

IN THE SUPREME COURT OF KANSAS
BEFORE A HEARING PANEL APPOINTED UNDER
SUPREME COURT ORDER 2012 SC 94

In the Matter of)
)
Sarah Peterson Herr,)
Respondent.)
_____)

FINAL HEARING REPORT

Procedural History

1. A review committee, appointed under an alternate disciplinary procedure authorized by Supreme Court Order 2012 SC 94, on August 16, 2013, found probable cause to believe that respondent had committed a violation of the Kansas Rules of Professional Conduct (KRPC) and recommended institution of formal disciplinary charges against respondent.

2. On August 23, 2013, a hearing panel was appointed by the Supreme Court to conduct a formal hearing. The hearing panel consisted of Hon. Robert J. Fleming, Presiding Officer; Hon. Edward Larson; and Hon. Mary B. Thrower. The hearing panel scheduled a hearing on the formal charges for December 20, 2013.

3. On September 3, 2013, special prosecutor Todd N. Thompson filed a formal complaint alleging violations of KRPC 8.4 (c), (d), (e), and (g). On that same date, Mr. Thompson filed a notice of hearing, confirming that a hearing on the formal complaint was scheduled for December 20, 2013. On September 24, 2013, respondent filed a timely answer to the formal complaint.

4. On December 9, 2013, the parties filed a document entitled “Stipulations of the Parties” which included stipulated and agreed facts as well as twenty-eight exhibits stipulated as admissible evidence.

5. On December 20, 2013, the hearing panel conducted a hearing on the formal complaint in the Kansas Judicial Center, Fatzner Courtroom. Special prosecutor Todd N. Thompson appeared in defense of the formal complaint. The respondent appeared in person and through counsel, Peggy A. Wilson of Morrow Willnauer Klosterman Church, L.L.C. There were no objections to the notice of hearing; to the date, time, or place of hearing; to the composition of the hearing panel; or to the jurisdiction of the hearing panel.

Findings of Fact

6. Based on the Stipulations of the Parties, testimony presented at the hearing, and an additional ten exhibits admitted into evidence at the hearing without objection, the hearing panel finds the following facts by clear and convincing evidence.

7. Sarah Peterson Herr (the respondent) is an attorney at law, Kansas attorney registration number 24667. Her last registration address with the clerk of the appellate courts is 1924 SW 13th Street, Topeka, Kansas 66604.

8. The Kansas Supreme Court admitted the respondent to the practice of law in the State of Kansas on September 24, 2010.

9. In September 2010, respondent started her employment at the Kansas Court of Appeals as a judicial assistant for Judge Christel Marquardt. It was respondent’s first job out of law school.

10. About a year later, she was promoted to a research attorney position, also for Judge Marquardt. That is the job she held on November 15, 2012.

11. On November 15, 2012, the Kansas Supreme Court was hearing oral arguments in an attorney discipline proceeding involving former Kansas Attorney General Phill Kline. The members of the panel hearing the matter were Justice Biles (acting as Chief) and Justice Moritz from the Supreme Court, Judge Green and Judge Arnold-Burger from the Court of Appeals, and District Court Judges Bouker, Gatterman, and Malone. Judge Marquardt was not serving on the panel considering the complaint against Kline.

12. When respondent arrived for work on November 15th, there were “more officers, like actual security guards.” She arrived and went through the metal detector, which was not always required of her, and she then went to her office on the second floor. Respondent was aware that something high profile and out of the ordinary was going on at the Judicial Center on the 15th.

13. Respondent elected to watch the oral arguments in the Kline proceedings. She did not go to the courtroom to do so but watched instead from her office. To watch the proceedings, she used the computer furnished to her by the state for her job.

14. As the hearing progressed, respondent sent out a series of “tweets” through her personal Twitter account.

15. The tweets sent out by respondent included the following:

- a. “Holy balls, There are literally 15 cops here for the Phil Kline [sic] case today. Thus I actually wore my badge.”
- b. “You can watch that naughty naughty boy, Mr. Kilein [sic], live! live.kscourts.org/live.php.”

