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**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER OF) File Nos. 02-0207, 02-1137, 02-1916
THE STATE BAR OF ARIZONA,)
)
)
) **AMENDED**
) **HEARING OFFICER'S REPORT**
JOHN R. AUGUSTINE, JR.,) **AND RECOMMENDATION**
Bar No. 013743)
)
RESPONDENT.)
)
)
)

The Hearing Officer files an amended recommendation in this matter.

PROCEDURAL HISTORY

Probable Cause Orders were filed on October 15, 2002 and November 22, 2002. A three-count Complaint was filed on December 23, 2002 and served on December 30, 2002. Respondent did not file an answer pursuant to old Rule 53(c)(2), Arizona Rules of Supreme Court; therefore, the Disciplinary Clerk entered a Default on February 14, 2003. A hearing on aggravation and mitigation was held on March 20, 2003. Maret Vessella appeared on behalf of the State Bar and the Respondent did not appear. Three witnesses testified and documents were admitted.

A Report and Recommendation was filed on April 17, 2003. The matter was scheduled for consideration by the Disciplinary Commission on June 21, 2003. On June 19, 2003, a Notice of Appearance was filed along with a request for extension of time and leave to present evidence. On

1 July 21, 2003, the Disciplinary Commission stayed this proceeding. On November 13, 2003, the
2 Respondent moved to lift the stay and on November 20, 2003, the stay was lifted by the
3 Disciplinary Commission and the matter was remanded to this Hearing Officer. A hearing was
4 held on January 23, 2004. Pursuant to agreement of the parties, the hearing was limited to the
5 consideration of mitigation issues.¹

6 FINDINGS OF FACT²

7 1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having
8 been admitted on October 26, 1991.

9 Count I

10 2. In or about mid-November 2001, Jeff and Anna North ("North") contacted Respondent
11 regarding representation in connection with claims they had against various parties relating to the
12 offer and sale of certain investments.

13 3. On November 27, 2001, Mr. North met with Respondent and further discussed
14 representation. At that time, Respondent requested a \$3,000.00 retainer.

15 4. Initially, Respondent indicated that he would place the funds in his trust account and bill
16 against them for services. An engagement letter dated November 26, 2001, reflected that
17 arrangement.
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19 5. Later during that meeting, Respondent proposed a mixed billing arrangement. Respondent
20 indicated that he would prepare a demand letter for a flat fee of \$1,500.00 and would bill against
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24 ¹Pursuant to that agreement, the findings of fact and conclusions of law are not amended.

25 ²The allegations of the Complaint are deemed admitted as Respondent did not respond or appear
26 in this action. *Matter of Zang*, 158 Ariz. 251, 762 P.2d 538 (1988).

the remaining \$1,500.00.

1 6. North agreed to the mixed billing arrangement and gave Respondent a check for \$3,000.00.

2 7. On November 28, 2001, Respondent faxed North an engagement letter dated November 27,
3 2001, which reflected the mixed billing arrangement discussed by the parties.

4 8. On November 29, 2001, the North's decided that they did not want to continue with
5 Respondent's services. Mrs. North called Respondent and advised that she would be retrieving the
6 check and the documents left with Respondent.

7 9. Respondent indicated that he had cashed the check and would not return \$1,500.00 of the
8 total amount paid.

9 10. The North's requested that Respondent provide an accounting of how the funds were
10 expended. Respondent indicated that he would have the accountant send them an accounting.
11 Respondent agreed to reduce his fee to \$750.00 thereby returning \$2,250.00 to the Norths.

12 11. Respondent did not provide the Norths with an accounting.

13 12. In early January 2002, the Mrs. North contacted Respondent. Respondent advised that he
14 would send an accounting in seven to ten days.

15 13. Respondent did not correspond or communicate with the Norths following their contact in
16 early January 2002.

17 14. On or about January 21, 2002, the North's again contacted Respondent's office. The
18 North's left a message for Respondent requesting a return call. Respondent did not return their
19 phone call.

