BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	
	No. 02-0918
GEORGE R. BROWN, State Bar No. 009628	**HEARING OFFICER'S REPORT AND RECOMMENDATION**
Respondent.	

A hearing was held on this matter before the Hearing Officer at 9:30 a.m., February 23 2004 at 177 N. Church, Suite 200, Tucson, Arizona. Having reviewed the record in this matter, including the exhibits, testimony and argument of counsel, and recognizing that Respondent failed to appear and participate in this disciplinary proceeding, the Hearing Officer finds, concludes and recommends as follows:

I. PROCEDURAL HISTORY

1. The Probable Cause Panelist issued the Probable Cause Order for this matter on March 28, 2003.

2. The State Bar filed the Complaint for this matter on September 5, 2003, and served it on Respondent by mail on September 9, 2003 as provided by Rule 53(c)(1),

Ariz.R.S.Ct. (2002) (recodified as Rule 55(b), effective Dec. 1, 2003).

3. The Disciplinary Clerk issued a Notice of Default on October 10, 2003 and Respondent filed his Answer on October 17, 2003.

4. The State Bar served its Preliminary Disclosure Statement on Respondent (Exhibit 22) on November 7, 2003, and filed a notice of service of discovery with the Disciplinary Clerk on the same day. On November 21, 2003, the State Bar served Respondent with its First Set of Non-Uniform Interrogatories (Exhibit 19), First Request for Production of Documents (Exhibit 20) and filed a Notice of Service of discovery with the Disciplinary Clerk on the same day.

5. On October 28, 2003, the Hearing Officer issued a Case Management Order requiring Respondent to serve his Rule 26.1, Ariz.R.S.Ct. initial disclosure statement no later than December 1, 2003 and respond to the State Bar's discovery requests no later than January 5, 2004.

6. Respondent failed to serve his disclosure statement as required by Rule 26.1, Ariz.R.Civ.P. and failed to respond to either of the State Bar's discovery requests by the deadlines set out in the Case Management Order. Respondent did not raise any objections to the State Bar's discovery requests.

7. The Case Management Order set a settlement conference for Thursday, January 8, 2004 in Tucson, Arizona. Counsel for the State Bar appeared. Respondent did not appear, nor did he advise the settlement officer or bar counsel that he could not attend. The settlement conference was vacated.

8. On January 9, 2004, bar counsel filed a motion to compel responses to discovery requests. A telephonic hearing on the motion was set for January 13, 2004 in order to address the discovery issues expeditiously, and to adhere to the time limits in the Supreme Court's Disciplinary Rules. Respondent was notified of the date and time of the hearing by mail and facsimile to the addresses on file with the Arizona Supreme Court and the State Bar.

9. Telephonic oral argument on the motion to compel was heard on January 13, 2004. Respondent could not be reached by telephone and did not communicate a reason for his unavailability. On January 13, 2004, the Hearing Officer entered an order requiring Respondent to serve his Rule 26.1 disclosure statement on or before January 16, 2004, and to file responses to the State Bar's non-uniform interrogatories and request for production of documents by no later than 3:00 p.m., January 23, 2004. Respondent delivered a disclosure statement and responses to the State Bar's discovery requests by the times specified in the order, but the responses did not conform to the requirements of Rules 26.1, 33 and 34, Ariz.R.Civ.P. (See Par.40, p.11 *infra*).

10. The Case Management Order of October 28, 2003 also scheduled a telephonic pre-hearing conference for January 26, 2004. Bar counsel appeared by telephone, but the Disciplinary Clerk's office could not reach Respondent by telephone, nor did Respondent communicate a reason for not appearing.

11. The Case Management Order set the hearing in this matter for 9:30 a.m., February 2, 2004. Bar counsel drove from Phoenix and appeared for this hearing in Tucson. However, on the morning of February 2, 2004, a voice mail message was left with the Hearing

Officer by someone claiming to call on behalf of the Respondent. The person stated that Respondent would not be appearing because he had sought medical attention for an anxiety attack. The person also indicated the Respondent requested a postponement of the hearing.

12. The Hearing Officer filed a motion to continue the hearing with the Disciplinary Commission. The Disciplinary Commission entered an order on February 9, 2004 granting the motion. The Hearing Officer issued a Notice of Hearing on February 9, 2004, continuing the hearing to 9:30 a.m. February 23, 2004.

13. The Disciplinary Commission's order and the Notice of Hearing were served on Respondent by first class mail to Respondent's address of record with the State Bar.

14. After Respondent failed to attend the hearing scheduled for February 2, 2004, the State Bar filed its request for subpoena duces tecum on February 17, 2004. The Hearing Officer signed the subpoena and it was served on Respondent by first class mail and by facsimile on February 18, 2004. The subpoena directed Respondent to bring receipts and medical records relating to his treatment for the medical or mental condition that precluded his appearance at the February 2, 2004 hearing to the hearing set for February 23, 2004.

