BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

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HEARING OFFICER OF THE SUPREME COURT OF ARIZONA
BY

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 08-0407
VICTORIA R. MIRANDA, BAR No. 08511	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

1. Probable cause was found in this matter, 08-0407 (Padilla), on July 4, 2008. A Complaint was thereafter filed on August 14, 2008, and service accomplished by certified mail on August 14, 2008. The matter was assigned to the undersigned Hearing Officer on August 18, 2008. Respondent, through her attorney, filed an Answer on August 28, 2008, and an Initial Case Management Conference was held on September 9, 2008. A contested final hearing was held on the merits of this matter on November 18, 2008.

FINDINGS OF FACT

Case Summary

2. The contested issues in this case involve:

   1) The nature of the fee arrangement between Respondent and her client;

   2) Whether the Respondent failed to adequately communicate the basis of the fee in writing to her client;

3) The extent to which her client requested an accounting and the return of funds he felt were owed to him by Respondent, and the propriety of Respondent's response to the client's request;

4) Whether Respondent violated ethical rules in charging her client $5,000, and not refunding monies owed to her client when requested by him after termination of her representation of him.

3. 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 October 18, 1997.[1]

4. On or about May 23, 2007, Respondent had an initial consultation with Javier Padilla ("Mr. Padilla") about the possibility of representing him in a dissolution proceeding initiated by Mr. Padilla's wife.

5. On May 25, 2007, Mr. Padilla retained Respondent's services for the dissolution. Mr. Padilla paid Respondent the sum of $5,000 by cashiers check for the representation. The check was dated May 25, 2007.

6. Mr. Padilla testified that Respondent told him that the $5,000 would "cover all my divorce" and he did not recall Respondent discussing how the $5,000 would be spent or Respondent's hourly fee (Transcript of hearing ("Tr.") 17:5-24). In his reply to Respondent's response to his initial Bar Charge, Mr. Padilla stated that he never received a Contract Agreement for the legal representation, and: "... my understanding was that I would be charged depending on how many hours needed to be invested in this case." (Hearing Exhibit ("H/E") 3)

[1] Unless otherwise noted, the facts recited herein are from the stipulated facts set forth in the Joint Prehearing Statement submitted by the parties.

7. Both Respondent and her secretary testified that Mr. Padilla was given a fee agreement dated May 23, 2007, although this fee agreement, according to Respondent, was erroneous in that it listed the $5,000 payment made by Mr. Padilla as an" advance fee".

8. Mr. Padilla gave Respondent a mailing address that was actually a rental property he owned where he did not live, and the evidence was that Mr. Padilla did not get his mail there (Tr. 19:20-25, 30:16-31:16, 32:9-16). Mr. Padilla testified that the reason that he gave Respondent the address that he did, and did not later correct it, was because he had not planned to stay where he was actually living very long and at the time could get his mail at the address given to Respondent. After he changed attorneys he gave Mr. Mendez a better address (Tr. 32:17-33:2). Mr. Padilla testified that the phone number he gave Respondent was a good number to reach him (Tr. 22:12-19, 23:14-20, 37:11-17, 38:9:-12), but Respondent testified that the number he gave her had been disconnected (Tr. 119-5-19).

9. Within a short period of time, on June 19, 2007, Mr. Padilla changed attorneys and requested that Respondent withdraw (Tr. 20:22-24, 76:4-10).

10. Mr. Padilla's new attorney, Mr. Mendez, on June 25, 2007, sent Respondent a stipulation to withdraw as Mr. Padilla's attorney. The Court allowed the substitution of attorneys on or about July 24, 2007.

11. Respondent testified that when she met with Mr. Padilla the first time she explained that the $5,000 initial payment was a "flat fee" to cover Mr. Padilla's dissolution and some other property issues, but did not provide him with a fee agreement (Tr. 63:6-20).

12. At the second meeting with Mr. Padilla, on May 25, 2007, Respondent says that she again told him that it was a flat fee, and her secretary, Ms. Sotello, was preparing a fee agreement (Tr. 64:13-19). In her later testimony, Respondent is still certain that she explained that the $5,000 was a flat fee, but is uncertain in which meeting it was (Tr. 112:10 -20).

13. That after Respondent made some changes to it to make it a "flat fee" (Tr. 71:17-72:2), Respondent's secretary told Respondent that she gave the fee agreement to Mr. Padilla (Tr. 67:20-23). The first fee agreement is set forth in Hearing Exhibit 4, BSN 0011. When asked if the first fee agreement had the language of a flat fee agreement, Respondent replied that she did not know and had not reviewed the fee agreement (Tr. 72:3-10), then later admitted that the fee agreement did not have ER 1.5 language regarding a refund (Tr. 72:11-15).

