

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

DENNIS P. BAYLESS)
Bar No. 012052)

RESPONDENT.)

No. 01-1267

HEARING OFFICER'S REPORT
AND RECOMMENDATION

PROCEDURAL HISTORY

A Probable Cause Order was filed on April 18, 2002. A two-count Complaint was filed on July 2, 2002. A Notice of Default was filed by the disciplinary clerk's office on August 15, 2002. Respondent filed an Answer on August 26, 2002. On October 11, 2002 the State Bar filed a Motion to Compel Discovery, which was granted. Respondent was ordered to provide disclosure on or before October 22, 2002. A settlement conference was held on October 17, 2002. The parties were unable to reach an agreement. On November 19, 2002 the State Bar filed a Motion for Rule 37 Sanctions and a Motion in Limine to Exclude or Limit the Testimony of Certain Witnesses.

FINDINGS OF FACT

At all times relevant hereto, and as to both counts, Respondent was a member of the State Bar of Arizona, having been admitted on October 21, 1988.

COUNT I

A. THE ROMERO COMPLAINT

Respondent was retained by Teddi Romero on May 7, 2001, to

1 pursue a claim against an estate that was in probate. He received a retainer of
2 \$1500. At the initial meeting, Respondent explained his fees to both Teddi
3 Romero and to Karen German, a witness to Respondent's representation of Ms.
4 Romero. The extent of the explanation of the charges is in dispute. Ms.
5 Romero testified that she read over the agreement for five minutes and she was
6 given a copy to keep (RT 38). Witness German testified that Respondent
7 simply pushed the agreement across a table to Ms. Romero and told her to sign
8 it. (RT 19, 20). Respondent testified that he gave the retainer agreement to
9 Ms. Romero to read and sign (RT p. 110), then explained all of his billing rates
10 (RT pp. 118-119.) The evidence is clear that Ms. Romero was adequately
11 advised of the billing procedures Respondent would utilize in her case (See,
12 Exhibit Two). It is an unreasonable interpretation of that contract to exclude
13 telephonic contact between the Respondent and Ms. Romero as billable time.

14 Beginning almost immediately after the contract for Respondent's
15 services was entered into, Respondent's office began receiving telephone calls
16 from both Ms. Romero and Ms. German. While there exists no documentation
17 for all of the phone calls that Respondent asserts were received by his office,
18 and returned from his office, the evidence shows that all of Respondent's
19 billings to Ms. Romero were reasonable and for all intents and purposes
20 accurate. There is a great deal of dispute regarding those telephone calls, see
21 e.g., RT pp. 29, 39, 45, 48, 50-52, 93, 96, 128, 131. Also see pp. 102 - 104.
22 Some calls were made by Ms. Romero and Ms. German using calling cards.
23 There would be no record of those calls. Some calls were made from
24 telephones outside the area, and Ms. German would apparently then call

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26 ¹As explained by witness Karen German, "we suspected fraudulent on a will" RT p. 17

1 Respondent's office from her local number, resulting, for whatever reason, in
2 no record of such calls.² Having had an opportunity to hear the testimony of
3 the Bar's witnesses, and Respondent and his office staff, this Hearing Officer
4 cannot be persuaded by any standard of evidence that the billings for the
5 telephone calls, as explained by the Respondent, were in any way erroneous.

6 The nature of the work undertaken by Respondent consisted of
7 attacking, in court, a will and living trust that had been created by Attorney
8 Dianne Prescott and her staff. The will, apparently replacing an older will
9 naming Ms. Romero as a beneficiary, did not leave any of the decedent's
10 property to Ms. Romero. Ms. Romero sought to challenge the new will/trust
11 on the grounds that the decedent was incompetent at the time she signed the
12 second document, that is the one that deprived Ms. Romero of her benefits in
13 the decedent's estate.

