



BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

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IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
RICHARD E. CLARK,)
Bar No. 009052)
)
)
RESPONDENT.)
_____)

No. 00-1066

**DISCIPLINARY COMMISSION
REPORT**

Procedural History

This matter first came before the Disciplinary Commission of the Supreme Court of Arizona on April 11, 2003, pursuant to Rule 53(d), Ariz. R. S. Ct. The Commission considered the Hearing Officer's Report filed January 15, 2003 recommending censure, one year of probation (complete State Bar's Professionalism course and obtain practice monitor (PM) if Respondent leaves current job), restitution in the amount of \$10,841.16 to client, Edward Kosac, Jr., and costs of these disciplinary proceedings.

Upon review of the record, the Commission by a majority of five adopted the Hearing Officer's findings of fact, but modified *de novo* what was erroneously perceived as his conclusions of law to reflect that Respondent's misconduct was knowing, if not intentional and also reviewed *de novo* aggravating and mitigating factors present in the record. The Commission determined that a fraudulent act cannot be committed with a negligent mental state as found by the Hearing Officer, and therefore, recommended a two-year suspension, restitution and two years of probation with terms and conditions. Costs were not recommended, as the State Bar did not file a timely Statement of Costs and Expenses, pursuant to Rule 52(8).

1 The Supreme Court granted review to determine whether the Disciplinary
2 Commission may reject a hearing officer's factual findings absent a determination that the
3 findings were clearly erroneous and ultimately reversed the Commission's conclusion that
4 Clark violated ER 8.4(c), affirmed the Commission's conclusion that Clark violated ER
5 8.4(d), and remanded the matter to consider the appropriate discipline for Clark's negligent
6 violation of ER 8.4(d). The matter was then set for review by the Commission on May 8,
7 2004.

8 **Decision**

9 After review of the record and consideration of the decision by the Supreme Court,
10 the Commission believed that the only available legal sanction for the egregious misconduct
11 of the Respondent was a censure. Therefore, the seven¹ members of the Commission, by a
12 majority of five,² reluctantly recommend censure and restitution to Edward Kosac in the
13 amount of \$12,141.16 to be paid within one year of the entry of the final Judgment and
14 Order.³
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19 ¹ Commissioner Gutierrez did not participate in these proceedings. Commissioner
20 Funkhouser recused.

21 ² Commissioners Nelson and Osborne dissented. See the dissenting opinion listed below.

22 ³ The Hearing Officer found that Respondent should be required to pay Mr. Kosac
23 restitution in the amount of \$12,141.16 less the \$1300.00 due on the bank loan for which
24 assets were collateral at the time of the transfer, for a total of \$10,841.16 within one year
25 from the date of the final Judgment and Order. See Hearing Officer Report and
26 Recommendation, pp. 20-21 and the Commission initially agreed. The parties however
subsequently conceded that \$10,841.16 was an erroneous amount and that the correct
calculation was \$13,528.65 minus \$1,387.49 (the amount owed to secured creditor which
was calculated twice) for a total of \$12,141.16. See State Bar's Brief on Remand re
Proportionality, p. 14 and Respondent's Brief re Proportionality, p. 3-4. The Commission
however, did not agree with Respondent's proposed resultant figure of \$743.33.

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RESPECTFULLY SUBMITTED this 18th day of June, 2004.



Craig B. Mehrens, Chair
Disciplinary Commission

Commissioners Nelson and Osborne dissenting:

We respectfully dissent in the action of the Disciplinary Commission in the matter of Richard E. Clark.

Our objections are not focused on the legal principles involved. Indeed, the lawyer members of the Commission felt obligated to render their decision in deference to the Court's opinion that Mr. Clark acted negligently. As lay members, we feel perhaps less bound by the legal technicalities. It appears to us that the Court's decision to accept the conclusions of the hearing officer were in part based on the fact that the Commission failed in its formal conclusions to explicitly state that the Hearing Officer's findings of fact were "clearly erroneous" when he concluded that Clark acted negligently. The hearing officer summarized his report in an unusual way. We agreed with his "finding of fact" that respondent had committed fraud, but we concluded that the requisite mental state for fraud was "knowing", and felt that this conclusion was an issue of law which we were permitted to interpret de novo. We felt at that time, and continue to feel, that the fraudulent transfer by Mr. Clark was an intentional act and not a negligent one. The bankruptcy judge, a Superior Court judge, and the State Bar's expert all concluded, without hesitation, that Mr. Clark acted intentionally. It continues to mystify us that the hearing officer could have looked past the very deliberate acts of the Respondent, and into his "heart of hearts" to find negligent behavior. We remain convinced that there is no such thing as "negligent fraud".

1 The mantra of the legal disciplinary process is that its purpose is to protect the
2 public. We would suggest that beyond the obvious and direct protection of the public that
3 occurs when lawyers are suspended or disbarred, there are several other protective functions
4 of discipline. One of these is the restitution that is frequently required in disciplinary orders.
5 Since longer suspensions require reinstatement hearings, attorneys are more likely to
6 complete restitution if they have to face a reinstatement hearing. Client Protection Fund
7 access can be triggered by certain disciplinary actions. There is the additional protection for
8 the public through the deterrent effect of public discipline. It is not coincidental that most
9 attorneys, upon receiving their copy of the *Arizona Attorney*, turn immediately to the
10 disciplinary summaries. We expect that attorneys learn from the mistakes of others.
11 Finally, there is protection of the public simply by the fact that discipline is occurring. The
12 public can be reassured that there is a mechanism in place to sanction unethical behavior by
13 lawyers and that wronged clients can in some cases be compensated for their losses.

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15 The current action fails to protect the public in any of these regards. An attorney
16 used legal tricks to avoid a debt. Now it appears, because of technical legal issues, that he
17 may receive nothing more than a wrist slap from the Court. This is the type of outcome that
18 lay people sometimes fear from lawyers and the courts: that lawyers can resort to legal tricks
19 and escape sanction.

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21 The following facts are inescapable: an attorney poorly served his client, who
22 ultimately sued and won a judgment against the attorney. The client was blocked in trying
23 to collect on that judgment by the fraudulent actions of the attorney. The attorney will likely
24 now receive a public wrist slap, along with an order of restitution that has no teeth. The
25 attorney works for a local Indian tribe, where he is potentially garnishment-proof. The client
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1 is left holding the bag. This scenario does not speak well for the profession or for the
2 disciplinary process.

3 Original filed with the Disciplinary Clerk
4 this 18th day of June, 2004.

5 Copy of the foregoing mailed
6 this 18th day of June, 2004, to:

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8 Hearing Officer 9Q
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21 by: Kewigand

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