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DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA
BY

**BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA**

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| IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, | No. 98-2465 |
| **THOMAS J. ZAWADA, Bar No. 005815** | **DISCIPLINARY COMMISSION REPORT** |
| RESPONDENT. | |

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on April 12, 2002, pursuant to Rule 53(d), Ariz. R. S. Ct., for consideration of the Hearing Officer's findings of fact, conclusions of law and recommendation filed December 31, 2001, providing for a censure, six months of probation (15 hours of Continuing Legal Education) and costs of these disciplinary proceedings.

**Decision**

The nine[1] members of the Commission, by a majority of eight,[2] recommend adopting and incorporating by reference the Hearing Officer's findings of fact and conclusions of law.[3] The Commission, however, modifies the Hearing Officer's recommended sanction to reflect a censure, a Member Assistance Program (MAP) referral and costs of these disciplinary proceedings. In the opinion of the Commission, Respondent would not benefit

[1] Commissioner Mehrens did not participate in these proceedings. Richard Goldsmith, a former commissioner and an attorney from Phoenix, participated as an ad hoc member.

[2] Commissioner Cahill dissented.

[3] Though not alleged by the State Bar, the Hearing Officer found Respondent's conduct violated ER 1.1, Competence. The Commission does not agree that Respondent's conduct evidences incompetence. Respondent is an experienced prosecutor who made a calculated decision to proceed in the manner in which he did, as misguided as it may appear in hindsight. The Commission finds no ER 1.1 violation.

from a term of probation or continuing education related to the use of psychological or psychiatric evidence. Respondent informed the Commission he is no longer responsible for criminal prosecutions within the Pima County Attorney's Office and has been reassigned to handle only child support enforcement cases.

RESPECTFULLY SUBMITTED this 8th day of May 2002.

Alan Bowman

C. Alan Bowman, Chair
Disciplinary Commission

**Commissioner Cahill dissenting:**

The American Bar Association STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991) (ABA STANDARDS) are the guide we use to determine appropriate discipline for professional misconduct. *In re Wolfram*, 174 Ariz. 49, 57, 847 P.2d 94, 102 (1993). We consider the following factors: the duty that Respondent violated, his mental state, the extent of injury that resulted from his actions, and the existence of aggravating or mitigating factors. ABA STANDARDS 3.0.

The Hearing Officer recommends censure and the majority agrees. However, this was intentional misconduct and it caused severe injury. Plus, there is a pattern to Respondent's misconduct. Finally, and most significantly, Respondent has no remorse for what he did. Suspension is the presumptive sanction that is recommended by the ABA STANDARDS. Censure is insufficient to convince Respondent that he must follow the Ethical Rules. We should adhere to guidelines set forth in the ABA STANDARDS and recommend a long-term suspension.

**THE DUTY VIOLATED.**

Respondent abused the legal process by violating elementary rules that govern a prosecutor's conduct in trial. ABA STANDARDS 6.2 applies. The "public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice." ABA STANDARDS 6.0, *Introduction*. Suspension is the recommended sanction where, as is the case here, the lawyer's abuse of process was "knowing" and "intentional." ABA STANDARDS 6.22. Censure for a violation of this duty is appropriate only where the abuse of process was due to mere negligence and where no serious harm was done. ABA STANDARDS 6.23 and see *Matter of Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993).

**RESPONDENT'S MENTAL STATE.**

The Hearing Officer found that Respondent's misconduct was intentional. Report, p. 9. Intentional misconduct (the lawyer acts knowingly, with the "conscious objective or purpose to accomplish a particular result") is the "most culpable mental state." ABA STANDARDS, Theoretical Framework, at p. 6. The evidence fully supports the Hearing Officer's finding.