15. On February 20, 2004, bar counsel received an e-mail communication from Respondent advising of his new phone number for facsimile. Bar counsel then caused the subpoena to be sent by facsimile to the number provided by Respondent that same day.

16. Respondent failed to appear or participate in the February 23, 2004 hearing. The Hearing Officer, counsel for the State Bar and the court reporter were present at the time and place described in the February 9, 2004 Notice of Hearing. Respondent was declared to be in

default. The State Bar's request to make a record was granted. The Hearing Officer accepted into evidence exhibits offered by the State Bar, heard testimony of Gwen E. Lerner (Respondent's ex-wife and complainant in this matter (hereinafter "Ms. Lerner"), and received legal argument from the State Bar.

17. The Hearing Officer gave the parties until March 15, 2004 to file Memoranda of Law. Respondent was served with a copy of the Hearing Officer's order by mail in accordance with the rules. The State Bar filed a Proposed Report and Recommendation on March 15, 2004. Respondent did not file a memorandum.

II. FINDINGS OF FACT

18. At all times relevant to these proceedings, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on December 26, 1985.

19. The initial complaint in this matter was filed on Lerner's behalf by Dawn Priestman, a representative of the Brewster Center in Tucson, Arizona. Ms. Lerner sought the assistance of the Brewster Center in filing the complaint after she was unable to secure the assistance of an attorney in filing her complaint with the State Bar. (R.T., pp.46-47).

20. The initial complaint letter from Priestman on behalf of Ms. Lerner was dated May 2002. At the time, there were post-decree matters pending in the Pima County Superior Court before Judge Quigley regarding many of the issues enumerated in her complaint, including contempt proceedings. Thus, at the time the complaint in this matter was received by the State Bar, the Pima County Superior Court had exclusive jurisdiction over those issues, such as non-

payment of child support, maintenance and other payments.

A. FINDINGS ON WIRETAPPING BY RESPONDENT

21. Respondent intentionally intercepted telephone communications of his child, mother-in-law and, apparently, Ms. Lerner, to which Respondent was not a party in late February or early March of 1999. He did this by connecting an electronic recording device to the phone line of the family home for a twenty-four period. Respondent and Ms. Lerner were still married and resided together at the residence at the time the communications were intercepted. The parties had not filed for divorce and there were no legal proceedings pending between the parties at the time. The Pima County Attorney's office was not contacted until more than a year after this occurred and, after investigation, declined to prosecute. (*See* Exh. 12, Complaint Against a Lawyer; Exh.16, Respondent's letter to State Bar counsel; Respondent's Answer at Par.2).

22. Respondent's explanation for the wiretapping was twofold: 1) concern for his wife's welfare due to her unusual behavior and her past history of substance abuse, and 2) suspicion of her infidelity. *(See* Exh. 16 at pp. 2 and 3).

B. FINDINGS ON MISCONDUCT OF RESPONDENT CONCERNING HIS DIVORCE PROCEEDINGS

23. Respondent was the respondent in a dissolution proceeding with Ms. Lerner, captioned *In re Marriage of Gwen E. Brown and George R. Brown,* Pima County Superior Court case number D-125399, filed in April 1999. (Reporter's Transcript, [hereinafter "R.T."] at p.50).

24. At the time the dissolution proceedings began, the parties had been married for

approximately twenty-two years and had two children, ages 8 and 13. (R.T. at p.49).

25. On or about July 13, 2001, Judge Quigley of the Pima County Superior Court (hereinafter "trial court") signed the Second Amended Decree of Dissolution ("Decree") in the Divorce. (*See* Exh. 2, Second Amended Decree of Dissolution). The Decree included orders that Respondent pay child support and spousal maintenance. (*Id* at pp.6-7).

26. Ms. Lerner, the petitioner in the dissolution proceeding, filed orders to show cause attempting to secure Respondent's compliance with the terms of the Decree, including payment of spousal maintenance and child support, on December 18, 2001 (Exh.3), and again on February 15, 2002. (Exh.4).

27. On March 5, 2002, the trial court ordered Respondent to pay net arrearages of $3,480.00 for child support and spousal maintenance within sixty days. (Exh.6, Bates stamp p.103).

28. On May 13, 2002, Ms. Lerner filed another petition for order to show cause because Respondent had not paid spousal maintenance and child support arrears within the 60-days as ordered on March 5, 2002. (Exh.7).

29. In its Minute Entry dated June 21, 2002, the trial court ordered Respondent to comply with the terms of the March 5, 2002 order by July 12, 2002 and scheduled a review hearing for September 5, 2002. (Exh.9).

