

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 13-186

Judge:	No. 1057313507A
Complainant:	No. 1057313507B

ORDER

The complainant alleged a justice of the peace improperly failed to disqualify himself, made false representations, and improperly issued a ruling after disqualifying himself.

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 information provided by the complainant, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. The commission does not have jurisdiction to review issues that involve alleged legal error. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23.

Dated: September 19, 2013.

FOR THE COMMISSION

/s/ George Riemer

George A. Riemer
Executive Director

Copies of this order were mailed to the complainant and the judge on September 19, 2013.

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

This is a complaint of judicial misconduct against Judge

INTRODUCTION

The allegations in this initial filing are that failed to recuse himself in two instances involving the same underlying matter where recusal was unequivocally required. And that, in the second instance, engaged in dishonesty (i.e., lied) about his failure to recuse, so as to shield himself from liability in a federal civil rights lawsuit.

Also that failed in his administrative responsibilities to require "staff and court officials . . . to observe the standards of fidelity and diligence that apply to judges."¹

In subsequent supplements, complainant will allege that repeatedly failed to abide to the Arizona Rules of Civil Procedure (thus violating the 14th Amendment due process rights of litigants); engaged in ex parte communication; did not avoid the appearance of impropriety, failed to report judicial misconduct, and failed to supervise his clerk.

CHRONOLOGICAL BACKGROUND

This matter began on December 17, 2008, when Judge issued an ex parte civil Injunction against Harassment (IAH) against complainant. It continued through June 23, 2009, when Judge presided over complainant's appearance in a criminal matter. (Complainant had been accused of violating Judge ; IAH. (Charge dismissed.)) It ended three years ago to this date, on July 19, 2010, when Judge ostensibly vacated a January 14, 2010 Order of his and reassigned an earlier "Motion for relief from Order" to another judge.²

¹ Quoting from Arizona Code of Conduct 1993, Canon 3, C (2).

² As such, depending on how the Commission tolls time, it may be that complainant has missed the Commission's self-imposed three-year time limit, as stated in Rule 4 in its Administrative Policy Handbook. Complainant does not know how the Commission tolls its three years and the Rule does not specify. If complainant has erred, complainant asks for the Commission's indulgence to allow this complaint. 1) At worst, this complaint is only a few days past due; 2) Complainant was precluded from filing this complaint until December 2012, since, until that time, complainant had a federal lawsuit in play against Judge (Abstention/conflict issues.) Since then, complainant has been involved in another federal civil rights lawsuit involving (3) The reasoning

Given this chronology, the 1993 version of the Code of Conduct will be cited for most of this complaint, the current Code not taking affect until September 1, 2009.

FACTUAL BACKGROUND

Note: In the interest of brevity, complainant is focusing here only on the salient points for the above allegations. Also in the interest of brevity, complainant has not included every document to support every fact mentioned below. Complainant has the documentation and the Commission need only ask.

issued an ex parte IAH against complainant on December 17, 2008. That was

On March 12, 2009, complainant/defendant, acting pro se in this civil matter, filed his first of several "pre-trial" motions. Complainant was careful to specifically state that, by filing these motions, he was not requesting a challenge hearing for the Injunction at the time. That he would invoke his right to a challenge hearing at a later date.

signed a criminal summons against complainant, ostensibly for violating the IAH. (This after complainant's attorney, on behalf of complainant, faxed a courtesy copy of an emergency motion to plaintiff in the IAH.) Case

Complainant continued to file more pre-trial motions in the civil IAH. Despite the fact that complainant/defendant never requested a challenge hearing, and contrary to Rule 8(A) of the Arizona Rules of Protective Order Procedure set a date for a hearing anyway on March 19, 2009 as his response to one of complainant's pre-trial motions. Complainant, who does not live in unexpected Order by certified mail on March 25. The hearing date was to be the next day.

Given this unexpected event, complainant/defendant filed for a continuance. The hearing date was rescheduled for April 9, 2009.

behind Rule 4 is that "It is difficult and unfair to require a judge to respond to a complaint involving conduct that occurred so far in the past that neither the judge nor the witnesses, if any still exist, would be able to accurately remember the incident." However, complainant has provided ample documentation (including audio) to establish the facts, which largely obviates the need to rely on witnesses or anyone's memory.

