

1 Given By Counsel For The Bar Signed March 8, 2007. The hearing was reset for
2 April 20, 2007.

3
4 On or about March 19, 2007, Respondent filed Respondent's First
5 Amended Disclosure Statement and Hearing Statement. On April 2, 2007, the
6 State Bar filed its Motion to Strike Respondent's First Amended Disclosure
7 Statement and Hearing Statement. On April 4, 2007, the Hearing Officer granted
8 the State Bar's Motion to Strike. On April 19, 2007 a Joint Motion to Continue
9 the Hearing was filed due to Respondent's claimed ill health. The hearing was
10 eventually set for May 18, 2007.
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12 On May 18, 2007, the hearing was held at the Supreme Court of Arizona,
13 Certification & Licensing Division. The State Bar was represented by Shauna
14 Miller. Respondent appeared without counsel and indicated that he understood
15 that he was entitled to be represented by counsel but chose not to have
16 representation. Before the State Bar could present its entire case in chief, namely
17 the direct examination of Respondent's client, Wendy Foreman ("Ms. Foreman"),
18 Respondent called Ms. Foreman and instructed her not to appear to testify
19 because he was "simply not going to contest this matter any longer." [Reporter's
20 Transcript of the Proceedings May 18, 2007 ("RTP"), 87:7 - 12¹] The State Bar
21 has asked this Hearing Officer to admit the complaint in its entirety for purposes
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¹ Page numbers are to the right of the colon; line numbers are to the left of the colon

1 of supporting the findings of fact. Based on Respondent's interference with the
2 hearing, the State Bar believes that the complaint in its entirety should be deemed
3 admitted. This Hearing Officer regards Respondent's conduct during the hearing
4 as reprehensible, the appropriate sanction for the conduct will be addressed in this
5 report's recommended sanctions. The record seems clear on its own that
6 Respondent engaged in conduct alleged in the Complaint and admitted to in his
7 Answer, and the conduct warrants the kind of sanctions described in this Report
8 and Recommendation.
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10

11 **PROPOSED FINDINGS OF FACT**

12 1. At all times relevant, Respondent was an attorney licensed to
13 practice law in the State of Arizona, having been admitted to practice in Arizona
14 on October 23, 1993. [State Bar's Complaint ¶1; Respondent's Answer
15 ("Answer") ¶1; RTP 11:20 – 23, 93:5 – 6]
16

17 2. Sandra Burt ("Ms. Burt") represented Richard Foreman ("Ric"), the
18 petitioner in a marriage dissolution matter filed in Maricopa County Superior
19 Court, case number FC2004-002112. [Complaint ¶ 2; Answer ¶2; RTP 11:20 –
20 23, 93:5 – 6]
21

22 3. Respondent represented Ms. Foreman, the respondent in the
23 marriage dissolution matter filed in Maricopa County Superior Court, case
24 number FC2004-002112. [Complaint ¶ 3; Answer ¶ 3; RTP 11:20 – 23, 93:5 – 6]
25

1 4. On or about January 11, 2006, Respondent mailed a letter to Ms.
2 Foreman, referencing Ms. Burt's actions during the marriage dissolution
3 proceedings and litigation. [Complaint ¶ 4; Answer ¶ 4; RTP 11:20 – 23, 93:5 – 6;
4 Exhibit 1]
5

6 5. At the time Respondent sent the letter to Ms. Foreman, Ric was still
7 represented by Ms. Burt. [Complaint ¶ 5; Answer ¶ 5; RTP 11:20 – 23, 93:5 – 6]
8

9 6. In the January 11, 2006, letter to Ms. Foreman, Respondent stated:

10 At your request, I write this letter to explain what has
11 been going on in your case. While I am not permitted to
12 contact Ric directly, nothing prevents you from sharing
13 this letter with him. Ms. Burt may have been giving Ric a
14 different spin so that he will continue to believe in her
15 and will continue to pay her exorbitant attorney fees,
 none of which you have been ordered to pay. You'd
 think after a while Ric would wise up. But apparently he
 continues to get his pockets picked. What a fool!

