BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,

LES A BOEGEMANN,
Bar No. 023107

Respondent.

File Nos. 08-0606 and 08-1155

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 6S, Jonathan H. Schwartz)

PROCEDURAL HISTORY

A formal complaint was filed on December 9, 2008. The Hearing Officer was assigned on December 11, 2008. An Initial Case Management Conference was held on January 6, 2009. A Settlement Conference was held before Settlement Officer Philip Haggerty on January 30, 2009. A Notice of Settlement was filed on January 30, 2009. The Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement by Consent were filed on February 27, 2009. A hearing was held on March 25, 2009.

FINDINGS OF FACTS[1]

1. At all times relevant, Respondent was a lawyer licensed to practice law in Arizona having been first admitted to practice in Arizona on April 22, 2005.

[1] The facts are found in the Tender of Admissions and Agreement for Discipline by Consent unless a reference is made to the Transcript of the Hearing

Count One (File No. 08-0606/Jones)

2. Respondent represented Michael R. Dezonia ("Mr. Dezonia"), in a dissolution of marriage case in Cochise County, Case No. DO2006-01089. Mr. Dezonia was the Petitioner in the action and Samantha Jones ("Ms. Jones") was the Respondent.

3. On or about December 18, 2006, the Court signed a Decree of Dissolution.

4. Paragraph 5 of the Decree awarded the real property at 1500 S. Astronomer's Road, Benson Arizona to Mr. Dezonia, as his sole and separate property.

5. Paragraph 6 of the Decree provides: "That the Petitioner is ordered to pay the Respondent five hundred dollars and zero cents ($500.00) per month not later than the 15th day of each month commencing December 15, 2006 and continuing for sixty (60) months for her community interest she may have in real property located at 1500 S. Astronomer's Road, Benson Arizona."

6. Ms. Jones received the $500.00 payments regularly from her ex-spouse until February 2008 when she received a letter from Respondent indicating that he had become aware of a Disclaimer Deed signed by Ms. Jones in 2002 in which she acknowledged that the property in question was Mr. Dezonia's sole and separate property.

7. Respondent advised Ms. Jones that he believed Paragraph 6 of the Decree was null and void and indicated he had advised his client to discontinue making payments to her for the property.

8. Respondent's letter also stated "I have also advised my client that, should you request some form of court intervention to force my client to make these payments, he

should file suit against you for unjust enrichment to recover the monies he has already paid to you."

9. Ms. Jones replied to Respondent by letter dated March 4, 2008, indicating that she had consulted an attorney who had advised her she was to receive the money based on "any interest she may have had in the Petitioner's property." At that time Mr. Dezonia owed Ms. Jones $23,000.00.

10. In a letter dated March 8, 2008, Respondent replied to Ms. Jones, again stating that Respondent would advise Mr. Dezonia to seek a return of money already paid should she (Ms. Jones) seek to reopen the divorce proceedings.

11. Respondent erroneously believed that the indicated provision of the divorce decree was unenforceable for lack of consideration since Ms. Jones appeared to have no community interest in the subject real property and that he advised Mr. DeZonia as such. Respondent testified that his advice to Mr. DeZonia was probably incorrect and, more importantly, that the proper advice would include directing Mr. DeZonia to request an amended judgment. (Transcript of Hearing "TR", page 17, line 25 through page 18, line 9, "17:25 through 18:9", 19:12-20)

12. Respondent indicated that he did not "threaten" Ms. Jones, but merely reiterated his understanding of the law while advising Ms. Jones that any legal advice should come from her own attorney, as indicated in his communications with Ms. Jones.

Count Two (File no. 08-1155/ Reaume)

13. Sometime prior to June of 2006, Pierre Reaume ("Pierre") and his sister Cheri Jones ("Cheri") hired Respondent to represent them in an action against their brother Charles Pennington ("Charles") to recover royalties left to them in their mother's will.

14. The case proceeded to a jury trial in November 2007. Pierre and Cheri lost on their claim and were ordered to pay defendant's attorney's fees of over $40,000.00.

15. Pierre filed a complaint with the State Bar on July 9, 2008, alleging that Respondent was incompetent and expressing his concern over the manner in which Respondent handled the case.

