

FILED

JUL 24 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

JEFFREY D. MOFFAT,
Bar No. 021642

RESPONDENT.

No. 07-1428

**AMENDED
DISCIPLINARY COMMISSION
REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on July 11, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed June 19, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum providing for censure, one year of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), 15 hours of continuing legal education ("CLE") in federal litigation practice, and costs.

Decision

Having found no facts clearly erroneous, the eight members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, one year of probation (LOMAP), 15 hours of CLE in the area of federal litigation practice, and costs of

¹. Commissioner Flores did not participate in these proceedings.

these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.² The terms of probation are as follows:

Terms of Probation

1. The probation period will commence upon the date of the final Judgment and Order and will conclude one year from that date.³

2. Respondent shall, within 20 days of the date of the Judgment and Order, contact the Director of LOMAP. The "Terms and Conditions of Probation" shall be developed by LOMAP, and shall be incorporated herein by reference.

3. Respondent shall be responsible for the costs of participation in LOMAP and for the CLE courses required by the terms of this agreement.

4. Respondent shall comply with all other terms and conditions of probation, which shall be incorporated herein by reference.

5. Respondent shall comply with all rules governing practice in the Court of Federal Claims and shall comply with any court order or judgment entered relating to cases in which he is involved, either professionally or personally.

6. Respondent shall, during the period of probation, complete 15 hours of CLE on federal litigation practice. The CLE courses may be those offered and approved by the State Bar of Arizona, the Federal Bar, or private CLE providers. If the course is offered by a private purveyor, Respondent shall obtain the approval of bar counsel prior to completing the course.

² A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$643.75.

³ The concluding date of probation was amended pursuant to *In Re Miranda*, SB-09-0047-D (2009). The parties have stipulated to the amended terms.

1 7. Respondent shall refrain from engaging in any conduct that would violate the
2 Rules of Professional Conduct or other rules of the Supreme Court of Arizona, or any court in
3 which Respondent practices.

4 8. If Respondent fails to comply with any of the foregoing conditions and the
5 State Bar receives information about non-compliance, bar counsel shall file with the
6 Disciplinary Commission a Notice of Non-Compliance. The Disciplinary Commission may
7 refer the matter to a hearing officer to conduct a hearing at the earliest applicable date, but in
8 no event later than 30 days after the receipt of notice, to determine whether a term of
9 probation has been breached and, if so, to recommend an appropriate sanction. If there is an
10 allegation that Respondent failed to comply with any of the foregoing conditions, the burden
11 of proof shall be on the State Bar to prove noncompliance by a preponderance of the
12 evidence.

13 RESPECTFULLY SUBMITTED this 24th day of July, 2009.

14
15
16 Jeffrey Messinger
17 Jeffrey Messinger, Chair
18 Disciplinary Commission

19 Original filed with the Disciplinary Clerk
20 this 24th day of July, 2009.

21 Copy of the foregoing mailed
22 this 24th day of July, 2009, to:

23 Robert Stephan, Jr.
24 Hearing Officer 9R
25 P.O. Box 500
26 Tempe, AZ 85280-0500

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/mps

EXHIBIT

A

**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,**

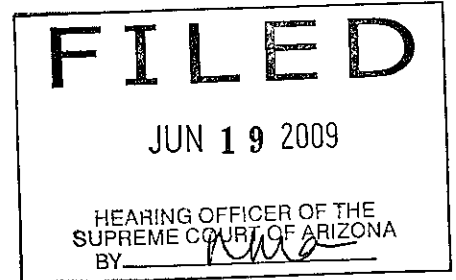
**JEFFREY D. MOFFATT,
Bar No. 021642**

Respondent.

