

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY W. J. [Signature]

Cesar M. Rojas et al, Yuma County Justice Court, Case Number J1401 CV200400975, and to represent them in another suit, Cesar M Rojas v Kishore Jogia, et al., Yuma County Superior Court, Case Number S1400 CV200400682. These actions were consolidated by agreement of the parties into the Superior Court case (hereinafter “civil action”).

4. The central issue in the civil action concerned a motel property owned by the Jogias. Mr Rojas claimed he had entered into a purchase agreement for the motel, and Mr Jogia alleged Mr. Rojas was merely renting and was a holdover tenant
- 5 To assist him in drafting an answer to the Complaint filed by Mr. Rojas against the Jogias, Respondent gave a copy of the Complaint to the Jogias and asked them to provide him with their comments about the allegations of the Complaint.
- 6 On the copy of the Complaint, the Jogias wrote suggestions including the words “deny”, “admit” or “allege” on each allegation and then gave the copy with their written suggested responses back to the Respondent
7. Respondent gave the copy of the Complaint with the Jogias suggested responses to his paralegal, Lynn Ballard, and asked her to draft an Answer
8. The Answer drafted by Respondent and his paralegal included about 20 items with responses different than those suggested by the Jogias.
 - (a) The Jogias denied paragraphs 1, 9, 52, 53, and 54, but Respondent admitted them in the answer
 - (b) The Jogias stated “allege” next to 15 other paragraphs, but Respondent admitted them in the answer.

- 9 In the answer drafted by Respondent and his paralegal, Respondent admitted at least the following, contrary to the instructions from the Jogias and to their prejudice.
- (a) Paragraph 27: "in reliance upon the representations of Defendant Jogia, . . and unaware of Defendant's fraudulent conduct..."
- (b) Paragraph 38: "Due to Defendant Jogias continued unlawful behavior, . . ."
- (c) Paragraph 40: "The correspondence from Mr Cook on Defendant Jogia's behalf. . fails to provide any basis for Defendant Jogia's repossession of the Property, i e , said notice is, inter-alia, evidence of Defendant Jogia's unlawful attempt to regain possession of the Property, all in violation of public policy, including but not limited to the provisions set forth in A R S Section 33-741, et seq "
- (d) Paragraph 50: "This action arises out of a contract..... and Plaintiff is entitled to recover his reasonable attorney's fees herein. . In the event of a default judgment, reasonable attorney's fees are 5000 and 00/100 Dollars (\$5,000 00).
- (e) Paragraph 53 "Defendant Jogia has failed to fulfill his requirements concerning the agreements reached by the applicable Parties concerning the sale of the Property and, specifically, Defendant Jogia has, inter alia, intentionally and maliciously interfered with plaintiff Cesar's quiet use and ownership of the Property.; And defendant Jogia intentionally and maliciously interfered with Plaintiffs attempt to obtain a loan . , and Defendant Jogia has refused to transfer title. .. refused to remove all relevant liens and encumbrances on the property..... Defendant Jogia further intentionally and maliciously interfered with Plaintiff's rights to the property by attempting to transfer title to the property to Defendant Kagaj Group LLC."

(f) Paragraph 55: "Plaintiff is entitled to recover the reasonable attorney's fees incurred herein. . ."

10. Respondent failed to adequately supervise his paralegal in the drafting of the Answer
11. Without properly reviewing the Answer first, Respondent signed the Answer and had it filed on September 22, 2004.
12. If this matter had proceeded to hearing, Respondent would affirmatively assert that Mr. Jogia reviewed and initialed the Answer before it was filed. The State Bar asserts that Mr. Jogia would deny that he did so.
13. The relationship between Respondent and the Jogias broke down shortly after he was retained. In a letter dated September 17, 2004, Respondent informed the Jogias that his representation would end after a September 24, 2004, hearing concerning the motel property. Consistent with this expressed intention, Respondent moved to withdraw from the case on December 2, 2004, and the motion was granted on January 3, 2005.
14. On September 19, 2005, over eight months after Respondent had withdrawn from representing the Jogias, Mr. Rojas filed a Motion for Summary Judgment against the Jogias based, in part, on the Jogia's admissions in the answer. The Jogias failed to respond to the summary judgment motion and Judgment was entered against them.
15. On or after October 2005, the Jogias moved to set aside the Judgment, and eventually retained counsel. The Honorable Tom C. Cole held a hearing on the motion, and on February 2, 2006, the Jogias stipulated, with counsel present, to the denial of their motion to set aside.
16. If this matter proceeded to hearing, Respondent would testify that the deficiencies in the answer that he filed on behalf of the Jogias did not come to his attention until months

after the Jogias stipulated to the denial of their Motion to Set Aside and that he did not have knowledge of his mistakes in the answer at a time when he could have corrected the answer and mitigated the consequences. For purposes of the consent agreement, the State Bar takes no position on this issue.

