

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

FILED

APR 17 2009

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY

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

ELLIOT J. PESKIND,
Bar No. 003096

Respondent.

No. 08-0168 and 08-1847

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

1. Probable Cause was found in 08-0168 on October 22, 2008, and in 08-1847 on December 17, 2008. The State Bar filed a Complaint on December 23, 2008, and service was affected on December 29, 2008. The case was assigned to the undersigned Hearing Officer on January 13, 2009. Respondent filed his Answer on January 27, 2009, and an Initial Case Management Conference was held on January 29, 2009, from which a Final Hearing was set on March 31, 2009. After discovery and motion practice, the parties settled the case and filed a Notice of Settlement on February 27, 2009. The matter went to hearing on the parties' agreement on March 31, 2009.

FINDINGS OF FACT

Factual Summary

2. This case involves a charge that Respondent failed to notify his clients in writing of an increase in his hourly fee rate, was tardy in responding to the Bar's request for information and, while on a previous probation which resulted in him losing

his certification in real estate law, sent out letterhead that contained the certification.

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 September 23, 1972.

Count One (File No. 08-0168 Valdini)

4. In or around March 2003, Respondent began his representation of Al and Marcela Valdini (the "Valdinis") in Case Number CV 2003-072 in the Gila County Superior Court.
5. Respondent's legal fees were \$275 per hour when the representation began. In Respondent's written fee agreement, he advised the Valdinis that this was his hourly rate and the hourly rate they would be charged for his representation, but that such hourly rate would be subject to periodic increases.
6. In or around January 2005, while Respondent was still representing the Valdinis, Respondent increased his hourly fee to \$300 per hour.
7. Respondent did not provide prior, written notice to the Valdinis specifically advising them of the increase of \$25 in his hourly billing before he began billing them at this new hourly rate.
8. In or around the year 2007, while Respondent was still representing the Valdinis, Respondent again increased his hourly fee, this time to \$325 per hour.
9. Respondent did not provide prior written notice to the Valdinis specifically advising them of the \$25 increase in his hourly billing rate before beginning to bill them at his new hourly rate.

10. By letter dated January 2, 2007, sent to Respondent at his address of record, Respondent was advised that the State Bar's Board of Legal Specialization intended to revoke Respondent's certification as a real estate law specialist, incident to his having been censured and placed on one year of probation by the Supreme Court of Arizona on October 13, 2006, in SB-06-0026-D.
11. The January 2, 2007, letter further advised that the revocation would become effective 30 days from the date of the letter and that Respondent had a right to request a hearing within 30 days of the date of the letter.
12. The Respondent did not request a hearing concerning the revocation of his real estate law specialist certification.
13. Respondent, not having responded or requesting a hearing, on or about February 1, 2007, had his certification as a real estate specialist revoked.
14. On or about January 27, 2008, Mr. Valdini submitted a charge to the State Bar of Arizona regarding Respondent's conduct. A screening investigation pursuant to Rule 54, Ariz.R.Sup.Ct., was initiated.
15. By letter dated February 13, 2008, sent to Respondent at his address of record, Bar Counsel advised Respondent of the Valdinis' allegations and requested that Respondent respond in writing within 20 days of the date of the letter.
16. Respondent failed to respond to the State Bar's February 13, 2008, letter within the prescribed time.
17. By letter dated March 19, 2008, sent to Respondent at his address of record, Bar Counsel reminded Respondent of his duty to respond and cooperate with the State Bar, and advised him that his failure to respond was, in itself, grounds for

