



BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
J. J. OAKLEY,)
Bar No. 010687)
)
RESPONDENT.)
_____)

No. 01-1300

**HEARING OFFICER'S REPORT
AND RECOMMENDATION**

PROCEDURAL HISTORY

A Probable Cause Order was entered on February 6, 2002 and filed on February 15, 2002. A three-count Complaint was filed on July 24, 2002 and served by mail on July 30, 2002. A hearing was set for December 6, 2002. Respondent did not file any response. Notice of Default was filed and served on September 3, 2002 and Default was entered on September 23, 2002. On September 30, 2002, the State Bar requested to be heard in aggravation and mitigation. Hearings were noticed for and held on October 18, 2002, October 31, 2002 and November 8, 2002. Despite specific notice, Respondent failed to participate in any of these hearings.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on May 10, 1986. Respondent was summarily suspended for non-compliance with Mandatory Continuing Legal Education on March 22, 2002 and remains suspended. The facts listed below are those set forth in the State Bar's Complaint, and were deemed admitted by way of Respondent's default and/or were proved by clear and convincing evidence at hearing:

Count One

1 2. Thomas Tekavec and his and his wife's corporation became involved in litigation
2 involving allegations of fraud and breach of contract surrounding the purchase of a business.

3 3. Approximately eight months after the lawsuit was filed, the corporation retained
4 Respondent. This occurred in 1998 according to Mr. Tekavec's testimony and the billing
5 statements. (TR 10-31-02 p. 10, Exhibit 1 and 2).
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7 4. In or about mid-November 2000, respondent contacted Tekavec by letter or fax and
8 telephone and advised that Respondent no would no longer be practicing law as of January 1.
9 2001. Tekavec reminded respondent: "You charged us \$4,000.00 when it fit in a file folder.
10 Now it's in several notebooks. You have to find someone do this on a contingency basis. I can't
11 afford to bring another lawyer on board". (TR 10-31-02 p. 19)
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13 5. In another telephone conversation in or about late-December 2000, respondent told
14 Tekavec that he had not found another attorney but was "still looking. Remember, I'm still your
15 attorney". (TR 10-31-02 p.21) In that conversation, Respondent said that he would send
16 Tekavec an accounting, and that he believed that some of Tekavec's or the corporation's funds
17 had not been expended. (TR 10-31-02 p. 21)

18 6. As of June 24, 2001, Tekavec had not heard anything from Respondent since late
19 December 2000, even though Tekavec had sent e-mail messages and at least five letters to
20 Respondent between March and June 24, 2001, none of which was returned as undeliverable.
21 (TR 10-31-02 p. 21 - 22) As of the restitution hearing on November 8, 2002 Respondent still
22 had all of the records regarding the pending litigation. (TR 11-8-02 p.8)
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24 7. The corporation spent in excess of \$30,000.00 on the lawsuit (not all of which was due to
25 respondent's representation) and Tekavec believes that respondent abandoned the corporation.
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1 8. Upon termination of representation, respondent failed to return to Tekavec or the
2 corporation the original documents given him by Tekavec, and respondent never provided
3 Tekavec with an accounting of the fees he had paid. (TR 11-8-02 p.8)

4 9. A summary of the billing statements provided by Tekavec, which covered April 1998
5 through March 2000 (Exhibit 1) demonstrates that Oakley billed the Tekavecs at least
6 \$29,443.13 (of which \$785.13 was for costs). This amount does not include any bills prior to
7 April 1998, or December 1999 or January 2000. (TR 11-8-02 p.21-24; Exhibit 2) During this
8 time, Oakley paid himself at least \$28,658.00 by way of draws from his Trust account, plus at
9 least \$785.13 in costs, and expended \$6,317.31 on actual litigation expenses, which totaled
10 \$35,760.44. (TR 11-8-02 p. 26-27, 29; Exhibit 2). Tekavec paid Oakley an additional
11 \$2000.00 between June and August 2002. (Exhibit 1) The Tekavecs paid Oakley a total of \$37,
12 970.43 to represent the corporation in the pending litigation, of which at least \$7102.44 was for
13 costs and litigation expenses. (TR 11-8-02 p.29; Exhibit 2)

14 10. It is Mr. Tekavec's recollection that a "\$3,765 check made out to the American
15 Arbitration Association ... was returned" (refunded). (TR 11-8-02 p. 14-15) However, the
16 available records do not reflect such a refund being returned to the Trust Account. (TR 11-8-02
17 p. 28) Presumably the amount was returned to Tekavec.

18 11. Mr. Oakley was personally informed of the date and time of the mitigation hearings by
19 Bar Counsel and Disciplinary Clerk's Office staff and declined to appear. (TR 11-8-02 p. 5-6)

20 12. Respondent's client balance that remained in his trust account totaled \$209.99 (Exhibit
21 2).
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Count Two

1 13. On or about June 28, 2001 the State Bar received correspondence from Thomas Tekavec
2 dated June 24, 2001, indicating that he had some concerns about respondent's representation of
3 him, his wife and/or their corporation.

