

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 12-185

Complainant: No. 1446210983A

Judge: No. 1446210983B

ORDER

The complainant alleged a municipal court judge was rude, biased, incompetent, and denied him an opportunity to be heard.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

After reviewing the information provided by the complainant, the judge's response, and various portions of an audio recording of a hearing, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. The commission does not have jurisdiction to review the legal sufficiency of the judge's rulings. Accordingly, the complaint is dismissed in its entirety pursuant to Rules 16(a) and 23.

Dated: November 29, 2012.

FOR THE COMMISSION

/s/ George Riemer

George A. Riemer
Executive Director

Copies of this order were mailed to the complainant and the judge on November 29, 2012.

This order may not be used as a basis for disqualification of a judge.

State of Arizona
Commission on Judicial Conduct
1501 West Washington Street, Suite 229
Phoenix, Arizona 85007

RE: Complaint against Judge

Phoenix Municipal Court

Greetings:

I am writing to file a judicial complaint against the Honorable who is a judge with the Phoenix Municipal Court. My judicial complaint against Judge arises from her conduct during the second of two interrelated cases I litigated in the Phoenix Municipal Court. In two separate Phoenix Municipal Court cases, I represented my client Mr. represented

In the first case, sought an injunction against for harassment. Judge Linda Lowery presided over the first case. In the second case, sought an injunction against for harassment and sought an order of protection against him. and (consolidated). Judge presided over the second case.

An issue in contention in the second case was whether a private investigator, John Waugh, who hired to investigate could testify against In the first case, subpoenaed Waugh's investigative file. I filed a motion to quash subpoena, arguing that Waugh's investigative file contained privileged information and was not relevant to request for injunctive relief against

Judge [redacted] was inclined to grant the motion to quash based on privilege. With the parties' stipulation, Judge [redacted] granted my motion to quash. [redacted] asserted that he would revisit the issue in the second case. Judge [redacted] cautioned that she did not believe that he could use [redacted] investigators against [redacted]

In the second case, [redacted] did not subpoena Waugh's investigative file. Instead, [redacted] called Waugh to testify during his case-in-chief. I objected to Waugh's testimony based on privilege between a client and private investigator. When Judge [redacted] questioned the basis of my objection, [redacted] falsely avowed to the court that a private investigator-client privilege did not exist in Arizona.¹ I asked Judge [redacted] to review Judge [redacted] ruling and the motion to quash that I filed in the first case. Judge [redacted] refused to review my motion. She rudely curtailed every effort I made to explain the privilege issue and Judge [redacted] ruling in the first case. Judge [redacted] refused to allow me to make my record and blindly accepted [redacted] lie that Waugh's testimony was not privileged. Judge [redacted] summarily overruled my objection.

After Judge [redacted] overruled my objection and allowed Waugh to testify, I asked Judge [redacted] to put Waugh on notice that [redacted] would file a civil suit against him for violating the private investigator-client privilege. Judge [redacted] was biased and, without any legal support, stated that my notice to Waugh was a "threat." Moreover, she refused to allow me to make a record on the issue of the private investigator-client privilege. Judge [redacted] chastised me in open court, repeatedly calling me "extremely unprofessional" when, in fact, I was rightfully advocating for my client's rights.

For the reasons detailed below, Judge [redacted] conduct violated the following Canons of Judicial Conduct: Rule 2.8, Decorum, Dememeanor and Communication with Jurors; Rule 2.6, Right to be Heard; Rule 2.2, Fairness and Impartiality; and Rule 2.5, Competence, Diligence and Cooperation.

¹ Arizona does, in fact, recognize a private investigator-client privilege. Specifically, A.R.S. § 32-2455(A), which governs licensed private investigators, provides: "Except as otherwise provided by this chapter or other law, no licensee, associate, registrant or employee of a licensee may divulge or release to anyone other than his client or employer the contents of an investigative file acquired in the course of licensed investigative activity." Pursuant to A.R.S. § 32-2458, a violation of § 32-2455 is a class 1 misdemeanor.

In order to for you to better understand the basis of my complaint, I will first provide you a short explanation of the underlying facts.

