

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

**MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE**

FORMAL PROCEEDINGS DOCKET ENTRIES

Date of Document

1. May 13, 2013 - [Notice of Formal Proceedings and Charges](#)
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3. May 22, 2013 - [Memorandum Regarding Hearing on Suspension from Duties](#)
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9. June 18, 2013 - [Notice of Hearing](#)
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**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE

NOTICE OF FORMAL PROCEEDINGS AND CHARGES

Notice is hereby given of the initiation of formal proceedings under Rule 4.180 of the Rules of the Supreme Court. At the times set out in this Notice, you were Senior Status Special Judge in Kentucky's Court of Justice. The charges are as follows.

COUNT I

In the case of *Coachhouse Inc. v. Edward H. Flint*, Jefferson Circuit Court Case Number 12-CI-03106, during a hearing on August 3, 2012, you refused to allow a pro se defendant to present any argument because he was not a lawyer and summarily entered an injunction against him and awarded attorney fees; and on August 8, 2012, pursuant to your ruling on August 3, 2012, judgment was entered for attorney fees and costs in the amount of \$11,579.20.

In regard to the above matter, you violated SCR 4.020(1)(b)(i) and (v) in that your actions constituted misconduct in office and violated SCR 4.300, the Code of Judicial Conduct, Canons 1, 2A and 3A and B(2), (4), (5), (7) and (8) which read in pertinent part as follows:

**CANON 1: A JUDGE SHALL UPHOLD THE INTEGRITY AND
INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. A judge should actively participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. *Judicial Duties in General.* The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. *Adjudicative Responsibilities.*

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

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

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and in proceedings before the judge, shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider ex parte communications with attorneys and shall not initiate, encourage or consider ex parte communications with parties...

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

In particular, by the above conduct, you engaged in misconduct in office; failed to observe high standards of conduct in violation of Canon 1; failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A; were not faithful to the law in violation of Canon 3A and B(2); were not patient and courteous to a litigant in violation of Canon 3B(4); manifested bias and prejudice against a pro se litigant in violation of Canon 3B(5); failed to accord to a person who had a legal interest in the proceeding the right to be heard according to law in violation of Canon 3B(7); and failed to dispose of judicial matters fairly in violation of Canon 3B(8).

COUNT II

In the case of *Commonwealth v. Roger Dale Epperson*, Warren Circuit Court Case Number 97-CR-00016, on September 28, 2012, in a hearing regarding Epperson's request for relief from a death-sentence conviction you engaged in the following conduct. You addressed the attorney for the defendant in an intemperate voice and, among other comments, you stated "if you ever call me on my cell phone again, I'll strangle you," and that you would try to get the attorney's law license "yanked" if he did it again. When the attorney attempted to explain that he had consent of opposing counsel to make the call, you stated "negative" and "be quiet". In directing the bailiff to bring the defendant from the holding cell into court, you stated "Bring his carcass out here." After hearing from only one witness, you stated "This has been a huge waste of time" and that the Department of Public Advocacy (DPA) attorney's allegations "have bordered on the ridiculous." You also stated that the DPA was "making a mountain out of a molehill." You also stated that the nature of ineffective counsel motions in general "is distasteful

to the court. The lawyers who do the work at trial now get criticized by backseat drivers who weren't there and who didn't try the case." You also stated to the DPA attorney "You've never been in the heat of battle in one of these cases, and now you're criticizing lawyers that actually are real lawyers that do the work, the dirty work, the down-in-the-trenches work." Your conduct at the hearing in question generated negative coverage in the *Courier-Journal* and other media outlets and brought the Kentucky judiciary into disrepute.

In regard to the above matter, you violated SCR 4.020(1)(b)(i) and (v) in that your actions constituted misconduct in office and violated SCR 4.300, the Code of Judicial Conduct, Canons 1, 2A and 3A and B(2), (4) and (5), which read in pertinent part as set out above.

In particular, by the above conduct, you engaged in misconduct in office; failed to observe high standards of conduct in violation of Canon 1; failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A; were not faithful to the law in violation of Canon 3A and B(2); were not patient, dignified and courteous to a litigant and the litigant's lawyer in violation of Canon 3B(4); and manifested bias and prejudice against attorneys of the DPA and claims of ineffective assistance of counsel in violation of Canon 3B(5).

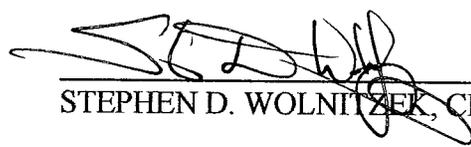
For your information, the Commission wishes to call your attention to the following Supreme Court Rule:

RULE 4.180 FORMAL PROCEEDINGS

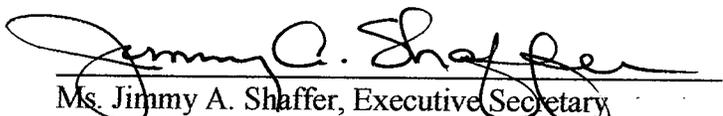
If the Commission concludes that formal proceedings should be initiated, it shall notify the judge. He may file an answer within 15 days after service of the notice. Upon the filing of his answer, or the expiration of time for so filing, the Commission shall set a time and place for the hearing and shall give reasonable notice thereof to the judge.

Please mail your answer to: Ms. Jimmy A. Shaffer, Executive Secretary, Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40252-0208.

Date: May 10, 2013


STEPHEN D. WOLNITZEK, CHAIR

I hereby certify that copy hereof was served on Martin F. McDonald, Senior Status Special Judge, by mailing same to his attorney, Timothy Denison, Suite 320, Republic Plaza, 200 S. Seventh Street, Louisville, Kentucky 40202 on the 13th day of May, 2013.


Ms. Jimmy A. Shaffer, Executive Secretary

Judge David Bowles recused from any consideration of this matter.

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

IN RE THE MATTER OF:

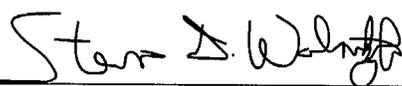
MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE

ORDER AND NOTICE OF HEARING
ON SUSPENSION FROM DUTIES PENDING FINAL ADJUDICATION

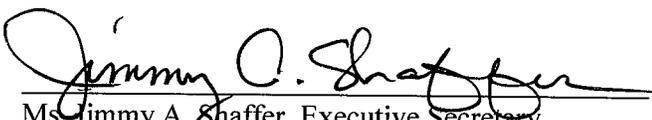
It appearing that as a result of a stroke Judge McDonald may be suffering from a disability that seriously interferes with the performance of his duties, it is by the Commission pursuant to SCR 4.020(1)(a)(ii):

ORDERED that a hearing will be held on the 4th day of June, 2013, at the time of 1:00 p.m., in the MCCRACKEN County Courthouse, Paducah, Kentucky, as to whether it will be in the best interest of justice that Judge McDonald be suspended temporarily from acting in his official capacity as a judge and from the performance of his duties, without affecting his pay status, until final adjudication of the pending formal proceedings.

Date: May 10, 2013


STEPHEN D. WOLNITZEK, CHAIR

I hereby certify that copy hereof was served on Martin F. McDonald, Senior Status Special Judge, by mailing same to his attorney, Timothy Denison, Suite 320, Republic Plaza, 200 S. Seventh Street, Louisville, Kentucky 40202 on the 13th day of MAY, 2013.


Ms. Jimmy A. Shaffer, Executive Secretary

Judge David Bowles recused from any consideration of this matter.

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE

**MEMORANDUM REGARDING HEARING ON
SUSPENSION FROM DUTIES**

Counsel for the Commission submits this memorandum to facilitate the hearing to be held on June 4, 2013, as to whether Judge McDonald should be suspended from performance of his duties with pay until final adjudication of this matter.

The Commission's Authority

Supreme Court Rule (SCR) 4.020(1)(a)(ii) provides that the Commission shall have authority to suspend temporarily from the performance of his duties without affecting his pay status

after notice and an opportunity to be heard, and upon a finding that it will be in the best interest of justice that he be suspended from acting in his official capacity as a judge until final adjudication of the complaint, any judge against whom formal proceedings have been initiated under Rule 4.180.

