

JAN 28 2013

FILED
BY

M. Smith

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

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

**JANE O. ROSS,
Bar No. 021999**

Respondent.

PDJ-2012-9057

**REPORT AND ORDER IMPOSING
SANCTIONS**

[Nos. 11-2008, 11-2801]

On December 10, 12, 13 and 14, 2012, the Hearing Panel ("Panel") composed of Dewey D. Schade, a public member from Maricopa County, Richard L. Brooks, an attorney member from Maricopa County, and the Presiding Disciplinary Judge ("PDJ") held a four day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Hunter F. Perlmeter and Shauna R. Miller appeared on behalf of the State Bar of Arizona ("State Bar") and Kenneth P. Bemis appeared on behalf of Respondent. Rule 615 of the Arizona Rules of Evidence, witness exclusionary rule was invoked.¹ The Panel carefully considered the exhibits, testimony, the parties' individual Pre-Hearing Statement, individual pre-hearing statements, proposed findings of fact and conclusions of law and evaluated the credibility of the witnesses including Respondent. The Panel now issues the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

¹ Consideration was given to the sworn testimony of J. Scott Rhodes, Esq., Patricia Ronan, Esq., Susan Ulrich, Arlene Lamp, Theresa Price, Jennifer B. Rubin, Esq., Jacqueline Fischer, Angela Fischer, Patricia Sallen Esq., Michael Tannery, J. Kyle Scoresby, Esq., Lisa Von Deldon, and Otilia Diaz, Esq. Conduct by Respondent during the hearing compelled the Panel to call Michele Smith, the PDJ's paralegal to provide first hand testimony regarding that conduct as well.

I. SANCTION IMPOSED:

ATTORNEY SUSPENDED FOR FOUR (4) YEARS. UPON REINSTATEMENT, TWO (2) YEARS OF PROBATION WITH SPECIFIC TERMS AND CONDITIONS TO BE DETERMINED AT THE TIME OF REINSTATEMENT, AND PAYMENT OF COSTS OF THESE DISCIPLINARY PROCEEDINGS.

II. BACKGROUND AND PROCEDURAL HISTORY

A Probable Cause Order was filed on May 21, 2012. The Complaint was filed on June 14, 2012 and served by mail on June 15, 2012 pursuant to Supreme Court Rule 47(c). The Complaint alleged violations of ERs 1.4 (communication), ER 3.1 (meritorious claims and contentions), ER 3.3(a)(1) (knowingly make a false statement of fact or law to tribunal or failure to correct a previously made false statement of fact or law), ER 3.4(c) (knowingly disobey an obligation under rules of tribunal), ER 3.4(e) (in trial, allude to matter not relevant or supported by admissible evidence), ER 3.5(a) (seek to influence judge, juror, prospective juror or other official of a tribunal by means prohibited by law), ER 4.3 (dealing with unrepresented person), ER 4.4(a) use means that have no substantial purpose other than to embarrass, delay or burden any other person, or use methods of obtaining evidence that violate legal rights of such a person), ER 1.16 (terminating representation), ER 8.2 (falsely or recklessly make a statement concerning qualifications or integrity of a judge), ER 8.4(c) (knowingly engage in conduct involving dishonesty, fraud, deceit or misrepresentation), ER 8.4(d) (conduct prejudicial to the administration of justice), and Rule 41(c) (maintain respect due to courts and judicial officers).

On July 17, 2012 the Initial Case Management Conference was held and the matter was set for a four day hearing, November 5 through November 8, 2012 contingent upon Respondent timely filing an answer. After an extension request was

granted, Respondent filed her Answer on July 24, 2012. The State Bar served Respondent with its initial disclosure statement on August 7, 2012. On August 29, 2012 the State Bar filed a Notice of Respondent's Failure to Make Disclosure. As a result of Respondent failing to timely file a disclosure statement, and after hearing, she was ordered precluded from presenting evidence at hearing. See PDJ Order filed September 7, 2012. On October 2, 2012 Respondent subpoenaed Judge Brain and Judge Gerlach as well as other witnesses. On October 9, 2012, the Assistant Attorney General filed a Motion to Quash Subpoenas, or in the Alternative, Motion for Protective Order, on behalf of subpoenaed Superior Court Judges Mark Brain and Douglas Gerlach. Oral argument was held on October 16, 2012 and it was ordered quashing the subpoenas and authorizing a single written interrogatory to each Judge. See PDJ Order filed October 16, 2012.

Respondent filed an Objection and Petition for Special Action and a request for stay of the disciplinary hearing with the Supreme Court and was granted relief with respect to the preclusion of evidence at hearing. See Supreme Court Orders filed October 10, 2012 and October 30, 2012. Respondent also filed a Motion for Summary Judgment which was stricken and a Motion for Sanctions for Failure of State Bar Counsel to Participate in Good Faith in Alternative Dispute Resolution, which was denied. See PDJ Orders filed October 15 and 16, 2012.

The State Bar filed its Individual Prehearing Statement on October 22, 2012. Respondent filed an Individual Prehearing Statement and amended it by a separate amended statement filed on October 23, 2012. A telephonic prehearing conference was held on October 24, 2012. The State Bar filed its pre-hearing memorandum on October 29, 2012; Respondent did not file a pre-hearing memorandum.

On November 1, 2012 Respondent orally requested an immediate status conference. The PDJ held a status conference at 1:30 p.m. on November 1, 2012. Respondent questioned whether the PDJ had jurisdiction to issue further rulings in the case. Respondent moved for a continuance which was granted. The four day hearing was ordered to commence on Monday, December 10, 2012. See PDJ Order filed November 1, 2012.

