BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 09-0202
CORNELIA WALLIS HONCHAR, Bar No. 019825	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

1. Probable cause was found in this matter on June 10, 2009, and a Complaint thereafter filed on July 24, 2009. The matter was assigned to the undersigned on August 11, 2009, and an Initial Case Management Conference was held on August 27, 2009. A contested hearing was held on November 16 and 17, 2009.

FINDINGS OF FACT

Factual Summary

2. This matter involves allegations by the State Bar that Respondent, by tearing up a letter from a criminal codefendant to Respondent's client during trial, unlawfully damaged or attempted to destroy evidence in a criminal case, and that Respondent lied or mislead the Court regarding whether she had read the letter. Respondent responds that she believed the letter was a privileged communication and not evidence in the case, that her conduct was not "unlawful" and not a violation of the ethical rules. Respondent also claims that she was not untruthful with the Court regarding whether she had read the note.

3. At the conclusion of the evidence, this Hearing Officer found that the State Bar had not met its burden of proof on certain issues, and ruled in Respondent's favor on the issue of her comments to the Court, and that Respondent did not knowingly damage or destroy evidence. Left open was whether Respondent's actions were negligent.

4. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on October 25, 1999.

5. Respondent represented Howard McMonigal ("Mr. McMonigal") in State v. Rimer and McMonigal, CR2007-3959, in the Pima County Superior Court. Jill Thorpe ("Ms. Thorpe") represented the codefendant and stepbrother to Mr. McMonigal, Ignacio Rimer ("Mr. Rimer").[1]

6. On or about December 2, 2008, a jury trial began in CR 2007-3959, in the Pima County Superior Court before the Honorable Gus Aragon ("Judge Aragon"). Mr. Rimer and Mr. McMonigal were tried at the same time before the same jury.

7. The charges against Mr. McMonagal and Mr. Rimer at trial consisted of numerous counts involving theft, drug possession, kidnapping, sexual assault, and illegal enterprise (importing methamphetamine from Mexico and then selling or trading it for stolen property).

8. Richard Wintory ("Mr.Wintory") and Kellie Johnson ("Ms. Johnson"), Deputy Pima County Attorneys, represented the State of Arizona in CR 2007-3959.

[1] Unless otherwise cited, the facts cited herein were admitted by Respondent in her Answer or stipulated to in the Joint Prehearing Statement.

9. On Day 19 of the trial, January 13, 2009, Defendant McMonigal, against Respondent's advice, had begun his testimony in his own defense. Respondent completed her direct examination of Mr. McMonigal, and the Prosecution had begun its cross examination.

10. Day 20 of the trial was conducted on or about January 14, 2009. On January 14, 2009, before Judge Aragon took the bench, and outside the presence of the jury, the parties entered the courtroom.

11. There was admitted at the hearing in this matter a video recording (no audio) of the courtroom prior to the start of trial on January 14, 2009, which showed what happened between the various parties, State Bar's Exhibit "S/B Ex." 2.

12. Respondent walked into the courtroom followed by Mr. McMonigal.

13. Respondent walked to the defense table where Co-defendant Rimer was standing. Mr. McMonigal followed Respondent to the defense table.

14. Mr. Rimer passed a handwritten letter[2] to Respondent who immediately passed it to Mr. McMonigal without reading it.

15. Mr. McMonigal then placed the letter he'd received from Mr. Rimer, through Respondent, down on the table to finish dressing for trial.[3]

16. Pima County Sheriff's Deputy Jason Taylor ("Deputy Taylor") went to inspect Mr. McMonigal's clothing and noticed the word "guns" in the letter laying on the Defense table. Deputy Taylor then consulted fellow Deputy Edwards regarding the letter.

---

[2] The document passed between Co-defendant Rimer and Mr. McMonigal was sometimes referred to as a "note" and sometimes a "letter". It will be referred to herein as the "letter".

[3] Both Defendants were in custody and were provided civilian clothes to wear during trial.

17. Both Deputies then approached defense table and were reading the note when Respondent noted their presence and asked what the problem was, Transcript of Hearing ("T/H") 311:23-312:11.

18. The Deputies advised Respondent that it was improper for inmates to exchange notes, T/H 312:12-15. However, during the course of the trial defendants Rimer and McMonigal had been, on a daily basis, passing notes to each other and showing each other their notes. This previous exchange of notes had occurred in the view of the Court, as well as the Deputies, T/H 177:1-24, 298:19-25, 302:25-303:3, 307:12-24, 35724-358:17.

