BEFORE A HEARING OFFICER

OF THE SUPREME COURT OF ARIZONA

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

CARLY VAN DOX,

Respondent.

No. 04-1846

HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

"No good deed goes unpunished" is the moral of this unfortunate proceeding. The Respondent, a well respected lawyer, licensed to practice in two states and certified as a mediator in Florida, came to Arizona in 1997 and began selling real estate. In 2004, as a favor to a friend, she agreed to assist the sellers of a house who were about to participate in a private mediation and afraid to go it alone. Little did she know that recent legislation, designed in good part to protect the public from disbarred lawyers serving as document preparers, would entrap her in the "unauthorized practice of law."[1]

The State Bar wants me to recommend a censure. On the facts, the most severe discipline sought should have been an informal reprimand. However, because of the impact even this could have on Respondent's future livelihood, because the public certainly needs no protection from Respondent, and because of the unique facts of this case, I strongly recommend dismissal and diversion, even though Respondent is not a member of the State Bar.

A. PROCEDURAL HISTORY

The State Bar of Arizona brought a formal Complaint against Respondent, charging her with violating Rule 31, Arizona Rules of the Supreme Court; Rule 42, Arizona Rules of the Supreme Court, ERs 5.5 and 8.4(c) and (d); and Rule 53(d) and (f), Arizona Rules of the Supreme Court. The parties were unable to settle, and this matter went to hearing on September 20, 2005.

[1] I will use the initials "UPL," awkward as they are.

B. FINDINGS OF FACT

Underlying Facts – Respondent's Background

1. Respondent received her law degree from George Mason University and was admitted to practice in Virginia in 1982. She eventually focused on real estate law and was a sole practitioner in Alexandria, Virginia from 1983 to 1990. She served as the President of the Alexandria Bar Association from 1989 to 1990.

2. In 1991, Respondent married and moved to Florida, where she took and passed the Florida Bar. She practiced first in the worker's compensation area and later in real estate. Respondent was also a certified mediator in Florida, one of the few states – if not the only one – to have a certification program for mediators. She divorced in 1992, and moved to Arizona in 1997.

3. After briefly considering resuming her law practice, Respondent began working as a licensed realtor. She has sold new homes since coming here. She has no intention of applying for admission to the Arizona Bar.

4. Other than the complaint in this matter, Respondent has never had a bar complaint in her 15 years of practice. Aside from the incident giving rise to this complaint, Respondent has never advised or otherwise assisted anyone in a legal capacity since her move to Arizona.

5. If Respondent receives any formal discipline as a result of this complaint, she will be required to disclose that discipline to the State of Arizona Department of Real Estate. This could result in Respondent losing her real estate license. Moreover, the Florida Bar has initiated reciprocal discipline pending the disposition of this matter, and the Virginia Bar could do the same.

Respondent's Medical Condition

6. In October 2002, Respondent suffered a stroke. She underwent rehabilitation, and the physical symptoms of the stroke are now minimal.

7. However, one of the lasting "residual deficits" of the stroke affects her memory and concentration. She suffers lapses in concentration, her attention to detail has diminished, and her ability to follow-through on matters has decreased. This is due at least in part to "significant cardiovascular plaque" that reduces blood flow.

8. Respondent's close personal friends, who knew her before and have known her since the stroke, have observed these changes in her behavior. Two of these testified at the hearing, including former Superior Court Judge Judy Joseph.

9. Her treating physician notes that "she could be suffering lapses in concentration since the time of the incident."

The Zuschlag Matter and Mediation

10. In August of 2004, a real estate dispute arose between Tammy and Jay Zuschlag (as sellers of their house), and Todd Child and Edward Williams (the buyers). The dispute was subject to mandatory mediation as the first step in the dispute resolution process.

11. The buyers were attempting to rescind their purchase of the Zuschlags house based on alleged non-disclosure of what they considered unbearable freeway noise coming from U.S. 60, a freeway adjacent to the house.

12. In September of 2004, a co-worker of the Zuschlags recommended Respondent for purposes of representing them in the upcoming mediation. The co-worker's wife was the realtor representing the Zuschlags. The co-worker knew Respondent had practiced law for many years and had some expertise in real estate law.

13. Respondent did not solicit the Zuschlag's business, and only agreed to help as a favor to the co-worker.

14. In October of 2004, Respondent spoke with Tammy Zuschlag. Respondent immediately explained that she was not licensed in Arizona, although licensed in other states, and that if the matter proceeded beyond mediation they would need to hire a

licensed Arizona attorney.

> Q: (Bar Counsel) Did she tell you that she was not an Arizona attorney?
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> A: (Tammy Zuschlag) She did. She told us that she was only licensed in Florida, but she told us her background in mediation, and she told us up front that if it went any further than the mediation, then we would have to seek other help, that she couldn't go any further than that.

Tr. (T references are to the transcript of the hearing) at 83, lines 11-17.

15. The Zuschlags nonetheless were eager to have Respondent's assistance. They knew the buyers had a lawyer, and wanted someone familiar with the mediation process to negotiate on their behalf as well. Respondent and the Zuschlags discussed the facts of the case.

16. After hearing the basic facts of the dispute, Respondent shared her informal opinion with the Zuschlags that she thought the buyer's claims were without merit.[2]

17. The Zuschlags signed a retainer agreement in which they agreed to pay Respondent $1,000. The document was a printout of a form retainer that Respondent had used in Florida.

18. The Zuschlags understood the scope of representation was strictly limited to the mediation. The Zuschlags thought of the agreement "more as a receipt."

19. Respondent believed that her participation in a non-court-ordered, private mediation did not present an ethical problem, or she would not have agreed to participate.

> Q: (Mr. Harrison) When you agreed to do this, did you have an opinion about whether it was proper or improper?

[2] The property's backyard abuts U.S. 60, a fact that is obvious to anyone who visits the house. Importantly, the sellers disclosed "freeway noise" on their Property Disclosure Statement. Moreover, the buyers had the property inspected and the buyers admitted visiting it "on several occasions" at "many times of day." However, the buyers claimed that at 4 a.m., the traffic noise was "unbearable in every room in the house."

A: (Respondent) Yes. I had an opinion that it would be permissible to do it.

Q: What was the basis for that opinion?

A: It was based upon the fact that I had done so many mediations earlier. The training that I received in Florida was training that involved – as I stated earlier, the alternative dispute resolution process was designed for situations where there's no court action, and people want a friendly, economical, quick way to resolve disputes. And since this was going to be a situation that was not court ordered, there was nobody to go to to ask permission to appear, because it wasn't court ordered, it seemed to me it would be perfectly okay to go ahead.

Tr. at 162, lines 1-15.

20. The mediation was held on October 12, 2004. It lasted approximately five hours. Respondent negotiated on behalf of the Zuschlags. The buyers wanted rescission and money damages. The mediation ultimately ended at an impasse.

21. During the mediation, the buyer's attorney, Jonathan Dessaules, learned by calling the State Bar that Respondent was not licensed in Arizona. He brought this to the attention of the mediator, Amy Lieberman, in part because he was unsure whether Respondent's participation presented an ethical issue.

Q: (Bar Counsel) At the outset of the mediation, one of the stipulated facts is that you didn't tell the buyers or the mediator or Mr. Dessaules that you were not an attorney in Arizona. Why didn't you tell the buyers that you were not an Arizona attorney?

A: (Respondent) Because it was a private mediation, and I didn't think it was necessary to even be an attorney in any jurisdiction to participate.

Q: But you did tell them at the mediation that you were an attorney; is that correct?

A: Yes, I am an attorney.

Tr. at 27, lines 15-25.

