

BEFORE A HEARING OFFICER

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2
3 IN THE MATTER OF A MEMBER) No. 01-0915
4 OF THE STATE BAR OF ARIZONA,)
5 **DAVID B. APKER,**)
6 **Bar No. 004741**)
7 **RESPONDENT.**)

**HEARING OFFICER'S REPORT
AND RECOMMENDATION**

PROCEDURAL HISTORY

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9 A Probable Cause Order was filed on October 19, 2001. A three-count Complaint
10 was filed on July 24, 2002 and served by mail on July 30, 2002. Respondent did not file
11 an answer and an Entry of Default was filed on September 23, 2002. An aggravation and
12 mitigation hearing was held on November 4, 2002. James D. Lee appeared on behalf of
13 the State Bar. Respondent did not appear.
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FINDINGS OF FACT

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16 At all times relevant hereto, Respondent was a member of the State Bar of Arizona,
17 having been admitted on December 7, 1976. Respondent was summarily suspended for
18 non-payment of dues on April 28, 2000 and remains suspended.
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Count I

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21 Count I alleges that Naijo Hicks engaged Respondent in January of 1999 to help him
22 collect a debt. Respondent did some unspecified work and drafted and sent to Hicks a
23 proposed collection letter. Thereafter Respondent became virtually unavailable. Hicks once
24 went to Respondent's office and saw Respondent, trying to stir him into action. When
25 Respondent still did nothing, Hicks went to Respondent's office a second time. He was told
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1 that Respondent had retired and moved out of state. Violations of E.R. 1.3, (lack of
2 diligence), 1.4 failure to communicate with client) 1.16(b) (withdrawal of representation of
3 the client without justification), 1.16(d) (failure to protect of client's interest on termination of
4 representation, 3.2 (failure to expedite litigation) and 8.4(d) (conduct prejudicial to the
5 administration of justice) are alleged.

6 **Count II**

7 The gravamen of Count II is that Respondent failed to respond to the State Bar's
8 inquiry into the concern expressed by Hicks about Respondent's representation of him. The
9 concern was expressed in a letter from Hicks dated February 11, 2001 and received by the
10 State Bar on March 4, 2001. The State Bar sent inquiry letters to Respondent dated May 22,
11 2001 and June 21, 2001. The first called for a written response within 20 days and pointed
12 out Respondent's duty to cooperate with a disciplinary investigation pursuant to Arizona
13 Supreme Court Rules 51(h) and (i). The second directed Respondent to respond within ten
14 days. The second letter was returned as undeliverable because Respondent's mail forwarding
15 order had expired. Violations of ER 3.4(c) (knowingly disobeying an obligation under the
16 rules of the tribunal), 8.1(b) (knowingly failing to respond to a lawful demand for information
17 from a disciplinary authority), Rule 31(c)(3) (failure to provide Bar with current address),
18 Rule 51(e) (willful disobedience or violation of a rule or order of a court), Rule 51(h) (failure
19 to furnish information or respond to inquiry) and (i) (failure to cooperate with staff of State
20 Bar) are alleged.
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23 **Count III**

24 Count III alleges two prior sanctions, an Order of Informal Reprimand issued June 13,
25 1986, for violations of ER 3.3(a)(1) and (2) and 8.4(a), (c) and (d)—these going generally to
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1 false statement, failure to disclose, and dishonesty—and a suspension for six months and a
2 day under an Order dated October 18, 2001 for violations of ER 1.15(b), 8.4(b) and (d), Rule
3 43(d) (Trust Account Guideline 1.c)—these going generally to mishandling of client funds.

4 At the hearing, Bar Counsel showed that Respondent had received actual notice of
5 both the charges and of the mitigation and aggravation hearing. Although the Bar's second
6 letter went undelivered, Bar Counsel later obtained from another source a Colorado address
7 for Respondent. Bar Counsel mailed copies of the Complaint and of the Notice of Hearing to
8 Respondent, who received them well before the hearing, as shown by signed return receipts.

9 Bar Counsel also showed through Exhibits 1-3 that Hicks had paid Respondent \$4,000
10 for services Hicks never received and that the State Bar's Client Protection Fund had
11 reimbursed Hicks in that amount. Bar Counsel requested that the sanction include both
12 suspension for six months a day and an order that Respondent reimburse the Client Protection
13 Fund \$4,000.
14

15 CONCLUSIONS OF LAW

16 Respondent failed to appear of answer and his default has been duly entered.
17 Consequently, the allegations of the Complaint are deemed admitted, pursuant to Rule 53(c)3,
18 Ariz. R. S. Ct. As Hearing Officer, I find that there is clear and convincing evidence that
19 Respondent violated Rule 42, Ariz. R. S. Ct., specifically:
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21 Count I

22 Violations of ER 1.3, ER 1.4, ER 1.16(b), ER 1.16(d) and ER 8.4(d). I do not find
23 clear and convincing evidence of a violation of ER 3.2, and recommend that no violation of
24 this ethical rule be found. Although failure to expedite litigation may be found in some
25 situations in which no suit has in fact been brought, I believe that the State Bar must at least
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1 show that the client instructed the attorney to file suit or to prepare for litigation. The
2 evidence before me shows only that the attorney was asked to help with collection by
3 preparing a collection letter. My recommended sanction would not change whether or not a
4 violation of ER 3.2 is found.

