

is carrying the original complaint to the higher court. The “notice” doesn’t require supporting reasons, because they’re already in the complaint filed with, and denied by, the lower court. And the same complaint document that was filed with the lower court will be included in the Record of the Case sent up by the clerk of the lower court.

The Houston OC recommended adoption of the James River overture, and the GA adopted the change (*M42GA*, p. 65), and presbyteries voted 62-3 to approve. (Voting against were Central Georgia, Gulf Coast, and Siouxlans.) Then in 2015, the 43<sup>rd</sup> GA in Chattanooga gave final approval (*M43GA*, 2015 Chattanooga, p. 96 and 114-116).

Accordingly we believe that *BCO* 43-3 should be clarified by amendment offered through an Overture.

/s/ RE Howie Donahoe, RE Dan Carrell, TE Will Barker

**CASE 2016-05**

***TE THOMAS E. TROXELL***

**VS.**

***THE PRESBYTERY OF THE SOUTHWEST***

**DECISION ON COMPLAINT**

**October 20, 2016**

**I. SUMMARY OF THE FACTS**

04/25/2013 At the Stated Meeting of The Presbytery of the Southwest (PSW), PSW voted to ". . . erect a small committee to shepherd a Teaching Elder (TE) and recommend any actions they deem necessary during his crisis in Roswell." This action followed an executive session for which no minutes were produced.

June 2013      The TE resigned.

09/19/13      PSW received a "Status of Redeemer Christian Fellowship" noting that the TE "resigned in June 2013." Later, it was further reported, "TE Shelby Moon gave report of the shepherding committee for TE [name redacted]. ... It was

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MSP to remove the limited power of an evangelist from TE [name redacted] and change his status to "Without Call."

01/24/14 At Stated meeting of PSW, in report of Officers, Churches and Nominations Committee, "The court prayed for TE [name redacted], who is without call, for guidance as to whether to seek a new call or to demit." In Admin & Judicial Business Committee it was reported, "Communicated change in status to TE [name redacted]."

June 2014 Divorce granted in a civil action filed in Texas by the TE's wife.

July 2014 The TE wrote the Chairman of the PSW committee overseeing his care and requested PSW to recognize his divorce as an "ecclesiastical divorce" or rule that he had Biblical grounds for divorce.

09/25/14 At stated meeting of PSW, shepherding committee presented a "Motion to Grant Ecclesiastical Divorce" in which it recommended, "the Presbytery of the Southwest, being persuaded of TE [name redacted]'s innocence in this matter, grant him an ecclesiastical divorce in accordance with the Biblical provision laid out in 1 Corinthians 7:15 and our church's confession in WCF 24:6." "The motion was referred to Admin & Judicial Business Committee for further consideration."

01/22/15 At stated meeting of PSW, the Administration and Judicial Business Committee recommended "that the Presbytery of the Southwest form a committee to investigate the matters surrounding the divorce of TE [name redacted] .... This committee is to investigate to determine if TE [name redacted] was the "innocent party" in the divorce, whether he may be deemed to have a biblical divorce, and his subsequent fitness to pursue another call in the Presbyterian Church in America."

02/12/15 The TE formally requested PSW to suspend its investigation as to whether his divorce was biblical.

03/07/15 The TE remarried.

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- 04/24/15 At a stated meeting of PSW, after an executive session, "[i]t was MSP to refer the report of the investigative committee for TE [name redacted] back to the committee to continue its investigation. The committee was specifically instructed to interview TE [name redacted]'s former wife, TE Henry Fernandez, TE Jim Bailey and his wife, TE Shelby Moon, TE John Pickett and any others who may have pertinent information. The committee is to report at the September 2015 stated meeting. The committee's report is to be completed for publication thirty days in advance of the Presbytery's September stated meeting. TE [name redacted] is also to be instructed to be present at this meeting to answer questions."
- 09/24/15 PSW at its stated meeting, after hearing the report of the investigative committee, took the following action: "MSP to institute process against TE [name redacted] ...."
- 01/21/16 After an executive session, the Court approved two charges presented by the prosecutor: "not managing his family well ..." and "not submitting to the government of the church." PSW approved suspension of the TE from any pastoral duties while under process.
- 02/29/16 TE Thomas Troxell filed a complaint.
- 04/21/16 PSW denied TE Troxell's complaint.
- 04/25/16 TE Troxell sent his complaint to the General Assembly.
- 09/26/16 The hearing was conducted by telephone conference. The Panel members were EJ Nusbaum, Paul Kooistra and John Bice. Alternates Pawl Fowler and Jack Wilson also participated in the hearing.