16 [Complaint ¶ 6; Answer ¶ 6; RTP 11:20 – 23, 93:5 – 6; Exhibit 1]
17

18 7. Respondent also states in the January 11, 2006, letter that the judge
19 saw Ric as unreasonable.

20 ... Both [Ms. Burt] and I understood Judge Burke's
21 failure to award Ric his attorney fees as a measure of his
22 dissatisfaction with counsel of the parties for not settling
23 this without coming to court. Needless to say, Ric was
24 not pleased. I am sure the \$1000 you finally paid Ric was
25 more than eaten up by [Ms. Burt's] fees.

[Complaint ¶ 7; Answer ¶ 7; RTP 11:20 – 23, 93:5 – 6; Exhibit 1]

1 8. In the January 11, 2006, letter, Respondent makes many references
2 to what Ric may or may not have understood, and gives Respondent's view of
3 events related to the parties' negotiations and settlement of the consent decree.
4 [Complaint ¶ 8; Answer ¶ 8; RTP 11:20 – 23, 93:5 – 6; Exhibit 1]
5

6 9. In the January 11, 2006, letter, Respondent makes statements about
7 the judge's reasons for taking certain actions that represent Respondent's version
8 of the judge's orders, making it appear that Ms. Foreman came out ahead
9 throughout the dissolution proceedings. [Complaint ¶ 9; RTP 94:12 – 13, 95:15 –
10 96:4, 102:21 – 103:10; Exhibit 1]
11

12 10. Finally, in the January 11, 2006, letter Respondent's states his desire
13 that Ric fire Ms. Burt and work directly with Respondent. [Complaint ¶ 10; RTP
14 94:12 – 13, , 95:15 – 96:4, 102:21 – 103:10; Exhibit 1]
15

16 11. On July 12, 2006, two days after Ms. Burt's filing of a Notice of
17 Withdrawal as Ric's attorney, Respondent mailed a letter directly to Ric.
18 [Complaint ¶ 11, Answer ¶ 11; RTP 11:20 – 23, 93:5 – 6; Exhibit 5]
19

20 12. In the July 12, 2006, letter Respondent informs Ric as follows:

21 With the recent withdrawal of [Ms. Burt] as your
22 attorney, I am now free to write or talk to you.... No
23 doubt you were wondering what happened leading up to
24 [Ms. Burt's] complaining to the bar about me. In short,
25 [your attorney] sold you short in the hearing before J.
Burke.... The letter I wrote to Ms. Foreman was written
to explain all this to her so that she could explain it to
you.... After all someone had to tell you how Sandra

1 Burt cheated you! If I were you, I'd seriously consider
2 complaining to the bar about what [Ms. Burt] did and get
3 most of your attorney fees back from her.... Now you
know how you got cheated and who was to blame for it.

4 [Complaint ¶ 12, Answer ¶ 12; RTP 94:12 – 13, 95:15 – 96:4, 102:21 – 103:10;
5 Exhibit 5]

6
7 13. Respondent wrote the January 11, 2006, letter to Ms. Foreman so she
8 would give the letter to Ric, hoping that Ric would fire Ms. Burt. [RTP 27:13 –
9 15, 87:11 –24, 94:12 – 13; Exhibits 1, 2, and 3]

10
11 14. Responded admitted to writing the July 12th letter. [Complaint ¶ 12,
12 Answer ¶ 12; RTP 93:5-6; Exhibit 5]

13
14 15. Given the content and context of the July 12 letter, it is reasonable to
15 conclude that Respondent intended that Ric would either read the January 11th
16 letter or know the contents of the letter for the purpose of communicating with
17 Ric, knowing that Ric was still represented by Ms. Burt, and to influence Ric's
18 confidence in Ms. Burt.