Factual Background Regarding

In January of 2011, retained my firm to conduct an investigation into the death of a radiologist in Houston. had met and her husband, while vacationed in Jamaica with his girlfriend, made no secret of his attraction to even though he was married to

After died under mysterious circumstances in November of 2009, moved to Arizona, began a relationship with and collected \$2 million from life insurance policy. asked to marry him just after the one-year anniversary of death. suspected that may have had something to do with death so he could be free to pursue

explained that in September of 2010, moved out of his home because she needed "space." believed their relationship would continue. On September 8, 2010, went to a Red Robin restaurant in north Phoenix. When arrived he found dining together. was dismayed to see left the restaurant to talk briefly. When they came back inside, approached at his table. account of what ensued differed. claimed that tried to slug his chest and he slapped hand away. claimed that threatened to beat him up. The police were called, but no one was arrested.

In October of 2010, hired private investigator, John Bruch, to confirm his suspicion that were romantically involved. Bruch was a retired FBI agent. Bruch referred to his colleague, John Waugh, at Lochmoor Investigations. Waugh, like Bruch, was a retired FBI agent. retained Waugh to investigate relationship with Waugh placed GPS tracking devices to monitor

came to believe that posed a danger. was fearful of and requested that I file an injunction against harassment. I did file the injunction. Judge issued the injunction and requested a hearing. As stated above, hired After a full hearing, Judge denied request for an injunction. then retaliated with requests of their own.

Consolidated Nos.

Now sought an order of protection against sought an injunction against harassment against Their petitions, filed on May 3, 2011, initiated the cases. The cases were consolidated and a trial was set for May 24. Judge was assigned to this case.

On the first day of trial, had secretly arranged with Waugh, (who may have cooperated with to curry favor for possible work in the future), to appear without the need for a subpoena. and Waugh both knew that objected to Waugh testifying about his confidential work for him. certainly knew that I had made legal objections to Waugh's disclosure of information and that my objections had not been addressed on the merits at the first trial.

When called Waugh to testify, I immediately objected on the ground that Waugh's work for was privileged. responded by stating, "there's no such privilege in Arizona as a witness private investigator privilege." I attempted to explain to Judge that the issue had been briefed in the first case and that Judge had expressed an opinion that there could be a valid privilege. I did not get the opportunity to fully explain what had occurred in the first case because Judge rudely cut me off and refused to listen to my reasoned argument. again insisted that no private investigator-client privilege exists in Arizona. I asked the court to review my motion in the first case.² When I requested that Judge review my

² At the time of the hearing I had not briefed A.R.S. § 32-2455 in my motion. I was ambushed by and did not know that he was going to call Waugh as a witness. After the hearing, I had an opportunity to research the private investigator-client privilege in Arizona. That is when I discovered A.R.S. § 32-2455. If the court had acted

motion. asserted, “but there’s no privilege. That’s why we’ve called Mr. Waugh to testify.” What I was seeking was a definitive ruling on whether there was a private investigator-client privilege in Arizona. Had Judge taken the time to consider the opposing arguments and issue such a ruling—for or against my client—I would have been satisfied. Judge however, did not take the time to consider the issue. Instead she rudely overruled my objection to initial question to Waugh and did not state clearly on the record whether there was a privilege or not. Judge without reviewing the law, relied solely on false statement that no private investigator-client privilege existed in Arizona, when in fact A.R.S. §§ 32-2455 and 32-2458 made it illegal for Waugh to testify.

After Judge overruled my objection, I asked to put Waugh on notice that I would file a civil suit against him should he testify about the contents of investigative file. Judge angrily characterized my notice as a “threat” and stated repeatedly in open court that I was “extremely unprofessional.” I attempted to explain to Judge that I wanted Waugh to be aware that would file a suit against Waugh for violating the private investigator-client privilege. Judge continued to characterize my notice as a “threat”. While I remained calm and professional, Judge was openly disrespectful to me and ill-tempered.

Not only was Judge incredibly rude, she was also very wrong on the law. As mentioned above, Arizona has a statute that clearly prohibits private investigators from testifying and releasing their files to anyone other than their clients. A.R.S. § 32-2455, states in relevant part:

- A. Except as otherwise provided by this chapter or other law, no licensee, associate, registrant or employee of a licensee may divulge or release to anyone other than his client or employer the contents of an investigative file acquired in the course of licensed investigative activity.

in an impartial and professional manner, the parties could have briefed the issue further. Instead, Judge summarily rejected the notion of reviewing the law.

