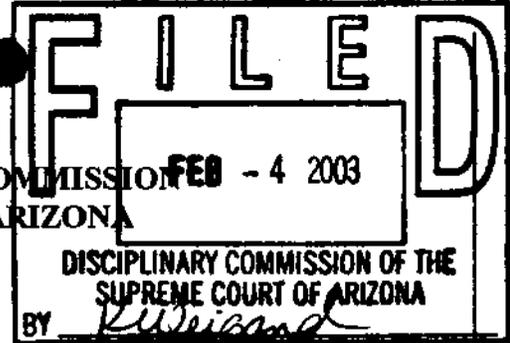


BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE MATTER OF A SUSPENDED MEMBER ) Nos. 00-0117, 00-0181, 00-0235,  
OF THE STATE BAR OF ARIZONA, ) 00-0520, 00-0830, 00-1051,  
) 00-1084, 00-1313, 00-1369,  
**JAMES E. BERTZ,** ) 00-1426, 00-1059, 00-1522,  
**Bar No. 015631** ) 00-1637, 00-1697, 00-1934,  
) 00-1960, 00-2406, 00-2478,  
RESPONDENT. ) 01-0490, 01-0696  
)  
) **DISCIPLINARY COMMISSION**  
) **REPORT**

These matters came before the Disciplinary Commission of the Supreme Court of Arizona on January 11, 2003, pursuant to Rule 53(d), Ariz. R. S. Ct. The Commission considered the Hearing Officer's Report filed November 22, 2002 recommending disbarment, restitution, and costs of these disciplinary proceedings. The State Bar filed an objection stating that the Hearing Officer was clearly erroneous in not making findings of specific fact as referenced in the State Bar's Opening Brief, Appendix A, and requests that the Commission find these additional facts; that the Hearing Officer was clearly erroneous in determining the State Bar did not prove allegations in 7 counts deemed admitted by default;<sup>1</sup> and that the Hearing Officer was clearly erroneous in not ordering appropriate restitution in File Nos. 00-1960, 00-1084 and 00-1697.

<sup>1</sup> These counts represent allegations in Files Nos. 00-0181, 00-0830, 00-1313, 00-1369, 00-1509, 01-0490 and 01-0696.

## Decision

1           Upon review of the record on appeal, nine members<sup>2</sup> of the Commission considering this  
2 matter unanimously adopt the Hearing Officer's findings "that the facts as set forth in the State  
3 Bar's Complaints are deemed admitted by way of Respondent's default."<sup>3</sup> The Commission  
4 construes this statement to mean that the Hearing Officer made findings of fact that all of the  
5 factual allegations of the Complaints are true. The State Bar requested the Commission make  
6 additional findings of fact; however, the Commission does not have the authority to supplement  
7 or modify the findings of a hearing officer. *Matter of Tocco*, 194 Ariz. 453, 984 P.2d 539  
8 (1999). In any event, the additional facts are not necessary to prove the allegations of the  
9 Complaints or to support the recommended sanction of disbarment.  
10

11  
12           The Hearing Officer determined that the allegations in the above mentioned seven (7)  
13 counts were not proven by clear and convincing evidence. The Commission disagrees and finds  
14 *de novo* that Respondent violated all of the ethical rules alleged in the four (4) Complaints  
15 deemed admitted by default.<sup>4</sup> When the facts of a complaint are deemed admitted by default,  
16 and as long as sufficient facts are pled in the complaint to establish all the required elements of  
17 an ethical violation, the Hearing Officer and the Commission must find that clear and  
18 convincing evidence exists to support the violation and the Bar is not required to supplement the  
19 record with live or documentary evidence to further support the allegations of the complaint.  
20  
21

22  
23 <sup>2</sup> J. Conrad Baran, an attorney and hearing officer from Navajo County, participated as an ad hoc  
member.

24 <sup>3</sup> See Hearing Officer's Report and Recommendation, p. 3:19.