The Formal Proceedings

Judge McDonald is charged with two counts of misconduct in formal proceedings which were initiated on May 10, 2013. Count I alleges that Judge McDonald refused to allow a pro se defendant to present any argument because he was not a lawyer, and summarily entered an injunction against him and awarded attorney fees in excess of \$11,000. Count II alleges that during a hearing regarding a defendant's request for relief from a death-sentence conviction, Judge McDonald addressed the defendant's attorney in an intemperate voice and made

comments which included: “if you ever call me on my cell phone again, I’ll strangle you;” that he would try to get the attorney’s law license “yanked” if he ever did it again; when the attorney attempted to explain he had consent of opposing counsel to make the call, the judge stated “negative” and “be quiet;” that “this [hearing] has been a huge waste of time” and the attorney’s allegations “have bordered on the ridiculous;” and, referring to the defendant, “Bring his carcass out here.” This count alleges that the judge’s conduct caused negative coverage in media outlets and brought the Kentucky judiciary into disrepute.

The Surrounding Circumstances

The Commission’s file in the preliminary investigation conducted pursuant to SCR 4.170 presents the following circumstances:

1. The Commission notified Judge McDonald of the matters reflected in the two counts by letters dated October 2, 2012, and November 13, 2012.
2. The Commission invited Judge McDonald to an informal conference pursuant to SCR 4.170, and at the request of Judge McDonald’s attorney rescheduled the conference.
3. His attorney attended the rescheduled conference on March 29, 2013, but Judge McDonald did not. His attorney informed the Commission that Judge McDonald was not present because he was handling a case for another judge. His attorney also reported to the Commission that Judge McDonald had suffered a stroke a year and a half ago which affected his ability to filter what he says, and that it was a miracle that he could retake the bench.
4. After an exchange of correspondence with the Commission in an unsuccessful attempt to resolve the matter, Judge McDonald’s attorney asked the Commission to schedule another conference for Judge McDonald to meet informally with the Commission. The

Commission granted the request and scheduled the conference for May 10, 2013. On May 9, his attorney emailed to the Commission a letter (Exhibit A attached hereto) stating that Judge McDonald had just informed him “of his inability to attend the conference tomorrow.” The letter gave no explanation as to why Judge McDonald was unable to attend the conference.

5. When the judge did not attend the informal conference scheduled for May 10, 2013, the Commission initiated the formal proceedings which are now pending.

Judicial Notice

Judicial notice of adjudicative facts is governed by Kentucky Rule of Evidence 201 which reads in full:

KRE 201. Judicial notice of adjudicative facts

- (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
 - (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
 - (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When discretionary. A court may take judicial notice, whether requested or not.
- (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

- (g) Instructing the jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

In 29 Am. Jur. 2d *Evidence* § 142 (1908) it is noted “Courts may take judicial notice of their own records, and a court may be presumed to have taken notice of its own files.” See also 29 Am. Jr. *Evidence* § 146.

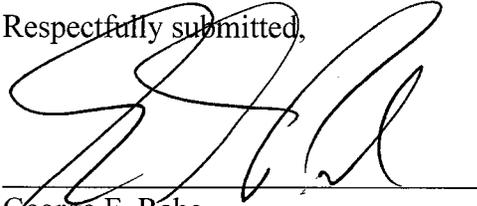
It seems appropriate for the Commission to take judicial notice of the steps in its own preliminary investigation file of this matter, subject to what may be presented at the hearing on June 4. Counsel for the Commission requests that the Commission take judicial notice of its own records which reflect that Judge McDonald was notified of the issues in the investigation, that conferences were scheduled twice for him to appear informally before the Commission, that Judge McDonald’s attorney attended the first informal conference during which he reported to the Commission that Judge McDonald had suffered a stroke a year and a half ago which affects his ability to filter what he says; and that Judge McDonald did not attend either informal conference the Commission scheduled for him.

Conclusion

Subject to what may be presented at the hearing on June 4, 2013, Judge McDonald’s failure to appear for two scheduled conferences with the Commission, his attorney’s report at a conference with the Commission that Judge McDonald had suffered a stroke which affects his ability to filter what he says, and the pending formal proceedings based on allegations of rulings and statements Judge McDonald made in open court, indicate that it will be in the best interest of justice that Judge McDonald be suspended from his duties pending adjudication of the charges.

Indeed, Judge McDonald's continued performance of his duties under these circumstances may jeopardize the legality of cases he presides over.

Respectfully submitted,

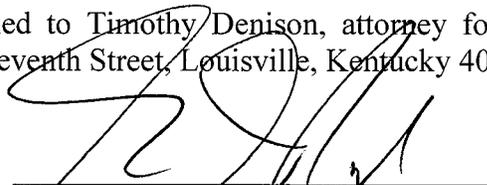


George F. Rabe
157 Kentucky Avenue
Lexington, Kentucky 40502
(859) 255-2313

Counsel for the Commission

Certificate of Service

Copy hereof was on May 22, 2013, mailed to Timothy Denison, attorney for Judge McDonald, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, Kentucky 40202.



George F. Rabe

TIMOTHY DENISON
Attorney at Law
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Toll Free: (877) 337-2149

Facsimile (502) 581-1675

www.timdenisonlaw.com

May 9, 2013

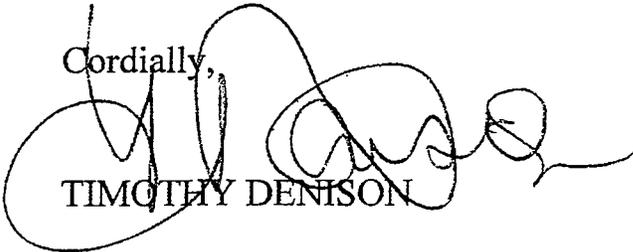
Ms. Jimmy Shaffer
Executive Secretary
Judicial Conduct Commission
P.O. Box 22208
Louisville, Kentucky 40222-0208

RE: May 10, 2013 informal meeting request from Martin F. McDonald

Dear Ms. Shaffer:

I have just been informed by Judge McDonald of his inability to attend the informal conference tomorrow. Therefore, we must respectfully ask that Judge McDonald's request for an informal conference on the May 10, 2013, docket be withdrawn. Judge McDonald would be happy to appear at the June meeting, although I understand due to time constraints that the Commission must act no later than May 28, 2013, in this matter and such a request for a June conference is probably a moot point. I apologize for this eleventh hour notice of cancellation to the Commission as well as any inconvenience it may cause, but we appreciate the Commission's initial granting of Judge McDonald's request for an informal conference. Beyond that, if we may do or be of assistance to the Commission in any other way, shape or form, Judge McDonald stands ready to fully cooperate with the investigation or any other requests of the Commission. Thank you for your time and attention to this matter.

Cordially,


TIMOTHY DENISON

TD/mos

cc: Martin F. McDonald

EXHIBIT A

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE: THE MATTER OF:

MARTIN F. MCDONALD
SENIOR STATUS SPECIAL JUDGE

ANSWER OF MARTIN F. MCDONALD

Comes the Respondent, Hon. Martin F. McDonald, and for his Answer to the Notice of Formal Proceedings and Charges, states as follows:

1. With respect to Count I of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct, Canons 1, 2A, 3A and B(2), (4), (5), (7) and (8). Respondent further asserts the defenses of res judicata and collateral estoppel based on United States District Court Judge Charles R. Simpson's Memorandum Opinion entered January 17, 2013, in Edward H. Flint v. Martin McDonald (action # 3:12-CV-6130 - Exhibit A), which wholly absolved Judge McDonald of any judicial misconduct (while simultaneously sanctioning Flint) based on Flint's same claims against Judge McDonald in Flint's Federal Law Suit and Flint's claims now pending before the Judicial Conduct Commission.

2. With respect to Count II of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct Canons 1, 2A, 3A, B(2), (4) and (5).

