

FILED

NOV 18 2002

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

BY *H. Carson*

**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
27
28

IN THE MATTER OF A MEMBER OF)
THE STATE BAR OF ARIZONA,)
)
PHILIP D. HINEMAN, JR.,)
Bar No. 011887)
)
RESPONDENT.)
_____)

Nos. 99-1374, 00-1054, 01-0033, 01-0555

**DISCIPLINARY COMMISSION
REPORT**

These matters came before the Disciplinary Commission of the Supreme Court of Arizona on October 19, 2002, pursuant to Rule 53(d) Ariz. R. S. Ct., for consideration of the Hearing Officer' findings of fact, conclusions of law, and recommendation filed June 14, 2002, providing for censure, one (1) year of probation (Practice Monitor) and costs. The State Bar filed an objection and requested oral argument. The Respondent, counsel for the Respondent and bar counsel were present. The State Bar appealed the Hearing Officer's findings and conclusions regarding violations of ERs 1.4, 1.8, 1.15 and SCR 44(b)(3), appealed some of the aggravating and mitigating factors found,¹ and recommended a 90-day suspension. The Respondent argued in support of the Hearing Officer's report and recommendations.

Decision

The nine members of the Commission by a majority of eight,² recommend adopting the Hearing Officer's findings of fact,³ the majority of the conclusions of law, and

¹ See discussion of Aggravation/Mitigation factors, pp. 5-6.
² Commissioner Carson was opposed and supported a suspension.
³ The Hearing Officer's report, p. 1 inadvertently reads Fourth Amended Complaint and should read Third Amended Complaint.

1 recommendation of censure, one (1) year of probation (Practice Monitor) and costs of these
2 disciplinary proceedings. The terms of probation are as follows:

3 **Terms Of Probation**

- 4 1. Respondent shall be censured and placed on one (1) year probation, effective
5 the date of the final Judgment and Order in this matter, subject to renewal as
6 provided in SCR 52(a)(6);
- 7 2. Within 30 days of the of the final Judgment and Order, the Respondent shall
8 contact the Director of the Law office Management Program (LOMAP) and
9 obtain a qualified practice monitor (PM) approved by the LOMAP Director;
- 10 3. During the probation period, Respondent shall meet with the PM monthly
11 and the PM shall file quarterly status reports;
- 12 4. In the event that Respondent fails to comply with any of the foregoing
13 conditions, and information thereof is received by the State Bar, bar counsel
14 shall file with the Hearing Officer a Notice of Non-Compliance. The Hearing
15 Officer shall conduct a hearing at the earliest practicable date, but in no event
16 later than thirty days after receipt of notice, to determine whether a condition
17 of probation has been breached and, if so, to recommend an appropriate
18 sanction.
- 19 5. In the event there is an allegation that any of these terms have been
20 breached, the burden of proof shall be on the State Bar to prove
21 non-compliance by a preponderance of the evidence.

22 **Discussion**

23 The Commission's standard of review is set forth in Rule 53(d)(2), which states that
24 questions of law are reviewed *de novo*. In reviewing findings of fact made by a hearing
25 officer, the commission applies a clearly erroneous standard. Mixed findings of fact and law
26 are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing
27 *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

28 Great deference is also given to the trier of fact in matters involving the credibility of
witnesses. See *In re Kersting*, 151 Ariz. 171 at 172, 726 P.2d 587 (1986) and *In re Arrick*,
180 Ariz. 137 at 141, 882 P.2d 943 (1994).

1 Upon review, the Commission adopts the Hearing Officer's findings of fact and
2 based on Respondent's admissions, the Commission agreed with the Hearing Officer that
3 clear and convincing evidence is present that Respondent violated SCR 42, specifically: ER
4 1.5(a) (excessive fee) in Counts Three and Four, and ER 1.5(b) (communication of basis/rate
5 of fee) in Counts Two, Three, and Four. The Commission however disagreed with the Hearing
6 Officer's legal conclusions that in Count One, no violation of ER 1.8 (prohibited transactions)
7 occurred. See Hearing Officer's Conclusions of Law, pp. 14-16.

8
9 In Count One, File No. 99-1374, Respondent while representing a client in a criminal
10 matter, entered into a business transaction⁴ with his client to satisfy unpaid legal fees. This
11 transaction involved Respondent's acceptance of a quick claim deed to the client's house to
12 secure payment for delinquent legal fees and an amended fee agreement was executed.

