BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BOBBIE ANNE BERRY,** **Bar No. 013762** RESPONDENT.	)	No. 08-0183 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 10, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed December 8, 2008, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for a censure, one year of probation (three additional hours of Continuing Legal Education in the area of criminal law), and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission by a majority of five,[1] recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation a censure, one year of probation (three additional hours of Continuing Legal Education in the area of criminal law), and costs of the disciplinary proceedings.[2]

[1] Commissioner's Belleau, Flores, Horsley and Katzenberg were opposed and determined the agreed upon sanction was overly harsh. See Commissioner Flores and Katzenberg's dissenting opinion below.

[2] A copy of the Hearing Officer Report is attached as Exhibit A.

Terms of Probation

1. Respondent shall complete three hours of additional CLE in the area of criminal practice, preferably criminal trial practice.

2. Respondent shall meet in person with an attorney of her choice, whose primary practice is criminal law, to review her actions in this matter and discuss methods of assuring that the conduct is not repeated.

3. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

5. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

RESPECTFULLY SUBMITTED this 9th day of February, 2009.

Jeffrey Messing, Vice Chair
Disciplinary Commission

Commissioner Flores and Katzenberg respectfully dissenting:

As this matter came before the Disciplinary Commission of the Supreme Court {Commission} as a Tender of Admissions and Agreement for Discipline by Consent

("Tender") and Joint Memorandum ("Joint Memorandum") {hereinafter the Agreement), there are few options before us. We can accept the Agreement, calling for censure, or reject the Agreement and send it back for a full hearing or further potentially negotiated resolution.[3] This should be a simple matter as the Hearing Officer completed a thorough and detailed hearing on this Agreement and Respondent by the Agreement has conceded she negligently violated certain ethical rules. However, in sanctioning the Respondent for the conduct in this matter this commissioner is concerned that we are piece-mealing a litigant's words during what could only be considered the most contentious type of litigation, trial for first degree murder, for what we are assuming is unethical, as conceded by Respondent, though was arguably justified argument by a properly zealous attorney representing her client.

The three sentences in question occurred during closing arguments following what could only be assumed was a lengthy first degree murder trial with multiple witnesses. Again, unfortunately as the Respondent conceded the matter, the record before the Hearing Officer and the Commission lacked significant details as to the length of trial, appearance of witnesses or testimony of those witnesses. Clearly, the complainant, an experienced and respected prosecutor, who was present for the entire trial believed Respondent's conduct was an ethical violation and her statements were not justified based on the evidence presented during trial. As we lack this same understanding, looking at the Respondent's statements they could be unethical, but could also be directly based on testimony offered

[3] I recognize that to reject the Agreement causes the State Bar and Respondent additional time, energy and expense. A hearing could result in more severe consequences or even potentially dismissal, but even if I find the punishment harsh or excessive the Respondent has made a decision by balancing her own personal interests and finds the Agreement an appropriate resolution, even if I do not.

during trial. As alleged in the complaint and admitted in the Agreement the statements are as follows:

> You know a lot about Jesse through the various witnesses in this case. You know that Jess is married, has kids, went to Apollo College. He's a masseuse. Handled a conflict or a potential conflict by writing a letter. That he has no prior, has no prior felony conviction. No evidence of trouble. A mild mannered person who handles his problems not in a violent sort of way, but with some sort of intellectual way or by presenting some letter. (emphasis added).

If a witness testified during trial that the Defendant resolved a conflict by writing a letter, which I can only assume is true as why else would Respondent make such a statement and without objection[4] during closing argument, then the last offending statement that he resolved a problem in a non-violent way was supported by testimony during trial. Thus, I cannot find these two statements unethical unless there was no testimony during trial to support her statements, which I must assume there was such testimony. So the only truly offensive statement is that there was "no evidence of trouble," and I cannot justify a censure for these statements. Granted, I realize as a prosecutor that after what would appear to be relevant prior misconduct of the defendant is precluded by the trial court and then to have defense counsel paint a picture of a mild mannered defendant appears misleading and inappropriate. However, these limited words may be rationally and ethically based on testimony presented at trial.