30. In an order dated July 1, 2002, the court ordered Respondent to pay the amounts set forth in the March 5 and June 21 orders by September 5, 2002. (Exh.10)

31. Respondent purged the contempt by paying all child support and spousal

maintenance owed by the trial court's deadlines and by paying the net arrearage of $3,480.00 to Ms. Lerner within the time set by the July 1, 2002 order. (Exh. 13, Minute Entry Order of September 5, 2002).

32. Ms. Lerner testified that as a result of the Respondent's failure to pay spousal maintenance and child support as ordered, she had to seek public assistance for herself and the two minor children. (R.T. at pp.43-44). No documents were introduced to support her claim that she received assistance. Additionally, no evidence was submitted as to the length of time she received this assistance, if she did, in fact, receive it. Certainly, had Ms. Lerner received public assistance, the Arizona Department of Economic Security ("D.E.S.") would have sought and obtained reimbursement for the payments from the Respondent. There was no evidence that this occurred.

Based on other exhibits entered into evidence at the hearing on this matter, the Hearing Officer does not find Ms. Lerner's testimony regarding public assistance credible. Ms. Lerner somehow found the resources to move herself and the two minor children to New York and hire lawyers there to file an action under the UCCJA in a failed attempt to get jurisdiction transferred from Arizona to New York. This is not consistent with an individual who needs public assistance in order to live. The trial court assessed a significant contempt sanction against her as a result, $23,250.00. (Exh.6, Bates stamp p. 102). It is not reasonable that the trial court would have assessed such a sum against a party who was receiving public assistance. The fact that Lerner received public assistance was not proven by clear and convincing evidence.

33. In the Second Amended Decree, the court ordered Respondent to pay certain

community debts. (Exh. 2, pp.8,11,13-14). Respondent failed to pay all of these amounts. However, pursuant to a January 7, 2003 order of the court, on stipulation of the parties, the Lerner and Respondent arrived at a settlement of all outstanding issues between them, including all judgments and amounts owed by Respondent to Ms. Lerner. Ms. Lerner waived all the outstanding judgments and arrearages she had against the Respondent for those expenses, including any child support or spousal maintenance arrearages. Neither party was awarded attorney's fees. (Exh.11.)

34. The terms of the January 7, 2003 order, which affirmed the stipulation of the parties, required Respondent to pay $836.00 per month in child support to Ms. Lerner. (Exh.11 at pars.9,10). As of the date of the hearing in this matter, February 23 2004, there was no evidence that Respondent was not in compliance with terms of the January 7, 2003 order.

35. Although Respondent was found in contempt of court on March 5 and July 1, 2002 for failure to pay the spousal maintenance and child support as ordered, the minute entry order of March 5, 2002 indicates the trial court considered the conduct of Ms. Lerner, who had been found in contempt of court for removing the children from Arizona and filing frivolous proceedings in New York, and the substantial financial impact on Respondent due to her violation of court orders. The judge gave the Respondent time to make the child support payments:

> " 3. Respondent is in contempt of court for his failure to pay child support and spousal maintenance as previously ordered. In making this finding, the Court is not unmindful of the facts surrounding the petitioner's [Lerner's] conduct that resulted in the foregoing August 17, 2001 contempt finding against petitioner, but is constrained to note nevertheless that respondent has not paid one penny of support in almost seven months. The respondent may purge himself of his contempt by (a) hereafter paying all child

support and spousal maintenance promptly when due and (b) paying the net arrearage of $3,480.00 to petitioner within not more than sixty (60) days of this date...." (Exh.6, Bates stamp p.103).

5. ...First, the significant contempt sanctions previously ordered against petitioner were not intended as a windfall to respondent but were meant to punish petitioner's [Lerner's] contemptuous conduct and were structured with an awareness that such conduct would cause financial loss to respondent in the nature of costs, fees and travel expenses..." (Exh. 6, Bates stamp pp.103-104).

36. Ms. Lerner had been found in contempt of court on August 17, 2001 for removing the parties' two minor children from the jurisdiction of Arizona and moving to New York, then instituting legal proceedings in New York in an unsuccessful attempt under the Uniform Child Custody Jurisdiction Act ("UCCJA") to have New York assume jurisdiction. Her petition in New York was dismissed in its entirety by the New York court. (Exh.6, Bates stamp p.104, par. 5).

C. FINDINGS ON ALLEGATIONS OF FRAUD BY RESPONDENT

37. The State Bar's Complaint alleges that Respondent signed Ms. Lerner's signature on various documents during the marriage, including a power of attorney, tax returns and on a line of credit. The signatures were done with the express or implied permission of Ms. Lerner. There is no evidence that the Respondent affixed Ms. Lerner's signature to the documents with the intent, purpose or consequence of prejudicing or otherwise deceiving Ms. Lerner or to defraud any creditor. (*See* Exh.16; Answer at Par.3).

