Judicial Discipline & Disability Commission

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DAVID A. STEWART
EXECUTIVE DIRECTOR

PRESS RELEASE

POINT OF CONTACT: DAVID J. SACHAR

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FOR IMMEDIATE RELEASE

September 20, 2012

The Judicial Discipline and Disability Commission today announced the filing of Formal Charges against Monticello District Court Judge Ken Harper. A Statement of Allegations containing the charges follows this press release.

Judge Harper will be formally served with charges and given 30 days to respond. The judge is entitled to a trial by the Judicial Discipline & Disability Commission, wherein all allegations must be proven by clear and convincing evidence. All future pleadings in this case will be public information.

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JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

STATEMENT OF ALLEGATIONS

CASE #12-233

It is alleged that District Judge Kenneth Harper of the Monticello District Court, by the conduct indicated below, is subject to sanctions pursuant to ACA § 16-10-410 (b)(4), for the commission of conduct that is prejudicial to the administration of justice, ACA § 16-10-410 (b)(5), for willful violation of the Code of Judicial Conduct and ACA § 16-10-410 (b)(7), habitual intemperance in the use of alcohol or other drugs.

THE CODE OF JUDICIAL CONDUCT

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.

Relevant Canons

RULE 1.1 Compliance with the Law
A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

RULE 1.2 Promoting Confidence in the Judiciary
A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

RULE 1.3 Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

RULE 2.3 Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

RULE 2.5 Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

RULE 2.16 Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

RULE 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

...

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

Factual Allegations

Many of the alleged fact patterns below apply to more than one Canon violation. However, they are not duplicated for the sake of brevity.

I. Failure to Comply with JDDC Censure (Rule 1.1, 1.2, 2.2 and 2.16)

Judge Harper was Censured in case #11-204 with remedial requirements in 2011 (see attached Letter of Censure). The judge has not responded to a compliance check letter sent on May 30, 2012 giving him 10 days to simply acknowledge that he is complying with the requirements of the Censure (See attached Compliance Letter #1). Additionally, the JDDC has received information that the judge has broken the terms of his agreed Censure by drinking alcohol and being intoxicated in public (see following paragraphs). Participation in and compliance with The Judges and Lawyers Assistance Program (JLAP) was also a requirement of the judge's agreed remedial measure in the settlement of case #11-204. JLAP informed the JDDC on June 27, 2012 that the judge was no longer in compliance with the program anymore. JLAP stated that Harper would be able to get back into compliance if he chose to take specific actions that were available to him. There has been no notification that the judge has taken those steps and JLAP has not informed the JDDC that the judge is back in compliance (see attached letter from JLAP)

The following terms were agreed by the judge in resolving case #11-204 and the status of those terms (in bold):

Proof of (at least) weekly attendance at AA meetings.

None provided

Being subject to alcohol testing performed as part of the JLAP Program.

No longer in the JLAP program due to non-compliance

No positive tests for alcohol from the testing listed above.

No longer in the JLAP program due to non-compliance

No consumption of alcoholic beverages.

Conflicting information received states the judge is drinking alcohol

Use of prescription medication only as directed by a licensed doctor in Arkansas.

No information received as the judge will not confirm compliance

Compliance with any other requirements from your voluntary arrangement with the JLAP program.

No longer in the JLAP program due to non-compliance

No D.W.I. or criminal offenses committed during the compliance period.

No information that the judge has violated this term

II. Alcohol Use and Other Violations (Rule 2.3, 2.5 and 3.1)

The JDDC has received information that the judge has, since his November 18, 2011 Letter of Censure, been purchasing alcohol, drinking alcohol and being intoxicated in public. The JDDC has received information that a law enforcement officer has seen Judge Harper coming out of Pine Hills Liquor Store. Another witness has given information about the judge coming out of Pine Hills Liquor Store with a package several months ago. This witness was concerned about testifying against a sitting district judge who also has relatives in the legal and judicial field. Other witnesses have given information about the judge being drunk while around his family and at public events.

