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JUN - 6 2005

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

By *[Signature]*

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3 IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
4)
5 **NANCY E. DEAN,**)
Bar No. 011198)
6)
7 **RESPONDENT.**)

No. 02-2290

**DISCIPLINARY COMMISSION
REPORT**

8 This matter came before the Disciplinary Commission of the Supreme Court of
9 Arizona on May 6, 2005, pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the
10 Hearing Officer's Report filed March 7, 2005 and Order filed March 29, 2005,¹
11 recommending a six month suspension, two years of probation upon reinstatement with
12 the State Bar's Member Assistance Program (MAP), and costs of these disciplinary
13 proceedings. Both parties filed a Notice of Appeal objecting to the Hearing Officer's
14 Report. Both parties filed timely Opening and Answering briefs. Respondent,
15 Respondent's Counsel and Counsel for the State Bar were present at oral argument.

17 Respondent accepts the Hearing Officer's findings of fact, but appeals the
18 recommended sanction. Respondent argues that the Hearing Officer's recommended
19 sanction is too severe and does not fairly reflect Respondent's interim rehabilitation.
20 Respondent maintains she has demonstrated by clear and convincing evidence of interim
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24 ¹ Respondent moved for reconsideration of the Hearing Officer's Report based on three grounds: newly
25 discovered information, error of fact concerning the losses suffered by Respondent and former Judge
26 Nelson, and error of fact concerning evidence in the record regarding lack of misrepresentation by Nelson
to the Commission on Judicial Conduct. The Hearing Officer denied the Motion on the first two grounds,
but granted the motion on the third ground. The Hearing Officer admitted error in his findings that there is
no evidence Nelson lied during the Commission on Judicial Conduct's investigation. See Hearing Officer's
Report, p. 14:25 and subsequent Order, p. 2:7.

1 rehabilitation as set forth in the spirit of *Matter of Arrotta*, 208 Ariz. 509 (2004),² by
2 providing ample evidence of her new self-awareness, an understanding of the ethical
3 rules, genuine remorse, and her good faith efforts to mitigate the prejudice caused by her
4 misconduct to the administration of justice. Respondent's efforts to rehabilitate should
5 provide guidance to other attorneys. A suspension for more than six months will not
6 serve general deterrence purposes and moreover, is not needed to protect the public
7 against recidivism. Respondent asserts that two years of probation (MAP) is an
8 appropriate sanction.³ In the alternative, if suspension is recommended, a short term,
9 retroactive suspension which does not require formal reinstatement proceedings is also
10 appropriate.

11 Respondent further asserts that the State Bar's proportionality analysis between
12 *Matter of Nelson*, 207 Ariz. 318, 86 P.3d 374 (2004), and the instant matter is flawed and
13 the outcomes are unbalanced. Former Judge Nelson suffered a loss of standing,
14 humiliation, and personal upheaval. His resignation from the bench led to his complete
15 exoneration as a lawyer and as a judge on the same facts as the instant matter and he has
16 been permitted to practice law without sanction. A sanction proportional to *Nelson*
17 would be Respondent's resignation in lieu of disbarment.⁴

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19 The State Bar agrees with the Hearing Officer's findings of fact and conclusions
20 of law, but asserts the sanction should be greater than the Hearing Officer's
21 recommendation of a six month suspension. The State Bar argues a lengthy suspension
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24 ² The Supreme Court held that in reinstatement matters with an element of dishonesty in the underlying
25 misconduct, an applicant must show that he has identified what weaknesses caused the misconduct and
demonstrate that he has overcome those weaknesses. The Commission does not interpret the Court's
26 holdings to require that an IME is necessary in every reinstatement case.

³ Post hearing Respondent argued for censure and two years of probation (MAP).

⁴ The Rules of Professional Conduct no longer provide for resignation during attorney disciplinary proceedings.

