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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Williams*

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

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3			
4	IN THE MATTER OF A MEMBER)	Nos. 04-1290, 04-1509, 04-1589
5	OF THE STATE BAR OF ARIZONA,)	
6)	
7	KEVIN F. CHRISTOF,)	
8	Bar No. 018276)	
9)	HEARING OFFICER'S REPORT
10	RESPONDENT.)	
11	_____)	

PROCEDURAL HISTORY

The State Bar filed a Complaint in File Nos. 04-1290, 04-1509, and 04-1589 on August 1, 2005. Service of the Complaint on Respondent was accomplished on August 1, 2005, pursuant to Rule 47(c) Ariz.R.S.Ct. by regular first-class mail and by certified mail/delivery restricted to Respondent's address of record with the State Bar. On or about August 26, 2005, Respondent filed a Motion for Extension of Time to File Answer. Respondent listed as his address on such motion 1928 East Highland Ave., Suite F-104 #427, Phoenix, AZ 85016-0001. On August 31, 2005 the Hearing Officer considered Respondent's Motion for Extension of Time to File Answer and the State Bar having no objection, granted the motion, ordering Respondent to file an answer with the Disciplinary Clerk on or before Friday, September 16, 2005.

Thereafter, when Respondent failed to file an answer, the Disciplinary Clerk filed and mailed a notice of default on September 19, 2005, to Respondent's address of record and the address Respondent used on his Motion for Extension of Time to Answer. When Respondent

1 still failed to file an answer, the disciplinary clerk entered default against Respondent on
2 October 14, 2005.

3 The State Bar requested an aggravation/mitigation hearing. A hearing was held on
4 November 15, 2005. Testimony and exhibits were received at the hearing.

5 Pursuant to Rule 57(d), Ariz.R.S.Ct., with Respondent's failure to answer the
6 Complaint, all allegations in the Complaint are deemed admitted.

7 Based on the record in this matter, this Hearing Officer makes the following findings of
8 fact and conclusions of law.

9 **FINDINGS OF FACT**

10 1. At all times relevant, Respondent was an attorney licensed to practice law in the
11 State of Arizona, having been admitted to practice in Arizona on July 7, 1998.

12 **COUNT ONE (File No. 04-1290- Robbins/Roth/Schutz)**

13 **Facts Deemed Admitted:**

14 2. On February 27, 2004, Diana Roth, now known as "Diana Schutz" met with
15 Respondent to retain Respondent to file a marriage dissolution proceeding for her.
16

17 3. Subsequently, Respondent drafted and sent two letters (dated March 3, 2004 and
18 March 9, 2004) on Ms. Schutz's behalf to opposing counsel stating that he had been retained in
19 the divorce case. However, Respondent failed to file a Petition for Dissolution.
20

21 4. Opposing counsel prepared and filed the Petition for Dissolution and served Ms.
22 Schutz. Respondent did not timely file a Notice of Appearance or an Answer on Ms. Schutz's
23 behalf.
24

25 5. As a result, a default was entered against Ms. Schutz and the matter was set for
26 a default hearing on May 26, 2004. Respondent filed an answer on behalf of Ms. Schutz the

1 day before the default hearing and did appear at the hearing with Ms. Schutz. Respondent was
2 not allowed to participate because Ms. Schutz was found in default.

3 6. Later, Ms. Schutz hired another lawyer, Merrill W. Robbins, to set aside the
4 default. Mr. Robbins filed a charge with the State Bar providing details of Respondent's
5 conduct in the matter.

6 7. On September 7, 2004 bar counsel wrote to Respondent requesting a written
7 response to the charge addressing his conduct and addressing ERs 1.1 (Competence), 1.3
8 (Diligence), 1.4 (Communications), and 3.2 (Expediting Litigation).

9 8. On October 21, 2004, Respondent filed a response dated October 18, 2004 to
10 the State Bar's charging letter of September 7, 2004. In his response, Respondent indicated that
11 he first met with Ms. Schutz at the Family Lawyer Assistance Project (FLAP). Respondent
12 provided to her general information regarding the marital dissolution process and suggested
13 that she consult with private counsel.
14

15 9. Respondent also gave Ms. Schutz his contact information and told her he could
16 assist her in obtaining an order of protection, as she was concerned that her husband had
17 threatened to kill her and her daughter.
18

19 10. Respondent and Ms. Schutz met again in late February 2004 at Respondent's
20 office. Respondent indicated that at that time he informed Ms. Schutz that he could not
21 represent her until she signed a retainer agreement and paid the court's filing fee. Respondent
22 mailed a proposed retainer agreement to Ms. Schutz on March 14, 2004.
23

24 11. Ms. Schutz was served with a petition for dissolution on March 22, 2004, upon
25 which she forwarded a copy of the petition to Respondent. However, Ms. Schutz did not
26 return the retainer agreement and did not pay the filing fee.

12. On April 5, 2004, Respondent then sent an e-mail to Ms. Schutz and advised that she needed to return the retainer agreement and pay the filing fee, as he did not advance filing fees. Respondent also reports he told Ms. Schutz that a response to the petition for dissolution of marriage was due on April 12, 2004.

