



## *Judicial Discipline & Disability Commission*

### **P R E S S   R E L E A S E**

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**FOR IMMEDIATE RELEASE**

June 14, 2019

The Arkansas Judicial Discipline and Disability Commission today issued an Order regarding Circuit Judge Wendell Griffen, in Commission case numbers 17-171-17-173 (COMBINED).

A copy of the Order follows this press release.

**ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION**  
**IN RE: CIRCUIT JUDGE WENDELL GRIFFEN, JDDC CASE NOS. 17-171-173**  
**(COMBINED)**

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**ORDER**

On June 12, 2019, during a teleconference meeting of the Arkansas Judicial Discipline and Disability Commission (the “Commission”), the Commission considered and ruled upon the following pending motion: Special Counsel Rachel Michel’s Notice of Recusal. In order to help clarify the basis for its ruling and the subsequent effect of that ruling on the entirety of this matter, the Commission is providing a summary of the history and background of this matter.

**Case History and Background**

This matter was initiated by a complaint filed by David Sachar, the Executive Director of the Arkansas Judicial Discipline and Disability Commission (the “JDDC”), against the Honorable Wendell Griffen, Circuit Judge, on May 1, 2017, based on a referral from the Arkansas Supreme Court and media reports. Briefly, the complaint alleged that on April 14, 2017, Judge Griffen had been assigned the case of *McKesson Medical-Surgical Inc. v State of Arkansas et al.*, Case No. 60CV-17-1921, and issued a temporary restraining order barring the use of McKesson’s property in connection with impending prisoner executions by the Arkansas Department of Corrections (“ADC”) until a hearing could be held on April 18, 2017. McKesson’s underlying complaint involved a drug it sold to the ADC, which the ADC intended to use during the state’s planned executions. Because the hearing scheduled by Judge Griffen was set to occur after the executions were scheduled to begin, the order issued by Judge Griffen essentially served as a stay of the executions. Those executions were scheduled to begin on April 17, 2017 and continue through April 27, 2017.

On Friday, April 14, 2017, Judge Griffen, within a matter of a few hours of entering the aforementioned temporary restraining order, was seen attending and participating in an anti-death penalty protest rally on the steps of the Arkansas State Capitol, and, on that same evening, a second protest rally held at the Governor's Mansion. At the protest rally at the Governor's Mansion, Judge Griffen was brought in on a stretcher wearing what appeared to be prison clothing and an anti-death penalty button, all as depicted in photographs attached to the complaint filed with the Commission. Further, Judge Griffen had posted his personal opinions on his personal blog regarding implementation of the scheduled executions and the usage of the medications that were subject to the temporary restraining order in those executions. These were the allegations in the complaint, including photographs. (Complaint, May 1, 2017)

The complaint against Judge Griffen alleged that Judge Griffen's actions violated several provisions of the Code of Judicial Conduct, which include, but are not limited to, Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety; Canon 2: A judge shall perform the duties of judicial office impartially, competently, and diligently; and Canon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office. *Id.*

As provided in Rule 6 of the Commission's Discipline and Disability Rules (the "Rules"), "[t]he Commission shall administer the judicial discipline and disability system, and perform such duties as are required to enforce these rules" *Id.* The procedures for initiation of an inquiry, screening, investigation of complaints, and dismissal or formal statement of allegations are set out in Commission Rule 8. In the normal course of things, this complaint was assigned to one of three Investigative Panels made up of alternate Commission members, which consists of one judge, one

attorney and one public member, who were tasked with investigating the allegations against Judge Griffen. In the present matter, following the completion of this step in the Commission's procedural process, the process became, at best, atypical.

First, at the outset of this case, the Commission's Executive Director recused from the case because of a conflict of interest. Furthermore, the then Deputy Director, Emily White, also recused from the case due to conflicts of interests. Then, after a new Deputy Director, Emily Abbott, was hired to fill the position left vacant when Ms. White was appointed to fill a judicial vacancy, she too had to recuse because of a conflict. Normally, either the Executive Director or the Deputy Director assists the Investigative Panel and performs the prosecutorial role of presenting the case to the Commission, if, as they did here, the Investigative Panel assigned to the matter finds probable cause to believe a violation of the Code of Judicial Conduct has occurred.

The recusal of the Executive Director and the Deputy Director immediately necessitated the search for a Special Counsel to assume the prosecutorial duties normally performed by the Executive Director and/or Deputy Director, in accordance with Commission Rule 9E. With the disqualification of these staff attorneys, the task of retaining Special Counsel fell on Commission Counsel. The Commission notes that the position of Commission Counsel was established to eliminate any potential conflict of interest between Commission Staff and the Commission, in its role as trier of fact. The Commission Counsel's role is to advise the nine-member Commission on legal issues, and to administer any matter that proceeds to hearing after probable cause has been found. Commission Counsel's job is not to administer the procedural process; however, because there is no provision in the Commission's Rules for securing someone to administer a case in the event of a recusal by both the Executive Director and Deputy Director, Commission Counsel attempted to fill the void by providing procedural guidance regarding the case, and to secure

Special Counsel. Deputy Director White provided the name of Rachel Michel, an attorney with the Mississippi Commission of Judicial Performance, who was willing to be considered for the position of Special Counsel. Ms. Michel was selected to serve as Special Counsel in June, 2017, because she was an attorney with the Mississippi Commission of Judicial Performance, had experience in prosecuting such cases, and was otherwise qualified to fill the role of Special Counsel in this matter. Furthermore, Commission Staff agreed that it would reciprocate this role if the need ever arose in Mississippi.

