State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 14-400

Judge: Charles A. Irwin

Complainant: Emily Danies

ORDER

The complainant alleged a superior court judge engaged in improper ex parte communications and improperly inserted himself into the appellate process of a case.

Rule 1.2 of the Code of Judicial Conduct requires that "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". Rule 1.3 requires that a judge not "abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Rule 2.2 requires that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Finally, Rule 2.9 provides that a judge "shall not initiate, permit, or consider ex parte communications . . . concerning a pending or impending matter."

In a post-conviction relief proceeding involving a case in which Judge Irwin had imposed the underlying sentence, the judge became aware of a misstatement made by the defendant's current counsel about the status of one of the defendant's prior attorneys in oral argument before the Arizona Supreme Court. In an ex parte email, Judge Irwin contacted the Attorney General's office, specifically one of the attorneys who appeared at the oral argument, advising of the misstatement and demanding his office take action to correct the mistake. When that attorney advised the judge his office believed the misstatement to be immaterial to the outcome of the case and that the Attorney General's Office would not be filing anything concerning the misstatement, Judge Irwin sent yet another ex parte email demanding to have a supervisor involved, and chastising both sides over the misstatement. The parties ultimately submitted a statement of clarification to the Arizona Supreme Court. Upon remand of the case to the trial level, the complainant sought and obtained Judge Irwin's disqualification for cause due to the foregoing conduct.

The commission found that Judge Irwin's ex parte communications and his insertion of himself into the appellate process of the case in question violated the foregoing rules. Accordingly, Superior Court Judge Charles A. Irwin is hereby publicly reprimanded for his conduct as described above and pursuant to Commission Rule 17(a). The record in this case, consisting of the complaint, the judge's response, and this order shall be made public as required by Rule 9(a).

Dated: March 26, 2015

FOR THE COMMISSION

/s/ Louis Frank Dominguez

Louis Frank Dominguez
Commission Chair

Copies of this order were mailed
to the complainant and the judge
on March 26, 2015.

MANDEL YOUNG
APPELLATE LAWYERS

December 16, 2014

VIA E-MAIL
Arizona Commission on Judicial Conduct
1501 W. Washington St., Suite 229
Phoenix, AZ 85007
cjc@courts.az.gov

Re: Judicial Complaint against Judge Charles Irwin

Dear Commission Members:

I write on behalf of Attorney Emily Danies in submitting this complaint against Cochise County Superior Court Judge Charles Irwin related to Superior Court Case Number CR 2007-00013.

Introduction

On December 5, 2014, Lisa Pinahi with the Ethics Hotline at the State Bar of Arizona advised Emily Danies that she is obligated to report ethical misconduct by Judge Charles Irwin to the Commission on Judicial Conduct (Commission). This advice was consistent with informal advice Ms. Danies received from attorney Mark Rubin who is experienced in ethics matters. Thereafter, Ms. Danies retained the firm of Mandel Young and undersigned counsel to assist her in filing this complaint with the Commission.

In summary, Judge Irwin initiated a series of escalating improper *ex parte* communications related to a factual error that culminated in a false accusation that Ms. Danies intentionally misled the Arizona Supreme Court. *See* Attachment 1 (Judge Irwin's Emails). The error at issue is one that both the State and Ms. Danies consider immaterial and yet Judge Irwin's obsession with it led him to improperly insert himself as an advocate into the appellate process of the underlying case.

Ms. Danies respectfully requests that the Commission take the following actions:

1. Given the power that Judge Irwin may continue to yield over Ms. Danies and her client, and his accusations denigrating Ms. Danies' in the underlying case, firmly remind the judge of his obligation to disqualify himself pursuant to Rule 2.11 of the Arizona Code of Judicial Conduct (Code);

2. Similarly, remind Judge Irwin that it is grounds for separate or additional discipline should he engage in any conduct that may be construed as retaliatory, as set forth in Rule 2.16(B); and

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3. Given Judge Irwin's disciplinary history, the egregious nature of the misconduct at issue, and the relevant aggravating factors present, appoint an investigative panel to consider the filing of formal charges and recommendation of a formal sanction.

The Underlying Case—State v. Diaz

Daniel Diaz was convicted of drug-related offenses following a jury trial in a 2007 case, and has since been through the appellate process four times. Three of those four times related to post-conviction relief (PCR) proceedings. Judge Charles Irwin served as Mr. Diaz' trial judge and issued the primary rulings that are the subject of Mr. Diaz' current appeal pending before the Arizona Supreme Court. If Mr. Diaz' current appeal is successful, as it is likely to be based on the representations of the Court and the concessions by the State at oral argument, the matter will be remanded to Judge Irwin for further proceedings.

In his initial PCR attempt, Kelly Smith served as Mr. Diaz' appointed counsel. Ms. Smith sought numerous extensions in which to file the Rule 32 petition. Judge Irwin eventually struck Ms. Smith's untimely petition and dismissed the Rule 32 proceeding with prejudice based on Ms. Smith's delays. The ruling striking the petition effectively foreclosed Mr. Diaz opportunity to ever raise an ineffective assistance of counsel claim. The Court of Appeals granted review and denied relief in a memorandum decision. *See* Attachment 2 (Court of Appeals Memorandum Decision, January 1, 2011).

