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BEFORE A HEARING OFFICER

IN THE MATTER OF A SUSPENDED MEMBER )	No. 01-1850
OF THE STATE BAR OF ARIZONA, )	
)	
DONALD W. HART, )	
Bar No. 003058 )	HEARING OFFICER'S REPORT
)	AND RECOMMENDATION
RESPONDENT. )	
)	

**Relevant Procedural History**

A Probable Cause Order was filed on September 13, 2002. A one-count Complaint was filed on October 28, 2002, and was served by mail on October 29, 2002. Respondent did not file an answer; therefore, the Disciplinary Clerk entered a Default on January 10, 2003. An aggravation and mitigation hearing was held on January 28, 2003. Robert A. Clancy, Jr. appeared on behalf of the State Bar. Respondent did not appear. On February 4, 2003, Respondent moved to reopen the aggravation/mitigation hearing. Without objection, on February 19, 2003, the hearing was reopened. Robert A. Clancy, Jr. appeared on behalf of the State Bar. Respondent appeared pro per.

**Findings of Fact**

The one-count Complaint actually charges two types of ethical misconduct: (1) ethical misconduct arising from a bankruptcy proceeding, and (2) practicing law while suspended. Because a default was entered in accordance with Arizona Supreme Court Rule 53(c)(3), the following facts alleged in the Complaint are deemed admitted as amplified by the testimony and exhibits admitted at the mitigation/aggravation hearings and the State Bar's closing memorandum.

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1. Respondent, a member of the State Bar of Arizona since September 23, 1972, was administratively suspended from the practice of law effective on August 13, 1999, for failing to comply with the MCLE requirements for MCLE year 1997-98, and has been continuously suspended since that date.

2. Respondent had known Complainant E. Lucille Boettge for 30 years and had represented her company, Star Cleaners, Inc., for over a decade. In 1998 on behalf of Star Cleaners, he had brought a suit to recover a debt arising out of the sale of the business. See *Star Cleaners, Inc. v. Joymor Enterprises Inc.*, No. CV 98-05080 (Maricopa County Superior Court). In the Spring of 1998, the debtor filed for Chapter 13 bankruptcy, staying the pending law suit. See *In re Morjaria*, No. 98-05342-PHX-RTB (D. Ariz.).

3. Although Respondent told Ms. Boettge he was not an expert in bankruptcy matters, he agreed to represent her in the bankruptcy proceedings.

4. The bankruptcy action was essentially dormant for over two years.

5. During the course of the bankruptcy proceedings, and after being suspended from the practice of law, Respondent signed one pleading entitled "Stipulation of Objecting Creditors to Confirmation of the Second Amended Plan" prepared by another attorney and filed with the bankruptcy court on June 15, 2000. (SB Hearing Exhibit 4; Tr. 2/19/03, at 16-17.)

6. Respondent did not tell his client, other counsel, or the court, that he had been suspended from the practice of law.

7. Respondent failed to file a Proof of Claim required in Chapter 13 bankruptcy proceedings. In a letter on law office stationary dated January 31, 2001, Respondent told his client:

1 No proof was filed (1) because no official Notice of Bankruptcy stating the need for  
2 a proof was sent to Star Cleaners, Inc. (as you may recall it was sent to the wrong  
3 address), and (2) because I relied on my experience in Chapter 11 bankruptcy cases  
4 where a proof is not filed in this situation.

In fact, the rules of the Court require a Proof of Claim to be filed in this case, despite  
the fact that Star Cleaners, Inc. is listed for payment on the final Chapter 13 Plan  
approved by the Court.

5 (SB Hearing Exhibit 1; emphasis original.) In the letter, Respondent advised his client of the steps he  
6 had taken to correct the matter, explained the potential malpractice claim and the attendant conflict of  
7 interest, advised his client to obtain the advice of independent legal counsel, and provided her with the  
8 name of a certified specialist in bankruptcy law, Donald W. Powell.

9 8. Because the certified specialist recommended by Respondent was a friend of Respondent,  
10 Ms. Boettge employed Randy Nussbaum, also a certified bankruptcy specialist. (Tr. 1/28/03, at  
11 19-20.)

12 9. In a letter on law office stationary dated February 17, 2001, Respondent wrote the attorney  
13 representing another creditor admitting his error and attempted to mitigate his clients' losses. (SB  
14 Hearing Exhibit 5.)

15 10. Seven months later, Ms. Boettge sought the State Bar's intervention not because of  
16 [Respondent's] original error, but

17 because since he committed the error, I have relied upon his promise that he would  
18 make good and his failure to do so has forced me to incur additional legal fees and  
19 costs and will probably now force me to have to sue him.

