

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 09-182

Complainant:	Wilbur Gallegos-Duran	No.
Judge:	Pendleton Gaines	No.

AMENDED ORDER

A defendant in a criminal case alleged that the judge made several inappropriate and unprofessional comments throughout his seven-day trial. After reviewing the complaint, the trial transcripts, and the judge's response, the commission found that the judge's informality and attempted humor in the courtroom gave the appearance that he did not take the defendant's case seriously.

Rule 2.8 of the Code of Judicial Conduct requires a judge to be dignified and courteous. In this instance, the judge's behavior was inappropriate and inconsistent with the canons, and the judge is hereby reprimanded for his conduct pursuant to Rule 17(a). In addition, the judge is directed, pursuant to Rule 17(b), to use recording equipment in the courtroom to record proceedings when it becomes available.

Dated: June 22, 2010.

FOR THE COMMISSION

J. William Brammer, Jr.
Commission Chair

Copies of this order were mailed to the complainant and the judge on June 22, 2010.

#233945

WILBER GALLEGOS-DURAN

POST OFFICE BOX 9600

FLORENCE - ARIZONA

85132-9600

JUL 14 2009

11 JULY 2009 CE

RE: CR 2007-151054-001

ARIZONA SUPREME COURT

CHIEF ADMINISTRATOR

COMMISSION ON JUDICIAL CONDUCT

INVESTIGATIVE PANEL

1501 WEST WASHINGTON STREET

PHOENIX - ARIZONA

85007

THE ROLE OF THE JUDICIARY IS CENTRAL TO AMERICAN CONCEPTS OF JUSTICE & THE RULE OF LAW. THE ARIZONA CODE OF JUDICIAL CONDUCT IS INTENDED TO ESTABLISH STANDARDS FOR ETHICAL CONDUCT OF JUDGES. IT CONSISTS OF SPECIFIC RULES DESIGNED TO GOVERN CONDUCT OF JUDGES, & BE BINDING UPON THEM, IN MAINTAINING HIGH STANDARDS OF JUDICIAL & PERSONAL CONDUCT. THROUGHOUT MY 7 DAY CRIMINAL TRIAL, TRIAL JUDGE F. PENNILETON GAINES III & DEPUTY COUNTY ATTORNEY MARCH ELISSA GOLOMB, MAKE AN ASTONISHING AMOUNT OF INAPPROPRIATE, UNETHICAL, & UNPROFESSIONAL COMMENTS THAT, BECAUSE OF THEIR FREQUENCY & NATURE, IMPAIRED THE JURY'S ABILITY TO RENDER A FAIR & UNBIASED VERDICT.

GAINES & GOLOMB CONDUCTED TRIAL OF A VERY SERIOUS NATURE AS IF THOUGH THEY'RE AT A FAMILY REUNION, & TRANSFORMED THE COURTROOM INTO THEIR VERY OWN BROADWAY PRODUCTION, IN WHICH TO MAKE A MOCKERY OUT OF THE GRAVITY OF MY CASE. GAINES INTERRUPTS RELEVANT TESTIMONY TO INQUIRE ABOUT PARADISE BAKERY COOKIES, VAN GOGH, LARRY KING, "PESEY" CRIMINAL DEFENSE LAWYERS, LAW & ORDER, EMROU, PERRY MASON, BRAVEHEART, CARRIER PIGEONS, & BEN HUR. GAINES EVEN REFERS TO MY TRIAL AS THE GONG SHOW, INSTRUCTS THE JURY TO BRING FRAIL MIX TO TRIAL AS IF THEY'RE AT A BLOCKBUSTER WORLD PREMIERE, & ASKS THE JURY TO "BEAR" WITH HIM & DO SUDOBU AS HE READS THEIR PRELIMINARY INSTRUCTIONS. GAINES PERSISTENTLY INTERRUPTS TESTIMONY, AS IF HE HAS A MENTAL ABNORMALITY, TO TELL "CUTE" STORIES, JOLES, HISTORY LESSONS, SET COUNSEL THERAPY, & TELL A WITNESS TO ANSWER A SUSTAINED DEFENSE OBJECTION. GOLOMB MOVES TO REBUT HER OWN CASE, INFORMS THE JURY SHE'S "COMEDY RELIEF" & "CAN'T DO MATH." DEPUTY CLERK, ANITA J. BEERY, POLLED THE JURY BY NAME (CT 9/3/08 @ 120-122) & NOT NUMBER. BASED UPON THE WILLFUL & CONSTANT PATTERNS OF JUDICIAL ABUSE, I.M. REQUESTING THAT GAINES & GOLOMB

- I. BE FORMALLY CHARGED IN FRONT OF AN INVESTIGATIVE PANEL
- II. BE CENSURED & SUSPENDED
- III. PARTICIPATE IN, & COMPLETE, PROFESSIONAL COUNSELING
- IV. PARTICIPATE IN, & COMPLETE, JUDICIAL

