

Committee Initiated Complaint

In the Matter of the Honorable Pamela D. Albee

Docket Number: JC-15-034-C

REPRIMAND AND CAUTION

I. PROCEDURAL HISTORY

On July 23, 2015 the New Hampshire Supreme Court issued an opinion captioned, In the Matter of Tammy Rokowski and Shane Rokowski, No. 2014-617. Based on that decision, on September 11, 2015, the Committee initiated an inquiry into Judge Albee's conduct as the trial judge in the Rokowski case pursuant to New Hampshire Supreme Court Rule 40 (6). The Committee requested that Judge Albee provide a response relative to her having engaged in an independent investigation of facts outside of the evidence presented by the parties at the final hearing and as to the delay of some thirteen months between the close of evidence on or about May 9, 2013 and the issuance of her final order on June 4, 2014.

Judge Albee filed a response on October 8, 2015 and on December 11, 2015 a Committee-generated Complaint was docketed. The complaint asserted violations of Canon 2, Rule 2.9 C, based on Judge Albee's independent factual research in the Rokowski matter, and Canon 2 Rule 2.5 A, based on her failure to timely issue a decision in that case.

Judge Albee and the Committee further stipulated that the Committee-generated Complaint would be amended to also address concerns related to the timeliness of her decision in a case entitled, In the Matter of Timothy Rioux and Lee Ann Rioux, Case Number: 212-1999-DM-0071, which was the subject of a previously pending complaint captioned, In the Matter of the Honorable Pamela D. Albee - JC-14-045-C, and her consideration of facts not put into evidence by the parties at a hearing in another case captioned, In the Matter of Robert Beckwith and Kelly Beckwith, Case Number: 664-2011-DM-102, which came to light during the course of the investigation.

Pursuant to Supreme Court Rule 40(8)(f)(2), Judge Albee now stipulates to a violation of Canon 2, Rule 2.9 C and consents to resolution of the violation without formal discipline through the issuance of this reprimand.

Pursuant to Supreme Court Rule 40(8)(f)(1), the Committee determines that a clear violation of Canon 2, Rule 2.5A is not found, but that the judge acted in a manner which requires

attention and Judge Albee stipulates and consents to resolution for violation of that Code provision by a dismissal with the issuance of a caution.

II. FINDINGS OF FACT

1. At all times relevant to these proceedings, Judge Albee has been a full-time Justice of the New Hampshire Circuit Court.
2. While assigned to the 3rd Circuit-Carroll County-Family Division-Conway, Judge Albee held a final divorce hearing in a case entitled, In the Matter of Tammy Rokowski and Shane Rokowski, Docket Number 630-2011-DM-104.
3. The first day of the hearing commenced on January 10, 2013 and concluded following a second day of hearing on May 9, 2013.
4. Judge Albee issued her thirty-page Final Decree on June 4, 2014, approximately thirteen months after the conclusion of hearings in that matter.
5. The decision was appealed to the New Hampshire Supreme Court which, on July 23, 2015, issued an opinion captioned, In the Matter of Tammy Rokowski and Shane Rokowski, No 2014-617.
6. In determining the value of the parties' marital home and to choose a valuation date, Judge Albee's decision indicated that she relied on information supplied by the Respondent from an on-line service, as well as up-dated information she was able to obtain by using *Zillow*, a similar on-line service and tax records.
7. In its opinion, the Supreme Court held that "the trial court relied upon its internet research to evaluate the Respondent's comparable sales data, which consisted of the tax records for homes on the same street as the marital home." It further stated that "the trial court also relied upon its internet research to choose a valuation date."
8. Although not cited in the opinion, the trial court also used *Zillow* to determine the approximate rental value of the second unit of the marital home for purposes related to an alimony award.
9. The Supreme Court held that "it is axiomatic that a trial court cannot go outside of the [evidentiary] record except as to matters judicially noticed."
10. New Hampshire Rule of Evidence 201 sets out the circumstances upon which the court may take judicial notice of facts. Although those rules do not strictly apply to divorce cases, the court found them to be instructive and concluded that the *Zillow* information utilized by the court was not "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" and therefore taking judicial notice of that information was not appropriate.

11. Although Judge Albee conspicuously noted her use of independent factual internet research in her final order, there was no indication that any consideration had been given as to whether the information acquired and utilized in her order, met the applicable standard for judicial notice.

12. Based upon the trial court's partial reliance upon internet research from outside the evidentiary record that failed to meet the standard for judicial notice in order to ascertain the value of the marital home and choose a valuation date, the New Hampshire Supreme Court found reversible error and set aside the trial court's property distribution and alimony award.

