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Hearing Officer 7M

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **WILLIAM M. SPENCE,** **Bar No. 002728** RESPONDENT.	Nos. 03-1172, 03-1378, 03-1665 **AMENDED** **HEARING OFFICER'S REPORT** **AND RECOMMENDATIONS**

Having considered Respondent's Motion to Reconsider Terms of Probation and the State Bar having no objection and good cause appearing,

IT IS HEREBY ORDERED granting the Motion and incorporating the proposed amended terms of probation.

I. INTRODUCTION

The Amended Complaint filed in this matter against Respondent William M. Spence ("Respondent" or "Spence") included three counts. The first two counts involve allegations that Respondent engaged in inappropriate personal and/or sexually suggestive conduct towards two of his domestic relations clients in violation of ER 1.7, ER 8.4, and Rule 41(g). The names of these two clients were Jami Borba-Stout ("Borba-Stout"), and Holly DeLuca ("DeLuca"). Count three alleges that Respondent improperly represented a client at an Expedited Services Conference, after an order had been issued disqualifying him from future representation of that client. Respondent has admitted that his actions at the Expedited Services Conference amounted to representation of his former client, and that he knowingly disobeyed an obligation under

the rules of a tribunal, and willfully violated a Court order in violating of E.R. 3.4(c), and Rule 51(e).

Like previous disciplinary cases considering allegations of inappropriate suggestions of sexual relationships between attorneys and their clients, this is a very close case, the disposition of which turns largely on issues of credibility and the burden of proof. *See, e.g., In re Walker*, 200 Ariz. 155, 160, 24 P.3d 602, 607 (2001).

II. PROCEDURAL HISTORY

1. The Probable Cause Orders on the Borba-Stout matter (03-1172) and the DeLuca matter (03-1378) were both issued on March 1, 2004. The Probable Cause Order on the admitted allegations of Count Three (03-1665) was issued on April 30, 2004.

2. The State Bar filed its initial Complaint on April 30, 2004, and filed its First Amended Complaint on May 6, 2004, adding the admitted Count Three.

3. Respondent, through his counsel, Nancy A. Greenlee, accepted service of process on May 10, 2004. Respondent filed his Answer on June 7, 2004.

4. Hearing Officer 7M conducted a telephonic Initial Case Management Conference on June 7, 2004, and issued a Case Management Order that same day.

5. On June 24, 2004, the State Bar filed its Notice of Intent to Use Prior Discipline, disclosing its intent to rely upon Respondent's resignation in lieu of discipline in 1976 as a potentially aggravating factor.

6. The parties participated in a Settlement Conference before Settlement Officer 7R on August 26, 2004, but were unable to reach a settlement at that time.

7. On September 15, 2004, the parties filed a Joint Pre-Hearing Statement. In the Joint Pre-Hearing Statement, the parties stipulated regarding Count Three (03-1665). As part of the Stipulation, Respondent admitted that he knowingly disobeyed an obligation under the rules of a tribunal and willfully violated a Court order in violation

of E.R. 3.4(c) and Rule 51(e), but did not stipulate to any particular sanction for these violations.

8. On September 22 and 23, 2004, Hearing Officer 7M conducted an evidentiary hearing in this matter. The State Bar was represented by Robert L. Tepper and Angela M.B. Napper. Respondent was represented by Nancy A. Greenlee.

9. Hearing Officer 7M received the transcripts of this hearing on October 15, 2004.

III. GENERAL FACTUAL FINDINGS AND BACKGROUND

10. At all relevant times, Respondent was an attorney licensed to practice in Arizona.[1]

11. Respondent was first admitted to practice in Arizona on April 3, 1971.[2]

12. In 1976, Respondent resigned from the State Bar of Arizona in lieu of disbarment based on certain psychological difficulties he was suffering at that time.[3]

13. Respondent was subsequently readmitted to the Bar in approximately November, 1981.[4]

A. Respondent's Dealings With Borba-Stout

14. In approximately November, 2002, Respondent was hired by Borba-Stout to represent her in a domestic relations matter.[5]

15. Respondent admits that during most of his meetings with Borba-Stout, he told her she was looking nice that day.[6]

16. During the representation, Respondent learned that Borba-Stout had undergone breast augmentation surgery.[7]

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1 Joint pre-hearing statement at 1:22 – 1:25.
2 Joint pre-hearing statement at 1:22 – 1:25.
3 Exhibit 8 at 000217, 000218, 000227-000230.
4 Spence, 9/22/04 at 143:5 – 143:6.
5 Joint pre-hearing statement at 2:2 – 2:5.
6 Spence 9/22/04 at 232:13 – 232:23.
7 Joint pre-hearing statement at 2:9 – 2:10.

