

ORIGINAL

## In The Supreme Court of Ohio

Disciplinary Counsel,	)	Case No. 2011-1190
Relator,	)	
	)	<b>RESPONSE SHOWING CAUSE AS</b>
	)	<b>TO WHY COMPARABLE DISCIPLINE</b>
David Marlborough Lynch,	)	<b>IS UNWARRANTED</b>
Respondent.	)	

Now comes the Respondent who hereby indicates that identical discipline as that imposed in Arizona would be unwarranted in this case.

The reasons that it would be unwarranted are more fully outlined in the attached Brief in Support.

Respectfully submitted,



  
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Respondent

## **BRIEF IN SUPPORT**

### **FACTS OF THE CASE**

In the Fall of 2009, I was asked to represent Betty Yoger Pro Hac Vice in Arizona regarding her brother being the target of economic and physical abuse.

The Arizona Court determined that no emergency existed but conducted no Hearing on whether there had been economic abuse.

I was denied Pro Hac Vice admission in Arizona.

I was then brought up on disciplinary charges in Arizona based on two claims:

**One.** That I presented false or misleading information to the tribunal in the Affidavit and Petition for Emergency Order in the Arizona Court.

**Two.** That I violated ethical rules by pretending to have an ankle injury in order to book an appointment with the Doctor treating the abused brother.

In Arizona, I reached a Settlement Agreement for admonition. This kept me from having to travel to Arizona to resolve this case.

In the Settlement Agreement, I was admonished based only on the false statements made to book the appointment with the Doctor of the abused brother.

No finding was made relating to anything else. The Settlement Agreement is attached hereto as Exhibit A.

Most importantly, the Supreme Court's Disciplinary Counsel, Robert Berger, also reviewed this exact same matter here in Ohio.

Mr. Berger concluded that the Ohio Office of Disciplinary Counsel exercised prosecutorial discretion and chose to take no action.

Mr. Berger's letter is attached hereto as Exhibit B. My letter to Mr. Berger is attached as Exhibit C.

### **ARGUMENT**

I do not believe a similar (to Arizona) sanction is appropriate here in Ohio for four reasons:

**One.** The Arizona sanction was reached as a settlement for a lawyer (me) to also avoid the expense of litigating the matter in Arizona.

**Two.** The only issue that caused the admonition in Arizona was my booking my appointment with Dr. Luberto under false pretenses.

**Three.** The Ohio Disciplinary Counsel reviewed this same violation and chose not to pursue disciplinary action.

**Four.** The misleading statements made to book the appointment were made for fear of the safety of the abused brother.

Respondent urges the Court to review Mr. Berger's January 14, 2011 letter choosing not to pursue the matter further. It truly places this matter in context.

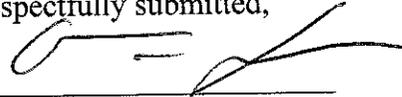
One last matter should be addressed by Respondent. I did not realize that I was required to notify Ohio regarding the Arizona admonition. I apologize for this deeply and I realize the importance of letting my home State Supreme Court know about such things.

Finally, I did in fact exercise poor judgment in booking the Luberto appointment. Regardless of my fears, I should have found an alternate way to reach Dr. Luberto.

**CONCLUSION**

**WHEREFORE**, in light of the previous review of this matter by Robert Berger of the Disciplinary Counsel, and in light of Respondent's sincere remorse and good intentions, Respondent urges this Court under Rule V(11) (f) (4) not to impose a similar sanction here in Ohio.

Respectfully submitted,



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Respondent

**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent to the Office of Disciplinary Counsel, The Supreme Court of Ohio, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411 this 6<sup>th</sup> day of September, 2011 by regular mail.