14 Respondent testified that he had spent time that was never billed to
15 Ms. Romero drafting a document and researching the issue, relating to a
16 challenge of the will and trust. He also testified that such a challenge would
17 require the posting of a bond. (RT pp. 115 - 116). The State Bar does not
18 challenge this assertion. Because of the amount of time he and his staff had
19 spent answering phone calls from, and returning phone calls to, Ms. Romero,
20 Respondent decided to terminate his relationship with Ms. Romero.

21 Ms. Romero had been informed that before any documents could be filed
22 in court, a bond would have to be posted. (R.T. p. 118) In order for the
23 Respondent to meaningfully assist Ms. Romero, it was necessary for Ms.

24
25 ² See e.g. RT p. 21

26 ³ This hearing officer is not persuaded by testimony to the contrary, see e.g. RT pp. 89 - 90.

1 Romero to provide a bond. There was essentially no reason for contact
2 between Ms. Romero and the Respondent until the bond was obtained, and
3 there was no evidence produced that the bond was ever obtained. There was
4 no failure to file, for there was nothing to file. There was an extraordinary
5 amount of communication between counsel, his office, and Ms. Romero. This
6 hearing officer cannot find, by a preponderance of evidence, that Respondent
7 knowingly misstated his billings. He did not exaggerate his billings; indeed the
8 credible evidence presented at the hearing establishes that a great deal of time
9 was spent on the telephone with Ms. Romero that was not billed at all.

10 B. FAILURE TO COOPERATE WITH THE STATE BAR

11 Respondent failed to cooperate with the Bar in its investigation of the
12 case. First, Respondent failed to file a timely response (Exhibits 7 and 8).
13 Respondent failed to respond to Bar Counsel's requests for information. (RT
14 pp. 129, 135, 136, 150, 151, and Exhibit 11). Respondent failed to respond to
15 reasonable demands of Bar Counsel, even after order of the hearing officer. At
16 the hearing, Respondent did produce the records that were the subject of the
17 motions to produce and for sanctions.⁴

18 CONCLUSIONS OF LAW

19 Count I

20 This Hearing Officer finds no ethical violation by Respondent in any
21 of his dealings with Ms. Romero, and recommends that Count One, as to those
22 allegations (1 - 10, 13 - 17) be dismissed.

23 As to the allegations contained in paragraphs eleven and twelve, this

24 ⁴ See, e.g., RT pp. 157, 159, 165, 172, 179-9, 179.

25 ⁵ Transcript of Hearing (RT) pp 4, 9-10

1 hearing officer finds that there is clear and convincing evidence that
2 Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 8.1 and
3 Supreme Court Rules 51 (h) and (I). Respondent failed to respond to
4 reasonable demands of Bar Counsel, even after order of the hearing officer.

5 **Count II**

6 The Hearing Officer finds that Respondent has been previously
7 disciplined in File Number 95-2105 (Private Informal Reprimand and
8 Probation), File Number 97-0279 (Informal Reprimand), File Number 97 -
9 1171 (Informal Reprimand and Probation), and File Number 98-2254, Thirty
10 Day Suspension, Restitution, and Costs. This prior record is discussed below.

11 **ABA STANDARDS**

12 ABA Standard 3.0 provides that four criteria should be considered:
13 (1) the duty violated; (2) the lawyer's mental state and (3) the actual or
14 potential injury caused by the lawyer's misconduct; and (4) the existence of
15 aggravating or mitigating factors. **Matter of Tarletz** 163 Ariz. 538, 789 P.2d
16 1049 (1990).

17 This Hearing Officer considered Standard 9.22 (a), (d) and (e)
18 Respondent failed to respond to reasonable requests from the State Bar, and
19 disobeyed a hearing officer's order. (This Hearing Officer places little weight on
20 this aggravator since it is the essence of the violation itself.) Respondent has been
21 practicing law since 1988. Respondent's prior disciplinary record is considered in
22 aggravation. The prior disciplinary matters are listed above.