17. When Respondent learned of Borba-Stout's breast augmentation surgery, he replied, "Oh, and I thought they were real."[8]

18. During a subsequent office conference with Borba-Stout, Respondent commented on Borba-Stout's augmented breasts, stating "Wow, I can see plastic showing through that shirt."[9]

19. During a later meeting, Spence said something along the lines of ""Oh, it's so hot in here you could be wearing a thong."[10]

20. On at least one occasion, Spence called Borba-Stout after hours while she was at her daughter's dance class between 6:30 and 8:00 p.m., simply to see how she was doing.[11]

21. In discussing Borba-Stout's earning potential, Respondent suggested that she could earn a lot of money in Las Vegas,[12] which Borba-Stout reasonably interpreted as suggesting employment involving sex and/or nudity.

22. On a number of occasions, Respondent suggested that Borba-Stout should invite him to her house for a dinner of spaghetti.[13]

23. In discussing Borba-Stout's concerns regarding seeing her the car owned by her husband's new girlfriend parked at her husband's home overnight, Respondent asked Borba-Stout how her husband was going to feel when he saw Respondent's car outside her house.[14] Respondent had never been to Borba-Stout's home, and there was no reason for him to go there.[15] As such, Borba-Stout reasonably interpreted Respondent's comments as suggesting the possibility of a romantic involvement between Respondent and herself.

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[8] Borba-Stout, 9/22/04 at 20:13 – 21:3. This testimony was confirmed by Borba-Stout's mother, who was present when Spence made these comments. Dianna Velarde, 9/22/04 at 58:6 – 58:18.

[9] Borba-Stout, 9/22/04 at 26:8 – 26:18.

[10] Borba-Stout, 9/22/04 at 26:19 – 26:22.

[11] Borba-Stout, 9/22/04 at 23:20 – 24:18.

[12] Borba-Stout, 9/22/04 at 28:1 – 28:17.

[13] Borba-Stout 9/22/04 at 31:23 – 32:11.

[14] Borba-Stout 9/22/04 at 29:10 – 30:5.

[15] Borba-Stout 9/22/04 at 30:3 – 30:21.

24. In discussing Borba-Stout's concerns of possible violence by her husband, Respondent asked if she had seen the movie "The Bodyguard," and suggested that he would be her bodyguard.[16] This movie involved a romance between a music star and her bodyguard.[17] Borba-Stout reasonably interpreted Respondent's comments as suggesting that he would like to become romantically involved with her.

25. Respondent never directly said that he wanted to sleep with Borba-Stout.[18]

26. The Hearing Officer believes that taken as a whole, Respondent's comments to Borba-Stout were intended by Respondent, and reasonably interpreted by Borba-Stout, to suggest that Respondent was interested in having some sort of romantic or sexual relationship with Borba-Stout.

27. As a result of Respondent's comments detailed above, Borba-Stout was uncomfortable dealing with Respondent, and started having other people accompany or drive her to her meetings with Respondent.[19]

28. Borba-Stout never informed either Respondent or Respondent's office staff that she felt that Respondent had said anything inappropriate to her.[20] Although the parties stipulated to this fact, the Hearing Officer believes he is constrained to find that it is for the most part irrelevant based on the Disciplinary Commission's Report in *Matter of Moore* (SB-02-0043-D; 00-1461), in which the Commission held that the lack of such protest is irrelevant, because "a client is not under any burden to protest misconduct such as occurred here, the burden is on the attorney." The Hearing Officer has considered Borba-Stout's lack of protest solely for purposes of assessing her credibility. The Hearing Officer accepts Borba-Stout's explanation that she failed to protest because she was emotionally weak and under stress, resulting from her abusive

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[16] Borba-Stout 9/22/04 at 30:22 – 31:22. Respondent admits to making reference to this movie. Spence, 9/22/04 at 150:16 – 150:19.

