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HEARING OFFICER OF THE SUPREME COURT OF ARIZONA
BY

BEFORE A HEARING OFFICER

OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA DOUGLAS B. LEVY, Respondent.	No. File No.: 04-1845, 05-0148 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on September 30, 2005. Respondent, through Counsel, filed an Answer on October 24, 2005.

Respondent filed a Motion To Strike on the State Bar's allegations of violation Rule 41(g), Ariz. R.S.Ct. On January 10, 2005. The State Bar filed its Response on January 30, 2006. The Respondent replied to the Response on February 1, 2006. The Hearing Officer held Oral Argument on February 3, 2006, after which the Hearing Officer took the motion under advisement. By Order dated February 14, 2006, the Hearing Officer granted Respondent's motion in part, and dismissed the State Bar's allegations of violations of Rule 41(g), Ariz.R.S.Ct., suggesting that said Rule as unconstitutional, and unenforceable.

The State Bar notice a timely appeal of the Hearing Officer's Order on February 22, 2006. The State Bar's Opening Brief was filed on March 14, 2006. Respondent filed an Answering Brief on or about March 30, 2006. Oral Argument on the State Bar's Appeal was held before the Disciplinary Commission on April 7, 2005. By Order dated April 12, 2006, the Disciplinary Commission reversed the Order of the Hearing Officer and held that Rule 41(g) Ariz.R.S.Ct. is facially constitutional, and remanded the matter for a hearing on the merits.

On May 12, 2005, Respondent filed Respondent's Second Motion To Strike Rule 41(g) Allegations, seeking a determination that the State Bar's allegations were unconstitutional as applied to Respondent. On May 15, 2005, the State Bar filed a Motion To Strike Respondent's Second Motion To Strike Rule 41(g) Allegations on the basis that Respondent's second motion was untimely. The Hearing Officer held Oral Argument on June 22, 2006, and took the motions under advisement. It was decided that the State Bar would be given more time to respond the

Second Motion To Strike Rule 41(g) Allegations as the hearing on the merits was to take place on June 30, 2006. The parties appeared for the scheduled hearing. However, that hearing was continued due to the absence of a Court Reporter.

A hearing on the merits was conducted on August 17, 2006. At the conclusion of the hearing, the Hearing Officer requested that both parties file Post-Hearing Memoranda, including proposed Findings Of Facts, Conclusions Of Law and addressing proportionality.

FINDINGS OF FACT

At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 21, 1995.

COUNT ONE (04-1845)

1. Respondent was sued by two former employees in the matter of Michele and Eric Pitts, and Charlotte Molina v. Douglas B. Levy and Nanci O. Levy, and Douglas B. Levy, P.C., No. C-20042915, Pima County Superior Court, filed on June 3, 2004 (hereinafter the "Pitts Litigation"). [1]JPHS p.2, para.2. The Complaint alleged that Respondent had failed to pay one Plaintiff wages, and both Plaintiffs cash for unused vacation time. (SB Ex. 2)

2. Respondent initially represented himself and the Douglas B. Levy, P.C. in the Pitts Litigation. Respondent's Counsel, JoJene Mills, entered an appearance prior to Arbitration and concluded the matter. (JPHS p. 2, para. 3)

3. Respondent testified in this action that he strongly believed that there was no legal basis for any of the complaint's allegations. (Tr. pp. 112-118) He also strongly believed that the lawsuit was brought out of spite, particularly that of Ms. Molina, in an effort to embarrass Respondent. (Tr. p. 118, l. 24) Respondent's suspicion arose from several facts, including: (1) Molina enlisted Pitts in the lawsuit and attempted to enlist another of Levy's former employees;

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[1] Citations to the Transcript of the hearing on the merits will henceforth be noted as "Tr." followed by page numbers; references to exhibits will be noted as SB Ex. For State Bar exhibits, R Ex. For Respondent's exhibits. References to the parties' Joint Pre-Hearing Statement will be noted as "JPHS" followed by page and paragraph numbers.

(Tr. p. 119, 1.6) (2) Molina tried to use as an exhibit a letter she herself wrote after her resignation from Respondent's firm, claiming it was written by Mr. Levy; (Tr. p. 119, 1. 24) (3) Plaintiffs subpoena'd Respondent's personal tax returns; and (3) tried to depose his wife. (Tr. p. 122, 1. 20)

4. On June 28, 2004, Respondent filed an Answer and Counterclaim (hereinafter th "Counterclaim") against Plaintiffs Michele Pitts (hereinafter "Pitts") and Charlotte Molina (hereinafter "Molina"). Count One of the Counterclaim was entitled "Abuse of Process and/Or Malicious Prosecution and/or Wrongful Institution of Civil Proceedings". (JPHS p. 2, para. 4)

5. In response to the Counterclaim, on July 9, 2004, Pitts and Molina filed a three-page Motion For Judgment On The Pleadings and Motion For More Definite Statement. The motion contains basic and straightforward legal arguments. (JPHS p. 2 , para. 5, SB Ex. 4, Tr.p.40) The motion does not contain any personal attacks or accusations regarding Respondent. SB ex. 4.

6. Respondent believed that it was necessary to state every factual and legal basis for his Counterclaim in his Response To the Motion To Dismiss the Wrongful Institution Of Civil Proceedings claim. In other words, Levy believed he needed to provide the Court with all the facts he was aware of to support his belief that the lawsuit was brought for an improper purpose. (Tr. p. 128, 1. 5)

7. In response to the July 9, 2004 motion filed by Pitts and Molina, Respondent filed a 15 page opposition, plus 18 pages in attachments. (SB Ex. 5, Tr. p.40) The opposition contains the following statements:

> "This Court will quickly realize that this is absolutely the dumbest lawsuit pending in Pima County Superior Court."
>
> "The sole purpose of the instant motion is an unprofessional attempt at embarrassing undersigned counsel before this Honorable Court."
>
> "... Plaintiff's counsel has truly acted shamefully by agreeing to file such a patently frivolous lawsuit against undersigned."
>
> "Why would Plaintiff's counsel label Count Three as being 'cryptic,' when paragraphs 10-24 can easily be comprehended by a freshman in high school?"