20 (SB Hearing Exhibit 1.)

21 11. As a result of Respondent's representation, Ms. Boettge suffered an economic loss.

22 12. There is no evidence that Respondent received any money from Ms. Boettge after he was  
23 suspended from practicing law.  
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### Discussion and Conclusions of Law

1 I find that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S.  
2 Ct., specifically that Respondent practiced law while suspended. See ER 1.16(a)(1) (failure to  
3 withdraw) 3.4(c) (fairness to opposing party and counsel), 5.5(a) (unauthorized practice of law), 8.4(c)  
4 & (d) (misconduct), Rule 31(a)(3) (privilege to practice), Rule 33(c) (practice in courts) and Rule 51(e)  
5 & (f) (grounds for discipline). Respondent testified that, in 1997–98, he was intentionally in the process  
6 of winding down his not limited general practice with the hope of going into broadcasting, and was low  
7 on money, thus, did not complete his required MCLE. (Tr. 2/19/03, at 29–30.)

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9 It is undisputed that Respondent failed to timely file a Proof of Claim and that because of this  
10 failure, his client suffered economic loss. But “mere negligence in the handling of a case” will not  
11 necessarily constitute a violation of ER 1.1 (competency). *In Matter of Curtis*, 184 Ariz. 256, 261, 908  
12 P.2d 472, 477 (1995). “We recognize the important distinction between conduct by an attorney that  
13 is simply negligent and conduct that rises to the level of an ethical violation.” *Id.*; see also *In re*  
14 *Wolfram*, 174 Ariz 49, 53, 847 P.2d 94, 98 (1993) (fact that a criminal defense attorney has been found  
15 to have rendered constitutionally ineffective assistance to his client does not conclusively establish an  
16 ethical violation); *In re Mulhall*, 159 Ariz. 528, 531, 768 P.2d 1173, 1176 (1989) (decided under pre-  
17 1983 code, negligently allowing a statute of limitations to run does not constitute an ethical violation.)  
18 “[C]are should be taken to avoid the use of disciplinary action . . . as a substitute for what is essentially  
19 a malpractice action.” *In re Myers*, 164 Ariz. 558, 561 n.3, 795 P.2d 201, 204 n.3 (1990) (citation and  
20 internal quotation omitted).  
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24 This single act of negligence in failing to file a Proof of Loss does not rise to the level of a ER  
25 1.1 violation in my view. While it is true—as the State Bar elicited from Respondent—this was not a  
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1 situation where Respondent simply neglected to perform an act he knew was required, but rather his  
2 negligence arose from his failure to know a point of law, this single negligent failure does not equate  
3 with being ethically incompetent. Nothing in the record suggests that his handling of the bankruptcy  
4 was incompetent.

5 Nor, based on the existing record, do I find a violation of ER 1.3 (diligence) or ER1.4  
6 (communication). Ms. Boettge testified that she had contacted Respondent every three to four months  
7 after the case entered the bankruptcy court for an update. (Tr. 1/28/03, at 17.) And Respondent  
8 informed her that he had not heard anything from the court. (*Id.*) Nothing in the record indicates that  
9 this statement was incorrect. While it might be reasonable and a good practice to send status letters  
10 to clients every few months on cases where there is no change in the status of the litigation, failure to  
11 do so does not rise to the level of an ethical violation. Ms. Boettge understood that Respondent had  
12 filed papers and they were simply waiting for a decision of the bankruptcy court. (*Id.*) Apparently, Ms.  
13 Boettge learned of the bankruptcy court's decision *before* Respondent when another creditor told her  
14 that she had received money from the bankruptcy trustee. (*Id.* at 18-19.) Under these circumstances  
15 and based on this record, there does not appear to be a failure to communicate.

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18 Although it could be argued that Respondent was not diligent in filing the Claim of Proof, based  
19 on this record, diligence was not the cause of his failure to file the Claim of Proof. Rather, Respondent  
20 admitted in his letter to his client and at the mitigation hearing that he had made a mistake based on his  
21 prior experience with Chapter 11 bankruptcies. Thus, there is not clear and convincing evidence that  
22 Respondent did not act with reasonable diligence and promptness in representing his client. His actions  
23 following the discovery of his error demonstrate just the opposite.  
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## Discussion of Sanctions

1           Although not mandatory, the ABA *Standards for Imposing Lawyer Sanctions* (1991)  
2           [*Standards*], may be a useful starting point in determining an appropriate sanction. *See In Matter of*  
3           *Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996); *see also In Matter of Murphy*, 188 Ariz. 375,  
4           380, 936 P.2d 1260, 1274 (1997) (declining to apply the *Standards*).

