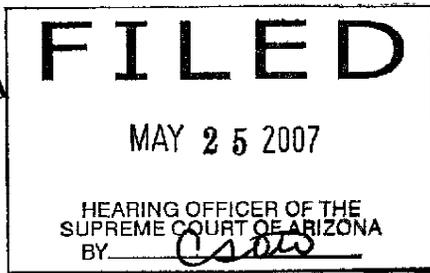


BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA)

No 06-0600

CYNTHIA A. LEYH)
Bar No. 017333)

RESPONDENT)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The Complaint against the Respondent, Cynthia A. Leyh, was filed by the State Bar on December 1, 2006, and thereafter Respondent's counsel accepted service for Respondent on December 6, 2006

Respondent, through her attorney Nancy Greenlee, thereafter filed an answer dated December 29, 2006

Bar Counsel and Respondent entered into negotiations and arrived at a resolution of this matter which is the subject of a Tender Of Admissions And Agreement For Discipline By Consent, and Joint Memorandum in Support of Agreement For Discipline By Consent

This matter was tendered to the undersigned Hearing Officer on April 13, 2007, at a hearing attended by Bar Counsel, Respondent, Respondent's Counsel, Court Reporter Kristen Wunsch, and the undersigned Hearing Officer. The Hearing Officer questioned the parties about the agreement and was satisfied that the agreement was arrived at after good faith negotiation by both parties

FINDINGS OF FACT

At all times relevant hereto, Respondent was a lawyer licensed to practice law in the State of Arizona, having been admitted to the practice in Arizona on October 19, 1996

COUNT ONE (File No. 06-0600)

Pursuant to the Tender Of Admissions and Joint Memorandum, both of which were signed by Bar Counsel, Respondent and her counsel, as well as the comments of Respondent, her attorney and Bar Counsel at the hearing on the Tender Of Admissions and Agreement For Discipline By Consent, the Hearing Officer finds that

Beginning on or around October 31, 2004, Respondent began representing Lamar Wathogoma ("Wathogoma") in *State v Wathogoma*, CR2003-011549 DT, in Maricopa County Superior Court. Wathogoma had been charged with first degree murder

The trial was originally set in *State v Wathogoma* for October 26, 2005

Respondent knew shortly after commencing her representation of Wathogoma that there were two very important witnesses, Eliza Paya and Neikomas Kill, both members of Wathogoma's tribe, the Fort McDowell tribe, and both of whom resided on the Fort McDowell Indian Reservation

Respondent had used the services of court-appointed investigators to attempt to locate and serve Ms Paya and Ms Kill with subpoenas so as to ensure their appearance and testimony at Wathogoma's trial

All attempts to locate and serve these witnesses were unsuccessful, as both women did not initially wish to be involved and thus, were avoiding service

In October 2005, as the first trial setting for Wathogoma rapidly approached, Respondent learned from Wathogoma's family members that Ms Paya and Ms Kill would be attending a Halloween dance on the Friday before Halloween on the Fort McDowell Indian Reservation

In discussing the situation with members of her office staff, Respondent concluded that she needed to find a way to keep both women talking to her long enough so that she could hand them subpoenas Respondent's experience with Native Americans had been that they were highly wary of non-Native Americans, and that they would not welcome her presence on the reservation

Respondent and her law clerk developed a "ruse" whereby they created fictitious coupons for a fictitious beer called "Zephyr Lager " The plan was to have Wathogoma's mother point out the two women, and then for Respondent to tell the women that she was representing a marketing company that was testing a new beer called "Zephyr Lager " In order to keep them present long enough to serve them with the subpoena, Respondent also planned to take a clipboard and ask the women for their contact information ostensibly in order to provide them with the free "Zephyr Lager" at some later date Once she was able to keep the women in her presence, Respondent planned to hand them both an envelope containing a subpoena for attendance at Wathogoma's trial

On October 28, 2005, Respondent and her law clerk attended the Halloween party Respondent was directed by Mrs Wathogoma to Ms Kill Respondent presented Ms Kill with the coupon, explaining about the fictitious "Zephyr Lager," and as Ms Kill was filling out her contact information, Respondent handed her the envelope containing

the subpoena. At the time that Respondent handed Ms Kill the subpoena, she informed her that she represented Wathogoma and that they needed her to testify at his trial.

With respect to Ms Paya, it was not necessary for Respondent to carry out her "ruse", as Mrs Wathogoma brought Ms Paya over to Respondent and introduced her as her son's lawyer. Respondent then handed Ms Paya the envelope containing the subpoena and explained that her client desperately needed her to testify at his trial.

"Zephyr Lager" does not exist.

Respondent knew that the "Zephyr Lager" coupons were for a beverage that did not exist.