22. Ms. Lieberman asked Respondent about her status. Respondent readily acknowledged that she was licensed in Florida but not Arizona. Ms. Lieberman did not feel that Respondent was "hiding anything" and felt she answered honestly without "hesitancy." (Tr. at 132: 15-21). Ms. Lieberman was not certain whether Respondent's participation constituted UPL or whether Ms. Lieberman might be aiding and abetting UPL by continuing the mediation in view of Respondent's non-licensed status.

23. Ms. Lieberman, with Respondent present, then called Mark Lassiter, an Arizona attorney Ms. Lieberman knew to be knowledgeable concerning UPL issues. Mr. Lassiter had, shortly before the mediation, given a seminar which included UPL issues as they related to alternative dispute resolution.[3]

24. After that conversation, in which Ms. Lieberman related the facts to Mr. Lassiter, Ms. Lieberman was sufficiently assured that Respondent's participation was not problematic that she decided to continue the mediation.

25. Specifically, the communications with Mr. Lassiter led Ms. Lieberman to believe that private "mediation was different" than court proceedings or arbitration, and that "new rules" would be effective shortly that would "totally remove this as an issue." (Tr. at 124: 21 – 125: 2). Ms. Lieberman also reviewed the ethical rules, as well as a "bunch of stuff, anything I could get my hands on," including her ADR notebook and an informal ethics opinion that Mr. Lassiter faxed to Ms. Lieberman. (Tr. at 125: 22 – 126: 24, Exhibit 28). After her review of these references, Ms. Lieberman believed she could proceed with the mediation with Respondent's participation. (Tr. at 124: 5-9; 166: 13-20).

[3] Coincidentally, Mark Lassiter and I participated in a meeting with a State Bar representative and others to discuss UPL issues prior to this seminar. As luck would have it, I saved three e-mails from Mark that he sent me at the time. They are attached as Exhibit 1, along with an outline of the program and the informal opinion he sent Amy Lieberman which is discussed below. I did not remember this meeting or these e-mails until writing this Report.

26. Opposing counsel was made aware of Ms. Lieberman's efforts and did not object to Respondent's continued participation. (Tr. at 44: 24 – 45: 6; 137: 6-8). After Respondent's status came to light, the mediation continued for over two hours.

27. Respondent took the matter seriously, and was concerned enough at the time to seek advice from her good friend, retired Superior Court Judge Judy Joseph.

> A: (Judy Joseph) She discussed them [issues concerning the mediation] with me, I believe, on October 12th, when the mediation occurred. If that's the right date, I'm not sure. October 12th.
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> Q: (Bar Counsel) What did you discuss at that time?
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> A: She called me from leaving the mediation and she told me that she was in a mediation, and she told me some of the facts of what had occurred, and she asked me if she was – she was puzzled because she thought that people were very upset, and she felt that she had done, you know, she was appropriate in her actions. And she asked me what I knew about this, and I told her that I knew that the UPL laws were in flux. I did use UPL. I also thought in my mind, but I did not tell her, that there was a multi-jurisdictional practice act. And I knew that she was admitted into other jurisdictions, and I told her I was not clear, that there were a number of changes, but I was not clear on what those changes would entail. And I asked her what had happened, and she told me that she was in this mediation and the mediator had called someone from the State Bar, or someone in some capacity, who told the mediator it was fine for her to proceed, and that they would continue with her in that capacity.
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> And I know Amy Lieberman, not personally, but I knew her from reputation. I said, well, if Amy called someone and got some type of an opinion, that's probably what you need to rely upon, because I don't have all of these things exactly clear in my brain, because there had been a lot of changes. And she was, you know, upset because she didn't want to do anything wrong or do anything that she shouldn't do. And she was asking me if she could rely on this mediator's opinion, and I said that I thought she could.

Tr. at 151, line 6 to 152, line 12.

28. Opposing counsel, the mediator, and the Zuschlags believe and acknowledged that the outcome of the mediation would have been the same had Respondent been licensed in Arizona. The Zuschlags never received an acceptance offer during the entire process.

29. The buyers stated that they would not have answered Respondent's questions had they known she was not licensed in Arizona, and claimed that matters became more "polarized" after her non-licensed status came to light. The buyers' attorney, however, testified that the mediation did not progress productively past the first exchange, which occurred before Respondent's status was known to the buyers, their counsel and the mediator. The buyers appear to want to blame everyone but themselves for buying a house next to a freeway.

30. Mr. and Mrs. Zuschlag were pleased with Respondent's representation at the mediation and have never lodged a complaint, formal or otherwise, regarding Respondent. They have never requested that she return the $1,000.

31. The buyers filed a complaint with the State Bar on October 28, 2004. The State Bar wrote to Respondent in December 2004 requesting a response. Respondent did not respond.

32. Respondent had suffered a stroke in October 2002, one of the continuing symptoms of which is a diminished memory and ability to concentrate. Respondent attributes her failure to respond to the State Bar's initial letters in part to these symptoms.

33. In December of 2004, Respondent had the unfortunate habit of letting mail pile up in her mailbox, to the point that the mailman could not get the mail inside. In fact, around that time, Respondent ignored payment demands from her homeowner's association, which lead to a judgment against her.

34. In March of 2005, Respondent received a second letter to which she did not respond. Sometime after that, Respondent learned that the sellers/complainants had sold the subject property and had made over $50,000 profit.[4]

35. Aware of that profit, Respondent believed the buyers had suffered no damage and erroneously assumed that their complaint would be "dropped."

Mitigation

36. Respondent graduated from law school in 1982 and was admitted to practice in Virginia in 1982. While practicing in Virginia, she was the president of the Alexandria Bar Association, and was appointed to trusteeships and guardianships by local judges. Respondent enjoyed an excellent reputation within the legal community in Virginia and Florida and now enjoys one within the Arizona real estate community.

37. Respondent has no prior disciplinary history.

38. After receiving the formal complaint and learning that her assumption about the status of the matter was wrong, Respondent was cooperative and forthcoming throughout the proceedings.

39. Respondent did not have a dishonest motive.

40. Although the Zuschlags have not requested a refund, Respondent is willing to refund the $1,000 they paid her for her assistance in the mediation. I find there is no reason for Respondent to return the money.

41. Respondent is both embarrassed and remorseful regarding her conduct. During the Hearing, she testified openly and candidly about her mistake. She was forthright throughout, and was a compelling witness.

[4] The buyers bought the home for $245,000 in July 2004, and sold it for $289,900 in January of 2005. Moreover, one of the buyers has a realtor, and made a commission of $8,350.

C. CONCLUSIONS OF LAW

1. I find that there is clear and convincing evidence Respondent committed a violation of ER 5.5 and Supreme Court Rules 31 and 53(f). I find that the State Bar failed to prove by clear and convincing evidence that Respondent violated ERs 8.4(c) and (d), and Rule 53(f).

ER 5.5 and Supreme Court Rule 51

2. Respondent admitted in her Answer that her participation in the mediation constituted UPL.

3. At the time of the mediation, Respondent believed her participation did not constitute UPL because it was a private mediation that was non-binding. Her belief, though ultimately erroneous, was bolstered by the investigation conducted by the mediator, who obtained a second opinion and determined Respondent could complete the mediation. Respondent's opposing counsel did not object to her continued participation.

4. Most of the parties involved in the mediation, including the mediator, Respondent, her clients, and opposing counsel believed that that Respondent's non-licensed status did not affect the outcome. In other words, the result would have been the same if Respondent had been an Arizona lawyer.

ER. 8.4 (c)

5. To commit a violation of 8.4(c), an attorney must have a "purpose to deceive." ER 1.0(d). E.R. 8.4(c) requires dishonesty, fraud, deceit or misrepresentation, *not just negligence*." *In re Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995) (emphasis added).

