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4 Hearing Officer 7M

FILED

MAY 14 2008

HEARING OFFICER OF THE
SUPREME COURT OF ARIZ
BY M. M. M.

5
6 **BEFORE A HEARING OFFICER**
7 **OF THE SUPREME COURT OF ARIZONA**

8 **IN THE MATTER OF A SUSPENDED**
9 **MEMBER OF THE STATE BAR OF**
10 **ARIZONA,**

11 **ERIC M. CASPER,**
12 **Bar No. 009947**

13 Respondent.

No. 07-0860

HEARING OFFICER'S REPORT

14
15 Respondent, Eric M. Casper ("Respondent" or "Casper") has defaulted
16 and failed to answer the complaint in this matter. Default has been entered,
17 and the matters alleged in the complaint are thereby deemed admitted. Upon
18 the State Bar's request, a hearing was scheduled to consider both aggravating
19 and mitigating factors relevant to the imposition of discipline against Casper.
20 Casper appeared and testified at the hearing conducted on February 25, 2008.

21 Based upon the matters deemed admitted in the complaint, and the
22 evidence received at the February 25, 2008, the Hearing Officer recommends
23 that Casper be suspended for an additional period of six months and one day,
24 and that he be required to pay restitution in the amount of \$3,000 to his former
25 client, Sandra Dawson.

1 **I. Procedural History**

2 The probable cause order in this matters was issued against Casper on
3 October 20, 2007. The complaint was filed on November 29, 2007, and a copy
4 was mailed by certified mail to Casper at his addresses of record on April 3,
5 2006. Casper failed to file an answer, and on January 4, 2008, a notice of
6 default was filed and mailed to Casper at the same addresses. Casper still did
7 not answer, and on January 31, 2008, default was entered against Casper.

8 On February 4, 2008, the State Bar requested a hearing on aggravation
9 and mitigation. This motion was granted on February 5, 2008, and the hearing
10 was scheduled for February 25, 2008 ("the Hearing"). Casper appeared and
11 represented himself during the Hearing. The State Bar was represented at the
12 Hearing by its attorney, Edward W. Parker. The State Bar presented telephonic
13 testimony from Casper's former client, Sandra Dawson ("Dawson"), and cross-
14 examined Casper. Casper testified on his own behalf.

15 **II. Matters Deemed Admitted**

16 Because Casper did not file an answer in this matter, and default was
17 entered against him, the following matters contained in the complaint are
18 deemed admitted pursuant to Rule 57(d), Ariz. R. S. Ct.

19 1. Casper was first licensed to practice law in the State of Arizona on
20 June 4, 1985.

21 2 On February 9, 2007, the Supreme Court of Arizona entered an
22 Order suspending Casper from the practice of law for a period of six months
23 and one day, in case #SB-06-0176-D, State Bar file #05-2180.1

24 1 **The Hearing Officer also served as the hearing officer in this prior disciplinary**
25 **proceeding against Casper, in which Casper similarly allowed a default judgment to be**

1 3. Casper has remained on suspension since that date.

2 4. In 2003, Sandra Dawson ("Dawson") retained Casper for advice
3 concerning bankruptcy

4 5. Based on Casper's advice that a filing under Bankruptcy Code
5 Chapter 13 was appropriate for her needs, Dawson paid Casper a fee of \$3,000
6 plus a filing fee of \$185.

7 6. On or about July 11, 2003, Casper filed a Chapter 13 Plan on
8 Dawson's behalf in the United States Bankruptcy Court for the District of
9 Arizona in Petition #2:03-bk- 11342-RTBP.

10 7 Pursuant to Paragraph 1 of the Plan, Dawson agreed to pay the
11 Trustee the sum of \$873 per month for 36 months, beginning on August 11,
12 2003, for distribution to creditors under the Plan.

13 8. On September 11, 2003, the U S Internal Revenue Service
14 ("IRS") filed an objection to confirmation of the Plan.

15 9. Casper failed to file a response to the objection, to which Dawson
16 was entitled based on the advice Respondent had given her

17 10 According to Dawson, Casper never responded to letters from the
18 Court or the Trustee concerning resolution of the IRS's objection.

