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AUG 16 2004

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA
DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA
BY *P. Williams*

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| IN THE MATTER OF A MEMBER |) | Nos. 02-1070, 02-1628, 02-2066 |
| OF THE STATE BAR OF ARIZONA, |) | |
| |) | |
| JOHN T. BANTA, |) | |
| Bar No. 010550 |) | DISCIPLINARY COMMISSION |
| |) | REPORT |
| |) | |
| RESPONDENT. |) | |

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on July 10, 2004, pursuant to Rule 58(e), Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed March 15, 2004, recommending an informal reprimand and that no costs be assessed against Respondent, since the Respondent substantially prevailed. The State Bar appealed and the matter was set for oral argument. Respondent and counsel for the State Bar were present. The State Bar argued that the Hearing Officer erred when he failed to find violations of ERs 1.15(b) and (c), 3.5, 4.4, 8.4(d) and SCR 41(g), and that censure and two years of probation with the State Bar's Member Assistance Program (MAP) is an appropriate sanction. Respondent argued in support of the Hearing Officer's recommendation. Neither party disputes the Hearing Officer's findings of fact.

The Commission's standard of review is set forth in Rule 58(b), which states that the Commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

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The Hearing Officers' findings of facts are briefly summarized as follows:

Respondent's misconduct arose in Count One while representing a plaintiff/client in a personal injury matter. On December 12, 2000, Respondent sent notice to health care providers that an award was received and included a proposal for distribution. Respondent deposited the award into his trust account, but did not distribute the award funds because he was not able to obtain distribution agreements from Dr. Siegal or Dr. Mazarella. The distribution proposal provided that Dr. Siegal be excluded from the settlement. During discussion on July 24, 2001 with Dr. Siegal and Dr. Mazarella's staff about the proposed pro-rated distribution, Respondent referred to Dr. Siegal as a "fucking asshole" and maintained that he would "hold the funds in trust until he dies unless Dr. Siegal would compromise." In December of 2001, Respondent was again advised by the billing staff that Dr. Siegal expected his portion of the award monies. Respondent was ultimately contacted by the State Bar in July and August of 2002 regarding this matter and subsequently filed an interpleader action with Maricopa County Superior Court.

In Count Two, on August 8, 2002, Respondent presented at the Glendale Justice Court regarding a forcible detainer action. Upon conclusion of the courtroom proceedings, Respondent proceeded to the lobby to obtain the necessary paperwork to appeal the attorney fee award from the Clerk's office. While obtaining the appeal paperwork, Respondent commented to the Clerk's staff that some non-attorney pro tem justices of the peace "are fucking lousy." Respondent's tone was louder than conversational tone, but was not considered shouting; however, the conversation was such that it drew attention from other persons present in the lobby.

1 In Count Three, Respondent represented a client in a civil matter. During a pre-trial
2 conference on September 27, 2002, Respondent called opposing counsel a "liar" and
3 accused him of making intentional representations to the court and hiding evidence. Judge
4 Donohoe was called for a ruling on a claim of attorney client privilege, which was sustained.
5 Respondent called the ruling "crazy." The telephonic argument became heated and
6 Respondent called Judge Donohoe names and Judge Donohoe responded by citing
7 Respondent for contempt. Judge Donohoe then requested that Respondent apologize, which
8 he did, and the sanction was lifted. Judge Donohoe testified that he did not recall what
9 names he was called but described Respondent's conduct as "abusive." In addition, during a
10 deposition of Respondent's client on March 20, 2002, Respondent told opposing counsel to
11 "go perform an unnatural sex act on himself."
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13 Decision

14 Having found no findings of fact clearly erroneous, the nine members of
15 Commission unanimously adopt and incorporate by reference the Hearing Officer's finding
16 of fact and the majority of his conclusions of law.¹ Based on the finding of additional
17 violations as discussed below, the Commission also modifies the recommended sanction to
18 reflect censure, one year of probation (MAP) with the following terms and conditions, and
19 costs of these discipline proceedings.
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26 ¹ Effective December 1, 2003 the Rules of the Supreme Court of Arizona and Arizona Rules
27 of Professional Conduct were amended. Because these matters arose prior to the
28 amendments, the former rules apply and are reflected herein.

