BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	Comm. No. 97-1909
KENNETH J. PEASLEY, Bar No. 004114	**DISCIPLINARY COMMISSION REPORT**
RESPONDENT.	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on November 16, 2002, pursuant to Rule 53(d), Ariz. R. S. Ct. The Commission considered the Hearing Officer's Report filed July 1, 2002, recommending a 60-day suspension, one year of probation (LOMAP and a limited caseload) and costs of these disciplinary proceedings. Both parties filed objections and requested oral argument. Respondent also filed a separate objection to costs. On October 21, 2002, the State Bar filed a Motion to Supplement the Record with the Arizona Supreme Court Opinion filed October 11, 2002 in *State v. Minnitt*, ___Ariz. __, 55 P.3d 774, 384 Ariz. Adv. Rep. 8 Ariz. (2002). The Commission simultaneously filed an Order giving the parties an opportunity to submit additional memoranda solely on what effect, if any, *Minnitt* should have on these proceedings. Both parties filed supplemental briefs and oral argument was held. The Respondent, his counsel and the State Bar were present. The State Bar argued for disbarment. Respondent argued for no more than a censure, or in the alternative, to adopt the Hearing Officer's recommendations.

Decision

Upon review of the record on appeal, eight members[1] of the Commission considering this matter unanimously adopt and incorporate by reference the Hearing Officer's findings of fact[2] and conclusions of law relating to misconduct, but, on *de novo* review, reach different conclusions regarding the presence of aggravating and mitigating factors, and modify the recommended sanction to reflect disbarment and partial costs.[3]

Discussion of Decision

The Commission's standard of review set forth in Rule 53(d)(2), Ariz. R. S. Ct., states that the Commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of fact and law are also reviewed *de novo*. *State v Blackmore,* 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

The State Bar asked the Commission to find additional facts it contends were proven by clear and convincing evidence but not included in the Hearing Officer's Report, and to find implicit facts not contained in the Hearing Officer's findings of fact, but that the Bar feels are supported in his conclusions of law. The State Bar argued these additional facts establish Respondent's state of mind and demonstrate a far-reaching pattern of misconduct. *See* State Bar's Opening Brief, pp.6-15 and Appendix filed September 23, 2002. The Commission has no

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[1] Commissioner Choate recused herself from consideration of this case.

[2] The Hearing Officer inadvertently stated that both parties filed a petition for review when only the Respondent filed a petition. *See* Report, p.12, finding of fact #22.

[3] The Commission did not assess against Respondent the State Bar's costs incurred from Lex Solutio, Corp., which totaled $7,330.20.

authority to independently make additional findings of fact. *See In re Tocco,* 194 Ariz. 453, 456, 984 P.2d 539, 542 (1999). Moreover, the Commission does not find the Hearing Officer's findings of fact clearly erroneous.

Historically, the Commission gives great deference to a hearing officer's report and recommendation. *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989). The Hearing Officer's Report in this complex matter was well reasoned and thorough. This was a highly contentious case and the record was extremely voluminous. The hearing spanned a total of 11 days with numerous exhibits and many witnesses. The Hearing Officer's work in this case epitomizes the valuable contributions that volunteer hearing officers provide to the discipline process while maintaining their own busy practices.

The Commission, as well as the Hearing Officer, found clear and convincing evidence[4] that Respondent violated Rule 42, specifically:

ER 3.3(a)4	(candor toward the tribunal)	2 Violations
ER 4.1(a)	(false statement of material fact or law)	2 Violations
ER 8.4(c)	(conduct involving dishonesty, fraud, deceit or misrepresentation)	2 Violations
ER 8.4(d)	(conduct prejudicial to the administration of justice)	2 Violations

Respondent while employed as a prosecutor, engaged in prosecutorial misconduct by intentionally eliciting false testimony from a witness (Tucson police detective Joseph Godoy)

[4] Counts Three, Four and Five are dismissed. *See* Report, p. 21.

and knowingly making false statements in two separate capital murder trials.[5] The misconduct was also found to be dishonest and prejudicial to the administration of justice because it resulted in criminal convictions and imposition of the death sentence based upon perjured testimony. *State v. Minnitt, supra.* Minnitt was incarcerated and faced a sentence of death from 1992 to 2002. It is particularly egregious that Respondent engaged in this misconduct while seeking the death penalty. Significant court resources were expended in conducting multiple trials, and in remedying Respondent's misconduct to ensure that there was not a gross miscarriage of justice. Respondent adamantly maintained throughout these disciplinary proceedings that he did not intentionally elicit false testimony. *See* Commission transcript, p. 12. An excellent discussion of Respondent's particular misconduct is contained in the Hearing Officer's detailed Report, which is attached to this Report and incorporated herein.

