

Arizona Commission on Judicial Conduct
1501 West Washington Street, Suite 229
Phoenix, AZ 85007
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FILED

DEC 28 2006

ARIZONA COMMISSION ON
JUDICIAL CONDUCT

STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning Judge)	
)	Supreme Court No.
JOSEPH W. MALKA)	
Surprise Municipal Court)	Commission Case No. 06-079
Maricopa County)	
State of Arizona)	RECOMMENDATION
Respondent)	

On October 5, 2006, the Commission on Judicial Conduct ("Commission") filed formal charges against Judge Joseph W. Malka ("Respondent") based on a finding of reasonable cause by the three-member investigative panel assigned to oversee the investigation in this case. On the same date, the chairperson of the Commission appointed an eight-member hearing panel to hear and take evidence in the case and designated the undersigned as the presiding member of the panel.

On December 7, 2006, Respondent and Disciplinary Counsel submitted an Agreement for Discipline by Consent ("agreement") containing a waiver of Respondent's right to appeal and all other procedural rights set forth in Rule 29 of the Rules of the Commission on Judicial Conduct.

On December 15, 2006, the hearing panel met telephonically to consider the agreement and to discuss the proposed sanction of a public censure under Rule 18(a). The hearing panel reviewed the admissions in the agreement and voted to accept the terms of the agreement subject to the addition

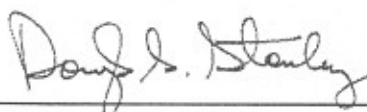
of language providing that both parties waive formal hearing and that Respondent waives his right to legal counsel in this matter.

On December 21, 2006, Disciplinary Counsel and Respondent jointly submitted the attached Amended Agreement for Discipline by Consent ("amended agreement"), which the undersigned presiding member has reviewed and accepted on behalf of the hearing panel in an order dated December 28, 2006.

In full accordance with the terms and conditions of the amended agreement, which are incorporated herein by reference, the hearing panel recommends to the Arizona Supreme Court that Respondent be publicly censured for violating the Code of Judicial Conduct as admitted in the amended agreement; that the parties shall pay their own costs and attorney's fees associated with this case; and that the parties shall comply with all other conditions set forth in the amended agreement.

RESPECTFULLY SUBMITTED this 28th day of December 2006.

FOR THE HEARING PANEL



Hon. Douglas Stanley
Presiding Member of the Hearing Panel

Copies of this pleading were delivered via fax and mail this 28th day of December 2006 to:

Hon. Joseph W. Malka, Respondent
Surprise Municipal Court
12604 Santa Fe Drive
Surprise, AZ 85374

Linda Haynes
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

By: Barbara Winkless
Acting Clerk

Linda Haynes
Disciplinary Counsel (Bar #12178)
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DEC 21 2006

ARIZONA COMMISSION ON
JUDICIAL CONDUCT

STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning Judge)

JOSEPH W. MALKA)

Municipal Court)

City of Surprise)

State of Arizona)

Respondent)

Case No. 06-079

**AMENDED AGREEMENT FOR
DISCIPLINE BY CONSENT**

COME NOW Judge Joseph W. Malka (Respondent) and Linda Haynes, Disciplinary Counsel for the Commission on Judicial Conduct (Commission) and hereby submit the following proposed resolution of this case pursuant to Rule 30 of the Commission Rules.

JURISDICTION

1. The Commission has jurisdiction of this matter pursuant to Article 6.1 § 4 of the Arizona Constitution.
2. This Agreement is filed pursuant to Rule 30(a) of the Rules of the Commission on Judicial Conduct (Commission Rules).
3. Respondent has served as a municipal judge in the City of Surprise since July 25, 2005, and was serving in this capacity at all times relevant to the allegations contained herein.

4. As a city magistrate, Respondent is and has been subject to the Code of Judicial Conduct (Code) as set forth in Supreme Court Rule 81.

BACKGROUND

5. On October 5, 2006, Disciplinary Counsel filed a formal Statement of Charges against Respondent after a duly appointed investigative panel found reasonable cause to commence formal proceedings.