On or about July 30, 2012, Judge Harper allowed an unlicensed driver, Charles McKinney, to operate his vehicle. The vehicle was stopped and McKinney had two bottles of liquor that he had recently purchased. The investigation into this matter continues. The video of the incident shows McKinley talking on the phone with someone he indicated was Judge Ken Harper. McKinley makes statements about the judge wanting to speak with the trooper involved in the traffic stop. Violations from this incident include:

A judge knowingly allowing his vehicle to be used contrary to law by providing it to a driver who is known not to have a driver's license or liability insurance.

Harper sending McKinley to get alcohol for him in an effort to hide the judge's drinking in violation of the conditions of his Letter of Censure.

Harper associating with a convicted felon. McKinley has multiple felony convictions as well as DWI and other misdemeanor offenses. The felonies include Delivery of Cocaine, Forgery in the 2nd Degree, Attempted Burglary and Rape. He lists "Ken Harper" as his employer on a pleading from 2005.

Harper having been the judge on cases involving McKinley as a defendant while having him run errands for the judge and use the judge's vehicle.

Harper attempting to interfere with an Arkansas State Police trooper who is executing a traffic stop on a driver who is using the judge's vehicle.

Additional information has been received about the following allegations. These allegations are based on witness conversations and sworn affidavits:

The judge has moved in with a female friend who has been convicted for theft of property out of Pulaski County. Additionally, this friend has been convicted during 2012 of multiple traffic and criminal offenses with Harper having been the judge on the cases in Drew County. These include DWI, Theft by Deception, Disorderly Conduct and Possession of a Controlled Substance. She has an outstanding balance due of over $1,500.00 in fines and has already paid over $4,500.00 in fines to Harper's District Court.

The judge has allowed convicted felon, Charles McKinley, to continue to use his Jeep even though McKinley does not have a valid driver's license. Recently, police officers observed McKinley pick up the judge's female friend in Harper's vehicle.

On September 7, three officers were called to an incident at Harper's home involving an accident where part of a fence was knocked down due to an unknown cause. Officers have provided statements that they had contact with Ken Harper while investigating the incident. He was describes as having "slurred speech", being "intoxicated to the point that he didn't need to be driving or out in public", having "extremely bloodshot...red and glassy/watery eyes",

III. Disability

Multiple witnesses have given information and quotes about the judge's abuse of alcohol and prescription drugs. These are described with remarkable consistency as being a long term and on-going problem. The facts support a possible physical disability and the JDDC will consider forcing the judge to submit to evaluation and present medical records for review. The JDDC may consider this allegation in the same manner they consider discipline issues and may recommend that the judge be forced into involuntary retirement by the Arkansas Supreme Court. The facts from cases #11-204 and #11-207 (Letter of Reprimand for a DWI conviction) will also be used as bases for the disability allegation.

Rule 13. Cases involving allegations of mental and physical disability.

A. *Procedure*. In considering allegations of mental and physical disability, the Commission shall, insofar as applicable and except as provided in Paragraph B., follow procedure established by these rules.

B. *Special Provisions*.

(1) If a complaint or statement of allegation involves the mental or physical health of a judge, a denial of the alleged disability or condition shall constitute a waiver of medical privilege and the judge shall be required to produce his medical records.

(2) In the event of a waiver of medical privilege, the judge shall be deemed to have consented to an examination by a qualified medical practitioner designated by the Commission.

(3) The Commission shall bear the costs of the proceedings, including the cost of a physical or mental examination ordered by it.

IV. Habitual Drunkenness

Pursuant to ACA § 16-10-410 (b)(7), judges are subject to discipline or removal for "habitually intemperance in the use of alcohol or other drugs". The previous paragraphs are incorporated into this allegation as are the facts surrounding the Letter of Censure and Letter of Reprimand from November 2011. (See attached Letter of Censure and Letter of Reprimand). Additionally, witnesses will testify about the judge's frequent drunkenness and consumption of alcohol. All evidence from previous case files will be used as substantive evidence in this case to the extent allowed by law. In the alternative, the evidence will be used under A.R.E. 404 (B) as proof of *modus operandi,* absence of mistake or accident or any other purpose allowed by law.

The above allegations, if proven to be willful misconduct by clear and convincing evidence, would constitute conduct that is prejudicial to the administration of justice (ACA § 16-10-410 (b)(4)). Many of the allegations above are of a serious nature that, if proven, could result in public discipline up to and including removal from office. (see JDDC Rule 9 J and A.C.A. § 16-10-410).

