BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOHN P. MOORE,** **Bar No. 003442** Respondent.	Nos. 08-1382 **HEARING OFFICER'S REPORT** Hearing Officer 8T, Frederick K. Steiner, Jr.

I adopt the State Bar's proposed "Procedural History" and its proposed "Findings of Fact" 1-19, with changes set forth below.

PROCEDURAL HISTORY

On October 24, 2008, the Probable Cause Panelist of the State Bar of Arizona issued an order placing Respondent on two years of probation. By letter dated November 26, 2008, Respondent contested the Order. Pursuant to Rule 54(b)(5)[1], formal proceedings were instituted. On December 16, 2008, the Probable Cause Panelist issued a Probable Cause Order directing the State Bar to prepare and file a complaint in the matter. On January 28, 2009, the State Bar filed its complaint. On February 25, 2009, the Disciplinary Clerk issued a Notice of Default for Respondent's failure to timely file an answer; Respondent filed his answer on the same date. On April 6, 2009, Respondent's counsel, Denise M. Quinterri, filed her Notice of Appearance. On May 18, 2009, a hearing on the merits was conducted.

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 September 29, 1973.

[1] The proceedings in this matter were governed by the Rule in effect prior to January 1, 2009.

2. On or about January 9, 2008, Respondent agreed to represent Phillip McIlveen ("Mr. McIlveen") in a family court matter. Respondent and Mr. McIlveen entered into a fee agreement on that day. [SB Ex 9:SBA000022-24; *see also* TR.. 32:18-21; Tr.. 47:20 – 48:4]

3. Respondent's representation concerned custodial rights with Mr. McIlveen's son. [TR.. 60:11-13]

4. Respondent's January 9, 2008, fee agreement did not explain the scope of the representation. [SB Ex. 9:SBA000022-24]

5. Respondent's fee agreement calls for a $5,000 "retainer fee." The document further states the "agreement is not a flat fee agreement if the original estimate proves to be unfair." [Id]

6. On or about March 21, 2008, Respondent went to a party and took multiple drags from marijuana joint. [TR.. 34:8 – 35:20; *see also* RPHS 2:2; SB Ex.8:SBA000021]

7. Respondent knew it was illegal to use and possess marijuana. [TR.. 43:24 – 44:4]

8. In or around June 2008, Mr. McIlveen hired Respondent for representation in a separate legal matter. [TR.. 35:21-23; *see also* Tr.. 58:22 – 59:6]

9. Respondent's representation in the second matter concerned Mr. McIlveen's daughter. [TR. 60:6-10]

10. Respondent did not provide a written fee agreement concerning the new representation. [Tr.. 36:2-9; *see also* TR.. 59:7-10]

11. In or about July 2008, Respondent and Mr. McIlveen had a meeting at Respondent's office. [TR.. 37:19 – 38:2]

12. Respondent and Mr. McIlveen left Respondent's office together and got into a car. [TR. 38:3-6; 53:15 – 54:1]

13. During the car ride, Respondent told Mr. McIlveen a true story in which Respondent paid a woman in exchange for a sex act. [TR. 38:7-16; *see also* 54:9 – 55:2; SB Ex. 1:SBA000003; SB Ex. 3:SBA000010]

14. While telling this story, Respondent used the vernacular term "blow job" to describe the sex act performed. [TR. 55:3-5]

15. Respondent considered the telling of this story as simple "locker room talk" and "bravado." [SB Ex. 3:SBA000010]

16. Mr. McIlveen, upon hearing this story, began to question Respondent's competence and found the story to be inappropriate. [TR. 55:8 – 56:1]

17. Later that same day, Mr. McIlveen and Respondent returned to Respondent's office. [TR. 40:17-19; 56:2-5]

18. While Respondent was seated at his desk, Respondent, apparently in an expression of anger or frustration, threw a tape recorder across the room in Mr. McIlveen's presence. [Tr.. 40:20 – 41:10; *see also* TR. 57:5 – 58:1; SB Ex. 1:SBA000003; SB Ex 3:SBA000010]

19. Years before, on March 5, 2002, the Supreme Court of Arizona censured Respondent for violating Rule 41(g), Ariz.Sup.Ct., and ER 1.7 for making inappropriate sexual comments to a client. [SB Ex 12; *see also* SB Ex 13; Tr.. 41:22 – 42:21].

From Respondent's proposed findings of fact 1-29 I adopt, modify and renumber them as paragraphs 20-25. In general, there is little disagreement on the facts between counsel for the State Bar and Respondent's counsel. There is wide difference in their interpretation of the facts.

