FILED
JUN 29 2009
DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA
BY

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **MICHAEL P. SCHLOSS,** **Bar No. 019283** RESPONDENT.	No. 08-0703 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 13, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed April 13, 2009, recommending dismissal. The State Bar filed an objection and requested oral argument. Respondent, Respondent's counsel and counsel for the State Bar were present.

The State Bar argues that the Hearing Officer employed the wrong standard of proof and erred in his conclusions of law regarding ERs 1.2(a), 1.4 and 1.16. Respondent did not have sufficient reason to withdraw under ER 1.16 and had a legal obligation to consult with his client regarding his unilateral decision to terminate representation. In addition, the State Bar argues Respondent had a legal obligation to protect his client's interests after he filed the Motion to Withdraw.

The State Bar asserts that an informal reprimand and two years of probation is the appropriate sanction.

Respondent argues that although the Hearing Officer applied the wrong standard of proof, it did not affect the outcome. Respondent further argues that the Hearing Officer did

not err in his conclusions of law. Respondent had no legal obligation to consult with his client regarding his unilateral decision to terminate the representation and had sufficient reason to withdraw from representation. Respondent urges the Disciplinary Commission to accept the Hearing Officer recommendation of dismissal and asserts that an award of attorneys fees would be appropriate in this matter, if the Commission had such authority.

Decision

Having found no facts clearly erroneous, the seven members[1] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact and conclusions of law,[2] and his recommendation that the Complaint be dismissed. Pursuant to Rule 60(b), Ariz.R.Sup.Ct., costs of these disciplinary are not recommended as the State Bar failed to prove any ethical violations by clear and convincing evidence.

The Disciplinary Commission took judicial notice of the Superior Court's Minute Entry dated March 13, 2007, which vacated the hearing set for March 13, 2007 at 1:15 p.m. and reset the hearing to April 24, 2007, at 1:15 p.m. and notes that the State Bar's Exhibit 31 reflects that Respondent contacted Judge Hausner's Division on Tuesday March 13, 2007 at 10:15 a.m., before the original time and date set for the hearing, and was informed

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[1] Commissioners Gooding, Horsely, and Todd did not participate in these proceedings. Mary Carlton participated as an ad hoc public member.

[2] The Hearing Officer erroneously applied a preponderance of the evidence standard as opposed to clear and convincing evidence as provided by Rule 48(d), Ariz.R.Sup. Ct.; however, the error did not affect the outcome.

that the matter was continued and not yet reset.

DATED this 29th day of June, 2009.

Jeffrey Messing/ep
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 29th day of June, 2009.

Copy of the foregoing mailed
this 29th day of June, 2009.

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EXHIBIT
A

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APR 13 2009
HEARING OFFICER OF THE SUPREME COURT OF ARIZONA
BY

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **MICHAEL P. SCHLOSS, Bar No. 019283** RESPONDENT.	)	No. 08-0703 **Hearing Officer's Report**

FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been admitted to practice in Arizona on October 16, 1998.

2. Respondent has been practicing family law for several years and is familiar with the Arizona Rules of Family Law Practice.

3. Respondent represented Robert Martinez in his divorce case from February 6, 2006, to February 8, 2007, when Respondent advised Mr. Martinez by email that he was withdrawing from representing him (Ex. 24). This was followed by a Motion to Withdraw filed February 12, 2007, (Ex. 25), a letter from Respondent's firm dated February 21, 2007 stating "you will need to consult another attorney. This firm is no longer providing legal services to you," and an Order dated March 19, 2007, granting Respondent's motion to withdraw. (EX 32)

4. On May 12, 2006, Mr. Martinez provided Respondent with a financial affidavit, similar to the Form 2 referenced in Rule 76(c) Arizona Rules of Family Law Procedure. (Ex.5)

5. Rule 76(c) of the Arizona Rules of Family Law Procedure requires the filing of a pretrial statement, joint, if ordered by the Court, twenty days prior to trial.

6. Under Rule 76(c) when a joint pretrial statement is to be filed, counsel are to confer, prepare the statement, and both counsel are to sign it.

7. Rule 76 also requires the parties to file a financial affidavit (Form 2).

8. On March 15, 2006, Judge Duncan ordered the parties to file a joint pretrial statement in compliance with Rule 76 (emphasis in original) to include current financial affidavits. (Ex. 4).

9. Respondent filed a separate Affidavit of Financial Information dated May 5. 2006. (Ex. 5)

10. Respondent filed a separate pretrial statement dated May 12, 2006. (Ex. 6). He testified that he did so because of contact and communication problems with the then unrepresented Ms. Martinez.

11. On July 11, 2006, the newly assigned Judge Hauser reset the trial to December 5, 2006, and ordered the parties to file a joint Pretrial Statement at least ten days before the trial, the Statement to include a current financial affidavit. Judge Hauser also ordered counsel to meet personally ("face to face") to prepare the Joint Pretrial Statement. (Ex. 8).

