

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-017

Judge:	No. 1460810885A
Complainant:	No. 1460810885B

ORDER

The complainant alleged a superior court commissioner treated a witness improperly, failed to appropriately control the courtroom, and abused her judicial authority.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the commissioner 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 all of the information provided by the complainant, the commissioner's response, and the recordings of several hearings, the commission found no evidence of ethical misconduct and concluded that the commissioner did not violate the Code in this case. The commission does not have jurisdiction to review the legal sufficiency of court rulings. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23.

Dated: May 24, 2013.

FOR THE COMMISSION

/s/ George Riemer

George A. Riemer
Executive Director

Copies of this order were mailed
to the complainant and the commissioner
on May 24, 2013

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**2013-017****COMPLAINT AGAINST A JUDGE****Your name:****Judge's name:****Date: 01/28/13**

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.

Preamble:

I wish to preface this complaint with the following information:

I have always found _____ to be a professional and capable Judicial Officer until this recent case. I would not be filing this complaint had I not been advised to do so by several of my senior, professional colleagues. It appears that I have an ethical obligation to report this and since I will be presenting some of these issues to the Arizona Board of Psychologist Examiners, I must file this as well. I believe, however, that the Commissioners in the Mental Health Courts should be more closely monitored by a Judge and not by individuals who participate in the proceedings. I actually believe that this complaint should have been filed by the attorneys involved in this and other case but I am guessing there is a fear of repercussion.

Foundation:

I will be alleging: 1) mistreatment of a professional witness, 2) misuse of judicial discretion and 3) mismanagement of the courtroom (lack of control of the courtroom and permitting a Defendant to be treated disrespectfully by an attorney). Since I am not a party in the proceedings (I was merely a witness), I cannot file an appeal to have the courts review Commissioner Spencer's discretion so I will include it in this complaint.

Before I provide the specific details of the complaint, I must first provide a foundation. To my knowledge, prior to this case, I had a collegial and working relationship with Commissioner Spencer. I presented at a conference with her, provided services to her courtroom and heard from attorneys that she suggested they contact me because I was able to provide low cost services, to indigent individuals, through the use of students. Why I received the treatment I did in this particular case is a mystery to me. I can only provide the Commission with information that has been provided to me.

For years I have been dealing with State Attorney, Ms. Warzynski, in the mental health courts. She has repeatedly accused me of withholding materials when I have been ordered by the Court to release them. Specifically, she has been alleging that I withhold the computer-generated interpretive reports for the MMPI, when I use this test in cases that come before the Court. I have repeatedly assured her that I do not use the software programs for the MMPI, yet she has persisted in her belief and accusations that I have. I actually believe that she was not aware that the MMPI can be hand-scored (or at least she has been resistant in her belief even with my repeated explanations to her). Ms. Warzynski has presented in my forensic classes for the past several years. This past spring, she accused me of withholding these computer-generated reports in front of my class. At this point, the class responded by telling her that I will not let them (the students) use the computer software at the school (I do not own it) and that I do not use it myself. Since that time, Ms. Warzynski has been trying to obtain the actual test itself from me but I had never been ordered to release it until the case which forms the foundation for this complaint.

I provide you with this information because others have told me that she has repeatedly made allegations to Judicial Officers (actually misinformed them), that I do not comply with their orders to release information. I will say, under penalty of perjury, that I have NEVER been ordered to release a copy of the actual proprietary test materials (other than raw test data or score sheets) and I have been practicing since 1996 (since 1995 as a post-doc). I will also say, under penalty of perjury, that I have ALWAYS complied with a court-order to release raw test data and the contents of my files. Not only can I say that I have ALWAYS complied with such orders, I have ALWAYS done so in a timely manner. What happens to the information when I release it to the attorney is out of my hands but I have ALWAYS complied with orders to release information in a timely manner. I have heard, however, that Ms. Warzynski has repeatedly told Judicial Officers that I have not complied with orders in the past. Unfortunately I am not usually in court when these orders are drafted and this information is provided to the Judicial Officer. Apparently, however, there is a sample of her behavior in another courtroom with a different Judicial Officer where a record is available. Apparently, Ms. Warzynski spent an inordinate amount of time linking me (some say she was slanderous) with another case with which I was uninvolved. I refer the Commission to Ms. Jennifer Roach who can provide details of the case and the dates when this took place to obtain the record. It would seem to me, however, that if the Judicial Officer was going to admit this information about me (totally unrelated to the case), a factual foundation should have been established. I was never asked to appear on the case to assist the Court in determining the factual nature of Ms. Warzynski's allegations. I have been told that the psychologist who was a witness in these proceedings was admonished by the Commissioner, without being offered an opportunity to speak, for something I may or may not have done (in terms of her speaking to me). I do not have any desire to know the specific allegations that were made. I am merely providing this information as a record that this behavior by Ms. Warzynski is not merely hearsay and there should be a judicial record of these proceedings for the Commission to review.

