

FILED

FEB 27 2006

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

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

IN THE MATTER OF A MEMBER) Nos. 04-0685, 04-1439, 05-0211
OF THE STATE BAR OF ARIZONA,) 05-1141
)
TIMOTHY FORSHEY,)
Bar No. 013003)
) **HEARING OFFICER'S REPORT**
)
RESPONDENT.)

PROCEDURAL HISTORY

A Complaint was filed on September 19, 2005. Respondent filed an Answer on October 18, 2005. The Settlement Officer held a settlement conference on November 8, 2005, at which time the parties were not able to reach an agreement. The State Bar filed a Notice of Settlement on January 9, 2006 indicating the parties had reached an agreement. A Tender of Admissions and Agreement for Discipline by Consent (Tender) and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent (Joint Memo) were filed on January 25, 2006. No hearing has been held in this matter.

1 **FINDINGS OF FACT**

2 1. At all times relevant, Respondent was an attorney licensed to practice
3 law in the State of Arizona, having been admitted to practice in Arizona on May
4 19, 1990.
5

6 **Count One (File No. 04-0685, Kisseberth)**

7 2. Paul Kisseberth (Complainant) and his son Charles were in a car
8 accident in June of 1998.
9

10 3. As a result of the car accident Charles was seriously injured.

11 4. Complainant and his ex-wife, Lucinda Cousino, shared joint custody of
12 Charles at the time of the accident.
13

14 5. Respondent represented Ms. Cousino in her 1997 divorce and custody
15 proceedings against Complainant.

16 6. Complainant and Ms. Cousino initially enlisted the assistance of a
17 paralegal in settling Charles' personal injury claim resulting from the June 1998
18 car accident.
19

20 7. Complainant and Ms. Cousino contemplated that a conservatorship
21 would be established in order to protect any funds received by Charles in his
22 personal injury case.
23

24 8. Complainant filed a pro-per petition for Appointment of Conservator on
25 September 5, 2001.

1 9. Pursuant to settlement negotiations, on October 29, 2001, Allstate
2 Insurance also filed a petition for Appointment of Conservator and Approval of
3 Settlement on behalf of Complainant.
4

5 10. On November 1, 2001, at a scheduled hearing, Ms. Cousino appeared
6 without counsel and objected to the appointment of Complainant as conservator.
7 The hearing was continued.
8

9 11. On January 15, 2002, at the rescheduled hearing, Ms. Cousino appeared
10 with Respondent as her lawyer and again objected to the appointment of
11 Complainant as conservator and objected to the settlement that Complainant had
12 negotiated with Allstate Insurance.
13

14 12. Ms. Cousino told Complainant that she wanted the proposed settlement
15 reviewed by an attorney and explained that was her reason for bringing
16 Respondent to the hearing.
17

18 13. The court continued the January 15, 2002 hearing allowing Ms. Cousino
19 the opportunity to file with the court a cross-petition for Appointment of
20 Conservator.
21

22 14. On January 17, 2002, Ms. Cousino signed a fee agreement with
23 Respondent, whereby Respondent purportedly agreed to represent Charles in the
24 personal injury case. Ms. Cousino signed the agreement as "client, on my own
25 behalf and on behalf of my minor son."

1 15. On February 13, 2002, Respondent filed a Petition for Appointment of
2 Conservator on Ms. Cousino's behalf.

3
4 16. On February 28, 2002, at the suggestion of the court, Complainant
5 agreed to meet with Ms. Cousino and Respondent to discuss the proposed
6 personal injury settlement.

7 17. If called upon, Complainant would testify that when the parties met,
8 Respondent advised Complainant that Complainant could not be Charles'
9 conservator because he was 25 percent responsible for the car accident. Further,
10 Complainant would testify that Complainant believed that Respondent was acting as
11 his attorney at the time the advice was given.
12

13
14 18. On April 22, 2002, Complainant signed a fee agreement with
15 Respondent, whereby Respondent purportedly agreed to represent Charles in the
16 personal injury case. Complainant signed the agreement as "client, on my own
17 behalf and on behalf of my minor son."
18

19 19. On October 6, 2003, the court appointed Ms. Cousino as Charles'
20 conservator and approved the settlement of Charles' personal injury matter.

