

Judicial Conduct Board
Commonwealth of Pennsylvania
717-234-7911

Press Release

TO: Media/Press

FROM: Judicial Conduct Board

DATE: January 15, 2010

SUBJECT: Judicial Conduct Board Reply to Response of the Inter-branch
Commission on Juvenile Justice ("ICJJ")

The Judicial Conduct Board of Pennsylvania has filed the attached Reply to Response of the "ICJJ" with the Pennsylvania Supreme Court.

The full text of the Reply to Response is attached.

Contact: Paul H. Titus, Esquire, Outside Counsel to the Judicial Conduct Board,
ptitus@schnader.com or 412-577-5224.

For more information about the Judicial Conduct Board, please visit our website at
www.jcbpa.org.

Attachment

#END#

**IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 53 WM 2009

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA,

Petitioner

v.

INTERBRANCH COMMISSION ON JUVENILE JUSTICE,

Respondent

**REPLY TO RESPONSE OF INTERBRANCH COMMISSION ON JUVENILE JUSTICE
TO THE JUDICIAL CONDUCT BOARD'S APPLICATION FOR RELIEF PURSUANT
TO THIS COURT'S ORDER OF NOVEMBER 6, 2009 IN THIS MATTER**

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**REPLY TO RESPONSE OF INTERBRANCH COMMISSION ON JUVENILE
JUSTICE TO THE JUDICIAL CONDUCT BOARD'S APPLICATION FOR
RELIEF PURSUANT TO THIS COURT'S ORDER OF NOVEMBER 6, 2009 IN
THIS MATTER**

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

On December 30, 2009, the Judicial Conduct Board filed an Application for Relief Pursuant to This Honorable Court's Order of November 6, 2009 in This Matter ("Application for Relief"), respectfully requesting that this Court uphold objections to certain questions asked of the Board's Chief Counsel and a Board member at the December 8, 2009 hearing held by the Interbranch Commission on Juvenile Justice, and objections to certain document requests made by the Commission on the grounds of confidentiality under Article V, Section 18(a)(8) of the Pennsylvania Constitution. The Board also respectfully requested that this Court prevent the Commission from compelling answers to these questions and from compelling the production of any documents pursuant to subpoena.

Following the Board's Application for Relief, the Commission served a subpoena *duces tecum* on the Board on January 5, 2010, calling for the production of a wide range of documents related to its investigation of allegations of judicial misconduct in Luzerne County. The Board promptly filed its Response and Objections to the subpoena *duces tecum* with the Commission. (Copies of the subpoena *duces tecum* and the Board's Response and Objections are attached hereto as Exhibit A.) The Commission then filed a Response to the Board's Application for Relief, claiming, without support, that it qualifies as an "appropriate agency" under the Board's Rules of Procedure and,

thus, is entitled to this confidential information. This unsupported contention must be rejected. The Commission itself acknowledges that “[a]s a necessary investigative aid,” it holds “*public hearings* for the taking of testimony and the requesting of documents.” Response at 2 (emphasis added). Thus, the Commission asks the Board to do precisely what the Pennsylvania Constitution forbids: publicly disclose confidential information involving Board investigations. The Commission is not an “appropriate agency” under the Board’s Rules, and its argument to the contrary must be rejected.

ARGUMENT

As an initial matter, it is important to recognize that the Board’s role is to investigate and determine whether the conduct of judges comports with the standards set for judicial behavior. While criminal conduct clearly violates a judge's duty to the public set forth in the Code of Judicial Conduct, the Board is not a criminal law enforcement agency under the Constitution and the laws of the Commonwealth. Moreover, the Board simply lacks the staff and resources needed to investigate the type of criminal behavior which occurred in Luzerne County—where it took at least three years and the combined resources of the F.B.I., I.R.S., and the U.S. Attorney’s Office to bring criminal charges. Not only does the Board lack the internal resources to have conducted such an investigation but it also is devoid of the power to convene a grand jury, access federal and state law enforcement data bases, and employ prosecutorial conventions such as the granting of immunity. An additional reason for deferral is that criminal charges and the consequences of federal prosecution could result in imprisonment and fines, remedies that are beyond the reach of the Court of Judicial Discipline before whom the Board would initiate its charges.

Against this backdrop, the Commission’s sole contention in its Response to the Board’s Application for Relief is that it qualifies as an “appropriate agency” under Judicial Conduct Board Rule of Procedure 18, which, according to the Commission, entitles it to confidential information about Board investigations. For the reasons set forth below, the Commission is not an appropriate agency under Rule 18. Indeed, nothing in the Board’s Response alters the conclusion mandated by the Pennsylvania Constitution and this Court’s jurisprudence—the Board may not disclose the information to the Commission.