MUTUAL CONSIDERATION

6. Respondent admits committing the acts of judicial misconduct and corresponding ethical violations set forth below. In consideration thereof, the Commission shall dismiss any allegations not specifically referred to in this agreement. The dismissal of the charges by the Commission should not be construed as a comment as to whether there was sufficient evidence to prove those allegations by clear and convincing evidence.

MATERIAL FACTS

7. Respondent admits that on February 15, 2006, after overhearing husband and wife defendants cursing and making disparaging and threatening remarks about the victim and conspiring to immediately leave the courtroom and violate the injunction against harassment that Respondent had upheld, Respondent, out of his sincere concern for the safety of the two victims who were just outside the courtroom, ordered both husband and wife into custody and handcuffed, without allowing them to make a phone call to arrange for childcare or to seek legal counsel. Once Respondent was satisfied that the victims were protected, Respondent adjourned the matter to regroup and consider his options. In doing this, Respondent was following the policy imposed by his then presiding judge.

8. Respondent admits that between September 2005 and March 2006, several people in his courtroom were treated summarily when minor disruptions such as cell phone use and talking occurred, and that litigant's matters were resultantly reset for other days, pursuant to his presiding judge's direct administrative order which required the rescheduling of cases where individuals were "causing disturbances or who were late to court"

ADMISSIONS CONCERNING CODE OF JUDICIAL CONDUCT

9. Respondent agrees that by failing to follow the procedures for a summary criminal contempt proceeding delineated in Rule 33 of the Arizona Rules of Criminal Procedure by denying the couple any opportunity to make a phone call or speak with an attorney prior to having them taken into custody, Respondent violated Canon 2A ("[a] judge shall comply with the law").

10. Respondent agrees that by imposing the strict sanctions required by his presiding judge on litigants, witnesses, and attorneys for disrupting court proceedings, he gave the appearance of discourtesy, which violated Canons 3B(4) ("a judge shall be dignified and courteous to litigants and attorneys"), 3B(8) ("[a] judge shall dispose of all judicial matters . . . fairly"), and 1A ("[a] judge shall uphold the integrity and independence of the judiciary").

AGREED UPON SANCTION

11. Respondent agrees that censure is an appropriate sanction for his misconduct, and further submits that he has, on his own accord, completed a week long course through the National Judicial College entitled "Enhancing Judicial Bench Skills" and has worked for seven months with Judge Michael Lester as his mentor to address the issues raised in this matter. Respondent further agrees

to attend and complete an additional course in criminal procedure approved in advance by the Commission on Judicial Conduct by January 1, 2008.

OTHER TERMS AND CONDITIONS

12. This agreement, if accepted by the hearing panel, fully resolves all issues raised in the Statement of Charges and may be used as evidence in later proceedings in accordance with the Commission's Rules. If the hearing panel does not accept this agreement as a full resolution, then the admissions made by Respondent are withdrawn, and the matter will be set for hearing without use of this agreement.

13. If this agreement is accepted by the hearing panel and approved by the Supreme Court, both parties agree to waive any rights they might have to a hearing before the Commission.

14. Pursuant to Commission Rule 28(a), both parties waive their right to object to the hearing panel's proposed recommendations and their right to appeal the charges at issue in this matter, including the appeal procedures set out in Commission Rule 29.

15. Both parties agree not to make any statements to the press that are contrary to the terms of this agreement.

16. Both parties will pay their own costs and attorneys' fees associated with this case.

17. Respondent clearly understands the terms and conditions of this agreement and fully agrees with its terms. Respondent waives his right to legal counsel in this matter.

18. This agreement constitutes the complete understanding between the parties.

SUBMITTED this 20th day of December, 2006.

Joseph W. Malka
Respondent

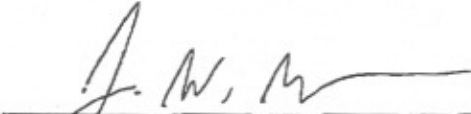
Date Signed

Linda Haynes
Linda Haynes, Disciplinary Counsel
Commission on Judicial Conduct

12-20-06
Date Signed

18. This agreement constitutes the complete understanding between the parties.

SUBMITTED this 21st day of December, 2006.



