

FILED
MAR 02 2009
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

No. 08-1493

HEARING OFFICER'S REPORT

RESPONDENT.

1. Probable cause was found in this matter on November 19, 2008, and a Complaint thereafter filed on December 18, 2008. Respondent was served at his address of record on December 22, 2008. The matter was assigned to the undersigned Hearing Officer on January 12, 2009. Respondent failed to file an Answer to the Complaint, a Notice of Default was filed on January 14, 2009, and Respondent's default was entered on February 4, 2009. An Aggravation/Mitigation hearing was held on February 9, 2009.

FINDINGS OF FACT

2. 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 September 25, 1971.
3. This case involves the charge that Respondent abandoned his client to her great detriment, and then refused to cooperate with the State Bar's inquiry and these proceedings. For this misconduct, the State Bar is requesting disbarment.

COUNT ONE (File no. 08-1493)

4. In or about April of 2005, Sharon Ralls ("Ms. Ralls") retained Respondent to represent her in civil litigation against her former live-in partner and paid him a \$2,500 retainer.¹
5. The litigation involved contested half ownership of personal and business property Ms. Ralls claimed to own with her former partner.
6. On or about May 9, 2005, Respondent filed a Complaint against Ms. Ralls' former partner on behalf of Ms. Ralls in Mohave County, case CV 2005-4093.
7. After filing the Complaint, Ms. Ralls made multiple attempts to contact Respondent, but was unable to get in contact with him or to get him to return her attempts at communication.
8. Defense counsel in the civil case sent Requests for Admissions to Respondent. Respondent never conveyed the Requests for Admissions to Ms. Ralls and never responded to the Request for Admissions, Transcript of Hearing ("T/H") 7:8 - 10.
9. On or about May 31, 2006, defense counsel in the civil case filed a Motion for Summary Judgment.
10. Respondent never informed Ms. Ralls of the Motion for Summary Judgment, and never responded to the Motion for Summary Judgment.
11. On or about July 5, 2006, the Court granted defense counsel's Motion for Summary Judgment.
12. The Court further awarded fees in Defendant's favor and against Ms. Ralls in the amount of \$2,978.25, as well as costs in the amount of \$151.00.

¹ Unless otherwise cited, all facts recited herein were set forth in the original Complaint, and therefore deemed admitted.

13. Still unable to get Respondent to contact her, Ms. Ralls went to the courthouse and inquired as to the status of her case, learning for the first time of the Request for Admissions, the Motion for Summary Judgment and the Judgment against her.
14. Ms. Ralls resorted to waiting in front of Respondent's home in order to confront and communicate with him.
15. When Ms. Ralls finally met with Respondent, they entered into a verbal agreement that Respondent would (and did) satisfy the Judgment against Ms. Ralls for \$4,000 in attorney fees, and Respondent paid \$5,000 towards Ms. Ralls retention of a new attorney, Anthony Mullin ("Mr. Mullin"). Respondent also verbally agreed to pay Ms. Ralls \$500 a month for 10 years to make up for the fact that her case against her partner had been dismissed. While this agreement was reduced to writing prepared by Ms. Ralls' new attorney, it was not signed by Respondent, T/H 9:17 – 10:4. Respondent only made one \$500 payment toward this agreement, and thereafter paid no more, T/H 8:14 - 24.
16. Mr. Mullin attempted to revive Ms. Ralls' civil case, but was unsuccessful.
17. On August 19, 2008, Ms. Ralls sent a charge regarding Respondent's conduct to the State Bar of Arizona. On September 26, 2008, the State Bar sent a copy of Ms. Ralls' Bar charge to Respondent at his address of record, along with a request that he provide a response to the allegations within 20 days. Respondent did not provide a response.
18. On October 23, 2008, the State Bar sent a follow-up letter to Respondent at his address of record advising him of his non-response, reminding him of his duty

pursuant to Rule 53, and requiring a response within 10 days. Respondent did not provide a response.

19. As pointed out in the Procedural History, Respondent has failed to respond to the Complaint that was filed in this matter against him, his default was entered, and he failed to appear at the Aggravation/Mitigation hearing, and so has continued to not cooperate in these proceedings.
20. At the Aggravation/Mitigation hearing in this matter, Bar Counsel advised that not only have they not heard anything from Respondent, Respondent has stopped complying with a previous Order of Probation, and also has received a new referral alleging that Respondent has engaged in similar conduct of not showing up to court, T/H 3:6 - 15.