As explained in the Board’s Application for Relief, the Pennsylvania Constitution plainly forbids the Board from disclosing this confidential information to the Commission. PA. CONST. art. V, § 18(a)(8) (“Complaints filed with the board or initiated by the board shall not be public information. . . . [I]nformation or evidence acquired by the board in the conduct of an investigation shall not be public information [and] . . . [a]ll proceedings of the board shall be confidential”); *see* Application for Relief at 4-6. In apparent recognition of the fact that its request for public information flies in the face of this clear constitutional mandate, the Commission instead argues that it fits into a narrow provision in the Board’s Rules, which, in limited circumstances, permit certain types of information to be disclosed to an “appropriate” agency. More specifically, “[i]nformation related to violations of the criminal laws may be disclosed to the appropriate governmental agency,” and “[i]nformation related to violations of rules of professional conduct may be disclosed to the appropriate agency.” 207 Pa. Code ch. 109 Rule 18(C), (D).

The Commission simply does not qualify as an appropriate agency under Rule 18. The agencies referred to under that provision are those which, in accordance with the command of the Constitution, safeguard the information's confidentiality, such as federal and state law enforcement and prosecuting entities. This furthers the Board's purpose by ensuring that, where warranted, specific instances of judicial misconduct are addressed by those appropriate prosecuting agencies. Conversely, the Commission's broad role, while important, is purely investigatory and instructional; as the Commission indicates, unlike a federal prosecutor's office or a grand jury, it has no prosecutorial, legislative, or regulatory authority. *See, e.g.*, Response at 4 (“[T]he purpose of the Commission's request is informational rather than prosecutorial . . .”). The Commission has cited no authority for its bald assertion that it is an appropriate agency and, given the nature of the Commission, it clearly cannot be considered one. Under these circumstances, the Board cannot accede to public disclosure of information regarding its investigations; to do otherwise would flout the clear mandate of the Constitution.¹

Indeed, this Court has already recognized that the Constitution forbids the Board from disclosing confidential information to investigatory entities like the Interbranch Commission, despite the significant interests at stake. In *In re Petition for*

¹ The Commission incorrectly insists that the Board, by sharing certain information with the federal prosecutor's office and in grand jury proceedings, has “selectively” invoked confidentiality toward the Commission and that this somehow translates to requiring the Board to disclose that information now. This unsupported contention must be rejected. The Board's practice of disclosing certain information to the federal prosecutor's office and during grand jury proceedings is wholly consistent with the Constitution and Rule 18. The prosecutor's office is precisely the type of agency covered by Rule 18, and the information in those instances remains confidential until charges have been filed. *See In re Petition for Enforcement of a Subpoena to the Pa. Jud. Inquiry and Rev. Bd.*, 512 Pa. 496, 507, 517 A.2d 949, 955 (1986) (explaining that confidentiality may, in certain circumstances, be balanced with law enforcement efforts by disclosure during grand jury proceedings and to prosecutors).

Enforcement of a Subpoena to the Pennsylvania Judicial Inquiry and Review Board, 512 Pa. 496, 517 A.2d 949 (1986), this Court affirmed the Commonwealth Court’s quashing of a subpoena requesting the Board’s predecessor to provide the Pennsylvania Crime Commission with confidential information regarding the investigation of a certain justice. Importantly, this Court rejected the Crime Commission’s contention that its statutorily-proscribed duties—which, similar to the role of the Interbranch Commission, involved making inquiries into public corruption—entitled it to the confidential information. *Id.* at 506-09, 517 A.2d at 954-56.

Like in *In re Petition*, this case, “[s]tripped to its most basic elements,” involves a “conflict between a constitutionally based privilege and a general statutory right of access.” *Id.* at 507, 517 A.2d at 955. In such instances, the law is settled: “In the framework of our governmental system it is clear that the constitutional rule of law is more fundamental and must prevail.” *Id.* Accordingly, the Commission’s argument that it is entitled to the Board’s confidential information must be rejected.

