

SUPREME COURT OF ARIZONA

In the Matter of a Member of ) Arizona Supreme Court  
the State Bar of Arizona ) No. SB-17-0078-AP  
)  
JOSEPH W. CHARLES, ) Office of the Presiding  
Attorney No. 3038 ) Disciplinary Judge  
) No. PDJ20179070  
Respondent. )  
\_\_\_\_\_) FILED 05/15/2019

DECISION ORDER

Pursuant to Rule 59 of the Rules of the Arizona Supreme Court, the State Bar appealed from the hearing panel's Decision and Order dismissing the disciplinary Complaint with prejudice. The panel's decision, however, did not contain findings of fact and conclusions of law. The State Bar filed "State Bar's Motion to Remand Hearing Panel's Decision for a Supplemental Decision Containing Formal Findings of Fact and Conclusions of Law" and requested an expedited ruling on the Motion. On January 18, 2018, this Court granted the Motion and remanded the matter to the hearing panel with directions to file "a supplemental decision, including formal findings of fact and conclusions of law as to each count and each charge alleged in the disciplinary complaint."

On February 23, 2018, the panel filed its supplemental decision. The panel concluded that the State Bar failed to prove the allegations of unethical conduct against the Respondent, Joseph W. Charles, by clear and convincing evidence, and it again dismissed the Complaint against him with prejudice. The State Bar resumed its

appeal challenging the panel's decision to dismiss allegations that Respondent violated the following ethical rules: ER 1.7 (Conflict of Interest; Current Clients), ER 1.12(a) (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral), and ER 8.4(d) (Misconduct). The State Bar also challenged the panel's determination that Respondent did not violate his probation in violation of Arizona Supreme Court Rule 54(e). The State Bar does not challenge the panel's decision regarding other alleged ethical rule violations and therefore has waived any such challenges.

The Court has considered the panel's decision, the parties' briefs, and the record in this matter. For the following reasons, we find that the panel's decision to dismiss this matter with prejudice is not supported by reasonable evidence and is clearly erroneous. The Court concludes that Respondent engaged in misconduct by violating several ethical rules, as set forth in this decision order. We impose a suspension from the practice of law for six months and one day and place Respondent on probation for two years, with terms and conditions to be determined should he be reinstated.

#### **I. BACKGROUND**

In the parties' Joint Pre-Hearing Statement, they listed several stipulations of fact. The stipulations generally follow the allegations in the Complaint, paragraphs 1 through 7, 10, and 13. In addition, Respondent admitted in his Answer some of the Complaint's allegations. Those facts are:

1. "Respondent was admitted to practice law in Arizona on September 23, 1972." Respondent admitted this allegation in paragraph 1 of his Answer to the Complaint.
2. "On September 23, 2015, Mr. and Mrs. Blair hired Respondent to mediate their divorce and Respondent was paid \$2,850.00." Respondent admitted this allegation in paragraph 2 of his Answer - with the additional explanation that "shortly before filing of the divorce," he met with the Blairs and with "their agreement, he agreed to serve as mediator for a fixed fee of \$2,500 plus costs."
3. "Respondent filed a petition for dissolution on September 24, 2015, and Respondent was listed as the attorney for Mr. Blair's wife; however, Mr. Blair believed that this was part of the mediation process." Respondent admitted the first part of this allegation in paragraph 3 of his Answer and also explained that "both parties agreed and knew that Respondent was to serve as mediator," though the caption identified him as "Attorney for Petitioner."
4. "Mr. Blair accepted service of the petition and the mediation process started December 2015. Mr. Blair believed that Respondent was a neutral party and, as such, he communicated freely with Respondent." Respondent admitted these allegations in paragraph 4 of his Answer.
5. "Respondent drafted a consent decree and made changes that were requested by Mrs. Blair." Respondent admitted this allegation in paragraph 5 of his Answer.
6. "After reviewing the consent decree, Mr. Blair had concerns that he raised with Respondent. Respondent then told Mr. Blair to seek a legal consultation." Respondent admitted the allegations about Mr. Blair's concerns with the decree in paragraph 6 of his Answer.
7. "Respondent provided Mr. Blair with the name of an attorney to consult with and told Mr. Blair that Respondent would pay for the consultation. Respondent referred Mr. Blair to Steven Keist." Respondent admitted these allegations in paragraphs 7 through 8 of his Answer.
8. "Mr. Blair met with Mr. Keist and then received a letter detailing Mr. Keist's analysis of the consent decree." Respondent admitted these allegations in paragraph 10 of his Answer and explained that he did not confer or coordinate with Mr. Keist.

9. "Attorney Boca<sup>1</sup> contacted Respondent regarding concerns with [Respondent's] continued representation given [Respondent's] conflict of interest. Respondent said he would withdraw, which he did." Respondent admitted these allegations in paragraph 13 of his Answer with an explanation that he prepared a notice of withdrawal with consent but never received a signed consent from Mrs. Blair.