EDUCATION

RESPECTFULLY SUBMITTED THIS 11 DAY OF JULY 2009 CE
B/H

DEFENDANT / APPELLANT



SEP 10 2009

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FROM THE CHAMBERS OF
PENDLETON GAINES
JUDGE

201 W. JEFFERSON, STE. 9C
PHOENIX, AZ 85003
(602) 506-3940
FAX (602) 506-0473

September 10, 2009

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

ATTN: E. Keith Stott, Jr., Esq.
Executive Director

Re: Case No. CJC 09-182
(Wilber Gallegos-Duran)

Members of the Commission:

Upon receipt of Mr. Gallegos-Duran's complaint, I immediately undertook a thorough review of all 1,142 pages of the trial transcript. I consulted with one of my fellow judges for a candid reaction to my performance and to the issues raised in the complaint. That process has led me to conclude what, I believe, the Commission will conclude with its own review of the trial record: (1) Mr. Gallegos-Duran received a fair trial; and (2) although not perfect, my performance did not rise to the level of any substantial violations of the Code of Judicial Conduct.

As an initial matter, I acknowledge that I do speak a lot during trial – perhaps more than other judges. I like to engage with counsel, the parties and, where appropriate, the jurors. I do this both to add some levity and lightness to what often can be a frightening and laborious experience, and to assist with everyone's understanding of the process. I am quite conscious of my tendencies in that regard, and I am constantly working to make sure I never cross any line that would in any way take away from the seriousness or fairness of the process.

Turning to the matter before the Commission, I do not believe my conduct in this trial ever crossed that line. That said, there are three specific acts about which I am embarrassed:

1. During jury selection, in an effort to help a panel member recall the type of case he had been involved in in the city court, I used the adjective "dumb" in describing the types of cases handled by those courts. I was shocked and appalled to read this in the transcript. I have great respect for all of our courts and would never intentionally say anything to demean or diminish their role, integrity or importance. This is a particularly painful realization for me, because my sister, the Honorable Sallie Gaines, is a full-time judge on the City of Phoenix Municipal Court. I regret this statement, and I am ashamed and embarrassed that I made it. I am confident that this is an aberration. I am sure that I have never made this statement before. I will never make it again.

2. I emphasized in jury selection the importance of jurors' following the law and told them many times during trial that they were required to follow the Court's instructions. As I read the somewhat tedious and occasionally boring preliminary instructions to a trial jury, I usually tell the jurors that they are welcome to read along or not, as they choose, and that the instructions will be with them during trial and during their deliberations. It was during this statement that I made the foolish "Sudoku" comment. I did not intend to convey that the jurors should be inattentive during the reading of the preliminary instructions. I now see that the wrong impression may have been created. I very much regret this statement and am confident that I have not said this before or since. That said, in the context of my many, other admonitions to the jury, I doubt that anyone on the jury believed I was in any way suggesting that anything short of their full attention was expected throughout the proceedings.

3. In a colloquy with counsel outside the jury's presence, the prosecutor asked me whether I was willing to delay the trial to wait for a late witness. According to the transcript, my response was, "Hell, no." I do not use or tolerate profanity in my courtroom, even of this mild type. It was not necessary or appropriate here, even though I was trying to emphasize the need to adhere to the trial schedule and move the case forward.

I am chagrined, embarrassed and sorry about these comments, especially the indefensible comment about municipal courts. I assure the Commission that they do not fairly represent me, my attitudes or my conduct in court. I have made and will continue to make every effort to maintain courtroom decorum. As described below, my reputation among litigants, lawyers and jurors for administering a fair, friendly, engaging and efficient trial process is very good.

Response to Complaint

I want to begin by observing that Mr. Gallegos-Duran received a fair trial, from start to finish. His attacks upon the prosecutor and me are unwarranted, unfair and unsupported by the trial

record. Indeed, this seems to have been borne out by his appeal, in which his counsel filed, on May 4, 2009, an *Anders* brief, attesting to the lack of any “arguable issues of law.”¹

Further, I note for the Commission my general concern that Mr. Gallegos-Duran’s complaint is misleading and mischaracterizes what happened in his trial. Among other things, the complaint provides no context for its selective record references and makes no differentiation between discussions had in and out of the jury’s presence. Given these pleading deficiencies, I think it most efficient for me to respond to the specific allegations with a separate Appendix in which I provide for the Commission some context and response to each allegation. I am enclosing a copy of that Appendix with this response.

I encourage the Commission to review the trial transcript, as such a review will confirm that I continually admonished and informed the panels of prospective jurors and the trial jury of the need for fairness, open-mindedness and the valuable, Constitutional protections afforded the defendant in a criminal trial. As the Commission will further see, I regularly reminded the jury that the case was a serious one for both sides and should be treated accordingly.

