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OCT 22 2007

HEARING OFFICER OF THE SUPREME COURT OF ARIZONA
BY ____

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No 05-0504, 05-0674, 05-0887 05-1593, 05-1782, 06-0058, 06-1312, 06-0663
GARY F. FORSYTH, **Bar No. 007586**	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL BACKGROUND

1. On October 24, 2006, the parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in support of Agreement for Discipline by Consent. Respondent Gary F. Forsyth (Respondent) was represented by Counsel Nancy A Greenlee and the State Bar was represented by Senior Bar Counsel Shauna R Miller. The tendered agreement called for the Respondent to receive a four month suspension, two years of probation, LOMAP conditions, and the immediate participation in the Member Assistance Program (MAP). The Agreement also included participation in fee arbitration and payment of costs and expenses.

2 After the agreement was tendered, but before it was accepted, the State Bar requested a teleconference with the parties and the Hearing Officer to discuss the State Bar's concerns regarding, *inter alia*, a biological fluid test obtained from the Respondent on January 22, 2007.

3 On January 31, 2007, a teleconference with the parties was held. The Hearing Officer requested that the parties submit a joint post-hearing statement to address the new issues

4 On February 13, 2007, the parties submitted their joint post-hearing statement. Therein, the State Bar amended its recommendation and urged that the Hearing Officer reject part of the consent agreement. The State Bar suggested that the Respondent should be suspended six months and one day rather than the four months previously agreed upon The Respondent recommended that the initial agreement be accepted.

5. On April 20, 2007, undersigned Hearing Officer issued his report recommending that the proposed sanction be modified to a six month (without one day) suspension rather then the four months suspension. The Hearing Officer's report also recommended that the other conditions be accepted and that an additional condition be implemented, *i e.*, that the Respondent participate in a comprehensive evaluation at an approved evaluation center

6. On May 17, 2007, Nancy A. Greenlee was withdrawn as counsel for the Respondent. Respondent did not obtain new counsel.

7 On June 20, 2007, the parties filed the Amended Agreement for Discipline by Consent (Amended Agreement). In the Amended Agreement, the parties agreed:

A. To modify period of suspension from four months to six months;

B. To amend the condition Member Assistance Program (MAP) requirement so that the Respondent would not begin the program until Respondent seeks reinstatement;

C That the Respondent would participate in a comprehensive evaluation at an evaluation center approved by Dr Sucher or his designee before being reinstated, and

D That Respondent would sign a two year MAP contact prior to being reinstated

8. On July 20, 2007, the parties submitted the Second Amended Agreement for Discipline by Consent (Second Amended Agreement). Therein, the parties stipulated that two additional mitigating factors were present, *to wit*, ABA *Standard* 9 32(l) (remorse) and ABA *Standard* 9.32(c) (personal or emotional problems)

9. For the reasons set forth below, this Hearing Officer recommends that the Amended Agreement for Discipline by Consent be approved and accepted

CONDUCT

10. The Tender of Admissions and Agreement for Discipline, the Amended Agreement for Discipline by Consent, and the Second Amended Agreement for Discipline by Consent will collectively be referred to as the "Tender" As reflected in the Tender, Respondent has conditionally admitted that he violated Rule 42, Ariz.R.S.Ct., to wit: ER 1.2(a), 1.3, 1 4(a) and (b), 1.16(d), 8 1(b), and Rule 53 (d) and (F), Ariz R S Ct.

RELEVANT FACTS

11. The statement of facts set forth in the Tender and the uncontested facts set forth in the Joint Post-Hearing Statement are adopted herein and incorporated by this reference. A brief summary is noted below.

12. **Count One, 05-0504/Patton.** Count One involved a series of civil matters where the Respondent was representing Nu Look Auto Body and Glass Inc (Nu Look).

Respondent was representing Nu Look on more then one matter and failed to adequately communicate with this client Respondent also failed to diligently pursue the client's legal interests The Respondent conditionally admits to violations of ER 1.3 (diligence) and 1.4(a) and (b) (communication).

13 **Count Two, 05-0674/Tafoya.** Count Two involved a dependency matter where Respondent was appointed to represent Mr Tafoya Mr. Tafoya was in custody on a related criminal matter (Respondent did not represent Mr Tafoya on the criminal matter) By necessity, the dependency matter's resolution would trail the resolution of the criminal charges Nevertheless, Respondent failed to adequately communicate with his client. During a six month period while Respondent was representing Mr Tafoya, Respondent never visited/consulted with him at the jail Respondent did see his client at periodic court proceedings However, Respondent did not respond to his client's written letters requesting that Respondent communicate with him about his case Respondent conditionally admits violations of ER 1 2 (Scope of Representation) and ER 1 4 (a) and (b) (Communication).