The Board recognizes that the Commission has an important role to the Commonwealth, but so too is the mission of the Board to fully and fairly investigate complaints of judicial misconduct. Article V, Section 18(a)(8) makes clear that confidentiality is essential to fulfilling that role. *See, e.g., First Amendment Coalition v. Jud. Inquiry & Rev. Bd.*, 784 F.2d 467, 475 (3d Cir. 1986) (“The notion that the effectiveness of judicial disciplinary boards depends to a large extent on confidentiality is not unique to Pennsylvania; the idea has been almost universally accepted.”); *see generally Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 835 (1978) (discussing

the advantages to confidentiality in judicial disciplinary proceedings, including encouraging the filing of complaints, protecting judges from unfounded complaints, and preserving confidence in the judiciary).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant its Application for Relief Pursuant to This Honorable Court's Order of November 6, 2009 in This Matter, so as to protect the important constitutional provision at stake.

Respectfully submitted,

Arlin M. Adams (I.D. No. 2601)
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*Attorneys for the Judicial Conduct Board of
Pennsylvania*

BY:


Paul H. Titus

Dated: January 15, 2010.

Exhibit A



COMMONWEALTH OF PENNSYLVANIA
INTERBRANCH COMMISSION ON JUVENILE JUSTICE

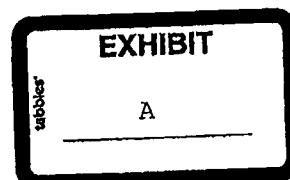
SUBPOENA DUCES TECUM

To: The Pennsylvania Judicial Conduct Board
601 Commonwealth Avenue
Suite 3500
Harrisburg, PA 17120

Attention: Joseph Massa, Esquire

Within twenty (20) days after service of this subpoena, you are hereby ordered by the Interbranch Commission Juvenile Justice ("Commission") to produce the following documents or things:

1. The "first anonymous complaint" filed against former judge Conahan, identified by the Judicial Conduct Board ("JCB") in its September 10, 2009 response brief in the case of *In re Ann H. Lokuta*, 3 JD 2006. See 9/10/2009 JCB Brief filed pursuant to the Court Order dated 5/13/2009 (hereinafter "JCB Brief") pg. 19, point 1.
2. All preliminary and final investigative reports prepared in connection with the first anonymous complaint (as identified in JCB Brief pg. 19, point 2).
3. All preliminary and final investigative reports prepared in connection with the "second anonymous complaint" (as identified in the JCB Brief pg 19, point 3).
4. Any notes, reports, correspondence, e-mails or any writings whatsoever that mention, detail or confirm the conversation between Chief Counsel Massa and former judge Conahan or his attorney regarding the waiver of confidentiality relating to the release of information in the JCB Brief. See JCB Brief page 19.

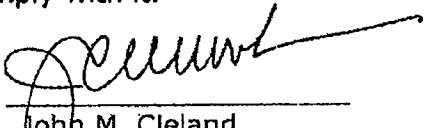


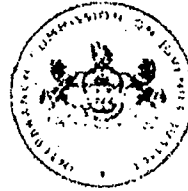
5. Any other documents or e-mail communications relating to the first or second anonymous complaints (as referred to in the JCB Brief) relating to the investigation, reports, recommendations, and any JCB action on those complaints.
6. The 2008 complaint against former judge Conahan and/or former judge Ciaverella identified by JCB member Edwin L. Klett during his December 2009 testimony before the Interbranch Commission on Juvenile Justice. (See 12/8/2009 ICJJ transcript pages 111-113).
7. Any and all complaints, anonymous or otherwise, received against either former judge Conahan or former judge Ciaverella during their tenure as judges sitting on the Court of Common Pleas of Luzerne County.
8. Any and all Letters of Caution and/or Letters of Counsel issued to former judge Conahan or former judge Ciaverella during their tenure as judges sitting on the Court of Common Pleas of Luzerne County.
9. Any and all preliminary and/or final investigative reports prepared in connection with any investigations involving former judge Conahan and/or former judge Ciaverella during their tenure as judges sitting on the Court of Common Pleas of Luzerne County.
10. The email from Attorney Paul Titus to the Philadelphia Inquirer as referenced in the December 26, 2009 article "Oversight of Pa. Judges is Wrapped in Secrecy" written by William Ecenbarger in the Philadelphia Inquirer.

You may deliver or mail legible copies of the documents or produce things requested by this subpoena, together with the certificate of compliance, to the attention and address of Commission Counsel identified below. You have the right to seek in advance the reasonable cost of preparing the copies or producing the things sought.

If you fail to produce the documents or things required by this subpoena within twenty (20) days after its service, the Commission may seek a court order compelling you to comply with it.

