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DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

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

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3 IN THE MATTER OF A MEMBER)
4 OF THE STATE BAR OF ARIZONA,)
5 **KIMBERLY L. S. PUGH,**)
6 **Bar No. 018574**)
7 **RESPONDENT.**)

No. 04-1782

**DISCIPLINARY COMMISSION
REPORT**

8 This matter first came before the Disciplinary Commission of the Supreme Court of
9 Arizona on June 10, 2006, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the
10 Hearing Officer's Report filed April 17, 2006. The central issue at that time was whether
11 Respondent's prior representation of wife in connection with her probation for a felony drug
12 conviction posed a conflict of interest when Respondent subsequently represented husband
13 in connection with divorce proceedings and an effort to obtain sole legal custody of the
14 couple's minor child. The Hearing Officer concluded that Respondent had no conflict of
15 interest and did not violate ER 1.9 (b) because Respondent gained no confidential
16 information from the wife during the prior representation. The Hearing Officer also
17 concluded that Respondent did not violate ER 1.9(a) because the two matters were not
18 substantially related and because, given the high probability that wife would not appear to
19 contest the proceedings, husband's interests were not materially adverse to those of wife.
20 The Hearing Officer recommended dismissal.

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23 Upon review, the Disciplinary Commission disagreed with the Hearing Officer's
24 legal analysis with regard to ER 1.9(a). It determined that the two matters were substantially
25 related within the meaning of that Rule because the issues raised in each (wife's fitness as a
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1 mother) were the same. Further, the fact that the Mother was not expected to respond to
2 husband's petition did not change the fact that a lawyer who files a complaint against a
3 former client is representing interests that are "materially adverse" to those of the former
4 client, even if the former client is expected to and does default.

5 The Commission noted that the Hearing Officer's finding that Respondent did not
6 possess a culpable mental state was based, in part, on the Hearing Officer's erroneous legal
7 conclusion that the conduct he found did not constitute a violation of ER 1.9(a). Obviously,
8 if there were no conflict, Respondent would not have been negligent in failing to determine
9 that there was one. Having reached the legal conclusion that there was a conflict, the
10 Commission concluded Respondent was negligent in failing to recognize it. The matter was
11 remanded for an aggravation and mitigation hearing. See Disciplinary Commission Report
12 filed August 10, 2006. Respondent filed a Petition for Review on September 13, 2006,
13 which was rejected by the Supreme Court.
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15 On remand, the Hearing Officer did not take any evidence. He assumed without
16 discussion or analysis that the presumptive sanction was informal reprimand and reduced it
17 to diversion based on the aggravating and mitigating factors found in his prior Report. The
18 Hearing Officer recommended, that Respondent be required to complete an ethics course
19 and "for example, write an article for *Arizona Attorney* magazine on the lessons she has
20 learned in this matter." The State Bar filed an objection and requested oral argument.
21 Respondent, Respondent's counsel and counsel for the State Bar were present.
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23 Decision

24 The nine members of the Disciplinary Commission unanimously adopt the Hearing
25 Officer's findings of fact regarding the existence of aggravation and mitigation factors.
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1 However, the Commission concludes that the presumptive sanction for Respondent's
2 conduct is censure. Based on its *de novo* review of the aggravating and mitigating factors as
3 found by the Hearing Officer, the Commission recommends that sanction be reduced to
4 informal reprimand and a requirement that Respondent pay the costs of these disciplinary
5 proceedings.

6 Discussion

7 The Disciplinary Commission applies a clearly erroneous *standard* to findings of fact
8 and reviews questions of law *de novo*. Rule 58(b), Ariz.R.Sup.Ct. Mixed findings of fact
9 and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996)
10 (citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985)).

11 The Hearing Officer's findings of fact can be briefly summarized as follows:

12 In January 2001, Respondent was hired to transfer supervision of wife's probation
13 from Maricopa County to Pima County. Before that transfer was approved, wife was jailed
14 for a probation violation. Respondent represented wife in connection with the probation
15 violation proceedings. During those proceedings, Respondent filed pleadings portraying
16 wife as a good mother and a fit parent, issues, Respondent believed relevant to those
17 proceedings. Respondent was subsequently hired, in June 2002, to represent husband in
18 connection with an injunction against harassment proceeding filed by one of wife's
19 probation officers.
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22 In July 2002, Respondent agreed to represent husband in a divorce action in which
23 he was seeking sole custody of the couple's minor child. Respondent agreed on the
24 condition that she would withdraw as counsel if wife, who was not expected to appear,
25 contested the custody action. Respondent did not contact wife and did not obtain her
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1 consent before accepting the representation. Wife did not appear and the Court entered a
2 default, emergency custody order and later a default divorce order. Respondent
3 subsequently withdrew as husband's attorney and closed the file.

