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HEARING OFFICER OF THE SUPREME COURT OF ARIZONA
BY

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DEBORAH L. ABERNATHY,** **Bar No. 014112** RESPONDENT.	)	No. 04-1252 **HEARING OFFICER'S REPORT AND RECOMMENDATION**

A. INTRODUCTION

B. PROCEDURAL HISTORY

The State Bar filed its Complaint on April 26, 2005. Respondent filed her Answer on May 10, 2005. The Settlement Officer conducted a settlement conference on June 30, 2005, at which time the parties reached a settlement. The parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Tender") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memo") on August 19, 2005. A Protective Order sealing Exhibits C and D of the Joint Memo was filed on August 23, 2005. A hearing on the Tender and Joint Memo was held on August 24, 2005.

[1] This Introduction, footnote 3 and Section D should be sealed.

C. STIPULATED FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 15, 1993.

2. In or about April 2004, Respondent began representing Bonnie Foster ("Ms. Foster") in a domestic relations matter in Maricopa County Superior Court, case no. FN2004-001816. A return hearing in Ms. Foster's matter, based on a petition for temporary orders, was scheduled before the Honorable George H. Foster ("Judge Foster" or "the Court"), to be held on July 16, 2004, at 3:30 p.m.

3. If this matter proceeded to a hearing, Judge Foster's Judicial Assistant ("J.A.") would testify that on or about July 16, 2004, at approximately 1:55 p.m., Respondent telephoned Judge Foster's chambers and spoke to the J.A. Respondent stated that she would not be appearing at the return hearing because she did not feel that she was ready or prepared, and/or that her client had not provided sufficient information to her.[2]

4. Respondent had not previously filed any motion to continue or to vacate the hearing, as required by court rule, statue and/or local practice.

5. On or about July 16, 2004, at the time scheduled for the 3:30 p.m. return hearing, Ms. Foster telephoned Judge Foster's chambers to check the status of her case. Ms. Foster stated that she had learned a short time before, from Respondent or by a message left by Respondent, that Respondent would not be appearing for the hearing and was canceling the hearing.

6. Ms. Foster stated that she was in dire need of the support that she anticipated would be ordered at the return hearing.

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[2] The use of "and/or" in this sentence highlights the increasing reliance on and misuse of the phrase. There is a huge difference between the reasons – one is the lawyer's fault, and the other the client's. I find the reasons do not matter in this case.

7. On or about July 16, 2004, at 3:30 p.m., the return hearing commenced as scheduled. Ms. Foster appeared telephonically. Respondent did not appear.

8. Judge Foster received information from his J.A. that Respondent had telephoned earlier and had stated that she would not be appearing because she did not feel that she was ready. Judge Foster noted that Respondent had not orally moved to continue, nor explained why she was not ready, nor when she would be ready to proceed in the matter.

9. During the hearing, Ms. Foster informed the Court that she had spoken to Respondent at approximately 1:30 p.m. that day and Respondent had not indicated that the hearing was not going forward. Ms. Foster also informed the Court that she had left work early, to be able to appear at the hearing telephonically. Ms. Foster learned after leaving work that Respondent had left a message with Ms. Foster's sister indicating that Respondent was going to cancel the hearing.

10. Ms. Foster did not know of this plan in advance and had not agreed to the cancellation of the hearing.

11. The Court found that Respondent having called Court staff and advising staff that she was not going to appear was contrary to the procedure required by the Court and by the Arizona Rules of Civil Procedure.

12. The Court referred the matter to the State Bar of Arizona ("State Bar"). The Court scheduled a Show Cause Hearing in order that Respondent appear to tell the Court why she should not be held in contempt for violation of Rule 11, for failure to appear in court, and for failure to timely file a notice to continue Ms. Foster's matter.

13. The Show Cause hearing in this matter was scheduled for August 18, 2004, at 9:00 a.m. In a minute entry, sent to Respondent, the Court ordered that Respondent appear

personally for the Show Cause hearing. The return hearing in Ms. Foster's matter was also rescheduled for August 18, 2004, at 9:00 a.m.

