



BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

No. 01-1843

IN THE MATTER OF A NON-MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
L. MARK STEINBERG,)
)
RESPONDENT.)
_____)

HEARING OFFICER'S REPORT
AND RECOMMENDATION

PROCEDURAL HISTORY

The probable cause order in this matter was filed on November 22, 2002. The complaint was filed on December 31, 2002 and served by mail on January 6, 2003. Respondent filed an answer on February 11, 2003. Settlement conferences were held on April 29, 2003 and May 13, 2003. The parties were unable to reach a settlement.

On September 9, 2003 Respondent's counsel, Barry S. Berger, filed a motion to appear telephonically for the evidentiary hearing set for September 10, 2003. The motion to appear telephonically was granted. (See Reporter's Transcript of the Proceedings ("RTP"), Volume I, 6:6-8).

On September 10, 2003 Respondent made an oral motion to consolidate the case at hand with a pending matter brought by the State Bar involving File Numbers 02-1743, 02-2036 and 02-2092, and to continue the entire proceeding. RTP, Vol. I, 7:20-11:17. These motions were denied. RTP, Vol. I, 16:15-24; 38:11-23. On the prior day (September 9, 2003) Respondent filed a motion entitled "Motion to Dismiss all Proceedings or, in the Alternative, Motion to Stay all Present and Future Proceedings in

Arizona Permanently". At the hearing this motion was discussed. RTP, Vol. I, 18:14-20:16. The State Bar was directed to respond to Respondent's motion in writing. (RTP, Vol. I, 18:4-19:4), and the hearing then proceeded until approximately five p.m.. Respondent's Counsel and Respondent were present telephonically for the September 10, 2003 proceeding.

A second hearing date was scheduled for October 2, 2003. Respondent filed a motion to continue the second hearing, and on October 2, 2003, the hearing officer granted the continuance due to the fact that Respondent's counsel had moved to withdraw as attorney of record. Respondent's Counsel, Berry S. Berger, subsequently withdrew as counsel for the Respondent. The resumption of the hearing was set for October 20, 2003.

The State Bar submitted its Response to Respondent's motion to dismiss on October 17, 2003. The hearing resumed and was completed on October 20, 2003. Bar Counsel was present and the Respondent again appeared telephonically.

The "Motion to Dismiss all Proceedings or, in the Alternative, Motion to Stay all Present and Future Proceedings in Arizona Permanently" was denied on December 12, 2003.

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FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney not licensed to practice law in the State of Arizona, having been admitted to practice only in the State of Texas. (Respondent's Answer ¶¶ 2, 5; RTP, Vol. I, 13:9-10). All of the conduct listed below occurred in Arizona.
2. On August 3, 2001, Tracy Akers ("Akers") met with Respondent to represent her in a divorce, a Chapter 7 bankruptcy and criminal matters. RTP, Vol. I, 49:2-17; 50:7-52:25.
3. Respondent represented himself to Ms. Akers as a lawyer. Ms. Akers reached him through an advertisement for Frost Law Office in the Yellow Pages of the local telephone book. RTP, Vol. I, 44:8-46:5. When Ms. Akers called, Respondent answered the phone.
4. Respondent gave Ms. Akers a business card that identified Respondent as "L. Mark Steinberg, J.D., Lawyer". (State Bar Exhibits 2 and 21; RTP, Vol. I, 44:2-18; 58:3-64:20). The card did not contain any notation limiting his practice to Texas. The card did not contain any notation indicating that he was a paralegal or legal assistant.
5. Respondent met with Ms. Akers for her initial consultation and executed a fee agreement with her. RTP, Vol. I, 49:24-54:19.
6. Ms. Akers did not meet with Mr. Frost during her initial consultation. *Id.*
7. Ms. Akers believed that Respondent was her attorney of record. *Id.*; *see also* RTP, Vol. I, 95:3-101:11; RTP, Vol. II, 11:18-12:19, 15:18-21, 91:3-24.