12. On September 21, 2006, at Respondent's request, Mr. Martinez supplied Respondent with requested further information, including an

updated financial affidavit, which contained changed financial information. (Ex. 21).

13. On December 1, 2006, Ms. Martinez's counsel filed a separate Joint Pretrial Statement for Ms. Martinez, in the preparation of which Respondent did not participate or sign. (Ex. 14). Respondent testified that he did not do so because he advised then counsel for Ms. Martinez (Holly Marshall) that he stood on the prior unilateral Statement he had filed for Respondent as being sufficient. Respondent did not file any updated Pretrial Statement or a response to the Joint Pretrial Statement of December 1, 2006, to contest Ms. Martinez's detailed statements and requests, which included an allegation of domestic violence.

14. In Respondent's exhibit list he included the February 6, 2006, financial affidavit or Mr. Martinez. He failed to include Mr. Martinez's September 21, 2006, financial affidavit, which was never filed or presented to the Court.

15. The trial began December 5, 2006.

16. During the trial the Court sent the issue of child support to a different court (IV-D Court), when it became apparent that the IV-D court was the appropriate court because it handles domestic maters in which a party (here Ms. Martinez) has received public financial support.

17. On January 9, 2007, the IV-D Court set a hearing on child support for March 13, 2007.

18. The trial resumed on January 16, 2007. No testimony was taken because Respondent and opposing counsel informed the Court that the parties had resolved certain issues.[1]

19. The Court entered the decree of dissolution on January 24, 2007. (Ex. 20.)

20. In the decree the Court ordered spousal maintenance of $400 per month for one year ($4,800) "for the reasons set forth in the Joint Pretrial Statement filed December 1, 2006." In this he was siding with Ms, Martinez; for it was Ms. Martinez in her unilateral Joint Pretrial Statement of December 1, 2006, who proposed a short period of spousal maintenance to give her time to master enough English to practice dentistry in the United States. Mr. Martinez in his pretrial statement of May 12, 2006, wanted to pay nothing.

21. Mr. Martinez was upset with the Court's rulings and inquired about potential remedies.

22. Respondent advised him that based on his experience and knowledge of the judge, the judge would not change his rulings. Respondent did so advise Mr. Martinez after conferring with his partners, who concurred

[1] As hearing officer, I was referred to the audio CD by State Bar council. Respondent took the position that the Court asked Mr. Martinez to verify what was said. Mr. Martinez contested that. The recording furnished me as Hearing Officer was all but inaudible and confused by a background of Spanish translation. It was of no help, but the point was of little consequence, and I concede it to Mr. Martinez.

23. Mr. Martinez consulted with a former commissioner who advised him that the rulings were subject to reconsideration if a motion was filed within fifteen days.

24. The reasonable inference is that the commissioner was referring to Rule 82 of the Arizona Rules of Family Law Procedure, which allows for amendment and addition of findings by the Court if a motion is filed within fifteen days after the ruling. It is also a reasonable inference that the commissioner did not advise him of the time to appeal, which is not a motion to amend or add, as to which Respondent correctly advised Mr. Martinez that the time for appeal is 30 days from the court's order. (Ex. 22)

25. Mr. Martinez advised Respondent of his conversation with the commissioner and also criticized Respondent's preparation for the trial. My understanding of the sequence is that Mr. Martinez wanted Respondent to move for rehearing. Respondent declined to do so, believing a rehearing motion would be wasted effort, and, instead, advised Mr. Martinez that he had 30 days to appeal. He also told Mr. Martinez that he was withdrawing, leaving it up to Mr. Martinez to find another lawyer to carry on the case from that point.

26. Respondent decided unilaterally, without any discussion with Mr. Martinez, to file a Motion to Withdraw. He had no legal obligation to consult Mr. Martinez, although it might have been more politic to do so. At no time did Mr. Martinez ask Respondent to withdraw. nor did

he at any time agree to such a withdrawal, but it was not required that Mr. Martinez initiate any such request or agree.

27. Mr. Martinez demanded that Respondent continue to represent him.

28. Respondent did not refer Mr. Martinez to any attorney who might assist him with the remainder of the case, nor did he check with Mr. Martinez on the status of a replacement attorney. He did, however, give Mr. Martinez ample time to obtain other counsel. Mr. Martinez did not ask Respondent for a referral, did obtain other counsel, and was not prejudiced by lack of a referral from Respondent.

29. Respondent did not file a Motion to Continue the March 13, 2007, IV-D Court hearing, having previously advised Mr. Martinez that he and his firm no longer represented him.

30. Respondent did not provide Mr. Martinez with a copy of the client file to assist him with the March 13, 2007, hearing, nor was he asked to do so by Mr. Martinez or by his new counsel.