No. 07-1428

HEARING OFFICER REPORT

(Assigned to Hearing Officer 9R, Robert J.
Stephan)



I. PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on December 23, 2008. Respondent's counsel accepted service of the complaint, as documented by the Acceptance of Service filed on January 7, 2009. The initial case management conference was conducted on January 27, 2009. The parties, having immediately engaged in settlement discussions, filed a Notice of Settlement on February 9, 2009. A Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of the Tender of Admissions and Agreement for Discipline by Consent were filed on March 11, 2009. A hearing on the consent agreement was conducted on May 4, 2009, at which Respondent testified. At the conclusion of the hearing, the Hearing Officer accepted the agreement and ordered the parties to jointly file a proposed Hearing Officer Report and Recommendations.

II. FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on July 9, 2002.

2. Respondent represented Robert and Vienna Leshin (“the Leshins”) in a case before the United States Court of Federal Claims, captioned *Robert and Vienna Leshin v. United States*, No. 06-637T.

3. Respondent filed a complaint with the Court in the Leshins matter.

4. The Honorable Marian Blank Horn, (“the Court”) having reviewed the complaint filed by Respondent, discussed the matter with the parties in a status conference on or about January 10, 2007, after the United States, the defendant, filed a motion to dismiss.

5. The Court subsequently filed an order on or about January 11, 2007, in which the basic requirements for a claim for relief before the Court were reviewed.

6. The Court dismissed the Leshins complaint without prejudice, for failure to state a claim upon which relief can be granted, stating that “(t)he instant complaint fails to meet these basic requirements” and “(t)he deficiencies in the instant complaint are too overwhelming for the complaint to stand.”

7. The defects in Respondent’s pleadings included the fact that “(t)he caption of the complaint was incorrect; the cited basis for the jurisdiction in this court was in part incorrect and otherwise unclear; the complaint contains case names without citations; the facts underlying the claim are unclear and confusing; the complaint states that tax levies were made against people referred to only by first names; not listed as plaintiffs, and not otherwise identified; the tax years at issue are unclear; and pertinent procedural history, including United States Tax Court activity, is omitted.” *See, Janaskie, supra.*

8. Respondent represented Alan Janaskie (“Mr. Janaskie”) and filed a suit on Mr. Janaskie’s behalf before the United States Court of Federal Claims, captioned *Alan Janaskie v. United States*, No.06-602C.

9. Respondent on Mr. Janaskie’s behalf, sought \$1.8 million in veterans benefits, disability retirement and special disability compensation, and made claims for alleged violations of the Uniform Code of Military Justice (“UCMJ”), breach of contract, due process violations, a Fifth Amendment taking, and a federal tort claim.

10. The United States, the defendant, moved to dismiss Mr. Janaskie’s claims.

11. The Court, Judge Williams presiding, granted the United States’ motion to dismiss in Mr. Janaskie’s matter.

12. The Court, in its opinion, ruled that it did not have jurisdiction over Mr. Janaskie’s matter, specifically his claims under the UCMJ, as the complaint had not included citations to any provision of the UCMJ that was violated or articulated any facts to support such a claim; his due process claim; his claims for veterans or disability benefits; or his Federal Tort Claims Act claim.

13. The Court further ruled that Mr. Janaskie’s complaint had failed to state a claim for which relief could be granted for a breach of contract or a Fifth Amendment taking.

14. The Janaskie case was the fifth case in which Respondent had submitted filings containing numerous errors and exhibited “a fundamental misunderstanding of this Court’s jurisdiction,” and the Court referred the matter to the Chief Judge for consideration of whether any further action (against Respondent) was warranted.

15. In a section of the opinion entitled “Responsible Advocacy,” the Court noted numerous other matters, in other cases for other clients, in which Respondent had filed pleadings “deficient in almost every respect.” *See*, Opinion in *Janaskie v. United States*, incorporated herein by reference. [A copy of the Court’s opinion is attached to the Tender as Exhibit “B.”]

16. The Court dismissed Mr. Janaskie’s case with prejudice.

17. Respondent represented Leroy Pope (“Mr. Pope”) in a case before the United States Court of Federal Claims, and filed suit on Mr. Pope’s behalf.