A few days later, complainant received a very unusual "courtesy" call from [redacted]. Among other things, she told complainant that [redacted] wanted her to tell complainant that he could not communicate with the plaintiff (in the civil injunction) "even in writing by mail." This apparently in response to the fact that complainant/defendant, acting as his own lawyer, was complying with Rule 5(a) of the Rules of Civil Procedure by sending copies of court paperwork to the plaintiff. See Judge [redacted]'s personal note documenting this along with the Clerk's Nature of Proceedings, dated 3/25/2009,

Given Judge [redacted]'s apparent prejudice and ex parte communications in the civil IAH (not only calling complainant/defendant, but obviously having learned ex parte from plaintiff that complainant was sending copies of court paperwork), complainant filed a Rule 42(f) Notice for change of judge/Motion for recusal on or about March 31, 2009.

Judge [redacted] immediately recused himself and first assigned the matter to Judge [redacted]. But Judge [redacted] informed Judge [redacted] that he ([redacted]) had a conflict of interest, since he knew a party in the case. Of note is that Judge [redacted] did this on April 1, 2009.

Sometime shortly after that, Judge [redacted] made a handwritten notation in the court file acknowledging complainant's Rule 42(f) Notice, acknowledging that Judge [redacted] had recused, and that Judge [redacted] had assigned the case to Judge [redacted]. (See Exhibit 1-D.³) Of note is that Judge [redacted] had to have written this note in the first week of April, since Exhibit 1-C was received on April 1 and Judge [redacted] had to be assigned before the rescheduled of April 9.

Complainant was forced to hire a criminal attorney for the criminal matter. Complainant's attorney filed a Notice of Appearance on April 28, 2009 and a motion for a continuance on May 21, 2009 with the [redacted] Justice Court. Despite having recused from this civil matter and documented his recusal from the underlying civil matter a few weeks beforehand, Judge [redacted] did not recuse himself sua sponte from the ongoing related criminal matter. (Violation of Canon 3(E).)

Complainant first became aware that Judge [redacted] had failed to recuse in the criminal matter on June 23, 2009, when complainant appeared in court for the first time with his

³ Dates might have been redacted in the public court file by the clerk. Also, there was a second page of judge's notes, which appears to have been redacted from the public record. Perhaps it contains helpful information and the Commission should request it.

attorney before Judge [REDACTED].⁴

Upon seeing that Judge [REDACTED] was sitting on the case, complainant quickly informed his attorney that Judge [REDACTED] had recused from the underlying civil matter. Complainant's attorney, in turn, brought the issue up as the first order of business in court. Complainant has provided the audio of that first hearing, and an unofficial transcript.

Before complainant's attorney finished speaking (he started to ask for a continuance to file a motion for a change of judge for cause), Judge [REDACTED] interrupted him.

Of note is that Judge [REDACTED] said in court that "I don't recall having recused myself."

That is difficult to believe, considering the short time frame involved and that Judge [REDACTED] had even handwritten himself a two page note in the record.

Whatever, Judge [REDACTED] offered to recuse and immediately assigned the case to Judge Ray.

However, Judge [REDACTED] did not fully recuse. He backtracked. Before officially recusing, he set some release conditions on complainant.

Rule 10.6 of the Rules of Criminal Procedure require that "When a motion or request for change of judge is timely filed under this rule, the judge **shall proceed no further in the action**, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge or the presiding judge's designee."

While complainant has no issue with Judge [REDACTED] assigning another judge in the matter, complainant alleges that Judge [REDACTED] violated the Rules when he issued Release Conditions.⁵ While complainant realizes that the Commission's Dispositions do

⁴ Admittedly, based on Judge [REDACTED]'s Order granting the motion for continuance (dated May 21, 2009), complainant could have seen that Judge [REDACTED] had not recused from the criminal matter and could have informed his attorney of the need to file a motion to disqualify Judge [REDACTED] due to his prior recusal. Still, this oversight on complainant's part does not relieve Judge [REDACTED] of his duty to comply with the Canons.

⁵ Anticipating that Judge [REDACTED] might cite "temporary orders as they may be necessary in the interest of justice before the action can be transferred,"

not set precedent, please see the [redacted] calling this a violation in a similar matter.

Even though a violation of the Rules, complainant would have overlooked Judge [redacted] offense if not for what happened next.

Per the audio/transcript, Judge [redacted] ; verbal release conditions were that complainant/defendant 1) obey all laws; 2) don't possess or drink alcohol; and 3) have no contact with the alleged victim.

However, the Order that the clerk typed was different from what the judge said. The clerk added on her own that "the defendant is not to possess ANY deadly weapons."

Whether this was the sole prejudicial act on the part of the clerk on behalf of the plaintiff (as above, there is good reason to believe clerk [redacted] personally knows the plaintiff, then known as [redacted]), or collusion between the clerk and the prosecutor, or collusion between the clerk and judge cannot be known without further investigation by the Commission.