20. Mr. Moore's January 9, 2008, fee agreement explains the scope of the representation generally, makes it clear that the fee agreement pertained to a family law matter involving Complainant's son and that the $5,000 referred to as a retainer was a "bookend"

estimate of the range within the fees for the matter would probably fall. It left open the possibility of later fee adjustment by either increasing the total amount or by a rebate if the matter proved easier than expected. The parties verbally discussed the fee arrangement and reached an understanding that Complainant was to reimburse Respondent for Respondent's costs of suit when billed and was to pay either $100 (according to Complainant) or $200 (according to Respondent) per month on legal fees. (*See* Reporter's Transcript of Proceedings ("TR.") for May 18, 2009, 46:18-21; 47:1-25; 48:11-17); 61:18-21; 66:8-19; 73:12-25 (McIlveen testimony). *See* State Bar's Exhibit 9. (*See id.* at SBA000022.) *See* TR. at 124:13-23; 160:10-13. See also Roxanne Carstensen's testimony TR. at 115:14-116:2 .

21. In the latter part of June, 2008, Complainant asked for Mr. Moore's assistance in another family law matter. *See* TR. at 58:22-59:6; *see also* Respondent's Exhibit B at 1018-19. This one was a different matter involving custody of Complainant's daughter by a different mother than the son's mother in the first matter. *See* TR. at 63:2-5, 180:11-16; *see also* Respondent's Exhibit B at 1018-19.

22. Respondent undertook to represent Complainant on the second matter but the engagement was not reduced to writing. Respondent discussed with Complainant that he would keep track of his hours and that he would not be doing two cases for the price of one. Respondent was told by Complainant that he did not care what it would cost to save his daughter. Respondent admitted that failure to get an engagement letter was inattention on his part. *See* TR. at 36:2-15; 170:14-171:9; 180:19-25. *See also* Respondent's written responses at State Bar's Exhibits 3, 6 and 8.

23. Upon taking on the second matter, Mr. Moore immediately expended $565.80 in costs for service of process fees. *See* Respondent's Exhibit A at 1007; Exhibit B at 1018. *See also* TR. 118:22-119:8 (Carstensen testimony).

24. Complainant had repeatedly expressed his satisfaction with Respondent's services up to that point. *See e.g.* Respondent's Exhibit B at 1019: "Thank you both for being in my life and [I] will pay every penny to not have my daughter hurt like that again, or minimize the chance of that happening." Complainant admitted that he was happy with Respondent's services when he engaged Respondent the second time. *See* TR. at 62:17-21; 88:4-7.

25. Over the course of Respondent's representation of Complainant on the two matters, Respondent performed services and incurred costs totaling $7769, against which Complainant paid 9 installments of $100. *See* Respondent's Exhibit A. Ms. Carstensen, Respondent's employee, pressed Complainant for payment by e-mail, regular mail, cover letter with billing statement, and telephone. *See* TR. at 117:20–118:1; 118:5-12; 120:12-20; *see also* Respondent's Exhibit B at 1018 and 1021. Ms. Carstensen would periodically say to Complainant: "You do have costs, they're due on receipt." Complainant would respond with promises of payment. *See* TR. at 120:12-20, but paid nothing on costs and only the nine $100 installments on fees.

From the testimony, Exhibits and Complainant's demeanor, I further find as facts:

26. Complainant's sweeping and wildly accusatory beliefs concerning Respondent are entitled to little credibility. *See, e.g.* Complainant's letter to Bar Counsel of August 8, 2008, Exhibit 5. *Also see*, "Around March 2008 I noticed incompetent behavior and violent remarks." Exhibit 1 and TR. at 89:1-27. The accusations were not proven, or attempted to be proven, by Bar Counsel. Most of them did not even pass the muster of initial review by Bar Counsel; The only ones to reach the complaint stage were the ones discussed below. *See generally* State Bar's

Exhibits 1 and 5 and Respondent's Exhibit B and its attachments. Complainant's testimony was often contradictory. For example, Complainant first testified that he never went to an AA meeting with Respondent. On cross examination he stated that Respondent was present at many meetings Complainant attended. Complainant treated an offer of settlement from Respondent as a bribe offer of money to drop the complaint, causing Respondent to withdraw the offer. *See* State Bar's Exhibits 1 and 2.