Respondent filed a Supplemental Individual Pre-Hearing Statement on November 29, 2012. A final case management Order was filed on November 30, 2012. On that same day, Respondent filed a Verified Request/Motion for Removal of Judge [William J. O'Neil] pursuant to Rule 51(d), Ariz.R.Sup.Ct. The State Bar filed its response on December 3, 2012. Volunteer Attorney Panel Member Paul D. Friedman was assigned by the Disciplinary Clerk to hear the motion. On December 4, 2012, oral argument was held on the motion. The Motion was denied as untimely. See Attorney Panel Member Paul D. Friedman Order filed December 4, 2012. Thereafter Respondent filed a Motion for Clarification filed December 6, 2012 asking for "clarification on how the Court believes it was assigned to the case." That Motion was denied on December 6, 2012.

At the onset of the hearing, Respondent objected to public Panel member Dewey Schade's participation in this matter.² Specifically, Respondent swore that she had had an encounter with Mr. Schade approximately nine to twelve months earlier at a restaurant called the "Wild Thaiger" on Central Avenue in Phoenix. Respondent alleged that Mr. Schade was dining with his wife and another couple,

² Notice of appointment of the panel members was filed on October 11, 2012. Respondent did not file a change of hearing panel member for cause pursuant to Rule 52(f), Ariz.R.Sup.Ct.

and outside their presence made offensive racial and ethnic comments about the waiter/waitress employees. Respondent stated that before leaving the restaurant, she confronted Mr. Schade about the offensive behavior.

Mr. Schade avowed however, that he had never been to the "Wild Thaiger," is currently not married, and had never had such a confrontation. Mr. Schade swore he had never met or seen Respondent prior to the onset of this hearing. Respondent thereafter, withdrew her objection.

At the conclusion of the hearing on the merits, the PDJ invited the parties' to file proposed findings of fact and conclusions of law by December 28, 2012. See PDJ Order filed on December 17, 2012, and both parties did.

The State Bar asserts that a long term suspension is the appropriate sanction but has not specified a specific length of time. Respondent asserted at the hearing that censure and probation is appropriate; her proposed findings and conclusions filed on December 28, 2012, reflect that a suspension of two months is the appropriate sanction for her admitted violation of ER 3.5(a) (seek to influence judge, juror, prospective juror or other official of a tribunal by means prohibited by law).

III. FINDINGS OF FACT

COUNT ONE (File No. 11-2008/Theresa Price)

1. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on May 23, 2003.³

³ Answer, ¶ 1.

2. Theresa Price hired Respondent in February of 2010 to represent her in a family law matter (See Maricopa County Superior Court case no. FC2010-090206).⁴

3. On August 11, 2010, Respondent received a draft of the proposed Joint Pretrial Statement from opposing counsel which needed her client's portion.⁵

4. On August 17, 2010, Respondent received a email from opposing counsel informing her that "If Ms. Price does not accept the settlement offer we sent to you by fax today, August 17, 2010 we will need your portions of the Joint Pretrial Statement (the draft of which which (sic) was emailed to you on August 11, 2010) by 9:00 a.m. on Wednesday, August 18, 2010 or we will file a separate pretrial statement with the Court."

5. On August 17, 2010, Ms. Price visited Respondent's office concerning her upcoming trial and voiced concern about whether Respondent was prepared for trial and whether Ms. Price's exhibits would be timely filed.⁶

6. Respondent did not tell Ms. Price that she had not prepared her portion of the Joint Pretrial Statement. Nor did Respondent inform her that a Motion to Compel Responses to Discovery Requests had been filed against her or that a motion to exclude Ms. Price's exhibits at trial had been filed on July 29, 2010.⁷

⁴ *Id.*, at ¶ 2; State Bar's Exhibit 16.

⁵ Exhibit 10.

⁶ Hearing Testimony of Theresa Price.

⁷ Exhibit 5.

7. At this August 17, 2010 meeting, Respondent suggested to Ms. Price, for the first time, that another attorney, whom Ms. Price had never met, should represent Price at trial.⁸

8. Later that same day, Respondent emailed Ms. Price stating, "Based on your reaction today, I am not willing to proceed with an outstanding balance and no funds in your account. So the total I need from you tomorrow is \$10,500.00."⁹

9. No Invoice for \$10,500.00 was provided to Ms. Price with the email and no prior notification was made by Respondent indicating that such an amount was due.¹⁰

10. As of August 17, 2010, Ms. Price had paid Respondent fees and costs totaling \$18,000.00.¹¹

11. There had been no issues concerning payment of bills between Respondent and Ms. Price prior to August 17, 2010, as up until that date, Ms. Price had always paid her bills in a timely manner.¹²

12. Ms. Price had made her most recent payment, totaling \$5,000, to Respondent on August 4, 2010.¹³

13. On August 18, 2010 Ms. Price received an email from Respondent's assistant, that stated: "Jane needs a check from you for \$10,500.00 by noon today or she will be unable to proceed further with your case. If we do not receive a check by noon today, Jane will file a motion to withdraw from your case, before

⁸ *Id.*

⁹ State Bar's Exhibit 3.

¹⁰ Hearing Testimony of Theresa Price.

¹¹ Answer, ¶ 8.

¹² State Bar's Exhibit 25, Bates No. SBA1702; hearing testimony of Theresa Price.