Additionally, even assuming those two sentences were unethical and not based on testimony during trial, or the one statement taken in isolation was unethical in itself

[4] Again, I must assume there was no objection to Respondent's closing statements as we do not have the transcripts of the closing argument, however, had there been an objection the trial court could have resolved any alleged false statement thus eliminating a violation of ER 3.3(a) even if other ethical rules were still implicated by Respondent's conduct.

justifying discipline, based on the mitigating factors presented I must find that it was nothing more than an isolated incident in what appears to be a noteworthy career without prior discipline; and should I have the prosecutorial discretion to resolve this matter, would rather offer the Respondent diversion. However, as the options are as stated previously, to accept or reject the Agreement, I have difficulty accepting the Agreement and must respectfully dissent.

Original filed with the Disciplinary Clerk
this 9th day of February, 2009.

Copy of the foregoing mailed
this 10th day of February, 2009, to:

Honorable H. Jeffrey Coker
Hearing Officer 6R
P.O. Box 23578
Flagstaff, AZ 86002-0001

James J. Belanger
Respondent's Counsel
1850 North Central Avenue, 19th Floor
Phoenix, AZ 85004

Thomas E. McCauley, Jr.
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: _____

/cs

EXHIBIT
A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 08-0183
BOBBI ANNE BERRY, Bar No. 013762	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

1. Probable cause was found in this matter on July 30, 2008. The State Bar thereafter filed a Complaint in this matter on August 4, 2008. The case was assigned to the undersigned Hearing Officer on August 5, 2008, and an Initial Case Management Conference was held on August 19, 2008. A Notice of Settlement was thereafter filed on October 7, 2008, and the matter proceeded to a hearing on the Joint Memorandum and Tender on November 14, 2008.

FINDINGS OF FACT

2. At all times relevant, Respondent was an attorney licensed to practice law in the state of Arizona, having been admitted to practice in Arizona on October 26, 1991.

COUNT ONE (File No. 08-0183)

3. On or about March 30, 2005, Jesse Dwayne Flemons ("Flemons") was charged by the State of Arizona through the Pima County Attorney's Office ("the State") with

the crimes of first-degree murder and drive-by shooting ("the charges"). Respondent represented Flemons to defend these charges.[1]

4. On or about June 1, 2005, and May 16, 2007, the State disclosed to Respondent during the discovery process certain "prior bad act" evidence of acts allegedly committed by Flemons.

5. This evidence consisted, in part, of: documents reflecting that Flemons had been convicted of second-degree murder in 1997 and that the conviction was vacated; a police report from February 2005, showing that a carrying a concealed weapon violation was issued to Flemons; a 1999 police report showing that a carrying a concealed weapon violation was issued to Flemons; a police report showing that Flemons' 38 revolver was confiscated by police; a police report dated March 2004 for criminal damage and domestic violence showing Flemons punched a car window out after an altercation with his wife; a citation from March 2000 showing Flemons was cited for domestic violence; letters written by Flemons to his wife which detailed prior assaults committed by Flemons, physical threats made by Flemons and a threat made by Flemons to shoot his wife if she tried to leave him; evidence of Flemons prior conviction for domestic violence for which Flemons was on probation at the time the charges were brought by the State; and a police report from March 2005 revealing that gang insignia and bullets were recovered from Flemon's residence (hereinafter referred to collectively as the "prior bad acts evidence").

[1] The facts cited herein are, unless otherwise noted, from the Tender of Admissions stipulated to by the parties.

6. On or about May 22, 2007, Respondent filed a motion to preclude the admission of the prior bad act evidence at trial. The trial court granted the motion. The court held that the prior bad act evidence was irrelevant and that its probative value was outweighed by its prejudicial effect.

7. At the close of the trial on the charges, Respondent made the following statements during her closing argument to the jury, despite her knowledge of the prior bad act evidence:

> "You know a lot about Jesse through the various witnesses in this case. You know that Jesse is married, has kids, went to Apollo College. He's a masseuse. Handled a conflict or a potential conflict by writing a letter. That he has no prior, has no prior felony conviction. No evidence of trouble. A mild mannered person who handled his problems not in a violent sort of way, but with some sort of intellectual way or by presenting some letter. (emphasis added)"

8. Respondent made these statements despite her knowledge of the prior bad act evidence, suggesting to the jury that Flemons had not been in trouble and handled his problems in a peaceful way. Because the statements were made to the jury in closing, the State did not have the opportunity to rebut the statements by admitting into the evidence any of the prior bad act evidence.