21 **Count Three (File No. 05-0211, Robin)**

22 20. Colleen Robin (Complainant) and her husband contacted Respondent on
23 June 17, 2004, regarding representation in a child-custody matter.
24
25

1 21. The child-custody orders originated in California. Complainant resides
2 in Arizona. Complainant's ex-husband, father of the child in question, upon
3 information and belief, also moved from California to Arizona in May of 2003.
4

5 22. Complainant believed that her ex-husband was moving from Arizona to
6 Colorado in the summer of 2004.

7 23. At their initial meeting, Respondent recommended to Complainant that
8 the California child-custody orders be domesticated to Arizona. Respondent
9 quoted a flat fee of \$1,000.00 plus a \$200.00 filing fee to prepare the
10 domestication documentation as an unbundled service for Complainant. The fee
11 did not include a court appearance.
12

13 24. Respondent told Complainant that he would charge an additional
14 \$5,000.00 retainer if representation was required beyond that set forth in the fee
15 agreement.
16

17 25. On June 25, 2004, Complainant paid Respondent \$1,200.00 to initiate
18 the domestication proceedings.
19

20 26. If called upon, Complainant would testify that on June 26, 2004, she
21 received a telephone call from her ex-husband's lawyer in California advising
22 that the California court had set the matter for a hearing on June 28, 2004.
23
24
25

1 27. Complainant would testify that upon learning of the hearing she
2 contacted Respondent's office on the same day, and was advised by Respondent's
3 legal assistant that the judge would likely address the jurisdictional issues.
4

5 28. Complainant would testify that Respondent's assistant also told her that
6 the domestication documentation had been sent to Complainant's ex-husband's
7 Scottsdale address.
8

9 29. Respondent filed the Request to Domesticate a Foreign Judgment with
10 the Maricopa County Clerk of Superior Court on June 30, 2004.
11

12 30. Sometime prior to going to California, Complainant advised
13 Respondent that her ex-husband was not moving to Colorado, but was returning
14 to California.
15

16 31. Complainant attended the hearing in California on June 28, 2004, and
17 would testify that after the hearing her understanding was that the California court
18 no longer had jurisdiction over the case.
19

20 32. As a result of the June 28, 2004 California hearing, an order to show
21 cause hearing was scheduled in California for July 21, 2004.
22

23 33. Complainant went to Respondent's office upon her return to Arizona
24 and advised Respondent that she wished to retain him for the balance of the
25 matter and paid an additional \$1,000.00 toward his services.

1 34. Respondent did not prepare a new fee agreement reflecting the fee or
2 the scope of representation for his additional services.

3
4 35. Complainant would testify that in August of 2004, Respondent began to
5 seem rather "defeated" and complained that her ex-husband had hired an
6 expensive lawyer.

7
8 36. Complainant would testify that on January 25, 2005, she received a
9 phone call from Respondent's office informing her that the motion for
10 domestication had been dismissed.

11 37. On January 26, 2005, Complainant went to Respondent's office to
12 discuss the matter.

13
14 38. In a minute entry dated January 24, 2005, dismissing the Petition for
15 Modification, Maricopa County Superior Court Judge Margaret Mahoney found
16 that Complainant (and therefore Respondent on Complainant's behalf) appeared
17 "to not have been forthcoming with the Arizona Court in the representations
18 made and importantly, representations not made, such as the fact of the California
19 proceedings in the Petition for Modification." A copy of the minute entry was
20 attached to the Complaint in this matter as Exhibit A.