D. FINDINGS ON EX PARTE CONTACT WITH THE COURT

38. On July 26, 2001, after the Decree for the divorce had been entered, Respondent sent an ex parte communication to the trial court, specifically, a facsimile copy of a letter from

Respondent to Ms. Lerner's attorney. Ms. Lerner had also sent an ex parte communication to the court. In a minute entry dated July 30, 2001, the court admonished both parties to refrain from making ex parte communications with the court. (Exh. 14).

E. FINDINGS ON RESPONDENT'S FAILURE TO COOPERATE WITH DISCIPLINARY PROCEEDINGS.

39. Respondent failed to submit a Rule 26.1 disclosure statement or respond to the State Bar's discovery requests within the time provided in the Case Management Order. This necessitated the State Bar's filing a request for an order from the Hearing Officer to compel Respondent to comply with discovery.

40. Although Respondent then submitted a Rule 26.1 disclosure statement and responses to the State Bar's discovery requests by the deadline set forth in the order, Respondent's responses did not conform to the Arizona Rules of Civil Procedure and contained incomplete, inaccurate or untrue statements as follows:

a. Respondent's disclosure statement did not provide a "fair description of the substance of [the] expected testimony" for each witness identified in the disclosure statement. *See* Rule 26.1(a)(3), Ariz.R.Civ.P.

b. In response to the State Bar's request that Respondent produce copies of his tax returns for the years 1999, 2000, 2001 and 2002, Respondent claimed that the State Bar already had a copy of the 1999 return and that the returns for the years 2000, 2001 and 2002 "did not exist." *See* Exh.20. Ms. Lerner, however, provided the State Bar with a copy of Respondent's tax return for the year 2000. *See* Exh.21.

41. Respondent failed to participate in these disciplinary proceedings other than to file his Answer and insufficient discovery. He did not obey orders or rulings entered by the Hearing Officer herein.

F. ADDITIONAL FINDINGS OF FACT

42. The divorce proceedings of Respondent and Ms. Lerner were lengthy and contentious. The exhibits admitted into evidence from the Pima County Superior Court file of the divorce proceedings speak for themselves. Judge Quigley's March 5, 2002 minute entry states:

> " 5. Both parties have asked the Court to award attorney's fees in connection with this most recent battle of their on-going three-year war. The Court declines to award either party attorney's fees for several reasons including the belief that both parties come before the Court with less than clean hands and a sad conviction that to 'reward' either party given the history of this case will only encourage the 'victor' to prolong the conflict and acrimony.[emphasis supplied]..." (Exh.6, Bates stamp p.103).

III. CONCLUSIONS OF LAW

A. WIRETAPPING CHARGE

The State Bar has proven by clear and convincing evidence that Respondent's conduct in wiretapping his home telephone without the consent to the other parties, a criminal act in violation of A.R.S. §13-3005, was a violation of Rule 42, ER 8.4(b) and (c). However, for the following reasons, the Hearing Officer finds that the conduct was not so serious that it warrants imposition of serious disciplinary sanctions.

Discussion

A.R.S. §13-3005(A)(1) provides that a person who intentionally intercepts a wire or electronic communication to which he is not a party, without the consent of either a sender or

receiver of the communication, is guilty of a class 5 felony. Exceptions to A.R.S. §13-3005 are set forth in A.R.S. §13-3012. Respondent's conduct does not fall specifically within one of the enumerated exceptions. However, the Arizona Court of Appeals and certain federal circuit courts have recognized some exceptions.

In *State of Arizona v. Morrison*, 203 Ariz. 489 (Div. One, 2002), the court of appeals recognized the exception found in federal case law that exempts parents from criminal liability where the parent is acting on a good faith, objectively reasonable belief that the taping of the conversations is in the best interest of the parent's minor child. The court of appeals also noted with approval that: "...The Seventh, Tenth and Second Circuits have held that parental interception of their minor child's phone conversations does not violate Title III if the recording is done from an extension within the home. [citations omitted]." *Id.* at 490-491.

The Hearing Officer was unable to find any Arizona cases dealing with the situation presented here involving interspousal surveillance. There is, however, federal law regarding this issue and the circuits are split. The Ninth Circuit has not ruled on this particular issue, but a federal district court from the Central District of California has. In *Perfit v. Perfit*, 693 F.Supp. 851 (C.D.CA,1988), the district court granted a directed verdict in favor of a defendant husband after he installed a recording device on a telephone in his marital home, holding that it was unlikely Congress intended §18-2510-2520 (the federal criminal wiretapping statute) to extend to such actions within the marital home. While the federal cases are not binding on Arizona courts, and they are interpreting federal statutes prohibiting wiretapping, the federal cases are instructive.