1 and two years of probation (MAP) upon reinstatement is the appropriate sanction in order
2 to fulfill the purposes of lawyer discipline, which is deterring similar misconduct by other
3 lawyers and maintaining the integrity of the profession in the eyes of the public.⁵

4 The State Bar argues that Respondent failed to provide sufficient evidence of
5 interim rehabilitation to warrant a suspension that does not require proof of fitness to
6 practice, pursuant to Rules 64 and 65. The State Bar argues that the record does not show
7 that Respondent is rehabilitated from her misconduct and from any weaknesses that
8 caused her misconduct. Respondent's assertion that the Hearing Officer gave
9 Respondent's efforts at interim rehabilitation insufficient weight is not afforded by the
10 record, because an Independent Medical Evaluation (IME) and four psychotherapy
11 sessions do not sufficiently demonstrate interim rehabilitation.

12 The State Bar further argues that aggravating factor 9.22(b) selfish or dishonest
13 motive is supported by the record and the Hearing Officer erroneously concluded that
14 mitigating factor 9.32(b) absence of selfish or dishonest motive is present.⁶

15 Concerning proportionality, the Hearing Officer found no cases on point and the
16 cases provided by the parties provide a very general range for an appropriate sanction.
17 See Hearing Officer's Report, p. 16.

18 The State Bar argues that a proportionality analysis of similar misconduct by
19 attorneys demonstrates that the appropriate sanction is a suspension in excess of six
20 months. See *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004), *Matter of Fuller*, SB-
21 04-0130-D (2004), *Matter of Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989), and *Matter*
22 *of Alcorn*, 202 Ariz. 62, 41 P.3d 600 (2002). Respondent offers *Matter of Fioramonti*,

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26 ⁵ Post hearing the State Bar argued for a three year suspension and two years of probation.

Terms of Probation

1 1. Respondent shall meet with the Director of MAP, who will conduct an
2 assessment. Respondent thereafter shall enter into a MAP contract based upon
3 recommendations made by the Director of MAP.

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

Discussion

12 The Disciplinary Commission's standard of review is set forth in Rule 58(b),
13 Ariz. R. S. Ct., which states that the commission reviews questions of law *de novo*. In
14 reviewing findings of fact made by a hearing officer, the commission applies a clearly
15 erroneous standard. *Id.* Mixed findings of fact and law are also reviewed *de novo*. *State*
16 *v. Blackmore*, 186 Ariz. 630. 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz.
17 440, 711 P.2d 579 (1985).

18 In Count One, Respondent continued to appear before former Judge Michael
19 Nelson in her capacity as a prosecutor for Apache County after entering into a romantic
20 relationship with former Judge Nelson, thereby creating a conflict of interest.

1 In Count Two, Respondent did not disclose the relationship and made false and
2 material misrepresentations to the State Bar in her original response to the previous
3 anonymous charge in File No. 01-1993. Respondent subsequently admitted the
4 allegations in her Answer in the instant matter, File No. 02-2290, except for the alleged
5 violation of ER 8.4(f) knowingly assist a judge in conduct that is a violation of the Code
6 of Judicial Conduct.

7 The Disciplinary Commission, as well as the Hearing Officer determined by clear
8 and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically:

9 ER 1.7(b) (conflict of interest)	1 Violation
10 ER 1.16(a)(1)(terminating/declining representation)	1 Violation
11 ER 8.1(a) (knowingly make a false statement of fact)	1 Violation
12 ER 8.1(b) (failure to disclose a fact necessary to correct 13 a misapprehension)	1 Violation
14 ER 8.4(c) (conduct involving dishonesty, fraud, deceit or 15 misrepresentation)	1 Violation
16 ER 8.4(d) (conduct prejudicial to the administration 17 of justice)	1 Violation
18 ER 8.4(f) (knowingly assist a judge in conduct that is a 19 violation of the Code of Judicial Conduct)	1 Violation

20 In determining the appropriate sanction, our Supreme Court considers the ABA
21 *Standards for Imposing Lawyer Sanctions* ("Standards") a suitable guideline. *In re*
22 *Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission
23 are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney
24 discipline. In imposing a sanction after a finding of misconduct, consideration is given to
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1 the duty violated, the lawyer's mental state, the actual or potential injury caused by the
2 misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0*