David M. Lynch

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Respondent

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

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

**David M. Lynch**

**Bar No.**

**Respondent.**

No. 10-0651

**AGREEMENT FOR DISCIPLINE  
BY CONSENT**

The State Bar of Arizona (State Bar), through undersigned bar counsel, and Respondent, David M. Lynch, who has chosen not to seek the assistance of counsel, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. Respondent voluntarily waives the right to an adjudicatory hearing on the complaint, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ER 4.1(a), Ariz. R. Sup. Ct. Upon acceptance of this agreement,

Exhibit   A

Respondent agrees to accept imposition of the following discipline: admonition. Respondent also agrees to pay the costs and expenses of the disciplinary proceeding pursuant to Rule 60(b), Ariz. R. Sup. Ct.<sup>1</sup> The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit "A."

## **FACTS**

### **GENERAL ALLEGATIONS**

1. At all times relevant, Respondent was not a lawyer licensed to practice law in the state of Arizona.
2. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Ohio having been first admitted in 1982.

### **COUNT ONE**

3. At all times relevant, Betty Yoger (Ms. Yoger) was an Ohio resident.
4. At all times relevant, Lamar LaLonde (Mr. LaLonde) resided in Maricopa County, Arizona, was approximately 90 years old, and was Ms. Yoger's brother.
5. Sometime prior to 2009, Ms. Yoger was provided a Power of Attorney and was named as an alternate trustee for Mr. LaLonde.
6. At all times relevant, Mr. LaLonde suffered from dementia and was cared for in Arizona by the Alcala family.
7. Sometime prior to 2009, Mr. LaLonde created or had created a new Power of Attorney in favor of Gerardo Alcala (Mr. Alcala), a member of the Alcala family, removed Ms. Yoger as a trustee, and conveyed one-half of his home to Mr. Alcala.

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<sup>1</sup> Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

8. Ms. Yoger did not believe the legal documents executed by Mr. LaLonde were reliable given Mr. LaLonde's dementia, and so retained Respondent to challenge the documents in or about fall of 2009.

9. At all times relevant, Dr. Robert Luberto (Dr. Luberto) was Mr. LaLonde's primary care physician.

10. Sometime before December 29, 2009, Respondent called the office of Dr. Luberto and scheduled an appointment for an ankle exam.

11. Dr. Luberto's office is located in Peoria, Arizona.

12. Respondent scheduled the appointment by speaking to one of Dr. Luberto's assistants.

13. Respondent told Dr. Luberto's assistant that Respondent was in Phoenix for a conference, that he suffered from ankle pain in his right foot, that his ankle felt weak, and that his ankle was originally injured in 2007. These statements were false and known by Respondent to be false at the time he made them.

14. On or about December 29, 2009, Respondent appeared for his appointment with Dr. Luberto at Dr. Luberto's office.

15. Upon Dr. Luberto entering the examination room, Respondent identified himself as Ms. Yoger's lawyer, told Dr. Luberto that he was there under false pretenses and that he, in fact, wanted to talk to Dr. Luberto about Mr. LaLonde.

16. Respondent explained to Dr. Luberto that he believed the deception was necessary because he believed Dr. Luberto's staff knew the Alcalas.

17. Dr. Luberto explained that, to the best of his knowledge, none of his staff knew the Alcalas.

18. During the appointment, Respondent asked Dr. Luberto about Mr. LaLonde's mental capacity and wellbeing.

19. Dr. Luberto told Respondent that he was not qualified to render an opinion about Mr. LaLonde's mental capacity and that Mr. LaLonde would have to see a neurologist for a proper diagnosis.

20. Dr. Luberto also told Respondent he believed the Alcala family provided appropriate care for Mr. LaLonde.

21. Dr. Luberto billed Respondent's office directly for the appointment.

22. On or about March 19, 2010, Respondent filed a "Petition for Emergency and Permanent Appointment of Conservator and Guardian of an Adult and Petition for Appointment as Trustee," (Emergency Petition) and also filed for *pro hac vice* admission in Maricopa County Superior Court Case No. PB2010-070222.

23. The Emergency Petition was filed on behalf of Ms. Yoger who signed and verified the Emergency Petition on or about January 28, 2010.

24. Respondent signed, but did not date, the Emergency Petition.

25. The Emergency Petition stated in part that the appointment of a conservator was necessary because Mr. LaLonde "cannot manage [his assets] due to mental illness, mental deficiency or mental disorder and physical illness or disability and [the Alcalas] cannot be trusted because of their interest in taking over [Mr. LaLonde's] assets for themselves."

