BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JEFFREY J. TONNER,** **Bar No. 011338** RESPONDENT.	Nos. 03-1536, 04-0188 **HEARING OFFICER'S REPORT**

Pursuant to Ariz. R. Sup. Ct. 56(e), the undersigned hearing officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and submits the following report.

I. PROCEDURAL HISTORY

The State Bar filed a Complaint on December 20, 2004. Respondent Jeffrey J. Tonner ("Tonner" or "Respondent") filed an Answer on January 18, 2005. A hearing was then scheduled for April 19, 2005. The Settlement Officer conducted a settlement conference on March 15, 2005, at which time the parties were unable to reach an agreement. The parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") on May 9, 2005. No hearing has been held in this matter.

II. FINDINGS OF FACT[1]

1. At all times relevant hereto, Tonner was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 9, 1987.

[1] The following facts have been conditionally admitted and form the basis for the hearing officer's recommendation. *See* Agreement.

COUNT ONE (File No. 03-1536/Charland)

2. Respondent was retained to represent Stefan Erik King ("Mr. King") in a civil lawsuit entitled *Kekar v. King*, case number CV99-10352 ("the litigation").

3. During the litigation, the court ordered Mr. King to produce documents relating to several specific areas. On behalf of Mr. King, Respondent produced over 500 documents related to the document production order and he believed, at that time, that he had fully complied with the court's order.

4. On March 18, 2002, a bench trial commenced. During the trial, it became apparent that some of the court-ordered documents had not been produced. Respondent recognized that he had misread the order and neglected to address one aspect of the order.

5. In part due to Respondent's failure to fully respond to the court's order requiring the production of documents, the court preliminarily indicated that it would rule against Mr. King and/or award sanctions if the trial proceeded to its conclusion.

6. Thereafter, Respondent and Mr. King began settlement discussions with Ms. Kekar and the remainder of the trial was postponed while settlement was discussed. On June 28, 2002, Mr. King and Ms. Kekar signed a settlement agreement which resolved the civil litigation between them. By settling the case, Mr. King forfeited the equity in a residential home transferred to Ms. Kekar.

7. During this time, Respondent and Mr. King discussed resolution of any malpractice claim that Mr. King may have had against Respondent.

8. At or about this time, Mr. King asked Respondent if he carried malpractice insurance.

9. Respondent advised Mr. King that his insurance carrier was CNA; however, Respondent asked Mr. King not to pursue a claim against him with CNA because CNA retained Respondent to represent dentists in malpractice actions and in cases before the Arizona State Board of Dental Examiners. Respondent told Mr. King

that he was concerned that a claim against him might cause CNA to stop sending him cases.

10. In settlement of the potential malpractice claim, Respondent agreed to pay Mr. King the sum of $150,000.00, plus interest at the rate of 7% per annum.

11. Respondent reduced the agreement to writing. Respondent signed the agreement and it was witnessed by Mr. King on June 28, 2002, the same day as the settlement between Mr. King and Ms. Kekar.

12. Respondent did not advise Mr. King in writing or otherwise, to consult with another attorney before entering into the settlement agreement with him.

13. Following the execution of the agreement, Mr. King made attempts to get Respondent to pay on the settlement amount.

14. Respondent made one payment of $20,000.00 to Mr. King on April 16, 2003.

15. In or about June 2003, Mr. King retained John E. Charland, Esq. ("Mr. Charland") to assist him in the collection of this debt.

16. On or about July 2, 2003, Mr. Charland spoke with Respondent on the telephone regarding the King matter and inquired whether Respondent had malpractice insurance. Respondent told Mr. Charland that his carrier was CNA, and reiterated what he had previously told Mr. King, that he did not want a claim filed because he feared losing business from CNA.

17. During this call, Mr. Charland also requested a copy of Mr. King's file. Respondent agreed to provide the file in one week.

18. Not having received the file, Mr. Charland sent Respondent a letter dated July 21, 2003, requesting that Respondent call him so that he could have a runner pick up Mr. King's file. In this same letter, Mr. Charland requested the name of Respondent's malpractice carrier and his policy number.

19. On or about July 22, 2003, Respondent called Mr. Charland and left him a voice mail message stating that he did not have malpractice coverage in effect at the

time that the King agreement was made. The next day, Respondent delivered to Mr. Charland a portion of Mr. King's file. Included with the delivery was a note from Respondent stating that he would deliver the remainder of the file.

20. Although Respondent did produce documentation to Mr. Charland's satisfaction, he was not timely in doing so.

21. Thereafter, a Judgment was entered against Respondent by consent on or about January 13, 2004 for the amount of $149,911.78. The Judgment provided that Respondent would make monthly payments to Mr. King in the amount of $ 3000.00 until paid in full.

