VIRGINIA:

BEFORE THE FOURTH DISTRICT COMMITTEE SECTION II
OF THE VIRGINIA STATE BAR

IN THE MATTER OF HELENA DAPHNE MIZRAHI, ESQUIRE
VSB DOCKET NO. 05-042-3903

DISTRICT COMMITTEE DETERMINATION
(PUBLIC REPRIMAND WITH TERMS)

On April 3, 2008, a hearing in this matter was held before a duly convened Fourth District Committee, Section II, consisting of Robert K. Coulter, Esquire, Cary S. Greenberg, Esquire, Dennis C. Barghaan, Jr., Esquire, Drewry B. Hutchinson, Jr., Esquire, Andrea L. Moseley, Esquire, Roger L. Amole, Esquire, Mary Lee Anderson, Lay Member, and David T. Williams, Esquire, presiding.

The Virginia State Bar was represented by Kathleen M. Uston, Assistant Bar Counsel. Respondent, who filed an Answer to the Charges of Misconduct served upon her and was duly noticed of the date, time and location of the hearing, waived her right to appear at the hearing in a pleading transmitted to the chair and to the Virginia State Bar the evening prior to the hearing and was not present. Despite the Respondent's absence, the District Committee received into evidence those exhibits identified by Respondent that were relevant to the issues under consideration.

Pursuant to Part 6, §IV, ¶13.H.2.l.(2)(d) of the Rules of the Supreme Court of Virginia, the Fourth District Committee Section II of the Virginia State Bar hereby serves upon the Respondent the following Public Reprimand with Terms.

I. FINDINGS OF FACT

1. At all times relevant hereto, Helena Daphne Mizrahi ("Respondent") has been an attorney licensed to practice in the Commonwealth of Virginia.

2. The Charges of Misconduct served upon the Respondent arise out of the Respondent's representation of a plaintiff ("Brown") in a civil action brought in the Superior Court of the District of Columbia styled *Brown v. National Academy of Sciences*, No. 95-CA-5111. For the vast majority of the time period relevant to the instant matter, the Honorable Judith E. Retchin presided over the *Brown* trial, which commenced on April 14, 1996 and was in session on April 14-17, and 21-23, 1996.

3. Brown was a former employee of the National Academy of Sciences and alleged generally that she had been the victim of employment discrimination, specifically improper termination and subsequent failure to re-hire her.

4. During the course of the *Brown* trial, the Respondent persistently engaged in conduct that: was intended to be and was disruptive to the Tribunal; violated established rules of procedure; and, was prejudicial and damaging to her client and to the administration of justice in the case. The Respondent accused the Court of bias in favor of the defendant and, despite the Court's order that she refrain from doing so, persisted in making the accusation, throughout the trial and in her closing argument to the jury.

5. The parties filed their joint pretrial statement in *Brown* on October 31, 1996. Local rules and Judge Retchin's standing order required the statement to include a section delineating those issues on which the parties could agree, and a section explaining the parties' contentions concerning disputed issues and facts, including a list of the facts to which Brown would not stipulate. The statement also provided a list of jury instructions that the parties agreed should be given by the Court and a list of instructions requested by the Academy to which Brown would not agree.[1] Respondent signed the

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[1] The statement explained that there were *no* jury instructions that Brown sought to have the Court deliver to which defendant would not agree.

joint statement on behalf of Brown. Notwithstanding the fact that local rules and Judge Retchin's standing order provided that the statement be filed jointly, and that the Court provided ample opportunity for the parties to explain their disagreement with their opponent's position, Respondent asked the Court to "see objections filed on October 31, 1996" in the signature line.[2]

6. During a colloquy directly preceding *voir dire* and jury selection, Judge Retchin held, over the Respondent's objection, that the Respondent could not introduce certain evidence during Brown's case-in-chief dealing with specific employment issues raised by the Respondent's client.[3]

7. Notwithstanding the Court's ruling, the Respondent made reference to the evidence excluded by the Court during her opening statement and attempted to elicit testimony concerning the excluded evidence during direct examination both of her client and other witnesses presented during Brown's case-in-chief.

8. The Court also made very specific rulings concerning the type of evidence that the Respondent was permitted to adduce during her rebuttal case. Again, despite the clarity of those rulings, the Respondent disregarded those orders and attempted nevertheless to adduce such barred evidence.

9. Further, during the Respondent's presentation of Brown's case-in-chief, Judge Retchin was required to admonish the Respondent on several occasions that she

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[2] Respondent did not present these "objections" to the Fourth District Committee Section II panel for consideration.