14. **Count Three, 05-0887/Mack** Count Three was a private criminal case. Respondent was hired to represent Mr Mack in the Show Low Justice Court Mr. Mack provided Respondent with $1,000.00 and other documents for his case. During the course of his representation, Respondent continued the trial without communicating with Mr. Mack about the continuance Mr. Mack was also dissatisfied with his inability to meet and communicate with the Respondent On February 7, 2005 Mr. Mack terminated Respondent's representation In his hand-delivered letter to the Respondent, Mr. Mack demanded the return of his property and the balance of his advance fee deposit. Because Mr. Mack and the Respondent were unable to reach an agreement on the amount of the unused deposit, Mr.

Mack filed a lawsuit against the Respondent Mr Mack obtained a judgment against the Respondent for $535 00 and court cost of $24.00. The Respondent conditionally admits to violation of ER 1 4(a) (Communication) and ER 1.16(d) (Termination of Representation).

15. **Count Four, 05-1593/Judicial Referral.** Count Four involved a judicial referral to the State Bar by the Honorable Dale P Neilson. Count Four involved three separate criminal defendants where Respondent was court appointed counsel All three defendants were in custody All three defendants complained that the Respondent had not adequately communicated with them The Superior Court removed Respondent from his representing two of the three defendants The Respondent conditionally admits to violations of ER 1.3 (Diligence) and ER 1.4(a) (Communication).

16 **Count Five, 05-1782/Mason.** Count Five involved a criminal (DUI) case Initially, Anthony and Linda Mason hired the Respondent to represent their son, Mark Mason, for a misdemeanor DUI charge The initial misdemeanor DUI was handled by the Respondent in a satisfactory manner.

17. The Masons also retained Respondent to represent their son on a second felony DUI charge The Masons paid Respondent an initial retainer of $2,500.00. During the second case, the Respondent filed at least two motions to continue the case without consulting the client or his parents The Masons were dissatisfied with the Respondent because they traveled 150 miles to Phoenix to pick-up their son but were not told that the case was being continued. The Respondent contested this allegation. Nevertheless, the Masons terminated the relationship and requested a refund of their advance fee deposit A dispute arose between the Respondent and the Masons as to how much of the fee was earned The Respondent admitted that his billing program contained incomplete or inaccurate information that needed to be

corrected by hand Respondent conditionally admits that he violated ER 1.16(d) (Termination of Representation).

18 **Count Six, 06-0058/Yazzie.** The Respondent was appointed to represent Mr Yazzie in as many as 16 different criminal matters The matters were scheduled in various courts with many different hearing dates Mr. Yazzie complained that, *inter alia*, Respondent failed to adequately communicate with him regarding his cases

19 With respect to Count Six, Respondent conditionally admits that he violated ER 8.1(b) (Failure to respond to the State Bar) and Rule 53(d) and (f), Ariz.R.S.Ct. (Failure to cooperate/furnish information to the State Bar).

20 **Count Seven, 06-0663/Caid.** Count Seven involved a divorce case. On July 25, 2005 Jenny Caid paid Respondent $2,500 to represent her with her divorce. Between July 25, 2005 and September 21, 2005, Respondent and client encountered various problems in the representation On September 21, 2005, Ms Caid obtained new counsel to represent her with her divorce A dispute arose between Respondent and client regarding the fee. Respondent's fee agreement contained an agreement for fee arbitration. Ms. Caid submitted the dispute to the State Bar's fee arbitration program The Respondent failed to respond to her petition Respondent agrees to participate in fee arbitration with Ms Caid on this matter.

21. **Count Eight, 06-1312/Alldredge.** Count Eight involved the representation in a dependency matter. The client had requested a copy of her file from the Respondent The Respondent refused to give the client a copy of the file unless she first paid for the file. There were other problems in communication between Ms. Alldredge and the Respondent as well When Ms. Alldredge filed a complaint against the Respondent with the State Bar, the State

Bar advised Respondent to reply to Ms. Alldredge within twenty days Respondent failed to respond to the State Bar's request.

22 In regard to Count Eight, Respondent conditionally admits that he violated ER 8 1(b) (Failure to respond to the State Bar) and Rule 53(d) and (f), Ariz R SCt. (Failure to cooperate/furnish information to the State Bar).