"Yes, undersigned is amazed that a lawyer in Pima County agreed to lend his name to this litigation."

8. The Pitts/Molina case was assigned to Pima County Superior Court Judge Carmine Cornelio. Respondent did not know Judge Cornelio and had never appeared before him. (Tr. p. 129, 11. 1-15)

9. On August 30, 2006, Oral Argument was held on Pitts and Molina's Motion For Judgment On The Pleadings and Motion For More Definite Statement. (SB Ex. 8) In their Motion, Pitts and Molina did not seek sanctions. (SB Ex. 4) A transcript of the hearing was made. Prior to this hearing, there were no substantive hearings such that Judge Cornelio would know anything about the facts of the case. (Tr. p. 129, 1. 16)

10. At the hearing, the Court expressed its belief that there was no good faith basis to bring a Wrongful Institution Of Civil Proceedings action when the underlying case had not yet been terminated. (SB Ex. 8, pp. 6-7)

11. During the Oral Argument, Judge Cornelio asked Respondent about the accusations of unprofessional conduct and "personal attacks" against opposing Counsel that were presented in Respondent's Opposition. Judge Cornelio questioned Respondent in such a manner as to suggest that Respondent had been sanctioned and reported to the State Bar by Judge Christopher Browning over a discovery matter. (SB ex. 8, pp. 15-16) These statements were incorrect. (SB Ex. 10, pp. 3-4) Judge Cornelio also referred to the reputation of the plaintiffs' lawyer, David Toone, by stating, "...Mr. Toone's worked for a couple firms that all have a good reputation." (SB Ex. 7, Ex 8, p. 16) At the conclusion of the Oral Argument, the judge ruled on Pitts' and Molina's motion. SB Ex. 8.

12. In a Minute Entry dated August 30, 2004, Judge Cornelio granted the Motion for Judgment on the Pleadings as to Count One of the Counterclaim. (SB Ex. 7) This ruling was based on Judge Cornelio's belief that a WICP claim required a favorable determination in a previous case, and therefore could not be brought concurrently, as a counterclaim in the underlying action. (SB Ex. 8, p. 6, 1. 17) Judge Cornelio further determined that a sanction was

appropriate for the cost incurred by Pitts and Molina in filing the Motion For Judgment On The Pleadings and Motion For More Definite Statement. (JPHS p. 2, para. 6., SB Ex. 7) This sanction was entered without a motion and without Respondent having notice and an opportunity to be heard. (Tr. P. 133, 11. 2-11)

13. The August 30, 2004 Minute Entry ordered a sanction against Respondent in the amount of $500.00 (hereinafter the "Sanction") be paid to Pitts and Molina within 15 days of the date of the Minute Entry. (JPHS p. 3, para. 7) The Minute Entry was signed by Judge Cornelio and then filed by the clerk on September 1, 2004. (SB Ex. 7) The sanction was therefore due on September 18, 2004.

14. Judge Cornelio's determination that a WICP claim could not be brought contemporaneously with the underlying claim was incorrect under Morn v. City of Phoenix, 152 Ariz. 164, 730 P.2d 873 (App. 1986) (defendant counterclaimed for abuse of process; defendant need not show that underlying claim was terminated in defendant's favor.). Thus, Respondent had a valid basis for questioning both Judge Cornelio's ruling dismissing the claim and the sanction.

15. On September 14, 2005, Respondent filed "Defendant's Counterclaimants Motion For Reconsideration of the Order Imposing $500.00 Sanctions and Dismissal of the Abuse of Process Claim" (hereinafter the "Motion for Reconsideration"). (JPHS p. 3, para. 9, SB Ex. 10)

16. The Motion for Reconsideration requested the Sanction be vacated and Count One of the Counterclaim be reinstated. (JPHS p. 3, para. 10, SB Ex. 10) In the Motion for Reconsideration, Respondent specifically tried to correct Judge Cornelio's belief that the WICP claim could not be brought concurrently as a counterclaim. Respondent also tried to correct Judge Cornelio's statements at the hearing about Respondent's sanction and State Bar history. (Tr. P. 134, 1. 16) Respondent also felt the record should be clear that the judge was getting *ex parte* information about a party appearing before him and where Judge Cornelio was getting erroneous information about sanctions and reports to the State Bar. Respondent therefore made a record about Judge Cornelio playing golf with Judge Christopher Browning. (Tr. P. 135, 1. 10)

17. Attached to the Motion For Reconsideration was a copy of the golf tee times for the Tucson Country Club and 42 documents consisting of professional accolades. (SB Ex. 8) In submitting these documents, Respondent stated "Because Judge Cornelio clearly believes that 'talk is cheap' undersigned annexes the following 42 documents to overwhelmingly permit others to address the issue of undersigned's professionalism." The annexed documents included a complimentary note from a job applicant, and a note from Respondent's mother. (SB Ex. 10., Tr. P.62, 66-67) Respondent further suggested that Judge Cornelio engaged in improper conduct during a golf outing with Judge Browning. (SB Ex. 10)

18. Respondent failed to pay the Sanction within 15 days of the date of the August 30, 2004, minute entry. (JPHS p. 3, para. 8, Tr. P. 50)

19. In an unsigned Minute Entry dated September 22, 2004, Respondent's Motion for Reconsideration was denied. Judge Cornelio further ordered that Respondent "self-report" to the State Bar of Arizona " and that he determine the appropriate Reviewing Committee (e.g. Peer-to-Peer, Professionalism, etc.)", and file an Affidavit of Compliance regarding the Order to self-report on or before October 21, 2004. The judge further ordered that Respondent file an Affidavit setting forth the outcome of the self-reporting on or before March 21, 2005. (SB Ex. 11) The Court also addressed in a footnote Respondent's concern about the Court's incorrect statements about Respondent having been sanctioned and reported to the Bar. The Court did not acknowledge its error in the previous statements. Instead, the Court referred to a new case:

> Further, this Court has decided not to make an issue regarding Mr. Levy's potentially inaccurate response to never having been sanctioned. See C-20035489 minute entries dated March 1 and march 25, 2003 and May 4, 2004.