14. On or about August 18, 2004, at approximately 9:43 a.m., the Court convened the Show Cause hearing.[3]

15. The Court noted that Respondent did not appear and ordered that Respondent be held in contempt for failing to appear, failing to follow proper procedures for seeking a continuance and failure to properly keep her client, Ms. Foster, advised of the status of the proceedings in her case.

16. The Court ordered that Respondent might purge her contempt by paying $500 to the Clerk of the Court and by providing proof to the Court that she had not charged Ms. Foster for any attorney's fees for any action she had taken involving the petition for temporary orders. The Court ordered that Respondent was to take these actions within thirty days of the Court's order, or the Court would take further actions, including referral of the matter to the State Bar.

17. After the August 18, 2004, show cause hearing, Respondent paid $500 to the Clerk of the Court. Respondent, however, did not advise the Court that she had refunded Ms. Taylor's fee in full.

18. By letter dated August 31, 2004, Respondent was advised of the State Bar's investigation into this matter and was asked to respond.

19. Respondent provided a response to the State Bar, by letter dated September 3, 2004, received by the State Bar on September 7, 2004, in which Respondent stated that the day before the hearing scheduled for July 16, 2004, she had telephoned the J.A. to confirm the

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[3]

hearing and was informed that the hearing had earlier been vacated pursuant to a request from Respondent received by telephone earlier that day. Respondent stated that she assumed there had been confusion on the J.A.'s part because she had not called the court to cancel the hearing and further, she had no staff at that time who could have called the court; that she had received a fax from "Burton & Leather & Associates" indicating that they had been retained by Ms. Foster to represent her and that they had requested the postponement of the July 16, 2004 return hearing. Respondent speculated that "the person who called the judge from that law firm simply said the call was coming from 'Ms. Foster's attorney,' but did not identify the office she was calling from."

20. On or about September 13, 2004, the State Bar received from Respondent, an amended version of Respondent's September 3, 2004 letter, in which the statements that Burton & Leather & Associates requested the postponement and that "the person who called the judge from that law firm simply said the call was coming from 'Ms. Foster's attorney,' but did not identify the office she was calling from" were stricken through. Respondent included a postscript indicating that on further review of her file she could not speculate who might have called the court that day before the hearing, but reasserted that the call did not come from her or her office.

21. On or about September 10, 2004, Respondent moved the Court for relief from the contempt order and order for sanctions. The Court, finding no good cause shown, denied Respondent's motion.

22. In a "Statement to Correct the Court Record" filed in case number FN2004-001816 on September 24, 2004, Respondent admitted that she had been negligent in not having carefully read the minute entry from the Court scheduling the Show Cause Hearing,

after "reading the unsworn, outrageous hearsay and double hearsay against me upon which the court found me in contempt."

23. Judge Foster's J.A. specifically remembers having spoken to, on or about July 16, 2004, a person who identified herself as Respondent, not to anyone purporting to be calling from Respondent's office.

24. Upon information and belief, subsequent to the July 16, 2004 return hearing, Ms. Foster retained Burton & Leather to represent her in the domestic relations matter. Mr. David Yuhas of Burton & Leather appeared on Ms. Foster's behalf at the return hearing held on August 18, 2004.

25. On or about October 28, 2004, in an apparent attempt to obtain telephone records for use in responding to the State Bar's investigation, Respondent issued subpoenas *duces tecum* and noticed a deposition for telephonic records. The subpoenas and notice were issued under the caption and case number of Ms. Foster's domestic relations case and submitted to the Clerk of the Court for issuance, rather than under the caption and case number of Respondent's matter pending with the State Bar.

26. A Probable Cause Order was filed on February 4, 2005.

27. Respondent failed to provide competent representation to her client in violation of Rule 42, Ariz.R.S.Ct., specifically ER 1.1.

28. Respondent failed to abide by her client's decisions concerning the objectives of the representation and to consult with her client as to the means by which they were to be pursued, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 1.2.