6. The State Bar contends that Respondent participated in the mediation knowing this constituted UPL. Nothing in the record supports this allegation.

7. Instead, the record demonstrates that every lawyer at the mediation (and one immediately afterward) was unsure whether Respondent's participation was

problematic under the ethical rules, and that Respondent herself believed that a private mediation, because it was not court-ordered or annexed, did not constitute UPL. Moreover, the mediator conducted an investigation and assured herself the mediation could continue with Respondent's participation.

8. The record shows that Respondent's conduct was at most negligent. She had an honest, good faith belief that her participation did not constitute UPL. Negligence is not sufficient to prove a violation of E.R. 8.4(c). *In re Owens*, 182 Ariz. at 125, 893 P.2d at 1288. The State Bar has failed to prove a violation of E.R.s 8.4 (c) by clear and convincing evidence.

ER 8.4(d)

9. The State Bar contends that Respondent engaged in conduct prejudicial to the administration of justice in violation of E.R. 8.4(d).

10. According to the Annotated Model Rules of Professional Conduct, ER 8.4(d) proscribes disrespect for the court, abusive or uncivil behavior towards opposing counsel or parties, sexual misconduct, abuse of public office, and deceitful conduct. *See* Annotated Model Rules 615-17 (5th ed. 2003). Although intent is not an explicit element of ER 8.4(d), plainly something more than mere negligence is required to violate this rule.

11. There is no evidence that Respondent was disrespectful, uncivil, or abusive to any of the parties involved in the mediation. Her conduct was not deceitful, and other than one complainant's statement that he would not have answered questions posed by Respondent if he had known she was not an Arizona attorney, all parties at the mediation agree the result would have been the same whether or not Respondent was licensed in Arizona.

12. Respondent did not act with an improper motive or bad faith. She did not act pursuant to a calculated plan. She did not harm her client or her client's interests. She did not engage in any self-dealing and did not act dishonestly.

13. The State Bar has failed to prove a violation of E.R.s 8.4 (c) by clear and convincing evidence.

Supreme Court Rule 53(d)

14. The State Bar contends that Respondent violated Rule 53(d). That Rule proscribes evading service or refusing to cooperate with officials of the State Bar.

15. While the record shows Respondent did not respond to the State Bar's letters, she never evaded service and there is evidence which indicates there is some medical basis for her failure to respond to those letters. Moreover, since receiving the complaint, Respondent has cooperated fully.

16. The State Bar has failed to prove by clear and convincing evidence that Respondent violated Rule 53(d).

Supreme Court Rule 53(f)

17. Respondent admitted violating Rule 53(f) by failing to respond promptly to the State Bar's inquiries.

18. Relevant to her failure to respond to the letters are the residual symptoms of her stroke, including a reduced ability to concentrate and attend to details.

19. As to the second letter to the State Bar, Respondent did not respond because she learned that the complainants had sold the property at a profit, and erroneously assumed the complaint would be dropped in the absence of any monetary harm.

20. The State Bar has failed to prove by clear and convincing evidence that Respondent's failure to respond to the State Bar's letter was in bad faith or meant to obstruct the disciplinary process.

D. PROPORTIONALITY ANALYSIS

1. The objective of discipline proceedings is not to punish the lawyer, but to deter future misconduct and protect the public, the profession and the administration of

justice.[5] *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004). In imposing discipline, it is appropriate to consider the facts of the case, the ABA *Standards for Imposing Lawyer Sanctions* ("Standards"), and discipline imposed in similar cases.

2. In imposing a sanction after a finding of misconduct, it is appropriate to consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors. ABA Standard 3.0.

3. Respondent violated ER 5.5 and Rule 31 (unauthorized practice of law) as well as Rule 53(f) (failure to respond promptly to an inquiry from the State Bar). Therefore, the appropriate ABA Standards to consider are Standards 7.4 (violations of other duties owed as a professional), 9.22 (aggravating factors) and 9.32 (mitigating factors).

(a) The Duty Violated and ABA Standard 7.4

4. Standard 7.4 provides that "admonition [informal reprimand in Arizona] is generally appropriate when a lawyer engages in an isolated instance 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."

5. Under these circumstances, Standard 7.4 is applicable. The evidence establishes that Respondent's conduct in participating in the mediation was the result of negligence. Respondent did not violate any duties owed to her client, and caused "little or no" injury by her conduct. Respondent's clients were pleased with her representation. Respondent disclosed her status to her clients before the mediation and to the mediator as

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[5] In addition to serving as a Hearing Officer on lawyer discipline, I have served as a Hearing Officer in two document preparer licensing matters under the new rules regarding licenses for document preparers. This regulation is directly related to UPL issues. One of the document preparers was a disbarred lawyer, and the other was no better. This experience further supports my belief that the public does not need protecting from this Respondent.

soon as her status became an issue. After investigating the matter, the mediator and opposing counsel did not object to Respondent's continued participation. Moreover, Respondent's clients, the mediator, and opposing counsel did not believe her non-licensed status in any way affected the process. Finally, the complainants were able to sell their property, a property that increased twenty percent in value in around six months. Thus there was little or no actual injury.

(b) Aggravating Factors

6. I find that the record supports no aggravating factor.

(c) Mitigating Factors

7. I find that the record supports five mitigating factors: 9.32(a) (absence of prior disciplinary record); 9.32(b) (absence of a dishonest or selfish motive); 9.32(e) (cooperative attitude towards proceedings); 9.32 (g) (character or reputation); 9.32(l) (remorse).

8. Respondent is willing to return the $1,000 to the Zuschlags.

9. Respondent may lose her real estate license if formal discipline is imposed in this proceeding. Respondent has devoted herself exclusively to real estate since 1997.

10. Respondent is likely to experience the expense and consequences of proceedings in Florida and Virginia if formal discipline is imposed.

(d) Disciplinary Cases

11. Discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *Matter of Rivkind*, 164 Ariz. 154, 159, 791 P.2d 1037, 1042 (1990); *Matter of Wines*, 135 Ariz. 207, 660 P.2d 458 (1983).

12. Respondent's violation was based on an honest misunderstanding of what was required of her under the ethical rules, and resulted in no harm to her client. Indeed,

her underlying conduct in the mediation violated no ethical rules other than UPL.[6] Respondent has no aggravating factors and several mitigating factors. Respondent's disciplinary record is unblemished.

13. This distinguishes Respondent's situation from most published Arizona disciplinary decisions addressing UPL. While those decisions usually resulted in a sanction of censure or greater, each of them, without exception, involved lawyers who engaged not only in UPL, but who also either engaged in (1) a pattern of UPL or (2) underlying conduct that violated other ethical rules, ranging from the duty of competency to the duties of diligence, communication, and honesty. *See, e.g. In re Creasy*, 198 Ariz. 539, 12 P.3d 214 (2000) (holding that disbarred attorney's examination of treating physician, on behalf of insured motorist in private arbitration of insured's claim against insurer under underinsured motorist insurance policy, was the "practice of law" in violation of disbarment order); *Matter of Brown*, 175 Ariz. 134, 854 P.2d 768 (1993) (holding that pattern of misconduct with multiple offenses, mitigated by lack of selfish motive, warranted six-month suspension); *Matter of Taylor* 180 Ariz. 290, 883 P.2d 1046 (1994) (suspending attorney for three years for practicing law while suspended, as well as failing to act with diligence, failing to maintain adequate communication, and failing to respond to inquiries of State Bar); *see also* Respondent's Hearing Memorandum, at Tab 2 (citing cases). The conduct involved in the cited cases is clearly distinguishable from Respondent's conduct and thus not pertinent to a proportionality analysis in this case.