13 Although the Hearing Officer found that Respondent gave the client a reasonable
14 opportunity to seek the advice of independent counsel, he failed to satisfy the affirmative
15 obligation to provide notice to the client to consult with independent counsel, as previously
16 held in *Matter of Redondo*, 176 Ariz. 334, 861 P.2d 619 (1993). In *Redondo*, the lawyer
17 entered into an improper business transaction involving the sale of a client's rings and failed to
18 provide the client with notice and opportunity to seek independent counsel in violation of ER
19 1.8. *Id* at 336, 621. At the time of the transaction in *Redondo*, no appraisal was obtained to
20 determine the actual value of the rings.

21
22
23 Absent advice from independent counsel, Respondent then failed to obtain the client's
24 written consent to proceed with the transaction. Consequently, the Commission finds *de novo*

25
26
27
28

⁴ This transaction involved Respondent's acceptance of a quick claim deed to the client's house to secure payment for delinquent legal fees and an amended fee agreement. was executed.

1 that clear and convincing evidence is present in the record that Respondent's conduct in Count
2 One violated ER 1.8(a). The Commission believes in finding a violation of ER 1.8(a), that it is
3 not relevant to distinguish whether the interest Respondent acquired was an ownership interest
4 or a security interest adverse to the client. Had Respondent complied with the exceptions of
5 ER 1.8(a), and the requirements as set forth in *Redondo*, both parties would have been
6 protected by the safeguards provided by this rule. By complying, Respondent and the client
7 may have also obtained an appraisal and determined the actual value of the property at the time
8 of the transaction, and thus would have been more informed as to the risks associated with such
9 a transaction. When entering into a business transaction with a client, the lawyer does not
10 abandon his professional obligation and must ensure that the client *knows* to seek the advice of
11 outside counsel. See *Matter of Wade*, 168 Ariz. 412, 814 P.2d 753 (1991). The Commission
12 determined however, that a violation of ER 1.8(a) would not affect the overall outcome.
13
14

15 In Count Two, File No. 00-1054, Respondent agreed to represent a client in two
16 aggravated assault matters and the parties entered into a signed fee agreement. Under the terms
17 of the agreement the client was to pay \$5,000 for pretrial representation and \$1,000 per trial
18 day if the case proceeded to trial. After a bar complaint was filed and Respondent obtained
19 legal counsel, it was discovered that Respondent had erred in billing and overcharged the client.
20 Restitution was promptly made, however, the fee agreement did not adequately communicate
21 or explain the basis for the fees. Respondent admitted to violating ER 1.5(b).
22

23 In Count Three, File No. 01-0033, Respondent's firm (Hinerman and Associates)
24 represented a client in a DUI matter and entered into a written fee agreement. Subsequently,
25 the client terminated the firm's services. Thereafter, the client filed a bar complaint and it was
26 again discovered that an error in billing had occurred and the client was charged an excessive
27
28

1 fee. Respondent promptly refunded monies to the client, however, the fee agreement failed to
2 communicate or explain the basis for the fees. Respondent admitted to violations of ER 1.5 (a)
3 and (b).

4 In Court Four, File No. 01-0554, Respondent's firm represented another client in a DUI
5 matter and entered into a written fee agreement. The client was not satisfied with the firm's
6 representation and terminated services. The fee was found to be excessive and the agreement
7 did not explain or communicate the basis for the fees. Respondent made restitution by writing
8 off approximately \$700.00 from the client's final invoice. Respondent admitted to violations of
9 ER 1.5(a) and (b).

10 Generally, the Arizona Supreme Court and the Disciplinary Commission utilize the
11 American Bar Association's Standards For Imposing Lawyer Discipline (ABA STANDARDS)
12 to assist in determining the appropriate sanction in discipline proceedings. *In re Augenstein*,
13 178 Ariz. 133, 871 P.2d 254 (1994). In imposing a sanction after a finding of misconduct,
14 consideration is given to the duty violated, the lawyer's mental state, the actual or potential
15 injury caused by the misconduct and the existence of aggravating and mitigating factors.
16 *See* ABA STANDARDS 3.0.

17 ABA STANDARDS 4.0 addresses Violations of Duties Owed to Clients and 4.63 (Lack
18 of Candor) specifically provides:

19 Reprimand (censure in Arizona) is generally appropriate when
20 a lawyer negligently fails to provide a client with accurate or
21 complete information and causes injury or potential injury to a
22 client.