Why I have given the above information as a foundation is because it is the only possible way that I can think of, which could justify the way I was treated by Commissioner Spencer in this case. I believe that Ms. Warzynski has, all these years, assumed that I have withheld computer-generated reports when I have never used them and as such, it appears that some Judicial Officers may have been misled into believing that I am a rebel of some sort. That is the only explanation that I can find for the change in the working relationship I had with Commissioner Spencer. I must also say that Commissioner [redacted] was somehow misled to believe that I had released proprietary test materials in the past as she commented, in Court, on 11/08/12, "You've had to do this before..." I have no idea where she obtained that information but I have been led to believe that Ms. Warzynski may have provided it to her (the defense attorney had no reason to say this as they were actually opposed to releasing the test). Again, I have NEVER been ordered by a Judicial Officer to release proprietary test materials (other than test sheets or the raw test data) before. With this as a foundation for the only possible explanation I can come up with as to why I was mistreated by Commissioner [redacted] I will address my involvement in the case and how, at some points during the legal proceedings, I felt that I was being treated like a criminal.

Mistreatment of Witnesses:

As indicated above, I was ordered to release the proprietary test materials for the MMPI. Initially the order dated (08/09/12) read:

"...that defense expert, Dr. [redacted], provide to defense counsel most recent copies of all records, including raw data and testing materials, and all notes and any DVD/CD's, if applicable, pertaining to the neuropsych [sic] and/or evaluation of the Defendant forthwith. IT IS FURTHER ORDERED that Dr. [redacted] shall produce the MMPI testing, answers and protocol for scoring to defense counsel forthwith."

As ordered, I released my entire record to Ms. Glass-Hess immediately following receipt of the order. My understanding was that although Ms. Warzynski was in receipt of the raw test score and protocol (which she could have provided to an expert to have it scored), she wanted the entire test released to her. She apparently interpreted the ambiguity of "testing materials" to mean the actual proprietary test itself. Naturally, given that I am bound by the State of Arizona, Board of Psychologist Examiners to maintain the security of psychological tests, I asked the attorneys to clarify as to whether or not I was to release the test instrument itself. I set a date for Ms.

Warzynski to come to my office (09/12/12) to view the materials but we had not received clarification from the Court so we cancelled the meeting. On 09/13/12 the Court issued an order that I was to disclose:

“...all proprietary information related to the MMPI in his control including templates, scoring and secure testing materials.”

Again, I released the raw test data and test protocols when I was originally ordered to do so by the Court and I scheduled a time convenient to Ms. Warzynski to view the test itself. I can only provide my understanding of how the order got clarified. Apparently, Ms. Warzynski wanted to hand-score the test herself to determine if I had made any scoring errors. She asked that the scoring equipment, test manual, test items (all proprietary material) be released to her. Commissioner [redacted] under the misbelief that I had been ordered to release these materials in the past, ordered these materials be disclosed to Ms. Warzynski.

Unfortunately the order did not specify which version of the MMPI was to be released (I have three different versions) and I needed to explain the implications of the order because of my professional organization and the State Board practice rules. I submitted a letter to all parties (Commissioner [redacted], Ms. Warzynski and Ms. Glass-Hess), by email, on 09/13/12, requesting clarification as to which version of the MMPI I was to release, explaining alternatives to violating test security, explaining the implications of copying the materials (cost and time) and most of all, indicating that a photo copy of the scoring templates (which was the foundation for Ms. Warzynski's request) would be useless since the templates are transparent overlays. I must emphasize that Ms. Warzynski had always had the raw test data and could have had an expert rescore it at any time. She announced in Court, however, that she is not provided a budget to hire experts and I can only assume that she intended to rescore the test herself. This would mean that she intended to practice psychology.