17. Respondent has returned the \$5,000 flat fee paid to him by the Jogias to Angela Jopia's divorce attorney, Mr. Josh Carpenter.
18. During the hearing on the Motion to Set Aside, Mr Jopia made certain representations under oath concerning his previous testimony, made while Mr. Jopia was represented by Respondent. In short, Mr. Jopia testified in February 2006 that in September 2004, while represented by Respondent, Respondent had instructed Mr. Jopia to lie to the Court about his net worth. Judge Cole informed Respondent on February 2, 2006, of Mr. Jopia's testimony and allegations concerning Respondent.
19. Respondent asserts that the statements made by Mr. Jopia were false. For purposes of the consent agreement, the State Bar does not contest Respondent's assertion.
20. In a letter dated February 16, 2006, and mailed to Robert Cuevas with the Department of Homeland Security, Respondent stated that he had good reason to believe that the Jogias were committing criminal conduct from North Carolina to Arizona. Respondent referred to the Jogias as two non-US citizens. He included their last known address and six telephone numbers for them, and offered to provide the Jogias' Social Security numbers.
21. Respondent had referred the Jogias to Mr. Cuevas, regarding the Jogias' allegation (made in the context of the September 2004 civil action) that Mr. Rojas was housing undocumented persons at the Jogias motel property. By introducing the Jogias to Mr

Cuevas, Respondent felt that he vouched for their credibility. After learning about Mr. Jogia's testimony in February 2006 and in speaking with Mr. Rojas counsel in the underlying civil action, Respondent believed that Mr. Jogias may have set up sham business entities and Respondent felt that he could not remain silent as to the Jogia's credibility/honesty. Respondent wrote the letter to Mr. Cuevas because he believed the Jogias were engaged in criminal conduct and because he wanted Mr. Cuevas to proceed with full awareness of this possibility.

- 22 In a letter dated February 17, 2006, and mailed to Mr Jon Smith, Yuma County Attorney, Respondent stated that the Jogias had committed perjury in the Superior Court of Yuma County Respondent requested that the Jogias be investigated, and prosecuted, for lying under oath and that deportation proceedings be commenced immediately against them, calling the Jogias felonious non-US citizens
- 23 The Yuma County Attorney's Office is the enforcing agency that could have brought charges either against Mr Jogia or Respondent concerning the allegations of perjury.
24. Respondent wrote to the county attorney to clarify that he did NOT suborn perjury and to express his opinion that Mr. Jogia committed perjury when he testified that Respondent had instructed Mr. Jogia to lie under oath.
- 25 Neither the Yuma County Attorney's Office nor the Department of Homeland Security initiated actions against either the Jogias or Respondent as a result of Respondent's letters

CONCLUSIONS OF LAW

26. The Hearing Officer finds that Respondent violated Rule 42, Ariz.R Sup.Ct., specifically ERs 1.1 and 5.3(a), when he filed the answer on behalf of the Jogias. The Hearing

Officer further finds that, as to the letter to the Yuma County Attorney, Jon Smith, Respondent violated Rule 41(g) and Rule 42, Ariz.R.Sup.Ct., specifically ER 1 6(a)

- 27 Based upon information received by the State Bar after the Complaint was filed in this matter, the State Bar agreed to dismiss allegations that Respondent's conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.2, 1.3, 1.4, 1.5, 1.6, 1.9(c) and 8.4(d) and Rule 41(g).¹

ABA STANDARDS

28. ABA *Standard* 3.0 provides that four criteria should be considered. (1) the duty violated, (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating and mitigating factors.