19. Prior to this date no one had objected or expressed concern about the exchange of notes between the co-defendants, T/H 298:20-299:6, 414:14-415:2.

20. The Deputies' policy was to allow the notes as long as the notes were passed through the attorneys because they considered such notes attorney-client documents and therefore privileged, T/H 312:20-313:20.

21. There was testimony that the Deputies had a few days previously advised Respondent of this policy in an unrelated incident, T/H 362:25-364:6, 430:19-431:8.

22. Respondent picked up the letter and gave it to Mr. McMonigal, and asked the Deputy if that was proper, to which the Deputy replied that it was, T/H 313:5-315:5. At this point Respondent had not read the letter.

23. Mr. McMonigal then sat down at the defense table and began to read the letter. Respondent was not paying attention to her client reading the letter as she was preparing for the day's trial work, T/H 432:16-24,T/H 447:5-449:7.

24. Eventually, Respondent sat in a chair by the defense table near Mr. McMonigal. Respondent then accepted the letter from Mr. McMonigal and looked at it. Respondent had the letter for approximately two minutes, but testified that because of interruptions and distractions only spent about 67 seconds actually reading it, S/B Ex. 2, video, minute 9:09, T/H 376:22-377:15.

25. From Respondent's brief review of the letter she concluded that it was "stupid" and she was more concerned about keeping her client from reading Co-defendant Rimer's "stupid" comments than carefully reading the letter's contents, T/H 437:17-439:19, 443:8-444:8, 482:4-10. After her brief review of the letter Respondent concluded that it would be inappropriate for her client to have the letter, T/H 39:24-41:1, 443:23-446:5. At this stage, Respondent did not know whether her client had read the letter, T/H 44:5-14, 432:16-24, 447:5-449:7.

26. The State Bar's position is that the letter was a clear attempt by Co-defendant Rimer to influence the testimony of Mr. McMonigal, State Bar's Exhibit 7.[4]

27. Respondent testified that after her brief review of the letter it did not enter her mind that the letter was an attempt by Mr. Rimer to tamper with a witnesses' testimony, that it must be disclosed to the Prosecution, or that it was evidence in the case, T/H 436:21-437:10, 441:11-21.

28. During the time that Respondent was trying to read the letter, her client Mr. McMonigal was demanding that she return the note to him. Respondent and her client argued about the return of the note, T/H 42:19-43:25, 437:17-439:19, 441:2-8.

[4] At this juncture it is advisable to read the letter to get an appreciation of not only its content but the difficulty in reading the handwriting.

29. Respondent testified that her relationship with her client, Mr. McMonigal had been strained for some time. She characterized Mr. McMonigal as a sociopath; a narcissist; a megalomaniac; very strong-willed; manipulative; controlling; and who argued with Respondent endlessly throughout the approximate two years leading up to the trial. Respondent further testified that Mr. McMonigal repeatedly failed to follow her instructions and would not take "no" for an answer, that he lied to her, and actively did things in defiance of her specific instruction, T/H 73:11-20, 167:19-168:3, 437:17-440:17.

30. Respondent further testified that Mr. McMonigal engaged in conduct that, if Respondent had not taken action, could potentially have caused her ethical problems, T/H 437:17-440:17.

31. Respondent testified that, at this point in the trial, she was tired and frustrated with Mr. McMonigal. Respondent was upset with her client and, not wanting to create a scene in the courtroom, and yet trying to convince him quickly that he could not have the note, made a split second decision to tear the note. She tore the note twice in four pieces, then gave the pieces to her investigator Mr. Godtlibson (who put them in his pocket) and told him to "Keep it away from Howard [McMonigal], I don't want Howard to have this", T/H 45:1-10, 377:20-25, 437:17-439:19, 443:8-444:8, 458:25-459:12, 481:4-9, 482:4-10.

32. Both Respondent and Mr. Godtlibsen testified that it was their understanding that Mr. Godtlibson would place the letter pieces in Respondent's trial box, where Respondent kept all of the documents from each day of trial, T/H 48:8-15, 367:12-368:22, 378:1-23.

33. Prosecutor Mr. Wintory then walked to where Respondent was seated followed by Deputies Taylor and Edwards. Mr. Wintory and Respondent then discussed the letter and Respondent's tearing of the letter.

34. Mr. Wintory asked Respondent if she had the note and if she had torn it. Respondent responded to Mr. Wintory by asking him what the problem was. Respondent admitted that she tore the note, and that Mr. Godtlibson had it, T/H 95:4-19.