25 <sup>4</sup> See report, pp.4- 5, Conclusions of Law.  
26

1 The Commission further concludes that based on the record, restitution in the amount of  
2 \$2,560.00 is appropriate for James Wisher, widower of the client in File No. 00-1697.<sup>5</sup> In File  
3 No. 00-1960, the client's testimony regarding the full amount paid to Respondent was vague,  
4 and therefore, the Commission cannot say that the Hearing Officer was clearly erroneous in  
5 awarding \$600.00 restitution to client Terry Shores.<sup>6</sup>

6 The State Bar recommended restitution in the amount of \$172,656.25 to client Shirley  
7 Roselli in File No. 00-1084 because Respondent failed to timely pursue her claim against her  
8 deceased ex-husband's estate. The Hearing Officer properly rejected this amount. Pursuant to  
9 Rule 52(a)(7) restitution is appropriate to the persons financially injured. However, any award is  
10 based on evidence of proven damages involving liquidated amounts only, and not based on  
11 speculative judgment of what the client's claim may have been worth if handled timely and  
12 properly. We leave that remedy to some other forum. The Arizona Supreme Court has  
13 previously held that additional consequences such as monetary damages are best left to the civil  
14 courts. *Matter of Murphy*, 188 Ariz. 375, 380, 936 P.2d 1269, 1274 (1997).  
15

16  
17 In consideration of an appropriate sanction, the Commission adopts the Hearing  
18 Officer's recommendation of disbarment, restitution as amended, and costs in this default  
19 matter. Restitution is awarded as follows:

|                                     |           |
|-------------------------------------|-----------|
| 20 Ric Biddlecome/ File No. 00-0117 | \$ 81.00  |
| 21 Patricia Cooper /File No.00-0235 | \$6400.00 |

22 <sup>5</sup> Mr. Wisher testified that \$2500.00 was spent on travel from Washington, D.C. to Phoenix to  
23 attend a deposition, and that an additional \$60.00 was paid for copies of medical records that the  
24 Respondent failed to return. See hearing transcript dated August 8, 2002, pp. 32-34.

25 <sup>6</sup> The client testified that she paid Respondent approximately \$600.00. See hearing transcript,  
26 pp. 41-45.

|   |                           |
|---|---------------------------|
| Dorothy Weeks/ File No. 00-1051             | \$1500.00                 |
| Shirley Roselli/ File No. 00-1084           | \$3656.00                 |
| William Cusak File No. 00-1522              | \$2132.50                 |
| James Wisner/ File No. 00-1697              | \$2560.00                 |
| Arthur M. Benton/File No. 01-1934           | \$2200.00                 |
| Terry Shores/File No. 00-1960               | \$ 600.00                 |
| Albert Liapis/ File No. 01-2406             | \$9500.00                 |
| Larry and Stephanie Achzige/File No.00-1426 | \$ 500.00                 |
| David Matice/File No. 00-1637               | <u>\$ 5847.00</u>         |
|   | <b>Total: \$34,976.50</b> |

**Discussion**

The Commission's standard of review set forth in Rule 53(d)(2), Ariz. R. S. Ct., states that the Commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985). The Commission determined that based on the conduct deemed admitted by default, Respondent violated Rules 42 and 51, specifically:

|  |               |
|--|---------------|
| ER 1.1 (competence)                                      | 9 Violations  |
| ER 1.2 (scope of representation)                         | 4 Violations  |
| ER 1.3 (diligence)                                       | 17 Violations |
| ER 1.4 (communication)                                   | 17 Violations |
| ER 1.5 (fees)  | 2 Violations  |
| ER 1.15 (safekeeping property)                           | 3 Violations  |
| ER 1.16 (termination of representation)                  | 11 Violations |
| ER 1.16(d) (protect client's interests upon termination) | 4 Violations  |

