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JAN 12 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *M. Samouelle*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

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

**KAYE L. McCARTHY,
Bar No. 007449**

Respondent.

No. 05-1517

**HEARING OFFICERS REPORT
AND RECOMMENDATION**

(Assigned to Hearing Officer TV,
Stanley R. Lerner)

The Hearing officer hereby makes the following Findings of Fact and Conclusions of Law, and recommendation for sanction in this matter.

I. PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on May 31, 2006. Respondent's counsel accepted service of the complaint, evidenced by the acceptance of service filed on June 15, 2006. Respondent filed an answer on July 5, 2006. Respondent filed a motion for summary judgment on September 15, 2006; the State Bar responded on September 25, 2006. A settlement conference was conducted on September 28, 2006, with no settlement reached.

The Hearing Officer denied Respondent's motion for summary judgment by order filed October 23, 2006. A hearing on the merits was conducted on Tuesday, October 17, 2006. The Hearing Officer ordered the parties to file proposed findings of fact and conclusions of law two weeks from the date of the filing of the transcript of the proceedings.

1 **II. FINDINGS OF FACT**

2 1. At all times relevant hereto, Respondent was an attorney licensed to
3 practice law in the State of Arizona, having been admitted to practice in Arizona
4 on October 23, 1982. [Answer, ¶ 1]

5
6 2. On January 8, 2003, Respondent was appointed as a Court
7 Appointed Special Advocate (“CASA”) for a minor child¹ in Maricopa County
8 Superior Court matter JV-161043. [Tr. 113:22 – 114:3]

9
10 3. As set forth in Arizona Revised Statute (“A.R.S.”) § 8-522(E),
11 Respondent’s role as CASA was to gather and provide independent, factual
12 information to aid the court in making decisions regarding the minor child, to
13 provide advocacy to ensure that appropriate case planning and services were
14 provided to the child, and to perform other duties prescribed by Supreme Court
15 rule. [SB Ex.² 9, BS 082]

16
17 4. Respondent’s duties as a CASA, as well as restrictions on her
18 authority are clearly contained in the Code of Conduct adopted by the Supreme
19 Court of Arizona and were incorporated by reference in the order-appointing
20

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22

¹ As dependency matters are confidential, the minor child will hereinafter be referred to as
23 “the child”.

24 ² Hereinafter, State Bar Exhibits will be referred to as “SB Ex.”, followed by the exhibit
25 number, and Bates Stamp (“BS”) page numbers, also noted as “PO” for those pages covered
by protective order issued pursuant to Rule 70, Ariz.R.Sup.Ct., or any relevant paragraph
numbers. Respondent’s exhibits will be cited as “R Ex.”, followed by the exhibit number
and Bates Stamp number, if applicable. References to the transcript of the hearing
conducted on October 17, 2006, will be notes as “Tr.” followed by “page:line number(s)”

1 Respondent as a CASA. Apparently, the Respondent never read the Code of
2 Conduct either because the Code was not provided to her or that she did not avail
3 herself of the opportunity to read the Code. In any case, the Code was
4 incorporated by reference and she is bound by the Code.
5

6 5. None of the duties conferred upon Respondent as CASA included
7 making independent decisions regarding the child's legal or physical custody.
8

9 [See, generally, SB Ex. 9; see also, Tr. 115:15 – 18]

10 6. Respondent was provided with information about the duties of a
11 CASA, including a document "remarkably similar" to the one found in SB Ex.
12 11. [Tr. 166:2 – 16]
13

14 7. Respondent was aware that her role as CASA did not include the
15 authority to make placement decisions regarding the child. [Tr. 115:15 – 18]
16

17 8. Training was provided to Respondent, as to all CASA volunteers,
18 included information about the duties and responsibilities of a CASA, and
19 limitations on their authority. [Tr. 108:12 – 109:2; see also, Ex. 47]
20

21 9. On October 14, 1999, the child's biological mother's parental rights
22 were terminated. [Tr. 35:14 – 24; Answer ¶ 3]
23

24 10. Respondent, who also served as CASA for the child's siblings, was
25 aware of this fact at all relevant times. [Answer ¶ 4; Tr. 114:4 – 21]