14. *In re Winiarski* is probably the most analogous Arizona case. Comm. No. 98-2052 (filed May 15, 2000). The Disciplinary Commission imposed an informal reprimand on Winiarski, an attorney licensed in Maine, but not in Arizona, who represented himself before the Registrar of Contractors "in pursuit of corporate objectives

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[6] The amendment to Rule 31's definition of "practice of law" adding mediation to that definition was effective July 1, 2003. Rule 31 has been amended eight times in the last two years.

of his unincorporated business." *Id.* at 3. The Commission applied Standard 7.4 because the Respondent's conduct was negligent and caused no actual harm. Also significant to the Commission was that Winiarski was told by office staff of the Registrar's office that one did not need to be an Arizona attorney to appear before the Registrar. Importantly, the Commission considered other UPL cases imposing censure, but declined to impose censure on Winiarski because "the conduct in [those] cases [was] more extensive than that of this Respondent." *Id.* at 4. This fact, "coupled with the existence of several mitigating factors," justified the imposition of a lesser sanction. Like Winiarski, Respondent participated in an isolated event after being informed that her participation was proper, she was negligent in her belief that her participation was in fact proper, and her participation did not cause any harm.

15. In *In re Stevens*, 178 Ariz. 261, 872 P.2d 655 (1994), the Disciplinary Commission formally censured Stevens for practicing law while suspended and noted that "an informal reprimand is an inadequate sanction for any conduct involving the unauthorized practice of law, regardless of the circumstances." 178 Ariz. at 263, 872 P.2d at 667. However, other disciplinary cases have noted that while the cited language in *Stevens* may be appropriate "when a lawyer who is suspended or disbarred practices law," that certain cases of UPL are "simply different." *Winiarski*, Comm. No. 98-2052 at 9. Respondent's conduct is different from Stevens.' Stevens made a court appearance and prepared a post-dissolution decree knowing his license was suspended. *Stevens*, 178 Ariz. at 262, 872 P.2d at 666. In contrast, Respondent never appeared in court but rather participated in an isolated instance private, voluntary mediation, *not knowing* her conduct violated the UPL rules. Moreover, she participated under circumstances in which the representations and conduct by the mediator, and opposing counsel, reasonably led her to believe her conduct was appropriate. The sweeping, unqualified language of *Stevens* is contrary to the underlying purposes of both the UPL rule and lawyer sanctions. The

Standards for Imposing Lawyer Sanctions both distinguish between different levels of culpability and include mitigating factors, demonstrating that the "circumstances" *matter* in disciplinary cases. This supports the proposition articulated by the Supreme Court that lawyer discipline must cases must be decided on their own facts. *Matter of Rivkind*, 164 Ariz. at 159, 791 P.2d at 1042 (noting that "we must tailor the discipline in each case to its facts").

16. Informal Reprimand No. 99-11-10-2 involved a lawyer, not admitted in Arizona, who filed a Response to a Complaint for Divorce and a Cross-Petition. An informal reprimand was imposed. This informal reprimand was discussed in *In re Sodaro* but no further information was provided. *See Sodaro*, No. SB-02-0111-D (filed August 1, 2002) (noting the facts of Informal Reprimand No. 99-11-10-2 involved an "isolated, one-time incident" and contrasting that conduct with that of Respondent Sodaro).

17. In *In re Richardson*, Comm. Nos. 00-1877, 2378 (filed October 3, 2002), the Disciplinary Commission imposed a formal censure, where Respondent, not licensed in any state to practice law, represented clients on patent applications and bankruptcies, and engaged in a pattern of misconduct as to three clients, including violations of ERs 1.2, 1.3, 1.4, 1.15, 1.16, 4.1, and 8.4.

18. In *In re Sodaro*, No. SB-02-0111-D (filed August 1, 2002), the Commission imposed censure where Respondent, not licensed to practice law in any state, represented three clients and sent numerous letters representing herself as an attorney. The commission found this to be conduct more analogous to the pattern of conduct in *Menor*, *infra*, than the isolated incident in *Winiarski*, *supra*.

19. In *In re Menor*, Comm. No. 95-1601 (filed April 8, 1997), the Commission imposed a censure. Menor was a member of the Wisconsin State Bar but not the Arizona State Bar, and represented three clients in separate matters, filing numerous pleadings and sending correspondence to opposing parties and counsel in the process. Despite the

pattern of representing clients and the filing of documents in court, the Commission found Menor's conduct was the product of negligence.

20. In conclusion, I find this case more analogous to *Winiarski* than to cases in which the Respondent's conduct was part of a pattern (*Menor*, *Sodaro*, *Brown*, *supra*), cases in which the respondent's conduct violated other ethical duties owed to clients (*Taylor*, *Richardson*, *supra*), or cases in which Respondent's conduct was a knowing violation (*Stevens*, *supra*). Moreover, the cases justify a finding that Respondent's conduct was indeed an isolated event that was the product of negligence and which did not cause damage to anyone other than Respondent herself. (*Winiarski*, *Menor*, *supra*).

E. RECOMMENDATION

1. The State Bar has proven by clear and convincing evidence that Respondent violated ERs 5.5 and Rules 31 and 53(f).

2. The State Bar has not proven by clear and convincing evidence that Respondent violated Rule 53(d) and ERs 8.4(c) and (d).

3. On the unique facts of this case, diversion is the appropriate remedy. The purpose of Arizona's Diversion Program is to rehabilitate, not punish, lawyers like Respondent, who have engaged in an isolated instance of negligence. Ariz.R.S.Ct. 52. Diversion is to be liberally applied to effectuate its purposes at any stage of a disciplinary proceeding, and is intended as an alternative to discipline where the problems are attributable to "law office management, impairment, or *negligent conduct.*" Rule 52(a)(11), Rules of the Supreme Court and Notes accompanying the 1991 and 1995 amendments to the rule; Guidelines/Regulations for Implementation of the Diversion Program, State Bar of Arizona ("Guidelines"), Sec. III(A)(B)(5)(6) and (7) (emphasis added). Diversion "will be considered in cases where, assuming allegations of ethical violations against the respondent lawyer are true, the sanction would probably be less than suspension." (Guidelines, Sec. I (Notes)).

4. The Guidelines further state that diversion is available at all stages of disciplinary proceedings, and a hearing officer may recommend it. (Guidelines, Sec. II(A)). The presence of one or more mitigating factors may qualify an otherwise disqualified respondent for diversion, and the "*hope is that doubts will be resolved in favor of diversion.*" (Guidelines, Sec. II(C); III(7)(Notes, 5) (emphasis added)).

5. In deciding whether diversion is appropriate, I have considered "the nature of the violation, the duty involved, whether the respondent was involved in self-dealing or breach of fiduciary duty, whether harm resulted, and the absence or presence of mitigating factors." (Guidelines, Sec. III(B)(1)).

6. Respondent's violations stemmed from negligence and as such, the sanction would be less than suspension. Respondent's negligence related to a confusing legal issue concerning what constitutes the unauthorized "practice of law," an issue that has been in considerable flux, and one about which the lawyers who participated in the mediation were themselves uncertain. Respondent disclosed her status to her clients, and did not harm her clients or violate any duty owed to them. Several mitigating factors are present, whereas no aggravating factors are present.

7. As was demonstrated at the hearing, neither the public nor other lawyers will benefit from whatever lessons might be gleaned from Respondent's mistake in representing the Zuschlags in a private mediation. Respondent's violations were the result of negligence relating to a legal issue about which Respondent is now knowledgeable. There is no risk Respondent will make the same mistake twice.

