

IN RE RAEL, S.Ct. No. 33,633 (Filed October 3, 2012)

**IN THE MATTER OF MICHAEL G. RAEL, SR.,
Municipal Court Judge, City of Questa, New Mexico**

NO. 33,633

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

October 3, 2012, Filed

INQUIRY CONCERNING A JUDGE
NO. 2011-040

COUNSEL

Randall D. Roybal, Phyllis A. Dominguez, Albuquerque, NM, for Judicial Standards Commission

Robles, Rael & Anaya, P.C., Daniel J. Macke, Albuquerque, NM, for Respondent

FORMAL REPRIMAND

PER CURIAM

{1} This matter comes before this Court upon a petition to accept a stipulation agreement and consent to discipline filed by the Judicial Standards Commission concerning the Honorable Michael G. Rael, Sr. (Respondent), a municipal court judge in Questa, New Mexico. In the stipulation, the Judicial Standards Commission and Respondent agreed that Respondent's improper ex parte proceedings with parties and his temporary restraining order issued without jurisdiction violated several rules of the Code of Judicial Conduct and represented willful misconduct in office. We granted the petition, and, on June 15, 2012, we ordered that Respondent complete a twelve-month supervised probation and formal mentorship, attend two special seminars at the National Judicial College, and receive a public censure. This Formal Reprimand to be posted on the New Mexico Compilation Commission web site and in the *Bar Bulletin*, will serve as Respondent's public censure.

FACTS

{2} The facts leading to discipline in this case arose in the context of a criminal complaint filed by Mr. Julian Cisneros on March 2, 2011, alleging that Mr. Thomas Chavez (Defendant) vandalized his vehicle causing \$2,700 worth of damages. As set out in the stipulated petition, Respondent admitted the following facts.

{3} On March 25, 2011, Respondent issued an order to show cause in the Village of Questa Municipal Court, cause number 11-0206, requiring Defendant to appear for a hearing on the temporary restraining order against him. On March 30, 2011, Respondent held an ex parte hearing with Defendant, and neither Mr. Cisneros nor the Village was present. Respondent admitted that conducting the hearing was a knowing and intentional act and that the hearing amounted to an ex parte proceeding. On or about March 31, 2011, Respondent had an ex parte communication with Mr. Cisneros regarding Mr. Cisneros's position on the temporary restraining order in cause number 11-0206 without giving Defendant notice or an opportunity to be heard.

{4} On or about March 31, 2011, and in response to the foregoing ex parte contacts, Respondent backdated a document entitled "Temporary Restraining Order" to March 2, 2011. The order was not actually filed until March 31, 2011. Respondent admitted that his issuance of the restraining order was a knowing and intentional act, and at the time it was issued he knew that he did not have jurisdiction to issue it.

DISCUSSION

{5} In the stipulation agreement and consent to discipline, Respondent conceded that his conduct constituted willful misconduct in office. Under Article VI, Section 32 of the New Mexico Constitution, "[A]ny justice, judge or magistrate of any court may be disciplined or removed for willful misconduct in office[.]" Respondent also acknowledged that his conduct violated several provisions of the Code of Judicial Conduct. See Rules 21-100 NMRA (1995) (requiring a judge to uphold the integrity and independence of the judiciary); 21-200(A) and (B) NMRA (1995) (requiring a judge to be impartial and comply with the law); 21-300(A), (B)(2), (B)(7), and (B)(8) NMRA (2009) (requiring a judge to be fair and prohibiting ex parte contacts); and 21-400(A)(1) NMRA (2004) (requiring the judge to recuse when judge has a personal bias or prejudice).¹

{6} This case presents an example of the ethical dilemmas judges in small communities face. In addition to the position judges occupy in our state's judiciary, they are also members of the communities in which they live. In smaller communities, judges are more visible and are more likely to know the parties who appear before them. The Arkansas Supreme Court has characterized this dilemma in the following manner:

Judges are required, more often than they like, to deal with . . . sensitive situations. This is especially true of the small town or rural judge who must preside over cases involving people known quite well by the judge whom the judge sees frequently on a business or personal basis.