1 11. Respondent was also aware that the child's biological father's
2 parental rights had been previously terminated. [Tr. 118:10 – 12]

3
4 12. Respondent was aware that the child's biological father had been
5 physically abusive to the mother and the children before his rights were
6 terminated. [Tr. 118:13 – 17]

7
8 13. As the child's CASA, Respondent provided the Court with periodic
9 reports on the child (and her siblings) and attended court hearings and other
10 administrative staffings relating to the child. [Answer ¶¶ 5, 6; Tr. 120:9 – 15;
11 122: 6 – 10]

12 14. Respondent also had regular contact with the child's attorney.³

13
14 15. As the child's CASA, Respondent had access to otherwise
15 confidential information relating to the child and her juvenile court file. [Tr.
16 54:16 – 55:2]

17
18 16. On August 5, 2004, Respondent was present at a hearing before the
19 Honorable Teresa Sanders ("Judge Sanders") in Maricopa County Superior Court
20 on the child. [SB Ex. 13, PO 14]

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³ The child's attorney, Kenneth J. Sherk, is also Respondent's attorney in these disciplinary proceedings.

1 17. At the August 5, 2004, hearing as memorialized on the Court's
2 minute entry, the Court found that the child was on runaway status, but continued
3 to be dependent.
4

5 18. The Court also ordered that the child remain a ward of the Court in
6 the legal care, custody and control of the Arizona Department of Economic
7 Security ("DES"). [SB Ex. 13, PO 15]
8

9 19. The child was subsequently picked up, and continued to be a ward
10 of the Court, in the physical custody of the Court and DES. [Tr. 147:12 - 151:5]
11 In this regard, the Respondent testified that she learned of the child's
12 whereabouts during the period of the child's status as a "runaway" and gave
13 notice to the Tempe Police Department of the child's location in order that the
14 child be taken into custody, which as a result of the Respondent's information,
15 occurred.
16

17 20. On November 9, 2004, Respondent attended a hearing in Maricopa
18 County Superior Court, over which Judge Sanders presided. [SB Ex. 13, PO 4;
19 Tr. 42:11 - 25]
20

21 21. At the November 9, 2004, Judge Sanders ordered that the child, who
22 had admitted to a petition filed alleging that she was delinquent after having
23 committed disorderly conduct, a Class 1 misdemeanor, be made a ward of the
24 Court. [SB. Ex. 13, PO 5; Tr. 43:1 - 9]
25

1 22. Judge Sanders further ordered that the child be placed on probation
2 under the protective custody of a probation officer, subject to all terms of
3 probation, and in the physical custody of Child Protective Services ("CPS"). [SB
4 Ex. 13, PO 5; Tr. 42:18 - 21]

5
6 23. The Court ordered that after release from a rehabilitative program,
7 the child be released to the physical custody of CPS. [SB Ex. 13, PO 5]

8
9 24. This rehabilitative program was to address the child's substance
10 abuse problem. [Tr. 154:8 - 9]

11 25. On January 6, 2005, the child absconded from CPS/DES custody
12 and was again later placed on "runaway" status. [Tr. 154:14 - 155:5]

13
14 26. Respondent was made aware that the child had run away and the
15 child's "runaway" status. [Tr. 120:22 - 121:2]

16 27. Respondent was aware at a January 10, 2005, hearing in Maricopa
17 County Superior Court, that the child was on "runaway" status, was a ward of the
18 Court and was in the custody of CPS. [SB Ex. 13, PO 17; Tr. 46:12 - 18]

19
20 28. On February 11, 2005, the child's birth mother contacted
21 Respondent and asked that Respondent provide funds to a relative so that the
22 child could travel to Pennsylvania where the birth mother resided. [Tr. 138:22 -
23 25; 243:13 - 16; Answer ¶ 8]

1 29. Respondent knew at that time that the child was in the custody of
2 the court and CPS, and knew the funds were requested so that the child could
3 leave the state. [Tr. 115:19 – 23]
4

5 30. The person to whom Respondent was requested to provide the funds
6 was identified in previous CASA reports to the Court as a friend of the child's
7 biological mother, and a relative of the child's biological father. [SB Ex. 15, PO
8 033 – 048]
9