F. DIVERSION IS AVAILABLE EVEN THOUGH RESPONDENT IS NOT A MEMBER OF THE STATE BAR

The State Bar asserts that I am without power to recommend diversion because Respondent is not a member of the Arizona State Bar. No Arizona authority stands for this anomalous proposition, one that suggests the State Bar can *censure* Respondent, but

not refer her to diversion, a remedy *lesser than and different from* the sanction of censure. Contrary to the State Bar's contention, the Rules of the Supreme Court provide that diversion is available to "respondents," not just to "members."

Rule 55 governs diversion, and states that "Bar Counsel may recommend diversion . . . if bar counsel concludes that *the lawyer* committed professional misconduct" that was not the result of any willful conduct, and the cause of the misconduct can be remedied by "alternative programs or mechanisms." S. Ct. Rule 55(b). "Lawyer" is not defined anywhere in Chapter V, governing "regulation of the practice of law." Nonetheless, Respondent is clearly a "lawyer," being duly admitted in both Virginia and Florida. Moreover, the term "respondent," unlike the term "lawyer," *is* defined in the Rules. It is this term, not "member" or "non-member" (also defined terms), that is used in other rules relating to diversion.

Rule 32(b) defines the terms used in Chapter V governing the regulation of the practice of law. That rule states that its definitions "shall apply to the interpretation these rules relating to admission, discipline, disability and reinstatement of lawyers." R. Sup. Ct. 32(b) (emphasis added). "Respondent" is defined as "*any person subject to the jurisdiction of the court against whom a charge is received* for violation of these rules." R. Sup. Ct. 32(b)(8) (emphasis added). A respondent, then, is any individual subject to the jurisdiction of the Arizona Supreme Court against whom a disciplinary charge has been brought. Respondent is clearly a respondent.

Rule 52(b) governs the "powers and duties of bar counsel" and states that among these powers is the power to "monitor and supervise *respondents* during a probationary or *diversionary* term, report material violations of the terms of . . . *diversion* to the imposing entity, and prepare and forward a report to the imposing entity regarding *respondent's* completion or non-completion of the imposed terms." R. Sup. Ct 52(b)(6) (emphasis added). This rule plainly contemplates that "respondents," not just "members," can be

subject to diversion, a result bolstered by the fact that Rule 32(b) defines the additional terms "members" and "non-members," but the drafters of Rule 52(b)(6) chose to utilize the term "respondent." This evinces an intent that diversion be available to respondents. Where the legislature has specifically used one term in a certain place within a statutory scheme, but excluded the term in another place, courts will not read that term into the section from which it is excluded. *See Ariz. Bd. of Regents v. State ex rel. State of Ariz. Pub. Safety Retirement Fund*, 160 Ariz. 150, 771 P.2d 880 (App. 1989). The only terms used in those rules addressing diversion are either the term "lawyer," an undefined but indisputably broad term which clearly includes Respondent, or "respondent," an expressly defined term that also includes Respondent.

The State Bar's single citation of "authority" is one sentence from the Guidelines for Diversion.[7] However, the Guidelines are simply that – Guidelines, not controlling authority. In contrast, the Rules of the Supreme Court governing the regulation of the practice of law use the term "respondent" (Rule 52(b)) or "lawyer" (Rule 55) in reference to diversion, *not* "member." The Rules are the controlling authority on this issue.

Therefore, after consideration of the facts, application of the Standards, including aggravating and mitigating factors, and a proportionality analysis, I recommend that the complaint be dismissed and the matter be remanded to the probable cause panelist with instructions to vacate the probable cause order and refer the matter for diversion.

[7] The Guidelines provide at Section I. The Purpose of the Diversion Program, pages 1-2: "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** through the operation of the following sub-goals: . . ." (emphasis added).

DATED this 2nd day of November, 2005.

Richard N. Goldsmith
Hearing Officer, 7I

ORIGINAL of the foregoing has been filed this 2nd day of November, 2005, with:

Discipline Clerk of the
Supreme Court of Arizona
Certification & Licensing Division
1501 West Washington, Suite 104
Phoenix, AZ 85007-3329

COPY of the foregoing ~~e-mailed and~~ hw mailed this 2nd day of November, 2005, to:

Mark I. Harrison, Bar No. 001226
Sara Southern, Bar No. 022706
Osborn Maledon, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, Arizona 85012

Denise K. Tomaiko, Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

PWilliams

EXHIBIT 1

Goldsmith, Richard

From: Mark Lassiter [mlassiter@bfklaw.com]
Sent: Friday, June 18, 2004 9:05 AM
To: Richard N. Goldsmith
Subject: FW: 2004 AZ Bar 'Private Arbitration Update' CLE Program Outline (OUTLINE2.DOC;1)

Attachments: OUTLINE2.doc; ARBCASES.pdf; Bob Benson ADR Summary.pdf


OUTLINE2.doc (37 KB)


ARBCASES.pdf (209 KB)


Bob Benson ADR Summary.pdf (91...

Rich,

Here are the outlines.

-----Original Message-----
From: Mark Lassiter
Sent: Thursday, May 27, 2004 2:55 PM
To: 'sharon.shively@sackstierney.com'; 'hcoleman@adelphia.net'; 'natalie.mauvais@staff.azbar.org'
Cc: Rayel Papke
Subject: 2004 AZ Bar 'Private Arbitration Update' CLE Program Outline (OUTLINE2.DOC;1)
Importance: High

All,

I'm attaching the DRAFT Outline in the above matter, which Sharon and I worked out today. Although we originally thought that the program was going to last 4 hours, apparently it will only last three hours. Hence, I've shortened the period for us to talk about certain topics. Most of the program will now be devoted to a review of various arbitration cases.

I'm also attaching my updated summary of Arizona Arbitration Cases and a very helpful summary of other recent arbitration cases that was prepared by AAA arbitrator Robert Benson of Holland & Hart in Denver. I am in the process of trying to secure his permission to incorporate this into our CLE program materials. However, in the interim it is helpful for us to select certain 'Hot Cases' to discuss. Harold and Sharon, please review Mr. Benson's summary of recent arbitration cases and select those that you think worthy of discussion. (We will NOT have time to discuss them all.) At a minimum we should include U.S. Supreme Court and 9th Circuit cases. Also, let me know which ones you'd like to discuss, as we will all be doing the 'case summary' portions of the outline together.

Harold and Natalie, please review the Outline and offer your comments on its substance.

Harold, I'm particularly interested in how you might 'flesh out' and further develop the subject of the recent developments to the AAA's Commercial and Construction Rules. The only one I could immediately think of was the rule allowing 'Summary Dispositions' under the AAA's 7/2003 Construction Rules. Are there other, significant rule changes that you can think of? Please advise.

Natalie, does the proposed outline seem responsive to the way that the program was advertised? What is the cut-off date for submitting our program materials? Please advise.

By copy of this e-mail to my assistant, Rayel, I ask that she set a telephone conference call with Harold, Sharon and me the week of June 7th to finalize the outline and our respective tasks and case summaries for the program. Thanks!

Sincerely,

Mark E. Lassiter, Esq.
Barnes, Lassiter & Killoughey, P.L.C.
1423 S. Higley Road, Suite 114

Mesa, AZ 85206-3449
Tel: 480-218-4455
Fax: 480-218-4450
E-Fax: 586-314-2935
E-mail: mlassiter@biklaw.com
<<OUTLINE2.doc>> <<ARBCASES.pdf>> <<Bob Benson ADR Summary.pdf>>

Goldsmith, Richard

From: Mark Lassiter [mlassiter@blklaw.com]
Sent: Friday, July 02, 2004 12:52 PM
To: MooreK@adr.org; Richard N. Goldsmith; mede8@msn.com; phigdon@perkinscoie.com; tierney@sackstierney.com; frances.johansen@staff.azbar.org
Cc: hcoleman@adelphia.net; tuchmanne@adr.org; ska@hs-law.com; tkleinschmidt@lsazlaw.com; Bruce@mlp-law.com; brucemeyerson@msn.com; sharon.shively@sackstierney.com
Subject: Mark Lassiter's Scheduling and Procedure Order in AAA Arbitration Cases (w/ language for 'Out of State Attorneys' needing pro hac vice admission)

Attachments: 00000048.dot; ARBCASES.pdf; Template Disclosure Letter.pdf


00000048.dot (100 KB)


ARBCASES.pdf (213 KB)


Template Disclosure Letter.pdf...