In a second PCR attempt, Paul Mattern served as Mr. Diaz' counsel on a pro bono basis. Mr. Mattern was not appointed by the court. Similar to Ms. Smith, Mr. Mattern sought multiple extensions of his PCR filing deadline, and ultimately Judge Irwin again dismissed the petition. In the Court of Appeals ruling denying Mr. Mattern's PCR attempt, the court referred to him incorrectly as appointed counsel; this minor error was ultimately repeated in all subsequent appellate proceedings. *See* Attachment 3 (Court of Appeals Opinion, January 27, 2012).

Complainant Ms. Danies was subsequently appointed by the Court of Appeals in 2012 with Cochise County Indigent Defense approving the appointment to file a Petition for Review to the Arizona Supreme Court. Ms. Danies has a contract with Cochise County Indigent Defense. The Supreme Court denied jurisdiction. After consultation with Mr. Diaz, Ms. Danies then filed a further PCR attempt. The Court of Appeals again issued a memorandum decision denying Mr. Diaz relief, and again erroneously referred to Mr. Mattern as appointed counsel. *See* Attachment 4 (Court of Appeals Memorandum Decision, February 13, 2014). The Court of Appeals recognized the inherent unfairness of the position in which Mr. Diaz found himself based on the rigidity of the relevant procedural rules, but determined that its hands were tied by those rules. *See* Attachment 3 at 4, ¶7.

Ms. Danies then petitioned for review by the Arizona Supreme Court, which accepted the opportunity for review, requested supplemental briefing, and appeared for oral argument on

November 6, 2014. *See* Attachment 5 (Diaz Petition for Review) and Attachment 6 (Diaz Supplemental Brief).

In accepting the petition for review, the Arizona Supreme Court reframed the issues presented, and, consistent with the Court of Appeals, continued to refer to Mr. Mattern and Ms. Smith both as appointed counsel although only Ms. Smith was appointed. *See* Attachment 7 (Supreme Court Framed Issue). During the oral argument, Justice Timmer raised a question referencing Mr. Mattern as appointed counsel; neither attorney corrected Justice Timmer's misunderstanding of Mr. Mattern's status and instead focused on the substance of her question.

Based on undersigned counsel's interviews, neither the State nor Ms. Danies believed the mistake regarding Mr. Mattern's status to be a material issue and thus neither party sought to correct the Court.

Judge Irwin's Misconduct

Sometime between November 6 and 21, 2014, Judge Irwin called Assistant Attorney General Jonathan Bass, the attorney who prepared the briefing for the State before the Arizona Supreme Court in the Diaz matter. The judge explained that he had viewed the oral argument recording, pointed out the misstatement regarding Mr. Mattern's status, and urged Mr. Bass to take corrective action.

Mr. Bass declined to take action pursuant to Judge Irwin's phone call. He did not believe the factual error was of any material consequence to the case.

On Friday, November 21, 2014, Judge Irwin emailed Mr. Bass reiterating his concerns regarding the Court's misunderstanding of Mr. Mattern's status. Attached to the judge's November 21 email was a 2012 email from Ms. Danies to Amy Hunley, the Indigent Defense Administrator for Cochise County. That email chain revealed that Judge Irwin's assistant, Heidi Tanner had contacted Ms. Hunley on November 21, 2014, apparently in an effort to obtain the 2012 email. In other words, the judge had engaged his staff to investigate for the purpose of finding evidence as to Ms. Danies' knowledge of Mr. Matterns' status, and then provided that evidence to Mr. Bass. The judge's email suggested to Mr. Bass that Ms. Danies had thus engaged in improper conduct because she had failed to take affirmative action to correct the Supreme Court on this factual point. Judge Irwin again urged Mr. Bass to take action.

Judge Irwin did not copy Ms. Danies on the email communication, nor did he suggest that his communication be disclosed to her.

On December 2, 2014, the judge followed up with Mr. Bass asking, "Has there been any development in this matter after your Notice to the SC re: the facts?"

Mr. Bass met with his supervisor, Joseph Parkhurst, about Judge Irwin's emails and responded to the judge, "We decided not to notify the Court. As an office, we concluded based on the pleadings and oral argument, that Mattern's status wasn't essential to the resolution of the case. The Pima Co Attorney's Office agreed."

The following morning, Judge Irwin responded to Mr. Bass and again indicated he believed Ms. Danies engaged in misconduct: "the Court was mislead [sic] by defense counsel." He also indicated disdain for both sides, "Seems to me the decision not to inform the Court of this critical mistake of fact is more of a face saving decision and will result in bad case law being generated."

Judge Irwin went on to demand an opportunity to speak with Mr. Bass' supervisor and indicated he would look at his "options . . . as the trial judge to inform the Supreme Court of what I view as an intentional misrepresentation of facts."[1]

In deference to the judge's demand, Mr. Parkhurst called Judge Irwin and discussed the judge's concern about the factual error, as well as additional questions the judge had about the involvement of the Pima County Attorney's office. The judge continued to urge some action by the attorneys for the State, improperly taking on the role of an advocate in the appellate proceedings.

On December 3, 2014, Mr. Bass contacted Ms. Danies and informed her for the first time of Judge Irwin's conduct in initiating these communications. On December 4, 2014, Mr. Bass forwarded the various emails to Ms. Danies.

