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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
[Signature]

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

IN THE MATTER OF A SUSPENDED MEMBER) No. 02-2229
OF THE STATE BAR OF ARIZONA,)
)
ALEXANDER L. SIERRA,) **HEARING OFFICER'S REPORT**
Bar No. 009295) **AND RECOMMENDATION**
)
Respondent.)

PROCEDURAL HISTORY

A Probable Cause Order was filed on March 9, 2002. A one-count Complaint was filed on December 9, 2002 and served by mail on April 11, 2003. The matter was assigned to this Hearing Officer on April 15, 2003. The Disciplinary Clerk filed a Notice of Default on May 12, 2003. Respondent, pro se, filed an Answer on May 14, 2003. A telephonic Settlement Conference was held on June 16, 2003, before David M. Waterman, Settlement Officer 8J. Respondent did not appear at the Settlement Conference and the parties were therefore unable to reach a settlement. The State Bar filed a Motion to Strike Respondent's Answer and requested Entry of Default on July 22, 2003. The Respondent filed his Response to the State Bar's Motion on July 31, 2003. The State Bar then filed a Reply on July 30, 2003. Oral argument on the State Bar's Motion to Strike Respondent's Answer and Request for Entry of Default took place on August 15, 2003. The Respondent failed to appear for the oral argument. On August 18, 2003, this Hearing Officer granted the State Bar's Motion to Strike Respondent's Answer and Request for Entry of Default, and further ordered the State Bar or Respondent to request the opportunity to be heard in aggravation or mitigation.

On August 19, 2003, the State Bar requested an Aggravation/Mitigation hearing.

1 On September 24, 2003, Respondent filed a Request for Consideration of Evidence in
2 Mitigation.

3 The hearing on Aggravation and Mitigation took place on September 25, 2003.
4 Christine M. Powell attended the hearing as counsel for the State Bar. Clifford B. Altfeld was
5 present as counsel for Complainant, Esther Loya. Ms. Loya was also present at the hearing.
6 Respondent failed to appear for the hearing. Following the hearing, it was requested that the
7 State Bar submit proposed Findings of Fact and Conclusions of Law, which were submitted on
8 October 31, 2003. On November 3, 2003, Respondent filed a response to the State Bar's
9 Findings of Fact and Conclusions of Law.

10 FINDINGS OF FACT

11 INTRODUCTION

12 At all times relevant hereto, Respondent was a member of the State Bar of Arizona,
13 having been admitted on October 19, 1983. Respondent was suspended for thirty days on
14 November 5, 2001, and was reinstated on January 24, 2002. Respondent was then summarily
15 suspended for non-payment of dues on April 25, 2003 and remains suspended.

16 COUNT ONE (File No. 02-2229)

17 In 1999, Esther Loya retained Respondent to represent her in a medical malpractice
18 claim against Carondelet Healthcare Corporation of Arizona, Inc. (Carondelet), captioned
19 *Esther L. Loya v. Carondelet Healthcare*, Pima County Superior Court cause number 333518,
20 filed on June 10, 1999. (Transcript of Aggravation/Mitigation Hearing, September 25, 2003,
21 page 20, lines 22-25).

22
23 On May 30, 2000, Carondelet filed a Motion for Summary Judgment seeking dismissal
24 of the case due to Respondent's failure to name an expert witness within the deadline set by the
25 court.

1 Respondent failed to respond to the Motion for Summary Judgment, which was granted
2 by the court on July 20, 2000.

3 On December 12, 2000, the court entered judgment in favor of Carondelet, dismissing
4 Ms. Loya's complaint with prejudice and awarding costs against Ms. Loya in the amount of
5 \$1,632.95.

6 Beginning in May 2000 and continuing through November 2002, Respondent made
7 numerous false statements to Ms. Loya concerning the status of the matter. Respondent told
8 Ms. Loya that her case was proceeding to trial and that the trial date had been continued
9 because the judge had the flu. (Transcript, page 36, lines 16-24; page 37, lines 4-14).

10 Respondent told Ms. Loya to appear at court for trial in the matter. Ms. Loya appeared
11 but the case was not on the court's calendar and Respondent failed to appear. (Transcript, page
12 16, lines 16-25; pages 17-18). Respondent then told Ms. Loya that the case had settled for
13 \$100,000.00. (Transcript, page 24, lines 17-25; page 25, lines 1-13).

14 Respondent also told a lender threatening to foreclose on Ms. Loya's property that the
15 case had settled. Respondent executed an assignment of the non-existent settlement proceeds
16 that Respondent claimed were in the firm's trust account to keep the lender from foreclosing on
17 Ms. Loya's property. (Transcript, page 26, lines 16-25; page 27, lines 1-15).

