

**FILED**

JUN 22 2007

DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA**

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2  
3 IN THE MATTER OF A RETIRED MEMBER ) No. 05-1517  
4 OF THE STATE BAR OF ARIZONA, )  
5 )  
6 **KAYE L. MCCARTHY,** )  
7 **Bar No. 007449** ) **DISCIPLINARY COMMISSION**  
8 ) **REPORT**  
9 )  
10 **RESPONDENT.** )

11 This matter came before the Disciplinary Commission of the Supreme Court of  
12 Arizona on May 19, 2007, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the  
13 Hearing Officer's Report filed January 12, 2007, recommending a 30-day suspension, one  
14 year of probation upon the return to active membership status with the State Bar's Ethics  
15 Enhancement Program (EEP), and costs. Respondent filed an objection and requested oral  
16 argument. Respondent, Respondent's Counsel, and counsel for the State Bar were present.

17 **Decision**

18 The seven members<sup>1</sup> of the Disciplinary Commission by a majority of four,<sup>2</sup>  
19 recommend accepting and adopting the Hearing Officer's findings of fact and conclusions  
20 of law, but modify the recommend sanction to reflect informal reprimand and costs of  
21 these disciplinary proceedings.<sup>3</sup>

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24 <sup>1</sup> Commissioner Horsley did not participate in these proceedings. Commissioner Atwood recused.

25 <sup>2</sup> Commissioners Flores, Osborne and Todd were opposed. Commissioners Flores would have  
26 supported censure; Commissioner Osborn would have affirmed the Hearing Officer's  
recommendation. Commissioner Todd supported dismissal. See Commissioner Todd's dissenting  
opinion below.

<sup>3</sup> A copy of the Hearing Officer's Report is attached as exhibit A.

## Discussion

1           The Disciplinary Commission applies a clearly erroneous standard to findings of  
2 fact and reviews questions of law *de novo*. Rule 58(b), Ariz. R. Sup. Ct. Mixed findings  
3 of fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d  
4 1347 (1996) (citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985)).

5           Respondent's misconduct arose while serving as a CASA volunteer for a minor  
6 child. The child ran away from foster care and was living on the streets. Without  
7 informing the court or her CASA supervisors, Respondent provided money to the minor  
8 child to travel to Pennsylvania to live with her natural mother whose parental rights had  
9 been previously terminated. Respondent's supervisors learned of Respondent's actions  
10 when the child was picked up in Pennsylvania and Respondent was questioned.

11           The Disciplinary Commission agrees with the Hearing Officer that clear and  
12 convincing evidence is present that Respondent violated ERs 8.4(c) conduct involving  
13 dishonesty, fraud, deceit and misrepresentation, 8.4(d) conduct prejudicial to the  
14 administration of justice, and Rule 53(c) violation of a court order.

15           Despite Respondent's technical arguments regarding what orders were or were not  
16 applicable to her, she admits she received documents which specifically set forth her duties  
17 and obligations as a CASA volunteer. *See* State Bar's Exhibit 11. Although Respondent  
18 believes that the child was in jeopardy and her actions removed the child from imminent  
19 danger, clearly, Respondent did not have the authority to make that decision and lawyers  
20 do not get to make their own rules. Respondent's role as a CASA volunteer is to gather  
21 and provide independent, factual information to aid the Court in making decisions  
22 regarding the minor child, to speak for the child's interest in Court proceedings and to act  
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1 as the child's advocate with administrative agencies. A CASA volunteer does not have the  
2 authority to make placement decisions for the child and is prohibited from giving the child  
3 gifts of more than \$10.00. See Duties and Responsibilities of a CASA Volunteer, State  
4 Bar's Exhibit 11.

5 As the dissent eloquently explains, Respondent was motivated by what she  
6 perceived to be the child's best interests. Given the factually unique circumstances of this  
7 matter, including Respondent's retirement from the practice of law and the substantial  
8 mitigation present, the Commission determined in its discretion, that an informal  
9 reprimand will fulfill the purposes of discipline.

10 RESPECTFULLY SUBMITTED this 2nd day of June, 2007.

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14 J. Conrad Baran, Chair  
15 Disciplinary Commission

16 **Commissioner Todd respectfully dissenting:**

17 Focusing on a very narrow view of Respondent's conduct, the Hearing Officer  
18 found that Respondent violated three ethical rules. The facts of Respondent's conduct that  
19 were the basis of the Hearing Officer's report are not in dispute. The dispute is over  
20 whether her conduct rises to the level of an ethical violation when considering the full  
21 context in which she acted. The ethical rules at issue are:

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23 "It is professional misconduct for a lawyer to engage  
24 in conduct involving dishonesty, fraud, deceit or  
25 misrepresentation," ER 8.4(c)  
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1                    “It is professional misconduct for a lawyer to engage  
2                    in conduct that is prejudicial to the administration of justice,”  
3                    ER 8.4(d)

4                    “Grounds for discipline of members and non-  
5                    members include the following: . . . (c) Willful violation of  
6                    any rule or any order of the court of a state, territory or  
7                    district of the United States, including child support orders.”  
8                    Rule 53(c).