21
22 39. Judge Mahoney further found that Respondent failed to register the
23 California judgment and order in compliance with Arizona statutes, specifically
24 by failing to provide notice to the father/ex-husband.
25

1 40. Respondent failed to undertake independent efforts to ascertain the
2 status of the California case prior to filing the Request to Domesticate the Foreign
3 Judgment or the Petition for Modification.
4

5 **Count Four (File No. 05-1141, State Bar of Arizona)**

6 41. Several minute entries from two cases in the Superior Court of
7 Maricopa County were anonymously submitted to the State Bar.
8

9 42. In the first case, *Caroline Anne Newcomb, et al v James R. Bair, et al*,
10 CV 1992-022705, Respondent represented plaintiffs in a medical malpractice
11 case involving the death of a woman in childbirth.
12

13 43. When Respondent was attorney of record in late 2001, several
14 defendants filed motions for summary judgment to which Respondent did not
15 respond on plaintiffs' behalf.
16

17 44. The court granted summary judgment in favor of the defendants in May
18 2002. A copy of the minute entry was attached to the Complaint in this matter as
19 Exhibit B.
20

21 45. Respondent filed a Notice of Appeal on behalf of plaintiffs, but the
22 appeal was later dismissed as abandoned.
23

24 46. In November 2004, plaintiffs, having retained new counsel, urged the
25 court to re-open the case and to vacate the judgments citing extraordinary
circumstances and the total abandonment of their case by Respondent.

1 47. Maricopa County Superior Court Judge Rebecca Albrecht issued a
2 minute entry on March 14, 2005, detailing the case history and denying the
3 plaintiffs' request. The previous judgment was affirmed. A copy of the minute
4 entry was attached to the Complaint in this matter as Exhibit C.
5

6 48. In the second case, *John Murphy v Richard A. Mickle, et al.*, CV 2002-
7 000066, Respondent represented the plaintiff in a medical malpractice case.
8

9 49. Maricopa County Superior Court Judge Roger W. Kaufman issued a
10 minute entry on January 9, 2003, granting unopposed motions for summary
11 judgment as to two defendants.
12

13 50. On April 28, 2003, Judge Kaufman granted three additional motions for
14 summary judgment and a motion to dismiss for lack of prosecution, all without
15 opposition from Respondent on behalf of the plaintiff.
16

17 51. Regarding a defendant's motion for attorney's fees, the court granted
18 the motion, but withheld a decision with respect to the amount of the judgment
19 allowing counsel to either stipulate to an amount or allowing defendant to file a
20 statement in support of a specific claim.
21

22 52. Regarding three additional motions for summary judgment, the court
23 heard argument and allowed Respondent no more than four days to file on behalf
24 of the plaintiff, controverting affidavits sufficient to defeat summary judgment.
25

1 53. Two of the three additional motions for summary judgment were
2 granted, Respondent having failed to provide the affidavits as allowed by the
3 court.
4

5 54. On August 11, 2003, the court sanctioned Respondent personally for
6 repeatedly failing to respond to outstanding discovery and causing unnecessary
7 delay. The court found that in representing the plaintiff Respondent delayed the
8 proceedings by failing to respond to discovery in a timely manner, by engaging in
9 the abuse of discovery by not responding appropriately and by failing to dismiss
10 voluntarily once he became aware that there was not a good faith basis to proceed
11 against certain defendants. The court awarded attorney fees to three of the
12 defendants against Respondent personally, totaling \$22,345.50. Respondent paid
13 the fees in full in December 2003. A copy of the minute entry was attached to the
14 Complaint in this matter as Exhibit D.
15
16

17 **CONDITIONAL ADMISSIONS & DISMISSALS**
18

19 Respondent conditionally admits that his conduct, as set forth above,
20 violated the following Rules of Professional Conduct and the Rules of the
21 Supreme Court:
22

23 **Count One (File No. 04-0685, Kisseberth)**

24 By failing to identify the conflict of interest in representing Ms. Cousino,
25 Complainant, and Charles Kisseberth, a minor, when the representation of any

1 one of those persons was directly adverse to the representation of another,
2 Respondent violated ER 1.7(a).¹ Respondent had no basis to reasonably believe
3 that the representation of one client would not adversely affect the relationship
4 with the others, and Respondent failed to obtain each client's consent after
5 consultation regarding the representation.
6

