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

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

MICHAEL L. FREEMAN,
BAR No. 010237

Respondent.

File No 06-2029

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 8S, Sandra L. Slaton)

PROCEDURAL HISTORY

On August 27, 2007, the State Bar filed a formal Complaint in the instant matter, alleging that Respondent's conduct, (in connection with his subpoenaing of a victim's counseling records on behalf of a client in a criminal matter) violated ERs 3 4© (knowingly disobey obligation under rules of tribunal except assertion based on no valid obligation), 4 4(a) (respect for rights of others), 8 4(a) (violation of rules of professional conduct), 8.4© (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8 4(d) (conduct prejudicial to administration of justice). (Exhibit DD) Respondent's Motion for Summary Judgment his Motion for a New Finding of Probable Cause were both denied The hearing took place on April 3, 2008 Written closing arguments and proposed findings of fact and conclusions of law were submitted by both the Respondent and the State Bar After considering all of the testimony and evidence at the hearing reviewing the closing arguments for both parties, together with the proposed findings of fact and conclusions of law for both parties, this Hearing Officer finds as follows

FINDINGS OF FACT

1 By Indictment filed May 10, 2005 in the Maricopa County Superior Court, Defendant Jay Style (and Respondent's client) was charged in case number CR2005-032083 with Count 1,

1 Indecent Exposure, a class 6 felony in violation of A.R.S. §13-1402 and Count 2, Sexual
2 Conduct with a Minor, a class 2 felony and dangerous crimes against children, in violation of
3 A.R.S. §§13-1404, 13-604 01 (Exhibit A)

4 2. If convicted on Count One, the Defendant faced four months to two years
5 imprisonment, with the presumptive sentence being One year. (Exhibit B)

6 3. If convicted of Count Two following trial, Defendant faced 10 to 24 years mandatory
7 imprisonment, with the presumptive sentence being 17 years (Exhibit D)

8 4. This Hearing Officer finds that the charges and potential sentencing consequences
9 pending against Respondent's client, as set forth above, were extremely serious in nature.

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11 5. Respondent was retained to represent the accused, Jay Style, a retired doctor and
12 step-grandfather of the alleged victim, a minor (10 years of age) (Exhibit E, ¶ 1)

13 6. Respondent was admitted to practice law in Arizona in 1985. Tr 137, 15-24

14 7. He has been a certified specialist in criminal law continuously since 2000 Tr 137,
15 25 - 138, 23

16 8. The victim was, herself, being prosecuted as a juvenile for committing lewd acts on
17 other minors in her neighborhood. Complaint and Answer, §3

18 9. In his defense of the Defendant, Respondent alleged that the victim's parents planted
19 the idea in the victim's mind to accuse the Defendant of committing lewd acts against the victim
20 as a means of explaining why she acted out as she did in the case against her. Complaint and
21 Answer, §4.

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23 10. Respondent learned that the victim obtained psychological counseling and sought
24 her treatment records. Complaint and Answer, §5

25 11. Respondent's theory was that the counselor was duty-bound to report criminal
26 acts perpetrated against the minor patient--otherwise, the counselor would herself have
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1 committed a crime

2 Complaint and Answer, §6

3 12 An absence in the treatment records of a reference to reporting allegedly would
4 tend to establish that Courtney denied being assaulted by Style. Complaint and Answer, §6

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6 13. On or about December 5, 2005, Respondent filed a formal motion for the disclosure
7 of the alleged victim's counseling records (Exhibit I) In actuality, in the motion Respondent
8 requested the court to order the State to produce these records Id Respondent in his pleading
9 also requested an order that the state produce the counselor's correct name, phone number and
10 address in order that Respondent could subpoena the records Id

11 14 On March 24, 2006, the victim's mother--Complainant Margery Sheridan--submitted
12 to an interview by defense counsel, and actually provided the name and agency of the counselor,
13 although her disclosure was somewhat incorrect/incomplete (Exhibit J)

14 15 By pleading filed April 10, 2006, Respondent supplemented his motion for disclosure
15 of the victim's counseling records (Exhibit K)

16 16 By pleading filed April 24, 2006, the State responded to the motion, contending *inter*
17 *alia* that it "cannot disclose what it does not have" (Exhibit L) . *See also*, Tr April 3, 2008
18 (A M), p 61, ll 6-8 In effect, the State's position was that these counseling records were not in
19 its possession or control, therefore, the State was unable to comply with Respondent's request Id

20 17 The State's position was also that the alleged victim's mother, (Complainant in this
21 matter) Margery Sheridan, objected to the production of such counseling records, and the State,
22 through the prosecutor, Rebecca Baker, communicated this fact to Respondent as well
23 Tr April 3, 2008 (A M) p 61, ll 8-12 Exh L