5           Generally, in cases involving multiple charges of misconduct arising out of related events, the  
6           appropriate sanction is that for the most serious instance of misconduct. *See In re Cassalia*, 173 Ariz.  
7           372, 375, 843 P.2d 654, 657 (1992). The remaining violations are to be considered aggravating  
8           circumstances. *Id.*

### ABA Standards

9           ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2)  
10          the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4)  
11          the existence of aggravating or mitigating factors. *See In Matter of Spears*, 160 Ariz. 545, 555, 774  
12          P.2d 1335, 1345 (1989).

13          The State Bar is correct, "[i]n this case, the most serious conduct involves Respondent's  
14          dishonest conduct in hiding the fact that he was suspended from his client and the bankruptcy court,  
15          and his failure to respond to the State Bar." (Agg/Mit. Memo. at 7.)

16          Dishonesty is addressed by *Standard* 6.22 that states, in part, suspension is appropriate when  
17          an attorney knows that he is violating a court order or rule, and there is injury or potential injury to a  
18          client.

### *Aggravating and Mitigating Circumstances*

1           The *Standards* suggest a series of aggravating and mitigating circumstances that may serve to  
2 increase or decrease the degree of discipline imposed. *Standards* § 9.0; *see also, e.g., In re Scholl*, 200  
3 Ariz. 222, 25 P.3d 710, ¶¶ 20, 23 (2001). The *Standards* do not assert that the listed circumstances  
4 are all inclusive. For any circumstance to affect the discipline decision, it must be supported by  
5 reasonable evidence. *In Matter of Varbel*, 182 Ariz. 451, 455, 897 P.2d 1337, 1341 (1995).  
6

7           **Aggravation:** Prior to the final mitigation hearing, the State Bar suggested that there were six  
8 aggravating circumstances: *Standards* 9.22(d) (multiple offenses); 9.22(e) (bad faith obstruction of the  
9 disciplinary proceedings); 9.22(g) (refusal to acknowledge wrongful nature of conduct); 9.22(h)  
10 (vulnerability of victim); 9.22(i) (substantial experience in the practice of law); 9.22(j) (indifference to  
11 making restitution).  
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13           The record supports four of them: (d), (g), (h) and (i). Evidence submitted at the final  
14 mitigation hearing shed a different light on whether there was bad faith obstruction of the disciplinary  
15 proceedings. Additionally, Respondent did not appear indifferent to making restitution.  
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17           Initially, the most serious aggravating circumstance was Respondent's failure to participate in  
18 the disciplinary proceedings after a formal complaint was filed. "Failure to respond to inquiries from  
19 the State Bar shows a disregard for the Rules of Professional Conduct and borders on contempt for the  
20 legal system." *In re Davis*, 181 Ariz. 263, 266, 889 P.2d 621, 624 (1995) (citation omitted). "Inaction  
21 serves to undermine the profession's efforts at self-regulation, damaging both its credibility and  
22 reputation." *In Matter of Brown*, 184 Ariz. 480, 483, 910 P.2d 631, 634 (1996).  
23

24           Respondent's Mitigation Memorandum and testimony at the second hearing significantly  
25 mitigates his failure to respond to the formal charges to the extent that I do not find bad faith  
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1 obstruction of the disciplinary proceedings. Respondent initially responded to the Bar's inquiry in May  
2 2002. (SB Hearing Exhibit. 3.) A formal complaint was filed in October 2002, and default entered on  
3 January 10, 2003. Respondent testified that on June 10, 2001, he suffered a cerebral stroke that had  
4 a substantial disabling effect (although it did not impact the underlying disciplinary allegation regarding  
5 the bankruptcy), in September 2001 he underwent surgery for bladder cancer, and that he had been  
6 hospitalized for grand-mal seizures and is currently receiving therapy through Value Options. (Tr.  
7 2/19/03, at 11-12, 25.) However, the documentation Respondent offered in supported of this  
8 testimony is sparse. A collection letter from John C. Lincoln Hospital for \$22,602.16 for unknown  
9 service provided on August 22, 2001; a collection notice from the Maricopa Health System for \$218.50  
10 for services performed on July 12, 2002, and a self-prepared page from his address book for his  
11 contacts at Value Options with notes concerning Group Therapy and Stroke Support Group meetings.  
12 (Resp. Exhibits 1 through 3.)