19
20 **CONCLUSIONS OF LAW**

21 This Hearing Officer finds that there is clear and convincing evidence
22 that Respondent violated Rule 42, Ariz. R. Sup. Ct., specifically:

23 1. ER 4.2, Rule 42, Ariz.R.Sup.Ct.: "In representing a client, a
24 lawyer shall not communicate about the subject of the representation with a party
25 the lawyer knows to be represented by another lawyer in the matter, unless the

1 lawyer has the consent of the other lawyer or is authorized by law to do so.” By
2 using his client to contact a represented opposing party about the subject matter of
3 the representation, Respondent violated ERs 4.2 and 8.4(a), Rule 42,
4 Ariz.R.Sup.Ct.
5

6 The ethics rule against communicating with a represented
7 person without the consent of his or her lawyer safeguards
8 the lawyer-client relationship and shields the interests of a
9 represented person from encroachment by opposing
counsel. *U.S. v. Lopez*, 4 F3d 1455 (9th Cir. 1993)

10 “Because of the client-protective purpose of the rule, the breach need not be
11 intentional to be the subject of a disciplinary action.” *Carter v. Kamaras*, 430
12 A.2d 1058 (R.I. 1981); *In re McCaffrey*, 549 P.2d 666 (Ore. 1976).

13
14 1. ER 4.4, Rule 42, Ariz.R.Sup.Ct.: “(a) In representing a client, a
15 lawyer shall not use means that have no substantial purpose other than to
16 embarrass, delay, or burden any other person, or use methods of obtaining
17 evidence that violate the legal rights of such a person...” Respondent’s
18 allegations about the representation Ms. Burt provided to Ric had no purpose
19 other than to embarrass, delay or burden Ms. Burt and Ric, thereby violating ER
20 4.4(a), Rule 42, Ariz.R.Sup.Ct.
21

22 2. ER 8.4(a), Rule 42, Ariz.R.Sup.Ct.: “It is professional misconduct for
23 a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct,
24 knowingly assist or induce another to do so, or do so through the acts of
25

1 another;...” Respondent violated ER 4.2 through the acts of his client.
2 Respondent’s conduct during the hearing also demonstrates his ability to induce
3 Ms. Foreman to act on his behalf in order to achieve Respondent’s objectives.
4 [RTP 87:23 – 25; 89:20 – 25]. Respondent’s defense to writing the letters was
5 that he was attempting to put in writing a point of clarification for his client’s use.
6 At its best, this seems disingenuous since the rules require an attorney to know
7 when a client asks the attorney to act in violation of the law or rules and to advise
8 the client regarding lawful conduct, rather than conduct that could result in lawyer
9 sanctions or criminal liability. Respondent’s intent is further clarified through his
10 communication directly to Ric when Respondent erroneously concluded that Ric
11 was no longer represented by counsel. The purpose for Respondent’s earlier
12 communications were clearly for the intended purpose of creating conflict in the
13 attorney/client relationship between Ric and Ms. Burt.
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17 **IV. THE STATE BAR’S PROPOSED SANCTION**

18 **A. The ABA Standards for Imposing Lawyer Sanctions.**

19 The ABA *Standards* are designed to promote consistency in the imposition
20 of sanctions by identifying relevant factors the court should consider and then
21 applying these factors to situations where lawyers have engaged in various types
22 of misconduct. ABA *Standard* 1.3, Commentary. The ABA *Standards* indicate
23 that the "ultimate sanction imposed should at least be consistent with the sanction
24
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1 for the most serious instance of misconduct among a number of violations; it
2 might well be and generally should be greater than the sanction for the most
3 serious.” *Matter of Taylor*, 180 Ariz. 290, 292, 883 P.2d 1046 (1994).
4

5 It is also appropriate in determining a sanction that the Supreme Court and the
6 Disciplinary Commission consider the duty violated, the lawyer’s mental state, the
7 actual or potential injury caused by the misconduct and the existence of aggravating
8 and mitigating factors. *Peasley*, 208 Ariz. 27 at 35, 90 P.3d at 772; *Standard 3.0*.
9

10 The most serious violation is Respondent’s knowing communication with
11 an opposing party, so consideration was given to *ABA Standard 6.3*. Suspension
12 is generally appropriate when a lawyer engages in communication with an
13 individual in the legal system when the lawyer knows that such communication is
14 improper, and causes injury or potential injury to a party or causes interference or
15 potential interference with the outcome of the legal proceeding.
16

17 Respondent knowingly violated his duty to the legal system and there was
18 potential injury to the opposing party by Respondent’s attempt to interfere the
19 lawyer-client relationship.
20