13. On April 17, 2004 Ms. Schutz responded to Respondent's April 5, 2004 e-mail indicating that she had the cash to pay for the filing fee and wished to meet with Respondent. Respondent received the filing fee from Ms. Schutz on April 20, 2004. Ms. Schutz signed Respondent's retainer agreement on April 27, 2004.

14. Ms. Schutz met Respondent at FLAP. She testified Respondent told her that he would "front" the money for the filing fee and that she "could pay him later." Ms. Schutz indicates that the first time she saw the retainer agreement was on the date it was signed, April 27, 2004.

15. In his response to the State Bar's charging letter, Respondent wrote that based on his experience, he believed that filing an Answer in a marital dissolution matter instead of a motion to set aside default is a recognized and sufficient action in Maricopa County.

16. Ms. Schutz's subsequent counsel, Mr. Robbins, filed a Motion to Vacate Default Judgment on behalf of Ms. Schutz that was considered by the Court on December 1, 2004. The Court found that Ms. Schutz, while represented by Respondent, did not act promptly and found that the circumstances did not constitute excusable neglect. The motion was denied.

17. Considering the results of the investigation by the State Bar pursuant to Rule 54 Ariz.R.Sup.Ct., the probable cause panelist of the State Bar signed an Order of Diversion on March 4, 2005, providing Respondent with an opportunity to participate in diversion as

1 provided for by Rule 55 Ariz.R.Sup.Ct. Respondent was referred to the Ethics Enhancement
2 Program (“EEP”) and the Law Office Management Assistance Program (“LOMAP”).

3 18. On March 8, 2005, LOMAP sent a copy of the Order of Diversion and an
4 instructional letter to Respondent. However, Respondent did not contact LOMAP as
5 instructed.

6 19. LOMAP sent another letter to Respondent on March 31, 2005.

7 20. Subsequently, LOMAP attempted to call Respondent, but the telephone
8 numbers provided by Respondent were either out of service or incorrect. As of the date of this
9 Complaint, Respondent has failed to contact LOMAP or bar counsel.

10 21. Because the Respondent failed to respond to the Order of Diversion, On May 4,
11 2005, the Probable Cause Panelist issued an Order Vacating Order of Diversion. On that date
12 the Probable Cause Panelist issued a Probable Cause Order directing the State Bar to file a
13 complaint with the disciplinary clerk, charging respondent with violations of Rule 42
14 Ariz.R.S.Ct., including but not limited to, ERs 1.2, 1.3, and 1.4 and Rule 32 (c)(3) Ariz.R.S.Ct.

15 **Additional facts proven at hearing:**

16 22. Exhibits. 1 through 18 were admitted into evidence. [Hr.Tr. 24: 19-23]

17 23. The client in Count One, Diana Schutz, testified that the allegations set forth in
18 Hr.Ex. 11, her complaint filed with the State Bar, were accurate except that the amount she
19 paid her subsequent counsel, Merrill Robbins, to undo the damage caused by Respondent was
20 more than listed in the exhibit. [Hr.Tr. 15:16-16:5]

21 24. Ms. Schutz testified that with regard to avoiding the default, that when she got
22 the first notice advising her she had 10 days to respond, she immediately gave it to Respondent
23 and when she received a second notice after Respondent did not respond to the first notice
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1 indicating she had 20 days to respond she called Respondent and he advised her she had 60
2 days. Ms. Schutz testified that Respondent never told her she was on her own and needed to
3 file an answer to defend herself without him. [Hr.Tr. 18:2-17]

4 25. Ms. Schutz testified that she had a judgment of \$43,000 against her as a result of
5 Respondent's representation. [Hr.Tr. 21:20-22:27]

6 26. Ms. Schutz also testified that she thinks Respondent is totally incompetent.
7 [Hr.Tr. 22:8-23]

8 27. Ms. Schutz testified that she paid Respondent \$260 for filing fee [Hr.Tr. 20:23-
9 21:5]; that she paid Respondent at least \$1,000 as a fee [Hr.Tr. 24:2- 15]; and that she paid her
10 subsequent counsel, Mr. Robbins, about \$7,000. [Hr.Tr. 24:14-16]

11 28. At the conclusion of the hearing, bar counsel requested an opportunity to
12 supplement the record with additional information from Ms. Schutz as to the exact amount
13 paid. Although the record supports a finding of financial injury at a minimum of the amount
14 testified to by Ms. Schutz, contemporaneously with these proposed findings of fact and
15 conclusions of law bar counsel has filed herein a Motion to Supplement the Record including
16 documents marked as Exhibit "61" and has requested the record be supplemented with the
17 admission of such exhibit as Hr.Ex. 61.

18 29. The foregoing described Hr.Ex. 61, is a letter from Ms. Schutz dated November
19 28, 2005 with an enclosure of a February 4, 2005 letter and related invoices from Mr. Robbins,
20 the lawyer Ms. Schutz hired to undo the damage caused by Respondent.