Terms of Probation

1. Respondent shall be placed on one year of probation (MAP) effective the date of the signing of the probation contract, and shall pay all costs and expenses associated with the compliance of the probation terms, including those incurred by the State Bar as a result of the administration and enforcement of those terms.
2. Respondent shall contact the Director of MAP within 30 days of the final Judgment and Order and submit to an assessment. Respondent thereafter will enter into a MAP contract based upon recommendations made by the MAP Director of designee.
3. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

Upon review of the record, the Commission determined that the Hearing Officer clearly was clearly erroneous as a matter of law in failing to find the following violations:

In Count One, the Commission determined that the Hearing Officer erred in failing to find violations of ERs 1.15(b) and (c) (safekeeping property) and SCR 41(g) (abstain

1 from all offensive personality). The Commission finds these violations *de novo* based on the
2 Hearing Officer's findings of fact and the clear and convincing evidence present in the
3 record.

4 The State Bar also argued that in Count One, the Hearing Officer erred by failing to
5 find a violation of ER 1.3 (diligence). The Hearing Officer found that no evidence was
6 presented to determine when the funds were deposited. *See* Hearing Officer's Report and
7 Recommendation, p. 1, finding of fact #4. The Commission agrees that the record is unclear
8 and there is insufficient evidence to ascertain when the funds were received and therefore,
9 determined that the Hearing Officer was not clearly erroneous in his conclusion regarding
10 ER 1.3.
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12 In Count Two, the Commission determined that the Hearing Officer erred in failing
13 to find violations of SCR 41(c) (maintain respect due courts and judicial officers) and (g)
14 (abstain from all offensive personality). The Commission concluded that the Hearing
15 Officer's findings of fact and the record support a finding of these violations.
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17 In Count Three, the Commission determined that the Hearing Officer erred in failing
18 to find violations of ER 3.5(c) (conduct intended to disrupt a tribunal), 4.4 (respect for rights
19 of third persons), 8.4(d) (conduct prejudicial to the administration of justice), and SCR 41(g)
20 (offensive personality). The Hearing Officer concluded that Respondent's conduct in this
21 case was not a flagrant disrespect but rather an emotional exclamation. *See* Report, p. 5,
22 Conclusions of Law, footnote #4. The Commission disagrees and finds that the record
23 supports that in all three counts, Respondent engaged in offensive conduct and demonstrated
24 an overall lack of professionalism and self discipline in his conduct towards judges, court
25 personnel and opposing counsel. The record also reflects that Respondent was sanctioned for
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1 contempt for his use of abusive language in Count Three. Respondent subsequently
2 apologized and the judge withdrew the contempt charge

3 The Commission concluded that the State Bar proved these additional violations by
4 clear and convincing evidence and the Hearing Officer's facts as stated support the
5 conclusion that Respondent violated ERs 3.4, 4.4 and 8.4(d) and SCRs 41(c) and (g).
6 Respondent's conduct in these matters were offensive at a minimum and clearly
7 sanctionable. Respondent does not deny any of his actions and argues that he was merely
8 protecting his clients. Respondent stated during oral argument that he regrets that the word
9 "zealous" was removed from the *Preamble, A Lawyer's Responsibilities* Rule 42, Ariz. R. S.
10 Ct. (*Preamble*),² and acknowledged that if his conduct occurred under the new rules, it
11 would be considered an ethical violation. Respondent further stated that because of the
12 amendments he cannot now be as zealous as he once was in defending his clients.
13 Respondent considered his conduct under the former rules to be intemperate, inept and
14 involved the use of an "intensive," but that the remarks made were not ethical violations and
15 his conduct does not rise to the level of discipline that the State Bar seeks. *See* Commission
16 transcript, pp. 11-12 and pp. 21-22. Respondent further maintains that his use of intensives
17 is protected by the First Amendment.

18 The Commission has before it the question of what authority the Supreme Court has
19 over its members of the bar for the use of inappropriate verbal language; language that
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24 ² The former *Preamble* stated in part that "as an advocate, a lawyer zealously asserts the
25 client's position under the rules of the adversary system, and that a lawyer's responsibilities
26 as a representative of clients, an officer of the legal system and a public citizen are usually
27 harmonious. While it is a lawyer's duty when necessary, to challenge the rectitude of official
28 action, it is also a lawyer's duty to uphold the legal process. Thus, when an opposing party is
well represented, a lawyer can be a zealous advocate on behalf of a client and at the same
time assumes that justice is being done."

1 certainly is heard frequently in movies, television and other public settings with impunity.
2 The Commission believes it does have the authority to promote civility among its members
3 and to discipline them when they step outside the boundaries of professionalism.