"A stipulation by the parties as to the facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise." *Higgins v. Guerin*, 74 Ariz. 187, 190 (1952) (citation omitted). Parties cannot be relieved from a stipulation unless (1) they make a clear showing it is untrue, (2) the request is made in a seasonable manner, and (3) good cause is shown. *Id.* "As long as a stipulation remains in effect[,] it is binding not only on the parties, but on both the trial and appellate court." *Id.* (citation omitted). Here, neither party sought relief from any stipulation. Consequently, the parties and the panel are bound by those stipulations for purposes of deciding this appeal.

Notwithstanding the parties' stipulation of facts, the panel made several factual findings departing from it and Respondent's admissions. To the extent the panel subsequently referred in its supplemental decision to stipulated facts as "untrue" or "unproven" or stated that "there was no evidence supporting these allegations nor the arguments based on those allegations," the panel's findings are clearly erroneous and not supported by reasonable evidence. See

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<sup>1</sup> After speaking with Mr. Keist, Mr. Blair eventually retained Cantor Law Group, and the firm assigned Nik Boca to the Blair matter.

Ariz. R. Sup. Ct. 59(j); *In re Non-Member of State Bar of Ariz., Van Dox*, 214 Ariz. 300, 304 ¶ 15 (2007). Accordingly, we defer to the parties' stipulation of facts in evaluating whether the State Bar proved the allegations of ethical violations by clear and convincing evidence.

Besides conflicting with stipulated facts, certain of the panel's findings are inconsistent with testimony presented at the hearing held on September 21, 2017. The panel's assertion that "[t]he evidence in the hearing was almost uniformly inconsistent with the allegations in the complaint" is not supported by reasonable evidence and is clearly erroneous.

**A. Respondent was hired by the Blairs to provide mediation services.**

The panel concluded that the State Bar failed to show the allegations in paragraphs 2 through 3 of the Complaint. It found there was no evidence that Respondent was paid \$2,500 as a mediation fee and that it was not true that Mr. Blair believed filing the petition for dissolution was part of the mediation process. Relying on the fee agreement, Mr. Blair's testimony that he had never seen the fee agreement until the hearing, and Mrs. Blair's testimony that she wanted to move forward quickly, the panel found that Respondent properly filed the petition at Mrs. Blair's direction solely as her attorney.

These findings conflict with stipulated facts 2 and 3 and evidence adduced at the hearing. Both Mrs. Blair and Respondent

testified that the Blairs hired him on September 23, 2015, to mediate their divorce, and he was paid \$2,500 for his mediation services. Respondent indicated in a written response to the State Bar's investigation that he informed the Blairs that, if there was a conflict, he would not be able to represent either of the Blairs. Respondent also clarified in this written response that he told the Blairs he would serve as a mediator and not as a lawyer for either party. Respondent testified to the same during the hearing. According to Respondent, the parties agreed to move forward with him as their mediator. Also, Mr. Blair signed a waiver and acceptance of service of process and a notice of appearance.

Even though the parties understood Respondent was hired to mediate, he filed a petition for dissolution appearing on record as "Attorney for Petitioner" representing Mrs. Blair, who did not direct Respondent to file a petition as her attorney. The petition was filed before the Blairs met with Respondent to confirm their agreement to mediate. Mrs. Blair testified she never granted Respondent the authority to act solely as her attorney. Respondent did not contradict her testimony, and he testified that his designation as "Attorney for Petitioner" was a mistake and should have never been on the petition from the beginning. Additionally, Mr. Blair believed that Respondent's filing of the petition was on behalf of both spouses as part of the mediation process - not only as attorney of record for Mrs. Blair. Both Mr. and Mrs. Blair also

testified that Mr. Blair paid Mrs. Blair \$1,250 as his share of the mediation fee.

In sum, there is no reasonable evidence to support a finding that Respondent and Mrs. Blair intended to form an attorney-client relationship starting from their first meeting or that the fee she paid was for his representation of her alone rather than for joint mediation services. In addition, the panel cited no testimony to contradict the stipulated fact that Mr. Blair believed that the filing Respondent made with the family court was part of the mediation process.

**B. The Blairs did not give informed consent to Respondent to provide them with mediation services after he filed a petition for dissolution for Mrs. Blair as her attorney of record.**

The panel found that the State Bar failed to show the allegations in paragraphs 4 and 5 of the Complaint. It also found that the Blairs and Respondent met in late October 2015, when they agreed to proceed with mediation. The panel concluded that Respondent explained the mediation process to them, told them he would no longer represent either of them, and obtained their informed consent to continue with the mediation. The panel also found no evidence that Mr. Blair repaid Mrs. Blair for his share of the mediation fee. The panel's findings are inconsistent with testimony adduced at the hearing and are clearly erroneous.