16. In his reply to the State Bar, Respondent stated: "I have read your correspondence dated July 15, 2008, wherein you raise concerns regarding my representation of [Pierre]. I would first like to note that the filing of this complaint by [Pierre] was in violation of an agreement that we had previously reached, that is, I would forgo more than $17,000 in attorney's fees and [Pierre] would not file this or any other complaint."

17. Respondent testified that his reply to the State Bar was an inaccurate statement based on an emotional response to what he believed to be a meritless complaint against him and that he never entered any such agreement as Respondent's forgoing of attorney's fees was independent of Pierre's statement that he would not file any lawsuit. (TR 38:11 through 40:17) For purposes of this agreement, the State Bar does not contest Respondent's statement. Respondent characterized his own statement to the Bar that he had

an "agreement" with Pierre as a product of his own highly emotional state. Respondent referred to himself as his own worst enemy. (TR 40:18 through 42:17)

18. Respondent testified that he reluctantly agreed to forego the balance of Cheri Jones' bill which was more than $17,000 during a meeting with Pierre Reaume at a restaurant, in front of two separate witnesses. Pierre Reaume subsequently left the restaurant and returned shortly thereafter to state that he [Pierre] had contemplated suing Respondent, but that he no longer intended to do so and, therefore, there was no *agreement by either party* to forego a lawsuit or a bar complaint, but rather a unilateral statement from one party to another. Respondent testified that, while it may be presumed that Mr. Reaume's statement resulted from Respondent's willingness to forego certain legal fees, it was unsolicited and unbargained for and was never agreed to by the Respondent. For purposes of this agreement, the State Bar does not contest Respondent's statement. (TR 38:11 through 40:17)

CONDITIONAL ADMISSIONS

Count One (File no. 08-0606/Jones)

Respondent conditionally admits that his conduct, as set forth in this count, violated Rule 42, Ariz.R.Sup.Ct., specifically, ERs 8.4(a) and 8.4(d) and Rule 53(c), Ariz.R.Sup.Ct.

Respondent's admissions are being tendered in exchange for the form of discipline stated below.

DISMISSED ALLEGATIONS

Count One (File No. 08-0606/Jones)

In Count One, the State Bar has agreed to dismiss the allegation that Respondent violated ER 4.4(a) [burdening Ms. Jones by threatening her with an unjust enrichment claim if she sought court action to correct Mr. Dezonia's failure to abide by the court's decree] in exchange for the settlement in this matter and in light of evidentiary concerns. Respondent asserts that his purpose was not to burden Ms. Jones, but rather to help his client. For purposes of this agreement, the State Bar does not dispute Respondent's assertions.

Count Two (File No. 08-1155/Reaume)

The State Bar has agreed to dismiss Count Two in exchange for the settlement in this matter and in light of evidentiary concerns and for the reasons stated above.

CONCLUSIONS OF LAW

The Hearing Officer concludes based on the evidence at the hearing and the conditional admissions of Respondent that there is clear convincing evidence that in Count One Respondent violated the following ethical rules, Rule 42 Ariz.R.Sup.Ct. ER 8.4 (a) [violating a Rule of professional Conduct], ER 8.4 (d) [engaging in conduct that is prejudicial to the administration of justice] and Rule 53 (c) [knowingly violating any rule or order of the court].

RESTITUTION

Restitution does not appear to be appropriate in this matter. Respondent does not owe his client Mr. Dezonia any money. Respondent was not representing Ms. Jones in Count One. (TR 9:18 through 16:22) If Ms. Jones wants relief from Mr. Dezonia's failure to abide by the Decree of Dissolution she has a remedy by seeking an order of the Superior Court in Cochise County. At the Hearing the Bar could not present evidence on whether Ms. Jones in Count One had any interest in the property that was the subject of the Decree's provision ordering Mr. Dezonia to pay her $500 per month. Although she had a court order directing Mr. Dezonia to pay her, the Bar's investigation did not focus on whether Ms. Jones had any property interest that justified that order. (TR 21:18 through 22:17)

Since the Bar is dismissing Count Two no restitution is necessary. In addition Respondent had reluctantly agreed to not seek to collect the balance of Cheri Jones' bill for attorney fees, which was about $17,000.