(SB Ex. 11, p. 2)

20. Judge Cornelio's statements in the footnote were again incorrect. The case referred to was one in which Respondent appeared as local Counsel for an out-of-state law firm. It was the other law firm, not Respondent who was sanctioned. (Tr. p. 146 l. 18) Respondent testified that Judge Cornelio "should have used this opportunity to apologize" to him in issuing the September 22, 2004 Minute Entry and ruling on the Motion for Reconsideration. Tr. P. 69.

21. On or about October 14, 2004, Pitts and Molina filed an "Application for Order to Show Cause" regarding Respondent's ongoing failure to pay the Sanction.)JPHS p. 4, para. 13)

22. On. October 21, 2004, Respondent filed "Defendant/Counterclaimant's Statement of Non-Compliance" (hereinafter "Statement of Non-Compli8ance") in which he stated that he would not self-report to the State Bar of Arizona and he would not file affidavits of compliance. (JPHS p. 4, para. 14, SB Ex. 12) The Statement of Non-Compliance contained the following statements:

> "Undersigned will **not** 'self-report tot he Arizona Bar Association' [sic. It should read 'State Bar of Arizona']. Undersigned will not 'determine the appropriate Reviewing Committee (e.g. Peer-to-Peer, Professionalism, etc.).'
>
> "Therefore undersigned will not file a report regarding 'any outcome of the referral."
>
> "If Judge Cornelio truly believes that undersigned should be reported to the State Bar of Arizona, then he is free to do so."
>
> "Judge Cornelio erroneously refers to exhibit 3 of undersigned's Motion for Reconsideration as a 'myriad of irrelevant attachments.' This 'myriad of irrelevant attachments' proves that undersigned is one of the most accomplished lawyers who has ever appeared before Judge Cornelio. This 'myriad of irrelevant attachments' is precisely why undersigned will **never** self-report to the State Bar of Arizona."
>
> ". . . undersigned is not some 'run-of-the-mill' trial lawyer, but a distinguished lawyer who practices his craft at the highest echelons of our noble profession."
>
> ". . . Judge Cornelio should learn from this experience is that when one is proven egregiously wrong about such a serious allegation, one should apologize immediately, . . ."

23. Respondent's Statement of Non-Compliance does not cite any legal authority challenging the Judge Cornelio's Orders to self-report to the State Bar and submit Affidavits of Compliance. (SB Ex. 12) Rather, the Statement of Non-Compliance notes, *inter alia*, that the judge is inexperienced and plays golf with other judges. *Id.* In addition, Respondent again attempted to correct the record about any sanctions, with regard to the new case cited by the Court. Respondent explained Respondent was acting as local counsel for an out-of-state firm that was responsible for the conduct giving rise to the sanction. (SB Ex. 12, pp.3-5)

24. Respondent did not intend his Statement of Noncompliance to be his Response To

the Order to Show Cause and did not address it. (TR. p. 149, 1. 9) Nevertheless, Judge Cornelio ruled on the Application for Order To Show Cause before Respondent responded. (SB Ex. 13, Tr. p. 150, 1. 4)

25. Respondent did not self-report to the State Bar of Arizona as ordered by Judge Cornelio in the September 22, 2004 Minute Entry (JPHS p. 4, para. 15, Tr. p. 69), nor did he file the Affidavits of Compliance regarding the self-reporting as ordered by the judge in the September 22, 2004 Minute Entry. (JPHS p. 4, para. 16, Tr. p. 70)

26. In a Minute Entry dated October 25, 2004, Judge Cornelio found Respondent in contempt for willful violation of the Order to pay the Sanction and the Order to self-report to the State Bar of Arizona. The judge imposed an additional sanction of $200.00, payable to Plaintiffs Pitts and Molina. (JPHS p. 4, para 17, SB Ex. 13) This sanction was again imposed without a motion by Plaintiff and without notice and an opportunity for Respondent to be heard on further sanctions. (Tr. p. 150, 1. 25) The judge also directed Plaintiffs' Counsel to "file a Form of Final Judgment against Mr. Levy..." (SB Ex.13) The judge further determined that no hearing was necessary on the Petition For Order To Show Cause based on Respondent's filing of the Statement of Non-Compliance.

27. On October 25, 2004, Judge Cornelio reported Respondent to the State Bar. He stated, "I am forwarding these documents to you for review and determination of whether and how to proceed to address the issues of professionalism raised by the conduct of Mr. Levy and the content of his pleadings." (SB Ex 1) In this same letter, Judge Cornelio stated, "I must also reprot that, after my minute entry of September 22, 2004, my office received a fair number of calls/reports from attorneys practicing in Tucson that said, 'It was about time'." (SB Ex. 1)

28. On or about October 27, 2004, Respondent learned that Judge Browning had faxed Respondent's "Defendant/Counterclaimant's Statement of Non-Compliance" to one or more insurance defense lawyers in Tucson. (SB Ex. 15, last page with fax information, Tr. p. 153) Respondent began receiving telephone calls from lawyers that his pleadings and minute entries were circulating around Tucson. (Tr. p. 153, 1. 9)

29. On October 29, 2004, Respondent filed "Defendant/Counterclaimant's Opposition to Application for Order to Show Cause and Motion for Reconsideration and/or Modification of October 25, 2004 Minute Entry." (JPHS p. 4, para. 18, SB Ex. 15) This pleading contained the following statements:

> "It would be impossible for any competent lawyer to 'respect Judge Cornelio and his opinion'..."
>
> "Exactly what part of the above would cause **any** lawyer to have any 'respect for Judge Cornelio and his opinion'? You can poll 1,000 lawyers **and** judges, and they will **all** tell you that the above questioning by Judge Cornelio, in the context of this motion practice, was uncalled for, unprofessional and asinine."
>
> "Judge Cornelio has now had **three (3)** opportunities to apologize to undersigned on the record ... and has failed to do so. Again, how could anyone respect this kind of conduct from a Pima County Superior Court Judge?"
>
> "... Judge Cornelio's citation to Judicial Canon 3(b)(7)(c) is **not** credible. This further demeans Judge Cornelio and causes further lack of respect for his opinion."