14. There was significant confusion about the fee agreement between Respondent and Mr. Padilla. The original fee agreement set forth in Hearing Exhibit 4 states that the $5,000 payment is an "advance fee". There is no further explanation in the agreement of what this term means. Respondent testified that even though she thought that she had made corrections to this first fee agreement to make it a "flat fee", upon review it is clear it is not a "flat fee" agreement, nor does it contain the required language regarding a refund.

15. In her first response to Mr. Padilla's Bar Charge, Respondent claims that the $5,000 was a "flat fee" (H/E 2), but in her second response (H/E 4) Respondent's position is that her first response was in error, and that the $5,000 was an "hourly fee agreement with the minimum charge of $5,000, with any services above

$5,000, to be charged on an hourly basis" (H/E 4). This position is also reflected in Respondent's Answer filed in response to the Complaint filed by the State Bar.[2] There is no discussion in the written fee agreement as to the hourly rate that Respondent was charging Mr. Padilla.

16. Respondent concedes that the language of the first fee agreement given to Mr. Padilla by her secretary in error would have required her to place Mr. Padilla's $5,000 in her trust account and that she did not do so (Tr. 73:22-74:11).

17. Later, exactly when could not be determined because Respondent's memory was "hazy", Respondent realized the first fee agreement was faulty and on June 1, 2007, sent Mr. Padilla a letter that stated that the agreement was that Mr. Padilla's $5,000 was a "non-refundable flat fee" and considered earned upon receipt, and also contained ER 1.5(a) language that he "may be entitled to a refund" (H/E 10). Respondent admitted that her June 1, 2007, letter to Mr. Padilla did not point out that the first fee agreement was in error, that she felt that the letter "...would suffice. And that if he had any questions, he could call me. He was told to call if he had any questions" (Tr. 75:12-17). Mr. Padilla denied ever receiving the June 1, 2007, letter.

18. During this time period, Respondent testified that she was transferring her practice from hourly billing to flat fee because of all the time it took to do it (comply with the trust accounting Rules) and she did not want to do it (Tr. 65:3-12, 110:25-111:25), but that she could not remember when the transition took place (Tr.65:17-19), but then later testified that she thought it was "...May, March

[2] Respondent's attorney claimed that this version was a mistake and miscommunication, and the Hearing Officer takes it as such, but it bears on the later discussion of the confusion on this issue.

something like that." (Tr. 111:25-112:5). State Bar Practice Management Counselor Tracy Ward verified during her testimony that she was working with Respondent during this time to develop a flat fee agreement (Tr. 42:2-22). Ms. Ward also testified that she had sent Respondent a form flat fee agreement as early as March 2007, but Respondent was still using a fee agreement that had been previously rejected by the Bar and was not a legitimate flat fee agreement when she was retained by Mr. Padilla on May 25, 2007, (Tr. 46:21-47:25).

19. Respondent testified that it was her practice not to discuss her fee agreements with her clients, but rather she would give them to her clients, have them leave with a recommendation that they have others review it "even an attorney", and when they come back she would ask questions of them to make sure that they understood it, then she would sign it (Tr. 69:-70:7).

20. Respondent stated that to her knowledge Mr. Padilla never signed or returned the fee agreement (Tr. 68:8-15).

21. After he terminated her services in June 2007, Mr. Padilla testified that he made numerous attempts to get Respondent to explain what work Respondent had done for him and to return the unused portion of the money paid to her (Tr. 21:12-17, 22:12-25:11).

22. Mr. Padilla's testimony was that he lost track of Respondent because she moved her office (Tr. 22:20-24), but that he did call her "a few times" and she would not return his calls (Tr. 38:23-25). Mr. Padilla eventually went to her office in January 2008 and he claims:

1) That he had gone to her office several times and also left his phone number, but Respondent would not return his calls (Tr. 23:16-20).

2) That he did eventually meet with Respondent in January 2008 and at the first meeting he asked for a refund and was told that she was going to refund $1,500 to him. He also asked for an explanation of what the rest of the money was used for (Tr. 23:25-24:4).

3) That Respondent told Mr. Padilla that she could not give him his money because it was in the bank and that he should come back in a month (Tr. 24:5-7).

4) That Mr. Padilla went back "in about a month" and Respondent told him that she did not have the money but would give it to him in payments (Tr. 24:7-13).

5) That when Mr. Padilla went back in approximately March 2008, Respondent got upset with Mr. Padilla and asked him to leave her office as he was wasting her time and she would charge him for an hour (Tr. 21:12-17, 25:3-7).

6) At some point, Mr. Padilla was uncertain which visit, Respondent gave Mr. Padilla $1,000 (Tr. 25:8-14).

7) That Respondent never provided Mr. Padilla an accounting of the work that she had done on his behalf, nor did she ever pay him any more money (Tr. 22:2-5, 25:15-17).