AFFIRMATIVE DEFENSES AND OBJECTIONS

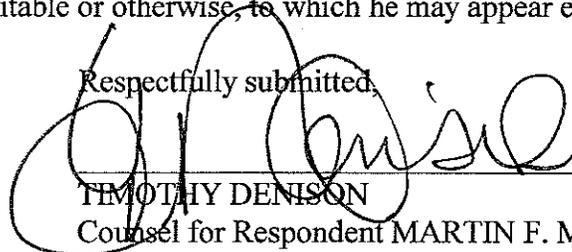
3. In addition to the foregoing, Respondent hereby objects to any further initiation, continuation, or finalization of any action or discipline against him based on the following:
On or about May 31, 2013, Judge McDonald finished his last day and completed his service as a

senior status special judge. He will not return to the bench nor will he adjudicate any further pending legal issues, disputes or rulings in any cases that were formerly pending before him. He has filed his final report with the Senior Status Clerk of the Kentucky Supreme Court and his finalized his completion of service requirements as well as his retirement obligations with the state. Respondent respectfully submits that based upon his complete fulfillment of duties as special senior status judge and his permanent retirement as well as the Rules of the Supreme Court, SCR 4.180 et al., the Commission has lost jurisdiction to take any further disciplinary action against him except for the issuance of a public or private reprimand. Also, based upon the foregoing, it is believed the Hearing on Temporary Suspension of Duties, now scheduled for 1:00 p.m. in Paducah on June 4, 2013, is rendered moot and notice is respectfully given that neither Respondent nor counsel will be appearing in Paducah for said mooted hearing.

WHEREFORE, the Respondent requests as follows:

1. Dismissal of the Notice of Formal Proceedings and Charges against him; and
2. Any and all other relief, equitable or otherwise, to which he may appear entitled.

Respectfully submitted,

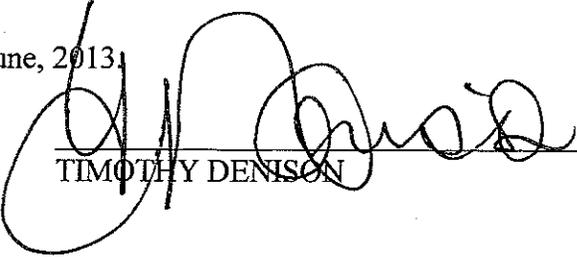


TIMOTHY DENISON
Counsel for Respondent MARTIN F. MCDONALD
Suite 320, Republic Plaza
200 South Seventh Street
Louisville, Kentucky 40202-2721
(502) 589-6916; (FAX) 581-1675
Timothydenison@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid, scanned and emailed and faxed to: Ms. Jimmy Shaffer, Executive Secretary, Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40258-0208; and Hon. George Rabe, Counsel for Judicial Conduct Commission, 157 Kentucky Avenue, Lexington,

Kentucky 40502, on this the 3rd day of June, 2013.



TIMOTHY DENISON

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE: THE MATTER OF:

MARTIN F. MCDONALD
SENIOR STATUS SPECIAL JUDGE

**RESPONDENT'S MEMORANDUM REGARDING HEARING
ON TEMPORARY SUSPENSION FROM DUTIES**

Comes the Respondent, Hon. Martin F. McDonald, by counsel, and for his Memorandum Regarding Temporary Suspension From Duties, hereby states as follows:

1, Respondent adopts, alleges and incorporates by reference as if fully set forth herein his Answer to the Notice of Formal Proceedings and Charges filed of even date herewith.

THE COMMISSION'S AUTHORITY

While Respondent does not deny any of the statutory authority as pled in counsel for the Commission's Memorandum, Respondent respectfully submits that his completion and fulfillment of all duties and obligations as special senior status judge as well as his retirement from the bench on or about May 31, 2013, terminated the Judicial Conduct Commission's ability or authority to take any further action (disciplinary or otherwise) against him except for issuance of a public or private reprimand.

With respect to Count I of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct, Canons 1, 2A, 3A and B(2), (4), (5), (7) and (8). Respondent further asserts the defenses of res judicata and collateral estoppel based on United States District Court Judge Charles R. Simpson's Memorandum Opinion entered January 17, 2013, in Edward H. Flint v. Martin McDonald (action # 3:12-CV-6130 - Exhibit A), which wholly absolved Judge

McDonald of any judicial misconduct (while simultaneously sanctioning Flint) based on Flint's same claims against Judge McDonald in Flint's Federal Law Suit and Flint's claims now pending before the Judicial Conduct Commission.

With respect to Count II of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct Canons 1. 2A, 3A, B(2), (4) and (5).

THE SURROUNDING CIRCUMSTANCES

An informal conference was originally scheduled before the Commission on or about January 18, 2013. Respondent's counsel gave notice to the Commission (and Judge McDonald signed a waiver of time) that he would be out of the state/country for virtually the entire month of January 2013, and requested the hearing be rescheduled. This continuance was based solely on counsel's travel calendar and Judge McDonald played no role in this matter nor did Judge McDonald personally or in any manner request the continuance.

The hearing was rescheduled for February 22, 2013, on which morning counsel for counsel for Respondent awoke with a condition that prevented him from personally attending the informal conference that day. The Commission was kind enough understand counsel's situation and reschedule the matter for March 29, 2013.

On March 29, 2013, counsel appeared before the Commission and attended the informal conference. While Judge McDonald had every intention of attending the informal conference that day, he was recruited last minute by the Jefferson Circuit Court to sit for Judge Frederic Cowan in Division 13 of the Jefferson Circuit Court that morning due to the unfortunate, unexpected and untimely death of Judge Cowan's mother.

At the request of Judge McDonald thereafter, the Commission granted Judge McDonald's request for an informal conference which Judge McDonald could attend and fully address these matters with the Commission. The Commission kindly granted Judge McDonald's request to meet on May 10, 2013, however, certain private McDonald family issues arose that prevented Judge McDonald from attending the informal conference that he requested on May 10, 2013.

JUDICIAL NOTICE

Judge McDonald does not dispute the rendition of the law as it applies to judicial notice, but affirmatively submits that it is wholly inappropriate for the Commission to take judicial notice of and/or consider Judge McDonald's non-attendance at these informal conferences in any way, shape or form with respect to discipline.

CONCLUSION

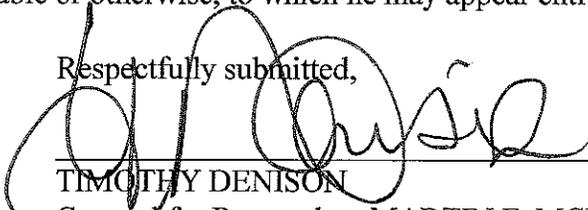
With respect to "his attorney's report at a conference with the Commission that Judge McDonald had suffered a stroke which affects his ability to filter what he says," counsel states that information was given during a colloquy with the Commission about Judge McDonald's medical issues known to the Commission and at which time counsel reiterated to the Commission that said stroke in no way interfered with Judge McDonald's judicial abilities or capabilities and, in fact, conversely gave the Commission assurances and his word as an officer of the court that not only would the judge's medical issues NOT impair his ability to continue to sit on the bench, but also even went so far as to give the Commission counsel's personal assurance that Judge McDonald would neither have nor create any new issues or allegations during the pendency of Judge McDonald's remaining time on the bench. Despite the Commission's disbelief of counsel's assurances and promises on behalf of Judge McDonald, hindsight being 20/20 and no new issues, allegations or complaints having arisen since that time,

counsel submits that his assurances and promises as an officer of the Court on Judge McDonald's behalf have now come to pass. Also, based upon the foregoing, it is believed the Hearing on Temporary Suspension of Duties, now scheduled for 1:00 p.m. in Paducah on June 4, 2013, is rendered moot and notice is respectfully given that neither Respondent nor counsel will be appearing in Paducah for said mooted hearing.

WHEREFORE, the Respondent requests as follows:

1. Dismissal of the Notice of Formal Proceedings and Charges against him; and
2. Any and all other relief, equitable or otherwise, to which he may appear entitled.