10 31. Respondent did not obtain leave of the Court for the child to leave
11 the State of Arizona. [Tr. 51:20 – 52:5]
12

13 32. Respondent did not inform the Court of the contact by the child's
14 birth mother. [Tr. 115:25 – 116:4]
15

16 33. Respondent understood that she did not have the authority to make
17 decisions about the child's placement pursuant to the court order appointing her
18 as CASA for the child. [Tr. 137:20 – 22; 175:5 – 16]
19

20 34. On February 13, 2005, Respondent provided funds to the child's
21 father's relative, and biological mother's friend, to enable the child to leave the
22 State of Arizona. [Tr. 182:17 – 18; 143:13 – 144:2]
23

24 35. On October 17, 2005, Judge Sanders wrote to Roberta Tepper as set
25 forth in SB Ex. 5. In particular, Judge Sanders wrote:

The information in my possession caused me concern that an attorney had knowingly assisted a child by providing financial

1 assistance to violate two court orders: (1) absconding from the
2 Court's order placing the child on probation supervision, and (2)
3 absconding from the Court's custody order placing the child in the
4 legal care, custody, and control of the Arizona Department of
Economic Security.

5 36. Based on Judge Sander's letter, her orders and testimony the
6 Hearing Officer finds that Respondent knowingly and willfully assisted the child
7 to violate the orders of the Court.

8 37. Respondent had not seen the biological mother's residence, nor had
9 any personal knowledge of the circumstances or conditions under which the
10 mother was living. [Tr. 116:21 - 117:2]

11 38. Respondent was aware that the person to whom the money was
12 provided, Lavella Williams, had a history of an arrest after engaging in a dispute
13 with another woman and was jailed overnight, but that knowledge did not affect
14 her decision to provide the funds by which the child could leave Arizona [Tr.
15 164:21:21 - 165:6; R Ex. 44, BS 013].

16 39. Each of Respondent's CASA reports filed prior to this time
17 contained a recommendation that the child remain a ward of the court and in the
18 custody of CPS. [SB Exs. 15- 19, PO 033 - 123]

19 40. In none of the reports, including the one or ones filed after the child
20 absconded from CPS custody, did Respondent recommend that the child be
21 returned to the custody or care of her birth mother.
22
23
24
25

1 41. In a hand-written letter from the child to the Court, after a runaway
2 incident, the child expressed a desire to be adopted by her foster mother, not to
3 return to the custody of her birth mother. [SB Ex. 20, PO 124]
4

5 42. On each CASA report Respondent filed with the court, Respondent
6 signed her name and indicated her State Bar of Arizona membership number.
7 [SB Exs. 15 – 19, PO 048, 064, 088, 106]
8

9 43. Respondent did so because she believed it was important that she be
10 open with the Court, and with others viewing the report, so that all who received
11 the report would be on notice that Respondent was an attorney. [Tr. 171:15 –
12 172:4]
13

14 44. As an attorney, Respondent was responsible for knowing the law
15 applicable to her actions as a CASA, including the terms of probation imposed
16 on the minor child and the statutes and rules relating to service as a CASA. [See
17 *In re Riggs*, 277 Ariz. 494, 496, 869 P.2d 170, 172 (1994) and *Moore v. Meyers*,
18 31 Ariz. 347,356, 253 P. 626, 629 (1927) (“...ignorance of the law excuses no
19 man from the result of his conduct.”)]
20

21 45. SB Ex. 19 provides recommendations by Respondent that the child
22 remain a ward of the Court.
23
24
25

1 46. Testimony at Tr. 43:1-13 by Judge Sanders provides that the child
2 was placed on probation and that under the terms of the probation order the child
3 was not to leave Arizona.
4

5 47. The Respondent did not get a copy of the probation order, but the
6 probation order was available. [Tr. 44:25 and 45:1-8.]
7

8 48. Testimony at Tr. 48:10-15 by Judge Sanders provides that the ward
9 of the Court means under care, custody and control of DES.
10