8) That it was Mr. Padilla's understanding in the beginning that Respondent would charge him by the hour and that the payment of $5,000 was to start his case (Tr. 27:16-20, H/E 3).

9) That Mr. Padilla never saw an accounting from Respondent until after he filed a complaint with the State Bar, and that the accounting he then received set forth a

total for Respondent's services of $1,824.10 which Mr. Padilla did not disagree with because Respondent had done some other work for him (Tr. 28:1-29:2).

10) That Mr. Padilla never received a fee agreement from Respondent, and in fact received no "papers" from Respondent (Tr. 18:3-15, 29:14-19).

11) That Respondent never claimed to Mr. Padilla that she was entitled to keep his money, or denied that she owed Mr. Padilla a refund (Tr. 39:18-40:2).

23. Respondent testified that after Mr. Padilla terminated her services less than a month after retaining her, Respondent simply put Mr. Padilla's file in storage and did not consider refunding him any money because to her it was a "... flat fee, so I just closed it up." (Tr. 78:18)

24. Respondent felt that, regarding any refund, she had a duty to "...speak with Mr. Padilla...about the refund or whatever monies were left." (Tr. 79:9-15) Respondent testified that because Mr. Padilla was hard to contact by phone or by mail "... we just stored it." Respondent admitted that she never sent Mr. Padilla any letters regarding a refund (Tr. 79:15-20, 80:22-81:3), but her staff did try unsuccessfully to contact him by phone (Tr. 81:9-24). Respondent also admitted that Mr. Padilla's new attorney, Mr. Mendez, could contact him, but it did not "occur' to her to try to reach Mr. Padilla through Mr. Mendez (Tr. 119:5-19).

25. Respondent's version of the next meeting with Mr. Padilla is markedly different from Mr. Padilla's. Respondent testified that when Mr. Padilla came in January 2008 she was with clients and did not meet with Mr. Padilla. Her secretary told her Mr. Padilla was there and wanted his file and his money (Tr. 84:21-85:6). Respondent told her secretary to tell Mr. Padilla that his file was in storage and

"come back another day." (Tr. 85:14-16) Respondent did not contact Mr. Padilla in the interim between the meeting in January and the next meeting in March (Tr. 85:22-24).

26. When Mr. Padilla came into her office in March, Respondent again was with clients and did not meet with Mr. Padilla. When her secretary came in and told Respondent that Mr. Padilla was there, Respondent told her to get $1,000 out of the cash fund and give it to Mr. Padilla (Tr. 86:18-20). Respondent's feeling about the $1,000 payment was: "Maybe he'll be satisfied right now and will get back to that subject again. But it was just to pacify him." (Tr. 115:15-23). Mr. Padilla then left without further explanation and he was not told by Respondent that he was owed anymore money because: "He didn't ask." (Tr. 87:5).

27. When asked at the hearing in this matter how she had decided on the $1,000 amount, Respondent stated that: "It was just a number. I knew that he had at least a thousand coming." (Tr. 87:11-13)

28. Mr. Padilla ultimately filed a Bar Charge on March 10, 2008, and in that Charge alleged that he had made requests for his unearned funds, and that the Respondent had been "...putting me off for months, saying that she has spent the money and will pay the unearned money in payments. Attorney Miranda spent my money without earning it and refuses to give me an accounting or a refund of the unearned funds" (H/E 1). Respondent denies ever having told Mr. Padilla that she had spent his money and would have to repay him in payments (Tr. 88:20).

29. In response to the Bar Charge sent on April 10, 2008, Respondent stated that Mr. Padilla had paid her a flat fee of $5,000, and later when he came in on March 18, 2008, and wanted a refund she had her secretary give him $1,000 (H/E 2). Respondent testified that her secretary had told her that when Mr. Padilla left he had looked happy, and he was laughing (Tr. 90:2-7). Respondent's secretary does not verify this testimony (Tr. 127:18-23). Respondent testified that it was her intent at that time to give Mr. Padilla more of his money back, but that sentiment was not set forth in her initial response to the Bar Charge (H/E 2), nor by the fact that Respondent made no effort to try and contact Mr. Padilla after the $1,000 payment.

30. Also contained in her response to the Bar Charge, Respondent submitted for the first time an accounting of attorney's fees earned by her in the amount of $1,824.10. Respondent testified that she never sent this accounting to Mr. Padilla, and that he never asked for an accounting. When asked how Mr. Padilla, without an accounting, would have known whether he was entitled to receive more money back or not, Respondent replied: "How? I don't know. I don't read Mr. Padilla's mind. I don't know whether he was going to come back." (Tr. 90:16-91:5) This sentiment, that Mr. Padilla was satisfied with the $1,000 and nothing further was due him, was also reflected in a June 12, 2008, second response that Respondent's attorney submitted to the State Bar (H/E 4, Tr. 94:5-16).

