BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOHN THOMAS BANTA,** Bar No. 010550 RESPONDENT.	) File Nos. 02-1070, 02-1628) 02-2066))))) **HEARING OFFICER'S REPORT**) **AND RECOMMENDATION**)	

PROCEDURAL HISTORY

Probable Cause Orders were filed on December 17, 2002. A three-count Complaint was filed on June 4, 2003 and served by mail on June 5, 2003. Respondent filed an Answer on June 30, 2003. A settlement conference was held on September 23, 2003. The parties were unable to reach a settlement. On September 25, 2003 the State Bar filed a Motion to Amend Compliant; Respondent filed an Objection to the Motion on October 2, 2003. Oral argument on the Motion and Objection was held on October 3, 2003. The Motion was granted and the State Bar filed an Amended Complaint on October 15, 2003. A hearing was held on December 8, 2003, Bar Counsel and Respondent were present.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in Arizona, having been admitted in Arizona on May 10, 1986.

COUNT 1

2. Respondent assumed representation for a tort injury client.

3. Medical bills exceed the award ultimately achieved at arbitration.

4. The award was paid and the funds were ultimately deposited into Respondent's trust account. No evidence was presented to allow me to determine when the funds were

deposited.

5. Respondent sought compromises from eight[1] health care providers in order to distribute the funds equitably. A letter was sent on December 12, 2000 detailing his proposal for a pro-rata distribution. It appears this letter was sent at or about the time the award check was received.

6. Respondent was unable to obtain agreements from Dr. Seigal or Dr. Mazzarella. Respondent proposed that Dr. Siegal be excluded from the settlement because he had received the largest distribution from the client's medical payments coverage. Dr. Seigal insisted that he be included in the pro-rata distribution nevertheless.

7. On or about July 24, 2001, Respondent referred to Dr. Siegal as a "fucking asshole" during a conversation with one of Dr. Siegal's billing representatives. Respondent further stated that he would hold the trust account funds until he dies if Dr. Seigal did not compromise

8. In or about December, 2001, Respondent had a conversation with Dr. Siegal's billing representative; Respondent was advised that Dr. Siegal wanted his share of pro-rata distribution.

9. Respondent was contacted by the State Bar in July, 2002, and again in August, 2002, about this matter. Respondent testified that he did not personally see the July, 2002, letter.

10. As a result of that contact, Respondent filed an interpleader action with the Maricopa County Superior Court.

11. Although the matter was not resolved promptly, Respondent attempted to resolve

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[1]Dr. Mazarrella was not one of the eight health care providers apparently because Respondent was unaware that Dr. Mazzarella had provided services.

the matter and, immediately upon learning of a request from the State Bar, an interpleader action was filed.

COUNT 2

12. Respondent appeared at the Glendale Justice of the Peace Court in connection with a forcible detainer action.

13. After the proceedings in the courtroom, Respondent went into the lobby to obtain appeal paperwork from the clerk's office. Respondent wanted to appeal the attorney's fee award only.

14. While discussing the proper paperwork with employees of the Clerk's office, Mr. Banta complained there was a problem with non attorney *pro tem* justices of the peace; that some of them were "fucking lousy." Employees believed that Respondent was referring to Judge Tolby.[2]

15. Although the testimony was conflicting, I find that Respondent was speaking louder than conversational tone but not shouting. The tone of conversation was sufficiently sharp to draw attention from other persons in the lobby.

COUNT 3

16. Mr. Banta represented the defendant in Natividad Moreno v. Fair Exchange Auto Sales. Michael Christopher and DeShon Pullen represented the plaintiff.

17. On September 27, 2002, during a pretrial conference, Respondent called opposing counsel a liar and accused opposing counsel of making intentional representations to the court and of hiding evidence. Mr. Banta asserted that he called opposing counsel a liar because "he is a liar." No evidence on this point was presented.

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[2]Notice is taken that Judge Tolby was, at all times relevant, the duly elected Justice of the Peace for the Glendale Justice Court.

18. Judge Donohoe was called to rule on a claim of attorney client privilege by plaintiff's counsel during a deposition. Judge Donohoe sustained the privilege claim. Respondent called the ruling "crazy."

19. The argument became heated and Judge Donohoe, during the telephonic argument, cited Respondent for contempt. Judge Donohoe stated that, in fourteen years, he had never cited an attorney for contempt. Judge Donohoe had Respondent apologize to Mr. Christopher and, after he did, Judge Donohoe lifted the sanction.[3] Judge Donohoe stated that Respondent called him names but could not remember what names; Respondent denied calling the Judge names. Opposing counsel did not testify that Respondent called Judge Donahoe names. Judge Donohoe described Respondent's conduct as abusive; opposing counsel testified that Respondent became visually and verbally upset and made some comments primarily about opposing co-counsel.

20. Judge Donohoe intervened in an argument between Respondent and Mr. Christopher after Respondent called Mr. Christopher a liar. Respondent became angry with counsel and the Court and used "abusive language." Judge Donohoe could not remember the words stated.

21. During the deposition of Respondent's client in the same case, Respondent and opposing counsel argued about whether or not the client should read a portion of an exhibit into the record. Respondent stated that he would read it into the record. After some debate on the issue, the following exchanges occurred:

Mr. Christopher: Mr. Soza, will you read that into the record?

Mr. Banta: I find your behavior, sir - - -

Mr. Christopher: Why don't you writ a letter to the court? Why don't you do that?

