

Commission on Judicial Conduct  
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**FILED**

**DEC 20 2007**

ARIZONA COMMISSION ON  
JUDICIAL CONDUCT

**STATE OF ARIZONA**  
**COMMISSION ON JUDICIAL CONDUCT**

Inquiry concerning Judge, )  
 ) Case No. 06-074  
**MICHAEL K. CARROLL,** )  
 )  
 Respondent ) **ORDER**  
 )

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On October 3, 2006, the Commission on Judicial Conduct entered an amended order imposing an informal reprimand on former Judge Michael K. Carroll for violating Canon 3B(4) of the Code of Judicial Conduct, which requires, among other things, that a judge must be patient, dignified and courteous with others with whom the judge deals in an official capacity, and Canon 3C(1), which imposes an additional requirement to cooperate with other judges and court officials in the administration of court business. The commission concluded that, although it is acceptable and may even be necessary for a judicial officer to express an opinion in opposition to a presiding judge's administrative decisions, either personally or at a group meeting with other judges, in this situation the Respondent went too far and continued to complain about the decision in an e-mail message after being asked to stop. He also withdrew from a court committee, claiming he had "major philosophical differences" with the presiding judge and indicating he no longer had respect for her.

The Respondent subsequently filed a motion for reconsideration or, in the alternative, a motion for a formal hearing, which the commission denied. He then filed a special action with the Arizona Supreme Court. In its decision, the court held that the judge was entitled to a hearing, vacated the commission's order imposing the informal reprimand, and remanded the matter to the commission for further proceedings.

The commission scheduled a hearing for December 6, 2007, but the Respondent filed a motion to vacate the proceedings. The commission denied the motion, and the Respondent filed a second

petition for special action with the court claiming there was no basis for a hearing in the absence of formal charges alleging grounds for discipline. The court denied the motion and returned the case to the commission. The Respondent subsequently withdrew his request for a hearing, and the commission vacated the hearing and scheduled a telephone conference to consider final resolution of the case.

The telephone conference was held on December 6, 2007, with a quorum of the commission participating and voting. (Judge Louis Frank Dominguez recused himself and did not participate or vote in this case.) During the meeting, the commission noted that the Respondent had served on the bench for many years without any disciplinary problems. He also appeared genuinely concerned during the proceedings about the ability of judges to defend themselves in informal disciplinary matters and the effect this case would have on his career. Nonetheless, the commission found by clear and convincing evidence that the Respondent's conduct in this instance violated the Code of Judicial Conduct and voted unanimously to reprimand the judge, noting that an informal sanction of this nature should not be viewed as an impediment to further judicial service. Now, therefore,

**IT IS ORDERED THAT** former Judge Michael K. Carroll is informally reprimanded for the manner in which he treated his presiding judge as described in the original complaint that gave rise to these proceedings, and that the record in this case, consisting of the complaint, the judge's response and this order, shall be made public as required by Rule 9(a).

**DATED** this 20th day of December, 2007.

FOR THE COMMISSION

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Hon. J. William Brammer, Jr.  
Commission Chair

Copies of this order were delivered and  
and mailed on December 20, 2007, to:

James E. Padish  
Tiffany & Bosco P.A.  
Camelback Esplanade II  
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The Commission on Judicial Conduct  
1502 West Washington, Suite 229  
Phoenix, AZ 85007

**Judicial Ethics Complaint regarding Judge Michael K. Carroll**

6. This matter involves conduct by Judge Carroll concerning his interaction with all of the judges of the Court and others, and most specifically with the Chief Presiding Judge, as it relates to the administration of Court business. It also includes conduct involving the judge's judicial retention process that bears on his veracity and his ability to fulfill certain judicial assignments as a result of lawyer endorsements for his retention.

**FACTS REGARDING COMPLAINT AGAINST JUDGE CARROLL**

1. After being appointed Chief Presiding Judge (CPJ) of Phoenix Municipal Court (PMC) effective 12-1-05, Judge Song Ong interviewed Judge Carroll and all other full-time judges and hearing officers regarding several matters, including who might be suitable and interested in serving in court administration as the new Assistant Presiding Judge (APJ). These interviews occurred from 12-1-05 to 12-19-05.
2. Judge Karyn Klausner, the spouse of Judge Carroll and also a member of the PMC bench, had expressed an interest in the APJ position but was not ultimately selected. Although some were advised personally by Judge Song Ong of her selection of Judge Jeffery, Judge Klausner and everyone else at PMC were officially notified of Judge Song Ong's appointment of Judge Jeffery pursuant to a court-wide bulletin dated 12-19-05 (**See attached bulletin, Exhibit #1**).
3. Judge Carroll and Judge Klausner were the only two individuals who ~~affirmatively made their~~ disapproval of this decision known to Judge Song Ong by way of e-mail transmissions, which was done through two separate e-mails on 12-20-06. The appropriateness of word selection and tone of these e-mails speak for themselves (**See Judge Carroll's first e-mail dated 12-20-05, Exhibit #2 and Judge Klausner's e-mail, Exhibit #3**).
4. Judge Carroll sent a second e-mail to Judge Song Ong and copied to all other judges of PMC (the judges) on 1-13-06, again publicly affirmatively voicing his disapproval. The appropriateness of this e-mail, especially in light of the addressees, again speaks for itself. (**See Judge Carroll's second e-mail dated 1-13-06, Exhibit #4**).

5. Other e-mails were subsequently sent by Judge Klausner that appeared to perpetuate a sarcastic and negative tone in the same manner as Judge Carroll's e-mails. These e-mails also speak for themselves. (**Ybarra e-mail, Exhibit #5, Whitehead e-mail, Exhibit #6**).
6. Many of the judges communicated to Judge Song Ong by way of telephone, e-mail or by personal visit, that they did not approve of these e-mails and that they felt it was negative, potentially damaging to the collegiality of the PMC bench and was an attempt to undermine the authority of the CPJ and APJ as administrators of the Court. There was a general expression of annoyance with the e-mails and that the conduct possibly constituted violations of the Judicial Canons of Ethics and/or City policy regarding the use of e-mail. The judges asked Judge Song Ong to address the problem.
7. Judge Song Ong responded by delivering a statement and admonition to all of the judges at a special judges' meeting on 1-25-06 where she specifically directed that judges not use e-mail to lodge personal and offensive comments about other colleagues (**See attached statement by Judge Song Ong dated 1-25-06, Exhibit #7**).
8. Judge Carroll then sent a third e-mail to Judge Song Ong on 1-25-06, immediately after the judges meeting, which also speaks for itself (**See Judge Carroll's third e-mail dated 1-25-06, Exhibit #8**).
9. On the afternoon of the judges meeting on 1-25-06, Judge Klausner requested a meeting between herself, Judge Carroll, and Judge Song Ong. A contentious three hour meeting ensued in Judge Song Ong's office on that same day from 2:30-5:30 between the three judges. Both Judge Carroll and Judge Klausner reiterated and confirmed that they held the same positions as earlier expressed in their e-mails. At the conclusion of that meeting, Judge Carroll advised Judge Song Ong that she needed "to watch her back" because she did not have the support of other PMC judges and that at least he and Judge Klausner would disagree with her openly (**See attached written description of the meeting by Judge Song Ong on 1/25/06, Exhibit #9**).
10. At the 1-25-06 meeting that took place in Judge Song Ong's office, Judge Carroll advised Judge Song Ong that no one other than Judge Klausner had read his e-mail dated 12-20-05 and that it was intended only for Judge Song

Ong. However, Judge Carroll solicited Judge Alice Wright to read the e-mail prior to it being sent, and she advised him not to send it (**See attached statement by Judge Wright dated 2-3-06, Exhibit #10**).