All,

Per our conversation at lunch yesterday, I'm attaching:
1. my standard "Scheduling and Procedure Order" (in an MS Word document template format); and
2. a list of all reported Arizona decisions on Arbitration law, together with my comments on the same. (Rich and Sharon - note that this is an updated version from the one that I gave you before last week's CLE program - the last two pages only are changed with new case information.); and
3. my standard Arbitrator Disclosure Letter, which explains my 'reasonable inquiry' methodology concerning potential conflicts.

I hope that you find these useful. Concerning the form of order, it is a compilation of various provisions from various orders that I have seen issued by the courts or other arbitrators over the years, so I claim no pride of authorship. However, I would welcome any constructive suggestions or comments that you may have concerning my form. In particular, note that paragraph 20 concerns the subject of pro hac vice admission in Arizona private arbitration proceedings that we all discussed yesterday. It provides:

20. Order that Out of State Attorneys obtain Pro Hac Vice Admission in Arizona. If any party's attorney is a non-Arizona attorney not otherwise admitted to practice law in the State of Arizona (an "Out of State Attorney") then each Out of State Attorney is hereby advised that the representation of parties to a private arbitration proceeding in the State of Arizona constitutes the 'practice of law,' which requires the Out of State Attorney to gain pro hac vice admission to assume the representation of any party to this proceeding in the State of Arizona. [See, e.g., In re: Creasy 12 P.3d 214, 333 Ariz. Adv. Rep. 36 Oct. 17, 2000 and Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court 17 Cal.4th 119, 949 P.2d 1, 70 Cal.Rptr.2d 304, Jan. 5, 1998. See also Arizona State Bar informal Ethics Opinion Request No. 2191.] Arizona pro hac vice admission is no longer granted by the Arizona Courts. Amended Supreme Court Rule 33(d), the Pro Hac Vice Rule, was effective September 1, 2002. The State Bar is the record repository for all who apply for pro hac vice admission. Arizona attorneys associating with out-of-state counsel appearing pro hac vice and Out of State Attorneys seeking pro hac vice admission in Arizona should be aware of the changes in Supreme Court Rule 33(d). For more information concerning this issue Out of State Attorneys may go to: http://www.myazbar.org/AZBarInfo/pro_hac.jsp <http://www.myazbar.org/AZBarInfo/pro_hac.jsp> or contact the following person:

Frances Johansen, Esq.
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742
Tel: (602) 340-7292
E-mail: frances.johansen@staff.azbar.org <mailto:frances.johansen@staff.azbar.org>

The arbitrator will not make any further inquiry concerning this matter and will assume that any further appearances in this matter by Out of State Attorneys indicate that the above requirements have been fully satisfied and

that all such Out of State Attorneys have obtained proper pro hac vice permission from the State Bar of Arizona to appear in this matter.

I look forward to working with you all to resolve the 'pro hac vice' problems that we discussed yesterday. Special thanks, again, to Dave Tierney for his generosity in hosting our lunch yesterday.

Sincerely,

Mark E. Lassiter, Esq.
Brown, Lassiter & Killoughey, P.L.C.
1423 S. Higley Road, Suite 114
Mesa, AZ 85206-3449
Tel: 480-218-4455
Fax: 480-218-4450
E-Fax: 586-314-2935
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<<00000048.dot>> <<ARBCASES.pdf>> <<Template Disclosure Letter.pdf>>

BARNES, LASSITER & KILLOUGHEY, P.L.C.
ATTORNEYS

Mark E. Lassiter
480-218-4455
mlassiter@blklaw.com

PRIVATE ARBITRATION UPDATE
PROGRAM OUTLINE

I. INTRODUCTION: (Mark Lassiter - 10 minutes)

1. Nature of "Commercial" Arbitration (also known as "Private" or "Contract" Arbitration) – what this program is not about.

a) "Commercial" or "Private" (i.e., *non*-judicial) Arbitration Distinguished from:

(i) "Court-ordered" or "Judicial" Arbitration; or

(ii) Other "Alternative Dispute Resolution" procedures (e.g., "Mini-Trial," "Summary Jury Trial," "Mediation," etc.)

2. Focus on arbitration before the American Arbitration Association ("AAA").

3. Housekeeping matters (e.g., questions & answers, evaluation forms, etc.).

4. Introduction of Materials.

5. AAA Web Sites as source of additional forms, rules, articles and information – go to www.adr.org or www.adrworld.org.

6. Introduction of the Program Hypothetical.

II. PROS & CONS OF PRIVATE ARBITRATION: (Sharon Shively - 20 minutes)

1. **Pros**:

a) Arbitration is a private proceeding (i.e., no public record of it will exist, unless the arbitration award is reduced to a judgment or ancillary court proceedings are filed relating to the arbitration);

b) Arbitration procedures are more relaxed and informal than litigation procedures (e.g., generally, the rules of evidence do not apply in arbitration proceedings). Focus is on **substance – not procedure**;

Entrada Executive Plaza
1423 S. Higley Road, Suite 114
Mesa, Arizona 85206-3449
Tel: 480-218-4445
Fax: 480-218-4450

c) Attorneys' fees are usually less than those incurred in State or Federal Court cases (because of reduced discovery, not otherwise);

d) Parties can agree about procedures to resolve their own differences;

e) Parties can select a trier of fact with expertise in the subject matter of their dispute (e.g., appraiser, architect, engineer, lawyer, retired judge);

f) Most arbitrations proceed to an evidentiary hearing faster than a Court case will proceed to trial (most non-complex AAA cases go to hearing in less than 60 days);

g) Corporations can represent themselves in pro per by their officers and employees;

h) Arbitration is designed to reach a "fair and equitable" result, which is not necessarily based on strict, technical compliance with the law;

i) Summary Judgments may not be available in arbitration proceedings; and

j) No jury trial.

2. **Cons**:

a) Most attorneys are unfamiliar with the nature, rules and procedures of private arbitration – there are pitfalls for the unwary or uninformed;

b) Case administration is more expensive than State or Federal Court litigation (e.g., AAA filing fees, room fees and arbitrator fees);

c) Unless the arbitration agreement allows for it or the parties otherwise agree (as is commonly done in arbitration proceedings), **discovery is not permitted as a matter of right** (e.g., no depositions, no interrogatories, no requests for admissions, no "disclosure statements," etc.). However, the arbitrator can order an exchange of documents and the disclosure of witnesses and their expected testimony and, in the arbitrator's discretion, even some discovery not otherwise allowed;

d) Time to prepare for an arbitration hearing is sometimes very short;

e) Arbitration hearing is sometimes the last bastion of "trial by ambush" (you may not know how a witness will testify until the hearing and rebutting such testimony, which may include "hearsay," is often difficult on short notice);

f) For the above reasons it's often difficult to prosecute or defend fraud, bad faith, or other claims seeking punitive or tort damages;

g) Practical impossibility of reversing an arbitrator's award on "appeal;"

h) Summary nature of the arbitrator's written award;

i) Scant record of the arbitration hearing (*was it res judicata for you too?*);

j) You're "stuck" with the written arbitration clause/agreement – if it's poorly drafted then your client (and law partner...) has to live with it;

