

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

3 Filing Date: _____

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OCT 12 2012

NM JUDICIAL
STANDARDS COMMISSION

4 **NO. 33,633**

5 **INQUIRY CONCERNING A JUDGE**

6 **NO. 2011-040**

7 **IN THE MATTER OF MICHAEL G. RAEL, SR.,**

8 **Municipal Court Judge, City of Questa, New Mexico**

9 **FORMAL REPRIMAND**

10 Randall D. Roybal

11 Phyllis A. Dominguez

12 Albuquerque, NM

13 for Judicial Standards Commission

SUPREME COURT OF NEW MEXICO
FILED

OCT - 3 2012



14 Robles, Rael & Anaya, P.C.

15 Daniel J. Macke

16 Albuquerque, NM

17 for Respondent

1 **PER CURIAM**

2 {1} This matter comes before this Court upon a petition to accept a stipulation
3 agreement and consent to discipline filed by the Judicial Standards Commission
4 concerning the Honorable Michael G. Rael, Sr. (Respondent), a municipal court judge
5 in Questa, New Mexico. In the stipulation, the Judicial Standards Commission and
6 Respondent agreed that Respondent's improper ex parte proceedings with parties and
7 his temporary restraining order issued without jurisdiction violated several rules of
8 the Code of Judicial Conduct and represented willful misconduct in office. We
9 granted the petition, and, on June 15, 2012, we ordered that Respondent complete a
10 twelve-month supervised probation and formal mentorship, attend two special
11 seminars at the National Judicial College, and receive a public censure. This Formal
12 Reprimand to be posted on the New Mexico Compilation Commission web site and
13 in the *Bar Bulletin*, will serve as Respondent's public censure.

14 **FACTS**

15 {2} The facts leading to discipline in this case arose in the context of a criminal
16 complaint filed by Mr. Julian Cisneros on March 2, 2011, alleging that defendant
17 vandalized his vehicle causing \$2,700 worth of damages. As set out in the stipulated
18 petition, Respondent admitted the following facts.

19 {3} On March 25, 2011, Respondent issued an order to show cause in the Village
20 of Questa Municipal Court, cause number 11-0206, requiring Mr. Chavez to appear
21 for a hearing on the temporary restraining order against him. On March 30, 2011,

1 Respondent held an ex parte hearing with Defendant, and neither Mr. Cisneros nor
2 the Village was present. Respondent admitted that conducting the hearing was a
3 knowing and intentional act and that the hearing amounted to an ex parte proceeding.
4 On or about March 31, 2011, Respondent had an ex parte communication with Mr.
5 Cisneros regarding Mr. Cisneros's position on the temporary restraining order in
6 cause number 11-0206 without giving Defendant notice or an opportunity to be heard.

7 {4} On or about March 31, 2011, and in response to the foregoing ex parte
8 contacts, Respondent backdated a document entitled "Temporary Restraining Order"
9 to March 2, 2011. The order was not actually filed until March 31, 2011.
10 Respondent admitted that his issuance of the restraining order was a knowing and
11 intentional act, and at the time it was issued he knew that he did not have jurisdiction
12 to issue it.

13 **DISCUSSION**

14 {5} In the stipulation agreement and consent to discipline, Respondent conceded
15 that his conduct constituted willful misconduct in office. Under Article VI, Section
16 32 of the New Mexico Constitution, "[A]ny justice, judge or magistrate of any court
17 may be disciplined or removed for willful misconduct in office[.]" Respondent also
18 acknowledged that his conduct violated several provisions of the Code of Judicial
19 Conduct. *See* Rules 21-100 NMRA (1995) (requiring a judge to uphold the integrity
20 and independence of the judiciary); 21-200(A) and (B) NMRA (1995) (requiring a

1 judge to be impartial and comply with the law); 21-300(A), (B)(2), (B)(7), and (B)(8)
2 NMRA (2009) (requiring a judge to be fair and prohibiting ex parte contacts); and 21-
3 400(A)(1) NMRA (2004) (requiring the judge to recuse when judge has a personal
4 bias or prejudice).¹

5 {6} This case presents an example of the ethical dilemmas judges in small
6 communities face. In addition to the position judges occupy in our state's judiciary,
7 they are also members of the communities in which they live. In smaller
8 communities, judges are more visible and are more likely to know the parties who
9 appear before them. The Arkansas Supreme Court has characterized this dilemma in
10 the following manner:

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

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

16 {7} In this case, Respondent, based upon his personal knowledge of the situation
17 and the parties, initiated at least two ex parte communications and issued a temporary
18 restraining order without authority or jurisdiction. Respondent has characterized his
19 actions as an effort "to keep the peace" between two families in a small community.

20 ¹ We have cited previous versions of the Code of Judicial Conduct because
21 Respondent's conduct occurred before the new Code became effective on January 1,
22 2012.