Date: 1/5/2010

BY: 
Hon. John M. Cleland
Chairman



Documents must be submitted to:

Darren M. Breslin, Esquire
1515 Market Street, Suite 1414
Philadelphia, PA 19102
(215) 560-6300, Ext. 6211

CERTIFICATE OF COMPLIENCE

To: Pennsylvania Judicial Conduct Board, Attention Joseph Massa,
Esquire

You are required to complete the following Certificate of Compliance
when producing documents or things pursuant to this subpoena.

**CERTIFICATE OF COMPLIANCE WITH INTERBRANCH COMMISSION ON
JUVENILE JUSTICE SUBPOENA TO PRODUCE DOCUMENTS OR THINGS**

I, _____ certify to the best of my knowledge,
information and belief that all documents or things required to be
produced pursuant to the subpoena issued on January 5, 2010 have
been produced.

I declare that the statements in this Certificate of Compliance are true
and correct. I understand that false statements herein are made
subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn
falsification to authorities.

Date

Signature

RESPONSE AND OBJECTIONS TO SUBPOENA DUCES TECUM

To: Interbranch Commission on Juvenile Justice
c/o Darren M. Breslin, Esquire
1515 Market Street, Suite 1414
Philadelphia, Pennsylvania 19102

The Pennsylvania Judicial Conduct Board hereby responds or objects to the Subpoena *Duces Tecum* served on it and dated January 5, 2010. (A copy of said Subpoena is attached hereto as Exhibit "A".) The specific objections or responses are as follows:

1. The Pennsylvania Judicial Conduct Board cannot produce this document by reason of the provisions of Article V, Section 18 of the *Constitution of Pennsylvania*.
2. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
3. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
4. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
5. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
6. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
7. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.

8. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1.
9. The Pennsylvania Judicial Conduct Board cannot produce the documents requested by this item for the reasons set forth in response to Request No. 1
10. A copy of the document requested in this item is attached to this Response and Objections as Exhibit "B".

Given the objections and responses set forth above, there is no necessity for filing of a Certificate of Compliance in this matter.

Respectfully submitted,



Paul H. Titus (Pa. I.D. # 01399)
SCHNADER HARRISON SEGAL & LEWIS LLP
Suite 2700, Fifth Avenue Place
120 Fifth Avenue
Pittsburgh, Pennsylvania 15222-3001
(412) 577-5200

Dated: January 8, 2010

*Attorneys for the Pennsylvania Judicial
Conduct Board*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above **Response and Objections to Subpoena** *Duces Tecum* has been served upon the Interbranch Commission on Juvenile Justice by electronic transmission to Darren M. Breslin @ *pacourts.us* and by First Class Mail, postage prepaid, addressed as follows:

Darren M. Breslin, Esquire
1515 Market Street, Suite 1414
Philadelphia, PA 19102

Dated: January 8, 2010



Paul H. Titus

VERIFICATION

I, Edwin L. Klett, hereby verify that I am a Member of the Judicial Conduct Board of Pennsylvania and that I am authorized to verify on its behalf the foregoing Reply to Response of Interbranch Commission on Juvenile Justice of the Judicial Conduct Board's Application for Relief Pursuant to This Honorable Court's Order of November 6, 2009 in This Matter. The statements set forth in this Reply are true and correct to the best of my knowledge, information, and belief. This verification is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn verifications.

Date: January 14, 2010


Edwin L. Klett

CERTIFICATE OF SERVICE

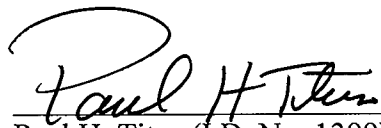
I, Paul H. Titus, hereby certify that on this 15th day of January, 2010, I caused to be served the foregoing Reply to Response of Interbranch Commission on Juvenile Justice of the Judicial Conduct Board's Application for Relief Pursuant to This Court's Order of November 6, 2009 in This Matter by electronic transmission and first class mail on the following:

The Honorable John M. Cleland
Superior Court of Pennsylvania
P.O. Box 774
4355 Route Six
Kane, PA 16735
Fax: (814) 837-1506

*Chair, Interbranch Commission
on Juvenile Justice*

Arthur H. Stroyd, Jr.
Del Sole Cavanaugh Stroyd LLC
Waterfront Building
200 First Avenue, Suite 300
Pittsburgh, PA 15222
Fax: (412) 261-2110

*Counsel, Interbranch Commission
on Juvenile Justice*



Paul H. Titus (I.D. No. 1399)