3 The Disciplinary Commission, as well as the Hearing Officer, determined that the
4 presumptive sanction for Respondent's misconduct is disbarment. The State Bar,
5 Respondent and the Hearing Officer also agreed that disbarment is not an appropriate
6 sanction, given the uniqueness of this case and because the mitigation present
7 substantially lowers the range for an appropriate sanction. *See Hearing Officer's Report,*
8 *p. 18:3.* The Hearing Officer found that Respondent's most serious misconduct is her
9 false statements to the State Bar, ERs 8.1(a) and (b). *Id.* at 11:24. *See also Matter of*
10 *Varbel*, 182 Ariz. 451, 454 (1995), which held that being untruthful during disciplinary
11 proceedings is one of the most serious ethical violations warrants disbarment, absent any
12 mitigating circumstances. *Standard 5.11 (Failure to Maintain Personal Integrity)* provides
13 that:
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15 [d]isbarment is generally appropriate when:
16 (b) a lawyer engages in any intentional conduct involving
17 dishonesty, fraud, deceit, or misrepresentation that
seriously adversely reflects on the lawyer's fitness to
practice.

18 Respondent's false statements to the State Bar were intentional and seriously adversely
19 reflected on Respondent's fitness to practice. *See Hearing Officer's Report, p. 12.*
20 *Standard 7.1 (Violations of Duties Owed as A Professional)* also provides in part that:
21

22 [d]isbarment is generally appropriate when a lawyer
23 knowingly engages in conduct that is a violation of a duty
24 owed as a professional.... and causes serious or potentially
serious injury to a client, the public, or the legal system.

25 The Hearing Officer also found that Respondent's conflict of interest established actual
26 injury to the administration of justice and the conflict undermined public trust in the

1 justice system beyond calculation. *Id.* at 4-5. Respondent's misconduct caused serious
2 harm to the legal system by delaying the State Bar's investigation and caused the re-
3 sentencing of matters she was assigned. *Id.* at 12:7.

4 Respondent still does not recognize the injury caused by her misconduct.
5 Although Respondent acknowledged the wrongful nature of her misconduct and is
6 remorseful, she still does not recognize the serious injury caused to the public's
7 perception of the justice system, the integrity of the profession, and the administration of
8 justice. The Hearing Officer determined that the reason Respondent cannot recognize
9 that actual harm resulted from the conflict, is that she is so certain in her integrity and that
10 of Nelson, she does not believe that any case was in fact affected by their relationship.
11 *Id.* at 10:8.

12 The Disciplinary Commission, as well as the Hearing Officer, having concluded
13 that disbarment is the presumptive sanction, reviewed *Standards* 9.22 and 9.32,
14 aggravating and mitigating factors, respectively to determine whether and to what extent
15 aggravating and mitigating factors should affect the ultimate sanction imposed. *In re*
16 *Augenstein*, 178 Ariz. 133, 136, 871 P.2d 254, 257 (1994).

17 The Disciplinary Commission determined that the evidence contained in the
18 record is sufficient to support the Hearing Officer's findings and conclusion regarding the
19 presence of aggravating factors 9.22(c) a pattern of misconduct, (d) multiple offenses,¹⁰
20 (e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply
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26 ¹⁰ The Hearing Officer found that the record demonstrates that all of the offenses arose out of a single continuing course of action. See Hearing Officer's Report, p. 12:22.

1 with rules or orders of the disciplinary agency,¹¹ and (i) substantial experience in the
2 practice of law;¹² are present.

3 The Disciplinary Commission, as well as the Hearing Officer, determined
4 mitigating factors 9.32(a) absence of a prior disciplinary record, (b) absence of a
5 dishonest or selfish motive, (c) personal or emotional problems, (l) remorse, and public
6 and personal humiliation are supported by the record.

