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

OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER	)	**No. 04-1979**
OF THE STATE BAR OF ARIZONA,	)	
	)	
ARNOLD M. SODIFOFF,	)	
Bar No. 001821	)	
	)	**HEARING OFFICER'S REPORT**
RESPONDENT	)	
	)	

PROCEDURAL HISTORY

The State Bar filed a Complaint on July 27, 2005. Respondent filed an Answer on September 19, 2006. A Settlement Officer conducted a settlement conference on November 9, 2005, although the parties were unable to reach an agreement at that time. As a result, on November 18, 2005, the parties filed a Joint Pre-Hearing Statement and a formal hearing was held on January 20, 2006. In addition to the direct testimony of the Respondent and Mr. Robert L. Fruge, the other party involved in the incident with which this Complaint deals, six other witnesses testified, either as to the direct factual matters contained in the State Bar's Complaint, or by way of mitigation on behalf of the Respondent. As requested, Counsel for the State Bar then submitted a Memorandum regarding Recommended Sanctions and Counsel for Respondent submitted a Memorandum on Matters of Mitigation.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on September 25, 1965. On November 15, 2004, Respondent appeared and

represented Andrew J. Williams in a dissolution of marriage proceeding in Yavapai County Superior Court in Prescott, Arizona, before the Hon. David L. Mackey. Robert L. Fruge was the opposing counsel in that case, representing Teresa Williams. After the hearing, Respondent and Mr. Fruge and their clients left the courtroom. Outside the courtroom, Respondent and Mr. Fruge had a verbal confrontation due to Mr. Fruge twice engaging in direct conversations with Respondent's client, Mr. Williams, allegedly to work out a settlement in the dissolution proceedings, despite repeated admonishment by Respondent not to do so. This confrontation led to Mr. Fruge, followed by Respondent, returning to the courtroom whereupon Respondent and Mr. Fruge engaged in another conversation which admittedly was disruptive to the proceedings then taking place before Judge Mackey. As a result, the Court's bailiff, James C. Mercer, escorted Mr. Fruge, again followed by Respondent, from the courtroom, whereupon a heated face-to-face confrontation between Respondent and Mr. Fruge took place, resulting from the assertion by Respondent that Mr. Fruge had purposefully bumped him as he walked pass. In reaction, Respondent warned Mr. Fruge not to do that again, which in turn precipitated what Respondent described as a combative posture and a taunting dare by Mr. Fruge, in the guise of "What are you going to do Arnold, hit me?", or words to that effect. In doing so, it is altogether possible - at least from Respondent's testimony, that in Mr. Fruge being face-to-face with Respondent, Mr. Fruge "hacked" in such a manner as to cause spittle to be expectorated upon Respondent.[1] It appears this provoked and is what precipitated Respondent instinctively to strike Mr. Fruge in the face with his open hand. While none of the witnesses other than the bailiff actually saw this confrontation, they did see Mr. Mercer separate Respondent and Mr. Fruge, during which time he requested a bystander to go back into the courtroom to bring the bailiff-in-training out to assist him. Mr. Mercer testified that Respondent thereafter was cooperative and non-belligerent and needed no restraint, although the police were called regarding the above described incident; however, no charges were filed against Respondent or Mr.

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[1] While this allegation was denied by Mr. Fruge, Mr. Mercer confirmed the "hacking" aspect of the allegation and further confirmed that Mr. Fruge taunted Respondent several times from a very close - 6 to 12 inches - distance with the dare to Respondent to "hit me - hit me!".

Fruge. Nevertheless, and while Judge Mackey was able to continue his Court's morning calendar, he issued a November 16, 2004, Minute Entry Order which memorialized his findings regarding the incident, noting that the Court's staff had to become involved in the incident and was distracted and distressed by the situation. As a result, Judge Mackey then set an Order to Show Cause Hearing (OSC) for Respondent and Mr. Fruge to determine whether he should hold them in criminal contempt. The OSC was held on July 12, 2005. After conducting an evidentiary hearing into the incident of November 15, 2004, Judge Mackey sanctioned both Mr. Fruge[2] and Respondent, finding Respondent guilty of both direct and indirect criminal contempt. A further hearing for the purpose of imposing sentence on Respondent was held on August 11, 2005, at which time Judge Mackey sentenced Respondent to three days in jail, and ordered Respondent to pay fines and fees related to the conviction. Commenting in response to questioning by Mr. Blakey at the hearing, Judge Mackey stated that it was his "belief that what happened outside the courtroom based upon the findings I made should not and will not be tolerated under any circumstances for the safety of the public and the people that come to this building". This Hearing Officer took that comment to apply to both Mr. Fruge and Mr. Sodikoff.

Respondent has admitted he engaged in conduct which is prejudicial to the administration of justice, in violation of ER 8.4 (d), Rule 42, Ariz.R.S.Ct.