**THE HARM DONE.**

Respondent was the prosecutor in a first-degree murder case. The jury convicted the defendant. However, the conviction was reversed because of Respondent's prosecutorial misconduct. *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998). According to our Hearing Officer, Respondent: (a) appealed to the jury's fears if the defendant was not convicted; (b) made unfavorable reference to the defendant's exercise of his 5th Amendment rights; and (c) his prejudice against psychiatric and psychological experts resulted in

harassing cross-examination and improper argument. Report, Finding 6, p. 3. The Hearing Officer concluded that this conduct violated numerous Ethical Rules:

> A. Invoking Personal Fear in the Jury to Create Unfair Prejudice.
>
> [Respondent's] argument improperly invoked personal fear in the jury that was wholly unrelated to a rational consideration of the evidence. In combination with the lack of credible evidence against the insanity defense, this argument substituted personal fear for a proper prosecution response to a legitimate defense, which violated ERs 3.1 (meritorious contentions), 3.4(e) (trial tactics unsupported by admissible evidence), and 8.4(d) (misconduct that is prejudicial to the administration of justice).
>
> B. Improper Insanity Cross-Examination and Argument
>
> The more significant problems from an ethics perspective involved the lack of evidence supporting respondent's position and [Respondent's] abusive, unfairly prejudicial tactics used during cross-examination and argument. (Citations omitted.) The pattern of misconduct violates ERs 3.1 (meritorious contentions), 3.4(e) (trial tactics unsupported by admissible evidence), and 8.4(d) (misconduct that is prejudicial to the administration of justice).

*Id.*, at Conclusions of Law, p. 5.

Respondent engaged in a "win-by-any-means strategy." He prejudiced the jury by putting the fear of acquittal in their minds. He deliberately risked a mistrial or reversal in order to win the case and prevent an acquittal. Because of this, jeopardy attached and the defendant, who was charged with first-degree murder, could not be tried again. *State v. Jorgenson*, 198 Ariz. 390, 391, 10 P.3d 1177 (2000).

The injury here is serious. There was "never much doubt that (the defendant in *Hughes*) had done what he was charged with doing," yet he could not be tried or punished because of Respondent's ethical violations. *State v. Hughes*, 193 Ariz. at 81, 969 P. 2d at 1192 (1998). Neither restitution nor a damage award could compensate for what

Respondent did. Simply put, his knowing, deliberate and intentional misconduct either caused a murderer to walk free, or it helped convict an innocent man of first-degree murder. Either way, no harm could be more serious. When we consider what sanction to recommend, we must consider what was at stake in the *State v. Hughes* trial. *In re Cardenas*, 164 Ariz. at 152, 791 P.2d at 1035 (1990), (a more serious injury justifies a more severe sanction).

**THE AGGRAVATING CIRCUMSTANCES.**

The ABA STANDARDS list the factors that justify an increase in the degree of discipline, including "(c) a pattern of misconduct" and "(i) substantial experience in the practice of law." ABA STANDARDS 9.2. Both factors exist here. Hearing Officer's Report, p. 9. However, the Hearing Officer did not increase the degree of discipline even though he found that these aggravating circumstances were present here. And, inexplicably, he did not find an additional aggravating circumstance, Respondent's "refusal to acknowledge wrongful nature of conduct." ABA STANDARDS 9.2(g). The Hearing Officer's failure to find this aggravating circumstance is, in my view, clearly erroneous. The only possible finding is that Respondent has no remorse for what he did in *State v. Hughes*.

**a. Pattern of Misconduct.**

Respondent has a disturbing pattern of violating the ethical rules that govern a lawyer's conduct at trial. When it suits his purpose to ignore these rules, he will. The Hearing Officer found a pattern of misconduct. Report, p. 9. This is an aggravating circumstance. ABA STANDARDS 9.22(c). This pattern is shown by the multiple violations that occurred throughout the State v. Hughes trial. It is also demonstrated by prior misconduct, as documented in *Pool v. Superior Court*, 139 Ariz. 98, 677 P.2d 261 (1984).

*Pool* is another case where Respondent was the prosecutor at trial. His conduct in *Pool* was strikingly similar to his conduct years later in *State v. Hughes*. According to the Arizona Supreme Court, Respondent's conduct was "egregiously improper" and he "intentionally engaged in conduct which he knew to be improper" in order to "prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal." As a result, jeopardy attached and the defendant could not be tried again. *Id.*

The evidence fully supports the Hearing Officer's finding that the aggravating circumstance of a pattern of misconduct exists here. The fact that Respondent's misconduct continued – actually it was repeated almost exactly – after *Pool*, should concern us. The fact that a prosecutor of major felonies, a position of great power and responsibility, deliberately ignored the law in order to put someone in prison is frightening.