¹³ Hearing Testimony of Theresa Price.

close of business today. Please call us ASAP, to make arrangements for payment. Also, I'll be emailing you an invoice and statement by 9:15 am today."¹⁴

14. Around August 18, 2010, Ms. Price received threatening phone calls from Respondent's legal assistant regarding the demand for immediate payment.¹⁵

15. On the afternoon of August 18, 2010, Respondent called the State Bar's Ethics Hotline concerning her attorney-client relationship with Ms. Price.¹⁶

16. Advice given over the ethics hotline is based solely on information provided by the inquiring attorney.¹⁷

17. Ethics hotline call notes of the call involving Respondent do not indicate that Respondent communicated she had demanded \$10,500.00 from Ms. Price with a one day deadline for payment and we find Respondent did not communicate that information. The notes also do not reflect that during the hotline call that Respondent was advised by the hotline to withdraw as Ms. Price's attorney in the underlying litigation. Rather, the notes indicate that Respondent was simply directed to review ER 1.16.¹⁸

18. It is standard procedure that no such advice be given. We find Ms. Ross was given no advice regarding whether to withdraw or not. If Respondent had indicated during the phone call with the ethics hotline that her client had paid \$18,000 to date, such information customarily would have been included in the call notes.¹⁹

¹⁴ Answer, ¶ 9.

¹⁵ Hearing testimony of Theresa Price.

¹⁶ Respondent's Exhibit 1.

¹⁷ Hearing testimony of Patricia Sallen, Esq.

¹⁸ Respondent's Exhibit 1.

¹⁹ Hearing testimony of Michael Tannery.

19. Respondent filed a "Mandatory Motion to Withdraw" in the Price litigation at 5:01 p.m. on the afternoon of August 18, 2010. In the Motion Respondent requested a continuance of Ms. Price's trial even though Respondent had not discussed a continuance or any other aspect of the Motion with Ms. Price.²⁰

20. At that time, trial was scheduled for August 23, 2010, three business days later.²¹

21. Ms. Price expressed by an email sent to Respondent on August 18, 2010 her concern regarding allegations of discovery abuse by Respondent contained in opposing counsel's portion of the Joint Pre-Trial Statement.²²

22. Respondent did not communicate to Ms. Price that Respondent had already filed her Motion to Withdraw. Instead Respondent emailed Ms. Price at 8:43 p.m. on the evening of August 18, 2010, that "There really isn't time to explain this to you now ... we have to continue forward." In the email Respondent made no mention of her Motion to Withdraw.²³

23. Respondent did not communicate to Ms. Price that Respondent had filed her Motion to Withdraw until the following day, August 19, 2010.²⁴

24. Respondent's threat to withdraw effectively ended the attorney/client relationship between Respondent and Ms. Price.²⁵

²⁰ State Bar's Exhibit 13; hearing testimony of Theresa Price.

²¹ State Bar's Exhibit 1, SBA 001848; Respondent's hearing testimony.

²² State Bar's Exhibit 5; hearing testimony of Theresa Price.

²³ State Bar's Exhibit 14.

²⁴ Hearing testimony of Respondent.

²⁵ State Bar's Exhibit 25, Bates No. SBA001702.

25. On September 8, 2010, Ms. Price requested that Respondent participate in fee arbitration, an express term of the fee agreement she entered into with Respondent.²⁶

26. Respondent, however, refused to participate in fee arbitration.²⁷ She intentionally crafted her contract to mislead Ms. Price into assuming fee arbitration bound both Ms. Ross and herself. Ms. Ross testified it was her intent that only Ms. Price be obligated to fee arbitration. "It is obvious on its [the fee agreement] face that the client must participate in fee arbitration and not me."

27. Instead, Respondent filed a breach of contract lawsuit against Ms. Price for fees on September 9, 2010.²⁸

28. The fee agreement drafted by Respondent intentionally placed a lien upon the "file and documents" of Ms. Price in Respondent's possession.²⁹

29. On September 17, 18 and 19, 2010, Ms. Price sent e-mails to Respondent requesting a copy of her fee agreement. Respondent did not respond to any of the requests.³⁰

30. Respondent retained attorney Jennifer Rubin to replace Respondent in Price's family law matter. Respondent refused to comply with attorney Rubin's request for a copy of the fee agreement during the year 2010.³¹

31. Ms. Price did not receive a copy of her fee agreement from Respondent until March or April of 2011.³²

²⁶ Answer, ¶ 18; Exhibit 16.

²⁷ Hearing testimony of Theresa Price and Respondent.

²⁸ Answer, ¶ 21; the matter is currently pending on appeal in Superior Court. Respondent's proposed findings and conclusions.

²⁹ State Bar's Exhibits 16, 26, 27 and 28.

³⁰ Answer, ¶ 22.

³¹ Hearing testimony of Jennifer Rubin, Esq.

32. On October 18, 2010, Respondent filed a Motion for Judgment on the Pleadings in the civil fees matter. In delivering a copy of the pleading to Price, Respondent attached a "sticky note" that read, "Theresa, you have no defense; you owe the money; the longer this goes on the more you will owe; just send a check and be done with it."³³

33. When Ms. Price received the sticky note, Ms. Price was unrepresented in the case.³⁴

34. In Respondent's Reply to Ms. Price's Counterclaim filed on November 3, 2010 in the fee litigation, Respondent stated: "Defendant merely asked that the proceedings be stayed or dismissed pending simultaneous action by the State Bar. The State Bar has concluded its analysis and no further action will be taken." The State Bar, however, had never conducted any analysis because Respondent had refused to participate in fee arbitration.³⁵ These statements were intentionally misleading.

35. Also in the Reply, Respondent indicated to the Court that Ms. Price had settled her family law matter immediately after Respondent and opposing counsel had withdrawn from the case. However, the family law matter had not immediately settled.³⁶

36. On March 14, 2011, Respondent filed a Motion for Summary Judgment in her fee litigation against Ms. Price in which she stated, "Here, the Defendant

³² Hearing testimony of Theresa Price.

³³ Answer, ¶ 24; State Bar's Exhibit 21.

³⁴ Hearing testimony of Theresa Price.