23 This Hearing Officer then considered the mitigating circumstances set
24 forth in Standard 9.32, and finds Standard 9.32 (b) (Absence of dishonest or
25 selfish motive) applicable here.
26

PROPORTIONALITY REVIEW

1
2 The Supreme Court has held in order to achieve proportionality when
3 imposing discipline, the discipline in each situation must be tailored to the
4 individual facts of the case in order to achieve the purposes of discipline. *In re*
5 *Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49,
6 847 P.2d 94 (1993).

7 This hearing officer considers the cases cited by the State Bar as
8 inapplicable. This Hearing Officer finds Respondent's only violation to be his
9 failure to cooperate and therefore finds *Matter of Galusha*, 144 Ariz. 503,
10 794 P.2d 136 (1990); *In re Lincoln*, 165 Ariz. 122, 798 P.2d 371 (1990);
11 *Matter of Kobashi*, 177 Ariz. 584, 870 P.2d 402 (1994) and *Matter of Yates*
12 2001 Lexis 126 (2001), inapposite. Failure to cooperate has been, in those
13 cases, found to be a significant aggravating factor, however, in this case, the
14 failure to cooperate stands alone.

15 This Hearing Officer was not provided any comparable cases by the
16 Respondent.

17 This Hearing Officer believes that *Matter of Davis*, 181 Ariz. 263,
18 889 P.2d 621, is illuminating. While the conduct in that case was more
19 egregious, the principal is clear that failure to cooperate with the Bar, standing
20 alone, can result in serious consequences. Another case this Hearing Officer
21 considers in making his recommendation *Matter of Brown*, 184 Ariz. 480,
22 910 P.2d 631 (1996).

23 In arriving at his recommendation, the Hearing Officer reviewed the
24 nature of the conduct that was the basis of Respondent's prior discipline. None
25 of those matters involved any allegations of failure to cooperate with the Bar.
26

1 The Hearing Officer also notes that the lack of cooperation in **Davis, supra**, and
2 **Brown, supra**, occurred after the respondents were under the supervision of the
3 Bar for another violation.

4 While the Hearing Officer cannot in any way condone the actions of
5 the Respondent, he does not believe that they justify a suspension.

7 RECOMMENDATION

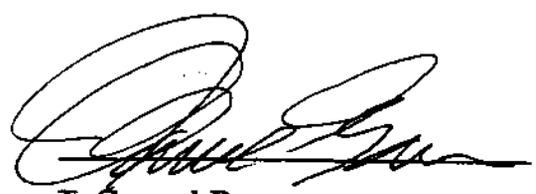
8 The purpose of lawyer discipline is not to punish the lawyer, but to
9 protect the public and deter future misconduct. **In re Fioramonti** 176 Ariz.
10 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer
11 discipline to protect the public, the profession and the administration of justice.
12 **In re Neville** 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to
13 instill public confidence in the bar's integrity. **Matter of Horwitz** 180 Ariz. 20,
14 29, 881 P.2d 352, 361 (1994).

15 In imposing discipline, it is appropriate to consider the facts of the
16 case, the American Bar Association's **Standards for Imposing Lawyer**
17 **Sanctions ("Standards")** and the proportionality of discipline imposed in
18 analogous cases. **Matter of Bowen**, 178 Ariz. 283, 286, 872 P.2d 1235,
19 1238 (1994).

20 Upon consideration of the facts, application of ~~the~~ **Standards**,
21 including aggravating and mitigation factors, and a proportionally analysis,
22 this Hearing Officer recommends the following:

- 23 1. Respondent shall be publically censured
- 24 2. Respondent shall pay the costs and expenses incurred in these
25 disciplinary proceedings.

1
2 DATED this 3 day of March, 2003.

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6 J. Conrad Baran
7 Hearing Officer 8M

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11 Original filed with the Disciplinary Clerk
12 this 3rd day of March, 2003.

13 Copy of the foregoing mailed
14 this 19th day of March, 2003, to:

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