21 30. Ms. Schutz paid a total of \$7,096.91 in attorney fees and costs to his office, all
22 incurred for services rendered "in the preservation of income, the protection of assets and
23 attempts to overturn [her] Decree of Dissolution."
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Conclusions of Law For Count I

1 This Hearing Officer finds that there is clear and convincing evidence that Respondent
2 violated Rule 42, Ariz. R. S. Ct., as noted below.

3
4 31. Respondent violated ER 1.2 by failing to abide by his Ms. Schutz's decisions
5 concerning the objectives of the representation and failing to consult with her as to the means
6 by which the objectives of the representation were to be a pursued.

7 32. Respondent violated ER 1.3 by failing to act with reasonable diligence and
8 promptness in representing Ms. Schutz.

9
10 33. Respondent violated ER 1.4 by failing to promptly inform Ms. Schutz's of
11 circumstances to which her informed consent was required; failed to consult with the Ms.
12 Schutz about the means by which the client's objectives were to be accomplished; failed to
13 keep Ms. Schutz reasonably informed about the status of the matter; failed to promptly comply
14 with reasonable requests for information; and failed to explain a matter to the extent reasonably
15 necessary to permit Ms. Schutz to make informed decisions regarding the representation.
16

17 34. Respondent violated Rule 32 (c)(3) Ariz.R.S.Ct. by failing to "provide to the
18 State Bar office, a current street address, telephone number," or "any other post office address
19 the member may use."

20 35. Respondent's conduct in all the foregoing respects was prejudicial to the
21 administration of justice in violation of ER 8.4(d) (Misconduct-prejudicial to the
22 administration of justice).
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COUNT TWO (File No. 04-1509 – Claxton)

Facts Deemed Admitted:

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2 36. On or about May 6, 2004 Ms. Jan Claxton met with Respondent to discuss a
3 petition for modification of child support that had been served on her. There, she gave
4 Respondent her file, including all original documents.
5

6 37. On May 14, 2004, Ms. Claxton signed and mailed to Respondent a Retainer
7 Agreement and included a check for \$750.

8 38. On May 25, 2004, Respondent filed a Request for Hearing in Ms. Claxton's
9 case.
10

11 39. Unfortunately, Respondent failed to discern that in fact, Ms. Claxton had been
12 served personally with the petition to modify support on May 3, 2004, and subsequently
13 "served" a second time with an Acceptance of Service, which she executed two days later on
14 May 5, 2004. The court calculated the time for the response from the personal service date
15 instead of the acceptance of service date thereby determining that Respondent's Request for
16 Hearing, filed timely based on the Acceptance of Service was untimely.
17

18 40. Subsequently, on June 16, 2004, Ms. Claxton received a copy of an Order of
19 Assignment, reducing her ex-husband's support payments from \$542.10 to \$213.12. The order
20 also reduced uninsured medical/dental payments from 60% to 35.7%.

21 41. Respondent filed the response on May 25, 2004 at 5:01 p.m. Respondent claims
22 that based upon information received, he had no reason to believe that his responsive motion
23 was filed late. Respondent claimed the error in calculating the response time was compounded
24 by the fact that the Court, for reasons unexplained, failed to mail Respondent a copy of the
25
26

1 Order for Child Support entered on June 11, 2004. Respondent had filed a Notice of
2 Appearance on May 25, 2004.

3 42. Respondent claims Ms. Claxton's ex-husband's effecting the double service was
4 contrary to the Civil Rules. Respondent claimed he immediately began to prepare a motion to
5 set aside the June 11, 2004 order regarding child support pursuant to Rule 60(c) Ariz.R.Civ.P.

6 43. Respondent claims he explained to Ms. Claxton repeatedly the procedural error
7 committed by her husband, and the remedy he proposed. However, Respondent claims that
8 her voice mail messages to him between July 5 and July 10, 2004, became belligerent in tone
9 and blamed him for the status of the case. Respondent admits that due to Ms. Claxton's tone,
10 he resolved to communicate with her only in writing once the work was done.

11 44. Ms. Claxton claims that her phone messages were not belligerent, but did
12 express her concern over the entry of the order. Ms. Claxton, further charges that Respondent
13 failed to return any of her phone messages and only responded by e-mail, on January 12, 2004
14 after she informed him she had retained other counsel.

15 45. When Ms. Claxton retained other counsel on July 11, 2004, Respondent ceased
16 work on the matter and forwarded her file to her new lawyer. Subsequently, on August 5,
17 2004, Respondent received a stipulation for substitution of counsel, which he executed and
18 returned on August 10, 2004. Respondent also forwarded Ms. Claxton's \$750 retainer to
19 successor counsel.

20 46. Ms. Claxton reported that she told Respondent that she received personal
21 service on May 3, 2004, so Respondent could not possibly have been confused about the date
22 of service and therefore should have calculated the response time correctly.
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1 47. Ms. Claxton accuses Respondent of lying in his response regarding his
2 communication with her and restates her position with regard to compensation she believes is
3 adequate, to wit: \$986.94, representing child support arrearage for the three months the matter
4 was pending; and \$1,710.29 the net sum Complainant had to pay substitute counsel to correct
5 the mistakes made by Respondent.