7 The Hearing Officer found that Respondent has taken steps to identify what
8 weaknesses led to the misconduct and to overcome that weakness. *See* Hearing Officer's
9 Report, p. 18:12. At the hearing, the weaknesses were identified as low self-esteem,
10 features of dependent personality and the effects of the dissolution of her prior marriage.
11 *See* hearing transcript, pp. 15-16. The Commission applauds Respondent's rehabilitative
12 efforts thus far, but a more sustained period of treatment is needed to establish her fitness
13 to practice and to ensure protection of the public.

14 The Hearing Officer also found the mitigating factors substantially lower the
15 range for an appropriate sanction. *See* Hearing Officer's Report, p. 18:4. The
16 Commission agrees that based on the mitigation present in the record, a reduction of the
17 presumptive sanction of disbarment to suspension is appropriate, but a six month
18 suspension is not adequate given Respondent's significant personal and emotional
19 problems and her failure to recognize the injury caused by her transgressions.
20 Respondent acknowledged that she regrets her decisions and that she is remorseful for
21 *potentially* causing injury to the public's perception of the justice system and *possible*
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25 ¹¹ The Hearing Officer gave this factor no weight. *Id.* at 13.

26 ¹² Respondent was admitted to practice law in Arizona in 1987; the Hearing Officer waived this factor because Respondent's experience in the practice of law did not directly relate to the ethical violations found. *Id.* at 13:3.

1 harm to the administration of justice. See Respondent's Opening Brief, p. 9 and
2 Commission transcript. P. 16:20.

3 Although great deference is given to the Hearing Officer's report and
4 recommendation, *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989), the
5 Disciplinary Commission rejects the recommended sanction and determines *de novo* that
6 a one year retroactive suspension is a more appropriate sanction.

7 The Hearing Officer considered the disparity of the sanction imposed in *Matter of*
8 *Nelson*, 207 Ariz. 318, 86 P.3d 374 (2004), in which Former Judge Nelson resigned and
9 received no further sanction. See Hearing Officer's Report, p. 14:16.

10 Although factually similar, the Disciplinary Commission does not find *Matter of*
11 *Nelson* proportionally analogous or even instructive. The Commission on Judicial
12 Conduct is an independent state agency governing judicial proceedings and operates
13 under rules of conduct that are separate from those governing attorney disciplinary
14 proceedings. The Disciplinary Commission's focus is on attorney discipline and the
15 matter before it. It is not appropriate to consider any perceived disparity of treatment in
16 this forum. Had former Judge Nelson been subjected to attorney discipline proceedings
17 after his resignation,¹³ it may then have been appropriate to consider the proportionality
18 of any sanctions imposed.

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21 Respondent's misconduct, specifically her lying to the State Bar, her supervisor,
22 colleagues, opposing counsel and staff for over two years, and her subsequent efforts to
23 cover up her transgressions, are considered serious misconduct. In consideration of the
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¹³ The State Bar recommended that the Supreme Court of Arizona sanction Nelson as a lawyer, pursuant to
Rule 46(c), Ariz. R. S. Ct.; the Court declined to sanction Nelson as a lawyer. The State Bar filed a Motion
for Clarification, which was denied.

1 appropriate length of suspension to impose, the Disciplinary Commission weighs the
2 injury caused by Respondent's misconduct. Case law has established that the more
3 serious the injury the greater the sanction should be. *See In re Cardenas*, 164 Ariz. 149,
4 152, 791 P.2d 1032, 1035 (1990). Based on the serious injury caused, specifically the
5 prejudice to the administration of justice, the Disciplinary Commission determines that a
6 suspension greater than six months is necessary.

7 Respondent was not only an officer of the court, but in her capacity as a
8 prosecutor, she had a greater duty to adhere to the Professional Rules of Conduct.
9 Respondent violated the trust placed in her as an officer of the court and failed the system
10 completely. Her misconduct has served to cast prosecutors in the worst possible light.