[17] Spence, 9/22/04 at 226:13 – 227:12.

[18] Borba-Stout 9/22/04 at 37:15 – 37:17.

[19] Borba-Stout 9/22/04 at 33:6 – 33:22.

[20] Joint pre-hearing statement at 2:11 – 2:13; Borba-Stout, 9/22/04 at 37:6 – 37:14.

marital relationship, stressful divorce proceedings, and having been locked out of her home with her children.[21]

B. Respondent's Dealings With DeLuca

29. In approximately January, 2003, Respondent undertook the representation of DeLuca in a domestic relations matter on a pro bono basis through the Volunteer Lawyer's Program.[22]

30. During their first meeting, Respondent told DeLuca that he had hand-picked her case.[23]

31. Respondent made off-colored and suggestive comments to DeLuca during this first meeting.[24]

32. During the course of Respondent's representation of DeLuca, Respondent made a number of references to DeLuca's breasts, including asking her if she had ever had a "boob job."[25]

33. Respondent repeatedly informed DeLuca that she could make a really good living and support her children if she were to work as a topless dancer, including suggestions that she do such work in Las Vegas.[26] DeLuca typically tried to redirect the conversation whenever Respondent brought up this subject.[27]

34. At one point during the representation, DeLuca mentioned to Respondent that she did not think she could ever repay him for what he was doing, and Respondent replied that they could make a statute of her body so that he could put in his office and stare at it all day.[28]

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21 Borba-Stout 9/22/04 at 44:10 – 44:20.
22 Joint pre-hearing statement at 2:16 – 2:18.
23 DeLuca 9/22/04 at 73:7 – 73:14.
24 DeLuca 9/22/04 at 71:12 – 71:17.
25 DeLuca 9/22/04 at 76:1 – 76:6.
26 DeLuca 9/22/04 at 77:5 – 79:4.
27 DeLuca 9/22/04 at 77:5 – 79:4.
28 DeLuca 9/22/04 at 76:9 – 77:4.

35. At some point, Respondent questioned DeLuca regarding whether she was having any romantic or sexual relationships during the time that her divorce was pending.[29] Respondent told DeLuca that other men would perceive her to be a "good screw" because of her emotional vulnerability associated with her divorce.[30]

36. When DeLuca questioned Respondent regarding whether she should have a relationship while her divorce action was pending, Respondent commented in a joking manner that she shouldn't have sex with anyone but him.[31] This comment made DeLuca feel uncomfortable, even though it was said in a joking manner.[32] He went on to inquire whether she liked to give massages, and whether she had any sexual fetishes.[33] DeLuca testified that she was disgusted by these comments.[34]

37. In discussing DeLuca's possible ability to earn a living with a home based business making furniture, DeLuca offered to show Respondent the furniture she had built. In a joking manner, Respondent asked whether anyone else would be at her home, and whether she would give him a massage if he came to look at the furniture.[35]

38. At first, DeLuca believed that Respondent's sexually suggestive comments were simply jokes made in poor taste.[36] As time went on, however, she believed the comments progressed to serious attempts to proposition her.[37] DeLuca believed that Respondent was attempting to solicit some sort of relationship with her, without being totally forward about his attempts.[38] DeLuca believed that Respondent was trying to see if she would "bite" on any of his suggestive comments.[39]

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29 DeLuca 9/22/04 at 79:5 – 79:19; Spence 9/22/04 at 198:23 – 199:16.
30 DeLuca 9/22/04 at 89:21 – 90:6.
31 DeLuca 9/22/04 at 80:19 – 81:11; DeLuca 9/22/04 at 125:14 – 126:7.
32 DeLuca 9/22/04 at 81:7 – 81:11.
33 DeLuca 9/22/04 at 79:5 – 79:19.
34 DeLuca 9/22/04 at 79:5 – 79:19.
35 DeLuca 9/22/04 at 79:20 – 80:17.
36 DeLuca 9/22/04 at 124:3 – 125:3.
37 *Id.*
38 DeLuca 9/22/04 at 91:5 – 91:13.
39 DeLuca 9/22/04 at 124:15 – 125:3; DeLuca 9/22/04 at 127:16 – 128:7.