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[3]The record does not reflect the nature of the short-lived sanction.

Mr. Banta: Why don't you go perform an unnatural sex act upon yourself.

22. Mr. Banta asserted that he was trying to protect his uneducated client from embarrassment. Respondent's client has a ninth grade education and is uncomfortable reading complex documents out loud because of his limited education.

CONCLUSIONS OF LAW

1. The State Bar bears the burden of proof by clear and convincing evidence that Respondent committed the violations charged. The State Bar must establish that it is highly probable that the allegations are true.

COUNT 1

2. The State Bar has failed to prove by clear and convincing evidence a violation of ER 1.3, 1.15(b), 1.16(b), or Rule 41(g).

COUNT 2

3. The State Bar failed to prove by clear and convincing evidence a violation of Rules 41(c), 41(g), or 51(g).

COUNT 3

4. The State Bar has failed to produce clear and convincing evidence that the Respondent violated ER 3.5(d), 4.4, or 8.4(d).

5. The Respondent violated Supreme Court Rule 41(c).

6. The State Bar has failed to prove by clear and convincing evidence that the Respondent violated Rule 41(g)[4] or 51(g).

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[4]"The legal profession has seen an increasing number of attorneys engaging in conduct that is personally and professionally offensive. State-bar disciplinary action results because of findings that an attorney has engaged in flagrant disrespect toward a court, opposing counsel, and adverse party, or the attorney's own client[.]" Janelle A. McEacharn, Annotation, *Engaging in Offensive Personality as Ground for Disciplinary Action Against Attorney*, 58 A.L.R. 5th 429 (1998), quoted in *Discipline of Eicher*, 661 N.W.2d 354 (S.D. 2003). The Respondent's conduct in this case was not "flagrant disrespect" but rather an emotional exclamation. *Cf. Kentucky Bar Assoc. v. Waller*, 929 S.W. 2d 181 (1996) (filing of scurrilous pleadings). Under the circumstances of this case, I cannot conclude an "offensive personality."

ABA Standards

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

ABA *Standard* 6.23 states that reprimand is generally appropriate for a lawyer's negligent failure to comply with a court order or rule and causes interference or potential interference with a legal proceeding. ABA *Standard* 6.24 states that admonition (informal reprimand in Arizona) is generally appropriate for an isolated instance of such conduct causing little or no actual or potential interference with a legal proceeding. ABA *Standard* 7.4 states that admonition (informal reprimand) is generally appropriate for an isolated instance of negligence that is a violation of a duty owed as a professional which causes no injury.

Aggravating and Mitigating Factors

One aggravating factor as recognized in the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 ed.) [hereinafter, A.B.A. Stds.], § 9.22, is substantial experience in the practice of law. § 9.22(i).[5]

Applicable mitigating factors as recognized in the A. B. A. Stds., § 9.32, are: a) no prior disciplinary history. § 9.32(a); b) absence of dishonest or selfish motive. § 9.32(b)

Proportionality Analysis

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

[5]I don't consider 9.22(g) as an aggravating factor because, while Respondent does not admit his conduct was wrongful, the wrongfulness of the conduct is not as clear as the State Bar asserts.

In Re Ziman, 174 Ariz. 61, 847 P.2d 106 (1993), considered the respondent's offensive and profane comment to an arbitrator as but one small part of a multitude of transgressions. He was suspended for ninety days for violation of eight separate ethical rules and Rule 41(g). The Judicial Commission, in *Matter of Goodfarb*, 179 Ariz. 400, 880 P.2d 620 (1994), recommended a public censure, despite a prior admonition, for profane and insulting language. In the instant case, Respondent became abusive in his language after becoming verbally and visually upset with the Court's ruling. He called the ruling "crazy" and, had he used other terms to characterize the ruling, he would not have been briefly sanctioned by the Court. Respondent's conduct was far less severe than *Ziman* or *Goodfarb*.

In *Matter of Delozier*, State Bar File No. 00-1963, as represented by the State bar, the respondent received an informal reprimand for making sarcastic comments to the Court in the presence of opposing counsel and his client. Specifically, the respondent asked the Court "now what part of your anatomy do you want me to kiss?" and later told the Court that he was a disgrace to the profession. Respondent's conduct herein is less egregious.

Discussion of Appropriate Sanction

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's Standards for Imposing Lawyer Sanctions ("Standards") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). I have considered all of these factors.

In this instance, there was an isolated instance of improper conduct before a tribunal.

There was no selfish motive; to the contrary, Respondent was motivated by zealous advocacy on behalf of another. Other evidence, while not rising to the level of clear and convincing evidence of an ethical violation, convinces me that Respondent may not always appropriately temper his zealousness. Such conduct, however, permeates the profession. So, while a violation is found, close scrutiny of many lawyers will unearth similar conduct. For these reasons and consistent with the *Delozier* matter, a strong sanction is not warranted.

Based upon a proportionality review, the ABA *Standards*, and the weight of the aggravating and mitigating circumstances, it is recommended that Respondent be informally reprimanded. I do not find it appropriate to recommend that Respondent be ordered to pay the costs of these proceedings because he substantially prevailed.

DATED this 15th day of March, 2004.

Martin Lieberman/ps
Martin Lieberman
Hearing Officer 7W

Original filed with the Disciplinary Clerk
this 15th day of March, 2004.

Copies of the foregoing mailed
this 15th day of March, 2004.

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