

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 09-082

Complainant: No. 1359410479A

Judge: No. 1359410479B

ORDER

The commission reviewed the complaint filed in this matter and found no evidence of ethical misconduct on the part of the judge.

The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: July 23, 2009.

FOR THE COMMISSION

\s\ Keith Stott
Executive Director

Copies of this order were mailed to the complainant and the judge on July 23, 2009.

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

I. HISTORY

1. On February 22, 2004, (the “Complainant”) Father was killed in automobile accident.

2. On September 8, 2004, the Complainant was appointment as personal representative in accordance with his father’s December 31, 2003 Will that had been submitted to probate in case number

3. Over four years later on November 10, 2008 the Petitioners filed an Unverified Ex-Parte Motion for Order Authorizing Forensic Examination of Will in Laboratory alleging that the Will [the “Ex-Parte Motion”]. The Petitioners are two adult women in their thirties who assert that the Complainant’s Father is also theirs. They had never sought a finding of paternity by any court. The Unverified Ex Parte Motion contained scandalous innuendo and speculation about Will being the result of a conspiracy and being fraudulent. Attached to the Unverified Ex Parte Motion was an Affidavit from a forensic document examiner. The only real conclusion contained in the Affidavit is that the page containing the Decedent’s signature was a copy. The Unverified Ex Parte Motion requested that the Court allow an ex parte examination of the Will.

4. The Unverified Ex Parte Motion on its face indicated that it was time-barred as it stated that the Decedent died on February 2, 2004. A.R.S. §14-3801(3) set the time bar for commencing proceedings to “contest” an informally probated will at the later of twelve months from the opening of probate or two years after the decedent’s death.

5. On November 19, 2008, Commissioner met ex parte with two members from Counsel for Petitioners’ Office. Petitioner’s Counsel told Commissioner that he was trying protect against someone utilizing the normal review process going into the Clerk’s, office obtaining the file, and switching or pulling a page. Commissioner stated that was what he was most worried about right now and he was thinking about issuing an order that the Clerk would not allow anyone access to the document until further order of the Court, so you couldn’t walk over to sixth and Jackson, ask to look at the file, and slip it into their briefcase and walk out or substitute pages. Commissioner stated it was the issue of just as “we’re” being concerned that someone “other” than a representative from the Petitioners’ Counsel’s office may affect the chain of custody, six months or a year from now after the analysis, the finger may be pointed at Petitioner’s Counsel’s office regarding the chain of custody. Commissioner never questioned the legal authority for proceeding of after the statute of limitations had expired or the legal authority for

holding an ex parte hearing on the Unverified Motion. Commissioner ordered that the Clerk of Court seal the Will and it not be viewed by anyone until further order of the Court.

6. On December 10, 2008 at 1:30 p.m., Commissioner held a Status Conference. At the Status Conference the Complainant presented Commissioner with a copy of the Estate's Response and Motion to Authenticate a Copy of the Will in accordance with A.R.S. § 14-3415(B). Attached to the Estate's Motion to Authenticate were two affidavits. One was from the Decedent's former worker and the other was from the Decedent's biological sister. Both affidavits stated that the Will submitted to Probate was a copy of a Will shown to them by the Decedent shortly before his death. In the Estate's Motion to Authenticate, the Complainant pointed out that the only conclusion contained in the Expert Affidavit submitted with Petitioners' Ex-Parte Motion was that the page containing the Decedent's signature was a copy [presumably mixed up by the Decedent].

7. During the December 10, 2008 Status Conference, Judge indicated that he ordered the return hearing because he was concerned about chain of custody issues. When the Complainant rose to speak, Commissioner cautioned him that he might not want to say anything. The Complainant was forced to defend himself and responded that he had nothing to hide. Commissioner refused to consider the issue of the Petitioners' presumptive lack of standing to proceed. Commissioner agreed with Petitioners that there as a basis to proceed based upon a potential a Fraud Upon the Court theory. At the conclusion of the hearing, Commissioner granted the Petitioners' Ex Parte Motion.

8. Based on Commissioner initial statement to the Complainant that he might not want to say anything at the December 10, 2008 hearing, his fraud upon the Court comments to Petitioners' Counsel and his sealing of the will, Complainant believed that Commissioner had formed an opinion prior to his appearance. Therefore, on February 12, 2009, the Complainant filed a Motion for Change of Judge for Cause.

9. The forensic examination of the Will was completed on March 3, 2009. The two Forensic Document Examiners provided a qualified opinion that the questioned signature "appears to be genuine."

