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AUG 12 2004

**BEFORE THE DISCIPLINARY COMMISSION OF THE
OF THE SUPREME COURT OF ARIZONA**

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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3 IN THE MATTER OF A MEMBER)
4 OF THE STATE BAR OF ARIZONA,)
5 **RICHARD FULLER,**)
6 **Bar No. 004835**)
7)
8 **RESPONDENT.**)
_____)

No. 02-0390

**DISCIPLINARY COMMISSION
REPORT**

9 This matter came before the Disciplinary Commission of the Supreme Court of
10 Arizona on July 10, 2004, pursuant to Rule 58(e), Ariz. R. S. Ct., for consideration of the
11 Hearing Officer's Report, filed May 13, 2004, recommending a six month suspension, two
12 years of probation upon reinstatement with the State Bar's Law Office Management
13 Assistance Program (LOMAP) involving a Practice Monitor (PM), the Member Assistance
14 Program (MAP), and costs.

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16 The State Bar and Respondent both appealed and the matter was set for oral
17 argument. The State Bar and Respondent were present. The State Bar argued for a
18 suspension of no less than six months and one day or, preferably, a one year suspension for
19 violating trust account rules, submitting altered documents to the State Bar, and failing to
20 respond to the State Bar. Respondent argued that censure was an appropriate sanction for
21 non-material representations, untimely responses and trust account violations. Respondent
22 further argued that a term of probation was appropriate to actively monitor Respondent's
23 trust account, and the assessment of one half of the costs in these disciplinary proceedings.
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Discussion

1 The Commission's standard of review is set forth in Rule 58(b), which states that the
2 Commission reviews questions of law *de novo*. In reviewing findings of fact made by a
3 hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of
4 fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347
5 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).
6

7 Upon review of the record, the Commission determined the Hearing Officer made
8 the following inadvertent errors in his procedural history and findings of fact:

- 9 1. Respondent did not file a separate Pre-Hearing Statement on April 15, 2004. *See*
10 Hearing Officer's Report and Recommendation, p. 1 Procedural History.
- 11 2. A hearing was held on March 25, 2004 not April 15, 2004. *Id.*
- 12 3. The bank paid check no. 7347, charging a \$29.00 overdraft fee instead of \$59.00. *Id.*,
13 p. 3, finding of fact #11.
- 14 4. Respondent's client ledgers showed \$750.00 for Reimann instead of Reinmann. *Id.*,
15 p.4, finding of fact #21.
- 16 5. The deposit consisted of the following checks \$450.00 for Atkin; \$50.00 for Gathar;
17 \$20.00 for Lathan; \$375.00 for Pitts; \$0 for Reed; \$730.00 for Ritter; \$750.00 Reimann and
18 \$340.00 for Western Pacific Bfts. *Id.*, p. 4, finding of fact #22.
- 19 6. The client ledger for Monasterior, M., indicates a February 19, 2002 deposit to
20 Respondent's client trust account of \$24.00 in costs, not a February 9, 2002 deposit. *Id.*, p. 7,
21 finding of fact #23, item m.
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24 The Commission however, does not find the Hearing Officer clearly erroneous for
25 not including certain language or any additional paragraphs that the parties included in their
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1 Joint Pre-Trial Statement. These would be considered additional findings, which per its
2 standard of review, the Commission may not find. The parties' Joint Pre-Trial Statement
3 included both contested and uncontested statements of fact.

4 Upon review of the aggravating and mitigating factors found by the Hearing Officer,
5 the Commission determined that the Hearing Officer erroneously found mitigation factor
6 9.32(b), absence of a dishonest or selfish motive. The Commission determined to the
7 contrary, that aggravating factor 9.22(b) is present. The evidence in the record supports that
8 in responding to the State Bar, Respondent deliberately altered 10 trust account checks to
9 reduce any appearance of impropriety and to deter further questions from the State Bar. *See*
10 Hearing Officer's Report, p. 3, Finding of Fact #6 and Hearing Transcript dated March 26,
11 2004, p. 114:17. The Commission therefore, finds *de novo* aggravating factor 9.22(b).

12 The Commission further determined that the Hearing Officer's finding in
13 aggravation regarding the presence of a pattern of misconduct, factor 9.22(c), is also clearly
14 erroneous. The Hearing Officer specifically found that the pattern of misconduct has been
15 ongoing since 1991 and the behavior continues into 2002. *See* Hearing Officer's Report, p.
16 12. The Hearing Officer attributes Respondent's pattern of misconduct to specifically
17 similar past misconduct. While Respondent prior disciplinary offenses are similar in nature
18 to this instant matter, the Commission determined that significant weight should be given
19 instead to aggravating factor 9.22(a), prior disciplinary offenses, when considering
20 Respondent's present misconduct, which involves a repeated failure to respond or cooperate
21 with the State Bar.
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Decision

1 Therefore, having found no other findings of fact clearly erroneous, the nine
2 members of the Commission unanimously recommend adopting and incorporating by
3 reference the Hearing Officer's remaining findings of fact and conclusions of law.

4 In consideration of an appropriate sanction, the Commission determined that, in
5 order to protect the public, a suspension of six months and one day requiring formal
6 reinstatement proceedings to establish Respondent's fitness to practice law is a more
7 appropriate sanction. It therefore modifies the Hearing Officer's recommended sanction to
8 reflect a six month and one day suspension, two years of probation upon reinstatement
9 (LOMAP with PM and MAP), and costs of these disciplinary proceedings. The
10 recommended terms of probation are as follows:
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Terms of Probation:

- 12 1. Upon reinstatement, Respondent shall submit to a LOMAP audit and comply
13 with all recommendations and orders of the State Bar's LOMAP director or her
14 designee.
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- 16 2. Respondent shall within 30 days of the effective date of probation, obtain a
17 practice monitor (PM) approved by the State Bar for the term of probation.
18 Respondent shall meet with the PM no less than monthly and shall have weekly
19 telephone contact with the PM during the term of probation.
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- 21 3. Upon reinstatement, Respondent shall contact the director of MAP, or her
22 designee, and engage in a therapeutic program for a period of two years.
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4. Respondent shall meet with the director of MAP or her designee, who will conduct an assessment. Respondent thereafter shall enter into a MAP contract based upon recommendation made by the director of MAP or her designee.

5. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

RESPECTFULLY SUBMITTED this 12th day of August, 2004.



Craig B. Mehrens, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 12th day of August, 2004, to:

Copy of the foregoing mailed
this 12th day of August, 2004, to:

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