Respondent indicated to Ms Kill that she needed her contact information for verification purposes.

Respondent indicated to Ms Kill that Ms Kill had to give Respondent her contact information before Ms Kill could obtain the "Zephyr Lager".

Prior to obtaining the contact information, Respondent did not inform Ms Kill that she was an attorney.

Prior to obtaining the contact information, Respondent did not inform Ms Kill that she represented Mr Wathogoma.

Prior to obtaining the contact information, Respondent did not inform Ms Kill that she wanted Ms Kill to testify in Mr Wathogoma's criminal matter.

Respondent did not want Ms Kill's contact information for verification purposes related to her obtaining "Zephyr Lager".

In the course of representing her client, Respondent knowingly made a false statement or statements of material fact or law to third persons in violation of Rule 42, Ariz R. Sup Ct , specifically ER 4.1(a)

The event on the Friday before Halloween on the Fort McDowell Indian Reservation was also Alcohol Awareness Night Members of the Fort McDowell tribe who learned of Respondent's ruse were embarrassed and offended Respondent, however, did not know that it was Alcohol Awareness Night and did not employ the above-described ruse to embarrass, delay or burden other persons, or violate their rights

Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 42, Ariz R Sup Ct , specifically ER 8 4(c).

Respondent conditionally admits that her conduct as set forth above violated ERs 4.1(a), and 8 4(c)

SUMMARY OF FACTS/RULE VIOLATIONS

Respondent violated Rule 42, Ariz R Sup Ct., ERs 4 1(a) and 8 4(c), when she developed a "ruse" to serve two witnesses vital to her client's criminal defense by telling one of the witnesses that she represented a company trialing a fictitious beer called "Zephyr Lager" and presenting this witness with a coupon entitling her to a free sample of the fictitious beer

CONCLUSIONS OF LAW

The Hearing Officer finds that there is clear and convincing evidence that the aforesaid conduct violated Rule 42, Ariz R Sup Ct , ERs 4 1(a) and 8 4(c) The Bar

Counsel's Office agreed to dismiss the alleged violation of ERs 4 1(b), 4 4(a), and 8 4(d) based upon evidentiary concerns and in exchange for this agreement

ABA STANDARDS

ABA *Standard 3 0* provides that four criteria should be considered (1) the duty violated; (2) the lawyer's mental state, and (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors

This Hearing Officer considered *Standard 5 0* (Violation of Duties Owed to the Public)

5 13 Reprimand (Censure in Arizona) is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law

This Hearing Officer finds that Respondent violated her duty to the public by making false statements to a witness and that her conduct was knowing

AGGRAVATION/MITIGATION

This Hearing Officer finds the following mitigating factors

- Absence of a prior disciplinary record 9 32(a)
- Absence of a dishonest or selfish motive 9 32(b)
- Timely good faith effort to make restitution or to rectify the consequences of misconduct 9 32(d) Once Respondent achieved service on Ms Kill, she told Ms Kill the truth, so carried on her deception only as long as necessary

- Remorse, *Standard 9 32(1)* This Hearing Officer finds that Respondent ran her idea of how to get Ms Kill served by two attorneys, her husband and father-in-law (now retired) neither of who expressed any concerns Respondent had no idea that her conduct was not appropriate for an attorney and had the best interest of her defendant client at heart when engaging in this deception Respondent also enjoyed no gain for herself in this deception Witnessing the demeanor of the Respondent, this Hearing Officer finds sincere remorse, mortification and regret such that there is little to no chance of a repeat of this misconduct

Aggravating Factors

- Substantial experience in the practice of law While respondent technically fits this standard in that she has been practicing law in Arizona since 1996, this Hearing Officer gives it little weight

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)

Proportionality Review

The parties have cited the Hearing Officer to three cases, *In re Gatti*, 8 P.3d 966 (Or 2000), *In re Edelman*, SB-04-0152-D (2004), and *In re Brinton*, 02-1473, 03-0042, 03-0440 (2003)

In re Gatti is cited because Gatti had been contacted by Dr Saboe regarding Comprehensive Medical Review (CMR), a California corporation that provides medical review reports to insurance companies recommending whether to accept or deny claims. CMR solicited Dr Saboe to work for them. Dr Saboe had concerns about the company and its business. Gatti also became concerned that CMR had been denying legitimate claims for reasons that were not medically related and that benefited the insurance companies. Gatti contacted CMR employees on three separate occasions. In one instance, Gatti posed as a chiropractor and expressed an interest in possibly working for CMR. The Oregon Supreme Court found that Gatti's conduct was intentional. The Oregon Supreme Court also found that several years prior to this incident, Gatti had reported an incident in which a law enforcement agency had used deceptive means to obtain evidence of wrongdoing. Gatti's report had been dismissed after the disciplinary agency found that the law enforcement agency's conduct was probably legal and not unethical. Two aggravating factors (multiple offenses and substantial experience in the practice of law) and two mitigating factors (absence of a dishonest or selfish motive and character and reputation) were found. Gatti received a public reprimand (censure) for violations of ERs and 4.1(a) and 8 4(c) for posing as a chiropractor to obtain information for the lawsuit.