24 18 It is undisputed that the victim's Mother, in fact, registered her written opposition to
25 the disclosure of the requested information, that was included with the State's responsive papers
26 (Exhibit L)

27 19 The State further maintained in its April 24, 2006 pleading that production of the

1 counseling records was protected by the Victim's Bill of Rights. (Exhibit L)

2 20 By pleading filed April 27, 2006, Respondent replied that the Court could order the
3 disclosure of either the documents or "Order the State to provide the counselor's correct name,
4 phone number and address so that defense counsel can subpoena the records" (Exhibit M)

5 21 By minute entry order dated May 16, 2006, the court denied Respondent's Motion
6 for disclosure of the counsel records (Exhibit O, P)

7 22. On or about May 17, 2006, Respondent ascertained the true name of the victim's
8 counselor, telephonically inquired at the third party medical provider about obtaining the records
9 and was advised that they would be produced in response to a subpoena (Exhibit E, ¶6)

10 23 On May 17, 2006, Respondent caused subpoenas to issue, requiring the production of
11 the victim's counseling records to his office on June 1, 2006. (Exhibit E, ¶7, Q)

12 24 The subpoena was personally served on the agency and the counselor on
13 May 18, 2006 (Exhibit Q)

14 25 On May 30, 2006, Respondent moved for reconsideration of court's denial of his
15 Motion for disclosure of the counseling records (Exhibit R)

16 26 A trial management conference was held on June 20, 2006, wherein the State advised
17 that Respondent had informed her the day previous that he had received the records, and she had
18 asked how and when the records were received (Exhibit T)

19 27 At the June 20, 2006 trial management conference, Judge Udall affirmed the trial
20 date of July 13, 2006. (Exhibit T)

21 28 By pleading filed June 20, 2006, Respondent supplemented his witness list to include
22 the victim's counselor as a potential defense witness (Exhibit U)

23 29 By cover letter addressed to the prosecutor dated June 21, 2006, Respondent
24 provided the State with copies of the subpoenas at issue and the records produced pursuant
25 thereto, and filed notice of same with the court. (Exhibit V)

26 30. By motion filed July 3, 2006, the State moved to preclude use of the victim's
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1 counseling records at trial, and for sanctions against Respondent based on the fact that he had
2 independently obtained them (Exhibit W) The relief sought on behalf of the State against
3 Respondent included, *inter alia*, requested contempt sanctions, a request for preclusion at trial of
4 the very same counseling records that Respondent had received *via* subpoena from the provider,
5 and a request that Judge Udall report Respondent's conduct *vis a vis* the counseling records to
6 the State Bar of Arizona Id

7 31 Shortly before Defendant Style's trial was to begin (on or about July 7, 2006) the
8 prosecutor became aware of new evidence that caused her to reevaluate the case (Exhibit X).
9 Transcript, April 3, 2008 (A.M), p. 69, ll 10-13. Specifically, the prosecutor became aware that
10 the alleged victim had actually given contradictory statements to the prosecutor herself and to the
11 detective Id at ll. 23-25 As the prosecutor stated, in pertinent part, during the hearing before
12 this Hearing Officer "[t]he act that she was describing to me was not the act that the defendant
13 was charged with And when I asked her about some statements that she made in her forensic
14 interview to the detective, and I believe I might have even played back that part of the tape for
15 her and asked her, you know, what did you mean when you said that, it became apparent that
16 there had been some confusion between her and the forensic interviewer. So what he was
17 charged with was not the correct act, and so I did not have the correct acting indictment" Id at p.
18 69, ll. 24-25, p 70, ll 1-8

19 32 By motion dated July 13, 2006--the day of trial—based *inter alia* on the above
20 developments in the case, the State moved to dismiss both charges, asserting that there "is no
21 reasonable likelihood of conviction as charged in the indictment " (Exhibit Z)

22 33 The State's motion was granted by the court that date, and the case dismissed without
23 prejudice (Exhibit AA) (Defendant was subsequently charged in a new case and concluded by
24 Defendant accepting a Plea Agreement and being found guilty Transcript, April 3, 2008, A.M
25 p 59, ll 20-22)

26 34 At this same time, after hearing oral argument on the State's motion against
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1 Respondent for Sanctions, including contempt, requesting Judge Udall to report Respondent to
2 the Bar, and requesting preclusion of the counseling records, Judge Udall denied all of the
3 State's requested relief by minute entry issued later that same day (Exhibit AA, BB).
4 (The Minute Entry itself in the ruling did not specifically mention the Motion for Sanctions, but
5 this Hearing Officer concludes that it the minute entry included such motion, as it was mentioned
6 above in the body of the Order)