31. Mr. Padilla testified that he was satisfied with the work set forth in the bill attached to Respondent's response to the initial Bar Charge (H/E 2), and he felt that the $1,824.10 billed therein was appropriate for the work performed for him

by Respondent (Tr. 10-20). The State Bar concedes that the $1,824.10 was earned by Respondent (Tr. 110:19).

CONCLUSIONS OF LAW

32. As stated previously, there are two primary areas of concern in this matter. The first relates to Respondent's dealings with her client at the inception of her representation, and whether she complied with ER's 1.4 and 1.5 regarding her fee arrangements with her client. The second deals with Respondent's compliance with the ER's 1.15 and 1.16(d) in refunding Mr. Padilla's unused fees.

33. ER 1.4 Communication and ER 1.5 Fees Allegations:

While Mr. Padilla denies it, this Hearing Officer finds that he was given the initial fee agreement set forth in Hearing Exhibit 4. By all accounts this fee agreement did not reflect what Respondent testified that she intended in that it stated that the $5,000 paid by Mr. Padilla was an "advance fee" rather than a flat fee. Respondent testified that although this fee agreement was in error, she did explain to Mr. Padilla at the time that she met him that it was a flat fee. There is further evidence that Respondent made an effort to correct the problem by sending Mr. Padilla a letter on June 1, 2007, which states clearly that it was a nonrefundable $5,000 flat fee, and also added the language of ER 1.5(a) that Mr. Padilla could be entitled to a refund based upon the reasonableness of the fee.

34. The problem confronted by this Hearing Officer is that Mr. Padilla gave Respondent an address at which he admitted he did not get mail. Therefore, while Respondent made an effort to correct the language of the first fee agreement, through no fault of hers, Mr. Padilla never received it.

35. The testimony offered by Tracy Ward from the State Bar LOMAP indicates that Respondent was in the midst of going to flat fee agreements and doing away with hourly billings because she did not want to have to deal with the complexity of the trust accounting requirements. This testimony would seem to support Respondent's version of the events that this was a flat fee agreement.

36. There was significant confusion concerning what the fee agreement actually was, contributed to in no small part by Respondent herself: Respondent was using a fee agreement form that had been specifically rejected by the State Bar LOMAP counselor; the fee agreement called the $5,000 paid by Mr. Padilla "an advance fee of $5,000, our minimum fee" without any explanation of what that means; the June 1 letter sent by Respondent to Mr. Padilla does not bring to Mr. Padilla's attention the fact that the language used in that letter is in contravention to the language used in the fee agreement presented to him; Respondent testified that it was her practice to give the fee agreements to her clients, let them take the fee agreement to anyone else that they wish to have review it, and then when they come back she answers any questions they might have. Mr. Padilla is a non-English-speaking resident of Mexico, and certainly deserved more in the way of an adequate explanation of what Respondent was going to do for him and how his money was going to be earned by Respondent.

37. The State Bar alleges that Respondent violated ER 1.4(e) in failing to "... explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation." Respondent counters that she did

explain to Mr. Padilla in either the first or the second meeting that it was a flat fee, and that it was earned upon receipt. Respondent did not testify that she explained to Mr. Padilla at either of the two meetings that he could be entitled to a partial refund, but claimed that the subsequent letter to him, should have cleared that issue up because it did contain the ER 1.5(d)(3) language.

38. On the one hand Respondent was clearly at fault in using a defective fee agreement that had been rejected by her counselor, not explaining the refund provisions of ER 1.5(d)(3) to her client during their meetings, and worst of all giving a person not familiar with either the English language or the language of the law a complicated fee agreement and sending him off to figure it out for himself and later asking him questions about the fee agreement.

39. On the other hand, Mr. Padilla must bear some responsibility in not providing Respondent with a good address with which she could communicate with him. Mr. Padilla's own testimony that he did not get mail at the address he gave Respondent shows irresponsibility that resulted in him not getting the subsequent clarifying letter.

40. Based on the evidence presented, there is not sufficient proof by a clear and convincing standard that Respondent violated ER 1.4 Communication. Respondent initially was sloppy and disorganized, but did try to clean up the mistake and, had it not been for Mr. Padilla's faulty address, the error could have been corrected.

41. ER 1.15 Safekeeping Property and ER 1.16(d) Terminating Representation:

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated ER 1.15 and ER 1.16(d).

42. ER 1.15 requires that:

"... a lawyer shall promptly deliver to the client any funds or other property that the client... is entitled to receive and, upon request by the client..., shall promptly render a full accounting regarding such property."

43. ER 1.16(d) requires:

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as... surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned."

44. It should be noted that the requirement of providing an accounting is based upon the request of the client, but the requirement that the client's un-earned advance payment be refunded is triggered by the termination of the relationship not by the request of the client. In that the amount of money due back to the client cannot be determined until some form of accounting has been prepared, it is clear that the attorney has an obligation upon termination of the relationship to prepare an accounting so that the amount due the client can be determined, and "promptly" return the client's money.