On May 25, 2011, the second day of trial, I called Dr. Phillip Keen to testify. Dr. Keen is a well-respected private consulting forensic pathologist. [redacted] had hired Dr. Keen to review the autopsy and investigative report of [redacted] death, as well as a summary of the police investigation of [redacted] death. I called Dr. Keen to testify about the circumstances of [redacted] death to demonstrate that [redacted] investigation had merit. [redacted] had characterized [redacted] investigation of [redacted] death as the act of a madman.

Dr. Keen was prepared to testify that [redacted] investigation had merit. On direct examination, I asked Dr. Keen to offer the court his opinion as to whether [redacted] death was suspicious based on his review of the autopsy report and his training and experience. [redacted] objected on relevance. Judge [redacted] sustained [redacted] objection, despite her allowing [redacted] to spend days attacking [redacted] as a lunatic who had no basis to believe that [redacted] died other than by suicide. I asked Judge [redacted] if I could make a record. Judge [redacted] refused to allow me to make a record. I asked Judge [redacted] to allow me to make an offer of proof. Judge [redacted] with open hostility, refused to allow me to make an offer of proof.

At the end of trial, Judge [redacted] granted [redacted] request for an order of protection against [redacted] Judge [redacted] however, denied [redacted] request for an injunction against harassment against [redacted]

Files a Vindictive Bar Charge

Following the second trial, [redacted] filed a bar charge against me. [redacted] is an opportunist and he used Judge [redacted] hateful characterization that my notice to Waugh was a “threat.” Despite the fact that I was right, I had to defend a meritless bar charge.

However, the formal complaint filed by the State Bar was summarily dismissed by a three-member hearing panel in proceedings before the Presiding Disciplinary Judge of the Arizona Supreme Court on April 12, 2012. In fact, the Presiding Disciplinary Judge's Order outright rejected the notion that my notice to Waugh was a threat. The Panel instead said that I was right and that my statement was a lawful promise of future litigation. Specifically, the court stated:

There may be a fine line in some cases between a threat and a promise, but not under these facts. Under the evidence submitted, this Panel finds no threat was made, nor should it have been considered a threat. It was instead an entirely reasonable notice that legal consequences would follow if testimony was given. The Panel finds as a matter of fact that there was no intent by Respondent to threaten or unlawfully obstruct Mr. [redacted] access to properly obtainable evidence. Mr. [redacted] was not entitled to the information by state law. Further, the Panel finds there was no conduct prejudicial to the administration of justice. (See Exhibit # 1, Report and Order of Dismissal dated April 30, 2012).

Presiding Disciplinary Judge [redacted] expressed grave concern with Judge [redacted] refusal to allow me to make a record when I attempted to explain why Waugh needed to hire counsel before testifying. Judge [redacted] stated:

We note two things that occurred there that were both troubling. One was that in our view that discussion that someone that requests to make a record, a judge should, in fact, permit the making of a record. The interrupting of the Respondent was awkward.

But, more troubling was, frankly, Mr. [redacted] - - who certainly has a great deal of experience in the law to assert that there is no privilege in Arizona for this- - is a blatant misrepresentation of the law. The stipulation we have before

us is that, in fact, that was simply untrue and it appears the judge rooted on that and proceeded accordingly.
(See Exhibit # 2, Audio Recording of Disciplinary Proceeding)(Emphasis supplied)

The following is the exchange that took place with Judge when she angrily mischaracterized my statement to Waugh as a threat:

Judge Violations of Judicial Canons

A. Rule 2.8 – Decorum, Demeanor, and Communication with Jurors.

Rule 2.8(B), requires that judges “be patient, dignified, and courteous to . . . lawyers . . . ” Comment 1 further provides that a judge’s “duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. *Judges can be efficient and businesslike while being patient and deliberate.*” (Emphasis Supplied).