18. Mr. Pope’s suit, captioned *Pope v. United States*, No. 06-446C, sought reinstatement in the National Guard, military disability pay, back pay, veterans’ disability benefits, and compensation for due process violations, a Fifth Amendment taking, and an unspecified violation of the UCMJ.

19. The United States, the defendant in the matter, moved to dismiss.

20. After consideration of the matter, and the United States’ motion, the Court, Judge Williams presiding, granted the motion to dismiss.

21. The Court found that “(n)one of Plaintiff’s (Mr. Pope’s) claims are actionable in this Court.”

22. The Court found that the complaint (filed by Respondent) had failed to state claims on which relief could be granted and/or found a lack of jurisdiction on other claims, and dismissed Mr. Pope’s case with prejudice.

23. The Court found, in a section entitled “Responsible Advocacy” that Respondent had filed a complaint “deficient in almost every respect.” *Citing Locke v.*

United States, No. 06-629T, slip opinion filed July 10, 2007. *See*, Opinion of the court, attached to the Tender as Exhibit “C” and incorporated herein by reference.

24. Respondent represented Peter and Jeanne Locke (“the Lockes”) in a matter before the United States Court of Federal Claims, and filed suit on their behalf in that court, captioned *Locke v. United States*, No. 06-629T.

25. The complaint, filed by Respondent for the Lockes, sought damages for wrongful tax levy on their social security benefits. The United States, the defendant, moved to dismiss.

26. The Court, Judge Christine O. C. Miller, presiding, in an opinion issued on or about July 10, 2007, found that the Court did not have jurisdiction over the Lockes’ claims.

27. The Court also stated that “the court is compelled to point out that the pleading and brief filed by plaintiffs’ counsel were deficient in almost every respect. Some egregious errors include incorrect case citations; case names without any citations; statutes that have either been repealed or never existed; unclear and confusing facts purporting to support plaintiffs’ claims; and arguments based entirely on conjecture.”

28. The Court, in dismissing the Lockes’ case, found that Respondent had made argument(s) “explicitly negated by the very statute” relied upon for the argument, and that such argument was “by its nature, illogical and unreasonable, and therefore, is sanctionable” under the pertinent federal rule of appellate procedure. *See*, Opinion of the Court, attached to the Tender as Exhibit “D,” and incorporated herein by reference.

29. The Court also admonished Respondent not to file and burden the court with complaints containing the same jurisdictional defects.

30. Respondent represented Alex and Ann Cherbanaeff (“the Cherbanaeffs”) in a case before the United States Court of Federal Claims, captioned *Cherbanaeff v. United States*, No. 06-640T, and filed suit on their behalf contending that the Internal Revenue Service had violated various statutory and constitutional provisions by levying against the Cherbanaeffs’ social security benefits. The United States, the defendant in the action, moved to dismiss.

31. The Court, Judge Firestone, presiding, granted the motion to dismiss, holding that the Court lacked jurisdiction and that relating to a takings claim, the complaint (prepared and filed by Respondent) failed to state a claim, in an opinion filed on or about July 12, 2007.

32. In a footnote to its opinion, the Court stated, “It has come to the court’s attention that counsel for the plaintiffs has filed similar cases in this court which have also been dismissed for lack of jurisdiction or for failure to state a claim. (citations omitted) Counsel would be wise to follow the admonition of Judge Miller in *Locke* (citation omitted) not to file and burden the court with complaints containing the same jurisdictional defects.” *See*, Opinion of the Court, attached to the Tender as exhibit “E” and incorporated herein by reference.

33. The deficiencies in Respondent’s pleadings were atypical of the general quality of his work and were occasioned by personal circumstances that caused disruption in his practice.

III. CONCLUSIONS OF LAW

Respondent's conduct in these matters violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.1, 1.3, 3.1 and 8.4(d).

IV. RECOMMENDED SANCTION

In determining the appropriate sanction, consideration was given to the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and Arizona case law.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The court and commission consider the *Standards* a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994).