In response to my request for clarification, I received a notice from Commissioner [redacted] judicial assistant telling me that the Commissioner would not review my letter and that I was to go through the attorneys. At that point I set out to comply with the order. As instructed, I asked Ms. Glass-Hess which version of the test I was to release. She told me the version used in the case (I could have presumed this but did not want to presume anything given the way the order was written “in my control”). I explained the implications of copying the test materials and how a copy would not permit someone to rescore the test (*just a reminder the hand-scoring templates are transparent overlays*). She decided that I should make the test available for Ms. Warzynski to review in my office. Ms. Warzynski wanted me to drop the materials off (the test itself) at her office and leave them with her for days. I was not going to do this. We use those materials daily and I was not going to leave materials for which I am responsible for security, with Ms. Warzynski when I could not be available to monitor what she did with them. These were materials that I purchased and did not feel that I should have to disrupt my ability to make a living to comply with Ms. Warzynski's requests. Efforts to provide Ms. Warzynski with times that she could come and review the materials in my office were unsuccessful. She eventually made it clear that she would not come to my office and that she wanted a copy of the materials. The stress created from trying to work with her was unbearable. I was trying to comply with an order, for which noncompliance is a criminal offense and hence could affect my livelihood and I was placed helplessly between two attorneys who were not getting along. This should have never happened. Ms. Glass-Hess determined that it would be best if I brought the materials to Court and made them available at one of the status conferences. I was scheduled to do this on 09/17/12 when I received a call that my sister was dying and I needed to go to Canada.

I went to Canada for one week (my sister did not actually die the first week I was there but a week or so after and I returned to Canada a second time for her funeral). When I returned from my first trip, I contacted Ms. Glass-Hess and asked what was decided in terms of the order. I was told “not to worry about it” because the Defendant was placed back into restoration and there would be no evidentiary hearing. I specifically and emphatically told Ms. Glass-Hess that the order was still outstanding and that I wanted it rescinded because as it was I was in contempt. It is important that I remind you that I was directed back to the attorneys to handle all my issues on this case. Ms. Glass-Hess told me that she would check with her supervisor and get back to me. She did and said that I need not worry about the order since there was no evidentiary hearing. I insisted that she file a motion to rescind the order because I was in contempt. I was again called up to Canada but this time for my sister's funeral. I went only for a few days and when I returned on 10/08/12, I immediately contacted Ms. Glass-Hess (and Ms. Friddle her supervisor) to inquire as to the status of the order. Ms. Friddle contacted me and told me that they would be filing a motion to rescind the order.

Eventually I was told that the motion to rescind was denied and that I had to comply with the order. I was asked to give dates and times when Ms. Warzynski could come to my office. After several days of trying to elicit cooperation from Ms. Warzynski and her claim that none of the many dates and times offered would work for her, I finally asked Ms. Glass-Hess to obtain dates and times from her so that I could accommodate. At that point, I was told, Ms. Warzynski finally made it clear that she had no intention of coming to my office to review the test materials.

Shortly after this, I received an email from Commissioner [redacted] judicial assistant (11/06/12) telling me that I was to appear for a "Show Cause" hearing on 11/08/12. I felt like a criminal! I was now facing potential criminal charges for contempt of court when I had attempted to work through the attorneys, as directed by the Commissioner and I was the driving force behind trying to fulfill the Court's order, yet I was being ordered to essentially drop everything and appear in Court. On both of the days prior to when I was to appear (I was given two days of notice) I was booked solidly. On one of the days I was booked in Tucson which had been scheduled several months prior. I had only one option, spend an evening at Staples, copying the proprietary test materials, scanning them into a pdf file and saving them to a compact disc so that I could be in compliance with the Court. *I must emphasize that I am governed by Rules indicating that I must keep psychological tests secure and I could not delegate this task to clerical support or I could have been held in violation of test security.* I was leaving for vacation the day following the Show Cause hearing and had to have a resolution to the order. Ms. Warzynski was not cooperating and I did not want contempt charges hanging over my head on my vacation. I also wondered if I needed to retain an attorney to look after my interests since I was now, potentially, facing criminal charges.

The Show Cause hearing (11/08/12) was poorly managed. I asked Ms. Glass-Hess to ask the Court if I needed to retain an attorney given that I could be facing contempt charges and was never allowed to speak in the courtroom. Ms. Glass-Hess proceeded to explain her attempt to elicit cooperation from Ms. Warzynski so that I could comply with the order and Ms. Warzynski kept yelling at her from her desk. Ms. Glass-Hess kept telling Ms. Warzynski that she was trying to address the Court but this did not seem to have any effect. I was in shock watching this and was quite concerned because the issue being addressed was my compliance with the order. Commissioner [redacted] made no effort to control the two attorneys. I presented the disc I had prepared and was told that I could not release it because a "special action" had been filed. I was not given the opportunity to explain to the Court that I had been diligent in my effort to obtain cooperation from Ms. Warzynski to comply with the order. In frustration, I provided the disc to Ms. Glass-Hess, in open court, so that I could not be accused of noncompliance while the Court and attorneys worked out their differences. I was going to be gone for a full week and would not be available and did not want to come back to find myself in contempt. It was at that hearing that Commissioner [redacted] said something to the effect "You've done this before" and I explained that I had not. This should be on the record. I believe, as I indicated earlier, that Ms. Warzynski misled the Judicial Officer to believe that I had released proprietary tests in the past.