6 48. An Order of Diversion directing respondent to participate in EEP and LOMAP
7 was issued on March 4, 2005. A copy of the order along with an instructional letter was sent
8 by bar counsel to Respondent on March 8, 2005.

9 49. Respondent did not contact LOMAP as instructed. LOMAP sent another letter
10 to Respondent on March 31, 2005. LOMAP attempted to call Respondent, but the telephone
11 numbers provided by Respondent are either out of service or incorrect. To date Respondent
12 has failed to contact LOMAP, EEP or Bar counsel.

13 50. On May 4, 2005, because Respondent failed to respond to the Order of
14 Diversion, the Probable Cause Panelist issued an Order Vacating Order of Diversion. On that
15 date the Probable Cause Panelist also issued a Probable Cause Order directing the State Bar
16 file a complaint charging Respondent with violations of Rule 42 Ariz.R.S.Ct. including but not
17 limited to, ERs 1.2, 1.3, and 1.4 and Rule 32 (c)(3) Ariz.R.S.Ct.

18 **Additional facts proven at hearing:**

19 51. Exhibits 19 to 35 were admitted into evidence in support the allegations of the
20 complaint. [Hr.Tr. 25:24- 26:6]

21 52. The client in COUNT TWO, Jan Claxton, testified that her complaint to the
22 State Bar, Bates page numbered 66 through 98 [marked and admitted as Hr.Ex. 19] was
23 accurate. [Hr.Tr. 28:7-28: 22] Ms. Claxton also testified as to the accuracy of her letter dated
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November 18, 2004, addressed to bar counsel Angela B. Napper. Hr.Tr. 28:23-29:19; see
1 Hr.Ex. 27]

2 53. Ms. Claxton testified she did not believe Respondent should be practicing as "he
3 gives lawyers a very bad name." [Hr.Tr. 32:5-8]

4 54. Ms. Claxton testified that because of Respondent's representation, her child
5 support payments were in arrears for three months at \$328.98 per month for a total of \$986.94.
6 [Hr.Tr.31:10-18; Hr.Ex. 27]

7 55. It cost the Complainant \$1,710.28 in additional attorney fees to correct the
8 problem caused by Respondent. [Hr.Tr. 31:23-32: 4; Hr.Ex. 27]

9 10 11 **Conclusions of Law For Count II**

12 This Hearing Officer finds that there is clear and convincing evidence that Respondent
13 violated Rule 42, Ariz. R. S. Ct., as noted below.

14 56. Respondent violated ER 1.3 by failing to act with reasonable diligence and
15 promptness in representing Ms. Claxton.

16 57. Respondent violated ER 1.4 by failing to promptly inform a Ms. Claxton of
17 circumstances to which her informed consent was required; failed to consult with Ms. Claxton
18 about the means by which her objectives were to be accomplished; failed to keep Ms. Claxton
19 reasonably informed about the status of the matter; failed to promptly comply with reasonable
20 requests for information; and failed to explain a matter to the extent reasonably necessary to
21 permit Ms. Claxton to make informed decisions regarding the representation.

22 58. Respondent violated ER 3.2 by failing to make reasonable efforts to expedite
23 litigation consistent with the interests of Ms. Claxton.
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1 65. On November 21, 2004, Respondent filed a response to the State Bar's charging
2 letter. Therein, Respondent admitted that on April 12, 2004, Ms. Balicki sent an e-mail
3 requesting a consultation regarding paternity and "expungement matters." Respondent also
4 admitted that Ms. Balicki retained him in late April 2004, but that his failure to file the initial
5 paternity complaint was due to Complainant's failure to sign the verification required to attach
6 to and file with the complaint.

7 66. Respondent claimed he left voice messages for Ms. Balicki during the months
8 of May and June asking her to make an appointment. When he did not receive a response to
9 the voice mails, Respondent claimed he wrote a letter to Ms. Balicki (June 12, 2004).
10 Respondent claimed that due to the lack of further contact from Complainant and her failure to
11 make additional payments pursuant to their agreement, he simply closed her file. Respondent
12 denied receiving any payment beyond the initial \$150.00.

13 67. Bar counsel wrote to Ms. Balicki on February 28, 2005 requesting copies of
14 bank records reflecting when and by whom the cashier's checks had been negotiated. In
15 addition, bar counsel wrote to Respondent requesting that he submit a copy of the Complaint to
16 Establish Paternity that he had referenced in his initial response but had neglected to attach.
17 No response was forthcoming and On April 12, 2005 Bar Counsel again wrote to Respondent
18 requesting a copy of the document. Respondent has failed to respond to the specific request
19 for a copy of the Complaint to Establish Paternity.

20 68. Ms. Balicki indicated that she received no telephone messages or mail from
21 Respondent. Responding to a request from Bar counsel, Ms. Balicki submitted copies of
22 cashier's check receipts for the checks she sent to Respondent in May 2004 and June 2004.
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1 Ms. Balicki subsequently advised that when she checked with her credit union, neither
2 cashier's check had been negotiated.