22. Respondent negligently failed to produce a court ordered document in Mr. King's case in violation of ER 1.3

23. Respondent failed to timely produce Mr. King's file, upon request, to subsequent counsel in violation of ER 1.16(d).

24. Respondent failed to advise Mr. King in writing to seek independent legal advice prior to entering into a settlement of the malpractice claim in violation of ER 1.8(h).

25. If this matter proceeded to hearing, Respondent would testify that he did not object to the amount requested by Mr. King in settlement of the malpractice claim, or the amount of interest. Further, Mr. King had previously held a real estate license and made a career selling residential properties so he had knowledge of the market, and therefore Mr. King's potential damages. As a result, it did not occur to Tonner that he needed to advise Mr. King to seek independent legal advice.

26. Respondent asserts, and the State Bar conditionally does not dispute, that he was negligent in not ascertaining that it was necessary for him to advise Mr. King in writing about consulting independent counsel before entering into the agreement.

27. Respondent did not timely provide Mr. King's file; however, during that time, Respondent was experiencing a staff shortage and he was having difficulties meeting the request. Respondent asserts, and the State Bar conditionally does not

dispute, that Mr. King was not harmed by the failure, initially, to receive an entire copy of the file.

28. If the matter proceeded to hearing, Respondent would testify that during times relevant to this matter, he had had malpractice coverage with CNA; however, his coverage was periodically canceled and reinstated due to late payment of premiums. Respondent asserts, and the State Bar conditionally does not dispute, that as a result, he was unsure whether he actually had coverage at all times relevant hereto. During the bar investigation, Respondent contacted his insurance agent, who was also unable to state definitively when Respondent had malpractice coverage in effect during times relevant to this matter.

COUNT TWO (File No. 04-0188/Levitan)

29. On or about February 23, 2000, the Arizona State Board of Dental Examiners ("Board") entered an order by which Dr. Marc Levitan ("Dr. Levitan") was censured, placed on probation for twelve months, and ordered to pay an administrative penalty of $1,000.00.

30. On or about August 10, 2000, Respondent filed a Complaint in Superior Court on behalf of Dr. Levitan, requesting judicial review of the February 23, 2000 Administrative order ("the administrative review action").

31. On or about November 13, 2000, the Board filed the certified Administrative Record on Review. On or about February 6, 2001, the Board filed the transcripts with the Court as an addendum, but did not provide a copy of the transcripts to Respondent. The Board did not file the formal pleading entitled "Notice of Filing Administrative Record" until February 28, 2001.

32. The administrative review action was governed by the Rules of Procedure for Judicial Review of Administrative Decisions ("JRA Rules"). JRA Rule 6(a) required that Dr. Levitan's opening brief be filed within 45 days after service of the filing of the Administrative Record on Review. Respondent's interpretation of this rule

and the timing of the Board's filing led him to conclude that Dr. Levitan's opening brief was due on or about April 14, 2001.

33. The Board and the Court believed that Dr. Levitan's opening brief was due on or before January 2, 2001.

34. On or about April 24, 2001, the Board filed a Motion to Dismiss, and argued that based on the November 13, 2000 Administrative Record filing date, Dr. Levitan's opening brief was due on January 2, 2001 and that the matter should be dismissed because Respondent, on behalf of Dr. Levitan, had not filed his opening brief.

35. Respondent's response to the Board's Motion to Dismiss was due on or before May 14, 2001.

36 On June 1, 2001, Respondent filed a response to the Board's Motion to Dismiss, and also filed an Opening Brief. In his response, Respondent argued that the action should not be dismissed because the Board had not provided him with copies of the transcript at the time of its February 28, 2001 Administrative Record filing date, and therefore, he had had to independently obtain transcripts of the Board proceedings in order to complete his opening brief.

37. On June 25, 2001, the court entered an order granting the Board's Motion to Dismiss the case. The minute entry indicated that Respondent's opening brief should have been filed on January 2, 2001. The court also noted that Respondent's response to the Motion to Dismiss was filed two weeks past the due date. The court noted that Respondent had asserted that he was awaiting transcripts from the administrative hearing to be delivered to him, but ruled that the applicable statutes and rules did not require such a procedure. Thus, the court found that no good cause had been shown for the delay in filing the opening brief.

38. On July 25, 2001, Respondent filed a Motion to Reconsider, wherein he noted that he had requested transcripts from the Board. He argued that because the transcripts were not provided to him, the opening brief could not have been filed on January 2, 2001. The Motion to Reconsider was denied.

39. Dr. Levitan has claimed that on July 19, 2001, he spoke with Respondent by telephone, and that at the time, Respondent informed him that a hearing would be set within a month and that Respondent did not inform him of the court's June 25, 2001 decision to dismiss the case.

