

FILED

OCT 12 2007

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

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

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
DALE E. WHITING,)
Bar No. 015357)
)
RESPONDENT.)

No. 06-0194

DISCIPLINARY COMMISSION REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on September 15, 2007, pursuant to Rule 58, Ariz.R.Sup.Ct , for consideration of the Hearing Officer's Report filed July 10, 2007, recommending a six-month and one-day day suspension, one year of probation with terms and conditions to be determined at the time of reinstatement, and costs. Respondent filed and objection and requested oral argument. No Opening Brief was filed by Respondent. Respondent and counsel for the State Bar were present for oral argument.

Respondent asserts that the Hearing Officer demonstrated bias after he called the State Bar's witness, his former client, and instructed her not to appear the evidentiary hearing. Respondent further asserts that the recommended sanction is overly harsh and that a letter of reprimand is warranted. Respondent requests that the Commission interview him in order to present evidence in an appropriate forum

The State Bar urges the Commission to adopt the Hearing Officer's Report and recommendation. The State Bar argues that Respondent has failed to show that the Hearing officer was clearly erroneous in her findings

Decision

1 Having found no facts clearly erroneous, the nine members of the Disciplinary
2 Commission by a majority of eight,¹ recommend accepting and adopting the Hearing
3 Officer's findings of fact, conclusions of law, and recommendation for a six-month and
4 one-day day suspension, one year of probation with terms and conditions to be determined
5 at the time of reinstatement, and costs of these disciplinary proceedings.²
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Discussion

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8 Although the Dissent does not identify any of the Hearing Officer's facts clearly
9 erroneously, it concludes that Respondent's conduct does not warrant a six-month and one-
10 day suspension. The facts, many of which Respondent admitted, can be briefly
11 summarized Respondent represented wife in a divorce Husband was represented by
12 separate counsel. In January 2006, while Husband was represented, Respondent wrote to
13 his client about the pending action stating.
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15 At your request, I write this letter to explain what has been
16 going on in your case. While I am not permitted to contact
17 [husband] directly, **nothing prevents you from sharing this**
18 **letter with him** [Husband's lawyer] may have been giving
19 [husband] a different spin so that he will continue to believe in
20 her and will continue to pay her exorbitant attorney fees, none
of which you have been ordered to pay. You'd think after a
while [husband] would wise up. But apparently he continues
to get his pockets picked What a fool!

21 Complaint at 6 (emphasis added) and Answer at 6 (admitting allegations of Complaint)

22 The Hearing Officer also found, and the facts support, that Respondent's letter
23 made many references to what husband may have understood and gave Respondent's view
24 of the parties' negotiations, the reason behind the judge's rulings and stated Respondent's
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26 ¹ Commissioner Todd was opposed See dissenting opinion below

² A copy of the Hearing Officer's Report is attached as Exhibit A.

1 desire that husband fire his lawyer and work directly with Respondent. Husband's lawyer
2 filed a Notice of Withdrawal in July 2006. Two days later, Respondent sent husband a
3 letter which stated in relevant part:

4 With the recent withdrawal of . . . your lawyer, I am now free
5 to write or talk to you . . . No doubt you were wondering what
6 happened leading up to [your lawyer] complaining to the bar
7 about me. In short, [your attorney] sold you short in the
8 hearing before J. Burke. . . . **The letter I wrote to [my client]**
9 **was written to explain all this to her so that she could**
10 **explain it to you . . .** After all someone had to tell you how
11 [your attorney] cheated you! If I were you, I'd seriously
12 consider complaining to the bar about what [your attorney] did
13 and get most of your attorneys fees back from her . . . Now
14 you know how you got cheated and who was to blame for it

15 (Emphasis added.)

16 Given the substance of the letters, the Hearing Officer found Respondent wrote the
17 January 2006 letter to his client intending that she give her husband while he was
18 represented by an attorney. That finding was fully supported by the record and not clearly
19 erroneous

20 Although the parties originally attempted to settle this matter with an agreement
21 calling for a censure, the agreement fell apart and the matter went to hearing After the
22 morning session, at the beginning of the lunch break, Respondent unsuccessfully attempted
23 to renew settlement negotiations with the Bar. Respondent nonetheless contacted his
24 client, whom the Bar had subpoenaed to testify during the afternoon session, and told her
25 not to appear. Despite the fact that he had not reached a settlement agreement with the
26 Bar, Respondent rationalized his conduct by stating that he was "simply not going to
contest this matter any longer "