In this document, Respondent specifically stated his intention to appeal the sanction and self-reporting order. (SB E. 15, pp. 3-4) Respondent also raised the question of when such an appeal would be appropriate and asked the Court to modify its October 25, 2004 Minute Entry so that the case could proceed to Arbitration and any and all matters could be appealed at the end of the case.

30. In a Minute Entry dated November 3, 2004, Judge Cornelio denied Respondent's new Motion For Reconsideration filed October 29, 2004. (SB ex. 14)

31. On November 2, 2004, Plaintiffs lodged a Form of Judgment.

32. Respondent filed a Notice of Payment on or about November 15, 2004. On that date, he paid the $700 in sanctions. (JPHS p. 5, para 20)

33. On December 10, 2004, an Arbitration in the Pitts/Molina case was held. Arbitrator David Sobel made some findings in favor of Respondent and some against. (Tr. p. 162, l. 18)

34. On February 23, 2005, Respondent paid the Arbitrator's monetary award, and the case was concluded.

35. There were never any allegations in the case that Respondent failed in any of his discovery or disclosure duties. (Tr. p. 163, 1. 1)

36. Respondent testified that it was his intention, up until he changed his mind on advice of Counsel and paid the $700 sanction, to appeal Judge Cornelio's rulings. (Tr. p. 163, 1. 12). It was also Respondent's belief that throughout the case, through its conclusion, there was never a final, appealable order. (Tr. p. 163, 1. 7)

37. Respondent testified that to him, phrases like "pathetic lawsuit," or "bogus lawsuit" accurately described the lawsuit against him, and are no different that "unfounded lawsuit" or "lacking merit." (Tr. p. 164, 1. 11)

COUNT TWO (05-148)

38. Respondent was the attorney of record in the matter of *Samantha Rollin, et al, v. Gerald Zimmerman, et al,* C-2035412, Pima County Superior Court. Respondent represented the Plaintiffs Samantha Rollin, a minor, and her parents Lawrence S. Rollin and Jill Rollin. (JPHS, p. 5, para. 21) Larry Rollin is a transactional lawyer at Chandler and Udall, L.L.P. (Tr. p. 18, 1. 1)

39. The *Rollin* litigation was a personal injury claim arising out of an injury sustained by Samantha Rollin while horseback riding. (JPHS, p. 5, para. 22)

40. Respondent alleged in the Complaint in the Rollin litigation that Zimmerman was an "obnoxious, self-centered and arrogant individual" with a "dangerous, careless and thoughtless" style of horseback riding." Respondent included these allegations because that is the evidence Respondent was provided from his clients, the Rollin family, about what the stable employees told the Rollinses about Zimmerman and previous incidents. The language Respondent used where euphemistic substitutes for the stable employees' language----"asshole." (Tr. pp. 19-20, 166-167) These were not Respondent's personal assessments of Zimmerman; these were disclosures about the evidence in the case.

41. Zimmerman's attorney, Doug Clark, informed Respondent by letter that Zimmerman was offended by this language. (SB Ex. 21) Zimmerman's attorney specifically

stated "It doesn't appear to be professional to accuse a man that neither your clients, nor you, have ever met or know anything about, as being an 'obnoxious, arrogant and self-centered individual,' I think it is allegations like this that make lawyers look bad to the public in general." *Id.*

42. In response to this letter, Respondent wrote "Form what I have heard about Jerry Zimmerman, I doubt he will take any offense to what was correctly stated in Plaintiff's Complaint. (SB Ex. 22) In another letter, Respondent wrote "Mr. Zimmerman is a bad, bad guy." (SB Ex. 23)

43. In a letter to opposing Counsel, Respondent wrote "obviously, we had no idea Mr. Zimmerman was insured with Snake Farm when this lawsuit commenced." (SB Ex. 25) When questioned about this comment, Respondent testified "They are my words, yes. Snake Farm is how most of us refer to State Farm Insurance. Well deserved." Tr. p. 101.

44. Respondent wrote that opposing Counsel wrote "whiny letters", was "bullying" and all the lawyers involved looked "like babies". (SB Ex. 25)

45. Respondent wrote another letter accusing the opposing party witnesses of lying, accepting money for false testimony and engaging in a conspiracy to cover up lying. (SB Ex. 25)

46. Respondent questioned Zimmerman's credibility in pleadings and letters to Zimmerman's lawyer, Doug Clark, because Respondent learned Zimmerman wrote out statements for the stable employees to sign that were directly contradicted by statements the employees made to others. (Tr. pp. 21-22, 25, 167-168)

47. Zimmernan's attorney, Doug Clark, similarly accused a minor, Samantha Rollin, and Jill Rollin of "lying." (Tr. p. 25. 1. 1, p. 172- 1. 25) Clark also counterclaimed against the Rollin family for defamation and abuse of process. (Tr. p. 24, 1. 18)

48. Respondent wrote that opposing Counsel had submitted an "absolutely, positively pathetic Pre-Arbitration Memorandum". (SB Ex. 28)

49. The *Rollin* litigation proceeded to Arbitration in November 2004. (JPHS p. 5, para. 23)

50. The Arbitrator noted that the stable employees' statements were contradictory, stating, "If I find any witnesses to have credibility problems, they are Gray, Bush and Klatt. So many of their statements, both individually and collectively, are so contradictory as to render their versions of events suspect, to put it mildly." (SB Ex. 29, p. 1) It is not clear if the Arbitrator knew that Zimmerman himself wrote out the statements for Gray, Bush and Klatt to sign.