In *In re Edelman*, SB-04-0152-D (2004), Edelman received a censure. Edelman filed a motion to suppress evidence that was seized during a search of his client's (a juvenile) mother's home. When mother's counsel, Mr Contreras, reviewed the motion, he found that Edelman had talked to his client, had her sign an affidavit, and filed it as an attachment to the motion, all after Mr Contreras had been appointed to represent the

mother Edelman never received Mr Contreras' permission to speak to his client or discuss the affidavit with him. Mother could have been harmed by the affidavit. Edelman also never advised her that her rights could be prejudiced and that her case could be affected. Edelman used a dishonest method to obtain information that violated the legal rights of another person. There were two aggravating factors: (a)-prior disciplinary offenses, and (h)-vulnerability of victim and three mitigating factors: (b)-absence of a dishonest or selfish motive, (e)-full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and (l)-remorse. Edelman was sanctioned for violation of Rule 42, Ariz R S Ct, specifically ERs 4 2, 4 4 and 8 4(d).

In *In re Brinton* 02-1473, 03-0042, 03-0440 (2003), Brinton was suspended for 30 days and placed on probation for two years (LOMAP/MAP). This was a multi-count case and, generally speaking, only the first count is relevant here. Brinton filed an altered stipulation and a Motion to Set and Certificate of Readiness, which was a misrepresentation and demonstrated a lack of truthfulness in statements to others. Brinton conditionally admitted to violations of ERs 3 3, 4 1 and 8 4(c) and (d) and Rule 41(c) in the first count. The other two counts consisted of failing to properly maintain trust accounts, failing to follow client's directions concerning scope of representation, failing to diligently represent client, failing to adequately communicate with client, and failing to renew two judgments on behalf of client. There was one aggravating factor: (i)-substantial experience in the practice of law. There were five mitigating factors: (a)-absence of prior disciplinary record, (b)-absence of dishonest or selfish motive, (c)-personal or emotional problems, (e)-full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and (l)-remorse. Brinton was sanctioned for

violating Rule 42, Ariz.R.S.Ct , specifically ERs 1 2, 1 3, 1.4, 1 15, 3.3, 4 1, and 8 4(c) and (d), Rules 41(c), 43(d) and 44

While these citations are perhaps similar, the facts of this case are unique and not comparable to any cases I could find This Hearing Officer trusts that counsel for both the State Bar and Respondent negotiated this agreement in good faith and support its acceptance by this Hearing Officer This Hearing Officer is not certain that this case and sanction fits within the cases cited and, therefore, has the requisite proportionality A review of the cases cited shows that those cases have more egregious conduct

Bearing in mind that the purpose of Bar discipline is to protect the public and the integrity of the profession, the question becomes whether the proposed sanction of censure and probation is appropriate in this case

Clearly Respondent should not have lied to Ms Kill, especially under the circumstances of the alcohol awareness theme of the night Her unselfish motive of serving a necessary witness for her client's upcoming trial does not excuse her conduct This officer has not been able to find a similar case such that a true comparison can be made.

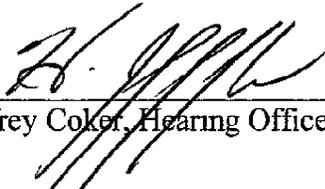
Pursuant to Rule 56(e), this Hearing Officer can either accept, reject or modify the agreement After having witnessed the Respondent's demeanor, her remorse and her acceptance of responsibility, this Hearing Officer concludes that a censure alone is sufficient and the requirement that Respondent be placed on probation for one year to be unnecessary and a waste of resources

Pursuant to Rule 56(e)(2), this Hearing Officer hereby modifies the stipulated agreement as follows. Respondent shall be

- Censured
- Placed on probation until such time as she completes the EEP Program, which she must complete within one year. Once Respondent has completed the EEP Program, her probation will cease
- Pay the costs of the State Bar in connection with these proceedings in the amount of \$928 58

The Hearing Officer is aware that this is a modification to the original stipulation, and on May 16, 2007, held a conference call with Bar counsel, David Sandweiss, and Respondent's counsel, Nancy Greenlee Both counsel stipulated to this modification

DATED THIS 18 DAY OF May, 2007



H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 25th day of May, 2007.

Copy of the foregoing mailed
this 25th day of May, 2007, to:

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By Christina [Signature]