On June 8, 2018, the Investigative Panel issued a Statement of Allegations in accordance with Commission Rule 8, finding probable cause that Judge Griffen had violated the Code of Judicial Conduct. It was at this time that the Commission entered the case in its role as trier of fact. Prior to the June 8, 2018 filing, the Commission had no knowledge of the actions or deliberations of the Investigative Panel. Judge Griffen filed a restated motion to dismiss, and after a series of motions and responses by counsel, a hearing was held on the motion to dismiss on August 17, 2018, which was attended by Special Counsel Michel, along with Judge Griffen and his counsel. After considering the arguments and matters presented at the hearing, the Commission, after deliberation, entered an Order on August 20, 2018, denying the motion to dismiss.

On September 10, 2018, the Commission set the date for the hearing on the complaint against Judge Griffen for October 5, 2018. Judge Griffen requested the hearing be continued because the October 5, 2018 date provided insufficient time to conduct discovery, and because his counsel had a conflict on that date. Special Counsel Michel also informed the Commission that she would be on military orders on that date. The hearing was continued until March 22, 2019. In the meantime, Special Counsel Michel informed the Commission that her military orders had been expanded into February 2019. At this time, Commission Counsel, again, began a search for Special

Co-Counsel to assist with discovery while Special Counsel Michel was on military orders. After several unsuccessful attempts to secure additional Special Counsel in Arkansas, Commission Counsel contacted Tim Discenza, Director of the Tennessee Board of Judicial Conduct, to request his assistance. After conferring with his Board, he agreed to undertake the role of Special Co-Counsel to conduct discovery, and eventually agreed to present the case, if Special Counsel Michel was unavailable. Special Co-Counsel Discenza was retained in or around October 1, 2018.

On January 4, 2019, Judge Griffen's counsel requested the scheduling order be modified to allow counsel to depose David Sachar, Emily White and Stacey Pectol (these depositions had previously been set for December, 2018, but had to be postponed due to various scheduling conflicts). In an Order dated January 22, 2019, the Commission granted the modification of the schedule, which required the change of the date of the hearing from March 22, 2019 to May 17, 2019. Special Co-Counsel Discenza attended these depositions in Little Rock.

Special Co-Counsel Discenza, on January 19, 2019, requested a continuance of the May 17, 2019 hearing due to a personal conflict that could not be rescheduled. Without objection from Judge Griffen, the hearing was rescheduled for May 22, 2019.

In accordance with the Amended Scheduling Order, counsel made appropriate and timely filings, including a motion for summary judgment filed by Judge Griffen on April 5, 2019, to which Special Co-Counsel Discenza timely responded on April 24, 2019. At this point, the Commission had every reason to believe that the final hearing scheduled for May 22, 2019 would take place on that date and that Special Co-Counsel Discenza and/or Special Counsel Michel would prosecute the matter. On May 8, 2019, however, by motion to withdraw, Special Co-Counsel Discenza informed the Commission that he had developed a very serious medical issue which required hospitalization and a surgical biopsy during the week of May 20, 2019, and that he

would require substantial recovery time, lasting more than a month. At this time, Special Counsel Michel had returned from military orders, and was reintroduced to the case. On May 13, 2019, within less than a week of Special Co-Counsel Discenza's withdrawal, Special Counsel Michel filed a motion to withdraw or alternatively, motion for continuance, stating that she would be on military orders beginning May 17, 2019, and that she would not be prepared to present the case on May 22, 2019. At the Commission's regular meeting, on May 17, 2019, it took up Special Counsel Michel's motion to withdraw, and denied the motion, but continued the matter until June 10, 2019. In the meantime, Commission Counsel, once again and in recognition that Special Counsel Michel was attempting to withdraw from the case, began another search for new Special Counsel to present the case. During the period between May 17 and May 31, 2019, Commission Counsel contacted several attorneys, all of whom declined for various reasons, including the preparation time being too short, upcoming case commitments, or conflicts of interests.

During this same period, Judge Griffen filed a motion to dismiss alleging that the prosecution of the case had not occurred within the limitations period provided in Commission Rule 15. On May 28, 2019, Special Counsel Michel filed a motion to enlarge time to respond to Judge Griffen's motion to dismiss, and renewed her motion to withdraw, or in the alternative, to continue the case. The Commission took up Special Counsel's and Judge Griffen's motions at a June 5, 2019, teleconference, denying Special Counsel's motion to withdraw and Judge Griffen's motion to dismiss, and continuing the matter to June 13, 2019. On June 10, 2019, Special Counsel filed a Notice of Recusal, the Commission canceled the June 13, 2019 hearing, and set another teleconference meeting for June 11, 2019.