4 Eventually wife did appear and hired a lawyer to contest the default proceedings.
5 The judge issued an order requiring Respondent to appear for a hearing. Instead,
6 Respondent filed a pleading objecting to that order and explaining why she did not think she
7 should be required to appear. The judge subsequently filed a Bar complaint.

8 As noted, the Commission previously determined that the foregoing facts as found
9 by the Hearing Officer establish Respondent negligently violated ER 1.9(a).

10 In determining the appropriate sanction, the Supreme Court considers the ABA
11 *Standards for Imposing Lawyer Sanctions* ("Standards") a suitable guideline. *In re Peasley*,
12 208 Ariz. 27, 33, 23, 90 P.3d 764, 770 (2004). The Supreme Court and the Commission are
13 consistent in utilizing the *Standards* to determine appropriate sanctions for attorney
14 discipline. In imposing a sanction after a finding of misconduct, consideration is given to
15 the duty violated, the lawyer's mental state, the actual or potential injury caused by the
16 misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0*.

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18 The Hearing Officer began his analysis in this case with the assumption that
19 admonition (informal reprimand in Arizona) was the presumptive sanction under the ABA
20 *Standards*. Three of the Commission members voted to impose an informal reprimand
21 rather than remanding for an aggravation/mitigation hearing and that may have been the
22 basis for the Hearing Officer's assumption. Those Commission members, however, were
23 voting to impose an informal reprimand as a final sanction after considering the aggravating
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and mitigating factors found in the Hearing Officer's original Report, not expressing their views as to the presumptive sanction which serves as the starting place in that analysis.

In fact, the presumptive sanction in this case is censure, not informal reprimand.

Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Standard 4.33 (Emphasis added.)

Standard 4.34, which the Hearing Officer relied on below, provides that admonition or informal reprimand is appropriate when the adverse representation "causes little or no actual or potential injury to a client." *ABA Standard 4.34*. The facts in this case demonstrate that wife, Respondent's former client, suffered both actual and potential harm. She lost custody of her minor child and was forced to hire a new lawyer to set aside the order obtained by her former counsel. The issue is not whether Respondent used confidential information to obtain that order. That would only be relevant to an ER 1.9(b) violation. The harm ER 1.9(a) is intended to avoid is violation of a lawyer's duty of loyalty, which certainly did occur in this case.

The Disciplinary Commission agrees with the Hearing Officer that no aggravating factors are present and that mitigating factors 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a selfish or dishonest motive, 9.32(e) full and free disclosure to disciplinary board or cooperative attitude towards proceedings, and 9.32(f) inexperience in the practice of law are supported by the record. *See Hearing Officer's Report on Remand at 1.* Those mitigating factors justify decreasing the presumptive sanction from censure to informal reprimand.

Conclusion

1 The purposes of attorney discipline are to protect the public and to deter similar
2 conduct by other lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986); to instill
3 public confidence in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352,
4 362 (1994); and to maintain the integrity of the legal system, *In re Fioramonti*, 176 Ariz.
5 182, 187, 859 P.2d 1315, 1320 (1993).

6 Therefore, having considered Respondent's misconduct, application of the ABA
7 *Standards*, the absence of aggravating factors and those factors present in mitigation, the
8 Disciplinary Commission recommends Respondent receive an informal reprimand and be
9 required to pay the costs of these disciplinary proceedings.

10 RESPECTFULLY SUBMITTED this 23rd day of April, 2007.

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J. Conrad Baran, Chair
Disciplinary Commission

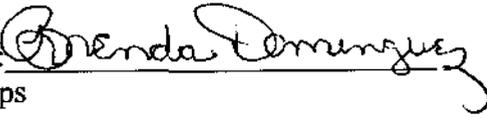
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Copy of the foregoing mailed
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