26. The Emergency Petition also stated in part:

[Mr. LaLonde] has been seen over the last few years by a Dr. Robert Luberto who has treated [Mr. LaLonde] for various ailments. Dr. Luberto, upon [Mr. LaLonde's] arrival in Arizona became [Mr. LaLonde's] treating physician.... *Dr. Luberto is the one who notified [Ms. Yoger] that he suspected that [the Alcalas] were manipulating [Mr. LaLonde's] assets and indicates that [Mr. LaLonde] has suffered*

from dementia for a substantial period of time and is incapable of understanding documents such as those that transferred authority to the Alcala family. [emphasis added]

27. The statements in the Emergency Petition about Dr. Luberto's purported statements were based on information provided to Respondent by Ms. Yoger.

28. Ms. Yoger read, verified, and signed the Emergency Petition prior to its filing.

29. The State Bar conditionally agrees that there was no information provided to Respondent by Dr. Luberto during their meeting that directly refuted Ms. Yoger's claims as stated in the Emergency Petition.

30. On or about March 24, 2010, Dr. Luberto spoke to court staff about his concerns regarding statements within the Emergency Petition and faxed a statement of his concerns to the Court.

31. On or about March 25, 2010, an Emergency Hearing was held in PB2010-070222.

32. The Court denied Respondent's *pro hac vice* motion on the grounds that Respondent might have to testify in the matter during the Emergency Hearing.

33. Ms. Yoger testified and verified the information provided in the Emergency Petition during her testimony.

34. Respondent's opposing counsel called Dr. Luberto as a witness who testified about Respondent's fake ankle exam.

35. Respondent did not testify during the Emergency Hearing.

36. The Court did not find Ms. Yoger credible, dismissed part of the Emergency Petition, and sanctioned Ms. Yoger based on her testimony.

37. Ms. Yoger's sanction was not joint and several with Respondent.

38. During the Emergency Hearing, Respondent did not notify or otherwise discuss with the Court the context of his meeting with Dr. Luberto.

39. If this matter were to go to a Hearing on the Merits, Respondent would testify that he was not afforded the opportunity to discuss the meeting with Dr. Luberto because his *pro hac vice* motion was denied and he could not therefore speak on behalf of his client during the proceedings.

### **CONDITIONAL ADMISSIONS**

Respondent's admissions are being tendered in exchange for the form of discipline stated below and is submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that his conduct as referenced in paragraphs 1 through 39, above, violated Rule 42, ER 4.1(a), Ariz. R. Sup. Ct.

### **CONDITIONAL DISMISSALS**

The State Bar has conditionally agreed to dismiss Rule 42, ERs 3.3(a)(1), 8.4(c), and 8.4(d), Ariz. R. Sup. Ct. The State Bar conditionally agrees that the evidence supports Respondent relied on information provided to him by his client in submitting the Emergency Petition to the Maricopa County Superior Court. The State Bar conditionally agrees that Respondent's conversation with Dr. Luberto did not reveal any information that directly contradicted Ms. Yoger's verified statements as reflected in the Emergency Petition.

### **RESTITUTION**

Because Respondent was not held jointly and severally liable for the sanctions ordered against Ms. Yoger, there is no restitution at issue in this matter. Further, Respondent has paid Dr. Luberto for the false ankle exam.

## **SANCTION**

Respondent and the State Bar agree that based on the facts and circumstances of this matter, as set forth above, the following sanction is appropriate: admonition.

### **LEGAL GROUNDS IN SUPPORT OF SANCTION**

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction 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. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The parties agree that *Standard* 6.14 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 6.14 provides that "admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements...are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or

potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.”