51. The Arbitration was so contentious that the assigned Arbitrator, in his decision dated December 6, 2004, noted that "some of the goings-on in this case have been less than honorable" and that "[t]here is no need for personal attacks. . . of any kind."

52. Doug Clark characterized Respondent as "a competent, sensible, knowledgeable and capable attorney." (Tr. p. 170, 1. 1) Clark has never filed a Bar complaint against Respondent, for this or any other matter. (Tr. p. 170, 1. 12)

53. Larry Rollin was impressed with Respondent's language in all his correspondence and was very professional in not using the word "asshole". (Tr. p. 20, 1.20) Rollin felt that Respondent accomplished Rollin's goals and "was extremely professional and understanding" "throughout this whole emotional battle". (Tr. p. 28, 1.1)

54. The State Bar's complaint against Respondent is based on Mr. Zimmerman's second complaint against Respondent. Zimmerman's first complaint was identical to his second. The first complaint was dismissed by the State Bar without hearing Respondent's Response. (Tr. p. 165, 1. 15)

55. Zimmerman also made a complaint against Larry Rollin for some of the same allegations as Zimmerman made against Respondent. The State Bar also dismissed that complaint. (Tr. p. 28, 1. 18)

CONCLUSIONS OF LAW

1. Respondent violated Rule 42, Ariz.R.S.Ct., ER 3.4(c) by failing to pay the Sanction within fifteen (15) days, by failing to self-report to the State Bar of Arizona, and by failing to file Affidavits of Compliance.

It is undisputed that Respondent failed to comply with numerous Court Orders. Respondent seeks to excuse his conduct by invoking the "open refusal" exception in ER 3.4(c) which allows for an "open refusal [of an obligation of the tribunal] based on an assertion that no valid obligation exists." Respondent claims that he intended to appeal the $500.00 sanction, [2] and that this intention qualifies as an "open refusal" excusing his failure to pay said sanction. This claim fails on two grounds.

First, the record does not clearly support the claim that Respondent intended to appeal, or that he provided the Court with notice of the intention to appeal, Indeed, Respondent's first clear statement of a desire to appeal the Sanction was in the second Motion For Reconsideration filed after the instances of non-compliance, the finding of contempt, the imposition of a second $200.00 sanction, and the filing of the Statement of Non-Compliance. Second, an inchoate intention to appeal an order at some future time, without more, is not an "open refusal based on an assertion that no valid obligation exists." The Hearing Officer further note(s) that absent a stay under Rule 62, Ariz.R.S.Ct. or the posting of a supersedeas bond under Rule 7, Ariz.R.Civ.App.Proc., a judgment or final order is fully enforceable upon entry. Respondent was clearly obligated to follow the Court's Orders.

The Hearing Officer finds that the Minute Entry Order of August 30, 2004, filed September 1, 2004, was a final appealable order. *Lamb v. Superior Court*, 127 Ariz. 400, 621 P.2d 906 (1980); *Focal Point Inc. V. Court of Appeal*, 149 Ariz. 128, 717 P.2d 432 (1986)(holding minute entry order signed by Court and filed with clerk constitutes a formal judgment, and the time for filing post-judgment motions or prosecuting appeal runs from time of filing). The August 30, 2004, Minute Entry was signed by Judge Cornelio and filed with the Clerk, and thus was fully appealable. The Hearing Officer notes that sanctions are also

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[2] As discussed in greater detail in paragraph 2., Respondent does not claim that he intended to appeal the additional Orders contained in the September 22, 2004 Minute Entry directing Respondent to self-report and take other actions. Respondent only intended to appeal the August 30, 2004 Sanction and dismissal Orders.

separately appealable under Rule 54(b), Ariz.R.Civ.Proc. Respondent's Motion For Reconsideration, filed September 14, 2004, did not stay the time for noticing an appeal or stay enforcement of the sanction order.[3] Finally the Hearing Officer notes that orders and judgments are fully valid and enforceable upon issuance and that any stay of such orders is discretionary under Rule 62, Ariz.R.Civ.Proc. See also, *Bruce Church, Inc. V. Superior Court*, 160 Ariz. 514, 774 P.2d 818 (Ariz.App. 189)(holding that judgment creditor may commence enforcement proceedings immediately upon entry of judgment, even though judgment debtor has not exhausted post-trial or post-judgment remedies such as appeal). Finally, the Hearing Officer further notes that ER 3.4(c) requires attorneys to follow the rules or obligations of the tribunal, not just the final appealable Orders of the tribunal.

In any event, Respondent never did file a Notice of Appeal, request a stay of the Order to pay the sanction, or take any other affirmative step toward appealing the Judge Cornelio's rulings. The Hearing Officer does not need to reach the question of whether the act of noticing an appeal is an "open refusal" excusing a refusal to follow a Court Order because Respondent never took this step. It is clear in any event the mere *intention* to notice an appeal at some future time certainly is not a justification for failing to follow a Court's Order, and does not fall within the "open refusal" exception fo ER3.4(c).