Eason v. Erwin, 781 S.W.2d 1, 2 (Ark. 1989).

{7} In this case, Respondent, based upon his personal knowledge of the situation and the parties, initiated at least two ex parte communications and issued a temporary restraining order without authority or jurisdiction. Respondent has characterized his actions as an effort "to keep the peace" between two families in a small community.

While Respondent may have had good intentions, his actions were knowing and intentional, and he knew that at the time he issued the restraining order he did not have the authority to do so. We therefore take this opportunity to discuss the importance of abiding by the Code of Judicial Conduct no matter the size of the community in which a judge resides.

Ex parte communications

{8} Judges are prohibited from engaging in ex parte communications outside the presence of the parties or their lawyers concerning a pending matter. Rule 21-300(B)(7) (stating in part, that “[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 concerning a pending or impending proceeding . . .”).

{9} Respondent’s conduct in discussing Mr. Cisneros’s criminal complaint with Defendant outside the presence of Mr. Cisneros and the Village and then subsequently discussing the complaint with Mr. Cisneros outside the presence of Defendant clearly violated Rule 21-300(B)(7). Under Rule 21-300(B)(7), Respondent should not have initiated, permitted or considered these communications.

{10} All parties or their attorneys are to be included in communications with a judge. See Rule 21-300(B)(7) cmt. Accordingly, Respondent also failed to “accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law” pursuant to Rule 21-300(B)(7). Respondent did not give notice to or otherwise attempt to include Defendant or Mr. Cisneros in his separate ex parte communications with each of them thus again violating Rule 21-300(B)(7).

{11} Respondent stated that, in engaging in ex parte communications, he was trying to protect both parties and believed that neither side would gain any procedural or tactical advantage as a result of the meeting. However, in engaging in ex parte communications, Respondent violated each party’s right to be heard. A judge in a small community must be especially mindful of protecting this right. We have disciplined judges in the past for offenses such as adjudicating traffic cases for family members and friends and discussing sentencing of a defendant with a relative of that defendant. See *In re Griego*, 2008-NMSC-020, 3, 22, 143 N.M. 698, 181 P.3d 690; *In re Perea*, No. 25,822, slip op, 8-9. (N.M. Sup. Ct. August 17, 1999). In this case, Respondent improperly allowed his personal knowledge of the parties and his desire to “keep the peace” to usurp the fundamental right to be heard. Therefore, we reiterate our warning in *In re Guillory*, No. 31,920, slip op at 8. (N.M. Sup. Ct. Dec 7, 2010):

[E]x parte communications not authorized by law are simply not fair to the party or attorney who is not privy to the communications. . . . *Ex parte* communications threaten the integrity and independence of the judiciary and are contrary to our notions of justice. We will not tolerate such misconduct.

Respondent's conduct was not fair to Defendant, Mr. Cisneros or the Village. Not only did Respondent's conduct prejudice the proceeding itself but it also cast doubt upon Respondent's impartiality.

{12} The restrictions against ex parte communications are for the purpose of maintaining the integrity, independence, and impartiality of the judiciary. When a judge engages in unauthorized ex parte communications, it may appear that the judge has been improperly influenced about the merits of the case that is pending before that judge. See Rule 21-200(B). Unless otherwise authorized by law, our system of justice requires that all parties be present when the substance of a matter is discussed with the judge. See Rule 21-300(B)(7). The reason for this requirement is simple: there is always more than one side to a story. Each party has the right to tell his or her side of the story. It is equally important that each party has the right to question the story told by his or her adversary. In doing so, the adversary can ensure that the story be told in compliance with the constitution and other legal requirements such as the rules of evidence. The integrity of the justice system depends on a judge's insistence that parties comply with constitutional and relevant legal requirements. It is impossible for a judge to insist on compliance when one party is allowed to tell its side of the story outside the presence of its adversaries. In our system of justice, the adverse party usually challenges the admissibility of evidence, which obviously is impossible if the adversary is not present to hear the other party's story.