11 Additionally, Respondent's practical rationale for continuing to appear before
12 former Judge Nelson on behalf of her client, the State of Arizona, is troubling and an
13 affront to the judicial system. Regardless of the number of appearances before former
14 Judge Nelson,¹⁴ Respondent's misconduct has given rise to the perception that her
15 misconduct affected the judge's decisions. Although problematic, Respondent should
16 have immediately ceased appearing before the judge once the relationship became
17 romantic.
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19 It is unfortunate that Respondent continues to minimize the impact her
20 misconduct had on the administration of justice. She still does not recognize that *actual*
21 harm resulted from the conflict of interest. *See* Hearing Officer's Report, pp. 4-5. This is
22 a clear indicator that Respondent is currently not fit to practice.
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26 ¹⁴ The record reflects that Respondent appeared approximately 485 times before former Judge Nelson after her romantic involvement.

1 The record supports that Respondent has a history of exercising poor judgment in
2 her decisions. Although she has taken steps to identify any weaknesses that caused her
3 misconduct and *initial* efforts have been made towards rehabilitation, the Commission is
4 not persuaded that Respondent has come to terms with her personal problems, or the real
5 harm she has caused by her professional misconduct. Under the circumstances,
6 Respondent has not established her fitness to practice law.

7 Respondent needs to demonstrate that the public is not at risk by her re-entering
8 the practice of law. Long term, consistent therapeutic help is needed to address her
9 personal and emotional problems and to ensure that she is capable of making sound
10 ethical decisions. Forensic psychiatrist, Dr. Steven Pitt also recommended that
11 Respondent receive continued counseling after re-commencing the practice of law.
12 Although Respondent may be able to function as a lawyer, based on her identified
13 dependent personality traits, she still may be swayable in her judgment.
14

15 The Disciplinary Commission recognizes that the instant matter involves unique
16 circumstances, but given the egregious nature of the misconduct, a greater sanction than a
17 six month suspension and probation is warranted.

18 Evidence contained in the record supports that Respondent voluntarily withdrew
19 from the practice of law and transferred to inactive membership status.
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21 Historically, retroactive suspensions are suitable when lawyers voluntarily
22 removed themselves from the practice of law for a period of time, as it is an attempt to
23 prevent any additional harm to clients. *Matter of Nicolini*, 168 Ariz. 448, 814 P.2d 1381
24 (1991). *Matter of Higgins*, 180 Ariz. 396, 884 P.2d 1094 (1994), also held that a
25 retroactive suspension is normally imposed when an attorney has been placed on interim
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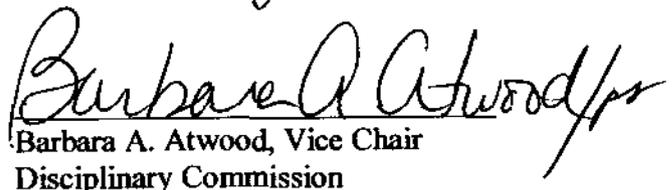
1 suspension or has voluntarily removed himself or herself from the practice of law. In
2 *Matter of Murray*, 159 Ariz. 280, 283, 767 P.2d 1, 4 (1990), consideration was given for
3 a "lengthy self imposed retreat from the practice of law."

4 Consequently, the Disciplinary Commission determines that based on the
5 misconduct in this matter and in order to protect the public from further harm,
6 Respondent should be required to demonstrate a prolonged period rehabilitation and
7 fitness to practice, pursuant to Rules 64 and 65. The Commission is mindful that the
8 purpose of lawyer discipline is not to punish the lawyer, but to deter others and to protect
9 the public. *Matter of Kersting*, 151 Ariz. 171, 179, 726 P.2d 587, 595 (1986).

10 Conclusion

11 Therefore, upon *de novo* review, the Disciplinary Commission determines that a
12 more appropriate sanction is a one year suspension retroactive August 2004,¹⁵ and two
13 years of probation (MAP).
14

15 RESPECTFULLY SUBMITTED this 6th day of June, 2005.

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18 Barbara A. Atwood, Vice Chair
Disciplinary Commission

19 **Commissioner Mehrens dissents:**

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21 The facts as I understand them, and I do not believe the majority disagrees, are as
22 follows. Nancy Dean was a prosecutor (one of a few) for the Apache County Attorney's
23 Office when she became romantically involved with then Judge Michael C. Nelson, the
24 only elected Superior Court judge in that county who presided *inter alia* over all felony
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26 ¹⁵ The date Respondent transferred to inactive status and voluntarily removed herself from the practice of law.

