

SUPREME COURT OF ARIZONA

In the Matter of a Member of the) Arizona Supreme Court
State Bar of Arizona) No. SB-17-0079-AP
)
RACHEL L. YOSHA,) Office of the Presiding
Attorney No. 11780) Disciplinary Judge
) No. PDJ20179071
Respondent.)
_____) **FILED 05/09/2018**

DECISION ORDER

Respondent Rachel L. Yosha appeals the Hearing Panel's October 23, 2017 *Amended Decision and Order Imposing Sanctions*. The Hearing Panel found violations of Rule 42, Ariz. R. Sup. Ct. ER 1.6 and ER 4.4. Respondent timely requested a stay pending appeal under Ariz. R. Sup. Ct. 59(c) which was granted and subsequently terminated when Respondent did not agree to the State Bar's proposed *Terms of Supervision (MAP)*.

The State Bar's Amended Complaint claimed Respondent violated ER 1.6 (Confidentiality of Information, alleging, "Respondent revealed confidential information learned during the representation without the informed consent of the client"), ER 1.9(c)(1)(Duties to Former Clients, alleging, "Respondent used information relating to the representation to the disadvantage of a former client"), and ER 4.4 (Respect for the Rights of Others, alleging, "Respondent used means that have no substantial purpose other than to embarrass, delay, or burden any other person.").

The record establishes that Respondent agreed to represent a

client on a limited-scope basis at a hearing involving temporary custody orders. In addition to the child custody dispute, the client, had several pending legal difficulties including a domestic assault charge, a criminal probation order and a deportation order. Respondent worked with her client and the client's husband to prepare for the temporary custody order and appeared at the hearing. After the hearing, Respondent made repeated efforts to collect her fees and ultimately obtained a default judgment against the client and her husband (now judgment debtors), which they unsuccessfully attempted to set aside. Respondent promulgated discovery in support of her collection efforts and ultimately determined that the judgment debtors were residing in the Flagstaff area. Respondent advises that after she sent notice of a pending inspection in an attempt to execute on the judgment, the judgment debtors left the state. Respondent had previously warned her client about the need to keep various authorities apprised of a current address in order to avoid violating court orders.

On September 16, 2016, Respondent sent the judgment debtors an e-mail threatening to initiate criminal proceedings under A.R.S. § 13-2205, which provides "A person commits defrauding judgment creditors if such person secretes, assigns, conveys or otherwise disposes of his property with the intent to defraud a judgment creditor or to prevent that property from being subjected to payment of a judgment," and is a class 6 felony. The e-mail specifically

stated, "due to your conduct in completely ignoring your debt to ... this law firm ..., you are hereby notified that if I do not receive a payment ... by September 30, 2016, I will be filing felony criminal charges against you under the attached statute and reporting [client's] numerous violation[s] of the conditions of her probation to the probation department. ICE and Vegas law enforcement will be notified."

The Panel found that the e-mail was "more than a threat, it was a promise to use the information she had gained from her representation to damage her client ... if she did not receive payments." *Decision* at 5. The Panel concluded that Respondent had violated ER 1.6 and ER 4.4. The Panel also found that Respondent testified that she sends such letters "all the time" *Id.* at 12. The Panel found three aggravating factors (1) prior disciplinary offenses pertaining to a 2012 reprimand with probation for violating ERs 3.3, 8.4(c) and 8.4(d); (2) selfish motive; threatening a client to obtain unpaid fees; and (3) substantial experience in the practice of law, specifically 30 years. The Panel found one mitigating factor, which was full and free disclosure or cooperative attitude toward the proceedings. It ordered a 90-day suspension, a 2-year probation effective the date of the reinstatement order; six hours of CLE above the annual requirement, a Member Assistance Program (MAP) assessment, and costs associated with the assessment and the costs and expenses incurred by the SBA.

Respondent argues that there was no disclosure of confidential information and therefore no violation of ER 1.6. Also, she claims the threat to file a criminal complaint did not violate Arizona's extortion statute, A.R.S. § 13-1804. She maintains that a lawyer is not prohibited from "using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process." ABA Formal Op. 92-363. She also argues that Arizona Ethics Opinion 93-11 prohibits an attorney from filing criminal charges against a client (there, where the client tendered payment with an NSF check) when the attorney has taken no effort to initiate a civil suit. ("[W]e believe that filing a criminal complaint against a client is rarely, if ever, ["]reasonably necessary" to collect a fee, when a civil action is available." Ethics Opinion 93-11.