11. The Judicial Selection Advisory Board (JSAB) met on 2-1-06 to hold reappointment hearings on Judge Carroll along with six other judges. The Board voted unanimously to recommend the reappointment of the other six judges, and the Board voted 4-2-1 to recommend his reappointment. The City Council has since completed the reappointment process of five of the seven judges up for reappointment. The reappointment process for Judge Carroll and one other judge are still pending before the City Council.
12. Judge Carroll's JSAB hearing on 2-1-06 was initially scheduled near the beginning of the meeting agenda when no public attorneys were present. At that time, the chair of the JSAB announced that Judge Carroll's hearing would be moved to the end of the agenda at 5:30 p.m. to give all concerned time to review the documents that were going to be considered in his case. Judge Carroll and Judge Klausner left the meeting and returned by 5:30 along with ten attorneys, nine of whom were defense attorneys. Eight of the defense attorneys proceeded to speak in favor of Judge Carroll's reappointment. It was disclosed later that some of these attorneys were present at the request or at the urging of attorney Gary Kula, Director of the Public Defenders Office for the City of Phoenix, or of other City public defenders. At least two of these attorneys who spoke have since had pending cases which have been heard by Judge Carroll.
13. At Judge Carroll's JSAB reappointment hearing, he again asserted that his 12-20-05 e-mail was intended only for Judge Song Ong. At this public hearing he was specifically asked if anyone else had read the e-mail. He falsely stated that Judge Klausner was the only other person who had read the e-mail. When directly asked if another judge, in particular, Judge Wright, had in fact read the entire e-mail and advised Judge Carroll not to send it, he flatly denied this. (**See attached transcript of JSAB meeting of 2-1-06, Exhibit #11, to be provided once the transcription is complete**).
14. On 2-10-06, Judge Carroll was advised by the City Council's Chief of Staff that his reappointment hearing before the Public Safety Subcommittee of the City Council had been indefinitely postponed. Later that same day, after receiving the notice of postponement, Judge Carroll hand-delivered to Judge

Song Ong a letter of a conciliatory nature, addressed to her and marked "personal."

15. Subsequent to 2-10-06, the content of the letter marked "personal" to Judge Song Ong, and/or its existence, was shared with others inside and outside of the Court by Judge Carroll and/or Judge Klausner without acknowledging that the letter was limiting with respect to Judge Song Ong as "personal" **(this letter is not included as an exhibit since it was marked "personal" by Judge Carroll but may later be provided upon Judge Carroll's permission).**
16. On 2-23-06, Judge Song Ong, pursuant to Canon 3(D)(1) of the Code of Judicial conduct, sent a short letter to Judge Carroll advising him that his conduct in continuing to hear cases involving attorneys who spoke on his behalf at the Judicial Selection Advisory Board hearing may be contrary to the provisions of AZ Ethical Opinion 99-1. He was also advised that the Judicial Ethics Advisory Committee was available to him for guidance. The next day, 2-24-06, Judge Carroll responded in writing that after review of the opinion, he did not feel it applicable to this situation **(See letter from Judge Song Ong, Exhibit #12 and letter from Judge Carroll, Exhibit #13 and list of cases heard by Judge Carroll with attorneys who spoke on behalf of Judge Carroll at 2-1-06 hearing, Exhibit #14).**
17. On the morning of 3-2-06, attorney Gary Kula, spoke to Judge Song Ong at length about Judge Carroll's reappointment. He asked Judge Song Ong what could be done to resolve this matter. Judge Song Ong advised Mr. Kula that it was not his place as the Public Defender Director to resolve this matter. Mr. Kula then spoke to Judge Carroll, who then drafted a formal letter of apology which Mr. Kula hand delivered to Judge Song Ong on behalf of Judge Carroll. Mr. Kula was also one of the several defense attorneys who spoke on behalf of Judge Carroll at the JSAB hearing on 2-1-06. **(Although a copy of this letter was delivered to Judge Song Ong, Judge Carroll wanted to discuss the letter further with Judge Song Ong before delivering it to the other addressees, therefore a copy is not included as an exhibit but may later be provided upon Judge Carroll's permission.)**
18. This Complaint may be supplemented with additional facts as they may become available.

## Conclusion

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The tone of the exchanges from Judge Carroll to Judge Song Ong, both by e-mail and in person, were not constructive and were personally disparaging to Judge Song Ong and Judge Jeffery. The timing of the exchanges appeared to be deliberate and with intent to incite others to join in this negative barrage to undermine the authority of the office of the Presiding Judge and Assistant Presiding Judge, and not merely to voice an opposing position. Judge Carroll's conduct was continuing, deliberate and apparently designed to disparage Judge Song Ong and Judge Jeffery to affect their ability to conduct their administrative duties.

Judge Carroll's conduct is exacerbated by the fact that after he sent his first two e-mails, he sent a third e-mail and had a contentious three hour face-to-face exchange with Judge Song Ong after she had admonished all of the Judges not to participate in this type of conduct. In addition, he misrepresented to Judge Song Ong and to the JSAB about who had read his first e-mail before it was sent.

After receiving a written admonishment from Judge Song Ong, Judge Carroll continued to hear pending cases in which the representing attorneys were some of the same as those who spoke on his behalf at the 2-1-06 JSAB hearing contrary to the provisions of AZ Ethical Opinion 99-1.

It was only when he was faced with a postponed reappointment hearing and apparent advice from outside parties that he then chose to be conciliatory and to finally apologize.