TENDERED SANCTION

23 Respondent agrees to accept a six month suspension, two-year probation, which includes LOMAP conditions, participation in the Member Assistance Program if he seeks reinstatement, participation in fee arbitration with complainants in Counts One, Five, and Seven, and payment of the costs and expenses of the disciplinary proceedings The State Bar and Respondent agree that these are appropriate sanctions.

24. In determining the appropriate sanction, both the American Bar Association's *Standards for Imposing Lawyer Sanctions* (*"Standards"* or *"Standard* ______") and applicable case law was considered.

25. Given the conduct in this matter, it is appropriate to consider *Standard* 4.0 (Violations of Duties Owed to Clients) and *Standard* 8 0 (Prior Discipline Orders).

4.4 Lack of Diligence

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

8. **Prior Discipline Orders**

8 2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the professions.

26 Based on the conditional admissions, the presumptive sanctions for the admitted conduct under the Standards is suspension To determine the applicability of the Standards, the factors listed in the theoretical framework must be considered.

The Lawyer's Mental State

27 The parties agree that Respondent's conduct in the eight counts was knowing.

Potential or Actual Injury

28. There was potential injury to the legal profession in Count Four as Respondent had to be removed from pending criminal cases There was potential injury to clients in all of the other counts

The Aggravating and Mitigating Circumstances

29 The presumptive sanction for this type of knowing infraction is a suspension

30 The following three (3) factors were considered in aggravation:

Standard 9 22(a) – Prior disciplinary offenses. Respondent has a discipline history regarding the same type of misconduct as present in the instant matter. Respondent previously received an order of informal reprimand and probation (fee arbitration), restitution and costs on December 10, 2003, in File No 03-0969 for violations of Rule 42, Ariz.R.S.Ct., specifically ERs 1 3 and 1 4.

Although diversion cases are not considered prior discipline, it is important to note that Respondent has previously received help from the State Bar, albeit in 1995 and 1996, to correct what were previously considered as minor infractions of the ethical rules These now constitute a continuing pattern of misconduct Respondent previously received an order of diversion in expunged File No 95-0795, for violation of ERs 1 2, 1 3 and 1 4; in expunged File No 95-2003, for violation of ERs 1 2, 1 3 and 1 4; and in expunged File No 96-0034, for violation of ERs 1 2, 1 3 and 1 4

Standard 9.2(c) - A pattern of misconduct There are eight separate files in the State Bar's complaint.

Standard 9 22(i) - Substantial experience in the practice of law. Respondent was admitted to practice in Arizona on October 12, 1982, and has been an attorney for 36 years

31. The following factors were considered in mitigation:

Standard 9 32(b) – Absence of a dishonest or selfish motive.

Standard 9.32(c) – Personal or emotional problems The parties attached the documentation to support this mitigating factor as Exhibit A and supplemented in the Second Amended Agreement

Standard 9.32(g) – *Character or reputation.* Had this matter proceeded to a hearing, Respondent would have presented testimony as to his competence and professionalism from Carolyn Holliday, Esq., Hon. Thomas L. Wing, and Sam Roser, Esq

Standard 9 32(l) – Remorse. As set forth in the Second Amended Agreement and clearly expressed by the Respondent at the hearing on July 19, 2007, Respondent expressed deep and genuine regret for his actions.

Proportionality Analysis of Analogous Cases

32 The Joint Memorandum in Support of Agreement for Discipline by Consent reviewed several cases These cases included, *In re Rolph, SB-06-0011 (2006)*; *In re Shaw, SB-05-0152-D (2006)*, and *In re MacDonald, SB-03-0082-D (2003)*.

33 In *In re Rolph*, SB-06-0011 (2006), a two-count case, Rolph, after being conditionally admitted to the State Bar and placed on probation as a term of his admittance, failed to comply with the requirements of the probation He also failed to cooperate with the State Bar's investigation in two disciplinary matters and failed to appear at a deposition for which a subpoena had been issued compelling his attendance. In both counts, Rolph failed to return clients' phone calls, failed to adequately consult with clients regarding the objectives of their cases, and failed to diligently pursue client matters Four aggravating factors were found (1) prior disciplinary offenses, (2) a pattern of misconduct; (3) multiple offenses, and (4) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency Three factors were found in mitigation (1) absence of a dishonest or selfish motive; (2) inexperience in the practice of law, and (3) remorse Rolph's mental state was knowing and there was actual harm as a result of the misconduct Rolph was suspended for 90 days, with probation for two years with participation in MAP and LOMAP with a practice monitor Rolph violated ERs 1 3, 1.4, 3 4(c), 8 1(b) and 8.4(d), and Rule 53(f), Ariz R.S.Ct