CONCLUSIONS OF LAW

21. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.S.Ct., specifically:

ER 1.1, Competence, by failing to provide competent representation to his client;

ER 1.3, Diligence, by failing to act with reasonable diligence and promptness in representing his client;

ER 1.4, Communication, by failing to keep his client reasonably informed about the status of her case;

ER 8.1(b), by failing to respond to a lawful demand for information from the disciplinary authority;

ER 8.4(d), by engaging in conduct that is prejudicial to the administration of justice;

Rule 53(f), Failure to furnish information or respond promptly to an inquiry from Bar Counsel.

ABA STANDARDS

22. 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:

23. The Hearing Officer finds that Respondent violated his duties to his client and to the legal profession. Respondent knowingly failed to perform services for his client, causing serious financial injury to the client.

24. *Standard* 4.41 (Lack of Diligence) states:

“Disbarment is generally appropriate when:

- 1) a lawyer abandons the practice and causes serious or potentially serious injury to a client;
- 2) a lawyer knowingly fails to perform services for a client, and causes serious or potentially serious injury to a client; or
- 3) a lawyer engaged in a pattern of neglect with respect to client matters, and causes serious or potentially serious injury to a client.”

25. Respondent took \$2,500 as a retainer from his client and then thereafter, through his failure to act, judgment was rendered against his client wherein she lost a claim to property valued at approximately \$500,000, as well is being held responsible for \$4,000 in opposing counsel's fees. This conduct fits the sanction that ABA

Standard 4.41 sets forth. The presumptive sanction in this case then is Disbarment.

The Lawyer's Mental State:

26. The Hearing Officer finds that Respondent's mental state was "knowing".

Injury Caused:

27. As a result of Respondent's failure to act on the Request for Admissions and to the Motion for Summary Judgment, Ms. Ralls lost her claim to one half of property estimated to be worth in the neighborhood of \$500,000. While it is speculation to assume that Ms. Ralls would have prevailed in her claim, Respondent at one point, verbally agreed to, but never signed, an agreement to pay Ms. Ralls \$500.00 per month for 10 years (\$60,000, of which he only paid \$500.00 to Ms. Ralls) to make up for the claim that she had lost. Respondent did pay the \$4,000 judgment against Ms. Ralls for attorney's fees and then thereafter paid \$5,000 to a new attorney, Mr. Mullin, to represent Ms. Ralls. While Respondent did pay \$5,000 towards a new attorney for Ms. Ralls, because of his failure to adequately represent her, he deprived Ms. Ralls of the ability to make her claim for one half of the property of her partner.

Aggravating and Mitigating Factors:

Aggravating Factors:

28. *Standard* 9.22(a), Prior Discipline. Respondent received a Censure with Probation in case number 05-1928 on December 28, 2006, for violation of ERs 1.3, 1.4, 1.5, 1.15, 1.16, 8.1 and Rule 53(d)&(f). According to Bar Counsel, Respondent has been noncompliant with the terms of his probation.

29. *Standard 9.22(c)*, Pattern of Misconduct. Respondent is accused of violations in this matter that are the same or similar in nature to the violations he was found to have committed in his prior case: ER's 1.3, 1.4, 8.1 and Rule 53.
30. *Standard 9.22(e)*, Bad Faith Obstruction of Disciplinary Proceedings. Respondent failed to respond to the State Bar, and defaulted in the formal disciplinary process.

Mitigating Factors:

31. No evidence was submitted to the Hearing Officer which would support any mitigating factors.

PROPORTIONALITY REVIEW

32. The Supreme Court has held that in order to have an effective disciplinary process, the discipline in each situation must be tailored to the individual facts of the case, but also that there should be proportionality of discipline in cases with similar factual circumstances, *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983), *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
33. In *In re Beskind*, SB- 07-0155-D (2007), Beskind was disbarred from the practice of law and ordered to pay restitution. Beskind took retainers from clients, and failed to adequately or fully perform the legal services as promised. Beskind failed to attend hearings and trials, failed to communicate with clients, and failed to provide a written fee agreement. Beskind further failed to respond or cooperate with the State Bar's investigation. Beskind's mental state was found to be intentional or knowing and he was found to have caused actual injury. There were eight aggravating factors: *Standards 9.22(b)*, Dishonest or selfish motive;

