

FILED
FEB 24 2009
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY Amr

File No. 08-1681

HEARING OFFICER'S REPORT

RESPONDENT.

1. This matter originated as a direct filing of a Joint Memorandum and Tender of Admissions on January 30, 2009. No Complaint was filed in this matter. The case was assigned to the undersigned Hearing Officer on February 9, 2009. Because the conduct set forth herein is fairly straightforward and the Mitigating Factors did not require significant factual support, no hearing was held on the agreement.

2. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having first been admitted to practice in Arizona on November 6, 1984.
3. This case involves an attorney who failed to communicate with his client prior to filing an Answer on behalf of the client in a civil matter, and failing to properly monitor and supervise the conduct of a senior associate attorney in his firm representing that client. There is no issue of restitution in this case, and the

Complainant has been notified of the consent agreement in compliance with Rule 52(b)(3), Ariz.R.Sup.Ct.

COUNT ONE (File no. 08-1681)

4. On or about April 17, 2007, Respondent filed an Answer on behalf of Vadim Stepanov in the case of Domingo Perez Paciencia, et al. v. PDQ Transit LLC. et al. (CV 2007-000239).
5. The above referenced case involved the death of three Mexican Nationals who were killed when an 18 wheeler driven by Vadim Stepanov crashed into them.
6. Respondent and his firm routinely are assigned the defense of lawsuits by Lincoln General Company. Through them, Respondent was assigned the representation of PDQ, the defendant trucking company and its driver, Vadim Stepanov.
7. Respondent was the partner assigned to the case and Stephen Adelman was the Senior Associate responsible for handling the above referenced case. It was Respondent's responsibility to monitor the litigation and supervise Mr. Adelman.
8. Respondent was not able to locate or consult with Mr. Stepanov, a long-distance truck driver who lives in Ohio, before he filed the Answer on his behalf.
9. According to Respondent, he prepared the Answer based upon information contained in a report prepared by a California attorney and an investigator who had been dispatched to the accident scene the day after the accident.
10. On July 10, 2007, Mr. Aleman filed an unverified Initial Disclosure Statement in the above referenced case even though he was not able to locate or consult with Mr. Stepanov before he filed it.

11. On July 2, 2007, Plaintiffs filed their initial discovery, including: Plaintiff's First Set of Non-Uniform Interrogatories, Plaintiff's Uniform Interrogatories, and Plaintiff's First Request for Production.
12. Mr. Stepanov, the driver of the 18 wheeler, was not located until April 16, 2008, by a private investigator hired by Respondent's firm.
13. It was not until June 30, 2008, that Mr. Adelman spoke directly with Mr. Stepanov about the facts of the case. This was over one year after Respondent filed the Answer in the above referenced case.
14. On May 13, 2008, Plaintiffs filed a Motion for Partial Summary Judgment Re: Liability. The basis of the Motion for Partial Summary Judgment was that Defendants had failed to respond to Plaintiff's First and Second Requests for Admissions, which had been filed on July 2, 2007, and March 7, 2008, and therefore, Defendants had admitted everything pursuant to Rule 36(a), Ariz.R.Civ.P.
15. Upon receipt of the motion, Mr. Adelman immediately looked for the missing discovery. There were no paper copies in the file. Mr. Adelman then checked to see if the Admission Responses existed on the law firm's computer system. A copy of the Admission Responses existed on the firm's computer system, however, it only showed the date on which each document had been last edited.
16. On May 19, 2008, Mr. Adelman sent Plaintiff's counsel a letter explaining that he believed that Defendant's Admission Responses had already been sent out but a paper copy was not contained in his file. Mr. Adelman further explained that the firm's computer system showed the last edit date. Accordingly, Mr. Adelman sent

Plaintiff's counsel Defendant's Admission Responses with a mailing certificate which listed the date each document was last edited, August 17, 2007, and April 21, 2008.