39. The sexually suggestive statements which Respondent made to DeLuca caused DeLuca to feel disrespected and cheap.[40] The comments about her breasts, and whether she ever had a "boob job" made her uncomfortable.[41]

40. As the relationship progressed, DeLuca became sufficiently uncomfortable with Respondent's comments that she began bringing other people, such as her brother or her children, along to her meetings with Respondent.[42]

41. DeLuca never directly asked Respondent to stop making sexually suggestive comments to her, and she never mentioned any of these comments to Respondent's staff.[43] As discussed above, this lack of protest is for the most part irrelevant, except perhaps for credibility purposes. The Hearing Officer also finds that DeLuca was hesitant to raise her objections to the sexually suggestive statements for fear it could jeopardize Respondent's willingness to represent her on a pro bono basis.[44]

42. In June, 2003, Respondent and DeLuca attended a settlement conference at Respondent's office with her husband and his attorney.[45] At the conclusion of this conference, the terms of a proposed settlement were dictated on a tape recorder.[46] It is undisputed that after the settlement was complete, Respondent and DeLuca hugged and kissed each other.[47] The parties dispute, however, who initiated the hug and kiss.[48] Given concerns regarding Ms. DeLuca's credibility discussed below, the Hearing Officer finds that the State Bar has failed to prove, by clear and convincing evidence, that Respondent initiated the hug, or that he kissed DeLuca on the mouth or lips.[49]

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[40] DeLuca 9/22/04 at 90:21 – 91:4.
[41] DeLuca 9/22/04 at 76:1 – 76:8.
[42] DeLuca 9/22/04 at 82:4 – 82:23.
[43] DeLuca 9/22/04 at 100:6 – 100:15.
[44] DeLuca 9/22/04 at 79:17 – 79:4.
[45] DeLuca 9/22/04 at 83:10 – 83:14; DeLuca 9/22/04 at 107:15 – 107:24.
[46] DeLuca 9/22/04 at 83:15 – 84:11; Exhibit 7(C) at 000209 – 000212.
[47] DeLuca 9/22/04 at 83:15 – 85:8; DeLuca 9/22/04 at 112:24 – 114:17; Spence 9/22/04 at 191:22 – 192:18.
[48] *Id.*
[49] The Hearing Officer is not finding that DeLuca actually initiated the hug and kiss. Rather, the Hearing Officer simply finds that the State Bar has not proved by clear and convincing evidence that Respondent initiated the hug and kiss.

Because this type of physical contact was not corroborated by testimony of similar types of attempted physical touching from Borba-Stout, and because of the credibility concerns discussed below, the Hearing Officer finds that DeLuca's testimony on the subject of physical contact does not rise to the level of clear and convincing evidence.

43. The Hearing Officer believes that there may be reasons to have some concerns about the credibility of DeLuca's testimony. DeLuca testified that she felt that during the settlement conference, Respondent had pressured her to accept a settlement she was not necessarily comfortable with signing.[50] DeLuca later informed Respondent that she was not willing to sign the settlement agreed to during the settlement conference.[51] Because of concerns about being a witness to the settlement agreement, Respondent then moved to withdraw.[52] Respondent also sought to withdraw because he believed that DeLuca intended to provide false testimony in connection with seeking an order of protection against her former husband.[53] The Hearing Officer believes that this "noisy withdrawal"[54] provided a motive for DeLuca to attempt to discredit Respondent, including discrediting him by accusing him of improper sexual contact.

C. <u>Conclusion Regarding Counts One and Two</u>

44. The Hearing Officer finds that standing alone, neither the testimony of Borba-Stout nor the testimony of DeLuca would rise to the level of clear and convincing evidence that Respondent made inappropriately sexually suggestive comments to his clients.

45. The Hearing Officer finds, however, that the testimony of these witnesses describes a very similar pattern and practice of escalating sexually suggestive comments, and that the two descriptions corroborate one another. For example,

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50 DeLuca 9/22/04 at 126:13 – 127:4.