45. There is no question, even by Respondent, that she had not earned the entirety of the $5,000 paid by Mr. Padilla during her brief (approximately 2 weeks) representation of him. Respondent's undated billing reflects that Mr. Padilla was,

on the date of his termination of Respondent's services, due $3,175.90. The question is did Respondent make appropriate efforts to contact Mr. Padilla such that the balance of his payment could be refunded to him.

46. Respondent's testimony was that, once Mr. Padilla changed attorneys, she did not have any way to contact him because his phone was disconnected. The evidence simply does not support this position. Respondent had in her files information on property that was owned by Mr. Padilla because she earned the fee set forth in her billing in part doing work to clear up title on that property. Therefore, Respondent could have obtained contact information from the Treasurer's or Recorder's office regarding Mr. Padilla's whereabouts. More importantly, Respondent knew the name of the attorney that was thereafter representing Mr. Padilla, and she could have contacted the attorney about refunding Mr. Padilla's unearned fees. Respondent did neither. Respondent testified that it simply did not "occur to her" to contact the attorney then representing Mr. Padilla.

47. Similarly, once Mr. Padilla contacted Respondent's office in January 2008, and thereafter seeking a refund, Respondent's response to Mr. Padilla's request was inadequate at best. The first time he came in in January, she put him off with the explanation that she didn't have the file, it was in storage. The second time he came in, she told her secretary to give him $1,000 with the hope that it would "pacify him". Mr. Padilla was not told that he had more money due to him because he, in the words of Respondent, "didn't ask". Respondent also testified that it was her intent to "get back to him on that subject" but she never did. Respondent also testified regarding how she came up with $1,000, she stated that

she knew she had that much money in her office safe and "It was just a number. I knew he had it least $1,000 coming."

48. Two things are apparent from this discussion: From the time that Mr. Padilla came into her office in January and the next meeting in March, Respondent made no effort whatsoever to check the file and calculate how much money was owed to Mr. Padilla, and, while it might have been Respondent's intent to "get back to him on that subject", she made no attempt to do so.

49. Mr. Padilla testified that he made numerous attempts to get an accounting from Respondent for the monies that he had paid to her. This Hearing Officer finds Mr. Padilla's testimony to be credible that he called Respondent's office on numerous occasions and at the very least, starting in January of 2008, asked for an accounting of the money that was earned by Respondent and the balance that was due back to him.

50. By Respondent's own testimony, she was merely trying to placate him and buy time. By Mr. Padilla's testimony, Respondent had already spent his money and did not have it to pay it back to him so would have to pay him with monthly payments. Mr. Padilla also testified that he never received an accounting on the fees earned by the Respondent until after he filed a complaint with the State Bar. Respondent was clearly deficient in her compliance with Mr. Padilla's request for an accounting of the money due him, ER 1.15. By Respondent's own admission and the evidence in this matter, Respondent was also clearly deficient in her responsibility to refund unearned fees, ER 1.16(d).

ABA STANDARDS

51. 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.

52. **The Duty Violated:**

The State Bar is asking for a suspension of the Respondent because it claims Respondent's conduct fits *Standard* 4.12 which provides that:

"Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

53. Respondent claims that her conduct is deserving of no more than an Informal Reprimand under *Standard* 7.4 which states that:

"Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system."

54. Respondent urges that this was a matter of her negligence in making a diligent effort to locate Mr. Padilla. Unfortunately, while this was conduct involving one client, Respondent's conduct took place over many months and involved much more than her simply negligently making diligent efforts to locate Mr. Padilla. Once Mr. Padilla made it absolutely clear that he wanted an accounting and a

refund of unearned fees (January, 2008) Respondent did virtually nothing, except retrieve his file from storage, to: determine how much was yet owed to Mr. Padilla; make certain that she had accurate contact information; contact his subsequent attorney, Mr. Mendez, to get contact information on Mr. Padilla; or to make sure that she was ready to give him an accounting and to pay him when he came back in March 2008.

55. In fact, Respondent's testimony about the meeting in March 2008, wherein Mr. Padilla was paid $1,000 is revealing. When Respondent was asked how she came up with the $1,000 amount, she said it was "just a number" and that the $1,000 payment was "... just to pacify him." When Mr. Padilla left her office after the $1,000 payment, Respondent testified that Mr. Padilla was not told that he had more money coming to him because "he didn't ask." Finally, Respondent testified that the itemized accounting submitted in her response to the Bar Complaint was never provided to Mr. Padilla, and when asked how Mr. Padilla would know that he had more money coming back to him when he did not have the accounting, Respondent replied: "How? I don't know, I don't read Mr. Padilla's mind."