The attorneys on both sides ultimately decided that it would not cause harm to alert the Court to the factual error, although they continued to believe this error was not material to the issues raised. The parties filed a joint notice to the Court clarifying the issue. *See* Attachment 8 (Diaz Notice of Clarification). Ms. Danies, of course, had no objection to notifying the Court and assisted in drafting the Notice. That said, it is important to note that Judge Irwin's angry emails impugning Ms. Danies' integrity prompted her to file the Notice out of a sense of intimidation and desire to serve Mr. Diaz well given he might soon be back before Judge Irwin.

Application of the Code to Judge Irwin's Misconduct

Judge Irwin's conduct as described above violates, at a minimum, Rules 1.2, 1.3, 2.2, 2.3, and 2.9. While the underlying case is not currently before Judge Irwin, it is likely to return to him and thus his substantive *ex parte* communications were improper as relating to an impending case. *See* Rule 2.9. Further, the judge failed to promote confidence in the judiciary when, as an experienced judge, he engaged in such blatantly improper conduct not once, not twice, not three times, but at least four separate occasions of improper communications. *See* Rule 1.2. This

[1] Comment 10 to Rule 2.9 suggests there are circumstances under which it would be permissible for a trial court judge to communicate with the appellate courts "with respect to a proceeding." Of course any such communication must be disclosed to the parties.

misconduct was compounded by the judge's failure to subsequently recognize his missteps and disclose his inappropriate communications to Ms. Danies. *See* Rule 2.9.

Importantly, the judge's substantive communications were particularly egregious because he took on the position of an advocate in the appellate process, repeatedly demanding that the State's attorneys to take some action. It is not clear why Judge Irwin was so very concerned with a factual error that all parties agreed was immaterial, except to the extent he believed the ongoing misconception somehow reflected poorly on him and his rulings. His reliance on his position as a judge to try and force the State's attorneys into action was thus an improper abuse of his position. *See* Rule 1.3.

The judge further displayed a lack of impartiality by communicating only with the State, impugning Mr. Diaz' attorney to the State, and repeatedly pressuring the State to take substantive action in an ongoing case. *See* Rule 2.2. Judge Irwin's derogatory references to Ms. Danies in improper communications with the State's attorneys suggest an improper personal bias against her, which is particularly concerning in light of the likelihood that Ms. Danies will soon be back in front of Judge Irwin on this very matter. *See* Rule 2.3.

As the Commission is aware, Judge Irwin has previously received a formal sanction for significant misconduct that demonstrated a lack of discernment regarding proper conduct as a judge. *See* CJC Case No. 00-200, JC 00-0003 (formal censure for misconduct including keeping alcohol in chambers and inviting court employees to drink in chambers after hours; making inappropriate, sexually suggestive comments to a female court probation officer; and acting in such a way as to result in complaints by two other court employees for sexually inappropriate behavior).

While the direct conduct in the underlying case does not involve the same facts, the same general principle applies. Judge Irwin either lacks an understanding of his proper role and limitations on his conduct as a judge or does not care.

Commission Rule 19 sets forth some aggravating factors that the Commission considers in identifying the appropriate sanction for misconduct. Numerous aggravating factors apply in this case:

1. Judge Irwin's conduct was "frequent" in that it occurred multiple times (19(a));
2. he is experienced and should have known better than to engage in such blatantly improper conduct (19(b));
3. the conduct occurred in his official capacity (19(c));
4. the conduct impaired respect for the judiciary in that it involved an entire department at the Arizona Attorney General's office, the Cochise County Indigent Defense Coordinator, and Ms. Danies' office (19(d));
5. the judge exploited his position to improperly insert himself into the appellate process and intimidate the appellate attorneys in doing so (19(e));

6. he has not, to date, recognized the wrongful nature of his actions and instead his inappropriate conduct appeared to escalate (19(f)); and
7. Judge Irwin has had prior disciplinary proceedings relevant to the instant case (19(g)).

Conclusion

Our Supreme Court has articulated the goals of judicial discipline as: "maintaining the high standards of the judiciary and the proper administration of justice, protecting the public from judges who abuse the responsibility entrusted to them, and assuring the public that we will not tolerate misconduct by judges." *In re Carpenter*, 199 Ariz. 246, 248, ¶9, 17 P.3d 91, 93 (2001).

Judge Irwin's conduct is egregious for a number of reasons, not least of which is his repeated and blatant disregard for the fundamental principle that judges do not insert themselves as advocates into an ongoing court proceeding.

Ms. Danies respectfully submits this complaint so that the judge's misconduct can be promptly and publicly addressed. In particular, the Commission should act to ensure that the public, including judges and attorneys in Arizona, know that such conduct as occurred here is not proper and will not be countenanced.

Sincerely,

/s/ Jennifer M. Perkins

Jennifer M. Perkins

CC: Emily Danies

Resp Judge Irwin
(rec'd via US Mail 1/23/15)
JAN 23 2015

Charles A. Irwin
Judge
Division I

100 Colonia de Salud, Suite 203
(520) 803-3300

Superior Court
Cochise County
Sierra Vista, Arizona 85635

January 16, 2015

April P. Elliott
Staff Attorney
Commission on Judicial Conduct
1501 W Washington, Suite 229
Phoenix AZ 85007

RE: Response – Case #14-400

Dear Ms. Elliott:

I received Ms. Danies' complaint concerning my conduct in case #CR200700013 (State v. Diaz) while that matter was pending a decision by the Arizona Supreme Court on a Petition for Review of proceedings as to a Petition for Post-Conviction Relief filed by Ms. Danies on behalf of Mr. Diaz. The Supreme Court did not accept review as to any of the issues raised by Ms. Danies, rather the Court reframed the issue it wished to address and included within that reframed issue a clear mis-statement of fact, i.e, that Mr. Diaz' "two prior court-appointed attorneys" failed to file a Petition in the two prior Post-Conviction Relief proceedings. (Actually, Mr. Diaz' second attorney was not court appointed.)