19 11. The Trustee in Bankruptcy filed a Motion to Dismiss on February
20 11, 2005, claiming: "Debtor is unable to provide feasibility of this case and
21 provide sufficient funds to satisfy her Chapter 7 Reconciliation or resolve the
22 objection with the Internal Revenue Service "

23
24 **entered against himself. Although the complaint alleged that the suspension was**
25 **effective February 9, 2006, Bar Counsel clarified on the record during the Hearing that**
 the correct date was February 9, 2007.

1 12. Casper failed to file a response to the motion, or to comply with
2 the Court's requirements, or to resolve the issues presented in the Trustee's
3 Motion to Dismiss.

4 13. Dawson's bankruptcy case was dismissed on April 12, 2005,
5 subject to reinstatement upon certain circumstances.

6 14. Shortly after the case was dismissed, Casper assured Dawson that
7 he would obtain reinstatement of the Petition within one or two weeks.

8 15. Based on Casper's representation, Dawson continued to make her
9 monthly payments to the Trustee as called for in the Plan, for a total payment
10 of \$31,428 00, including her tax obligations.

11 16. Casper failed to file any pleading to have Dawson's case
12 reinstated.

13 17. Casper failed to inform Dawson that the case was not reinstated

14 18 The IRS issued a levy against Dawson's account with the Trustee
15 on February 16, 2006.

16 19 According to the Final Report and Account, the Trustee disbursed
17 the sum of \$28,372.95 to the IRS, plus \$2,057 11 to the Office of the Arizona
18 Attorney General, and \$2,052.05 to himself, leaving no funds to pay her other
19 creditors.

20 20 As a result of Casper's conduct, Dawson did not receive the
21 benefits of the bankruptcy filing as she had expected and bargained for, leaving
22 her at the mercy of her creditors

23 21 By letter dated June 12, 2007, Bar Counsel notified Casper of
24 Dawson's inquiry and requested a response within 20 days, the letter further
25 informed Respondent that he has a duty pursuant to Ariz R.Sup Ct , Rule 53(d)

1 & (f) to cooperate with disciplinary investigations.

2 22 Casper failed to respond to the letter from the Bar.

3 23. By letter to Casper dated August 29, 2007, Bar Counsel again
4 notified Casper of Dawson's inquiry and requested a response within 10 days;
5 the letter further informed Casper again of his duty pursuant to Ariz R Sup.Ct ,
6 Rule 53(d) & (f) to cooperate with disciplinary investigations.

7 24. Casper continued to fail to respond to the Bar's requests for
8 information.

9 25 Casper's conduct as described above violated Rule 42,
10 Ariz R.Sup.Ct , specifically ER's 1 1, 1.2, 1 3, 1.4, 1.5, 1.15, 3.2, and 8 4(d),
11 and Rule 53(d) & (f).

12 **III. CASPER'S PRIOR DISCIPLINE**

13 26. As discussed in paragraph 2 above, Casper was previously
14 suspended from the practice of law for six months and one day on February 9,
15 2007 in case #SB-06-0176-D, State Bar file #05-2180

16 27 This prior suspension in turn related to Casper's failure to comply
17 with the terms of his probation entered in connection with an order of informal
18 reprimand entered against Casper on September 6, 2005 in another disciplinary
19 action.

20 **IV. SANCTION**

21 28. In determining the appropriate sanction, Arizona generally follows
22 the American Bar Association Standards for Imposing Lawyer Discipline
23 (1992) ("ABA Standards"). *In re Van Doo*, 214 Ariz. 300, 303, ¶ 11, 152 P 3d
24 1183, 1186 (2007)

25 29 The ABA Standards list the following factors to be considered in

1 imposing the appropriate sanction.

2 a the duty violated,

3 b the lawyer's mental state;

4 c. the actual or potential injury caused by the lawyer's
5 misconduct; and
6

7 d the existence of aggravating or mitigating circumstances

8 ABA Standard 3.0 *Van Dox* at ¶ 11 The Hearing Officer has considered
9 all of the required factors
10

11 30 The theoretical framework analysis contained in the ABA
12 Standards states that where there are multiple acts of misconduct, the sanction
13 should be based upon the most serious misconduct, with the other acts being
14 considered as aggravating factors *See also In re Moak*, 205 Ariz 351, 353, ¶
15 9, 71 P 3d 343, 345 (2003).