7 **Count Three (File No. 05-0211, Robin)**

8
9 Respondent failed to diligently research Complainant's California case
10 prior to filing the domestication pleadings in Arizona and failed to adequately
11 supervise his staff's efforts to obtain information about the case prior to filing
12 the domestication pleadings in Arizona. By these failures, Respondent violated
13 ERs 1.3 and 5.3.
14

15 The Court found Complainant and, therefore, Respondent, less than
16 forthcoming about the status of the case in California and the residence of the
17 ex-husband. By this conduct, Respondent violated ERs 3.3(a), 4.1(a), and 8.4(c)
18 and (d).
19

20 By failing to comply with notice requirements of the specifically
21 applicable statutes in providing notice to Complainant's ex-husband,
22 Respondent lacked diligence and therefore violated ER 1.3.
23

24
25 ¹ The applicable ethical rule is that in place prior to the amendments effective December 1,
2003.

1 By failing to memorialize the scope of representation after being paid an
2 additional \$1,000.00 to appear as attorney of record and petition for
3 modification of child support, Respondent violated ER 1.5(b).
4

5 **Count Four (File No. 05-1141, State Bar of Arizona)**

6 By failing to respond to motions for summary judgment in the *Newcomb*
7 matter, Respondent violated ERs 1.3 and 3.2.
8

9 By failing to respond to motions for summary judgment in the *Murphy*
10 matter, Respondent violated ERs 1.3 and 3.2.

11 By failing to respond to discovery requirements in the *Murphy* matter,
12 Respondent violated ER 3.4(d) and 8.4(d).
13

14 In exchange for the admissions set forth above, the State Bar conditionally
15 dismisses alleged violations as follows:

16 **Count One (File No. 04-0685, Kisseberth)**

17 The allegation set forth in paragraph number 24 of the Complaint which
18 states that: By failing to consult with Ms. Cousino and Complainant and obtain
19 their informed consent in writing to proceed with the representation despite the
20 conflict of interest, Respondent violated ER 1.7(b).
21

22 **Count Two (File No. 04-1439, Kennedy)**

23 The parties agree that Count Two shall be conditionally dismissed in its
24 entirety. Specifically, the allegations that Respondent violated ERs 1.8(a) and
25

1 1.14 are dismissed. The parties agree that including this count in the admissions
2 would not enhance the sanction beyond censure. The parties further agree that
3 admissions in the other counts adequately justify a sanction of censure, and
4 therefore admissions in Count Two are unnecessary to reach the negotiated
5 disposition.
6

7 Respondent submits the allegations set forth in Count Two of the
8 Complaint are not supported by the evidence, and in the interest of justice,
9 should be dismissed. The State Bar agrees that dismissal is appropriate and in
10 the interests of justice.
11

12 **Count Three (File No. 05-0211, Robin)**
13

14 A portion of the allegation set forth in paragraph number 111 of the
15 Complaint which states that: By failing to comply with notice requirements of
16 the specifically applicable statutes in providing notice to Complainant's ex-
17 husband, Respondent lacked competence and violated ER 1.1.
18

19 **ABA STANDARDS**

20 The *ABA Standards* list the following factors to consider in imposing the
21 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
22 actual or potential injury caused by the lawyer's misconduct, and (4) the
23 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*
24
25

1 The parties indicated that *Standard 4.0* (Violations of Duties Owed to
2 Clients) and *Standard 6.0* (Violations of Duties Owed to the Legal System) are
3 the most applicable in this matter. A review of ABA *Standard 4.3* (Failure to
4 Avoid Conflicts of Interest), *Standard 4.4* (Lack of Diligence) and *Standard 6.2*
5 (Abuse of the Legal Process) indicates that censure is the presumptive sanction
6 for Respondent's misconduct.
7

8 *Standard 4.33* specifically provides:
9

10 Reprimand [censure in Arizona] is generally appropriate when a
11 lawyer is negligent in determining whether the representation of a
12 client may be materially affected by the lawyer's own interests or
13 whether the representation will adversely affect another client, and
14 causes injury or potential injury to a client.

