

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 12-195

Complainant: No. 1447400088A

Judge: No. 1447400088B

ORDER

The complainant alleged a justice of the peace improperly decided an issue involving attorney fees and failed to ensure he received a copy of the order. He further alleged the judge engaged in an improper ex parte communication with opposing counsel.

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 and the judge's response, 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.

BACKGROUND

On 18 November 2011, I settled the above mentioned case with the Plaintiff in the amount of \$800, attorney fees to be ascertained following submission of a *China Doll* affidavit for attorney fees. The Plaintiff's attorney requested \$4,240 and the judge awarded the same.

RULES & ANALYSIS

- A) Rule 2.5(A) of the code requires that a judge perform judicial and administrative duties competently. However, to my amazement, I received the ruling on attorney fees from the *Plaintiff*, rather than the court, on Friday, 29 June 2012, over a month after the ruling. (Attachment 1). Note in particular, that the "Mailed to Defendant" block is not checked, unlike any previous correspondence I have received from the court. A notice of appeal usually must be filed 14 days following the ruling or the right is lost. Therefore, had I chosen to appeal, I may have been deprived the right.
- B) I note the purpose of the commission is not to call into question the legal conclusions of the judge and this complaint is not being made for that purpose. However, Rule 1.1 requires that a judge comply with the law.

Lateness of Request for Attorney Fees

1. The settlement was made on 18 November 2011 following a mediation session with the judge. (Attachment 2). The request for attorney fees was mailed on 22 March 2012, over 120 days following the settlement. (Attachment 3). Arizona Rules of Civil Procedure, Rule 54(g)(2) requires such requests to be filed within 20 days. In *Gecko Pools & Spas, L.L.C. v. Blackhawk Holdings, L.L.C.*, 2010 WL 785875 (App. 2010), the court explains, "Based on these authorities and a common sense reading of Rule 54(g)(2), we conclude the rule requires a party to submit a fee application within twenty days after the court enters a ruling on the merits of a cause of action that can be reduced to a final judgment."¹ (Attachment 4). The State Bar Committee Notes addressing the 1999 Amendments clarify that "claims for attorneys' fees under A.R.S.

¹ Note, under ARCAP Rule 28(c), this case can only be considered "for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review."

§ 12-341.01 or other similar grounds *must* be timely asserted in the pleadings.” As I am moving out of country on 21 July 2012, the lateness of the submission was ultimately terminal to my pursuing an appeal. I have spoken to multiple civil attorneys in Arizona, none of whom could imagine how a judge would accept such a late submission.

Failure to Review Under Warner

2. I requested, following our settlement mediation, that the judge conduct a hearing on attorney fees. The judge indicated this would put me at a disadvantage and I should allow the Plaintiff to submit *China Doll* affidavit and that I should respond. That is, indeed what took place.

You’ll note on page 2 of the Plaintiff’s *China Doll* affidavit, Attachment 3, paragraph 1, “Upon reflection Moore does not believe that _____ claims were not made in ‘good faith’...” In other words, the Plaintiff concedes the good faith of myself in pursuing my defense. Yet, in his decision, the Judge cites *Kaufmann v. Cruikshank*, 22 Ariz 488 (2009) which involved bad-faith or harassing litigation. As no bad-faith or harassment was alleged in the Plaintiff’s request for attorney fees, I did not reference it in my response. I would liken it in criminal law, an area upon which I am more familiar, to a judge convicting for larceny where the Government only alleged wrongful appropriation. It is a due process violation. More specifically however, the Arizona Code of Judicial Conduct, Cannon 1 requires that impartiality be maintained. It is defined as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties.” In implying bad-faith, when none was alleged, and worse, where it was specifically conceded as nonexistent by the Plaintiff, demonstrates favor for the Plaintiff over myself. Indeed, the elements of *Warner* are not even referenced in the Judge’s decision. Further, while I noted in my *China Doll* affidavit a legitimate question of the actual costs paid by the Plaintiff to his attorney—as Plaintiff’s attorney provides conflicting information—the Judge refused to review the actual costs. Whether or not the ultimate finding of the Judge would remain the same had the Judge based the decision on the pleadings is not in question. The issue is, whether it was ethical for the judge to essentially unilaterally change the Plaintiff’s pleading from good-faith to bad-faith.

It is only instructive, though not conclusive, that the Judge awarded every dollar the Plaintiff requested despite the latter’s missing mandatory deadlines for 1) disclosure; and, 2) for his request for attorney fees, not to mention alleging fees in his initial complaint for which he did not have a good-faith basis, requiring that his complaint be amended. Indeed, the Judge did not consider this at all in his awarding all Plaintiff’s attorney fees and the determination of bad-faith on the part of myself.

- C) Immediately following the settlement of the case, following a mediation hearing by the Judge, the Plaintiff’s attorney began a casual conversation with the judge. I do not allege, because I simply do not have sufficient evidence, that this constituted an *ex parte* communication, because I do not know the content of the conversation. However, Cannon 1

requires that the "judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety." Engaging in what appeared to be a casual conversation with the Plaintiff's attorney immediately following a settlement hearing and prior to the determination of attorney fees does precisely the opposite.

While it may appear to be a small amount of money, \$4,240 is a great deal of money to me. I thank you for your time and consideration. For ease of communication, as I am currently en route to Japan, please contact me by email at _____ If needed, I would be happy to provide a United States telephone number as soon as I have activated it.

Respectfully Submitted,