Respondent's letter to Bar counsel explained that the purpose of this conduct was two-fold: concern for his wife's welfare given her past history of substance abuse and suspicion of infidelity. (Exh. 16, pp.24-25). The former would be an appropriate, reasonable basis for Respondent's conduct, the latter would not. In any event, this was an isolated incident which took place during one 24-hour period at a time when the parties were still married and no dissolution proceedings were pending. The reasoning in the cited cases is persuasive. *See Perfit* , 693 F.Supp. at 856; *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert.denied,* 419 U.S. 897 (1974); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977). Respondent could just as easily have obtained this information by picking up another extension in the house and listening, which conduct is not prohibited by the statute. The Pima County Attorney's office apparently investigated the matter and declined to file charges.

The ABA Standards indicate that discipline is appropriate even though a criminal charge has not been brought. *See Standard 5.11, 5.12 Commentary*. However, the commentary also states: "Not every lawyer who commits a criminal act should be suspended." *Standard 5.12 Commentary*.

The *Commentary* to *Standard 5.13* is persuasive:

> "...isolated, trivial incidents of this kind not involving a fixed pattern of misbehavior find ample redress in the criminal and civil laws. They have none of the elements of moral turpitude, arising more out of the infirmities of human nature. They are not the appropriate subject matter of a solemn reprimand by this court." *In re Johnson*, 106 Ariz. 73, 471 P.2d 269 (1970).

In tapping his telephone, the Respondent engaged in dishonest behavior in violation of ER 8.4(c) and failed to maintain personal integrity. He violated *ABA Standard 5.1 Failure to*

Maintain Personal Integrity. He was a lawyer and knew that what he was doing was wrong. His conduct was dishonest, but the evidence is insufficient that it was done with the purpose of obtaining any legal advantage or leverage over Ms. Lerner in any legal proceedings. It did not occur during the course of his representation of a client. At most, the Respondent's conduct warrants the sanction of a censure or informal reprimand.

The Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.S.Ct., specifically ER 8.4(c) (Misconduct, specifically engaging in conduct involving dishonesty). However, when viewed in its entirety, it does not rise to a level that requires the serious sanction of suspension. The commentary to *ABA Standard 5.12* indicates that suspension is appropriate where: "The most common cases involved lawyers who commit felonies ... such as the possession of narcotics or sexual assault." Respondent's conduct was not that serious. At most this conduct merits an censure. *See ABA Standards, 5.13* and *In re Johnson*, 106 Ariz. 73, 471 P.2d 269 (1970).

B. CONCLUSIONS OF LAW ON CONTEMPT CITATIONS

The State Bar has failed to establish by clear and convincing evidence that Respondent's failure to pay child support and spousal maintenance as ordered by the trial court in the dissolution proceedings was a wilful violation of the court's orders in violation of Rule 53(c). Ariz.R.S.Ct.

The State Bar has failed to establish by clear and convincing evidence that Respondent's failure to pay child support and spousal maintenance as ordered by the court was conduct that was prejudicial to the administration of justice in violation of Rule 42, Ariz.R.S.Ct., ER 8.4(d).

Discussion

Although Respondent was found in contempt of court for his failure to pay the child support and spousal maintenance in accordance with the Decree of Dissolution, the minute entry of March 5, 2002 clearly indicates that Ms. Lerner had also been found in contempt of court for her own conduct in removing the parties' minor children from the jurisdiction. Respondent was given a credit for a substantial amount of money, $23,250.00, toward his arrearages for that reason. It is also clear from the March 5 minute entry that the Court intended to give the Respondent a reasonable period of time to get caught up with the payments, sixty days. The second minute entry, addressing the same issue, again gave Respondent time to pay his arrearages. (Exh. 9). Respondent did pay the required amounts by the court's final deadline and cured the contempt. The record further establishes that all judgments and arrearages owed to Ms. Lerner were resolved by a stipulated settlement between the parties.

These facts simply do not establish by clear and convincing evidence a wilful refusal on the part of the Respondent to pay child support or comply with the orders of the court. In fact, it is just the opposite. Due to the actions of Ms. Lerner in removing the children from the jurisdiction and then instituting frivolous proceedings in New York to try to establish jurisdiction there, which proceedings were dismissed, the Respondent incurred substantial costs. These included legal fees and travel expenses in addition to the lack of visitation with his children and the negative impact on his practice, i.e. his ability to earn money while he had to litigate the New York matters. The trial court recognized this when it gave Respondent a substantial credit on his arrearages and gave him additional time to comply with the orders. (Exh.6).