The next time I appeared in Court was on 12/03/10 where I saw that Ms. Warzynski had reproduced the entire test. I was horrified to see that Ms. Warzynski had blatantly ignored the order indicating that she "may not copy or disseminate the information to..." She announced to the Court that she "could not read it" and that she had to print it. I specifically scanned the copies of the test materials into a pdf file because I had to reduce them to make the originals fit onto 8 1/2 by 11" sheets. I am not sure why Ms. Warzynski told the Court that she could not read the material because you can enlarge and enhance images in pdf files. She actually printed copies from the file as it was presented to her. In my opinion, she misled the Court again because if she could not read them in a pdf file she certainly would not be able to read them in an identical, printed copy. Commissioner [redacted] made no comment as to this violation of the order by Ms. Warzynski.

I asked the Court what Ms. Warzynski was planning to do with the test because I had just watched her violate the order without repercussion. I explained that if it was Ms. Warzynski's intention to practice psychology without a license (which she essentially told the Court since she could not retain an expert), I would be required to file a bar and board complaint (I am required to do this according to the practice guidelines by my professional association which have been adopted by the Arizona Board of Psychologist Examiners). Commissioner [redacted] said, "Why don't you ask her." I turned to Ms. Warzynski and she did not respond. Commissioner [redacted] then spoke for her saying, "She may look at it. She may show it to another expert." Showing it to another expert would have been another violation of the order and it seemed that Commissioner [redacted] did not really care about her order which I assumed was at least some attempt at keeping the test secure. She did not say anything about Ms. Warzynski reproducing the test materials and had then told her that she could show it to another expert. *It is*

worth emphasizing that "another expert" would have had access to the test anyway and did not need the Commissioner to use her discretion to release proprietary materials to them.

Ms. Warzynski appeared with a second copy of at least part of the test (the manual) and admitted it into evidence. For a period of time, the proprietary test manual for the MMPI-2RF was accessible to the public. I am hoping that the Commissioner has sealed the record at this point since the case is now "under advisement" and testimony and final arguments have been made.

Essentially, it cost tax payers \$952.40 for me to reproduce the MMPI-2RF and be in compliance with the order. Ms. Warzynski could have paid five experts, \$150/each to rescore the test for what we, as taxpayers, paid to reproduce it. Again, I immediately released the raw test data to Ms. Warzynski when the first order came out. I could have purchased two full starter kits and tested 50 clients with what it cost to comply with the Commissioner's order. The end result, Ms. Warzynski could not rescore the test with what was provided to her anyway. She was permitted, however, to use the materials to reinterpret the test results from the scores that I provided in the very beginning. In sum, Commissioner [redacted] used her discretion and released proprietary test materials to an attorney so that the attorney could practice psychology and taxpayers paid dearly for this.

Finally, with respect to the abuse of witnesses, two of my students were involved in this case and although I was not permitted to observe their testimony or talk to them until the conclusion of the case, one of them was reportedly treated harshly by the Commissioner. I refer the committee to the hearings of 01/07/13 and 01/14/13. I hope the recordings of the proceedings will accurately portray these and the other noted issues outlined so far.

Summary of this issue:

- 1) I was never permitted to clarify the order issued by Commissioner [redacted] nor was I permitted to explain the implications of the order to the Court.
- 2) I was told to direct my issues and seek guidance from two attorneys who were not working with each other. I had no way of expediting my need to comply with the order and Ms. Warzynski was not cooperating. This was extremely stressful because I had no control over the outcome. Neither of these two attorneys represented me, my interests, or the interests of my profession.
- 3) I was ordered to drop everything and appear to a Show Cause hearing, was never given the opportunity to explain my diligent efforts to comply with the order, yet I was facing criminal charges of contempt. I felt like a criminal and actually wondered if I needed an attorney to represent me when all I was doing was trying to provide information to the Court.
- 4) Two students, who participated in this evaluation as a part of a class, one of which donated days of her own time to provide a sentencing evaluation (which was somehow used in competency proceedings) were brought into Court. One of these students was harshly treated by Commissioner [redacted].

Misuse of Judicial Discretion:

As indicated above, Commissioner [redacted] used her discretion to release proprietary test materials so that an attorney could practice psychology. She sent a clear message, to all those involved, that any attorney, if given a psychological test manual and a test, was capable of doing that of a licensed psychologist. The implications of this order have just begun to reveal themselves. Other psychologists have been ordered to make the Intelligence test and other proprietary tests available to Ms. Warzynski in the other mental health court.