13. At the time of issuance of the Rokowski opinion by the Supreme Court, the Committee had pending a separate Complaint filed by Timothy Rioux, docketed on October 7, 2014 as JC-14-045-C. The Complaint arose in conjunction with a domestic relations case heard by Judge Albee entitled, In the Matter of Timothy Rioux and Lee Ann Rioux, Docket Number 212-1999-DM-0071. Although, after a review of the record in that matter, the Committee determined that the Complaint would be subject to dismissal as the factual allegations related solely to the judge's findings, rulings or decision, which in effect, was a substitute for an appeal, the Committee investigated the circumstances related to the approximately six-month delay in issuing a decision in that case.

14. As part of its preliminary investigation in the Rioux matter, the Committee received and reviewed Circuit Court Overdue Order Reports for 2013 and 2014 and spoke with Circuit Court Administrative Judge Edwin Kelly. The Committee also reviewed Overdue Order Reports through July of 2015.

15. Although the Rokowski and Rioux cases represented the most protracted delays in issuing decisions, Judge Albee consistently had multiple cases which were beyond the 30-day mark each month. This problem appeared to peak in 2014, where late decisions ranged from a low of seven in one month, to a high of twenty-one cases which were reported to be late and outstanding. Late decisions in 2015 were significantly lower.

16. Judge Albee filed a response as to the timeliness of her decisions in the Rioux matter on January 12, 2015 and to the inquiry of the Committee as to her independent factual research and timeliness of her decision in the Rokowski matter on October 8, 2015. On December 9, 2015, Judge Albee also responded to the Committee's inquiry as to whether she had conducted independent factual investigations extending outside of the case records in other cases. Her complete responses are a matter of public record and are summarized below.

17. Judge Albee concurs that it is axiomatic that a court may not go outside the evidence or introduce its own evidence and that doing so is inconsistent with the established role of the trial court in adversary litigation and a violation of the Code of Judicial Conduct Canon 2 Rule 2.9 C. She notes, however, that there may be a growing trend to allow internet research. While she does not dispute the court's determination that *Zillow* is not a reliable or an appropriate source from which judicial notice may be taken, she asserts that this determination was made subsequent to her utilizing that source. She further notes that her attempt to utilize that source was made in an effort to better inform her own general knowledge of an improving real estate market and to determine an updated value of the parties' marital home. Judge Albee now

realizes, however, that she failed to engage in a judicial notice analysis and asserts that she “unintentionally and misguidedly pushed the envelope and went beyond what is permissible.” She also conceded that this issue was raised in a timely filed request for reconsideration which she summarily denied and that, in hindsight, she should have ruled differently.

18. Judge Albee also informed the Committee that, although arguably not independent research on her part, she utilized information received in the mail from a local realtor in her decision issued on February 17, 2015 in another case entitled, In the Matter of Robert Beckwith and Kelly Beckwith, Docket Number 664-2011-DM-102. The issue before the court was again the value of the marital home and her decision indicated that she utilized the information in the solicitation to homeowners that she received to adjust the appraised values submitted into evidence by the parties to reflect the most recent stabilization and normalization in the housing market. The flyer attributed the description of the local housing market to the New Hampshire Association of Realtors which indicated that there had been the most unit sales in the last ten years along with the highest median price since 2008. Judge Albee indicated that this matter was not appealed and was subsequently resolved by the parties.

19. Judge Albee’s response to the delay in issuing a decision in the Rokowski matter, and the pattern of late decisions in other cases including the Rioux matter, is multifaceted. She asserts that the delay in issuing decisions is not for lack of diligence on her part. She cites the budget cut-backs, her having to preside in multiple court locations with extensive travel and the nature of her Family Division caseload, which requires written orders with substantial findings and rulings. Judge Albee also cited her extensive judicial duties in a high profile criminal matter in her court, which required countless hours to manage. She asserts that insufficient staffing of both judicial and non-judicial personnel in clerk’s offices, with little input from the judge in the organization and coordination of dockets, as well as the lack of administrative writing time, have been root causes of her own backlog of unwritten decisions. Judge Albee stated that she was not aware of the level of overdue orders until she was presented with an Overdue Order Report in May or June of 2014.