Prepared by David J. Sachar, Deputy Executive Director, at the direction of Investigation Panel 2 of the JDDC (Thyer, Terry, Stuart).

See attachments.

Judicial Discipline & Disability Commission

JUDGE WILLIAM STOREY
CHAIRMAN

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DAVID A. STEWART
EXECUTIVE DIRECTOR

November 18, 2011

Honorable Ken Harper
Monticello District Court
PO Box 505
Monticello, AR 71657

Letter of Censure #11-204

Dear Judge Harper:

It is alleged that your alcoholism has led to multiple violations of the Code of Judicial Conduct. These include the following facts which you have agreed are true:

A. Specifically on Ma y 18, 2011 (as well as other dates earlier this year) you took the bench while under the influence of alcohol according to staff and others present. Staff and others present in the court room could smell the odor of alcohol from your consumption of liquor.

B. In June of 2011, you came to the jail to conduct bond hearings. You were observed by law enforcement officials to be confused and physically and mentally impaired.

C. July 5, 2011 you appeared in court with slurred speech and other indications of impairment. Attorneys present were concerned about your ability to render judgment and you were guided through your own docket. You were not impaired by alcohol consumption but rather from prescription drugs that you had taken that day.

D. On April 28, 2011 you appeared at a public meeting concerning the MEDC. You were scheduled to address public officials at the meeting but left before your scheduled time to speak. You were reported to have attended this public meeting

under the influence of alcohol and several of those present were able to smell the odor of alcohol from your consumption of liquor.

E. On Ap ril 28, 2011 around 4:00 pm you entered the offices of the MEDC, which are housed in the same building as your court room. You were concerned about doors and signs that, in your opinion, interfered with people attempting to attend court. You were observed by several witnesses to smell like alcohol. There was a reported confrontation with the director of the MEDC. The extent of this confrontation is still under investigation. Any findings concerning possible criminal violations are held in abeyance. However, the mere fact of being involved in a public argument, while under the influence of alcohol, is a sufficient action on your part to bring disrepute to the judiciary and violate the Code of Judicial Conduct.

The above described behavior violates the following sections of the Code of Judicial Conduct:

RULE 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

RULE 2.5 Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

RULE 2.8 Decorum, Demeanor, and Communication with Jurors

...

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

For your actions set out in the paragraphs above, you are hereby issued a letter of Censure. You have agreed that this sanction is appropriate and that more serious sanctions could have been imposed. Your honesty with the JDDC Staff, willingness to take steps to combat your alcohol and substance abuse and promise to adhere to the conditions below have led the JDDC to refrain from recommending a suspension or removal from the bench.

If you violate the terms below or have additional violations of the Code of Judicial Conduct the JDDC may consider this Censure to be vacated and may send you notice of intent to pursue a more serious sanction. If you violate the terms below, you agree that the facts listed in paragraphs A through E shall be deemed admitted by you in any

future proceedings before the Commission and the Arkansas Supreme Court. The period of time for your compliance shall be from this date until January 1, 2013.

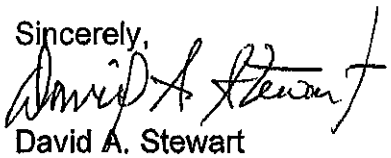
Your Censure will include the following agreed conditions:

Proof of (at least) weekly attendance at AA meetings.
Being subject to alcohol testing performed as part of the JLAP Program.
No positive tests for alcohol from the testing listed above.
No consumption of alcoholic beverages.
Use of prescription medication only as directed by a licensed doctor in Arkansas.
Compliance with any other requirements from your voluntary arrangement with the JLAP program.
No D.W.I. or criminal offenses committed during the compliance period.

In view of these circumstances, it is the judgment of the Judicial Discipline and Disability Commission that you are hereby censured. This public censure constitutes adequate discipline and no further action, other than the remedial measures described above, is warranted. Further discipline may occur if the Judicial Discipline & Disability Commission finds you committed additional violations of the Code of Judicial Conduct in the future.

This Commission action is public information.