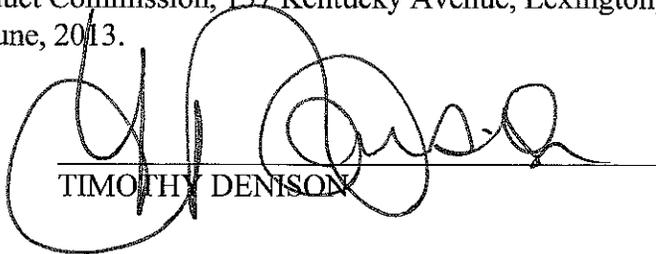
Respectfully submitted,



TIMOTHY DENISON
Counsel for Respondent MARTIN F. MCDONALD
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Timothydenison@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid, scanned and emailed and faxed to: Ms. Jimmy Shaffer, Executive Secretary, Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40258-0208; and Hon. George Rabe, Counsel for Judicial Conduct Commission, 157 Kentucky Avenue, Lexington, Kentucky 40502, on this the 3rd day of June, 2013.



TIMOTHY DENISON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

EDWARD H. FLINT

PLAINTIFF

v.

CIVIL ACTION NO. 3:12-CV-613

MARTIN MCDONALD

DEFENDANT

MEMORANDUM OPINION

Plaintiff Edward H. Flint brought this action *pro se* against defendant Judge Michael McDonald of the Jefferson County, Kentucky, Circuit Court, in his individual capacity. Currently pending before the court are three motions: (1) a motion by Judge McDonald to dismiss for failure to state a claim (DN 3); (2) a motion by Judge McDonald for sanctions (DN 4); and (3) a motion by Flint to disqualify the undersigned judge (DN 6).

Initially, the court will deny the motion for recusal filed by Flint. Motions for recusal are committed to the sound discretion of the district court deciding the motion. *See Youn v. Track, Inc.*, 324 F.3d 409, 422 (6th Cir. 2003). “A district court judge must recuse himself where a reasonable person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned. This standard is objective and is not based on the subjective view of a party.” *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993) (internal quotation marks and emphasis omitted).

In his motion, Flint states that the undersigned judge has been “bias[ed] against him” in “a number of cases” and that “based on the past history between Judge Simpson and Plaintiff Flint, that Judge Simpson[’s] impartiality might reasonably be questioned.” Flint does not provide any factual

detail to back up his assertions. Flint's general allegations of bias, unsupported by facts setting forth a personal or extrajudicial source of the bias, are insufficient to require recusal. *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005); *Youn*, 324 F.3d at 423. The undersigned notes that, although Flint does not so state in his motion for recusal, Flint has previously filed an action against the undersigned. Nevertheless, that is not a sufficient basis to establish that recusal is warranted. *Flint v. MetLife Ins. Co. Connecticut*, 460 F. App'x 483, 486 (6th Cir. 2011) (citing *Azubuko v. Royal*, 443 F.3d 302, 304 (3d Cir. 2006). Holding otherwise "would allow litigants to judge shop by filing a suit against the presiding judge." *In re Taylor*, 417 F.3d 649, 652 (7th Cir. 2005). The undersigned is aware of no grounds upon which his impartiality may reasonably be questioned in this case, and thus the motion for recusal will be denied.

We now turn to the motion of the defendant, Judge Martin McDonald, to dismiss Flint's complaint for failure to state a claim. Upon a motion to dismiss for failure to state a claim, a court "must construe the complaint in the light most favorable to plaintiff" and "accept all well-pled factual allegations as true." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). To survive a motion to dismiss, the "complaint must contain either direct or inferential allegations respecting all material elements" of the offense. *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 902 (6th Cir. 2009) (internal question marks omitted). The complaint's "factual allegations must be enough to raise a right to relief above the speculative level" and must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007).

Judge McDonald argues that he is entitled to absolute judicial immunity and thus Flint's complaint must be dismissed. In his complaint, Flint complains about actions taken by Judge

McDonald in a case in which Flint was a party in Jefferson Circuit Court. Specifically, Flint notes that Judge McDonald presided over a hearing on August 3, 2012 in that state court case, during which he made rulings and signed an order. Then, on August 8, 2012, Judge McDonald signed another order in the case. One of Judge McDonald's orders in the case apparently awarded attorney's fees to Flint's opponent. Flint stated that Judge McDonald was biased against Flint and that Judge McDonald took "actions" in the case that harmed Flint both "physically" and "mentally." Flint alleged that Judge McDonald "made up rulings" to fit what he wanted and "disregard[ed] rules and laws" to take advantage of an elderly pro se litigant. According to Flint, Judge McDonald's actions denied Flint various rights under the United States and Kentucky Constitutions, including Flint's rights to a fair trial, to file lawsuits in the state courts, to defend himself, and to freedom of speech.

Further, in his response to the motion to dismiss, Flint delves into more detail concerning the hearing held by Judge McDonald and the orders signed by him. Flint contends that at the August 3, 2012 hearing, Judge McDonald let the attorney for Coach House, Inc., the plaintiff in that case, address the court, but would not let Flint, the *pro se* defendant, address the court. The order signed by Judge McDonald after the hearing enjoined Flint from filing lawsuits against Coach House or any person associated with that company. The order also awarded attorney's fees and costs to Coach House, both for that action and for its defense of any action filed by Flint against it after October 18, 2011. Then, on August 8, 2012, after receiving an affidavit concerning the amount of attorney's fees and costs Coach House believed it was entitled to pursuant to Judge McDonald's August 3 order, Judge McDonald signed an order entering a final judgment against Flint.

It is well-established that judges are immune from suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 9, 11 (1991). The doctrine protects a judge from lawsuits, not just from the assessment

of damages. *Id.* at 11. “Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.” *Id.* Indeed, “[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978).

Here, the allegations in Flint’s complaint plainly relate to actions Judge McDonald took while acting in the capacity of a judge and pursuant to his jurisdiction as a judge. Flint’s response papers only make that more clear: Flint takes issue with Judge McDonald’s handling of a hearing and with the propriety of orders issued by Judge McDonald. None of Flint’s allegations can be said to relate to actions Judge McDonald took in the absence of jurisdiction. Accordingly, judicial immunity applies and Flint’s claims must be dismissed.

Finally, the court turns to Judge McDonald’s motion for sanctions against Flint. To say that Flint is an experienced litigator despite his *pro se* status would be an understatement. And amongst the many lawsuits Flint has filed are several against judges of the state and federal courts. In one such suit filed by Flint against United States Magistrate Judge Dave Whalin, United States District Judge John Heyburn issued a memorandum opinion and order, dated June 21, 2011, finding that the complaint should be dismissed *sua sponte* on the basis of absolute judicial immunity. *Flint v. Whalin*, 2011 WL 2471550, 3:11-CV-316-H, at *2 (W.D.Ky. June 21, 2011). Judge Heyburn proceeded to review Flint’s “documented history of filing frivolous and unsubstantial litigation against state and federal judges in this Court.” *Id.* In doing so, Judge Heyburn cited to eight cases filed by Flint against state or federal judges that were dismissed on the basis of absolute judicial

immunity. *Id.* Judge Heyburn noted that Flint's "submission of frivolous and duplicative lawsuits serves no legitimate purpose, places a tremendous burden on this Court's limited resources, and deprives other litigants with meritorious claims of the speedy resolution of their cases." *Id.* Thus, Judge Heyburn stated in bold text in the memorandum opinion and order:

Accordingly, Flint is WARNED that he will be sanctioned in the amount of \$700.00 per suit should he file any additional lawsuits in this Court against federal or state judges on the grounds that he believes they were biased against him, made incorrect rulings, or otherwise improperly oversaw any of his cases. Additionally, filing any additional such lawsuits could result in the imposition of additional sanctions, including the imposition of filing restrictions.

Despite that warning, Flint was obviously undeterred. Approximately 15 months after Judge Heyburn's warning to Flint, Flint filed the instant suit. This suit plainly falls within the terms of Judge Heyburn's warning: it is a lawsuit against a state judge on the grounds that the state judge was biased against him, made incorrect rulings, and improperly oversaw a hearing in the case.

