

FILED
JUL 26 2004
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY P. Williams

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

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5 IN THE MATTER OF A MEMBER) No. 03-1910
6 OF THE STATE BAR OF ARIZONA,)
7)
8 **SANFORD J. EDELMAN,**)
9 **Bar No. 004497**)
10) **HEARING OFFICER'S REPORT**
11)
12) **RESPONDENT.**)

PROCEDURAL HISTORY

11
12 A Probable Cause Order was filed on March 4, 2004. A Complaint was
13 filed on April 16, 2004. An Answer was filed on April 29, 2004. The parties filed
14 a Tender of Admissions and Agreement for Discipline by Consent and a Joint
15 Memorandum in Support of Agreement for Discipline by Consent on July 13,
16 2004. The Complainant has been notified. No hearing has been held.

FINDINGS OF FACT

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19 At all times relevant, Respondent was an attorney licensed to practice law
20 in the State of Arizona, having been admitted to practice in Arizona on June 15,
21 1976.
22

COUNT ONE (File No. 03-1910)

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24 1. On July 14, 2003, while investigating a burglary and vandalism of a
25 vehicle, Deputy Sean Gijanto (Deputy Gijanto), of the Cochise County Sheriff's

1 Office, contacted Robin Kimbrough (Ms. Kimbrough) and her son Tanner
2 Kimbrough (Tanner). Deputy Gijanto asked Ms. Kimbrough for consent to
3 search her house for the owner's manual and the registration missing from the
4 vehicle. During the search of Tanner's room, Deputy Gijanto found a small
5 amount of marijuana. Deputy Gijanto asked Ms. Kimbrough if she had any
6 marijuana and she allegedly retrieved a quantity of marijuana and allegedly stated
7 that she provided Tanner with the marijuana found in his room, which Tanner
8 used as a substitute for Ritalin. Ms. Kimbrough was subsequently charged with
9 possession of marijuana, possession of drug paraphernalia and child abuse and
10 Tanner was charged in Juvenile Court with possession of marijuana. Ms.
11 Kimbrough had allegedly consented to the search and later signed a form
12 consenting to the search.
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16 2. Roger H. Contreras (Mr. Contreras) was appointed to represent Ms.
17 Kimbrough in the Cochise County Superior Court with respect to the felony
18 charges. Respondent, a public defender for Cochise County, was appointed to
19 represent Tanner in the Cochise County Juvenile Court proceedings.
20

21 3. Respondent thereafter filed a motion in Juvenile Court to suppress the
22 evidence seized during the search.
23

24 4. When Mr. Contreras reviewed the motion to suppress filed by Respondent,
25 he discovered that Respondent had talked to Ms. Kimbrough and had obtained

1 her affidavit and filed it as an attachment to the motion to suppress, all after Mr.
2 Contreras had been appointed to represent her.

3
4 5. Respondent never asked Mr. Contreras if he could talk to Ms. Kimbrough,
5 he never told Mr. Contreras he had talked to Ms. Kimbrough, and he never
6 discussed the affidavit with Mr. Contreras.

7
8 6. Mr. Contreras asked Respondent to withdraw the affidavit or move to
9 strike the affidavit from the record. Respondent refused to do so.

10
11 7. Mr. Contreras filed a motion to strike the affidavit on behalf of Ms.
12 Kimbrough.

13
14 8. Respondent knew that Ms. Kimbrough was represented at the time he
15 asked her to sign the affidavit.

16
17 9. Ms. Kimbrough could have been harmed by the affidavit, as it was relevant
18 to the question of whether she consented to a search of her home, and some issues
19 that could have been raised in her defense regarding the search were limited.

20
21 10. Respondent did not advise Ms. Kimbrough that her rights could be
22 prejudiced by signing the affidavit, or that her case could be affected by the act of
23 signing of the affidavit. He also did not adequately emphasize the need for her to
24 consult with her lawyer.