3 69. Bar counsel followed up attempting to contact Respondent but found none of
4 the telephone numbers in the State Bar's membership database to be working. Telephone calls
5 to an alternate number in the membership database came back to a California pool and spa
6 business. Respondent's number listed with the State Bar of California actually belongs to his
7 mother who, when called by Bar counsel, advised that Respondent has moved his Arizona
8 office and that she did not have his new telephone number.

9 70. On May 5, 2005, the probable cause panelist issued an Order of Probable Cause
10 and directed the State Bar to file a Complaint with the disciplinary clerk charging Respondent
11 with violations of Rule 42, Ariz.R.S.Ct., including but not limited to ERs 1.3, 1.4, 1.5 and
12 8.1(b) as well as Rules 32(c)(3) and 53(f) Ariz.R.S.Ct.

13
14 **Additional facts proven at hearing evidence:**

15 71. Exhibits. 37 through 59 were admitted into evidence in support the charges
16 alleged in Count 3 of the Complaint. [Hr.Tr. 36:10-15]
17

18 72. The client in Count 3, Yolanda Balicki, testified that the document numbered
19 "160", offered and admitted as Hr.Ex.37, was a copy of the charge she filed with the State Bar
20 concerning Respondent. [Hr.Tr. 38:11-20 3; Hr.Ex. 37]

21 73. Ms. Balicki also testified as to the authenticity of pages numbered 184 through
22 189. [Hr.Tr. 38:24-39:16; Hr.Ex. 46]
23

24 74. Ms. Balicki testified that because of her encounter with Respondent, her son's
25 father is not paying a child-support; she is skeptical to go to another lawyer for help; her son is
26 2 1/2 years old and she is raising him by herself without any assistance. [Hr.Tr. 41:13-23]

1 75. Ms. Balicki incurred \$36 in fees to stop payment on cashier's checks that she
2 drew from her account to pay Respondent. The checks had not been cashed. [Hr.Tr. 42:13-
3 43:3]

4 **Conclusions of Law For Count III**

5 76. Respondent violated ER 1.3 by failing to act with reasonable diligence and
6 promptness and representing Ms. Balicki.

7 77. Respondent violated ER 1.4 by failing to promptly inform Ms. Balicki of
8 circumstances to which her informed consent was required; failed to consult with Ms. Balicki
9 about the means by which her objectives were to be accomplished; failed to keep Ms. Balicki
10 reasonably informed about the status of the matter; failed to promptly comply with reasonable
11 requests for information; and failed to explain a matter to the extent reasonably necessary to
12 permit Ms. Balicki to make informed decisions regarding the representation.
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14 78. Respondent violated ER 1.5 by charging an unreasonable fee, as the services
15 provided were worthless to Ms. Balicki.
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17 79. Respondent violated ER 8.1(b), Rule 53(d) and rule 53(f) Ariz.R.S.Ct. by
18 knowingly failing to respond to a lawful demand for information from a disciplinary authority
19 in his failure to provide a copy of the Complaint to Establish Paternity repeatedly requested by
20 bar counsel.
21

22 80. Respondent violated Rule 32 (c)(3) Ariz.R.S.Ct. by failing to "provide to the
23 State Bar office, a current street address, telephone number," or "any other post office address
24 the member may use."
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1 81. Respondent's conduct in all the foregoing respects was prejudicial to the
2 administration of justice in violation of ER 8.4(d)

3 **Additional Conclusions of Law - Default**

4 82. Respondent filed his Motion for Extension of Time to File Answer and then
5 failed to answer, failed to provide the Disciplinary Clerk of the Arizona Supreme Court with a
6 correct address or in the alternative failed to accept mail at such address as Respondent
7 provided. Respondent then defaulted to the Complaint and failed to attend or participate in the
8 Aggravation Mitigation hearing herein. Such conduct constitutes a refusal to cooperate with
9 officials and staff of the State Bar and the Hearing Officer acting in the course of their duties
10 and therefore violated Rule 53(d) Ariz.R.S.Ct.
11

12 **Summary of Violations.**

13 Based on the record, the following violations have been proven by clear and convincing
14 evidence:
15

16	ER 1.2 Scope of Representation	
17	[file nos. 04-1290]:	1 violation
18	ER 1.3 Diligence	
19	[file nos. 04-1290, 04-1509, 04-1589]:	3 violations
20	ER 1.4 Communication	
21	[file nos. 04-1290, 04-1509, 04-1589]:	3 violations
22	ER 1.5 Fees [04-1589]:	1 violation
23	ER 8.1(b) Bar Admission and Disciplinary Matters	
24	Rule 53(d) (Grounds for Discipline:	
25	Evading Service or refusal to cooperate);	
26	53(f) (Grounds for Discipline: Failure to	
	furnish information) -	
	[file nos. 04-1589]:	1 violation

