

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 11-302

Complainant: No. 1432410890A

Judge: No. 1432410890B

ORDER

An attorney who sought an emergency continuance alleged that a pro tem justice of the peace proceeded to hold an improper ex parte hearing and entered judgment against her client.

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 complaint and the judge's response, the commission decided to dismiss this matter with a private warning to the judge. The complaint is dismissed pursuant to Rules 16(b) and 23(a).

Dated: March 15, 2012.

FOR THE COMMISSION

/s/ Louis Dominguez

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed to the complainant and the judge on March 15, 2012.

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

Attorney at Law

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

Re: Complaint against _____ County
Justice Court, Justice Pro-Tempore;
Supreme Court Rule 81, Rules of judicial Conduct,
Rule 2.6 and 2.9.

Dear Sirs:

I am writing to lodge a formal complaint against a
Pro-tempore JP in the _____ County Justice
Courts, _____ Reference is made to Supreme
Court Rule 81, Code of Judicial Conduct, Rules 2.6 and
2.9.

This complaint arises out of _____ County JP Cause
number CV 11- _____ entitled
The matter was set for trial on _____ at 1:00
PM. Ms. _____ was representing herself in this matter.
I represent the Defendant in this case and a number of
related cases filed by _____

When I awoke yesterday, I was feverish, and suffered
from diarrhea, making it difficult to be far from a
restroom for any length of time. I telephoned my client
who informed me that he was ill as well. I then called
the Plaintiff to see if she had an objection to a
continuance. She said she did.

I then prepared and filed a motion to continue, and
informed _____ that I had done so. I was told by the
Judicial Secretary that there would be no problem with
the continuance. I was later called by the court and
told that there would be no hearing, and that the court

had scheduled another matter in our place. I relied upon that communication, and was never told differently. I next called _____ to inform her that the court had continued the matter and would let us know the new date. She evidenced that she would go to court anyway to make sure of any new date.

I received a call from the court thereafter (shortly before noon) informing me that the Judge desired to set the matter for trial on _____. I informed the judicial secretary that I had a calendar conflict with a Superior Court matter set at the same time on that date. I was told I would be called back. I was not given any indication that my reliance was mis-placed, or that the situation had changed in any respect. I gave the court my cell phone number, since I was not in my office. I waited for the call from the court.

At 1:30 PM I received a call from the court and was informed that _____ showed up, and the court, without notice to me or my client, took testimony from her, and entered judgment against my client. This *ex parte* hearing, contrary to the assurances given me, the misleading behavior of the court, and the failure to notify me that my presence was necessary (and believe me, I would have appeared had I known) have seriously prejudiced my client. Proceeding without notifying me that the Judge had changed his mind and wanted to proceed, made it impossible for me to attend. I had no clue, no notice and no idea that the matter would proceed without me. The court, without any Defense input in a very questionable case, and without any testimony or cross-examination, entered judgment for the Plaintiff and against my client.

The Court owes a duty of fairness to litigants, and can not allow one party to take advantage of another by holding a hearing without notice and without their presence.

Justice must be meted out in a fair manner. Acting *ex parte* and in secret, especially when the court had Counsel's telephone number, is not "fair." At the very least, Counsel could have appeared telephonically. Undersigned counsel would have appeared if there was any indication whatsoever that her motion to continue had been denied, or that her presence was needed. The entire notion of justice has been defeated by the court's

actions:

"[e]ven where there is no actual bias, justice must appear fair." *Salazar*, 182 Ariz. at 608, 898 P.2d at 986 (quoting *McElhanon v. Hing*, 151 Ariz. 403, 411, 728 P.2d 273, 281 (1986), cert. denied, 481 U.S. 1030, 107 S.Ct. 1956, 95 L.Ed.2d 529 (1987)). In other words, "justice must not only be done fairly but . . . it must be perceived as having been fairly done." *McElhanon*, 151 Ariz. at 412, 728 P.2d at 282; see *Salazar*, 182 Ariz. at 609, 898 P.2d at 987." *Kay S. v. Marks S.*, 213 Ariz. 373, 380 (App. 2006)

Furthermore, if counsel had been told the matter was not continued and if Counsel had not been misled as to the court re-scheduling another matter in the place of the current case and calling counsel concerning upcoming dates, sick or not, counsel would have appeared, but instead, she was kept in the dark. The Court heard from the Plaintiff with no notice to Defendant. The court violated its affirmative right to protect a litigant's right to be heard.

The essence of due process is notice and an opportunity to be heard. In fact, the duty to ensure the right to be heard is the central duty of the court. Rule 2.6 of the Arizona rules of Judicial Conduct, Supreme Court Rule 81 makes this abundantly clear, by providing:

"A Judge shall accord to every person who has a legal interest in the proceeding, or that person's lawyer, the right to be heard according to law." Rule 2.6. [emphasis added]

Furthermore, the comment to the Rule reinforces this duty:

"The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed." Comments, Rule 2.6. [emphasis added]

Defendant was denied that right, and was deprived of his substantive right to notice and hearing and his constitutional right to put on his defense. As a result,

the *ex parte* hearing held without his knowledge, presence or consent violated due process.

There was no intent to waive the right to be present. There certainly was no knowing waiver of any known right, nor was there any affirmative and voluntary waiver of the constitutional right to be present and to present the defense case. *COUNTY OF LA PAZ v. YAKIMA COMPOST CO.*, 224 Ariz. 590 (App. 2010)

Furthermore, the *ex parte* hearing held by the court also violates Rule 2.9 of the Arizona rules of Judicial Conduct, Supreme Court Rule 81. *Ex Parte* communications are forbidden when they involve substantive matters, or where they give a party an advantage. That Rule provides:

"A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the Judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
(1) When circumstances require it, *ex parte* communications for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided

(a) the judge makes provision to promptly notify all other parties of the substance of the *ex parte* communication and **gives the parties an opportunity to respond;** and
[emphasis added]

(b) the Judge makes provision to promptly notify all other persons of the substance of the communication and **gives the parties an opportunity to respond.** [emphasis added]

The Court gave no notice of the intent to engage in an *ex parte* conversation, and hold a hearing without Defendant's knowledge, and in Defendant's absence, nor did the court grant the Defendant **an opportunity to respond.**

The Court's behavior clearly violated the Judicial Code of conduct, and has placed my client at a severe

disadvantage. After investigation into this complaint,
it is requested that Sanctions issue against this person.

Sincerely,