11 49. Respondent did not reveal her role in assisting the child to leave the
12 jurisdiction until a representative of the CASA program questioned her about it,
13 approximately 3 weeks after Respondent had provided the funds. [Tr. 182:11 –
14 183:6]. In this regard, the Hearing Officer finds that the conduct of the
15 Respondent evidenced a guilty mind and an intention to hide her conduct from
16 her supervisors and others in authority to whom she had a duty to report.
17

18 50. Respondent had a duty to report to the Court and to CPS any
19 violations of Court orders by the child, the status of the child, the whereabouts of
20 the child, and understood that duty. [Tr. 184:15 – 23]
21

22 51. Respondent never directly and timely informed the Court of the fact
23 that she had provided financial assistance to enable the child to leave Arizona
24 [Tr. 51:24 – 52:5; 115:25 – 116:9] and would not have willingly provided the
25 information without an inquiry first made.

1 52. Respondent testified that on occasions she would give money to the
2 child.

3
4 53. Judge Theresa Sanders testified when she learned of Respondent's
5 conduct she (Judge Sanders) spoke to the Presiding Judge about what she (Judge
6 Sanders) learned. Judge Sanders testified that both she and the other two judges
7 (Judges Ronan and Mandel) concluded that the Respondent's conduct was "so
8 outrageous" that it had to be reported. Judge Theresa Sanders testified as follows
9 at Tr. 54:14-25 and 55:1-2:
10

11 Q: What about Ms. McCarthy's conduct did you consider so
12 outrageous?

13 A: That she was in a position of trust with the Court. She had -
14 she was in a Court Appointed Special Advocate. She had
15 access to confidential court files, she had access to a
16 confidential computer system, and she was an attorney, no
17 less. And she knew that a child was on probation
18 supervision, she knew the child was on runaway status, she
19 knew the mother's parental rights had been terminated, and
20 she intentionally planned this child's escape from Arizona.
21 She provided financial assistance for the child's escape from
22 Arizona, and then afterwards didn't tell anybody about it
23 until she was caught.

24 54. The Respondent's defense is based in part on removing the child
25 from an emergent situation because past events were indicative of current
26 events. One can understand Respondent's conduct was motivated because she
27 wanted the child off the street. Respondent had no reasonable basis to believe
28 that an emergent circumstance existed in January and February 2005 to justify

1 her conduct. [Tr.179:14-25 and 180:1-20]. In this case, the Hearing Officer
2 finds that the child's runaway status is not tantamount to an emergency.

3
4 55. Respondent had the duty to advise her superiors of material
5 information about the child including: the loan, Lavella's participation, the
6 child leaving Arizona with the intent to relocate in Pennsylvania.⁴

7
8 56. Respondent knew that her role was neither to make placements nor
9 to allow the child to "self place."

10 57. Respondent testified that she did not receive certain orders and
11 minute entries relating to the child. Respondent further testified that there was
12 no "pick up" order for the child in effect at the times she gave money to
13 Lavella. Respondent testified that on one occasion she had brought to the
14 Court's attention the facts surrounding the plight of a visually impaired student
15 who was not provided reasonable accommodations from the school in which the
16 student was enrolled. In this regard, Respondent further testified, that her
17 supervisor told Respondent that in the future she was not to take it upon herself
18 to make similar reports to the Court.
19
20
21
22

23
24 ⁴ Had Respondent immediately informed her supervisor, CPS, or the Court that she gave
25 money to Lavella, that the child with Respondent's help was on her way to Pennsylvania,
Respondent's defense would be more credible. It is the knowing and willful lack of candor
and disclosure displayed by Respondent together with the knowing and willful failure to
report that is at the crux of this matter.

1 58. The Hearing Officer rejects the Respondent's testimony as
2 justification for her conduct.

3
4 59. Based on SB Ex. 9 at BS 44 and 45, which provides assistance in
5 determining the emergent nature of the child's situation.

6 60. SB Ex. 9 at BS 49 provides that Respondent could request a
7 staffing meeting.

8
9 61. SB Ex. 9 at BS 52 reads:

10 As the child's advocate, the CASA should ensure that all pertinent
11 information is given to the case manager, even if the case manager
12 does not ask questions relating to the information.