First, the panel's finding of informed consent is not supported by the record. ER 1.7 provides generally that a lawyer may not

represent a client "if the representation involves a concurrent conflict of interest," unless each affected client gives informed consent, confirmed in writing. ER 1.0(b) defines "confirmed in writing" as "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

The panel correctly identified that Respondent, as attorney of record for Mrs. Blair at that time, was required to obtain informed consent to proceed as mediator because the Blairs' interests were in direct conflict. The panel referred to Mr. Blair's testimony (that he thought he signed a mediation agreement) to support its finding that Respondent obtained the Blairs' informed consent to waive a conflict within the meaning of ER 1.0(b). However, no informed consent, confirmed in writing, was introduced into evidence to document that Respondent complied with his duty to make complete and adequate disclosures regarding the waiver of any conflict of interest. Indeed, Respondent even testified at the hearing that he never had a written mediation agreement with the Blairs. Based on the foregoing, the panel's finding that Respondent obtained the parties' informed consent to proceed as mediator is clearly erroneous.

Additionally, the panel's finding that Mr. Blair did not pay Mrs. Blair for his share of the cost for Respondent's mediation services was clear error. Both Mr. and Mrs. Blair testified that Mr.

Blair paid Mrs. Blair \$1,250, half of the \$2,500 mediation fee. At any rate, who paid whom what amount is simply irrelevant. This evidence is only relevant to show whether Respondent was providing mediation services to the Blairs. This question was resolved beyond all reasonable dispute; Respondent admitted that he was hired by the Blairs to provide them with mediation services.

Nothing in the record supports that Respondent sought informed consent to provide mediation services for the Blairs. Thus, the panel's determination that Respondent successfully obtained informed consent from the Blairs was clear error.

**C. Respondent continued representing Mrs. Blair after he terminated his role as mediator.**

The panel concluded that the State Bar failed to show the allegations in paragraph 12 because "[t]here was no clear and convincing evidence that [Respondent] continued to represent Mrs. Blair in any meaningful way in the dissolution matter." This finding was clearly erroneous.

Respondent testified that he identified the conflict when he noticed the draft consent decree identified him as "Attorney for Petitioner," like the petition for dissolution he had filed with the superior court. At that time, Respondent contemplated withdrawing from the case. Instead, he wrote Mr. Blair a letter on January 5, 2016, seeking to terminate the mediation and remain attorney of record for Mrs. Blair. He also failed to send Mrs. Blair a copy of the letter.

Although the evidence establishes that Respondent did not take action on Mrs. Blair's behalf after sending the January 5, 2016 letter, he nevertheless failed to withdraw and thus continued to represent Mrs. Blair. Respondent also did not make a timely motion to withdraw even after Mrs. Blair terminated the representation and received a \$2,500 refund. In fact, Respondent failed to withdraw even when Mr. Blair's new attorney requested him to do so, requiring Mr. Blair's attorney to file a motion to disqualify Respondent as Mrs. Blair's attorney, which resulted in Respondent's withdrawal.

Consequently, the panel incorrectly determined that Respondent did not continue to represent Mrs. Blair after he ended his role as mediator. Respondent continued to represent Mrs. Blair until he withdrew in March 2016. In the meantime, Respondent never sought informed consent from either of the Blairs to continue serving as Mrs. Blair's attorney despite his desire to do so.

## II. RULE VIOLATIONS

### A. ER 1.7(a).

The State Bar alleged that Respondent's conduct violated ER 1.7(a). That rule provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." There is a "concurrent conflict of interest" if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former

client or a third person or by a personal interest of the lawyer.

ER 1.7(a). A lawyer need not act knowingly to violate ER 1.7(a). See ER 1.7 cmt. 3.

The State Bar has shown by clear and convincing evidence that Respondent violated ER 1.7(a). Because Respondent took on the role of mediator for the Blairs, his ability to represent Mrs. Blair as her attorney of record was materially limited. See ER 1.7 cmt. 8. Thus, Respondent's conduct constituted a concurrent conflict of interest under ER 1.7(a)(2).

When Respondent realized the conflict, he did not withdraw but sought to end the mediation and continue representing Mrs. Blair alone. He took this action without informing Mrs. Blair that he had referred Mr. Blair to other counsel. Respondent also contradicted his own determination that he would be required to withdraw and represent neither of the Blairs if a conflict arose between them during the mediation. He continued to represent Mrs. Blair as counsel of record until he withdrew after Mr. Blair's counsel moved to disqualify him. Consequently, the Court finds based on reasonable evidence in the record that the State Bar has shown by clear and convincing evidence that Respondent violated ER 1.7(a).