29. Respondent failed to act with reasonable diligence and promptness in representing her client, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 1.3.

30. Respondent failed to reasonably communicate with her client, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 1.4.

31. Respondent failed to make reasonable efforts to expedite litigation, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 3.2.

32. Respondent knowingly disobeyed an obligation under the rules of a tribunal, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 3.4.

33. Respondent engaged in conduct that is prejudicial to the administration of justice, in violation of Rule 42, Ariz.R.S.Ct., specifically ER 8.4(d).

D. ADDITIONAL FINDINGS OF FACT[4]

[4] These additional facts are taken from the medical records attached to the Joint Memo, Respondent's Statement Re: Mitigating Factor 9.32(c) dated August 18, 2005, and testimony during the Hearing.

D. Additional Findings of Fact (cont'd)
Pages 8-9

Sealed by Order of Hearing Officer

E. CONDITIONAL ADMISSIONS

Respondent conditionally admits, for purposes of this agreement only, that her conduct, as set forth above, violated Rule 42, Ariz.R.S.Ct., specifically ERs 1.1, 1.2, 1.3, 1.4, 3.2, 3.4, and 8.4(d).

F. CONDITIONAL DISMISSALS

The State Bar conditionally agrees, for purposes of this agreement only, to dismiss the alleged violations of ERs 1.5, 3.1, 3.3, and 8.4(c). The State Bar conditionally admits for the purpose of this agreement that the State Bar would be unable to prove those violations by clear and convincing evidence. For purposes of this agreement only, the State Bar conditionally accepts Respondent's assertion that she did not knowingly pursue non-meritorious claims or contentions. The State Bar also conditionally agrees to dismiss the allegation of a violation of Rule 47(i) based on Respondent's assertion that her failure to follow the rule regarding issuance of subpoenas in a discipline matter was negligent rather than knowing or intentional. Finally, the State Bar conditionally agrees to dismiss the allegations of violations of Rule 41(c), and Rule 53(c), Ariz.R.S.Ct., as they are duplicative of other admitted violations.

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[6] As discussed at the Hearing (on page 10 of the transcript), there are two Arizona cases in which it appears that eight months and twelve months met the "meaningful" standard.

G. ABA STANDARDS

The ABA *Standards for Imposing Lawyer Sanctions* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. ABA *Standard* 1.3, Commentary. The court and commission consider the *Standards* a suitable guideline. *In re Peasley*, 427 Ariz. Adv. Rep. 23, 90 P.3d 764, §§ 23, 33 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.

Given the conduct in this matter, it is appropriate to consider *Standards* 4.0, (Violations of Duties Owed to the Client), and 6.0 (Violations of Duties Owed to the Legal System.

> 4.4 Lack of Diligence
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> 4.42 Suspension is generally appropriate when:
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
> (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
>
> 4.43 Reprimand (censure in Arizona) is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.
>
> 4.5 Lack of Competence
>
> 4.53 Reprimand (censure in Arizona) is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or produces and causes injury or potential injury to a client; or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

6.2 Abuse of the Legal Process

6.22 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, or interference or potential interference with a legal proceeding.

6.23 Reprimand (censure in Arizona) is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury of potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Based on the conditional admissions, the presumptive sanction for the admitted conduct under the Standards falls between suspension and censure. To determine the applicability of these Standards in this case, the factors listed in the theoretical framework must be considered.

Respondent violated her duty to her client by failing to provide competent representation; reasonable diligence and promptness; abiding by her client's decisions concerning the objectives of the representation; reasonable communication with her client; and by failing to appear on her client's behalf at the return hearing which would have set the date for the evidentiary hearing to address monetary support for her client, and the show cause hearing. Although Respondent asserts that there was a miscommunication with court staff regarding the return hearing, Respondent had a duty to be present at the return hearing and the show cause hearing.

Respondent violated her duties to the legal system by failing to follow appropriate procedures for continuing a hearing and absent that, by failing to appear at the return hearing, and at the show cause hearing. Respondent also did not comply with a court order when she neglected to provide the court with the proof that she had not charged her client attorney's fees in the matter.