18 In November 2002, Ms. Loya discovered that her case had been dismissed.
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21 **PRIOR DISCIPLINE**

22 Respondent has previously been sanctioned for violations of the Rules of Professional
23 Conduct. Specifically, in File Nos. 99-1363, 99-1904 and 99-2134, Respondent was suspended
24 for thirty days by Judgment and Order filed on November 5, 2001, for violations of ERs 1.4,
25 1.8(h), 1.15, 8.1(b), 8.4(a) and (d) and Rules 43 and 44, Ariz. R. S. Ct.

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CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 1.1 (Competence), ER 1.3 (Diligence), ER 1.4 (Communication), ER 3.2 (Expediting Litigation), ER 4.1 (Truthfulness in Statements to Others) and ER 8.4(c) (Misconduct, specifically engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

ABA STANDARDS

A review of the *ABA Standards for Imposing Lawyer Sanctions* ("*Standards*") will assist in determining the appropriate sanction. *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 10355 (1990). In applying the *Standards*, the Supreme Court considers (a) the duty violated; (b) respondent's mental state; (c) the injury to the client; and (d) any aggravating or mitigating factors. In cases of multiple charges of misconduct, the *Standards* suggest the attorney be sanctioned for the most serious misconduct with the additional instances of misconduct treated as aggravating factors. See Standard 3.0 and Theoretical Framework of the *ABA Standards*.

In this case, the most serious misconduct relates to Respondent's repeated lack of candor with Ms. Loya and his fraudulent conduct in executing assignments to Benchmark Mortgage Fund and Danelle Limited Partnership. The related *Standards* are 4.6 and 5.1. As to other misconduct alleged, the applicable *Standards* include 4.4, 4.5, 6.1 and 6.2.

Standard 4.6 sets forth the appropriate sanction when a lawyer knowingly deceives the client. *Standard 4.61* states:

1 Disbarment is generally appropriate when a lawyer knowingly
2 deceives a client with the intent to benefit the lawyer or another, and
3 causes serious injury or potential serious injury to a client.

4 Respondent made repeated misrepresentations to Ms. Loya concerning the status of
5 her case in order to hide the fact the matter had been dismissed due to Respondent's
6 misconduct. Respondent went so far as to tell Ms. Loya to appear at court for a trial
7 Respondent knew would not be occurring as the case had already been dismissed.
8 Respondent led Ms. Loya to believe she would be receiving a settlement when he knew there
9 was no settlement. (Transcript, page 30, lines 13-25; page 31, lines 1-11). Respondent
10 continued to deceive Ms. Loya for almost two years in order to cover up his misconduct,
11 thereby precluding Ms. Loya from seeking recovery for the injury she suffered. This breach
12 of the attorney-client relationship is even more egregious given that Respondent knew Ms.
13 Loya and offered to take her case in order to help her. Because of their relationship, Ms.
14 Loya trusted Respondent as her attorney and her friend. (Transcript, page 8, lines 10-25;
15 page 9, lines 1-8). Needless to say, once Respondent's misconduct was revealed to Ms.
16 Loya, she was left feeling violated. (Transcript, page 35, lines 2-16). In light of the
17 extraordinary lengths Respondent went to in order to deceive Ms. Loya and the serious injury
18 caused, the appropriate sanction is disbarment.

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20 In addition to deceiving Ms. Loya, Respondent knowingly deceived Ms. Loya's
21 mortgage companies by executing an assignment of settlement proceeds Respondent knew did
22 not exist. Ms. Loya's case had been dismissed on December 12, 2000, yet Respondent
23 executed the assignment of non-existent settlement proceeds to Benchmark Mortgage Fund and
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1 Danelle Limited Partnership on January 11, 2001. (State Bar's Exhibit 2,
2 Aggravation/Mitigation Hearing of September 25, 2003).

3 The applicable *Standard* for Respondent's fraudulent conduct in relation to the
4 mortgage company is *Standard 5.1*. *Standard 5.11(b)* states:

5 Disbarment is generally appropriate when a lawyer engages
6 in any other intentional conduct involving dishonesty, fraud, deceit,
7 or misrepresentation that seriously adversely reflects on the
8 lawyer's fitness to practice.
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10 As a direct result of Respondent's conduct, Ms. Loya is being evicted from her home.
11 (Transcript, page 13, lines 13-24). The lenders permitted Ms. Loya to stay in her home for
12 three years without making mortgage payments in reliance on Respondent's misrepresentations
13 that proceeds would be forthcoming. (Transcript, page 14, lines 13-17). Because of
14 Respondent's misrepresentations, the mortgage companies lost three years of revenue. The
15 appropriate sanction for Respondent's conduct is disbarment.