The court finds that Judge McDonald's motion for sanctions should be granted. "Pursuant to its inherent powers, a court in the Sixth Circuit may impose sanctions to curb vexatious, bad faith litigation if the claims are meritless, the litigant knew or should have known that the claims are meritless, and the claims were filed for an improper purpose." *Halliburton v. United States*, 59 F. App'x 55, 57 (6th Cir. 2003) (citing *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 512, 519 (6th Cir. 2002)). The Sixth Circuit in *Halliburton* found all three factors were met where a plaintiff had been "expressly advised that he could not file any more claims challenging his judgment of conviction and sentence without first obtaining permission to do so from the Court of Appeals," yet did so anyway. *Id.* The Sixth Circuit held that filing such claims "without authorization in the face of th[e] expressed advice and clear warning of a sanction if done anyway constitutes bad faith conduct that was properly sanctioned." *Id.* So too with Flint: after having

repeated frivolous cases against judges dismissed on the same basis, he was expressly warned as to the types of claims against judges that are frivolous and for which a court would sanction him. Flint nevertheless filed the exact type of claims he had been warned not to file; that constitutes bad faith. Accordingly, the court concludes that sanctions are appropriate. Further, the amount of sanctions set forth in Judge Heyburn's order – \$700, double the cost of the filing fee – is reasonable.

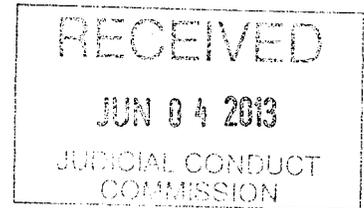
Lastly, the court will issue the following warning to Flint to ensure that Flint is aware that any future frivolous lawsuits could result in even more severe sanctions: **Flint is WARNED that if he files any additional lawsuits in this Court against federal or state judges on the grounds that he believes they were biased against him, made incorrect rulings, or otherwise improperly oversaw any of his cases, he will face further sanctions, which could include, but are not limited to, monetary sanctions of more than \$700 or the imposition of filing restrictions.**

A separate order will issue in accordance with this opinion.

January 17, 2013



**Charles R. Simpson III, Judge
United States District Court**



**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE: THE MATTER OF:

MARTIN F. MCDONALD
SENIOR STATUS SPECIAL JUDGE

FIRST AMENDED ANSWER OF MARTIN F. MCDONALD

Comes the Respondent, Hon. Martin F. McDonald, and for his First Amended Answer to the Notice of Formal Proceedings and Charges, states as follows:

1. With respect to Count I of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct, Canons 1, 2A, 3A and B(2), (4), (5), (7) and (8). Respondent further asserts the defenses of res judicata and collateral estoppel based on United States District Court Judge Charles R. Simpson's Memorandum Opinion entered January 17, 2013, in Edward H. Flint v. Martin McDonald (action # 3:12-CV-6130 - Exhibit A), which wholly absolved Judge McDonald of any judicial misconduct (while simultaneously sanctioning Flint) based on Flint's same claims against Judge McDonald in Flint's Federal Law Suit and Flint's claims now pending before the Judicial Conduct Commission.

2. With respect to Count II of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct Canons 1, 2A, 3A, B(2), (4) and (5).

AFFIRMATIVE DEFENSES AND OBJECTIONS

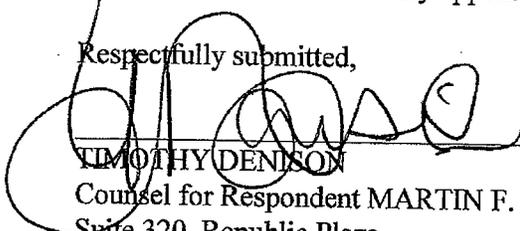
3. In addition to the foregoing, Respondent hereby objects to any further initiation, continuation, or finalization of any action or discipline against him based on the following: On or about June 4, 2013 (previously incorrectly stated as May 31, 2013), Judge McDonald

finished his last day and completed his service as a senior status special judge. He will not return to the bench nor will he adjudicate any further pending legal issues, disputes or rulings in any cases that were formerly pending before him. He has filed his final report with the Senior Status Clerk of the Kentucky Supreme Court and has finalized his completion of service requirements as well as his retirement obligations with the state. Respondent respectfully submits that based upon his complete fulfillment of duties as special senior status judge and his permanent retirement as well as the Rules of the Supreme Court, SCR 4.180 et al., the Commission has lost jurisdiction to take any further disciplinary action against him except for the issuance of a public or private reprimand. Also, based upon the foregoing, it is believed the Hearing on Temporary Suspension of Duties, now scheduled for 1:00 p.m. in Paducah on June 4, 2013, is rendered moot and notice is respectfully given that neither Respondent nor counsel will be appearing in Paducah for said mooted hearing.

WHEREFORE, the Respondent requests as follows:

1. Dismissal of the Notice of Formal Proceedings and Charges against him; and
2. Any and all other relief, equitable or otherwise, to which he may appear entitled.

Respectfully submitted,



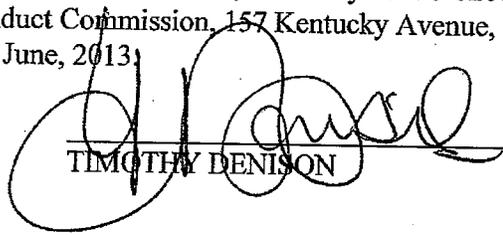
TIMOTHY DENISON

Counsel for Respondent MARTIN F. MCDONALD
Suite 320, Republic Plaza
200 South Seventh Street
Louisville, Kentucky 40202-2721
(502) 589-6916; (FAX) 581-1675
Timothydenison@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid, scanned and emailed and faxed to: Ms. Jimmy Shaffer, Executive Secretary,

Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40258-0208; and Hon. George Rabe, Counsel for Judicial Conduct Commission, 157 Kentucky Avenue, Lexington, Kentucky 40502, on this the 4th day of June, 2013;



TIMOTHY DENISON

RECEIVED

JUN 04 2013

JUDICIAL CONDUCT
COMMISSION

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE: THE MATTER OF:

MARTIN F. MCDONALD
SENIOR STATUS SPECIAL JUDGE

**RESPONDENT'S AMENDED MEMORANDUM REGARDING HEARING
ON TEMPORARY SUSPENSION FROM DUTIES**

Comes the Respondent, Hon. Martin F. McDonald, by counsel, and for his Amended Memorandum Regarding Temporary Suspension From Duties, hereby states as follows:

1, Respondent adopts, alleges and incorporates by reference as if fully set forth herein his Answer to the Notice of Formal Proceedings and Charges filed of even date herewith.

THE COMMISSION'S AUTHORITY

While Respondent does not deny any of the statutory authority as pled in counsel for the Commission's Memorandum, Respondent respectfully submits that his completion and fulfillment of all duties and obligations as special senior status judge as well as his retirement from the bench on or about June 4, 2013 (previously incorrectly stated as May 31, 2013), terminated the Judicial Conduct Commission's ability or authority to take any further action (disciplinary or otherwise) against him except for issuance of a public or private reprimand.

With respect to Count I of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct, Canons 1, 2A, 3A and B(2), (4), (5), (7) and (8). Respondent further asserts the defenses of res judicata and collateral estoppel based on United States District Court Judge Charles R. Simpson's Memorandum Opinion entered January 17, 2013, in Edward H. Flint v. Martin McDonald (action # 3:12-CV-6130 - Exhibit A), which wholly absolved Judge

McDonald of any judicial misconduct (while simultaneously sanctioning Flint) based on Flint's same claims against Judge McDonald in Flint's Federal Law Suit and Flint's claims now pending before the Judicial Conduct Commission.

With respect to Count II of the Notice of Formal Proceedings and Charges, Respondent denies any and all allegations of judicial misconduct and any and all violations of the Code of Judicial Conduct Canons 1. 2A, 3A, B(2), (4) and (5).

THE SURROUNDING CIRCUMSTANCES

An informal conference was originally scheduled before the Commission on or about January 18, 2013. Respondent's counsel gave notice to the Commission (and Judge McDonald signed a waiver of time) that he would be out of the state/country for virtually the entire month of January 2013, and requested the hearing be rescheduled. This continuance was based solely on counsel's travel calendar and Judge McDonald played no role in this matter nor did Judge McDonald personally or in any manner request the continuance.

The hearing was rescheduled for February 22, 2013, on which morning counsel for counsel for Respondent awoke with a condition that prevented him from personally attending the informal conference that day. The Commission was kind enough understand counsel's situation and reschedule the matter for March 29, 2013.

On March 29, 2013, counsel appeared before the Commission and attended the informal conference. While Judge McDonald had every intention of attending the informal conference that day, he was recruited last minute by the Jefferson Circuit Court to sit for Judge Frederic Cowan in Division 13 of the Jefferson Circuit Court that morning due to the unfortunate, unexpected and untimely death of Judge Cowan's mother.

