

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

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IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
RAND MACDONALD,)
Bar No. 004489)
)
RESPONDENT.)
_____)

Nos. 01-1161, 01-1428

DISCIPLINARY COMMISSION
REPORT

These matters came before the Disciplinary Commission of the Supreme Court of Arizona on April 11, 2003, pursuant to Rule 56, Ariz. R. S. Ct., for consideration of the Tender of Admissions and Agreement for Discipline by Consent (Agreement) and Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memorandum) filed February 27, 2003, providing for a 30-day suspension, two years of probation with the State Bar's Member Assistance Program (MAP) and six months of probation with the State Bar's Law Office Management Assistance Program (LOMAP), and costs. The Commission requested oral argument. The State Bar and Respondent were present. The parties moved to modify the terms of probation to include a provision that Respondent is responsible for costs associated with MAP.¹

Decision

The eight² members of the Commission by majority of six³ recommend accepting

¹ See Commission transcript, p. 4.

² Commissioner Funkhouser recused. Commissioners Bowman and Orozco did not participate in these proceedings. C. Eileen Bond, a hearing officer from Yavapai County and J. Conrad Baran, a hearing officer from Navajo County, participated as ad hoc members.

³ Commissioners Choate and Gutierrez supported rejection of the Agreement and dissented. Both believed that Respondent poses a risk to the public and that lengthier suspension involving reinstatement proceedings seemed more appropriate. See dissenting opinion, p. 9.

and incorporating by reference the Agreement and Joint Memorandum providing for a 30-day suspension, two years of probation, (six months participation in LOMAP and two years participation in MAP), including an independent psychological evaluation (IPE), and costs of these disciplinary proceedings.

Discussion

Respondent conditionally admits his conduct violated Rule 42, Ariz. R. S. Ct., specifically ERs 1.2 (failure to abide by the client's decisions concerning objectives of representation), 1.3 (failure to act with reasonable diligence), 1.4 (failure to communicate with clients), 3.2 (failure to expedite litigation), 8.1(b) (failure to respond to lawful demand for information from disciplinary authority), 8.4(d) (conduct prejudicial to the administration of justice) and SCRs 51(h) (failure to respond to bar inquiry) and (i) (refusal to cooperate).

In September 2000, the client in File No. 01-1161 retained Respondent to resolve a domestic relations matter involving legal paternity and formalizing child support. The child's father was voluntarily paying child support and there was no dispute over visitation or custody; however, the appropriate amount of support was in question. Over the course of representation, the client paid Respondent a total of \$2,000. Respondent however failed to perform the requested services, failed to return the client's phone calls and update her on the status of her case. When Respondent ultimately spoke to the client, he falsely advised client that he would begin work on her case in the near future. In June 2001, the client requested a full refund of fees paid. Respondent complied with the client's request

1 approximately one month later. Additionally, Respondent failed to respond and cooperate
2 with the State Bar's inquiries of this matter until after a formal complaint was filed.

3 In June 2000, the client in File No. 01-1428 retained Respondent in a domestic
4 relations matter involving marriage dissolution. Respondent thereafter did not diligently
5 pursue the client's case and it was dismissed in June 2001 for lack of prosecution.
6 Respondent failed to respond to the State Bar's inquiries in this matter.

7 At first glance the Commission believed the conditional admissions in this case may
8 have supported a lesser sanction; however, Respondent's three instances of prior discipline
9 involved similar misconduct including a lack of diligence, failure to communicate with
10 clients, and failure to respond to the State Bar. The Commission noted that probation with
11 participation in LOMAP and MAP was previously imposed and terms were successfully
12 completed.
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14 The Commission also expressed concern about Respondent's underlying mental
15 stability and his fitness to practice law. Of most concern was the appropriateness of the
16 proposed sanction and if the public would be protected by the sanction.
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18 In determining the appropriate sanction, our Supreme Court considers the ABA
19 *Standards for Imposing Lawyer Sanctions* ("*Standards*") a suitable guideline. *In re*
20 *Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are
21 consistent in utilizing the *Standards* to determine appropriate sanctions for attorney
22 discipline. In imposing a sanction after a finding of misconduct, consideration is given to
23 the duty violated, the lawyer's mental state, the actual or potential injury caused by the
24 misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0*.
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A review of *Standard 4.0* involving Violations of Duties Owed to Clients indicates that suspension is the presumptive sanction and *Standard 4.42* specifically provides that