Joseph W. Malka
Respondent

12/20/06
Date Signed



Linda Haynes, Disciplinary Counsel
Commission on Judicial Conduct

12-20-06
Date Signed

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FILED

OCT 05 2006

**ARIZONA COMMISSION ON
JUDICIAL CONDUCT**

**STATE OF ARIZONA
COMMISSION ON JUDICIAL CONDUCT**

Inquiry concerning Judge)	
)	
JOSEPH W. MALKA)	Case No. 06-079
Municipal Court)	
City of Surprise)	STATEMENT OF CHARGES
State of Arizona)	
Respondent)	
)	

An investigative panel composed of members of the Commission on Judicial Conduct (Commission) has determined that there is reasonable cause to commence formal proceedings against the Respondent, Joseph W. Malka, for misconduct in office. This statement of charges sets forth the jurisdiction of the Commission and specifies the nature of the alleged misconduct.

JURISDICTION

1. The Commission has jurisdiction of this matter pursuant to Article 6.1 § 4 of the Arizona Constitution.
2. This Statement of Charges is filed pursuant to Rule 24(a) of the Rules of the Commission on Judicial Conduct (Commission Rules).
3. Respondent has served as a city magistrate in the City of Surprise since July 25, 2005, and was serving in this capacity at all times relevant to the allegations contained herein.

4. As a city magistrate, Respondent is and has been subject to the Code of Judicial Conduct (Code) as set forth in Supreme Court Rule 81.

COUNT I

ABUSE OF AUTHORITY

5. On February 15, 2006, a man and his wife appeared in Respondent's courtroom to contest an injunction against harassment that was filed against them by a neighboring competing business. During the hearing, Respondent demonstrated uncompromising and dictatorial behavior when the man tried to get a marker from the bench area and again when Respondent threatened the man with contempt and jail for interrupting. Respondent upheld the injunction and left the courtroom. Unknown to the couple, Respondent had a video monitor in his office which showed the couple talking in the courtroom after Respondent left. The couple, who were alone in the court, were discussing how they would violate the injunction by going to the plaintiff's office each day and using the common restroom so that they could harass the plaintiff. When Respondent heard the conversation, he stormed back into the courtroom and began berating the couple, accusing them of threatening the plaintiffs (who were not present at any time during the incident). Respondent ordered both of them into custody, had them handcuffed and denied the wife's request to make a phone call or arrange for childcare. After an hour, they were returned to the courtroom, still cuffed, were grilled by Respondent and were ultimately found not to be in contempt. They were never provided with an attorney.

6. By failing to follow the procedures for a summary criminal contempt proceedings delineated in Rule 33 of the Arizona Rules of Criminal Procedure, which requires that the

contemptuous behavior occur within the “actual presence of the court” (Rule 33.2), and by denying the couple any opportunity to make a phone call or speak with an attorney prior to having them taken into custody, Respondent abused his authority as a judge and violated Canons 2A (“[a] judge shall comply with the law”), 3B(4) (a judge shall be dignified and courteous to litigants), and Canon 3B(8) (a judge shall dispose of judicial matters fairly). This conduct also constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Article 6.1 § 4 of the Arizona Constitution.

COUNT II
INCOMPETENCE

7. On December 9, 2005, Respondent was seated at the prosecutor’s table while Pro Tem Judge Colglazier presided over an in-custody hearing. Respondent was in the courtroom to supervise and train Judge Colglazier. Neither the assigned public defender nor the prosecutor was present in the courtroom. The hearing was to set a stipulated trial date. The defendant was present and appeared in a holding cell behind a window looking out on the courtroom. Respondent was in street clothes and at no time during the hearing was he identified in any manner. Judge Colglazier set the date, and the defendant asked to have his conditions of release modified because he had a full-time job and already had been in custody for 18 days. Respondent asked to approach Judge Colglazier and went through the court file, whispering to Judge Colglazier about a pending probation revocation and advising him that the state “obviously” wanted to hold the defendant longer. Judge Colglazier relayed that information to the defendant, who became upset and said he was not on probation (his probation was for three years and he had only two or three more days left). Judge Colglazier denied