10 On March 9, 2009, Judge denied the Motion for Change of Judge for Cause.

11. On March 9, 2009 the Complainant had his assistant call to Commissioner office in to get information regarding continuing lien on a garnishment that was payable to the

Complainant in an unrelated matter. The assistant spoke to Commissioner [redacted] Judicial Assistant, Joc ("JA"). The assistant inquired as to the status of the Order of Continuing Lien that filed on February 3, 2009. The assistant started giving the JA the case number and before he could complete the number the JA indicated that the order was signed, however the clerk had not entered it in. The JA tersely said it will take the clerk anywhere from 1 to 2 weeks to enter the order in. The assistant stated that was an unusual amount of time to enter an order isn't it. The assistant told the JA that he would call later in the week to see if the clerk had completed it. The JA told the assistant that he had completed his obligation under the process and it is out of his hands, so there would be no reason to call him. The assistant asked if the JA could check the system to see if it has been entered. The JA rudely said no that is a waste of his time. The Assistant asked him for the clerk's number so he wouldn't have to bother the JA. The JA said that the clerk doesn't have a number and the Complainant will have to just send a runner to the court every day to check and see if it is in the out box. This was clear change in tone from the previous contacts between the JA and the assistant. It was apparent that the JA was intentionally trying to inconvenience the Complainant.

12. On March 31, the assistant appeared at Commissioner [redacted] division in order to hand deliver a Motion for Order Consolidating Oral Argument with a status conference. The assistant entered the division and waited for the JA ("Joc") to finish helping another court staff. After, the JA completed helping the other staff member, the assistant approached him, greeted him, and asked if he could have Commissioner [redacted] review the Motion to Consolidate. The JA initially said that it was not problem, then reviewed the pleading and tersely informed the assistant to put it into outbox rather than assisting him. It is quite clear that Commissioner [redacted] JA is manifesting some displeasure with the Complainant and is being less than even-handed treatment.

II. VIOLATIONS OF CODE OF JUDICIAL CONDUCT

13. Commissioner [redacted] actions violate Canon 3 (7) as he permitted an ex parte hearing on an impending proceeding and there is no law that expressly provides for an ex parte hearing on an unverified motion or pleading.

14. Commissioner [redacted] never disclosed the substance of the ex parte communication. The Complainant learned of what occurred at the ex-parte hearing after obtaining a CD of the hearing from the Court Administration.

15. Commissioner actions violate Canon 3(B) (2) and demonstrated a lack of professional competence in the subject as evidenced by the fact that he never questioned the fact that claim appeared to be time-barred on its face and was swayed by partisan interest.

16. Commissioner actions violate Canon 3(B) (2) and demonstrated a lack of professional competence as he swayed by partisan interest allowed opposing counsel to convince him that he had jurisdiction to proceed based upon a upon Fraud Upon the Court theory. "Fraud on the court is defined as that species of fraud which constitutes an attempt to defile the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases that are presented for adjudication." *State Ex Rel. Corbin v. Arizona Corp. Com'n*, 143 Ariz. 219, 226 (App. 1984). "The doctrine of fraud upon the court has been applied to judicial proceedings involving ex parte communications with a judge or where a judge has relinquished his decision-making power to one of the parties." *Id.* "On the other hand, the doctrine is equally well-settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." *Dockery v. Central Arizona L. & P. Co.*, 45 Ariz. 434, 451-452 (1935).

17. Commissioner actions violate Canon 3(B) (2) and demonstrated a lack of professional competence as he swayed by partisan interest to grant injunctive relief in sealing the will based on an unverified motion and before a complaint had been filed in violation of Arizona Revised Statutes §12-1803; *Bryant v. Bloch Companies*, 166 Ariz. 46 (App. 1990).

18. Commissioner actions violate Canon 3(B) (5) as failed to perform his duties without bias or prejudiced. His conduct manifested alignment with the Petitioners Counsel. He never questioned the fact that claim appear to be time-barred on its face. Commissioner ex parte statements like "we're" being concerned that someone "other" than a representative from the Petitioners' Counsel's office may affect the chain of custody ...and the finger may be pointed at Petitioner's Counsel's office regarding the chain of custody, evince alignment with Petitioner's Counsel. Commissioner statement to the Complainant that he might not want to say anything evinces a prejudiced view that the Personal Representative had engaged in some improper activity that was formed before the Complainant appeared.

19. Commissioner actions violate Canon 3(C) (5) as failed to require his Judicial Assistant to comply with the code of conduct of judicial assistants. The Judicial Assistant's demeanor became terse and uncooperative after the Motion for Change of Judge for Bias was filed.

20. Commissioner actions violate Canon 3(E) (1) as he has refused to disqualify himself. Commissioner actions in conducting an ex parte hearing, issuing an injunction based on an unverified motion, and then telling the Complainant that he might not want to say anything upon his appearance, place his ability to be impartial in reasonable question.

21. The Complainant will supplement this complaint in the coming week with documentation and other incidents that demonstrate a lack of judicial temperament, bias, and disrespect for the laws of the State.

RESPECTFULLY SUBMITTED this 1st day of April 2009.