## II. STATEMENT OF THE ISSUES

- A. Did PSW err when it charged the TE with failing to manage his household well, arising from events which occurred more than 12 month prior to process being commenced?

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- B. Did PSW err when the Moderator allowed members of PSW to discuss potential charges and make assertions of the guilt of the TE and his fitness for ministry?
- C. Did PSW err when the TE was questioned on the floor of presbytery at the September 24, 2015 stated meeting?
- D. Did PSW err when the Moderator declared that the TE was no longer in good standing at the September 24, 2015 Stated Meeting?
- E. Did PSW err when it charged the TE with lack of submission to the government and discipline of the church in violation of the Rules of Discipline in the *BCO*?

### III. JUDGMENT

Shall these specifications of error be sustained?

- A. Yes. The action taken by PSW to institute process with regard to Charge 1, “not managing his family well,” is annulled.
- B. No.
- C. No.
- D. Yes. However, this error is not of such a nature as to annul the other actions taken by PSW. The TE is considered to be in good standing. The PSW did suspend his official functions through proper process at the January 2016 meeting of PSW. That suspension remains in effect.
- E. No. There is no constitutional reason to prevent this Charge from being adjudicated.

### IV. REASONING AND OPINION

- A. *BCO 32-20* states in part that “Process, in case of scandal, shall commence within the space of one year after the offense was committed, unless it has recently become flagrant.” This provision establishes a standard for timeliness in dealing with offenses while allowing the court the ability to deal with allegations of sin when they become flagrant. This is consistent with the purpose of church courts.

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Unlike civil courts, a church court cannot deprive a person of life, liberty or property. Rather church courts exist to glorify God, purify the church and to keep and reclaim the sinner. By giving the church court the ability to deal with allegations of sin when the allegations become flagrant, the court can intervene in order to glorify God, purify the church and keep and reclaim a sinner even if the offense becomes known after a significant period of time has passed without the restraint of some sort of “statute of limitations.”

However, the record before us does not indicate that the offense in question did recently become flagrant. The specification in the charge reads “That on or about June 2014, the said TE [name redacted] did finalize his divorce to [his former wife—name redacted] for insupportability which indicates a breakdown of love, forgiveness and grace in the marriage relationship.” PSW knew that the divorce had been finalized “earlier” in 2014 as reported by the shepherding committee at the September 2014 meeting. In January 2015, PSW initiated an investigation. PSW received a report from the original committee in April 2015 and from an expanded committee in September 2015. Although each of these reports contains findings regarding the conduct of the TE, there is nothing in the record of the case that would indicate that any of the findings could be considered to have “recently become flagrant” in the twelve (12) months preceding the September 2015 initiation of process. We are therefore left with a record that shows that PSW voted to institute process in September 2015 for an offense that occurred in June 2014; the fifteen (15) month delay does not meet the standard specified in *BCO 32-20*.

We note that the TE initiated the entire matter by requesting in July 2014 that PSW grant him an “ecclesiastical divorce.” While the term “ecclesiastical divorce” does not appear in our constitution, we understand the request to be that PSW declare that the TE either had Biblical grounds for divorce or was otherwise fit to serve as a minister since his wife initiated the divorce. Given the weight and formality of this request, it is not surprising that PSW proceeded deliberately. The record demonstrates that a PSW committee met with the TE and came to the preliminary conclusion that he either had grounds for divorce himself or that he was not disqualified from further pastoral ministry based on the divorce initiated by his wife. The record indicates that PSW was satisfied for a time to deal with the TE’s request “pastorally” rather than “judicially.” This election was well within PSW’s

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discretion and judgment. Having chosen this path, however, PSW could not reset the timeline to begin prosecution in the absence of some newly evident scandal or flagrancy or a newly committed or continuing offense. Commenting on an analogous predecessor provision to our *BCO* 32-20, F.P. Ramsey noted:

The principle is that, if the Church neglects to commence process against scandal (which is any flagrant public offence of [sic] practice bringing disgrace on the Church) within a year, she is debarred from thereafter doing it. This is not to shield the offender, but to incite to the prompt prosecution of such offences. Offences not so serious or scandalous the Church may bear with the longer while seeking to prevent scandal...

F.P. Ramsay, *Exposition of the Book of Church Order* (1898, p. 207), on VI-20.