4 14. On or about July 2, 2001, the Attorney/Consumer Assistance Program at the State Bar
5 sent a "get in touch" letter to Respondent, advising him to contact Tekavec and attempt to
6 address his concerns.
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8 15. On or about July 17, 2001, Tekavec informed the State Bar that he had not yet heard
9 from respondent.

10 16. On or about August 22, 2001, Bar Counsel sent a copy of Tekavec's letter and an initial
11 transmittal letter to respondent, directing him to submit a written response to Tekavec's concerns
12 and allegations within twenty (20) days of that letter. That letter stated, in part: "Pursuant to
13 Rule 51(h) and (i), Ariz. R. S. Ct., you have a duty to cooperate with disciplinary investigations."
14 Respondent failed to submit a response to the State Bar.
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16 17. On or about October 3, 2002, Bar Counsel sent additional correspondence to Respondent
17 that had been received from Tekavec.

18 18. On or about October 10, 2001 Bar Counsel sent a second letter to Respondent, directing
19 him to submit a response to Tekavec's concerns and allegations. That letter stated, *inter alia*, "I
20 again refer you to Rule 51(h) and (i), and caution you that failure to cooperate with a disciplinary
21 investigation is grounds, in itself, for discipline." Respondent failed to submit a response to the
22 State Bar.
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Count Three

1 19. Respondent has previously been sanctioned for violations of the Rules of Professional
2 conduct. Specifically, in file number 96-1697, respondent received an informal reprimand by
3 order filed May 25, 2000, for violation of ERs 1.2, 1.3, 1.4, 1.15(b), 8.1(b), Rule 44(b)4, Ariz. R.
4 S. Ct., and Rule 51(h) and (i), Ariz. R. S. Ct.; and in file number 99-1186, respondent was
5 censured by judgment and order filed April 19, 2002, for violation of ERs 1.2, 1.3, 1.4, 1.5,
6 8.1(b), 8.4(d), and Rule 51(h) and (i), Ariz. R. S. Ct.
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8 **MITIGATION/AGGRAVATION**

9 20. As noted by Bar Counsel, aggravating and mitigating factors must be supported by
10 reasonable evidence. *In re Varbel*, 182 Ariz. 451, 897 P.2d 1337 (1995). Respondent submitted
11 no evidence, and the record before this Hearing Officer reveals no factors in mitigation.
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13 21. Respondent's prior disciplinary sanctions are for failure to properly represent his clients,
14 and for failure to cooperate with the Bar during disciplinary proceedings.

15 22. Respondent had been in practice for twelve years when he undertook representation of
16 Tekavec, and more than fourteen years when he abandoned that representation, which is a
17 substantial period of time.

18 23. Respondent's failure to respond to the State Bar and to comply with the rules and orders
19 of the disciplinary agency was intentional.
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CONCLUSIONS OF LAW

1 This Hearing Officer finds that there is clear and convincing evidence that Respondent
2 violated Rule 42, Ariz. R. S. Ct., specifically: ER 1.2 (Scope of representation), 1.3 (Diligence),
3 1.4 (Communication), 1.16(b) and (d) (Declining or terminating representation), 3.2 (Expediting
4 Litigation) 8.1(b) (Bar admission and disciplinary matters) and 8.4(d) (Misconduct) and Rule
5 51(h) and (i), Ariz. R. S. Ct., (Grounds for discipline) as follows:
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7 **Count One**

8 1. Respondent violated ER 1.2 (Scope of representation), by failing to proceed with
9 representation of the Tekavecs, as directed by the clients, by failing to abide by the clients'
10 requests to proceed with litigation to conclusions, and by failing consult with the Tekavecs as to
11 the means to be pursued and by failing to respond to the clients requests for information.
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13 2. Respondent violated ER 1.3 (Diligence) by failing to proceed with representation of the
14 Tekavecs in a timely and appropriate manner and by effectively abandoning representation of the
15 Tekavecs in the midst of pending litigation.

16 3. Respondent violated ER 1.4 (Communication) by failing to keep the Tekavecs informed
17 about the status of the litigation and by failing to promptly respond to the clients' reasonable
18 inquiries for information.

19 4. This Hearing Officer concludes that the State Bar's allegation of a violation of ER 1.5 is
20 more properly addressed under ER 1.16(d) pursuant to Rule 42, ER 1.5 Comment "Terms of
21 Payment".
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23 5. Respondent violated ER 1.16(b) (Declining or terminating representation) by abandoning
24 the client without good cause in the midst of representation at a time when that withdrawal
25 would seriously and materially adversely affect the interests of the Tekavecs. Respondent
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1 further violated ER 1.16(d) by failing to take any steps to protect the clients' interests in the
2 pending litigation, and by failing to return the unearned portion of fees paid by the clients.