{13} In addition, when ex parte communications occur, it is difficult, if not impossible, to defend against an accusation that the judge has decided the outcome of a case out of fear or favor rather than on the merits. This accusation is avoided when a judge listens to the dispute in open court with notice and an opportunity for all parties to be present and participate. Avoiding the appearance that a judge decides cases out of fear or favor is essential because deciding a case without fear or favor is the essence of an independent judiciary. See Rule 21-200 cmt. As judges review legal disputes and render decisions, they must be fair and impartial, which means that judges must uphold the constitution and laws based on the application of the law to the evidence admitted in open court. See Rule 21-200(A).

{14} The fact that a judge located in a small community likely knows many of the people in that community is all the more reason for the judge to avoid ex parte communications. Word travels fast in small communities. Word that a judge is willing to meet in private with one party at a time will only invite members of the community who find themselves embroiled in litigation to approach the judge for an ex parte communication. In addition, community members may also learn from community gossip about the ex parte communications and arrive at the conclusion that the judge decided the merits of the case out of fear or favor, and not on the merits.

Issuance of a Temporary Restraining Order

{15} Respondent issued a temporary restraining order without jurisdiction to do so. Pursuant to Rule 21-200(A) NMRA, "[a] judge shall respect and comply with the law . . .

.” The power to issue temporary restraining orders lies with the district courts, not municipal courts. See N.M. Const. art. VI, § 13; Rule 1-066(B). Respondent’s action was knowing and intentional, and he knew at the time he issued the order that he did not have jurisdiction to do so. Respondent’s conduct constitutes actual impropriety. See Rule 21-200(A) cmt. (“Actual improprieties . . . include violations of law, court rules or other specific provisions of this Code.”). Impropriety erodes public confidence in the judiciary. See Rule 21-200(A)

{16} Respondent stated that he issued the restraining order based on his personal knowledge of an incident that occurred between the parties that was outside the scope of the complaint or any court proceedings. Respondent stated that he felt he had to “bend the law to keep peace with [the] families [because] [t]his is a very small town and sometimes I must go out of the box to keep peace.” While a judge retains considerable discretion in fashioning equitable remedies, he or she must still act within the bounds of the Code of Judicial Conduct. Rule 21-200(B) states that “[a] judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.” This obligation is especially true in small communities where a judge will be called upon to settle sensitive disputes between parties the judge knows quite well. In such cases, the judge must not only *be* impartial, but he or she must *be regarded as* impartial by the community. See Rule 21-300(B)(5) (stating that a judge “shall perform judicial duties without bias or prejudice”); Rule 21-200(A) (requiring a judge to act “in a manner that promotes public confidence in the integrity and impartiality of the judiciary”). When a judge does not act accordingly, confidence in the judiciary and the rule of law are eroded. See Rule 21-200(A) cmt. (“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”).

{17} In issuing this public censure we do not mean to leave the impression that there is nothing a judge can do to defuse a dangerous situation. Our Code of Judicial Conduct “is not intended . . . to affect a judge’s ability to act on information as necessary to protect the health or safety of any member of the public if consistent with other provisions of this Code.” Rule 21-305 NMRA cmt. 2 (2012). Therefore, if Respondent had credible information that either Defendant or Mr. Cisneros was in danger, he could have notified the authorities. By doing so he could have complied with the Code of Judicial Conduct while also protecting the public.

CONCLUSION

{18} Respondent has acknowledged and apologized for his conduct, and we agree that the stipulated disciplinary measures for his conduct are appropriate. The twelve-month supervised probation and formal mentorship, public censure and required training are sufficient to deter Respondent from repeating such conduct while also reaffirming and restoring public confidence in the integrity of the judiciary. This public censure should also serve as guidance for other judges faced with similar dilemmas that must be addressed within the confines of the ethical obligations embodied by our Code of Judicial Conduct.

{19} IT IS SO ORDERED.

PETRA JIMENEZ MAES, Chief Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

CHARLES W. DANIELS, Justice

PAUL J. KENNEDY, Justice

¹ We have cited previous versions of the Code of Judicial Conduct because Respondent's conduct occurred before the new Code became effective on January 1, 2012.