

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 20-173

Judge:

Complainant:

ORDER

August 11, 2020

A superior court judge (now retired) self-reported a violation of Rule 2.9 of the Code.

The role of the Commission on Judicial Conduct is to impartially determine whether a judicial officer has engaged in conduct that violates the Arizona Code of Judicial Conduct or Article 6.1 of the Arizona Constitution. There must be clear and convincing evidence of such a violation in order for the Commission to take disciplinary action against a judicial officer.

The Commission reviewed all relevant available information and concluded there was not clear and convincing evidence of ethical misconduct in this matter. The complaint is therefore dismissed pursuant to Commission Rules 16(a) and 23(a).

Copies of this order were distributed to all appropriate persons on August 11, 2020.

Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix AZ 85007
VIA U.S.MAIL AND EMAIL (Supporting documentation will be sent in a separate transmittal)

Re: Self-Report – Code Violation: Rule 2.9

Ladies and Gentlemen,

This is a self-report of a violation of the Code of Judicial Conduct in connection with a case that was before me titled, . The matter involves a violation of Rule 2.9, Ex-Parte Communications, specifically Rule 2.9(A)1.b. and 2.9(A)3.

BACKGROUND

The violation is the result of a ruling I issued in connection with a Motion to Remove the County Attorney from the case. The Defendant's counsel filed the motion on making claims which in essence sought to relieve the because the assigned prosecutor made a plea offer and told Defendant's counsel the plea would not change and it would only get worse if not accepted within some initially unspecified time. The motion claimed that the had not complied with Rule 17.4 of the Rules of Criminal Procedure and stated that, during out of court discussions between counsel, the assigned prosecutor allegedly said he would not listen to what the settlement conference judge would say. Defendant demanded an evidentiary hearing. The responded that Defense counsel had made several statements that were not true and denied the allegations of failure to negotiate in good faith and opposed the evidentiary hearing.

The parties came before me on _____ and presented the matter. I advised Defense counsel that it seemed to me this matters turns on the prosecutor's discretion in making a plea offer and that there is no legal requirement that he do so or that he change an offer he has made. I asked whether there was some circumstance that made this different. I was trying to understand the basis for the drastic remedy of disqualifying the prosecutorial entity. Because Defense counsel had cited Rule 17, Rules of Criminal Procedure, I also asked, as it was not clear from the briefs, whether the parties had participated in a settlement conference inasmuch as it seemed to me that if there was a violation of Rule 17 the settlement conference judge would know best. I was told the parties had not had a settlement conference. It seemed to me then that the motion cited a rule on a matter had not taken place, a settlement conference. To me the motion therefore was premature, or not ripe. I was also advised that the original prosecutor was no longer on the case and that the _____, through a new prosecutor, would participate in a settlement conference. They cautioned, however, that they made an offer based on certain information ostensibly provided by the defense and that their offer was firm. The _____ also indicated that the Defendant was free to make a counter offer but that if the offer was not based on any new information the original offer would not get any better. Accordingly, I held the motion in abeyance and ordered the parties to participate in a settlement conference with a judge other than myself. I indicated that if after a settlement conference had been conducted the Defendant still believed there was an issue we would revisit the motion.

The matter did not come back to my court for several months, _____. It appears scheduling may have been the issue and I was told Defense counsel was on vacation during the month of _____. By the time the parties returned to me on the motion they had appeared before _____ on _____ for a settlement conference that was not successful. The Defendant's counsel re-urged his motion and demand for an evidentiary hearing because the _____ had not changed their position regarding the plea offer and because according to the Defendant's counsel, the _____ would not "listen to the judge". The _____ objected.

THE CODE VIOLATION

After hearing argument from counsel I asked if anyone had an objection to me conferring with _____ about what happened in his chambers at the settlement conference. No one objected. See, Minute Entry dated, _____. I believe I also indicated I would review the FTR recording and use all of that information to make a decision. I filed my decision on _____, denying the motion. See Minute entry dated, _____. The error and the code violation is that I considered information ex-parte and made my ruling without first giving the parties the opportunity to challenge the information learned from _____. At the time I had not realized the error. I did not intend to violate the rule. It was inadvertent but a violation nevertheless.

