



# ***Board of Judicial Conduct***

Nashville, Tennessee 37219

[www.tncourts.gov/court-judiciary](http://www.tncourts.gov/court-judiciary)

CHRIS CRAFT  
Board Chairman

TIMOTHY DISCENZA  
Disciplinary Counsel

May 23, 2014

Dear Mr. Williams,

I understand you have inquired about my prior statements on behalf of the Board of Judicial Conduct concerning any complaints about Tennessee Supreme Court Chief Justice Gary Wade's comments on certain judges undergoing assessment by the Judicial Performance Evaluation Commission (JPEC).

Chief Justice Wade has provided to the Board a signed waiver of the confidentiality provisions concerning actions of the Board on this matter. This allows the Board to issue a more complete statement on its actions. It is the Board's hope that this revised statement clarifies the information the Board received, and actions taken by the Board.

A November 10, 2013 blog post by the Knoxville News Sentinel's Tom Humphrey reported comments allegedly made by Chief Justice Wade concerning certain judges who were going through the process of being evaluated by JPEC. The Board received in the mail a copy of the newspaper blog post along with a handwritten note asking for an investigation. The note was unsigned and the sender did not otherwise identify himself.

No formal complaint was filed. However, out of an abundance of caution, the Board decided to treat the matter as an internal complaint. The Board has authority under Tenn. Code Ann. §17-5-304(a) to investigate matters brought to its attention even if no formal complaint is filed. Consequently, the Board's disciplinary counsel investigated the internal complaint in the same manner as if a formal complaint had been filed, and the matter was assigned to a three-member investigative panel.

In the investigation, Chief Justice Wade confirmed that the newspaper accurately reported his comments. Disciplinary counsel and the panel considered whether the comments violated Rule 4.1(A)(3) of the Rules of Judicial Conduct. This rule states that, with certain limited exceptions, a judge shall not "publicly endorse or oppose a candidate for any public office."

The Board has authority to act only where there has been a violation of the Rules. To determine whether there was a violation of the Rules in this matter, the Board's Disciplinary Counsel focused on whether the judges who were the subject of Chief Justice Wade's comments were candidates for public office at the time the comments were made.

JPEC does not decide whether an appellate judge will be elected; instead, its recommendation determines whether an appellate judge will appear on the retention (retain or replace) ballot or whether the appellate judge will stand in a contested election under Tennessee Code Annotated Section 17-4-115. Chief Justice Wade's comments were on JPEC's recommendation against retention of certain appellate judges. A "no retention" recommendation by JPEC would have required those judges to stand for reelection in a contested election instead of appearing on the retention ballot.

Disciplinary Counsel concluded that the Chief Justice's comments were aimed at how the judges would appear on the ballot, that is, whether they would be included in the August 2014 retention ballot or whether they would stand in a contested election. Consequently, Disciplinary Counsel determined that the Chief Justice's comments were not a public endorsement of a candidate for public office intended to influence voters in the eventual election. This would not be a violation of the Rules of Judicial Conduct.

As a result, Disciplinary Counsel recommended to the investigative panel that the Board dismiss the internal complaint that it had opened on the matter, because Chief Justice Wade's comments did not violate the Rules of Judicial Conduct. After careful consideration, the Board investigative panel agreed with the recommendation. Consequently, the Board dismissed the internal complaint and the matter was closed.

As per Board procedure, Chief Justice Wade received a letter from the Board informing him of the Board's decision to dismiss. Since Chief Justice Wade has signed a waiver, the letter sent to the Chief Justice is attached for your information.

Please note that the letter to Chief Justice Wade refers to an "anonymous complaint." While this is technically accurate, it may be inadvertently misleading. The Board received no formal complaint, anonymous or otherwise. However, as outlined above, the Board opened its own internal complaint, which is investigated as though a formal complaint had been filed.

The Board hopes that this statement clarifies its actions in this matter.