1	Rule 32(c)(3) Ariz.R.Sup.Ct. (failing to provide current address to State Bar)	
2	[file nos. 04-1290, 04-1509]:	1 violation
3	8.4(d) (Misconduct-prejudicial to the administration of justice)	
4	[file nos. 04-1290, 04-1509	3 violations
5	Rule 53(d) Ariz.R.S.Ct. (Grounds for Discipline along refusal to cooperate with <u>staff of the State Bar and the Hearing Officer:</u>	<u>1 violation</u>
6		
7		
8	TOTAL:	<u>14 violations</u>
9		

10 **ABA STANDARDS**

11 In determining an appropriate sanction, the American Bar Association's Standards for
12 Imposing Lawyer Sanctions (*Standards*) should be considered. *In re Rivkind*, 164 Ariz. 154,
13 157, 791 P.2d 1037, 1040 (1990). The *Standards* list the following factors to consider in
14 imposing an appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
15 actual or potential injury caused by the misconduct, and (4) the existence of aggravating and
16 mitigating factors.

17 **Duty violated and lawyer's mental state:**

18
19 According to the *Standards* and *In re Cassalia*, 173 Ariz. 372, 843 P.2d 654 (1992),
20 where there are multiple acts of misconduct, a lawyer should receive one sanction consistent
21 with the most serious instance of misconduct. The other acts should be considered as
22 aggravating factors. *Id.* Respondent engaged in a pattern of knowingly failing to diligently
23 represent clients and failing to communicate with his clients. These are both equally serious
24 violations.
25
26

1 ABA Standard 4.4 Lack of Diligence, applicable to a lawyer's violations of duties of
2 diligence provides:

3 ABA Standard 4.41 provides:

4 *Disbarment is generally appropriate when:*

5 (c) *a lawyer abandons the practice and causes serious or potentially serious injury
6 to a client; or*

7 (b) *a lawyer knowingly fails to perform services for a client and causes serious or
8 potentially serious injury to a client; or*

9 (c) *a lawyer engages in a pattern of neglect with respect to client matters and
10 causes serious or potentially serious injury to a client.* [Emphasis added]

11 ABA Standard 4.42 provides:

12 *Suspension is generally appropriate when:*

13 (a) *a lawyer knowingly fails to perform services for a client and causes injury or
14 potential injury to a client, or*

15 (b) *a lawyer engages in a pattern of neglect and causes injury or potential injury to
16 a client.*

17 Standard 4.41 applies because of the pattern of neglect. Respondent neglected three
18 separate unrelated clients.

19 Respondent's failure to participate in these discipline proceedings is also troublesome.
20 *Standard 7.0, Violations of other Duties Owed as a Professional*, is applicable to conduct
21 concerning a lawyer's conduct in connection with a lawyer discipline matter. In this regard,
22 the Respondent's failures to comply with terms of diversion, and failures to cooperate with
23 staff of the State Bar.

24 ABA Standard 7.2 provides:

25 *Suspension is generally appropriate when a lawyer knowingly engages in conduct
26 that is a violation of a duty owed as a professional, and causes injury or potential
injury to a client, the public, or the legal system.*

1 To Respondent's failure to participate in diversion, failure to provide documents
2 requested by bar counsel and failure to file an answer after requesting an extension of time to
3 do so in these proceedings support a conclusion Respondent's failure to cooperate, failure to
4 respond to the State Bar and failure to participate in these disciplinary proceedings should be
5 deemed "knowing" conduct such that Standard 7.2, would apply.

6 **Actual or potential injury caused by the misconduct:**

7 The ABA Standards do not distinguish between "actual injury" and "potential injury" in
8 determining an appropriate sanction:

9
10 *The injury resulting from the late lawyer's misconduct need not be actually realized;*
11 *in order to protect the public, the court should also examine of the potential for*
12 *injury caused by the lawyers misconduct. In a case where a lawyer intentionally*
13 *converts client funds, for example, disbarment can be imposed even where there is*
14 *no actual injury to any client (see Standard 4.11).*

15 ABA Standards, at page 25, Commentary.

16 The ABA standards do make distinctions between various levels of actual or potential
17 injury for purposes of determining an appropriate sanction. Generally disbarment is reserved
18 for cases of "serious or potentially serious injury" whereas suspension is generally considered
19 appropriate where the misconduct results in "injury or potential injury." For example, ABA
20 Standard 4.41 provides for disbarment when a lawyer's lack of diligence causes "serious or
21 potentially serious injury to a client" whereas ABA standard 4.42 provides for suspension
22 when the lawyers lack of diligence causes "injury or potential injury to a client."