17. Although Respondent met regularly with Mr. Adelman concerning the case, they did not discuss the backdated Admission Responses or the false mailing certificate before Mr. Adelman sent them to Plaintiff's counsel.
18. On June 4, 2008, Mr. Adelman noticed the deposition of two DPS officers that responded to the scene of the accident. Mr. Adelman did not request leave of the Court to take the depositions and did not have the agreement of the parties to move forward with the depositions. Plaintiff's counsel notified Mr. Adelman that he should wait to take the depositions until after the Court made a ruling on the issue of liability. Mr. Adelman conducted depositions of the two DPS officers without agreement or court order, and knowing adverse counsel could not and would not participate in the depositions.
19. Respondent asserts, and the State Bar does not dispute, that the deposition dates were set in consultation with Plaintiff's paralegal whom had checked with her attorney, consistent with the "consultation" between counsel prior to setting of "depositions" as required by the 1991 comment to Rule 30(a), Ariz.R.Civ.P. Respondent further asserts, and the State Bar does not dispute, that the delay Plaintiff's counsel sought would have pushed the depositions beyond the discovery cutoff to which the parties had stipulated, leading to the risk that Judge Janet Barton would preclude Defendants from taking the depositions.

20. On June 16, 2008, Mr. Adelman propounded an Interrogatory to which Plaintiff's counsel objected. Mr. Adelman later filed a Motion to Compel an answer to the Interrogatory. The Interrogatory requested information regarding how Plaintiffs learned of their attorney's existence, and who contacted whom first, whether the date of the initial communication with their current lawyers was before or after April 24, 2005, and whether plaintiffs had ever heard of a lawsuit before they became a plaintiff in this lawsuit.
21. Mr. Adelman believed the interrogatory was relevant in light of the fact that Plaintiffs had testified that they had never traveled beyond their home state of Chiapas, Mexico, and only speak a local tribal language called Tzotzil and are illiterate. Mr. Adelman also believed that Plaintiff's co-counsel from Corpus Christi, Texas may have violated Arizona's ER 7.3.
22. On June 16, 2008, Mr. Adelman requested discovery relating to Plaintiff's lack of indoor plumbing facilities and Plaintiff's bathroom habits and other issues about their living conditions.
23. Mr. Adelman sought the discovery to memorialize the substance of deposition testimony that was unreliably translated from Tzotzil to Spanish by a relative retained by Plaintiff's counsel, and to obtain basic background information to show the most basic aspect of Plaintiff's lifestyle, and to show the loss of contribution of the deceased, which would be foreign to a Maricopa County juror. Respondent asserts, and the State Bar does not dispute, that the purportedly embarrassing subject matter had been originally explored by Plaintiff's counsel in their direct witness examination, and then followed up on by Mr. Adelman.

24. Respondent was not aware that these two discovery requests were propounded until after they had been sent to Plaintiff's counsel and the Motion to Compel had been filed.
25. The discovery cut-off date in the above referenced case was scheduled for July 26, 2008.
26. On September 3, 2008, Mr. Adelman provided Defendant's Answers to Plaintiff's First Set of Non-Uniform Interrogatories, Defendant's Answers to Plaintiff's Uniform Interrogatories, and Defendant's Response to Plaintiff's Request to Produce. These Answers to Interrogatories and Requests to Produce were provided 14 months after they were due.
27. On September 15, 2008, Judge Oberbillig found the Interrogatory regarding the solicitation of Plaintiffs submitted by Mr. Adelman violated Rule 11. Judge Oberbillig also determined that defense counsel conceded that the discovery requests and Motion to Compel were not reasonably calculated to lead to the discovery of admissible evidence. Judge Oberbillig also ruled the question regarding bathroom habits was offensive and not relevant. The Court requested that the State Bar conduct further investigation into this matter.
28. On September 15, 2008, Judge Oberbillig ordered the depositions of the two DPS officers would not be usable at the request of the defense, unless otherwise agreed upon between counsel. Judge Oberbillig also allowed Plaintiff's counsel to retake the DPS officers' depositions.
29. On September 15, 2008, Judge Oberbillig permitted Plaintiff's counsel to withdraw disclosure of the Plaintiff's Expert Report and submit a new Expert

Report. Photographs taken shortly after the incident were provided to Plaintiff's counsel just prior to the discovery cut-off date, but after their Expert Report was disclosed. No discovery document other than the insurance policy had been provided to Plaintiff's counsel prior to filing their Expert Report.