51 DeLuca 9/22/04 at 116:1 – 116:14; Spence 9/22/04 at 193:8 – 194:3.

52 Spence 9/22/04 at193:17 – 196:9.

53 Spence 9/22/04 at 194:19 – 196:9.

54 This term refers to a withdrawal that basically calls attention to the fact that a witness intends to provide false testimony. See ER 3.3, comment 15.

Respondent discussed breast augmentation surgery with both clients, and suggested that both clients could earn good livings in Las Vegas.

46. The Hearing Officer finds that there is no evidence that Borba-Stout or DeLuca had ever met each other or compared their stories prior to testifying at the Hearing.

47. The Hearing Officer finds the remarkable similarity between their stories regarding the sexually suggestive comments made by Respondent, does rise to the level of clear and convincing evidence.[55]

48. The Hearing Officer has carefully considered Respondent's testimony in which he claims that the witnesses may have mistaken various innocent comments as being sexually suggestive. The Hearing Officer finds that considered in isolation, any number of the sexually suggestive statements attributed to Respondent by Borba-Stout and DeLuca could be explained away as either awkward attempts at humor, or misinterpretations of his comments. The Hearing Officer finds, however, that when considered as a whole, these comments evidence a pattern and practice of making sexually suggestive comments to these clients, which they reasonably believed were inappropriate, and which caused them to feel uncomfortable.

49. Considering all of the evidence, the Hearing Officer finds that the State Bar has established by clear and convincing evidence that Respondent did make inappropriate sexually suggestive comments to both Borba-Stout and DeLuca.

D. Count Three

50. Respondent has stipulated that he **knowingly** disobeyed an obligation under the rules of a tribunal, and willfully violated a court order in violation of ER 3.4(c) and Rule 51(e).

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[55] As discussed above, because only DeLuca testified regarding physical hugging and kissing, and given the possible motive for DeLuca to discredit Respondent, the Hearing Officer found that the uncorroborated testimony of DeLuca regarding the hugging and kissing incident after the settlement conference did not rise to the level of clear and convincing evidence.

51. The State Bar has agreed that the conduct which is the subject of Count Three is less serious than the conduct which is the subject of Counts One and Two, and that Count Three should be considered as an aggravating factor.[56]

IV. Conclusions of Law

52. The Hearing Officer finds that the State Bar has proved by clear and convincing evidence that in making the sexually suggestive statements to Borba-Stout and DeLuca, as detailed above, Respondent violated ER 1.7, ER 8.4 and Rule 41(g).

53. The issue of Respondent's mental state in violating ER 1.7, ER 8.4 and Rule 41(g) is important for purposes of deciding sanctions in this case. The presumptive sanction differs depending on whether Respondent acted knowingly, or negligently. Inappropriate sexual comments violating ER1.7 are governed either by Standard 4.32 or 4.33. Standard 4.32 suggests that suspension is appropriate if the violation is done knowingly, while Standard 4.33 suggests that reprimand is appropriate if there is a single negligent instance of conflict of interest with no overreaching or serious injury to clients. *In re Walker*, 200 Ariz. 155, 160, 24 P.3d 602, 607 (2001).

54. The Standards define "knowledge" as the "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." ABA Standards, Definitions at 7. The Standards define "negligence" as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standards, Definitions at 7.

55. Some Arizona cases with more egregious facts have found attorneys making sexual advances on their clients acted negligently, rather than knowingly. *See, e.g., In re Piatt,* 191 Ariz. 24, 951 P.2d 889 (1997). In *Piatt*, the attorney was much

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[56] State Bar Closing 9/23/04 at 18:1 – 18:19. *Matter of Cassalia,*. 173 Ariz. 372, 843 P.2d 654 (1992) (sanctions should be based on most serious misconduct, with other violations being considered in aggravation).