Judge conduct violated Rule 2.8. Judge was unprofessional, impatient and undignified. Judge grossly mischaracterized my notice to Waugh as a “threat.” Judge was clearly wrong and acted rudely when she repeatedly called me “extremely unprofessional” in open court. Judge chastised me in front of the entire courtroom, including my client. Judge could have avoided her hostile outburst if she had simply taken the time to review Judge ruling in the first case or reviewed my motion to quash. Instead, Judge abandoned the decorum and demeanor characteristic of a judge.

³ These are just two instances of Judge’s hostility towards case. Throughout the entire trial Judge demeanor demonstrated her outright bias and antagonism towards case.

B. Rule 2.6 – Ensuring the Right to Be Heard.

Rule 2.6(A), Arizona Code of Judicial Conduct, provides that a judge “*shall* accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” Comment 1 importantly adds: “The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.”

Judge conduct violated Rule 2.6. First, she did not allow me to be heard on the issue of privilege. Had Judge given me the opportunity to be heard I could have provided a detailed background on Judge ruling and the substance of the motion to quash that I filed during the first trial. Judge cut me off and relied solely on false avowals that no private investigator-client privilege existed in Arizona.

Second, Judge refused to allow me to be heard when she did not allow me to make a record concerning Dr. Keen’s proffered testimony. Although she granted objection to Dr. Keen’s testimony, Judge shut down every effort I made to make an offer of proof of Dr. Keen’s testimony. Judge demeanor was discourteous and unbecoming of a judge. When I asked to make a record, Judge ordered me to “move on.” She did not allow me to be heard when I requested to make a record for appellate review.

C. Rule 2.2 – Fairness and Impartiality.

Rule 2.2, Arizona Code of Judicial Conduct provides that a judge “shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” Comment 1 further provides, “To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”

Judge did not perform her judicial duties with fairness and impartiality. Judge was clearly biased towards position. blatantly misrepresented the law to the court, yet Judge took his untruthful avowals at face value. Judge could have taken the time to review the motion to quash that I had filed in the first case or taken a recess to review the law concerning the private

investigator-client privilege. Instead, Judge _____ neglected her duty to act fairly and impartially when she relied on _____ account of Judge _____ ruling and his misrepresentation of law.

D. Rule 2.5 - Competence, Diligence, and Cooperation.

Rule 2.5(A) requires judges to perform judicial duties competently and Comment 1 notes that “Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge’s responsibilities of judicial office.”

Judge _____ ruling in the second hearing demonstrates that she lacked competence. At the conclusion of the second hearing, Judge _____ granted petition for an order of protection. Judge _____ found: (1) _____ use of tracking devices constituted “stalking” under Arizona’s “domestic violence statute;” (2) investigators took surreptitious photographs of _____ and (3) the Red Robin incident between _____ constituted disorderly conduct against _____. Specifically, Judge _____ stated:

We have a situation of potential domestic violence, and the incidents that Ms. _____ has introduced show that her petition should be granted is that Mr. _____ placed tracking devices on her vehicle. And she had introduced evidence that on three separate occasions, Mr. _____ placed tracking devices on her vehicles.

Mr. _____ testified that he placed those on there, first to determine whether or not she was cheating on him, and whether or not she was being honest about what she was saying regarding her relationship with Mr. _____. Then he testified that he placed those on her vehicle to determine whether or not she was involved with the theft of his property and money. But either way, placing tracking devices on your girlfriend or your ex-girlfriend is - - can be viewed as stalking under the domestic violence statutes.

Also, the - - some of the surveillance photos that were taken of Ms. [redacted] were shown, according to Ms. [redacted] to a friend of hers, [redacted] and Ms. [redacted] testified that's how she even learned that the Defendant was conducting surveillance is because Ms. [redacted] told her that she had seen the pictures and that she was under surveillance.