When complaint carefully read the clerk's order, he and his attorney immediately returned to the courtroom. Complaint's attorney complained to Judge [redacted] that the clerk's written order did not comport with the judge's verbal order. But Judge [redacted] failed to correct the situation. [redacted] Rather, he accepted what the clerk had added. Thus, Judge [redacted] failed to diligently discharge his administrative responsibilities and failed to require his staff and court officials to observe the standard of fidelity and diligence in the performance of their official duties. (Canon 3(C)(1) & (2).)

As it goes to your Rule 19(d), Aggravating Factors, complainant was thus forced to spend considerable time and money filing motions and replies (and was ultimately deprived of his cherished Second Amendment right) in an attempt to modify complaint's release conditions, all due to an unsupervised clerk playing judge.

Fast Forward: The prosecutor dropped the criminal faxing charge "in the interest of justice" a few days before criminal trial was to begin in November 2009. Complainant lost his fight over the civil injunction and his appeal regarding same, even though the

complainant/defendant had not been under any release conditions for three months prior to appearing. Complainant had not violated any laws, nor did complainant send any more copies of court paperwork to the plaintiff in the IAH. The criminal matter was about faxing court paperwork to the plaintiff. There was no violent crime and thus no urgency to do anything in the interest of justice.

Judge [redacted] in that case had engaged in ex parte communication with the plaintiff, allowing the plaintiff (through the clerk) to sneak new evidence into the court file without filing any Notices or serving copies on complainant/defendant.

Shortly after this, in the winter of 2009, Judge [redacted] had been assigned a lucrative pro tem job in [redacted] County. Her resume was posted with the announcement, whereupon complainant/defendant found new evidence that Judge [redacted] had failed to recuse herself in complainant's/defendant's civil case.

In light of this new evidence, complainant/defendant filed a Rule 60(c) Motion for Relief from Order, citing fraud at a few places.

Presumably because Judge [redacted] was now disqualified from hearing the case (especially since she was the one who engaged in the fraud of ex parte communication with the plaintiff), Judge [redacted] even though disqualified from hearing complainant's/defendant's motion by way of a prior Rule 42(f) Notice in this matter, ruled on the motion anyway.

Predictably, he denied the motion. (If he had granted the motion, he would be acknowledging fraud on the part of one of his hand chosen colleague judges and his own clerk. Arguably, he was "circling the wagons" or "running interference.")

Fast forward again to July 2010: Complainant filed a lawsuit in federal court against Judge [redacted] Judge [redacted] and Clerk [redacted] (among others), for deprivation of complainant's Fourteenth Amendment Due Process rights.

Judge [redacted] was served on July 1. Judge [redacted] was not served until July 20. Still, it is reasonable to believe that Judge [redacted] learned about the impending lawsuit from Judge [redacted] (Or from [redacted] County, who defended all the defendants and may have contacted him to see if he'd been served.)

Not un-coincidentally, on July 19, 2010, complainant/defendant received an unsolicited Order/Nature of Proceedings from Judge [redacted], claiming that it had come to Judge [redacted] attention that he had "forgotten" that the Defendant in this case had asked for another Judge to decide this case.

It is difficult to believe Judge [redacted], that he had simply "forgotten" that he had been disqualified from this case. For, at the top of page 2 of complainant's/defendant's Rule 60(c) motion, complainant/defendant wrote "Since Judge [redacted] and Judge [redacted]

also recused themselves previously, this Motion should be review by a new impartial judge who is not touched by my previous pretrial Rule 42(f) Motion for Recusal." (see Exhibit 1-I.)

If Judge _____ isn't lying, then he's admitting he was not diligent to read the motion. A violation of Rules 2.5 and 2.6 in the 2009 Code of Conduct.

Furthermore, by this late date, the IAH had long expired. The case was closed. Any order after that was moot. In fact, Judge _____ did not cite any legal authority for his spontaneous act, which was not an Order. Rather, he used his prestige of judicial office to advance his personal or economic interest. A violation of Rule 1.3 in the 2009 Code of Conduct.

Even though complainant lost his federal case on technical grounds, the Commission should take notice that a judge does not have absolute immunity when he acts as a judge after recusing himself. That is, he no longer functions legitimately as a judge and is open to civil liability.⁶

Therefore, it is more reasonable to believe that Judge _____ was simply pulling a CYA here in an attempt to "un-recuse" himself to avoid liability in complainant's lawsuit.

By not disqualifying himself this time, Judge _____ violated Rule 2.11 of the 2009 Code of Conduct. By lying about it, he violated Canon 1 of same.

⁶ Complainant will be happy to provide the case law to establish this fact.