21 In determining what aggravating factors apply, the following information
22 needs to be considered. The State Bar subpoenaed Respondent’s client, Ms.
23 Foreman, to appear and testify at the hearing. Ms. Foreman was personally
24 served with a subpoena issued by the Hearing Officer on February 27, 2007. Ms.
25

1 Foreman was reminded that she needed to appear at the hearing by voice message
2 left at her home telephone number on May 16, 2007, and by letter mailed to her
3 home address on the same date. [RTP, 83:15 – 17] The May 16, 2007, letter to
4 Ms. Foreman also included a copy of the subpoena as well as a copy of the
5 Affidavit of Service of the subpoena. [Exhibits 14 and 15]
6

7 During the hearing, Respondent acknowledged that his client was planning
8 on being present at 1:00 p.m. and that he expected Ms. Foreman to be available to
9 testify by 1:30 p.m. [RTP 84:7 – 8]
10

11 Prior to the afternoon lunch break, Respondent requested that the parties go
12 off the record and have a discussion. [RTP 85:7 – 8] Upon return from the break,
13 wanting to make sure there was a clear record, the Hearing Officer outlined what
14 had happened during the break. The Hearing Officer stated that although
15 Respondent suggested the hearing could end prior to the break, during the break,
16 Respondent stated he did not think that his conduct warranted discipline. The
17 State Bar did not want to continue the discussion at that point and the parties
18 broke for lunch. [RTP 86:1 – 21] It was made clear prior to the lunch break that
19 the State Bar would not agree to settle the case at that time and the hearing would
20 continue after the lunch break. [RTP 117:23 – 118:12]
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24 When the lunch break was over, Respondent informed the Hearing Officer
25 that the case was settled because he was no longer going to contest the matter.

1 [RTP 87:11 – 12] Respondent further informed the Hearing Officer that because
2 he was no longer going to contest the matter, he had called Ms. Foreman and told
3 her she did not need to appear at the hearing to testify. [RTP 87:23 – 25] At no
4 time did this Hearing Officer communicate to Respondent or the State Bar that
5 the witness Ms. Foreman was released from the subpoena.
6

7 Other evidence of the Respondent's failure to cooperate in this disciplinary
8 process was reflected in the Respondent's failure to cooperate with the State Bar
9 in presenting a Joint Pre-hearing Statement. Respondent's conduct throughout
10 this proceeding seemed to reflect an attitude of arrogance and a belief that his
11 conduct was above reproach by this disciplinary process.
12

13 Based on the conduct described above, the following aggravating factors
14 are present in this case:
15

16 *Standard 9.22(e)* bad faith obstruction of the disciplinary proceeding.
17 Respondent intentionally hindered and obstructed the disciplinary proceedings
18 through his unilateral decision to instruct his client to not appear and testify as
19 described above. Being untruthful during a disciplinary proceeding or failing to
20 cooperate with disciplinary authorities is a significant aggravating factor. *In re*
21 *Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988); *In re Varbel*, 182 Ariz. 451, 897
22 P.2d 1337, (1995); *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993); *In re*
23 *Fresquez*, 162 Ariz. 328, 783 P.2d774 (1989).
24
25

1 *Standard 9.22(f)* submission of false evidence, false statements, or other
2 deceptive practices during the disciplinary process. Respondent, unilaterally and
3 without authority, took it upon himself to instruct his client to not appear and
4 testify as described above. As recognized by the Hearing Officer, in unilaterally
5 dismissing his client from the subpoena Respondent demonstrated a failure to
6 take the disciplinary process seriously. [RTP 88:24 – 89:1]

7
8 *Standard 9.22(g)* refusal to acknowledge wrongful nature of conduct.
9 Respondent failed to acknowledge any wrongdoing in the writing of a letter to a
10 represented party and acknowledged only that the letter should have been written
11 in an entirely different tone. [RTP 109:22 – 24] Respondent has failed to
12 acknowledge the seriousness of his conduct as it relates to both the
13 communication with Ric Foreman and his interference in the disciplinary process.
14 [RTP 104:1 – 4, 107:21 – 22, 118:13 – 17] *In re Wade*, 174 Ariz. 13, 846 P.2d
15 826 (1993)(Respondent's failure to appreciate the significance of his misconduct
16 or even to realize that there was any misconduct makes him a danger to the
17 public.)
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19
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21 *Standard 9.22(i)* substantial experience in the practice of law. Respondent
22 was admitted to the State Bar on October 23, 1993 and has been an Arizona
23 attorney for approximately 14 years.
24
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1 There are no mitigating factors. Although Respondent was given an
2 opportunity to present mitigating evidence, he failed to provide any evidence that
3 would support the finding of any mitigating factors. [RTP 111:15 – 17,112:20 –
4 12, 114:8 – 20] *In re Augenstein*, 178 Ariz. 133, 871 P.2d 254
5 (1994)(Respondent's self-serving testimony was insufficient to prove Respondent
6 had personal and emotional problems.)
7

