

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 12-265

Complainant: Eleanor Miller

Judge: Crane McClennen

ORDER

The complainant alleged that a superior court judge demonstrated bias, impatience, and failed to disqualify himself when his impartiality was reasonably questioned.

After reviewing the complaint and related attachments, as well as the judge's response and related attachments, and the relevant recording, the Commission finds that Judge McClennen violated the Code of Judicial Conduct. Specifically, the judge displayed an improper demeanor and suggested bias by making statements impugning the integrity and professional conduct of an attorney appearing before him and in general making improper sarcastic remarks.

Accordingly, Judge Crane McClennen is hereby reprimanded for his conduct as described above and pursuant to Commission Rule 17(a). The record of this case, consisting of the complaint, the judge's response, and this order, shall be made public as required by Rule 9(a).

The Commission notes the complainant requested that the Commission find Judge McClennen must recuse from all future cases involving this attorney. The judge is bound to comply with Rule 2.11 of the Code, as are all other judges.

Dated: December 4, 2012.

FOR THE COMMISSION

Louis Frank Domínguez
Commission Chair

Copies of this order were mailed to the complainant and the judges on December 4, 2012.

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

ELEANOR L. MILLER
Attorney at Law

3610 North 15th Avenue
Phoenix, AZ. 85015

October 4, 2012

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

Dear Ladies/Sirs,

On February 13, 2012, counsel undersigned had an oral argument set before the Honorable Crane McClennen in *State v. Rudolph*, a lower court appeal (LCA). Judge McClennen has been hearing LCAs for a number of years now, and is not regularly rotated off this assignment as are all other judges. [Counsel doesn't know the reason for this.]

Counsel undersigned has appeared before Judge McClennen for oral argument on a number of LCAs, and the one immediately preceding the Rudolph argument (by a few weeks) was contentious between counsel undersigned and the judge. However, when it was over, Judge McClennen did not appear to be angry with counsel, and we exchanged a few words about how close our bar numbers were.

Attached hereto is a copy of the oral argument before Judge McClennen in *State v. Rudolph*. It is in CD form, and is best reviewed in that form because of Judge McClennen's tone of voice during the argument. Unfortunately, the facial and body expressions are not available on video. If they were, the judge's tone of voice would mean even more.

In the argument, Judge McClennen repeatedly makes vitriolic, personal attacks on counsel's "failure to answer questions," "lack of candor" with the court, and accusations of "non-answers." The day following the oral argument, counsel's client (who was present), emailed counsel with concerns that Judge McClennen was seriously prejudiced against counsel undersigned personally, and that this would hurt the client's chances on the appeal.

When counsel recently found out that she would have to appear before Judge McClennen in another pending case, she immediately filed a "Notice of Change of Judge for Cause," pursuant to rule 9.5 of the Maricopa County Local Rules of Procedure. The presiding criminal judge, Douglas Rayes, denied the motion and denied counsel's opportunity to have witnesses

appear at a hearing she requested on the matter. (A copy of Judge Rayes' ruling is also attached.)

While Judge Rayes did not find "cause" under the law to justify disqualifying Judge McClennen from counsel's cases, he made an interesting finding towards the end of his ruling.

"...[T]he court needs some latitude to control the discussion. However, it should be done in a professional manner and by a means that does not offend the attorneys and parties appearing before the court."

Minute Entry, 8/6/12, p. 3.

Counsel reads this statement, with the rest of the minute entry, to say that it is not "cause" to *disqualify* a judge who conducts himself unprofessionally, but that the judge still must be guided in his conduct towards parties and their attorneys by Judicial Canons.

As a result of Judge Rayes' refusal to grant the motion, counsel believes she has no other alternative than to call to the Judicial Commission's attention to what she views as violations of rules 2.3, 2.8 and 2.11(A) by Judge McClennen of the Rules of Judicial Conduct. (Counsel is fully aware that filing a judicial complaint does not result in an "automatic" disqualification of the judge, and she is not asking for that result.)

Rule 2.3(A) and (B) read, in part, as follows.