### Commission's Findings and Rulings

With this background, based on the motion filed herein, the Commission makes the following findings:

1. *Notice of Recusal or Motion to Withdraw.* The Commission views Special Counsel's "Notice of Recusal" as a motion to reconsider her previous motions to withdraw as Special Counsel, which were denied. In her current filing, Special Counsel essentially states that because this Commission has denied her two previous motions to withdraw, and her employer, the Mississippi Commission of Judicial Performance, refuses to grant her leave time to come to Arkansas to prosecute this matter, "her continued employment and continued representation of the JDDC create competing interests," which she states is prohibited under ABA Model Rule 1.10 and the Arkansas Court Rule 1.7. ABA Model Rule 1.10, however, is not applicable here. Rule 1.10 addresses "imputed disqualification," which "gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm." *See* Rule 1.10 Imputation of Conflicts of Interests: General Rule- Comment. The Rule deals with preserving and protecting the integrity of the attorney-client relationship as it relates to law firms, and its members, who may have conflicts. The present situation does not involve a law firm and does not involve any imputed conflicts of interest as defined in Rule 1.10.

Arkansas Rules of Professional Conduct Rule 1.7 also does not apply here. Rule 1.7 addresses concurrent conflicts of interests. Pursuant to Rule 1.7, a concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
- (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer . . .



The basis of Special Counsel's assertion for disqualification is not related to the representation of one client being adverse to another client because Special Counsel's employer is not her client. Nor is it that her representation in this case will be materially limited by her responsibilities to another client, a former client or a third person, *i.e.*, fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director, as envisioned by Rule 1.7. Special Counsel's situation is not a matter of a conflict of interest but, rather a regrettable inconvenience to her and to her employer, which does not dictate the drastic measure of disqualification. The Commission understands the burden of the situation. The Commission also understands that Special Counsel committed to present this case, and is still counsel of record on this case. At this late date, and as inconvenient the circumstances may be for Special Counsel, the Commission is not inclined to permit Special Counsel to withdraw. Thus, Special Counsel's motion to withdraw or notice of recusal is DENIED.

2. *Dismissal of this Matter.* Notwithstanding the Commission's denial of Special Counsel's attempt at disqualification, the reality is that, based on the Notice of Recusal and Special Michel's continued and repeated efforts to be relieved of her obligation to prosecute this matter, it became unequivocally clear to the Commission that under no circumstances did Special Counsel Michel intend to appear and present this case on any date prior to June 30, 2019, which is the date upon which the 18-month time period for prosecution of this matter expires under Commission Rule 15. Moreover, the Commission has no authority to compel the appearance of Special Counsel to present this case. Because of this, and because all prior efforts by Commission Counsel to secure competent counsel to prosecute this matter have been unsuccessful, the reality that this matter will not be prosecuted prior to June 30, 2019 and the concept of fairness dictate the dismissal of this case at this time.

The Commission notes that this case has been pending since May 1, 2017, and that the adjudication of the allegations presented in this and any other case is critically important to ensuring an independent, fair and impartial judiciary. Equally important is providing Judge Griffen, or any other accused, with a fair opportunity to defend his or her actions that lead to a statement of allegations. Unfortunately, the circumstances outlined above have prevented the Commission from reaching the merits of this case. As a result, while the Commission's ruling serves as a dismissal of this matter, this decision is not intended to be a decision as to the merits in relation to whether Judge Griffen's actions, as stated in the allegations, violated the Code of Judicial Conduct.

Considering all of the foregoing, the case is DISMISSED, with prejudice, due to Special Counsel Michel's failure to prosecute the matter, and bring it to completion within the time permitted by Rule 15.

3. *Commission Recommendations.* The path of this case since its inception has been beset with obstacles atypical to any previous case before the Commission, a perfect storm if you will. These obstacles included the following succession of unprecedented events in the history of the Commission, under the new Rules:

- \* Recusal of both the Executive Director and the Deputy Director;
- \* An investigation that took over one year;
- \* Special Counsel being under lengthy military orders, requiring the retention of a second Special Co-Counsel
- \* Second Special Co-Counsel, who was ready to present the case, becoming seriously ill two weeks before the hearing, and, thereafter, the initial Special Counsel unwilling to prosecute the case in a timely manner.

This anomalous case revealed to the Commission the need to review the Commission Rules in order to address those areas of the process for which, as here, no remedy has been provided. The Commission respectfully directs the Executive Director and staff to begin a review of the Rules in relation to the procedural issues that arose during this case, and to recommend to the Commission changes to the Rules to ensure that the procedural issues faced here can be avoided in the future. The results of this review should be presented to the Commission within (6) months from the date of this Order, unless additional time is required. Final recommendations will be submitted to the Arkansas Supreme Court for consideration.

4. *Stacey Pectol Subpoena*. With the dismissal of the matter, the motion to quash subpoena by Stacey Pectol, Arkansas Supreme Court Clerk is, hereby, moot.

**AT THE DIRECTION OF THE COMMISSION: IT IS SO ORDERED.**

/s/ Marie-Bernarde Miller  
Judicial Commission Counsel

DATED: June 14, 2019