³⁵ State Bar's Exhibit 20, Bates No. SBA 001853.

³⁶ *Id.*, Bates No. SBA 001854; hearing testimony of Jennifer Rubin, Esq.

does not deny the allegations in the Complaint. She admits she owes the money. She went to the State Bar for relief and was denied.”³⁷

37. The State Bar, however, had never considered the reasonableness of Respondent’s fees because Respondent had refused to participate in fee arbitration.³⁸ This statement was intentionally misleading.

38. In drafting her Motion for Summary Judgment, Respondent signed the mailing certificate on March 4, 2011. The Motion was date stamped by the court on the same date. However, Respondent did not mail a copy of the motion to Price until March 21, 2011.³⁹

39. On July 8, 2011, in her Disclosure Statement in the civil fees matter, Respondent included the following statement in her “Factual Basis” section: “Defendant sought fee arbitration through the State Bar of Arizona but Plaintiff preferred to seek her remedy in this Court and did not participate in the fee arbitration offered by the State Bar. Defendant Price then filed a bar complaint against Plaintiff Ross. Such complaint was not pursued by the Bar.” This statement was false and intentionally misleading because Ms. Price’s charge was pursued by the State Bar and a formal Complaint was filed.⁴⁰

40. On November 16, 2011, the Court (Honorable Mark Brain), in the civil fees matter filed by Respondent against Ms. Price, ruled on a Motion for Sanctions that Ms. Price had filed against Respondent relating to Respondent’s Motion for Summary Judgment, and forwarded the Court’s Minute Entry to the State Bar for

³⁷ State Bar’s Exhibit 17, Bates No. SBA 000254; hearing testimony of Theresa Price.

³⁸ Answer, ¶ 26; hearing testimony of Theresa Price.

³⁹ State Bar’s Exhibit 29; hearing testimony of Theresa Price.

⁴⁰ Answer, ¶ 33; Complaint, at Count I.

review. The Court found therein that Respondent's motion "patently defective for a number of reasons."⁴¹

41. Specifically, the Court found that Respondent's Motion for Summary Judgment did not contain a separate statement of facts or cite to relevant portions of the record, as required under Rule 56, and that many of the specifically numbered facts in her memorandum were entirely unsupported.⁴²

42. The Court also found that Respondent's Motion violated Rule 11, because it was "not well grounded in fact or warranted by existing law or a good faith argument that existing law should change," and "it was simply put, bound to be denied in the form in which it was filed." The Court also entered Rule 11 sanctions against Respondent in the amount of \$2,000.⁴³

43. According to Respondent, Judge Brain told her at the argument concerning the Motion for Summary Judgment, "You don't look like an attorney."⁴⁴

44. Judge Brain however, never made this alleged comment and has never made a comment about Respondent's appearance.⁴⁵

45. The Court assigned an arbitrator to hear the fee dispute between Ms. Price and Respondent. In a Notice of Decision of Arbitrator issued on August 2, 2012, the Arbitrator found that Respondent's threat to withdraw "effectively ended the attorney/client relationship and started the issues that resulted in this suit."⁴⁶

⁴¹ State Bar's Exhibit 23.

⁴² State Bar's Exhibits 17; Exhibit 23.

⁴³ State Bar's Exhibit 23, Bates No. SBA001807.

⁴⁴ Hearing testimony of Respondent.

⁴⁵ Answer to non-uniform interrogatory authored by Judge Brain; hearing testimony of Jennifer Rubin, Esq.; and State Bar's Exhibit 30, Bates No. SBA001793-001794.

⁴⁶ State Bar's Exhibit 25.

COUNT TWO (File No. 11-2801/Jacqueline Fischer)

46. Respondent was retained to represent her client, Jacqueline Fischer ("Client Jacqueline Fischer") in a family law matter (FC2010-050681) concerning visitation rights for Client Jacqueline's daughter against Angela Fischer.⁴⁷

47. Angela Fischer was Client Jacqueline Fischer's former domestic partner. Angela Fischer was not represented by counsel for the majority of the visitation case.⁴⁸

48. Angela Fischer first learned that Respondent was representing Client Jacqueline Fischer when she received notification that Respondent's Notice of Change of Judge had been denied. She had not received a copy of the Notice.⁴⁹

49. In responding to Angela Fischer's discovery request for contact information for witnesses, Respondent provided no contact information whatsoever.⁵⁰

50. After Angela Fischer emailed Respondent on September 22, 2010, attempting to obtain the same contact information, Respondent replied, "If you would like to interview witnesses I can arrange it through my office. Unfortunately direct contact is not appropriate."⁵¹

51. In a further email on the same day, Respondent told Angela Fischer, "Put shortly, I propose you do not discuss this case with the witnesses prior to trial."⁵²

⁴⁷ Hearing testimony of Respondent.

⁴⁸ Hearing testimony of Angela Fischer.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ State Bar's Exhibit 39, Bates No. SBA000546.

⁵² *Id.*, Bates No. SBA000547.

52. In responding to the State Bar's investigation, Respondent, through her former counsel, Ralph Adams, indicated that Angela Fischer wanted the witnesses' personal information because "they are her prior partners who wanted no further contact with her."⁵³ This information was false.⁵⁴

53. During this disciplinary hearing, Respondent testified that the State Bar's Disclosure Statement indicated that some witnesses could only be contacted through undersigned Bar Counsel.⁵⁵ This statement was false.