20 15. Respondent never provided the North's an accounting nor did he produce any documents
21 or records reflecting any work he performed on their behalf.
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16. On or about January 29, 2002, the North's filed a complaint with the State Bar of Arizona concerning Respondent's conduct.

17. By letter dated February 5, 2002, the State Bar's Attorney Consumer Assistance division advised Respondent that the North's had made allegations concerning his professional conduct. The letter indicated that the Norths were advised that if they did not hear from Respondent within 15 days that they were to again contact the State Bar.

18. By letter dated February 20, 2002, the North's advised the State Bar that Respondent did not contact them.

19. By letter dated March 20, 2002, the State Bar advised Respondent of the allegations concerning his professional conduct. Respondent was advised that he should respond to the State Bar in writing within twenty days of the date of the letter. The State Bar's letter specifically requested that Respondent provide a copy of the bank statement, deposit receipt, trust account register and client ledger in relation to the \$3,000.00 check received from the Norths.

20. The State Bar's letter dated March 20, 2002, was sent to Respondent's address as maintained by Membership Records.

21. Respondent did not respond to the State Bar's letter dated March 20, 2002.

22. By letter dated May 3, 2002, the State Bar again advised Respondent that he should respond to the allegations in writing and that he should do so within ten days from the date of the letter. Respondent was also advised that failure to cooperate with a disciplinary investigation was separate grounds for discipline.

23. By letter dated May 24, 2002, Respondent provided a written explanation relating to the allegations made by the Norths. Respondent did not provide the specific records requested by the

State Bar in their letter dated March 20, 2002.

Count II

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2 24. In or about August 2001, Larry Hall ("Hall") retained Respondent's services in connection with
3 claims he had against various parties relating to the sale of investment products.

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5 25. Respondent sent Hall an engagement letter dated August 21, 2001 requesting a retainer fee of
6 \$2,500.00.

7 26. Hall paid Respondent a \$2,500.00 retainer fee for representation, which was to be placed in his
8 trust account and billed against as services were rendered.

9 27. On September 5, 2001, Respondent filed a civil complaint captioned, Larry K. Hall v. Leroy C.
10 Neagle, docket number CV 2001-015416, filed in Superior Court, Maricopa County.

11
12 28. Following service of the complaint in early October 2001, Respondent advised Hall that the
13 appropriate course of action would be to seek a judgment with a covenant not to execute as the
14 defendant had no assets.

15 29. Thereafter, Hall did not hear from Respondent for several months. In March 2002, Hall was
16 advised by Respondent's office that a judgment had been signed in the case.

17
18 30. Hall requested a copy of the judgment and a breakdown of the time expended and charges
19 incurred on the case.

20 31. Despite being advised that there was a judgment in the case, there was no judgment ever entered
21 by the court.

22 32. On February 12, 2002, the court entered a 150-day order advising the parties that the complaint
23 was filed more than 150 days prior ago and that without further action, the matter will be dismissed
24 without further notice on or after August 1, 2002.
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33. In or about April 2002, Hall reached Respondent at his office. At that time, Hall requested status information concerning the case. Respondent advised that he had been looking for the defendant but his house appeared vacant.

34. Since April 2002, Hall made numerous attempts to reach Respondent regarding his case.

35. Respondent has not responded to Hall's contacts.

36. On or about May 31, 2002, Hall filed a complaint with the State Bar of Arizona raising allegations concerning Respondent's professional conduct.

37. By letter dated July 10, 2002, the State Bar advised Respondent of the allegations concerning his professional conduct. Respondent was advised that he should respond in writing to the letter within twenty days.

38. The State Bar's letter dated July 10, 2002, was sent to Respondent's address of record as maintained by Membership Records.

39. Respondent did not respond to the State Bar's letter dated July 10, 2002.

40. By letter dated August 9, 2002, the State Bar again advised Respondent that he should respond to the allegations in writing and that he should do so within ten days from the date of the letter. Respondent was also advised that failure to cooperate with a disciplinary investigation was separate grounds for discipline.