9.22(c), Pattern of misconduct; 9.22(e), Bad Faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency; 9.22(f), Submission of false evidence, false statements or other deceptive practices during the disciplinary process; 9.22(g), Refusal to acknowledge wrongful nature the conduct; 9.22(i), Substantial experience in the practice of law; and 9.22(j), Indifference to making restitution. There was one mitigating factor: *Standard* 9.32(a), Absence of a prior disciplinary record. Beskind's conduct was found to have violated Rule 42, Ariz.R.Sup.Ct., ERs 1.3, 1.4, 1.5, 3.4(c), 8.4(d), and Rules 53(d), 53(e) and 53(f).

34. In *In re Hoover*, SB-06-0027- D (2006), Hoover was disbarred from the practice of law and ordered to pay restitution. Hoover engaged in a pattern of neglect of clients by failing to diligently represent and communicate with clients. Hoover abandoned the practice of law after charging fees for services that were not paid or were of little or no value to the clients. Hoover also failed to cooperate with the State Bar's investigation. Hoover's mental state was found to be knowing and he was found to have caused serious injury. There were five aggravating factors: *Standards* 9.22(a), Prior disciplinary offenses; 9.22(c), Pattern of misconduct; 9.22(d), Multiple offenses; 9.22(h), Vulnerability of victim; and 9.22(i), Substantial experience in the practice of law. There were no mitigating factors, and Hoover was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.2, 1.3, 1.4, 1.5(c), 1.15, 1.16, 3.2, 3.2(c)(3), 8.1(b), 8.4(d), and Rules 53(d) and 53(f).

35. In *In re Son*, SB-05-0173 D (2006), Son was disbarred from the practice of law and ordered to pay restitution. Son abandoned his law practice and engaged in a pattern of neglect with respect to client matters. Son failed to perform any contracted services for clients after accepting fees, and a conservator was appointed to handle Son's client files and trust account. Son also failed to cooperate with the State Bar's investigation. Son's mental state was found to be knowing, and he was found to have caused actual injury. There were three aggravating factors: *Standards* 9.22(c), Pattern of misconduct; 9.22(d), Multiple offenses; and 9.22(e), Bad Faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency. There was one mitigating factor: *Standard* 9.32(a), Absence of a prior disciplinary record. Son was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 8.1(b), and Rules 53(d) and (f).

RECOMMENDATION

36. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Is also the purpose of attorney discipline to instill public confidence in the Bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
37. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *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).

38. The consequences of Respondent's failure to meet his duty to his client to competently represent her have had a significant and lasting negative impact on Ms. Ralls. While Respondent did initially pay for the consequences of his inaction, (by paying the sanction of \$4,000 for the opposing party's attorneys fees, and a \$5,000 retainer to Mr. Mullin) he thereafter failed to do so. While it is too speculative in these proceedings to find that Respondent is responsible for Ms. Ralls' claim against her former partner, it is not speculative to say that she paid him \$2,500 and got nothing for that representation.
39. Additionally, according to the information provided by the State Bar, Respondent has stopped complying with the conditions of probation for a prior disciplinary matter and has another matter pending for failing to appear on behalf of a client. While it is unknown whether Respondent has abandoned the practice of law altogether, he certainly did abandon Ms. Ralls to her great detriment. Respondent has also completely ignored his responsibility to respond to the State Bar's investigation and these disciplinary proceedings. Because of Respondent's failure to respond to the Bar and these proceedings, this Hearing Officer must conclude that Respondent has not only abandoned his client, he has abandoned his responsibilities to this profession as well. The proposed sanction of disbarment is fully within the sanction recommended in the American Bar Association's *Standards*, and nothing has been submitted which would mitigate against this sanction.

40. Therefore, upon consideration of the facts, application of the *Standards*, and weighing the aggravating factors and proportionality analysis, this Hearing Officer recommends the following:

1. Respondent be disbarred;
2. Respondent pay to Sharon Ralls \$2,500 in restitution;
3. Respondent pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 2nd day of March, 2009.

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

Original filed with the Disciplinary Clerk
this 2nd day of March, 2009.

Copy of the foregoing mailed
this 3rd day of March, 2009, to:

Rex L. Martin
Respondent
2938 Camino Del Rio
Bullhead City, AZ 86442

Stephen Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Neeta Manelkar