9. The jury entered a verdict of guilty to a lesser included charge of manslaughter and a guilty verdict on the drive-by shooting charge.

CONCLUSIONS OF LAW

10. Based on the Tender of Admissions and the testimony offered at the hearing on the Tender, the undersigned Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically, ER's 3.3(a)(1), 3.4(e), and 8.4(d).

ABA STANDARDS

11. 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; (4) the existence of aggravating and mitigating factors.

THE DUTY VIOLATED

12. The Hearing Officer finds that the Respondent violated the duties owed to the public and the legal system by:

1. Knowingly making a false statement of fact or law to a tribunal or failing to correct the false statement of material fact or law previously made to the tribunal in violation of ER 3.3(a)(1);

2. At trial alluding to any matter that Respondent did not believe was relevant or would not be supported by admissible evidence in violation of ER 3.4(e);

3. Engaging in conduct prejudicial to the administration of justice in violation of ER 8.4(d).

THE LAWYER'S MENTAL STATE

13. The parties submit, and the Hearing Officer concurs, that while Respondent knowingly made the comments that she did during her closing argument, that she was negligent in determining whether these statements were a violation of her duties to the Court and opposing counsel.

THE INJURY CAUSED

14. The parties submit, and the Hearing Officer concurs, that Respondent's conduct caused injury or potential injury to the opposing party, and caused a potentially

adverse affect on the legal proceedings. While the potential for injury was great had the jury "bought" Respondent's argument, apparently it did not and Mr. Flemons was convicted.

AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors

15. *Standard* 9.22(i): Substantial experience in the practice of law. Respondent has been an attorney for over 15 years.

Mitigating Factors

16. *Standard* 9.32(a): Absence of a prior disciplinary record.

Standard 9.32(b): Absence of a dishonest or selfish motive.

Standard 9.32(e): Full and free disclosure to a disciplinary board or cooperative attitude toward proceedings.

Standard 9.32(g): Character or reputation. According to the exhibits submitted at the hearing in this matter, the Respondent is very well regarded in the Pima County legal community, including members of the bench, who have indicated that she has "abundant common sense, good judgment and high moral character" and that "she is one of the best defense attorneys in [Pima] County."

Standard 9.32(l) Remorse.

17. The ABA *Standard* most applicable in this case appears to be *Standard* 6.13, which provides:

> "[Censure] is generally appropriate when a lawyer is negligent, either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding."

18. The recommended sanction in this matter is a Censure and one year of probation.

PROPORTIONALITY REVIEW

19. The Supreme Court has held that in order to have an effective system of professional sanctions, there must be internal consistency between cases with similar facts, *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). The discipline imposed in each case, however, must be tailored to the individual case as neither perfection nor absolute uniformity can be achieved, *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984).

20. In *In re Gregory*, SB-05-0161-D (2005), while employed as a deputy public defender, Gregory advised the Court that he had just become aware of his assigned criminal case a few weeks previously as a basis for continuing a trial date. In fact he had the case for about two months. Gregory entered into an agreement for a Censure and probation, admitting to violating ERs 3.3(a)(l) and 8.4(d). Only one aggravating factor was found to be present, prior discipline, *Standard* 9.22(a). There were four mitigating factors found: absence of a dishonest or selfish motive, *Standard* 9.32(b); full and free disclosure in the disciplinary proceedings, *Standard* 9.32(e); inexperience in the practice of law, *Standard* 9.32(f); and remorse, *Standard* 9.32(l). Gregory's mental state was found to be "Knowing" and there was potential injury to the client.