5 **Count II**

6 Violations of ER 3.4(c), ER 8.1(b), Rule 31(c)(3) and Rule 51(e), (h) and (i), Ariz. R.
7 S. Ct.

8 **Count III**

9 Two prior sanctions, as alleged: (1) An Order of Informal Reprimand issued June 13,
10 1986, File No. 85-1933; and, (2) A Suspension for six months and one day, pursuant to an
11 Order dated October 18, 2001, *In the Matter of Apker*, SB-01-0126-D (2001).

12 **ABA STANDARDS**

13 ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty
14 violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the
15 lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

16 This Hearing Officer considered *Standard* 4.0 (Violations of Duties Owed to
17 Clients) in determining the appropriate sanction warranted by Respondent's conduct.
18 Specifically, *Standard* 4.42 (Lack of Diligence) provides that: "Suspension is generally
19 appropriate when:
20 appropriate when:

- 21 (a) a lawyer knowingly fails to perform services for a client and causes injury or
22 potential injury to a client; or
23 (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a
24 client."
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1 This Hearing Officer then considered aggravating and mitigating factors in this
2 case, particularly those suggested by Bar Counsel as factors in aggravation. Six (6) factors
3 were considered; however, only five (5) factors are present: 9.22(a), (prior disciplinary
4 offenses), 9.22(c), (a pattern of misconduct), 9.22(d), (multiple offences), 9.22(e), (bad
5 faith obstruction of disciplinary proceedings), 9.22(h) (vulnerability of victim), and 9.22(i),
6 substantial experience in the practice of law.¹

7 I agree with Bar Counsel that all of the above are aggravating factors in this case,
8 with the exception of 9.22(h). The mere fact, standing alone, that Respondent took
9 advantage of Mr. Hicks does not establish that Mr. Hicks was more vulnerable than the
10 average person. 9.22(h) would become virtually meaningless if all that has to be shown is
11 that the client was harmed; for then virtually every discipline would include a 9.22(h)
12 aggravating circumstance. In addition, I find as an aggravating factor that Respondent was
13 suspended from the practice of law in Arizona for non-payment of dues on April 28, 2000
14 and remains suspended.
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16 There is one factor in mitigation: *Standard* 9.32(m), remoteness of prior offenses.²

17 PROPORTIONALITY REVIEW

18 The Supreme Court has held in order to achieve proportionality when imposing
19 discipline, the discipline in each situation must be tailored to the individual facts of the case in
20 order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983)
21 and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
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23 There are many disciplinary cases, which have as their fulcrum the attorney's lack of
24 diligent representation, abandonment of the client, failure to communicate and failure to
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26 ¹ Respondent was licensed to practice in Arizona in 1976.

² Order of Informal Reprimand issued in 1986.

1 cooperate in the Bar's investigation. In that general area there is a wide range of disciplinary
2 results, from censure to disbarment, the particulars of each case of course weighing the result
3 in one direction or the other. In this case, were it a first instance and had it involved only
4 Respondent accepting money and failing to perform or to keep his client advised, censure
5 might have sufficed. But this offense followed close on the heels of a suspension for
6 Respondent having diverted to himself money the client intended to pay a third party for a
7 title report. Also, in this case, Respondent left town leaving no forwarding address, and when
8 tracked down failed to respond to the State Bar's inquiry.

9 It is tempting to take Bar Counsel at his word that he has abandoned the practice of
10 law and to accommodate him with disbarment. However, I concur with the recommendation
11 of Bar Counsel that Respondent be suspended from practice for six months and a day and that
12 he be required to pay restitution of \$4,000 to the Client Protection Fund. It would be a
13 sanction less that was meted out in cases such as *Carrasco, D (II)*, 178 Ariz. 468, 875 P.2d
14 127 (1994)—suspension for 9 months and restitution for lack of diligence, lack of
15 communication with client, failure to cooperate with State Bar investigation, and *Secrist II*,
16 181 Ariz. 526, 892 P.2d 862 (1995)—suspension for one year and restitution for lack of
17 diligence, failure to communicate with client, charging fee for work not performed, and
18 abandoning practice without notice to client.
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21 RECOMMENDATION

22 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
23 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315,
24 1320 (1993). It is also the objective of lawyer discipline to protect the public, the
25 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297
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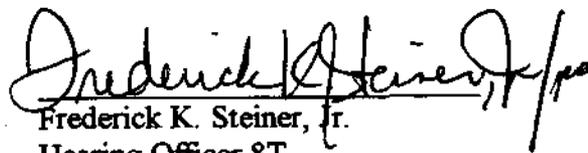
(1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionally analysis, as Hearing Officer I recommend the following:

1. Respondent shall be suspended from the practice of law for six months and one day.
2. Respondent shall pay restitution of \$4,000 to the State Bar's Client Protection Fund.
3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 12th day of December, 2002.


Frederick K. Steiner, Jr.
Hearing Officer 8T

Original filed with the Disciplinary Clerk
this 12th day of December, 2002.

Copy of the foregoing mailed
this 12th day of December, 2002, to:

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