the motion to reduce bond and the defendant repeated that his probationary period was over. Without identifying himself, Respondent then commanded, "Stop talking until the judge tells you you can talk, understand?" The defendant said, "Yes, sir." Respondent returned to the bench to go through the file again. He then asked Judge Colglazier, "Do you want to raise his bond?" Judge Colglazier raised the bond to \$1,000 and made it a cash bond. The defendant asked to speak to his attorney. Judge Colglazier ignored the attorney request and told him the case was not getting resolved, that it was over for the day. As the defendant moved away from the window, Respondent told Judge Colglazier that the defendant said "Fuck you." Judge Colglazier ordered the defendant brought back to the window area and asked him what he said. At first the defendant said he didn't remember. When questioned further, the defendant again asked if he could talk with his attorney. His request was ignored. Judge Colglazier questioned the defendant further, and the defendant denied swearing. The defendant said, "Is that it?" Judge Colglazier responded, "No, it's not. I will tell you when it's it." The defendant said, "Can I speak to my attorney?" and Judge Colglazier loudly stated, "You will shut up right now!" Respondent then approached the bench and urged Judge Colglazier to set the trial date out to January or February. Judge Colglazier did not change the date but did increase the bond to \$2,000. At no time did Respondent advise Judge Colglazier to call the defendant's attorney, who was in the building, into the courtroom. At no time did Respondent advise Judge Colglazier of the defendant's rights or the correct court procedure for conducting a contempt hearing. At no time did Respondent advise Judge Colglazier to arraign the defendant on the probation violation or provide the defendant with a list of the allegations in the petition.

8. By failing to advise Judge Colglazier of the defendant's right to counsel, by permitting and assisting Judge Colglazier in conducting an informal contempt hearing with no sworn testimony and without giving the defendant an opportunity to provide a meaningful response, by suggesting that Judge Colglazier raise the defendant's bond twice with no valid or credible explanation, and by failing to ensure that Judge Colglazier provide the defendant with a copy of the petition or charges against him, Respondent violated Canons 2A ("A judge shall . . . act at all times in a manner that promotes public confidence in the integrity . . . of the . . . judiciary"), 3B(2) ("A judge shall be faithful to the law and maintain professional competence in it"), Canon 3B(7) ("A judge shall afford to every person . . . the right to be heard according to law"), Canon 3B(8) ("A judge shall dispose of all judicial matters . . . fairly"), and Canon 3C(3) ("A judge with supervisory responsibility for the judicial performance of other judges shall take reasonable measures to assure . . . the proper performance of their other judicial duties"). By advising Judge Colglazier of the state's alleged position on the petition to revoke probation and carefully pointing out that Judge Colglazier could increase the bond, Respondent gave the appearance of bias in favor of the state in violation of Canons 2 ("[a] judge shall avoid impropriety and the appearance of impropriety . . ."), 2A (A judge shall be impartial), 3B(2) (A judge must not be partisan), and 3B(5) (a judge must not display bias). This conduct also constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Article 6.1 § 4 of the Arizona Constitution.

COUNT III

APPEARANCE OF BIAS

9. On March 20, 2005, a bench trial was set for a domestic violence case. The prosecutor moved to continue the case because the state had neglected to subpoena the victim and other witnesses. The defense attorney had no objection. Despite this, Respondent began to grill the defense attorney regarding the whereabouts of the victim and directed the defense attorney to ask his client if he had told the victim not to come to court. The defense attorney tried to explain that since the victim was not served with a subpoena, she had no obligation to be present, but Respondent insisted that the state call the victim and ask her if she knew there was a trial. By questioning defendant's attorney as to the whereabouts of the victim and her status, Respondent was assuming the prosecutor's function and giving the appearance that he was biased against the defendant, which violated Canons 2 ("[a] judge shall avoid impropriety and the appearance of impropriety . . ."), 2A ("A judge shall be impartial"), 3B(2) ("A judge must not be partisan"), and 3B(5) ("a judge must not display bias").

COUNT IV

IMPROPER JUDICIAL DEMEANOR

10. On December 13, 2005, an attorney's cell phone went off in Pro Tem Judge Colglazier's courtroom at a time when Respondent was seated, unidentified, at the prosecutor's table in order to train and observe. After the cell phone rang, Judge Colglazier ordered the attorney to take the phone outside and the attorney tried to explain to the court that he was sorry, but he thought it was turned off. Suddenly, Respondent loudly ordered the attorney to leave and

added, "I am Judge Malka." This was the first time he identified himself. The attorney had to wait until the end of the morning calendar before he was allowed to appear in the court. This conduct violated 3B(4) ("a judge shall be dignified and courteous to litigants and attorneys"). This conduct also constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Article 6.1 § 4 of the Arizona Constitution.