At the request of Judge McDonald thereafter, the Commission granted Judge McDonald's request for an informal conference which Judge McDonald could attend and fully address these matters with the Commission. The Commission kindly granted Judge McDonald's request to meet on May 10, 2013, however, certain private McDonald family issues arose that prevented Judge McDonald from attending the informal conference that he requested on May 10, 2013.

JUDICIAL NOTICE

Judge McDonald does not dispute the rendition of the law as it applies to judicial notice, but affirmatively submits that it is wholly inappropriate for the Commission to take judicial notice of and/or consider Judge McDonald's non-attendance at these informal conferences in any way, shape or form with respect to discipline.

CONCLUSION

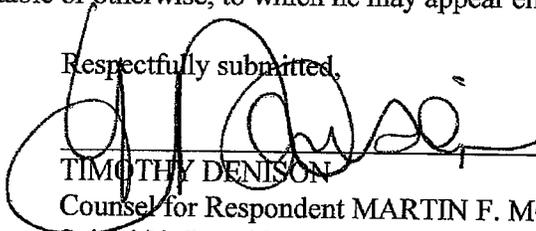
With respect to "his attorney's report at a conference with the Commission that Judge McDonald had suffered a stroke which affects his ability to filter what he says," counsel states that information was given during a colloquy with the Commission about Judge McDonald's medical issues known to the Commission and at which time counsel reiterated to the Commission that said stroke in no way interfered with Judge McDonald's judicial abilities or capabilities and, in fact, conversely gave the Commission assurances and his word as an officer of the court that not only would the judge's medical issues NOT impair his ability to continue to sit on the bench, but also even went so far as to give the Commission counsel's personal assurance that Judge McDonald would neither have nor create any new issues or allegations during the pendency of Judge McDonald's remaining time on the bench. Despite the Commission's disbelief of counsel's assurances and promises on behalf of Judge McDonald, hindsight being 20/20 and no new issues, allegations or complaints having arisen since that time,

counsel submits that his assurances and promises as an officer of the Court on Judge McDonald's behalf have now come to pass. Also, based upon the foregoing, it is believed the Hearing on Temporary Suspension of Duties, now scheduled for 1:00 p.m. in Paducah on June 4, 2013, is rendered moot and notice is respectfully given that neither Respondent nor counsel will be appearing in Paducah for said mooted hearing.

WHEREFORE, the Respondent requests as follows:

1. Dismissal of the Notice of Formal Proceedings and Charges against him; and
2. Any and all other relief, equitable or otherwise, to which he may appear entitled.

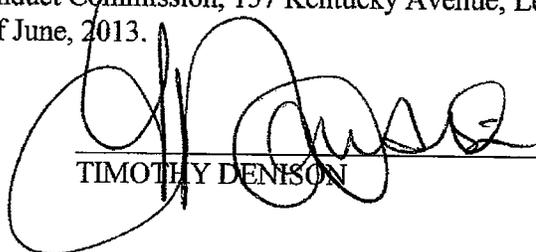
Respectfully submitted,



TIMOTHY DENISON
Counsel for Respondent MARTIN F. MCDONALD
Suite 320, Republic Plaza
200 South Seventh Street
Louisville, Kentucky 40202-2721
(502) 589-6916; (FAX) 581-1675
Timothydenison@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid, scanned and emailed and faxed to: Ms. Jimmy Shaffer, Executive Secretary, Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40258-0208; and Hon. George Rabe, Counsel for Judicial Conduct Commission, 157 Kentucky Avenue, Lexington, Kentucky 40502, on this the 4th day of June, 2013.



TIMOTHY DENISON

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE

**ORDER OF TEMPORARY SUSPENSION FROM DUTIES
PENDING FINAL ADJUDICATION**

This matter, having come before the Commission on June 4, 2013, on hearing pursuant to SCR 4.020(1)(a)(ii), upon consideration thereof, and of the entire record in this matter, the Commission finds that it will be in the best interest of justice that Judge McDonald be suspended temporarily from acting in his official capacity as a judge and from the performance of his duties, without affecting his pay status, until final adjudication of the pending formal proceedings, it is by the Commission:

ORDERED that Martin F. McDonald, Senior Status Special Judge, be and hereby is suspended from acting in his official capacity as a judge and from the performance of his duties, without affecting his pay status, until final adjudication of the pending formal proceedings.

Date: June 4, 2013

Stephen D. Wolnitzek
STEPHEN D. WOLNITZEK, CHAIR

I hereby certify that copy hereof was served on Martin F. McDonald, Senior Status Special Judge, by email and by mailing the same to his attorney, Timothy Denison, Suite 320, Republic Plaza, 200 S. Seventh Street, Louisville, Kentucky 40202 on the 6th day of June, 2013.

Jimmy A. Shaffer
Ms. Jimmy A. Shaffer, Executive Secretary

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

**MARTIN F. MCDONALD
SENIOR STATUS SPECIAL JUDGE**

NOTICE OF TIME AND PLACE FOR HEARING

NOTICE is hereby given that the hearing in these formal proceedings will be held commencing August 7, 2013, at 10:00 a.m., in the Jefferson County Judicial Center, 10th Floor Appellate Courtroom, 700 West Jefferson Street, Louisville, Kentucky, 40202.

CERTIFICATE OF SERVICE

Copy hereof was mailed this 18th day of June, 2013, to Hon. Martin F. McDonald, Senior Status Judge, by mailing same to his attorney, Timothy Denison, Suite 320, Republic Plaza, 200 S. Seventh Street, Louisville, Kentucky 40202; and George F. Rabe, 157 Kentucky Avenue, Lexington, KY 40502.


JIMMY A. SHAFFER
EXECUTIVE SECRETARY

Judge David P. Bowles recused from any consideration of this matter.

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

MARTIN F. McDONALD
FORMER SENIOR STATUS SPECIAL JUDGE

HEARING MEMORANDUM ON ISSUES OF LAW RAISED
IN JUDGE MCDONALD'S ANSWER

Counsel for the Commission submits this memorandum on issues of law raised in Judge McDonald's answer for the hearing in formal proceedings on August 7, 2013.

Judge McDonald asserts defenses of res judicata and collateral estoppel in regard to Count I based on a Memorandum Opinion of the U.S. District Court for the Western District of Kentucky which dismissed an action against Judge McDonald by the pro se litigant whose case is involved in Count I and which sanctioned him for filing vexatious and frivolous lawsuits. Judge McDonald alleges that this order "wholly absolved Judge McDonald of any judicial misconduct." To the contrary, the District Court's order did not deal with whether or not Judge McDonald's actions involved in Count I constituted judicial misconduct, but was based on the absolute immunity which judges have from lawsuits by litigants. That the dismissal of the action against Judge McDonald was based on judicial immunity – and not on the propriety of Judge McDonald's conduct at issue in Count I – is made clear in the court's Memorandum Opinion (pages 3, 4):

It is well-established that judges are immune from suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 9, 11 (1991). The doctrine protects a judge from lawsuits, not just from the assessment of damages, *Id.* at 11. "Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in

discovery and eventual trial.” *Id.* Indeed, “[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather he will be subject to liability only when he has acted in the clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978).

Here, the allegations in Flint’s complaint plainly relate to actions Judge McDonald took while acting in the capacity of a judge and pursuant to his jurisdiction as a judge. Flint’s response papers only make that more clear: Flint takes issue with Judge McDonald’s handling of a hearing and with the propriety of orders issued by Judge McDonald. None of Flint’s allegations can be said to relate to actions Judge McDonald took in the absence of jurisdiction. Accordingly, judicial immunity applies and Flint’s claims must be dismissed.

In addition, the fact that the litigant had filed numerous vexatious and frivolous lawsuits is not a defense to Judge McDonald’s arbitrary denial of his right to be heard in the action for injunction and attorney fees which was before Judge McDonald.