I became aware of the Court's misunderstanding of the appointed/non-appointed status of Mr. Diaz' previous attorneys when I read the Court's September 13, 2014 Order. I took no action at that time because I thought that since Mr. Mattern's status had been discussed and resolved within the appellate process in Division Two, the attorneys for the state and Mr. Diaz would correct the Court's misunderstanding of fact.

Around November 19, 2014, I became aware that oral arguments had taken place. My Judicial Assistant informed me that the "court-appointed" issue had been raised by the Court and she believed that the Court was still of the belief that both of Mr. Diaz' previous lawyers were court-appointed. I watched the recorded oral arguments myself and came to the same conclusion based on Justice Timmer's questions and Ms. Danies' response. I further noted that the state also did not correct the Court's factual error.

In her complaint, Ms. Danies admits that she nor the state "corrected Justice Timmer's misunderstanding...". She justifies such action by her belief that notwithstanding the factual error being placed in the Court's reframed issue, in her opinion (and the state's) the factual error was not material.

At that time I had no idea how relevant this factual error would be to the Court's decision, but I knew it was important enough that the Court itself included it in its reframed issue and made specific reference to it at oral argument.

My expectation of both attorneys in this matter is that they would have made it clear to the Court that it was operating under a misunderstanding of fact. Anything less in my view was a breach of their obligation of candor toward the Court. (E.R. 3.3).

After I watched the oral arguments, I was at a loss as to what should be done. It was my firm belief that the Supreme Court should be informed of this factual error before they issued their opinion. I had no idea as to when the opinion would issue and I knew I could not call the Court with this information.

I spoke with my Presiding Judge, Judge Conlogue, our former Presiding Judge, Judge Hoggatt, and another Superior Court Judge seeking advice. All three confirmed that I should not call the Court directly, but all three also thought I should call the Attorney General's Office and request that the Court be notified of this factual error through that office.

While I was certainly aware that the Attorney General's Office represented the state in this matter, such office also serves the Court as its attorney when needed. I have, over the years, called Jonathon Bass for advice as to Post-Conviction Relief issues in serious cases. He is the "go to" person for many Judges on procedural matters.

I called Mr. Bass either on November 19th or 20th and asked him whether he was aware of the factual error. At first, he was not clear because the Court of Appeals had inadvertently left the error in its Memorandum decision. I asked him to review the record to make sure, as I was certain of the error. I asked him if the Court can, at this stage, (after oral argument and pending its decision) be notified of the error. I suggested that the Attorney General file a Notice to the Court. Mr. Bass indicated that he would check the record to make sure of the correct facts, consult with his supervisor and I seem to recall that he said he would speak to Mr. Lines, the Deputy Pima County Attorney who argued the case, and Ms. Danies. I requested that he let me know the outcome of his actions.

As Mr. Bass was not clear about Mr. Mattern's status, I did contact (through my Judicial Assistant) our Indigent Defense Office to verify that Mr. Mattern was not court-appointed. I received Ms. Danies' e-mail from the Indigent Defense Office and forwarded it to Mr. Bass on November 21, 2014.

Having not heard from Mr. Bass, I e-mailed him on December 2, 2014. I received his e-mail of December 2, 2014 and responded to it on December 3, 2014.

While I agree that my December 3, 2014 e-mail is direct regarding my opinion of counsel's duty of candor to the Court, it clearly demonstrates that my sole purpose was to make sure the Supreme Court was made aware of the factual error and that it was my view that the attorneys had the obligation to correct the Court's misunderstanding. My intention in requesting that Mr. Bass' supervisor call me was to urge the Attorney General to reconsider and file a Notice of Correction; if not, then to request the Attorney General on my behalf as the Trial Judge file the Notice.

I received a call from Assistant Attorney General Joseph Parkhurst (Mr. Bass' supervisor) on or about December 3, 2014. He indicated he would review the record to verify the error and talk with Mr. Lines and Ms. Danies about filing a joint notice of clarification and, if Ms. Danies declined, the Attorney General would consider filing a separate notice. As it was my view that the attorneys had the obligation to advise the Court of the error, I was satisfied with Mr. Parkhust's actions and did nothing further. Mr. Parkhurst did initiate the call to me directly (as I had requested) but at no time did he indicate that he believed the communication was of an ex-parte nature. It was clear that my concern was as to the procedural process in correcting an error of fact.

In my phone conversations and e-mails I was not acting as an advocate for either side, nor was I advancing legal arguments to be raised or which had been previously raised before the Supreme Court. I was addressing both parties' obligation to the Court. An obligation both parties recognize as the joint Notice of Clarification was filed on December 4, 2014. I understood that the Attorney General's Office would share my concerns and e-mails with Ms. Danies and I fully expected them to do so after my discussion with Mr. Parkhurst.

