

SUPREME COURT OF ARIZONA

In the Matter of Thomas J. Zawada

208 Ariz. 232, 92 P.3d 862 (2004) · No. SB-02-0103-D · Decided July 1, 2004

SUMMARY

The Supreme Court of Arizona reviewed sua sponte the discipline imposed on prosecutor Thomas J. Zawada for intentional and egregious misconduct during a criminal trial involving an insanity defense. The court found violations involving unsupported attacks on mental-health experts, improper jury argument, and knowing disobedience of tribunal obligations. It increased the sanction to a six-month-and-one-day suspension, followed by probation, continuing education, participation in a Member Assistance Program, and payment of disciplinary costs.

CASE DETAILS

COURT	Supreme Court of Arizona
WRITING FOR THE COURT	Chief Justice Jones; Vice-Chief Justice Ruth V. McGregor; Justice Rebecca White Berch; Justice Michael D. Ryan; Justice Andrew D. Hurwitz
JURISDICTION	Arizona
DECIDED	July 1, 2004
DOCKET	SB-02-0103-D
DISPOSITION	other
PROCEDURAL POSTURE	Sua sponte review of a lawyer-disciplinary matter to determine whether the Disciplinary Commission's recommended sanctions for prosecutorial misconduct were adequate.
STANDARD OF REVIEW	The Arizona Supreme Court is the ultimate trier of fact and law in disciplinary proceedings and requires clear and convincing evidence of all facts. Hearing-officer factual findings and Commission recommendations receive great weight but are not ultimately determinative.
PRECEDENTIAL VALUE	Published, en banc Arizona Supreme Court opinion; precedential authority on the court's sua sponte disciplinary-review authority and appropriate sanctions for intentional prosecutorial misconduct.
PARTIES	Thomas J. Zawada v. State Bar of Arizona

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court had authority to conduct sua sponte review of the appropriate disciplinary sanction even though the Disciplinary Commission had not recommended suspension or disbarment and a petition for review had been filed.
2. Whether clear and convincing evidence established that Zawada knowingly violated Ethical Rule 3.4(c) by attacking a mental-health expert and the insanity defense with unsupported accusations and argument.
3. What sanction was appropriate in light of the purposes of lawyer discipline, the intentional and egregious nature of the misconduct, the serious injury caused, aggravating and mitigating factors, and sanctions imposed in analogous cases.

HOLDINGS

1. The Arizona Supreme Court has authority to review sua sponte the appropriate sanction in a disciplinary matter; Rule 59(i) governs the procedure when no timely petition for review of a recommended suspension or disbarment is filed but does not strip the court of its inherent and exclusive disciplinary authority when a petition has been filed or when the Commission recommends a lesser sanction.
2. Zawada knowingly violated Ethical Rule 3.4(c) by disobeying the obligation not to imply unethical conduct by an expert witness without evidentiary support.
3. A six-month-and-one-day suspension, followed by one year of probation, a Member Assistance Program referral, continuing education, a restriction on participating in cases involving a mental-health component until completion of the education, and payment of disciplinary costs was warranted.

KEY QUOTATIONS

“In disciplinary proceedings, this court is the ultimate trier of fact and law, requiring clear and convincing evidence of all facts.” (208 Ariz. 232, 235)

“But a prosecutor cannot attack the expert with non-evidence, using irrelevant, insulting cross-examination and baseless argument designed to mislead the jury and undermine the very purpose of the rule.” (208 Ariz. 232, 237)

“A mere censure of Zawada or even the imposition of probation without suspension, in our judgment, would undermine the disciplinary process applicable to all lawyers, would contravene the presumptive discipline suggested by the ABA Standards, and would be grossly disproportionate to discipline imposed in other cases in which serious misconduct was found.” (208 Ariz. 232, 243)

FACTUAL BACKGROUND

Zawada, a Pima County prosecutor, prosecuted Alex Hughes for serious violent crimes, including first-degree murder, while knowing that six mental-health experts found Hughes mentally ill and that Hughes relied on insanity and self-defense. During trial, Zawada attacked defense mental-health experts through unsupported insinuations that they fabricated diagnoses, insulting cross-examination, and improper arguments appealing to fear and prejudice. The resulting convictions were reversed for cumulative prosecutorial misconduct, retrial was barred by double jeopardy, and the disciplinary proceedings found that Zawada had engaged in intentional and egregious misconduct.

PROCEDURAL HISTORY

Zawada was prosecuted through attorney-discipline proceedings after the State Bar alleged misconduct in his prosecution of Alex Hughes. A hearing officer found multiple ethical violations and recommended censure, probation, continuing education, restrictions on handling mental-health cases, and costs. The Disciplinary Commission modified the recommendation by removing probation and continuing education and adding a Member Assistance Program referral. Although Zawada sought review and the court denied his petition, the Arizona Supreme Court exercised sua sponte review under its disciplinary authority and increased the sanction.

DISPOSITION

other

CASES CITED

- State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998)
- State v. Jorgenson, 198 Ariz. 390, 10 P.3d 1177 (2000)
- Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984)
- In re Riley, 142 Ariz. 604, 691 P.2d 695 (1984)
- In re Brady, 186 Ariz. 370, 923 P.2d 836 (1996)
- In re Kleindienst, 132 Ariz. 95, 644 P.2d 249 (1982)
- In re Stout, 122 Ariz. 503, 596 P.2d 29 (1979)
- In re Horwitz, 180 Ariz. 20, 881 P.2d 352 (1994)
- In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993)
- In re Bowen, 178 Ariz. 283, 872 P.2d 1235 (1994)
- In re Cardenas, 164 Ariz. 149, 791 P.2d 1032 (1990)
- In re Peasley, 208 Ariz. 27, 90 P.3d 764 (2004)
- Maretick v. Jarrett, 204 Ariz. 194, 62 P.3d 120 (2003)
- New Jersey v. Torres, 328 N.J. Super. 77, 744 A.2d 699 (N.J. Super. Ct. App. Div. 2000)
- Florida Bar v. Schaub, 618 So. 2d 202 (Fla. 1993)
- In re Alcorn, 202 Ariz. 62, 41 P.3d 600 (2002)
- In re Moak, 205 Ariz. 351, 71 P.3d 343 (2003)

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