The Duty Violated

29. The Hearing Officer finds that Respondent's conduct violated *Standards* 4.23, 4.53 and 7.0.
30. *Standard* 4.23 applies to the violation of ER 1.6 and provides that reprimand (censure in Arizona) is generally appropriate when a lawyer negligently reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
31. *Standard* 4.53 applies to violations of ER 1.1 and provides that reprimand (censure in Arizona) is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client, or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client

¹ See Tender of Admissions pages 11 and 12

32. *Standard 7.3* applies to violations of ER 5.3 and provides that reprimand (censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.
33. There are no ABA *Standards* specifically applicable to violations of Rule 41(g), Ariz.R.Sup Ct.

The Duty Violated

34. Respondent's conduct in the preparation, with the help of a non-lawyer staff, of an answer that contained many assertions and admissions that did not adequately or accurately represent his client's position in the matter constitutes a violation of the ERs set forth above.
35. Further, after his representation of the Jogias ended, Respondent wrote a letter to the Yuma County District Attorney, Jon Smith, in which he improperly revealed information related to his past representation of the Jogia's and urged Mr. Smith to take action against his former clients. This conduct is in violation of the ERs set forth above.
36. In sum, the Respondent's conduct, taken as a whole, violated his duties to his clients and to the profession.

The Lawyer's Mental State

37. The parties submit, and the Hearing Officer has no evidence to the contrary, that Respondent was negligent in not realizing that errors had been made in the Answer he filed, and he was negligent in determining whether he could properly reveal information concerning his former clients to third parties. Respondent learned from third parties after termination of his representation of the Jogia's, that his former client had accused

Respondent of suborning perjury, and was concerned about his own implication in perjury charges. The parties further submit that Respondent acted negligently when he divulged confidential client information and acted unprofessionally in his letter to Mr. Smith concerning his former clients. Based upon the information presented to the Hearing Officer, the Hearing Officer must conclude that the attorney's mental state was negligent.

Actual or Potential Damages

38. The Parties submit that Respondent's conduct caused potential and actual injury to his clients and the profession. The parties submit that Respondent's clients, Jogias, had summary judgment entered against them based in part on the Answer drafted by Respondent, and had to participate in additional proceedings regarding the motion to set aside the Judgment
- 39 The Parties submit that the harm caused to the Jogias by Respondent's conduct was mitigated by the Jogias own conduct after the representation ended Respondent's representation of the Jogias ended shortly after the Answer was filed and before the summary judgment motion was filed. The Jogias failed to file a response to the summary judgment motion or take appropriate timely action, and that summary judgment was entered against them. Later, while represented by other counsel, the Jogias stipulated to the Court's denial of the motion to set aside the summary judgment. Therefore, the Jogias actions after Respondent's representation had ended, contributed to the results in the underlying civil action.

40. Respondent submits that he did not know of the mistakes in the Answer he filed at a time when he could have mitigated the consequences of those mistakes. Respondent also has returned the entire fee to his clients.
41. The Parties submit that no actual harm was caused to the Jogias as a result of the letter to the Yuma County Attorney, Mr. Jon Smith. There is agreement by the Parties that Respondent's conduct in sending the letter to the Yuma County Attorney exposed his clients to potential harm. They further agree that Respondent's letter contained unprofessional language and was sent for unprofessional reasons, which caused potential, if not actual, harm to the profession. The public reasonably relies on lawyers to act in a professional manner and to maintain the lawyer's client's confidences and there is agreement that Respondent's conduct did not uphold either of these ideals and caused damage to the profession in general.

Aggravating and Mitigating Factors

42. *Standard 9.2* sets forth the aggravating factors to be considered, and *Standard 9.3* sets forth the mitigating factors that can be considered.

Aggravating Factors

43. The Hearing Officer finds the following aggravating factors:

(a) Prior Disciplinary Offenses. Respondent received an Order of Informal Reprimand in SB File No. 04-0713, filed February 10, 2006.

(c) Pattern of Misconduct. Respondent has exhibited a pattern of unprofessional conduct when dealing with others. In addition to the current matter, Respondent exhibited a similar pattern of behavior in State Bar File No. 04-713, in which he received an Informal Reprimand. In File No. 04-713, among other unrelated misconduct,

Respondent verbally threatened his client and her former boyfriend because he believed that they had failed to pay him in full as promised. In that case, as in this case, Respondent acted unprofessionally.

(d) Multiple Offenses. Respondent violated several different ethical rules by his conduct and at different periods of time in the current disciplinary matter.