35. At this point in time it is not clear whether Respondent was aware that Mr. McMonigal had read the letter, S/B Ex. 3, Bates Stamp Number "BSN" 000138:14, T/H 447:9-11.

36. Respondent did not attempt to conceal the existence of the note, or disagree with Mr. Wintory's request that the note be given to the Deputies, T/H 95:9-16. Respondent responded by stating that she was surprised the note was "becoming a big deal", T/H 96:20-24. Respondent also responded by stating: "I'm sorry, I'm sorry, I'm sorry. I didn't mean to do it. I screwed up. I'll get you the letter." T/H 339:9-17.

37. Mr. Godtlibsen provided the letter pieces to Deputy Taylor, who then gave the note pieces to Mr. Wintory.

38. There was then some discussion among the attorneys as to whether Mr. Wintory should have possession of the letter in the absence of permission from the Court, and/or Respondent and her client Mr. McMonigal. Ultimately, Mr. Wintory agreed to give the note to the Court and let Judge Aragon decide the issue, T/H 47:1-48:4, 67:12-68:4, 97:21-98:4, 195:1-196:9.

39. Respondent walked away from the other attorneys stating: I didn't know we were doing anything wrong. No one told me anything wrong was going on. T/H 386:2-22.

40. Respondent testified that she wanted to have the letter, as she wanted to be the one who raised the issue of the letter with the Court, T/H 193:18-194:17, 384:22-385:12, 452:14-16.

41. Eventually the letter pieces were given back to Deputy Taylor, who then gave the pieces to court staff so that the letter could be taped back together.

42. Later that morning, Judge Aragon took the bench. Judge Aragon admonished Mr. Rimer about the previous day's courtroom decorum, and then asked if there were other "housekeeping" matters. Ms. Johnson stated, "Yes, yes, Judge."

43. Respondent then stated to the Court: "I would like to handle what I consider to be a significant issue, and that is there is a note, and I would like to address this right now."

44. After Judge Aragon inquired where the letter came from, Ms. Johnson informed Judge Aragon about the morning's events regarding the letter.

45. Respondent addressed the Court about her involvement and stated: "I read over the letter very briefly, I did not want to get involved in this." Respondent testified that when she was referring to not "getting involved" she was referring to Mr. Rimer's attempt to pass the letter to Mr. McMonigal and her refusal to give the letter to Mr. McMonigal when he demanded it from her.

46. Respondent apologized to the Court for tearing the letter and had already previously apologized to Mr. Wintory for tearing the letter, State Bar's Exhibit 3

at BSN 000124:1-12, T/H 339:9-17, 489:7-490:2. Respondent testified that she remains very sorry and remorseful that she tore the letter, T/H 47:22-488:11.

47. After some discussion about the impact of the letter, Judge Aragon then asked Respondent directly if she read the note.

48. Respondent responded to Judge Aragon's question: "I cannot remember word for word, I glanced it over, it appears-- I have to answer the truth, the answer is yes, yes, sir." In her Answer to the State Bar's Complaint, as well is in her testimony, Respondent states that while she was trying to read the letter, she was: interrupted by several conversations; folded and unfolded the letter several times; tried to monitor and listen to other conversations in her presence; and only briefly looked at the letter. Respondent also testified that because she had not thoroughly read the letter, she hesitated in answering the Court's question affirmatively, but answered as honestly she could, T/H 471:11-472:22. The video bears out Respondent's statements regarding the environment within which she was trying to read the letter, S/B Ex. #2.

49. Subsequently, the letter was taped back together and given to Judge Aragon, who then read it.

50. Once he was done reviewing the note, Judge Aragon ordered Mr. Rimer and Mr. McMonigal not to discuss the case with one another, S/B Ex. 3, BSN 000132:16. Respondent points out that this is the first time the Court had made such a ruling. Heretofore, the codefendants had passed notes to each other, in full view of everyone and no one had made any objection.

51. Judge Aragon then gave the note to the bailiff so that photocopies could be made. Judge Aragon stated: "The Court would characterize this letter as an attempt to coach the witness, Mr. McMonigal, and tell him what he might consider testifying to and how he might testify and relaying other facts or allegations or information, whether it is correct or not, that he should take into account." See S/B Ex. 1, BSN 000106, the Minute Entry from the hearing. For the Judge's exact comments, see S/B Ex. 3 BSN 00148.