Sincerely,



David A. Stewart
Executive Director

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DAVID A. STEWART
EXECUTIVE DIRECTOR

November 18, 2011

Honorable Ken Harper
Monticello District court
PO Box 505
Monticello, AR 71657

LETTER OF PUBLIC REPRIMAND #11-207

Dear Judge Harper:

It was alleged that at approximately 6:15 pm on July 12, 2011, you were stopped by a Deputy Sheriff on Highway 425 North, in Lincoln County, Arkansas. You were arrested and subsequently charged with Driving While Intoxicated (*A.C.A. § 5-65-103*). You failed field sobriety tests and refused to take a BAC test. You were also charged with Drinking on the Highway (*A.C.A. § 5-71-212*) and Refusal to Submit to a Chemical Test (*A.C.A. § 5-65-205*). The arrest report is public record (*Arrest #11-A00059, Incident #00-71126, Lincoln County Sheriff's Office*) as is the record of your guilty plea to D.W.I. (*District Court of Lincoln County, Nos. DWI-11-19, CR11-293, TR-560 and TR-561*). You were ordered to pay a fine and court costs of $830.00 and to serve one day in jail, for which you received one day credit from the day of your arrest.

On November 18, 2011, the Judicial Discipline & Disability Commission found the above described actions to be a willful violation of Canons 1.1 and 1.2 of the Arkansas Code of Judicial Conduct. You have agreed with that finding and have candidly admitted to having a problem with alcohol abuse. You are actively involved in a rehabilitation program to help you avoid issues with substance abuse in the future.

In view of these circumstances, it is the judgment of the Judicial Discipline and Disability Commission that you are hereby reprimanded. This public reprimand constitutes adequate discipline and no further action is warranted. Further discipline may occur if the Judicial Discipline & Disability Commission finds you committed additional violations of the Code of Judicial Conduct in the future.

This Commission action is public information.

Sincerely,

David A. Stewart
Executive Director

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DISABILITY AND COMMISSION

Helping Judges, Lawyers and Law Students Find Personal Solutions for Positive Change

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Little Rock

Prof. Cynthia Nance
Fayetteville

Shannon Pearce
Hot Springs

Amanda White
Little Rock

June 27, 2012

David Sachar, Deputy Executive Director
Judicial Discipline and Disability Commission
323 Center Street, Suite 1060
Little Rock, AR 72201

Dear Mr. Sachar,

I am writing to inform you that Judge Ken Harper is in non-compliance with his Health Monitoring Contract with the Arkansas Judges and Lawyers Assistance Program.

Our experience has been that a JLAP client can choose to take specific actions that bring him or her back into compliance. These actions are available to Judge Harper, should he choose to take them. If that case arises, I will inform you about that as well.

I appreciate your office working with JLAP and hope that a final outcome in this case will be positive for Judge Harper.

Yours truly,

Sarah Cearley, PhD, LCSW

Sarah Cearley, PhD, LCSW

Judicial Discipline & Disability Commission

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CHAIRMAN

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DAVID A. STEWART
EXECUTIVE DIRECTOR

May 30, 2012

Honorable Ken Harper
Monticello District Court
PO Box 505
Monticello, AR 71657

RE: Case #11-204

Dear Judge Harper:

Pursuant to your letter of Censure issued on November 18, 2011 by the JDDC you were given certain conditions to comply with to avoid further or future discipline. The specific condition that were in your letter are listed below:

Proof of (at least) weekly attendance at AA meetings.
Being subject to alcohol testing performed as part of the JLAP Program.
No positive tests for alcohol from the testing listed above.
No consumption of alcoholic beverages.
Use of prescription medication only as directed by a licensed doctor in Arkansas.
Compliance with any other requirements from your voluntary arrangement with the JLAP Program.
No D.W.I. or criminal offenses committed during the compliance period.

Please reply via letter and affirm within ten (10) days that you are complying with the above listed requirements. If you are not complying please explain the reason and any mitigating factors you wish to mention. You will receive a compliance letter similar to this one every 90 days or so until your compliance period has expired or a reasonable time under the circumstance.

This letter is not pubic information nor is your response. It is part of an investigatory file concerning compliance with remedial measures set in public discipline. Thank you in advance for your prompt response.

Sincerely,

David J. Sachar
Deputy Executive Director

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