23 The Commentary to *ABA standard 4.41* sites as an example of "serious injury" the case
24 of *The Florida Bar v. Lehman*, 417 So. 2d 648 (Fla. 1982), in which one client's statute
25 limitations ran, and many of 450 abandoned clients never recovered the money they paid to the
26 lawyer as fees. *ABA Standards* at page 32, Commentary to 4.41. In contrast, the commentary

1 to ABA Standard 4.42 cites cases in which one client suffered a default judgment which forced
2 her to settle and pay a second lawyer, and two cases in which the clients suffered the loss of the
3 fee. *ABA Standards* at page 33, Commentary to 4.42

4 The loss of important rights by a client without a "day in court" that results from a
5 lawyer's neglect of the client is inherently a serious injury. In file 04-1290, Ms. Schutz had a
6 default judgment entered against her and incurred significant legal fees in an unsuccessful
7 attempt to get the default set aside. In file 04-1509, Ms. Claxton lost child support and had to
8 incur additional legal fees to correct the problem caused by Respondent. In file 04-1589, Ms.
9 Balicki, at the very least has been significantly delayed in her effort to establish paternity and
10 recover child support such that she has been raising her young son without support or other
11 assistance from the father of the child. In total, there was clear and convincing evidence of
12 "serious injury" or "serious potential injury" to all three clients.
13

14 **Aggravating and mitigating factors**

15 The ABA Standards identify aggravating and mitigating factors. Standard 9.22
16 identifies factors which may be considered in aggravation and Standard 9.32 identifies factors
17 which may be considered in mitigation.
18

19 This Hearing officer finds there are no mitigating factors present.

20 Aggravating factors present in this matter include:

21 9.22(c) pattern of misconduct;

22 9.22(d) multiple offenses;

23 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to
24 comply with the rules or orders of the disciplinary agency;

25 9.22(g) refusal to acknowledge wrongful nature of conduct;
26

9.22(i) substantial experience in the practice of law;

9.22(j) indifference to making restitution.

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 Court has also indicated that an effective system of professional sanctions requires internal consistency, and that in determining an appropriate sanction in a particular case it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 27, 41, 90 P.3d 764, 778 (2004)

A review of prior cases with similar facts reveals sanctions ranging from six-month and one-day suspensions to disbarment. Pertinent cases, generally involving a lawyer's failure to participate in disciplinary proceedings, in addition to whether misconduct, are also noted below.

In *In re Hoover*, DC Nos. 03-1249, et al., SB-05-0145-D. (Arizona Supreme Court, 11/20/05), the lawyer was found in default after failing to file answer a six count complaint. Conduct deemed admitted by default included not only a failure to participate in diversion but included violations of ER's 1.2, 1.3, 1.4, 1.5(c), 1.15, 1.16, 3.2, 8.1(b) and 8.4(d) as well as Rules 43(d), 44, 53(d), 53(e) and 53(f) Ariz.R.S.Ct. Factors found in aggravation included prior disciplinary offenses (9.22(a)), dishonest or selfish motive (9.22(b)), a Pattern of Misconduct (9.22(c)), Multiple Offenses (9.22(d)), bad faith obstruction of the disciplinary proceeding(9.22(e)), and substantial experience in the practice of law (9.22(i)). The hearing

1 officer recommended a three-year suspension, but the Disciplinary Commission, modified the
2 recommendation to recommended disbarment which was adopted by the Supreme Court.

3 The parallels to *In re Hoover* include multiple clients, (*In re Hoover*, 4 clients,
4 Respondent, 3 clients), bad faith obstruction of discipline proceedings, and a pattern of
5 misconduct. However, a close review of *In re Hoover* shows a more serious pattern of conduct
6 was present in *In re Hoover*. The findings in *In re Hoover* included trust account violations,
7 prior discipline proceedings and the aggravating factor of dishonest or selfish motive. None of
8 these findings are present in the Respondent's case. In contrast to the finding of dishonest or
9 selfish motive, Respondent Christof undertook representation in two of the cases (Diana
10 Schutz-count 1, Yolanda Balicki-count 3) for an essentially *pro bono* rate of \$150 per month.
11

12 In *In re Augustine*, DC Nos. 02-0207, et al., SB-04-0114-D (Arizona Supreme Court
13 10/29/04) the lawyer failed to file an answer but participated in an aggravation mitigation
14 hearing. Misconduct deemed admitted by default included violations of ERs 1.3, 1.4, 1.15(b),
15 1.16(d), 8.1, and 8.4 (c) and (d). The hearing officer recommended a 6 month and 1 day
16 suspension and restitution but the Disciplinary Commission modified the hearing officer's
17 findings and conclusions and recommended a 2 year Suspension and Restitution, which was
18 adopted by the Supreme Court.. Factors found in aggravation included 9.22(c) (d) (e) and (i) in
19 mitigation: 9.32(a) (b) (g) and (l).
20

21 In *In re Morrison*,. DC No. 03-0245, SB-04-0075-D (Arizona Supreme Court 05/27/04)
22 Misconduct deemed admitted by default included findings that Respondent failed to appear at
23 the time set for a court hearing in a criminal matter, requested the hearing be continued, then
24 again failed to appear, and instead sent a handwritten motion to continue via facsimile and
25 falsified the time the motion was sent. The court then issued a warrant for the client's arrest and
26

