

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 06-031

Complainant: No. 1277910350A

Judge: No. 1277910350B

ORDER

The commission reviewed the complaint in this matter and found no ethical misconduct on the part of the judge. The case is dismissed pursuant to Rules 16(a) and 23(a).

Dated: October 4, 2006.

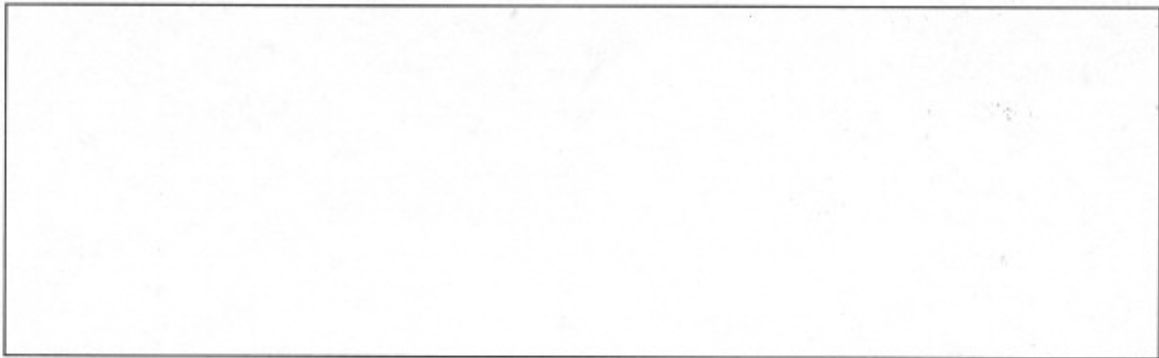
FOR THE COMMISSION

/s/ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on October 4, 2006.

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



February 1, 2006

FEB 02 2006

VIA FIRST CLASS MAIL

CJC-06-031

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

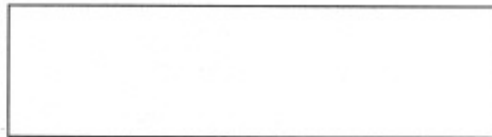
Re: Complaint against:



Case:



Complainants:



Dear Members of the Commission:

I have practiced law for [] years in the State of Arizona. Like most attorneys, I have certainly had many occasions to question the wisdom of judicial decisions (particularly when my clients don't prevail . . .) but, thankfully, I have never had the occasion to question the integrity of a judicial proceeding. Until now.

Together with [] I represent the Personal Representative of the [] This case was ably handled by Hon. [] for two years, at which time she [] and Hon. [] became the judge. The case is rather contentious, pitting [] the PR, who was [] close friend against [] who is the Trustee of a wealthy trust set up by [] for his children. The Children, [] have been caught in the middle of this ongoing contest, with both sides contending that they are acting in the children's best interest. Counsel for the Children, [] are each paid by [] and are closely aligned with her.

I must say that I was favorably impressed with Judge [] integrity in her first encounter with an *ex parte* communication to the Court. At a hearing on [] Judge [] explained that she had received a letter from [] but that it was *ex parte* and she could not consider it. She handed the letter to [] counsel, [] I

believed that this demonstrated Judge [] appreciation of the significance of *ex parte* contacts, which are strictly prohibited by Canon 3 of the Code of Judicial Conduct. I was wrong.

The trouble began when Judge [] appointed [] and [] of the firm [] as Special Master for the action. While the Code of Judicial Conduct specifically defines Special Masters to be "a judge within the meaning of this code", these gentlemen were, unfortunately, inexperienced and careless. Despite written warnings from counsel for both sides that they were judicial officers and should not engage in *ex parte* contacts, they repeatedly engaged in *ex parte* contacts. Based on these contacts (which took place exclusively with counsel on one side of the dispute) the Special Master issued a lengthy report consisting largely of a vitriolic screed against the PR, mirroring the opinions of the *ex parte* sources. Fortunately, some of those sources were referenced, if somewhat obscurely, in the report. This led the PR to move that the Court dismiss the Special Master for conduct violating the Code of Judicial Conduct and disregard the Special Master's Report. Judge [] appropriately ordered the Special Master to report on the full extent of their *ex parte* adventures, which produced two filings from the Special Master revealing numerous additional *ex parte* communications.