30. On September 15, 2008, Judge Oberbillig found that Mr. Adelman's Responses to Admissions were backdated and the mailing certificate was false. The Court found that this conduct was unprofessional at a minimum, and referenced this inappropriate behavior to the State Bar.¹
31. Respondent asserts, and the State Bar does not dispute, that the backdated Responses to Admissions were not submitted in a dishonest manner because Respondent had a good faith belief that the date on the Responses was the correct date and he simply re-created a document he believed had been previously sent to Plaintiff's Counsel with the correct date. Respondent sent Plaintiff's counsel a letter with this explanation attached to the Responses to Admission. The date Respondent put on the Responses to Admission was the date of the last correction on his computer system. Respondent acknowledges that he did not follow the proper procedure when he served the backdated Responses to Admissions and admits that this matter should have been handled differently.
32. On September 15, 2008, Judge Oberbillig ordered that Plaintiff's Counsel could submit a fee application relating to the additional time spent and the preparation for the deposition of the DPS officers as well as retaking the deposition of Robert Williams, the safety manager, and Defendant Vadim Stepanov. Additionally, the

¹ The Hearing Officer has been advised that Mr. Adelman has entered into a similar consent agreement to discipline.

Court allowed Plaintiffs to submit a fee application for the additional time spent on updating their Expert Disclosure Report. The Court stated that Plaintiff shall include in their fee application any time spent responding to Defendant's Motion to Compel.²

CONCLUSIONS OF LAW

33. This Hearing Officer finds that Respondent, by failing to consult with his client prior to filing the Answer, violated ER's 1.2 and 1.4., not consulting with his client; and 8.4(d), engaging in conduct that is prejudicial to the administration of justice. Respondent, by failing to supervise an associate in his firm, caused improper discovery requests and motions to be filed, delaying the progress of the case, and which violated: ER's 1.3, acting with diligence and promptness in representing the client; 3.2, expediting litigation; 5.1(b) & (c)(1), adequately supervising an associate; and 8.4, conduct prejudicial to the administration of justice.

ABA STANDARDS

34. 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

35. Respondent's conduct is a violation of his duties owed to his client, and as a professional. *Standard* 4.43, Lack of Diligence, and *Standard* 7.3, Violation of

² The issue of sanctions by Judge Oberbillig against Respondent or his firm was not completely addressed by the parties in the Tender of Admissions, so the undersigned Hearing Officer inquired of the parties and was advised that Judge Oberbillig left the fees issue open and that issue is being negotiated as part of the settlement discussion of the underlying litigation.

Other Duties Owed as a Professional would appear to be the most applicable *Standards*. *Standard 4.43* provides: "Reprimand (Censure in Arizona) is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. In this matter, Respondent did not consult with his client, and in fact did not even meet with his client prior to filing in Answer on his behalf. Thereafter, Respondent's firm went about the representation of the client in a civil lawsuit without the client's permission or participation.

36. *Standard 7.3* provides: "Reprimand (Censure in 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. Respondent, by failing to supervise his associate, not only delayed the civil proceedings but caused extra work to be performed by other parties.

The Lawyer's Mental State

37. The parties submit, and the Hearing Officer finds no evidence to the contrary, that Respondent's mental state was "negligent".

Actual or Potential Injury

38. Respondent's conduct in failing to consult with his client, and failing to supervise an associate within his firm, caused no injury to the client but did result in delay of the proceedings and potential sanctions being imposed by Judge Oberbillig on Respondent's firm.

Aggravating and Mitigating Factors

39. The parties in this matter submit the following Aggravating and Mitigating factors and the Hearing Officer finds no evidence to contradict these considerations:

Aggravating Factors

40. *Standard 9.22(d)*, Multiple Offenses. Respondent violated numerous ethical rules and duties in this matter.
41. *Standard 9.22(i)*, Substantial Experience in the Practice of Law. Respondent was admitted to practice law on November 6, 1984.

Mitigating Factors

42. *Standard 9.32(a)*, Absence of a Prior Disciplinary Record.
43. *Standard 9.32(e)*, Full and Free Disclosure to a Disciplinary Board or Cooperative Attitude Toward Proceedings:

PROPORTIONALITY ANALYSIS

44. The Supreme Court has held that one of the goals of an effective discipline system is proportionality when imposing discipline. While the discipline in each situation must be tailored to the individual facts of the case, there should be consistency between cases with similar factual circumstances, *In re Wines*, 135 Ariz. 203, 660 P.2d 445 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
45. The parties submit that the following cases, while not exactly the same as the present case, demonstrate that a Censure with probation is an appropriate sanction in cases involving similar Rule violations.