In determining the appropriate sanction, our Supreme Court considers the ABA *Standards for Imposing Lawyer Sanctions* ("*Standards*") a suitable guideline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In imposing a sanction after a finding of misconduct, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors. *See Standard* 3.0. A review of *Standard* 6.0, involving Violations of Duties Owed to the Legal System, indicates that disbarment is the presumptive

[5]Detective Godoy was indicted on May 17, 2001 for perjury. He was subpoenaed to testify in the discipline process but his attorney advised he would invoke his Fifth Amendment privilege and therefore, the subpoena was not enforced. *See* Report, p. 12, finding of fact #21.

sanction for cases involving false statements, fraud and misrepresentation. The Respondent so concedes. *Standard* 6.11 provides:

> Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes significant or potentially significant adverse effect on the legal proceedings.

The *Standards* further provide that lawyers are officers of the court and the public expects a lawyer to abide by the legal rules of substance and procedure that affect the administration of justice. Lawyers must always operate within the bounds of the law and cannot create or use false evidence or make a false statement of material fact.

Here, Respondent intentionally violated his duty to the legal system and his most fundamental duty as an officer of the court by intentionally introducing false testimony in two murder trials and knowingly making false statements of fact, causing serious harm to criminal defendants, Minnitt and his co-defendant McCrimmon, causing a significant adverse effect on the legal proceedings, and potentially undermining public confidence in the criminal justice system.

Minitt's criminal appeal was progressing simultaneously with the disciplinary proceedings. The Hearing Officer found that Respondent's intentional misconduct caused potential injury in that the death penalty was sought and might have been carried out. *See* Report, p. 22. The Commission bases its recommendation entirely upon the findings of fact and conclusions of law of the Hearing Officer and not upon the Arizona Supreme Court's Opinion in *State v. Minnitt, supra,* which was issued after the Hearing Officer filed his Report. The

Commission takes judicial notice that the *Minnitt* Opinion is consistent with the Hearing Officer's determination that Respondent's conduct was intentional.[6]

Prosecutors take an oath to administer justice. A prosecutor is charged with the specific and fundamental obligation to seek justice and ensure that guilt is decided upon the basis of sufficient evidence — not merely to obtain a conviction.[7] In fulfilling those obligations, a prosecutor must refrain from using improper methods to obtain a conviction:

> [T]he prosecutor is not the representative of an ordinary litigant; he is a representative of a government whose obligation to govern fairly is as important as its obligation to govern at all. The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." It is the prosecutor's duty to refrain from improper methods calculated to produce a wrongful conviction just as it is his duty to use all proper methods to bring about a just conviction.

State v. Pool, 139 Ariz. 98, 103, 677 P2d 261, 266 (1984), *quoting Berger v. United States,* 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935); *See also State v. Bible*, 175 Ariz. at 600,

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[6] The Commission may take judicial notice of the records of the Arizona Supreme Court. *Wallace v. Shields*, 175 Ariz. 166, 176, 854 P.2d 1152, 1162 n. 2 (App. 1992). *See* generally Udall, Livermore, Escher and McIlvain, Arizona Practice—Law of Evidence, § 152 at 331 (1991). Ultimately, the *Minnitt* Opinion overturned Judge Nichols' denial of the defendant's motion to dismiss, vacated the defendant's murder conviction and barred retrial based on Arizona's constitutional protection against double jeopardy. *Minnitt* further held that Respondent engaged in extreme misconduct that he knew was grossly improper and highly prejudicial, both as to the defendant and to the integrity of the system and that he did so with knowing indifference to the danger of mistrial, if not a specific intent to cause a mistrial. The Court also determined that Respondent not only knew the testimony was false, he failed to clarify the mistake and then argued the evidentiary point to the jury. The Court concluded that the conduct was a calculated deception that deprived the defendant of a fair trial and subjected him to the death penalty. *See Minnitt,* 55 P.3d at 777, 782 (2002).

[7] *See* Commentary to ER 3.8. Respondent was charged with ethical violations involving dishonesty and conduct prejudicial to the administration of justice. He was however, not charged with a violation of ER 3.8 (special responsibilities of a prosecutor).

858 P.2d at 1023 (1993). In this case, Respondent lost sight of these duties, attempting to obtain a conviction and the sentence of death through any means, including perjured testimony.

The Commission, as well as the Hearing Officer, having concluded that disbarment is the presumptive sanction, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors, respectively to determine whether and to what extent aggravating and mitigating factors should affect the ultimate sanction imposed. *In re Augenstein*, 178 Ariz. 133, 136, 871 P.2d 254, 257 (1994).