3 6. Respondent violated ER 3.2 (Expediting Litigation) by abandoning the litigation in a
4 manner, which essentially prevented the matter from proceeding to resolution.

5 7. Respondent violated ER 8.4(d) (Misconduct) by engaging in conduct prejudicial to the
6 administration of justice by failing to proceed with the litigation as directed by the client and by
7 failing to cooperate with the Bar.

8 **Count Two**

9 8. Respondent violated ER 8.1 (b) (Bar admission and disciplinary matters) by wholly and
10 intentionally failing to respond to informal and formal inquiries by the Bar in this disciplinary
11 proceeding.

12 9. Respondent violated Rule 51 (h) and (i), Ariz. R. S. Ct., (Grounds for discipline) by
13 failing to respond to the requests for information from the State Bar made pursuant to the Rules
14 of the Supreme Court, and by failing to cooperate with Bar Counsel in the investigation and
15 prosecution of this disciplinary proceeding.
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17 **Count Three**

18 10. Respondent was the subject of prior discipline (informal reprimand) in File no. 96-1697
19 for violation of ERs 1.2, 1.3, 1.4, 1.15(b), 8.1(b), Rule 44(b)4 and Rule 51(h) and (i), Ariz. R. S.
20 Ct. Respondent was the subject of additional Bar discipline (censure) in File no. 99-1186 for
21 violation of ERs 1.2, 1.3, 1.4, 1.5, 8.1(b), 8.4(d) and Rule 51(h) and (i), Ariz. R. S. Ct., for
22 matters which occurred in August, 1998, which is prior to the misconduct in this matter, although
23 the discipline was imposed in April 2002, subsequent to this misconduct.
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ABA STANDARDS

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

4 This Hearing Officer considered *Standard* 4.0 (Violations of Duties Owed to Clients)
5 in determining the appropriate sanction warranted by Respondent's conduct. Specifically,
6 *Standard* 4.42 provides that: Suspension is generally appropriate when (d) a lawyer
7 knowingly fails to perform services for a client and causes injury or potential injury to a
8 client. Respondent's abandonment of the Tekavecs in the midst of litigation in a manner that
9 has essentially prevented the corporation from proceeding to resolution. The actual injury
10 clearly consists of the fees paid by Tekavec to Respondent for which Tekavec has received
11 essentially no value. The potential injury may be much greater, but cannot be determined on
12 the record since there is no evidence as to the value of the pending lawsuit.

13 *Standard* 7.2 provides that: Suspension is generally appropriate when a lawyer
14 knowingly engages in conduct that is a violation of a duty owed as a professional and causes
15 injury or potential injury to a client, the public, or the legal system. Respondent's abandonment
16 of the Tekavecs in the midst of litigation, after he had assumed and received payment for
17 representation of the corporation, without the consent of the client and without providing for
18 substitute representation, violates the duty owed to the profession and caused, or potentially
19 could cause, serious injury to the client's financial interests.

20 This Hearing Officer then considered aggravating and mitigating factors in this
21 case, pursuant to *Standards* 9.22 and 9.32, respectively. Three (3) factors are present in
22 aggravation: (a) prior disciplinary offenses; (e) bad faith obstruction of the disciplinary
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1 proceeding by intentionally failing to comply with the rules or orders of the disciplinary
2 agency, and (i) substantial experience in the practice of law. No mitigating factors are
3 found.

4 PROPORTIONALITY REVIEW

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

9 In *In re Blaine*, SB-02-0071-D (Disc. Comm. Nos. 99-0368 and 99-1938 (2002))
10 attorney Steven Blaine was suspended for six months and one day and placed on probation for
11 two years for violation of ERs 1.2, 1.3, 1.4, 8.1, 8.4 and Rule 51(h) and (i) Ariz. R. S. Ct. In
12 two different cases, Blaine failed to adequately communicate with a client; failed to act with
13 reasonable; failed to promptly comply with reasonable requests for information from his
14 client and failed to submit a response to State Bar inquiries. There were three aggravating
15 factors and two mitigating factors.