1 The Bar, understandably disturbed by Respondent's interference with a witness it
2 had under subpoena, asked the Hearing Officer to sanction Respondent by striking his
3 Answer and entering a default. The Hearing Officer did not go that far, but based on
4 Respondent's admissions and the evidence that was submitted at the hearing, found all of
5 the facts the Bar had alleged in its Complaint. Specifically, the Hearing Officer found
6 Respondent violated ERs 4.2 and 8.4(a) by using his client as an intermediary to
7 communicate with the opposing party while he was represented by counsel. The Hearing
8 Officer also found Respondent's assertions regarding his opposing counsel had no purpose
9 but to embarrass, delay or burden husband and his counsel in violation of ER 4.4(a)

10 The Hearing Officer concluded the presumptive sanction for Respondent's
11 knowing violation of ER 4.2 was suspension because Respondent's attempt to interfere
12 with husband's attorney/client relationship had the potential to cause injury. The Dissent
13 does not quarrel with that conclusion. The Hearing Officer also found four aggravating
14 factors: (1) bad faith obstruction of the disciplinary proceedings; (2) use of deceptive
15 practices in the disciplinary process; (3) refusal to acknowledge the wrongful nature of his
16 conduct (both in writing the letters and in interfering with the witness); and (4) substantial
17 experience in the practice of law (14 years). The first and second factors were based on
18 Respondent's unilateral instruction to his client to disregard the Bar's subpoena and not
19 appear for the hearing.
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21 All of those findings were amply supported in the record. The Dissent concedes
22 Respondent lacked the authority to instruct his client to ignore a subpoena, but argues the
23 Hearing Officer's findings that Respondent acted in bad faith and employed deceptive
24 practices were clearly erroneous. We disagree. At the time he instructed his client to
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1 disregard the Bar's subpoena, Respondent knew he had been unable to reach a settlement
2 with the Bar. The Bar had the right to present its case, both as to Respondent's ethical
3 violations and aggravating and mitigating factors. It had the right to do so through the
4 witness it had subpoenaed to testify. By making that witness unavailable to the Bar,
5 Respondent knowingly and intentionally interfered with the Bar's ability to present its
6 case, and so doing, obstructed the disciplinary proceedings.

7 The Hearing Officer who observed Respondent throughout the proceedings and
8 heard him explain his conduct first hand, did not credit that explanation and found he acted
9 in bad faith and employed deceptive practices. Although we might have reached a
10 different conclusion if we were the fact finder, that is not the standard the Commission
11 employs to review a Hearing Officer's Recommendation. The Commission is not a fact
12 finding body. The Hearing Officer's findings were supported by the record and are not
13 clearly erroneous.

14 As the Dissent notes, prior to the Hearing, the Bar's sanction recommendation was
15 a public censure, one-year probation and CLE. Based on Respondent's conduct at the
16 hearing, the Bar withdrew that recommendation and the Hearing Officer ultimately
17 recommended a six-month and one day suspension. We agree with and adopt the Hearing
18 Officer's analysis. Respondent's testimony and argument at the hearing made it clear that
19 he did not understand the magnitude of either his original misconduct or his interference
20 with the hearing. He first attempted to manipulate the system to interfere with the
21 opposing party's attorney/client relationship. Then during the hearing, he interfered with
22 the Bar's ability to present its case by instructing his client to disregard a subpoena. That
23 pattern of conduct established that Respondent fails to grasp a lawyer's fundamental duty
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1 to maintain the integrity of the judicial process We agree with the Hearing Officer that
2 Respondent should not be allowed to practice unless and until he can demonstrate that he
3 has gained that understanding

4 RESPECTFULLY SUBMITTED this 12th day of October, 2007.

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7 J. Conrad Baran, Chair
8 Disciplinary Commission

9 **Commissioner Todd dissenting.**

10 The Hearing Officer recommended and the Commission approved a six-month and
11 one-day suspension for this 60 year-old Respondent who has been practicing law for 14
12 years without any prior ethical or administrative violation This sanction requires that
13 Respondent Whiting re-apply to be reinstated Because I believe neither Whiting's
14 conduct nor the record support such a sanction, I respectfully dissent

15 The first mistake Whiting made was becoming involved in the dissolutionment
16 proceedings of his neighbors who he claimed as friends. His second mistake was
17 proceeding *pro per* at the hearing and before the Commission. Representing himself in
18 these proceedings has not helped his case. But neither of these mistakes are ethical
19 violations.