ABA STANDARDS

The ABA *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. ABA *Standard* 1.3, Commentary. The ABA *Standards* provide guidance with respect to an appropriate sanction in this matter. The Court and the Commission consider the ABA *Standards* a suitable guideline. *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772

(2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the Court and the Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

Given the conduct in this matter, the most applicable ABA *Standard* is 6.23 which states:

> Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Based upon the conditional admissions in this matter, the presumptive sanction with regard to the most serious admission of misconduct under ABA *Standard* 6.23 is reprimand (censure in Arizona).

Respondent erroneously advised his client to discontinue making payments to his ex-spouse in violation of a court order, although Respondent believed that the ex-spouse had no community interest in the real property that was the subject of the order and that therefore his client's obligation was "moot or "null and void". [2]

[2] The Joint Memorandum (page 3, line 20) incorrectly states that Respondent "...erroneously believed that the ex-spouse had no community interest in the real property..." At the Hearing the parties corrected this mistake in drafting by indicating that the word "erroneously" should have modified the word "advised" on page 3, line 19 of the Joint Memorandum. (TR 23:8 through 26:18)

The Duty Violated

Respondent violated his duty to the profession and to the legal system. He now realizes that he should not have advised Mr. Dezonia to violate a court order. (TR 17:25 through 18:2; 19:15-20; 20:20-24) Instead he should have told his client to seek a modification of the order from the court. An attorney is an officer of the court. The profession and the legal system expect an officer of the court to have respect for court orders and to counsel a client to use lawful means to seek redress from a court order if the client has an arguably legal basis on which to state a claim for such relief. The legal system is weakened when one of its officers counsels self-help in direct contravention of a court order.

The Lawyer's Mental State

In regard to Respondent's mental state, the parties agree that although Respondent "willfully" advised his client to discontinue payments, it was because Respondent negligently determined that the Court's order was "null and void".

The Hearing Officer concludes that the term "negligently" is being used very broadly in these circumstances to bring the agreed upon sanction somewhat into line with the ABA standard for reprimand and not suspension. Rule 53(c), Ariz.R.Sup.Ct. has been amended so that the word "Willful" violation of any rule or court order has been replaced with the word "Knowing". Respondent knew of the court order and advised his client to disregard it because Respondent saw the 2002 Disclaimer Deed Ms. Jones signed saying she had no interest in the subject property. (TR 20:5, 38:3-10) The only "negligence" in this conduct was Respondent's failure to even try to learn whether a court order could simply be ignored.

This "negligence" would be more appropriately characterized by this Hearing Officer as "ignorance". It is also troubling that Respondent's common sense would not tell him that a court order cannot be ignored. However, Respondent's inexperience in the practice of law combined with his relative isolation in a small community led to a very dangerous circumstance. Respondent simply relied on his own limited and incorrect judgment. It is with an abundance of lenity that this Hearing Officer agrees to call his state of mind "negligent" for not doing any research or contacting another attorney to seek guidance on the issue before advising his client to disregard a court order. (TR 30:6)

The Hearing Officer recognizes that *Standard* 6.22 would not be appropriate for Respondent's conduct in this case. It reads in part, "Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, ..." Respondent did not violate a court order. The examples cited in the Commentary to this *Standard* warranting suspension refer to 1) a lawyer in his own dissolution action refusing to comply with a decree ordering spousal maintenance and 2) a lawyer behaving so badly to a judge in a court proceeding that his conduct interfered with the court process. Respondent's conduct does not rise to this level. (TR 33:10 through 34:7)

