State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 07-090

Complainant: No. 1307110569A

Judge: No. 1307110569B

ORDER

The commission reviewed the complaint filed in this matter as well as the recording of the hearing and found no ethical misconduct on the part of the judge.

The complaint is dismissed pursuant to Rules 16(a) and 23(a).

Dated: June 5, 2007.

FOR THE COMMISSION

/s/ Keith Stott
Executive Director

Copies of this order were mailed
to the complainant and the judge
on June 5, 2007.

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

[redacted]

CJC-07-090

[redacted]

28 March 2007

To Whom it May Concern;

I am a lawyer that has practiced primarily criminal defense law in [redacted] since admission to the Bar in [redacted] My career started at the [redacted] Public Defender's Office in [redacted] and after two years in a trial group, I left to go into private practice. I have held indigent defense contracts with the City [redacted] as a trial lawyer and an appeals and PCR lawyer, [redacted] and I currently hold a contract with the Office of Court Appointed Counsel in [redacted] to provide legal services for indigent defendants.

So as to give you a little background, let me outline some of the chronology of a typical criminal case in the [redacted] Superior Court. After the Not Guilty Arraignment, a date called the Initial Pretrial Conference date is set. That date is commonly referred to as the IPTC and it is set in front of what appears to be one [redacted] Superior Court Commissioners assigned to an IPTC calendar. If there any outstanding discovery issues they are to be addressed at the IPTC. If a Defendant wishes to enter into a plea agreement, he may do so at that time. In simple terms, the IPTC court acts as a weigh station for a case on the way to it's assigned Trial Judge, if it has not yet been weeded out of the system by way of a guilty plea proceeding. If, at the IPTC, there is no resolution by way of a plea agreement, the practice has been to set a "status conference" date, prior to the expiration of any plea deadline. This "status conference" is often times over the Defense Counsel's objection. The reality is that this IPTC setting and or mandatory status conference has turned into a setting that encourages the Defendant to accept the State's plea offer by a deadline, or else..... This is done by way of a forced "*Donald*" hearing, again, usually over Defense Counsel's objection.

In the particular case that prompts me to write, the IPTC was set for [redacted] At that time, as the Defendant's lawyer, I alerted the court that there were still outstanding discovery issues and discovery was still missing. Commissioner [redacted] who presided over that setting, set a mandatory status conference back in her court for [redacted] I did not object, this time, because I was hopeful that another hearing would be a good opportunity to make sure that the required discovery had been provided to the Defense. At no time did I ever indicate that my client wanted to change his plea of Not Guilty, which he entered at the arraignment. Note however, her minute entry indicates that this might be a "possible change of plea" and finds that the State has complied with discovery, when this was simply not the case.

My other reason for not objecting to the status conference is that when I have done this in the past and when my objection is overruled or request is denied, I have been reprimanded. Then, a phone call to [redacted] the administrator for the Office of Court Appointed Counsel, follows. Of course, this is only happens when the issue of the day stems from a case on which I am court appointed. If I appear with a privately retained client and there is an issue, I am not sure who she would call, as I am self employed. The implication is clear; that there are different standards for Defendants who are indigent. It is little wonder that often times indigent defendants are distrustful of their public defenders or court appointed lawyers and have the perception that they work for the State. If I speak up on behalf of Defendant in a court

appointed case, I face retaliation. If I speak up on behalf of a privately retained client, I do not worry that the client will discharge me.

I mean no disrespect but I have questioned Commissioner [ ] on several occasions as to the need for another mandatory status conference, prior to the expiration of the plea deadline. The mandatory status conference, beyond the IPTC, in Commissioner [ ] court, that must occur before the expiration of a plea deadline is routinely an exercise into her inquiring as to whether the Defendant is willing to accept the plea offer before the deadline, regardless of whether discovery is complete. The " coverage" attorney from the State is present and at that point the Defendant is FORCED to have what the Court calls a "*Donald*" hearing, that is, the Court tells the Defendant what the plea offer is, when it expires and that after the expiration it will not be offered again. Essentially, the court reiterates only the State's position or general policy. The "coverage" attorney is often times not familiar with the case or the file and "this is not my case" has become an acceptable response to inquiries about outstanding discovery. I only bring this up to illustrate that at no time is the State ever required to have the assigned County Attorney present or anyone else with any familiarity with the case present and any claim that either the IPTC or the mandatory status conference is a settlement conference is misleading and simply not true. Often times, in absence of information from the coverage attorney, the Court seems to be incestuously familiar with the practices and policies of the [ ] County Attorney's office when it warns the Defendant that the plea will not be offered again after the expiration date.

On [ ] in attempting to make the complete record, I advised the Court that if it insisted on doing this to please make sure that what it was accurately conveying was simply the County Attorney's policy and not necessarily the reality of the situation. A true settlement discussion does not entail the Judge giving the Defendant a lecture on what the plea offer is and demanding to know whether he will take it, especially with outstanding discovery issues. There is no discussion of the merits of the case, the strengths or weakness of the case, and discovery issues as are glossed over. There is simply no real discussion allowed. The proceeding is intimidating and it is coercive. Commissioner [ ] doesn't inform the Defendant that often times, the plea offer does get better and this is often tied to ongoing discovery. Make no mistake, this is clearly an attempt to get a Defendant to accept a plea agreement prior to the expiration and any claim denying that is simply not true.