If this Hearing Officer interpreted the "open refusal" clause as broadly as Respondent appears to in this case, lawyers would be free to disregard Court Orders at will as long as they claimed or announced an intention eventually to appeal the disputed Order. Such an interpretation of ER 3.4(c) would undermine respect for the rule of law and the effective administration of justice without meaningful limitation. In effect, the exception would swallow

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[3] The Hearing Officer notes only a Rule 59, Ariz.R.Civ.Proc. Motion For New Trial extends the time period for filing a Notice of Appeal, and any such motion must expressly refer to Rule 59 and cite one of the grounds set forth in Rule 59(a) in order for the appeal period to be extended. *Farmer's Ins. Co. Of Ariz. V. Vagnozzi*, 132 Ariz. 219, 644 P.2d 1305 1982). A Motion For Reconsideration, such as the one filed by Respondent, has no such effect. See, Rule 7.1(e), Ariz.R.Civ.Proc.

the rule. Therefore, the Hearing Officer rejects an interpretation of ER 3.4(c) that only requires an intention to appeal to satisfy the "open refusal" exception to the rule.

Courts often rule in ways that the parties often dispute. This does not mean, however, that the parties have no valid obligation to follow a Court's Orders.

> [A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect.

Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 591, 42 L.Ed.2d 574. Respondent knowingly disobeyed an obligation under the rules of a tribunal, in violation of ER 3.4(c), when he failed to to pay the sanction within fifteen (15) days, failed to self-report to the State Bar, and failed to file an Affidavit of Compliance.

2. Respondent violated Rule 53(c) Ariz.R..S.Ct., by willfully failing to comply with the Orders set forth in the Minute Entry of September 22, 2005, regarding self-reporting to the State Bar of Arizona. Respondent never intended to appeal the September 22, 2004 Orders. Apparently, his reason for failing to comply with these Orders appears to be that the he disagrees with them. Respondent specifically testified that the Statement on Non-Compliance was directed solely to the Orders of September 22, 2004, regarding self-reporting and filing Affidavits of Compliance, and that he thought these Orders were unheard of and bizarre. Tr.p. 147-49. Respondent only intended to appeal the Sanction and the dismissal of Count One of his Counterclaim, which he believed were completely separate from the self-reporting Orders. *Id.* Respondent emphatically stated, in both pleadings and in testimony, that he never had any intention of complying with the Order to self-report. Thus, there can be no other conclusion than that Respondent willfully violated Court Orders in violation of Rule 53(c), Arizona.R.S.Ct.[4]

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[4] The Hearing Officer does not find it necessary to opine a to whether the September 22, 2004 Orders were appealable Orders, as Respondent has not argued that potential appeal excused his compliance with those Orders. Respondent has clearly stated that he did not intend to comply with the self-

The Hearing Officer notes that the Court had authority to issue the Orders regarding self-reporting pursuant to its inherent powers. *Precision Components Inc. V. Harrison, Harper, Christian & Dichter,* 179 Ariz. 552, 880 P.2d 1098. These powers are governed by " 'the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " *Id.* (Quoting *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L.Ed.2d 734 (1962)). See also, *Hmielewski v. Maricopa County* 192 Arizona. 1, 4, 960 P.2d 47, 50 (Ariz.App. 1997). The Judge Cornelio's orders to Respondent were clearly within the Court's inherent powers to manage its own affairs.

3. Respondent violated Rule 41(c), Ariz.R.S.Ct. by disobeying the clear Orders of the Court and by repeatedly expressing his lack of respect and regard for the individual judge. Respondent intruded on the Judge Cornelio's privacy by including information about the judge's golf outing, even including a photocopy of tee times in a pleading, and insinuating other improprieties. Respondent repeatedly demanded an apology from the Judge Cornelio, both in pleadings and during testimony at hearing. Respondent impugned the judge's intelligence, honesty, and ability. Respondent violated Rule 41(c), Ariz.R.S.Ct through these acts and statements of outright derision of the judge's integrity and authority.

4. As applied to Respondent in this case, Rule 41(g), Ariz.R.Sup.Ct. is unconstitutionally vague such that it cannot be used as basis for discipline by the State Bar of Arizona.

The right to practice law is a property right that cannot be denied without due process. In the Matter of BRADY, 186 Ariz. 370, 923 P.2d 836 (1996). A statute is void for vagueness when it does not sufficiently identify the conduct that is prohibited. U.S. v. Wunsch, 4 F.3d 1110 (9th Cir. 1996). Thus, the Fifth Amendment due process clause requires that a statute be sufficiently clear so as not to cause person "of common intelligence . . . necessarily [to] guess

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reporting orders under any circumstances. The Hearing Officer further notes that a Court Order need not be presented in appealable form to ensure compliance, particularly from sworn officers of the Court.

at its meaning and [to] differ as to its application. . ." Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Laws that are insufficiently clear are void of three reasons: (1) To avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972).

Language identical to Rule 41(g), Ariz. R. Sup. Ct. was found unconstitutional in U.S. v. Wunsch, 4F.3d 1110 (9th Cir. 1996). In addition, the State Bar itself has stated that Rule 41(g) provides insufficient guidance to practitioners about what constitutes unprofessional behavior that will be the subject of discipline. (State Bar Task Force on Professionalism The Report of the Task Force) ("[C]oncepts of integrity, courtesy and respect are somewhat subjective and thus difficult to enforce;" "Just what is professional' is often a subjective matter. Unlike the Rules of Professional Conduct, there are no 'rules' for 'professional behavior'. The Rules do not even address 'unprofessional' behavior.")

Respondent's conduct in this case did not involve profanity, physical violence, threats of any kind, yelling or any allegation of mistreatment of Respondent's clients. The statements were all made either at Court hearings when the parties were not present, or in pleadings or letters directed to opposing Counsel. The gist of the State Bar's complaint seems to be Respondent's word choice and personal style. There are no Arizona cases that sufficiently notify Respondent that the "subjective" language of rule 41(g) will give rise to discipline for behavior like Respondent's CF., Matter of Ziman, 174 Ariz. 61, 847 P.2d 106 (1993) (making an offensive and profane comment to an arbitrator); Matter of Banta (2005) (abuse of lienholder, use of profanity and threats in front of judge, parties, public); Matter of Medansky, (2004) (verbal threat of physical violence against the opposing party). Therefore, Arizona case law does not make the vagueness of Rule 41(g) constitutionally clear as to Respondent and his conduct.