1 While Respondent may have had good intentions, his actions were knowing and
2 intentional, September 24, 2012 and he knew that at the time he issued the restraining
3 order he did not have the authority to do so. We therefore take this opportunity to
4 discuss the importance of abiding by the Code of Judicial Conduct no matter the size
5 of the community in which a judge resides.

6 **Ex parte communications**

7 {8} Judges are prohibited from engaging in ex parte communications outside the
8 presence of the parties or their lawyers concerning a pending matter. Rule 21-
9 300(B)(7) (stating in part, that “[a] judge shall not initiate, permit, or consider ex
10 parte communications, or consider other communications made to the judge outside
11 the presence of the parties concerning a pending or impending proceeding . . .”).

12 {9} Respondent’s conduct in discussing Mr. Cisneros’s criminal complaint with
13 Defendant outside the presence of Mr. Cisneros and the Village and then
14 subsequently discussing the complaint with Mr. Cisneros outside the presence of
15 Defendant clearly violated Rule 21-300(B)(7). Under Rule 21-300(B)(7),
16 Respondent should not have initiated, permitted or considered these communications.

17 {10} All parties or their attorneys are to be included in communications with a
18 judge. *See* Rule 21-300(B)(7) cmt. Accordingly, Respondent also failed to “accord
19 to every person who has a legal interest in a proceeding, or that person’s lawyer, the
20 right to be heard according to law” pursuant to Rule 21-300(B)(7). Respondent did

1 not give notice to or otherwise attempt to include Defendant or Mr. Cisneros in his
2 separate ex parte communications with each of them thus again violating Rule 21-
3 300(B)(7).

4 {11} Respondent stated that, in engaging in ex parte communications, he was trying
5 to protect both parties and believed that neither side would gain any procedural or
6 tactical advantage as a result of the meeting. However, in engaging in ex parte
7 communications, Respondent violated each party's right to be heard. A judge in a
8 small community must be especially mindful of protecting this right. We have
9 disciplined judges in the past for offenses such as adjudicating traffic cases for family
10 members and friends and discussing sentencing of a defendant with a relative of that
11 defendant. *See In re Griego*, 2008-NMSC-020, ¶¶ 3, 22, 143 N.M. 698, 181 P.3d
12 690; *In re Perea*, No. 25,822, slip op, ¶¶ 8-9. (N.M. Sup. Ct. August 17, 1999). In
13 this case, Respondent improperly allowed his personal knowledge of the parties and
14 his desire to "keep the peace" to usurp the fundamental right to be heard. Therefore,
15 we reiterate our warning in *In re Guillory*, No. 31,920, slip op at 8. (N.M. Sup. Ct.
16 Dec 7, 2010):

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

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

4 {12} The restrictions against ex parte communications are for the purpose of
5 maintaining the integrity, independence, and impartiality of the judiciary. When a
6 judge engages in unauthorized ex parte communications, it may appear that the judge
7 has been improperly influenced about the merits of the case that is pending before
8 that judge. *See* Rule 21-200(B). Unless otherwise authorized by law, our system of
9 justice requires that all parties be present when the substance of a matter is discussed
10 with the judge. *See* Rule 21-300(B)(7). The reason for this requirement is simple:
11 there is always more than one side to a story. Each party has the right to tell his or
12 her side of the story. It is equally important that each party has the right to question
13 the story told by his or her adversary. In doing so, the adversary can ensure that the
14 story be told in compliance with the constitution and other legal requirements such
15 as the rules of evidence. The integrity of the justice system depends on a judge's
16 insistence that parties comply with constitutional and relevant legal requirements. It
17 is impossible for a judge to insist on compliance when one party is allowed to tell its
18 side of the story outside the presence of its adversaries. In our system of justice, the
19 adverse party usually challenges the admissibility of evidence, which obviously is
20 impossible if the adversary is not present to hear the other party's story.

1 {13} In addition, when ex parte communications occur, it is difficult, if not
2 impossible, to defend against an accusation that the judge has decided the outcome
3 of a case out of fear or favor rather than on the merits. This accusation is avoided
4 when a judge listens to the dispute in open court with notice and an opportunity for
5 all parties to be present and participate. Avoiding the appearance that a judge decides
6 cases out of fear or favor is essential because deciding a case without fear or favor is
7 the essence of an independent judiciary. *See* Rule 21-200 cmt. As judges review
8 legal disputes and render decisions, they must be fair and impartial, which means that
9 judges must uphold the constitution and laws based on the application of the law to
10 the evidence admitted in open court. *See* Rule 21-200(A).

11 {14} The fact that a judge located in a small community likely knows many of the
12 people in that community is all the more reason for the judge to avoid ex parte
13 communications. Word travels fast in small communities. Word that a judge is
14 willing to meet in private with one party at a time will only invite members of the
15 community who find themselves embroiled in litigation to approach the judge for an
16 ex parte communication. In addition, community members may also learn from
17 community gossip about the ex parte communications and arrive at the conclusion
18 that the judge decided the merits of the case out of fear or favor, and not on the
19 merits.