### **Applicable Code of Judicial Conduct sections and other relevant authorities:**

- (1) Canon 1
- (2) Canon 2
- (3) Canon 3
- (4) Arizona Ethical Opinion 99-1

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**MAY 10 2006**

May 9, 2006

Commission Members  
COMMISSION ON JUDICIAL CONDUCT  
Suite 229  
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Phoenix, Arizona 85007

*Re: The Honorable Michael K. Carroll, Judge of  
the Phoenix Municipal Court  
Case No. 06-074*

To the Commission:

**I. INTRODUCTION**

The Honorable Michael Carroll, Judge of the Phoenix Municipal Court, has retained our firm, in part, to respond to the complaint filed by Kevin Kane dated March 8, 2006. Judge Carroll received the complaint, along with a cover letter from Linda Haynes, Esq., your staff attorney, dated March 24, 2006, which summarized the allegations. Judge Kane's letter lists eighteen separate paragraphs of "facts regarding complaint against Judge Carroll" and the author's "conclusion," suggesting that the described conduct violates Advisory Opinion 99-1 and Canons 1, 2 and 3 of the Code of Judicial Ethics, Rule 81, Rules of the Supreme Court.

Judge Carroll wrote three emails to Judge Roxanne Song Ong, all dealing with administrative decisions she made with which he strongly disagreed. Judge Carroll denies that the conduct for which he is responsible constitutes a violation of the Code of Judicial Conduct. Before responding to the specific claims, it would be helpful to provide a brief history of the court and the context in which Judge Carroll directed his email correspondence to Judge Roxanne Song Ong.



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## II. THE COMPLAINANT

The letter from Ms. Haynes introduces the complainant as Kevin Kane "in his role as Counsel for the Phoenix Municipal Court." At the time of some of the relevant events, Mr. Kane was indeed staff attorney for the court. However, when he filed this complaint, he had been sworn in as a Judge of the Phoenix Municipal Court.

While Judge Kane swore to the truth of the complaint, almost all of the information contained therein could only be information originating from Judge Song Ong. Judge Kane refers to himself on the first page of the complaint as "Kevin Kane on behalf of the Phoenix Municipal Court." However, the judges who constitute the court have not had a meeting in which filing a complaint was discussed, considered or authorized. While Judge Song Ong may have the authority to speak on behalf of the Phoenix Municipal Court as Presiding Judge, there is no precedent to suggest that she has the authority to file a complaint in the name of the entire Court.

Furthermore, Mr. Kane himself has admitted that:

- a. he advised Judge Song Ong not to introduce the emails nor her views regarding them to the Judicial Selection Advisory Board;
- b. he believed that the emails are not public documents and that they are protected under Rule 123 of the Arizona Supreme Court; therefore, they cannot be considered a violation of Phoenix City email policy; and
- c. he followed Judge Song Ong's orders in filing the complaint.

Thus, the Commission should not be led to think that all members of the Phoenix Municipal Court endorsed this complaint, nor that it is the product of Mr. Kane's independent will. In fact, nothing has been presented which indicates any judge other than Judge Song Ong is willing to have his or her name attached to the complaint as a complainant, including now Judge Kane.

### III. **BACKGROUND**

#### A. **The Phoenix Municipal Court**

The Phoenix Municipal Court ("PMC") has experienced remarkable growth over the past 35 years. The City of Phoenix was very fortunate to have some dedicated, excellent magistrates in the 1960s and 1970s, who worked diligently on clogged calendars in cramped, inadequate quarters. As good as those judges were, PMC was "labeled" as a group of political appointees whose membership depended on the good will of the Phoenix City Council, rather than merit as judicial officers. In the early 1980s, the City Council selected the City's Chief Prosecutor, Lou Levin, to become the PMC Presiding Judge, despite the fact that he had no judicial experience at all. To many people, including the municipal judges, his appointment undermined the judges' efforts to become an independent judiciary, free of undue influence from the executive and legislative branches of government.

This was a serious image problem. Studies indicate that 85% of the public never see any court other than the city courts. People easily believe that the city judges and the city prosecutors are part of a system designed to create revenues for the city through fines and community service. "Promoting" the City Prosecutor to Presiding Judge cements the image of the two entities working as a unit, rather than independently.

Judge Levin's tenure was marked by controversy. However, PMC's judiciary grew professionally because of and in spite of significant internal tension. The City Council began approving judges whose selection was based on merit rather than connections. Judges who had been reluctant to voice their views in meetings began initiating and participating in discussions as to how to transform PMC into a modern efficient court with a dedication to justice for defendants and victims.

Debate over the present and future of the court became robust during this period. The judges felt that the community had a greater degree of respect for their court. The overall quality of the applicants for the bench increased substantially. This encouraged their willingness to work together to build a reputation for excellence.

Judge Levin left the bench in 1992 under circumstances which again plunged the court's image into question. He ended up sentenced to prison for drug felonies. The Judges of the Municipal Court wrote an announcement letter to the JSAB dated September 29, 1992 in which they discussed the continuing problem of judicial independence in the City. Carroll Exhibit 1.

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At this critical point in the court's history, the Judicial Selection Advisory Board, appointed by the Mayor and Council, recommended the appointment of Michael Lester as Presiding Judge, a man who had distinguished himself during his years as a both a trial judge and Assistant Presiding Judge. Instead, the Council appointed Robert Dorfman, who, like Judge Levin, was the Chief City Prosecutor and had no judicial experience. Once again, the judges felt their efforts in moving the court toward an image of judicial independence had been dealt a serious blow.

To his credit, Judge Dorfman ignored the storm of public criticism surrounding his choice by the Council and worked hard to build a respected and stable bench. To run the operation, he continued Judge Lester as Assistant Presiding Judge. Judge Dorfman recognized that the judges respected Judge Lester for his proven skills, knowledge, expertise and commitment to PMC. Together, they were able to maintain a collegial and professional atmosphere at the courthouse, retain experienced judges and develop efficiencies by drawing on the individual strengths of the judges. Generally, the members of the bench felt their concerns were heard and considered.

With the advent of email, communications among the judges increased. Email provided an opportunity for reasonably quick contact and conversation which might not otherwise happen because judges have little time for meetings with each other. It also meant that judges could communicate easily on legal and administrative issues.

**B. Judge Michael Carroll**

One of the truly talented members of PMC is Judge Michael Carroll, appointed to the court in 1986. Judge Carroll was a *cum laude* graduate of Arizona State University College of Law in 1975. He was a career prosecutor, serving the Phoenix City Prosecutor, the Maricopa County Attorney, and finally the Attorney General's specialized Organized Crime and Fraud Section. While serving the City of Phoenix as a municipal court judge, he has actively served on court committees, including the Judicial Policies and Procedures Committee. On the latter committee, which is essentially the executive council for the court, he has been a member for 18 years until he resigned in December 2005.