[3] Initially, the Respondent claimed not to understand the Court's evidentiary ruling and required Judge Retchin to explain her decision repeatedly. Eventually, Judge Retchin exclaimed that she had provided as much "guidance" to the Respondent on the meaning and application of her evidentiary conclusion as was possible. The Respondent then refused to proceed to trial without a written order detailing the Court's ruling.

was wasting the time of the Court and the jury with repetitive, unproductive, irrelevant and meandering questioning.

10. Finally, Judge Retchin required Brown, through the Respondent, to proffer the expected testimony of each witness she sought to call before they testified. The Court determined that many of the witnesses that Brown sought to have testify would provide testimony on the very subjects ruled inadmissible by the Court prior to the commencement of trial, and therefore limited or prevented these witnesses from testifying.

11. Due to the Respondent's inability to conduct competent direct and cross-examinations of witnesses, the Court placed time limits on the amount of time that the Respondent would have to examine witnesses.

12. The Court noted the Respondent's failure to elicit testimony from her witnesses that was necessary to sustain her client's claims against dispositive motions. As a result, the Court was forced to instruct the Respondent directly that she had failed to elicit this crucial testimony and therefore this testimony was not in the record. Although the Respondent challenged the Court's assessment of the record to date on that score, she very quickly heeded the Court's advice and adduced this testimony.[4]

13. Throughout the course of the *Brown* trial, the Respondent persisted, *inter alia*, in pursuing irrelevant lines of questioning, was combative, argumentative with, and disrespectful to Judge Retchin, and made sarcastic and unprofessional comments about

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[4] This fact notwithstanding, the Respondent's conduct of her client's case resulted in a directed verdict being entered against the plaintiff on several counts. In rendering her ruling, the Court noted that the Respondent, "did not put on evidence of who made the decision to hire, what it was based on, and whether it was for an impermissible purpose, and that there is no evidence that whoever made the decision had knowledge of the EEO complaint." Indeed, the Respondent herself admitted that she had failed to place into the record any evidence concerning her client's compensatory damages.

the Court's rulings and procedures, frequently in the presence of the jury. As noted above, the Respondent repeatedly disregarded the Court's orders and directives, ignored the Court's admonishments, and made inappropriate statements to the jury in her opening statement and closing argument by referring to facts not in evidence and counts dismissed from the case, despite being admonished by the Court to refrain from doing so.

14. By way of example, during the Respondent's closing argument the following exchange ensued:

> "Respondent: However, I would like to submit that I have gone further than that and I hope you will agree that in the evidence that was presented before the court and *the evidence that wasn't presented before the court* that I have gone beyond that to prove –
>
> Court: Excuse me. You may not refer to evidence not presented to the court.
>
> Respondent: *With regard to the evidence that was attempted to be presented to the jurors and* –
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> Court: Ladies and gentlemen, you may only consider evidence properly admitted. And, Ms. Mizrahi, confine yourself to the evidence properly admitted.

The Respondent, thereafter, specifically referred to counts upon which the Court had directed a verdict for the defense and referred to monetary damages she was not entitled to recover:

> Respondent: [Y]ou heard the evidence that she had – about the jobs, about the number of jobs and the court, that she applied for. And the court a couple of, last week told you when you came back from lunch one day that you were not going to get to rule on those claims about the jobs she applied for and the jobs she didn't get, even though we spent a whole afternoon showing what her skills were and that she qualified and what the job required and how she didn't get them.

Court: I'm interrupting to explain to the jury that I took those issues away from the plaintiff because there is a case line of proof that plaintiff must be required to even be allowed to present those claims to the jury and as a matter of law there was a failure of proof.

Ms. Mizrahi, I instructed you not to review that with the jury.

* * *

Court: Counsel, I think you had a failure of proof on that also and the only thing that you were allowed to pursue was a claim for what her salary was and the retirement benefits.

Respondent: *I think the jury's verdict, the jury's recollection will decide.*

Court: Ladies and gentlemen, you are instructed as a matter of law that there was a failure of proof on a claim for medical damages. The only economic damages, so to speak, that remain here are plaintiff's claim for lost wages and retirement.

15. By way of further example, the Respondent's witness examinations drew repeated objections from defense counsel and the Court *sua sponte*. During bench conferences, Judge Retchin was repeatedly required to ask the Respondent to keep her voice down lest the jury hear what was being discussed. The Respondent failed to comply with the court's requests.

16. The following colloquies are emblematic of the Respondent's disregard for the authority of the court, her disruption of the decorum of the proceeding, her disregard for standing rulings of the court, and her disruption of the tribunal.

Court: [Respondent], I think I am partial to reason.

Respondent: That's a matter of opinion, Your Honor."

* * *

Court: If you have a proper question, you can put it to your

witness, otherwise the witness is going to be excused. You are given the opportunity to do cross-examination here.