17 In *In re Yates*, SB-01-0127-D (Disc. Comm. No. 99-1645) (2001) attorney Robert Yates
18 was suspended for six months and one day for violation of ERs 1.2, 1.3, 1.4, 1.16, 3.2, 8.1(b),
19 8.4(d) and Rule 51(h) and (i) Ariz. R. S. Ct. Yates failed to diligently represent his client and to
20 expedite litigation; failed to adequately communicate with his client and misrepresented to the
21 client that petitions had been filed; failed to provide the client with the client's file when
22 representation was terminated, and failed to respond to Bar inquiries. There were four
23 aggravating factors and one mitigating factor.
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1 attorney Wittges was suspended for six months and one day for violation of ERs 1.2, 1.3, 1.4,
2 1.16(a) & (d), 3.4(c), 8.1(b), 8.4(d) and Rule 51(h) and (i) Ariz. R. S. Ct. Attorney Wittges
3 failed to diligently prosecute a case which resulted in dismissal; failed to adequately
4 communicate with two clients and failed to diligently represent them; failed to comply with
5 disclosure requirements in one case; failed to sign a substitution of counsel form as ordered by
6 the court, and failed to diligently represent them, and failed to respond to Bar Counsel's inquiries
7 in both cases. There were three aggravating factors and four mitigating factors.
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9 In *In re Lincoln*, 165 Ariz. 233, 798 P.2d 371 (1990), attorney Lincoln received a nine
10 month suspension for violation of ERs 1.3, 1.4, 8.1(b) and Rule 51(h) and (i), Ariz. R. S. Ct.
11 Lincoln was sanctioned for failing to diligently represent his client; failing to adequately
12 communicate with his client, and failing to cooperate or participate in the discipline proceeding.
13 The Supreme Court found five aggravating factors and one mitigating factor to be present.
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15 In *In re Carrasco*, 176 Ariz. 459, 862 P.2d 219 (1993), attorney Carrasco received a six
16 month suspension for violation of ERs 1.1, 1.3, 1.4, 1.8(h), 8.1(b), 8.4(c) and Rule 51(h) and (i),
17 Ariz. R. S. Ct. Two formal complaints alleging failure to diligently represent clients; failure to
18 adequately communicate with two clients, and failure to participate in the Bar investigation.
19 Two aggravating factors and two mitigating factors were present.
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RESTITUTION

1 Respondent was paid at least \$37,970.43 for representation of the Tekavecs in the
2 pending litigation. Of that amount, \$785.13 and \$6,317.31 (Exhibit 2) was actually disbursed to
3 cover costs, of which \$3,765.00 appears to have been returned to Tekavec. Thus, Respondent
4 personally received at least \$30,767.99 for representation of Tekavecs and their corporation then
5 abandoned them and the litigation. It is not possible based on the evidence presented herein to
6 estimate the value of the litigation should the Tekavec's have prevailed. But it is reasonable to
7 conclude that the litigation is valueless to them in its present posture, despite their having
8 expended at least \$30,767.99 on legal fees to Respondent - for which they received no value.
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RECOMMENDATION

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11 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and
12 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is
13 also the objective of lawyer discipline to protect the public, the profession and the administration
14 of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill
15 public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
16 (1994).
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18 In imposing discipline, it is appropriate to consider the facts of the case, the American
19 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the
20 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,
21 872 P.2d 1235, 1238 (1994).
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23 In *In re Redondo*, 176 Ariz. 334, 338, 861 P.2d 619, 623 (1993) the Arizona Supreme
24 Court enunciated a philosophy that in some cases subsequent misconduct should receive
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1 "gradual and graded sanctions." Respondent has previously received censure for infractions of
2 the same type as that herein. The next most serious sanction is suspension.

3 Upon consideration of the facts, application of the *Standards*, including aggravating and
4 mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following:

5 1. Respondent shall be suspended for one (1) year.

6 2. Upon reinstatement, Respondent shall be placed on probation for two (2) years,
7 with the following terms and conditions:

8 a.) Prior to accepting representation of any client, Respondent shall submit to
9 a law office audit by the State Bar's Law Office Management Assistance Program (LOMAP)
10 director or her designee, and shall comply with all recommendations of the LOMAP director or
11 her designee; and,

12 b.) Respondent shall attend and complete the State Bar's Professionalism
13 Course prior to or within three months of reinstatement. If Respondent has already completed
14 the course, he shall complete it again.

15 3. Respondent shall pay restitution in the amount of \$30,767.99 to the Tekavecs.

16 4. Respondent shall pay the costs and expenses incurred in these disciplinary
17 proceedings.
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19 DATED this 10th day of January, 2003.

20
21 C. Eileen Bond
22 C. Eileen Bond
23 Hearing Officer 7N

24 Original filed with the Disciplinary Clerk
25 this 10th day of January, 2003.

26 Copy of the foregoing mailed
this 10th day of January, 2003, to:

1 J. J. Oakley
2 Respondent
3 2400 Cyclorama Drive
4 Prescott, AZ 86303-4707

5 Copy of the foregoing hand-delivered
6 this 10th day of January, 2003, to:

7 James D. Lee
8 Senior Bar Counsel
9 State Bar of Arizona
10 111 West Monroe, Suite 1800
11 Phoenix, AZ 85003-1742

12 by: Karen Weigand

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