I believe there is a public interest issue here (which is why I must present this issue to the Arizona Board of Psychologist Examiners). Commissioner [redacted] cited Daubert (for Ms. Warzynski), as the reason for releasing the test, so that Ms. Warzynski could verify that it was "reliable and valid." Ms. Warzynski actually argued that she was entitled to the proprietary test materials because of potential hand-scoring errors. She essentially wanted to rescore the test and cross-check my work. Regardless of the reason behind the release of the proprietary test, if the Court now begins releasing them to attorneys, reducing the reliability and validity of the test, how can we ever comply with Daubert? The Court is aware that we are not only expected but required to use reliable and valid tests as the foundation for our opinions. It seems like a contradiction to me if we are going to release these tests which will eventually render them invalid and unreliable, how can we comply with Daubert? Further, both the MMPI and Wechsler Adult Intelligence Test have both been repeatedly tested and accepted under Daubert. The Court may wish to consider how psychologists will evaluate mental retardation in capital cases if we no longer have

valid and reliable intelligence tests because they are being released (and hence become unreliable and invalid), routinely to attorneys. I do not know what was written in the special action that was filed by Ms. Glass-Hess but she did not understand these implications when I spoke with her. If the Commission is interested, I have other published information concerning the relevance of test security and judicial proceedings as this is not the first time this has been addressed in Court. I am not an attorney and some of the information refers to a Supreme Court Decision {Detroit Edison Co. v. NLRB - 440 U.S. 301 (1979)} and I must rely upon others' interpretations of that decision but there have been a number of publications on the issue of test security and many of these reference that case.

If Ms. Warzynski chose to present the proprietary materials to another expert, then Commissioner used her discretion to release proprietary test materials to an attorney, to provide them to another expert, who should have had access to them anyway. If they did not, then the Commissioner essentially relieved that "expert" from having to qualify to the publishers and pay for the test. There are specific qualifications for the purchase and use of these tests. I doubt that this was the issue since Ms. Warzynski announced that she was not provided with a budget to hire experts but that she was concerned about potential scoring errors.

Either reason, the Commissioner was unaware, uninterested, or just did not care about the implications of the order. She did not permit me to provide an explanation to her. This order cost tax payers dearly and has resulted in several concerns about public interest and attorneys practicing psychology. There are serious implications to this.

Mismanagement of the Courtroom:

I have already outlined how the two attorneys in this matter did not get along. This is surprising since Rule 11 proceedings are not supposed to be adversarial in nature. There are several instances of mismanagement in the proceedings which I attended but I encourage the Commission to review all of the hearings. When I was providing testimony and being questioned by _____ i was permitted to yell things at me from her table (10/10/12 and 01/07/13). Commissioner _____ made no effort to control this behavior. I found it totally unprofessional and it ultimately may have affected my testimony.

In this particular case, several mental health providers and other laypersons opined that the Defendant suffered from a serious mental illness that was not treated. Ms. _____ had one expert who opined that the Defendant was malingering. The Defendant frequently had uncontrollable (in my opinion) outbursts in the courtroom during which he would rapidly discharge a serious of disconnected and delusional thoughts. These were obviously (to most involved), tormenting symptoms for him. I observed Ms. _____ i laugh at the Defendant when these occurred during the proceedings when I was there. During one of the hearings (Ms. _____ Ms. _____ can provide the date or the Commission can review all of the recordings), Ms. _____

said to Ms. _____ about her disrespectful behavior. Even if she believed that he was malingering, there were several mental health professionals who opined otherwise. I understood him to be innocent until proven guilty and that he should be treated with dignity and respect by the Justice System. Commissioner _____ permitted this behavior by Ms. _____ and made no mention of how inappropriate it was.

I have been providing services to the Superior Courts in Arizona (not just Maricopa County) since 1995 (with license since 1996) and have never had such a horrible experience as I did with the proceedings related to this case. I encourage the Committee to review this matter thoroughly. Although I will be filing independent Bar and Board complaints against Ms. _____ i for her unprofessional conduct and her practice of psychology without a license, _____ should have never facilitated or allowed these behaviors. I am available for questions but have no interest in the outcome of this investigation.

At this point I wish to reiterate that it is not my intention (and it has never been) to be a "rebel" but I have been advised that I have an ethical obligation to file this request for review. Quite frankly this has consumed an inordinate amount of my time and it would have been much easier to let this whole thing pass but I feel that I do have an ethical and professional obligation to fulfill.

1-28-13

Date