16 **Duties Violated**

17 31. The Hearing Officer believes that Casper's most serious violations
18 have to do with diligence (ER 1.3), communication (ER 1.4) and expediting
19 litigation (ER 3.2).

20 **Casper's Mental State**

21 32 Casper's mental state becomes important because the ABA
22 Standards generally provide more severe punishment for intentional or
23 knowing conduct, than for negligent conduct.

24 33. The ABA standards define "intent" as the "conscious objective or
25

1 purpose to accomplish a particular result” The ABA standards define
2 “knowledge” as the “conscious awareness of the nature or attendant
3 circumstances of the conduct but without the conscious objective or purpose to
4 accomplish a particular result.”

5 34. The complaint did not allege whether Casper’s conduct was
6 knowing or intentional. Based on the testimony taken during the Hearing, the
7 Hearing Officer does not find that the State Bar has established by clear and
8 convincing evidence that Casper acted intentionally. Rather, the evidence
9 merely establishes that Casper acted knowingly in failing to work on Dawson’s
10 bankruptcy, or to communicate with Dawson.

11 **Actual or Potential Injury to Dawson**

12 35 Most of the controversy at the Hearing had to do with whether
13 Casper’s failure to actively pursue Dawson’s bankruptcy, and his failure to
14 communicate with her caused actual injury, or only potential injury

15 36. The ABA Standards define “injury” in relevant part as “harm to a
16 client . which results from a lawyer’s misconduct.”

17 37 The ABA Standards define “potential injury” as “harm to a client
18 . that is reasonably foreseeable at the time of the lawyer’s misconduct, and
19 which, but for some intervening factor or event, would probably have resulted
20 from the lawyer’s misconduct ”

21 38. The disputes presented at the Hearing focused primarily on
22 whether Dawson would have remained liable for certain federal tax liens
23 regardless of whether or not Casper had diligently pursued Dawson’s
24 bankruptcy, and adequately communicated with her, and whether it was still
25 possible for Dawson to reinstate her bankruptcy through new counsel, and still

1 obtain a discharge.

2 39 The Hearing Officer finds that the State Bar did not establish, by
3 clear and convincing evidence, that Casper's misconduct caused actual injury,
4 as opposed to potential injury.

5 40. The Hearing Officer finds that the State Bar has not established by
6 clear and convincing evidence that Dawson could not still retain new counsel
7 to reinstate her bankruptcy, and obtain a discharge²

8 41. The Hearing Officer also notes that although there are questions
9 about whether or not Dawson was legally eligible for a discharge, in light of
10 the trustee's objection to her plan of reorganization, to the extent that she was
11 not entitled to a discharge, then the moneys that she paid to the trustee, which
12 were ultimately levied upon by the IRS, would have been subject to being
13 levied upon by the IRS in any event.

14 42 The Hearing Officer finds that Casper's misconduct caused only
15 "potential injury."

16 Presumptive Sanction

17 43. Standard 4.42 provides that suspension is generally appropriate if
18 an attorney knows that he or she is not performing the services requested by the
19 client, or engages in a pattern of neglect and causes injury or potential injury to
20 a client.

21 44. Standard 4.41 provides that disbarment is appropriate if a lawyer
22 abandons the practice and causes serious or potentially serious injury to a
23 client, knowingly fails to perform services for a client and causes serious or

24 ² During the Hearing, counsel for the State Bar agreed to notify Dawson that this
25 might still be possible. Hearing Transcript at 87:7 – 87:23.

1 potentially serious injury to the client, or engages in a pattern of neglect with
2 respect to client matters and causes serious or potentially serious injury to a
3 client.

4 45 Casper testified that he voluntarily stopped practicing law in
5 September of 2004 [HT³ 62:5 – 62:7] He testified, however, that he
6 attempted to transition his clients to other attorneys. [HT 61:1 – 61:15]
7 Although Casper was not successful in transitioning Dawson's file to another
8 attorney, it does not appear that Casper totally abandoned the practice of law

9 46. As discussed above, the Hearing Officer has already found that
10 Casper's misconduct caused only "potential injury," and not actual "injury."
11 The next question is whether the "potential injury" he caused was "serious." If
12 the "potential injury" is serious, then the presumptive sanction is disbarment
13 rather than suspension

14 47. The Hearing Officer finds that the State Bar did not establish by
15 clear and convincing evidence that Dawson's bankruptcy could not be
16 reinstated. As such, the evidence only supports a finding that Dawson's
17 bankruptcy was dismissed, but could be reinstated by new counsel. This
18 suggests that the potential injury was not "serious "

19 48 The Hearing Officer finds that the presumptive sanction is
20 therefore a suspension.