Judge Carroll has been a member of this bench for twenty years. He has lived through the low points, which included then Presiding Judge Lou Levin attempting to have two respected judges removed politically, followed by Judge Levin's indictment and imprisonment for drug offenses. He has been a part of the sometimes contentious inner dialogue among the judges over the image and future of Phoenix Municipal Court, which is the one of the largest in the nation. To him, one of the greatest experiences here is the rich tradition of discussion and debate, through which this bench has developed a sense of purpose and growth as an institution.

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Judge Carroll has been actively involved in justice issues both in and out of the courtroom. He served the Court as its Judicial Liaison to the City Administration on Planning and Budget. He has frequently spoken at the Arizona Judicial College, the Arizona Magistrates' Association Annual Conference, the Governor's Office of Highway Safety DUI Conferences for Judges and the Arizona Annual Judicial Conference. He has been an untiring advocate for judicial independence since his earliest years on the bench.

Judge Carroll has known Judge Song Ong as a friend for over 30 years. They have worked alongside each other on the bench for over 15 years, the last five of which she served as the Assistant Presiding Judge under Judge Dorfman.

When Judge Dorfman retired, Judge Carroll was very supportive of Judge Song Ong to replace him as Presiding Judge. She had long judicial experience and she had been the Assistant Presiding Judge for the previous five years. Judge Carroll has been a longtime and vocal supporter of judicial independence and believed that her promotion from within was the City's endorsement of the judiciary's hard work over the previous years.

#### IV. **TIMELINE OF RELEVANT EVENTS**

##### A. **November 2005**

Judge Song Ong was appointed Presiding Judge by the Phoenix City Council.

##### B. **November-December, 2005**

Discussion began among the judges as to who would be the new Assistant Presiding Judge. That position had been traditionally held by a senior judge on the court, as the judge assigned to that position oversees the daily operation of the court, judicial assignments, and case assignments. The APJ would usually handle day-to-day problems and issues which arose, and acted as liaison between judges and court administration.

##### C. **December 12, 2005**

Eric Jeffery, a former prosecutor who had been on the bench for less than a year had been scheduled by Judge Song Ong to preside over a change of judge for cause hearing against one of the senior members of the bench. Judge Carroll wrote an email to her expressing concern that he would be handling such a sensitive issue. Judge Carroll stated his opinion that one of the more senior members of the bench should hear such matters. He also pointed out that this could be a continuing problem if she chose one of the newer judges to act as APJ. (Carroll Exhibit 2)

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D. **December 19, 2005**

Judge Song Ong came to Judge Carroll's chambers to announce that she was going to appoint Eric Jeffery as APJ. He told her that he felt the decision was very wrong because he had only two months experience running his own trial division. Furthermore, he had been an administrator at the City Prosecutor's office for 13 years and had not had sufficient time to establish his credibility as an independent judge with the rest of the bench.

E. **December 20, 2005**

Judge Song Ong sent out the formal announcement of Judge Jeffery's appointment. Judge Carroll emailed her, expressing his extreme disappointment in her decision and questioning whether he should have given her his support for Presiding Judge. Carroll Exhibit 3. He made no profane or libelous statements. He never threatened a refusal to follow her direction. He acknowledged that: "In any event, you have made your decision." He tendered his resignation from the Judicial Practices and Procedures Committee since "...you and I have some major philosophical differences as to the direction the court should be taking."

This email is harshly critical of her decision. Judge Jeffery's qualities or abilities are not attacked at all. But he did point out the anomaly of putting a person in the position of reviewing the judicial performance of judges, who had been on the bench for decades, who had not experienced handling a trial calendar himself or going through his own evaluation.

This email was only directed to Judge Song Ong, addressed to "Roxanne." As Judge Carroll, has repeatedly stated, it was not intended to be made public, nor did he expect it to become the centerpiece of an effort to oust him from the court. It was a letter to a colleague with whom he had worked for thirty years, with whom he felt he could be completely candid and whom he thought would be strong enough to accept the criticism. (Complainant's Exhibit 2; Carroll Exhibit 3).

F. **January 13, 2006**

Judge Carroll sent an email to Judge Song Ong, with a copy to the judges. This email was not sent to any other court employee or judicial officer. Judge Carroll was concerned that there had not been any indication as to what Judge Jeffery's scope of authority as APJ was to be. Historically, the position was defined by the persons who occupied it— experienced judges who commanded the respect of the members of the bench. This email asked Judge Song Ong to delineate the duties and authority of the APJ,

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an issue which had been the subject of rumor and speculation since the appointment was announced. It too was forcefully written, but it specifically stated that he did not intend to "disparage Judge Jeffery." This email ended:

I would very much appreciate a candid response. I have shared this memo with the other full-time judges on the bench only because I believe this situation calls for some frank discussion to replace the rumor, speculation and innuendo that has surfaced since you made your decision. The judges on this court have a right and, perhaps more importantly, a need to know exactly what you consider to be the scope of Judge Jeffery's authority. It is simply a matter of common courtesy and respect.

(Complainant's Exhibit 4; Carroll Exhibit 4).

While Judge Song Ong has claimed that no one other than Judge Carroll and his spouse, Judge Karyn Klausner, had raised any issue about Judge Jeffery's selection, it had indeed been a subject of court-wide conversation. Four days after Judge Carroll's second email, one of the other relatively new full-time judges at the Court wrote an e-mail to Judge Song Ong in which she stated:

**If you don't mind a suggestion, however, (again based on having experienced changes at the top in my previous jobs) it might be helpful to have you communicate your vision of the [Assistant Presiding Judge] position to all of [the judges] at the same time so as to cut down on the 'buzzing' that seems to be going around.**

G. **January 25, 2006**

Judge Song Ong convened a judge's meeting, in which she read a prepared statement "Re: Inappropriate E-mail Transmissions," which was then distributed. This meeting was tape-recorded — highly unusual for any meeting of judges regarding administrative matters. While his name was not mentioned, the subject matter of the statement was Judge Carroll's emails; it is attached to the complaint as Complainant's Exhibit 7.

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Her statement accused Judge Carroll of violating the Canons of Judicial Ethics and the City's email policy and that his emails were "...obvious expressions of hostility and appear to undermine the court's administration."

Shortly after the meeting, Judge Carroll wrote a private email to Judge Song Ong, which strongly objected to her characterization that the emails violated judicial ethics and the City's email policy. He specifically asked her if he was now going to have to answer her allegations in his reappointment proceedings then only a week away — a legitimate question in light of what happened at the JSAB. (Complainant's Exhibit 8; Carroll Exhibit 5).

Pursuant to her invitation to discuss the matter, both Judges Carroll and Klausner scheduled a meeting with her later that day. This meeting was three hours long. Judge Song Ong was upset that he had written another email which she read in their presence. The content of the email dealt with his defense of his actions and response to her allegation that he had violated judicial ethics by his conduct. However, Judge Carroll felt that the meeting was a thorough and candid discussion of the situation. He reiterated that he had not intended to undermine her decisions, nor suggest that she did not have the authority to make those decisions. He admitted that his language had been strong.