27. Complainant, who at the onset was satisfied with Respondent's representation of him in both matters, changed his opinion diametrically. He came to believe that Respondent was no longer adequately representing him and, particularly, that Respondent openly continued a prior friendship with a Mr. Pena, who was an object of Complainant's ire as a friend of one of Complainant's ex-wives and believed by Complainant to be a threat to Complainant's daughter.

28. Complainant's change in attitude toward Respondent paralleled the mounting of Complainant's debt to Respondent for legal services. By the time Complainant filed his complaint with the State Bar on July 31, 2008, his primary purpose was to use the proceedings to get his $900 back (and, by inference, to avoid paying the balance of the over $7,000 he still owed Respondent.) He stated so much in his complaint and in his testimony: "All I want is my money back to pay a new sober counsel that does not misconduct himself. As well as possible *(sic)* shed light to (*sic*) John Moore that he needs help." State Bar Exhibit 1. Respondent denied that he was ever compromised in his practice of law because of any substance abuse. He admitted once violating his AA pledge, but that was due to his having one time used marijuana not insobriety. The State Bar made no effort to prove that Respondent was ever intoxicated or affected by smoking marijuana.

29. By the time of the hearing, Complainant's charges had been boiled down to: (a) Failure to reduce the fee agreements, particularly as to the second matter to writing, (b) a one time sharing of a marijuana cigarette at a social event having nothing to do with his practice of law or his representation of Complainant, (c) while on a car trip with Complainant, recounting a story of a past sexual encounter by Respondent with a prostitute, and (d) in pique or anger throwing a malfunctioning hand-held tape recorder across the room in the presence of Complainant.

30. With the exception of the fee agreement issue, none of the charges related to Respondent's performance of any legal responsibility of Respondent to Complainant or to any client of Respondent. Respondent's actions did not adversely affect his performance as a lawyer, he so testified. Character witnesses appeared on his behalf, Robert Hunxt in person, others via commendatory reference letters (Respondent's Exhibits E-I). It was not disputed that then tape recorder was thrown in Complainant's presence but not at him The State Bar offered no evidence that the events actually adversely affected Respondent' practice of law, taking instead the position that the smoking marijuana, the thrown tape recorder and the telling of a sexual anecdote were ethical violations in themselves.

CONCLUSIONS OF LAW

1. Respondent by failing to adequately communicate in writing the scope of the representation and the fee basis to Complainant violated Arizona Supreme Court Rule 42, ER 1.5. The violation was minimal, not an issue in contention, and caused no confusion or harm to Complainant.

2. Respondent did not otherwise violate any ethical rule of practice under Rule 42 of the Arizona Supreme Court.

DISCUSSION

The squeaky wheel is not always entitled to be greased. In this case Complainant is the loudly squeaking wheel that caused the Arizona State Bar to file an ill-advised complaint, although to its credit the Bar first winnowed out the more flagrant of Complainant's accusations. Nonetheless, Complainant seems likely to emerge with what he was most after, escape from paying a legitimate substantial bill for legal services.

Respondent is a family law practitioner of long practice and well-established reputation. He is also an admitted alcoholic in the sense that all members of Alcoholics Anonymous are, no matter for how many years they have been sober. Complainant engaged Respondent through their common membership in AA. Respondent was hired twice, once for a matter involving Complainant's son by a former wife, once for a matter involving his daughter by another.

For the first representation of Complainant Respondent drew up a letter of engagement which is less than a model of completeness and clarity. For the second he neither amended the first nor composed a second. The standards for an engagement letter are not very demanding, a "simple memorandum" can suffice, *See* comments to ER 1.5 Supreme Court Rules. But the ethical rule is not met if there is no writing at all even though the fee and cost bases of the engagements were not an issue in this case.

Complainant was fee and cost delinquent from the start. He was repeatedly billed, promised to pay, and, until the last stages of the relationship, expressed his intention to pay and his satisfaction with Respondent's services. I conclude that when he changed lawyers and was faced with the certainty of having to pay other counsel he sought a way to cut his legal expenses

and found it by generating a host of complaints about Respondent's character rather than by showing that Respondent lacked competence or actually failed to perform adequately as a lawyer.

Complainant's approach put the State Bar in a quandary. It might have dismissed the complaint, proposed diversion, or, as Respondent's counsel points out, chosen "dismissal with comment." Anyone would have avoided the problem the State Bar faced when it chose to file a full-blown complaint without evidence of any action or inaction by Respondent that adversely affected his representation of Complainant or performance as a lawyer.