21 Aggravating and/or Mitigating Circumstances

22 49. The following aggravating circumstances are present in this case
23 9 22(a) prior disciplinary offenses,
24

25 ³ "HT" refers to the Hearing Transcript dated February 25, 2008.

1 9 22(c) a pattern of misconduct;

2 9 22(d) multiple offenses,

3 9 22(e) bad faith obstruction of the disciplinary proceedings by
4 intentionally failing to comply with rules or orders of the disciplinary
5 agency,

6 9 22(i) substantial experience in the practice of law;⁴

7 9.22(j) indifference to making restitution. Although the State Bar
8 has argued that Casper has shown indifference to making restitution to
9 Dawson, Casper freely admitted during the Hearing that the \$3,000 in
10 fees Dawson had paid him should be repaid, and that he had not done so
11 because he did not wish to pay this amount without an order or
12 settlement determining the amount of such restitution [HT 54:4 – 59:5]
13 The Hearing Officer finds that although Casper had not refunded
14 Dawson's fees, he was not totally indifferent to restitution, in that he
15 willingly volunteered that he was prepared to refund the \$3,000 with
appropriate safeguards.

16 50 The following aggravating circumstances are present in this case:

17 9 32(c) personal or emotional problems. Casper testified that he
18 had problems dealing with various issues, and this caused him to
19 voluntarily quit practicing law. [HT 74:8 – 74:23] Casper testified that

20
21 ⁴ It is not clear that substantial experience should be an aggravating factor in this
22 case because failing to work on a case and failing to return calls from a client do not
23 seem to be the type of misconduct upon which experience would have any effect. *In re*
24 *Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994). The Hearing Officer cannot
25 say that because of experience, it is more likely that Casper "would have known
better" than to engage in such misconduct. *Id.* To the extent experience can be
considered an aggravating factor, it is offset by Casper's relatively small number of
prior disciplinary complaints. *Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994),
modified in part or other grounds, 181 Ariz. 307, 890 P.2d 602 (1994).

1 part of his coping mechanism in dealing with these personal and
2 emotional problems was to ignore communications from the State Bar.
3 [HT65 1 – 65:13].

4 9.32(d) timely good faith effort to make restitution or to rectify
5 consequences of misconduct. The Hearing officer has already discussed
6 restitution issues above. In addition to admitting he should refund the
7 \$3,000 of attorneys' fees Dawson paid to him, Casper agreed to provide
8 an affidavit admitting that he allowed the bankruptcy to be dismissed
9 and led Dawson to believe he was moving for reinstatement in order to
10 assist Dawson in reinstating the bankruptcy. [HT 89:10 – 90:5].

11 9 32(l) remorse. Casper expressed remorse, and admitted that he
12 “dropped the ball” in representing Dawson. [HT 62:8 – 62:17].

13 51. The Hearing Officer finds that although the aggravating factors
14 slightly outweigh the mitigating factors, the aggravating factors are not
15 significant enough to change the presumptive sanction from a suspension.

16 52 Although Casper testified he was willing to stipulate to
17 disbarment, because he has no intention of ever practicing law again [HT 59.6
18 – 59:23], the Hearing Officer does not find that this most severe form of
19 sanction is necessary in order to protect the public, the profession, and the
20 administration of justice *See In re Alcorn*, 202 Ariz. 62, 74, P41, 41 P 3d 600,
21 612 (2002) (“the objective of disciplinary proceedings is to protect the public,
22 the profession and the administration of justice and not to punish the
23 offender”). The Hearing Officer finds that a lengthy suspension, with its
24 attendant requirement of establishing rehabilitation before being readmitted, is
25 sufficient to protect the public, the profession and the administration of justice.