k) Arbitration is a poor forum for litigating title to real property (e.g., a "quiet title" action or lawsuit for "specific performance" of a real property marketing agreement) since you may not be able to join indispensable parties or record a *lis pendens*;

l) Absent a written agreement signed by such persons, there is a practical inability to join what would otherwise be 'indispensable parties' to the arbitration proceeding (e.g., spouses, guarantors or joint tortfeasors), opening the possibility of disparate results in separate legal proceedings;

m) Private arbitration is a poor forum if obtaining an injunction, a provisional remedy or the appointment of a receiver is important to your client or case;

n) There are no procedures for any "summary proceedings" to avoid having to go to the time, trouble and expense of an arbitration hearing. "Summary judgments," "motions to dismiss" or other dispositive motions are rarely entertained (absent a stipulation of the parties or other good cause) and even harder to get than in Court proceedings;

o) Attorneys' fees are <u>not</u> awardable under A.R.S. § 12-341.01(A). A party can only recover attorneys' fees if the parties' written agreement permits it. (The AAA Rules are part of the parties' written agreement.);

p) Unless administered by a competent ADR provider, processing and administration of a private arbitration can be sheer chaos;

q) Particularly with non-judge or non-lawyer arbitrators (e.g., engineers, appraisers, architects, accountants, etc.) the arbitrator's decision may not technically comply with the law, <u>but will still be enforced</u>; and

r) No Jury Trial, although sometimes 3 arbitrators will "try" the matter.

III. Important changes in the Commercial and Construction Industry arbitration rules of the American Arbitration Association (the "AAA") (Harold Coleman – 20 Minutes)

1. 'Summary disposition' motions.

2. Other?

IV. Arizona's Proposed "Revised Uniform Arbitration Act" (Mark Lassiter 30 Minutes)

V. Pre-Break Question & Answers. (All - 10 Minutes)

VI. BREAK [15 Minutes]

VII. Recent Developments & Current Trends In Arbitration Law. (All – 90 minutes)

1. Recent U.S. Supreme Court and other cases address various important arbitration issues (e.g., 'class actions' and 'unconscionable' arbitration clauses) – see Robert Benson, Esq.'s attached Outline for some of these cases.

VIII. "Unauthorized Practice of Law" problems posed to arbitrators and attorneys alike by current Arizona Pro Hac Vice Rules and Rules of Professional Conduct. (Mark Lassiter - 10 Minutes)

IX. Question & Answers. (All - 10 Minutes)

X. End.

Goldsmith, Richard

From: Mark Lassiter [mlassiter@blklaw.com]
Sent: Saturday, July 24, 2004 11:49 AM
To: Denise Troy
Cc: MooreK@adr.org; Helen.Grimwood@azbar.org; sahirsch@bryancave.com; hpg@grimwoodlaw.com; Richard N. Goldsmith; Bruce@mlp-law.com; brucemeyerson@msn.com; mede8@msn.com; phigdon@perkinscoie.com; tierney@sackstierney.com; frances.johansen@staff.azbar.org
Subject: RE: Out of state arbitrators
Attachments: image001.png; image002.jpg; Informal Ethics Opinion.pdf; Sample Scheduling and Procedures Order.pdf; MJP Rule Change.pdf

Denise.

Inresponse to your e-mail, below, I'm attaching the only ethics opinion on thematter (which I requested), but it is an informal one. For now, I'm trying todeal with the issue for myself by including language in my standard ArbitrationScheduling and Procedures Order that tells out of state attorneys to get prohac vice admission (see attached 'sanitized' SPO – paragraph 20).

I'malso copying this e-mail to Dave Tierney, Rich Goldsmith, Sherm Fogel, PhilHigdon, Kimberly Moore and Fran Johansen, with attachments, in follow up to ourlunch meeting on July 1st. (Incidentally, I also advise them that upon afurther, careful reading of the new, attached MJP rule, I am of the opinionthat - although it is still less than perfect - it is adequate to solve thecurrent problem posed to arbitrators presiding over cases with a partyrepresented by an out of state, non-Arizona attorney. Hence, I am no longerconvinced that a 'special task force' of the ADR section is still necessary to furtherdeal with this issue. There is a lunch meeting scheduled for August 13that the offices of the State Bar to discuss this matter, but I will be unable toattend due to a frenzied deposition schedule that week. However, I wouldappreciate a report from those present on any consensus on the issue that mightbe reached.)

Ihope you're doing well, Denise. I'd love to have lunch with you and Stevesometime in late August. Please check your calendar and let me know if thatwould work for you both.

Bestpersonal regards,

-----OriginalMessage-----
From: Denise Troy[mailto:denise.troy@mwmf.com]
Sent: Friday, July 23, 2004 5:14PM
To: Mark Lassiter
Subject: Out of state arbitrators

Mark,

Whenlast we met, you gave us the down on dirty on the requirement that out of statearbitrators be admitted pro haec vice. Is there an ethical opinionon the current state of the law? I know that the Supreme Court has relaxed thatrule, but its new rule does not take effect until 12/1/04. Thanks.

Denise H. Troy
Mariscal Weeks McIntyre & Friedlander, PA
2901 North Central, Suite 200
Phoenix, Arizona 85012
602-285-5097

****

Informal Op. Request No. 2191

SUMMARY

Assuming that non-member lawyers commit the unauthorized practice of law if they represent another in a private Arizona arbitration proceeding, members ethically may not participate in such proceedings without aiding and abetting the unauthorized practice of law. Assuming that mediation proceedings do not constitute the practice of law, members ethically may participate in mediation proceedings involving non-members. Finally, members have a duty to report a non-member lawyer's unauthorized participation in these proceedings only if the conduct raises a substantial question as to the lawyer's professional fitness to continue functioning as a lawyer.

FACTS[1]

The Committee is in receipt of a request for an opinion involving the ethics of a member's participation in mediation and arbitration proceedings when one of the parties is represented in such alternative dispute resolution ("ADR") proceedings by a non-Arizona attorney. The context in which the member finds himself so involved may be when the member is acting as the mediator or arbitrator or when the member represents one party and the non-Arizona admitted attorney represents the other. The inquiring member is specifically concerned with whether such participation is assisting the non-Arizona admitted attorney in the unauthorized practice of law ("UPL").

QUESTIONS PRESENTED

(1) Does a member acting as arbitrator, arbitration counsel, mediator or mediation counsel in an Arizona ADR proceeding assist another in the commission of the UPL when the other is a non-Arizona admitted attorney and represents one of the parties in the ADR proceeding?[2]

(2) Does a member acting either as arbitrator, arbitration counsel, mediator or mediation counsel in an Arizona ADR proceeding have an ethical obligation to report to the State Bar when a non-Arizona admitted attorney represents a party in such a proceeding?

---

[1]**This informal opinion is non-binding and only the opinion of one member of the Committee. It is intended for review only by the inquiring attorney.**

[2]This informal opinion assumes that the ADR proceedings at issue are "private" proceedings as opposed to court-ordered ancillary ADR proceedings as, for example, might be required by Ariz. R. Civ. P. 72-76.

RELEVANT ETHICAL RULES

ER 5.5. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where so doing violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ER 8.3. Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these rules or by law.

* * * *

(c) This rule does not require disclosure of information otherwise protected by ER 1.6 or [similar information] gained by a lawyer while serving as a member of an approved lawyers' assistance program . . . .

