

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 15-336

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Judge:

Complainant:

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**ORDER**

The complainant alleged a municipal court judge improperly engaged in ex parte communication, inserted himself as an adversary in a special action proceeding, and operated an unauthorized diversion program.

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 review, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. Accordingly, the complaint is dismissed in its entirety, pursuant to Rules 16(a) and 23.

Commission members Gus Aragón and Louis Frank Dominguez did not participate in the consideration of this matter.

Dated: March 25, 2016

FOR THE COMMISSION

/s/ George A. Riemer

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George A. Riemer  
Executive Director

Copies of this order were mailed to the complainant and the judge on March 25, 2016.

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

I understand the commission cannot reverse court orders or assign a new judge to a case.

I declare, under penalty of perjury, that the foregoing information and the facts I have provided upon which my allegations of judicial misconduct are based are true and correct.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**INSTRUCTIONS**

Use the following space or plain paper of the same size to explain your complaint. Explain why you believe what the judge did constitutes judicial misconduct. Be specific and list the names, dates, times, and places relevant to your allegations. Additional pages may be used and relevant copies of documents may be sent with your complaint (please do not send original documents). Use one side of each page only and write legibly or type your complaint. Please keep a copy of your complaint for your records.

The space provided on this form is inadequate to describe my complaints against the conduct of the Honorable \_\_\_\_\_ Accordingly, a 13-page complaint will be mailed to the address indicated on the Commission's website. A courtesy copy will be mailed to the Honorable \_\_\_\_\_ and other interested parties as indicated on the distribution list of the written complaint.

For present purposes it is sufficient to state that the three core complaints are:

1. \_\_\_\_\_ had ex parte communications about the case. He failed and refused to disclose those ex parte communications and has since removed himself for cause without disclosing his ex parte communications.
2. \_\_\_\_\_ took an adversary position in the special action proceedings stemming from the case pending in \_\_\_\_\_, going so far as to request an award of attorney's fees against a criminal defendant.
3. \_\_\_\_\_ operates a fee-for-dismissal program which is not authorized by law, and under which the city demanded a cash payment of \_\_\_\_\_ to dismiss criminal charges.

The Superior Court action, \_\_\_\_\_, has been resolved in favor of \_\_\_\_\_. The \_\_\_\_\_ court case, \_\_\_\_\_ has not been fully resolved however \_\_\_\_\_ was removed from the case. Accordingly, it appears to your question above, that neither case is still pending as that question applies to \_\_\_\_\_

## I. Complaints

The complaints raised herein against the conduct of the Honorable \_\_\_\_\_  
presiding \_\_\_\_\_ 1 court, are as follows:

1. **Failure to Disclose Ex Parte Communications**—Reference Rule 2.9, Arizona Code of Judicial Conduct (duty to promptly disclose ex parte communications). In short, \_\_\_\_\_ filed an *I-Ruled-Correctly* brief (the nature of an *I-Ruled-Correctly* brief is addressed in complaint number 2, below) in the special action proceedings arising from a criminal case pending in his court. In doing so, he coordinated his efforts with the city council, the city attorney and city staff but failed to disclose his ex parte communications to the defendant. Moreover, \_\_\_\_\_ failed to respond to a formal request for disclosure of his ex parte communications.
2. **Filed *I-Ruled-Correctly* Brief**—Reference Canon 2 (impartiality of judiciary); See also, State ex rel. Dean v. City Court of City of Tucson, 123 Ariz. 189, 598 P.2d 1008 (App. 1979); Hurles v. Superior Court, 174 Ariz. 331, 849 P. 2d 1 (App. 1993). Judges are nominal parties only in special action proceedings but \_\_\_\_\_ not only joined in a motion to dismiss the special action proceeding, he also sought an award of attorney’s fees in a criminal case and permitted his attorney to personally and professionally denigrate defense counsel. See also, Judicial Rule 2.3 (duty to prevent bias, prejudice and harassment).
3. **Unlawful and Ultra Vires Fee-For-Dismissal Program**—Reference Canon 1, Rule 1.1 (compliance with law/appearance of impropriety). \_\_\_\_\_ operates a fee-for-dismissal program in which defendants are given an option to pay an exorbitant sum of money in return for the judge entering an order dismissing the charges. Defendants who refuse the demand for cash are thereafter prosecuted in city court, facing up to six months of incarceration in the county jail plus applicable fines. As will appear more fully below, \_\_\_\_\_ fee-for-dismissal program is not a deferred prosecution program; is not a diversion program; and, is not an “exaction.” On the face of it, the city’s unauthorized fee-for-dismissal program gives the appearance of unlawful extortion. See, A.R.S. § 13-1804 and State v. Steiger, 162 Ariz. 138, 781 P. 2d 616 (App.1989). The extortionate nature of the city’s demand for cash is compounded by the fact that the