20. Judge Albee indicated that she has had multiple communications with Circuit Court Administrative Judge Edwin Kelly to address these issues. She indicated that she worked every weekend and during vacations but has been unable to get caught up. Although Judge Albee did not anticipate a major change in the speed with which orders get out, she believed that by providing her with more control over the court docket, a reasonable workload could be attained. In addressing the Rokowski case specifically, Judge Albee noted the five-month hiatus between the first and final day of hearing, evidence both as to the crowded nature of her dockets, which would not accommodate an earlier date, but also to emphasize the logistical problems this creates for a judge in re-engaging in the case and ultimately organizing the time and resources to write a complex decision.

21. Judge Kelly confirmed that he has been in frequent communication with Judge Albee concerning overdue orders. He confirmed that prior to 2013 she was not having difficulty in that regard. He did not believe that either judicial or non-judicial staffing patterns in the courts to which Judge Albee is assigned is significantly different from other courts throughout the state.

He stated that her caseload is consistent with those of other judges and, given the level of backlog of orders, he has actually provided her with considerably more writing time than any other judge in both 2013 and 2014. Although he did not concur that providing Judge Albee with more control over her own docket would yield significant results, he did indicate that her overdue orders were now trending downward.

22. The Committee also spoke with Clerk Elaine Lowe of the 3rd Circuit Court-Carroll County-District and Family Divisions-Conway. Clerk Lowe did not cite any problems with Judge Albee's attendance at court, punctuality or devotion of time to judicial duties. She concurred with Administrative Judge Kelly that clerical staffing patterns or problems were likely not a significant issue contributing to Judge Albee's delay in issuing written decisions, offering that this was more likely a time management issue on her part. She commented that Judge Albee relates well to staff and likes making a positive impact in the lives of the people who come before her.

23. Judge Albee sustained a serious injury from a fall in June of 2015 and has been on medical leave since that date. She has not returned to work on a full-time basis but has been working on overdue orders, which have now been cleared. On February 1, 2016 she retired as a full-time justice and has taken senior status which will allow her to be assigned on a part-time basis at the discretion of Judge Kelly.

III. RULINGS OF LAW

The Respondent and the Judicial Conduct Committee stipulate that the following Canon of the Code of Judicial Conduct was violated by clear and convincing evidence.

Canon 2

**A Judge shall perform the Duties of Judicial Office
Impartially, Competently and Diligently**

Rule 2.9 *Ex Parte* Communications

C. A Judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

24. Factual findings as set forth in Section II above are incorporated herein by reference.

25. In issuing a decision on June 4, 2015 in the case entitled, In the Matter of Tammy Rokowski and Shane Rokowski, Docket Number 630-2011-DM-104, Judge Albee independently investigated and considered facts not entered into evidence by the parties at the hearing.

26. Those facts were obtained from a source, which the New Hampshire Supreme Court determined on appeal of the above captioned case, not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned and therefore, judicial notice was not appropriate.
27. In issuing a decision on February 17, 2015 in the case entitled, In the Matter of Robert Beckwith and Kelly Beckwith, Docket Number 664-2011-DM-102, Judge Albee received and considered facts not put into evidence by the parties at the hearing.
28. It is stipulated that those facts were provided from a source from which judicial notice was not appropriate.
29. This conduct is a violation of Canon 2, Rule 2.9 C of the Code of Judicial Conduct.

The Respondent and the Judicial Conduct Committee stipulate that a violation of the following Canon of the Code of Judicial Conduct is not found, but that the Judge acted in a manner which involved behavior which requires attention and stipulate to dismissal with the issuance of a caution and recommendations for prudent future conduct.

Canon 2

**A Judge shall perform the Duties of Judicial Office
Impartially, Competently and Diligently**

Rule 2.5 Competence, Diligence and Cooperation

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

30. Factual findings as set forth in Section II above are incorporated by reference.
- 31.. Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matter under submission and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end (Comment [2], Rule 2.5).
32. Judges must therefore issue decisions in a timely manner.
33. While no bright line demarcation point has been set by statute, court rule or policy, a delay of thirteen months from the conclusion of the hearing to the issuance of a decision in the case entitled, In the Matter of Tammy Rokowski and Shane Rokowski, Docket Number 630-2011-DM-104, falls far short of reasonable expectations and standards for case processing of both the judicial branch and the public.

34. Similarly, the number of cases left undecided after 30 days, particularly in 2014, and the delay of over six months in the case entitled, In the Matter of Timothy Rioux and Lee Ann Rioux, Docket Number 212-1999—DM-0071, also fails to meet reasonable standards for decision-making by a judge.

35. The Committee considered Judge Albee's responses, which detail her explanation for the above delays, although those reasons were not generally supported by her administrative judge. However, other than the noted delay in issuing decisions, there was no evidence that Judge Albee, in other respects, was not devoting adequate time to judicial duties or attending court in a punctual and consistent manner.