8. Ms. Akers gave Respondent a postdated check for August 7, 2001, in the amount of \$3,500.00 to begin the representation. RTP, Vol. I, 56:2-57:20.
9. Akers gave Respondent four additional postdated checks as follows: (a) a check dated August 20, 2001 for \$2,500.00; (b) a check dated September 15, 2001, for \$1,600.00; (c) a check dated October 15, 2001, for \$1,600.00; and (d) a check dated November 15, 2001, for \$1,600.00. RTP, Vol. I, 56:2-57:24 (referring to State Bar Exhibit 5).
10. Ms. Akers met Mr. Frost on or about August 23, 2001, just prior to a court proceeding in Ms. Akers' case. (See Respondent's October 25, 2001 Response to the State Bar; RTP, Vol. I, 64:23-70:19). Mr. Frost spoke only briefly to Ms. Akers. *Id.*
11. Mr. Frost attended the proceeding with Ms. Akers and Mr. Steinberg. RTP, Vol. I, 64:23-70:19.
12. Ms. Akers never saw Mr. Frost sign any documents in her case. RTP, Vol. II, 54:19-56:10.
13. On September 14, 2001, Ms. Akers went to the Frost Law Offices to deliver funds to cover the September 15, 2001, check. (RTP, Vol. I, 72:15-76:17). At that time, she learned that Respondent was not in his office and that his cell phone had been disconnected. *Id.* Ms. Akers left a cashier's check with the receptionist and was given a phone number where she could leave a message for Respondent. *Id.*

14. Later that evening, Respondent telephoned Ms. Akers from Mexico and requested her to retrieve the cashier's check she left at the office and deposit it in his personal checking account. *Id.*
15. On September 15, 2001, Ms. Akers went to the office where she had previously met Respondent to attempt to pick up the check as he had requested. (RTP, Vol. I, 76:17-80:7). There, Ms. Akers met a lawyer named Bernard Porter. (RTP, Vol. I, 77:3-78:13; Vol. II, 73:1-24). Mr. Porter informed Ms. Akers that Respondent was not licensed to practice law in Arizona. *Id.*
16. With Mr. Porter's assistance, Ms. Akers terminated the Frost Law Offices as her attorneys of record. RTP, Vol. I, 79:13-80:7; Vol. II, 77:16-78:14.
17. Ms. Akers retrieved the cashiers' check for the September payment and did not make any further payments. RTP, Vol. I, 85:9-94:10.
18. In total, Ms. Akers paid \$6,000.00 to Respondent. *Id.* Respondent refused to refund any money. *Id.*
19. Ms. Akers then retained Mr. Porter to retain her for two of the matters for which she had originally retained Respondent. RTP, Vol. I, 94:10-95:3. Ms. Akers paid Mr. Porter \$3,500 for that representation. *Id.*
20. As Ms. Akers' former husband filed for bankruptcy, Ms. Akers never had to do so, which was the third matter for which she had paid Respondent. RTP, Vol. II, 67:23-67:25.

21. Mr. Porter testified that there was some work done in the case before he took over the file, and he estimated that the work would not be worth more than \$1,200.00-1,500.00 in value. RTP, Vol. II, 115:11-13.
22. Respondent was uncooperative in providing Mr. Porter with Ms. Akers' file in order that Mr. Porter could take over the representation. RTP, Vol. II, 103:1-12.
23. Respondent filed a motion to withdraw from Ms. Akers' case after Mr. Porter's letter of termination. RTP, Vol. II, 118:1-119:4.
24. At all times relevant hereto, Respondent was not a member of the State Bar of Arizona. RTP, Vol. II, 126:6-18.

CONCLUSIONS OF LAW

There is clear and convincing evidence that Respondent's conduct violated Rule 42, Ariz.R.S.Ct., ERs 5.5 and 8.4(c) and (d).

1. Respondent violated ER 5.5(a) by engaging in the unauthorized practice of law.
2. Respondent submitted himself to the disciplinary jurisdiction of the Arizona Supreme Court by practicing law in the State of Arizona. Ariz.R.S.Ct. Rule 46(b); *In re Creasy*, 198 Ariz. 539, 541, 12 P.3d 214, 216 (2000)

3. Respondent violated ER 8.4(c) when he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when he led Ms. Akers to believe he was an attorney and when he failed to inform Ms. Akers of his true status in Arizona.
4. Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice) when he made misrepresentations concerning his status as an attorney in Arizona. This resulted in causing Ms. Akers to hire a second lawyer to complete the work that Respondent was retained to perform.
5. Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice) by refusing to promptly turn over Ms. Akers file so that Mr. Porter could proceed with the legal work to be done.

DISCUSSION AND ABA STANDARDS

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).