15 *Standard 4.43* specifically provides:
16

17 Reprimand [censure in Arizona] is generally appropriate when a
18 lawyer is negligent and does not act with reasonable diligence in
19 representing a client, and causes injury or potential injury to a client.
20

21 *Standard 6.23* specifically provides:
22

23 Reprimand [censure in Arizona] is generally appropriate when a
24 lawyer negligently fails to comply with a court order or rule, and
25 causes injury or potential injury to a client or other party, or causes
interference or potential interference with a legal proceeding.

26 Respondent violated duties owed to his clients and duties owed to the legal
27 system.

28 Respondent's mental state was that of negligence, rather than knowing
29 misconduct. The multiple infractions contained in the conditional admissions all

1 suggest that although Respondent may have lacked malice, he certainly did not
2 act with vigilance and strict adherence to the high standards set forth in the rules
3 of professional conduct.
4

5 For the purposes of this agreement, the parties agree that in counts one and
6 three there was at least potential injury to Respondent's clients. The actual injury
7 suffered by Respondent's clients, particularly Paul Kisseberth and Colleen Robin,
8 is mitigated, albeit minimally, by the fact that each had the opportunity to seek
9 some recourse from the court to address those matters affected by Respondent's
10 neglect.
11

12 Respondent's failure to follow the rules of discovery in the *Murphy* matter
13 as set forth in count four caused actual injury or potential injury to the opposing
14 parties and caused interference or potential interference with the legal
15 proceedings.
16

17 **AGGRAVATING AND MITIGATING FACTORS**

18
19 I then considered aggravating and mitigating factors in this case, pursuant
20 to *Standards* 9.22 and 9.32, respectively.

21 I agree with the parties that there are three applicable aggravating factors in
22 this matter:
23
24
25

- 1 (a) prior disciplinary offenses;²
2 (c) a pattern of misconduct; and,
3 (i) substantial experience in the practice of law.
4

5 This Hearing Officer agrees with the parties that four factors are present in
6 mitigation:

- 7 (c) personal and emotional problems;³
8 (e) full and free disclosure to disciplinary board or cooperative attitude
9 toward proceedings;
10 (k) imposition of other penalties and sanctions; and,
11 (m) remoteness of prior offenses.
12

13 PROPORTIONALITY REVIEW

14
15 To have an effective system of professional sanctions, there must be
16 internal consistency, and it is appropriate to examine sanctions imposed in cases
17 that are factually similar. *Peasley, supra*, at ¶ 33, 90 P.3d at 772. However, the
18 discipline in each case must be tailored to the individual case, as neither
19 perfection nor absolute uniformity can be achieved. *Id.* at ¶ 61, 90 P.3d at 778,
20

21
22 ² In November 1992, Respondent received an informal reprimand for misconduct involving
23 violations of ER 4.4 and Rule 41(d). A copy of the informal reprimand was filed in this matter
24 with a Notice of Intent to Use Prior Discipline and attached thereto as Exhibit A to the Joint
Memo.

25 ³ Respondent was grieving the loss of two close family members and therefore suffering from
personal and emotional problems at the time some of the misconduct occurred. The
circumstances are more fully discussed in a letter prepared by Respondent and attached as
Exhibit A to the Joint Memo.

1 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135
2 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). The cases set forth below demonstrate
3 that a censure is an appropriate disciplinary response.
4

5 Cases set forth below demonstrate that both censure and suspension would
6 be appropriate disciplinary responses within the range of possible sanctions.
7 However, the three cases resulting in censure are more similar to the facts set
8 forth in Respondent's case and are therefore persuasive.
9

10 *In re Harrison* SB-05-0016-D (2005), Harrison failed to correct his client's
11 dishonest answers and failed to diligently respond to discovery requests. Harrison
12 received a censure and was placed on probation for two years with LOMAP and a
13 practice monitor. There was one aggravating factor (pattern of misconduct), and
14 four mitigating factors (absence of prior disciplinary record; absence of dishonest
15 or selfish motive; inexperience in the practice of law; and imposition of other
16 penalties or sanctions).
17
18