4 As Commissioner Gutierrez [a lay member] noted to Respondent at oral argument:
5 "With your discipline [your license to practice] comes the equivalent responsibility."
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7 The Commission was not persuaded by Respondent's arguments and notes that in
8 these matters Respondent's transgressions arose while acting in the capacity of a lawyer.
9 Lawyers are held to a higher standard of professional conduct than the average citizen
10 because lawyers are officers of the court. The Commission determined that Respondent's
11 overall conduct was disparaging to judicial officers. It notes that the former *Preamble*
12 required that lawyers demonstrate respect for the legal system and for those who serve it,
13 including judges, other lawyers and public officials, that they uphold the legal process, and
14 that they be guided by personal conscience and the approbation of professional peers.
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16 Consequently, upon *de novo* review, the Commission determined that clear and
17 convincing evidence is present that Respondent violated in Count One, ERs 1.15(b) and (c)
18 and SCR 41(g); in Count Two, ERs 41(c) and (g); and in Count Three ERs 3.5(c) , 4.4,
19 8.4(d) and SCRs 41(c) and (g).

20 In determining the appropriate sanction, our Supreme Court considers the ABA
21 *Standards for Imposing Lawyer Sanctions* ("*Standards*") a suitable guideline. *In re Kaplan*,
22 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent
23 in utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In
24 imposing a sanction after a finding of misconduct, consideration is given to the duty
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1 violated, the lawyer's mental state, the actual or potential injury caused by the misconduct,
2 and the existence of aggravating and mitigating factors. *See Standard 3.0.*

3 The Commission concluded that the Hearing Officer erroneously applied *Standards*
4 6.24 and 7.4, because he considered Respondent's misconduct to be an isolated incident and
5 that admonition (informal reprimand in Arizona), was the presumptive sanction for
6 Respondent's particular misconduct. However, based on the finding of additional violations,
7 the Commission reviewed *Standards* 6.0, 6.13, 6.23, and 6.33 involving Violations of Duties
8 Owed to the Legal System, and 7.3, Violations of Duties Owed as a Professional, and
9 determined that censure is the presumptive sanction for Respondent's particular misconduct.
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11 *Standard 6.23 Abuse of the Legal Process* provides:

12 Reprimand (censure in Arizona) is generally appropriate when
13 a lawyer negligently fails to comply with court order or rule,
14 and causes injury to a client or other party, or causes
15 interference or potential interference with a legal proceeding.

16 *Standard 6.33* provides:

17 Reprimand (censure in Arizona) is generally appropriate when
18 a lawyer is negligent in determining whether it is improper to
19 engage in communication with an individual in the legal
20 system, and causes injury or potential injury to a party or
21 interference or potential interference with the outcome of the
22 legal proceeding.

23 *Standard 7.3* provides:

24 Reprimand (censure in Arizona) is generally appropriate when
25 a lawyer negligently engages in that is a violation of a duty
26 owed as a professional and causes injury or potential injury to
27 a client, the public, or the legal system.

28 The Commission, having concluded that censure is appropriate, reviewed *ABA*
STANDARDS 9.22 and 9.32, aggravating and mitigating factors. As a result, the Commission
finds *de novo* that the record supports aggravation factor 9.22(g) refusal to acknowledge

1 wrongfulness of misconduct. The Hearing Officer concluded that while Respondent does not
2 admit his conduct was wrongful, the wrongfulness of the conduct is not as clear as the State
3 Bar asserts. See Report, p. 6, Aggravating and Mitigating Factors, Footnote #5. The
4 Commission disagrees, as Respondent continues to assert that his conduct under the existing
5 rules were not ethical violations.

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7 Respondent continues to rely on the former *Preamble* to justify his misconduct in
8 that he was simply being a zealous advocate for his client. See Commission Transcript, pp.
9 19-20. In contrast to the former *Preamble*, the amended *Preamble*, effective December 1,
10 2003, now provides *in part* that:

11 [2] As an advocate, a lawyer asserts the client's position under
12 the rules of the adversary system.

13 [8] Thus, when an opposing party is well represented, a lawyer
14 can be a zealous advocate on behalf of a client and at the same
time assumes that justice is being done.

15 [9] These principles include the lawyer's obligation to protect
16 and pursue a client's legitimate interest, within the bounds of
17 the law, while acting honorably and maintaining a
18 professional, courteous and civil attitude towards all persons
involved in the legal system.