At the end of this session, Judge Carroll believed that their differences had been aired. Judge Klausner asked if she was going to recommend reappointment. Judge Song Ong stated that she had not decided whether to recommend his reappointment as she had not received the information packet regarding statistics, recommendations, etc. accompanying each judge's application. (Complainant's Exhibit 9, p. 1 of 4)

H. **February 1, 2006**

At the beginning of the JSAB reappointment interview, the chairperson announced that Judge Song Ong — an ex-officio Member of the Board — had "concerns" about Judge Carroll's reappointment she wished to report. Prior to this time, the emails had not been seen outside of court personnel. Here, the emails were made part of the public record as part of her remarks.

Judge Carroll's reappointment was tabled briefly while less complicated interviews were conducted. When Judge Carroll's hearing resumed, many attorneys who had heard about Judge Song Ong's unusual request came to the Board meeting and asked to speak. Most of them have practiced in his court and knew his qualities and competence as a trial judge. Judge Carroll had not asked any of them to appear on his behalf.

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Judge Song Ong provided the JSAB with the three emails, her written statement to the judges, and her own typewritten notes of her recollection of the meeting with Judges Carroll and Klausner. She presented her version of what had happened and cross-examined Judge Carroll in front of the Board regarding the communications. Judge Carroll repeatedly stated that he had thought he and Judge Song Ong had resolved their difficulties in her office and that he was willing to move forward. (There had been no further email communications after January 25, 2006).

One of the members of the JSAB asked Judge Song Ong specifically whether, other than the manner in which he had communicated with her on the three emails, she had any reservation regarding "...Judge Carroll's qualifications to fulfill the duties of a judge on this bench?" She stated:

**With regard to adjudicatory functions, I think that all the attorneys who spoke to that very clearly outlined that they as well as I very much respect Judge Carroll's adjudicatory ability in the courtroom. I've always counted Mike a personal friend as well as a work colleague. And Mike is one guy that I would always go to to brief cases with. We'd talk about issues, and I knew he would give me a straight answer." Carroll Exhibit 6, JSAB hearing transcript, p. 72, ll. 10-25 ("JSAB").**

All of the people who spoke to the Board, other than Judge Song Ong, enthusiastically recommended his retention. Another judge also spoke on his behalf, pointing out that he was not the only judge who had a concern about the appointment of the APJ and that he was a highly respected judge. Furthermore, she reminded Judge Song Ong of the tradition of frank and candid discussion the judges had had on matters of administration in the past, after which "no one took it personally." JSAB, p. 63, l. 1.

The JSAB voted four to two, with one abstention to reappoint Judge Carroll.

I. **February 10, 2006**

Judge Carroll hand-delivered a letter to Judge Song Ong expressing his apology for the problems caused by his emails. His letter assured her that he would be more careful in expressing his opinions in the future. (Carroll Exhibit 7)



J. **February 23, 2006**

Judge Song Ong delivered a letter to Judge Carroll through Mr. Kane. The letter cautioned Judge Carroll about the possibility that he had committed an ethical violation because attorneys who had spoken on Judge Carroll's behalf before the JSAB were practicing in his court. The letter attached Ethics Opinion 99-01 which gives guidance to judges who are soliciting the assistance of attorneys for endorsements or financial assistance in attempting to obtain a higher office. Complainant's Exhibit 12.

Judge Carroll immediately reviewed the opinion and replied by letter, thanking Judge Song Ong for her concern and advising her that he did not believe that there was an ethical violation because he did not directly or indirectly solicit any endorsement from any attorney. Complainant's Exhibit 13; Carroll Exhibit 8.

K. **March 2, 2006**

Judge Carroll attempted to meet with Judge Song Ong with Gary Kula, Esq. as an intermediary. Mr. Kula had offered to be a liaison for Judge Song Ong in an effort to mediate. Judge Song Ong told Mr. Kula initially that it was not "his place."

At the appointed time Mr. Kula and Judge Carroll met with Judges Song Ong and Kevin Kane. At the beginning of the meeting Judge Carroll showed Judge Song Ong a letter he had drafted to send to the other full-time judges on the bench in which he apologized for causing discomfort through the emails and assuring them that he would be more careful in the future. After a very brief discussion, Judge Song Ong asked Mr. Kula and Judge Carroll to wait outside while she and Mr. Kane discussed certain issues. After they waited two hours, Judge Song Ong invited them back into the office and said that she would meet with Judge Carroll, but not until about a week later. In the meantime, Judge Song Ong asked that Judge Carroll delay sending the letter which had been prepared for the other members of the bench until after their meeting. Judge Carroll agreed to do so.

L. **March 9, 2006**

Judge Carroll met with Judge Song Ong and Kevin Kane at approximately 4:00 p.m., during which time Judge Carroll again apologized for the problems caused by the email and assured Judge Song Ong that he would be more careful in the future. Mr. Kane was silent throughout the meeting. Judge Song Ong did not respond to his apology. As soon as Judge Carroll left Judge Song Ong's office, he distributed the letter of apology to each member of the bench. Carroll Exhibit 9.

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Unknown to Judge Carroll, Judge Kane had already filed a judicial conduct complaint dated March 8, 2006, to which this response is directed.

M. **April 4, 2006**

The Public Safety Subcommittee of the Phoenix City Council, consisting of three Council members, convened a hearing as to whether to accept the JASB's vote to reappoint Judge Carroll. Numerous attorneys testified to Judge Carroll's judicial record and competence. All witnesses were favorable to him. However, the Subcommittee voted 3-0 against reappointment, based solely upon their consideration of the three intra-office emails and the Presiding Judge's summary of her meeting with Judges Carroll and Klausner.

The fact that a judicial conduct complaint had been filed by Judge Kane was made known at this hearing. The Subcommittee was not provided with any letters of apology which Judge Carroll had sent to Judge Song Ong or to the rest of the members of the bench. The Subcommittee did not seemingly take into account the facts that everybody, including Judge Song Ong, lauded Judge Carroll for his adjudicatory abilities, his intelligence and his service.

V. **LEGAL DISCUSSION**

A. **Objections to the Complaint**

1. **DOES THE COMPLAINT STATE A VIOLATION OF THE CODE OF JUDICIAL ETHICS?**

Professional discipline complaints are seldom defeated simply because the complainant does not formulate a specific claim against the judge. Generally, an unsophisticated complainant may not understand how to formulate the elements of the claim, and the reasons why the alleged misconduct should be sanctioned. However, this complaint was filed by a licensed attorney who, until shortly before the complaint was filed, served as staff attorney and at the time the complaint was filed, had been sworn in as a full-time judge. He did not have authority as a member of the bench to file complaints "on behalf of the court" – only on his own behalf. This response will deal with the propriety of criticism of a judge's administrative decision, the propriety of using email to do it and the constitutional protections which both the United States Constitution and the Arizona Constitution guarantee.