**b. Refusal to Acknowledge Wrongful Nature of Conduct.**

The discipline we recommend ought to recognize another aggravating factor that, according to the ABA STANDARDS, should be considered, refusal to acknowledge wrongful nature of conduct. ABA STANDARDS 9.2(g). An unwillingness (or inability) to see the error of one's ways is significant. This is because misconduct is sure to be repeated (as it was here) when a lawyer has no remorse after committing ethical violations.

Respondent adamantly refuses to acknowledge that what he did he was wrong. Despite opinions by the Arizona Supreme Court, a reprimand by his employer, and a Disciplinary Commission Hearing Officer's report, he will not acknowledge that he has violated any ethical rule. He accuses those who differ with him of having a "pro-psychiatric anti-prosecution bent." Respondent's Opening Brief, p. 39. He says there is "no precedent in the history of Arizona jurisprudence" to suggest that anything he has done was unethical.

*Id.* at p. 33. Respondent fails to acknowledge that he is single-handedly responsible for much of the law in Arizona on the consequences of extreme prosecutorial misconduct. His sweeping statement about our jurisprudence omits mention of several pertinent cases, each of which addresses whether he has ever done anything unethical. *State v. Pool, State v. Hughes,* and *State v. Jorgenson.*

Respondent learned nothing from *Pool, Hughes* or *Jorgenson*; apparently, he does not even acknowledge that these cases exist as precedent. He smugly accuses those who disagree with him as "anti-prosecution." However, he is a disgrace to those who honorably and ethically represent the interests of the State of Arizona. A mere censure will have no effect on this reckless lawyer.

**THE PROPER SANCTION.**

The intentional misconduct, the harm done, the pattern of abuse, together with a dangerous dose of self-righteous intransigence, mean that more than a censure is necessary. Much more. Censure is inconsistent with the proper application of the ABA STANDARDS and it does not accomplish the purpose of lawyer discipline.

The Hearing Officer incorrectly applied ABA STANDARDS 6.23 (censure for negligent conduct without serious interference with a legal proceeding). Suspension is the correct sanction according to ABA STANDARDS 6.22. Just as important, a suspension and not censure, is more consistent with the discipline that has been administered to other lawyers.

In *Matter of Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993), the respondent lawyer was a defense attorney who "knowingly failed to provide indispensable services" to a client. Because the client was the defendant in a criminal matter, there was a potential for serious

injury, thereby making the violations "especially egregious" due to the stakes involved in a criminal case. And, just as here, Mr. Wolfram had no remorse. He was suspended for eighteen months. Respondent caused serious *actual* injury, not merely the potential for injury, and he has a pattern of misconduct. It is hard to understand why Respondent deserves less than the eighteen-month suspension given in *Wolfram*.

The misconduct in *Matter of Kreckow,* SB-95-0038-D (1995), also arose out of a criminal case. Ms. Kreckow failed to comply with court orders, including orders that she file an opening brief for her client, the defendant. She was censured because there was extensive evidence in mitigation, she had a cooperative attitude toward the disciplinary proceedings, remorse, and there was evidence of serious emotional and personal problems. No such mitigation evidence justifies a censure for Respondent.

In the case of *In re Ockrassa*, 165 Ariz. 576, 799 P.2d 1350 (1990), the lawyer prosecuted a client whom he had previously defended, even after the client asked him to withdraw. This was a conflict of interest, a violation of ER 1.9. Mr. Ockrassa was suspended for ninety days because of his insensitivity to ethical violations, as "evidenced by a pattern of misconduct." Respondent also has, at the very least, an "insensitivity" to ethical violations. More accurately, he will disregard ethical rules whenever he chooses to do so.

*Matter of Alcorn and Feola,* ___ Ariz. ___, 41 P.3d 600 (2002), arose out of a civil case but nevertheless has similarities here. Alcorn and Feola intentionally abdicated "fundamental obligations of professional integrity by affirmatively misleading the judge." They did not deliberately attempt to misuse the process but misunderstood their obligations and had an "honest" – but mistaken – motivation to help a client. They were suspended for six months.