**B. ER 1.12(a).**

The State Bar alleged that Respondent's conduct violated ER 1.12(a), which states in pertinent part:

[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a . . . mediator or other third-party neutral, unless all parties to the proceeding give informed consent confirmed in writing.

The State Bar has shown by clear and convincing evidence that Respondent violated ER 1.12(a). Respondent initially was hired to mediate the Blairs' dissolution and remained their mediator until he sent the January 5, 2016 letter informing Mr. Blair to seek his own legal counsel. Despite advising the Blairs that if a conflict arose he could no longer represent either of them, Respondent remained Mrs. Blair's attorney after he terminated the mediation services. Respondent failed to obtain informed, written consent from the Blairs for his continued representation of Mrs. Blair, which caused a violation of ER 1.12(a).

Therefore, the Court finds based on reasonable evidence in the record that the State Bar has shown by clear and convincing evidence that Respondent violated ER 1.12(a).

**C. ER 8.4(d).**

The State Bar alleged that Respondent violated ER 8.4(d), which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." In this case, Respondent's conduct burdened the judicial system and opposing counsel. He failed to withdraw in December 2015 when he knew he had a conflict of interest, failed to withdraw from representing Mrs. Blair when asked to do so by opposing counsel, and

failed to withdraw from representing Mrs. Blair voluntarily before opposing counsel was forced to file a motion to disqualify Respondent. In addition, Respondent's conduct protracted the proceedings and caused the Blairs added expense and frustration.

Consequently, the Court finds based on reasonable evidence in the record that the State Bar has shown by clear and convincing evidence that Respondent violated ER 8.4(d).

**D. Arizona Supreme Court Rule 54(e).**

Arizona Supreme Court Rule 54(e) provides that a violation of probation is grounds for discipline. The panel correctly found that Respondent was on probation from a previous disciplinary matter. Because Respondent committed the aforementioned ethical rule violations while on probation, he violated Rule 54(e).

**III. SANCTION**

Given these findings and conclusions, the Court must consider the appropriate sanction. In doing so, the Court looks to the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA Standards"). Ariz. R. Sup. Ct. 58(k); *In re Alexander*, 232 Ariz. 1, 13 ¶ 49 (2013). Several factors affect the appropriate sanction: "(1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's conduct, and (4) the existence of aggravating or mitigating factors." *In re Phillips*, 226 Ariz. 112, 117 ¶ 29 (2010).

Respondent failed to fulfill his duties to his clients by violating ERs 1.7(a) and 1.12(a). He also failed to fulfill his duties to the legal system by violating ER 8.4(d) and committing the three ethical rule violations while on probation in another disciplinary matter.

Respondent's misconduct implicates ABA Standards 4.32 and 8.2. ABA Standard 4.32 provides that "[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Respondent identified a conflict of interest but never sought informed consent from the Blairs to waive it. Respondent's conduct also caused disharmony and distrust between the Blairs and unnecessarily extended their divorce proceedings. In fact, Mrs. Blair testified that the distrust Respondent's conduct created between the Blairs required Mrs. Blair to hire a lawyer to litigate the Blair matter, which cost her thousands of dollars. Therefore, ABA Standard 4.32 applies.

ABA Standard 8.2 provides that "[s]uspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct" and repeats the misconduct that "cause[s] injury or potential injury to a client, the public, the legal system, or the profession." Respondent has an extensive disciplinary history that includes two suspensions and prior violations of ER 8.4(d), so ABA Standard 8.2 is also applicable.

A presumptive sanction may be altered or enhanced by aggravating and mitigating factors. *In re Abrams*, 227 Ariz. 248, 252 ¶ 26 (2011). The State Bar identified three aggravating factors pursuant to ABA Standards that are present in this case: (1) ABA Standard 9.22(a) (prior disciplinary offenses); (2) ABA Standard 9.22(c) (a pattern of misconduct); and (3) ABA Standard 9.22(i) (substantial experience in the practice of law). The Court finds that the aggravating factors are substantiated by the record. However, the Court also finds that one mitigating factor, ABA Standard 9.32(1) (remorse), applies. At the hearing, Respondent testified that it was wrong to agree to be a mediator after he had appeared before the court as Mrs. Blair's attorney. He admitted that he had little training in mediation and that he had failed with the Blairs' case. Nevertheless, the existence of a single mitigating factor does not call for an adjustment of the presumptive sanction.

The Court finds that suspension is the appropriate sanction in this case. The Court further finds that Respondent's ethical violations are particularly egregious for having been committed while on probation. In addition, the Court finds that Respondent should be subject to a two-year period of probation upon his reinstatement. Accordingly,

IT IS ORDERED that the panel's supplemental decision dismissing with prejudice the allegations of violations of ERs 1.7(a), 1.12(a), and 8.4(d) and Arizona Supreme Court Rule



TO:

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