RECOMMENDED SANCTION

This recommendation is based on the applicable *ABA Standards for Imposing Lawyer Sanctions* ("Standards"), 1991 edition, including the relevant aggravating and mitigating factors, as well as it review of the applicable case law regarding proportionality of the prosed sanction.

A. APPLICABLE *STANDARDS*

The Standards provide guidance with respect to an appropriate sanction in the matter. The Supreme Court and Disciplinary Commission consider the Standards a suitable guideline. *In re Peasley,* 208 Ariz. 27 ¶ 23, ¶ 33, 90 P.3d 764, 770, 772 (2004); *In re Rivkind,* 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

The Supreme Court and the Disciplinary Commission consistently use the *Standards* to determine appropriate sanctions for attorney discipline. *See In re Clar*, 207 Ariz. 414, 87 P.3d 827 (2004). The *Standards* are designed to promote consistency in sanctions by identifying relevant factors the Court should consider and then applying these factors to situations in which lawyers have engaged in various types of misconduct. *Standard* 1.3, Commentary.

In determining an appropriate sanction, the Court and the Disciplinary Commission consider the duty violated, the lawyers' mental state, the presence or absence of actual or potential injury, and the existence of aggravating and mitigating factors. *Peasley, 208 Ariz. At ¶ 33, 90 P. 3d at 772; ABA Standard 3.0.* "The Theoretical Framework for the *Standards* advises that multiple charges of misconduct should receive one sanction that is a consistent with the sanction appropriate for the most serious instance of misconduct. Rather than imposing individual sanctions, the Framework state 'multiple instances of misconduct should be considered as aggravating factors.' ABA Standards, p. 6." *In re Cassalia,* 173 Ariz. 372, 375, 843 P. 2d 654, 657 (1992). In this case, the most serous instance of misconduct is Respondent's failure to follow Court Orders. Thus, the overall sanction is determined with reference to this misconduct.

Respondent's violation of Court Order implicates *Standard* 6.2, that provides:

Standard 6.22 Abuse fo the Legal Process

* * *

Standard 6.22

Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Respondent knowingly failed to pay the sanction or comply with the Court's other Orders. The Respondent's Statement or Non-compliance also expresses a clear intention to "never" self-report to the State Bar of Arizona. Respondent further testified that he "never hand any intention" of complying with the Court's Order to self-report. Tr.p.69. In this matter , the Hearing Officer finds that Respondent was knowing and willful in his violation of Court Orders. Respondent's conduct clearly interfered with a legal proceeding as his refusal to comply with Court Orders necessitated additional litigation and enforcement measures. Therefore, the presumptive sanction in this matter is suspension under *Standard 6.22.* Having established the presumptive sanction, it is appropriate to consider factors in aggravation and mitigation.

B. AGGRAVATING AND MITIGATING FACTORS

In determining the appropriate sanction, it is next necessary to consider whether there are any applicable aggravating or mitigating factors. The Hearing Officer finds the following aggravating factors under *Standard* 9.22.

(a) *Pattern of misconduct.* Respondent repeatedly disregarded the Orders of the Court, thus demonstrating a pattern of misconduct in Count One.

(b) *Multiple offenses.* Respondent is being disciplined for only one Count of misconduct as Count Two is being dismissed. Therefore, this is not an aggravating factor.

(c) *Refusal to acknowledge wrongful nature of conduct.* Respondent does not acknowledge any impropriety in his actions. To the contrary, Respondent testified that there was "no doubt" that he acted professionally with regard to Count One and Two. Tr. P. 174. Respondent even testified "I believe that I should be the poster-child for what a lawyer in Tucson or Phoenix should be." *Id.* As the Commission has observed, a Respondent's "failure to appreciate the significance of his misconduct or, for that matter, his failure even to realize that

there has been any misconduct makes him a danger to the public." *In re Wade,* 174 Ariz. 13, 18, 846 P.2d 826, 831 (1993). Respondent's failure to acknowledge or even perceive any error in his conduct is troubling and aggravating. However, the Hearing Officer does not find the Respondent to be a danger to the public.

(d) *Substantial experience in the practice if law.* Respondent testified that he has been an attorney for 18 years. Respondent was admitted in the State of Arizona in 1995, and is currently a Sole Practitioner. Respondent himself testified that he is an extremely knowledgeable and experienced attorney. "I am at the top of my game, having been lawyer for 18 years. I would say I'm at the peak of my career for the next 20 years, and extremely experienced." Tr. P. 108. For an attorney of Respondent's self-proclaimed stature, and one who believes himself to be an exemplar or "poster child" of fine lawyering, the failure to follow Court Orders is aggravating.

The Hearing Officer further finds that the following mitigating factors, as cited in *Standard* 9.32 apply:

(a) *Absence of a prior disciplinary record.* Respondent has no history of prior discipline, and therefore that is accorded some weight.

(b) *Absence of a dishonest or selfish motive.* Respondent's conduct in this matter did not involve dishonesty or selfish motive, but was more of a loss of composure brought on by the emotion of the moment while representing himself.

(c) *Full and free disclosure to disciplinary board or cooperative attitude toward proceedings.* The Respondent has been cooperative, forthcoming, and very honest throughout these proceedings, which is to his benefit and accorded some weight.

(d) *Character or reputation.* Opposing Counsel, Doug Clark, characterized Respondent as a competent, sensible, knowledgeable and capable attorney. Larry Rolling of Chandler & Udall, L.L.P. believed that Respondent was extremely professional and understanding. Respondent believed that he enjoyed an excellent reputation in the legal community of Tucson, which he attempted to defend in his legal pleadings filed with the Court in the Pitts/Molina litigation while representing himself.