Actual or Potential Injury

Respondent's conduct has caused or potentially caused injury to Ms. Jones, as Mr. Dezonia stopped making payments to her. She may have to seek court enforcement of the order. The record shows that Ms. Jones is owed $23,000 pursuant to the Decree. The record does not contain any evidence that Ms. Jones has sought court relief from Mr. Dezonia's violation of the court order. (TR 21:18 through 22:17). When the Hearing Officer broached

the subject of restitution with Respondent he argued that the Bar could not prove that his client Mr. Dezonia did not pay Ms. Jones because of Respondent's advice. (TR 17:6-18) Respondent impressed the Hearing Officer as a person with a very fertile mind. However Respondent's argument that Mr. Dezonia could have had his own financial reasons for wanting to discontinue payments to Ms. Jones (and therefore could have used Respondent's advice as an excuse not to pay) mistakenly draws attention away from Respondent's role in advising his client to violate the court order. Respondent must learn to appreciate his role as an officer of the court as much as an advocate for a client. Respondent is a lawyer working in a system of laws applied and interpreted by courts. Without respect for court orders the system of laws breaks down. If that happens the need for lawyers will dissipate.

AGGRAVATING AND MITIGATING FACTORS

ABA *Standard* 9.1 provides that "After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what standard to impose."

Aggravating Factors

In this matter the parties agree there is one aggravating factor to be considered: 9.22(a), prior discipline. Respondent is currently on probation for violation of ERs 1.4 and 5.3 in file no. 07-1013. This matter involved Respondent's client complaining of no communication with Respondent. An associate of Respondent was working on the client's case, but the client had retained Respondent. (TR 4:3 through 5:16) The conduct complained of was in March 2006. Respondent was placed on one year of probation on

March 31, 2008. (TR 5:25 through 6:12) The conduct in the instant case occurred in early March 2008, before Respondent was placed on probation. Therefore the conduct in the instant case does not qualify as a violation of the probation. However, in early March 2008 Respondent was still in the investigative process on File No. 07-1013. (TR 6:12 through 9:5) It is of concern to the Hearing Officer that the Respondent would commit a second violation of the ethical rules while he was still pending disposition on another charge.

Mitigating Factors

There is one mitigating factor: 9.32(f), inexperience in the practice of law. Respondent was admitted to practice on April 22, 2005 and is therefore relatively inexperienced in the practice of law. Respondent would benefit greatly from a mentor. When the Hearing Officer suggested a mentor to Respondent he was very receptive. (TR 46:18)

The parties agree and the Hearing Officer concurs that the aggravating and mitigating factors do not change the presumptive sanction of censure.

PROPORTIONALITY

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. *See Peasley*, 208 Ariz. at 35, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). The cases set forth below demonstrate that a censure is appropriate in this matter.

In *In re Alexander,* SB 06-0097D, Respondent Alexander represented Mr.

Underwood who was ordered to pay Cynthia Burrell, his ex-spouse, $925.00 per month in spousal maintenance. For the months of June, July, August and September of 2004, Mr. Underwood wrote checks in the amount of the spousal maintenance and sent them to Respondent, rather than Ms. Burrell. At Underwood's direction, Respondent held the checks in his trust account and did not send them to Ms. Burrell's attorney until September 23, 2004, after Ms. Burrell filed a post-decree action to enforce the order for spousal maintenance and a request that it be paid by assignment. The Respondent withheld the support payments in order to exert pressure on Ms. Burrell to list the marital residence for sale or buy-out his client's share. The Hearing Officer found that Respondent knowingly counseled and assisted his client to not pay spousal support in violation of a court order on the negligent assumption that it was an appropriate means to induce the opposing party to comply with a different court order to pay his client for his share of the family residence. The Hearing Officer determined that a censure was appropriate for such knowing, but negligent conduct. This case is similar to the facts here, where Respondent counseled his client to discontinue support payments on his negligent belief that the order was "moot" or "void".

Similarly, in *In re Mirescu,* SB No. 01-1534 (2003) Respondent Mirescu told her client, the father in a child custody dispute, to use "self-help" to obtain visitation with the child, rather than wait for the resolution of the custody mediation and court hearing. Mirescu knowingly counseled her client to remove his child from the mother while there was a court order in effect giving the mother temporary custody. Respondent did not intend to violate the court order or the ethical rules. The hearing officer determined a censure was

the appropriate sanction.

In *In re Banta* DC No. 06-0115 (2007) Respondent Banta received a censure when in addition to other violations he filed a Motion to Reinstate his client's case after dismissal. The Hearing Officer concluded (and the parties agreed) that Banta's conduct in filing the Motion was prejudicial to the administration of justice [ER 8.4 (d)] because the Motion had little or no substantial basis. In the instant case Respondent's advice to his client to violate the court order (divorce decree) was also prejudicial to our system of justice.