Lastly the incident in Red Robin. It was - - could be viewed as disorderly conduct and disturbing the peace of Ms. [redacted] in Red Robin, with the confrontation. So based upon all of those factors, the Court is granting the petition for Ms. [redacted]

[redacted] appealed Judge [redacted] ruling following the second hearing. ([redacted] Appeal was consolidated in the Maricopa County Superior Court with cross-appeals filed by [redacted] under case number: [redacted]). The appellate court found that Judge [redacted] erred in several respects. (See Exhibit # 4, Record Appeal Ruling dated May 23, 2012). First, the appellate court found that Judge [redacted] erred when she found that the surveillance photos [redacted] investigators took of [redacted] violated A.R.S. § 13-3019 and; therefore, supported the order of protection. There was no evidence that the photos violated A.R.S. § 13-3019. (See Exhibit # 5, A.R.S. § 13-3019). The photos were not taken in an area where [redacted] had a reasonable expectation of privacy. Moreover, there was no evidence that the photos depicted nudity or any other statutory requirement articulated in A.R.S. § 13-3019. Judge [redacted] ruling was flat out wrong and demonstrated that she did not read A.R.S. § 13-3019, before making a finding that it supported [redacted] order of protection. The appellate court found that because the photographs were taken in public places and [redacted] was fully clothed in the photos, they were not evidence of surreptitious photographing.

Second, the appellate court found that Judge [redacted] erred when she found that the Red Robin incident supported the order of protection. Simmons testified that she did not hear anything that [redacted] said to each other. In fact, [redacted] was standing several feet away near the entrance of the restaurant. [redacted] could not see anything that happened between [redacted] Accordingly, Judge [redacted] clearly erred when she found that the Red Robin incident supported Simmons' order of protection.

Lastly, the appellate court found that Judge [redacted] erred when she found [redacted] use of tracking devices was stalking pursuant to A.R.S. § 13-2923. (*See* Exhibit #6, A.R.S. § 13-2923). [redacted] presented no evidence, as required under § 13-2923, that [redacted] engaged in a “course of conduct” to maintain visual or physical proximity. Nevertheless, the appellate court affirmed Judge [redacted] ruling because the use of tracking devices was an act of domestic violence. The appellate court ruled that, although Judge [redacted] did not articulate harassment as a specific ground for [redacted] order of protection, the use of tracking devices was harassing. In other words, the appellate court supported [redacted] order of protection with some legal reasoning where Judge [redacted] failed to do so. Ultimately, the appellate court affirmed Judge [redacted] ruling although Judge [redacted] had clearly reached her conclusion for the wrong reason.

Judge [redacted] also ruled incorrectly in the second hearing in a critical regard. Judge [redacted] found that [redacted] committed two acts of harassment concerning [redacted] petition for an injunction against harassment: (1) the Red Robin Incident; and (2) [redacted] having tracking devices placed on [redacted] vehicle in Texas. During closing argument, [redacted] falsely stated that [redacted] investigators placed tracking devices on [redacted] car. Judge [redacted] relied only on [redacted] word and made a finding that [redacted] used tracking devices on [redacted] car.

The appellate court carefully combed through the entire trial record and correctly determined that there was absolutely no factual support for Judge [redacted] decision that [redacted] had placed tracking devices on [redacted] vehicle. Indeed, when [redacted] was specifically asked if he knew about any tracking of his vehicle, [redacted] responded that he had *no evidence* [redacted] put a tracking device on any of his vehicles.

Judge [redacted] ruling clearly demonstrates incompetence and bias. Judge [redacted] allowed her hostility towards [redacted] case to cloud her impartiality and judgment. Judge [redacted] made findings of fact based on [redacted] false assertions during closing argument, although there was no evidence to support [redacted] lies. Judge [redacted] went to great lengths to ignore the facts and the law to rule against [redacted]

Although reasonable minds may differ on the application of law to the facts of a case, that is not what took place here. Judge was downright wrong about the law and the facts of the case. Judge ruling was so far off the mark that it demonstrates that she did not review the applicable statutes before making a judicial ruling. Judge was totally incompetent and clearly never reviewed the elements of any of the offenses she used to justify her Orders.

Conclusion

Based on the foregoing, I firmly believe that Judge conduct violated the following canons of judicial conduct: Rule 2.8, Decorum, Demeanor and Communication with Jurors; Rule 2.6, Right to be Heard; Rule 2.2, Fairness and Impartiality; and Rule 2.5, Competence, Diligence and Cooperation.

Judge conduct warrants the Commission's serious review. Judge unprofessionalism reflects poorly on the legal profession as a whole. Judge allowed her antagonism for case to fog her judgment and shape her conduct on the bench.

If you need any additional information to review the issues discussed above, please let me know. I do have complete transcripts of both trials.

Sincerely,