Respondent maintains that earlier correspondence to her client had warned that failing to keep authorities apprised of a current address would have adverse consequences, and that the September 19, 2016 e-mail was a similar warning to the effect that if Respondent filed the felony charges, ICE would be notified. She conceded that threatening to contact the probation officer was an improper threat

because it was not a legal consequence of the client's failure to pay her obligation to Respondent. She indicates that she took no action to file any criminal charges following an inquiry to the State Bar which advised her that doing so could constitute an ethics violation.

Respondent also argues that the Panel misinterpreted her testimony, and that although she testified that she sends pre-litigation demand letters "all the time," this was an isolated incident involving a client that had stopped making payments and moved out of state to evade collection of a judgment.

Respondent also argues that the Panel gave undue weight to the prior disciplinary matter, which, she claims, was unrelated to the conduct in this matter, and erroneously concluded that efforts to collect unpaid fees constituted a selfish motive. Respondent has also objected to the Panel's decision to lift the stay pending appeal, arguing that the Panel imposed terms of supervision that were unduly intrusive and unsupported by any evidence in this proceeding. Respondent sought no relief from the interim order of suspension in this Court.

A. ER 1.6

The Court agrees with Respondent that a threat to disclose confidential information is not an actual disclosure and therefore is not a violation of ER 1.6. Because there was no showing of any disclosure of confidential information, the finding of this violation is not supported by the record. The Court therefore finds no

violation of ER 1.6.

B. ER 4.4

The Court also notes that Respondent obtained a judgment, the client unsuccessfully attempted to set it aside, and the judgment debtors evidently left the state after receiving notice that Respondent had initiated collection proceedings. It is not clear if the judgment debtors actually had property that was subject to execution.

Whether a threat to refer a judgment debtor for criminal prosecution is a threat or "merely some free educational, legal advice" may depend "upon both the intent of the sender and the perception of the recipient." Arizona Ethics Op. 91-07 (in the context of collecting child support on behalf of a government agency). However, here Respondent not only threatened to file criminal charges for the alleged efforts to secrete assets, she threatened to contact her client's probation officer and advised that there would be consequences for her client's immigration proceedings.

Ethics Opinion 91-07 notes, "There is still some debate over whether the use of a threat of criminal prosecution to gain advantage in a civil matter is banned by ER 8.4(d)," and points out that only prohibiting conduct that falls afoul of a jurisdiction's criminal law definition of extortion implicates "so unappealing a tactic in general that it would better have been prohibited outright in the Model Rules." Ethics Op. 91-07. The Ethics Opinion concluded it

could not judge whether the proposed conduct would constitute an impermissible threat, but that the better practice would be to omit references to the criminal statute.

i. Duty violated: Respondent acknowledges that the threat to contact the probation officer was improper and the Court likewise finds that the reference to "Vegas law enforcement" and ICE constituted an impermissible threat. The Court agrees with the Panel that ER 4.4 applies in this case where Respondent was representing herself as a judgment creditor, and further finds that the fact that Respondent was due the funds did not constitute a "substantial purpose" excusing the conduct. Although the subjective purpose of collecting a judgment for fees is not forbidden, threats to jeopardize a judgment debtor's unrelated immigration and criminal proceedings based on information obtained during the scope of representation are impermissible. This Court therefore agrees with the panel that threat to contact probation and ICE authorities in the September 19, 2016 e-mail was sent without substantial purpose other than to "embarrass, delay or burden" the judgment debtors, violating ER 4.4.

In imposing sanctions, the Court is to consider (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. See *In re Alexander*, 232 Ariz. 13 ¶ 49; see also ABA Standard 3.0. The applicable standard is ABA

Standard 6.2 (Abuse of Legal Process). See, ABA Standard 6.0 (Violations of Duties owed to the Legal System) (Introduction).

ii. Mental State: Having found the ER 4.4 violation, the Court looks to Respondent's mental state. Respondent claims that any misconduct was at most negligent and not knowing. State of mind is a fact question. *In re Non-Member of State Bar of Arizona, Van Dox*, 214 Ariz. 300, 304 ¶¶ 14-15 (2007) ("The 'clear error' standard requires that the Commission give "great deference" to a hearing officer's factual findings.")