25
CONDITIONAL ADMISSIONS

1 Respondent conditionally admits his conduct violates Rule 42, Ariz. R. S.
2 Ct., specifically ERs 4.2, 4.4 and 8.4(d).

3 **ABA STANDARDS**

4 The *ABA Standards* list the following factors to consider in imposing the
5 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
6 actual or potential injury caused by the lawyer's misconduct, and (4) the
7 existence of aggravating or mitigating circumstances. *ABA Standard 3.0*.

8
9 In this matter, consideration was given to *ABA Standard 6.23* and *6.33*.
10 Censure is generally appropriate when a lawyer is negligent in determining
11 whether it is proper to engage in communication with an individual in the legal
12 system or when a lawyer negligently fails to comply with a court order or rule,
13 and causes injury or potential injury to a client or party or causes interference or
14 potential interference with the outcome of the legal proceeding.
15

16
17 Most courts impose discipline in cases of misconduct involving
18 communication with a represented party, and it is immaterial whether the
19 communication was intentional or simply a negligent violation of the rules. See
20 *Standard 6.33*. In this case, Respondent, a public defender for Cochise County,
21 spoke to a represented person in a criminal matter without permission from that
22 person's attorney and prepared an affidavit for the represented person to sign,
23 which was then attached to a motion to suppress in Respondent's client's
24 juvenile matter.
25

1 The presumptive sanction for the admitted conduct is a censure. After
2 determining the presumptive sanction, it is appropriate to evaluate factors
3 enumerated in the *Standards* that would justify an increase or decrease in the
4 presumptive sanction.

5 **AGGRAVATING AND MITIGATING FACTORS**

6 This Hearing Officer then considered aggravating and mitigating factors in
7 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer
8 agrees with the parties that two aggravating factors apply and should be
9 considered in this matter: (a) prior disciplinary offenses - Respondent received a
10 thirty-day suspension and two years probation. The judgment and order was filed
11 August 7, 2002, in SB-02-0095-D. Respondent is currently still on probation;
12 and (h) vulnerability of victim.
13
14

15 This Hearing Officer agrees with the parties that three factors are present in
16 mitigation: (b) absence of a dishonest or selfish motive - Respondent was
17 representing the minor son of the women with whom he spoke. He believed his
18 actions were in the son's best interests, and that his actions would not hurt the
19 mother; (e) full and free disclosure to disciplinary board or cooperative attitude
20 toward proceedings - Respondent disclosed information to the State Bar and has
21 exhibited a cooperative attitude toward the proceedings; and (i) remorse -
22 Respondent's contends that his decision to accept an agreement for discipline by
23 consent evidences remorse. The primary violation that has been alleged involves
24
25

1 ER 4.2. In fact, ER 4.2, as written, says a lawyer “shall not communicate about
2 the subject of the representation with a party the lawyer knows to be represented
3 by another lawyer in the matter” Here, the woman was not represented in the
4 matter (the juvenile proceeding) by another lawyer. Arguably, therefore, there is
5 no violation of ER 4.2. Without a violation of ER 4.2, the balance of the State
6 Bar’s case is clearly less strong.
7

8
9 Notwithstanding the foregoing, Respondent recognizes the fact that, with
10 or without regard for ER 4.2, he should have contacted the woman’s lawyer
11 before he talked with her about the affidavit when he knew she was represented
12 in her own related drug case. His decision not to fight the complaint by trying to
13 parse the wording in ER 4.2 reflects an appreciation for the way in which he
14 should have handled this matter.
15

16 The parties have identified what they believe to be the relevant
17 aggravating and mitigating factors. The parties do not believe that these factors
18 justify an increase or decrease in the presumptive sanction in this case.
19

20 **PROPORTIONALITY REVIEW**

21 To have an effective system of professional sanctions, there must be
22 internal consistency, and it is appropriate to examine sanctions imposed in cases
23 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
24 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207 (1983)). However, the
25

1 discipline in each case must be tailored to the individual case, as neither
2 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
3 604, 615 (1984).
4