54. On October 12, 2010, in a Court of Appeals filing, Respondent stated, "Mother [Client Jacqueline Fischer] and her daughter relocated to Tennessee." On October 28, 2010, in an Emergency Motion for Temporary Orders filed by Respondent, Respondent again stated that "Mother [Client Jacqueline Fischer] and daughter relocated to Tennessee." In a December 20, 2010 filing, Respondent stated, "The Respondent trial court entered an order requiring Mother [Client Jacqueline Fischer] to return her 4 year old daughter to Arizona from Tennessee every other weekend"⁵⁶

55. Client Jacqueline Fischer [Mother] never lived in Tennessee and did not move from the State of Arizona until December 26, 2010 after Respondent made the foregoing filings.⁵⁷

56. Client Jacqueline Fischer hired Respondent specifically for the reason that she could not afford to move out of state under a court order requiring her to share visitation with Angela Fischer.⁵⁸

⁵³ State Bar's Exhibit 45; hearing testimony of Respondent.

⁵⁴ Answer, ¶ 58.

⁵⁵ Hearing testimony of Respondent.

⁵⁶ State Bar's Exhibits 32, 33 and 34, respectively.

⁵⁷ Hearing testimony of Jacqueline Fischer and Angela Fischer.

57. Client Jacqueline Fischer never told Respondent that she was already living in Tennessee.⁵⁹

58. On December 20, 2010, in a Special Action filed in the Court of Appeals concerning the issue of whether the trial court acted in excess of "its authority by entering a temporary order for parenting time for a nonparent pursuant to an in loco parentis petition," Respondent failed to include page 8 of a 32 page transcript. The missing page 8 contained testimony in which her client had agreed to a visitation schedule of "every other weekend." All other pages were included.⁶⁰

59. On March 31, 2011, during a hearing regarding her Emergency Motion for Temporary Orders, Respondent asked witness Angela Fischer:

*Would you be shocked to hear that your brother Andrew is an out and open member of a sadomasochistic sex club for adults? I take it you wouldn't be shocked because I'm told that he engages in that behavior in your home, or did he lived there, and in front of the children.*⁶¹

60. Client Jacqueline Fischer, had never indicated to Respondent that Angela Fischer's brother engaged in inappropriate sexual behavior in front of children.⁶² There is no evidence in any record supporting Respondent's in court statement.

61. On April 7, 2011, Respondent filed "Respondent's Disclosure Statement" on behalf of Client Jacqueline Fischer. All four of the so-called expert witnesses named in the Disclosure Statement were former law partners of Trial

⁵⁸ Hearing testimony of Jacqueline Fischer.

⁵⁹ *Id.*

⁶⁰ Hearing testimony of Angela Fischer; hearing testimony of Respondent.

⁶¹ Answer, ¶ 68.

⁶² Hearing testimony of Jacqueline Fischer.

Judge Gerlach. None of the so-called expert witnesses had been named in Respondent's earlier filed Disclosure Statement, and none of the four so-called expert witnesses had ever been contacted by Respondent or had knowledge of the case.⁶³

62. The Disclosure Statement contained false statements concerning anticipated testimony of the four so-called expert witnesses, none of whom was ever contacted by Respondent and none of whom had ever practiced family law, which was the basis of the lawsuit.⁶⁴

63. Before the filing of the Disclosure Statement, Respondent specifically told her assistant, Patricia Ronan, to look at the Jennings, Strouss and Salmon ("JSS") website to find witnesses to be listed in the Disclosure Statement.⁶⁵

64. Respondent instructed Ms. Ronan to visit JSS' website because Judge Gerlach had previously been affiliated with that law firm.⁶⁶

65. During the Disciplinary hearing, Respondent testified that she did not have any knowledge of Judge Gerlach's professional background before he took the Bench. This, however, is untrue because Respondent specifically ordered Ms. Ronan to visit the JSS website in selecting witnesses to be included in the Disclosure Statement for the purpose of causing Judge Gerlach to recuse himself.⁶⁷

66. Judge Gerlach never commented that he wanted to recuse himself.⁶⁸

⁶³ Answer, ¶ 72; hearing testimony of J. Scott Rhodes, Esq.; State Bar's Exhibit 40.

⁶⁴ Hearing testimony of J. Scott Rhodes, Esq.; hearing testimony of Respondent.

⁶⁵ Hearing Testimony of Patricia Ronan, Esq.

⁶⁶ *Id.*

⁶⁷ Hearing testimony of Respondent; hearing testimony of Patricia Ronan, Esq.

⁶⁸ Answer to Non-Uniform Interrogatory authored by Judge Gerlach and read into the record by bar counsel.

67. However, Respondent testified that Judge Gerlach made a comment in the courtroom about wishing he could recuse himself from the case.⁶⁹ Her testimony is not plausible.

68. Respondent's assistant Patricia Ronan, however, did not hear any comments by Judge Gerlach that led her to believe that Judge Gerlach wished to recuse himself.⁷⁰

69. Respondent did not make mention of the alleged comment by Judge Gerlach concerning recusal in her attorney's letters dated December 8, 2011 or January 26, 2012.⁷¹

70. Respondent never discussed her decision to list Judge Gerlach's former law partners in her Disclosure Statement with her Client Jacqueline Fischer.⁷²

71. Respondent testified that Judge Gerlach asked the parties to fax directly to his chambers, a "tentative wish list" of witnesses directly to his Chambers whom the parties would choose to call in a "perfect world". We find her testimony not plausible.

72. The "relevant portion of the transcript" provided to the Panel by Respondent through her counsel, demonstrates that a "wish list" was never requested by Judge Gerlach, and that Judge Gerlach did not order either party to fax the document to his chambers.⁷³

⁶⁹ State Bar's Exhibit 45, Bates No. SBA000349; hearing testimony of Respondent.

⁷⁰ *Id.*

⁷¹ State Bar's Exhibits 42 and 43, respectively.

⁷² Hearing testimony of Jacqueline Fischer.

⁷³ Hearing testimony of Respondent; State Bar's Exhibits 43 and 44.

