECOMMENDATION OF DISCIPLINE

The Investigative Panel of the Florida Judicial Qualifications Commission (“Commission” or “JQC”) served a Notice of Investigation dated September 5, 2018, on Circuit Court Judge Dennis Bailey of the 17th Judicial Circuit, pursuant to Rule 6(b) of the Florida Judicial Qualification Commission Rules. The Investigative Panel conducted a Rule 6(b) hearing on November 16, 2018, at which Judge Bailey appeared, with counsel, and provided sworn testimony. At the conclusion of that hearing, the Panel determined that probable cause existed that Judge Bailey had violated Canons 1, 2A, 3B(1), 3B(4), and 3B(7) the Florida Code of Judicial Conduct.¹

¹ Canon 1 states that, “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.”

Canon 2A states that, “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 3B(1) states that, “A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.”

Factual Findings

The facts relevant to the misconduct alleged in this matter are that while presiding over the felony criminal trial of *State v. Genesis Espejo* (Broward County Case No. 2017-CF-0824-10A), Judge Bailey became increasingly upset during a sidebar in which two of the defendant's attorneys attempted to make legal arguments on the same point. When one of the attorneys tried to help his colleague articulate a point during the sidebar, Judge Bailey repeatedly attempted to quiet him by saying, "One lawyer at a time," "Only one lawyer argues," followed shortly thereafter by, "You have a hard time understanding me? Two lawyers can't argue one argument." A review of the audio from the hearing reveals that the attorneys were not over-speaking, and that the attorneys were addressing the Court in a respectful tone. As the defense attorney prepares to respond by saying, "Judge I mean no disrespect...", Judge Bailey raises his voice and orders the in-court deputy, who was standing approximately fifteen feet away from the bench, to approach the bench and "return this attorney to his table."

Canon 3B(4) states that, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control."

Canon 3B(7) states, in pertinent part, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Thankfully for all involved, the attorney immediately retreated away from the sidebar and back to counsel table as soon as he saw the deputy approaching. This occurred in full view and hearing of the jury, who were seated in the jury box near the bench. Disturbingly, Judge Bailey indicated to the Commission that he would have allowed the deputy to use physical force, "if necessary."

Immediately after this, the remaining defense attorney asked for time to file a motion to disqualify the Court, and moved for a mistrial based on the incident that had just unfolded in front of the jury. Judge Bailey denied the motion for mistrial, and allowed a 45-minute break for the attorney to draft and file the motion to disqualify. Judge Bailey then denied the motion to disqualify as "legally insufficient."

Judge Bailey admitted to the Investigative Panel that while the sidebar conference was covered by "white noise," he raised his voice over the noise to summon the deputy who was standing some fifteen feet from the bench. Judge Bailey also admitted that, while it was "very likely" that the jury had heard his order for the deputy to remove the attorney from the sidebar conference, the jury definitely would have seen the deputy moving towards the attorney.

Judge Bailey also testified that, while there is no "written rule," local rule, or Administrative Order requiring this, he will "occasionally" enforce an "unwritten" policy in which only one attorney per side may argue a point. While a one-

speaker-per-side approach has been a practice utilized by courts, Judge Bailey acknowledged that he only sporadically applies it, and importantly, in this instance, admitted that he did not provide advance warning that this policy would be enforced during the Espejo trial.

Conclusions Regarding the Sidebar Conference

It is impossible to ignore the fact that the efficient administration of justice sometimes requires judges to place restrictions on the presentation of cases or arguments; such as a one-person-per-argument policy. However, such a policy should not be enforced arbitrarily, and never under the threat of physical force, in full view and hearing of the jury.

There are tools that judges have for dealing with inappropriate conduct by lawyers: admonishment, referrals to the Florida Bar, or in extreme cases- contempt proceedings. All of these were available to Judge Bailey if he truly felt that the attorneys were disruptive during the Espejo trial. Yet he chose not to utilize any of them.

While it is necessary for a judge to maintain order and decorum during proceedings, the evidence shows that the two attorneys were speaking respectfully to the Court during the sidebar, and were merely taking turns addressing the court, not speaking over each other. It appears that the attorneys had not breached the

order and decorum of the proceedings in any way, other than aggravating Judge Bailey by working together to articulate an argument during a sidebar.

Judge Bailey has admitted and acknowledged that his conduct was not patient, dignified, and courteous as required by Canon 3B(4); that he did not act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Canon 2A); and that he did not personally observe the high standards of conduct required to preserve the integrity and independence of the judiciary (Canon 1).

This Court has previously publicly reprimanded judges for intemperate misconduct towards litigants and lawyers, noting:

“Due to the demands of his or her position of trust and responsibility, a judge may not act in a manner unbecoming a member of the judiciary—even if provoked by the unprofessional behavior of those appearing before the judge. “The disparity in power between a judge and a litigant requires that a judge treat a litigant with courtesy, patience, and understanding.” *In re Shea*, 110 So. 3d 414, 418 (Fla. 2013) [internal citations omitted].

The Commission finds that, even though Judge Bailey’s conduct does not represent an extended period of misconduct as was the case in *Shea*, by inviting physical force be visited upon an attorney making an argument during trial, in full

view of the jury, Judge Bailey's misconduct was egregious enough that it harmed the integrity of the judiciary, as well as the public's confidence in the judicial system, warranting the discipline of a public reprimand.

