

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 10-212

Complainant: No. 1399710847A

Judge: No. 1399710847B

ORDER

The complainant alleged that a superior court judge made statements in court that demonstrated bias toward her. After reviewing the allegations and listening to the recording of the proceeding, the commission found no clear evidence of prejudice on the part of the judge. Therefore, the complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: September 24, 2010.

FOR THE COMMISSION

/s/ Keith Stott
Executive Director

Copies of this order were mailed to the complainant and the judge on September 24, 2010.

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

August 24, 2010

Arizona Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, AZ 85007

Re: The Honorable

Dear Members of the Commission:

The case from which this complaint arises is a capital murder trial in Yuma County, Arizona. The defendant is represented by two attorneys, Michael Donovan and The State of Arizona is represented by two prosecutors, Karolyn Kaczorowski and Levi Gunderson.

I am a domestic relations attorney and am not counsel of record in this death penalty case. is my husband and the other 50% shareholder in the law firm,

On July 20, 2010, I completed a hearing in another court and had some extra time prior to my next obligation. I entered Judge courtroom and sat in the first bench directly behind the defense to observe the trial. In the approximate ten minutes of trial I observed prior to a break, I saw Karolyn Kaczorowski, one of the two prosecutors, turning to look behind herself to the area of the court room where the victim's family sat.

During the break, I advised the defense of what I had seen as it seemed to me inappropriate for a prosecutor to behave in such way when a jury could observe her non-verbal conduct and signals broadcast to the victims' section of the courtroom. When trial resumed, Michael Donovan, lead defense counsel, called me to testify about my observations. There had been absolutely no discussion with any member of the defense team that I would be called to testify at that time. I had not spoken to Michael Donovan myself. Before I took the stand, and with no prior consultation with me, Michael Donovan advised the court, in pertinent parts as follows:

Karolyn Kaczorowski has a habit, nervous or otherwise, at times during my client's testimony of turning around and looking at the victims/spectator area and rolling her eyes. That is now made of record, and it cannot be tolerated.

Karolyn Kaczorowski sits at the prosecution table in full view of the jurors in this case. The jurors are also in full view of any response that may or may not have taken back—or been given back from the spectator area or from the victims

areas.

This is not acceptable in any trial where there is a fact finder such as a jury. It is not responsible. It is not appropriate.

Because what I'm saying now is of such significance, and I do not make that statement without those avowals from other people, we will tell you that is here, who has made those specific observations and declared those observations to me.

...But if it's in any fashion correct, that any time a prosecutor turns from the prosecution table and looks back to an area known to be the victims' side of this courtroom, it can't happen. It just can't happen. ...

July 20, 2010, Trial Transcript, Pp. 72-73. Karolyn Kaczorowski responded in pertinent part as follows:

...I do agree that gestures in response to the testimony would be inappropriate. The only times—there was two times I turned around. One was to look for our paralegal, at which time I passed her a note. She was not there. So if there was any exasperation it was because the paralegal was not there, and I had the Victims Advocate run the note to her.

The other time was when I heard a noise coming from the Defendant's side of the courtroom and I was looking to see who was responding in a verbal way to the Defendant's testimony. There is nothing inappropriate with having contact with our people back there.

Id. at 73-74. Michael Donovan then stated:

I would ask that be called because that is not the statement of facts that I have from an officer of the Court. And that is not acceptable.

...Conduct of counsel should be monitored by themselves and in the unique occasion where there are observations made outside of the perspective of the Court they should be seriously considered and not just simply set aside by a statement that the Court knows all. I wish the Court would, but that just is not the circumstances here.

Id. at 74. Judge then said:

Okay. The defendant is requesting a Court order that Ms. Kaczorowski not turn around during the testimony of the Defendant?

An exchange continued between Judge and Michael Donovan. *Id.* at 74. Judge said,

Well, the Court would just prefer to handle the matter with an order that if there's a need to turn around, then there's going to have to be some kind of a specific showing as to why there is a need to turn around.

Id. at 74-75. Michael Donovan responded in pertinent part as follows:

Judge, if I may, if in fact the Court determines from either an avowal or testimony of a spectator that the prosecutor I have referenced to has turned around and rolled her eyes to the spectator area where the victims are located, I do not believe that is sufficient...