73. Respondent testified that she knew at the time of sending the list that her "wish list" included four members of Judge Gerlach's former law firm. She intended to cause him to recuse himself.⁷⁴

74. During an April 8, 2011 hearing at which the Disclosure Statement was discussed, Respondent told Judge Gerlach that, "I'm very concerned that you may have prejudged this case."⁷⁵

75. During that hearing and in a subsequent Minute Entry, Respondent was ordered by the Court to produce a transcript of the March 31, 2011, hearing to support her contention that Judge Gerlach may have prejudged the case. Respondent disregarded the Order and never produced a transcript.⁷⁶

76. Respondent thereafter filed a Motion for Correction indicating that a different transcript would support her concerns about Judge Gerlach. However, she never produced a different transcript, and testified that she is now uncertain whether Judge Gerlach ever made the alleged comments that caused Respondent to believe that he may have prejudged her Client Jacqueline Fischer's case.⁷⁷

77. Immediately following the April 8, 2011 hearing, Respondent turned and said loud enough for those in the courtroom to hear that, "I guess the Judge doesn't like Lesbians."⁷⁸ Respondent knew both parties were lesbians and that multiple individuals in the courtroom at the time were lesbians.

⁷⁴ Hearing testimony of Respondent.

⁷⁵ Answer, ¶ 78.

⁷⁶ Hearing testimony of Respondent.

⁷⁷ *Id.*

⁷⁸ Hearing testimony of Susan Ulrich.

78. Respondent's comments were not perceived by the Bailiff to have been made in a joking manner.⁷⁹

79. Respondent, during a requested break in the disciplinary hearing by her counsel, stood approximately two feet from the door to Chambers, behind the judicial bench, listened to deliberations of the Panel, and made a comment to persons sitting in the courtroom where the hearing was taking place that she could hear the Panel's voices and could hear them deliberating.⁸⁰

IV. CONCLUSIONS OF LAW

The Panel finds that the State Bar met its burden of proof and provided clear and convincing evidence that Respondent violated numerous provisions of Rule 42, Ariz.R.Sup.Ct., as follows: ERs 1.4 (communication), ER 3.1 (meritorious claims and contentions), ER 3.3(a)(1) (knowingly make a false statement of fact or law to tribunal or failure to correct a previously made false statement of act or law), ER 3.4(c) (knowingly disobey an obligation under rules of tribunal), ER 3.4(e) (in trial, allude to matter not relevant or supported by admissible evidence), ER 3.5(a) (seek to influence judge, juror, prospective juror or other official of a tribunal by means prohibited by law), ER 4.3 (dealing with unrepresented person), ER 4.4(a) (use means that have no substantial purpose other than to embarrass, delay or burden any other person, or use methods of obtaining evidence that violate legal rights of such a person), ER 1.16 (terminating representation), ER 8.2 (falsely or recklessly make a statement concerning qualifications or integrity of judge), ER 8.4(c) (knowingly engage in conduct involving dishonesty, fraud, deceit or

⁷⁹ *Id.*

⁸⁰ Hearing testimony of Michele Smith.

misrepresentation), ER 8.4(d) (conduct prejudicial to the administration of justice), and Rule 41(c) (maintain respect due to courts and judicial officers).

(A). In Count One, the evidence demonstrates that Respondent violated ER 1.4 by failing to discuss client Theresa Price's concerns regarding then existing disclosure and discovery issues raised by opposing counsel. Respondent also failed to inform Ms. Price that Respondent had filed a Motion to Withdraw during a conversation that took place after the Motion to Withdraw had been filed. Respondent further failed to timely respond to Ms. Price's request for invoices.

Respondent violated ER 1.16 by informing Ms. Price, just three days prior to the date of trial [August 23, 2010], that Respondent intended to withdraw from the case unless Ms. Price paid Respondent \$10,500.00 the very next day after making the threat. By doing so, Respondent effectively ended the attorney client relationship. Respondent further failed to provide Ms. Price with a copy of her fee agreement, despite Ms. Price's repeated requests or the subsequent request of Ms. Price's new attorney Jennifer Rubin.

Respondent violated ER 3.1 by filing a Motion for Summary Judgment that contained multiple unsupported facts and justified the imposition of Rule 11 sanctions.

Respondent violated ER 3.3(a) by falsely indicating to the Court that her client, Ms. Price "...went to the State Bar for relief and was denied." Respondent also signed a mailing certificate of a document she filed on March 14, 2011, but failed to mail a copy to Ms. Price until March 21, 2011. Additionally, Respondent informed the Court in that civil matter that Ms. Price's family law matter had been settled, even though settlement had not been finalized.

Respondent violated ER 3.4(c) by filing a Motion for Summary Judgment that did not comply with the requirement of Rule 56, Arizona Rules of Civil Procedure, in that Respondent failed to include a separate statement of facts, and failed to cite to the record.

Respondent violated ER 8.4(c) by falsely indicating in her Disclosure Statement that Ms. Price's bar charge was not pursued by the State Bar, falsely indicated in her Motion for Summary Judgment that Ms. Price went to the State Bar for relief and was denied, and completed a mailing certificate on March 14, 2011, for a pleading that she did not mail to Ms. Price until March 21, 2011. Respondent also falsely informed the Court in the civil matter that Ms. Price's family law matter had settled when in fact no settlement had been entered.

Respondent violated ER 8.4(d) by refusing to participate in fee arbitration with Ms. Price, even though her printed fee agreement expressly indicated that any fee related dispute could be resolved by fee arbitration. See A.R.S. 12-1501, *WB, The Building Co., LLC v. El Destino LP*, 227 Ariz. 302, 257 P.3d 1182 (App. 2011) citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); *U.S. Insulation*, 146 Ariz. 250, 705 P.2d 490; *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Association, Inc.*, 12 Ariz. App. 13, 467 P.2d 88 (1970).