The Hearing Officer found one (1) aggravating factor: 9.22(i) (substantial experience in the practice of law)[8] present in the record, and provided case law indicating that the presence of this factor is often offset by mitigating factor 9.32(a) absence of prior disciplinary history, which is found to be a factor here. The Commission agrees these above mentioned factors are present, but reaches a different conclusion than the Hearing Officer. Substantial experience in the practice of law can be an aggravating factor when the misconduct is the type of misconduct that would be less likely to occur the more experienced the lawyer becomes. *Matter of Savoy*, 181 Ariz. 368, 371 (1995).

It is the Commission's belief that Respondent's significant experience in the practice of law is particularly aggravating given that Respondent is a seasoned prosecutor with over 25 years of experience. He has prosecuted numerous capital murder cases and his position allows him to assign himself the most serious murder cases. Given this experience, it is unconscionable that, when confronted with Detective Godoy's false testimony (which he intentionally elicited) Respondent wrongfully argued that Detective Godoy answered the crucial questions in order to

protect an informant. Respondent further argued to the court and jury that it is a "sick system" that puts police officers in a position where they had to testify as Godoy had. *See* Hearing Officer's Report, p. 17, finding of fact # 45. Respondent's flawed reasoning presented in the trial court in the underlying proceedings suggests the potential for future misconduct by Respondent, which places the public and the criminal justice system at substantial risk.

The Commission finds *de novo* additional aggravating factors 9.22 (b) selfish and dishonest motive and (d) multiple offenses. The record supports the finding that Respondent elicited false testimony, made false statements of material fact, and engaged in dishonest conduct prejudicial to the administration of justice in two separate trials with two separate defendants in order to obtain convictions and the death sentence. He wanted to "win" at any cost. *See* also *In re James H. Dineen*, 481 A.2d 499 (Maine 1994) in which a selfish and dishonest motive was established and disbarment imposed for deliberately eliciting false testimony from a client on the witness stand. *Dineen* held that there is no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach.

The State Bar additionally argued for application of aggravating factors 9.22 (c) pattern of misconduct and (g) refusal to acknowledge wrongful nature of conduct; however, the Commission does not find these factors. Presenting a vigorous defense does not necessarily result in a finding that a respondent refused to acknowledge the wrongful nature of the misconduct. *In re Curtis*, 184 Ariz. 256, 908 P.2d 472 (1995). Deference regarding these factors is given to the tribunal that heard the witnesses firsthand. *Matter of Varbel*, 182 Ariz. 451, 453, 897 P.2d 1337, 1339 (1995).

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[8] Respondent was admitted to the practice of law in Arizona on April 26, 1975.

The Hearing Officer found six (6) factors in mitigation: 9.32(a) absence of a prior disciplinary record, (e) full and free disclosure to disciplinary board or cooperative attitude toward proceeding, (g) character and reputation,[9] (h) physical disability,[10] (j) delay in disciplinary proceedings[11] and (j) interim rehabilitation.

The Commission agrees with the Hearing Officer that the mitigating factors of absence of a prior disciplinary record, full and free disclosure or cooperative attitude, and character and reputation are supported by the record.

Because of inconsistent application by the courts, mitigating factors 9.32 (h) and (i) were amended and combined (j) (interim rehabilitation) in February 1992, and a 4-pronged criteria was adopted.[12] The criteria established that mitigating factors of physical and mental disability and chemical dependency including alcohol or drug abuse *may* be considered when 1) there is medical evidence that the respondent is affected by the disability, 2) the disability caused the misconduct, 3) the respondent's recovery is demonstrated by a meaningful and sustained period of successful rehabilitation, and 4) that the recovery arrested the misconduct and that a recurrence of the misconduct is unlikely.

The *Commentary* further provides that issues of physical and mental disability or

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[9] Numerous witnesses testified on Respondent's behalf and several letters were submitted to support this factor. The Hearing Officer gave significant weight to this factor in reducing the presumptive sanction of disbarment to a short-term suspension.

[10] The Hearing Officer found this factor applied only to the *Minnitt* and *McCrimmon* retrials in August 1997; however, the Commission determined the threshold for this factor was not met.

[11] A Probable Cause Order was entered on May 21, 1999 and the Complaint was filed May 11, 2002.

[12] *See* Amendments to the ABA *Standards for Imposing Lawyer Discipline* adopted by the ABA House of Delegates in 1993, specifically 9.32 Mitigation.

chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. A direct causation between the disability or chemical dependency and the offense *must* be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight. *See Commentary* to *Standard* 9.32, paragraph 3.