The Hearing Officer recognizes that the Respondent did not participate at all in these proceedings. His wilful refusal to participate is addressed in Section E below. His failure to cooperate and provide information regarding these contempt allegations might warrant a finding in favor of the State Bar. However, the Hearing Officer has arrived at the conclusions herein after reviewing the exhibits submitted by the State Bar at the hearing in this matter. The Hearing Officer reviewed them in their entirety, and not just for the purpose of isolating the portions that support the State Bar's arguments and conclusions. The evidence is simply insufficient to establish a wilful failure by the Respondent to comply with the orders for child support and spousal maintenance.

It is not disputed that the parties were involved in a lengthy, contentious "war", as described by the trial court. The Respondent cured his contempt by the deadline given by the trial court and the parties ultimately settled the issues between them, including all arrearages and judgments that Ms. Lerner had against the Respondent. The trial court supervised the divorce proceedings and the conduct of the parties for almost four years and effectively and appropriately dealt with the contempt issues. As of the date of the hearing, there were no contempt proceedings pending against the Respondent. Further sanctions are not warranted here.
It is the conclusion of the Hearing Officer that the civil proceedings in this matter adequately addressed the Respondent's conduct in failing to comply with court orders.

C. CONCLUSION ON DISMISSED ALLEGATIONS

The State Bar has conceded that there is not clear and convincing evidence that Respondent engaged in dishonesty, deceit or misrepresentation when he signed Ms. Lerner's

name to certain legal documents during their marriage. Therefore, the charge that Respondent violated Rule 42, ER 4.1, Ariz. R.S.Ct. is dismissed.

D. EX PARTE COMMUNICATIONS WITH COURT

The State Bar did not prove with clear and convincing evidence that the Respondent's conduct involving the ex parte communication with the trial court constituted a violation of Rule 42, ER 8.4(d), that is, engaging in conduct that is prejudicial to the administration of justice. This was an isolated incident in response to conduct of Ms. Lerner and not in the course of representation of any client. The trial court admonished the Respondent and no further sanction is warranted. However, the Hearing Officer did consider this conduct as an aggravating factor for the imposition of discipline for the Respondent's failure to participate in these disciplinary proceedings. See Recommendations below.

E. FAILURE TO COOPERATE WITH DISCIPLINARY PROCEEDINGS

The Hearing Officer finds that Respondent has violated Rule 53(a),(d) and (f), Ariz.R.S.Ct. by failing to cooperate in this disciplinary proceeding. Respondent did not appear for any hearing set in these matters, failed to comply with discovery requests and orders and failed to comply with subpoenas and all other orders issued in these proceedings. Respondent violated Rule 53(d), Ariz.R.S.Ct.

ABA STANDARDS

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993); *In re Neville*, 147 Ariz. 106, 708 P.2d 1297

(1985).

In determining the appropriate sanctions for discipline, the Arizona Supreme Court and the Disciplinary Commission consider the American Bar Association *Standards for Imposing Lawyer Sanctions ("Standards")* as an appropriate guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). In applying the *Standards*, the Arizona Supreme Court considers 1) the duty violated; 2) respondent's mental state; 3) the injury to the client; and 4) any aggravating or mitigating factors. In cases of multiple charges of misconduct, the *Standards* suggest the attorney be sanctioned for the most serious misconduct with the additional instances of misconduct treated as aggravating factors. *See Standard 3.0 and Theoretical Framework of the ABA Standards; Matter of Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994).

In this case, the Respondent violated his duty to the profession. There is evidence that Respondent's violations were knowing and intentional. There was no injury to a client. There are aggravating and mitigating factors.

Aggravation and Mitigation

Aggravating factors, as recognized in the American Bar Association's ***Standards For Imposing Lawyer Sanctions, (Standard) Standard* 9.22**, present in this matter are the following:

(d) multiple offenses

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

(i) substantial experience in the practice of law.

The only mitigating factor present is no prior disciplinary history. *Standard 9.32 (a).* Personal or emotional problems and mental disability are factors which may be considered in

mitigation *(Standard 9.32(c) and (h))* and there is some indication in the record that Respondent has some emotional problems. However, since Respondent failed to participate in these proceedings and failed to provide documentation to support his claim of an anxiety attack as ordered, the Hearing Officer finds this potentially mitigating factor inapplicable.

Proportionality Analysis

In order to have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994). The Arizona Supreme Court has held that in order to achieve proportionality, the discipline in each situation must be tailored to the individual facts of the case. *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

A. Wiretapping

There is only one case in the disciplinary context that addresses the situation where a lawyer recorded conversations without the consent of the other party. The Arizona Supreme Court recognized this conduct as a violation of Arizona Ethics Opinion No. 75-13, DR 1-102(A)(4), now ER 8.4(c) and DR 7-102(A)(8), now ER 8.4(a), which exposed the attorney to discipline. *Matter of Wetzel*, 143 Ariz. 35,44 (1985). *Wetzel* is not instructive in the instant case because there were many serious instances of misconduct by Wetzel, including serious mishandling of clients' cases, dishonesty with clients, other lawyers and the courts and he had a history of prior discipline. Wetzel was disbarred for those reasons, not the surreptitious recording of conversations. The Supreme Court simply recognized that the conduct of taping conversations was grounds for discipline.