- c. “Why is Phil Klein [sic] smiling? There is nothing to smile about douchebag [sic].” [In stipulations before this panel, respondent’s position with regard to using the phrase “douche bag” in her tweets is: “I don’t think it’s a bad word. To me I’ve been using the term ‘douche bag’ since I was in high school. It’s just a term to mean ‘jerk.’ It’s a slang term.”]
- d. “ARE YOU FREAKING KIDDING ME. WHERE ARE THE VICTIMS? ALL THE PEOPLE WITH THE RECORDS WHO WERE STOLEN.”
- e. “I appreciate the question...but I refuse to answer it.. So, here’s a picture of a pony. – Phil Klein [sic]”
- f. “How do you get to re-categorize the grand jury’s request? A – They liked my pony.”
- g. “This is a fuzzy situation. Umm, no, sorry Phil [sic].”
- h. “You don’t think a sealed document is meant to be confidential. BURN.” [In stipulations before this panel, respondent defined her “BURN” comment as a term from teenager movies when somebody does something silly or something so obvious that it is not true, “burn.”]
- i. “I love that Phil [sic] is talking about Dr. Tiller like they are cool, and not that his witch hunt helped lead to Dr. Tiller’s murder.”
- j. “I might be a little too feisty today.”
- k. I predict that he will be disbarred for a period not less than 7 years.”
- l. “It’s over...sorry. I did like how the district court judges didn’t speak the entire time. Thanks for kicking out the SC Phil [sic]! Good call!”

16. Respondent did not associate the tweets in any way with her job. At least some of respondent’s followers on Twitter were aware that she was employed by the appellate courts.

17. Upon information and belief, on the morning of Friday, November 16, Ron Keefover [Public Information Officer] was contacted by the Associated Press with regard to respondent's tweets. He met with Patricia Henshall, the Personnel Director. Judge Marquardt was in New Orleans at an appellate judges institute.

18. Because there was some belief that respondent might still be tweeting about the Kline matter on that Friday morning, Henshall immediately called respondent's office and advised respondent that the media had contacted Judicial Center personnel about respondent's tweets of the day before, that respondent was to cease tweeting immediately, and that Henshall and others would be getting back to respondent shortly.

19. Henshall and Keefover then went to Judge Stephen Hill's office; Judge Hill was the acting Chief for the Court of Appeals that day due to Judge Malone's attendance at a judicial function. They contacted Judge Marquardt by phone and alerted her to the situation.

20. About ten minutes later Judge Marquardt phoned respondent and advised respondent that she was being placed on leave with pay until further notice and that Judge Hill and Patricia Henshall were going to escort her out of the building a few minutes later.

21. Between fifteen and forty-five minutes passed between the first call from Henshall to respondent and the arrival of Hill and Henshall at respondent's office.

22. Respondent "maybe" deleted the Internet history on respondent's computer, but she is "not sure." It is "a possibility" that she deleted the history. She knows she deleted the tweets.

23. Judge Hill explained the suspension to respondent. During the meeting with Hill and Henshall, respondent was asked to turn over her badge and her key, and she did so. Henshall then escorted respondent out of the building.

24. Later that same day (November 16th), respondent issued an “apology statement” which she sent to the Associated Press reporter who had made numerous attempts to contact her. The material portions of the statement read as follows:

I want to apologize for my tweets regarding the Phill Kline disciplinary case. I didn't stop to think that in addition to communicating with a few of my friends on Twitter I was also communicating with the public at large, which was not appropriate for someone who works for the court system.

In fact, I have had no connection of any kind with the Kline disciplinary case through my work, and I have not communicated with anyone who is working on that case.

I apologize that because the comments were made on Twitter – and thus public – that they were perceived as a reflection on the Kansas courts.

25. On Monday, November 19, 2012, respondent was asked to return to the Judicial Center for a meeting. The meeting was in the conference room on the second floor and was attended by Judge Marquardt, Henshall, and respondent.

26. Judge Marquardt had a copy of the tweets “like the one that was in the newspaper,” and she asked if the tweets had been sent by respondent. Respondent acknowledged she had sent the tweets. Whereupon, Judge Marquardt terminated respondent's employment.

27. On November 21, 2012, Chief Justice Nuss formally expressed by letter his concern that respondent may have failed to conform with the professional standards applicable to Kansas lawyers. Because the disciplinary administrator was a party to the

proceedings being argued on November 15th, the matter was referred to the clerk of the appellate courts for action.

28. Also on November 21st, respondent self-reported to the disciplinary administrator for possible violations of Rule 8.4 of the Kansas Rules of Professional Conduct.

29. Newspapers statewide reported the tweeting incident as well as respondent's employment termination by the Judicial Branch.