more direct in soliciting a sexual relationship with his clients than Respondent was in the present case, including inviting one of the clients to his home, and meeting her at the door in his bathrobe. The attorney in *Piatt* threatened both of his clients that if they did not respond to his advances, it could cost them a lot more money. Justice Feldman dissented in part from the *Piatt* decision, and rejected the Commission's finding that the attorney had acted only negligently. As the dissent discusses, this finding was in part based on the fact that *Piatt* was a case of first impression in Arizona. The concerns that led the Commission in *Piatt* to find only negligent conduct are no longer applicable approximately seven years later, after numerous attorneys have been sanctioned for improper sexual advances. *See also In re Moore* (SB-02-0043-D). In *Moore*, the attorney only solicited one client, but he requested to see her breasts both before and after augmentation surgery, and he contacted the client on three separate occasions attempting to arrange meetings before or after business hours. The Commission found that he acted negligently, rather than knowingly. The *Moore* decision, however, is somewhat internally inconsistent. It initially stated that the presumptive sanction for the respondent attorney's conduct was suspension. With no explanation of why the attorney acted negligently rather than knowingly, the Commission then went on to find censure to be appropriate because the attorney had only acted negligently. Because *Moore* was decided based on a tender of admissions and agreement for discipline by consent in which the agreement only involved a censure, this case may be distinguishable from the present matter.

56. Based on a consideration of all of the evidence in this case, the Hearing Officer finds that Respondent's violations of 1.7, ER 8.4 and Rule 41(g) were done **knowingly**. The Hearing Officer finds that at the time he made the sexually suggestive comments discussed above, Respondent was consciously aware of the nature and attendant circumstances surrounding such comments. The Hearing Officer finds, however, that Respondent acted without the conscious objective or purpose to: (a) limit

his clients' interests by pursuing his own interests; (b) prejudice justice; or (c) exhibit an offensive personality.

57. Based on Respondent's stipulation, the Hearing Officer finds that the State Bar has proved by clear and convincing evidence that in representing Mr. Haymore at the Expedited Services Conference, Respondent **knowingly** violated ER 3.4(c) and Rule 51(e).

V. Aggravation and Mitigation

In determining the appropriate sanction, Arizona considers the ABA Standards for imposing lawyer sanctions ("the Standards"). *See In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). In applying the Standards, consideration must be 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 Walker*, 200 Ariz. 155, 161, 24 P.3d 602, 608 (2001).

The theoretical framework analysis contained in the Standards states that where there are multiple acts of misconduct, the sanction should be based upon the most serious misconduct, with the other acts being considered as aggravating factors. *See also In re Cassalia*, 172 Ariz. 372, 375, 843 P.2d 654, 657 (1992).

Because the Hearing Officer has found that Respondent acted **knowingly**, and that there were several inappropriate comments made to two separate clients, the Hearing Officer believes that suspension is the presumptive sanction under Standard 4.32.

The Hearing Officer next looks to factors supporting either aggravation or mitigation. As discussed earlier, the admitted violations referenced in Count Three will be considered an aggravating circumstance. The State Bar has agreed that in light of

prior case law considering sanctions for violations of court orders, suspension would be excessive based solely on the violations outline in Count Three.[57]

The State Bar has argued that other relevant aggravating factors under Standard 9.21 include: prior discipline; dishonest or selfish motive; pattern of conduct; multiple offenses; refusal to acknowledge the wrongful nature of the conduct; vulnerability of the victims; and substantial experience in the practice of law.

9.21(a) Prior Discipline

The Hearing Officer does not find prior discipline to be an aggravating factor. Respondent's prior discipline resulted from mental illness, and was extremely remote. Respondent had no discipline for over 20 years after being readmitted. *See In re Piatt,* 191 Ariz. 24, 27, 951 P.2d 889, 892 (1997) (fact that attorney had not been disciplined in 20 years suggested suspension not needed to protect the public).

9.21(b) Dishonest or Selfish Motive

The Hearing Officer finds that Respondent acted with a selfish motive to attempt to establish a romantic or sexual relationship in making the inappropriate sexually suggestive comments.

9.21(c) Pattern of Misconduct

The Hearing Officer finds that Respondent engaged in a pattern of misconduct, by making numerous sexually suggestive comments to two separate clients.

9.21(d) Multiple Offenses

Respondent's admission to the allegations in Count Three, when considered in addition to the sexually suggestive comments, establishes this factor.

9.21(g) Refusal to Acknowledge Wrongful Nature of Conduct

The Hearing Officer finds this factor has not been established. Respondent acknowledges that if sexually suggestive statements were made in an attempt to solicit

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[57] State Bar's Closing Argument 9/23/04 at 19:18 – 20:7.

romantic or sexual relations, the conduct was wrongful. Respondent has simply disputed that any such attempts were made.