The record demonstrates that PSW initially viewed the TE's situation as one that was not so scandalous as to warrant immediate citation and prosecution. PSW chose to "bear with" the TE's situation "longer"--for nearly eighteen (18) months. Our constitution simply does not permit a presbytery to institute process after a delay of this length in the absence of scandal or a new or flagrant offense. As to Charge 1, the record does not demonstrate any such scandal or any new or flagrant offense.

For all these reasons, the action taken by PSW with regard to Charge 1, "not managing his family well," is annulled.

- B. There is nothing in the record of the case to indicate that the Moderator of PSW erred in allowing discussions regarding the TE. Discussion about potential charges, evidence, reports, etc. are necessary for the court to conduct the duties assigned to the court by the *BCO*.
- C. In this specification of error, Complaint claims that based on *BCO* 35-1, PSW erred in permitting member to ask questions of the accused on the floor of presbytery. However, *BCO* 35-1 deals with testimony taken during trial and is not applicable to inquiries being made outside of a trial. In questioning one of its members, the presbytery was properly exercising its duty to "with due diligence and great discretion

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demand from such persons satisfactory explanations concerning reports affecting their Christian character.” (*BCO 31-2*)

- D. There is no definition of good standing in the *BCO*, so we are compelled to rely on other constitutional standards. The effect of the declaration that the TE was “not in good standing” was to remove certain rights that are afforded to members in good standing. (See *BCO 13-13, 14-2, 19-1, 24-7, 43-1*, etc.) The removal of rights without process is contrary to “The Rules of Discipline” in the *BCO*. The minutes of the PSW meeting of September 24, 2015 include inartful language employed by the moderator to describe the TE’s status. In its January 21, 2016 meeting, PSW formally clarified and corrected that the TE was suspended per *BCO 31-10*. Nothing in the record indicates that the TE’s defense was harmed or his activities were limited by the moderator’s inartful description.
- E. In this specification, the Complainant alleges that PSW erred when it charged the TE with a lack of submission. We find nothing in the record of the case to support this allegation of error. On its face, Charge 2 addresses an offense that occurred within one year of the initiation of process; therefore, the charge is not barred by *BCO 32-20*. The Complainant alleges that certain correspondence in the record evidences an effort by the TE to cooperate with and submit to PSW regarding issues related to his divorce and remarriage. This evidence may bear on the merits of the charge at trial, but it does not preclude PSW’s filing the charge. Without addressing the guilt or innocence of the TE, this court finds no constitutional reason to prevent this charge from being adjudicated using the judicial process as outlined in the *BCO*.

This opinion was drafted, edited and adopted by the Panel and amended and approved by the SJC on October 20, 2016, on the following roll call vote (22 Concur, 2 Absent):

Bankson, <i>Concur</i>	Dowling, <i>Concur</i>	Meyerhoff, <i>Concur</i>
Barker, <i>Concur</i>	Duncan, <i>Concur</i>	Neikirk, <i>Concur</i>
Bise, <i>Concur</i>	Evans, <i>Concur</i>	Nusbaum, <i>Concur</i>
Cannata, <i>Concur</i>	Fowler, Absent	Pickering, <i>Concur</i>
Carrell, <i>Concur</i>	Greco, <i>Concur</i>	Robertson, <i>Concur</i>
Chapell, <i>Concur</i>	Jones, <i>Concur</i>	Terrell, <i>Concur</i>
Coffin, <i>Concur</i>	Kooistra, <i>Concur</i>	White, Absent
Donahoe, <i>Concur</i>	McGowan, <i>Concur</i>	Wilson, <i>Concur</i>

**CONCURRING OPINION ON CASE 2016-05**

RE Howard Donahoe, joined by TE Will Barker

We concur with the SJC Decision, but believe attention should be drawn to a recurring problem. This Complaint demonstrates one of the significant difficulties of allowing a *BCO* 43 complaint to be filed during judicial process – especially by a third party.

Presbytery indicted TE Hammons in January 2016. Thus, the trial could have been held in March or April 2016, and theoretically, he might have been acquitted. Or, if convicted, he could have appealed and the SJC would probably have been rendered a final decision on the appeal at or before its October 2016 meeting, at which time the matter would have been concluded.