16 The harm caused by Respondent's conduct is serious and, according to the ABA
17 *Standards*, the presumptive sanction for Respondent's conduct is disbarment. Even if this
18 Hearing Officer determines the presumptive sanction is suspension, there are several
19 aggravating factors present that would increase the sanction to disbarment.
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21 AGGRAVATION/MITIGATION

22 Once the presumptive sanction is determined, the *Standards* identify the aggravating
23 and mitigating factors that may increase or decrease the presumptive sanction. *Standard 9.0; In*
24 *re Ockrassa*, 165 Ariz. 576, 799 P.2d 1350 (1990). This Hearing Officer has considered
25 aggravating and mitigating factors in this case, pursuant to *Standards 9.22* and *9.33*.

1 **AGGRAVATING FACTORS:**

2 Seven factors are present in aggravation.

3 *Standard 9.22 (a)* prior disciplinary offenses. Respondent has previously been
4 sanctioned for violations of the Rules of Professional Conduct. Specifically, in File Nos. 99-
5 1363, 99-1904 and 99-2134, Respondent was suspended for thirty days by order filed on
6 November 5, 2001, for violations of ERs 1.4, 1.8(h), 1.15, 8.1(b), 8.4(a) and (d) and Rules 43
7 and 44, Ariz. R. S. Ct. In File No. 99-2134, Respondent failed to notice an expert and respond
8 to a motion for summary judgment, causing the client's case to be dismissed. In the prior
9 matter, Respondent did tell the client what he had done but then proceeded to negotiate a
10 settlement with the client without advising him to seek independent counsel.
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12 It should be noted that on November 6, 2000, one month prior to Ms. Loya's case being
13 dismissed due to Respondent's misconduct, Respondent appeared before a Hearing Officer in
14 the prior discipline matters and stated "I made a mistake in my life. It was a very bad time in
15 my life. I have come to grips in realizing that. I accept full responsibility for my misgivings
16 and what happened and fully understand now more than ever why they happened to me. I'm
17 not going to let it happen ever again. I have greater insight of it." (Transcript of November 6,
18 2000 hearing, page 87, lines 16-22).

19 *Standard 9.22(b)* dishonest or selfish motive.

20 *Standard 9.22(c)* a pattern of misconduct.

21 *Standard 9.22 (e)* bad faith obstruction of the disciplinary proceedings by intentionally
22 failing to comply with the rules or orders of the disciplinary agency. Respondent has refused to
23 participate in these proceedings from the inception of this case, instead insisting he should be
24 permitted to simply resign from the State Bar. An Entry of Default was entered against
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1 Respondent for reasons set forth in the Hearing Officer's Order of August 18, 2003.

2 Respondent failed to appear or otherwise participate in the discipline proceedings.

3 *Standard 9.22 (h) vulnerability of the victims.*

4 *Standard 9.22 (i) substantial experience in the practice of law.*

5 *Standard 9.22 (j) indifference to making restitution.* Due to Respondent's
6 misconduct, a judgment was entered against Ms. Loya in the amount of \$1,632.95, which is
7 still outstanding. To date, Respondent has not offered to pay the judgment on Ms. Loya's
8 behalf.

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10 **MITIGATING FACTORS**

11 On September 25, 2003, Respondent failed to appear at the Aggravation/Mitigation
12 Hearing held in this matter. Instead, Respondent filed a document entitled "Respondent's
13 Request for Consideration of Evidence in Mitigation." Respondent identifies the following
14 mitigating factors:

- 15 (1) Voluntary removal from the practice of law by attempting to resign with
16 discipline pending and by failing to pay Bar dues;
- 17 (2) Acknowledgment of responsibility;
- 18 (3) Remorse; and
- 19 (4) Prior experience.

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21 This Hearing Officer questions whether any of the mitigating factors as set forth by the
22 Respondent should be considered in mitigation under *Standard 9.32*.

23 **PROPORTIONALITY**

24 In deciding the appropriate sanction, the Supreme Court looks to sanctions imposed in
25 similar cases. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). As the Court pointed out in

1 *Matter of Owens*, 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995), "this is an imperfect process
2 because no two cases are ever alike." However, the following cases are instructive.