52. Respondent's position throughout the hearing in this matter is that the two defense attorneys (Respondent and Ms. Thorpe) had a "de-facto" Joint Defense Agreement that exists when the defense of multiple defendants in one case involves a common interest or "Joint Defense". Particularly in indigent defense cases, whether by explicit direction from the government authorities who are paying for the defense, or whether arising from the practical necessities of doing the job, the defense lawyers need to cooperate with one another and achieve "efficiencies" by sharing resources such as investigator services, court reporter services, interviewing witnesses, sharing information about the investigation of the case, document drafting, filing joint motions, sharing information of the theory each lawyer intends to use in defending the case at trial, and, where applicable, developing a common strategy and defending the case, T/H 113:19-119:10.

53. Respondent and Ms. Thorpe had conducted their defense of Mr. Rimer and Mr. McMonigal pursuant to a "de-facto Joint Defense Agreement", as all of these

things regularly occurred during Respondent and Ms. Thorpe's two year defense of the case, T/H 85:4-13, 169:14-171:19, 408:8-410:1.

54. Respondent further argues that, when made in the context of a Joint Defense Agreement, whether a "de-facto" informal agreement or formal written agreement, the communications between and among the defendants and their lawyers are presumptively attorney-client privileged and subject to the work product doctrine. Because there was a de-facto Joint Defense Agreement in this case, Respondent argues that she had a legitimate reason to assume that communications between and among the two defendants and their lawyers in Court were privileged and confidential, and not subject to disclosure to the State, T/H 113:14-120:5, 128:14-130:16, 312:20-313:4, 366:14-367:11.

55. It is conceded that if the note had raised a legitimate issue of courtroom security, that she may have been ethically required to disclose it to the appropriate authorities, T/H 159:2-24. However, because the note did not raise such an issue, and the Deputies had given their approval for her client to have the note after they read it, Respondent argues that she had no such duty, T/H 315:3-5, 327:18-329:1, 161:2-19.

56. Judge Aragon then ruled that the note was evidence and that the jury might consider it, State Bar's Exhibit 3 at BSN 000148:19-25.[5]

57. Respondent argued to the Court that the note should not be admitted because (1) the conspiracy had ended; (2) allowing the note into evidence would raise a Bruton issue as its author, Rimer, was not going to testify; and (3), the Court had

[5] The prosecutor testified that the letter played a significant role in Mr. Rimer's conviction as the State's evidence against Mr. Rimer was not as strong as the evidence against McMonigal. Both Defendants were convicted and sentenced to very long prison sentences.

no evidence before it that Mr. McMonigal had agreed to anything proposed by Mr. Rimer in the note, State Bar's Exhibit 3 at BSN 000142:2-000148:9. After Respondent's arguments, Judge Aragon affirmed his prior ruling that the letter was admissible evidence.

58. Judge Aragon then asked Respondent again if she had a chance to read the note. Respondent replied, "I glanced over it briefly and I was concerned, I only looked at it to see if there was anything that I felt I should not-- if there was anything that I should not ask my client, all right-- how can I say this. I glanced over it and I said I-- this isn't-- I didn't really read it carefully."

59. Whether the letter was or was not evidence (whether the conspiracy was ongoing) is important to this case because if in fact the letter was evidence, Respondent tore up evidence. If the letter was not evidence then Respondent's actions were inconsequential. There was evidence during the hearing in this matter that Judge Aragon was uncertain of the law, but he concluded that the conspiracy between the codefendants was ongoing and therefore the letter was admissible evidence, S/B Ex. 3 at BSN 000143:24-144:14.

60. There is no question that the letter did not contain "security" issues as the Deputies had read it and approved Respondent giving it to her client, T/H 315:3-5, 327:18-329:1.

61. There was testimony by Respondent's expert, Larry Hammond a career defense attorney, at the hearing in this matter that: Judge Aragon's ruling was in error; that it would not have occurred to him, Mr. Hammond, that the letter was part of the conspiracy; and further that Respondent's conduct was within the range of

conduct expected of a competent defense attorney, T/H 137:22-139:1, 143:12-144:2. It was pointed out that the matter is currently on appeal at this time, Respondent's Hearing Exhibit C.

62. Respondent's expert also testified that under Arizona law the conspiracy was over so the letter was privileged and should not have been admitted into evidence. If this position is correct, the letter was not evidence and therefore Respondent can not be held responsible for destroying or modifying evidence, T/H 126:21-128:9. Mr. Hammond also testified that it was, under Arizona law, appropriate for Respondent to tear up the letter, T/H 131:24- 132:13, 135:20-136:19, 143:12-144:3.