Id. at 76. To this, Judge responded, "Well, if you want to go down that road." *Id.*

At this time and at Mr. Donovan's request, a short break was taken during which Michael Donovan and I spoke outside of the court room. *Id.* Court resumed and I was then called to testify. I took an oath to testify truthfully and testified truthfully in pertinent parts as follows:

...I had been here for about ten minutes and during that 10-minute period what I had observed was on two occasions I had just seen Ms. Kaczorowski turn around and make – and look towards the victims' area of the courtroom, or what I would call that. I couldn't see Ms. Kaczorowski's face because I was sitting...in the pew right behind you...And so what I saw was just a couple of times...and it occurred to me that was odd because there was a jury here. That's not what I do.

I mean, I'm not a criminal attorney and I thought it was kind of odd. And I almost turned around to see what the reaction was in the victims' box, but I thought that that would probably be a worse thing to draw attention to the fact that I was sitting there looking with the jury looking around....

Well, the impression that I had was that Ms. Kaczorowski was turning and, like, making eyes or making facial expressions at the jury about comments that Ms. Cloud – or about the things Ms. Cloud was testifying about...

...And I think in a case like this from what I know about it, Ms. Cloud needs as much fairness as possible without anybody at the prosecution table turning around and making eyes or eliciting reactions from the victims' side of the courtroom.

Id. at 79-81.

As the transcript of this proceeding makes clear, I was not cross-examined. *Id.* at 81, Ll. 22-23. The only evidence presented to Judge were the statements of Michael Donovan and my own testimony. No further argument was made by Michael Donovan. No argument was made by the prosecution. To my knowledge, there was no other reference made in this matter to Ms. Kaczorowski's non-verbal conduct in the presence of the jury. To my knowledge, there was no other reference made in this matter to me or to my feelings about Ms. Kaczorowski. To my knowledge, there was no other reference made in this matter about me.

I returned to my seat. In front of a full court room complete with the presence of news media, Judge said the following:

Well, Counsel, the Court has observed the interactions between the attorneys in this case. And based on those interactions, there's no question in the Court's mind that the contempt that is held by attorneys on the prosecution side, in particular, Ms. Kaczorowski, and the attorneys on the defense side is contempt

that equals the worst contempt I have ever seen in a courtroom between attorneys. And it would be this Court's judgment that the contempt between Mr. [redacted] and Ms. Kaczorowski is even greater.

And it doesn't take much for the Court to conclude that the contempt is just as much with Ms. [redacted] vis-a-vis Ms. Kaczorowski, as it is between Mr. [redacted] and Ms. Kaczorowski. And the impressions that are going to flow as between counsel that have that level of contempt as to any actions, it's not surprising that the impressions that's been testified to exist in counsel's mind. Because in this Court's – it is this Court's view that –and this Court's concern that there's – there's an aim or there's a purpose of various counsel involved in this case to go more or go farther than simply winning the case.

I'm speaking of going farther in terms of counsel trying to purposely embarrass each other, things along those lines. *And just because of that fact, the Court has concerns about the views of counsel as to the actions and conduct of other counsel in this case.*

Now, what I haven't heard is that the jury would have been influenced by anything that occurred. And because of that the Court cannot find there has been prejudice. But I'm going to warn counsel, and they should have been on notice previously, that rolling of eyes is totally inappropriate.

And I think it would be better if Ms. Kaczorowski wants to get somebody's attention she can give a note to Mr. Gunderson and we proceed along those lines. What's the next issue?

Id. at Pp. 82-83 (*emphasis supplied*). Judge [redacted] may as well have called me a liar in open court. He may as well have stated in that courtroom full of people that I perjured myself.

As mentioned previously, only my testimony and the statements of Michael Donovan were before the Court as to any issue pertaining to me and my observations. Judge [redacted] violated the Code of Judicial Conduct as follows:

- a. He displayed bias and prejudice by his conduct and his words in violation of Rule 2.3(B). The judge stated in open court that I have contempt for the prosecutor in question when no such evidence had been presented and no such suggestion had been intimated;
- b. He displayed bias and prejudice by his conduct and his words in violation of Rule 2.3 (B). The judge engaged in sexual discrimination, perhaps even misogyny, when he stated in open court that "the contempt is just as much with Ms. [redacted] vis-a vis Ms. Kaczorowski, as it is between Mr. [redacted] and Ms. Kaczorowski." *Id.* at 82, Ll. 13-16. The judge may as well have said, "Mr. [redacted] little wife must share his feelings for Ms. Kaczorowski as she is just a woman, just a female attorney, incapable of forming opinions independent of Mr. [redacted]"
- c. He displayed a lack of courtesy to me as both a witness and an officer of the court by essentially calling me a liar in open court, in violation of Rule 2.8(B). There is no evidence to suggest I did not take my oath seriously. There is no evidence to suggest that as an officer of the Court I was willing to perjure myself to promote either Michael Donovan's or James [redacted] objectives at the trial of this case.