56. Not even considering Mr. Padilla's testimony that he had made repeated attempts to contact Respondent in a vain effort to get a refund and an accounting, and considering only Respondent's testimony, she betrays a fundamental misunderstanding of where the responsibility lies. Respondent seems to base almost her entire conduct on the assumption that it is the client's job to continually confront her to force her to give him an accounting and a refund, rather than her responsibility to make sure that the client is provided with an

accounting of how his money had been earned, and a prompt refund of any unearned fees. Yes, Mr. Padilla was not exactly easy to contact. However, after January of 2008 there was no doubt of what he wanted and Respondent had an obligation to do more than just simply wait for his return. Respondent's efforts to avoid the extra work involved in a trust account by charging a "flat fee" does not relieve her of the responsibility to charge a reasonable fee and account for the work she does.

57. The Respondent's suggested violation, under *Standard* 7.4, is inapplicable because there was actual harm to Mr. Padilla in that Respondent has had $3,175.90 that belongs to Mr. Padilla and has wrongfully kept it since July of 2007. Also, it does not apply because it was not an isolated incident, it took place over several months. Respondent could argue that she was simply negligent from the time of her termination in July 2007 to the next meeting with Mr. Padilla in January of 2008. However, her actions in not refunding Mr. Padilla's money and giving him an accounting at the very least from March of 2008 when she gave him $1,000 with the hope that that would placate him, indicate that she was acting with a "knowing" state of mind. The failure to give Mr. Padilla the money that was owed to him, and an accounting at the very least, after March of 2008 indeed to this very day, takes this conduct out of the "isolated" or "negligent" category.

58. *Standard* 7.2 provides:

"Suspension is generally appropriate when a lawyer knowingly 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."

59. The commentary to *Standard* 7.2 states as follows:

"Suspension is appropriate when a lawyer knowingly violates a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system, even when a lawyer does not intentionally abuse the professional relationship by engaging in deceptive conduct."

60. Similarly, *Standard* 4.12 states:

"Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client."

61. The comment to *Standard* 4.12 states as follows:

"Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who co-mingled client funds with their own, or fail to remit client funds promptly."

62. Therefore, the presumptive sanction in this matter is suspension.

63. **The Lawyer's Mental State:**

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

64. **The Actual or Potential Injury:**

There was actual injury to Mr. Padilla in not providing him with an accounting or a refund of the unearned fees of $3,175.90 in a timely fashion.

65. **Aggravating and Mitigating Factors:**

The Hearing Officer finds the following aggravating and mitigating factors:

66. **Aggravating Factors:**

9.22(a) Prior Disciplinary Offenses.

Respondent argues that her extensive prior disciplinary history should not be considered because her conduct in those cases was not exactly the same as in the present case. While the conduct in this case and her prior disciplinary cases is not exactly the same, a review of the last two cases wherein Respondent was censured and placed on probation shows that her conduct in those cases bears a striking resemblance to the facts in this case. While, as Respondent states in her closing memorandum, she has "successfully completed every requirement placed upon her by the disciplinary authorities in all previous matters" and that the circumstances of this case occurred while Respondent was "in consultation with the State Bar's LOMAP in improving her office procedures", that is not sufficient to preclude a consideration of her prior discipline as an aggravating factor.

67. The fact that Respondent has come to the attention of the disciplinary process on multiple occasions, gives this Hearing Officer concern about her competency. In her most recent disciplinary case prior to the case at hand, both the Hearing Officer (set forth on page 2 of the Hearing Officer's Report, exhibit A to the Notice of Intent to Use Prior Discipline) and the Disciplinary Commission (in the Disciplinary Commission Report attached to the same pleading, footnote number 2 on page 2) expressed concerns about the pattern of complaints and the number of censures previously imposed on this Respondent.

68. Respondent was indeed seeking the assistance of the LOMAP counselor at the time Mr. Padilla came in to see her. This was also taking place at roughly the same time that the Hearing Officer in the previous disciplinary matter was issuing his report (May 20, 2008) and the Disciplinary Commission was approving the report (July 14, 2008), both of which expressing concerns about Respondent's pattern of complaints. Clearly Respondent was not learning from her mistakes and complying with her obligation to Mr. Padilla. Therefore, it is entirely appropriate to consider Respondent's prior discipline history:

1) Respondent was censured and placed on probation by order of the Arizona Supreme Court filed August 22, 2008, in SB-08-0114-D, wherein Respondent was dealing with a client who did not understand English, mistook her client's intent to obtain a divorce rather than the separation his spouse had sued for, did not obtain a divorce, charged a fee and placed a lien for her fee against her client's property.

2) Respondent was ordered on probation with LOMAP and MAP by the State Bar Panelist on December 21, 2006, in SBA 06-1721 (06-1721) (no other details were provided).