In addition, Respondent failed to expedite litigation and engaged in conduct that was prejudicial to the administration of justice by not appearing at the return hearing and the show cause hearing.

Respondent conditionally admits that her conduct, taken as a whole, violated her duty to her client and the legal system.

The parties conditionally agree that Respondent was negligent regarding her lack of competent representation, lack of diligence and promptness, lack of reasonable communication with her client, and failure to abide by her client's decisions concerning the objectives of the representation, and in her failure to expedite the litigation. The State Bar contends, and Respondent conditionally for purposes of this agreement does not contest, that Respondent's conduct and misconduct in this regard constituted a pattern of neglect with regard to the handling of her client's case.

Respondent knowingly failed to comply with a court order or rule by failing to provide the court with the ordered proof of not charging her client legal fees, by failing to appear at the show cause hearing, and by failing to either properly request a continuance of the hearing in her client's matter or failing that, to appear at the return hearing.

There was minimal injury to the client involved in all of Respondent's rule violations.

If this matter were to proceed to a hearing, Respondent would take the position that her conduct caused no actual harm to her client and exposed her client to no potential harm. The State Bar would take the position that Respondent's failure to appear at the return hearing and show cause hearing exposed her client to minimal actual or potential injury.

H. AGGRAVATING AND MITIGATING FACTORS

I have considered the aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. I agree with the parties that two aggravating factors

apply and should be considered in this matter:

(1) Prior disciplinary offenses.[7]

(2) Substantial experience in the practice of law. Respondent has been practicing law in Arizona since May 15, 1993.

I agree with the parties that six mitigating factors apply and should be considered in this matter:

(1) Absence of a dishonest or selfish motive. Respondent was negligent and did not act out of any dishonest or selfish motive. Respondent did not intentionally fail to appear at hearings, either to personally benefit herself or her client, or to gain any advantage in the litigation.

(2) Personal or emotional problems.[8] Respondent was experiencing personal or emotional problems during the period of time relating to the charges in this complaint due to the death of her husband. For purposes of this Agreement, the State Bar conditionally agrees that Respondent's personal problems affected her conduct.

(3) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Throughout the course of the investigation and formal process, Respondent has been forthcoming and cooperative. She has made full and free disclosure and her actions should be considered as mitigating the misconduct.

(4) Mental disability or chemical dependency including alcoholism or drug abuse when:

(a) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(b) the chemical dependency or mental disability caused the misconduct;

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[7] See Exhibit B to the Joint Memo.
[8] See sealed Exhibit C to the Joint Memo.

(c) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(d) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.[9]

(5) Imposition of other penalties or sanctions. Respondent was fined $500 by the Court and pursuant to the Court's order refunded her client's fee in full;

(6) Remorse.

I. PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The most serious instance of misconduct in this case involves Respondent's conduct prejudicial to the administration of justice. The following cases are instructive concerning this type of misconduct, as well as on a failure to diligently complete duties and responsibilities due to clients and the legal system.

In *In re Brinton,* SB-03-0154-D (2004), Brinton filed a stipulation and order that had been unilaterally altered to delete one (1) of the proposed plaintiffs previously stipulated to in a civil case. The signature page of the original stipulation signed by opposing counsel in February was attached to the stipulation and "February" had been crossed off the signature

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[9] See Exhibit D to the Joint Memo and Additional Findings of Fact D1-10.

page and "June" and the date was written in. There was also an amended complaint attached that opposing counsel had not previously seen. Respondent then sent a copy of the modified stipulation to both the court and to opposing counsel, with the appearance that opposing counsel had agreed to the proposed amended complaint. The second count in *Brinton* involved trust account violations. The third count involved Brinton's failure to diligently pursue the collection of judgments, failure to appear at a garnishment hearing, and failure to preserve the judgments in the matter. There was one (1) aggravating factor present in *Brinton*: substantial experience in the practice of law. There were five (5) mitigating factors present: absence of a prior disciplinary record; absence of dishonest of selfish motive; personal or emotional problems; full and free disclosure; and remorse. Brinton received a thirty (30) day suspension and two (2) years of probation, which included participation in LOMAP and MAP.