14 Additionally, Respondent testified that he was unable to find counsel and "it just kind of got  
15 away from me, and before I knew it, there was a ruling in the case." (Tr. 2/19/03, at 32.) Respondent  
16 also offered an explanation for his failure to appear at the original mitigation hearing. He simply did  
17 not open the notice prior to the date of the hearing. (*Id.* at 31.) "I thought it was probably a decision  
18 of discipline and I was trying to get some other things done at the time . . ." (*Id.* at 32.) Given the  
19 totality of these circumstances, the record does not support a "bad faith" obstruction of the disciplinary  
20 proceeding.  
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22 Initially Respondent offered to make restitution to his client, but it appears that his failure to do  
23 so was not a wilful refusal, but rather primarily the result of his economic and medical circumstances.  
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25 Although Respondent acknowledged his error concerning the Claim of Proof, nothing in the  
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1 record indicates any acknowledgment to his client, opposing counsel or the court concerning his  
2 practice of law while suspended.

3 After the initial aggravation/mitigation hearing where Respondent did not appear, the State Bar  
4 attempted to determine if Respondent was still practicing law. A State Bar investigator ascertained that  
5 there was no record with any of the courts that he was still practicing. The only address that the State  
6 Bar had for Respondent was his residence and that was not marked in any way indicating that  
7 Respondent was still engaged in the practice of law. When the investigator called Respondent on the  
8 pretense of employing a divorce lawyer, he understood Respondent to state he was a "practicing  
9 attorney." (Tr. 2/19/03, at 38-41; 44-45.) While vaguely recalling the phone conversation,  
10 Respondent did not unequivocally deny ever telling the investigator that he was a practicing attorney,  
11 although he did not recall doing so. (*Id.* at 20-21, 40-41, 50.) It was undisputed, however, that  
12 Respondent made no offer of assistance other than to find in the state bar directory a name the  
13 investigator had furnished him. The investigator made no contemporaneous recording of the  
14 conversation. While a very close factual question, given the ambiguous nature of the conversation and  
15 the possibility of misunderstanding, I do not find that this isolated conversation is sufficient evidence  
16 in aggravation to support an allegation that Respondent is still practicing law.  
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19 **Mitigation:** The State Bar suggested one mitigating circumstance, *Standard* 9.32(a) (absence  
20 of prior disciplinary record). The record supports this circumstance. Prior to his summary  
21 administrative MCLE suspension, Respondent had practiced law for nearly 30 years. During that time,  
22 according to the Supreme Court's Disciplinary Clerk, the only complaint against Respondent did not  
23 meet the threshold for a disciplinary investigation. Respondent did have a prior MCLE suspension on  
24 February 11, 1997. He was reinstated about four months later.  
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1 As discussed above, the record contains evidence concerning Respondent's health issues.  
2 However, Respondent testified that he did not believe that these issues caused or contributed to the  
3 charged ethical misconduct. (*Id.* at 20, 26.) Because there is no causal nexus, they are not considered  
4 mitigating. See *Standards* 9.32(c) (personal or emotional problems), (h) (physical disability), (i) (mental  
5 disability).

6 Three other mitigating factors are present. I find that Respondent did not have a dishonest or  
7 selfish motive in committing the unethical conduct, that he timely made a good faith effort to rectify the  
8 consequences of his mistake in the bankruptcy, and that he was remorseful for that mistake. See  
9 *Standards* 9.32 (b)(d)(i). While the latter two circumstances do not relate directly to the practicing law  
10 while suspended charge, given the circumstances of this case, they are entitled to weight as mitigation.  
11

#### 12 PROPORTIONALITY REVIEW

13 Although not required by rule, in the past the Arizona Supreme Court often consulted similar  
14 cases in an attempt to assess the proportionality of the sanction. See *In Matter of Struthers*, 179 Ariz.  
15 216, 226, 877 P.2d 789, 799 (1994). At one time, the Court thought it helpful if the commission's  
16 orders set forth proportionality considerations in its sanction recommendations. *In Matter of Pappas*,  
17 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988). More recently, the Arizona Supreme Court has  
18 criticized the concept of proportionality review as "an imperfect process." *In Matter of Owens*, 182  
19 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*; see  
20 also *State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584 (1992) (abandoning proportionality  
21 review in death penalty cases).  
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23 The State Bar cited two unpublished decisions of the Arizona Supreme Court: *In Matter of*  
24 *Rogers*, Supreme Court No. SB-00-0050-D (2000) and *In Matter of MacDonald*, Supreme Court No.  
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1 SB-00-0021-D (2000). According to the State Bar's summary, neither case appears to furnish any  
2 significant guidance because of the difference in conduct. Because of the uniqueness of the  
3 circumstances of this case, further proportionality review does not seem necessary or appropriate.