RELEVANT ARIZONA ETHICAL OPINION

Formal Op. 99-07

OPINION

The Legal Context

The threshold question that must be answered before addressing specifically the questions presented is whether private arbitration or mediation proceedings are the "practice of law." The definition of the practice of law is a legal question and, in Arizona, a question reserved exclusively for the judiciary. *In re Creasy*, 198 Ariz. 539, 541, 12 P.3d 214, 216 (2000) (citing Ariz. Const. art. III, art. VI, §§ 1, 5(4); *In re Smith*, 189 Ariz. 144, 939 P.2d 422 (1997)). Only persons who are active members of the state bar may practice law within Arizona unless admitted *pro hac vice* by a court for a particular case and in accordance with court rules. Ariz. R. Sup. Ct., Rule 31(a)(3); *id.*, Rule 33(c).

The supreme court has previously defined the practice of law in very broad terms. The practice includes "those acts, whether performed in court or in the law office, which lawyers customarily

have carried on from day to day through the centuries . . . ." *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962). Utilizing this broad definition, the supreme court has included adversarial arbitration and contract negotiations within the definition of the practice of law. *Creasy*, 198 Ariz. 539 (arbitration); *In re Fleischman*, 188 Ariz. 106, 933 P.2d 563 (1997) (contract negotiations).[3] That being said, however, our supreme court appears not to have addressed the issue whether a lawyer licensed and in good standing from another jurisdiction may participate in a private arbitration or mediation proceeding without running afoul of the legal proscription against the unauthorized practice of law. Given that this precise issue is a question of law and not of ethics, this informal opinion takes no position on the issue. *See Creasy*, 198 Ariz. at 541, 12 P.3d at 216 (holding that the definition of the practice of law is a legal question vested in the judiciary).

In addition, this informal opinion does not address the ethical propriety of whether a non-member lawyer may engage in a private Arizona arbitration or mediation proceeding. That issue questions the conduct of a lawyer other than the inquiring member. Not opining on the conduct of non-inquiring members is a long standing practice of the committee.

Formal Opinion 99-07

The Committee addressed a similar issue in Formal Opinion 99-07. There, the Committee considered whether a member could ethically negotiate or participate in an arbitration proceeding with an opposing party's non-lawyer public adjuster (licensed under A.R.S. § 20-281) if that adjuster was not supervised by a lawyer. It was also asked whether a member may communicate directly with the opposing party if the public adjuster was neither supervised by a lawyer nor otherwise authorized to practice law. The majority concluded that the proscription against assisting the UPL prevented members from so negotiating or participating and that there was no bar to communicating directly with the opposing party under these circumstances.

In reaching this conclusion, the Committee had to decide whether the public adjusters were engaged in the UPL when the adjusters conducted settlement negotiations on behalf of clients, examined and cross-examined witnesses at depositions or arbitration hearings, and presented evidence and argument at those hearings. In analyzing the issue this conclusion, the majority examined the *Arizona Land Title* definition and the supreme court's *Fleischman* decision. The majority concluded that the activities were indeed the practice of law under these decisions. The majority also noted that other jurisdictions concluded the same.

Given that the adjusters were engaged in the UPL, the majority concluded that engaging in settlement negotiations with the adjusters assisted the UPL in violation of ER 5.5(b). Further, if at an arbitration hearing, the adjuster was to appear and offer evidence, examine and cross-

[3] There appears to be no supreme court or committee opinions addressing the mediation context of UPL.

examine witnesses, and make legal arguments, a member could not ethically participate in that arbitration proceeding. The majority specifically limited its opinion to circumstances where the non-lawyer adjuster was not supervised by a lawyer and where the adjuster was not a member of any bar.

Application

As noted above, it is a question of law whether a non-member lawyer "practices law" when that lawyer acts in a representational capacity in a private Arizona arbitration or mediation proceeding. This informal opinion takes no position on that legal question, but only assumes that such behavior is the practice of law and, if the lawyer is not properly admitted to practice law in Arizona, then it is UPL. Based on that assumption, this opinion concludes as follows.

Member Acting as Arbitrator or Mediator

When a member acts as an arbitrator he may be assisting UPL where one of the party's representatives is a non-Arizona lawyer. Such a conclusion appears reasonable under *Creasy* and Formal Opinion 99-07. Although *Creasy* concerned a disbarred Arizona lawyer and 99-07 concerned non-lawyer adjusters, the principle appears to be that adversarial arbitration is likely the practice of law in Arizona. No one who is not a member of the state bar may practice law in this state regardless of admission in another jurisdiction unless specifically admitted *pro hac vice* pursuant to some court rule. Given the absence of such a rule in Arizona for arbitration proceedings, it is reasonable to conclude that lawyers who are not members of the state bar should not engage in private arbitration proceedings. And, assuming that conclusion, no member should assist that violation by participating in such an arbitration proceeding.

When a member acts as mediator in a private mediation proceeding raises a more difficult question. Mediation proceedings tend not to be adversarial in the same manner as arbitration proceedings. There is not the usual examination of witnesses and the presentation of evidence and legal argument. However, there may be the giving of legal advice or even the semblance of contract negotiations, both of which *Fleischman* held was the practice of law. Thus the character of a mediation proceeding is substantively different than an arbitration proceeding. Further, neither the supreme court nor the full committee appears to have addressed the mediation issue. Given this dearth of Arizona authority, this opinion cannot reach any firm conclusion with respect to private mediation proceedings other than to caution the inquiring attorney to note well *Fleischman* and *Creasy* as they appear to be the closest cases concerning this issue.

Member Representing a Client in an Arizona Arbitration or Mediation Proceeding

Based on the above and making the same assumptions of law, a member who is representing a client in an Arizona arbitration proceeding may not ethically participate in that proceeding if another party is represented by a non-Arizona admitted lawyer where that lawyer is going to examine witnesses and offer evidence and argument. To do so would assist the non-member's UPL in violation of Rule 31(a)(3) and violate the member's duty under ER 5.5(b). When a member represents a client in an Arizona mediation proceeding, like the member mediator, he or she should carefully note *Fleischman* and *Creasy*.

Duty to Report Violations

ER 8.3(a) requires members to report knowledge that another "lawyer" has violated ethics rules to such a degree that the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." Thus, not all ethical violations must be reported. The comment to the rule enjoins lawyers to exercise judgment in considering whether a duty to report exists. Scholarship on this question cautions that a single instance of even serious misconduct may nonetheless not trigger a duty to report. For example, missing a filing date may have serious consequences for a particular client, but an isolated instance of such conduct does not by itself raise "'substantial' questions about the lawyer's fitness to function as a professional" which is the gravamen of the rule. 2 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering*, 64-8 (Aspen 2001).

Based on this analysis and given the still ongoing national debate about whether arbitration and mediation constitute UPL, this informal opinion concludes that a single and isolated instance of acting in an Arizona arbitration or mediation proceeding without being a member of the bar, although, misconduct, does not create a duty to report under ER 8.3(a). A pattern of such representation or a non-member's representation with actual knowledge that such conduct does constitute UPL, may trigger a duty to report.

CONCLUSION

Assuming non-member lawyers commit UPL when participating in a private Arizona arbitration or mediation proceeding, a member acting as arbitrator or arbitration counsel in an Arizona arbitration proceeding does assist another in the commission of the UPL when the other is a non-Arizona admitted attorney and represents one of the parties in the arbitration proceeding.

Mediation proceedings are inherently different from the proceedings at issue in *Fleischman* and *Creasy*. Neither the supreme court nor the full committee has addressed the mediation issue. Thus, members must review carefully the pertinent cases to avoid aiding and abetting UPL.

Making the same legal assumptions, a member acting either as arbitrator, arbitration counsel, mediator or mediation counsel in an Arizona ADR proceeding has an ethical obligation to report to the State Bar when a non-Arizona admitted attorney represents a party in such a proceeding only when the member knows that the non-admitted Arizona attorney's ethical lapse raises a substantial question as to that attorney's fitness to practice law.