1 cases prosecuted by the Respondent. This adulterous relationship lasted from April of
2 2001 through February of 2003. Both participants in the relationship overtly and patently
3 hid the relationship from all interested and relevant parties. In some cases when
4 questioned about the relationship both parties lied. When the matter was presented to the
5 State Bar and the Commission of Judicial Conduct [CJC] for disciplinary action, both
6 participants initially denied their involvement in an improper or intimate relationship.
7 Both parties eventually admitted their conduct.

8 After a formal hearing, the CJC found that Judge Nelson had violated several
9 canons of the Code of Judicial Conduct, almost identical to those the Respondent was
10 found to have violated.¹⁶ Judge Nelson summarily resigned before the CJC could
11 formally remove him from office but did reserve the right to protest costs which became
12 the Supreme Court's opinion in *Matter of Nelson* 207 Ariz. 318 86 P.3d 374 (2004). In
13 other words, for his conduct Nelson suffered only the sanction of a monetary assessment
14 of costs. Meanwhile, the State Bar pursued disciplinary action against the Respondent.
15 On October 29, 2004 pursuant to Arizona Supreme Court Rule 46¹⁷ the State Bar
16 formally requested the Supreme Court of Arizona to allow it to enter formal proceedings
17 against Nelson for his admitted ethical violations in his capacity as a lawyer. After a
18 briefing the Supreme Court of Arizona refused to allow the State Bar to pursue the
19 matter.
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24 ¹⁶ Judge Nelson was found to have engaged in this additional conduct: When his wife had discovered his
25 transgression and they argued, he assaulted her resulting in his arrest, conviction of a crime of domestic
26 violence and a sentence of probation, conduct in which Respondent had not engaged.

¹⁷ The State Bar cannot proceed against a former Judge who has resumed his status as a lawyer for his
unethical conduct without the imprimatur of the Supreme Court.

1 In analyzing this issue I start with the premise, long impressed upon us by our
2 Supreme Court, that the purpose of discipline is not to punish the lawyer but to protect
3 the public. *In re Greer*, 52 Ariz. 385, 81 P.2d 96 (1938), *In re Moore*, 110 Ariz. 312, 518
4 P.2d 562 (1974), *Matter of Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982), *In re Neville*, 147
5 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Feely*, 168 Ariz. 436, 814 P.2d 777 (1991),
6 *Matter of Owens*, 182 Ariz. 121, 893 P.2d 1284 (1995), *Matter of Piatt*, 191 Ariz. 24, 951
7 P.2d 889 (1997), and *Matter of Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001). Yet, former
8 Judge Michael Nelson, is currently being allowed to practice law without a single
9 restriction, even after admitting to the same or what can be considered more egregious
10 conduct than the Respondent. It is crystal clear to me that the Arizona Supreme Court, by
11 not allowing the State Bar to pursue Nelson's admitted unethical conduct, has found that
12 he is not a danger to the public and that the public needs no protection from a lawyer who
13 engages in these kinds of unethical and gross improprieties. But, a former female
14 prosecutor who engaged in the same misconduct may be required to suffer a one-year
15 suspension. The majority sets forth no reasoning why Arizona's public needs protection
16 from this particular lawyer but not the other. To paraphrase Marcellus to Horatio,
17 "Something is rotten in the state of Arizona".¹⁸

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19 I respectfully dissent.

20 Original filed with the Disciplinary Clerk
21 this 6th day of June, 2005.

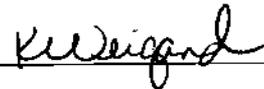
22 Copy of the foregoing mailed
23 this 6th day of June, 2005, to:
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¹⁸ Shakespeare, Hamlet, I, iv, 90.

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