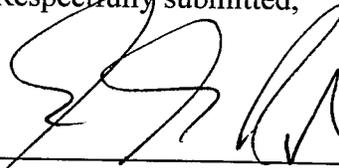
In his answer, Judge McDonald also objects to the continuation of these proceedings in view of the fact that he has completed his Senior Status service and is no longer performing judicial duties. However, Supreme Court Rule 4.025(1) explicitly provides that the “Commission shall have the authority set out in SCR 4.020 without regard to separation of a judge from office.” Indeed, in the same portion of his answer, Judge McDonald notes that public or private reprimand remains available.

For the foregoing reasons, neither the Memorandum Opinion of the U.S. District Court nor Judge McDonald’s completion of his Senior Status service and separation from judicial office is a bar to these proceedings.

Notice

The foregoing memorandum will be filed with the Commission at the hearing on August 7, 2013. It was not submitted earlier due to circumstances beyond counsel's control.

Respectfully submitted,

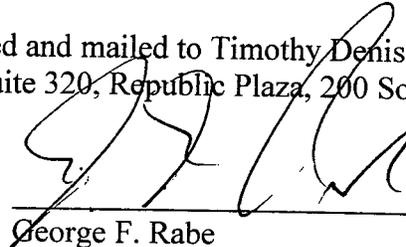


George F. Rabe
157 Kentucky Avenue
Lexington, Kentucky 40502
(859) 255-2313

Counsel for the Commission

Certificate of Service

Copy hereof was on August 6, 2013, emailed and mailed to Timothy Denison, attorney for Judge McDonald, timothydenison@aol.com, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, Kentucky 40202.



George F. Rabe

COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION

IN RE THE MATTER OF

HON. MARTIN F. McDONALD
FORMER SENIOR STATUS SPECIAL JUDGE

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I

STATEMENT OF CHARGES

The Judicial Conduct Commission of the Commonwealth of Kentucky was created for the purpose of, and is vested with the jurisdiction to, initiate, hear and decide charges of official misconduct by any judge of the Court of Justice or lawyer while a candidate for judicial office, and upon a finding of such official misconduct, to impose sanctions pursuant to SCR 4.020. In furtherance of this authority and purpose, the Commission filed charges of judicial misconduct against Judge Martin F. McDonald, Senior Status Special Judge, (now a Former Senior Status Special Judge), on May 10, 2013. (Notice of Formal Proceedings and Charges dated May 10, 2013 is attached hereto and incorporated herein by reference).

II

PROCEEDINGS

1. The Respondent, Martin F. McDonald is now a Former Senior Status Special Judge, and was, on May 10, 2013, a Senior Status Special Judge.
2. The Commission authorized an investigation into the allegations contained in Count I of the Charges after receipt of a complaint from Edward J. Flint, and into the allegations contained in Count II of the Charges after receipt of newspaper articles pertaining thereto.

3. Judge McDonald was informed of the investigation and his counsel, Hon. Timothy Denison, appeared before the Commission on March 29, 2013. Judge McDonald was then provided the factual information in the custody of the Commission for examination, pursuant to SCR 4.170(4) and was afforded an opportunity to present any other information bearing on the investigation. Judge McDonald requested to again appear before the Commission on May 10, 2013, but then informed the Commission that he would not attend the conference. Judge McDonald provided no additional information bearing on the Commission's investigation.

4. Notice of Formal Proceedings and Charges were filed against Judge Martin F. McDonald on May 10, 2013 under Supreme Court Rule 4.180.

5. A Notice of Hearing on Temporary Suspension was served on Judge McDonald on May 13, 2013, pursuant to SCR 4.020(1)(a)(ii), informing Judge McDonald that a hearing on his temporary suspension was scheduled for June 4, 2013.

6. The Commission's counsel submitted a Memo in Support of the Temporary Suspension on May 20, 2013, and Judge McDonald, by counsel, filed a Memo Regarding Hearing on Temporary Suspension on June 3, 2013.

7. Judge Martin F. McDonald filed his Answer to the Formal Charges by counsel on June 3, 2013. On June 4, 2013, Judge McDonald, by counsel, filed an Amended Answer and an Amended Memo on Temporary Suspension Hearing.

8. On June 4, 2013, following a hearing at which Judge McDonald and his counsel did not appear, the Commission voted to temporarily suspend Judge McDonald from acting in his official capacity as a Judge and from the performance of his duties, without affecting his pay status, until final adjudication of the pending proceedings.

9. Judge McDonald was provided a Notice of Hearing on June 18, 2013 setting the matter for formal hearing on August 7, 2013, at which time neither Judge McDonald nor his counsel appeared.

10. The six (6) voting members of the Commission in this case are as follows:

Hon. Stephen D. Wolnitzek, Judge Janet Stumbo, Judge Eddy Coleman, Judge Susan Johnson, Diane E. Logsdon and Joyce King Jennings. Pursuant to SCR 4.220, the Commission proceeded with the hearing as required by said Rule, even though neither Judge McDonald nor his counsel appeared.

III

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Judicial Conduct Commission unanimously concludes that the following Findings of Fact and Conclusions of Law have been established by clear and convincing evidence.

CHARGE

COUNT I

In the case of *Coach House, Inc. vs. Edward H. Flint*, Jefferson Circuit Court Case No. 12-CI-03106, during a hearing on August 3, 2012, Judge Martin F. McDonald refused to allow a *pro se* defendant to present any argument because he was not a lawyer, and summarily entered an injunction against Mr. Flint, and awarded attorneys' fees; and on August 8, 2012, pursuant to Judge McDonald's ruling on August 3, 2012, Judgment was entered for attorneys' fees and costs in the amount of \$11, 579.20.

By a vote of 6-0, the Commission finds with respect to Count I of the Charges that Judge McDonald violated SCR 4.020(1)(b)(i) and (v) in that his actions constituted misconduct in office, and violated SCR 4.300, the Code of Judicial Conduct. In particular, by the above

conduct, Judge McDonald engaged in misconduct in office, failed to observe high standards of conduct in violation of Canon 1, failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the Judiciary in violation of Canon 2A; was not faithful to the law in violation of Canon 3A and B2; was not patient and courteous to a litigant in violation of Canon 3B(4); manifested bias and prejudice against a *pro se* litigant in violation of Canon 3B(5); failed to accord a person who had a legal interest in the proceeding the right to be heard according to law in violation of Canon 3B(7), and failed to dispose of judicial matters fairly, in violation of Canon 3B(8).

COUNT II

In the case of *Commonwealth vs. Roger Dale Epperson*, Warren Circuit Court Case No. 97-CR-00016, on September 28, 2012 in a hearing regarding Epperson's request for relief from a death sentence conviction, Judge Martin F. McDonald engaged in the following conduct:

Judge McDonald addressed the attorney for the Defendant in an intemperate voice and, among other comments, stated "If you ever call me on my cell phone again, I'll strangle you", and that Judge McDonald would try to get the attorney's law license "yanked" if he did it again. When the attorney attempted to explain that he had consent of opposing counsel to make the call, Judge McDonald stated, "negative", "be quiet". In directing the bailiff to bring the Defendant from the holding cell into court, Judge McDonald stated, "Bring his carcass out here." After hearing from only one witness, Judge McDonald stated, "This has been a huge waste of time", and that the Department of Public Advocacy (DPA) attorney's allegations "Have bordered on the ridiculous". Judge McDonald also stated that the DPA was "making a mountain out of a mole hill". Judge McDonald also stated that the nature of ineffective counsel motions in general, "is distasteful to the court. The lawyers who do the work at trial now get criticized by backseat

drivers who weren't there, and who didn't try the case". Judge McDonald also stated to the DPA attorney, "You've never been in the heat of battle in one of these cases, and now you're criticizing lawyers that actually are real lawyers that do the work, the dirty work, the down in the trenches work." Judge McDonald's conduct at the hearing in question generated negative coverage in the *Courier-Journal*, and other media outlets, and brought the Kentucky Judiciary into disrepute.

By a vote of 6-0, the Commission finds with respect to this Charge that Judge McDonald violated SCR 4.020(1)(b)(i) and (v), and that the actions of Judge McDonald constituted misconduct in office, and violated SCR 4.300, the Code of Judicial Conduct, in that Judge McDonald failed to observe high standards of conduct in violation of Canon 1; failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the Judiciary in violation of Canon 2A; was not faithful to the law in violation of Canon 3A and B(2); was not patient, dignified and courteous to a litigant and the litigant's lawyer in violation of Canon 3B(4), and manifested bias and prejudice against attorneys of the DPA in claims of ineffective assistance of counsel in violation of Canon 3B(5).