Suspension is generally appropriate when:

- a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Standard 7.0 addresses Violations of Duties Owed as a Professional and *Standard 7.2* specifically provides:

Suspension is generally appropriate when a lawyer knowingly 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.

Standard 8.0 addresses Prior Discipline Orders and *Standard 8.2* specifically provides:

Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Respondent's prior similar offenses clearly put him on notice, such that his misconduct in this instant matter was knowing and involved a pattern of client neglect. The State Bar stated there was no actual harm to the client in Count One, and that the harm to the legal system was minimal,⁴ but also acknowledged that there was a six-month delay in the processing of the client's case in Count One.⁵

The Commission having determined that suspension is warranted reviewed *Standard*

⁴ See Joint Memorandum, pp.2-3, and pp.17-18.

⁵ See Commission transcript, p. 11:12.

1 9.0, Aggravation and Mitigation to determine the appropriate length of suspension. The
2 agreed upon factors present in aggravation include 9.22 (a) prior disciplinary offenses,⁶ (c)
3 pattern of misconduct, (d) multiple offenses and (i) substantial experience in the practice of
4 law. Mitigating factors include 9.32(b) absence of dishonest or selfish motive, (c) personal
5 or emotional problems, (d) timely good faith effort to make restitution or to rectify
6 consequences of misconduct, (e) full and free disclosure to disciplinary board or
7 cooperative attitude toward proceedings, (g) character or reputation, (i) mental disability
8 and (l) remorse.

9 A Protective Order was filed on April 16, 2003, granting the parties' Joint Motion
10 to Seal Exhibits 1 and 2 of the Joint Memorandum, which contained evidence in support of
11 Respondent's personal and emotional problems and mental disability. Standard 9.32(i) sets
12 forth the following four pronged criteria necessary for application of this factor:
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- 14 (i) mental disability or chemical dependency including alcoholism or
15 drug abuse when:
16 (1) there is medical evidence that the respondent is affected by a
17 chemical dependency or mental disability;
18 (2) the chemical dependency or mental disability caused the
19 misconduct;
20 (3) the respondent's recovery from the chemical dependency or
21 mental disability is demonstrated by a meaningful and sustained
22 period or successful rehabilitation; and
23 (4) the recovery arrested the misconduct and recurrence of that
24 misconduct is unlikely.

25 The *Standards* also caution that issues of physical and mental disability or chemical
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⁶ Prior offenses include Informal Reprimand in 1990 for violating ERs 1.4, 1.16(d), 8.1, and
SCRs 51(h) and (i); Censure and Probation (LOMAP and MAP) in 1996 for violating ERs
1.2, 1.3, 1.4, 1.16(d), 8.1(b) and SCRs 51(h) and (i); Censure and 6 months extended
Probation (LOMAP and MAP) in 2002 for violating ERs 1.3, 1.4, 3.4, 8.1(b), and SCRs
51(e), (h), (i) and (k).

dependency offered as mitigating factors in disciplinary proceedings require careful analysis.