Although Mr. Gallegos-Duran criticizes my judging style, there is absolutely nothing which was said or done during his trial that deprived him of a fair trial, diminished or demeaned any Constitutional or procedural right of his or reflected adversely or negatively upon him. The dignity and decorum of the trial process and both sides’ rights to a fair trial were upheld and honored. Although I very much regret the three instances cited above, they are a reflection on me, if on anyone, and cannot be said to have harmed or prejudiced the defendant or his right to a fair trial.

The remainder of this letter will focus on some general thoughts and observations about my conduct during jury selection and trial, and my prior work as a practitioner as well as from the bench.

Jury Selection

The first and most important object of jury selection is to select and seat a fair and impartial trial jury which will decide the case based upon the evidence and follow the Court’s instructions of the law.

¹On August 25, 2009, Mr. Gallegos-Duran filed, by permission, a pro se brief, raising four legal issues, one of which (two pages long) contains, in part, his criticisms of the Court and prosecution in this case. The appeal is pending in the Arizona Court of Appeals, Division One, Case No. 1 CA-CR 08-0771.

About 65 percent of our jurors are first-time jurors. For the majority, appearing for jury service is their first time in court. They are all present under compulsion. Courts are intimidating and potentially unfriendly places. Jurors typically are summoned, subjected to various, regimented procedures and made to wait in the jury assembly room until they are taken to a trial division. They are then given a number and assigned a seat in the courtroom.

The demographics of our jury panels reflect the strength, breadth and diversity which have made the American jury system a unique and powerful instrument of justice. All races, genders, ages, national origins and religions are represented. Educational levels range from some high school to advanced degrees. Occupational experience ranges from entry-level to retired and everything in between. We are currently experiencing the impact of "Gen X," "Gen Y" and "Millennial" jurors who have different learning styles and expectations from jurors of older generations.

The most important thing that can be done to ensure the seating of a fair and impartial trial jury is to place the panel at ease. To learn information necessary to enable the Court and counsel to intelligently exercise challenges for cause and consider the use of peremptory strikes, it is important that the jurors feel comfortable enough to be honest, candid and forthcoming in their answers. Trial lawyers fear most the "stealth juror," who, for reasons proper or improper, is not forthcoming in response to questioning by the Court and counsel. I try to put the panel at ease by adopting an informal, conversational approach, engaging jurors individually, ensuring that jurors are not afraid of or intimidated by the process and encouraging them to feel comfortable. Communication is essential. I try to find the common ground and keep the jury panel interested and involved.

Jury selection also represents the Court's most effective and available outreach to the community as a whole. During a typical week, almost 1,500 members of our community will appear in our court for jury service. Our justice system depends upon the support and participation of our citizens.² It is important that they understand the process, the reasons for the process, the issues which are involved in jury selection and trials, their rights of public access to the courts, the courts' accountability and transparency and other relevant matters. I insist that counsel respect the process. I try to explain as much as I can to the jurors about the process.

² I note for the Commission the dangers presented in the current, harsh economic times to people's continuing involvement in this essential civil function. *See e.g.* John Schwartz, "Call to Jury Strikes Fear of Financial Ruin," *N.Y. Times*, September 2, 2009. at A1.

My personal and conversational style helps achieve the objectives discussed above. I am told by lawyers and jurors that they appreciate my approach.

Trial

The Court is required to control trial proceedings, to ensure that trials are fair, that they start and end on time, that jurors' time is well utilized, that time is not wasted, etc. This has always been the role of judges, is contemplated by Rule 2.5, Comments 3 and 4, of the new Code of Judicial Conduct, and is specifically authorized by our Evidence Rule 611, which requires the Court to make a trial effective "for the ascertaining of the truth" and to "avoid needless consumption of time"

I exercise this responsibility sparingly but occasionally during the trial as required by circumstances. All trials are serious by nature, and some trials, like this one, are more difficult than others because of the subject matter. It is not necessary to over-emphasize the seriousness of a formal trial, but it is appropriate, as I did here from time to time, to remind the jury that the trial is, in fact, serious and that both sides are entitled to fair and full consideration and attention.

In any trial, especially one of this duration, humorous incidents are bound to occur. One, wonderful example in this case happened when the prosecutor asked a witness how many children the witness's parents had; received the answer, "Nine;" and then asked the witness whether she was one of those children. Another example occurred when the teenaged victim identified a heart-shaped Valentine as a bird, to the good-humored amusement of most of the people in the courtroom. Other incidents of this type occurred during the prosecutor's difficulty with ages and birth dates, as well as defense counsel's extended misunderstanding of the room layout of a house which was represented by an extremely poor, hand-drawn sketch. These incidents are all discussed in the Appendix.

