

State of Arizona  
COMMISSION ON JUDICIAL CONDUCT

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Disposition of Complaint 08-322

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Complainant: Stephen Mercer No.

Judge: Dennis L. Lusk No.

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**ORDER**

After reviewing the complaint, the evidence gathered during preliminary investigation, and the judge's response, the Commission on Judicial Conduct finds that the judge's conduct in this case violated the Code of Judicial Conduct.

Canon 2A requires a judge to follow the law. After a judge has been disqualified in a case, the judge may not act on any matter other than in situations involving necessity, such as a probable cause hearing or a temporary restraining order. Rule 10.6 of the Rules of Criminal Procedure sets out the judge's duty after disqualification: "When a motion or request for change of judge is timely filed under this rule, the judge shall proceed no further in the action . . ." In this instance, the case had already been transferred to a pro tem judge. Although that judge was not available, no necessity for immediate action existed, and Judge Lusk had no authority to act in the case.

Accordingly, the judge is reprimanded for his conduct pursuant to Rule 17(a), and 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: April 7, 2009.

FOR THE COMMISSION

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Hon. J. William Brammer, Jr.  
Commission Chair

Copies of this order were mailed to the complainant and the judge on April 7, 2009.

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

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

FOR OFFICE USE ONLY

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**COMPLAINT AGAINST A JUDGE**

Your name: Stephen Mercer Judge's name: Dennis Lusk Date: 12/17/08

**Instructions:** Describe in your own words what the judge did that you believe constitutes misconduct. Please provide all of the important names, dates, times and places related to your complaint. You can use this form or plain paper of the same size to explain your complaint, and you may attach additional pages. Do not write on the back of any page. You may attach copies of any documents you believe will help us understand your complaint.

On September 25, 2008, Mr. Midkiff retained the Weingart Law Firm to represent him on a DUI allegation. Counsel filed a timely notice of change of judge pursuant to Rule 10.2 of the Rules of Criminal Procedure. Thereafter the case was reassigned to Judge Pro Tem Kerry Wangberg. On December 11, I appeared on Mr. Midkiff's behalf for a pretrial conference. The prosecutor and I filed a joint motion to continue because discovery had just been provided and interviews of witnesses had not been completed. I learned from the prosecutor that Judge Wangberg was not present at court, but would be available by phone.

When I presented the motion to continue to the clerk, she provided the file to Judge Lusk, who took the file into chambers. A few minutes later, he returned from chambers and told me he was unable to reach Judge Wangberg. Judge Lusk told me that because he had been noticed, he could not rule on the motion, but he had been given authority by Judge Wangberg to schedule matters for trial in his absence, but not to grant a continuance. He told me my options were to stipulate to setting the case for trial, or to wait to see if Judge Wangberg called the court. I told Judge Lusk that it would be premature to set the case to trial, that this process amounted to him denying the motion, and I protested his involvement in the case. Judge Lusk then gave the file to the clerk with instructions to set it to trial.

Judge Lusk should not have had any involvement with this case after the Rule 10.2 motion was granted. The Court of Appeals has previously found that Judge Lusk has failed to properly recuse himself when presented with a notice of change of judge, observing "[w]hen a motion or request for change of judge is timely filed under this rule, the judge shall proceed no further in the action, except to make such temporary orders as may be necessary in the interest of justice before the action can be transferred to the presiding judge ..." *Hornbeck v. Lusk*, 217 Ariz. 581, 585, 177 P.3d 323, 327 (Div. 2, 2008) (quoting Rule 10.6).

*(Attach additional sheets as needed)*

January 26, 2009

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

JAN 28 2009

Re: 08-322

Members of the Commission:

At the time of the pretrial conference I had Judge Wangberg's express consent to set the matter for trial on his behalf. My instructions from him were that if counsel wanted anything else, that I should consult him by phone for a telephonic appearance or further instructions. Judge Wangberg was not available by phone after several attempts. I followed Judge Wangberg's instructions to set the matter for trial on his behalf.

I explained to counsel that he could file a motion to continue the trial date, and that the motion would be forwarded to Judge Wangberg for review. Although defense counsel has filed three separate pleadings since December 11, 2008, he has made no attempt to file a motion to continue the March 11, 2009 trial date. I can only speculate as to why counsel did not ask for a continuance if he was so concerned about the trial date.

After receiving this complaint I discussed this recurring problem since Division 2 rewrote the rules of Criminal Procedure, with Staff Counsel for the Commission. I was seeking guidance as to what I was expected to do in the future. We agreed that in the future, if the assigned judge was not available for the pretrial, that the attorney should file a written motion at that time, which would be forwarded to the assigned judge for review. This process means however that the Defendant will leave the court with no set date for return which would complicate FTA's or a trial *in absentia*.

I am in the process of creating a set of written instructions to be forwarded to defense counsel upon the reassignment of a judge pursuant to Rule 10.2. If the Commission wants that set of instructions when it is completed, I will provide the same.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Dennis L. Lusk