7 35 Judge Udall was the very same judge who had heard Respondent's original motion
8 for disclosure of the counseling records, the State's Response, Respondent's Reply and oral
9 argument on same, and had also denied Respondent's motion for reconsideration of that motion
10 Therefore, Judge Udall was the judge who was intimately familiar with the entire issue regarding
11 the counseling records, virtually identical to the issues in this case against Respondent, and yet
12 denied the State's motions against Respondent and refused to preclude the evidence at issue

13 36. On August 27, 2007, the State Bar filed a formal Complaint in the instant matter,
14 alleging that Respondent's conduct violated ERs 3.4© (knowingly disobey obligation under rules
15 of tribunal except assertion based on no valid obligation), 4 4(a) (respect for rights of others);
16 8 4(a) (violation of rules of professional conduct), 8 4© (conduct involving dishonesty, fraud,
17 deceit or misrepresentation) and 8.4(d) (conduct prejudicial to administration of justice) (Exhibit
18 DD)

19 37 This Hearing Officer finds that based upon the evidence, Respondent Freeman's
20 pleadings filed with the court asked that the court compel the State of Arizona to produce the
21 victim's counseling records, or to compel the State of Arizona to provide the defense with the
22 counselor's correct name, phone number and address so that the defense could itself subpoena
23 the counseling records In short, each pleading asked that the court compel the State of Arizona
24 to act by providing information to the defense in some fashion (RT 4/3/08 a m , 90 6-23,
25 91 4-12, 99.17-100 4, 104.24-105.4.) On its face, the record reveals that no pleading filed by
26 Respondent sought a court order issued to any third party for the production of documents
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1 pursuant to Rule 15.1(g), Ariz R Crim P. Similarly, no pleading sought permission from the
2 court allowing Respondent to himself subpoena the records from a third party (RT 4/3/08 a m ,
3 106:18-21)

4 38 This Hearing Officer further finds that at no time did Judge Udall issue any order
5 against Respondent directly instructing him to refrain from issuing subpoenas to one or more
6 third parties for the alleged victim's counseling records

7 39 In response to each of Respondent's pleadings, the prosecution asserted that it was
8 not in possession of the counseling records, nor did it possess the name/address of the counselor
9 or counseling agency. Thus, the State maintained it was not required to obtain or produce same
10 pursuant to Rule 15.1(b), Ariz R Crim P

11 40 During a pre-trial interview of the minor-victim's father and mother, Respondent
12 Freeman attempted to glean the identity of the counselor as well as the address of the counseling
13 agency. The father did not know the information sought, and recommended Freeman ask the
14 mother—which he subsequently did. The mother provided the information, but spelled the first
15 name of the counselor incorrectly. The mother admitted that at least as of March 24, 2006, she
16 was aware that the information she provided to Freeman would be used by him to attempt to
17 obtain the counseling records (RT 4/3/08, 47:4-10)

18 41 The prosecutor had no conversations with the mother/victim representative regarding
19 latter's willingness to obtain the records and provide them to the prosecution. (RT 4/3/08 am,
20 49:14-25)

21 42 The subpoenas at issue here were issued by the court at the request of Respondent
22 Freeman and pursuant to A R S §13-4071 (Supp 2006) on Wednesday, May 17, 2006 (Exhibit
23 Q-1) Service was effectuated on the counselor on Thursday, May 18, 2006 (Exhibit Q-1)
24 Service was effectuated on the counseling agency on Monday, May 22, 2006 (Exhibit Q-1)

25 43. After consulting with its legal counsel, the counseling agency produced the records
26 to Respondent Freeman. (RT 4/3/08 a m , 54 23-55 4)

1 Arizona has failed to prove by clear and convincing evidence that the minute entry order either
2 explicitly or implicitly ordered Respondent Freeman to refrain from obtaining the records himself
3 through a validly issued subpoena

4 4. This Hearing Officer also finds that the State Bar of Arizona has failed to prove by
5 clear and convincing evidence that Respondent Freeman actually possessed the May 16, 2006
6 court order at the time the subpoenas in question were issued and/or served. Consequently, the
7 State Bar has failed to establish that Respondent Freeman “knowingly” disobeyed an obligation
8 under the rules of a tribunal or a court order in violation of ER 3.4 (c). *In re Van Doo, 214 Ariz*
9 *300, 305, 152 P 3d 1183 (2007), In re Tocco, 194 Ariz 453, 984 P 2d 539 (1999)*. Said
10 allegation is, therefore, dismissed.