"A. A judge shall perform the duties of judicial office ... without bias or prejudice.

B. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment"

Rule 2.8(B) reads, in pertinent part, as follows.

"A judge shall be patient, dignified, and courteous to litigants, ... lawyers and others with whom the judge deals in an official capacity"

Finally, rule 2.11(A) starts with the following words.

"A judge shall disqualify himself ... in any proceeding in which the judge's impartiality *might reasonably be questioned*"

[Emphasis supplied.]

The *Comment* following this rule states that, "under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply."

Given Mr. Rudolph's perception of the way Judge McClennen treated counsel undersigned during this oral argument, Judge McClennen's impartiality might reasonably be questioned. It should be noted here that the client was, himself, an attorney, and had appeared before many judges during his career. His shock at how counsel undersigned was treated by

Judge McClennen was sincere, and counsel has provided his name and phone number as a witness with whom this commission may talk.

Counsel undersigned has been practicing law since 1972, first in New York State (Syracuse, N.Y.) and then in Arizona. She has done a considerable amount of appellate and post-conviction relief work during her career, and began her career in Arizona as a clerk to a now deceased Justice of the Arizona Supreme Court. She also worked for the Supreme Court as a staff attorney, immediately following her clerkship. Counsel undersigned has appeared and argued cases before judges in New York and Arizona, as well as the Arizona federal district court and the Ninth Circuit Court of Appeals. During the many, many years she has practiced, she has never encountered a judge as hostile to her as Judge McClennen was during this oral argument.

While Judge Rayes believes that Judge McClennen's conduct was insufficient to meet the legal standard for disqualification "for cause," counsel undersigned believes that Judge McClennen's conduct was (even for him),¹ offensive, harassing and vituperous. She respectfully requests that this body review the CD and decide whether any of the foregoing rules were violated by Judge McClennen, and whether, as a result, he should be sanctioned or disciplined.

Respectfully,

Eleanor L. Miller

¹ Many others have complained about Judge McClennen's rudeness and lack of professionalism during oral arguments. Not all are willing to speak to the judicial commission. However, two individuals are willing to confirm their unfortunate experiences. The first is Jeff Mehrens, 602-258-4485, and the second is Craig Penrod, 480-753-5888.



Rec'd
10-31-12
EML
9:58 am

Crane McClennen
Judge of the Arizona Superior Court Maricopa County
Central Court Building, Suite 4A
201 West Jefferson Street
Phoenix, Arizona 85003.2205

October 31, 2012

Members of the Commission
Commission on Judicial Conduct
1501 West. Washington, Suite 229
Phoenix, Arizona 85007

Re: **Case No. 2012-265**

Dear Members of the Commission:

This is in response to the Complaint of October 4, 2012, from Ms. Eleanor L. Miller based on the oral argument held February 12, 2012, in *State v. Paul Rudolph*, No. LC 2010-157435, and listing several Rules of Judicial Conduct. I submit the following response.

Rule 2.3. Bias, Prejudice, and Harassment.

I am not biased or prejudiced against Ms. Miller. We were both admitted to the Arizona Bar the same day in September 1972, and I became acquainted with her over the years since then. I first became acquainted with her in the 20 years I was an Assistant Attorney General in the Criminal Appeals Section of the Office of the Attorney General, and continued in the 6 years I was assigned as a Judge in the Criminal Division of the Maricopa County Superior Court. I consider her to be one of the best criminal law attorneys in the Phoenix area. I have found her to be very intelligent and knowledgeable, and always well-prepared. If someone were to ask me to recommend a criminal law attorney, especially in the area of criminal appeals, I would recommend her.

Ms. Miller indicates her client, Mr. Rudolph, thought I might be biased and prejudiced against him. I have never met Mr. Rudolph (although apparently he was present at the oral argument), and have no reason to be biased and prejudiced against him. His case presented somewhat novel and complicated issues. I issued a lengthy decision, a copy of which I have attached as Attachment A. I invite the members of the Commission to read that decision and make their own assessment whether that decision shows any bias or prejudice on my part toward Mr. Rudolph.