Conclusions Regarding the Failure to Disqualify

Having denied a prior motion to disqualify in the Espejo matter Judge Bailey told the Commission that he believed the second motion to disqualify him was part of a "trial tactic" by the defense. Judge Bailey explained that he denied the motion because he believed that he could continue to be fair to the parties, including the defendant.

The test of the sufficiency of a motion to disqualify is "whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge." *Gieseke v. Grossman*, 418 So. 2d 1055, 1057 (Fla. 4th DCA 1982). "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling.... [The trial judge] cannot pass on the truth of the allegations of fact. If they are not frivolous or fanciful, they are sufficient to support a motion to disqualify on the ground of prejudice." *Id.* As further articulated by *Hayslip v. Douglas*, 400 So. 2d 553, 557 (Fla. 4th DCA 1981):

Though a client and his counsel are separate entities, they share a common bond forged by the attorney-client relationship and tempered in the rigors of litigation. Most clients find the courtroom to be an

unfamiliar and, in some instances, uncomfortable atmosphere and so it is not unusual that they entrust themselves into their counsel's care and view their interests as one. Thus, it is understandable that a client would become concerned and fearful upon learning that the trial judge has an antipathy toward his lawyer and has expressed the opinion that the client's counsel "should not be in this case."

Judge Bailey acknowledges that he did not consider the motion from the defendant's perspective when considering whether or not to grant it. He simply dismissed it as a "trial tactic," and denied the motion because he knew he could remain impartial.

Similarly, Judge Bailey also acknowledged that he did not consider the prejudice his actions may have had on the final verdict. Judge Bailey points to the fact that the jury found the defendant not guilty as evidence that the jury was not tainted by his mistreatment of the defense attorney. However, this ignores the fact that the jury could have returned a not guilty verdict precisely because they felt sympathy for the defendant because the judge appeared to favor one side over the other. An outcome such as this casts a shadow on the trial-by-jury system in which parties are entitled to a verdict based on the facts of the case, and not the jury's sympathy for the one party or the other.

While it is unknown whether the jury's verdict was tainted by the judge's conduct, by failing to properly consider the motion to disqualify, Judge Bailey

allowed this to remain an open question, causing further harm to the integrity of the judiciary.

The Commission concludes that the facts and conclusions regarding misconduct as described above are supported by clear and convincing evidence.

Recommendation as to Discipline

The Investigative Panel of the Commission has now entered into a Stipulation with Judge Bailey pursuant to FJQC Rule 6(k). In this Stipulation Judge Bailey admits that his conduct in the Espejo case, as alleged in the Notice of Formal Charges and outlined above, was intemperate, inappropriate, and damaged the public's perception of the judiciary. Judge Bailey also now acknowledges that he did not properly consider the motion to disqualify from the defendant's perspective.

This Court reviews the findings of the JQC to determine "whether the alleged violations are supported by clear and convincing evidence, and reviews the recommended discipline to determine whether it should be approved." *In re Woodard*, 919 So.2d 389, 390 (Fla.2006). Where a judge stipulates to the JQC's findings of fact, no additional proof is necessary to support the JQC's factual findings." *Id.* at 390–91.

In this case, Judge Bailey has admitted the foregoing, accepts full responsibility, and acknowledges that such conduct should not have occurred. He has cooperated fully with the JQC throughout the investigative process.

By way of mitigation, the Commission notes that Judge Bailey is a relatively new judge, having won election in 2014, and that he does any disciplinary history with the Commission. Similarly, Judge Bailey also does not have any disciplinary history with the Florida Bar.

Judge Bailey has also, of his own accord, undertaken stress management counseling so that in the future, he is better equipped to handle stressful situations, and does not resort to knee-jerk reactions. He has also provided a letter of apology to the defense attorney involved.

Finally, the Commission believes that it is useful to note how similar misconduct has been treated in the past. In *In re Collins*, 195 So. 3d 1129, 1132 (Fla. 2016) this Court publicly reprimanded a judge for using intemperate language during a contempt hearing for a witness who refused to honor a subpoena for trial. The Court also ordered Judge Collins to undertake counseling and participate in a judicial training course on domestic violence. Finally, “This Court has repeatedly concluded that a public reprimand is the appropriate form of discipline for a judge's rude or intemperate behavior in open court. See *In re Wood*, 720 So.2d 506, 509 (Fla.1998).” Id.

Maintaining public confidence in the integrity and impartiality of the judiciary is of paramount importance to our system of justice, and Justice Terrell eloquently described the importance of properly considering motions to disqualify, in *State ex rel. Davis v. Parks*, 141 Fla. 516, 194 So. 613, 615 (1939),

(E)very litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

In this case, Judge Bailey's lack of restraint constituted serious misconduct which violated the Canons. His failure to appropriately consider the resulting motion to disqualify only further cast a shadow over the fairness of the administration of justice in this matter.

Accordingly, the Commission therefore finds and recommends that the interests of justice will be well served by a public reprimand of Judge Bailey.

Dated this 15th day of December, 2018.

**INVESTIGATIVE PANEL OF
THE FLORIDA JUDICIAL
QUALIFICATIONS
COMMISSION**

By: /s/

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