11 5 This Hearing Officer finds the following applicable definition of “knowledge” to apply
12 to this matter concerning allegations against Respondent “ ‘The ABA Standards define
13 “knowledge” as “the conscious awareness of the nature of attendant circumstances of the
14 conduct.’ ” ABA Standards at 12. This definition clarifies that merely knowing one performs
15 particular actions is not the same as consciously intending by those actions to engage in unethical
16 conduct. The actor must also know the nature and circumstances of those actions, ” 214 Ariz
17 at 305

18 6 This Hearing Officer concludes, from examining the motion filed by Respondent,
19 together with his testimony at the hearing, that his purpose in obtaining the counseling records
20 included legitimate reasons in accordance with his duties as the client’s criminal defense
21 advocate, such as building a defense in the case, impeaching the victim or others on her behalf,
22 possibly challenging the expert’s conclusions in the case and similar legitimate reasons. This
23 Hearing Officer further concludes that based upon all of the evidence presented, including the
24 testimony of Respondent and his written motion and related court pleadings, that he did not
25 knowingly (as that term has been defined by the Arizona Supreme Court, set forth above)
26 disobey an obligation under the rules of a tribunal or a court order in violation of ER 3.4©.

1 7 This Hearing Officer finds, after having considered all of the witnesses' testimony at
2 the hearing, together with all of the exhibits received into evidence, and the written closing
3 arguments of both parties, that the State Bar of Arizona has failed to establish by clear and
4 convincing evidence that Respondent "used means that had no substantial purpose other than to
5 embarrass, delay, or burden any other person .. ER 4.4(a)." This Hearing Officer further finds
6 that there was literally no credible evidence presented at the hearing establishing that
7 "Respondent used means that had no substantial purpose other than to embarrass, delay, or
8 burden any other person "

9 8 As to the second portion of ER 4 4(a) "[o]r use methods of obtaining evidence that
10 violate the legal rights of such a person " The Hearing Officer examines this portion of
11 ER 4 4(a), as pertaining to the instant case, in light of Ariz Const Art. 2, Sec 2 1(A)(5)
12 However, again, this Hearing Officer must conclude that there was no clear and convincing
13 evidence that Respondent violated this portion of ER 4.4(a). Respondent had a duty to
14 effectively represent his client in a most serious criminal felony sex offense In so doing, he
15 attempted to obtain vital counseling records of the alleged victim with notice that he was
16 intending to so do to the prosecutor and the court That was one of the purposes for
17 Respondent's filing of his Motion to Disclose the records (really a motion asking Judge Udall to
18 compel the State to producc such records for him) Yes, Respondent served a subpoena upon a
19 third party medical provider of victim However, there was no Court order mandating that he not
20 serve such a subpoena Whether or not the service itself was proper as an evidentiary criminal
21 defense tool was a question for the trial court to resolve Judge Udall did resolve that question,
22 by denying the State's motion for sanctions in totality, including the State's request to preclude
23 the very evidence obtained by Respondent in the trial. For this Hearing Officer to find that
24 Respondent violated this portion of ER 4 4 (a) the State Bar should have submitted clear and
25 convincing evidence that the mere service of a subpoena to the third party medical provider by
26 Respondent for the victim's counseling records did, in fact, violate the victim's legal rights Such
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1 clear and convincing evidence was lacking at the hearing. The mere reliance on the Victim's Bill
2 of Rights by the State Bar does not answer the question of whether the service of said subpoena
3 itself actually violated the victim's legal rights in this case.

4 It was the medical provider who really produced the records for Respondent, after
5 consulting with its own legal counsel. *See*, April 3, 2008 Transcript, p 55, ll 1-4 It was the
6 victim's Mother, the complainant herein, who provided the identity and whereabouts of the
7 counselor, through a voluntary interview in the presence of the prosecutor no less, to Respondent
8 Under these circumstances, this Hearing Officer is not able to find by clear and convincing
9 evidence that Respondent used "methods of obtaining evidence that violate[d] the legal rights"
10 of the victim in this case

11 Whether or not the "methods" of obtaining the evidence in question violated the legal
12 rights of the victim here appears to be first and foremost a substantive evidentiary issue more
13 appropriately answered by the criminal trial judge overseeing the criminal proceedings—Judge
14 Udall This Hearing Officer recognizes, of course, that the prior ruling by the trial court should
15 not preclude an ethical ruling on the same issue which may (or may not) be consistent However,
16 the issues presented here and before Judge Udall appear to be almost identical *See*,
17 In Re Levine, 174 Ariz 146, 155 (1993). Judge Udall actually ruled that the very evidence
18 obtained by Respondent would not be precluded for use in the trial itself, refused to hold
19 Respondent in contempt, and refused the prosecutor's request to report Respondent to the Bar
20 This Hearing Officer finds, on the basis of the entire evidentiary record before it (including all of
21 the testimony at the April 3, 2008 hearing) that there is not clear and convincing evidence that
22 Respondent violated Rule 4.4(a) in any respect.