From these reports a fuller picture of the extent of the *ex parte* contacts emerged. The Special Master spoke privately on matters of substance with [] counsel, who, at his request, sent him an e-mail with attachments. The Special Master obtained opinions in a private conversation with former counsel for []. The Special Master commissioned a private "expert" and spoke to him about case issues. Additional correspondence was received from other counsel paid by []. There were eleven *ex parte* contacts in all (that we know of); none of them disclosed, most of them actively concealed. Naturally, the PR re-urged his request that the Special Master be dismissed. What Judge [] did next was totally unexpected.

Upon learning of the full scope of the *ex parte* contacts and the efforts to conceal them, Judge [] decided to APPROVE retroactively all of this misconduct. She rationalized that some of the *ex parte* contacts could be described as "necessary" to gather information, others were unnecessary but the Special Master did not remember considering them in his report. In fact, she stated that she was not sure if the Special Master was even governed by the Code of Judicial Conduct. She told the Special Master that, going forward, he should **not** engage in *ex parte* contacts, then assigned him a raft of additional responsibilities, and adopted many of the recommendations in his Report.

My colleagues and I believed that we had somehow failed to impress Judge [] with the seriousness of the matter ---- or perhaps she did not understand that one judicial officer cannot excuse another for misconduct (any more than a senior partner in a law firm could excuse an ethical breach of his associate). We therefore engaged [] as Social Ethics Counsel for the Estate. [] of the [] wrote a strongly worded Motion for Reconsideration. I wish to share with you Mr. [] conclusion:

The Special Master engaged in multiple ex parte communications which precluded the parties' participation. Thereafter, the prohibited communications were not

[]

promptly or sufficiently disclosed. These actions were clear violations of the Arizona Code of Judicial Conduct. Such violations constitute actual improprieties – not merely the appearance thereof – and require recusal (or removal) of the Special Master and rejection of the Special Master's Report. When asked about the violations, the Special Master's responses were incomplete, misleading and evasive. Such responses further underscore the appearance of impropriety in the Special Master's conduct. An objective disinterested observer fully informed of such facts would certainly "entertain a significant doubt that justice would be done in the case." State v. Smith, 202 at 79, 50 P.3d at 829. Because of objective improprieties and the appearance of impropriety, and because there is no way to determine to what extent the unfairness of the proceedings tainted the Special Master's Report, it must be rejected in its entirety. The Court has an obligation to ensure that a special master acting under the Court's direction complies with the provisions of the Arizona Code of Judicial Conduct. When a violation occurs, the Court must take appropriate action. The only way to remove the taint of unfairness that has permeated the Special Master's investigation is to remove the Special Master from further involvement in this case and to reject the Special Master's findings in their entirety.

Mr. [] appeared on behalf of the Estate at a hearing on []. He asked whether the Court would "entertain any argument" on his Motion for Reconsideration. The Court responded "No, huh-uh. Thank you, []" Judge [] rejected the Motion for Reconsideration summarily.

In sum, I have been most reluctant to make this complaint. We have given the Judge and the Special Master multiple opportunities to remedy this situation and have been entirely rebuffed. Numerous other lawyers, including retired judicial officers, have reminded us of our responsibility under ER 8.3(b) to report misconduct by judicial officers. I will tell you frankly that I am mindful of the detriment that the judicial misconduct continues to have on this case. (Just yesterday, the Court approved another request by the Special Master to extend his authority, just a few hours after he filed his motion, disregarding the PR's right to object). However, the fact that we waited over four months since we first learned of the *ex parte* contacts to make this filing demonstrates the lengths we have gone to permit Judge [] the opportunity to right their own ship. They don't see that there is a problem. We trust the Commission will.

To assist the Commission, we have prepared a timeline of judicial misconduct and provided an exhibit notebook. We thank you for your attention to this matter.

I affirm, under penalty of perjury, that the foregoing information and the allegations contained in the attached complaint are true.

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