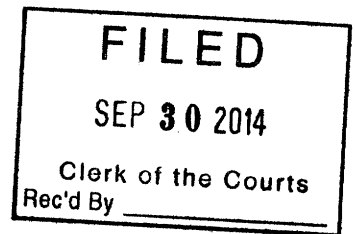


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**IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT**

**IN RE: THE HONORABLE JOHN A. DONALD  
GENERAL SESSIONS JUDGE  
SHELBY COUNTY, TENNESSEE**



**Docket No. M2013-02204-BJC-DIS-FC**

**File No. 11-4762**

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**REQUEST OF DISCIPLINARY COUNSEL FOR  
SPECIAL HEARING PANEL INSTRUCTION**

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Timothy Discenza, Disciplinary Counsel for the Tennessee Court of the Judiciary, and would respectfully move the Chair Person to Instruct the Hearing Panel in this action at the Hearing/trial of this action, as follows:

**Disciplinary Counsel Requested Special Hearing Panel Instruction No. 1**

Disciplinary Counsel may prove his claim of retaliation by Judge Donald with either direct or indirect evidence of intentional retaliation. Direct evidence is evidence that proves something conclusively, finally, and completely on its own. In other words, direct evidence of intentional retaliation means that if you believe it, the only conclusion that could be drawn is that intentional retaliation occurred.

The Disciplinary Counsel claims that Judge John A. Donald intentionally retaliated against David Gold after and because he engaged in a legally protected activity by filing a complaint against Judge Donald in the Tennessee Court of the Judiciary.

To prove and win his claim of retaliation, Disciplinary Counsel must prove by clear and convincing evidence that Judge John A. Donald intentionally took a materially adverse action against the Court of the Judiciary complainant David Gold because of his having filed a judicial misconduct complaint against Judge John A. Donald, and that the filing of that judicial misconduct complaint was a determining factor in the adverse action taken by Judge John A. Donald in filing a complaint against David Gold with the Board of Professional Responsibility.

Disciplinary Counsel may also potentially prove intentional retaliation with indirect or circumstantial evidence. To prove his claim by indirect or circumstantial evidence, Disciplinary Counsel must prove all of the following elements by clear evidence:

1. David Gold engaged in an activity authorized by state law, that being the right of an individual to file a judicial conduct complaint against a Judge in accordance with the Tennessee Court of the Judiciary statute, Tennessee Code Annotated Section 17-5-101 *et. seq.*, as it was in force and effect at the time of the conduct that occurred in 2011 and 2012, by filing a judicial misconduct complaint against Judge John A. Donald.

2. Judge Donald knew about the authorized activity, i.e., the right of an individual to file a judicial misconduct complaint against a Judge.

3. After becoming aware of the authorized activity, Judge Donald took a retaliatory action against David Gold; and

4. The retaliatory action was causally connected to that authorized activity by Mr. Gold.

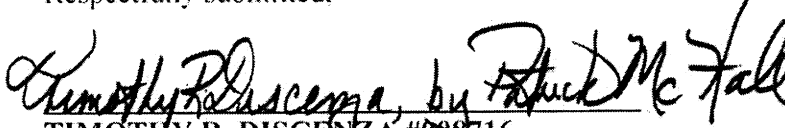
To “retaliate” is to “to return the like for: repay or requite in kind (as an injury) ... [or] to put or inflict in return.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1938 (1993 Unabridged).


**Statement in Support of Requested Hearing Panel Instruction**

Disciplinary Counsel would submit that a specific Hearing Panel Instruction on the definition of “retaliation” would be of assistance to the Panel, combined with an Instruction relating the elements and nature of proof required. The majority of the proposed instruction is adapted from a comparable and analogous Tennessee Pattern Civil Jury Instruction 860 C, relating to Tennessee Human Rights employment retaliation actions. The final paragraph/sentence of the Instruction is a simple and direct definition of retaliation cited in *White v. Empire Exp., Inc.*, 395 S.W.3d 696 (Tenn. App. 2012), also an employment case.

Dated: September 30, 2014.

Respectfully submitted,

  
TIMOTHY R. DISCENZA #008716  
Disciplinary Counsel

  
PATRICK J. McHALE, #004643  
Assistant Disciplinary Counsel

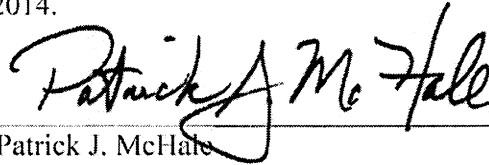
Tennessee Board of Judicial Conduct  
P.O. Box 50356  
Nashville, TN 37205

**Certificate of Service**

I hereby certify that a true and exact copy of the foregoing was mailed, sent by email or delivered to the following:

Hon. John A. Donald  
General Sessions Judge  
140 Adams Avenue, Suite 110  
Memphis, Tennessee 38103

This the 30th day of September, 2014.

A handwritten signature in black ink, reading "Patrick J. McHale". The signature is written in a cursive style and is positioned above a horizontal line.

Patrick J. McHale  
Assistant Disciplinary Counsel