B. **Failure To Comply With Court Orders**

The misconduct of the Respondent in this case, particularly the failure to pay child support as ordered, is a case of first impression, since there are no Arizona cases where discipline has been imposed on the grounds that an attorney violated a child support order. Therefore, cases in which discipline was imposed for failure to comply with other rules and court orders have been considered.

In *Matter of Merchant*, SB-00-0057-D (2000) the lawyer failed to comply with court-ordered duties as an arbitrator, failed to appear as ordered at a show cause hearing and failed to participate or file an answer in the disciplinary proceeding. The lawyer had no disciplinary history. The hearing officer found that the lawyer's failure to comply with the show cause order was knowing because she had requested a continuance of the hearing. Merchant's failure to participate in the disciplinary proceedings was an aggravating circumstance. The discipline imposed was suspension for six months and one day.

In *Matter of Ruffin*, SB-99-0027-D (1999), the lawyer failed to comply with a court order to pay a $1,500 sanction for filing a frivolous motion in violation of Rule 11, Ariz.R.Civ.P. and failed to participate in the disciplinary proceedings in any way. There was no disciplinary history. A seven month suspension was imposed as the sanction. The Disciplinary Commission concluded that the failure to pay the court-ordered fine and participate in the disciplinary proceedings evidenced a problem with Ruffin's fitness to practice law. A period of suspension that required her to demonstrate fitness to practice was considered an appropriate sanction.

In *Matter of Kistler*, SB-00-0098-D(2000), an attorney received a censure for willful

disobedience of a court order for engaging in two occurrences of unauthorized practice while on administrative suspension. The Disciplinary Commission found five mitigating factors: no disciplinary history, personal problems, full and free disclosure, character and reputation and remorse. Kistler's substantial mitigation supported censure rather than a more severe sanction.

In *Matter of Gabriel*, 172 Ariz. 347, 837 P.2d 149 (1992), the lawyer was censured and given two years of probation for knowingly violating court orders by failing to comply with discovery orders in a personal injury case in which the lawyer was a party. The Disciplinary Commission found that the violations of the court orders were not a pattern of misconduct, the conduct did not arise from a selfish motive, that the lawyer had no disciplinary record, cooperated with the disciplinary proceedings and made restitution.

C. Failure to Cooperate In Disciplinary Proceedings

In *Matter of Wittges*, SB-00-1075-D (2001) a lawyer who failed to respond to the State Bar's inquiries and failed to cooperate with the disciplinary process was suspended for six months and a day. The underlying conduct which prompted the initial proceedings was one count of client neglect. Wittges did not participate in any of the disciplinary proceedings except for the settlement conference. There was no disciplinary history. The sanction imposed was suspension for six months and one day.

In *Matter of Fuller*, SB-97-0065-D (1997), the Arizona Supreme Court censured an attorney for failing to respond to the State Bar's inquiries, even though none of the underlying misconduct was proven by clear and convincing evidence. The lawyer had prior discipline of two informal reprimands. The Disciplinary Commission found that "failure to respond to Bar

inquiries is a serious matter that demonstrates a disregard for the Rules of Professional Conduct and borders on contempt for the legal system." *Id.* slip op. at 3, citing *In re Davis*, 181 Ariz. 263, 266, 889 P.2d 621, 624 (1995). Fuller's conduct violated his duty owed as a professional, *Standard* 7.3.

In *Matter of Brown*, 184 Ariz. 480, 910 P.2d 631 (1996), the Arizona Supreme Court imposed a nine-month suspension. The Court refused to impose discipline on the underlying conduct. However, the lawyer had an extensive disciplinary record, failed to respond to the Bar in its disciplinary investigation and failed to comply with an order of the hearing officer in the disciplinary proceedings. The Court found the lawyer's conduct violated *Standards* 7.3 (negligent violation of a duty owed to the profession) as well as 6.23 (negligent failure to comply with a court order or rule). In the instant case, Respondent has no disciplinary record.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (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).

In imposing discipline, it is appropriate to consider the facts of the case, the *ABA Standards*, and the proportionality of discipline imposed in analogous cases. *Matter of Bowen,* 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). The Hearing Officer has considered all of these factors.