In hindsight I probably should have let _____ decide the motion, but if not, I should have given the parties the opportunity to address what I learned. It should be noted that no party objected to any of the findings or sought any reconsideration of the decision until Defense counsel filed a motion in _____ of this year.

On _____, just short of _____ after the decision, I received an email from a former colleague, a retired judge. In that email he indicated that I made an unspecified factual error in my ruling and that if I didn't change it Defendant's counsel would lose his license to practice law. He indicated counsel would be coming to the court to request an emergency hearing. I thought this a very unusual request because, *inter alia*, the case had not concluded and by this time Defendant's counsel had withdrawn from the case. In addition, the email was an ex-parte communication in that neither counsel of record was copied on it. Because the retired judge was a good friend of mine, a mentor of sorts, I felt that remaining on the case would be inappropriate and an appearance of impropriety if I had ruled in the case for either party. I also called the Executive Director of the CJC and my departmental presiding judge to confirm that the communication was inappropriate and that I was taking what I thought to be appropriate action by recusing. I also advised counsel of record of these actions. See, Minute Entry, _____ . On that same day Defendant's counsel, who had by that time withdrawn from the case, filed a motion to Clarify/Review the minute entry. That motion was referred to the newly assigned judge, _____, who denied the motion on _____ and _____ I took no part in the determination of that motion.

I did not hear anything more about the matter until _____, when I received a highly unusual email from Defendant's counsel asking to take my deposition because he was facing a Bar complaint as a result of a minute entry I issued. I assumed it was the _____ case, he didn't say, nor did he say what the purpose of the deposition or the subject matter. Again I called the Executive Director regarding the proper course of action in light of the rules prohibiting judges from being a character witness in an adjudicative proceeding and the law that generally disfavors deposing judges about decisions they have made in cases, especially ones that are active. I also contacted the Presiding Judge of _____ County who in turn and through the office of the Court's general counsel, referred the matter to the Attorney General who has provided counsel to me, advised Defense counsel of the need to seek a subpoena which she would move to quash.

Defense counsel now believes I made factual errors in the matter of deciding the motion but hasn't indicated to me what they are and what they have to do with his Bar complaint. In the last several days reviewing the file and various documents supplied by the Defense to discern what factual errors if any could be alleged by Defense counsel it finally hit me about one week or so ago that I failed to give the parties the opportunity address the matters I learned from _____ and that failure is a violation

of Rule 2.9. I recognize the seriousness of that error and I am embarrassed by it. I do not blame anyone but myself for it. I will say that in making my decision I believe I stated accurately the information I received from _____ and I believe I may have asked him to review the decision to make sure. As to this I can't be certain given the passage of time. If he says I did not do that or he doesn't recall it, I have no quarrel with that. I am remorseful that the error clouds the Bar complaint against counsel. I will say that even if I did not obtain or use the matters relayed to me by _____ my ultimate decision would not have been different in that based on the record there was insufficient cause to disqualify the entire office of the _____

As I write this self-report I have no idea specifically what the _____ has alleged to be an ethics violation against Defense counsel; although I can speculate it may have something to do with what the _____ may perceive as a frivolous motion. I made no referral of Defense counsel to the Bar fully cognizant of my duty under the Code to do so if I felt such a referral was warranted.

I apologize for the error. If you have any questions or need further information my cell phone number is _____ and my email address is _____

Sincerely,

/s/

Judge, _____ County
Superior Court (ret.)

SUPERIOR COURT OF ARIZONA
COUNTY

CLERK OF THE COURT

HONORABLE

v.

MINUTE ENTRY

The Court received Request to Clarify/Review Minute Entry Dated
filed . At the time of this minute entry, the case was assigned to
Judge Judge recused himself from this matter on and the case was
assigned to .

The Court has reviewed Request to Clarify/Review Minute Entry Dated
. The Court notes that references Rule 60 in his pleading. Assuming
that this reference is in regard to Rule 60 of the Arizona Rules of Civil Procedure, this request is
not timely.

The Court has reviewed the extensive Minute Entry Dated .

The Court will take no further action regarding the Minute Entry Dated .

IT IS ORDERED denying the Request to Clarify/Review Minute Entry Dated
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