(e) Substantial Experience in the Practice of Law. Respondent was admitted to the practice of law in Arizona on September 26, 1970. He has over 37 years of experience as a lawyer in Arizona.

Mitigating Factors

44. The Hearing Officer finds the following mitigating factors.

(a) Personal or emotional problems. The Parties stipulated that the Respondent, at various time periods pertinent to this matter, battled severe flare-ups of shingles. Shingles is an outbreak of rash or blisters on the skin that is caused by the same virus that causes chickenpox. Respondent's symptoms included fluid-filled blisters that were extremely painful. Respondent also has a neurological condition called Bilateral Trigeminal Neuralgia/Tic Doloceaux, which causes severe, disabling left and right facial pain. In February 2006, Respondent was hospitalized for a hernia repair and during this time was experiencing a flare-up of shingles, pain from his hernia surgery, and was highly medicated. It was during this time frame that he wrote the two letters to Mr. Cuevas and Mr. Smith.

(b) Timely good-faith effort to make restitution or to rectify consequences of misconduct. Respondent has returned his entire legal fee to the clients.

(c) Full and free disclosure to disciplinary board or cooperative attitude towards proceedings. Respondent has cooperated fully in this matter, and been forthright in his dealings with the State Bar.

(d) Good character or reputation Respondent contends that he has an excellent reputation for good character and a long history of serving his community. Respondent submitted a copy of his curriculum vitae and letters of support from other members of the legal community at the hearing on the agreement.

(e) Remorse. Respondent regrets the oversight relating to the answer he filed as well as some of the language he used in his letter to Mr. Smith Respondent did testify concerning his remorse, and his remorse appeared to the Hearing Officer to be genuine

PROPORTIONALITY

45. The Supreme Court has held that proportionality is one of the goals of discipline, and in order to achieve this consistency when imposing discipline, the discipline in each case must be tailored to the individual facts of the case, and yet concurrent with sanctions imposed in other similar cases *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983)
46. In *In re Banta*, SB 05-0003-D (2005), Banta was censured and placed on probation for one year, including a MAP assessment, resulting from a three count Complaint. Banta violated Rule 42, Ariz.R.Sup.Ct , ERs 1.15(b) and (c) and Rule 42(g), Ariz.R.Sup.Ct. in Count One; Rule 41(c) and (g) in Count Two; and Rule 41(c) and (g) and ERs 3.5 (c), 4.4 and 8.4(d) in Count Three In Count One, Banta failed to take appropriate steps to resolve a dispute with a physician lien-holder in a personal injury matter and referred to the physician as a “fucking asshole ” In Count Two, Banta, unhappy with a ruling in a

forcible detainer action, told the Clerk's staff at the Glendale Justice Court that some non-attorney pro tem justices of the peace "are fucking lousy" In Count Three, Banta, during a pretrial conference, called his opposing counsel a "liar" and accused him of unethical conduct. During a later hearing, Banta called the Court's ruling "crazy" and called the judge names. Finally, during a deposition, Banta told opposing counsel to "go perform an unnatural sex act on himself" One aggravating factor was found substantial experience in the practice of law. Two mitigating factors were found: no prior disciplinary history and absence of a dishonest or selfish motive.

47 The instant case is similar to Banta in that Respondent acted unprofessionally towards others. While Banta involved more egregious instances of unprofessional conduct than in this case, the instant matter involves unprofessional conduct directed at Respondent's former clients. Thus, Banta supports a finding of censure in the current disciplinary matter.

48 In *In re Hayes*, DC 02-1732, SB 04-0092 (2004), Hayes represented the beneficiaries of a probate estate. Without his clients consent, Hayes told a creditor that one of the beneficiaries had received life insurance proceeds from the deceased sufficient to pay the funeral expenses. After he was discharged, Hayes prepared claims on behalf of a creditor against the estate and encouraged another creditor to file a claim against the estate to the disadvantage, and without the consent, of his former client. Hayes received a censure for a violation of Rule 42, Ariz R Sup.Ct., specifically ERS 1.6(a) and 1.9(b). One aggravating factor was found: substantial experience in the practice of law. Three mitigating factors were found: absence of a prior disciplinary record, absence of a

dishonest or selfish motive, and full and free disclosure to disciplinary board or cooperative attitude towards the proceedings.