9.21(h) Vulnerability of Victims

The Hearing Officer finds that both Borba-Stout and DeLuca were vulnerable as a result of their marital situations that led them to seek representation from Respondent in the first place. DeLuca was especially vulnerable because she could not afford legal counsel, and Respondent was representing her on a pro bono basis. Respondent's comments to DeLuca regarding the fact that many men would think she would be a "good screw" demonstrated that Respondent was aware of such vulnerabilities.

9.21(i) Substantial Experience in the Practice of Law

The Hearing Officer finds that this factor is present, but is balanced by Respondent's history of practicing for over 20 years without being disciplined.

9.32(a) Absence of Prior Disciplinary Record

See discussion under 9.21(a) above.

9.32(e) Cooperation in Disciplinary Process

The Hearing Officer finds that Respondent has made full and free disclosure to the disciplinary agencies and has displayed a cooperative attitude toward the proceedings.

9.32(i) Mental Disability

The Hearing Officer finds this factor has not been established. Although Respondent testified he was depressed during the relevant time period, no medical or psychological evidence was admitted in support of this factor as required by Standard 9.32(i). Nor was there any required evidence demonstrating that the disability caused the misconduct, or that Respondent had demonstrated a "meaningful and sustained period of successful rehabilitation."

9.32(l) Remorse

The Hearing Officer finds that this factor is neutral. Although Respondent appears to be remorseful for representing Mr. Haymore in the Expedited Services Conference that is the subject of Count Three, he has not acknowledged that his comments to Borba-Stout and DeLuca were inappropriate. Rather he has disputed that such comments were made, or claimed the comments he did make were misunderstood.

Conclusion Regarding Aggravating and Mitigating Factors

The Hearing Officer finds that the aggravating factors slightly outweigh the mitigating factors in the present case. The balance of the factors was considered by the Hearing Officer in deciding the appropriate length of a suspension.

VI. Recommendation

As discussed above, Standard 4.32 suggests that suspension is appropriate for knowingly making sexually suggestive statements to clients. The Hearing Officer acknowledges that Standard 2.3 and its commentary suggest that suspensions should generally be for a period of time equal to or greater than six months. The Hearing Officer finds, however, that in light of the unique circumstances of this case, and the proportionality analysis discussed below, special circumstances present in this case warrant an exception to this general rule.

I recommend that Respondent be suspended for 30 days, and that he be placed on probation for two years, effective upon the signing of the probation contract, requiring: (1) a Membership Assistance Program (MAP) contract, to be developed by the director of MAP and Respondent's physicians, to insure that no emotional or psychological issues will negatively affect Respondent's ability to practice.[58] Respondent will participate in a program developed by MAP specifically tailored toward sensitivity training to address the type of conduct at issue in this matter.

[58] Spence 9/22/04 at 203:23 – 213:16.

Respondent should also be required to pay the State Bar all costs and expenses incurred in this disciplinary action.

VII. Proportionality

In assessing the appropriate sanction, it is appropriate to examine sanctions imposed in similar cases, to insure proportionality. *In re Peasley*, 208 Ariz. 27, 42, 90 P.3d 764, 778 (2004), *cert. Denied*, ___ U.S. ___, 125 S.Ct. 322 (2004).

There have been at least five Arizona disciplinary cases which have dealt with inappropriate sexual propositions. These cases include: *Matter of Piatt*, 191 Ariz. 24, 951 P.2d 889 (1997); *Matter of Walker*, 200 Ariz. 155, 24 P.3d 602 (2001); *Matter of Moore*, SB02-0043-D (2002); *Matter of Marquez*, SB00-72-D (2003); and *Matter of Pearlstein*, SB03-0155-D (2004).

All of the decisions have been fact intensive, and frankly, hard to reconcile with one another.

Piatt made much more explicit and direct propositions to his clients than did the Respondent in this case, but only received a censure. This result is probably explained by the fact that *Piatt* was the first case in Arizona to expressly consider sexually suggestive comments to clients, and a concern that suspending the attorney would result in "upping the ante" as a result of the attorney's decision to appeal the Commission's decision. Neither of those concerns is present in this case.

