



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

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

No. 03-0770

**DAVID D. RODGERS,
Bar No. 014623,**

**HEARING OFFICER'S
REPORT**

RESPONDENT.

PROCEDURAL HISTORY

The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on May 20, 2004. A telephonic status conference was held on June 2, 2004. The parties then filed an Amended Tender of Admissions and Agreement for Discipline by Consent. A second telephonic status conference was held on July 6, at which time the parties were given one week to supplement their Amended Tender. The parties filed that supplement on July 16, 2004. No hearing has been held.

FINDINGS OF FACT

1. Respondent has been a member of the State Bar of Arizona since October 24, 1992.

2. On February 21, 2003, Respondent was summarily suspended from the practice of law in Arizona for failing to comply with the Mandatory Continuing Legal Education (MCLE) requirements for the 2001/2002 year.

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1 11. Respondent contacted the State Bar to determine whether the Bar
2 had any record of his MCLE courses and determined that they had no such
3 records. Thereafter, Respondent began taking MCLE courses on-line and
4 completed 15 hours of MCLE by May 5, 2003.

5 12. During the period of suspension, on March 18, 2003 Respondent
6 participated as counsel of record in a hearing in Case Number LC2003-000136,
7 *Tarwater Development Inc. v. Allstar Rooter and Plumbing*, an appeal from the
8 Arizona Registrar of Contractors. On April 15, 2003, Respondent filed an
9 amended complaint in the same matter. Complainant Ezra Clark was opposing
10 counsel and discovered Respondent's suspension when his staff called the State
11 Bar to determine Respondent's correct mailing address. (See Attachment A).

12 13. Based on his review of his case files and time sheets, Respondent
13 believes that he did not participate in any trials during the period of suspension.
14 He did, however, participate in several scheduling/discovery conferences as
15 identified in Attachment B to the Joint Tender.

16 14. During his appearances as counsel of record, Respondent was not
17 questioned about his membership status and did not affirmatively misrepresent
18 his status to the Court.

19 15. After completing the required MCLE hours, Respondent applied for
20 reinstatement.

21 16. Upon applying for reinstatement, Respondent was immediately
22 reinstated and has been an active member of the State Bar in good standing since
23 that time.

24 17. Respondent has been fully responsive to the State Bar's inquiry and
25 admitted the violations of the Ethical Rules without requiring a formal complaint
26 to be filed. Respondent has demonstrated remorse for his conduct.

1 considered in this matter: (i) - substantial experience in the practice of law:
2 Respondent was originally licensed to practice in 1992.

3 The Hearing Officer also agrees with the parties that five factors are
4 present in mitigation: (a) - absence of a prior disciplinary record: Respondent has
5 no prior discipline with the State Bar; (c) - personal or emotional problems:
6 Respondent's personal situation, while not a significant mitigating factor, does
7 come into play as Respondent has within the last year set up a solo practice
8 following a difficult divorce; (e) - full and free disclosure to disciplinary board or
9 cooperative attitude toward proceedings: Respondent has cooperated fully with
10 the State Bar. Respondent admitted the violations of ethical rules openly and
11 prior to any formal complaint being filed; (g) - character or reputation:
12 Respondent has presented evidence of his good character and reputation within
13 the legal community in the form of letters of reference from practicing attorneys
14 and clients; (l) - remorse: Respondent has demonstrated remorse.

15 PROPORTIONALITY REVIEW

16 To have an effective system of professional sanctions, there must be
17 internal consistency, and it is appropriate to examine sanctions imposed in cases
18 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
19 (1994), (quoting *In re Wines*, 135 Ariz. 203, 207 (1983)). However, the
20 discipline in each case must be tailored to the individual case, as neither
21 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
22 604, 615 (1984).

23 The agreed upon sanction in this matter, censure, is consistent with other
24 similar cases. *In re Kistler*, SB 00-0098 (2000), is a case involving the
25 unauthorized practice of law. Kistler failed to withdraw from a court case after
26 his suspension. Kistler did not believe that he was engaging in the unauthorized

1 practice of law. There was one aggravating factor in the case, substantial
2 experience in the practice of law. There were five factors in mitigation, absence
3 of prior discipline, personal problems, cooperation with the State Bar, character
4 and reputation, and remorse. Kistler received a censure and probation.

5 In *In re Stevens*, 178 Ariz. 261, 872 P.2d 665 (1994) Stevens appeared in
6 court, and prepared documents for the court's signature, despite his MCLE
7 suspension. Stevens had been suspended for less than three weeks, and he
8 engaged in the unauthorized practice one day after filing his MCLE affidavit, but
9 one week prior to actually being reinstated. Stevens's failure to file his affidavit
10 was intentional, as he intended to file a federal challenge to the MCLE
11 requirement. The Disciplinary Commission found only one aggravating factor:
12 substantial experience in the practice of law. There were six factors in mitigation:
13 no prior discipline history, no dishonest or selfish motive, full cooperation with
14 the State Bar, consenting to discipline prior to a formal complaint, remorse, and
15 an apology to the court. Stevens received a censure.

16 In *In re Rhees*, SB 01-0161 (2001), also involves the unauthorized practice
17 of law. Rhees remained attorney of record for eighteen clients after he had been
18 suspended, including filing motions and pleadings on their behalf. Rhees also
19 attended one hearing, and made representations to the court and clients about his
20 MCLE affidavit. The Disciplinary Commission found that the ABA *Standards*
21 governing lack of candor towards the tribunal applied. There were two
22 aggravating factors: multiple offenses and substantial experience in the practice
23 of law. There were four mitigating factors: absence of prior discipline,
24 cooperation with the State Bar, mental disability and remorse. The Disciplinary
25 Commission gave weight to Respondent's mental disability and his probation
26

1 requiring him to continue with treatment. Rhees received a four-month
2 suspension.

3 In *In re Allred*, SB 98-0049 (1998), the lawyer continued to practice law
4 while suspended for failure to comply with MCLE requirements. Allred told a
5 judge that she had been reinstated when she had not. Allred had not completed
6 the required MCLE courses. The *Standards* governing lack of candor to the
7 tribunal applied in that case. There was only one aggravating factor: substantial
8 experience in the practice of law. There were four factors in mitigation: personal
9 or emotional problems, mental disability, no dishonest motive, and cooperation
10 with the State Bar. Allred was suspended for six months and one day.

11 In *In re Larriva*, SB 96-0020 (1997), the lawyer continued to practice law
12 while suspended for failure to comply with MCLE requirements. Larriva failed
13 to respond to the State Bar's requests for information during the investigation,
14 and failed to answer the formal complaint. Larriva also had prior discipline. The
15 Disciplinary Commission found there were three mitigating factors: lack of
16 dishonest motive, cooperation with the State Bar (but only after formal
17 proceedings were initiated), and Larriva's alcoholism. However, the Disciplinary
18 Commission found there was no causal link between Larriva's alcoholism and his
19 conduct. There were three factors in aggravation: thirty years of experience in the
20 practice of law; failure to respond to the State Bar; and prior discipline. The
21 Commission found the final factor significant, in that Larriva had been informally
22 reprimanded in 1993 (four years earlier) for failing to cooperate in a State Bar
23 investigation. For these reasons, the Disciplinary Commission increased the
24 hearing officer's recommended sanction of a censure to a suspension of six
25 months and one day.

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