46. In *In re Huser*, SB-00-0108-D (2001), Mr. Huser, in an insurance defense matter, negligently entered an appearance, filed an answer, and signed a stipulation on behalf of an insured without his knowledge or consent. Mr. Huser did not have authorization to represent the client, did not have contact with the client, failed to withdraw from the case, failed to disclose information, and failed to adequately supervise associate attorneys. There was one aggravating factor: bad-faith obstruction of disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency. There were two mitigating factors: absence of disciplinary record and mental disability or chemical dependency including alcoholism or drug abuse. Mr. Huser was Censured, placed on Probation for six months and was required to take the Ethics Enhancement Program (EEP). Mr. Huser was sanctioned for violations of Rule 42, Ariz.R.Sup.Ct., specifically, ER's 3.2, 3.4, 4.1, 4.4, 5.1(b), 8.4(c) and 8.4(d).
47. In *In re Bradley*, SB-08-0026-D (2008), Mr. Bradley failed to adequately communicate with and represent his client in a personal injury matter resulting in the Statute of Limitations expiring on the claim. Mr. Bradley maintained during the disciplinary process that he could continue to litigate the claim and told the client that the case was still open. There were four aggravating factors: dishonest or selfish motive, multiple offenses, submission of false evidence, false statements or other deceptive practices, and substantial experience in the practice of law. There were three mitigating factors: full and free disclosure to the disciplinary board or cooperative attitude toward proceedings, character or reputation, and remorse. Mr. Bradley was Censured and received a one year term

of Probation with LOMAP. Mr. Bradley was sanctioned for violations of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.1, 1.2, 1.3, 1.4, 3.2 and 8.4(d).

48. In *In re Abernathy*, SB-05-0171-D (2006), Ms. Abernathy engaged in a pattern of neglect in handling client matters. Ms. Abernathy failed to represent clients diligently and competently. Ms. Abernathy knowingly failed to comply with a court order or rule by failing to provide the court with the ordered proof of not charging her clients legal fees, failing to appear at a show cause hearing, failing to properly request a continuance of the hearing, failing to expedite litigation and engaged in conduct that was prejudicial to the administration of justice. There were two aggravating factors: prior disciplinary offenses and substantial experience in the practice of law. There were five mitigating factors: absence of a dishonest or selfish motive, personal or emotional problems, full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings, mental disability or chemical dependency, and imposition of other penalties or sanctions. Ms. Abernathy was Censured, placed on one year of Probation with the terms being LOMAP and MAP. Ms. Abernathy was sanction for violations of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.1, 1.2, 1.3, 1.4, 3.2, 3.4, and 8.4(d).
49. Given the results in the above enumerated proportionality cases, the parties submit that a Censure and Probation with LOMAP is an appropriate discipline for Respondent's conduct.

RECOMMENDATION

50. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice, and deter future

misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). 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).

51. 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. 282, 872 P.2d 1235 (1994).

52. A review of the facts of this case, the applicable Rules, the American Bar Association *Standards* and the proportionality cases indicate to this Hearing Officer that the proposed sanction serves the purposes of discipline. Therefore, it is recommended that Respondent receive the following sanction:

1. Respondent shall receive a Censure.
2. Respondent shall be placed on Probation under the following terms and conditions:

- a) Respondent shall contact the director of the State Bar's Law Office Management Assistance Program ("LOMAP") within 30 days of the date of the final judgment and order. Respondent shall submit to a LOMAP examination of his office procedures, including, but not limited to, compliance with ERs 1.2, 1.3, 1.4, 3.25, 5.1(b),(c)(1) and (2), 8.4(a) and
- (d) The Director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated by reference. The probation period will begin to run at the time of judgment and order and

will continue one year from the date that Respondent has signed the "Terms and Conditions of Probation." Respondent shall be responsible for any costs associated with LOMAP.

b) 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.

c) In the event that Respondent fails to comply with the foregoing terms of probation, and the State Bar of Arizona receives information thereof, 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 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 of Arizona to prove non-compliance by clear and convincing evidence.

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

DATED this 24th day of February, 2009.

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

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

Copy of the foregoing mailed
this 24th day of February, 2009, to:

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