63. The State Bar's expert, Paul Ahler a career prosecutor, testified that he felt that the letter was an attempt to coach the witness, relevant and admissible, T/H 251:14-253:10. Mr. Ahler testified that he felt that Respondent's conduct wasn't so much influencing a witness as it was tampering with evidence, T/H 260:5-10. Mr. Ahler conceded that he was not knowledgeable about Joint Defense Agreements nor aware of their impact on communications between defendants, but feels that the letter is not privileged, T/H 262:4-263:23. Mr. Ahler also concedes that the general rule is that conspiracy ends when the objective has been obtained, but feels that there are exceptions, T/H 265:4-265:12.

CONCLUSIONS OF LAW

64. In its Complaint, the State Bar charged Respondent with:

A) knowingly making a false statement of fact or law to a tribunal and/or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

B) unlawfully obstructing another party's access to evidence and/or unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value;

C) in representing a client, Respondent used means that have no substantial purpose other than to embarrass, delay, or burden any other person;

D) Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation;

E) Respondent engaged in conduct that was prejudicial to the administration of justice.

65. The basis of the State Bar's Complaint against Respondent is that she: A) Misled or lied to the Court when questioned by Judge Aragon about whether she had read the letter; and B) That she knowingly destroyed evidence when she tore the note. At the conclusion of the presentation of the evidence this Hearing Officer ruled that the State Bar had failed to prove by clear and convincing evidence that Respondent lied to the Judge or misrepresented whether she had read the letter. Additionally, this Hearing Officer ruled that the State Bar had failed to prove that Respondent knowingly destroyed evidence. Left open at the conclusion of the

hearing on the State Bar's Complaint was whether Respondent negligently tore evidence.

66. Respondent argues that ER 3.4(a) prohibits a lawyer from "unlawfully" altering, destroying or concealing a document having potential evidentiary value. Respondent first argues that because the two defense attorneys were conducting a "de-facto" Joint Defense Agreement in their defense of Mr. Rimer and Mr. McMonigal, the letter was a privileged in-court communication and therefore not disclosable to either the Court or opposing counsel. Respondent also argues that because the conspiracy between the two Defendants was over, the letter was not "evidence", and so improperly admitted into evidence by Judge Aragon. If the letter was not "evidence", Respondent could not have violated ER 3.4(a). Finally, Respondent argues that "unlawful" conduct in this instance is a specific intent violation that she could not have "negligently" violated.

67. The State Bar argued initially that Respondent's conduct was "unlawful" because she tore the letter into 4 pieces, allegedly a violation of *criminal* statute ARS 13-2809, tampering with physical evidence. In its Post-hearing Memorandum the State Bar, in light of this Hearing Officer's ruling that there was insufficient evidence that Respondent intentionally attempted to destroy evidence, takes the position that Respondent's conduct was "unlawful" under a duty imposed on attorneys to comply with a legal obligation "...to produce a document or other material, as in civil discovery", State Bar's Post-Hearing Memorandum 11:2. The

Bar goes on to cite cases in Colorado and Connecticut which are not clearly on point.[6]

68. The Colorado Case involved an attorney falsifying a key piece of evidence in the case. In the Connecticut case, the lawyer failed to disclose and then actively attempted to either change or suppress a report that she had a duty to disclose. In both of these cases the attorneys' conduct was well thought out and with the intent to deceive. In this case, Respondent's intent was as she testified, to keep her client from getting the letter. No evidence has been submitted to show otherwise. The State Bar also cites Hitch v. Pima County Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985). In the Hitch case there was evidence directly related to the defendant and the crime, a watch of the victim, which came into the defense attorney's possession. The Court ruled that the watch should be turned over to the State. Here we are not dealing with direct evidence of the crime, rather a document created later, during the trial, by one of the defendants.

69. This Hearing Officer does not agree with the Bar's analysis for several reasons. First, the circumstances under which the tearing of the letter occurred must be recognized. Respondent was in a protracted trial with an extremely difficult and demanding client who was facing serious charges. Respondent's client insisted on taking the stand and testifying against her advice, and doing a bad job of it.

70. Respondent's client and the co-defendant had been exchanging notes in court during the many days prior to the letter incident with no objection. The Respondent was told by the Deputies that as long as the letter in question went

[6] Respondent argues that the State Bar, after the hearing in this matter, should not be allowed to adopt a different theory of how Respondent's conduct violated the rules. This Hearing Officer addresses the issues raised because they are not dispositive, and also so they do not cloud subsequent consideration.

through her, it was okay for Mr. McMonigal to have it. This was after the Deputies had read the letter.