19 Perhaps the word "zealous" has since been removed from the *Preamble* because of the acts
20 of misguided lawyers who believed the term to be a carte blanche invitation to act without
21 discipline and self control.

22 While previously not reduced to writing, in general it has always been an unspoken
23 principle that within this professional calling, lawyers must at *all times* act honorably and
24 within the standard of conduct for their profession. The amended *Preamble* has expanded its
25 guidance on what is considered professional behavior.
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1 In fulfilling their professional calling lawyers should also be mindful of their
2 obligations and relationship to the legal system. It is unfortunate that some officers of the
3 court need specific instruction on how to act honorably and professionally. The *Preamble*
4 however, only serves to provide general and ethical guidance in observance of the rules.
5 Respondent undoubtedly could have used other means or methods to support his clients,
6 such as concluding the deposition.
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8 The Commission also determined that this instant case was not an isolated case of
9 improper conduct before a tribunal and Respondent not always tempering his zealousness, as
10 erroneously found by the Hearing Officer. *See* Report, p. 7-8. The record supports that
11 Respondent failed to exercise a sensitive professional and moral judgment and to abide by
12 the basic principles underlying the Rules of Professional Conduct.
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14 The Commission then considered the proportionality analysis offered for similar
15 misconduct. Although there is no specific case law in Arizona regarding what is deemed
16 offensive personality, the Hearing Officer found that Respondent's misconduct was less
17 egregious than those matters offered by the State Bar. The Commission disagreed and found
18 *Matter of Ronwin*, 139 Ariz. 576, 680 P.2d 107 (1983), as offered by the State Bar in their
19 Opening Brief, instructive.
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21 *Ronwin* involved the denial of application for admission to the bar because of a lack
22 of showing of mental fitness. The Supreme Court held that "epithets, verbal abuse,
23 unfounded accusations and the like emanating from counsel have no place in legal
24 proceedings." The Court further held that Ronwin's conduct demonstrated that he suffered
25 from a personality disorder and that his conduct exceeded the occasional anger or loss of self
26 control. The Court stated that Ronwin's conduct formed a pattern and appeared to be his
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1 normal reaction to personal and professional adversity. While there is certainly nothing in
2 the record of this case of any mental disorder or similar prior disciplinary offenses, in these
3 matters, the Respondent like Ronwin, failed to exercise restraint and self control.

4 The Commission also finds troubling the Hearing Officer's closing comments
5 regarding such conduct permeating the profession and that a close scrutiny of many lawyers
6 will unearth similar conduct. See Report, Discussion of Appropriate Sanction, pp. 7-8. If
7 such conduct is indeed pervasive in our profession, then it is time to send a message to our
8 colleagues that it must cease. In general, abusive and offensive conduct by lawyers should
9 not be tolerated, especially in a self-governing profession. As set forth in the former and
10 current *Preamble*, every lawyer is responsible for observing the Rules of Professional
11 Conduct and lawyers should aid in securing the observance of the rules by other lawyers.
12 Neglect of these responsibilities compromises the independence of the profession and the
13 public interest which it serves. Lawyers who encounter offensive behavior from other
14 lawyers have a duty to report such conduct to the State Bar. Lawyers are now required
15 yearly to take a minimum of three hours of continuing education in the area of professional
16 responsibility and should be acutely aware of their ethical obligations in this area. See Rule
17 45, Ariz. R. S. Ct. In future cases involving offensive and grossly improper conduct by a
18 lawyer, depending on the willfulness and seriousness of the violation, the sanction may be
19 even greater than the sanction recommended herein.
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23 Conclusion

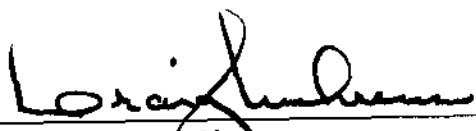
24 The purposes of discipline are to protect the public and deter similar conduct by
25 other lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986); instill public
26 confidence in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d, 352, 362
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(1994); and maintain the integrity of the legal system, *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).

Therefore, based on the findings and conclusions, the *Standards* and a proportionality analysis, the Commission recommends censure, one year of probation (MAP), and costs of these disciplinary proceedings.

RESPECTFULLY SUBMITTED this 16th day of August, 2004.



Craig B. Mehrens, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 16th day of August, 2004.

Copy of the foregoing mailed
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