This is the first time in my judicial career that I have been presented with this situation. I have not previously watched oral arguments of any of my cases presented to the Supreme Court and only did so based on the information presented by my Judicial Assistant that the factual error had not been corrected. I know of no Canon or Rule that prohibits the Trial Court from watching oral arguments.

There have been times when I have become aware of behavior by attorneys that comes close to or violates their ethical obligations to the Court and I do address such behavior. In this case, I do not think that an attorney can seriously argue their obligation to correct the Court's factual error, but Ms. Danies apparently did so only because of my insistence. It is unfortunate that she did so "out of a sense of intimidation".

In my view, there is a disconnect between Ms. Danies' insistence that the Court's error was not relevant to the substantive argument before the Court and her claim that I engaged in "substantive communications" with the Attorney General. The factual error I brought to the Attorney General's attention was not a substantive issue; rather, it was a procedural/administrative issue. How else would the Supreme Court be notified that it is operating under a factual misunderstanding?

As I was not attempting to give either party a procedural, substantive or tactical advantage as a result of my communication, my e-mails and phone conversation do not meet the definition of ex-parte communication. (See Judicial Ethics Advisory opinion 02-03, citing the Black's Law Dictionary definition of ex-parte) I also reviewed opinion 95-18 and found it helpful in determining whether my communication was "administrative" in nature.

While I understand that there are many shades of gray in this area of communication, this situation was very unique. I sought advice from colleagues, then called the Attorney General who provides advice to the Court. In hindsight, I do agree it would have been good to send the e-mail to both the Attorney General and Ms. Danies.

I have no improper personal bias against Ms. Danies based on this situation. I communicated through the Attorney General to her the obligation of both attorneys to inform the Court of the error and they did so. My opinion as to when such correction of the record should have occurred is of no importance at this point.

I understand Ms. Danies feels I made "derogatory references" to her lack of candor with the Court when she was asked a specific question by Justice Timmer or in not addressing the error in her pleadings, but I was equally hard on the state. It is my view that both attorneys shared the same obligation and eventually met it with their joint Notice. I do understand that this Post-Conviction Relief proceeding will be returning to the Trial Court. I can assure this Commission and Ms. Danies that I will not engage in any improper retaliatory conduct toward her or her client for her filing of this complaint.

In addressing the mitigating and aggravating factors in the event the commission feels that my communications were of an ex-parte nature, the following is offered for your consideration:

a) While there were two phone calls and two e-mails to the Attorney General's Office, they were all to address the one procedural/administrative issue: how to notify the Court of the error. The second call was initiated by the Attorney General. The communication stopped as of December 3, 2014 and the parties filed their joint Notice on December 4, 2014. No substantive matters were discussed in any of the communications.

b) The communications served to remind the attorneys on both sides of their obligation to correct the Supreme Court's factual error and did not attempt to advocate any issue pending with the Court.

c) There was no improper purpose behind the Court's actions.

d) The Court will be more cautious even in administrative communications to ensure that all parties are included in such communications.

e) My prior discipline from 2000 is over 14 years in the past and is of absolutely no relevance to this complaint. I have lived with the consequences of my past behavior, accepted full responsibility and completed all corrective actions required. I learned from my mistakes then and feel I have become a better Judge because of them. Ms. Perkin's attempt to influence the commission based on the 2000 action should be ignored.

I would request that the commission dismiss the complaint.

Sincerely yours,

CHARLES A. IRWIN,
Superior Court Judge

CAI/ht

MR
14-400

APR 0 8 2015

Charles A. Irwin
Judge
Division I

100 Colonia de Salud, Suite 203
(520) 803-3300

Superior Court
Cochise County
Sierra Vista, Arizona 85635

April 8, 2015

The Honorable Louis Frank Dominguez
Commission Chain
Commission on Judicial Conduct
1501 W. Washington, Ste 229
Phoenix, AZ 85007

RE: Motion for Reconsideration Case #14-400

Dear Judge Dominguez:

Please consider this correspondence as my Motion for Reconsideration of the Commission's Order dated March 26, 2015.

This request is not to dispute the Commission's findings that I have violated the cited Rules, but rather to request such violations be addressed by a "Dismissal with Comment" (Rule 16(h)) rather than a reprimand.

In reflecting upon my actions in this matter I realize that my zealous concern regarding the misstatement of fact lead to my inappropriate behavior and chastisement of the attorneys involved.

I was aware of my ire directed at the attorneys for what I perceived as a lack of candor to the Supreme Court. Please keep in mind that I made initial contact with the AG's office only after I consulted with Judge Conlogue and Judge Hoggatt to determine what action was appropriate, if any.

While I didn't have any personal or economic interest in the outcome of the Appellate process, I did insert myself where I had no business, notwithstanding the fact I had been involved as the trial judge in this matter since 2007. I lost sight of the fact that it was not "my" case, but only one of many that I am called on to process in the manner required by our Judicial Code.

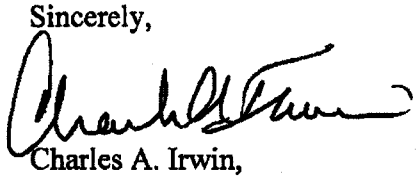
Rule 5 of the Commission Rules indicates that any disciplinary remedy or sanction shall be sufficient if it restores and maintains the dignity and honor of the position and protects the public by assuring that the judge will refrain from similar acts in the future.