13 62. Respondent was a CASA, and otherwise possessed of the
14 knowledge of matters related to the child and also possessed of the education,
15 skill, and experience as a lawyer.

16 63. Respondent was not justified in providing money to Lavella to
17 remove the child from Arizona to Pennsylvania.

18 64. Even if we assume an emergent situation existed at the time the
19 money was lent, the emergent situation subsided afterwards.

20 65. A prior emergent situation is not a defense to the non-disclosure by
21 Respondent after the fact.

22 66. SB Ex. 9 BS 82-87 provides clear instructions to Respondent,
23 especially the requirement that the case manager be updated. [See: BS 86.]
24
25

1 67. The Hearing Officer has considered the immunity defense raised
2 by Respondent.

3
4 68. The Hearing officer does not believe that the immunity provisions
5 under A.R.S. § 8-522(H) should be applied as argued by Respondent.

6 69. Respondent's conduct was not authorized and is thus excluded as
7 immunized conduct.⁵

8
9 70. The Hearing Officer asked the parties to brief the issue of
10 separation of powers relating to the immunity issue under A.R.S. § 8-522(H)
11 and the Hearing Officer has considered the arguments of counsel.

12
13 71. The Hearing Officer finds that the immunity extended under
14 A.R.S. § 8-522(H) does not apply to the Supreme Court disciplinary
15 proceedings.

16 72. Immunity under A.R.S. § 8-522(H) applies to claims by children
17 and those in privity.⁶

21
22 ⁵ To rule otherwise and to accept the Respondent's immunity defense under A.R.S. § 8-522
23 (H), especially under the circumstances where a CASA is a lawyer, would open the doors
24 for any CASA, to take whatever action they deemed appropriate and claim immunity. The
25 Hearing Officer does not believe that this was the legislative intent behind A.R.S. § 8-
522(H), nor was evidence presented in this regard. Moreover, Respondent's position is
inconsistent with Rule 48 (a), Rules of Supreme Court.

⁶ The CASA's conduct is insured under A.R.S. § 41-621(A).

1 73. While the immunity under A.R.S. § 8-522(H) provides immunity
2 from criminal proceedings, and Respondent argues that the disciplinary
3 proceedings are "quasi-criminal" the Hearing Officer defers to Supreme Court
4 Rule 48(a) which controls this issue.
5

6 74. A.R.S. § 522(H) does not provide immunity for a violation of a
7 lawyer's obligation under Supreme Court Rules 42 and 53.
8

9 75. The legislature cannot by grant of immunity under A.R.S. § 8-
10 522(H) invade the province of Supreme Court regarding lawyer discipline.
11

12 76. Respondent is not immune from discipline in these proceedings.
13

14 **III. CONCLUSIONS OF LAW⁷**

15 Respondent, by her conduct as found above, violated Rule 42 and 53:

16 1. As it relates to lawyers, who remain under the jurisdiction of the
17 Rules of Supreme Court when acting as a CASA, one may read A.R.S 8-522
18 (E).3 as inclusive of the Rules of Supreme Court 42 and 53.

19 2. By acting in contravention of the Supreme Court Administrative
20 Order No. 2001-108 and in particular Section 7-101 K.1, and by failing to
21 immediately inform the Court, CPS, and her supervisor of: the child's
22 whereabouts, the plan to remove the child from the Court's jurisdiction, and by
23

24
25 ⁷ The Hearing Officer does not believe he has either the role or the authority to interpret Judge Sander's orders. Judge Sanders' interpretation of her own orders is what is relied on by the Hearing Officer.

1 failing to provide information she had about Lavella, all of which Respondent
2 had reason to know was material with respect to the placement and removal of
3 the child and the arrangements to do so, Respondent's conduct violated 8.4(c);
4

5 3. By assisting in removing a minor dependent child from the
6 jurisdiction of the Court in violation of Court orders and in violation of her
7 CASA duties, Respondent committed conduct prejudicial to the administration of
8 justice, in violation of ER 8.4(d);
9

10 4. By willfully hiding information about the child's whereabouts and
11 by her own conduct in assisting the child to leave the Arizona in violation of
12 Court orders and maintaining the secrecy of this information from Court, CPS
13 and her superiors, Respondent violated Rule 53(c).
14