In determining an appropriate sanction, both the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

Respondent failed in his duty to his clients, the profession and the legal system. Given the conduct in this matter, the most applicable *Standards* are *Standard* 4.4 and *Standard* 4.5. *Standard* 4.4 is implicated for failures in diligence. *Standard* 4.42 provides that suspension is the appropriate sanction when a lawyer engages in a pattern of neglect and

causes injury or potential injury to a client; *Standard* 4.43 provides that reprimand (censure in Arizona) is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury.

Standard 4.5 is implicated by failures in competence; *Standard* 4.52 recommends suspension when a lawyer engages in an area of practice in which “the lawyer knows he or she is not competent, and causes injury or potential injury to a client.” *Standard* 4.53 recommends reprimand (censure in Arizona) when a lawyer either “demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client,” or “is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.”

Having determined that the presumptive sanction in this matter is between suspension and censure, application of aggravating and mitigating circumstances were considered, as follows:

Aggravating Factors:

Standard 9.22(c) Pattern of misconduct. Respondent’s misconduct was repeated in several client matters.

Mitigating Factors:

Standard 9.32(a) Absence of a prior disciplinary record. Respondent had no disciplinary record prior to these matters.

Standard 9.32(c) Personal or emotional problems. Respondent was experiencing personal and family difficulties during this period of time. Respondent testified as to the circumstances relating to these difficulties and the impact on his practice and the work he produced.

Respondent's testimony as to the remedial steps he took after these events was also considered. Respondent has implemented procedures within his practice to ensure that the conduct exhibited in this matter is not repeated, including upgrading his research software, instituting routine research methods including double-checking citations, and retaining the services of an editor.

Also considered in this matter was the fact that the Federal Court of Claims reviewed these matters and issued a "Non-Punitive Letter of Admonition" dated January 16, 2009. The Court declined to take disciplinary action, but advised Respondent that "should (he) file future claims with this Court, the adequacy of (his) submissions would be monitored, and should further allegations of misconduct be raised, the Court may initiate formal disciplinary proceedings" pursuant to the applicable Rule. Although this appears to be neither aggravating or mitigating, the fact that the Court did not discipline Respondent and permits him to continue to practice before the Bar of that Court was considered in determining that censure was appropriate.

The Hearing Officer noted Respondent's apparent remorse during his testimony. Although the parties did not include remorse (*Standard* 9.32(l)) in the consent agreement, the Hearing Officer finds that Respondent is contrite and remorseful about his conduct.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be

tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

Several recent cases support the proposed sanction in this matter. In *In re Capozzi*, SB-08-0022-D (2008), the lawyer was censured after she failed to obtain necessary information and take the appropriate steps required to properly and thoroughly represent clients. Among the violations found in *Capozzi* were violations of ERs 1.1, 1.3, 1.4 and 8.4(d). In addition, Capozzi was placed on probation for one year and required to complete six hours of continuing legal education. In *In re Cook*, SB-08-0074-D (2008), the lawyer prepared and filed an answer that contained many assertions and admissions that did not adequately represent his client's position. Cook's violations included having revealed confidential information, not present in the instant matter, but only related to one client matter, as opposed to the number of client matters in the instant case. Cook was censured and placed on probation for one year.

In *In re Tunac*, Sb-08-0014-D (2008), the lawyer was found to have engaged in a pattern of neglect with regard to client matters, in violation of ERs 1.1, 1.3, 1.4.¹ Significant mitigating, including personal and emotional problems, were found to justify a mitigated sanction of censure with two years of probation and participation in remedial programs. *See also, In re Nysather*, SB-08-0088-D (2008) (Lawyer failed to file necessary documents, failed to provide competent representation and comply with numerous court orders; censure with one year probation and completion of continuing legal education courses).