49. In the instant matter, Respondent did not, as did Hayes, actually represent a party adverse to a former client's interest. In addition, Respondent's mistake regarding the answer he filed was negligent, whereas Hayes' preparation of a claim on behalf of a creditor with interests adverse to his former client was purposeful.
50. In *In re Shannon*, 179 Ariz. 52, 876 P 2d 548 (1994), Shannon was suspended for one year, with probation and restitution for many violations including making changes to his client's answer to interrogatories and submitting the answers, without the client's review, to the court, knowing that they did not represent the client's position. Additionally, Shannon represented two defendants with conflicting interests in civil litigation with the intent of obtaining an advantage for one client over the other. Shannon failed to keep his clients informed and failed to execute a properly drafted Satisfaction of Debt until ordered to do so. Shannon was found to have violated Rule 42, Ariz R Sup Ct., specifically ERs 1.4(a) and (b), 1.7(b), 1.15, 3.2, 3.3, and 8.4(c) and (d). The aggravating factors that were found: dishonest or selfish motive, multiple offenses, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, substantial experience in the practice of law, and indifference to making restitution. Two mitigating factors were also found: absence of prior disciplinary record and full and free disclosure to disciplinary board or cooperative attitude towards proceedings.
51. Both the instant matter and Shannon involve lawyers who prepared documents in civil proceedings that included admissions or assertions on behalf of their clients that did not adequately represent those clients positions. Shannon acted with the intent to benefit one

client over another. In contrast, Respondent acted negligently in filing the answer that contained several errors. As the instant matter is not as egregious as Shannon, a censure, rather than his suspension is an appropriate sanction.

- 52 The Parties submit, and the Hearing Officer concurs, that the imposition of a censure with probation is appropriate under the facts and circumstances in this matter.

RECOMMENDATION

53. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, deter future misconduct, protect the profession and administration of justice, and instill public confidence in the bar's integrity. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz 106 (1985), 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
- 54 In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz 283, 872 P.2d 1235 (1994).
- 55 A review of the Respondent's history, letters of reference and witnessing his demeanor at the hearing on the agreement gives the Hearing Officer concern that should be conveyed to Respondent. In the letter of recommendation submitted by attorney Larry Suci, Mr. Suci states the following
- "His (Respondent's) personality is such that he sometimes does things in an unconventional way. His approach to problems can cause friction with other lawyers and sometimes clients . . . "

56. After watching and listening to Respondent, considering his actions in this case, and history, the Hearing Officer concludes that Respondent is a passionate and somewhat larger than life individual. While there is certainly much room in the law for passionate professionals, there comes with the passion a responsibility to not let it get the best of you. Simply stated, there is a line that discipline and good judgment should keep one from crossing. Whether because of medical problems, burnout, or other factors, the Respondent has, of late, let his emotions get the better of his good judgment.
57. Whatever is causing Respondent to act improperly, he needs to get a better understanding and control of it. These infractions can have a cumulative effect. The letters on behalf of Respondent state that he is an honest, conscientious, compassionate, skilled and ethical attorney. Should he continue to exhibit poor judgment, he faces greater sanction.
58. This Hearing Officer suggests to Respondent that he learn from this experience and take whatever steps are necessary to assure that there is no repetition.
59. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and the proportionality analysis, this Hearing Officer recommends the following:
- (1) Respondent shall receive a censure in this matter.
 - (2) Respondent shall be placed on probation for a period of one year, which will begin upon the issuance of the Judgment and Order in this matter. The terms and conditions of Respondent's probation shall include an assessment by the Law Office Management Assistance Program ("LOMAP") and the Member's Assistance Program ("MAP"), and Respondent's agreement to any contract and/or term deemed appropriate by LOMAP and/or MAP.

(3) In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz R.Sup Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation had been breached, and, if so, to recommend an appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence.

(4) Respondent shall pay all costs and expenses incurred in this disciplinary proceeding.

DATED this 21st day of February, 2008.

Hon H Jeffrey Coker /s/
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this, 21st day of February, 2008.

Copy of the foregoing mailed
this 9th day of February, 2008, to:

Mark I. Harrison
Sara S Green
Respondent's Counsel
Osborn Maledon, P A
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012-2793

Denise K. Tomaiko
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: 