In this case, there were several allegations of misconduct, including the failure to pay child support as ordered for a period of time, the taping of a telephone in his own home and the ex parte communication to the court during the divorce proceedings to which Respondent was a party. In addition to the underlying allegations of misconduct, other than filing some an Answer and incomplete discovery, the Respondent failed to participate in the disciplinary proceedings and ignored the orders entered in these proceedings. In this case involving multiple charges of misconduct, Respondent should be sanctioned for the most serious misconduct, and the additional instances of misconduct are treated as aggravating factors. *ABA Standard 3.0 and Theoretical Framework of the ABA Standards.*

Failure to obey court orders, especially a child support order, is a serious violation. However, for the reasons previously stated, the Respondent's conduct in this case was not a wilful violation of a court order. (*See* pp. *supra*). Therefore, this conduct alone does not warrant the imposition of serious discipline.

The taping of his home telephone for one 24 hour period was dishonest, but had at least a partially legitimate basis, i.e., the welfare of his wife. Respondent knowingly violated the law. However, there is no evidence that this was done in the course of representation of a client, nor was it done in order to obtain unfair advantage in litigation since no legal proceedings were pending between the parties at the time. This isolated instance of misconduct alone does not warrant imposition of a serious sanction. Not every lawyer who commits a criminal act should be suspended. *ABA Standard 5.12, Commentary*. Censure is the appropriate sanction for this conduct. *See ABA Standard 5.13.*

The ex parte communication with the trial court is again an isolated incident. There is no evidence that there were any other violations of this nature during the course of the proceedings. It was also apparently in response to the same conduct of Ms. Lerner, who had also sent an ex parte communication to the court. Ms. Lerner is a lay person and the Respondent is a lawyer. He knew he was violating procedural and ethical rules. However, there is no evidence he obtained any unfair advantage as a result. It was not prejudicial to the administration of justice.

In *Matter of Delozier*, SB-00-1963-D, 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: "[n]ow what part of your anatomy do you want me to kiss?" and later told the court that he was a disgrace to the profession. Delozier received an informal reprimand. Respondent's conduct herein is less egregious. This conduct alone does not warrant imposition of a sanction.

The compelling reason for imposing discipline in this matter is the Respondent's failure to participate or cooperate in any meaningful way in these disciplinary proceedings. When this failure is considered in combination with the underlying misconduct, though the underlying conduct does not rise to a level that would merit serious discipline, the combination of all of the violations together with the failure to cooperate in these proceedings demonstrates a serious disregard for the Rules of Professional Conduct. It also "borders on contempt for the legal system" and calls into serious question the Respondent's fitness to practice law. The serious sanction of suspension is clearly warranted. A suspension of at least six months and one day

is appropriate. This is in line with *Merchant, Ruffin* and *Fuller.*

In both *Fuller* and *Brown*, lawyers were disciplined because they failed to cooperate with the State Bar even though the underlying conduct was not determined to be grounds for discipline. In the instant case, though none of the instances of misconduct which formed the basis for the complaint standing alone merit imposition of a serious sanction, the conduct taken as a whole, together with the failure to participate in these proceedings, requires imposition of disciplinary sanctions. There is clear evidence that the Respondent fails to follow the ethical rules and fails to obey court orders and rules. Respondent's lack of respect for the legal system and disregard for his obligations as an officer of the court bears on his fitness to practice law.

A sanction of six months and one day is appropriate. Respondent should be required to demonstrate rehabilitation and willingness to abide by his duty to the legal system and the profession before being permitted to resume his practice.

Because Respondent failed to appear at the first scheduled hearing in this matter due to hospitalization for an anxiety attack, Respondent should provide documentary proof from a physician or licensed psychotherapist that he is fit to practice law as a condition of reinstatement.

Additionally, Respondent should be required to provide proof that he is in compliance with his child support obligations as a condition of reinstatement.

Upon reinstatement, Respondent should be placed on probation for a period of one year. [1] A condition of the probation should include Respondent's participation in the State Bar's

[1] The State Bar requested a two year probationary period. Given the lack of a disciplinary record, and considering the fact that the underlying conduct occurred during the emotionally charged divorce proceedings, a one year probationary period is appropriate.

LOMAP program.[2]

Restitution is not a factor in this case.

Respondent shall pay costs of these proceedings as ordered by the Supreme Court. Respondent shall pay all costs incurred by the State Bar in these proceedings pursuant to Rule 52(a)(8), Ariz.R.S.Ct. The State Bar shall file a Statement of Costs and Expenses, and the amount of costs and expenses shall be included in the Order.

DATED this 6th day of April, 2004.

Pamela M. Katzenberg
Hearing Officer 7T

[2] The State Bar has requested that Respondent be required to show continuous, regular, and timely compliance with his obligations to pay child support as a condition of probation. The Hearing Officer declines to impose this requirement. Adequate mechanisms are in place in the civil courts to police this. The Bar's and LOMAP's resources can be better spent in a case where it is truly warranted. This is not such a case.

Original of the foregoing filed
with the Disciplinary Clerk this
8th day of April, 2004,

and

Copies of the foregoing were
mailed this 8th day of April, 2004
to:

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