(e) *Imposition of other penalties or sanctions.* Respondent was order to pay $500.00 as a sanction for filing an alleged frivolous Counterclaim, which Respondent proved was procedurally correct under Arizona law. Respondent was later ordered to pay an additional sanction of $200.00 for failing to timely pay the first $500.00 as ordered. Respondent ultimately paid a total of $700.00 upon advice of his Counsel approximately ten (10) weeks after ordered to do so. Considering the initial $500.00 sanction was paid only after additional litigation and a finding of contempt, the mitigation of other penalties or sanctions is accorded some weight.

PROPORTIONALITY

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226, 8887 P. 2d 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality review is "an imperfect process." *In re Owens,* 182 Ariz. 121, 127, 893, P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*

To have effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra.* 208 Ariz. At ¶ 33, 90 P.3d at 772 However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id at 208 Ariz. ¶61, 90 P.3rd @ 778* (citing *In re Alcorn.* 202 Ariz. 62, 76, 41 P. 3d 600, 614 (2002); *In re Wines,* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

Attorneys who have failed to follow Court Orders have received a wide range of sanctions, from long-term suspension or disbarment at the severe end, to informal reprimands at the more lenient end of the discipline spectrum. As each case in this area is very fact-specific, it is difficult to find a prior case in which the facts are identical or substantially similarly. The following cases are somewhat similar in regards to a Respondent not following Court Orders, but are dissimilar as to the effect upon the Respondent's client, the opposing party, and/or upon opposing counsel. The cases resulted in a sanction of suspension in accordance with *Standard* 6.23.

In *In re Hickle,* SB-06-0046-D (2006), the lawyer consented to a four-month suspension for violations of ER 3.4(c) and 8.4(d). Attorney Hickle failed to appear at a trial, claiming he mistakenly thought the matter had settled. Hickle's client appeared on his own and the trial judge bifurcated the trial as to Hickle's client. That same day, the trial judge issued a Minute Entry directing Hickle to appear at an OSC hearing to explain his failure to appear at trial. Hickle failed to appear for the OSC hearing and was held in contempt.

A few months later, the trial judge ordered Hickle to pay a $7,000.00 deposit to the Clerk of the Court. The deposit was intended to secure payment of attorney's fees necessitated by the bifurcation fo the original trial. Hickle failed to apply the deposit and was again held in contempt. Hickle was further ordered to apply a sanction for the original contempt finding arising our to the missed OSC hearing. Hickle failed to pay the sanction. After failing to pay the sanction, Hickle was ordered to file an explanatory affidavit regarding his file an explanatory affidavit regarding his failure to follow prior Court Orders. When he failed to file the affidavit, the Court ordered Hickle to appear at an OSC hearing. Hickle failed to appear for the OSC, was again held in contempt, and was ordered to pay an additional monetary sanction.

In Hickle's case, there were two factors in aggravation (substantial experience in the practice of law, and a patter of misconduct), and four factors in mitigation (absence of a selfish or dishonest motive, imposition of other penalties or sanctions, remorse and remoteness of prior disciplinary offenses). Additionally, Hickle's conduct was found not to have resulted in actual injury to the client.

Overall, Respondent's case is somewhat similar to *Hickle*. Respondent repeatedly failed to follow the clear Orders of the Court. However, Respondent's pattern of misconduct, or the number of Orders violated, is not as substantial as those in *Hickle*. Furthermore, Respondent has no prior discipline, indicating that a lesser period of suspension is appropriate.

In *In re Arrick,* 161 Ariz. 16, 775 P.2d 1080 (1989), the lawyer received a six-month suspension for failing to comply with a Court Order directing him to reimburse overpayments of attorney's fees to a probate client among other violations. While particulars of the Court Order

are different, the case is somewhat similar. The lawyer claimed he simply interpreted the Court Order inaccurately, but the Supreme Court found the Order crystal clear saying

> "We strongly disapprove of respondent's conduct. An attorney must set an example for the general public that obedience to a court order is not a matter of personal convenience and cannot be ignored or disregarded without serious consequences."

Id. 161 Ariz. at 20, 775 P.2d at 1084,

The Commission found two aggravating factors (vulnerability of client and substantial experience in the law), and four mitigating factors (absence of prior discipline; acknowledgment of conduct; cooperation with discipline procedure; and remorse). In this matter, Respondent was representing himself, and thus did not jeopardize the interest of a separate client, indicating that a lesser sanction than that imposed in *Arrick.*

The Hearing Officer notes that some other cases involving failures to follow Court Orders resulted in the lesser sanction of Censure, particularly where substantial mitigation was present or the Orders violated were more administrative in nature and thus distinguishable from Respondent's case. *In Matter of Ames,* 171 Ariz. 125, 829 P.2d 315 (1992) (the Respondent was censured and order to pay restitution for, in part, failing to comply with a judge's specific schedule for responding to pleadings, supplementing discover and filing lists of witnesses and exhibits); *In Matter of La Pagila,* 173 Ariz. 379, 843 P.2d 1271 (1992) (the Respondent was censured for failing to attend a meeting of creditors and failing to timely file the statement of affairs and schedules of income and expenses, as well as other violations); *In Matter of Gabriel,* 172 Ariz. 347, 837 P.2d 149 (1992) (the Respondent was censured for failing to comply with discovery requests in a personal injury case in which he was the defendant).

In reviewing the presumptive sanction, the relevant factors in aggravation and mitigation, and the proportional cases, this Hearing Officer finds that the appropriate sanction in this matter is a suspension for a period of thirty (30) days along with participation in the State Bar's Ethics Enhancement Program (EEP).

RESPECTFULLY SUBMITTED this 12th day of January, 2007.

Juan Perez-Medrano /cs
Juan Pérez-Medrano
Hearing Officer 9D

Copy of the foregoing was mailed this 11th day of January, 2007, to:

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