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We will also discuss whether any basis exists to believe that Judge Carroll can be faulted for allowing persons who voluntarily appear on his behalf at the reappointment hearing to continue practicing in his court. We will explain why the innuendo that Judge Carroll was angry with Judge Song Ong because Judge Song Ong did not choose his wife, Judge Klausner, for the APJ position, is simply false. Finally, we will argue that the Commission should derive no negative inferences from the fact that Judge Carroll and another judge have different recollections of the same event — drafting the first email — and both may be right.

In making those substantive arguments, we do not waive the very basic claim that the complaint does not state a violation of the Canons of Judicial Ethics. The complaint apparently concedes that the content of his speech was not unethical. Instead, it concentrated on the "tone" of the speech, the author's perception that Judge Carroll intended to undermine the administrative authority and affect their ability to carry out their duties. While Judge Carroll recognizes that the email was strongly worded and that it offended Judge Song Ong, it was not unethical for him to speak his mind. Furthermore, he never intended to undermine her authority nor affect her ability to act as Presiding Judge. There are no objective facts to support such a claim.

## **2. HAS THE COMPLAINT BEEN FILED IN GOOD FAITH?**

In making substantive responses to the complaint, we do not waive a critical point for the Commission to consider: whether the complaint is the product of the named complainant who, though obviously relying on information obtained from sources other than himself, signed the complaint under penalty of perjury, avowing that all of the information in the complaint was true, why it was necessary for someone other than the true complainant to file and, in light of the complainant's statements that he does not believe that the emails constitute a violation of either the City's email policy or the Canons of Judicial Ethics. The Commission's attention is directed to the Declarations of Judges Carroll and Klausner with respect to their conversations with Kevin Kane, the complainant, who was the Staff Attorney to the court before he became a judge of the court. Judge Kane advised Judge Song Ong not to turn over the emails to the Judicial Selection Advisory Board. Judge Kane advised several judges that the emails were protected from public disclosure under Rule 123, Rules of the Supreme Court, governing dissemination of judicial department files, records and papers. Finally, Judge Kane has admitted in filing the complaint "he did what he was asked to do." Carroll Exhibits 10 and 11.

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The complaint does not point to a specific violation of the judicial code – only vague references to Canons 1, 2 and 3, despite being filed by a licensed attorney, former staff attorney for the court, and now a full-time municipal court judge. Other than broad subjective conclusions, the complaint fails to state any claim that constitute a violation.

**B. The Content of The Emails Is Protected Against Sanction By The United States Constitution, First Amendment, And The Arizona Constitution, art. 2, § 6.**

**1. THE DECEMBER 20, 2005 AND JANUARY 13, 2006 EMAILS.**

**From the Complainant's Conclusion:**

*The tone of the exchanges from Judge Carroll to Judge Song Ong, both by email and in person, were not constructive and were personally disparaging to Judge Song Ong and Judge Jeffery. The timing of the exchanges appeared to be deliberate and with intent to incite others to join in this negative barrage to undermine the authority of the Office of Presiding Judge and Assistant Presiding Judge, and not merely to voice an opposing position. Judge Carroll's conduct was continuing, deliberate and apparently designed to disparage Judge Song Ong and Judge Jeffery to affect their ability to conduct their administrative duties.*

**Judge Carroll's Response:**

Judge Carroll denies that he ever intended to incite others to join in any effort to undermine the authority of the Office of the Presiding Judge and Assistant Presiding Judge. Indeed, he has consistently denied that he attempted to undermine the authority of Judge Song Ong or Judge Jeffery. His conduct was never designed to affect the ability of either judge to conduct their administrative duties.

Only the second email was intended to be seen by all of the sworn judges. As stated therein, the concern addressed in the email was what Judge Song Ong's vision was for the duties for which Judge Jeffery would be responsible. While he criticized her decision in choosing Judge Jeffery, he never criticized Judge Jeffery.

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Judge Carroll pointed out factors about Judge Jeffery's lack of experience which, in his view, militated against his choice. After all, Judge Jeffery has been placed in a very difficult position. He has been on the bench for less than one year and he was involved in city prosecutor administration for the greater part of his career at the City Prosecutor's Office. He followed two assistant presiding judges who were exceptionally experienced, trusted and respected.

Judge Jeffery may turn out to be an excellent Assistant Presiding Judge, capable and fully trusted by his peers. However, he could also end up easily being blamed for mistakes for which he is not directly responsible, simply because he is the manager of the court. Judge Carroll pointed this concern out, as well as his concern about the court reverting to the image of being too "close" to the City Prosecutor's Office.

Judge Carroll and Judge Song Ong have been colleagues for decades. He felt he could be openly critical of her decision in a *private* email without causing her to think he was making a personal attack. It is now apparent that his words deeply affected Judge Song Ong. He has continually stated that he will work with her and Judge Jeffery, as well as the rest of the judges in the Municipal Court, now having stated his criticism. He has apologized to Judge Song Ong and to the other judges, and has publically stated his support for the Court.

It may be that Judge Song Ong feels Judge Carroll's second email offended other judges who feel that his concerns were too strongly worded. However, there can be no question that Judge Carroll's words were never intended to be publicized outside of the court. Judge Song Ong herself made them a part of the public record, despite the advice of staff counsel that she should not.

The First Amendment of the United States Constitution has always guaranteed individuals the right to have their speech protected against government action. Arizona courts recognize that the Arizona Constitution provides a far broader free speech right which protects against any action: *See Mountain States Telephone and Telegraph Company v. Arizona Corporation Commission*, 160 Ariz. 350, 773 P.2d 455 (1989). Article 2, § 6 of the Arizona Constitution reads as follows:

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

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In *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966), reporters had been threatened with contempt for violating a trial judge's "gag" order. The Supreme Court held that no trial court could preclude the publishing of an account of an open court hearing. In doing so, they stated:

[t]he words of the Arizona Constitution are too plain for equivocation. The right of every person to freely speak, write and publish may not be limited ....

*Id.* at 259, 596.

It seems clear that any person has a right to criticize the decision of a judge in public, so long as it does not obstruct or prejudice the administration of justice. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75, 111 S.Ct. 2720, 2744-45, 115 L.Ed.2d 888 (1991); see *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966).