40. If the matter proceeded to hearing, Respondent would testify that he has no recollection of such a call, and in any event, he would not have told Dr. Levitan that a hearing would be set at a time when the court had already dismissed the case. Respondent would further testify that he has no current recollection of informing Dr. Levitan that the case had been dismissed, however, this is his standard practice in all cases. Respondent does not however, have any documentation evidencing notification of the case status.

41. Dr. Levitan subsequently learned that his case had been dismissed. In 2003, Dr. Levitan retained Arizona counsel to pursue a claim against Respondent. The case was settled for $4,000.00.

42. Respondent failed to pursue the objectives of the representation by not timely filing a response to the motion to dismiss, and as determined by the court, by failing to timely file the opening brief on behalf of Dr. Levitan. Respondent's conduct was in violation of ER 1.2.

43. Respondent failed to act with reasonable diligence and promptness when he failed to timely respond to the motion to dismiss, and when pursuant to the court's ruling, he failed to timely file the opening brief. Respondent's conduct was in violation of ER 1.3.

CONDITIONAL ADMISSIONS

Respondent conditional admits that, for purposes of this agreement only, his conduct as described in Count One violated Rule 42, Ariz. R. S. Ct., specifically ER 1.3, ER 1.16(d) and ER 1.8(h). *See* paragraphs 22-24 above.

The State Bar conditionally admits that, for purposes of this agreement only, that it will not pursue discipline on the alleged violations of ER 1.7 and ER 8.4(c). The State

Bar proffers the following reasoning, which the hearing officer accepts. The formal complaint in this matter included an alleged violation of ER 1.7 for Respondent's representation of Mr. King at a time when his own personal interests were in conflict with his client. Upon further review, it appears more appropriate to find a conflict under ER 1.8(h) alone. Further, the State Bar does not believe that it can meet its burden of proof with respect to ER 8.4(c). The mental state required for a violation of ER 8.4(c) is knowing and based on the respective testimony of the parties involved the State Bar conditionally admits that it cannot prove by clear and convincing evidence a violation of this rule.

Respondent conditional admits that, for purposes of this agreement only, that his conduct as described in Count Two violated Rule 42, Ariz. R. S. Ct., specifically ER 1.2, and ER 1.3 .

The State Bar conditionally admits that, for purposes of this agreement only, it cannot prove violations of ER 1.1, ER 1.4, ER 8.4(c) and ER 8.4(d). The State Bar proffers the following analysis, which the hearing officer accepts. The formal complaint in this matter included a violation of ER 1.1. Based on further review of the evidence the State Bar does not believe that it can meet its burden in proving this allegation by clear and convincing evidence. Likewise, the facts surrounding the failure to communicate and the alleged misrepresentation regarding the status of Dr. Levitan's case are controverted. The testimony of the respective parties differs significantly and the issue would be decided on the credibility of the witnesses. For purposes of this agreement only, the State Bar conditionally admits that it cannot prove a knowing misrepresentation by clear and convincing evidence. With respect to the alleged violation of ER 8.4(d), the State Bar conditionally admits that it cannot meet its burden in proving that Respondent's conduct was prejudicial to the administration of justice.

III. THE APPROPRIATE SANCTIONS

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d

1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

ABA STANDARDS

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.

Based on the Agreement, Tonner negligently violated: (1) duties of diligence, conflict of interest, and duties upon termination in relation to Count One; and, (2) duties of diligence and abiding by the client's directions in relation to Count Two. Actual injury to the client was suffered in both cases in the form that their ability to defend their cases was compromised.

The parties agree that Standards 4.33 (negligent failure to avoid a conflict with the lawyer's own interests causing injury to the client), and 4.43 (negligent failure to act with diligence causing injury to the client). Both Standard 4.33 and Standard 4.43 dictate censure as the presumptive sanction for Tonner's conduct.

AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer agrees

with the parties[2] that three aggravating factors apply and should be considered in this matter:

(b) dishonest or selfish motive;

(d) multiple offenses; and,

(i) substantial experience in the practice of law.

This Hearing Officer agrees with the parties that four factors are present in mitigation:

(a) absence of a prior disciplinary record;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and

(l) remorse.[3]

Of these, the hearing officer gives the greatest weight to the fact that Tonner agreed to restitution and fully cooperated with disciplinary proceedings. Given the finding of negligent conduct, Tonner's effort to mitigate the harm caused are appropriate.

PROPORTIONALITY REVIEW

An effective system of professional sanctions requires internal consistency; therefore, it is appropriate to examine sanctions imposed in cases that are factually similar to this one. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 568 (1994). However, the discipline imposed must be tailored to this case, as neither perfection nor absolute uniformity can be achieved. *Id.*

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[2] The parties chose to address mitigating and aggravating factors in the Joint Memorandum rather than in conditionally admitted facts in the Agreement. However, both parties agreed to the Joint Memorandum and therefore this hearing officer accepts the statements therein as conditional admissions.

