BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DOUGLAS B. LEVY,** **Bar No. 016623** RESPONDENT.	Nos. 04-1845, 05-0148 **DISCIPLINARY COMMISSION REPORT**

This matter first came before the Disciplinary Commission on April 7, 2006 for consideration of the State Bar's appeal of the Hearing Officer's Order striking its allegation that Respondent violated Supreme Court Rule 41(g). The Hearing Officer ruled that Rule 41(g) was unconstitutionally vague on its face. The Commission reversed that ruling and remanded the case for an evidentiary hearing. *See* Commission Order filed April 12, 2006.

On remand, the Hearing Officer held an evidentiary hearing and issued a Report dated January 12, 2007 containing detailed Findings of Fact and Conclusions of Law. The Hearing Officer concluded that Respondent violated ER 3.4(c) and Supreme Court Rules 41(c) and 53(c) by willfully failing to comply with Superior Court orders and repeatedly expressing his lack of respect for a Superior Court judge. The Hearing Officer also found that Supreme Court Rule 41(g) was unconstitutionally vague as applied to Respondent's conduct in this case. The Hearing Officer recommended a 30-day suspension and participation in the State Bar's Ethics Enhancement Program (EEP). Both parties filed objections and requested oral argument.

On appeal, the State Bar argues the Hearing Officer erred in finding Supreme Court Rule 41(g), unconstitutionally vague as it applied to Respondent's conduct. Respondent

argues that he did not violate ER 3.4(c) or Rules 41(c) and 3(c) because his refusal to comply with the Court's orders was based on a good faith belief they were incorrect and he intended to appeal them.

Decision

The Disciplinary Commission[1] unanimously adopts the Hearing Officer's Findings of Fact. It also adopts his Conclusions of Law concerning Respondent's violations of ER 3.4(c) and Supreme Court Rules 41(c) and 53(c). Based on its *de novo* review, the Commission determines that the facts as found by the Hearing Officer establish that Respondent also violated Supreme Court Rule 41(g), which is not unconstitutionally vague as applied to Respondent's conduct in this case. The Commission, nonetheless, agrees that the Hearing Officer's recommended sanction of a 30-day suspension and participation in EEP is appropriate.

Discussion

The Disciplinary Commission applies a clearly erroneous standard to findings of fact and reviews questions of law *de novo*. Rule 58(b), Ariz. R. Sup. Ct. 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 Commission agrees with the Hearing Officer that clear and convincing evidence presented below established that Respondent violated ER 3.4(c) (knowingly disobeying an obligation of tribunal), and Rules 41(c) (maintain respect to courts and judicial officers) and 53(c) (willful violation of rule or court order). The record also establishes that Respondent

[1] Commissioners Atwood and Horsley did not participate in these proceedings. Former Commissioner Steven Nelson, M.D., and Hearing Officer Frederick Steiner participated as ad hoc members. Commissioner Katzenberg recused.

violated Rule 41(g) "offensive personality" by making gratuitous insults during the course of litigation.

Respondent Failed to Comply with Court Orders and Maintain Respect for the Court

Respondent argues that the Superior Court judge's ruling dismissing his Counterclaim and imposing sanctions on him personally was legally incorrect. As the Hearing Officer concluded below, Respondent had the right to seek reconsideration of that Order, which he did, and/or seek appellate review, which he did not do. He did not, however, have the right to simply ignore and/or refuse to comply with its terms or the terms of the Court's subsequent orders which required him to take immediate action.

The issue is not as Respondent argues, whether any or all of the Court's orders were correct, final and appealable. By their terms, they required him to take immediate action. Such orders are common in litigation and the Courts could not function if lawyers were free to disregard them because they intended to appeal at some future date. Under such circumstances, a lawyer has two choices, comply with the order as written or seek a stay from either the trial court or an appellate court. *See* Rule 5, Ariz. Rules of Procedure for Special Actions ("The Court in a special action may grant an interlocutory stay . . . in the same manner and subject to the same limitations and temporary resting orders and preliminary injunctions are granted under Rule 65 of the Rules of Civil Procedure.").

As the Hearing Officer concluded below, Respondent's failure to pursue either of those options in this case violated ER 3.4(c) and Supreme Court Rule 53(c). The Hearing Officer also correctly concluded that Respondent's insulting of the Judge with whose rulings he disagreed, impugning his intelligence, honesty and ability violated Supreme Court Rule 41(c).

Respondent's Conduct Violated Rule 41(g)

The Hearing Officer's findings contain a sampling of statements Respondent included in his pleadings and letters to opposing counsel. Those statements which include instances of gratuitous name-calling range from merely aggressive to needlessly insulting and demeaning. *See* Hearing Officer Report at ¶¶ 7, 43, 45 & 47. The Hearing Officer concluded these statements were not actionable because Supreme Court Rule 41(g)'s prohibition on "offensive personality" did not give Respondent sufficient notice that such insults and name-calling were prohibited. Hearing Officer's Report at 16-17.