9                    For twenty years, Respondent practice law without any blemish on her record. In  
10                    January 1999, she stopped practicing law, and in 2002 became a retired member of the  
11                    State Bar. When she stopped practicing law in 1999, she volunteered for the Court’s  
12                    CASA program and received her first case.

13                    Previously, in 1996, the child at issue came into CPS care with all but one of her  
14                    siblings. The youngest child remained with the mother and there is no indication in the  
15                    record that CPS ever removed this child from the mother. In October 1999, the natural  
16                    mother’s rights were terminated for the children in care because of her failure to keep  
17                    appointments set by CPS.

18                    In 2003, Respondent became a CASA for these children. Shortly before the  
19                    teenager at issue turned 15, Respondent was appointed as a surrogate parent for her  
20                    because of her special education needs. About this time, the teenager started runaway from  
21                    the shelters where CPS had placed her. Additionally, at 15 she began exhibiting defiant  
22                    behavior, including throwing a desk at a teacher and threatening another girl with a butter  
23                    knife.

24                    By June 2004, the teenager had run away from her placement shelters at least five  
25                    different times. That month she disappeared for almost two months. During July 2004,  
26                    Respondent worked with the Tempe Police Department to track her down and when she

1 learned where the teenager was on August 18, 2004, notified the Tempe Police who  
2 captured her. The CPS pick up order on that occasion had not been issued for nearly a  
3 month after the teenager had run away from the shelter.

4 When the teenager appeared in Court at the end of August, she begged for a second  
5 chance stating that while on the streets she had been raped and had a gun put to her head.  
6 She was also concerned she might be pregnant. The Court incarcerated at the Durango  
7 facility for the month of September, and because of her substance abuse issues placed her  
8 in a 28-day drug program at Scottsdale Banner Health.

9 Thereafter, the teenager was placed on probation for a class one misdemeanor  
10 disorderly conduct and place her in a new group home. On December 20, 2004, the Foster  
11 Care Review Board recommended that the case manager explore the possibility and  
12 appropriateness of the teenager having contact with her biological mother, who was living  
13 in Pennsylvania.

14 On January 6, 2005, the teenager again ran away from the group home. On January  
15 31, 2005, the teenager called Respondent crying. She told Respondent that she was  
16 considering turning herself into CPS. Respondent told her to do it and gave her the phone  
17 numbers of her case manager and her supervisor. (Tr. 10/17/06, at 139.) Later, the  
18 supervisor called Respondent and told her that she had spoken with the teenager and told  
19 her if she turned herself in, she would go to detention at possibly Adobe Mountain and  
20 then to a restricted placement. (*Id.* at 140.) The teenager told the supervisor that she was  
21 not going to do that. (*Id.*) Shortly, after that phone call, Respondent received a call from  
22 the teenager who told her the same thing and said she would not turn herself in and would  
23 not go to detention. (*Id.*)  
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1 A month after the teenager had returned to the streets, her natural mother called  
2 Respondent on February 6, 2005. (*Id.* at 142.) Over the years, she had had many phone  
3 conversations with Respondent, mainly discussing the child that was still in her custody.  
4 (*Id.* at 129-30.) Respondent's interaction with the natural mother and another relative was  
5 initially precipitated years before when Respondent started gathering information for a Life  
6 Book for the children. The natural mother advised Respondent that the relative would be  
7 coming to Phoenix. If Respondent gave the relative bus money for the teenager to travel to  
8 Pennsylvania, she would repay the loan. Previously, Respondent had asked the natural  
9 mother to try and talk sense into the teen about getting off the streets and back to CPS care.  
10 Respondent believed that the mother would protect the teenager. (*Id.* at 143.) At the time  
11 she gave the money to the relative, she did not know where the teenager was and did not  
12 know if the teen would take a bus to Pennsylvania to see her natural mother. Both  
13 Respondent and the teen's mother were terrified that the teen would die on the streets. (*Id.*  
14 at 146.) This is certainly reasonable given the teenager's experience on the street just a  
15 few months earlier. Respondent had been told by the police during a prior runaway that  
16 they would not go looking for a child, even if a pick up order had been issued. (*Id.* at 148.)