23 Moreover, this Hearing Officer specifically finds that Respondent's reasons for
24 obtaining the victim's counseling records fall within the legitimate aims of due process and
25 effective representation of criminal defendants by defense counsel as recognized by existing
26 Arizona and federal law. The State Bar's claim based upon Rule 4.4(a) is thus unsubstantiated

1 and, therefore, is dismissed.

2 10 Respondent's sworn testimony regarding his understanding that the court's denial of
3 his motions to compel the State to produce either the name and address of the counselor, or the
4 counseling records themselves was limited to just that, given the State's repeated assertions that
5 it did not possess the information sought and therefore was not obligated to produce either under
6 the Rules of Criminal Procedure" was un-rebutted by the State Bar of Arizona. Moreover, at all
7 times relevant to the proceedings below, Respondent made clear on the record his intent to
8 obtain the sought records *via* subpoena once he possessed the necessary information to do so. A
9 violation of ER 8.4(c) must rest on behavior that is knowing or intentional and purposely
10 deceives or involves dishonesty or fraud. *In re Clark, 207 Ariz 414, 87 P 3d 827 (2004)*. As
11 such, the State Bar's allegation that Respondent "engaged in conduct involving dishonesty,
12 fraud, deceit or misrepresentation in violation of ER 8.4(c)" has not been proved by clear and
13 convincing evidence and, therefore, is dismissed. This Hearing Officer specifically finds that
14 there was virtually no evidence introduced at all that substantiated any conduct by Respondent
15 that he engaged in any type of conduct involving dishonesty, fraud, deceit or misrepresentation in
16 violation of ER 8.4(c).

17 11 Based on the entire record in this case, including all testimony and evidence
18 presented at the hearing, the State Bar of Arizona has failed to prove by clear and convincing
19 evidence that Respondent "violated or attempted to violate the Rules of Professional Conduct in
20 violation of ER 8.4(a)" as alleged in the Complaint. This allegation is therefore unsubstantiated
21 and is, therefore, dismissed.

22 12 This Hearing Officer concludes, after considering all evidence and testimony set forth
23 in the hearing, including the testimony of Respondent himself, that he was legitimately and
24 effectively representing his client with his only purpose to be acting as an advocate on behalf of
25 his client during the underlying criminal proceedings. This Hearing Officer further concludes
26 that the State Bar has failed to prove by clear and convincing evidence that Respondent

1 engaged in conduct that is prejudicial to the administration of justice in violation of ER 8.4(d)"
2 as alleged in the Complaint. The allegation is therefore dismissed as unfounded and/or unproved.

3 13. Each of the claims currently pending before this Hearing Officer, alleged by the
4 State Bar of Arizona were raised by the prosecution in its motions against Respondent, and each
5 was rejected by the court. As stated above, the pleadings before Judge Udall also included an
6 allegation that Respondent's conduct violated the Rules of Professional Responsibility. Upon
7 witnessing *any* conduct for which there exists a "substantial likelihood" that a lawyer has
8 committed an ethical violation, the trial court is obligated pursuant to Arizona Code of Judicial
9 Conduct,
10 Canon 3(D)(2) to report same to the State Bar of Arizona. In denying every aspect of the
11 State's assertions, Judge Udall implicitly rejected each and every assertion levied
12 therein—including the assertion that Respondent's conduct presented a substantial likelihood that
13 ethical rules were violated.

14 14. Based on the entire record in this case, including the testimony of all witnesses,
15 including Respondent, and the documentary evidence, this Hearing Officer finds that the entire
16 complaint against Respondent lacks clear and convincing evidence. Specifically, there is
17 lacking clear and convincing evidence to establish that Respondent has violated Rule 42,
18 Ariz R Sup Ct, ER 3.4©, ER 4 4(a), ER 8 4(a), ER 8.4(c), or ER 8.4(d).

19 15. Therefore, the Complaint, in its entirety, against Respondent is dismissed.

21 DATED this 11th day of June, 2008

23 Sandra L Slaton
24 Sandra L Slaton
25 Hearing Officer 8S

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Original filed this 11th day of June, 2008
with The Disciplinary Clerk's Office of the
Supreme Court of Arizona,

Copy of the foregoing mailed
this 12th day of June, 2008, to

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