

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 11-033

Complainant: No. 1399110625A

Judge: No. 1399110625B

ORDER

The complainant alleged that a justice of the peace handled a photo enforcement hearing improperly by allowing the prosecutor to serve as both a witness and an advocate. He further alleged that the judge did not appear to swear in the prosecutor as a witness. The recording of the hearing confirmed the complaint, however, the commission found no ethical misconduct on the part of the judge.

The question of whether a prosecutor may properly serve as both the state's witness and legal advocate in civil traffic hearings raises a legal issue outside the jurisdiction of the commission that is more properly addressed through an appeal. This is consistent with the appeal that occurred in the underlying case at issue, resulting in a superior court ruling that it is improper for the city attorney to act as both prosecutor and witness. Accordingly, the complaint is dismissed in its entirety pursuant to Rules 16(a) and 23.

Dated: May 24, 2011.

FOR THE COMMISSION

/s/ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on May 24, 2011.

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

CONFIDENTIAL

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

FOR OFFICE USE ONLY

2011-033

COMPLAINT AGAINST A JUDGE

Your name: _____ **Judge's name:** _____ **Date:** 1/28/2011

Instructions: You can use this form or plain paper of the same size to file a complaint. Please describe in your own words what the judge did that you believe constitutes judicial misconduct. Be specific and list all of the names, dates, times and places that will help us understand your concerns. You may attach additional pages but not original court documents. Print or type on one side of the paper only, and keep a copy of the complaint for your files.

I was retained to write the Appellate Brief for the defendant, Ann Scavarda, regarding her Civil Traffic matter (Photo Enforcement), in Case # 2010 _____, in the Star Valley Magistrate Court. My complaint is regarding the conduct of _____ during the trial in this matter on October 14, 2010, of which I learned based on a detailed review of the audio record of the trial.

I do not know, apart from Ms. Scavarda and the Town Prosecutor, there were any others present in the hearing room at the time of the events here recounted. The hearing was audio recorded, and I have reviewed the recording.

As is relevant to my complaint, _____ conducted the trial in a manner which appears to be in violation of the Code of Judicial Conduct. Specifically, _____ treated the prosecutor, from the very beginning of the hearing, as both a witness and advocate, and permitted the prosecutor to testify at length about relevant and material matters not contained within offered exhibits, and to present testimony based on information contained within offered exhibits but without any witness to lay foundation. Moreover, _____ appeared to have accepted said testimony and evidence without swearing in the prosecutor acting as a witness.

I have attached a copy of the Appellate Brief in this matter, which details in the Statement of Facts the conduct here at issue.

I believe the _____ conduct, as briefly outlined above, violated the Code of Judicial Conduct (and not only in this matter, but, based on information and belief, in the other photo enforcement hearings).

In particular, I believe that _____ violated a number of the Rules, and that her conduct is such that likely brings the judiciary into disrepute. I will briefly review the violations of the relevant rules which I perceived, below.

Rule 1.1. Compliance with the Law. A judge shall comply with the law, including the Code of Judicial Conduct.

_____ sanctioned and ratified the prosecutor's conduct in acting as both an advocate and witness, which appears in violation of applicable law and rules. "A prosecutor has a special responsibility as a minister of justice and not simply that of an advocate. ER 3.8, cmt.; Holmberg v. De Leon, 189 Ariz. 109, 111, 938 P.2d 1110, 1112 (1997)." Formal Opinion of the Committee on the Arizona State Bar Rules of Professional Conduct, #00-09.

RULE 1.2. Promoting Confidence in the Judiciary

_____ conduct in permitting unsworn testimony from the prosecutor is one that must shake the public's confidence in the judiciary. ER 3.7 generally prohibits a lawyer from being an advocate and witness in the same trial.

RULE 2.2. Impartiality and Fairness. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

conduct in permitting unsworn testimony from the prosecutor significantly prejudiced the pro se defendant, as well as creating at least the appearance of unfairness and an absence of impartiality. "Combining the roles of advocate and witness can prejudice the tribunal and the opposing party ...". Comment 1 to ER 3.7.

RULE 2.15 (D). Responding to Judicial and Lawyer Misconduct. A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

failed to take appropriate and remedial steps following the prosecutor's conduct as both an advocate and a witness, and, in fact, appears to have sanctioned such conduct as a matter of course. "It is beyond debate that a prosecutor who may be a witness in a case [...] cannot prosecute the case. ER 3.7(a)." Formal Opinion of the Committee on the Arizona State Bar Rules of Professional Conduct, #00-09.

Please communicate with me regarding any action upon my complaint.