11. On January 30, 2006, the defense attorney and prosecutor informed Respondent they had agreed on a plea offer for a defendant who lived in Colorado. Because of a delay on the part of the prosecutor, the out-of-state plea agreement paperwork had arrived late in Colorado. Respondent did not vacate the trial date and advised the parties that if the paperwork was not at the court by 8:30 a.m. on February 2, the defendant had to be there in person. On February 2, court convened at 8:30 a.m., but the paperwork had not arrived. Counsel avowed that the completed agreement was en route via Fed-Ex and was due to be at the courthouse by 10:30 that morning. The prosecutor read the agreement aloud to the court. Respondent refused to wait or reset the case until later in the morning and asked if the state was ready to proceed to trial. The prosecutor said the victim was not present, but the officers were available within an hour to an hour-and-a-half time frame. Prior to any witnesses assembling in the courtroom, Respondent issued a warrant for the defendant's arrest, set a \$10,000 cash bond on each case, and quickly left the courtroom. By refusing to accept the plea offer agreed upon by both parties and requiring an out-of-state defendant to appear at a sentencing where the defendant had promptly provided the necessary paperwork which was only delayed because of the state's actions, Respondent violated Canon 3B(4), which requires that a judge "be patient, dignified and courteous," and 3B(9) ("[a] judge shall dispose of all judicial matters

... fairly"). This conduct also constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Article 6.1 § 4 of the Arizona Constitution.

12. On September 2, 2005, during an arraignment calendar, a man and wife were waiting to be called forward. The wife's hands were cold and she was cracking her knuckles and exchanged a few quiet words with her husband. Respondent suddenly ordered the man to leave the courtroom and reset the case a week later because of their disruption of the courtroom. Respondent's conduct in this matter violated Canon 3B(4), which requires that a judge ("be patient, dignified and courteous").

13. On March 3, 2006, a man ("Junior") was in court for arraignment and his father was also in the courtroom with him, sitting behind the bar. Respondent took Junior into custody and set a bond. As Junior was being handcuffed, someone said "fuck." Respondent initially thought it was Junior and demanded to know what he said. Junior stated, "I didn't say nothing your honor." Respondent said, "Yes you did." Father then admitted he had made the remark. Later in the morning, Respondent called father to the podium and father immediately apologized for his bad language and tried to explain why his son should not have been taken into custody. Respondent cut him off, saying, "Sir, that has nothing to do with what you did in my courtroom today." Father said, "I know, and I apologize," and Respondent snapped, "Stop talking for a moment," and threatened to hold Father in contempt. When father tried to speak, Respondent loudly said, "Stop talking." After father apologized a third time, Respondent accepted the apology and said, "If that ever happens again, you'll be taken into custody and you'll go to jail for it, but I'm also, sir, going to order that

you're not to come back to this courthouse . . . unless you're here on official business for yourself."

Respondent's conduct violated Canon 3B(4), which requires that a judge ("be patient, dignified and courteous") to litigants and others appearing in his courtroom.

COUNT V

FAILURE TO EXERCISE JUDICIAL INDEPENDENCE

14. On August 9, 2006, Respondent submitted a response to the commission regarding allegations of ethical misconduct. In his response, Respondent stated that his presiding Judge, Paul Cragan, had issued administrative orders requiring the rescheduling of cases where individuals were "causing disturbances or who were late to court . . ." By relying on an administrative policy to justify discourteous conduct, Respondent violated Canon 1A ("[a] judge shall uphold the integrity and independence of the judiciary") and Canon 3B(4) ("A judge shall be patient, dignified and courteous").

CONCLUSION

15. Rule 6 of the Commission Rules provides that grounds for discipline include "conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or a violation of the code." Each of the charges alleged in this pleading constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute within the meaning of Rule 6, as well as Article 6.1 §4 of the Arizona Constitution. Additionally, each count violates Canon 1A, which requires a judge to maintain, enforce and personally observe high standards of conduct and to uphold the integrity of the judiciary, and Canon 2A ("A judge shall . . . act at all times in a manner that promotes public confidence in the integrity and

impartiality of the judiciary"). Article 6.1 §4 of the Arizona Constitution provides that the Supreme Court may censure, suspend, or remove a judge for conduct that brings his judicial office into disrepute.

