

Findings of Fact, Analysis and Recommendations

To: Sixth Circuit Judicial Council
From: Sixth Circuit Judicial Council's Standing Investigating Committee
Date: September 22, 2010
Re: Complaint 06-08-90031 (Judge George C. Paine, II, Chief Bankruptcy
Judge, Middle District of Tennessee (Nashville))

INTRODUCTION AND PROCEDURAL BACKGROUND

[REDACTED] ("Complainant") has filed a Complaint of Judicial Misconduct (the "Complaint") against Judge George C. Paine, II, Chief Bankruptcy Judge for the Middle District of Tennessee at Nashville ("Judge Paine" or "Respondent"). The Complaint alleges that the Judge's membership in the Belle Meade Country Club (the "Country Club" or the "Club") violates Canon 2A and 2C of the Code of Conduct for United States Judges.

The Judge was advised of the Complaint and submitted a letter response to Chief Judge Danny Boggs on March 17, 2009. On or about June 10, 2009, Judge Boggs entered an Order dismissing the Complaint. On July 2, 2009, the Complainant petitioned for review of the dismissal of her Complaint and provided additional information in support of her allegations. The investigation by the Sixth Circuit Judicial Council's Standing Investigation Committee (the "Committee") ensued and included the following activities conducted by outside counsel retained by the Committee:

- * In person and recorded interview of Complainant, [REDACTED]
- * In person and recorded interview of Alex Friedmann ("Mr. Friedmann") who assisted Complainant in preparing Complaint and gathering supporting materials. He is the Associate Editor of the Human Rights Defense Center's publication *Prison Legal News*. He is also the President of Private Corrections Institute, a non-profit organization based in Florida, that works to educate the public and policy makers about the effects of prison privatization. Mr. Friedmann was involved in a campaign to defeat the nomination of a candidate for a federal district court judgeship in Tennessee. A basis for the opposition against the judicial candidate was his membership in the Country Club. Complainant worked with Mr. Friedmann at Prison Legal News from the end of 2007 through 2008.
- * In person and recorded interview of Respondent, Judge Paine.
- * In person and recorded interview of Judge Gilbert Merritt ("Judge Merritt"), United States Court of Appeals for the Sixth Circuit, who is a Honorary Resident member of the Country Club.
- * In person and recorded interview of Ridley Wills, II ("Mr. Wills"), a Nashville historian and author of *Belle Meade Country Club, The First Hundred Years*, a book on which Complainant relied in part in support of

her Complaint. He too is a Honorary Resident member of the Country Club.

- * Telephonic and recorded interview of Bob Boston ("Mr. Boston"), an attorney with Waller, Lansden, Dortch and Davis, LLP, who is representing Judge Paine in this matter. He is a Resident member of the Country Club, a past member of the Country Club's Board of Directors and the most immediate past Secretary of the Board of Directors of the Country Club. Mr. Boston appears to be on the Club's Membership Committee as well. The identities of the members of this Committee are to be known only to the President of the Country Club. As such, Mr. Boston declined to specifically acknowledge his role on the Membership Committee on the record, but implicitly confirmed his service on that Committee.¹

¹ Bob Boston's role in this matter is quite involved and it appears that the County Club has designated him as its spokesperson for this matter. He initially contacted counsel for the Committee advising of his representation of Judge Paine in this matter in advance of Judge Paine's interview. During counsel's interview of Judge Paine, Mr. Boston responded to a question posed to Judge Paine clarifying Judge Paine's answer. At that point, counsel learned for the first time that Mr. Boston is also a Resident member of the Country Club with a wealth of knowledge of the Club's membership and membership practices. He occasionally offered clarification and additional information during Judge Paine's interview. Counsel permitted that to a point, but eventually requested that Mr. Boston or some other member of the Board of the Country Club give a recorded, under oath, interview. Mr. Boston sought, and was granted, permission from the Country Club and Judge Paine to give an interview. Mr. Boston advised that he also periodically serves as counsel for the Country Club in various matters. Mr. Boston has served on the Board of the Club as the immediate past Secretary and appears to be currently serving on the Club's Membership Committee.

- * Communications with Judge Paine initiated by Chair Judge Tom Russell in which Judge Paine verbally waived any right to a post-investigation hearing.

Based on the investigation that has been conducted,² the Complaint and supporting materials, and Judge's Paine's written response, all of which the Committee has duly considered, the Committee's findings are set forth below.