The burden on the party attempting to sanction the speech is extraordinarily high, since the rule places such a significant burden on the right of free speech. Thus, a "clear and present danger" to the administration of justice may be sanctioned, but only if it is such to "constitute an imminent, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed.2d 1546 (1947). See also, *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) and *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

A person's employment cannot be conditioned on his or her willingness to waive his right to free speech:

It is well settled that the government cannot compel persons to relinquish their First Amendment right to comment on matters of public interest as a condition of public employment.

*Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 911 (1968); *Binkley v. Tacoma*, 114 Wash2d 373, 381, 787 P.2d 1366 (1990).

Public employees are therefore entitled to "comment on matters of public interest" in connection with the operation of the government agencies for which they work. *Roger Edwards, at al. v. Department of Transportation*, 66 Wash.App. 552, 832 P.2d 1332 (1992), citing *Pickering*, 391 U.S. at 568.

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There are very few cases in which a judge has been subject to sanction for exercising criticism of the judicial system. The leading case appears to be *Scott v. Flowers*, 910 F.2d 201 (5<sup>th</sup> Cir. (Tex.) 1990). In *Scott v. Flowers*, the Texas Commission on Judicial Conduct reprimanded a justice of the peace for making public statements in a newspaper which were critical of the superior court's administration of the county judicial system. The Fifth Circuit reversed judgment in the justice of the peace's § 1983 civil rights action against the Commission in favor of the Commission, holding that the judge's criticism was a matter of "public concern" and that the discipline violated the Justice of the Peace's First Amendment rights. 910 F.2d at 210. The Fifth Circuit reinstated the Section 1983 civil rights claim against the Texas Commission.

Obviously, free speech rights of judges are subject to reasonable curtailment, as they are in the Canons of Judicial Ethics and the Code of Judicial Conduct. But Judge Carroll's federal and Arizona constitutional rights to freely speak about the administration of justice in the PMC may not be extinguished by a presiding judge who does not want to hear criticism of her first major decision. Such restrictions include obligations not to make public comment on pending cases which "might reasonably be expected to affect its outcome or impair its fairness" (Canon 3(B)(9)) or make pledges or promises which are inconsistent with impartial performance of adjudicative duties. Canon 3(B)(10). Furthermore, judges are precluded from "actively taking part in any political campaign other than his or her own election, reelection or retention in office." Canon 5(A)(1)(d)<sup>1</sup>. See also Arizona Advisory Opinion 02-08.

While a judge is obligated to "cooperate with other judges and court officials in the administration of court business," no case or decision suggests that "cooperation" requires restrictions on the judge's ability to formulate opinions, debate and dissent from administrative decisions. In connection with that matter, Judge Carroll has not failed to cooperate and has continued to assert his willingness to move forward with Judge Song Ong's decision, regardless of his disagreement with it. He has given written letters of apology to Judge Song Ong and the rest of the judges, together with his pledge to continue supporting the administration.

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<sup>1/</sup> Though not necessarily germane to this response, Canon 5 appears to call for discipline if the actions of Judge Song Ong in "actively" taking a part in the retention proceedings of Judge Carroll, amount to the functional equivalent of a "political campaign" under the circumstances. "Active" participation would include making a recommendation for or against Judge Carroll, providing unsolicited information to the retention board which does not constitute a violation of judicial ethics, questioning the judge before the panel or participating as an ex-officio member.

Furthermore, whether the emails are "public" or "private" are not a distinction for purposes of analyzing whether the statements are protected constitutionally. There is no legal requirement that a public employee's speech be made public in order to constitute speech on a matter of public concern. *See e.g. Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 413-17, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) (First Amendment protection extends to a private communication with the employer rather than a public expression of views.) *See also, Nunez v. Davis*, 169 F.3d 1222 (9<sup>th</sup> Cir. 1999).

## 2. **THE THIRD EMAIL**

### **From the Complainant's Conclusion:**

*Judge Carroll's conduct is exacerbated by the fact that after he sent his first two emails he sent a third email and had a contentious three hour face-to-face exchange with Judge Song Ong after she had admonished all of the judges not to participate in this type of conduct.*

### **Judge Carroll's Response:**

In hindsight, it seems that the third email may have made the difference between whether Judge Song Ong would choose to bring information to the attention of the JSAB, or not. One can sense her agitation from her notes when she was told by Judge Carroll that he had sent her an email after the judges meeting. However, this email is clearly not a violation of the City email policy, nor is it sanctionable as a violation of Judge Song Ong's "admonition."

First, this email was a private email directed to Judge Song Ong and to no one else. Rule 123 of the Supreme Court defines the circumstances under which court papers, records and documents may be available to the "public." Rule 123 has been interpreted in *London v. Broderick* to permit reasonable restrictions of dissemination of communications within the judicial department. In *London v. Broderick*, a probation officer sought internal information relating to his proposed job termination. The decision denied access to him for several reasons, including the fact that he was not a member of the "public" and he was seeking to use the documents for his own private purposes, rather than a public one.



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Here, Judge Song Ong could not claim that the email was "public" for her own purposes. Judge Carroll has always stated that it was "private" and not "public." These communications deal with judicial policy, administrative decisions and judicial work product, all of which occupy special consideration when applied to the judicial department.

"[t]he purpose of this provision is to 'confirm the right of court employees as public officials to *uninhibitedly explore policy issues, without fear that their internal deliberations will be exposed to the public before deliberations are finalized.*'"

*London v. Broderick*, 80 P.3d 769, 775 (Ariz. 2003) Emphasis added.

The third email has greater protections afforded by the United States and Arizona Constitutions than the first two emails. It followed the judges meeting in which Judge Carroll was actually accused of violating the Code of Judicial Conduct and the City's email policy. He had a right to defend himself and to state his position with respect to whether that charge was appropriate. Based upon the caselaw, Judge Carroll could have chosen to make that statement intentionally public. However, he did not.

Regardless of whether that email is public or not, it is entitled to First Amendment protection. It went only to Judge Song Ong and it was fully and completely discussed with her in the course of the three hour conversation held that day, pursuant to her invitation to meet.

C. **Judge Carroll Was Not Attempting To Promote His Wife For Assistant Presiding Judge**

**From the Complainant's Facts, Paragraph 2:**

*Judge Karyn Klausner, the spouse of Judge Carroll and also a member of the PMC bench, had expressed an interest in the APJ position but was not ultimately selected.*

**Judge Carroll Response:**

During the course of the JSAB hearing, Judge Carroll was questioned as to whether or not his stated opposition to Judge Jeffery was really a conflict of interest because of his marriage to Judge Klausner, another candidate for the position. In fact, Judge Song Ong asked Judge Carroll what his thoughts were regarding Judge Klausner. He told Judge Song Ong that he did not believe she should be named Assistant Presiding Judge for two reasons:

- A. She had not been on the bench long enough to achieve the level of trust he viewed as necessary for the position. She had served only ten years; and
- B. He explained to Judge Song Ong that it could be viewed as a form of nepotism and that her appointment would necessitate a reassignment of Judge Carroll so that he was not directly supervised by Judge Klausner. Judge Song Ong admits that it was Judge Carroll who brought this point to her attention.