I submit that based on this unique set of facts that there is no likelihood or similar missteps in my future. This judicial position allows me to learn something new about myself almost daily, even after sixteen years. It is challenging and 99% of the time I meet that challenge, but in this case, I came up short.

I request you grant this request to modify your previous Order to a "Dismissal with Comment".

Thank you for your consideration.

Sincerely,



Charles A. Irwin,
Superior Court Judge

Commission on Judicial Conduct
1501 W. Washington St., Suite 229
Phoenix, AZ 85007
Telephone: (602) 452-3200

STATE OF ARIZONA

COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning **Judge Charles A. Irwin** Superior Court Cochise County State of Arizona, Respondent	Case No.: 14-400 **ORDER DIRECTING THE FILING OF A RESPONSE MEMORANDUM**

Respondent Judge Charles A. Irwin filed a Motion for Reconsideration of the public reprimand issued on March 26, 2015.

IT IS ORDERED that Disciplinary Counsel for the commission shall prepare and file a response memorandum to Respondent's motion. Disciplinary Counsel shall provide a copy of her Response to Respondent on or before April 17, 2015. Absent a request from the commission, Respondent may not submit a written reply brief or any additional materials.

Dated this 9th day of April, 2015.

COMMISSION ON JUDICIAL CONDUCT

Louis Frank Dominguez

Louis Frank Dominguez
Commission Chair

Copies of this pleading delivered via electronic or first class mail on April 9, 2015, to:

Hon. Charles A. Irwin
Cochise County Superior Court
100 Colonia de Salud, Suite 203
Sierra Vista, AZ 85635

Respondent

April P. Elliott
aelliott@courts.az.gov
Disciplinary Counsel

By: Kim Welch
Kim Welch, Commission Clerk

April P. Elliott
Disciplinary Counsel (Bar #016701)
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STATE OF ARIZONA

COMMISSION ON JUDICIAL CONDUCT

Inquiry concerning	)	Case No.: 14-400
	)	
Judge Charles A. Irwin	)	**Response to Motion for**
Superior Court	)	**Reconsideration**
Cochise County	)	
State of Arizona,	)	
	)	
Respondent	)	

On March 26, 2015, the Commission on Judicial Conduct (Commission) publicly reprimanded Superior Court Judge Charles A. Irwin (Respondent) for violations of the Arizona Code of Judicial Conduct (Code). Respondent filed a Motion for Reconsideration on April 8, 2015. Undersigned Disciplinary Counsel submits this response pursuant to Commission Rule 23(b), respectfully requesting that the commission deny the motion.

I. Respondent Does not Contest the Finding of a Violation, but Only the Severity of the Sanction

Respondent does not dispute the commission's findings that he violated Rules 1.2, 1.3, 2.2 and 2.9 of the Code. Rather, he only disputes the severity of the sanction. Instead of a reprimand, he seeks a dismissal with comment. In his response, Respondent cites Rule 5 of the commission's rules that any disciplinary remedy or sanction shall be sufficient if it restores and maintains the dignity and honor of the position and protects the public by assuring that the judge will refrain from similar acts in the future. He avows that, "based on the unique set of facts that there is no likelihood or similar missteps in my future."

II. Good Cause Exists for the Imposition of the Reprimand

The commission's reprimand was based on a finding that Respondent violated four separate Code provisions: Rules 1.2, 1.3, 2.2 and Rule 2.9. The conduct that led to this finding can be broken down as follows:

1. Respondent was the trial court judge in the underlying case of *State v. Diaz.* Mr. Diaz was convicted at trial, and sentenced to an aggravated term of 25 years in prison. Mr. Diaz had been offered two pleas for less time, which he had turned down. Mr. Diaz' trial counsel advised the court that he had provided Mr. Diaz with incorrect information as to the maximum sentence possible.
2. Mr. Diaz, through court appointed counsel, Kelly Smith, appealed the conviction which was affirmed. Mr. Diaz then began to pursue his post-conviction remedies pursuant to Rule 32, Arizona Rules of Criminal Procedure. Ms. Smith requested and received multiple extensions to file the petition, but ultimately filed well past the deadline. Her petition was struck, and Respondent dismissed the Rule 32 proceedings with prejudice. This decision was affirmed by the Arizona Court of Appeals.
3. Subsequently, through events not entirely clear, an attorney friend of Ms. Smith, Paul Mattern, began representing Mr. Diaz in a pro bono capacity on a Rule 32 claim of ineffective assistance of counsel. He also sought several extensions to file, but never did, and Respondent again dismissed the Rule 32 proceedings with prejudice. The Arizona Court of Appeals referred both attorneys to the state bar, and appointed a new attorney, Emily Danies, to file a petition for review to the Arizona Supreme Court. The Arizona Court of Appeals' ruling incorrectly referred to Mr. Mattern as court-appointed counsel, and that error was repeated in subsequent court proceedings.

4. Ms. Danies filed a Rule 32 petition, which Respondent denied. The Arizona Court of Appeals affirmed the ruling. Ms. Danies petitioned to the Arizona Supreme Court for review, which it accepted and set the case for oral argument. The Arizona Supreme Court continued to refer to Mr. Mattern as court-appointed counsel. Ms. Danies referred to Mr. Mattern as pro bono counsel in her brief, but at oral argument, she did not correct the misunderstanding that Mr. Mattern was not court-appointed.