FINDINGS OF FACT

1. Belle Meade Country Club is a private, social club in Nashville, Tennessee.
2. The members of the Country Club are classified as Resident, Honorary Resident, Associate Resident, Non-Resident, Lady members (unmarried females 18 years of age or older in Davidson County, Tennessee or within 100 miles of Davidson County), and Ministers of Gospel, as defined in Article IV/Members of the Country Club's Constitution. (See Exhibit 3: Belle Meade Country Club 2009 Membership Roster and Club Rules, Judge Paine's interview transcript).
3. The Resident members alone, and to the exclusion of all other classes of membership, shall have the right to control, manage, vote and hold office in the Club, except that a member of the Board of Directors who transfers from Resident to Honorary Resident member shall continue in his role as a member of the Board of Directors until the end of his elected term with continued voting and management rights during that time. *Id.*
4. The number of Resident members is capped at 625 while the limit of Lady and Associate Resident members is 175 in each category. The combined number of Resident members and Associate Resident members cannot exceed 750. *Id.*

² Efforts were made to secure an interview of Ed Nelson, a member of the Country Club and a former Board President, who has been quoted in the Nashville press stating that women cannot be Resident members of the Country Club. Mr. Nelson refused to be interviewed. Counsel wrote Mr. Nelson requesting an interview and he responded through a letter from Mr. Boston declining. Mr. Boston's letter did not specifically state that he was acting as counsel to Mr. Nelson or the Country Club, but his letter further suggests that he is the Country Club's representative in this matter.

5. Resident membership in the Country Club requires that the member pay a \$40,000 entrance fee, a \$10,000 Certificate of Membership fee and \$534.00 of monthly dues. Lady membership requires that the member pay an entrance fee of \$10,000 and monthly dues of \$344.00. *Id.*

6. Lady membership has historically been a category of membership for widows of Resident, Honorary, Associate or Non-Resident members.

7. It takes two Resident members to propose a candidate for membership. Proposals are presented by the Secretary to the Board of Directors. If no Board member objects, then proposals are sent to Membership Committee by the President. Proposals are then posted publicly in the Club for comment for at least ten days. Objections by any member(s) are sent to the President or Secretary for dissemination to the Board of Directors and Membership Committee. The Membership Committee notifies President of approved proposals, which approval must be unanimous. Proposals approved by Membership Committee must be presented to Board for unanimous consent from Board for final election to membership. Acceptance of membership is conditioned on candidate agreeing in writing to abide by terms of Club's governing documents. Following election by the Board, and subject to the limitations in the number of memberships by class, Secretary of Club notifies elected member. *Id.* at Article V/Proposals for Membership.

8. Resident members of the Club may propose only one, and second only one, proposal for membership at a time. *Id.*

9. Judge Paine is a Resident Member of the Country Club and has been since 1978.

10. Judge Paine has never held any leadership positions within the Country Club. He has never been to a membership meeting or voted on Country Club business, including candidates for membership which are voted on by Club's Membership Committee and Board of Directors.

11. There is one African American member of the Country Club, Richard Sinkfield. He is a Non-Resident member.

12. There are no African American Resident members of the Country Club, but there are no prohibitions against an African American being a Resident member.

13. There are no women who are Resident members of the Country Club, but there are no restrictions against a woman being a Resident member.³

14. At least two women have been approached about seeking Resident members status, but declined.

15. A number of African American candidates have been approached about being sponsored for Resident membership but declined, including but not limited to Dr. Andre Churchwell and his brother.

16. There was an African American who was on the cusp of being elected to membership when his business collapsed and he withdrew his proposal for membership.

17. There are gay, Jewish, and other non-African American persons of color who are Resident members of the Country Club.

18. Women can serve on Club committees and can vote on and otherwise influence Club business in those roles.

19. There are Caucasians who have been proposed for membership and rejected.

20. There have not been any persons of color or women who have been proposed for Resident member status and rejected by the Country Club.

³ There is conflicting evidence as to whether a woman can be a Resident member of the Country Club. Judge Paine and Mr. Boston stated under oath that women can be Resident members of the Country Club, but are choosing Lady Member status because of the cost savings associated with that class of membership. Judge Merritt stated under oath that he is unaware of any prohibition against women being Resident members, but he can't be sure that women are permitted to be Resident members because none have ever sought Resident member status. He acknowledged that the Country Club's membership policies with respect to female members may be ambiguous and expressed his desire for the Club to be clear that women can be Resident members. Mr. Wills stated under oath that he didn't think a woman could be a Resident member of the Club. He was somewhat equivocal in his testimony on that point. Finally, Mr. Nelson has been quoted in the press as stating emphatically that woman cannot be Resident members of the Club. Considering Mr. Wills' equivocation on this point and Mr. Nelson's refusal to be interviewed, the Committee's finding that there is no prohibition against a woman being a Resident member is based on the testimony of three long-time members of the Country Club, including one who has served on the Club's Board of Directors and Membership Committee and as the Club's immediate past Secretary in Mr. Boston. The weight of the evidence dictates a finding that women can be Resident members, but that none have chosen to pursue that membership status.