The Panel found that Respondent "knowingly violated ER 4.4(a) when she communicated to [client] that she would be 'reporting' information to authorities. The sole purpose of the threat was to induce fear and incentivize [client] to pay her attorney's fees." *Decision* at 10. In a similar case involving an attorney's letter threatening to press criminal charges if the client did not dismiss a bankruptcy proceeding, "the best evidence of his intent is the ... letter itself. In the letter, the accused expressed a definite intent to press criminal charges." *In re Conduct of Huffman*, 983 P.2d 534, 541 (Or. 1999). Reviewing the September 19, 2016 e-mail and the Panel's finding under a "clearly erroneous" standard, the Court finds that the violation was knowing. Ariz. R. Sup. Ct. 59(j).

iii. Injury: Looking to the injury, in *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Wilson*, 634 N.W.2d 467, 474 (Neb. 2001), the Nebraska Supreme Court examined threats to reveal

confidential information—in that case, a former client’s loss of employment which, if reported to the Immigration and Naturalization Service, would “destroy” the client’s INS case. *Wilson*, 634 N.W.2d at 471. That Court noted, “a disciplinary rule prohibiting disclosure of client confidences except in certain limited circumstances, including when an attorney reasonably believes disclosure is necessary for resolution of a fee dispute, does not permit an attorney to **threaten** a former client with disclosure of client confidences in order to resolve a fee dispute.” *Wilson*, 634 N.W.2d at 474, citing *Discipline of Boelter*, 985 P.2d 328 (Wash. 1999)(emphasis added). The *Wilson* court noted the importance of a client’s ability to be able to fully confide in his or her attorney, that such threats “undermine the confidential and fiduciary nature of the attorney-client relationship and lessen the public’s confidence in the legal profession.” *Wilson*, 634 N.W.2d at 475. *Boelter* involved a lawyer’s payment demand where the attorney indicated that if the client did not pay his bill, he would be “forced to reveal” that the client had lied on statements to the IRS and his bank as to his financial condition. *Boelter*, 985 P.2d at 334. Like Respondent, *Boelter* argued that he should have been able to reveal client confidence or secrets in litigation to recover fees if he reasonably believed that disclosure was necessary. *Id.* Like the Respondent, *Boelter* characterized his demand letter as being the product of concern for his client (or a “warning”), and not any desire to scare him into

making payment. *Id.* at 335. (*Boelter* also involved significant overbilling, which is not alleged here.)

This Court is likewise concerned that vague references to report a client's legal violations in an effort to extract payment threatens the fundamental protection of the attorney-client privilege. Threats of criminal prosecution to collect fees "tends to pollute the administration of justice and bring the legal profession into disrepute." *See generally, Matter of Yarborough*, 488 S.E.2d 871, 875 (S.C. 1997).

iv. Aggravating and Mitigating Factors: The Panel examined ABA Standard 9.22(a) and determined that Respondent's prior disciplinary history was an aggravating factor under ABA Standard 9.22(a). Although Respondent objects to the consideration of the prior disciplinary matters because the underlying facts were not presented during the hearing, nothing precludes the Panel or this Court from considering the prior disciplinary proceedings. In PDJ-2012-9086, the State Bar charged Respondent with taking unsubstantiated positions to family court judges on two separate occasions, and Respondent conditionally admitted that her conduct violated ERs 3.1, 3.2 and 8.4(d). In an *Agreement for Discipline by Consent*, the State Bar dismissed two allegations, Respondent admitted that her conduct violated ERs 3.1, 3.2 and 8.4(d); the parties agreed that the Respondent negligently committed the violations and that there was little, if any, actual harm to her client, the legal system and

public; Respondent accepted a censure and was placed on probation for two years with terms including LOMAP, MAP and CLE requirements. The Court agrees with the Panel that the prior disciplinary order is a pertinent aggravating factor. Decision at 12.