5. Following oral argument, Respondent became aware of the misstatement about Mr. Mattern's status and sent an ex parte email to Jonathan Bass of the Arizona Attorney General's Office, one of the attorneys present at oral argument on behalf of the state. He told Mr. Bass in this email that he believes the Arizona Supreme Court should be informed of the factual error concerning Mr. Mattern's status. His email chain reveals that he directed his judicial assistant to investigate whether or not Ms. Danies knew Mr. Mattern was not court-appointed. When Mr. Bass had not responded to his email, Judge Irwin sent a follow-up email the next day. Mr. Bass then responded, and advised that his office had chosen not to notify the court based on their conclusion that Mr. Mattern's status was not essential to the resolution of the case.

6. Respondent then sent another ex parte email to Mr. Bass in which he alleged that Ms. Danies intentionally misrepresented the facts to the court. He chastises both attorneys for their handling of the case, and demanded to speak to Mr. Bass' supervisor. Respondent then had an ex parte communication with the supervisor, Joseph Parkhurst. The next day, Mr. Bass notified Ms. Danies of the communications with Respondent, and they jointly agreed to file a notice of clarification with the Arizona Supreme Court.

Rule 1.2 of the Code requires that 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." Respondent's multiple ex parte communications with one side had, at the very least, the appearance of impropriety. This erodes public confidence that a judge can be fair and impartial to both sides. Rule 1.3 of the Code states that a judge "shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." When Respondent sent multiple emails demanding a correction, he stepped out of his neutral judicial role, and he took on the role of an advocate. He appears to have done so to protect his and his court's reputation as not having appointed an attorney who had failed in his basic duty to file a petition on time, which nevertheless still qualifies as a personal interest under Rule 1.3.

Rule 2.2 of the Code requires that a judge "uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." By communicating with only one party, pressuring its representatives to take substantive action in a pending matter, and impugning the character of the defense attorney to the state, Respondent was not performing his duties fairly and impartially. Finally, Rule 2.9 of the Code states 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," with some exceptions. Undersigned counsel does not believe any of those exceptions apply. Respondent had multiple ex parte email and telephone communications with the Attorney General's office about a pending matter without notice to opposing counsel or an opportunity for her to participate in them.

III. Factors Supporting a Sanction

The Scope section of the Code sets forth several factors for the commission to consider in determining whether a sanction is appropriate in a particular case. On balance, those factors support the issuance of the reprimand in this case.

A. Seriousness of the Transgressions

Our judicial system depends on the public's perception that judges are fair and impartial. A reasonable person would believe that a judge who has multiple email and telephone communications with only the state in a pending criminal matter, which involves impugning the character of defense counsel, could not be fair and impartial to the defendant.

This factor weighs in favor of a sanction.

B. Facts and Circumstances Existing at the Time of the Transgression

Respondent appears to have truly believed the issue of court-appointed counsel was a material issue to the case. However, instead of contacting both parties about the misstatement, he only contacted the state. After the Attorney General's office advised him they did not deem that fact to be material to the Arizona Supreme Court's determination, Respondent sent yet another ex parte email demanding to speak to a supervisor about it, and chastising both of the lawyers' presentment of the case. While he indicates he sought advice from two other seasoned judges on this issue, Respondent should have known it was improper to only have communications with one side on a pending case. Likewise, Respondent never took remedial measures to notify Ms. Danies of his communication with counsel for the state. Mr. Bass notified Ms. Danies.

This factor weighs in favor of a sanction.

C. Extent of Any Pattern of Improper Activity or Previous Violations

Respondent has not previously been publicly disciplined for conduct of this nature. He does have prior public discipline (public censure in 2000 for keeping liquor in his chambers

and making inappropriate sexual comments to female court employees), but that sanction was imposed fourteen years ago, and he has not had any public discipline since then.

This factor weighs against a sanction.

D. The Effect of the Improper Activity Upon the Judicial System or Others

As noted above, a fundamental requirement for the success of our judicial system is that the public can trust in the independence, integrity, and impartiality of the judges who serve on the bench. As a result of Respondent's conduct, Mr. Diaz and Ms. Danies had a substantial factual basis upon which to question Respondent's impartiality. Ms. Danies was very concerned over how the Respondent's actions would affect her client if the Arizona Supreme Court ruled in his favor and the case came back before Judge Irwin. When the ruling was favorable for Mr. Diaz, and the case was remanded to the trial level, Respondent did not recuse himself. Ms. Danies had to file a motion of change of judge for cause which was granted by Judge Conlogue.

This factor weighs in favor of a sanction.

Three of the four factors that the commission must consider weigh in favor of issuing a sanction (a dismissal with an advisory comment is not a sanction). While Respondent's prior public discipline was many years ago, he has been on notice for many years of the need for diligent attention to the requirement of the Code. How Respondent overlooked the restrictions against ex parte communication in Rule 2.9, among other rules, is inexplicable.