The duty violated in *Alcorn and Feola* is similar to the duty violated here. Respondent abdicated a "fundamental obligation of professional integrity." And, as in *Alcorn and Feola,* his actions were intentional. But the similarity stops here. Respondent cannot argue that he did not understand his obligations. These obligations – including the fact that a prosecutor may not engage in improper conduct in order to prejudice the jury – were explained to him years ago, in *Pool v. Superior Court.* And, while it was evidence in mitigation that the lawyers in *Alcorn and Feola* wanted to do everything they could to win a case for their client, prosecutors have a different obligation.

A prosecutor does not represent an ordinary litigant; her interest is not to do everything she can to win a case but to see that justice is done. A prosecutor must refrain from improper methods calculated to produce a wrongful conviction, just as she should use all proper methods to bring about a just conviction. *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). While Alcorn and Feola had an "honest" but mistaken motivation, Respondent is an unrepentant, repeat violator of the prosecutor's duty to do justice. He unabashedly embraces a "win-by-any-*and*-all-means strategy" – notwithstanding repeated rulings of our Supreme Court telling him he is wrong. Respondent will, without regret or remorse, toss aside ethical obligations if that's what it takes to get him what he wants, even if by doing so he jeopardizes a murder conviction or convicts an innocent man.

*Matter of Goff,* SB-01-0152-D (2001), is also instructive. Goff had several trust account violations, all of which were bookkeeping-type violations. In addition, he used his trust account to pay business and personal expenses. While serious, it was agreed that these violations were the result of negligence, not knowing or intentional conduct. And,

significantly, Goff did no actual harm; there was no loss or conversion of client funds. He admitted his shortcomings and improved his bookkeeping system. His exemplary and cooperative attitude toward discipline was persuasive evidence that his transgressions would not re-occur. Goff was censured. Yet we give this same sanction to a serial ER-violator who on multiple occasions caused grievous, irreparable injury and who – because he refuses to acknowledge he was wrong – will surely repeat his misconduct again, if he ever has the chance to do so.

Lawyer discipline should protect the public by deterring the Respondent and others from engaging in similar unethical conduct. *Matter of Kersting,* 151 Ariz. 171, 726 P.2d 587 (1986) and *In re Kleindienst,* 132 Ariz. 95, 644 P.2d 249 (1982). A public rebuke will do nothing to deter Respondent. The Supreme Court's 1984 criticism of his trial tactics in *State v. Pool* – in all practical effect a public censure – had no deterrent effect; he repeated his *Pool* misconduct in *State v. Hughes*. The Supreme Court's scathing assessment in the *State v. Hughes* opinion also has had no effect; Respondent is still right and everyone else is wrong – and biased. Finally, even *State v. Jorgenson* is not enough to deliver the message to Respondent. What else can be said to get him to obey the law? Why do we think he will heed our censure, when Supreme Court opinions mean absolutely nothing to him?

The sanctions we impose should instill confidence in the integrity of the lawyer discipline system. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d, 352, 362 (1994). But, when we give a sanction that will do no good, we *diminish* confidence in the integrity of the discipline system.

I would recommend a suspension lengthy enough to accomplish the most important purpose of lawyer discipline, preventing an unethical lawyer from doing further harm. We

should protect the public from a lawyer who will use improper means to obtain a criminal conviction and send someone to prison. We should ensure that future convictions are not jeopardized and innocent citizens are not wrongly convicted. A censure or even a six-month-or-less suspension will not accomplish this.

> "[S]hort-term suspensions with automatic reinstatement are not an effective means of protecting the public. If a lawyer's misconduct is serious enough to warrant a suspension from practice, the lawyer should not be reinstated until rehabilitation can be established."

*Alcorn and Feola,* fn 11.

A suspension for at least six months and a day would require Respondent to show rehabilitation, that he knows, respects and will in the future obey the law.

Original filed with the Disciplinary Clerk
this 8th day of May, 2002.

A copy of the foregoing mailed
this 8th day of May, 2002, to:

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Copy of the foregoing hand-delivered
this 8th day of May, 2002.

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By Karen Weigand

/kdl