8 **Proportionality Analysis**

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10 Sanctions against lawyers must have internal consistency to maintain an
11 effective and enforceable system; therefore, the court looks to cases that are
12 factually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d
13 1161, 1171, (1988).
14

15 Although there is no Arizona case directly on point, similar cases may be
16 considered. *In re Rivkind*, 164 Ariz. 154, 160, 791 P.2d 1037, 1043 (1990).
17

18 In *In re Edelman*, SB-04-0152-D, Edelman was censured for violation of
19 Rule 42, Ariz.R.Sup.Ct., ERs 4.2, 4.4 and 8.4(d). Edelman was appointed to
20 represent a juvenile in a drug-possession case. The juvenile's mother was criminally
21 charged in connection with the same matter and was represented by separate
22 counsel. Edelman had the juvenile's mother sign an affidavit without discussing the
23 matter with the mother's attorney, and filed it in the juvenile court matter. Edelman
24 then refused to withdraw the affidavit when the mother's attorney requested he do
25

1 so, even though the affidavit was potentially harmful to the mother's case. There
2 were two aggravating factors: prior discipline and vulnerability of the victim. There
3 were three mitigating factors: absence of a selfish or dishonest motive; full and free
4 disclosure to disciplinary board or cooperative attitude toward the proceedings; and
5 remorse.
6

7 Respondent's conduct is similar to Edelman's because both contacted a
8 represented party. Respondent's conduct is more egregious as he did so knowingly
9 with the intent to influence the opposing client. Censure would have been an
10 appropriate sanction but for Respondent's interference in the disciplinary
11 proceedings.
12

13 Arizona courts have suspended attorneys where they were found to have
14 engaged in deceptive practices and engaged in bad faith obstruction of the
15 disciplinary process. *In re Brown*, 184 Ariz. 480, 910 P.2d. 631 (1996),
16 (obstruction of disciplinary proceedings by intentionally failing to comply with
17 rules or orders of the court and the bar, and prior discipline, found to be
18 aggravating factors and Respondent suspended for 9-months where generally a
19 censure would have been appropriate).
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21

22 The State Bar's sanction recommendation, prior to Respondent's conduct
23 during the discipline hearing, would have been for a public censure, one year
24 probation, and CLE and Ethics classes. However, Respondent's deceptive
25

1 practices and obstruction of the disciplinary process requires that the sanction be
2 increased to a six-month and one day suspension.

3
4 **V. CONCLUSION**

5 The objective of lawyer discipline is not to punish the lawyer, but to protect
6 the public, instill public confidence in the profession, and deter similar conduct by
7 other lawyers. A six-month and one-day suspension, one-year probation with
8 terms and conditions to be determined at reinstatement and the payment of all
9 costs and expenses incurred by the State Bar in this disciplinary proceeding, are
10 proportional to sanctions imposed in other cases involving violations of the
11 charged ethical rules and where bad faith obstruction of the disciplinary process
12 has been found to be an aggravating factor.
13
14

15 The recommended sanction serves the purposes of discipline in that it
16 maintains the integrity of the judicial system, protects the public interest, and
17 demonstrates to the legal profession that such conduct shall not be tolerated.
18

19 **DATED** this 10th day of July, 2007.

20 
21 Yvonne R. Hunter
22 Hearing Officer 8P
23

24 Original filed with the Disciplinary Clerk
25 of the Supreme Court of Arizona
this 10th day of July, 2007.

1
2 Copy of the foregoing mailed
3 this 10th day of July, 2007 to:

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by: Christina Ad