- discipline. Respondent was instructed to reply within 10 days of the date of the letter.
18. Respondent failed to respond to the State Bar's March 19, 2008, letter within the prescribed time.
 19. On or about June 18, 2008, Respondent mailed a letter to the State Bar that addressed the Bar charge. The letterhead on which Respondent's letter was written indicated that Respondent was a certified real estate law specialist.
 20. By letter dated August 5, 2008, sent to Respondent at his address of record, Bar Counsel requested that Respondent provide further specific information in regard to the State Bar's investigation. Respondent was instructed to provide the information no later than August 19, 2008.
 21. Respondent failed to respond to the State Bar's August 5, 2008, letter by the due date.
 22. On or about September 4, 2008, Respondent mailed a letter to the State Bar that addressed Bar Counsel's request for further specific information. The letter was again written on the letterhead stationery indicating that Respondent was a certified real estate law specialist.
 23. By letter dated September 12, 2008, sent to Respondent at his address of record, Bar Counsel requested further specific information in regard to the State Bar's investigation. Respondent was instructed to provide the information no later than September 29, 2008.
 24. Respondent failed to respond to the State Bar's letter by the September 29, 2008, deadline.

25. On or about October 13, 2008, Respondent mailed a letter to the State Bar that addressed Bar Counsel's request for further specific information. Again, the letter was written on letterhead showing Respondent was a certified real estate law specialist.
26. On the occasions when Respondent failed to provide information to Bar Counsel within the time requested, he discussed with Bar Counsel the fact that he was having difficulty doing so due to health problems and other professional demands and requested additional time to respond. According to the Bar, Respondent was having cardiac episodes as well as having to deal with the problems of being a solo practitioner which delayed his response, Transcript of Hearing ("Tr.") 9:14 - 24. However, except on one occasion, Respondent only requested additional time to respond once the deadline to respond had passed. In Respondent's mind, he thought that he had an extension of time to file a more complete response, Tr. 10:23 - 12:5. The Bar stated that Respondent's responses, albeit late, were complete, Tr. 15:2 - 15 & 16:21 - 17:2.

Count Two (File No. 08-1847)

27. By Order of the Probable Cause Panelist, entered on December 21, 2006, Respondent was placed on probation in file number 05-2253, effective December 21, 2006.
28. Pursuant to the December 21, 2006, Order of Probation ("Order of Probation"), Respondent was required to submit to a Law Office Management Assistance Program ("LOMAP") assessment and to comply with any recommendations made by the LOMAP Director.

29. On or about March 29, 2007, pursuant to the Order of Probation, Respondent entered into a probation contract with LOMAP. The term of probation was one year from the date Respondent signed the probation contract.
30. Term I(E)(1) of the LOMAP probation contract stated Respondent was to “refrain from engaging in any conduct which would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona.”
31. Respondent's probation was extended pursuant to term I(E)(2) of the LOMAP probation contract while the State Bar investigated State Bar file number 08-0168 (Valdini).
32. By letter dated November 4, 2008, sent to Respondent at his address of record, Bar Counsel advised Respondent of the Bar's investigation of his possible ethical misconduct relating to his alleged violation of probation and instructed Respondent to respond in writing within 20 days of the date of the letter.
33. By letter dated December 15, 2008, received approximately 3 weeks after the stated due date, Respondent, or those under his direct supervision, e-mailed Respondent's response to the State Bar's November 4, 2008, letter.

CONCLUSIONS OF LAW

34. The Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically:

ER 1.5(b) changes to fee agreements must be in writing

ER 7.4(a) communication of fields of practice

Rule 53(e) violation of a condition of probation

Rule 53(f) failure to furnish information

35. The State Bar conditionally dismissed a Rule 42, ER 8.4(c) violation involving dishonesty, fraud, deceit or misrepresentation based upon uncertainty that it would be able to prove that Respondent acted with the requisite knowing mental state by clear and convincing evidence, Tr. 18:9 – 19:17.

ABA STANDARDS

36. 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:

37. Respondent violated his duty as a professional as well as his duty not to violate a prior probation order. Respondent also violated his duty to his client in that, although he contends that he notified his clients of the fee changes orally, the clients, without having been provided prior written notice, did not have a meaningful opportunity to object or terminate the Respondent's representation until after they received statements on which the new rates had been applied. One of the Complainants, Ms. Valdini, appeared at the hearing on the agreement but did not participate in the hearing in a substantive way.
38. Given the conduct that Respondent has admitted to, the most applicable *Standards* are *Standard* 7.0, "Violation of Other Duties owed as a Professional" and *Standard* 8.0 "Prior Discipline Orders."
39. *Standard* 7.3 provides:
- "Reprimand [Censure and Arizona] is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional,

and causes injury or potential injury to a client, the public, or the legal system.”