Occasionally, I inform the jury of the nature of procedural and evidentiary rules, for their education and use in understanding the trial process. It is also my practice, as I did here, to define unfamiliar terms, as, for example, the antiquated and archaic term, "publish," to mean "show." I discuss my reasons for discouraging bench conferences. These and other examples are discussed in the Appendix.

I also will occasionally mention an outside event to the jury, as I did once in this case, by telling them of an earthquake in Los Angeles and saying that I have family in the area.

At the end of trial, I explain to the jury how alternate jurors are selected. After the return of verdict, I invite the jurors to remain in the jury room to meet with the lawyers if they wish, while emphasizing that they need not do so. These matters are also discussed in the Appendix.

The trial was fair. I did little in this trial which I do not routinely do, as occasion requires, in any trial over which I have presided as a judge. I deeply regret the three statements mentioned above.

Reading the complaint in this case was a sobering and chastening experience. It will cause me to think more carefully about the effect of my words and my courtroom style.

A Few Words About Me

I came to the bench late in my career after 30 years as a courtroom lawyer. I have been a judge for ten years and have been on a jury assignment, civil and criminal, for the last eight. Others would describe me, I think, as warm, friendly, outgoing and, occasionally, lighthearted. I respect the justice system and the integrity of the trial process. I expect the same professionalism and respect for the process from all who appear in my court, whether as lawyers, litigants, witnesses or jurors. My judging style reflects these personal characteristics and expectations.

As a judge, I have spoken on various aspects of the justice system and the trial process at the request of many groups. For example, I have spoken and continue to speak at seminars and symposia sponsored by the State Bar of Arizona, the Maricopa County Bar Association, the Arizona Trial Lawyers' Association and other trial lawyers' groups on a number of topics, but many times on jury selection, management of jury trials and effective advocacy in the courtroom.

I was an invited speaker at the American Bar Association's 2006 Symposium on the American Jury Project in Dallas.

The topic on which I have spoken most often recently to judges and lawyers is "Twenty-First Century Jury Trials: Beyond the Reforms," which builds on Arizona's pioneering jury reforms, recognizes the changing demographics of our jury pools and emphasizes effective, creative, modern trial techniques. During the last, three, rotation training programs for incoming civil judges, I was asked by the presiding civil judges to speak on this subject. At an in-house training program this past Spring for our civil and criminal judges on issues affecting jury management, I spoke on one of my favorite topics, "Jurors Are Human, Too."

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I bring this to the Commission's attention not to say that I am the foremost expert on jury trials, but only to point out that the subject matter is one of serious, professional interest to me and that judges and lawyers have asked me to speak on these issues.

I have been extremely careful to try to guard my reputation as a judge in the same way I did as a lawyer. As a member for eight years of the Arizona Commission on Judicial Performance Review, I understand how easily judges may lapse and appear inattentive to aspects of their office. I am very proud to say that my own, personal scores, through five, two-year JPR cycles, have been consistently excellent. For example, I have never received a mean score less than 3.4 in any category. Most of my scores are grouped in the 3.5 to 3.7 range in every category, including, as applicable here, my last score of 3.7 in the important category of integrity, which includes such sub-categories as fairness, impartiality, sensitivity to racial, gender, national origin issues and so forth. (For reference, a 3.0 score is "Very Good," and a 4.0 score, maximum obtainable, is "Superior.") I would be happy to share with the Commission my JPR reports, including all anonymous comments and confidential, conference team evaluations, upon request.

One aspect of those reports which I believe might interest the Commission is attached to this letter. It is the unredacted page from my most recent (2008) JPR report of anonymous comments from jurors. I believe that the jurors' comments, which are complimentary, accurately reflect my courtroom performance and conduct.

Enclosures

I enclose the Appendix, referred to above, which addresses serially each record reference contained in the Complaint. I also enclose the anonymous juror comments from my last JPR report.

My courtroom is not equipped with electronic recording devices. I am furnishing the Commission with the entire seven-volume, 1,142 page transcript of the trial, together with the transcript of the sentencing proceeding.

Conclusion

I am very sorry that any action or conduct on my part has caused this matter to be brought before the Commission. I deeply and personally regret the several, isolated comments mentioned at the beginning of this letter. I am at pains to ensure that no such comments are ever made again. Those comments did not affect the fairness of Mr. Gallegos-Duran's trial,

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nor did any of the other matters of which he complains, and I respectfully ask that the complaint be dismissed.

I am available and willing to answer questions or supply any additional information the Commission may request.

Sincerely yours,

Pendleton Gaines

Enclosures:
Appendix (7 pages)
One-page extract of JPR report (2008) (1 page)
Trial transcript (1,142 pages)
Sentencing transcript (12 pages)

PG:emj