Respondent: That's debatable.

On yet another occasion, the Court issued an evidentiary ruling, to which the Respondent replied in open court:

Respondent: Now what is that supposed to mean, Your Honor, if I can get her to say she didn't mean her last answer? What exactly does that mean in English?"

17. Finally, after repeated instances of the behavior sampled above, the Court informed the Respondent that she would defer the filing of a bar complaint against her, but even then the Respondent replied with a lack of regard for courtroom decorum or respect for the Court:

Court: And the other thing I wanted to bring up was, [the Respondent], based on the entirety of the record . . . I have considered reporting you to bar counsel. And I think to remove or to inject yet another appellate issue I'm not going to do that, so I'm giving you, so to speak, a free bite of the apple, but if we ever have another matter together, I am not going to be as forbearing . . ..

Respondent: I don't eat apples, Your Honor.

18. At the close of the evidence, the Court entertained argument regarding jury instructions. Consistent with her approach to objections throughout the trial (*i.e.*, respondent would object to virtually each and every ruling that went against her position without any rhyme or reason,) the Respondent informed the Court that she objected to "all" of the instructions sought by the Academy, including generic instructions given in every civil proceeding. In addition, the Respondent proposed all new jury instructions at the instructions conference, despite having previously submitted instructions as part of the pretrial process (*see, supra*).

19. The Respondent's conduct resulted directly in harm to her client. During discussions regarding jury instructions, the Respondent abruptly left the courtroom without leave of court, informing the Court that she waived her client's right to participate further in the discussion. Upon her return to the courtroom, when the Court inquired about the Respondent's position regarding certain instructions, the Respondent demanded that the court "let her be" advising that she was present , "in physical body only." Despite this waiver, the Respondent thereafter objected to all of the jury instructions given.

20. As further evidence of the harm done to the Respondent's client, the one count upon which the jury found in Brown's favor was set aside by the Court in its June 9, 1997 Order granting the defendant's Motion for Judgment as a Matter of Law. The Court stated that it "could not say that the jury was not influenced by the dismissed claims or by sympathy for plaintiff based on conduct of her counsel, especially in light of the weakness of plaintiff's evidence." At the retrial a different Superior Court judge presided, and directed a verdict in favor of the defendant prior to jury deliberations, citing the weakness of Brown's evidence.

21. The Respondent appealed to the District of Columbia Court of Appeals. On March 11, 2004, that Court of Appeals affirmed, stating, *inter alia*, that, "The evidence in support of the claim for retaliatory termination was weak. On the other hand, the scope and degree of counsel's flagrant disregard of numerous orders from the trial judge was exceptional."

22. The District Committee determined that the Bar failed to present facts sufficient to support a finding of a violation of either Rule 1.3(a) or Rule 1.3(c).

II. NATURE OF MISCONDUCT

The District Committee finds that the behavior giving rise to the foregoing Findings of Fact supports the conclusion that the Respondent violated the following Rules of Professional conduct:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not engage in conduct intended to disrupt a tribunal.

III. DISTRICT COMMITTEE DETERMINATION

Accordingly, it is the decision of the District Committee that the Respondent shall receive a Public Reprimand with Terms. The terms and conditions which shall be met are as follows:

1. Within twelve (12) months following the date of entry of this Determination, the Respondent shall complete six (6) hours of Continuing Legal Education in the subject areas of either civil procedure or ethics, which hours shall be in addition to the twelve (12) hours that the Respondent must annually complete. The Respondent may not fulfill this obligation with attendance at an on-line or telephonically broadcast C.L.E. class.

Upon satisfactory proof that the above noted terms and conditions have been met, a Public Reprimand with Terms shall then be imposed. If, however, the terms and conditions have not been met within twelve (12) months of the date of entry of this Determination, then this matter shall be certified to the Disciplinary Board for sanction determination in accordance with Part Six, § IV, ¶ 13(H)(2)(p) of the Rules of the Supreme Court

Pursuant to Part Six, § IV, ¶ 13(B)(8)(c)(1) of the Rules of the Supreme Court, the Clerk of the Disciplinary System shall assess costs.

FOURTH DISTRICT COMMITTEE SECTION II
OF THE VIRGINIA STATE BAR

By: David T. Williams, Esquire
Chair

CERTIFICATE OF SERVICE

I certify that I have this 15th day of July, 2008, mailed a true and correct copy of the District Determination (Public Reprimand with Terms) by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Respondent, Helena Daphne Mizrahi, at P.O. Box 7033, Alexandria, VA 22307, her last address of record with the Virginia State Bar.

Kathleen M. Uston
Assistant Bar Counsel