30. On January 17, 2013, counsel in Case No. 106,870, *In the Matter of Phillip Dean Kline*, filed a motion in the Supreme Court entitled "Motion of Respondent Phillip D. Kline to Stay Action on Decision Subject to *In Camera* Inquiry into Communications of Support Staff."

31. Respondent was unemployed for over seven months and has only been able to gain temporary legal employment, performing document review at a Kansas city area law firm.

Conclusions of Law

32. Based upon the foregoing findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 8.4 (c), (d), and (e) as detailed below.

33. "It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation." KRPC 8.4(c). Respondent misrepresented the law and facts in her prediction of disbarment for seven years. She had no legal or factual basis on which to base such a prediction. The hearing panel, therefore, concludes that respondent violated KRPC 8.4(c).

34. “It is professional misconduct for a lawyer to...engage in conduct that is prejudicial to the administration of justice.” KRPC 8.4(d). Respondent’s prediction of seven years’ disbarment was prejudicial to the administration of justice in that it was a prediction which had no basis in law or fact. Further, there was prejudice in the pending disciplinary matter involving Mr. Kline. See Case No. 106,870, *In the Matter of Phillip Dean Kline*. On January 17, 2013, Mr. Kline’s counsel filed a motion in that case, calling for an investigation and alleging that respondent’s tweets showed a general bias against Mr. Kline in the Judicial Center. Respondent’s conduct reflected adversely on the appellate process and her position of trust as a court employee. The overall tone of her comments revealed a disrespect for a litigant before the appellate courts as well as a disrespect for the Supreme Court panel hearing the case. The hearing panel, therefore, concludes that respondent violated KRPC 8.4(d).

35. “It is professional misconduct for a lawyer to...state or imply an ability to influence improperly a government agency or official.” KRPC 8.4(e). Respondent’s prediction of seven years’ disbarment implied a degree of influence which she did not possess. Her conduct occurred in the course of her employment in the Judicial Center on court time. Her position gave her a unique platform from which to speak. The hearing panel, therefore, concludes that respondent violated KRPC 8.4(e).

*American Bar Association
Standards for Imposing Lawyer Sanctions*

36. In making its recommendation, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (Standards). Under Standard 3, the factors to be considered are the duty violated, the lawyer’s mental state, the potential or actual injury caused by the lawyer’s misconduct, and the existence of aggravating or mitigating factors.

37. *Duty Violated.* The respondent violated her duty to the public, the legal system, and the legal profession.

38. *Mental State.* The respondent negligently violated her duties.

39. *Injury.* As a result of her misconduct, the respondent caused injury to the legal profession and public perception of the legal system.

Aggravating and Mitigating Factors

40. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation, the hearing panel found no aggravating factors present.

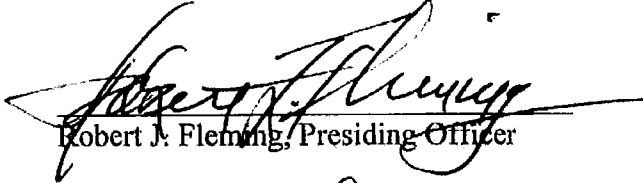
41. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation, the hearing panel found the following mitigating circumstances present. Respondent has no prior disciplinary history, her motive was not dishonest or selfish, there is no pattern of misconduct, she made a public apology for her conduct, she self-reported a possible disciplinary violation, she cooperated in the disciplinary investigation, and she has little experience in the practice of law.

Recommendation

42. At the hearing on the formal complaint, the special prosecutor recommended that discipline of published censure be recommended to the Supreme Court. The respondent requested a finding of no violation or, in the alternative, imposition of an informal admonition.

43. Based on the findings of fact, conclusions of law, and the mitigating factors listed above, the hearing panel unanimously recommends that the respondent receive an informal admonition and that this matter be closed.

44. Dated this 13th day of January, 2014.


Robert J. Fleming, Presiding Officer


Edward Larson


Mary B. Thrower

CERTIFICATE OF MAILING

I hereby certify that a true copy of Final Hearing Report was mailed by depositing same in the United States mail, postage prepaid, on the 13th day of January, 2014, to:

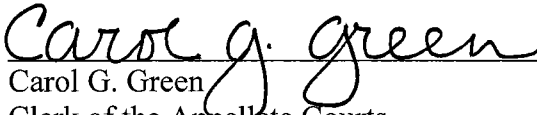
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