41. The State Bar's letter dated August 9, 2002 was sent to Respondent's address as maintained by the Membership Records Department at the State Bar.

42. Respondent did not respond to the State Bar's letter dated August 9, 2002.

Count III

43. In September 2000, Leonard Sloane ("Sloane") sought Respondent's services in relation to a

1 civil matter. Sloane was a named defendant in civil case captioned, Pinacor Inc., v. Advanced
2 Communication Sciences, Inc. et. al., docket number CV 2000-015430 filed in Superior Court,
3 Maricopa County.

4 44. By engagement letter dated September 13, 2000, Respondent requested a retainer fee of
5 \$5,000.00.

6 45. On September 22, 2000, Sloane gave Respondent a \$5,000.00 retainer fee for his services. The
7 retainer was to be placed in Respondent's trust account and billed against as services were rendered.

8 46. Initially, Respondent undertook action on behalf of Sloane.

9 47. Several months passed and Sloane had not heard from Respondent concerning any hearing
10 dates. 48. Sloane began leaving numerous messages on Respondent's answering machine
11 requesting information.

12 49. Respondent did not respond to Sloane's contacts.

13 50. Sloane also sent Respondent letters and faxes. Again, Respondent did not respond to Sloane's
14 attempts to communicate with him.

15 51. After several more months with no contact from Respondent, Sloane contacted his brother,
16 William Sloane, who is also an attorney and asked if he would intervene with Respondent.

17 52. William Sloane made several attempts to contact Respondent; however, Respondent did not
18 respond.

19 53. Respondent failed to produce any disclosure statement and did not comply with the discovery
20 rules.

21 54. On or about February 14, 2002, Plaintiffs filed a motion for summary judgment. Respondent
22 failed to respond to the motion.
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55. Respondent did not advise Sloane of the pending motion for summary judgment.

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56. The Court was to hear oral argument on Plaintiff's Motion for Summary Judgment on April 4, 2002. Respondent failed to appear at that time.

57. On April 4, 2002, the Court granted Plaintiff's Motion for Summary Judgment against Sloane in the amount of \$173,722.29 plus costs and attorneys' fees.

58. Respondent did not advise Sloane that the Court had granted Plaintiff's Motion for Summary Judgment.

59. In or about late May 2002, Sloane discovered that a judgment had been entered against him for his failure to respond to a motion for summary judgment.

60. On or about September 27, 2002, Sloane filed a complaint with the State Bar of Arizona concerning Respondent's professional conduct.

61. By letter dated October 4, 2002, the State Bar advised Respondent of the allegations concerning his professional conduct. Respondent was advised to respond to the allegations within ten days of the date of the letter.

62. The State Bar's letter dated October 4, 2002, was sent to Respondent's address as maintained in membership records.

63. Respondent did not respond to the State Bar's letter dated October 4, 2002.

CONCLUSIONS OF LAW

1 There is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct.,
2 specifically:

3 ER 1.3 (Diligence)	2 violations
4 ER 1.4 (Communication)	3 violations
5 ER 1.15(b) (Safekeeping Property)	2 violations
6 ER 1.16(d) (Declining or Terminating Representation)	1 violation
7 ER 8.1 (Bar Admission and Disciplinary Matters)	3 violations
8 ER 8.4(c) (Misconduct)	2 violations
9 ER 8.4(d) (Misconduct)	1 violation

10 Additionally, there is clear and convincing evidence that Respondent violated Ariz. R. S. Ct.:

11 Rules 53(f) & (d) (Grounds for Discipline)	3 violations
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Count I

12 64. Jeff and Anna North made numerous attempts to communicate with Respondent regarding
13 services he allegedly provided. Respondent would not respond to their efforts to communicate with
14 him. Respondent's conduct violated ER 1.4.