21. In *In re Robbins,* SB-06-0026-D, (2006), Respondent was censured for violations of ER 3.3(a)(1) and 8.4(d). Robbins entered into an agreement for discipline by consent and admitted to failing to take timely and appropriate remedial actions to correct a misleading statement made to the Court in a motion to extend time for

service of her client's complaint. Robbins did not correct the record at the time and the matter proceeded to a hearing. The judge in the case set aside the extension and sanctioned Robbins. Robbins substantial experience in the practice of law was found to be the only aggravating factor under *Standard* 9.22(i). Six mitigating factors were found, including *Standard* 9.32(a), absence of prior discipline; *Standard* 9.32(b), lack of a dishonest or selfish motive; *Standard* 9.32(e), full and free disclosure; *Standard* 9.32(g), character and reputation; *Standard* 9.32(k), imposition of other penalty or sanction; and *Standard* 9.32(l), remorse. Robbins conduct was found to be "knowing" and there was actual injury to the legal system.

22. In their Joint Memorandum, the parties submit *In re Everett*, DC No. 0201133 (2006), as a proportional case. However, the Hearing Officer finds that the conduct in that case, which resulted in a suspension, was much more severe, dishonest and self-serving than in this case and therefore inapplicable.

23. In *In re Slomski* SB-05-0019-D (2005), Slomski entered into an agreement for discipline by consent and received a Censure for violating ERs 3.4(e) and 8.4(d) when he failed to conform his closing argument to the rulings on objections and other statements made by the trial judge. Slomski's failure to comply with the Court's rulings necessitated the granting of a new trial. Slomski was found to be negligent in failing to either understand the basis for the Court's ruling or seek clarification from the judge as to the basis for her rulings. Respondent's conduct caused actual injury to the legal system. One factor was found in aggravation, *Standard* 9.22(i), substantial experience in the practice of law. Three factors were

found in mitigation: *Standard* 9.32(a) absence of prior discipline; *Standard* 9.32(b) absence of dishonest or selfish motive; *Standard* 9.32(e) free and full disclosure in the disciplinary proceedings.

24. Based upon the *Standards* and the proportionality cases, the parties submit that a Censure and one year of probation are within the range of just and appropriate sanctions and will serve the purpose of lawyer discipline.

RECOMMENDATION

25. The purpose of lawyer discipline has been held to be the following: to protect the public, the profession and the administration of justice; deter future misconduct; and to instill public confidence in the Bar's integrity. *In re Neville*, 147Ariz. 106, 708 P.2d 1297 (1985), *In re Fioramonti*, 176 Ariz. 182, 859P.2d 1315 (1993), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

26. During the hearing on the Tender in this matter, this Hearing Officer found Respondent to be very remorseful and also very aware of the error of her conduct. She seems to have taken the steps necessary to assure that this will not happen again and that she will not in the future allow herself to be caught up in the heat of the moment and compromise her responsibility to the Court and the legal profession. It is apparent from the letters submitted on behalf of the Respondent that she has an excellent reputation among her peers and that this conduct was an isolated misstep in what has otherwise been a fairly long and accomplished career.

27. The Hearing Officer, upon consideration of the facts, application of the *Standards,* including aggravating and mitigating factors as well as a proportionality analysis, recommends the following:

1. Respondent be censured;

2. Respondent be placed on probation for a period of one year with the following conditions:

a. Respondent shall complete three hours of additional CLE in the area of criminal practice, preferably criminal trial practice.

b. Respondent shall meet in person with an attorney of her choice, whose primary practice is criminal law, to review her actions in this matter and discuss methods for assuring that the conduct is not repeated.

c. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

d. Respondent's probation shall commence at the time the Judgment and Order is entered in this matter, and may be terminated early upon successful completion, with written verification, of paragraphs a. and b.

e. In the event that Respondent fails to comply with any of the foregoing probation terms and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days after receipt of

the notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by clear and convincing evidence.

3. Respondent pay all costs and expenses incurred by the State Bar, the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's Office in this disciplinary proceeding.

DATED this 8th day of December, 2008.

Hon. H. Jeffrey Coker (RM
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 8th day of December, 2008.

Copy of the foregoing mailed
this 9th day of December, 2008, to:

James J. Belanger
Respondent's Counsel
Cheifetz Iannitelli Marcolini, PC
1850 N. Central Avenue, 19th Floor
Phoenix, AZ 85004

Thomas E. McCauley, Jr.
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Evelyn Jorge