31. On February 26, 2007, Mr. Martinez objected *pro se* to Respondent's Motion to Withdraw.

32. Respondent did not file a Reply. The court granted the motion to withdraw on March 19, 2007. Between the filing of the motion and its being granted nothing transpired that prejudiced Mr. Martinez's "rights," whatever he thought them to be.

33. Mr. Martinez routinely and repeatedly referred to wanting his rights protected without specifying what rights he was referring to or how

they were not being protected. Mr. Martinez in other respects showed much sophistication and not a little skill in pleading, filing, for example, an extensive well presented typed memorandum in opposition to Respondent's motion to withdraw. (Ex. 28)

34. Mr. Martinez asked several times what Respondent was doing to protect his interests in light of the approaching March 13, 2007, hearing.

35. Respondent never responded with a pleading, but in email correspondence Mr. Martinez was bluntly advised, particularly in a letter of February 21, 2007, that Respondent's firm no longer represented him and that he should consult another attorney.

36. On March 8, 2007, Mr. Martinez filed a *pro se* Motion to Continue the IV-D hearing.

37. Respondent did nothing to protect Mr. Martinez's interests after he filed the Motion to Withdraw, nor did he have an obligation to do so.

38. As a direct result of Respondent's withdrawal, Mr. Martinez experienced significant frustration and had to expend additional time, effort, and money to retain a new attorney and get her up to speed to represent him in the remaining matters in the divorce case, but to no unexpectable or unreasonable extent.

39. There was a delay in the resolution of the remaining matters in Mr. Martinez's divorce case as a direct result of Respondent's withdrawal, but, again, to no extent beyond that expectable in any change of

counsel, and there was no prejudice. There was doubtless added expense, a subject important to Mr. Martinez, but no unethical practice by Respondent.

40. Respondent believed, and I find it to be true, that Respondent had complied in substance with the requirement that a joint prehearing statement be filed by advising Claimant's then counsel that Respondent stood on his prior pleadings, which stated his unchanged position. The Court and Claimant's counsel made no issue of the point; neither the Court nor Claimant's counsel were prejudiced, and the matter was fully heard at a hearing at which Mr. Martinez fully presented his case. A joint statement is largely for the convenience of the Court and to expedite the proceedings. Had the Court felt a joint prehearing statement essential, it could have insisted on one by further order, or even found Respondent in contempt, but did neither. There was no evidence with respect to the Prehearing Statement that Respondent failed to represent his client with diligence or in any way violated an ethical standard.

41. As to Respondent's withdrawal from representation of Claimant, Respondent had ample reason to withdraw, and did so in an appropriate and timely manner, without violation of any ethical standard. Claimant wanted Respondent to appeal the Court's rulings adverse to Claimant. Although a rehearing could have been requested it was Respondent's professional opinion that to do so would not have

been successful, an opinion he confirmed by his consultation with other experienced attorneys. He was further put out of harmony with his client because of statements from Mr. Martinez that he doubted Respondent's integrity and motives and by his client's seeming disloyalty by consulting other counsel. But the controlling reason was that he and his client did not see eye to eye on legal strategy. He withdrew in a timely and appropriate manner. Claimant was not prejudiced and was able to engage other counsel. There was no inordinate delay or other prejudice to Claimant. Factually, Respondent has good reason to withdraw on the basis of either E.R. 1.16(b)(6)—that further representation "has been rendered unreasonably difficult by the client"—or E.R. 1.16(b)(7) "good cause for withdrawal exists." Good cause, to this hearing officer, always exists when the confidence and trust that should exist between client and attorney has been lost, for whatever reason.

42. Claimant was not motivated to bring his complaint to the State bar by belief that Respondent acted unethically or unprofessionally but out of frustration that he had not gotten the result he had hoped for, a consequence not of Respondent's representation but of Claimant's inability to confirm what he clearly suspected (see Ex. 7) that his wife had outfoxed him and had more ability to earn money and more assets than she admitted, assets concealed and out of Claimant's reach, even though she received public financial aid.

43. Claimant's resort to generalities that he wanted his reputation not be "tarnished," and that he only wanted his "rights" protected were, I find, circumlocutions designed to avoid admitting outright that his real concern was financial. He felt that he was being bled and did not want to pay more than he was willing to pay—to his wife, to Respondent, or to any present or future lawyer. If he was truly concerned about the quality of legal representation he received from Respondent, he would not have objected, as he did *pro se,* to Respondent's withdrawal as his attorney, an objection the Court found meritless by summarily dismissing the objection and granting the motion to withdraw. Mr. Martinez, when he wanted to be, was knowledgeable, sophisticated and skilled. His 10 page letter to Respondent's firm complaining both of the conduct of the counselor and of his wife (Ex. 7) was venomous, but polished and well-written.