In *In re Fieger* Respondent Fieger had been suspended from the practice of law in Arizona for not completing Mandatory Continuing Legal Education. Fieger was licensed to practice law in two other states. Fieger filed an application to be admitted pro hac vice in an Arizona case, but he did not explain that he was admitted to practice in Arizona with a current suspension. Fieger was censured for his conduct that the Hearing Officer found violated ER 8.4 (d) because if Fieger had told the truth on the application he would not have been admitted pro hac vice. The Hearing Officer found the actions of Fieger to be prejudicial to the administration of justice.

RECOMMENDATION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). In this regard Respondent presents as a combination of factors. He is genuinely aware that he gave bad advice to his client Mr. Dezonia. (TR 27:7 through 28:16) But when the Hearing Officer asked him what he had learned from his two

encounters with the Bar he answered that he gave up a lucrative practice to represent lower income people and that in spite of his altruism he got complaints from clients like Pierre Reaume (dismissed Count Two). He blamed Mr. Reaume for having no reason to be dissatisfied. But it was Respondent's own words (see paragraph 16 above) that caused the Bar to believe that Respondent had made an unethical "agreement" with Mr. Reaume to prevent Mr. Reaume from filing a bar charge.

When a mentor was suggested to him Respondent explained that his passion for his cases rubs lawyers in his community the wrong way so that he does not have good enough relations with these local attorneys to establish a mentor relationship. He suggested a lawyer in another community who would be a good choice as a mentor. (TR 46:18, 48:2) This is troubling for a lawyer so new to the practice and who basically practices alone. Zealousness is one thing. But admittedly having poor relationships with opposing counsel is not a pleasant way to practice and may not auger well for Respondent's future.

Respondent also stated that in law school he did not think that every time he made a mistake as a lawyer he would have a bar complaint filed against him. He did not appreciate being "...put in the hot seat and defend my behavior..." every time a client became upset with him. (TR 45:25 through 46:12) If he is referring solely to Count Two then the Hearing Officer can understand his frustration. But if he is referring to Count One and the probation of March 31, 2008 he may be missing the point. It is vitally important that Respondent take from his two experiences with the disciplinary system that he must change. In reference to Count Two he should have calmed down before he emotionally told the Bar in writing that he had an "agreement" with Mr. Reaume that the client would

not file a Bar charge in exchange for Respondent waiving a claim to attorney fees. Respondent was so angry with his client that he was trying to portray the client as a deal-breaker. (TR 38:11 through 42:17)

The State Bar and Respondent believe and the Hearing Officer agrees that the objectives of discipline will be met by the imposition of the proposed sanction of a censure, and the requirement that Respondent pay the costs and expenses of these proceedings.

SANCTIONS

Respondent and the State Bar agree and the Hearing Officer recommends that on the basis of the conditional admissions contained herein the appropriate disciplinary sanctions are as follows:

1) Respondent will receive a censure;

2) Respondent will pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceedings. An Itemized Statement of Costs and Expenses is attached as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred in this matter by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's Office.

Dated this 13th day of April, 2009

Hon. Jonathan H. Schwartz/NM
Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 13th day of April, 2009.

Copy of the foregoing mailed
this 15th day of April, 2009, to:

Les A. Boegemann
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Shauna Miller
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by: Evelyn Loza

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Les, A. Boegemann, Bar No. 023107, Respondent

File No(s). 08-0606 and 08-1155

Administrative Expenses

The Board of Governors of the State Bar of Arizona has adopted a schedule of administrative expenses to be assessed in disciplinary proceedings, depending on at which point in the system the matter concludes. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. An additional fee of 20% of the administrative expenses is also assessed for each separate matter over and above five (5) matters due to the extra expense incurred for the investigation of numerous charges.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

General Administrative Expenses for above-numbered proceedings = **$600.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges	$ 0.00
TOTAL COSTS AND EXPENSES INCURRED	***$600.00***

Sandra E. Montoya
Lawyer Regulation Records Manager

2-25-09
Date