Walker also involved more extreme conduct than is present in this case. In *Walker,* the attorney touched the client's breast and engaged in express discussions regarding a sexual relationship. Like in *Piatt*, however, the attorney in *Walker* only received a censure. Like *Piatt*, the *Walker* decision seems to have been primarily influenced by two factors that are not present in this case. In *Walker*, there was evidence that the sexual contact was consensual, and the attorney had been arrested, prosecuted for prostitution, and sued for malpractice. There is no such evidence in the present case.

The Hearing Officer finds the *Moore* case to be the factually closest of the Arizona cases. In *Moore*, the attorney made numerous sexually suggestive comments to only one domestic relations client. When told that his client intended to have breast augmentation surgery, the attorney asked if he could see her breasts prior to and following the procedure, and asked numerous questions of a sexual nature regarding the proposed surgery. The Attorney also contacted the client at least three times and requested that she meet him at his office before or after business hours. In that case, the Commission found that the respondent acted only negligently, and as a result imposed a censure rather than a suspension. The *Moore* decision, however, contained no analysis as to why the attorney's conduct was negligent rather than knowing. The present case is distinguishable from *Moore* because the Hearing Officer has found that Respondent acted knowingly. Therefore, a more sever sanction is justified.

The *Marquez* case involved an attorney who made repeatedly grabbed an unrepresented adverse litigant and gave her "bear hugs," and refused to let go of her after she protested. The State Bar and the attorney initially agreed to a 60 day suspension. The Commission rejected this agreement, believing it was overly harsh, and that a censure would be more appropriate. The State Bar then withdrew from the agreement, and announced its intention to proceed with a formal hearing. The State Bar and the attorney later agreed to a 30 day suspension. The attorney did not want to further delay the final disposition, and did not wish to risk a more serious sanction. The Commission found that the attorney's conduct was more serious than that in the *Piatt*, *Walker* and *Moore* cases discussed above. As a result, the Commission approved the 30 day suspension.[59]

The *Pearlstein* case involved an agreed upon discipline by consent. In *Pearlstein*, the attorney made inappropriate sexual comments and jokes to a client, told

[59] This Hearing Officer agrees with the dissent of Commissioner Carson in the Marquez case in which he stated "Something is cockeyed and out-of-balance when similar cases have such different outcomes."

the client he wanted to have sex with her, and touched her in a sexual manner on more than one occasion. The client's claims were corroborated by former employees of the attorney who also claimed that the attorney had engaged in inappropriate sexual joking and sexual innuendo. In a second count, the attorney was accused of failing to refund an unearned retainer, and failing to respond to the client's complaint until after a bar complaint was filed. In *Pearlstein*, the Commission approved an agreement calling for a 60 day suspension. The present case seems slightly less serious than *Pearlstein*, in that Respondent never directly told either Borba-Stout or DeLuca that he wanted to have sex with them, and there is no clear and convincing evidence of any physical contact.

Overall, little consistent guidance can be drawn from these prior cases. The 30 day suspension recommended by the Hearing Officer is somewhere in the middle of the range of the sanctions imposed in other cases. It is less than the suspension of at least six months suggested by the Standards for a knowing violation. The proportionality analysis does not indicate that the proposed 30 day suspension is either too strict or too lenient. Discipline must be tailored to the facts of the individual case, and absolute uniformity with prior decisions cannot be achieved. *Matter of Riley*, 142 Ariz. 604, 615, 691 P.2d 695, 706 (1984).

The Hearing Officer believes that a 30 day suspension is sufficient to promote the goals of lawyer discipline by protecting the public, deterring future misconduct, and instilling public confidence in the Bar's integrity. *In re Peasley*, 208 Ariz. 27, 42, 90 P.3d 764, 779 (2004), *cert. Denied*, ___ U.S. ___, 125 S.Ct. 322 (2004). The Hearing Officer believes that in light of the recommended closely supervised probation, a

suspension of more than 30 days would be purely vindictive and punitive. *In re Scholl*, 200 Ariz. 222, 228, 25 P.3d 710, 716 (2001).

DATED this 6th day of December, 2004.

Daniel P. Beeks /pw
Daniel P. Beeks
Hearing Officer 7M

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Copy of the foregoing mailed
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