21. There are approximately six or seven African Americans whose proposals for membership are being developed for inclusion in the membership process and for presentation to the Board of Directors.

22. There are two African Americans with Resident membership proposals currently pending, David Ewing and Daryl Freeman. Their membership proposals have been pending for approximately four or five years, but to date neither candidate has been formally rejected for membership.

23. A four to five year period for a pending membership proposal is not out of the ordinary. Some membership proposals for Resident member status are approved in as little as eighteen months, while one proposal remained pending for eleven years before being approved. Those membership proposals that are approved in the eighteen-month time frame typically involve well known and influential individuals (i.e., Chancellor of Vanderbilt) or children of members.

24. Judge Paine has been active in promoting African Americans for Resident member status at the Country Club. Specifically, Judge Paine and another Non-Resident member are co-sponsoring Daryl Freeman's membership proposal. As one of Mr. Freeman's sponsors, Judge Paine is introducing Mr. Freeman around the Club, taking him to lunches and dinners, and soliciting letters of recommendation all as part of the membership process. Approximately seven years ago Judge Paine attempted to persuade another African American gentleman to join Club. The candidate chose another Country Club with what he perceived to be a better swimming program. Judge Paine has sought to propose eight to ten African Americans for membership. All have declined except for Daryl Freeman who Judge Paine is currently sponsoring for membership. Approximately 15 years ago, Judge Paine wrote a letter to the Country Club's Board demanding that it increase the diversity in the Club's membership.

ANALYSIS

Complainant alleges a violation of Canon 2A and 2C of the Code of Conduct for United States Judges which provide as follows:

**CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND
THE APPEARANCE OF IMPROPRIETY IN ALL
ACTIVITIES**

- A. *Respect. For Law.* A judge should respect and comply with the law and should act at all times in a manner

that promotes public confidence in the integrity and impartiality of the judiciary. . . .

- C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

(bold and italics emphasis in original). The Commentary to Canon 2A provides that “an appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.” The Commentary further provides that the conduct implicated by Canon 2A applies to both professional and personal misconduct.

With regard to Canon 2C, the Commentary provides in pertinent part:

Membership of a judge in an organization that practices invidious discrimination gives rise to the perceptions that the judge’s impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which the judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. . . . Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. **Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious**

discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted for membership.

...

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons [sic] 2A, the Judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization. (citations omitted).

Without ignoring the alleged violation of Canon 2A, the focus of the analysis is on Canon 2C. It seems clear that active membership in an organization that invidiously discriminates on the basis of race, sex, religion or national origin would necessarily call into question the fitness of a judge to serve the diverse litigants who may appear in the Judge's court and give the appearance of impropriety. It follows that any finding of a violation of Canon 2C inherently includes a violation of Canon 2A.

At the outset, the Committee acknowledges Judge Paine's personal efforts to increase the diversity in the Country Club's membership. He is currently sponsoring an African American candidate who has a pending proposal for Resident membership assisting the candidate in meeting members of the Club and otherwise attempting to position him for election as a Resident member. The Country Club's governing documents prevent him from sponsoring or offering a "second" to another candidate while Mr. Freeman's proposal for membership is pending. Judge Paine has also made

efforts in the past to diversify the Club's membership with his letter to Club approximately fifteen years ago demanding that increase diversity become a Club priority and his unsuccessful attempt to persuade an African American to pursue Resident member status approximately seven years ago. The Commentary to Canon 2C acknowledges an alternative to immediate resignation if a judge determines that an organization to which he or she belongs engages in invidious discrimination. Judge Paine does not believe the Club invidiously discriminates such that the Commentary's two year deadline for resignation from the Club is triggered, but has nonetheless made efforts to add diversity to the Club's membership rolls. These efforts are not dispositive of the question of whether the Country Club invidiously discriminates, but in the context of this investigation - whether Judge Paine holds membership in an organization that practices invidious discrimination - his activities are factors relevant to the analysis.

It is undisputed that while there is an African American Non-Resident member, the Country Club does not have any African American or women Resident members. However, the Commentary for Canon 2C cautions against "a mere examination of an organization's current membership rolls" or a conclusion that there is invidious discrimination based on the "mere absence of diverse membership." The Commentary suggests evaluating how the organization selects its members and other relevant factors. Indeed, there is evidence in this record that women vote on and influence Country Club business through service on various committees. There is no evidence

that the proposals of either of the African Americans with pending proposals for membership are being delayed due to their race or that their proposals have been pending for longer than is typical. Additionally, there are women and African Americans who have been approached about seeking Resident membership but declined for various reasons.