#### 4 **Conclusion and Recommendation**

5 The purpose of lawyer discipline is not to punish the offending attorney. *In re Fioramonti*, 176  
6 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Rather, the purpose is threefold: (1) to protect the public  
7 from harm by unethical, dishonest or disabled attorneys, (2) to foster professional integrity in part  
8 through deterrence, and (3) to maintain the public's confidence in the State Bar and the administration  
9 of justice. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994); *In Matter of Riches*, 179  
10 Ariz. 212, 215, 877 P.2d 785, 788 (1994).

11 Upon consideration of the facts, application of the *Standards*, including aggravating and  
12 mitigating factors, and the State Bar's recommendation that Respondent be suspended from the  
13 practice of law for a period of at least six months and one day, I recommend the following:

14 1. *Respondent shall be suspended for six months.* Prior to Respondent's participation in  
15 the disciplinary proceedings, I was in accord with the State Bar's recommendation of six months and  
16 a day, thus requiring Respondent to reapply to the Bar. Now understanding the circumstances  
17 concerning his failure to answer the formal complaint and for missing the initial mitigation/aggravation  
18 hearing and reviewing his work product that is in the file, I do not believe that the public needs to be  
19 protected from him. Respondent testified that the reason he did not file his MCLE affidavit was that  
20 he was no longer going to practice law. His practice of law in relationship to this long-time client  
21 whose litigation had been initiated while he was still licensed was minimal. There is no evidence at this  
22 point that his physical issues would interfere with a practice of law. Prior to his decision to wind-down  
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1 his practice and his stroke, Respondent had enjoyed many years of complaint-free practice. However,  
2 if he has not paid the ordered restitution, that would be a basis for the State Bar to object to  
3 reinstatement. See Rule 71(c), R. Sup. Ct.

4 2. *Restitution: \$ 3, 681.* In her original complaint, Ms. Boettge reported that because  
5 of Respondent's error, approximately \$7,000 had not been paid to her company. (SB Hearing Exhibit  
6 1.) Shortly after the error was discovered, Respondent wrote counsel representing the landlady creditor  
7 and stated "I am told that Ms. Risk has received a creditor dividend check from the Trustee in  
8 Bankruptcy in the amount of \$7,242.21. You may also recall from our negotiations that the total  
9 dividend she should receive is about \$3,400.00." (SB Hearing Exhibit 5.) Later, on behalf of  
10 Respondent and Ms. Boettge, Donald Powell obtained \$1,364 for her. (Tr.1/28/03, at 25.) At the  
11 hearing, Ms. Boettge did not seek any restitution related to funds from the Bankruptcy court, only the  
12 amount of attorney's fees she paid Respondent and the new attorney that she hired (Respondent was  
13 paid \$2,681 and Randy Nussbaum was paid \$1,000). (*Id.* at 25, 27.)

14  
15 For two reasons it would be inappropriate to pay any restitution for economic loss that is  
16 attributed solely to Respondent's bankruptcy error. First, Respondent has not been found to have acted  
17 unethically based on that error. Second, the record does not adequately demonstrate what ultimately  
18 was Ms. Boettge's loss associated with the bankruptcy proceedings.

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20 However, the amount of restitution requested by Ms. Boettge and recommended by the State  
21 Bar is sufficiently related to his unauthorized practice of law. Respondent should not be allowed to  
22 financially benefit from the unauthorized practice of law. Likewise, the additional \$1,000 Ms. Boettge  
23 spent for a licensed attorney is properly attributable to Respondent.  
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3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 12<sup>th</sup> day of March, 2003.

*John Pressley Todd*  
John Pressley Todd  
Hearing Officer 7X

Original filed with the Disciplinary Clerk  
this 12<sup>th</sup> day of March, 2003.

Copy of the foregoing mailed  
this 12<sup>th</sup> day of March, 2003, to:

Donald W. Hart  
Respondent  
6524 North 13<sup>th</sup> Street  
Phoenix, AZ 85014-1427

Copy of the foregoing hand-delivered  
this 12<sup>th</sup> day of March, 2003, to:

Robert A. Clancy, Jr.  
Bar Counsel  
State Bar of Arizona  
111 West Monroe, Suite 1800  
Phoenix, AZ 85003-1742

by: *K. Weigand*

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