In *In re Risley,* SB-05-0015-D (2005), Risley filed a procedurally inappropriate motion to compel production of documents and then misrepresented to the court and a non-party witness that the court had issued an order compelling production of documents when the court had denied Risley's motion to compel. In the second count, Risley filed a Temporary Restraining Order for the plaintiffs/tenants in a landlord/tenant action. In the Application for Temporary Restraining Order and the Verified Complaint, Risley misrepresented to the court that the plaintiffs/tenants were residing on the premises when they were not. The court found that the plaintiffs/tenant did not give Risley the "full story," therefore, Risley was negligent in his misrepresentation to the court. In *Risley*, the State Bar dismissed the alleged violation of ER 8.4(c) (acts involving dishonesty, deceit, or misrepresentation) because the charge was duplicative of the conditionally admitted violation of ER 3.3(a)(1) (making a false statement of material fact to a tribunal). There were three (3) aggravating factors present in *Risley*: dishonest or selfish motive; multiple offenses; and substantial experience in the practice of law.

There were three (3) mitigating factors present including absence of a prior disciplinary record; full and free disclosure; and character or reputation. Risley received a censure and one (1) year of probation, which included participation in the State Bar's Ethics Enhancement Program (EEP).

In *In re Hooper,* SB-04-0093-D (2004), Hooper filed a pleading styled "Motion to Expunge and Set Aside Defendant's Conviction and Restore Defendant's Civil Rights" for a client, which the Clerk of the Court rejected. Hooper prepared, but did not file, another pleading. Client made numerous attempts to contact Hooper to no avail. When client was able to contact Hooper he stated that he would be taking action on the case in furtherance of the representation. Hooper did not perform any further work for client. Hooper failed to respond to, or cooperate with the State Bar during the investigation of the matter. There were three (3) aggravating factors in *Hooper*: bad faith obstruction of the disciplinary proceeding; vulnerability of victim; and substantial experience in the practice of law. There were three (3) mitigation factors present: absence of prior disciplinary record; personal and emotional problems; and physical or mental disability or impairment. Hooper received a censure and one (1) year of probation, which included participation in LOMAP.

In *In re MacDonald*, SB-00-0021-D (2000), MacDonald failed to act with reasonable diligence and promptness in representing domestic relations clients. MacDonald failed to keep the clients informed as to the status of the case and failed to respond to reasonable requests for information. Additionally, MacDonald was instructed by the court to file certain documents and failed to do so. Further, MacDonald failed to protect clients' interests and failed to surrender clients' papers in a timely manner. MacDonald initially failed to cooperate with the State Bar, but did so after the Complaint was filed. There was one (1) aggravating factor in *MacDonald*: prior disciplinary offenses. There were four (4) mitigation factors present:

absence of a dishonest or selfish motive; physical or mental disability or impairment; delay in disciplinary proceedings; and interim rehabilitation. MacDonald was censured and had his probation extended for a period of six (6) months, which included participation in LOMAP and MAP.

In *In re Davis*, SB-04-0033-D (2004), the attorney failed to serve as an arbitrator as ordered, then failed to appear at a show cause hearing scheduled by the Court. When a second show cause hearing was scheduled, the attorney appeared, but failed to provide an explanation for her failure to comply with the Court's order regarding the arbitration and failure to appear at the show cause hearing. In that matter, unlike the instant case, the attorney failed to respond to the inquiry of the State Bar. The hearing officer considered *Standards* 6.22 and 7.2. Although the presumptive sanction was suspension, the sanction imposed was censure based upon the substantial mitigation present. In *Davis*, there was (1) there was no selfish or dishonest motive, (2) the attorney was experiencing personal and emotional problems due to deaths of two people close to her and resulting depression, (3) the attorney was subjected to a penalty by the court and had complied with it, and (4) remorse on the attorney's part. The attorney had received an informal reprimand 6 years prior, much as Respondent was informally reprimanded in 1996 in this case.