[3] Respondent's remorse is evidenced by his acknowledgement to King that his failure to produce the documents was malpractice and his willingness to resolve any malpractice claim. With respect to Dr. Levitan, Respondent settled that matter with Dr. Levitan's attorney because he recognized and acknowledged that he had failed to timely respond to the motion to dismiss and submit the opening brief.

The hearing officer has considered the cases submitted by the parties as informative.

In *In re Susman*, SB-03-0005D (2003), the attorney was censured and restitution was ordered for violations of ERs 1.8(a) and 8.4(a). The attorney obtained three separate loans from a client. The attorney negligently failed to advise the client in writing that the client should seek the advice of independent counsel. The disciplinary commission found actual injuries, five mitigating factors (absence of prior discipline, personal or emotional problems, full disclosure and cooperation, character or reputation, and remorse), and two aggravating factors (selfish motive and substantial experience in the law).

In *In re Herbert*, SB-02-0041D, 2002 Ariz. LEXIS 37, the attorney was censured and placed on probation for six months for violations of ERs 1.7(b), 3.1, and 8.4(d).

Herbert had a history of prior discipline, which included two prior confirmed reprimands and a prior 30-day suspension. The Disciplinary Commission found two aggravating factors: prior discipline and substantial experience in the practice of law. The Commission found only one factor in mitigation: full disclosure and cooperation.

In *In re Barfield*, SB-04-0139D (2004), the lawyer received a censure and one-year probation for violations of ERs 1.7(b) and 1.8(a). Respondent represented a client in connection with a personal injury case. He advised the client not to honor a medical lien and the lienholder subsequently filed a lawsuit against the client, Barfield, and all the law firms with which Barfield was associated during the representation. Barfield jointly represented all of the defendants without fully advising the client of the risks of the joint representation. In addition, during the representation, Barfield received a loan from his client to finance the client costs portion for his new law firm. The client was not advised in writing to seek independent legal advice. In determining that a censure was appropriate, the Hearing Officer found one aggravating factor (multiple offenses) and three mitigating factors (absence of prior discipline, absence of a dishonest or selfish motive, and full disclosure and cooperation). The Hearing Officer also found

that a censure was consistent with prior decisions which involved isolated instances of transactions with a client, coupled with some or all of the following circumstances: no harm, no dishonest motive, no prior discipline, and cooperation in the disciplinary process.

Respondent's mental state can both be an element of an ethical violation and relevant to the appropriate discipline for a violation. *In re Clark*, 207 Ariz. 414, 417, 87 P.3d 827, 830 (2004). Here, Tonner affirmatively asserts, and for purposes of this agreement the State Bar does not dispute, that his conduct was negligent rather than willful in that Respondent did not deliberately fail to advise his client to seek independent legal advice. Rather, it simply did not occur to him that he needed to so notify his client because there were no negotiations with the client as to the amount that he would be paying him, or the rate of interest, to compensate him for his failures with regard to the production of documents. Rather, Tonner acceded to Mr. King's demand. With regard to the second matter, Respondent did not deliberately fail to respond to the Motion to Dismiss, he simply did not appropriately calendar his response and therefore filed it late. In addition, although the court determined that Respondent had not shown good cause for this failure to submit his opening brief in a timely fashion, Respondent had argued that he had been unable to file his opening brief until all of the transcripts from the administrative proceedings had been provided to him.

On balance, the sanction to which Tonner has consented is at least, if not more, severe, given the specific facts, as any in the above considered cases.

IV. RECOMMENDATION

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent providing for the following:

1. Respondent shall receive a censure.

2. Respondent shall be placed on probation for a period of one year effective upon the signing of the probation contract. Bar Counsel will notify the Disciplinary Clerk of the date on which the probation begins. The terms of probation are as follows:

a. Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) within 30 days of the date of the final judgment and order. Respondent shall submit to a LOMAP audit of his office's procedures. Respondent shall obtain a practice monitor (PM) approved by bar counsel and the Director of LOMAP. The Director of LOMAP shall develop a probation contract, and its terms shall be incorporated therein by reference.

b. Respondent shall make timely payments of $3,000.00 to Mr. King in accordance with the Judgment[4].

c. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

d. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

[4] A copy of the judgment is attached to the Tender as Exhibit A.

Thomas M. Quigley
Hearing Officer 8W

Original filed with the Disciplinary Clerk
this 9th day of June, 2005.

Copy of the foregoing was mailed
this 9th day of June, 2005, to:

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