3) Respondent was censured and placed on probation for one year by order of the Supreme Court of Arizona on September 1, 2005, in SB-05-0129-D, 03-1114, for conduct that is very similar to conduct in this matter. Respondent's client's father had given Respondent $3,000 to be used for a mental health evaluation in a child custody matter. Later, it was decided that the mental health evaluation would not

be done and Respondent's client's father asked for the money back. After repeated demands for the return of the money and an accounting, to which Respondent failed to timely respond, Respondent ultimately refunded to her client's father $2,770.85. In response to a subsequent demand by the client's father for documentation to substantiate the withholding of $229.15, Respondent stated that the money was deducted by her from the cost funds for "services provided by me on the subject of a private mental health provider." A subsequent review of Respondent's trust account records by the State Bar revealed that Respondent did not comply with the trust account rules and guidelines.

4) Respondent was ordered on probation including EEP on December 20, 2002, by the Probable Cause Panelist of the State Bar (no other details were provided)

5) Respondent was censured in SB-02-0090-D (00-0474) and placed on six months of probation with LOMAP and a practice monitor by order of the Arizona Supreme Court on June 10, 2002. In this case, Respondent was found to have violated ER 3.3, knowingly making a false statement of material fact to the State Bar; ER 8.4(c) and (d) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, or engage in conduct that is prejudicial to the administration of justice.

69. **Mitigating Factors:**

9.32(b) Absence of Dishonest Motive.

Respondent submits that her conduct was negligent and therefore, she did not have a dishonest motive. This Hearing Officer concludes that there was insufficient proof to prove the absence of a dishonest motive. The multiple

occasions and opportunities that Respondent had to provide Mr. Padilla with the accounting that he wanted and the money that he was due, and which she failed to take advantage of, especially when considered in light of all of her previous problems complying with the Attorney Discipline Rules, causes this Hearing Officer to conclude that she is not entitled to the benefit of the doubt and have this mitigating factor considered.

70. 9.32(g) Character or Reputation.

Respondent submitted the testimony of Syl Rayes as a character witness who testified that Respondent is both competent and honest. The Hearing Officer would therefore find that the Respondent has a reputation with at least one person of being both competent and honest. However, Respondent's conduct in previous disciplinary matters would indicate that this view is definitely in the minority, and therefore not entitled to very great weight.

71. 9.32(m) Remoteness of Prior Offenses.

Respondent submits that her conduct in this case is remote in time as well as in-kind. The Hearing Officer finds neither given that Respondent was receiving a censure and probation order at just about the time she represented Mr. Padilla.

72. Therefore, the Hearing Officer finds that the aggravating factors significantly outweigh the mitigating factors.

PROPORTIONALITY REVIEW

73. The Supreme Court has held that one of the goals of Attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever

alike, *In re Struthers*, 179 Ariz. to 16, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *Peasely,* 208 Ariz. 90, 90 P.2d 772 (2004).

74. Respondent submits that the proportionality process in her case is unfair because she feels that she is entitled to an Informal Reprimand, and there are very few cases in the accessible database to find proportional cases. While this is true, given that the presumptive sanction is suspension and weighing the aggravating and mitigating factors, this Hearing Officer does not concur that an Informal Reprimand is the appropriate sanction.

75. Because of Respondent's prior disciplinary history, this case is somewhat unique. Respondent's previous sanctions can be summarized as follows:

1. Censure and Probation on August 22, 2008
2. Order of Probation on December 21, 2006
3. Censure and Probation on September 1, 2005
4. Order of Probation on December 20, 2002
5. Censure and Probation on June 10, 2002

76. When this history is added to Respondent's conduct in this case, it is clear that something more than simply a Censure and Probation will be necessary for the protection of the public and the profession.

77. In *In re Herbert*, SB-00-0014-D (2000), Mr. Herbert had been disciplined previously, and it was determined that a 30 day suspension for misconduct involving one matter wherein ER's 1.15 and 1.16(d) violations were shown.

78. In *Matter of Weisling*, SB-01-0038 (2001), Mr. Weisling received a two-year suspension for misconduct involving three matters which involved violations of ERs 1.15, 1.16(d) and Rule 51(h). Mr. Weisling also had been suspended previously and had several other violations.

79. Both the State Bar and Respondent cite numerous cases where the attorney received a censure and probation for conduct similar to Respondent's conduct in this case: *In re Hentoff*, SB-06-0145-D, *In re Bracamonte*, SB-07-0178-D, *In Re Frisbee*, SB-07-0196-D, *Matter of Odneal,* SB 01-0108-D (2001). However, none of these cases involved the discipline history that the Respondent has. A censure and probation might be entirely appropriate were it not for Respondent's significant disciplinary history.

RECOMMENDATION

80. 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). It 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).

81. 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).