1 Direct causation between the disability or chemical dependency and the offense must be
2 established. If the offense is proven to be attributable solely to a disability or chemical
3 dependency, it should be given the greatest weight. If it is principally responsible for the
4 offense, it should be given very great weight; and if it is a substantial contributing cause of
5 the offense, it should be given great weight. In all other cases in which the disability or
6 chemical dependency is considered as mitigating, it should be given little weight.⁷

8 On December 18, 2001, Respondent was diagnosed with Bipolar II with Attention
9 Deficit and residual Post-Traumatic Stress Disorder. Treating psychologist, Dr. Walter E.
10 Fidler, Ph.D., established a causal connection between Respondent's mental disability and
11 his misconduct. Dr. Fidler stated that Respondent has responded well to treatment, that his
12 disability is under control with medication, that he receives counseling on an as needed
13 basis, and that he has a one-year history of no repeated instances.⁸ Bar Counsel stated that
14 Respondent has established the 4-pronged criteria necessary for application of 9.32(i) based
15 on the medical information provided by Dr. Fidler; thus a longer period of suspension is not
16 necessary.⁹

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19 The Commission noted however, that evidence offered in support of mitigating
20 factor 9.32 (g) character and reputation was limited. The evidence consisted of a letter
21 from a former client and a brief thank you card from the Volunteer Lawyers Program's
22 paralegal.¹⁰ Additionally, no evidence was provided in support of Respondent's mentoring
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24 ⁷ See *Standard* 9.32, Commentary, ¶3 as amended February 1992.

25 ⁸ See Joint Memorandum, Exhibit 1.

26 ⁹ See Commission transcript, p. 8;

¹⁰ See Joint Memorandum, Exhibit 1.

1 role in the State Bar's Lawyer Concerned for Lawyers (LCL) Program, an adjunct of MAP,
2 which was formed to assist lawyers who need support as a result of personal or
3 psychological problems, drug or alcohol problems, and other forms of addictive behavior.
4 Because of Respondent's experiences with his own dysfunction, the Joint Memorandum
5 states that Respondent now shares his recovery experiences with other lawyers.¹¹
6 Nonetheless, because of the limited evidence provided, little weight was given to this factor.

7 In rectifying his misconduct and in an effort to prevent future occurrences,
8 Respondent voluntarily contacted LOMAP and MAP for assistance prior to the acceptance
9 of this Agreement.¹² Additionally, Respondent has reduced his caseload and eliminated
10 environmental stressors that affected his daily life and law practice. Respondent stated that
11 he is currently "providing services that are appropriate for his fragile, mental or emotional
12 makeup."¹³ Although Respondent's prior offenses resulted in the imposition of probation
13 with LOMAP and MAP, the Commission believes that Respondent can benefit from
14 repeated participation in these remedial programs and that the agreed upon sanction is
15 within the range of reasonableness. Closely supervised probation with formal participation
16 in MAP will safeguard the public and also assist Respondent in his ongoing rehabilitation,
17 thereby making a reoccurrence of the misconduct unlikely.
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20 The State Bar argued in support of the Agreement and that the proposed sanction
21 fulfills the purpose of attorney discipline. Respondent has acknowledged his misconduct,
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25 ¹¹ See Joint Memorandum, p. 10.

26 ¹² See Commission transcript, p. 11

¹³ See Commission transcript, p.18.

he has taken remedial measures, and is receiving ongoing treatment for his mental disability.

1 Recommendations from the State Bar are entitled to serious consideration in disciplinary
2 proceedings. *Matter of Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982).

3 The State Bar further conceded that it cannot prove the allegations as charged in
4 Count Three, File No. 01-1428, and that an award of restitution is not appropriate to the
5 client because Respondent did perform work on the client's behalf that exceeded the fee he
6 received. See Agreement, p. 13, item 4. Additionally, Respondent provided a full refund to
7 the client in Count One prior to receiving a copy of the allegations from the State Bar.
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9 The Commission then considered the proportionality analysis provided by the parties
10 and found *In re Bayless*, SB-02-0038-D (2002) to be most analogous to this instant matter.
11 Bayless accepted an agreement providing for a 30-day suspension, two years of probation
12 (LOMAP with PM) and was ordered to pay restitution for violating ERs 1.1, 1.2, 1.3, 1.4
13 and 8.4(a). In aggravation were factors 9.22(a), (i) and (j). In mitigation were factors
14 9.32(b), (e), (l) and (k). The misconduct in *Bayless* however was more egregious than this
15 instant matter as it involved substantial harm. Bayless' prior disciplinary offenses included
16 three informal reprimands and a term of probation. Bayless also engaged in similar
17 misconduct during his probation period.
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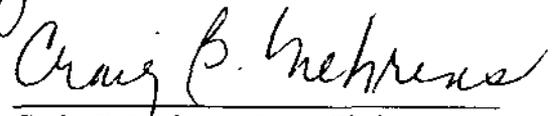
20 Conclusion