40. *Standard 8.3* provides:

“Reprimand [Censure in Arizona] is generally appropriate when a lawyer: (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or (b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that caused injury or potential injury to a client, the public, the legal system or the profession.”

41. The presumptive sanction therefore, under the American Bar Associations *Standards*, is Censure.

The Lawyer’s Mental State:

42. The parties submit, and the Hearing Officer could find no evidence to the contrary, that Respondent acted with a negligent mental state, Tr. 15:16 - 21.

The Injury Caused:

43. The parties submit, and the Hearing Officer could find no evidence to the contrary, that the injury in this matter was “potential” rather than actual injury, Tr. 15:22 - 24. Not only was there potential injury to the Valdinis, there was also potential injury while Respondent continued to use stationery which held himself out as a certified specialist after his certification was revoked.

Aggravating and Mitigating Factors

Aggravating Factors:

44. *Standard 9.22(a)* Prior Disciplinary Offenses: On October 13, 2006, in SB-06-0148-D, Respondent agreed to consent to discipline and was censured and placed

on one year of probation for violations of Rule 42, Ariz.R.Sup.Ct., specifically ER's 1.15, 1.16 and 8.1(b) and Rule 43, 44, 53(d) and 53(f). Also, on December 21, 2006, in State Bar File Number 05-2253, Respondent was placed on probation for a period of one year for violation of Rule 42, ER 1.2(a). The Bar stated at the hearing on the agreement that Respondent's prior violation was for unrelated violations, Tr. 8:7 – 9:5.

45. *Standard 9.22(d) Multiple Offenses:* Respondent violated multiple ethical rules and *Standards*.

46. *Standard 9.22(i) Substantial Experience in the Practice of Law:* Respondent was admitted to practice law in Arizona in 1972.

Mitigating Factors:

47. *Standard 9.32(b) Absence of Dishonest or Selfish Motive:* Respondent's conditionally admitted violations were the product of inadvertence, and did not spring from an intentional desire to deceive or advance his personal interests.

48. *Standard 9.32(d) Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct:* Respondent has willingly agreed to submit to arbitration of the fee dispute with the Valdinis and to comply with the decision of the arbitration panel. Respondent also immediately ceased using letterhead indicating that he was a certified real estate specialist after it was brought to his attention in these proceedings. Finally, Respondent has changed his practice setting and now practices within a law firm, not as a solo practitioner. Respondent's new firm has in place policies requiring that clients be provided advance written notice of any increases in the hourly rate and that all such

increases, along with the proposed communications to clients advising them of an impending increase, be reviewed and approved in advance by another senior partner of the firm.

49. *Standard 9.32(g) Character or Reputation:* Respondent has enjoyed a Martindale-Hubble “AV” peer rating for over 30 years. He is a recent past Chairman of the State Bar’s Law Practice Management Committee and has served on the State Bar’s Committee on Civil Practice. He has twice had articles published in “The Arizona Attorney.” Although the Bar had not verified the above stated mitigation, it was satisfied that the character claims were valid, Tr. 16:4 – 20.
50. *Standard 9.32(e) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings:* Although Respondent had difficulty providing information to Bar Counsel in the course of the investigation within the requested time frames, he ultimately made full and free disclosure of the pertinent information that was available to him, Tr. 15:2 – 15 & 16:21 – 17:2. Since the filing of the formal Complaint in this matter, Respondent has been fully cooperative.
51. *Standard 9.32(i) Remorse:* Respondent has twice apologized to Bar Counsel for his inadvertence giving rise to the conditionally admitted violation of ER 1.5(b) and ER 7.4(a), and has taken concrete steps calculated to ensure that such violations will not occur in the future. These steps include significantly changing his practice environment from solo practitioner to that of a partner in a law firm where he will have better backup and will be relieved of much of the day to day administrative responsibilities that he previously had to shoulder alone. In