The Panel's second aggravating factor, however, was not supported by the record. Seeking unpaid fees that have been determined due does not, without more, constitute a "selfish or dishonest motive" *In re Van Dox*, 214 Ariz. 300 (2007) ("Standing alone, however, the receipt of a fee does not mandate a finding of a dishonest or selfish motive.") In *Boelter*, using a threat to notify authorities of tax and bank fraud in support of an inflated fee supported a finding that the conduct was motivated by self-interest. See *Boelter*, 985 P.2d at 334, 339. Because there was no showing that the fees were not earned or were excessive, the Panel erred in finding a selfish or dishonest motive.

As to the third aggravating factor, the Panel correctly found that Respondent has substantial experience in the practice of law. Likewise, the Panel correctly found that Respondent's full and free disclosure was a mitigating factor.

v. Sanction: A Under ABA Standard 6.22, a knowing violation warrants a suspension. An attorney may ethically undertake actions to enforce collection of fees due. However, she must exercise care when making demand that she does not imply that she will undertake any action based on confidential information that would jeopardize

the former client's existing or potential proceedings unrelated to the collection of the fees. In determining an appropriate sanction, the Court may "look to other, similar cases in determining whether the sanction imposed is proportionate to the misconduct charged." *In re Abrams*, 227 Ariz. 248, 251 ¶ 17 (2011).

Respondent argues that cases involving an attorney's threat of criminal prosecution in furtherance of a civil claim warrants only a reprimand, see *Robertson's Case*, 626 A.2d 397, 400-01 (N.H. 1993) as modified on reconsideration (July 7, 1993) (involving threats the attorney made to further his client's claims against city attorneys), *Disciplinary Counsel v. King*, 617 N.E.2d 676, 677 (Ohio 1993) (involving an attorney's threats to report that the adverse party had committed the felony offenses of conversion, fraud and theft against his client) and *Matter of Walter*, 466 N.E.2d 35, 35 (Ind. 1984)(involving a threat to report an adverse party for paying rent to his client with an NSF check). However, although making an impermissible threat on behalf of a client may warrant a reprimand, making a threat to one's own client can implicate other ethical rules including ER 1.9(c) (not found here) which prohibits a lawyer who has formerly represented a client in a matter from using information relating to the representation to the disadvantage of the former client and ER 8.4(d) (not charged here) which prohibits engaging on conduct that is prejudicial to the administration of justice.

The seriousness of such threats is evident in the case involving Mr. Huffman, who had detailed information about his client's allegedly fraudulent activities, and received a 2-year suspension for threatening to disclose this information, see *Huffman*, 983 P.2d at 548 ("This case warrants a more severe sanction than that in *Lewelling*, in which the party whom the accused lawyer had threatened with criminal charges was not his client"). Likewise, Mr. Wilson received a 2-year suspension for threatening to notify INS. see also *Wilson*, 634 N.W.2d at 475 ("Respondent's threats in this case undermine the confidential and fiduciary nature of the attorney-client relationship and lessen the public's confidence in the legal profession"); Similarly, Mr. Boelter received a 6-month suspension for advising that he would be "forced" to reveal that his client lied on his statements to IRS and his bank" if the client did not pay. See *Boelter*, 985 P.2d at 334. Mr. Yarborough received a 6-month suspension for advising his client that he had filed criminal charges against her and would dismiss them if she paid sums he claimed due for costs incurred in his representation of her. See *Yarborough*, 488 S.E.2d 871.

The Court therefore concludes that a short-term suspension is appropriate based on the charges and findings in this case and affirms the Panel's decision. Therefore,

IT IS ORDERED denying the appeal and affirming the 90-day suspension effective March 14, 2018, a 2-year probation effective on

the date of a reinstatement order, and the additional 6-hour CLE requirement above the annual requirement.

IT IS FURTHER ORDERED that Respondent pay costs and expenses incurred by the State Bar.

IT IS FURTHER ORDERED overruling Respondent's *Objection to Consideration of Amended Record in Determining the Appeal*.

DATED this 9th day of May, 2018.

_____/s/_____
SCOTT BALES
Chief Justice

TO:

Rachel L Yosha
Craig D Henley
Amanda McQueen
Sandra Montoya
Maret Vessella
Beth Stephenson
Mary Pieper
Lexis Nexis
Don Lewis
Raziel Atienza