Another recent matter in which a lawyer's competence, as evidenced in part by his written work, was at issue is *In re Plummer*, SB-08-0151-D (2008). In two counts of a

¹ Tunac was also found to have violated other ERs, including ER 1.5, 1.15, 5.3 and 8.4(d).

multiple count complaint, Plummer's poor and unprofessional writing was found to be evidence of a lack of competence. Plummer's written advocacy was found to have fallen below the standard one would expect of a competent practitioner. Although Plummer was ultimately suspended for one year for violations more serious², and occurring over a longer period of time, than those present in the instant matter, the case supports the imposition of formal discipline in this matter.

SANCTION

Based on the facts and circumstances of this matter, the *Standards* and proportional case law, the Hearing Officer recommends acceptance of the agreement. At the hearing on the agreement, the parties agreed that an additional term of probation should be added (continuing legal education), and that is reflected in the following recommendation. The appropriate disciplinary sanctions in this matter are as follows:

1. Respondent shall be censured;
2. Respondent shall be placed on probation for a period of one year, under the following terms and conditions:
 - a. Probation period will commence upon the entry of the Judgment and Order by the Supreme Court of Arizona, and will conclude one year from the date that all parties have signed the "Terms and Conditions of Probation."
 - b. Respondent shall, within twenty (20) days of the date of the judgment and order, contact the director of the State Bar's Law Office Management Assistance Program. The "Terms and Conditions of Probation" shall be

² Plummer's violations also included dishonesty, lack of diligence, communication, engaging in conflicts of interest and lack of candor to the tribunal.

developed by the State Bar's Law Office Management Assistance Program ("LOMAP"), and are incorporated herein by reference.

- c. Respondent shall be responsible for the costs of participation in LOMAP and for the continuing legal education courses required by the terms of this agreement.
- d. Respondent shall comply with all other terms and conditions of probation, which shall be incorporated herein by reference.
- e. Respondent shall comply with all rules governing practice in the Court of Federal Claims and shall comply with any court order or judgment entered relating to cases in which he is involved, either professionally or personally.
- f. Respondent shall, during the period of probation, complete fifteen (15) hours of continuing legal education ("CLE") on federal litigation practice. The continuing legal education courses may be those offered and approved by the State Bar of Arizona, the Federal Bar, or private CLE providers. If the course is offered by a private purveyor, Respondent shall obtain the approval of Bar counsel prior to completing the course.
- g. 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, or any court in which Respondent practices.
- h. If Respondent fails to comply with any of the foregoing conditions and the State Bar receives information about non-compliance, Bar counsel shall file with the Disciplinary Commission a Notice of Non-Compliance.

The Disciplinary Commission may refer the matter to a hearing officer to conduct a hearing at the earliest applicable date, but in no event later than 30 days after the receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing conditions, the burden of proof shall be on the State Bar to prove noncompliance by a preponderance of the evidence.

3. Respondent shall pay the costs and expenses of the disciplinary proceedings. The State Bar's Itemized Statement of Costs and Expenses was attached to the Tender of Admission as Exhibit "A," and is incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Clerk's Office, the Disciplinary Commission, and the Supreme Court in this matter.

RESTITUTION

Respondent's clients did not file charges in this matter. In this matter, the State Bar was the complainant and is not seeking restitution; the State Bar has not been contacted by Respondent's current or former clients relating to these matters. Respondent understands that the clients involved in the underlying matters retain their rights to seek any appropriate and legal recovery from him, should they wish to do so, and that their rights are not impacted by this agreement for discipline by consent.

V. CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297

(1985). The objectives of discipline will be met by the imposition of the proposed sanction of
censure, probation, continuing legal
education, and the payment of costs and expenses of these proceedings.

RESPECTFULLY SUBMITTED this 19th day of June, 2009.

Robert Stephan, Jr./NM
Robert Stephan, Jr.
Hearing Officer 9R

Original filed with the Disciplinary Clerk
this 19th day of June, 2009.

Copy of the foregoing mailed
this 22nd day of June, 2009, to:

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by: Evelyn Jago