addition, Respondent has agreed to the implementation of several policies in his new firm that are calculated to minimize the likelihood of future violations of the sort to which he has conditionally admitted. Among these are the requirements that the following must be approved in advance by another senior partner in the firm: (1) All new matters (approval required before billable work can begin); (2) all engagement letters; and (3) all billing rate increases and letters to clients providing them with advance notice of impending increases. Respondent has also agreed to the implementation of a policy within his firm whereby the matters he is handling for clients are subject to monitoring by another senior partner of the firm, and that partner must be promptly notified of any client complaints and/or State Bar investigations. As yet another preventative measure, Respondent has volunteered to attend the State Bar sponsored CLE program "The Ethics Café" scheduled for June 10, 2009, and to attend for a second time the State Bar Professionalism Course that is scheduled for August 12, 2009. The Bar asserts that when these concrete steps by Respondent to address the circumstances that got him into trouble are combined with his apology and remorse, Respondent qualifies for a *Standard* 9.32(i) Remorse mitigating factor, Tr. 17:3 - 17. This Hearing Officer concurs.

52. The parties submit that the aggravating and mitigating factors do not remove this case from the presumptive sanction of censure.

PROPORTIONALITY REVIEW

53. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is recognized that the

concept of proportionality is an “imperfect process” because no two cases are ever alike. *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994); *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved. *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*.

54. In this case, the State Bar is recommending, and the Respondent has accepted, a Censure and probation for one year. The parties have submitted the following cases in support of the proposed sanction in this case.
55. In *In re Gregory*, SB-08-0153-D (2008), Gregory was Censured and placed on one year of probation for violating Rule 53(e) Ariz.R.Sup.Ct. Gregory failed to comply with the terms of his probation contract as imposed in a previous Judgment and Order. Specifically, Gregory failed to timely file quarterly trust account reports, failed to properly reconcile his trust account, and failed to pay the Trust Account Program fee as agreed in his probation contract. The one aggravating factor was 9.22(a) prior disciplinary offenses. The one mitigating factor was 9.32(f) inexperience in the practice of law.
56. In *In re Howell*, SB-07-0014-D (2007), Howell was Censured and placed on probation for two years for violating Rule 42, Ariz.R.Sup.Ct., specifically ER 5.5(a) and Rule 53(e). Howell engaged in unauthorized practice of law while summarily suspended for failure to comply with mandatory continuing legal education requirements. Howell further violated his conditions of probation

and/or diversion in an underlying matter. There were two aggravating factors: 9.22(a) prior disciplinary offenses and 9.22(d) multiple offenses. There were two mitigating factors: 9.32(b) lack of dishonest or selfish motive and 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct.

57. In *In re Harris*, SB-06-0150-D (2006), Harris was Censured and placed on one year of probation for violation of Rules 43(d) and 53(e) Ariz.R.Sup.Ct.. Harris failed to adhere to the trust account rules and guidelines by failing to maintain separate ledgers or equivalents for client funds and to conduct monthly reconciliations. Harris also violated his term of probation imposed in a prior discipline matter by failing to file complete quarterly reports, thereby constituting a material breach of the existing probation contract. There were four aggravating factors: 9.22(a) prior disciplinary offenses, 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, and 9.22(i) substantial experience in the practice of law. There were two mitigating factors: 9.32(b) absence of dishonest or selfish motive and 9.32(c) personal or emotional problems.
58. While the above cited cases are not directly on point, they do give guidance for cases in which an attorney violates a probation order. Also, in *Howell* and *Harris*, both Respondents violated ethical rules that caused a breach of their probation.

RECOMMENDATION

59. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice, as well as 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). 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).

60. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Associations *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).
61. This Hearing Officer is concerned any time that an attorney, while on probation, violates the rules yet again. This case started out by the Valdinis complaining that Respondent over billed them on attorney fees, Tr. 14:2 – 16.¹ During the investigation of the overbilling issue, the Bar discovered that Respondent had not notified his clients in writing that he was raising his hourly fee. In the communication back and forth between the Bar and Respondent, it was discovered that Respondent had not removed the mention of his real estate certification from his letterhead. Respondent also had problems with responding to the Bar's request for information in a timely fashion, although when he did respond, he apparently responded thoroughly.
62. Were these violations either more serious or intentional, this Hearing Officer would have more difficulty accepting and recommending this agreement. However, given the context within which Respondent's negligence occurred, having recently left a large firm and trying to manage all of the pressures and difficulties attendant to a solo practice, this Hearing Officer is perhaps a little more understanding.

¹ That issue is being addressed in the fee arbitration being required by the parties' agreement.

63. What persuades this Hearing Officer even more is Respondent's genuine remorse and acceptance of responsibility. Respondent has already implemented safeguards by not only joining a firm but also having internal structures within that firm to preclude problems in the future. Additionally, Respondent has indicated that he is ready to proceed with fee arbitration with the Valdinis even prior to these disciplinary proceedings' conclusion, and is also anxious to take part in the assistance offered by LOMAP right away, even knowing that if ultimately this agreement is rejected, he will not get credit for those efforts, Tr. 19:18 – 20:14.
64. This Hearing Officer is further persuaded by the Respondent's own comment that he makes no excuses and accepts the responsibility of an attorney to be timely in his responses, Tr. 13:1 -8. Also, Respondent stated the following:
- “It embarrasses me and distresses me that the inadvertence to the agreement today [sic] has occurred, and I have no reason whatsoever to believe that such inadvertence and/or negligence will occur again... I recognized honestly and openly the error or errors and a little confession is good for the soul.” Tr. 24:19 - 25:5.
65. Respondent has been practicing law for many years and has not had any problems until recently. It appears that he has taken the steps necessary to resolve the circumstances that have caused him to be involved in these proceedings, and it is hoped that the period of probation and supervision by a practice monitor, as well as his partner, will ensure that he does not have any further contact with the disciplinary process. This Hearing Officer found Respondent to be very open about his shortcomings, genuinely remorseful, and willing to address his problems in a comprehensive way.

66. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following:

- 1) Respondent be Censured;
- 2) Respondent be placed on a period of probation for one year on the following terms and conditions:

- a) Respondent contact the Director of LOMAP within 30 days of the date of the final Judgment and Order. Respondent submit to a LOMAP examination of his office procedures, including, but not limited to, compliance with ERs 1.5(b), 7.4(a), and Rule 53(e) and 53(f), Ariz.R.Sup.Ct. The director of LOMAP develop "Terms and Conditions of Probation" and those terms be incorporated herein by reference. One of the terms and conditions of the Respondent's probation be that Respondent's participation in LOMAP include the use of a Practice Monitor. The probation period will begin to run at the time of the Judgment and Order and will conclude one year from the date on which Respondent signs the "Terms and Conditions of Probation." Respondent will be responsible for any costs associated with LOMAP.

- b) Respondent participate in the State Bar's Fee Arbitration Program with respect to the complainant Valdinis' fee dispute. Respondent contact the Fee Arbitration Program Coordinator within 20 days from the date of the final Judgment and Order to obtain and submit the completed forms

necessary to participate in Fee Arbitration. Respondent timely pay any award entered in the Fee Arbitration proceeding.

3) Respondent pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent pay all costs incurred by the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerks Office in this matter.

4) In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Noncompliance with the imposing entity pursuant to Rule 60(f)(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 notice, to determine whether a term of probation has been breached, and if so, to recommend an appropriate sanction 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 noncompliance by clear and convincing evidence.

DATED this 17th day of April, 2009.

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

Original filed with the Disciplinary Clerk
this 17th day of April, 2009.

Copy of the foregoing mailed
this 20th day of April, 2009, to:

Richard K. Walker
Respondent's Counsel
Walker & Peskind, PLLC
7047 E Greenway Pkwy, Suite 155
Scottsdale, AZ 85254

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

by: Evelyn Loza