5 In *Matter of Saper*, SB-01-0196-D (2002), the Disciplinary Commission
6 issued its report which the Arizona Supreme Court adopted, censuring Saper for
7 conduct in violation of Rule 42, specifically ERs 1.1, 1.5, 1.16, 3.1, 3.3(a)(1),
8 4.1(a), 4.2, 4.4, 8.1, and 8.4(c).¹ Saper violated ERs 4.2 and 4.4, among others,
9 when he knowingly communicated with a former client who was represented by
10 new counsel at the time of the communications.
11

12 There were six aggravating and one mitigating factors reviewed by the
13 Disciplinary Commission in *Saper* including prior disciplinary offenses;
14 dishonest or selfish motive; multiple offenses; refusal to acknowledge wrongful
15 nature of conduct; vulnerability of client; and substantial experience in the
16 practice of law. The Disciplinary Commission found remorse and delay in the
17 proceedings as mitigating factors.² The Commission indicated that censure and
18 probation were within the range of reasonableness and that a suspension was not
19 appropriate.
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23 ¹ The State Bar argued that violations of ERs 3.3, 4.1 and 8.4 were knowing violations and that,
24 as a result, suspension was the appropriate sanction. The Commission determined that the
25 conduct was knowing, but that Saper was negligent in determining his ethical responsibilities.

² The Commission noted that ordinarily it would be inconsistent to find both the aggravating
factor of refusal to acknowledge wrongful nature of the conduct and remorse, but that because
of the delay in the proceedings Saper's attitude changed, making both factors applicable.

1 In this case, Respondent contacted a person he knew was represented and
2 asked her to sign an affidavit that could have affected her criminal matter
3 adversely. Although Respondent's conduct is not as egregious, overall, as
4 Saper's conduct, the potential injury to his client's mother in this matter could
5 have been substantial and may have violated her constitutional rights.
6

7 Based on the ABA *Standards* and Arizona case law, the parties agree that
8 the recommended sanction is appropriate given the facts in this matter.
9

10 This agreement provides for a sanction that meets the goals of the
11 disciplinary system. A public censure will serve to protect the public, instill
12 confidence in the public, deter other lawyers from similar conduct and maintain
13 the integrity of the bar.
14

15 **RECOMMENDATION**

16 The purpose of lawyer discipline is not to punish the lawyer, but to protect
17 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
18 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
19 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
20 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
21 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
22 (1994).
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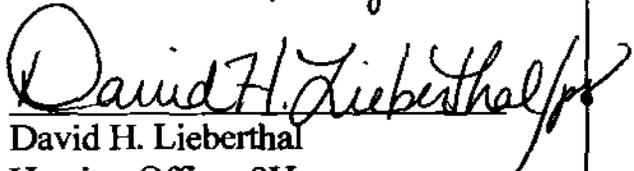
1 In imposing discipline, it is appropriate to consider the facts of the case, the
2 American Bar Association's *Standards for Imposing Lawyer Sanctions*
3 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
4 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
5

6 Upon consideration of the facts, application of the *Standards*, including
7 aggravating and mitigating factors, and a proportionally analysis, this Hearing
8 Officer recommends acceptance of the Tender of Admissions and Agreement for
9 Discipline by Consent and the Joint Memorandum in Support of Agreement for
10 Discipline by Consent and the Joint Memorandum in Support of Agreement for
11 Discipline by Consent providing for the following:

12 1. Respondent shall receive a public censure for violation of Rule 42 Ariz.
13 R. S. Ct., specifically ERs 4.2, 4.4 and 8.4(d).
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15 2. Respondent shall pay the costs and expenses incurred in this
16 disciplinary proceeding within 30 days of the Supreme Court's final judgment
17 and order.
18

19 DATED this 26th day of July, 2004.

20 
21 David H. Lieberthal
22 Hearing Officer 9H
23

24 Original filed with the Disciplinary Clerk
25 this 26th day of July, 2004.

1 Copy of the foregoing was mailed
2 this 26th day of July, 2004, to:

3 Mark D. Rubin
4 Respondent's Counsel
5 4574 North First Avenue, Suite 150
6 Tucson, AZ 85718

7 Shauna R. Miller
8 Senior Bar Counsel
9 State Bar of Arizona
10 111 West Monroe, Suite 1800
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by: P. Williams