The Commission has imposed public reprimands for similar conduct. In Case No. 12-118, reprimands were issued to Judges Keith Frankel and Ronald Karp when they submitted amicus briefs in two superior court cases when Judge Frankel was the judge whose decisions were being reviewed. The Commission found that Rule 1.2 was violated as the judges failed to promote public confidence that they are to be neutral and impartial and not be advocates for particular legal results. In Case No. 12-234, Judge Edward Bassett was reprimanded for

improper ex parte communications when he discussed the substance of the complainant's case with a court bailiff.

IV. Aggravating and Mitigating Factors

Rule 19 of the Commission Rules sets forth ten aggravating and mitigating factors for the commission to also consider.

A. Nature, Extent and Frequency of the Misconduct

This appears to be an isolated incident of misconduct, however, the egregiousness of the misconduct tends to give more weight to this being an aggravating, rather than mitigating factor.

B. Judge's Experience and Length of Service on the Bench

Respondent has been a judge for 16 years. He has substantial experience, and should be well-versed in his ethical obligations under the Code, including knowing not to engage in ex parte communication and act as an advocate in a pending matter. Therefore, this is an aggravating factor as well.

C. Whether the Conduct Occurred in the Judge's Official Capacity or Private Life

The conduct occurred in Respondent's official capacity, however, Disciplinary Counsel does not deem this factor to be either aggravating or mitigating.

D. Nature and Extent to Which the Acts of Misconduct Injured Other Persons or Respect for the Judiciary

Ms. Danies clearly was injured in the attack on her character. Mr. Diaz was injured in that Respondent's conduct imperiled his ability to receive fair and impartial treatment once the case was remanded to the trial level. Respondent's conduct also clearly impacts the public's perception and respect for the judiciary, and casts the judiciary in a negative light. This is an aggravating factor.

E. Whether and To What Extent the Judge Exploited His or Her Position for Improper Purposes

While Respondent alleges he had no personal interest in the outcome of the appellate litigation, his actions speak otherwise. Therefore, this also appears to be an aggravating factor.

F. Whether the Judge has Recognized and Acknowledged the Wrongful Nature of the Conduct and Manifested an Effort to Change or Reform the Conduct

In his motion for reconsideration, Respondent does recognize his conduct was inappropriate, and expressed that he has learned from this experience. Therefore, this becomes a mitigating factor.

G. Whether There Has Been Prior Disciplinary Action Concerning the Judge, and if so, its Remoteness and Relevance to the Present Proceeding

As stated previously, Respondent has no prior public discipline for similar conduct. He was publicly censured in 2000 for keeping liquor in his chambers and making inappropriate sexual comments to female court employees. He has had no public discipline since 2000. Thus, this is a mitigating factor.

H. Whether the Judge Complied with Prior Discipline or Requested and Complied with a Formal Ethics Advisory Opinion

Respondent complied with the terms of his 2000 censure. While Respondent consulted with other judges in this matter, he does not raise as a defense that he requested advice from the Judicial Ethics Advisory Committee and relied on that advice in doing what he did. Disciplinary Counsel does not deem this factor to be either aggravating or mitigating.

I. Whether the Judge Cooperated Fully and Honestly with the Commission in the Proceeding

Respondent has fully cooperated and has been honest as best as Disciplinary Counsel can determine. This is a mitigating factor.

J. Whether the Judge was Suffering from Personal or Emotional Problems, or from Physical or Mental Disability or Impairment at the Time of the Misconduct

This was not raised as a defense by Respondent, and Disciplinary Counsel does not deem this factor applicable to this case.

While the aggravating factors outweigh the mitigating factors numerically, the commission is free to assign whatever weight it chooses to the factors. Again, given the egregiousness of the conduct, Respondent's substantial experience, the injury to both Ms,. Danies and Mr. Diaz, and the injury to the public perception of the judiciary, Disciplinary Counsel argues that the overall balance is in favor of upholding the prior sanction.

V. Conclusion

Disciplinary Counsel respectfully requests that the commission deny Respondent's motion and leave in place the public reprimand order issued March 26, 2015, in this case.

Dated this 13th day of April, 2015.

COMMISSION ON JUDICIAL CONDUCT

April P. Elliott

April P. Elliott
Disciplinary Counsel

Copies of this pleading delivered via first class mail or email on April 13, 2015, to:

Hon. Charles A. Irwin
Cochise County Superior Court - Division 1
100 Colonia de Salud
Sierra Vista, AZ 85635

Respondent

By: Kim Welch
Kim Welch, Commission Clerk

State of Arizona

COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 14-400

Judge: Charles A. Irwin

Complainant: Emily Danies

ORDER DENYING RESPONDENT JUDGE'S MOTION FOR RECONSIDERATION

The respondent judge filed a motion for reconsideration of the commission's decision to reprimand him as set forth in its previous order. Pursuant to Commission Policy 23, disciplinary counsel was requested to file a response to the motion and did so.

On April 30, 2015, the commission denied the motion for reconsideration. As provided in Commission Policy 23, the respondent judge's motion for reconsideration, disciplinary counsel's response, and this order denying the motion for reconsideration shall be made a part of the record that is posted to the commission's website with the other public documents (the complaint, the judge's response, and the reprimand order).

Dated: May 7, 2015

FOR THE COMMISSION

/s/ Louis Frank Dominguez

Hon. Louis Frank Dominguez
Commission Chair

Copies of this order were mailed to the complainant and the judge on May 7, 2015.

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