



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**IN THE MATTER OF A NON-MEMBER OF THE STATE BAR OF
ARIZONA: CARLY R. VAN DOX , SB-06-0121-D**

PARTIES AND COUNSEL:

Petitioner: Carly Van Dox, represented by Mark I. Harrison and Sara Greene, OSBORNE MALEDON, P.A.

Respondent: State Bar of Arizona, represented by Robert Van Wyck and Denise K. Tomaiko.

FACTS:

Van Dox is a member in good standing of the Virginia and Florida bars. She is a licensed mediator in Florida. She is not a member of the Arizona bar. She has no prior disciplinary history in any jurisdiction. She moved to Arizona in 1997 and began working as a licensed realtor. In 2004, as a favor to a friend, she agreed to represent the sellers of a house in a private mediation. She told the sellers that she was licensed to practice in Florida, but not licensed to practice law in Arizona. She explained that if the matter proceeded beyond mediation, they would need to hire a lawyer licensed to practice in Arizona. The sellers agreed to pay Van Dox \$1,000 and signed a form retainer that Van Dox used in her law offices in Florida. Van Dox believed that her participation in a private, non-court-ordered mediation was not unethical; otherwise she would not have participated.

In the midst of the five hour mediation in October 2004, the buyer's attorney learned by calling the State Bar that Van Dox was not licensed in Arizona. The attorney brought this to the attention of the mediator, as he did not want to be assisting in the unauthorized practice of law (UPL). The mediator consulted with another attorney who was familiar with UPL issues. Based on her conversation with the attorney indicating that private mediation was different than court proceedings, her review of the ethical rules, and her review of an informal ethics opinion, the mediator concluded that Van Dox's participation was not a problem. The buyer's attorney did not object to Van Dox's continued participation and the mediation continued. The parties, unfortunately, were unable to settle the underlying matter.

Van Dox also consulted with a retired judge immediately after the mediation. The judge testified that she informed Van Dox that she could rely on the information obtained by the mediator. All parties involved agreed that the mediation outcome would have been the same had Van Dox been licensed in Arizona. The sellers were pleased with Van Dox's assistance.

The buyers, however, filed a complaint with the State Bar. In December 2004, the State Bar wrote Van Dox requesting a response to the allegations of UPL. Van Dox did not respond. In March 2005, the State Bar again wrote to Van Dox requesting a response. Van Dox did not respond. At the hearing, she claimed that a stroke in 2002 had left her with memory and concentration problems. She often ignored her mail and, as a result, had had a judgment entered against her by her

homeowner's association. During this time she had also learned that the buyers had sold the property at a substantial profit. She believed the buyers had suffered no damage and the complaint would be dropped.

The State Bar filed a formal complaint alleging violations of ERs 5.5 (UPL), 8.4 (c) (conduct involving dishonesty, fraud or misrepresentation) and (d)(conduct prejudicial to the administration of justice), Rule 31 (regulation of the practice of law), Rule 53(d) (evading service) and (f)(failure to respond to State Bar inquiries). After the formal hearing, the hearing officer found that the State Bar had proven violations of ER 5.5, Rule 31 and Rule 53(f). The hearing officer found that there was insufficient evidence of dishonest conduct under ER 8.4 or that Van Dox had evaded service. The hearing officer determined that Van Dox acted negligently when she participated in the mediation. The presumptive sanction was informal reprimand under ABA Standard 7.4 (when a lawyer engages in an isolated incident of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system).

The hearing officer found no factors in aggravation. In mitigation, the hearing officer found five factors: absence of a prior disciplinary record; absence of a dishonest or selfish motive; cooperative attitude toward proceedings; character and reputation; and remorse. The hearing officer noted that Van Dox was willing to return the \$1,000 to the sellers. Further, she may lose her real estate license if she is formally sanctioned by the State Bar and will likely receive reciprocal discipline in Virginia and Florida.

In a proportionality analysis, the hearing officer found that cases involving the imposition of a censure involved more extensive attorney conduct or additional violations. Because of the isolated nature of her conduct, the hearing officer recommended diversion under Rule 55. The purpose of diversion is to rehabilitate, not to punish, when lawyers have engaged in an isolated act of negligence. Contrary to the State Bar's argument, the rule contemplates that any respondent, not just members of the bar, would be subject to diversion. Van Dox is a "respondent" and subject to the disciplinary jurisdiction of the Court. The State Bar's only support for its argument that diversion does not apply to non-members comes from language in the diversion guidelines. ("The purpose of the Diversion Program is to protect the public by improving the professional competency of and providing educational, remedial and rehabilitative programs to *members* of the State Bar of Arizona. . ."). The rules provide that the provisions apply to lawyers and respondents, therefore, the rules are the controlling authority on this point.