71. Respondent testified, and the video verifies, that she had little time to thoroughly read the letter, what she got out of that review was that it was simply "stupid", and she would not give in to her client's demand that she give him the letter back. A review of the letter shows that Mr. Rimer's handwriting is very difficult to read and cannot be easily nor quickly deciphered. Respondent testified that she did not recognize or appreciate that it might be evidence in the trial. The fact that Judge Aragon **later** ruled that the letter was evidence, over Respondent's objection that it was privileged, does not mean that Respondent should have anticipated that ruling.

72. There was considerable testimony at the hearing in this matter from countervailing experts on whether Judge Aragon's ruling was or was not correct that the conspiracy was still ongoing and the letter was therefore admissible. The prevailing authority seems to say that the conspiracy was over, and that the letter was therefore not evidence and perhaps a privileged communication between codefendants in a de-facto joint defense environment. However, it is not necessary to second guess the judge. It is, though, important to note that two experts, as well as the attorneys in the trial of this case, have differing views on whether the note is or is not evidence. Even with months to research and think about the applicability of many cases, there is still a difference of opinion on whether the letter was evidence and whether it was admissible. That specific issue

will abide the Court of Appeals decision in the matter. Our focus must be on not what Respondent did, that is agreed to by everyone, but what her intent was.

73. Respondent testified as to the reasons why she tore the letter twice and the State Bar has not come forward with clear and convincing evidence to the contrary. Indeed, the fact that in view of numerous people in the courtroom she only tore it twice into four pieces, which were easily taped back together, and then gave it to her investigator, would indicate that she was not in fact trying to destroy it, but rather simply not giving in to her client's demand for what Respondent thought were the "stupid" ramblings of the co-defendant.

74. The State Bar argues that the letter constituted "potential" evidence and that Respondent should have realized that and not torn it. Indeed, this Hearing Officer's first reaction to reading the initial facts in this case was to conclude that the Respondent tore a piece of potential evidence. Even Respondent's initial reactions to the Court and opposing counsel shows a recognition that she should not have torn the letter.

75. Should Respondent have taken more time to thoroughly read the letter, anticipate that the judge would rule that it was evidence, and appreciate that it had potential evidentiary value? Perhaps so, but is that an ethical violation? This Hearing Officer has seen other instances where an attorney has been in a protracted trial with a very difficult and threatening client, with very high stakes. It is not fair to in hindsight, **after** Judge Aragon's ruling, to judge that a snap decision of an attorney under that kind of stress, under all these circumstances, and her belief that the letter was a privileged communication, was an ethical violation. While

Respondent's tearing of the letter to tell her client "no" might seem in hindsight not to be a very effective form of communication, there simply is no evidence that Respondent tore the letter as a way to keep either the prosecution or the Court from having access to it.

76. Did Respondent make a mistake by tearing the letter, yes. However, it has already been established in Arizona that while we look at the attorney's conduct, we also look at the why and the circumstances at the time that the attorney makes decisions, *In re VanDox,* SB 06-121. Given that Respondent felt that the letter was privileged, was one of many exchanged between the codefendants and not given to the Court and opposing counsel, and considering all of the environmental factors going on prior to the tearing of the note, this Hearing Officer concludes that Respondent tore the note for exactly the reason that she said she did and not in any attempt to unlawfully destroy evidence. Can we then go the next step and say that Respondent should have realized that the letter was "potential" evidence and not torn the note? For the same reasons, it is not fair in hindsight to judge Respondent's conduct from the safe distance of many months perspective, reflection and consideration that she should have in those short moments with all that had been and was going on, realized what the letter represented and tempered her frustration with her client. Respondent's actions were rash and, in hindsight not wise, but they were not a violation of the Ethical Rules.

77. This Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that Respondent's conduct violated any of the Ethical Rules.

RECOMMENDATION

78. It is therefore recommended that the Complaint against Respondent Cornelia Wallis Honchar be dismissed.

DATED this 7th day of January, 2010.

Hon. H. Jeffrey Coker/WM
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 7th day of January, 2010.

Copy of the foregoing mailed
this 7 day of January, 2010, to:

Karen A. Clark
Ralph Adams
Respondent's Counsel
Adams & Clark PC
520 E Portland Street, Suite 200
Phoenix, AZ 85004

Jason Easterday
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Deann Baker