

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 16-179

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Judge:

Complainant:

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**ORDER**

The complainant alleged a municipal court judge initiated an improper ex parte communication and independently investigated facts in a case and then acted on those facts without allowing a defendant to be heard in violation of his due process rights.

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 that the judge engaged in an improper ex parte communication, independently investigated facts, and failed to afford a party the right to be heard. While these actions were improper under Rules 1.2, 2.6(A), and 2.9(A), (C) and (D), the Scope Section of the Code of Judicial Conduct provides that it is not intended that every transgression will result in the imposition of discipline. The commission decided, after considering all the facts and circumstances, to dismiss the complaint pursuant to Rules 16(b) and 23(a), but to issue a warning letter to the judge to refrain from engaging in such conduct in the future.

Commission members Christopher W. Ames, Roger D. Barton, Louis Frank Dominguez, Margaret H. Downie, and George H. Foster did not participate in the consideration of this matter.

Dated: September 21, 2016

FOR THE COMMISSION

/s/ Peter J. Eckerstrom  
Hon. Peter J. Eckerstrom  
Commission Vice-chair

Copies of this order were mailed to the complainant and the judge on September 21, 2016.

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

Arizona Commission on Judicial Conduct  
1501 West Washington Street, Ste. 229  
Phoenix, AZ 85007

Re:

I write pursuant to my duty under Rule 2.15 of the Arizona Code of Judicial Conduct to report what I believe to be violations of that Code committed by . Our investigation of this matter, based on the Court's record, combined with information provided by members of our judiciary, court staff, and the Honorable herself, suggest that Judge did commit violations of Rules 1.2, 2.2, 2.6 and may have violated Rule 2.9 of the Arizona Code of Judicial Conduct (2014). Judge was first appointed to the bench by the effective , and has been a judge continuously since that date.

**Judicial Conduct:**

1. Rule 2.9 [Ex Parte Communication] 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. . . "
  - ". . . a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."
  - "A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this rule is not violated by court staff, court officials, and others subject to the judge's direction and control."

The events most relevant to this report commenced with a sentence review hearing held in the defendant's absence in Case No. . The defendant failed to appear for the scheduled hearing. While there is some indication the prosecutor and the defendant's advisory counsel may have been present and aware of her actions, we believe may have violated Rule 2.9 by initiating an *ex parte* communication, independently investigating the facts in a matter, and considering the results thereof in making a judicial determination without affording the defendant an opportunity to be heard. conduct consisted of directing a member of her staff to

then considered the information

in taking judicial action that ultimately resulted in the defendant. As described below, the defendant was never given an opportunity to be heard, or in any way respond concerning the *ex parte* information relied on in concluding the defendant had not

2. RULE 2.6. [Ensuring the Right to Be Heard] provides:

- "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

We believe that on violated Rule 2.6 by failing to provide the defendant with an opportunity to be heard and respond to the information *ex parte* communication with the prior to ordering him to be for

3. RULE 1.2 [Promoting Confidence in the Judiciary] provides:

- "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

4. RULE 2.2. [Impartiality and Fairness] provides:

- "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

We believe conduct in violating Rules 2.9 and 2.6, essentially depriving the defendant of an opportunity to be heard prior to being for an additional , also violated Rule 1.2 and Rule 2.2.

**Factual Basis:**

conduct occurred in connection with her handling of a contentious and prolonged criminal case. Reduced to the most basic facts:

- The filed a complaint, Case No. in including charges and a charge, all in conjunction with the arrest of the defendant. The defendant pled not guilty, was released on his own recognizance, and was scheduled for a pretrial disposition conference to be held on
- Case No. was assigned to the Honorable
- The defendant The defendant subsequently commenced Rule 32 post-conviction relief proceedings.
- the defendant's Rule 32 post-conviction relief proceedings.

- : , and:
  - sentenced the defendant to with
  - ordered the defendant to and and term on condition the defendant
  - ordered the defendant to to make arrangements to
  - hearing for
- : The defendant having failed to the Court's electronic court management system (CMS) automatically issued a to setting a show cause appearance date for
- : The defendant failed to appear for the sentence review hearing scheduled by The court's records indicated the defendant had not served his required jail time or made any payments on his fines and fees. There was no indication that the defendant had as ordered. With the possible knowledge of the defendant's advisory counsel and the prosecutor, directed to learn if the defendant had
  - contacted the and was informed the defendant had not completed the required then issued a warrant for the defendant's arrest, setting bail at
- : The defendant failed to appear in court to respond to the CMS generated A judge reviewed the case file and affirmed a warrant.
- : The defendant was arrested on warrant and booked into the but did not post the cash bail. The judge assigned to the then scheduled a hearing for at n of the and directed that the defendant be transported to the show cause hearing by the police.
- : informed that the defendant had been arrested and was scheduled to be transported to the court on , inquiring if wished to handle the matter or leave it to to handle. On reviewing the file, vacated the hearing and canceled the order to transport the defendant to the also amended the defendant's jail release order to provide that the defendant must serve an additional jail time, noting in the court log that she was doing so "... since he has not done his
  - At this time, one of the Court's asked whether her action vacating the show cause hearing was appropriate. responded that were appropriate. According to actions made the feel uncomfortable. then rescheduled the defendant's hearing from to at based on the defendant's failure to pay his assessed fines and fees.

- The defendant was released from jail in accordance with amended release order.
- : With the defendant present, issued an addendum to the Judgment and Sentence Order, ordering the defendant to to arrange for payment of unpaid fines and fees. also added a reference indicating the defendant completed of jail in lieu of

**Conclusion:**

At the scheduled show cause hearing on , the defendant could have been afforded the opportunity to be heard and respond to the information that had acquired through the earlier *ex parte* communications indicating the defendant had not completed and treatment. Because vacated the hearing, cancelled the corresponding transport order, and imposed an additional incarceration on the basis of that information, the defendant was deprived of his right to be heard. The right to notice and an opportunity to be heard are the essence of due process that is the foundation of the justice system in the United States. As such, a judicial officer who fails to recognize and respect these fundamentals calls his or her judgement into question, risks serious damage to public confidence in the impartiality and fairness of the judiciary, and ultimately harms the public.

If you need further information, please let me know.

Sincerely,