15 65. Jeff and Anna North requested an accounting of how Respondent earned the \$750.00, which
16 he retained. Respondent failed to provide any accounting to the Norths. Respondent's conduct violated
17 ER 1.15(b).

18 66. Respondent did not provide any service to Jeff and Anna North. Respondent did not earn
19 \$750.00 with respect to their case. Respondent failed to return and unearned fee. His conduct violated

ER 1.16(d).

1 67. Respondent failed to respond to a lawful demand for information from a disciplinary authority
2 in connection with its investigation. Respondent's conduct violated ER 8.1 and Rule 51(h) and (i).

3 68. Respondent retained fees, which he did not earn. Respondent's conduct was dishonest. His
4 conduct violated ER 8.4(c).

6 **Count II**

7 69. Respondent did not diligently pursue the goals of Mr. Hall's representation. Respondent's
8 conduct violated ER 1.3.

9 70. Larry Hall made numerous attempts to communicate with Respondent concerning the status of
10 his case. Respondent failed to respond to his requests for information. Respondent's conduct violated
11 ER 1.4.

12 71. Larry Hall requested that Respondent provide an accounting demonstrating how Respondent
13 expended his retainer. Respondent failed to provide Mr. Hall with an accounting. Respondent's
14 conduct violated ER 1.15(b).

15 72. Respondent failed to respond to a lawful demand for information from a disciplinary authority
16 in connection with its investigation. Respondent's conduct violated ER 8.1 and Rule 51(h) and (i).

17 73. Respondent was dishonest with Mr. Hall when he advised that a judgment was entered in his
18 case. Respondent's conduct violated ER 8.4(c).

21 **Count III**

22 74. Respondent was not diligent in taking action on behalf of Leonard Sloane. Respondent's
23 conduct violated ER 1.3.

24 75. Leonard Sloane made numerous attempts to communicate with Respondent concerning his case.
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2 representation. Respondent's conduct violated ER 1.4.

3 76. Respondent failed to respond to a lawful demand for information from a disciplinary authority
4 in connection with its investigation. Respondent's conduct violated ER 8.1 and Rule 51(h) and (i).

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6 77. Respondent's failure to respond to the Motion for Summary Judgment caused the Court to enter
7 an order against Leonard Sloane. Mr. Sloane did not have the opportunity to present a defense to the
8 allegations of the complaint, as the case was never heard on its merits. Respondent conduct was
9 prejudicial to the administration of justice and it violated ER 8.4(d).

10 **Restitution**

11 Respondent's conduct violated numerous Rules of Professional Conduct. Respondent conduct
12 has caused harm to the clients involved in the Complaint. Restitution is appropriately ordered to
13 persons financially injured. See, Rule 60(a)6, Ariz. R. S. Ct. Jeff and Anna North are entitled to an
14 order of restitution in the amount of \$750.00, which represents the amount retained by Respondent.
15 Respondent did not perform services to earn the amount he retained. Larry Hall is entitled to an order
16 of restitution in the amount of \$2,500.00, which represents the amount paid to Respondent as a retainer
17 fee. Although Respondent filed a complaint on behalf of Mr. Hall, the service had no value, as the
18 goals of the representation for which Respondent was retained were not pursued. In essence, Mr. Hall
19 received no benefit from the filing of the complaint, as it was not followed by any action consistent
20 with pursuing the representation. Moreover, the respondent has failed to appear in this action to justify
21 any fee in this matter.
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25 Leonard Sloane is entitled to an order of restitution in the amount of \$9,500.00. That amount
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1 represents the initial \$5,000.00 he paid to Respondent for representation in the civil matter.
2 Additionally, Mr. Sloane paid Gary Hendrikson, Esq. \$2,000.00 to undertake efforts to have the
3 judgment set aside in the civil matter. As those efforts were unsuccessful, Mr. Sloane paid Mr.
4 Hendrikson another \$2,500.00 to pursue a malpractice action against Respondent for allowing a
5 judgment to be entered against him.