This Committee must credit the efforts, of Judge Paine and others, that are being made to diversify the Resident membership class by seeking out women and African Americans for membership. But, the Committee cannot credit those efforts and then hold it against the Country Club and its members, like Judge Paine, when those women and African Americans who were sought out for Resident membership decline. It is not unreasonable to assume that women would select Lady membership over Resident membership in light of the amount of money to be saved by choosing Lady member status. Likewise, it is not irrational for someone, including women and African Americans, to decline membership altogether in light of the significant cost of membership. There are any number of reasons why there are no women or African American Resident members of the Country Club and to automatically assume discrimination as the reason for the lack of women and African American Resident members ignores the complexity of the issues recognized by the Commentary to Canon 2C.

Another relevant factor to be considered, along with the presence of an African American Non-Resident member, is that there are gay, Jewish and other non-African

American persons of color who are Resident members of the Country Club. Their presence on the membership rolls contradicts a belief that the Country Club is arbitrarily excluding members on the basis of race, religion, or national origin. Further, women can participate in and influence Country Club business through service on Club committees.

If the inquiry were a different one – namely, could the Country Club be doing more to diversify its membership, could the Club make it more clear that women may be Resident members, or are there individual members who might prefer to keep women and/or African Americans out of the Resident member ranks -- then this record may well provide sufficient grounds for an indictment of the Country Club or at least grounds for further investigation. This, however, is not the inquiry and the investigation has not revealed that the Country Club practices invidious discrimination on the basis of race, sex, religion, or national origin.

To be clear, the Committee's Findings, Analysis and Recommendations are not intended to applaud or congratulate the Country Club on its membership practices or its efforts to diversify the membership of the Club. The Committee does not believe that the Country Club is doing all that is possible and necessary to add diversity to the Club's membership, particularly Resident membership. Yet, the Committee has focused its investigation and analysis on the more narrow inquiry, whether Judge Paine is a member of an organization that practices invidious discrimination. In the context of

a charge against Judge Paine, the investigation has not shown that the Country Club is arbitrarily excluding African Americans or women from Resident membership.

RECOMMENDATIONS

Understanding the value to the Council of some discussion applying the facts to the guidelines of Canon 2A and 2C that would support the opposite conclusion – that the Country Club does engage in invidious discrimination – the Committee and its counsel attempted without success to develop a credible framework for such an argument. The key component of an alternative conclusion would be a prohibition against women being Resident members. While there is some evidence in the record to that effect, there is other credible contrary evidence that women can be Resident members even though no women have applied for Resident member status. To say that the Country Club invidiously discriminates when there is an African American Non-Resident member, there are gay, Jewish and other non-African American minority Resident members, there are applications of two African Americans currently pending for Resident member status and there are ongoing efforts to present other African Americans for Resident membership would be a blatant disregard for the evidence that the investigation has revealed.

Therefore, it is recommended that the Council adopt these proposed Findings of Fact and Analysis toward a conclusion that Judge Paine's membership in the Country Club is not a violation of either Canon 2A or 2C of the Code of Conduct for United States Judges. It is the Committee's opinion that a contrary conclusion is not supported

by the investigation that has been conducted and the record that has compiled. The Council should evaluate whether there is any additional evidence or testimony required after review of the above Findings of Facts and Analysis. Seeing the proposed Findings and Analysis and the recommended conclusion may suggest additional area(s) of inquiry that may be helpful.

Beyond the investigation conducted thus far, the only evidence that may be worthwhile to pursue, via the subpoena power of the Council and/or Committee, is to secure Ed Nelson's testimony and the membership records of the Country Club. Frankly, even if Mr. Nelson testified that a woman could not be a Resident member of the Country Club consistent with his statement in the press, there remains credible testimony to the contrary from Bob Boston who is the immediate past Secretary of the Board and a current member of the Membership Committee. Perhaps, it is only membership records from the Country Club that will answer any remaining questions assuming the Country Club keeps its records in such a way that would be helpful. The membership records of the Country Club, even if obtained, would likely have limited utility. For example, there would not be records to confirm whether there are indeed ongoing activities to position six or seven African Americans for Resident member status. Those records would not yet exist. In short, there is likely little to be gained by additional investigation and a final decision can be reached that is rationale and well founded on the evidence from the investigation conducted thus far. If, however, the

Council has additional interviews or investigation its wishes to pursue, the Committee will perform the additional work requested by the Council.

Pursuant to Rule 12(e) of the Rules Governing Complaints of Judicial Misconduct or Disability, the Committee has provided Judge Paine with a copy of these Findings, Analysis and Recommendations after filing with the Council. Pursuant to Rule 13(a) of the Rules Governing Complaints of Judicial Misconduct or Disability, it is within the Council's discretion to send a copy of these Findings, Analysis and Recommendations to Complainant, and the Committee defers to the Council in that regard.

These Findings, Analysis and Recommendations are unanimous and there are no separate or dissenting statements.