1 set an order to show cause hearing regarding Respondent's actions. The next day court staff
2 telephoned Respondent and directed him to appear for a hearing that afternoon. Respondent
3 was 45 minutes late and the hearing was rescheduled. At the rescheduled hearing, the court
4 sanctioned Respondent \$250 and referred the matter to the State Bar for investigation.
5 Thereafter, Respondent failed to respond to the State Bar, filed an untimely answer to the State
6 Bar's notice of default, twice provided the State Bar and assigned hearing officer with an
7 invalid mailing address, and failed to appear and participate in the formal proceedings against
8 him. ERs 1.3, 3.3, 8.1(b), 8.4(c) and (d), and SCRs Rule 51(h) and (i). The hearing officer on
9 Disciplinary Commission agreed and recommended a sanction of a 6 months and 1 day
10 Suspension and MAP screening prior to reinstatement factors found in aggravation included
11 prior disciplinary offenses (9.22(a)), dishonest or selfish motive (9.22(b)), multiple offenses
12 (9.22(d)), bad faith obstruction of the disciplinary proceeding (9.22(e)), refusal to acknowledge
13 wrongful nature of conduct (9.22(g)) and indifference to making restitution (9.22(i)). No
14 factors were found in mitigation.
15

16
17 In *In re Brady*, 186 Ariz. 370, 923 P.2d 836 (1996) the lawyer was disbarred after he
18 abandoned cases of several clients and violated ERs 1.1, 1.3, 1.4, 1.5, 1.15, 1.16, 3.3, 8.1 and
19 8.4. Applicable aggravating factors included a prior disciplinary history (9.22(a)) and failure to
20 cooperate with the State Bar (9.22(e)). No mitigating factors were found. Respondent
21 appeared and participated in some, but not all phases of the disciplinary proceeding.
22

23 The conduct in *In re Brady* involved a total of ten clients. The degree of injury to the
24 various clients in *In re Brady* ranged from a prison sentence of up to thirty-five years for one
25 client, to loss of important legal rights for several clients and loss of probate property for
26 another client. *In re Brady* like *In re Hoover* the Respondent had a history of prior discipline.

1 In *Matter of Hart*, SB-02-0119-D (2002) an agreement for a two-year suspension with
2 two years of probation was accepted where Respondent Hart failed to diligently represent his
3 clients, failed to adequately communicate with his client, failed to provide an accounting, failed
4 to take steps to protect his clients' interests, mishandled trust account funds, commingled
5 personal funds with client funds, failed to keep accurate trust account records and failed to
6 respond to State Bar counsel's inquiries during a State Bar investigation. Hart's conduct
7 violated ERs 1.1, 1.2, 1.3, 1.4, 1.15(a), 1.15(b), 1.16, 8.1(a), 8.1(b), 8.4; and SCRs Rules
8 43(a), 43(d), 44(a), 51(h) and 51(i). Factors found in aggravation included, dishonest or selfish
9 motive (9.22(b)), pattern of misconduct (9.22(c)), multiple offenses (9.22(d)), bad faith
10 obstruction of the disciplinary proceeding (9.22(e)), and (f) submission of false evidence, false
11 statements, or other deceptive practices during the disciplinary process (9.22(f)). Factors found
12 in mitigation were absence of a prior disciplinary record 9.32(a), personal or emotional
13 problems (9.32(c)) and remorse (9.32(l)).

14
15 In *In re Augustine*, 178 Ariz. 133, 871 P.2d 254 (1994), a two-year suspension was
16 imposed after a hearing on a three count complaint wherein the misconduct found included
17 failing to have a client's complaint served on a defendant, allowing clients' cases to be
18 dismissed for lack of prosecution, failing to inform clients their cases had been dismissed,
19 failing to communicate with clients, failing to adequately investigate a client's case and failing
20 to cooperate with the State Bar investigation in violation of ERs 1.1, 1.3, 1.4, 3.2, and Rules
21 51(h) and (i) Ariz.R.S.Ct. An additional disciplinary matter which resulted in a censure while
22 this case was pending was considered as prior discipline.
23
24
25
26

RECOMMENDATION

1 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
2 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320
3 (1993). Another purpose is to instill public confidence in the bar's integrity. *Matter of*
4 *Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

5
6 After considering the facts, the *ABA Standards*, the aggravating and mitigation
7 factors, and a proportionally analysis, this Hearing Officer recommends the following:

- 8 1. That the Respondent be suspended for a period of two years, to be followed by a
9 MAP assessment and two years probation upon reinstatement.
- 10 2. That the Respondent be ordered to pay restitution as follows:
 - 11 a. \$8,356.91 to Diana Schutz,
 - 12 b. \$2697.22 to Jan Claxton, and
 - 13 c. \$36 to Yolanda Balicki.
- 14 3. Respondent shall pay the costs and expenses incurred in these disciplinary
15 proceedings.
16

17
18 DATED this 17th day of February, 2006.

19
20 
21 Neal C. Taylor
22 Hearing Officer 8I

23
24 Original filed with the Disciplinary Clerk
25 this 17th day of February, 2006.

26 Copy of the foregoing mailed
this 17th day of February, 2006, to:

1 Kevin F. Christof
2 Respondent
3 *Law Office of Kevin F. Christof*
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5 Phoenix, AZ 85016-0001

6 and

7 Kevin F. Christof
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11 Loren J. Braud
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16 by: *P. Williams*

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