Yours Very Truly,

Chris Craft



## THE TENNESSEE BOARD OF JUDICIAL CONDUCT

511 Union Street  
Suite 600  
Nashville, TN 37219

### MEMBERS OF THE TENNESSEE BOARD OF JUDICIAL CONDUCT

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Disciplinary Counsel

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Assistant Disciplinary Counsel

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Christy R. Little  
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J. Michael Sharp  
Dwight E. Stokes  
David Wedekind

December 18, 2013

Michael W. Catalano, Clerk  
100 Supreme Court Building  
401 Seventh Avenue, North  
Nashville, TN 37219-1407  
615-253-1470

### PERSONAL/CONFIDENTIAL

The Honorable Gary Wade  
P.O. Box 444  
Knoxville, Tennessee 37901-0444

RE: Anonymous Complaint  
File No. B13-5575

Dear Justice Wade:

The above-styled complaint was considered by Disciplinary Counsel who recommended to an investigative panel that the complaint be dismissed. The investigative panel agreed with this recommendation. The purpose of this letter is to comply with the Board's policy of notification of all dismissals even though you were never asked to respond. A copy of the complaint is enclosed.

The investigative panel did conclude that you should be aware that because of the ambiguity which is inherent concerning the definition of "Judicial Candidate" under the Terminology Section of the Code of Judicial Conduct, as applied to the unique circumstances of Appellate Judges in Tennessee, some members of the public might reasonably conclude that once incumbent Appellate Judges submit paperwork to the Judicial Performance Evaluation Commission indicating a desire to be elected to retain their judicial positions, they become candidates for judicial office. Public remarks such as those contained in the interview quoted in the complaint might then be considered to be violative of Rule 4.1(A)(3) of Canon 4 of the Code of Judicial Conduct which provides in pertinent part:

**Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General**

(A) Except as permitted by law, or by RJC's 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

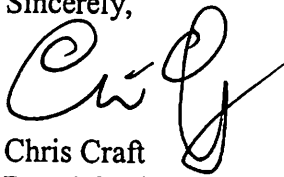
...

(3) publicly endorse or oppose a candidate for any public office,

The investigative panel has followed Disciplinary Counsel's recommendation that under the facts of this case, it cannot be said that the Code of Judicial Conduct has clearly been violated.

Accordingly, this is your notification that this complaint has been dismissed and our file has been closed.

Sincerely,



Chris Craft  
Board Chair

CC/bep

cc: Disciplinary Counsel  
Investigative Panel



**Senator Mike Bell**

☪

309 War Memorial Building  
Nashville, TN 37243  
(615) 741-1946

261 County Road 757  
Riceville, TN 37370  
(423) 829-0058

sen.mike.bell@capitol.tn.gov

# Senate Chamber State of Tennessee

**NASHVILLE**

**9<sup>th</sup> Senatorial District**  
Bradley, McMinn, Meigs  
Monroe and Polk Counties

☪

## **COMMITTEES:**

Chairman, Government Operations  
Judiciary, Energy, Agriculture  
and Natural Resources

May 27, 2014

The Honorable Chris Craft  
Tennessee Board of Judicial Conduct  
Administrative Office of the Courts  
511 Union Street, Suite 600  
Nashville, TN 37219

Dear Judge Craft,

As you know, the Government Operations Committees of the Tennessee General Assembly are tasked with the creation and reauthorization of governmental boards and commissions including the Board of Judicial Conduct ("BJC") and the Judicial Performance Evaluation Commission ("JPEC"). As you also know the recent relationships between the General Assembly and the BJC (formerly the Court of the Judiciary) and JPEC have been rocky at best. Simply put, some of the legislative Committee Chairman have felt and continue to feel that

- The BJC is ineffective in disciplining judges and overly secretive in its proceedings thereby protecting judges from public scrutiny, and
- The JPEC, which evaluates judges and recommends whether each judge should keep their job, is somewhat of an automatic rubber stamp.

In 2010, the legislature held special hearings on the conduct of the Court of the Judiciary (now BJC). Those hearings included several days of testimony and subsequent passage of reform legislation intended to make the operations of the judiciary more accountable and transparent. It appears to me that those reforms have failed.

The latest issue to arise is whether the Chief Justice sought to lobby JPEC members on the behalf of appellate judges who were not initially considered to be worthy of their position. Because Supreme and Appellate Court judges do not have an election opponent to point out short comings in their performance, the independence and professionalism of JPEC's evaluation is crucial to electing competent jurist.

Further this issue is indicative of

- whether the reformed BJC will aggressively enforce the laws and its Code of Ethics,
- JPEC's ability to use judges (peers) and lawyers practicing before the courts to fairly and impartially evaluate sitting appellate and supreme judges, and
- whether the legislature needs to take additional action regarding the BJC and the JPEC.