18 Two days later Respondent spoke with the teen and told her that the relative was  
19 coming to Arizona to see the teenager's brother, that her mother loved her, and gave the  
20 teenager her mother's phone number and encouraged her to call her mother. (*Id.* at 142.)  
21 On Sunday February 12, 2005, Respondent delivered a total of \$198 to the relative. (*Id.* at  
22 144.)

24 Between February 16 and 21, 2005, Respondent was in contact with the natural  
25 mother after the teen had arrived there. Respondent told the mother to contact the police  
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1 officer next door and tell him "exactly what happened." (*Id.*) Respondent suggested that  
2 mother find out if the officer could get the paperwork so the teen could remain in her  
3 home. (*Id.*) When Respondent spoke with the mother a few days later, the mother  
4 reported that the police officer learned that the Arizona authorities were not interested in  
5 getting the teenager back. (*Id.* at 145.)

6 When Pennsylvania Children's Bureau called to report that the mother had  
7 contacted them, CPS requested a pick up order for the teen. It was signed on March 8,  
8 2005. On March 24, 2005, the teen was flown back to Arizona. (Until she left state care,  
9 two years later, on March 20, 2007, the teen continued to pattern of running away from her  
10 placements.)

11 Around March 1, 2005, before the time of the court issued the pick up order,  
12 Respondent's supervisor called Respondent to see if she knew anything about the teen  
13 being in Pennsylvania. (*Id.* at 182-83.) She answered "yes," and explained what she had  
14 done and why, that she was trying to save the teen's life. (*Id.* at 183.)

15 Perhaps it was poor judgment to fund the teen's trip to her mothers. It could have  
16 turned out bad. The less risky thing would be to have done nothing. However, that also  
17 could have turned out bad. If the teen agreed to travel to her mother's home, based on  
18 what Respondent knew about the mother, the teen would be safe and eventually under  
19 control of some protective agency. It was clearly poor judgment not to have notified CPS  
20 once she learned that the teen had arrived at her mother's home. However, Respondent did  
21 nothing to hide the fact, rather she instructed the mother to tell the police exactly what had  
22 happened. When questioned by her supervisor, she was forthright. While it would have  
23 been better had she called her supervisor, once she learned that the child was in  
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1 Pennsylvania or before giving the money to the relative, in the context of the events, he  
2 failure to do so does not support in our view a lack of candor.

3 The Hearing Officer made no expressed finding that Respondent had been  
4 "deceitful." He did, however, suggest by not revealing her role she evidenced a guilty  
5 mind and intended to hide her conduct from her supervisors. (Report, par. 49). He also  
6 found that Respondent never directly nor timely informed the court that she had provided  
7 financial assistance and would not have voluntarily done so without an inquiry first.  
8 (Report, par. 51.) Apparently, based on these observations, the Hearing Officer concludes  
9 there exists clear and convincing evidence of a knowing and willful lack of candor to  
10 support his finding of a violation of ER 8.4(c). This conclusion is unsupported with the  
11 events are reviewed in context and attention is paid to the chronology. Rather than hiding  
12 her actions, Respondent's conversations with the mother lead to the involvement of  
13 authorities in Pennsylvania and the issuance of the Arizona pick up order.

14 Moreover, the Comment to ER 8.4 draws a clear distinction between criminal  
15 offenses that involve "moral turpitude," and those that do not. Here we are not speaking of  
16 criminal offenses, but of mistakes in judgment. This record simply does not support any  
17 claim involving "dishonesty, fraud, deceit or misrepresentation." Nor do Respondent's  
18 choices rise, in our view, to clearly prejudicing the administration of justice. At the time,  
19 the teen was out of the control of the probation department and CPS, or any other adult.  
20 Respondent's desire and actions were to bring the child under some adult control and make  
21 her safe. Finally, her conduct did not violate any explicit rule or order *of a court* directed  
22 at her as required by Rule 53(c). Even if there was some expressed court order that  
23 Respondent's conduct violated, the circumstances of this violation are not the type that  
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warrants a disciplinary proceeding. She acted out of a legitimate concern for the teen's  
1 safety. While she overstepped her authorization as a CASA, she has been punished for  
2 that. Her services as a CASA were terminated. Further discipline is not going to protect  
3 the public at large.

4 Original filed with the Disciplinary Clerk  
5 this 22<sup>nd</sup> day of June, 2007.

6 Copy of the foregoing mailed  
7 this 22<sup>nd</sup> day of June, 2007, to:

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17 by: M. Smith

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