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

Duty Violated. The ABA Standards direct that a lawyer has duties to his client (ABA *Standard* 4.0), duties to the public (ABA *Standard* 5.0), duties to the legal system (ABA *Standard* 6.0), and duties to the profession. (ABA *Standard* 7.0). The Respondent violated his duties in all four areas.

Mental State of Respondent. Respondent's mental state in reference to all of the underlying allegations is either intentional or knowing. The most culpable mental state is that of intent. Intent is "[w]hen a lawyer acts with the conscious objective or purpose to accomplish a particular result." *ABA Standards* at p. 6. Knowing is defined as "the conscious awareness of the nature or attendant circumstances of the conduct without the conscious objective or purpose to accomplish a particular result." *ABA Standards* at p. 7.

Respondent's testimony clearly established that Respondent's actions were intentional and knowing.

The Actual or Potential Injury Caused by the Misconduct. Respondent's conduct resulted in injury to the client. Some of the harm to Ms. Akers in this matter is quantifiable in monetary terms. She was forced to hire a second attorney. Ms. Akers also suffered other harm. She was deceived. She suffered delay due to the deception. She has now had to participate in a number of hearings and other legal matters against Mr. Steinberg, for which she has not been compensated and for which she has had to miss many hours of work. (RTP, Vol. I, 36:9-16).

The Presence of Aggravating or Mitigating Factors. *ABA Standards* 9.22 and 9.32, respectively detail the approved aggravating and mitigating factors to be considered

when a sanction for various types of conduct is recommended. That recommended sanction may increase or decrease depending on the evidence of aggravation or mitigation.

Several aggravating factors are present. Respondent's actions were dishonest and selfish. See Standard 9.22(b). Respondent's instruction to Ms. Akers to deposit a check into his personal bank account was inappropriate. Respondent's refusal to refund money to Ms. Akers after the relationship was terminated was dishonest and selfish. Ms Akers retained Respondent under the mistaken apprehension that he was licensed to practice in Arizona. The Respondent claimed that he did not intentionally mislead Ms Akers. However, once it became apparent to Respondent that his lack of membership in the Arizona Bar was material, he should have quickly acted to refund her money. His failure to do so was dishonest and selfish. This motive is further shown by the small amount of work that was performed on behalf of Ms Akers. The Respondent never offered even a partial refund of the funds paid by Ms Akers.

Respondent has engaged in a pattern of misconduct. See Standard 9.22(c). In addition to this particular complaint and proceeding, Respondent has engaged in prior conduct that essentially demonstrated the same type of misconduct. *See State Bar Exhibit 18*.

Respondent also exhibited a refusal to acknowledge the wrongful nature of his conduct. This is an aggravating factor under *ABA Standard 9.22(g)*. Respondent is fully aware that his conduct was improper. *See State Bar Exhibit 18*. His attitude to this matter appears both cavalier and callous. "You can look at me as a paralegal. You can look at

me as acting as an attorney. You can look at me as acting as a lawyer.” (RTP, Vol. II, 126:13-15). Moreover, he continually refused to acknowledge any wrongdoing, “All I can do is answer it the way I just said it. From either perspective, nothing illegal or no violation of any professional rule of conduct occurred.” (RTP, Vol. II, 127:12-14).

The Respondent is indifferent to making restitution. This indifference is an aggravating factor under *ABA Standard 9.22(j)*.

The State Bar suggests that the Respondent’s experience in the practice of law should be considered in aggravation pursuant to *ABA Standard 9.22(i)*. Although the Respondent was a member of the Texas Bar, the record does not adequately determine the duration of his practice. Accordingly, this factor will not be considered.

ABA Standard 9.32 sets forth the mitigating factors that may be considered. There has been no evidence of mitigation presented.

Application of ABA Standards. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct.” *ABA Standards* at p. 6. ABA Standards 4.6, 5.1, 6.0 and 7.0 address the violations of ERs 5.5 and 8.4(c) and (d) which are considered in this matter. This Hearing Officer considered the following *ABA Standards* as noted below.

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ABA Standard 4.6 -Lack of Candor. This Standard reads as follows:

“Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client.”

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

ABA Standard 5.1- Failure to Maintain Personal Integrity. This standard reads:

“Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation.”

5.11 Disbarment is generally appropriate when: [. . .] (b) a lawyer engages in any other intentional conduct involving dishonesty fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.