To his credit, Judge Kane does not make a claim in the complaint that Judge Carroll was motivated to criticize Judge Song Ong about her choice of Assistant Presiding Judge because he was promoting his wife. However, it is important to raise this issue here in order to dispel any notion that such a motive exists. See Page 3 of 4 of Complainant's Exhibit 9.

D. **Judge Carroll Did Not Misrepresent Whether He Showed The First Email To Anyone**

**From the Complainant's Conclusion:**

*In addition, he misrepresented to Judge Song Ong and to the JSAB about who had read his first e-mail before it was sent.*

**Judge Carroll Response:**

During the meeting on January 25, 2006, Judge Song Ong asked Judge Carroll if anyone else had read the first email sent on December 20, 2005. While she claims she had to "press" him, to obtain information that he had shown the letter to Judge Klausner and Judge Wright, Judge Carroll remembered telling her that he showed it to both Judges Klausner and Wright, his recollection was that Judge Wright had walked into his office while he was drafting it and that she had not read it, but he may have "bounced a line or two off of her, but that she had not read it completely." Page 4 of 4, Complainant's Exhibit 9.

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I asked him what her impression was after hearing or seeing the line or two. He said she said something like, she had lost respect for him. Judge Wright gave a memorandum dated February 3, 2006 to Judge Song Ong which is attached as Complainant's Exhibit 10. Judge Wright recalls the entire email, not just part of it, and that she told him not to send the letter. She left the chambers and sometime later in the day saw him standing in the doorway. She asked if he had sent the email to which he replied that he had. Her response was "it's a shame, it's just a shame." Complainant's Exhibit 10.

Judge Song Ong, during the course of the JSAB hearings actually cross-examined Judge Carroll. As to this single incident, Judge Carroll stated:

Judge Carroll: ... Judge Wright came in at one point, I think I was writing it, and I expressed concerns about appointing Judge Jeffery. She may have seen it, but I don't believe she read the whole thing. She put it down on my desk –

Judge Song Ong: Okay, so you would not dispute if she said she read it from top to bottom and told you, please don't send it to Roxanne?

Judge Carroll: No, I would dispute that. I don't --

Judge Song Ong: You would dispute that.

Judge Carroll: – yeah. I don't – that did not happen.

Complainant's Exhibit 11.

Essentially, Judge Carroll's recollection and understanding of what Judge Wright had done was that she didn't "read the whole thing." Judge Wright stated that she did.

This "discrepancy" is no more than one would expect of two people viewing the same incident, when they are focusing on different things and neither wrote down contemporaneous notes. Judge Wright should be believed when she states that she read the entire letter top to bottom, because the language offended her. Judge Carroll did not

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think that she read the entire email. Judge Carroll remembered that Judge Wright was upset and that she said something like "she had lost respect for him."

The bottom line is that both judges acknowledge that Judge Wright read enough of the letter for her to state to him either that it was a shame or that she had lost respect for him. There is no material discrepancy which arises to a false statement and the Commission should not pursue such a tenuous claim.

**E. No Violation Of Arizona Advisory Opinion 99-01**

**From the Complainant's Conclusion:**

*After receiving a written admonishment from Judge Song Ong, Judge Carroll continued to hear pending cases in which the representing attorneys were some of the same as those who spoke on his behalf at the 2/1/2006 JSAB hearing contrary to the provisions of Ethical Opinion 99-1.*

**Judge Carroll Response:**

Arizona Supreme Court Judicial Ethics Advisory Committee Advisory Opinion 99-01 does not support the claim. The opinion deals with "solicitation of support from attorneys for appointment to higher judicial office." (*Emphasis added*) First, the opinion deals with soliciting support for higher judicial office. It is reasonable, however, to think that the same consideration involving solicitation apply to a judge's effort to be retained. The real issue is whether the opinion applies where the judge did not solicit the support of the attorneys who appeared on his behalf. Here, the complainant has no good faith basis whatsoever for claiming that Judge Carroll solicited any attorneys whatsoever. The sole allegation he makes is that "it was disclosed later that some of these attorneys were present at the request or at the urging of attorney Gary Kula ... or of other City Public Defenders." Complaint, paragraph 12.

The complainant does not explain why Opinion 99-01 mandates that a judge must recuse himself from a case where an attorney gave unsolicited support, or for that matter unsolicited opposition.

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Judge Carroll is well aware of the final conclusion of Opinion 99-01 that:

It is the continuing duty of all judges, whether elected or merit selected, to avoid situations in which they might be perceived as biased or which might suggest an appearance of impropriety, and at all times maintain the dignity and integrity of the judiciary.

However, a rule which requires recusal where an attorney gives an unsolicited opinion to a retention board, whether the opinion is in support of the judge or opposed to the judge, is unworkable. Such a rule would cause an automatic notice of change of judge simply because an unsolicited opinion was expressed. This, of course, could wreak havoc to the court system.

The point of any rule of judicial ethics is to promote public trust in the honesty and decency of the judiciary. When judges solicit lawyers for financial or political support, there are obvious and real dangers that there is at least the appearance of impropriety where the solicited attorney appears before that judge in future proceedings, particularly where the support has resulted in success for the judicial officer. On the other hand, the system welcomes and encourages unsolicited opinion, whether they are spoken in front of the judge or not. Judicial Performance Review is precisely the kind of feedback the merit selection and retention systems believe are necessary in order to promote trust in the judiciary.

Judge Carroll is extremely mindful of the appearance of impropriety in his courtroom. His judicial performance review reports are excellent and he has not had a complaint against him. Judge Carroll will continue being diligent in recognizing those circumstances in which there may be an appearance of impropriety in connection with some of the attorneys who have appeared before him which may require his recusal in contested matters.

#### VI. **CONCLUSION**

Judge Carroll recognizes that his criticism of Judge Song Ong has triggered much of the resulting difficulties. However, his email was never intended to undermine the authority of the Presiding Judge nor the Assistant Presiding Judge. His email to Judge Song Ong regarding what duties would be given to the new Assistant Presiding Judge went to all judges, as it is a matter of what should be court-wide concern. In far less critical

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terms, another judge asked precisely the same question of Judge Song Ong. His assessment of Arizona Opinion 99-01 as not being applicable where he had not solicited attorney support was correct. The Complaint should be dismissed in its entirety.

Respectfully submitted, /

David G. Derickson

DGD/dch  
Enclosure

cc: The Honorable Michael K. Carroll