While Respondent misled Dr. Luberto’s staff in scheduling an ankle exam to meet with Dr. Luberto about Mr. LaLonde, Respondent did so because he relied on information provided to him by his client that individuals on Dr. Luberto’s staff knew the Alcalas. Respondent’s client was concerned that should the Alcalas become aware of Ms. Yoger’s intentions, Mr. LaLonde would be in danger. The parties agree that Respondent’s decision making in this regard was an isolated instance of negligence which could have been handled in a more appropriate manner. Respondent made his true intentions clear to Dr. LaLonde immediately upon meeting him. Additionally, Ms. Yoger was sanctioned during the Emergency Hearing based on her own testimony and not on Respondent’s conduct. Thus, no party to the matter suffered actual injury as a result of Respondent’s conduct, though the parties agree that Respondent should have discussed the matter with the underlying court. The parties further agree that there was only little injury caused to the legal proceedings as some, but only a small portion, of the proceedings addressed Respondent’s meeting with Dr. LaLonde. The majority of the proceedings were spent addressing Ms. Yoger, her testimony, and her claims as stated in the Emergency Petition.

### **The duty violated**

As described above, Respondent’s conduct violated his duties to the legal system and the public.

### **The lawyer's mental state**

For purposes of this agreement the parties agree that Respondent acted negligently and that his conduct was in violation of the Rules of Professional Conduct.

### **The extent of the actual or potential injury**

For purposes of this agreement, the parties agree that there was no actual harm to Respondent's client or any other party to the proceedings, and little actual harm was caused to the underlying legal proceedings.

### **Aggravating and mitigating circumstances**

The presumptive sanction in this matter is admonition. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

#### **In aggravation:**

*Standard 9.22(i)* – Substantial Experience in the Practice of Law – Respondent has practiced law in Ohio since 1982.

#### **In mitigation:**

*Standard 9.23(a)* – Absence of a Prior Disciplinary Record – Respondent has no prior disciplinary history in Arizona or Ohio.

*Standard 9.23(e)* – Cooperative Attitude Toward Proceedings – Respondent has been fully cooperative with the State Bar's investigation and with the formal disciplinary proceedings.

*Standard 9.23(l)* – Remorse – Respondent fully regrets his decision making in scheduling the appointment with Dr. LaLonde and does not appear likely to repeat this conduct.

## **Discussion**

The parties have conditionally agreed that a greater or lesser sanction than admonition would not be appropriate under the facts and circumstances of this matter.

Respondent agrees that it was inappropriate for him to mislead Dr. Luberto's staff regarding the true purposes of the meeting between Dr. Luberto and Respondent, and agrees that it was not appropriate to take time designated for doctor/patient appointments to discuss legal issues with Dr. Luberto. The State Bar agrees that Respondent came to his conclusion erroneously based on information relayed to him by his client and in an effort to protect his client's brother from potential harm. The State Bar further conditionally agrees that the evidence does not support other additional violations, such as providing misinformation to a tribunal, which would justify a higher sanction as originally alleged in the Complaint. The parties further agree that the aggravating and mitigating factors appropriately balance each other to support the presumptive sanction of admonition.

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

## **CONCLUSION**

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at 64, 90

P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of an admonition and the imposition of costs and expenses.

DATED this 4<sup>th</sup> day of March, 2011.

**STATE BAR OF ARIZONA**

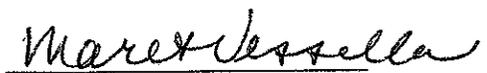
  
\_\_\_\_\_  
Russell J. Anderson  
Staff Bar Counsel

**This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation. I acknowledge my duty under the Rules of the Supreme Court of Arizona with respect to discipline and reinstatement. I understand these duties may include notification of clients, return of property and other rules pertaining to suspension.**

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
David M. Lynch  
Respondent

Approved as to form and content

  
\_\_\_\_\_  
Maret Vessella  
Chief Bar Counsel

Original filed with the Disciplinary Clerk  
of the Office of the Presiding Disciplinary Judge  
this 9<sup>th</sup> day of March, 2011.

Copies of the foregoing mailed/emailed  
this 9<sup>th</sup> day of March, 2011, to:

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Copy of the foregoing emailed this  
9<sup>th</sup> day of March, 2011, to:

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By: [Signature]  
BJA/glc

**ATTACHMENT NOT SCANNED**