82. This is a very challenging and somewhat unique case. The Respondent has a very compelling life story (see Tr. 98:1-104-:17). Respondent came from very humble

origins and has worked very, very hard under extremely adverse conditions to not only get her education, but also become attorney. Respondent also presents herself as a very pleasant and well intentioned person. Respondent's character witness praised Respondent very highly for her honesty and her competency.

83. Unfortunately, throughout the course of the hearing in this matter, this Hearing Officer was concerned about not only Respondent's physical health, but her emotional health as well. While she complained of having a headache and may, in fact, have just been having a bad day, she was very confused about many facts in this case, and seemed to not have a grasp of not only some aspects of the law but the ethical rules as well. Respondent seemed easily confused, and genuinely perplexed about several issues, namely, the differences in the fee agreements, her responsibility in a "flat fee" situation, the counseling that Tracy Ward was trying to help her with, and most of all her responsibility to her client.

84. Given the numerous times that she has taken advantage of the counseling offered through both MAP and LOMAP, one would think that the Respondent would quit getting in trouble. This Hearing Officer does not think that Respondent is deceitful or has larcenous intent. However, it is of great concern to this Hearing Officer that Respondent simply is not up to the rigors of operating a solo practice.

85. While there was insufficient evidence to convince this Hearing Officer that Respondent was intentionally trying to misappropriate Mr. Padilla's money, her testimony indicates that she had very little respect for Mr. Padilla, or his right to an accounting and to a refund. Respondent was worse than just cavalier about her responsibility to Mr. Padilla, she seemed to be unaware and unconcerned. Further,

her practice of giving a complex legal document to her clients and dismissing them to figure it out on their own is shocking. It must be kept in mind too, that Respondent's conduct in this matter from the time that Mr. Padilla terminated her services until he came to her office in January 2008, was the period of time that she was being cautioned by both the Hearing Officer and the Disciplinary Commission in her last disciplinary case. This Hearing Officer does believe that Respondent had already spent all of Mr. Padilla's money by the time that he came to her office in January of 2008 for a refund, and that partially explains her delay in preparing the accounting and making sure that Mr. Padilla received the refund he was due.

86. It is hard to say that Respondent is a bad person or that she has devious intent. However, that does not mean that she does not pose a danger to her clients, especially the ones that she seems to cater to, non-English-speaking people that are not well versed in the legal system.[3]

87. Respondent was, during the hearing in this matter, clearly under a great deal of stress and seemed confused, overwhelmed and adrift. Normally this Hearing Officer would attribute that to the nature of the proceedings, but having now read Respondent's prior disciplinary history, a pattern emerges of someone who is doing everything she can to maintain functionality in a work environment where she simply cannot keep up. This Hearing Officer was a solo practitioner for several years, and understands the stress and strain of trying to keep a solo practice open and thriving. The strain of not having someone to turn to for

[3] Respondent testified that she was switching her practice from domestic relations to immigration law, so this problem could be exacerbated.

assistance, and carrying the entire load oneself, can be tremendous. Respondent, who has been a sole practitioner since her admission in October of 1997, appears to be unable to thrive in the environment of a solo practice, and further not able to bear the strain. That is not to say that Respondent cannot make a contribution in the legal profession or that she should quit practicing law. It simply means that given Respondent's performance over the last 10 years of being a solo practitioner, and her multiple contacts with the disciplinary system, Respondent is not one of those people that should be practicing law by herself.

88. While Respondent is a nice and sympathetic person, her inability to comply with the ethical rules on a consistent and long-term basis, whether through intent or inability, means that she poses a danger to the public and reflects badly on the integrity of the profession.

89. This Hearing Officer recommends that Respondent be suspended for a period of 30 days, and at the end of her suspension be placed on two years of probation with the following requirements:

1) That Respondent be evaluated by a mental health professional who is familiar with the demands of the practice of law, and a report generated by that professional making recommendations as to Respondent's competence and steps that might be made to place her in an area of the law where she can thrive;

2) That Respondent, during the period of her probation, not be allowed to practice law as a sole practitioner.[4]

[4] This Hearing Officer would recommend that as a condition of being allowed to practice law, Respondent never practice as a sole practitioner again. However, this Hearing Officer is uncertain of the authority that would allow that restriction.

3) That Respondent pay restitution to Mr. Padilla in the amount of $3,175.90 prior to the expiration of her suspension;

4) That Respondent comply with any other terms and conditions of probation determined by the Arizona State Bar to be appropriate for not only the protection of the public, but also to assist Respondent in whatever area of employment in the law is deemed most appropriate for her;

5) 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;

6) In the event that the 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 30 days after receipt of the notice, to determine whether a term of probation has 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;

7) Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 7th day of January, 2009.

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

Original filed with the Disciplinary Clerk
this 7th day of January, 2009.

Copy of the foregoing mailed
this 7th day of January, 2009, to:

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