15 5. However, the Hearing Officer dismisses the alleged violations of ER
16 3.4(c).
17

18 **IV. RECOMMENDED SANCTION PURSUANT TO *STANDARDS***

19 **A. APPLICABLE *STANDARDS***

20 The *Standards* provide guidance with respect to an appropriate sanction in
21 this matter. The Supreme Court and Disciplinary Commission consider the
22 *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, ¶ 23, ¶ 33, 90 P.3d
23 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040
24 (1990).
25

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

7
8 In determining an appropriate sanction, the Court and the Disciplinary
9 Commission consider the duty violated the lawyer's mental state, the presence or
10 absence of actual or potential injury, and the existence of aggravating and
11 mitigating factors. *Peasley*, 208 Ariz. at ¶ 33, 90 P.3d at 772; *ABA Standard*
12 *3.0.*

13
14 The *Standards* identify four distinct categories in which a lawyer has
15 specific duties, to his client, to the general public, to the legal system and to the
16 profession. Respondent's duties to the legal system and to the profession are
17 implicated in this matter.

18
19 Respondent's conduct in violation of the Court's orders implicates
20 *Standards 6.2*. Specifically, *Standards 6.22*, reads as follows:

21
22 *Standard 6.22*

23
24 Suspension is appropriate when a lawyer knowingly
25 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.

1
2 Respondent's actions could have resulted in great harm to the child, who
3 was removed from the Court's jurisdiction and sent to a mother whose parental
4 rights had been terminated. Respondent's actions also caused actual interference
5 with the legal proceedings relating to the child, as the probation department
6 could no longer supervise her because she was removed from the State and
7 Respondent had substituted her own action for the judgment of the Court
8 without authority. There was no prior scrutiny of the mother's living conditions,
9 of whether she was living in an environment that was safe for the child,
10

11
12 In each CASA report filed by Respondent with the Court she
13 recommended that the child remain a ward of the court and in the custody of
14 CPS. Yet, Respondent furnished the ability for a person to take the child out of
15 the state. Additional potential harm to the child, on a trip across the country was
16 a reasonable possibility without a person with authority to act in the child's
17 matters of health and safety. Respondent had personal knowledge of the
18 conditions in which the child would be leaving the state, the person with whom
19 the child traveled and withheld material information from the authorities
20 regarding same and assisted the child in violating court orders.
21
22

23 The actions of the Respondent are at a minimum acts warranting censure
24 under Standards 5.13, and 7.3.
25

1. STATE OF MIND

1 There can be no doubt that Respondent acted knowingly when she
2 provided funds with which the child was able to leave the jurisdiction of the
3 Court and in violation of court orders. It is not an excuse that Respondent did
4 not review a court order of probation. It is not credible that Respondent did not
5 know under the circumstances that assisting the child to leave the State of
6 Arizona was not a violation of some court order relating to a dependent child.
7 It is clear that Respondent was aware of the Court's orders and her duties in this
8 regard having previously reported to the Police the whereabouts of the child
9 when the child was on "runaway" status.
10

11 The presumptive sanction in this matter is, therefore, suspension. To
12 determine the appropriate sanction in this matter, it is necessary to review other
13 factors, as set forth by the *Standards*.
14

15 2. AGGRAVATION AND MITIGATION

16 Once the presumptive range of sanction has been determined, to determine
17 where in that range the sanction should fall, it is appropriate to review the
18 aggravating and mitigating factors.
19

20 In aggravation, the following factors apply:
21

22 *Standard 9.22(g):* Refusal to acknowledge wrongful nature of conduct.
23

24 Respondent asserts that her actions were not wrong, and that her conduct was
25 appropriate and justified. Yet, her conduct of hiding the circumstances from

1 her superiors and the Court until confronted reveals just the opposite. Once
2 Respondent was aware of the out of state travel, and if her motives were in fact
3 to protect the child, then an immediate notification and referral to the CPS of
4 the child's whereabouts could be seen as mitigation of the Respondent's
5 conduct. Moreover, if Respondent's justification was foremost to get the child
6 off the streets, then once the child was provided safe passage money,
7 Respondent could have notified CPS and the court of her actions. Instead, she
8 hid her conduct until she was asked about the circumstances of the child's
9 location in Pennsylvania.
10
11

12 *Standard 9.22(i):* Substantial experience in the practice of law.