- Judge commentary about my testimony was rude, unfounded, arrogant and sexist;
- d. He indicates he had some external influence in reaching his conclusions about my testimony, in violation of Rule 2.4(A) and/or 2.4(B). After all, there is no evidence to suggest and/or to support the judge's conclusion about my testimony;
 - e. He indicates that he may have engaged in some *ex parte* communication in reaching his conclusions about my testimony in violation of Rule 2.9;
 - f. He displayed such contempt for me and my testimony, with no evidence before him to support this, that his conduct fails to promote confidence in the integrity and/or impartiality of the judiciary. Additionally, his conduct does not avoid the appearance of impropriety. This conduct violates Rule 1.2; and
 - g. He displayed a lack of impartiality and/or fairness when making commentary about my testimony in violation of Rule 2.2.

Judge assumed that I hold Karolyn Kaczorowski in contempt although no evidence was presented to Judge to support his conclusion in this regard. More important, no evidence was presented to Judge to support his conclusion that I was willing to perjure myself as both a witness and an officer of the court due to the contempt in which I am alleged to hold Ms. Kaczorowski. Judge statements lacked supporting evidence and were directed not just at a witness but at an officer of the court.

Just weeks prior to the incident of which I complain, Judge himself yelled at Ms. Kaczorowski and told her to sit down and to be quiet. The transcript of this proceeding, just being words in black and white, will not do justice to this yelling incident. The recording of this hearing will reveal the true nature of the exchange. That particular hearing will reveal that perhaps even Judge himself holds Karolyn Kaczorowski in contempt for good reason. While I was not present, I have been advised that he was literally screaming at Karolyn Kaczorowski. Unfortunately, I cannot at present forward that audio or the transcript with this letter. My understanding is that to date, Judge has denied every request for audio and/or visual recordings for days of trial in this matter. I reference this incident to provide more context to the nature of people involved in this matter. When I obtain the transcript of this hearing, I will forward the relevant portion to you for review and consideration in regard to this complaint. However, I do not wish to delay my complaint about Judge in regard to me.

Yuma remains a small legal community. Judges and attorneys tend to know each other. Larry the judge presiding over this trial, specifically knows that I am married to and specifically knows that we practice law together. I have never had any dispute with Judge Other judges and court room staff often observe the trial of this matter through cameras in the chambers of other judges.

Judge depiction of me in open court as a woman incapable of distinguishing reality from fiction cannot be further from the truth. Judge depiction of me in open court as a woman willing to perjure herself while in collusion with her husband to promote his goals in a criminal case cannot be further from the truth. I am a member of the State Bar of Arizona Family Law Executive Council. In 2004-2005, I served as chair of that council and have served

on that council since 1998. I served on the Arizona Supreme Court committee that drafted the original Rules of Family Law Procedure from 2003 through 2005. I am a judge *pro tempore* in the City of Yuma Municipal Court. I have practiced family law in Yuma for 15 years and enjoy the trust and respect of my colleagues. I am a professional who is not subject to ideas being put her mind, as Judge suggests, by my spouse so that I can be used in a court proceeding to support my spouse through perjury. I earned a law degree just as Judge did. I passed the Arizona bar exam just as Judge did. I am a member of the State Bar of Arizona just as Judge is. Judge baseless comments harm my reputation. Judge baseless comments offend me. Judge baseless comments should offend this commission and every fair-minded Arizona lawyer and judge.

I ask that Judge be reprimanded for the statements he made about me in open court on July 20, 2010. As both an individual and as an officer of the court, my most valuable commodity is my word, my integrity. I recognize that my complaint about a member of the judiciary may cause me personal and professional difficulty in the small legal community in which I practice. I realize, too, that what I risk reveals what I value. I value my word. I value judges who act within the confines of the Code of Judicial Conduct. Judge statements about me in open court in front of a full courtroom complete with local news media cannot be recalled. Judge should be reprimanded for his conduct.

Best regards,

encl/ Portions of July 20, 2010, Trial Transcript