The Respondent’s conduct evinced an intentional act of deception in this matter.

ABA Standard 6.0- Violations of Duties Owed to the Legal System.

ABA Standard 6.22 directs that “suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party”. The Respondent’s knowledge that he was violating the Code of Professional Responsibility was shown in State Bar’s Exhibit 5, the contract he had Ms Akers sign.

The contract indicates that this was a “pro se matter”. (*Id.*, ¶ 1) This shows his knowledge that he could not enter a contract to represent the party in court as an attorney.

ABA Standard 7.0- Violations of Duties Owed to the Profession.

ABA Standard 7.1 directs that “[d]isbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system.”

The ABA Standards suggest that disbarment is appropriate in this case.

Proportionality.

In the imposition of lawyer sanctions, the court is guided by the principle that an effective system of professional sanctions must have internal consistency. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). To achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are similar. *In re Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994). However, the discipline in each situation must be tailored to the specific case as neither perfection or absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604 (1984). The following cases are instructive to Respondent’s conduct in this matter.

In *Matter of Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994), non-Arizona attorney Olsen was censured by the Arizona Supreme Court for submitting false affidavits for the purpose of appearing *pro hac vice*. Olsen submitted an affidavit that he was an active member of the Utah and California bar associations at a time he was suspended from both of those

organizations. The Court stated that although Olsen's conduct warranted disbarment, the only sanction available was a censure (with costs imposed), because he was not a member of the State Bar of Arizona.

In *Matter of Mothershed*, SB 01-0076-D, 2001 Ariz. LEXIS 63, (April 17, 2001), Mothershed wrongfully represented himself as authorized to practice law in the State of Arizona. He consulted with clients and filed pleadings in Maricopa County Superior Court identifying himself as "attorney for defendants". In addition, Mothershed corresponded through letterhead that failed to indicate that he was not admitted to practice in Arizona. The Court noted that normally Mothershed's conduct would warrant disbarment but, since he was not a member of the Arizona bar, he could only be censured for his intentional conduct. Mothershed was found to have violated, among others, ERs 5.5, 8.4(c) and (d) and Rule 31(a)(3), Ariz.R.S.Ct.

In *Matter of Richardson*, SB-02-0145-D, 2002 Ariz. LEXIS, (November 14, 2002), Richardson was not an attorney licensed to practice law in the State of Arizona but practiced law and prepared bankruptcy petitions in Arizona. The Court found that Richardson had violated ER 1.2, 1.4, 5.5, 8.4 as well as ER 8.1(b) and Rule 51(h) and (i) for failing to respond to requests for information concerning allegations made against her for unauthorized practice. The court noted there were three aggravating factors, pattern of misconduct, multiple offenses and bad faith obstruction and one mitigating factor, absence of prior disciplinary record. Richardson received a censure as she was not a member of the Arizona Bar.

In *Matter of Sodaro*, SB-00-0013-D, 2002 Ariz. LEXIS 125, (2002), Sodaro agreed to a censure and payment of the costs and expenses of the disciplinary proceedings for the unauthorized practice of law in Arizona and failing to note on her letterhead that she was not admitted to practice in Arizona in violation of ER 5.5, 7.1(a), 7.5 and Rule 31(a)(3), Ariz.R.S.Ct.

Because Respondent is not a member of the State Bar of Arizona, and there was actual harm to the client, the most severe sanction available is a censure, with imposition of the costs and expenses of the disciplinary process and an order of restitution.

Restitution

Tracy Akers testified concerning her payments to Respondent and the amount of work he completed. Mr. Porter also testified to that issue and stated that based on the file reviewed, the amount of work was worth approximately \$1,200.00 and no more than \$1,500.00. Ms. Akers paid Respondent \$6,000.00. Based on the foregoing, an order of restitution should be entered in favor of Ms. Akers for \$4,800.00.

RECOMMENDATION

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).

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

1. That the Respondent be censured;
2. That the Respondent be ordered to pay \$4,8000.00 in restitution to Ms Tracy Akers; and
3. That the Respondent be ordered to pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 12th day of January, 2004.

Neal C Taylor
Neal C. Taylor
Hearing Officer SU

Original filed with the Disciplinary Clerk
this 13th day of January, 2003.

Copy of the foregoing mailed
this 13th day of January, 2003, to:

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