34 *In re Shaw*, SB-05-0152-D (2006) was a three-count case. Shaw, after a client's bankruptcy discharge, failed to transmit a reaffirmation agreement to a lender and failed to contact a credit card company as he had promised the client. This adversely affected the client's credit rating For this misconduct Shaw was placed in diversion by order of the

probable cause panelist When Shaw failed to comply with the terms of the diversion. the order of diversion was vacated and an order of probable cause was entered. In another count, a client paid Shaw to handle a bankruptcy matter Shortly thereafter, he abandoned the case, failed to return the fees paid by the client and failed to cooperate with the State Bar In the third count, Shaw failed to complete his duties as a court-appointed arbitrator and failed to cooperate with the State Bar His mental state was knowing and there was actual injury as a result of the misconduct There were four aggravating factors: (a) prior discipline, (2) multiple offenses, (3) vulnerability of victim, and (4) substantial experience in the practice of law. There were also four mitigating factors: (1) absence of dishonest or selfish motive; (2) full and free disclosure, (3) other penalties or sanction, and (4) remorse Shaw was suspended for 90 days, with two years of probation with participation in LOMAP and MAP, for violating ERs 1.2, 1 3, 1 4, 1 16, 3 2, 3 4 and 8.4(d), and Rules 53(c), (d) and (f), Ariz R.S Ct

35. *In re MacDonald*, SB-03-0082-D (2003) was a two-count case MacDonald failed to perform services requested by his client, failed to return his client's telephone calls and failed to update her on the status of her case, and falsely advised his client that he would commence work on her case in the near future In the second count, MacDonald failed to diligently pursue a client's case resulting in its dismissal for lack of prosecution. MacDonald also failed to cooperate with the State Bar. Four aggravating factors were found: (1) prior discipline; (2) pattern of misconduct; (3) multiple offenses, and (4) substantial experience in the practice of law. Five factors were found in mitigation (1) absence of dishonest or selfish motive, (2) personal or emotional problems; (3) good faith effort to rectify consequences or make restitution, (4) cooperative attitude; and (5) mental disability or chemical dependency. MacDonald's mental state was knowing There was found to be no actual harm to clients as a

result of his misconduct and minimal harm to the legal system for his failure to respond MacDonald was suspended for 30 days, with two years of probation for violating ERs 1 2, 1 3, 1 4, 3 2, 8 1(b) and 8 4(d), and Rules 51(h) and (i), Ariz R S Ct.

36 This Hearing Officer also considered several other cases *In re Mankowski*, SB 05-0002-D was a ten-count complaint. Respondent *Mankowski* repeatedly failed to communicate with his client, failed to schedule and/or attend court hearings and failed to diligently represent his client He collected fees from a client yet failed to perform any work on the case or to return the unearned monies Respondent *Mankowski* failed to attend depositions, failed to inform his clients about scheduled medical examinations, and ignored discovery requests He also failed to correct filed documents and failed to correct misstatements made to the court and opposing parties. *Mankowski* consistently failed to respond to repeated and numerous requests from the State Bar during its investigative process. Respondent *Mankowski* was suspended for six months and one day. The suspension was followed by two years of probation

37. Because there are some similarities with the Respondent's case and *Mankowski*, and because *Mankowski* was a six months and a day suspension, it is helpful to closely compare the two cases In *Mankowski* four aggravating factors were present, i.e., (1) a pattern of misconduct; (2) multiple offenses, (3) substantial experience in the practice of law, and (4) bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the disciplinary agency Respondent Forsyth's tender has three aggravating factors. In *Mankowski* there were three mitigating factors present, i.e., (1) absence of discipline; (2) absence of dishonest of selfish motives, and (3) personal or emotional problems The Respondent's tender has four mitigating factors

38 A close review of *Mankowski* shows that a much greater number of violations were present This is illustrated by comparing the actual violations in the *Mankowski* matter with the violations in the Respondent's case. The tabulation of the respective violations is noted below:

	Mankowski	Forsyth
ER 1 2	7 – violations	1 – violation
ER 1 3	8 – violations	2 – violations
ER 1 4(a) and (b)	7 – violations	6 – violations
ER 1 5	2 – violations	0
ER 1.16(d)	5 – violations	2 – violations
ER 3.2	1 – violation	0
ER 3.3(a)(1)	1 – violation	0
ER 3.4(c)	1 – violation	0
ER 4 1	1 – violation	0
ER 4.4	1 – violation	0
ER 8 1(b)	0	2 – violations
ER 8 4(c)	1 – violation	0
ER 8 4(d)	3 – violations	0
Rule 53(c)	1 – violation	0
Rule 53(d)	8 – violations	2 – violations
Rule 53(f)	8 – violations	2 – violations
Total	*55 – violations*	*17 – violations*

39. Another similar case is *In re: Johnson, SB03-1020*. *Johnson* was a fourteen count complaint. Johnson's misconduct consisted primarily of failing to act with diligence and failing to adequately communicate with his clients Johnson also failed to respond to requests for information concerning the status of clients' cases. Johnson failed to provide clients with an accounting for their fees In addition, Johnson was held in contempt for repeated violations of orders to file opening briefs and for his lack of candor in his requests for extensions. He also failed to properly respond to the State Bar's investigation of the case Respondent Johnson was suspended for six months and one day. He was ordered to serve two years of probation with conditions upon reinstatement Respondent Johnson, like Respondent

Forsyth, both had three aggravating factors present The aggravating factors in the *Johnson* were, (1) pattern of misconduct, (2) multiple offenses, and (3) prior disciplinary history. In Johnson there were five mitigating factors found[1]

40 A comparison of the respective violations between *Johnson* and the Respondent is noted below·

	Johnson	Forsyth
ER 1.2	2 – violations	1 – violation
ER 1.3	6 – violations	2 – violations
ER 1 4	12 – violations	0
ER 1 4(a)	0	4 – violations
ER 1.4(b)	0	2 – violations
ER 1 15(b)	3 – violations	0
ER 1.16(d)	1 – violation	2 – violations
ER 8.1	2 – violations	0
ER 8.1(b)	0	2 – violations
ER8 4(k)&(d)	1 – violation	0
Rule 51(h)	4 – violations	0
Rule 53(d)	0	2 – violations
Rule 53(f)	0	2 – violations
Total	*31 – violations*	*17 – violations*

Discussion and Recommendation

41 After considered review, this officer concludes that the Respondent's conduct is more serious than the conduct found in *In re Rolph, SB-06-0011 (2006)*; *In re Shaw, SB-05-0152-D (2006)*, and *In re MacDonald, SB-03-0082-D (2003)*. On the other hand, the level of misconduct does not rise to that found *In re Mankowski, SB 05-0002D* and *In re. Johnson, SB-03-1020.* The tendered six-month suspension is appropriate

[1] In *Johnson,* the Tender of Admission/Joint Memorandum stipulated to six mitigating factors However, the Disciplinary Commission disallowed one of the mitigating factors

42 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). 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)

43 Respondent's personal situation, as noted in the initial tender and supplemented in the Amended Agreement, attests to a constellation of unfortunate events that significantly lessened Respondent's ability to handle a busy law practice Significantly, as noted in the Amended Agreement, Respondent is not currently practicing law This serves to protect the public while this matter is proceeding

44. 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).

45 As noted above, the presumptive sanction under *Standards* 4 42 and 8 2 is suspension

46. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer makes the following recommendation:

1 That Respondent be suspended for six months,

2 That Respondent participate in fee arbitration with the complainants from Counts One, Five, and Seven;

3 That Respondent be placed on probation for two years after reinstatement The two-year period of probation shall commence upon the date of the signing

of the probation contract by Respondent The two-year period of probation should have the following terms.

a) Respondent shall undergo a Law Office Management Assistance Program (LOMAP) audit, and

b) Respondent shall comply with all of the recommendations made in the LOMAP audit,

4 That the Respondent is to enter into a two year Member Assistance Program (MAP) contract prior to being reinstated,

5 That the Respondent is to obtain comprehensive evaluation by Dr. Sucher or his designee, prior to reinstatement, and

6 That Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 22nd day of October, 2007.

Neal C Taylor /er

Neal C. Taylor
Hearing Officer 8I

Original filed with the Disciplinary Clerk
this 22 day of October, 2007.

Copy of the foregoing mailed
this 23 day of October, 2007, to:

Nancy A. Greenlee
Respondent's Counsel
821 E. Fern Dr. North
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Copy of the foregoing hand-delivered
this 23rd day of October, 2007, to:

Shauna R. Miller
Senior Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: [signature]