Rule 2.8. Decorum [and] Demeanor

Ms. Miller has provided the Commission with a copy of the C.D. from that oral argument, which I assume is an accurate copy of what was said. Ms. Miller contends I made "vitriolic, personal attacks on counsel's 'failure to answer questions,' 'lack of candor' with the court, and accusations of 'non-answers'" It appears she also considers this harassment. (Rule 2.3.)

I acknowledge I said what was recorded on that C.D. That case involved difficult questions of whether there was a “stop” in the constitutional context, and if there was a stop, exactly when did the stop occur and what information did the officer have when he made the stop. Because of those issues, I was trying to get from Ms. Miller exactly what she considered to be the “stop” and when did it occur. I tried to ask this question of Ms. Miller several different ways, and each time I felt she was not answering the question. I acknowledge I became frustrated with what I considered her lack of answers, and that I should not have responded in a way that offended her sensibilities.

This has caused me to think about how to handle such a situation in the future if an attorney does not want to answer a question I have asked. I would be happy to provide the details of how I would handle such a situation in the future, but in general, I will make sure the attorney understands the question I have asked and why I think the attorney has not answered the question, thus giving the attorney the opportunity to give an answer to the question. I will do this in a way that does not show emotion, and in a way the attorney would not consider to be offensive.

Rule 2.11. Disqualification.

Ms. Miller notes this rule provides a “judge shall disqualify himself . . . in any proceeding in which the judge’s impartiality might be reasonably be questioned . . .” which includes when the “judge has a personal bias or prejudice concerning . . . a party’s lawyer” Ms. Miller notes she filed a Notice of Change of Judge for Cause in *State v. Raymond Garcia*, No. LC 2012–000155, but in that Notice, she asked to have me disqualified from not only that case, but “from hearing any case in which Eleanor L. Miller is counsel of record.” (See Attachment B.) It thus seemed Ms. Miller’s intent was to have me disqualified from any Lower Court appeal in the future in which she was an attorney. As you saw from Judge Douglas Rayes’ ruling on that motion, he found no cause to remove me. It appears Ms. Miller is now seeking to have this Commission do what Judge Rayes did not do.

As noted above, I am not biased or prejudiced against Ms. Miller, and as such I would not plan to disqualify myself from any case in the future in which she was an attorney. In connection with the *Raymond Garcia* case, I would note two things. First, Ms. Miller was not Mr. Garcia’s original attorney, and is not Mr. Garcia’s current attorney, as shown by the minute entries in Attachment B. And second, I did not rule on the merits of that case; instead, it was re-assigned to Commissioner Myra Harris.

Finally, Ms. Miller states, “Many others have complained about Judge McClennen’s rudeness and lack of professionalism during oral arguments.” (Page 3, footnote 1.) Not knowing who these “others” are, I am not able to address this statement directly. The best I can do is include the scores from my most recent Judicial Performance Review. (Attachment C.) In the section for Judicial Temperament, 23 to 26 attorneys responded, depending on the question; 21 to 25 rated me as Superior, Very Good, or Satisfactory, depending on the question; and 1 to 3 rated me as Poor or Unsatisfactory, depending on the question. It thus appears the majority of the attorneys who responded were of the opinion I was doing my work in a proper manner.

Members of the Commission
Commission on Judicial Conduct
October 31, 2011
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Ms. Miller further states Jeff Mehrens and Craig Penrod “are willing to confirm their unfortunate experiences.” To the best of my knowledge, Mr. Mehrens has only appeared before me once, and I do not remember what happened at the time. Mr. Penrod has appeared numerous times before me for oral arguments, and all of them have been cordial to the best of my memory. I believe the proper way to address any concerns Mr. Mehrens and Mr. Penrod might have would be for them to submit something in writing giving specifics, and that way I would be able to address their concerns.

I believe this covers the concerns Ms. Miller has expressed. If you have any further questions, please let me know.

Sincerely yours,

Crane McClennen /