There were only accusations and demands by Complainant. There was no tangible evidence of any act or omission by Respondent which bore on Respondent's performance as a lawyer (other than Respondent's failure to generate adequate written engagement letters). The State Bar did not claim and made no effort to prove that any act or omission of Respondent—even the faulty engagement letter—caused or threatened any harm to Complainant or that Respondent's performance as a lawyer was in any way inadequate.

The State Bar's position perforce became a "per se" argument that a lawyer's character flaws and weakness, independent of any effect on his actual practice of law, can be ethical violations simply because he or she is a lawyer.

Most of the ethical rules refer to conduct that explicitly compromise a lawyer's practice of law. But there are some of sweeping broadness and generality. These are the ones the State Bar turns to in this case: ER 8.4(b) which makes it unethical to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," Rule 41(b) which requires a lawyer to support the constitution and laws of the United States and of this state. "Rule 41(g) which calls for lawyers to avoid "unprofessional conduct" and to avoid

"substantial or repeated violations of the lawyer's Oath of Admission to the Bar..." The lawyer's Oath in turn, requires the lawyer to "abstain from offensive conduct."

Under ethical rules such as these, it is possible to see ethical violations in contexts where no harm or potential harm is done to anyone, merely that in someone's opinion the lawyer has engaged in "offensive conduct." To paint with so broad a brush would cheapen the rules themselves and work to defeat their purpose. There is no "per se" ethical rule that dictates a lawyer is guilty of unethical practice merely because his client levies unfounded accusations or thinks the lawyer's conduct or personality to be generally offensive or in some minor way illegal but not in a way that adversely affects the lawyer's actual practice of law.

Paragraph 14 of the Preamble to the Ethical Rules states: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Applying this rule of rule of reason to the present case, I find it unreasonable to treat a fleeting casual single instance of a drag or two on a marijuana cigarette to be an ethical violation where the event is a one time social event. I do not consider it reasonable to treat a single confession or boast made on a car trip of some past sexual escapade as a breach of professional ethics, nor do I consider it reasonable to deem it unethical conduct for a lawyer a single time to throw a malfunctioning tape recorder at no one and hit no one.

PROPORTIONALITY

Apart from the failure of Respondent to adequately set out the terms of his engagement aside, I find the most apposite cases to be cases that fall generally into the category of "offensive personality." I look to the Disciplinary Cases matrix. The facts of all the cases dealt without exception to conduct directly related to legal proceedings or directed against clients, the court, or

other counsel in a legal setting, not to conduct criminally, morally or personally offensive in a non-legal context.

The sanctions in these cases ranged from one disbarment (facts not stated), one 90 day suspension, 3 thirty day suspensions, 3 censures, 2 informal reprimands, and 2 dismissals. Here the State Bar seeks censure and Respondent dismissal. Either would be proportionate within this line of case. I find persuasive *Matter of Johnson*, a 1970 case dismissed because the court held there to have been only isolated incidents not involving a fixed pattern of misbehavior.

Aggravation and Mitigation

Aggravation and mitigation do not figure into the charges in this case that I recommend being dismissed, those that involved the use of marijuana, the telling of an off-color remembrance, and the throwing of the tape recorder.

As to Respondent's failure to put in writing adequately the basis of his representation of Respondent on the first matter and not to do so at all as to the second, I find in aggravation under the ABA Standards 9.22(a) and 9.22(i) that there was a remote prior discipline and that Respondent had substantial experience in the practice of law. In mitigation under 9.32(b), (e), (g) (l) and (m) I find that there was absence of dishonest or selfish motive, full disclosure to the disciplinary board and a cooperative attitude, good character and reputation, remoteness of the prior offense and (as to the prior offense) remorse. In considering sanction I also have taken into account that Respondent's failure to adequately put the engagements in writing was at most a procedural lapse that had no effect on the case. Both parties understood both the scope of the engagements and the financial terms and neither was misled

RECOMMENDATION

For violation of ER 1.5(b) I recommend that under Supreme Court Rule 60(4) Respondent be given an Informal Reprimand. I do not recommend that he be placed on probation or suffer any other consequence. I further recommend that all other charges against Respondent be dismissed.

DATED this 24th day of June, 2009.

Frederick K. Steiner, Jr./NM
Frederick K. Steiner, Jr.
Hearing Officer 8T

Original filed with the Disciplinary Clerk
this 24th day of June, 2009.

Copy of the foregoing mailed
this 25th day of June, 2009, to:

Denise Quinterri
Respondent's Counsel
The Law Office of Denise M Quinterri PLLC
4747 E Elliot Rd, #29-210
Phoenix, AZ 85044

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

by: Evelyn Loya