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

|  |               |
|--|---------------|
| ER 3.2 (expediting litigation)   | 3 Violations  |
| ER 3.4 (fairness to opposing party/counsel)                                  | 1 Violation   |
| ER 5.5 (unauthorized practice of law)  | 3 Violations  |
| ER 8.1(b) (failure to respond)   | 19 Violations |
| ER 8.4 (misconduct)  | 3 Violations  |
| 8.4(c) (conduct involving dishonesty, fraud, deceit, and misrepresentations) | 2 Violations  |
| ER 8.4(d) (conduct prejudicial to the administration of justice)             | 8 Violations  |
| SCR 31(c)(3) (obligations of bar membership)                                 | 1 Violation   |
| SCR 51(h) (failure to furnish information)                                   | 17 Violations |
| SCR 51(i) (refusal to cooperate)   | 17 Violations |

Respondent was summarily suspended on April 28, 2000 for nonpayment of dues and reinstated on June 14, 2000. Respondent was placed on interim suspension effective November 8, 2000 and remains suspended. In four (4) separate Complaints involving over 20 charges, Respondent engaged in multiple instances of misconduct involving the abandonment of clients, failure to competently or diligently represent clients, failure to return client funds, the unauthorized practice of law while summarily suspended, and failure to cooperate with the

disciplinary process.<sup>7</sup>

1           In determining the appropriate sanction, our Supreme Court considers the ABA  
2 *Standards for Imposing Lawyer Sanctions* ("Standards") a suitable guideline. *In re Kaplan*, 179  
3 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent in  
4 utilizing the *Standards* to determine appropriate sanctions for attorney discipline. In imposing a  
5 sanction after a finding of misconduct, consideration is given to the duty violated, the lawyer's  
6 mental state, the actual or potential injury caused by the misconduct, and the existence of  
7 aggravating and mitigating factors. *See Standard 3.0*. A review of *Standards 4.0* involving  
8 Violations of Duties Owed to Clients and 7.0 involving Violations of Duties owed as a  
9 Professional indicates that disbarment is the presumptive sanction for Respondent's multiple  
10 instances of misconduct. *Standard 4.41 Lack Of Diligence* provides:

13           Disbarment is generally appropriate when:

- 14           a) a lawyer abandons the practices and causes serious or  
15           potentially serious injury to a client; or  
16           b) a lawyer knowingly fails to perform services for a client and  
17           causes serious or potentially serious injury to a client; or  
18           c) a lawyer engages in a pattern of neglect with respect to client  
19           matters and causes serious or potentially serious injury to a  
20           client.

21           *Standard 7.1* provides:

22           Disbarment is generally appropriate when a lawyer knowingly  
23           engages in conduct that is a violation of a duty owed as a

24           

---

<sup>7</sup> Respondent filed an Answer in the first two (2) Complaints filed, but then failed to respond to  
25           discovery requests or orders compelling discovery as to those Complaints. As a result, on  
26           August 15, 2002, the Hearing Officer filed an Order striking Respondent's Answers and an  
          Entry of Default was entered. Respondent never filed answers to the third and fourth  
          Complaints. Respondent did however, participate in the aggravation/mitigation hearing held on  
          August 27, 2002.

1 professional with the intent to obtain a benefit for the lawyer or  
2 another, and causes serious or potentially serious injury to a  
3 client, the public or the legal system.

4 Clear and convincing evidence is present in the record that Respondent abandoned the practice  
5 of law, knowingly failed to perform services for clients, and engaged in a pattern of neglect  
6 thereby causing serious and potentially serious injury to clients.

7 The Commission, as well as the Hearing Officer, having concluded that disbarment is  
8 the appropriate sanction, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors,  
9 respectively. The Commission, as well as the Hearing Officer found six (6) aggravating  
10 factors: 9.22 (c) patter of misconduct, (d) multiple offenses, (e) bad faith obstruction of the  
11 disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary  
12 agency, (g) refusal to acknowledge wrongful nature of conduct, (h) vulnerability of victim, and  
13 (j) indifference to making restitution.

14 In mitigation, the Commission as well as the Hearing Officer found two (2) factors  
15 present: 9.32(a) absence of a prior disciplinary record and (f) inexperience in the practice of law.