20 Whiting's January 2006 letter was intemperate and demonstrated poor judgment
21 His letter violated ER 4.2 as it was intended to communicate with a person represented by
22 counsel Nevertheless, the hearing transcript demonstrates that the State Bar thought
23 censure was the appropriate sanction for that violation. (Tr. 5/18/07, at 13, 100) In my
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1 view, the State Bar in its reasoned assessment at that time was correct, not its post-hearing
2 recommendation with less opportunity for reflection.

3 The Complaint arose from a dissolution proceeding where Whiting represented the
4 wife of his neighbor and another attorney represented the husband. When Whiting's client
5 gave the January letter to her husband he "chuckled at it," then emailed the letter to his
6 counsel who notified the State Bar (*Id.* at 27-28) After opposing counsel filed a Notice
7 (as opposed to a Motion) of Withdrawal, Whiting again contact his neighbor. (*See id* at
8 82.) This letter simply aggravated the husband. (*Id.* at 37)

9 Based on Whiting's decision to telephone his client during the noon recess and tell
10 her not to appear at the hearing, the Hearing Officer found this conduct supported two
11 aggravating factors, "bad faith obstruction of the disciplinary proceeding by intentionally
12 failing to comply with rules or orders of the disciplinary agency," and "submission of false
13 evidence, false statements, or other deceptive practices during the disciplinary process."
14 *See ABA Standards 9 22(e) and (f)*

15 Because the State Bar had subpoenaed his client, the Hearing Officer correctly
16 found Whiting did not have the authority to tell his client not to honor the subpoena
17 However, given the circumstances, the record is devoid of any facts that support a finding
18 of bad faith or deceptive practices. The record does show that his client would have had to
19 take off work, and at the point he called her, Whiting decided not to further contest the
20 State Bar's case.

21 It is uncontested that Whiting made an unsuccessful attempt to settle the matter
22 during the noon recess. After the recess, the parties went back on the record The
23 pertinent portion of the record follows.
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1 **Ms. Hunter [Hearing Officer]** Is there a reason why Miss Foreman will not be
2 appearing?

3 **Mr. Whiting:** Yes, there is. Because notwithstanding your opinions of my
4 intentions, I have settled. Now the settlement is not settlement along the lines that
5 the bar views it. I'm simply not going to contest this matter any longer. It's a *nolo*
6 *contender*

7 **Ms. Hunter:** No Mr. Whiting, my question to you is why Miss Foreman was not
8 going to be here today.

9 **Mr. Whiting:** Because I told her I was not going to contest the matter any longer,
10 and that therefore she didn't need to come

11 *Id.* at 87 In an attempt to correct his error, Whiting offered to call his client and have her
12 appear

13 **Mr. Whiting:** I am going to call Miss—

14 **Ms. Hunter:** Mr. Whiting, you know what, you've already—you cannot fix this
15 We are here, we're ready to proceed, we're in the middle of a hearing. You are not going
16 to make a telephone call in the middle of a hearing.

17 **Mr. Whiting:** May the record still reflect that she can be here in 45 minutes, while
18 I am still testifying?

19 *Id.* at 91 The Hearing Office declined to allow him to call his client. The State Bar did
20 not request that she appear. The proceedings recommenced with the State Bar's
21 examination of Whiting.

22 This record does not support a finding that Whiting was trying to disrupt the
23 proceedings. Rather, it demonstrates Whiting trying to avoid his client missing work
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1 because he was no longer contesting the State Bar's evidence—most of which was not in
2 dispute anyway.

3 The only person harmed by Whiting's conduct in these matters was himself. From
4 the transcript, the only matter that appeared to be in significant dispute was the effect of
5 opposing counsel's Notice of Withdrawal filed prior to Whiting's final letter to the
6 husband. The exhibits and the transcript makes clear that Whiting's position on that point
7 was correct. The finding of the two aggravating circumstances was clearly erroneous.

8 Whiting did not lie to the court, cheat his client, or fail to perform promise work for
9 his client. He thought opposing counsel was taking advantage of his neighbor, and his
10 neighbor disagreed. The sanction is far too harsh.

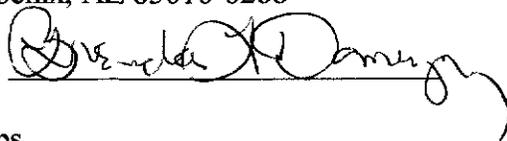
11 Original filed with the Disciplinary Clerk
12 this 12th day of October, 2007

13 Copy of the foregoing mailed
14 this 12th day of October, 2007, to.

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/mps