WHEREFORE, the Commission, upon conclusion of a hearing and a finding of good cause, may recommend to the Supreme Court that Respondent be publicly censured, suspended or removed from judicial office, and that the Court grant other relief as may be deemed appropriate.

DATED this 5th day of October 2006.

COMMISSION ON JUDICIAL CONDUCT



Linda Haynes
Disciplinary Counsel

ORIGINAL of this pleading filed
this 5th day of October 2006, with:

The Arizona Commission on Judicial Conduct
1501 W. Washington St., Suite 229
Phoenix, AZ 85007

Copy of this pleading
this 5th day of October 2006, to:

Joseph W. Malka
Surprise Municipal Court
12604 Santa Fe Drive
Surprise, AZ 85374

Hon. Joseph W. Malka
Surprise Municipal Court
12604 Santa Fe Drive
Surprise, AZ 85374
Telephone: 623-815-5432

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NOV 13 2006

ARIZONA COMMISSION ON
JUDICIAL CONDUCT

STATE OF ARIZONA

COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning Judge

JOSEPH W. MALKA
Municipal Court
City of Surprise
State of Arizona

Respondent.

Case No. 06-079

**RESPONDENT'S RESPONSE
TO FORMAL CHARGES**

AND

**RESPONDENT'S REQUEST TO SET
MATTER FOR AN IMMEDIATE
SETTLEMENT CONFERENCE.**

(Presiding Member - Hon. Douglas Stanley)

Respondent respectfully submits this Response to Formal Charges and Request to Set Matter for an Immediate Settlement Conference pursuant to Rule 25(a).

JURISDICTION

1. PARAGRAPH 1 - Respondent Admits.
2. PARAGRAPH 2 - Respondent Admits.
3. PARAGRAPH 3 - Respondent Admits.
4. PARAGRAPH 4 - Respondent Admits.

COUNT I

ABUSE OF AUTHORITY

1. PARAGRAPH 5 - Respondent Admits he was present and Denies the remainder.
2. PARAGRAPH 6 - Respondent Denies.

COUNT II

INCOMPETENCE

1. PARAGRAPH 7 - Respondent Admits he was present and Denies the remainder.
2. PARAGRAPH 8 - Respondent Denies.

COUNT III

APPEARANCE OF BIAS

1. PARAGRAPH 9 - Respondent Admits he was present and Denies the remainder.

COUNT IV

IMPROPER JUDICIAL DEMEANOR

1. PARAGRAPH 10 - Respondent Admits he was present and Denies the remainder.
2. PARAGRAPH 11 - Respondent Admits he was present and Denies the remainder.
3. PARAGRAPH 12 - Respondent Admits he was present and Denies the remainder.
4. PARAGRAPH 13 - Respondent Admits he was present and Denies the remainder.

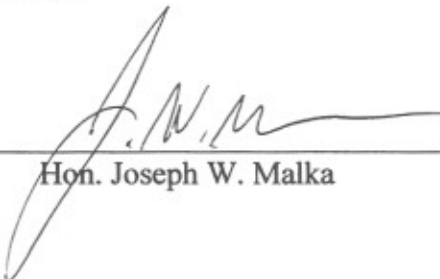
COUNT V

FAILURE TO EXERCISE JUDICIAL INDEPENDENCE

1. PARAGRAPH 14 - Respondent Denies.

WHEREFORE, Respondent respectfully requests that this matter be scheduled for an immediate settlement conference as stated in the previous order of the Presiding Member of this Honorable Commission, dated October 27, 2006.

Respectfully submitted this 10th day of November 2006.



Hon. Joseph W. Malka

Original of this Pleading filed by mail
this 10th day of November 2006, with:

The Arizona Commission on Judicial Conduct
1501 W. Washington St., Suite 229
Phoenix, AZ 85007

Copy of this pleading served by mail
this 10th day of November 2006 to:

Linda Haynes
Disciplinary Counsel
Commission on Judicial Conduct
1501 W. Washington, Suite 229
Phoenix, AZ 85007