CONCLUSIONS OF LAW

1. Complainant failed to prove by a preponderance of the evidence that Respondent committed any ethical offence.

2. At most, by failing to file a joint prehearing statement, as ordered by the Court (but achieving an equivalent result by contact with the Court and opposing counsel in confused circumstance involving changes of court and nature of hearings) Respondent's remiss was no more than procedural error, not an ethical lapse.

3. Respondent committed no ethical offence when he resigned as counsel for Claimant, nor in any action or omission in connection with these proceedings.

4. Complainant suffered no legally recoverable loss.

5. Respondent, for the reasons set forth below, may be subject to Admonition, but not in any case to Informal Reprimand, nor to any more severe discipline.

OPINION

In this case I am asked by the State Bar to recommend that Respondent be given an Informal Reprimand and by Respondent's counsel that I recommend that the charges against Respondent be dismissed. Possible disciplines of disbarment, suspension and censure are not involved in this case, giving a rare opportunity to consider in isolation Informal Reprimand and, if it exists, Admonishment. Dismissal, of course, is not a sanction.

Informal Reprimand is a sanction. It is not a subclass of Censure, although the flawed organization and typography of Rule 60 suggests that it is. In future revisions of Rule 60 it would be well to make clear by black letter caption (not the present italics) that Informal Reprimand stands by itself as a separate category of discipline. It would also be helpful if the now italicized paragraphs of section A. 5 (*Probation)* and section A. 6 (*Restitution*)were clarified to spell out whether they stand alone and can be imposed independently, or whether they can be imposed only as an adjunct to the imposition of some other sanction.

The American Bar Association's *Standards for Imposing Lawyer Sanctions* clearly state that Probation is a stand-alone remedy, but the ABA *Standards* are not specific as to whether other remedies such as restitution, imposition of costs, and limitation of practice are stand-alone sanctions. (*Standards,* Sections 2.5-2,8.)

Informal Reprimand has long been a recognized sanction, both in Rule 60 and in the American Bar Association's *Standards.* In Arizona, Informal Reprimand has often without question been imposed.

Admonition, on the other hand, is in a sort of limbo. It is recognized as a discipline in the *Standards,* Sec. 2.6, but one with the unique feature that Admonition is not made public. Neither does it limit the attorney's right to practice.

Admonition is not mentioned at all in Arizona's Rule 60, leaving one to speculate whether it is available at all in Arizona, and, if so, on what basis, with what effect, administered by whom, and in what way? The alternatives are that (1) it does not exist in Arizona, (2) it does exist as a discipline of "misconduct" under Rule 60, by inference or by importation from the Federal *Standards,* and that therefore it must go through the hearing process, with the possibility of probation, restitution, imposition of conditions and assessment of costs, or (3) it is available, but not as a discipline, instead, as an non-disciplinary educational tool of the State Bar akin to diversion and to assistance programs such as MAP and LOMAP, with analogy to the yellow light of a traffic signal. Running a yellow light is not a punishable offense, but the yellow light is a warning that to go a little faster would be.

If it were mine to choose, I would select the third alternative. Admonition, as a non-disciplinary educational function of the State Bar, administered solely by it, and

being no part of the discipline system, without imposition of fines, costs, probation, restitution or other conditions or restrictions, has much to commend it. It could be a useful tool for the State Bar to have in its kit.

But it is not for me to decide. If the Arizona rules were clear that Admonition is available as a non-disciplinary resource of the State Bar, I would recommend that the Commission refer this matter back to the State Bar solely for consideration of whether to admonish Respondent. The record in this case, especially Respondent's filing a unilateral Joint Prehearing Statement without getting the Court's approval, even though approval was doubtless likely and there were extenuating circumstances, for not furnishing the Court and counsel with the new financial information in Respondent's additional statement, and for withdrawing from representing a difficult client with a certain lack of cool, couth, and courtesy, would seem to justify a non-disciplinary admonition. But there is not enough evidence against Respondent to justify discipline at any level.

Admonition may not be available in Arizona as a non-disciplinary caution, and as I find that Respondent's conduct did not in any way amount to misconduct under Rule 60 or to any ethical violation, my recommendation must be, and is, that the Complaint against Respondent be dismissed. Attorney misconduct justifying sanction, even at the lowest level and imposed *in camera,* is too serious a black mark against an attorney to be imposed casually. Accordingly:

RECOMMENDATION

I recommend to the Commission that the Complaint against Respondent be dismissed.

DATED this 13th day of April, 2009.

Frederick K. Steiner, Jr. /NM
Frederick K. Steiner, Jr.
Hearing Officer 8T

Original filed with the Disciplinary Clerk
this 13th day of April, 2009.

Copy of the foregoing mailed
this 14th day of April, 2009, to:

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