(B). In Count Two, Respondent violated ER 3.3(a)(1) by filing an Emergency Motion for Temporary Orders in which she falsely stated that her Client Jacqueline Fischer and her Client's daughter had moved and were living in Tennessee.

Respondent made the same false statement in a pleading that she filed with the Court of Appeals.

Respondent violated ER 3.4(e) when on cross examination of Angela Fischer, she impugned the character of Angela Fischer's brother by implying that he belonged to a sadomasochistic adult club or that he engaged in inappropriate or unlawful behavior in front of children. There was no mention of the proposed testimony or evidence in Respondent's Disclosure Statement filed on April 7, 2011, there was no evidence supporting Respondent's insinuations, and there was no decision by the Court prohibiting the introduction of such evidence.

Respondent violated ER 3.5(a) by listing as her anticipated expert witnesses four of the sitting Judge's former law partners at the JSS firm in an attempt to cause the Judge to recuse himself.

Respondent violated ER 4.3 in that, when Angela Fischer attempted to secure contact information for witnesses listed by Respondent, Respondent replied, "If you would like to interview witnesses I can arrange it through my office. *Unfortunately, direct contact is not appropriate.*" (Emphasis added.)

Respondent violated ER 4.4(a) by listing several of the sitting Judge's former law partners at the JSS firm as expert witnesses in an attempt to cause the Judge to recuse himself and, further, to delay the proceedings.

Respondent violated ER 8.2 by accusing the Judge of prejudging her Client Jacqueline Fischer's case.

Respondent violated ER 8.4(c) by Respondent being dishonest with the Court concerning her reasons for listing the sitting Judge's former law partners, and was inconsistent in her attempt to justify that misconduct. Respondent further falsely

stated to the Court that her Client Jacqueline Fischer and her daughter had already moved and was living in Tennessee, when they actually were residing in Arizona when the statement was made.

Respondent violated ER 8.4(d) when she omitted page 8 from the 32 page transcript in filing her Special Action in the Court of Appeals. An issue in the Special Action was whether the trial court acted in excess of "its authority by entering a temporary order for parenting time for a nonparent pursuant to an in loco parentis petition." The missing page contained her Client's testimony that she was agreeable to a visitation schedule of "every other weekend". Respondent further failed to provide Client Jacqueline Fischer with any of the attachments she filed with the Court of Appeals.

Respondent violated Rule 41(c) by accusing the Trial Judge of prejudging her Client's case, and, before the Judge left the courtroom, by turning to persons in the courtroom gallery and telling them that maybe the judge "just doesn't like lesbians." There is no evidence in any record supporting Respondent's implication that the Judge was or is biased or prejudiced against anyone, regardless of their race, religion, gender or sexual preference.

DISCUSSION OF DECISION

The State Bar's allegations against Respondent Ross were troubling from the onset of this disciplinary proceeding. As troubling has been the conduct of Respondent personally during this proceeding as well as the conduct directed towards and accusations asserted, without submission of any supporting evidence, against a Panel Member (Mr. Schade) by Respondent. The implication was

consistently made that if the Panel did not rule for Respondent that it would be because the members of the Panel were bigoted against Respondent.⁸¹

The Panel has carefully considered the allegations of the State Bar's Complaint as well as the demeanor of the witnesses called by both the State Bar and Respondent, and find that the credible record evidence clearly and convincingly support the imposition of sanctions against Respondent.⁸² We find her actions were intentional and with a "win at any cost" attitude. The Panel carefully considered whether, in view of the substantial record evidence of Respondent's outrageous conduct, the sanction of disbarment, rather than suspension, should be imposed against her. For example, Respondent's testimony was simply incredible, often preposterous and possibly duplicitous. Her disregard for her client, her opponents, the court and justice is blatant. Her counsel's conduct during the proceeding was, at the very least, often disrespectful towards the Panel members as well as the judicial process. Regardless, disbarment is not ordered.

Contrary to unfortunate notions that have arisen over the past several decades, the law is still a profession, not a business or simply a means to making a living or maintaining a lifestyle. As long as a lawyer is engaged in the practice of law, he or she is bound by the ethical requirements of that profession and must conduct his or her actions accordingly. See Matter of Dwight, 117 Ariz. 407, 573

⁸¹ During the careers of Panel Members Mr. Schade and Mr. Brooks, both previously served as members of the Board of Directors of the Greater Phoenix Urban League, a well respected organization dedicated, in large part, to promoting the civil rights of all citizens. Mr. Brooks, additionally served as the outside General Counsel for that organization.

⁸² Inasmuch as the Bar Prosecutor and other attorneys or other Bar personnel were present and witnessed the conduct of Respondent's counsel during the disciplinary proceedings, the Panel Members do not believe that a referral or specific charge regarding Mr. Bemis is appropriate at this time. The record speaks for itself.

P.2d 481 (1977). Thus, as the Preamble to the Rules of Professional Conduct⁸³ states instruct members of the legal profession,

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

* * *

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

The Preamble also states that

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personnel affairs. A lawyer should use the laws procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

Preamble, at para. 5.

In these regards, the conduct of Respondent Ross falls woefully short of the mark. The evidence in the record before this Panel amply shows that she has considered herself to be above the law, above the Rules of Professional Conduct, and above the basic requirements of the legal profession. During the disciplinary

⁸³ Preamble to Arizona Rules of Professional Responsibility, at paras. 1, 13.

proceedings, in particular, Respondent was frequently evasive in answers to questions, gave inconsistent testimony, and acted unprofessionally and improperly (e.g. by listening to the Panel deliberations).