I have reviewed your letter to Phil Williams of **NewsChannel5** as well as the BJC December 18, 2013 letter to Chief Justice Gary Wade ("Wade letter"). Quite frankly I find both the specifics and the overall tone of your letter to Mr. Williams to be consistent with the obfuscation the legislature has come to expect from the BJC. Please consider:

*You state that "The Board received in the mail a copy of the (Tom Humphrey's) newspaper blog post along with a handwritten note asking for an investigation. The note was unsigned and the sender did not otherwise identify himself."*

I requested the investigation of Judge Wade in a meeting with Timothy R. Discenza, Disciplinary Counsel of the BJC. I did so after learning from JPEC members of Judge Wade's lobbying efforts and after reading Tom Humphrey's blog. Mr. Discenza stated to me that a written complaint was not required. At Mr. Discenza's request, I forwarded a copy of the newspaper article to him. Mr. Discenza and I agreed to keep my identity private so as to limit the impact of a complaint coming from the legislature. However, this investigation did not come about because the BJC was acting "out of an abundance of caution" as you state but rather at the specific request of the Chairman of the Senate's Government Operations Committee. Mr. Discenza knew that and has known that from the beginning.

Prior to the release of the Wade letter, which until Friday night was kept from the public, you told reporters that no complaint was ever filed even though, the Wade letter states it is in response to "Anonymous Complaint, File No. B135575." In your letter to Phil Williams you spend almost three paragraphs parsing the term

"complaint." This was an investigation as to whether the Chief Justice sought to sway which judges could run unopposed in August elections. Using legalese to cloud the sequence of events is disturbing and once again calls into question the court's ability to police its own members.

You state "*Consequently Disciplinary Counsel (Mr. Discenza) determined that the Chief Justice's comments were not a public endorsement of a candidate for public office...*" In other words, these judges were not candidates for public office. However the JPEC evaluation report addressing Justice Wade's actions said plainly "...each of the judges appearing before this Commission **were candidates for public office** within the meaning of Canon 4.1."

You state Justice Wade's actions "*...would not be a violation of the Rules of Judicial Conduct.*" However, the BJC states in its December 18, 2013 letter to Judge Wade that "*Public remarks such as those contained in the interview quoted in the complaint might then be considered to be violative of Rule 4.1(A)(3) of Canon 4 of the Code of Judicial Conduct.*" Further, the JPEC stated in its evaluation report that if Wade's comments were accurate, they "*amounted to active endorsement and public lobbying of this Commission...*"

You state "*...Chief Justice Wade's comments did not violate the Rules of Judicial Conduct.*" The investigative panel wrote "*...it cannot be said that the Code of Judicial Conduct has clearly been violated.*" Your statement says Judge Wade is innocent. The BJC letter says it is not clear that he did violate the Code of Ethics but it never exonerates his actions.

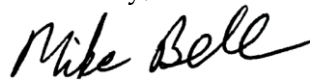
The most striking conclusion of your letter is that Judge Wade is not guilty because judicial candidates for retention elections are not standing for election. That contradicts the Supreme Court which has ruled on three different occasions that retention elections are elections.

Finally Judge Craft, your letter contradicts current members of the BJC and the JPEC who told me last fall and continue to say to me that Judge Wade actively and aggressively sought to influence JPEC's judicial evaluations through lobbying efforts tainting the entire evaluation process. If they are correct, and I believe they are, the Chief Justice of Tennessee's Supreme Court has damaged the cornerstone of the evaluation process by robbing it of its independence.

Some of my legislative colleagues think past General Assemblies have enabled an insular culture of cronyism and obfuscation at the BJC and JPEC by insufficiently

engaging those boards and commissions. I assure you lack of engagement will not be a problem in upcoming legislative sessions.

Sincerely,

A handwritten signature in black ink that reads "Mike Bell". The signature is written in a cursive, flowing style.

Senator Mike Bell

CC: Tim Discenza, Disciplinary Counsel Board of Judicial Conduct  
Senator Ron Ramsey, Lieutenant Governor  
Representative Beth Harwell, Speaker of the House of Representatives  
Senator Randy McNally, Chairman of the Senate Finance Committee  
Senator Brian Kelsey, Chairman of the Senate Judiciary Committee  
Senate Government Operations Committee Members  
House Government Operations Committee Members  
Lance Frizzell, Senate Chief of Staff  
Scott Gilmer, House Chief of Staff