State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 08-111

Complainant: No. 1334400311A

Judge: No. 1334400311B

ORDER

The commission reviewed the complaint filed in this matter and found no ethical misconduct on the part of the judge. The issue raised by the complainant is a legal question outside the commission's jurisdiction.

The commission is not a court and cannot change a judge's decisions; therefore, the complaint is dismissed pursuant to Rule 16(a).

Dated: June 10, 2008

FOR THE COMMISSION

\s\ Keith Stott
Executive Director

Copies of this order were mailed
to the complainant and the judge
on June 10, 2008.

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

Facts:

1. Defendant filed in the County Superior Court a timely notice of appeal from a judgment entered in a case before the Respondent Judge. Exh. A. did not at that time post a bond for costs on appeal as prescribed by A.R.CIV.APP.P. 10 (a).

2. Plaintiff-Appellee filed in the Superior Court a "Motion to Dismiss Appeal," stating that "because Defendant has not complied with [A.R.CIV.APP.P.] Rule 10, his appeal must be dismissed." Exh. B.

3. Defendant filed in the Superior Court a cash bond for costs on appeal. Exh. C. in accordance with A.R.CIV.APP.P. 10 (a), the Clerk of the Superior Court gave notice of this bond deposit to all other parties. Exh. D.

4. the Respondent Judge took up the Motion described in Paragraph 4 above and, by minute entry order of the same date, purported to grant the same "because Defendant has failed to respond to the same and Defendant has failed to post a bond for costs on appeal." Exh. E.

Law:

5. A.R.CIV.APP.P. 8 (a) provides:

> Rule 8. Appeal – How taken.
>
> (a) Filing the notice of appeal. An appeal or cross-appeal permitted by law from a superior court to an appellate court shall be taken by filing a notice of appeal with the clerk of the superior court within the time allowed by Rule 9. ... Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

6. The current Arizona Rules of Civil Appellate Procedure have been in effect since January 1, 1978. Official Comments to the new rules were published in 1977, and are included in most editions of the Rules in common use. The Official Comment to A.R.CIV.APP.P. 10 states: "A cost bond is no longer jurisdictional. See A.R.CIV.APP.P. 8 (a)."

7. In pre-1978 appellate practice in Arizona, appellant's filing of a cost bond was considered jurisdictional. However, motions to dismiss an appeal for failure to meet this requirement were presented to and ruled upon by the appellate court. See, e.g., *Pepsi-Cola Metropolitan Bottling Co. v. Romley*, 118 ARIZ. 565, 568, 578 P.2D 994 (App. Div. 1 1978).

8. A.R.CIV.APP.P. 8 (b) prescribes the procedure whereby an appellee may may file objections to the bond [for costs on appeal], specifying the particulars in which it is claimed that the bond is erroneous, defective, or insufficient, or that the surety is insufficient." Rule 8 (b) provides that the superior court shall hold a hearing on any such objection, and that "if the superior court sustains the objections in whole or in part, the appellant shall file, within 10 days thereafter, a new bond which complies in all respects with the court's order."

Discussion:

9. The "bond for costs on appeal" was deprived of its former jurisdictional character in Arizona *thirty years* ago. Under A.R.CIV.APP.P. 8 (a), Chiappetta's failure to file the bond for costs on appeal at the time he filed his notice of appeal was clearly "a ground only for such action as the *appellate court* deems appropriate, which *may* include dismissal of the appeal."

10. Under A.R.CIV.APP.P. 8 (a), under pre-1978 appellate practice, and under basic principles of appellate jurisdiction, it is and always has been manifest that a motion to dismiss a pending appeal must be addressed to, can be entertained only by, and certainly could be granted only by, the court in which the appeal is pending.

11. It is obvious that if the trial court had authority, after an appeal had been taken from one of its orders, to dismiss that appeal and thereby terminate the appellate court's authority in the matter, the right of appeal would be a nullity. (What if the would-be appellant appeals from the order dismissing his appeal? On Respondent Judge's hypothesis, the trial court could simply dismiss the second appeal as well.)

12. The signing by attorneys of the "Motion to Dismiss Appeal" which they addressed to the Superior Court was not warranted by existing law. Whether they can devise a "good faith argument for the extension, modification or reversal of existing law" which would warrant their action is not a question for this Commission.

13. The action of the Respondent Judge in uncritically taking up said Motion, injecting himself into an appellate proceeding and addressing a matter clearly relegated to the appellate court by the Rules of Civil Appellate Procedure, and actually *purporting to dismiss an appeal pending before the Court of Appeals* constitutes such an abuse of discretion as to amount to "misconduct in office" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

    By his conduct, the Respondent Judge has claimed (and even purported to *exercise*) the power to control litigants' ability to appeal from his own orders; he has attempted to usurp the unilateral and unreviewable authority to nullify A.R.S. § 12-2101, one of the fundamental laws shaping Arizona jurisprudence.

    Taking a conservative view of its authority, the Commission might understandably tend to regard even an egregious abuse of discretion whereby a judge claims, or purports to exercise, jurisdiction exceeding that lawfully possessed by his tribunal as a matter that can be adequately addressed by the appellate process – but not, surely, where the egregious abuse of discretion is also a direct and unwarranted attack on the appellate process itself! The conduct here complained of is not only "prejudicial to the administration of justice," but actually amounts to attempted interference with another (and superior) court's administration of justice.

    Where the controlling rule clearly confides a matter to the discretion of the Court of Appeals, whose province it is to correct the errors of the Respondent Judge, how must it appear to the intelligent layman if the Judge asserts the power to take the matter into his own hands, and in so doing forestall any risk that he will be corrected, or in any other way acted upon, by that Court? Must not the layman, and the public at large, regard the solemn pronouncements made from the Judge's bench as effectual? And can such a spectacle – a Superior Court judge, in defiance of rules and statutes, taking from the Court of Appeals a party's appeal from the orders of that same Superior Court judge – fail to bring the judicial office, and even the State's whole system for the administration of justice, into disrepute?