The Findings of Fact are, again, clearly and convincingly set forth in the record of this disciplinary proceeding. The purpose of disciplinary hearings is a search for truth. A lawyer's "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. See Nix v. Whiteside, 475 U.S. 157, 166 (1986).

Accordingly, the Panel unanimously has concluded that the following sanctions against Respondent are just, proper and warranted in the particular circumstances of this matter.

V. SANCTIONS

In consideration of an appropriate sanction, courts generally review the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction depends on the facts and circumstances of each case.

Analysis under the ABA Standards

When determining which sanction to impose, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). See also Standard 3.0.

In this matter, Respondent violated duties owed to the client, the legal system and as a professional.

Standard 4.4, Lack of Diligence is applicable to Respondent's violation of ER 1.4.

Standard 4.42 provides that:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Standard 5.1, Failure to Maintain Personal Integrity is applicable to Respondent's violation of ER 8.4(c). *Standard 5.11* provides that:

Disbarment is generally appropriate when:

- (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 5.12 provides that:

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in *Standard 5.11* and that seriously adversely reflects on the lawyer's fitness to practice.

Respondent was knowingly if not intentionally deceitful in her representations to the court and the State Bar.

Standard 6.1 False Statements, Fraud, and Misrepresentation is applicable to Respondent's violations of ERs 3.3(a)(1), 8.2 and 8.4(d). *Standard 6.11* provides that:

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding.

Standard 6.12 provides that:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Respondent knowingly submitted multiple documents to the court that contained false statements and caused potential harm to her client, the opposing party and the legal system.

Standard 6.2, Abuse of the Legal System is applicable to Respondent's violations of ERs 3.1, 3.4(c), 3.4(e) and 4.4(a). *Standard 6.21* provides that:

Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

Standard 6.22 provides that:

Suspension is appropriate when a lawyer knowingly 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.

Standard 6.3, Improper Communications with Individuals in the Legal System is applicable to Respondent's violations of ERs 3.5(a) and 4.3. *Standard 6.31* provides that:

Disbarment is generally appropriate when a lawyer:

- (a) Intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant interference with the outcome of the legal proceeding; or
- (b) Makes an ex parte communication with a judge or juror with the intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party,

- or causes significant interference with the outcome of the legal proceeding; or
- (c) Improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes or causes significant interference with the outcome of the legal proceeding

Standard 6.32 provides that:

Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

Standard 7.0, Violations of Other Duties Owed as a Professional is applicable to

Respondent's violation of ER 1.16. *Standard 7.1* provides that:

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Standard 7.2 provides that:

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

After a lawyer's misconduct has been established, the Panel may consider any aggravating and mitigating factors to aid in determining the appropriate sanction.

Standard 9.0, Aggravating and Mitigating factors

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *In re Matter of Peasley*, 208 Ariz. 27, 90 P.3d

764 (2004). The Panel determined that the following aggravating factors are present:

9.22(b) dishonest or selfish motive;
9.22(c) pattern of misconduct;
9.22(d) multiple offenses;
9.22(e) bad faith obstruction of disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
9.22(f) submission of false evidence, false statements, or other deceptive practices during the discipline process;
9.22(g) refusal to acknowledge wrongful nature of conduct; and
9.22(i) substantial experience in the practice of law.

In mitigation, Respondent argues that factors 9.32(b) absence of selfish or dishonest motive, 9.32(l) remorse, and given her services on Committees for the State Bar, 9.32(g) good character and reputation are present. See Respondent's Proposed Findings of Fact and Conclusions of Law, p. 15.

The Panel determined that the following factor is present in mitigation:

9.32(a) absence of prior disciplinary record.

CONCLUSION

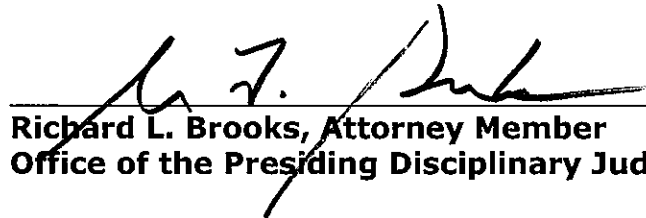
Based on the facts in this matter and in consideration of the applicable *Standards* including the significant aggravating factors and sole mitigating factor, the Panel has determined that a suspension of four (4) years, followed by two years of probation⁸⁴ upon reinstatement and payment of the costs of these disciplinary proceedings, is the appropriate sanction. The suspension shall be effective thirty (30) days from the date of this Report and Order. At a minimum, the terms of probation shall require that Respondent take the following State Bar continuing

⁸⁴ Rule 60(a)(5) provides for a specified period of probation not to exceed 2 years but may be renewed for an additional two year period.

legal education courses⁸⁵ in addition to showing that she has complied with her annual continuing legal education requirements:

1. Professionalism Course;
2. Course on Ethics for Trial Lawyers; and
3. Course on Candor, Courtesy and Confidences: Common Courtroom Conundrums.

DATED this 26 day of January, 2013.


Richard L. Brooks, Attorney Member
Office of the Presiding Disciplinary Judge

CONCURRING


Dewey D. Schade, Volunteer Public Member


Hon. William J. O'Neil, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 26 day of January, 2013.

Copies of the foregoing mailed/emailed
this 26 day of January, 2013, to:

⁸⁵ These courses are available online or CD.

Hunter F. Perlmeter
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288
Email: LRO@staff.azbar.org

Kenneth P. Bemis
Law Offices of Kenneth P. Bemis
637 N. 3rd Avenue, Suite 5
Phoenix, Arizona 85003-4532
Email: kbemis@qwestoffice.net
Respondent's Counsel

by: 