\_\_\_\_\_. According to the United States Census bureau its residents are 98.7% Hispanic or Latino and 44.5% are foreign born. At the risk of stating the obvious, there are no immigration consequences for those who pay the city’s exorbitant demand for cash. The consequences of a criminal conviction, on the other hand, cannot be overstated for seasonal farm workers, tourists, and immigrants on the path to formal residency or citizenship status. See, e.g. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

## II. Nature of Complaints

**Overview:** is the court. In late a criminal charge was filed against my client, , for an incident in which it was alleged that was a cross-dresser who appeared fully clothed, albeit in female clothing, at a public restaurant and that a waitress was “disturbed” by his conduct. On this allegation, was charged with a single count of disorderly conduct. denies that he was the cross-dressing person sought by the police.

Given the bizarre and antiquated nature of the criminal charge, I enquired whether the city planned to continue with its prosecution, thinking perhaps the charges were the result of an overzealous police officer and the charges had been filed without adequate oversight. Astonishingly, we were informed that would enter an order dismissing the charges *but only on the condition that pay to have the charges dismissed.* declined the offer.

Thereafter pretrial motions were filed which eventually led to a petition for special action in the Court of an action in which coordinated with the city attorney and city council in filing his motion to dismiss the petition for special action. Exhibit One to this Complaint is a copy of a letter from the demanding as payment for dismissing the charges. Exhibit Two is a copy of the City Council Agenda demonstrating that was present at the time the city attorney sought and received permission for the city attorney to represent him in the Court special action proceedings. In his motion, sought to dismiss the special action proceeding and, even more surprisingly, asked for an award of attorney’s fees against a criminal defendant.

Despite the well documented coordination between the failed and refused to disclose his ex parte communications as is required by Rule 2.9, Arizona Rules of Judicial Conduct. failure to promptly disclose his ex parte communications made it necessary for to file formal demand for disclosure in the municipal court proceedings. did not overtly reply to the demand for disclosure of ex parte communications but his former attorney from the special action proceedings, the city attorney, filed a scathing attack in which former attorney personally and professionally denigrated defense counsel, going so far as to suggest that would be better served by choosing other counsel. Exhibit Three is a copy of Defendant Demand for Disclosure of Ex Parte Communications filed in the court proceedings. Exhibit Four is a copy of the response filed by has to this day failed and refused to disclose his ex parte communications.

**ARIZONA COMMISSION ON JUDICIAL CONDUCT – COMPLAINT**

In light of \_\_\_\_\_ failure to disclose his ex parte communications, Defendant \_\_\_\_\_ was forced to file a motion to remove \_\_\_\_\_ for cause pursuant to Rule 10, Arizona Rules of Criminal Procedure. A copy of the Rule 10 motion is attached as Exhibit Five. Even in the face of this formal demand, \_\_\_\_\_ once more failed to disclose his ex parte communications. Further, he failed to disclose the information required by Rule 2.11, Arizona Rules of Judicial Conduct Comment 5, which provides:

5. A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

In like fashion, the committee comment to Rule 10.1.c. of the Arizona Rules of Criminal Procedure obligates a judge facing a Rule 10 motion to disclose information relevant to the issue of cause. \_\_\_\_\_ eventually removed himself for cause but did not disclose the information referenced in the comments to the Judicial Rules or the Rules of Criminal Procedure. Nor did he respond to the formal demand for Disclosure pursuant to Rule 2.9 of the Judicial Rules.