However, at this point, if the Presbytery proceeds to a trial on the charge of “lack of submission,” it is not likely a verdict would be rendered, and judgment approved, until the end of 2016. And if appealed, the full SJC would not likely render a decision on an appeal before July 2017. Thus, because of a third-party complaint, the final decision in this judicial case will likely be delayed between 6 and 16 months<sup>16</sup> – and the accused has had his “official functions suspended” for the entire time, per the allowance of *BCO* 31-10.<sup>17</sup>

We should note Presbytery’s April 2016 Minutes indicate “TE Troxell gave notice *on behalf of the accused* that he would elevate the complaint to the next higher court...” (Emphasis added.) While the meaning of the italicized is not entirely clear, we assume TE Hammons approved this approach. Presbytery also adopted a motion at the same meeting to “defer” the trial “until the complaint has been adjudicated” by the SJC. Presumably, the accused could have objected to the trial deferral, and requested it proceed expeditiously so he might have an opportunity to seek an acquittal, and a lifting of the 31-10 suspension, or at least begin the appeal process much sooner.

Three years ago in Case 2013-03: *Complaint of Marshall v. Pacific*, the SJC rendered the following Decision:

The Complaint is Judicially Out of Order, because it has to do with matters in a judicial case that an accused should reserve

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<sup>16</sup> It is possible he might have been acquitted in March 2016, or had his appeal sustained in October 2016.

<sup>17</sup> *BCO* 31-10: “When a member of a church court is under process, all his official functions may be suspended at the court’s discretion; but this shall never be done in the way of censure.”



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for proper disposal in an appeal, not through a complaint (*BCO* 32-14; 42-3), and because it arose in a judicial case in which an appeal is now pending (*BCO* 43-1).”<sup>18</sup>

Thus, if the *Marshall* complaint (from the accused) was out of order for filing after judicial process had begun, then perhaps the Troxell complaint (from a third party) should also have been ruled judicially out of order for the same reason.

In a Concurring Opinion in *Marshall*, RE Donahoe wrote the following, which also applies to this present Complaint, especially point number 2 below.

If the accused [or a third party] were allowed to file complaints against any and all actions of a trial commission up to the time of the trial, it could significantly and needlessly delay the trial, especially if adjudication of each complaint needed to wait for the next stated meeting of Presbytery. For example, the accused might file complaints against:

1. the appointment of a particular prosecutor
2. the wording of the indictment
3. the appointment of a particular member of the trial commission
4. the date of the trial
5. any pre-trial rulings of the trial commission (allowable defense counsel, witness citations, length of briefs, scheduled length of trial, length of closing arguments, etc.)

To avoid this problem, perhaps *BCO* 43 should be revised to something like the following:

43-1. A complaint is a written representation made against some act or decision of a court of the Church. It is the right of any communing member of the Church in good standing to make complaint against any action of a court to whose jurisdiction he is subject, ~~except that no complaint is allowable in a judicial case in which an appeal is pending.~~ However, in matters related to a judicial case, no complaint

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<sup>18</sup> SJC vote in *Marshall* was 13-3, with one Concurring (Donahoe) and one Dissenting Opinion (Carrell, Bise, McGowan). See *M43GA*, 2015 Chattanooga, p. 548-554. <http://pcahistory.org/ga/index.html#a43>

is allowable to the accused after process has commenced (i.e., the court has directed the appointment of a prosecutor and ordered an indictment drawn - *BCO* 32-2). If a complaint is filed by any other member, adjudication shall be delayed until after the judicial case has been completed, or, if an appeal is filed, after it has been adjudicated or withdrawn.

/s/ RE Howie Donahoe, TE Will Barker

**CASE 2016-07**

***RE JOHN AVERY AND RE DALE LEWELLING  
VS.  
NASHVILLE PRESBYTERY***

**DECISION ON COMPLAINT  
March 3, 2017**

Messrs. Avery and Lewelling complain against the action of Nashville Presbytery in denying their complaint against “the action of the Shepherding Committee of the Nashville Presbytery taken in the November 10, 2015, meeting of the Presbytery which improperly initiated an investigation of Teaching Elder Jim Bachmann, Senior Pastor of Covenant Presbyterian Church of Nashville, and the action taken by the Shepherding Committee of the Nashville Presbytery in the February 9, 2016, meeting of the Presbytery forwarding the report of their investigation to the Committee on Judicial Business.”

*BCO* 43-1 provides:

A complaint is a written representation made against some act or decision of a court of the Church. It is the right of any communing member of the Church in good standing to make complaint against any action of a court to whose jurisdiction he is subject, except that no complaint is allowable in a judicial case in which an appeal is pending. (Emphasis added).

To the extent that the Complaint is against any actions of Nashville Presbytery taken on November 10, 2015, the Complaint is not timely, having been filed on February 23, 2016 and therefore not meeting the 60-day filing requirement