The hearing officer recommended that the complaint be dismissed and the matter remanded to the probable cause panelist with instructions to vacate the probable cause order and refer the matter to diversion. The State Bar filed an appeal.

Disciplinary Commission Report: The Disciplinary Commission *sua sponte* addressed whether it had subject matter jurisdiction to review this case in light of the new rules relating to the prosecution of UPL that took effect in June 2003. See Rules 75-80, Rules of the Supreme Court of Arizona. On this issue, the Commission split 5-4 in finding that it had jurisdiction. The majority found that Rule 79, Formal Proceedings before the Superior Court, was not the exclusive authority over the UPL of non-members. Rules 75-80 are primarily designed for those individuals who are not licensed to practice in any jurisdiction and are engaged in the practice of law in Arizona. The

new provisions allow UPL proceedings to be commenced in superior court. Various judicial sanctions available include injunctive relief and civil contempt. Rule 76. Under Rule 75, an “unauthorized practice of law proceeding” means “any action involving a respondent pursuant to these rules relating to the unauthorized practice of law.” This definition refers only to court actions filed under the new rules. The majority did not read this to exclude traditional disciplinary authority under Rules 31 and 46. Together, the rules create alternative tracks for controlling UPL and do not limit the Supreme Court’s pre-existing disciplinary authority over non-members.

On the merits, the Commission agreed with the hearing officer’s findings regarding the ethical violations. The Commission concluded, however, that several findings were clearly erroneous. The Commission found that the hearing officer’s finding that Van Dox acted with negligence was clearly erroneous. The record clearly supports that Van Dox acted knowingly. She had the clients sign a retainer agreement that was entitled “Law Offices of Carly R. Van Dox, P.A.” Van Dox signed the mediation agreement as “Carly Van Dox, Atty.” The unauthorized practice of law includes the use of the designation of lawyer by anyone not authorized to practice law in this state. Rule 31(a)(2)(B)(2). Under ABA Standard 7.2, suspension is the appropriate sanction when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system. The hearing officer found that there was no injury to Van Dox’s client, but did not consider the harm or potential harm to the public, the legal system or the profession.

As to the factors found in mitigation and aggravation, the Commission found a number of errors. The Commission found that the conclusion that Van Dox did not have a dishonest motive was erroneous. The record shows that Van Dox earned \$1,000 in representing the clients in the mediation. Therefore, the aggravating factor of selfish or dishonest motive is present. Standard 9.22(b). The Commission also found that the hearing officer erroneously considered the impact of the sanction on Van Dox’s real estate license, future livelihood, and the effects of reciprocal discipline in Florida and Virginia. The hearing officer considered Van Dox’s medical condition as an excuse for her failure to respond to State Bar inquiries. No direct causation was established between the misconduct and her medical condition, however, so little weight should be given to this condition.

On proportionality, the Commission did not find the cases cited helpful because they involved UPL by disbarred or suspended members. Censure is the most severe sanction that can be imposed on a non-member lawyer. *In re Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994). In light of all the purposes of attorney discipline, the Commission recommended censure for engaging in UPL and failing to respond to the State Bar inquiries.

The dissenting Commissioners disagreed with the majority’s conclusion that the Commission had jurisdiction. Supreme Court Rules 75-80 now provide specific procedures for cases involving UPL. Neither the hearing officer nor the Commission plays a role in this process. The majority’s conclusion that the State Bar has the option to proceed either under the traditional discipline process or under new Rule 79 ignores the language of Rule 78 which provides:

An unauthorized practice of law proceeding commences upon the receipt by the state bar of a charge against a respondent. An unauthorized practice of law proceeding shall be disposed of by dismissal or by the filing of a complaint in superior court seeking imposition of one or more sanctions as provided in these rules.

Once the State Bar received the buyer's complaint concerning Van Dox, an unauthorized practice of law proceeding "commenced" within the meaning of Rules 75(b)(16), 78 and 79. The State Bar no longer had discretion to proceed under the standard discipline rules. The matter should be dismissed and remanded for the State Bar to proceed under Rules 78 and 79, or to dismiss the proceedings.

Issues:

The Court accepted review of issues A, B and C:

- A. Whether the Hearing Officer and the Disciplinary Commission lack subject matter jurisdiction over unauthorized practice of law proceedings pursuant to Supreme Court Rules 75 through 80, effective July 1, 2003, an issue on which the Disciplinary Commission was sharply divided 5-4;
- B. Whether the Disciplinary Commission clearly erred in finding that Respondent acted "knowingly" and, therefore, committed legal error in applying Standard 7.2 and censuring Respondent;
- C. Whether a respondent attorney admitted to practice law in another jurisdiction, and over whom this Court has jurisdiction to impose attorney discipline, is ineligible for diversion because the Respondent is not a member of the Arizona Bar.

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