3 In *In the Matter of Carey*, 2000 Ariz. LEXIS 86, Supreme Court No. SB-00-0055-D
4 (2000), Respondent was disbarred for violations of ERs 1.2, 1.3, 1.4, 1.5, 1.16, 3.2, 8.4 and
5 SCR 51. In that case, *Carey* had been representing the client for a number of years and they
6 had established a close relationship. Like Respondent, *Carey* basically abandoned
7 representation of the client, caused serious injury in the nature of financial loss and loss of legal
8 rights, was summarily suspended during the pending discipline proceedings, and failed to
9 appear or participate in the discipline proceedings. Like Respondent, *Carey*, had previously
10 been disciplined, although the misconduct alleged was not as serious as Respondent's prior
11 misconduct.
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13 In its determination that disbarment was the appropriate sanction, the Disciplinary
14 Commission applied *Standards* 4.41 and 4.42 relating the *Carey's* lack of diligence.
15 Respondent's conduct in the present case is even more egregious than *Carey's* because
16 Respondent not only failed to diligently represent Ms. Loya, he intentionally lied to her about
17 the status of the case for almost two years in order to hide his misconduct from his client.
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19 In *In the Matter of Silver*, 2001 Ariz. LEXIS 25, Supreme Court No. SB-00-0109
20 (2001), *Silver* was disbarred for violations of ERs 1.2, 1.3, 1.4, 1.16, 3.2, 3.4, 8.1, 8.4 and SCR
21 51. *Silver*, like Respondent, failed to diligently pursue a matter on behalf of the client, resulting
22 in the client's case being dismissed. Like Respondent, *Silver* was summarily suspended during
23 the course of the disciplinary proceedings for failure to pay dues, filed an Answer in bad faith,
24 and failed to appear at subsequent hearings. *Silver* is distinguishable from the present case in
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1 that *Silver* submitted fraudulent documents to the State Bar concerning his conduct and had no
2 prior discipline history.

3 In determining that disbarment was the appropriate sanction, the Disciplinary
4 Commission applied *Standards* 5.11 and 7.1 relating to *Silver's* lack of candor with his clients
5 and the State Bar and his submission of false information during the course of the discipline
6 proceedings. In the present case, Respondent submitted an Answer to the complaint wherein
7 Respondent denied facts he could not deny in good faith, resulting in Respondent's Answer
8 being stricken and a default entered against him. Unlike *Silver*, Respondent did not submit
9 fraudulent documents to the State Bar in an attempt to cover up his misconduct. However,
10 Respondent's conduct, in executing fraudulent documents to Benchmark Mortgage Fund and
11 Danelle Limited Partnership, evidences the same lack of honesty and adversely reflects on
12 Respondent's fitness to practice law, thus warranting disbarment.

14 Respondent's conduct in this matter must be considered in relation to the prior
15 complaints brought against him in File Nos. 99-1363, 99-1904 and 99-2134, for which
16 Respondent was suspended for thirty days. In File No. 99-2134, Respondent failed to retain an
17 expert witness and respond to a Motion for Summary Judgment, causing the client's case to be
18 dismissed in December of 1998. Respondent was under investigation by the State Bar at the same
19 time he was representing Ms. Loya. Respondent was served with a copy of the State Bar's formal
20 complaint in March of 2000, two months prior to his failure to respond to the Motion for
21 Summary Judgment filed in Ms. Loya's case. In fact, Respondent was before another hearing
22 officer in November of 2000, arguing that suspension need not be imposed because Respondent
23 was successfully addressing his problems in treatment and had learned from his mistakes. In
24 December of 2000, Ms. Loya's case was dismissed by the court.

1 In *In the Matter of Galusha*, 164 Ariz. 503, 794 P.2d 136 (1990), *Galusha* was disbarred
2 for violations of ERs 1.1, 1.3, 1.4, 1.15, 1.16, 8.1, and 8.4. The Supreme Court noted that because
3 *Galusha* was already involved in another disciplinary matter for similar misconduct at the time of
4 the instant misconduct, he had a heightened awareness of his obligations to his client. The Court
5 concluded that *Galusha's* misconduct, his failure to cooperate with the State Bar, and his prior
6 misconduct demonstrated contempt for the legal system, thus warranting disbarment.

7 RECOMMENDATION

8 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
9 and deter future misconduct. *In re Fioramonti*, 175 Ariz. 182, 187, 859 P.2d 1315, 1320
10 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the
11 administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another
12 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,
13 29, 881 P.2d 352, 361 (1994).

14 In imposing discipline, it is appropriate to consider the facts of the case, the American
15 Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and the
16 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,
17 872 P.2d 1235, 1238 (1994).

18 Upon consideration of the facts, application of the *Standards*, including aggravating and
19 mitigating factors, and a proportionally analysis, this Hearing Officer recommends the
20 following:
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- 22 1. Respondent be disbarred.
- 23 2. Respondent pay restitution to Esther Loya in the amount of \$1,632.95 for
24 costs assessed against her in connection with the dismissal of her case.
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