36. Based on the above, the Committee determines that Judge Albee's conduct does not constitute a clear violation of the Code of Judicial Conduct warranting disciplinary action but that it does involve behavior requiring attention.

IV. DISPOSITIONAL ANALYSIS

Canon 2, Rule 2.9C

After determining the existence of clear and convincing evidence supporting the finding of a violation of Canon 2, Rule 2.9 C of the Code of Judicial Conduct by Judge Albee, the Committee examines the factors identified by the New Hampshire Supreme Court pursuant to its decision, In Re: Coffey's Case, 157 N.N.156 (2008) in determining a sanction.

Specifically, the Committee considers the nature of the misconduct, the extent of the misconduct, the judge's culpability, the judge's conduct in response to the Committee's inquiry and disciplinary proceedings and the judge's reputation and record on the bench.

A. The Nature of the Conduct:

The conduct occurred in the judge's official capacity. Although she knowingly conducted research outside the evidence presented, there was no indication that it was conducted in bad faith or for personal gain.

B. The Extent of the Conduct:

These events occurred in two isolated incidents. Although the aggrieved party in Rokowski was required to appeal the inclusion of independent research in the decision, other issues were presented as well. Given the nature of the conduct, there is no substantial basis to conclude that there has been actual or potential harm to the court system as a result of these actions.

C. The Judge's Culpability:

Canon 2, Rule 2.9 B is unequivocal and directly prohibits the conduct as issue. Compliance with this principle is central to our adversary system of justice. Judges are keenly

aware of this prohibition and there was no indication that personal or other issues caused this momentary lapse in judgment.

D. The Judge's Conduct in Response to the Committee's Inquiry and Disciplinary Proceedings.

Judge Albee was completely cooperative with the Committee and its investigation. She responded timely and thoroughly to requests for information, and immediately acknowledged that her conduct violated the applicable code provision, and has consented to this resolution.

E. The Judge's Reputation and Record on the Bench

Judge Albee has been a judge since 1989 and has no prior disciplinary record. She was recently recognized by the New Hampshire Bar Association for her judicial professionalism.

Canon 2, Rule 2.5A

Consistent with the Rulings of Law in Section III, this Code provision is being dismissed with a caution. The Committee notes that Judge Albee retired as a full-time justice on February 1, 2016 and took Senior Status which will allow her to serve on a part-time basis at the discretion of the Administrative Judge of the Circuit Court.

Judge Albee is presently on medical leave and is not hearing cases. Her orders are now current. It is the understanding of the Committee that any future assignments will be tailored and monitored to ensure that problems with past due written orders will be alleviated.

V. STIPULATED DISPOSITION

Upon a finding that Judge Albee has violated Canon 2, Rule 2.9 C, based on the above dispositional analysis, the Committee finds that the violation is not of a sufficiently serious nature to warrant the imposition of formal discipline by the court. Pursuant to Supreme Court Rule 40(8)(f)(2) and with the consent of Judge Albee, the Committee issues this Reprimand. The Committee urges that Judge Albee refrain from conducting factual investigations outside the evidentiary record of the hearing or utilizing that information in her decision-making process unless she follows the procedure and substantive guidance contained in New Hampshire Rule of Evidence 201 applicable to judicial notice.

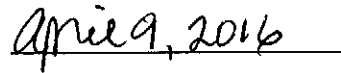
Pursuant to Supreme Court Rule 40(8)(f)(1), the Committee determines that a clear violation of Canon 2, Rule 2.5A is not found but that the judge acted in a manner which requires attention and Judge Albee stipulates and consents to resolution of that Code provision by its dismissal with the issuance of this caution. Delays in rendering judicial decisions have negative consequences not only for the parties but for the overall administration of justice and must be avoided in the future. It is recommended that Judge Albee, in conjunction with her Administrative Judge, closely monitor her caseload and pending decisions, and that she not

accept ongoing assignments as a senior judge if she has written orders pending which are overdue or where she is not confident that she will be able to render a timely decision.

Judge Albee has stipulated to resolve these matters by way of her agreement to accept the attached Reprimand and Caution from the Judicial Conduct Committee. By entering into this stipulation, she has waived her right to a public hearing pursuant to New Hampshire Supreme Court Rule 40 (9) and herein agrees that the attached Reprimand and Caution will serve as the official record of these proceedings.



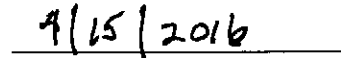
Robert O. Wilson, DDS, Chair



Date



Judge Pamela D. Albee



Date