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

Based on Respondent's conditional admissions as set forth in the Agreement, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, the Commission is persuaded that the public will be adequately protected by the agreed upon sanction and therefore, recommends by a majority to accept the Agreement and Joint Memorandum providing for a 30-day suspension, two years of probation (MAP, including an IPE and 6 months LOMAP), and costs of these disciplinary proceedings.

DATED this 12th day of May, 2003.


Craig B. Mehrens, Vice Chair
Disciplinary Commission

Commissioner Gutierrez dissenting:

The foundation for the current dissent to the Disciplinary Commission's recent recommendation in *MacDonald* is based on a concern for protection of the public. Specifically, Mr. MacDonald has been diagnosed with several "brittle" psychological diagnoses. Per the record, these include Adult Attention Deficit Disorder, Post Traumatic Stress Disorder, and Bipolar Disorder. Additionally, he has diabetes, which he has been unable to stabilize for over 2 years. Mr. MacDonald's discipline cases describe a man who was unable to separate the dramatic events occurring for his clients from his own life and ego. Indeed, he felt that if anything happened to his clients it would be his personal fault. Though this can be interpreted as true concern, given Mr. MacDonald's resulting behavior

and the exacerbation of his existing mental illness with these events, it seems unfruitful for
1 Mr. MacDonald to continue practice without a period of time to ensure his
2 emotional/mental stability. All of the disorders with which Mr. MacDonald is diagnosed are
3 highly susceptible to external stressors. Though he has indicated that he "screens" all his
4 cases so that he will not be overwhelmed, it seems unlikely that he will not take another
5 such case given that his judgment may still be impaired because he is not sufficiently
6 stabilized on medication over a significant period of time. For these reasons, I think that a
7 suspension of six months and one day, requiring evidence of rehabilitation and emotional
8 stability would better serve the public and this lawyer.
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10 *Guadalupe Gutierrez/mgs*
11 Guadalupe Gutierrez, Commissioner

12 **Commissioner Choate dissenting and concurring:**

13 I respectfully dissent from the majority of the Disciplinary Commission and concur
14 with Commissioner Guitierrez, in part, that the current agreement does not go far enough to
15 protect the public. While I do not profess to understand all of the psychological issues
16 involved, Mr. MacDonald is currently only taking Ritalin and not any other medications for
17 his well documented mental disorders and diabetes.¹⁴ He has been sanctioned on three prior
18 occasions for similar conduct and has previously participated in State Bar programs,
19 including LOMAP and MAP. For whatever reasons, Mr. MacDonald, is again before this
20 body for disciplinary proceedings arising out of similar ethical violations. I do not find the
21 record before us sufficient to support the Respondent returning to the practice of law after
22 only a brief 30-day suspension. Therefore, I believe a longer suspension, which would have
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26 ¹⁴ See Commission transcript, p. 16.

required Mr. MacDonald to show a sustained period of rehabilitation, would have been in
the public's best interest.

Cynthia L. Choate / mps
Cynthia L. Choate, Commissioner

Original filed with the Disciplinary Clerk
this 12th day of May, 2003

Copy of the foregoing ~~mailed~~
this 13th day of May, 2003, to:

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Copy of the foregoing hand-delivered
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