CONCLUSIONS OF LAW

This Hearing Officer finds there is clear and convincing evidence to sustain Respondent's admission in the Joint Pre-Hearing Statement, that he violated ER 8.4 (d), Rule 42, Ariz.R.S.Ct. This Hearing Officer finds there also is clear and convincing evidence that Respondent violated ERs 3.5 and 8.4 (b), Rule 42, Ariz.R.S.Ct. However, this Hearing Officer does not find that the State Bar has proven by clear and convincing evidence that Respondent violated ER 4.4, Rule 42,

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[2] It was not divulged through testimony at the hearing what sanction was imposed on Mr. Fruge by Judge Mackey. However, Exhibit 14, admitted into evidence by stipulation, discloses that Mr. Fruge also was found in indirect criminal contempt of court and fined. Mr. Fruge voluntarily testified that he had received a formal reprimand from the State Bar for his actions that day.

Ariz.R.S.Ct.

ABA STANDARDS

ABA *Standards* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state: (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of mitigating factors.

This Hearing Officer considered *Standard* 5.0 and 5.1 and 9.0, 9.1, 9.2 and 9.3 in determining the appropriate sanction warranted by Respondent's conduct.

Specifically, *Standard* 5.0 provides that "[T]he most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officer of the court is undermined when lawyers engage in illegal conduct." In this regard, and while the Respondent was found to be in both civil and criminal contempt of court, according to the commentary under *Standard* 5.12, suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in *Standard* 5.11 and that seriously adversely reflects on the lawyer's fitness to practice. The conduct of Mr. Sodikoff in striking another lawyer, in the arena of a courtroom and courthouse, without himself in fear of being in immediate physical danger for his health and safety, is inexcusable as a matter of law. Provocation is no justification. Mr. Fruge's bad behavior may help to explain why Respondent reacted as he did, but it cannot excuse it. A lawyer must be held to a higher standard than the law of the street. And, while in this instance, the Hearing Officer believes Respondent's instinctive and reactive conduct, when viewed in the abstract, <u>was</u> inexcusable, based upon the fact that (1) Respondent has had unfortunate and unpleasant confrontations with Mr. Fruge before, (2) Respondent has had a history of mental and emotional problems, (3) Mr. Fruge has known about both of those conditions and has used them to embarrass and intimidate the Respondent on more than one prior occasion, (4) testimony from other witnesses called in mitigation not only corroborated these incidents, but in particular another attorney, Jeff Coughlin, related a similar emotionally threatening incident involving himself and Mr. Fruge at and following the taking of a deposition, and (5) in this specific situation, Mr.

Fruge exhibited similar intimidating tendencies which the Hearing Officer found as a matter of fact were a combative posture and a taunting dare in the guise of "What are you going to do Arnold, hit me?", or words to that effect, which may or may not have occasioned spittle to be expectorated upon Respondent, the instinctive striking of Mr. Fruge in the face by Respondent, is objectively understandable and should be given greater weight in mitigation than had Respondent deliberately and intentionally struck a blow to Mr. Fruge's face.

In addition, *Standard* 9.1 provides that "[A]fter misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose." In this regard, the Hearing Officer took into consideration the aggravating circumstances of Respondent's prior disciplinary offenses,[3] his pattern of misconduct and his substantial experience in the practice of law, all in accordance with the guidelines set forth in *Standards* 9.22 (a), 9.22(c) and 9.22(i), respectively. These factors were balanced with the mitigating factors of his personal emotional problems, his timely good faith efforts to rectify the consequences of his misconduct, his cooperative attitude toward the proceedings brought against him and his remorse, all in accordance with the guidelines set forth in *Standards* 9.23 (c) ,9.23 (d), 9.23 (e) and 9.23 (l), respectively. And, while not an integral part of the above standards, this Hearing Officer also took into consideration the rather mild sanctions assessed against Mr. Fruge for his part in this unfortunate and utterly embarrassing incident by both Judge Mackey and the State Bar, as will be noted below in the Dictum which follows at the end of this Hearing Officer's recommendation.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To arrive at a just conclusion, the Hearing Officer considered the

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[3] In 1990, Respondent was informally reprimanded, in 1996, Respondent was censured, in 1999, Respondent was suspended from the practice of law for a period of one year, and in 2001, Respondent was again censured.

following cases in making his recommendation:

1. *In the Matter of a Member of the State Bar of Arizona, David B. Medansky, Bar No. 013963.* Here the Respondent was found by the Hearing Officer to have violated his duty to the court by using an offensive personality and demeaning the legal process by his total disregard and disrespect for litigants and ways of the court. He recommended suspension for a period of thirty (30) days and that Respondent be ordered to retake the State Bar's Professionalism Course. The State Bar appealed, seeking a suspension of six months and a day based on the egregious nature of the misconduct and Respondent's prior disciplinary history, or in the alternative, if a short term suspension was recommended, that a term of probation with the State Bar's Member Assistance Program (MAP) was appropriate. With two (2) members of the Disciplinary Commission dissenting and holding out for a six month and one day suspension, the other seven (7) members, having found that all but one of the Hearing Officer's findings of fact were not clearly erroneous, recommended adopting and incorporating by reference the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 30 day suspension, completion of the State Bar's Professionalism Court prior to reinstatement, and costs. In addition, however, and because there had been a threat of physical violence, here to a litigant and not an opposing lawyer, the Commission imposed the one year MAP probation which alternatively had been recommended by the State Bar.

2. *In the Matter of a Member of the State Bar of Arizona, Meyer L. Ziman, 92-0073.* Here, Respondent was charged with four counts of ethical violations under ERs 3.5 and 8.4, Rule 42, Ariz.R.S.Ct., one of which involved having made profane and insulting remarks to an arbitrator during *ex parte* communications, a violation of his duties and obligations as a lawyer. Ziman was suspended for a period of ninety (90) days, ordered to submit to the State Bar's Law Office Management Assistance Program, put under the supervision of a practice monitor appointed by the State Bar for the period of one year and required to take and complete twenty additional hours of continuing legal education.

3. Collectively, the Hearing Officer analyzed the cases of *In the Matter of a Member of the State Bar of Arizona, Jack Levine, 99-0049, In the Matter of a Member of the State Bar of*

Arizona, Robert C. Forquer, 03-0122, In the Matter of a Member of the State Bar of Arizona, Scott F. Saidel, 03-0123, In the Matter of a Member of the State Bar of Arizona, Norman Alan Schwartz, 93-0061 and In the Matter of a Member of the State Bar of Arizona, James Francis Keefe, 91-1140, because each of them dealt with violations of ER 8.4, Rule 42, Ariz.R.S.Ct. And, although none of these cases were factually similar to the Sodikoff matter, all of them had many of the same aggravating and mitigating circumstances as found here, and all of them imposed sanctions of less than six months and a day,[4] which it was this Hearing Officer's inclination to follow.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent should be suspended for a period of ninety (90) days;

2. Respondent should be placed on probation upon reinstatement for a period of two (2) years;

3. Respondent should be required to enroll with the State Bar's Member Assistance Program (MAP), there to be put under the supervision of a practice monitor appointed by the State

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[4] In two of the cases, the sanction was for six months only, and not six months and a day.

Bar for the period of one year following his reinstatement;

4. Respondent again should be required to attend and complete the State Bar's Professionalism Course, prior to his reinstatement;

5. Respondent should be required to take and complete six (6) additional hours of continuing legal education ethics courses;

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

7. Respondent should be required to pay the costs and expenses incurred in these disciplinary proceedings.

DICTUM

As noted above, while Respondent was cited for both direct and indirect criminal contempt of court by Judge Mackey, Mr. Fruge was cited only for indirect criminal contempt in this incident. Yet, while Judge Mackey also found, as a matter of law, that "while [his] Court was still in session both attorneys re-entered the Courtroom conducting a discussion that disrupted Court proceedings", and he also said that "[A]though the Court was able to conclude the morning calendar, Court staff had to be involved in this matter and the Court was distracted and distressed by the actions of the attorneys and the public perception to such conduct by officers of the Court" (Empasis Added), only Respondent and not Mr. Fruge was cited by the State Bar for having violated ERs 3.5 and 8.4 (b) and (d), Rule 42, Ariz.R.S.Ct.

Now, clearly, it was Respondent who slapped Mr. Fruge and not the other way around. And just as clearly, it is that kind of conduct which cannot be justified or tolerated between two attorneys -

anywhere, let alone in a courtroom and a courthouse. Nevertheless, the actions and conduct of Mr. Fruge in first precipitating and then provoking Respondent into what this Hearing Officer concludes may well have been an understandable instinctive reaction to Mr. Fruge's "hacking" towards him, should have been dealt with in a more equitable and even-handed manner by the State Bar. The simple questions to be asked here, based upon Judge Mackeys findings as a matter of law as to both of these two lawyers and not just Mr. Sodikoff, are whether Mr. Fruge did not also violate ERs 3.5 and 8.4 (b) and (d), Rule 42, Ariz.R.S.Ct., and should he not also have been required to face at least a similar sanction as that about to be meted out to Mr. Sodikoff?

DATED this 13th day of March, 2006.

Michael L. Rubin
Hearing Officer 7K

Original filed with the Disciplinary Clerk
this 13th day of March, 2006.

Copy of the foregoing mailed
this 13th day of March, 2006, to:

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