13 Respondent was admitted to the State Bar of Arizona in 1982 and has admitted
14 to a long and active practice.
15

16 The Hearing Officer considers the following in mitigation:

17 *Standard 9.32(a):* Absence of a prior disciplinary record. Respondent has
18 never been sanctioned or subject to disciplinary proceedings.
19

20 Consideration of the applicability of aggravating and mitigating factors is
21 not a mathematical application. Rather, it is necessary to decide the weight to
22 be given to each applicable factor. Under the facts of this matter, Respondent's
23 failure to admit the wrongfulness of her conduct in light of her non-disclosure
24 and her substantial experience weigh far more heavily than the absence of prior
25

1 disciplinary history. The presumptive sanction in this matter, therefore, remains
2 suspension.

3
4 Other standards to consider for mitigation under 9.32 are (b) absence of
5 dishonest or selfish motive, (e) full and free disclosure to the disciplinary board
6 and a cooperative attitude, (g) character and reputation, and (l) remorse.

7
8 The Respondent testified that she has been involved in activities that are
9 intended to protect children. The hearing officer accepts this at face value.
10 But, Respondent's activities could have had grave implications to the child.
11 Moreover, Respondent obviously knew or had reason to know that her conduct
12 was questionable because she hid her conduct from those to whom she owed a
13 duty to report.
14

15 In this matter Respondent has retired from the active practice of law. She
16 is, nonetheless, a member of the State Bar and subject to disciplinary
17 proceedings, her retired status notwithstanding. Respondent has downplayed
18 suspension given the fact she has retired and is inactive. Suspension of one's
19 professional license, even if inactive, is a matter of great importance. The
20 Hearing Officer will give the Respondent the benefit of the doubt that
21 suspension of her license is not meaningless despite Respondent's retirement
22 status.
23
24
25

1 The hearing Officer finds that no express testimony about Respondent's
2 remorse. However, it is the belief of the Hearing officer that Respondent must
3 have felt remorse because her shame and guilt motivated her to hide her
4 behavior until confronted. Her conduct placed her in a position of disrepute
5 when heretofore she was held in high regard by those persons who mattered to
6 her, especially those in the child advocacy arena. The Hearing Officer infers
7 that Respondent felt remorse about this circumstance as well. Yet, Respondent
8 continues to deny any wrongful conduct.
9
10

11 While Respondent has demonstrated full and free disclosure along with
12 cooperative attitude, she continues to deny wrongdoing.
13

14 3. PROPORTIONALITY

15 In the past, the Supreme Court has consulted similar cases in an attempt to
16 assess the proportionality of the sanction recommended. *See In re Struthers*, 179
17 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized
18 that the concept of proportionality review is "an imperfect process." *In re*
19 *Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two
20 cases "are ever alike." *Id.*
21

22 To have an effective system of professional sanctions, there must be
23 internal consistency, and it is appropriate to examine sanctions imposed in cases
24 that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772.
25

1 However, the discipline in each case must be tailored to the individual case, as
2 neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶
3 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614
4 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

6 “The *Standards* do not account for multiple charges of misconduct. The
7 ultimate sanction imposed should at least be consistent with the sanction for the
8 most serious instance of misconduct among a number of violations; it might well
9 be and generally should be greater than the sanction for the most serious
10 conduct.” *Standards*, p. 6 *In re Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994).