The Hearing Officer found that Respondent was experiencing medical problems with his vision, pain on his left side, including periodic vertigo, and difficulties in focusing and concentration. *See* Report, pp. 23-24 and Commission transcript, pp. 46-48. Although Respondent provided sealed medical records that support a diagnosis of vertigo, during the 1997 Minnitt and McCrimmon retrials, he failed to establish that the disability caused the misconduct, failed to demonstrate a sustained period of rehabilitation, and that a recurrence of the misconduct is unlikely.

Therefore, the Commission does not find sufficient evidence to support factors 9.32(h) physical disability or (j) interim rehabilitation. Moreover, the Commission is not persuaded, given the seriousness of the misconduct, the injury sustained and the potential for future injury, that the remaining mitigating factors are sufficient to justify a reduction of the presumptive sanction of disbarment to a 60-day suspension.

The Commission also does not believe that the mitigating factor of delay is present. This was a complex case, which took a significant amount of time to prepare and present on both sides.

Respondent argued that his public and personal humiliation was an additional mitigating factor. This factor was rejected by the Hearing Officer. The Commission agrees and concluded that even if this factor were found, its presence would not change the overall outcome.

The Commission then considered the proportionality analysis offered for similar misconduct. While no case was directly on point, nine cases proved instructive. In *Matter of Fresquez,* 162 Ariz. 328, 783 P.2d 774 (1989), the respondent was disbarred for preparing a false, backdated letter to the State Bar during its investigation, submitting a false affidavit and for lying under oath during bar proceedings. The Arizona Supreme Court found the case for disbarment to be compelling.

In *Matter of Fioramonti,* 176 Ariz. 182, 859 P.2d 1315 (1993), manufacturing evidence during the bar investigation, committing perjury, and suborning perjury warranted a three-year suspension in light of the mitigation present in that case. The Commission believes that presenting perjured testimony in a capital murder trial, not once, but twice, is more egregious and has the potential for greater harm than presenting false evidence in one's own defense in bar proceedings.

In *Matter of Wolfram,* 174 Ariz. 49, 847 P.2d 94 (1993), the respondent, a defense attorney, was suspended for 18 months, ordered to pay restitution, and obtain 24 hours of continuing legal education, for failing to adequately prepare for a client's criminal trial, and failing to respond to the state bar's inquiries in violation ERs 1.1, 1.3, 1.4 and SCRs 51 (h) and

(i). *Wolfram* further held that where the defendant faces the potential for a loss of liberty, the potential harm caused by the misconduct is given added significance. Here, not only was a loss of liberty at stake, but also loss of life, as the Respondent argued consistently and won verdicts for the death penalty.

In re Hansen, 179 Ariz. 229, 877 P.2d 802 (1994), the respondent, a prosecutor, lied to the court to cover her error in dismissing a witness prematurely. Hansen admitted her conduct and accepted an agreement for censure for violating ERs 1.3, 3.3(a)(1), 4.1(a), 8.4(a), (c) and (d). The agreement was tendered prior to issuance of a formal complaint. The court agreed that extremely significant mitigation was present and no actual injury occurred; thereby justifying a reduction the presumptive sanction of disbarment or suspension to censure.

In re Florida Bar v. Cox, 794 So. 2d 1278 (2001), the respondent, an Assistant United States Attorney, knowingly presented false evidence during a criminal prosecution with the intent to obtain a benefit for the witness. The court determined that disbarment was the presumptive sanction but it was reduced to a one-year suspension based on mitigating factors.

In *Matter of Brey*, 171 Wis. 2d 65, 490 N.W. 2d 15 (1992), the respondent abused his authority as a prosecutor and subsequently made false statements to the court and disciplinary board concerning his misconduct. A 60-day suspension was imposed.

In *In re Norton and Kress*, 128 N.J. 520, 608 A.2d 328 (1992), the respondent prosecutors falsely informed the court that police officers did not intend to pursue a DUI case. The respondents knew that this information was false and caused the case to be dismissed. Respondents received a three (3) month suspension.

in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 362 (1994); and maintain the integrity of the legal system, *In re Fioramonti*, *supra.*

Therefore, having considered Respondent's misconduct, application of the ABA *Standards*, factors present in aggravation and mitigation, and a proportionality analysis, the Commission recommends disbarment and partial costs of these disciplinary proceedings.

RESPECTFULLY SUBMITTED this 16th day of December 2002.

Peter Cahill, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 16th day of December 2002.

Copy of the foregoing mailed and faxed
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