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1 Consideration of the sanctions imposed in similar cases is
2 necessary to preserve some degree of proportionality, ensure
3 that the sanction fits the offense, and avoid discipline by whim
4 or caprice. . . . Proportionality review however, is an imperfect
5 process. . . . Normally the fact that one person is punished more
6 severely than another involved in the same misconduct would
7 not necessarily lead to a modification of a disciplinary sanction
8 Both the State Bar in its capacity as prosecutor and the
9 Disciplinary Commission in its quasi-judicial capacity have
10 broad discretion in seeking discipline and in recommending
11 sanctions

12 *In re Dean*, 212 Ariz 221, 225, ¶ 24, 129 P.3d 943, 947 (2006)

13 57. Because perfect uniformity cannot be achieved, the Arizona
14 Supreme Court has long recognized that the discipline in each situation must be
15 tailored for the individual case. *In re Piatt*, 191 Ariz 24, 31, 951 P.2d 889,
16 896 n.5 (1997) The Hearing Officer has evaluated the recommended
17 suspension of six months and one day to make sure that it is adequately tailored
18 for the individual case.

19 58 Suspensions of six months and one day or less have been imposed
20 in a number of recent cases involving attorneys who have failed to diligently
21 perform services for clients, communicate with clients, and who have failed to
22 cooperate with the State Bar. Representative cases include:

- 23 • *In re Heath O. Dooley*, DC Nos. 05-1377 et al., SB-
24 07-0051-D (2007) 9six month suspension where
25 Respondent engaged in a pattern of neglect in
failing to diligently work on cases and failing to
communicate with clients, and then did not
cooperate with the State Bar),
- *In re Barry G. Nelson*, DC Nos. 05-0782, et al., SB-

07-0102-D (2007) (six month and one day suspension where Respondent repeatedly failed to perform work for clients, failed to communicate with clients, failed to refund unearned fees, and violated trust account rules);

- In re Jason J. Bryn, DC Nos. 05-0782, et al., SB-07-0102-D (2005) (90 day suspension where Respondent abandoned clients and engaged in a pattern of neglect. Respondent failed to cooperate and respond to the State Bar's investigation and failed to produce his trust account records despite being served with a subpoena duces tecum).
- In re Bierman, DC No. 06-0086, SB-07-0107 (2007) (90 day suspension where Respondent failed to diligently pursue client's case, allowed case to be dismissed, failed to communicate with client, and practiced law while suspended).

V. RESTITUTION

59. As discussed on the record during the Hearing, Casper should be ordered to refund the \$3,000 of attorneys' fees paid to Casper as restitution in this case

60 Although Dawson also paid \$185 for a filing fee, this amount would have been paid to file the bankruptcy in any event, and the State Bar has not established by clear and convincing evidence that Dawson could not reinstate her bankruptcy without filing an additional filing fee

61. Although the State bar also sought restitution of the \$31,428.00 that Dawson paid to the bankruptcy trustee, the majority of which was ultimately levied upon by the IRS, the Hearing Officer finds that the State Bar has not established by clear and convincing evidence that these damages were caused by Casper's misconduct. These amounts would have been paid

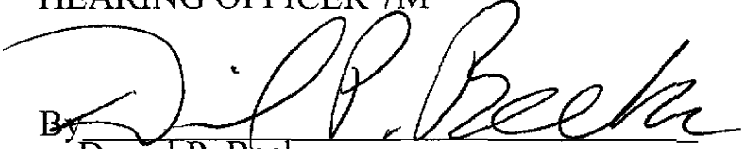
1 to the bankruptcy trustee (and then to other creditors including the IRS) had
2 Dawson's bankruptcy not been dismissed, and had her plan been confirmed.
3 Had the bankruptcy plan not been confirmable, these amounts would have been
4 subject to being levied upon by the IRS in any event.

5 **VI. CONCLUSION**

6 For the reasons discussed above, the Hearing Officer recommends that
7 Casper be suspended for six months and one day, that Casper be ordered to pay
8 restitution to Dawson in the amount of \$3,000, and that Casper be ordered to
9 pay the costs of these proceeding. The Hearing Officer recommends that if
10 Casper ever applies to be reinstated, the terms of any probation be determined
11 at that time.
12

13
14 DATED May 14, 2008.

15 HEARING OFFICER 7M

16
17 By 

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22 ORIGINAL of the foregoing filed
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