12 The facts of the instant case are relatively unique, and there appears to be
13 no prior case in which the exact facts have been dealt with by the Court or
14 Disciplinary Commission relating to an inactive lawyer in a CASA position. It is
15 still instructive, however, to review some cases in which court orders have been
16 violated.
17

19 In *In re Mirescu*, SB-03-0114-D, the respondent lawyer was representing
20 a client in a dissolution case-involving visitation. The lawyer counseled her
21 client to take the child from the mother in violation of a court order.
22 Violations of ERs 3.4(c) and 8.4(a) and (d) were found. A censure was
23 imposed pursuant to an agreement for discipline by consent.
24
25

1 In *In re Davidon*, 2002 Ariz. Lexis 22, the lawyer, a prosecutor, who
2 despite the rule requiring such, did not disclose witnesses prior felony
3 convictions to defense attorney was found to have violated ERs 3.4(c) and
4 8.4(d). The lawyer's negligent mental state and willingness to enter an
5 agreement for discipline by consent pursuant to his admission of wrongful
6 conduct made censure the appropriate sanction in that case. It is significant
7 that formal discipline was imposed, despite the negligent mental state found,
8 and the willingness of the lawyer to admit the wrongfulness of his acts.
9

10
11 These cases are not as egregious as here where Respondent gave
12 assistance to persons (Lavelle and the child) to violate a Court order, assisted
13 the child to leave Arizona, and then to hid these facts from those to whom she
14 had a duty to disclose.
15

16 **V. HEARING OFFICER'S RECOMMENDED SANCTION**

17 In considering the sanction appropriate in this matter, the purpose of
18 discipline must be considered. The purpose of discipline is "to protect the
19 public from further acts by respondent, to deter others from similar conduct,
20 and to provide the public with a basis for continued confidence in the Bar and
21 the judicial system." *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944
22 (1987).
23
24
25

1 In a matter such as this, the importance of assuring the integrity of the
2 profession and deterring others from similar conduct are pressing concerns.

3
4 Even a retired or inactive lawyer can serve as an example to others.

5 Although Respondent asserted that she was not acting as a lawyer in her
6 role as CASA, Respondent signed each report she submitted to the Court with a
7 notation of her State Bar of Arizona membership number. Respondent testified
8 that she believed it was important for her to be open with the Court and the
9 Court to know that she was an attorney. Whether attorneys are acting as
10 attorneys, or in non-attorney roles in their personal or professional lives, they
11 must be mindful of their obligation to comply with court orders and not assist
12 others in violating court orders. The Rules of Professional Responsibility
13 require Respondent to act accordingly when she is a CASA.
14
15

16 Suspension may have little practical impact on Respondent's day-to-day
17 life. The gravity of the misconduct and the importance of impressing upon
18 other attorneys the vital need to obey court orders and not assist others
19 (especially children) to violate court orders, and to report material information
20 about the child (rather than substituting their own judgment) makes suspension
21 the appropriate sanction.
22
23

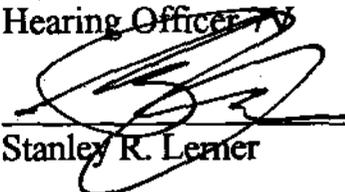
24 Therefore, the Hearing Officer imposes the sanction of a suspension for
25 30 days. If Respondent returns to the active practice of law after her

1 suspension, she is to notify the State Bar and the Court immediately upon
2 reinstatement, or upon resumption of an active practice. If Respondent returns
3 to the active practice of law after reinstatement, she should be placed on
4 probation for the period of one year, and required to complete the State Bar's
5 Ethics Enhancement Program during the period of probation.
6

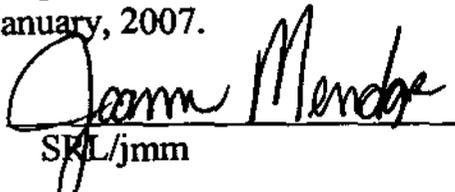
7 Finally, the Hearing Officer strikes Exhibit 47.

8
9 **RESPECTFULLY SUBMITTED** this 12th day of January, 2007.

10 **STANLEY R. LERNER**
11 Hearing Officer ~~TV~~

12 
13 Stanley R. Lerner

14 Original filed with Disciplinary Clerk of
15 the Supreme Court of Arizona this 12th day
16 of January, 2007.

17 By: 
18 SKL/jmm

19 Copies mailed and e-mailed this 12th
20 day of January, 2007, to:

21 Roberta L. Tepper
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7 Copy mailed this 12th day of
8 January, 2007, to:

9 Randall M. Howe
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14 Copy of the foregoing hand-delivered this
15 12th day of January, 2007, to:

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