**III. Underlying Cases, Index to Exhibits and List of Witnesses**

**A. Reference to Underlying Court Cases:** The actions of the \_\_\_\_\_ which give rise to this judicial conduct complaint stem from a misdemeanor case filed in the \_\_\_\_\_ court of the \_\_\_\_\_ and a Petition for Special Action Relief filed in the \_\_\_\_\_ the \_\_\_\_\_ springing from the \_\_\_\_\_ misdemeanor case. Those cases are:

This case is still pending.

This case is resolved, with Defendant \_\_\_\_\_

**B. Index to Exhibits:** The exhibits offered in support of the assertions made in this complaint are as follows:

1. **Exhibit One:** \_\_\_\_\_ letter demanding \_\_\_\_\_ as condition of dismissing charges.
2. **Exhibit Two:** \_\_\_\_\_ showing both \_\_\_\_\_ and his attorney at \_\_\_\_\_ authorizing the *I-Ruled-Correctly Brief*.
3. **Exhibit Three:** Demand for Disclosure of Ex Parte Communications filed in \_\_\_\_\_ court.
4. **Exhibit Four:** \_\_\_\_\_ response to Demand for Disclosure.

**ARIZONA COMMISSION ON JUDICIAL CONDUCT – COMPLAINT**

- 5. **Exhibit Five:** Rule 10 Motion seeking removal of \_\_\_\_\_ for cause.
- 6. **Exhibit Six:** The \_\_\_\_\_ documenting the extensive nature of fee-for-dismissal program.

**C. Witnesses and Interested Parties: The following list of people have information regarding the complaints raised:**

- 1. Complainant: \_\_\_\_\_ Attorney at Law,  
Telephone \_\_\_\_\_ Has knowledge of all matters asserted in this complaint.
- 2. \_\_\_\_\_ Defendant in \_\_\_\_\_ court and Petitioner in special action proceedings. May be contacted through \_\_\_\_\_ Has knowledge of all matters asserted in this complaint.
- 3. \_\_\_\_\_ officers and employees, who are physically located at \_\_\_\_\_ who may be reached by mail at \_\_\_\_\_ or by telephone at \_\_\_\_\_
  - a. \_\_\_\_\_ Has knowledge of all matters asserted in this complaint.
  - b. \_\_\_\_\_ Has knowledge of all matters asserted in this complaint.
  - c. \_\_\_\_\_ Telephone \_\_\_\_\_ Has knowledge of all matters asserted in this complaint.
  - d. \_\_\_\_\_ Has knowledge and records of city council meetings, including which persons were present and what actions were taken. Will have records regarding council's authorization of the *I-Ruled-Correctly* brief. Presumably knowledgeable about the existence of the city's fee-for-dismissal program including whether it has been authorized by mayor and council, how it is staffed, how it is budgeted and how funds from the program are disbursed. Conversely stated, will have knowledge that no deferred prosecution program exists, that it has no staff, the city offers no specialized supervision, has no criteria for acceptance into or graduation from the program, and that the city had made no annual reports for its "deferred prosecution program."
  - e. \_\_\_\_\_ Presumably knowledgeable about the existence of the city's fee-for-dismissal program including whether it has been authorized by mayor and council, how it is staffed, how it is budgeted and how funds from the program are disbursed. Conversely stated, will have knowledge that no deferred prosecution program exists, that it has no staff, the city offers no specialized supervision, has no criteria for acceptance into or graduation from the program, nor has the city made any annual reports for its "deferred prosecution program."

**THE COMMISSION'S POLICY IS  
TO POST ONLY THE FIRST FIVE  
PAGES OF ANY DISMISSED  
COMPLAINT ON ITS WEBSITE.**

**FOR ACCESS TO THE  
REMAINDER OF THE  
COMPLAINT IN THIS MATTER,  
PLEASE MAKE YOUR REQUEST  
IN WRITING TO THE  
COMMISSION ON JUDICIAL  
CONDUCT AND REFERENCE  
THE COMMISSION CASE  
NUMBER IN YOUR REQUEST.**