ORDER

Judge Martin F. McDonald has been found guilty of violating the Code of Judicial Conduct and engaging in misconduct in this matter. Judge McDonald is a Former Senior Status Special Judge, who served on the Bench for many years. Judge McDonald's actions in entering an injunction and awarding attorney fees against a *pro se* litigant without the taking of any proof, merely hearing argument of opposing counsel, is something the Commission would not expect from a seasoned veteran Judge. Judge McDonald completely disregarded his responsibility to

provide access to the Court for all litigants in the Commonwealth of Kentucky, and his actions in this matter were so improper as to be reprehensible.

Judge McDonald's actions in regard to Count II, which was a hearing relating to a request by the Defendant for relief from a death sentence conviction are likewise something the Commission would not expect from a veteran jurist. The seriousness of this type proceeding and the stakes involved, require the Court to consider the matter appropriately, and not act as Judge McDonald did in this instance.

It is important to note that during the pendency of this matter, the majority of the Commission voted to order a temporary suspension of Judge McDonald from acting in his official capacity as a Judge, and from the performance of his duties pending final resolution of this matter. A temporary suspension is only pursued in egregious cases. Suffice it to say that the actions of Judge McDonald in both of these cases were egregious.

Judge McDonald is no longer serving in the Kentucky Court of Justice. However, his conduct described in this Order violated the Code of Judicial Conduct and brought the Kentucky Judiciary into disrepute and should be sanctioned. Since Judge McDonald has completed his service, a public reprimand is the most severe sanction available. Were Judge McDonald still a member of the Kentucky Judiciary, a much more severe sanction, perhaps including removal from the Bench, would have been warranted, and would have been ordered.

Therefore, for the foregoing conduct, Former Senior Status Judge Martin F. McDonald is hereby publicly reprimanded.

Judge David Bowles recused from any consideration of this matter.

DATED: 8/12/13


STEPHEN D. WOLNITZEK
CHAIR OF THE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Findings of Fact, Conclusions of Law and Final Order were mailed to Hon. Timothy Denison, Suite 320, Republic Plaza, 200 South Seventh Street, Louisville, Kentucky 40202, and counsel for the Commission Hon. George F. Rabe, 157 Kentucky Avenue, Lexington, Kentucky 40507, this 12th day of August, 2013.


MS. JIMMY SHAFFER,
EXECUTIVE SECRETARY

**COMMONWEALTH OF KENTUCKY
JUDICIAL CONDUCT COMMISSION**

IN RE THE MATTER OF:

MARTIN F. McDONALD
SENIOR STATUS SPECIAL JUDGE

NOTICE OF FORMAL PROCEEDINGS AND CHARGES

Notice is hereby given of the initiation of formal proceedings under Rule 4.180 of the Rules of the Supreme Court. At the times set out in this Notice, you were Senior Status Special Judge in Kentucky's Court of Justice. The charges are as follows.

COUNT I

In the case of *Coachhouse Inc. v. Edward H. Flint*, Jefferson Circuit Court Case Number 12-CI-03106, during a hearing on August 3, 2012, you refused to allow a pro se defendant to present any argument because he was not a lawyer and summarily entered an injunction against him and awarded attorney fees; and on August 8, 2012, pursuant to your ruling on August 3, 2012, judgment was entered for attorney fees and costs in the amount of \$11,579.20.

In regard to the above matter, you violated SCR 4.020(1)(b)(i) and (v) in that your actions constituted misconduct in office and violated SCR 4.300, the Code of Judicial Conduct, Canons 1, 2A and 3A and B(2), (4), (5), (7) and (8) which read in pertinent part as follows:

**CANON 1: A JUDGE SHALL UPHOLD THE INTEGRITY AND
INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. A judge should actively participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. *Judicial Duties in General.* The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. *Adjudicative Responsibilities.*

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

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

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and in proceedings before the judge, shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. With regard to a pending or impending proceeding, a judge shall not initiate, permit, or consider ex parte communications with attorneys and shall not initiate, encourage or consider ex parte communications with parties...

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

In particular, by the above conduct, you engaged in misconduct in office; failed to observe high standards of conduct in violation of Canon 1; failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A; were not faithful to the law in violation of Canon 3A and B(2); were not patient and courteous to a litigant in violation of Canon 3B(4); manifested bias and prejudice against a pro se litigant in violation of Canon 3B(5); failed to accord to a person who had a legal interest in the proceeding the right to be heard according to law in violation of Canon 3B(7); and failed to dispose of judicial matters fairly in violation of Canon 3B(8).

COUNT II

In the case of *Commonwealth v. Roger Dale Epperson*, Warren Circuit Court Case Number 97-CR-00016, on September 28, 2012, in a hearing regarding Epperson's request for relief from a death-sentence conviction you engaged in the following conduct. You addressed the attorney for the defendant in an intemperate voice and, among other comments, you stated "if you ever call me on my cell phone again, I'll strangle you," and that you would try to get the attorney's law license "yanked" if he did it again. When the attorney attempted to explain that he had consent of opposing counsel to make the call, you stated "negative" and "be quiet". In directing the bailiff to bring the defendant from the holding cell into court, you stated "Bring his carcass out here." After hearing from only one witness, you stated "This has been a huge waste of time" and that the Department of Public Advocacy (DPA) attorney's allegations "have bordered on the ridiculous." You also stated that the DPA was "making a mountain out of a molehill." You also stated that the nature of ineffective counsel motions in general "is distasteful

to the court. The lawyers who do the work at trial now get criticized by backseat drivers who weren't there and who didn't try the case." You also stated to the DPA attorney "You've never been in the heat of battle in one of these cases, and now you're criticizing lawyers that actually are real lawyers that do the work, the dirty work, the down-in-the-trenches work." Your conduct at the hearing in question generated negative coverage in the *Courier-Journal* and other media outlets and brought the Kentucky judiciary into disrepute.

In regard to the above matter, you violated SCR 4.020(1)(b)(i) and (v) in that your actions constituted misconduct in office and violated SCR 4.300, the Code of Judicial Conduct, Canons 1, 2A and 3A and B(2), (4) and (5), which read in pertinent part as set out above.

In particular, by the above conduct, you engaged in misconduct in office; failed to observe high standards of conduct in violation of Canon 1; failed to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A; were not faithful to the law in violation of Canon 3A and B(2); were not patient, dignified and courteous to a litigant and the litigant's lawyer in violation of Canon 3B(4); and manifested bias and prejudice against attorneys of the DPA and claims of ineffective assistance of counsel in violation of Canon 3B(5).

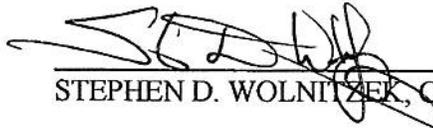
For your information, the Commission wishes to call your attention to the following Supreme Court Rule:

RULE 4.180 FORMAL PROCEEDINGS

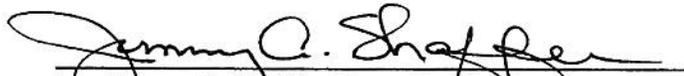
If the Commission concludes that formal proceedings should be initiated, it shall notify the judge. He may file an answer within 15 days after service of the notice. Upon the filing of his answer, or the expiration of time for so filing, the Commission shall set a time and place for the hearing and shall give reasonable notice thereof to the judge.

Please mail your answer to: Ms. Jimmy A. Shaffer, Executive Secretary, Judicial Conduct Commission, P.O. Box 22208, Louisville, Kentucky 40252-0208.

Date: May 10, 2013


STEPHEN D. WOLNITZEK, CHAIR

I hereby certify that copy hereof was served on Martin F. McDonald, Senior Status Special Judge, by mailing same to his attorney, Timothy Denison, Suite 320, Republic Plaza, 200 S. Seventh Street, Louisville, Kentucky 40202 on the 13th day of MAY, 2013.


Ms. Jimmy A. Shaffer, Executive Secretary

Judge David Bowles recused from any consideration of this matter.