16 Respondent was admitted to practice law in Arizona on October 21, 1995.

17 Sanctions against lawyers must have internal consistency to maintain an effective and  
18 enforceable system; therefore, the court looks to cases that are factually similar to the case  
19 before it. *Matter of Pappas*, 159 Ariz. 516, 526, 768 P. 2d 1161, 1171 (1988).

20 The Commission, as well as the Hearing Officer, reviewed numerous analogous cases,  
21 which support disbarment as the appropriate sanction. In *Matter of Sivic*, SB-02-0034-D (2002),  
22 disbarment was imposed for violations of ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.16(d), 8.1(b), 8.4 and  
23 SCRs 51(h) and (i). In *Matter of Carey*, SB-00-0055-D (2000), disbarment was imposed for  
24  
25  
26

1 violations of ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 8.4 and SCR 51(b), (h) and (i). In *Matter of*  
2 *Hessinger*, SB-99-0082-D (2000), disbarment was imposed for violations of ERs 1.2, 1.3, 1.4,  
3 1.5, 1.6, 1.15, 1.16, 3.4(c), 5.1, 5.5, 8.1(b), 8.4 and SCR 51(e), (h), (i) and (k). In *Matter of*  
4 *Royleson*, SB-00-0039-D (2000), disbarment was imposed for violations of ERs 1.1, 1.2, 1.3, 1.4,  
5 1.5, 1.7, 1.8, 1.15, 1.16, 3.2, 3.3, 5.5, 8.1(b), 8.4 and SCR 31(c)(3) and 51(h) and (i). In *Matter*  
6 *of Schollars*, SB-99-0062-D (1999), disbarment was imposed for violations of ERs 1.3, 1.4, 3.1,  
7 3.2, 3.3, 4.1, 1.16(d), 8.1(b), 8.4 and SCR 51(h) and (i). In *Matter of Evans*, SB-98-0055-D  
8 (1998), disbarment was imposed for violations of ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(b),  
9 8.1(b), 8.4 and SCR 51(h) and (i) and 63(a). In *Matter of Brody*, SB-96-0012-D (1996),  
10 disbarment was imposed for violations in ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.16, 3.2, 8.1(b), 8.4 and  
11 SCR 51(h) and (i). In *Matter of Wilkinson*, SB-96-0025-D (1996), disbarment was imposed for  
12 violations of ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.1, 3.2, 3.4, 5.5, 8.1, 8.4 and SCR 51(e), (f),  
13 (h), (i) and (k).  
14

### 15 Conclusion

16 The purposes of discipline are to protect the public and deter similar conduct by other  
17 lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986); instill public confidence in the  
18 bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d, 352, 362 (1994); and maintain the  
19 integrity of the legal system, *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).  
20

21 Therefore, having considered Respondent's misconduct deemed admitted by default,  
22 application of the ABA *Standards*, factors present in aggravation and mitigation, and a  
23 proportionality analysis, the Commission recommends adopting the Hearing Officer's  
24  
25  
26

1 recommendation of disbarment, restitution and costs of these disciplinary proceedings.

2 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February 2003.

3  
4 Jessica Funkhouser  
5 Jessica G. Funkhouser, Chair  
6 Disciplinary Commission

7 Original filed with the Disciplinary Clerk  
8 this 4<sup>th</sup> day of February 2003.

9 Copy of the foregoing mailed  
10 this 4<sup>th</sup> day of February 2003, to:

11 Michael L. Rubin  
12 Hearing Officer 7K  
13 230 Anderson Road  
14 Prescott, AZ 86303

15 James E. Bertz  
16 Respondent  
17 P.O. Box 20069  
18 Bullhead City, AZ 86439

19 and  
20 James E. Bertz  
21 Respondent  
22 1104 Highway 95  
23 Bullhead City, AZ 86429

24 Copy of the foregoing hand-delivered  
25 this 4<sup>th</sup> day of February, 2003, to:

26 Jacqueline N. Schesno  
Bar Counsel  
State Bar of Arizona  
111 West Monroe, Suite 1800  
Phoenix, AZ 85003-1742

by Karen Weigand  
/mps