20 **Issuance of a Temporary Restraining Order**

1 {15} Respondent issued a temporary restraining order without jurisdiction to do so.
2 Pursuant to Rule 21-200(A) NMRA, “[a] judge shall respect and comply with the law
3” The power to issue temporary restraining orders lies with the district courts,
4 not municipal courts. *See* N.M. Const. art. VI, § 13; Rule 1-066(B). Respondent’s
5 action was knowing and intentional, and he knew at the time he issued the order that
6 he did not have jurisdiction to do so. Respondent’s conduct constitutes actual
7 impropriety. *See* Rule 21-200(A) cmt. (“Actual improprieties . . . include violations
8 of law, court rules or other specific provisions of this Code.”). Impropriety erodes
9 public confidence in the judiciary. *See* Rule 21-200(A)

10 {16} Respondent stated that he issued the restraining order based on his personal
11 knowledge of an incident that occurred between the parties that was outside the scope
12 of the complaint or any court proceedings. Respondent stated that he felt he had to
13 “bend the law to keep peace with [the] families [because] [t]his is a very small town
14 and sometimes I must go out of the box to keep peace.” While a judge retains
15 considerable discretion in fashioning equitable remedies, the judge must not only *be*
16 impartial but must *be regarded* as impartial to still act within the bounds of the Code
17 of Judicial Conduct. Rule 21-200(B) states that “[a] judge shall not allow family,
18 social, political or other relationships to influence the judge’s judicial conduct or
19 judgment.” This obligation is especially true in small communities where a judge will
20 be called upon to settle sensitive disputes between parties the judge knows quite well.
21 In such cases, the judge must not only *be regarded as* impartial by the community.

1 See Rule 21-300(B)(5) (stating that a judge “shall perform judicial duties without bias
2 or prejudice”); Rule 21-200(A) (requiring a judge to act “in a manner that promotes
3 public confidence in the integrity and impartiality of the judiciary”). When a judge
4 does not act accordingly, confidence in the judiciary and the rule of law are eroded.
5 See Rule 21-200(A) cmt. (“Public confidence in the judiciary is eroded by
6 irresponsible or improper conduct by judges.”).

7 {17} In issuing this public censure we do not mean to leave the impression that there
8 is nothing a judge can do to defuse a dangerous situation. Our Code of Judicial
9 Conduct “is not intended . . . to affect a judge’s ability to act on information as
10 necessary to protect the health or safety of any member of the public if consistent
11 with other provisions of this Code.” Rule 21-305 NMRA cmt. 2 (2012). Therefore,
12 if Respondent had credible information that either Defendant or Mr. Cisneros was in
13 danger, he could have notified the authorities. By doing so he could have complied
14 with the Code of Judicial Conduct while also protecting the public.

15 **CONCLUSION**


16 {18} Respondent has acknowledged and apologized for his conduct, and we agree
17 that the stipulated disciplinary measures for his conduct are appropriate. The twelve-
18 month supervised probation and formal mentorship, public censure and required
19 training are sufficient to deter Respondent from repeating such conduct while also
20 reaffirming and restoring public confidence in the integrity of the judiciary. This
21 public censure should also serve as guidance for other judges faced with similar

1 dilemmas that must be addressed within the confines of the ethical obligations
2 embodied by our Code of Judicial Conduct.

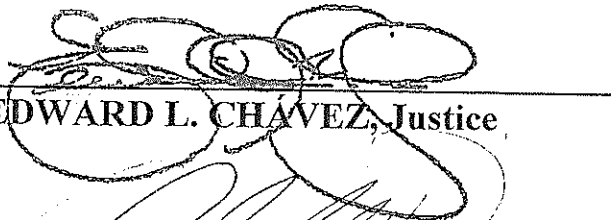
3 {19} **IT IS SO ORDERED.**

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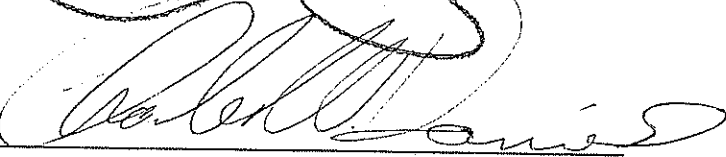
PETRA JIMENEZ MAES, Chief Justice

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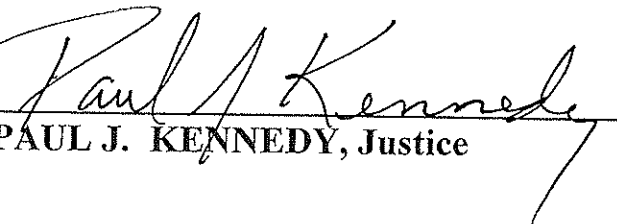
RICHARD C. BOSSON, Justice

8 
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EDWARD L. CHAVEZ, Justice

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CHARLES W. DANIELS, Justice

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PAUL J. KENNEDY, Justice