On [ ] not unlike many other instances, I objected to this so called "*Donald*" hearing, attempting to make a record that *Donald* speaks to POST CONVICTION issues and whether the Court can order the State to reinstate a plea if a Defendant's attorney has failed to inform him about a plea. A *Donald* remedy must be premised on showing of ineffective assistance of counsel. However, I informed the Court that yes, I had advised my client of the plea offer, so no further inquiry should have been necessary. I also attempted to inform the Court that we find this proceeding coercive. My objection was based on the holding in *State v. Hon. Rayes/Reynaga*, CV 06-0303-Pr 3-20-07, where the Arizona Supreme Court addressed the issue of *Donald* type remedies and specifically stated that judges CANNOT consider *Donald* type relief in pretrial proceedings and reiterates what *Donald* stands for and that is as a POST CONVICTION relief issue. "No court in the United States has ordered a *Donald* type remedy unless it first found that defense counsel failed to provide effective assistance of counsel under the Six Amendment" the *Reynaga* Court reasoned. Nonetheless, Commissioner [ ] interjects her own desire to dispose of a case, over objection of counsel who is trying to be effective by insisting on discovery being resolved prior counsel's first. Advising the Defendant of a whether a plea offer is in his best interests is not possible otherwise and a plea that is not make voluntarily, knowingly and intelligently, t will be overturned on a Rule 32 proceeding. Yet she continues to insist on questioning the Defendant as to whether he is rejecting the offer. There is also the unmistakable implication that by holding a *Donald* hearing, the Judge is telegraphing that Defense counsel is ineffective.

To have a Judge presiding over a pre trial conference hearing insist on being the messenger for the State's position only and their policy is not only coercive but it undermines the attorney client relationship. The Defendant, in Commissioner [ ] court was required to answer if he understood his potential prison exposure, notwithstanding the fact that even if he were convicted, he would be eligible for probation, and most likely receive probation, as he has no prior felony convictions. In my [ ] years of practice, I have never seen a Defendant, with no prior felony convictions, sentenced to prison for first felony conviction stemming from an offense that did not actually require prison. For a Judicial officer to launch into a speech that required us to listen to her insisting on advising how he can plead guilty today and be guaranteed probation and then inform him that he could go to prison if he didn't accept the plea can be nothing but coercive and intimidating.

In this particular case on [ ] Commissioner [ ] first line of inquiry was whether there has been an offer and when does it expire. I asked if we could please address the outstanding discovery issues and while those were glossed over with a subsequent Order that the items be disclosed by [ ] there was much more emphasis on her talking about the plea offer and it's expiration date of [ ]

Again, today, I objected to this attempting to tell her that it interferes with his right to counsel when Commissioner [ ] became irate with me and all but screamed at me. She continued on to threaten me that if I continued with this I "would be in much bigger trouble than I ever realized." Certainly, this attack in open court and in front of the client is not condoned by the judicial canons, specifically Canon 3B(7) which states that a judge shall accord to every a person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. I also ask this commission to consider the threat in light of Canon 3B(9) which states that "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect it's outcome or impair it's fairness...." Not only does her threat and promise of bigger trouble than I ever realized violate the canon, I believe her comments to the Defendant commenting on the possible outcome of a conviction have the power to affect the outcome of a decision that his to make, with the advice of counsel.

She did not indicate that she would hold me in contempt or suggest that my attempt to object to a proceeding such as this was contemptuous, just that I would be in much bigger trouble than I ever realized.

At this point and given the "due processing" that seems to be happening in her court, I feel compelled to bring this to the Commission's attention. With greater and greater regularity, I am met with this kind of tyrannical temperament. I find her calls to the OCAC administrator inappropriate and while I've never been one to be intimidated easily, her calls to the contract OCAC administrator are intimidating. While we do not share an employer employee relationship, OCAC has the power to terminate my contract if I am perceived to be a "problem" and there is the power to control whether I am assigned cases which can certainly impact my practice. If that isn't tortuous interference with a contract at the very least, to be decided in another forum, I am often put in the position of having to chose between making the appropriate record or just being quiet so I don't have to worry about who she's going to call. Clearly, that impacts a Defendant's representation and Six Amendment right to effective assistance of counsel.

As for her threat today, I find no justification for it whatsoever. While I attempted to make a record she assumed the role of a schoolyard bully. If this is simply a difference of opinion on the law or differing interpretations, perhaps that would be the appropriate response from the bench, without threats and still allowing a record.

As I attempt to represent my clients, her reaction violates the judicial canons, specifically Canon 3B(4) which requires a judge to be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others when she threatens his lawyer as we stand in open court together. Any attempt to justify her intrusion into the attorney client relationship, based on any court policies does not justify her treatment of an attorney who is attempting to make a record and protect a client from being intimidated. Any further attempt to hide behind the court's power, sua sponte, and it's sole discretion to "participate" in "settlement discussions" is misleading. Commissioner [redacted] does not participate, but rather directs the proceeding. And clearly, "discussion" is not allowed. If it were, I would be allowed to talk on behalf of my client without fear of being reprimanded or threatened the way I was on [redacted] I also doubt that any meaningful settlement discussion takes place with a "coverage" attorney from the state who usually answers inquiries with "I don't know, it's not my case" or that a good faith discussion would be set on the morning calendar when a typical calendar has in excess of thirty cases set.

In all honesty, I expect that she would respond by saying that I am disrespectful. It seems, however, that in her court, respect is defined as not questioning or arguing or advocating on behalf of my client if it interferes with her desire to advance the State's offer and talk to the Defendant about pleading guilty and eliciting an answer him from him on whether he will take the plea offer before a so called deadline.

I have been approached by several others in the court system who have asked to remain anonymous as they relate stories of her abuse of power. Perhaps they are afraid of being in the kind of trouble she promised me, in open court and on the record. She is alleged to have told one attorney to not tell his client that she was planning on taking him into custody. Certainly that isn't proper? A Defendant cannot expect that his lawyer will keep him reasonably informed, as the ethical rules require, but he can expect to have the Judge advise him of only the State's position for purposes of pleading guilty?

I appreciate whatever attention you are willing to give to this matter.

[redacted]