19 *Harrison* contains elements present in Counts Three and Four of the
20 complaint against Respondent. Respondent failed to correct and/or failed to
21 diligently investigate the status of Ms. Robin's case in California and Respondent
22 failed to diligently respond to discovery requests as set forth in Count Four.
23

24 *In re Turner*, SB 05-0125-D (2005), Turner failed to act with reasonable
25 diligence and promptness in representing his client. Respondent failed to respond

1 to pleadings, failed to appear in court, and failed to comply with the civil rules of
2 discovery. Turner was censured and placed on probation for one year. There
3 were two aggravating factors (multiple offenses and substantial experience in the
4 practice of law) and four mitigating factors (lack of disciplinary history,
5 cooperativeness throughout proceedings, another sanction, and remorse). This
6 case also encompasses the violations set forth in Count Four of the complaint
7 against Respondent.
8
9

10 *In re Kloberdanz*, SB-01-0169-D (2001), Kloberdanz was censured for
11 violations of ERs 1.7(b) and 1.8(a). There were four aggravating factors
12 (dishonest or selfish motive, refusal to acknowledge wrongful nature of conduct,
13 vulnerability of victim, and substantial experience in the practice of law) and two
14 mitigating factors (lack of disciplinary history and delay in the disciplinary
15 proceedings). Kloberdanz was negligent in not determining whether he had
16 obtained a legal right in an entity. This negligence resulted in him engaging in a
17 conflict of interest when he gave legal advice while obtaining an ownership
18 interest. He failed to discuss the conflict of interest, failed to obtain a waiver or
19 written consent from his clients, and failed to provide his client with a reasonable
20 opportunity to seek the advice of independent counsel. He later filed suit against
21 his clients, asserting an interest in the object of the work he had performed for his
22 clients. Although factually distinct from Respondent's case now in issue, the ER
23
24
25

1 1.7 and 1.8 violations standing alone warranted censure. Respondent was
2 negligent in determining that a conflict of interest existed between Mr. Kisseberth
3 and Ms. Cousino in Count One.
4

5 RECOMMENDATION

6 The purpose of lawyer discipline is not to punish the lawyer, but to protect
7 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
8 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
9 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
10 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
11 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
12 (1994).
13
14

15 In imposing discipline, it is appropriate to consider the facts of each case,
16 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
17 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
18 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
19

20 Upon consideration of the facts, application of the *Standards*, including
21 aggravating and mitigating factors, and a proportionality analysis, I recommend
22 acceptance of the Tender of Admissions and Agreement for Discipline by
23 Consent and the Joint Memorandum in Support of Agreement for Discipline by
24 Consent which provides for the following:
25

1 1. Respondent shall receive a censure.

2 2. Respondent will be placed on probation for a period of one year
3 effective upon the signing of the probation contract. The State Bar will notify the
4 Disciplinary Clerk of the exact date of commencement of probation. The terms of
5 probation are as follows:
6

7 a. Respondent will submit to an assessment and participate in the State
8 Bar's Law Office Management Assistance Program (LOMAP);
9

10 b. Respondent will complete the continuing legal education course, "The
11 Ten Deadly Sins of Conflict"; and,

12 c. Respondent will participate in the Ethics Enhancement Program
13 (EEP).
14

15 d. If Respondent fails to comply with any of the foregoing conditions,
16 and the State Bar receives information, bar counsel shall file a Notice of Non-
17 Compliance with me, pursuant to Rule 60(a)5, Ariz. R. S. Ct. I would then
18 conduct a hearing within thirty days after receipt of said notice, to determine
19 whether the terms of probation have been violated and if an additional sanction
20 should be imposed. If there is an allegation that any of these terms have been
21 violated, the burden of proof shall be on the State Bar of Arizona to prove non-
22 compliance by clear and convincing evidence.
23
24
25