Respondent correctly notes that lawyers routinely express the same or similar sentiments in more polite terms without eliciting any comment or rebuke. He argues that lawyers should not be disciplined based on their subjective word choice and/or personal style of litigation. The issue does, indeed, come down to whether a lawyer can be sanctioned based on his or her choice of words. But"word choice" and "personal style" can be very important. Much of what lawyers do concerns the choice of appropriate words, and those choices have meaning and consequence. It matters whether the words a lawyer uses to describe a person or argument are respectful or disparaging. On one level, the information conveyed may be the same, but the words are not interchangeable.

Telling a Court "this is absolutely the dumbest lawsuit pending in Pima County Superior Court", "plaintiff's counsel has truly acted shamefully by agreeing to file such a patently frivolous lawsuit", and "yes, undersigned is amazed that a lawyer in Pima County agreed to lend his name to this litigation" is not the same as saying a case lacks merit. Respondent's statements were intentionally insulting *ad hominum* attacks as opposed to a comment on the merits of the claims being asserted. Respondent's use of derogatory names

("Snake Farm") to belittle his opponent's insurance carrier and demeaning characterizations of his opponents' letters as "whiny," "bullying" and making the lawyers look "like babies" have no legitimate place in the practice of law.

As the Supreme Court held in *In re Piatt*, 191 Ariz. 24, 26, 951 P.2d 889, 891 (1997), although Rule 41(g) "which requires lawyers to 'abstain from all offensive personality' is quite general" its prohibitions have meaning which can and will be enforced when appropriate. *See also*, *In re Ziman*, 174 Ariz. 61, 847 P.2d 106 (1993) (Respondent engaged in "offensive personality" by making offensive and obscene comment to arbitrator); *In re Banta*, SB-05-003-D (2005) (Respondent demonstrated overall lack of professionalism and self-discipline in his conduct towards judges, court personnel and opposing counsel.).

In determining whether a statute or rule gives fair notice of the conduct it proscribes judicial opinions construing it are considered. *United States v. Lanier*, 520 U.S. 259, 267 (1997) (The "touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the . . . conduct was [prohibited]."). This case is hardly the first time a lawyer has faced discipline for violating a prohibition against "offensive personality" based on the use of inappropriate language. *See In re Ronwin*, 557 N.W.2d 515 (Iowa 1997) (Respondent filed brief, accusing those who challenged his conduct, including trial judge, of being "dishonest and corrupt" and accusing federal trial court of giving "comfort and encouragement to" criminal conduct.); *Shortes v. Hill*, 860 So.2d 1 (Fla. 2003) (Attorney's comments in appellate brief that trial judge's ruling was "cockeyed and absurd" and demonstrated a "most startling absence of legal knowledge and irrational decision" constituted "offensive personality."); *In re Laprath*, 670 N.W.2d 41 (S.D. 2003) (Respondent wrote inflammatory letters containing personally and

professionally offensive statements to opposing counsel.); *In re Eisenberg*, 269 Wis.2d 43, 675 N.W.2d 747 (2004) (Respondent attempted to reach police detective on client's behalf by telling police dispatcher that it was a "life or death emergency" threatening, lying, swearing and acting in a rude and obnoxious manner to police dispatcher.).

The purposes of attorney discipline include instilling public confidence in the bar's integrity, and in the integrity of the legal system. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 362 (1994); *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Those goals cannot be achieved if lawyers feel free to engage in the type of schoolyard name calling and bullying at issue here. *See* Code of Judicial Conduct Canon 3(b)(4) (Judge shall require lawyers subject to judge's control to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers. . . ."). The conduct at issue in this case are not isolated incidents or the result of a momentary loss of temper. They form a pattern which extends to Respondent's treatment of the Judge described above. Respondent has not expressed any shame or remorse for this conduct. To the contrary, he proudly holds himself up as a role model or a "poster boy" in his own words, whose conduct should be emulated by others in the legal profession. The Commission agrees that Respondent is a poster boy, but not one whose conduct should be emulated or tolerated.

Conclusion

Having considered the nature and extent of Respondent's misconduct; application of the ABA *Standards* and the aggravating and mitigating factors as found by the Hearing Officer, the Commission agrees with and adopts his recommendation that Respondent be suspended for 30-days, required to participate in EEP. In addition, Respondent should be

assessed the costs of these proceedings.

RESPECTFULLY SUBMITTED this 5th day of June, 2007.

J. Conrad Baran, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 5th day of June 2007.

Copy of the foregoing mailed
this 5th day of June, 2007, to:

Juan Perez-Medrano
Hearing Officer 9D
360 North Court Avenue
Tucson, AZ 85701

JoJene E. Mills
Respondent's Counsel
Law Office of JoJene Mills, P.C.
1670 East River Road, Suite 270
Tucson, AZ 85718

Ariel I. Worth
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Loreta Dominguez

/mps