In *In re Morrison*, SB-04-0075-D (2004), the attorney failed to appear for a scheduled pre-trial conference in a client's matter, and called the court after the scheduled commencement time to inform the court that he had overslept and would appear later. The attorney then failed to appear for the hearing, as did his client. In a subsequent hearing on the same matter, the attorney appeared late with no reasonable explanation. The court sanctioned the attorney for failing to timely appear. In addition, the attorney failed to timely respond to inquiries by the State Bar. Violations of ERs 1.3, 3.3 and 8.4(d) were among the violations found. The

presumptive sanction was suspension. Due to the fact that there were multiple aggravating factors in the matter, including prior disciplinary history, and no mitigating factors, the attorney was suspended from the practice of law for 6 months and 1 day.

Finally, in *In re Bihn,* SB-05-0084-D (2005), the attorney's misconduct included a failure to respond to discovery and motions in a Federal Court action. Violations of ERs 1.2, 1.3, 1.4, 3.2, and 8.4(c) and (d) were found. The parties agreed that the most serious misconduct in the case was the attorney's pattern of neglect of clients and his failure to communicate with them. Although the presumptive sanction was disbarment, the attorney received the mitigated sanction of a suspension for 60 days, and was placed on probation, and required to participate in LOMAP and MAP. In *Bihn*, there was significant mitigation present, and a finding of 6 mitigating factors, including personal and emotional problems and remorse. An examination of the significant mitigation present in the instant case has resulted in a proposed sanction fashioned to address this Respondent's particular situation, much as was done in *Bihn*. It is important to note, however, that while the rationale for mitigating the sanction in *Bihn* is instructive, the violation of ER 8.4(c) present in *Bihn* is not present in the instant case. Therefore, while a sanction of suspension was appropriate in *Bihn*, a sanction of censure is appropriate in this matter

In this case, Respondent conduct was serious and posed a danger of injury or potential injury to her client. However, in light of the considerable mitigation present, the recommended sanction is proportional and within the range of discipline imposed in similar cases with substantial mitigation.

J. 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).

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).

After considering the facts, applying the *Standards*, including aggravating and mitigating factors, and applying a proportionality analysis, I recommend acceptance of the Tender and the Joint Memo providing for the following:

1. Respondent will receive a censure.

2. Respondent will be placed on probation for a period of one year effective upon the signing of the probation contract. Bar Counsel will notify the Disciplinary Clerk of the date on which the probation begins. The terms of probation are as follows:

   a) Respondent will, within 30 days of the Supreme Court's final judgment and order, contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) to schedule a limited review of the procedures utilized in her law office. The LOMAP director or his or her designee will consult with Respondent no later than 60 days after that. Following the consultation, if additional changes are recommended, Respondent will enter into a probation contract that will be effective for a period of one year from the date on which all parties have signed the contract. Respondent will comply with all recommendations of the LOMAP director or his or her designee.

b) Respondent will follow all the Rules of Professional Conduct and all trust account guidelines.

c) Respondent will contact the Director of the Member Assistance Program (MAP) within 30 days of the final Judgment and Order. A probation contract will be drafted by the Director of MAP, in consultation with the Medical Director of MAP, which will include all applicable terms and reporting requirements. Respondent will participate in the MAP program for the entire period of probation, beginning when all parties have signed the probation contract.

d) Respondent will pay all costs associated with probation.

e) In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information to that effect, bar counsel will file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer will conduct a hearing within thirty days after receipt of third 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 is on the State Bar to prove non-compliance by clear and convincing evidence.

3. Respondent will pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 3rd day of ~~September~~ October, 2005.

Richard N. Goldsmith
Hearing Officer 7I

Original filed with the Disciplinary Clerk
this 3rd day of October, 2005.

Copy of the foregoing was mailed
this 3rd day of October, 2005, to:

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