23 The Hearing Officer determined there was no actual client harm and there was little
24 likelihood of potential harm. *See* Hearing Officer report, p. 13 and p. 21.
25
26
27
28

1 The Commission, having concluded that censure is warranted, reviewed ABA
2 STANDARDS 9.22 and 9.32, aggravating and mitigating factors and agreed with the Hearing
3 Officer that two (2) aggravating factors were present in the record: 9.22 (a) prior disciplinary
4 offenses⁵ and (i) substantial experience in the practice of law.⁶ The State Bar argued that
5 aggravating factors 9.22(b), (c), (d) and (h) are also applicable.
6

7 The Commission determined that evidence of aggravating factor 9.22(d) multiple
8 offenses is present in the record and therefore finds it *de novo*. Respondent's violations
9 counts involved four (4) separate clients and did not constitute a single continuing violation
10 of ER 1.5. See report, p. 20:17-20 and p. 22:8-11. The presence of this additional factor
11 does not however justify an increase in the presumptive sanction.
12

13 The Commission also agreed with the Hearing Officer that four (4) factors are
14 present in mitigation: 9.32(b) absence of selfish or dishonest motive, (d) timely good faith
15 effort to make restitution or to rectify consequences of misconduct,⁷ (e) full and free
16 disclosure to disciplinary board or cooperative attitude toward proceedings, and (l) remorse.
17

18 The Hearing Officer also considered mitigating circumstances not listed in the
19 Standards. See Hearing Officer's report, p. 13. The State Bar opposed these findings and
20 argued the presence of ABA factors 9.32(e) and (i) only. The Commission reviewed these
21 additional factors *de novo* and does not find the mitigating factors as discussed in items # 67,
22
23

24 ⁵On December 18, 2000 in File No. 96-3100 et al., Respondent was censured and placed on
25 probation for violating ERs 1.1, 1.3, 1.4, 1.16(d), 3.2 and 8.4(d).

26 ⁶ Respondent was admitted to practice law in Arizona in May 1988.

27 ⁷ Once Respondent became aware that he had violated ER 1.5, he made timely restitution. A
28 LOMAP audit was conducted in conjunction with Respondent's prior disciplinary offense.
Respondent has implemented new office procedures and has amended his fee agreements to
avoid future problems and to comply with the ethical rules.

1 71 and 75 of the report.

2 The Commission then considered the proportionality analysis provided and found
3 two (2) cases instructive. In *Matter of Gliege*, SB-99-0038 (1999) an agreement providing
4 for censure was accepted for violating ER 1.5. In *Matter of Cline*, File No. 92-1863 an
5 informal reprimand was imposed for violating ERs 1.4, 1.5, 1.7, 1.9, 3.3 and 8.4.
6

7 The Commission independently considered their recent decision in *Matter of*
8 *Phillips*, SB-02-0127-D (2002). In its 34 count Complaint, the State Bar alleged numerous
9 violations of ER 1.5 (excessive fees) in addition to other rule violations. After obtaining
10 counsel and prior to proceeding to hearing, Phillips entered into an Agreement for Discipline
11 by Consent involving 19 of the original 34 matters. Phillips ultimately received a censure
12 and two (2) years of intense probation (LOMAP) for a total of 38 rule violations involving
13 ERs 5.1, 5.3 and 7.1. Factors found in aggravation were 9.22 (c) and (d). In mitigation were
14 factors 9.32 (a) absence of prior disciplinary offenses, (b) absence of selfish or dishonest
15 motive, (d) timely good faith effort to make restitution and rectify consequences of
16 misconduct, (e) full and fee disclosure to disciplinary board or cooperative attitude toward
17 proceedings, and (l) remorse. Phillips' negligent misconduct, as in this instant matter,
18 caused little or no harm to the clients. Restitution was made and both lawyers instituted new
19 office procedures and amended their existing fee agreements to ensure compliance with the
20 rules.
21

22
23 Therefore, based on the findings of fact, conclusions of law, application of the ABA
24 Standards and a proportionality analysis, notably the State Bar's negotiated settlement in
25 *Phillips*, the Commission is convinced that censure is within the range of reasonableness for
26
27
28

1 similar misconduct and that the purposes of discipline will be fulfilled with this
2 recommended sanction.

3 RESPECTFULLY SUBMITTED this 15th day of November 2002.

4
5 PETER CAHILL

6 Peter Cahill, Chair
7 Disciplinary Commission

8 Original filed with the Disciplinary Clerk
9 this 15th day of November 2002.

10 A copy of the foregoing mailed
11 this 14th day of November 2002, to:

12 Frederick C. Berry, Jr.
13 Hearing Officer 9S
14 350 East Virginia Ave., Suite 200
15 Phoenix, AZ 85004

16 Mark Harrison
17 Respondent's Counsel
18 Bryan Cave LLP.
19 Two North Central Ave., Suite 2200
20 Phoenix, AZ 85004-4406

21 A copy of the foregoing hand-delivered
22 this 14th day of November 2002, to:

23 Karen Clark
24 Bar Counsel
25 State Bar of Arizona
26 111 West Monroe, Suite 1800
27 Phoenix, AZ 85003-1742

28 by M Smith

/mps