6 ABA STANDARDS

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

10 *Standards* 4.4 and 7.0 appear to determine the appropriate sanction warranted by Respondent's
11 conduct. Specifically, *Standard* 4.42 provides that: "Suspension is generally appropriate when (a) a
12 lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client;
13 or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."
14 *Standard* 7.2 provides that: "Suspension is generally appropriate when a lawyer knowingly engages
15 in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to
16 a client, the public, or the legal system." Respondent's failure to respond to the State Bar caused harm
17 to the legal system.
18

19 *Standards* 9.22 and 9.32, define the aggravating and mitigating factors to be considered. The
20 following factors are present in aggravation: 9.22(c) a pattern of misconduct, (d) multiple offenses, (e)
21 (i) substantial experience in the practice of law, and (j) indifference to making restitution.
22

23 The following factors are present in mitigation: 9.32(a) absence of a prior disciplinary record,
24 (b) absence of a dishonest or selfish motive, (c) personal or emotional problems, (g) character or
25

reputation, (h) physical and mental disability or impairment, and (l) remorse.

PROPORTIONALITY REVIEW

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

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (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).

In re Blasnig, 174 Ariz. 9, 846 P.2d 822 (1993), involved an attorney suspended for two years for accepting retainers and then failing to provide diligent representation who also failed to respond to State Bar inquiries. *In Re McKee*, SB-97-0082-D (1997) also involved a two year suspension; the attorney failed to timely pursue cases, failed to communicate with his clients for lengthy periods of time and failed to respond to Bar inquiries. *In Re Stewart*, SB-97-0083-D (1997), accepted an agreement for two year suspension where the attorney had failed to communicate with and advise clients, failed to perform work for which he was retained, and failed to respond to Bar inquiries. *In Re Sadacca*, SB

1 97-0037-D (1997), the Court imposed a 30 month suspension for an attorney who failed to
2 communicate with and advise clients, failed to perform work for which he had been paid, and failed
3 to respond to Bar inquiries. And in *In Re Summers*, SB-00-0004-D (2000), the Court imposed a two
4 year suspension for multiple instances of failing to communicate with clients, failing to diligently
5 pursue their legal matters and failing to cooperate with the State Bar.

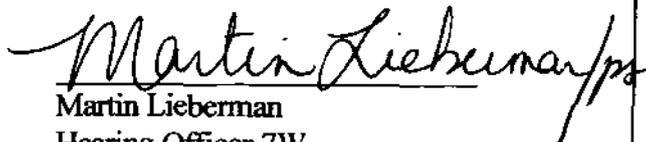
6 In this case, strong evidence of the Respondent's reputation and character prior to his physical
7 and mental disability, presented at the mitigation hearing, convinces me that a two year suspension is
8 not warranted. The ethical violations would not have occurred but for the physical and emotional
9 turmoil. However, the Respondent should be required to apply for reinstatement prior to resuming the
10 practice of law.

11
12 **RECOMMENDATION**

13 Upon consideration of the facts, application of the *Standards*, including aggravating and
14 mitigating factors, and a proportionally analysis, this Hearing Officer recommends the following:

- 15 1. Respondent shall be suspended for a period of six months and one day.
16 2. Respondent shall pay restitution as follows:
17
18 Jeff and Anna North \$750.00
19 Larry Hall \$2,500.00
20 Leonard Sloane \$9,500.00
21 Total: \$12,750.00
22 3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

23 DATED this 19th day of March, 2004.

24 
25 Martin Lieberman
26 Hearing Officer 7W

Original filed with the Disciplinary Clerk
this 19th day of March, 2004.

Copy of the foregoing mailed
this 19th day of March, 2004, to:

Richard Weinroth
Respondent's Counsel
3007 E. Fremont Rd.
Phoenix, AZ 85042-6008

Maret Vessella
Deputy Chief Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

by: K. Weigand

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