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APR 26 2006

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

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

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IN THE MATTER OF A MEMBER) Nos. 05-0132, 05-0381
OF THE STATE BAR OF ARIZONA,)
)
NICHOLAS S. HENTOFF,)
Bar No. 012492)
) **HEARING OFFICER'S REPORT**
RESPONDENT.)

PROCEDURAL HISTORY

A Probable Cause Order was filed on June 27, 2005. A Complaint was filed on October 3, 2005. Respondent filed an Answer on November 18, 2005. The State Bar filed an Amended Complaint on December 16, 2005. The Settlement Officer held a settlement conference on February 2, 2006, at which time the parties were able to reach an agreement. The parties filed 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) on March 22, 2006. No hearing has been held in this matter.

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FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on June 6, 1989.

COUNT ONE (File No. 05-0132)

2. In or about early 2003, Respondent began to represent Mr. Bradley Kennedy, DDS, in two criminal matters: CR2003-031405, in Maricopa Superior Court, and another matter in Tempe Justice Court.

3. Respondent also represented Mr. Kennedy in several other matters including a forcible detainer action (CV2003-010053) and a fraudulent conveyance action (CV2003-010254) in Maricopa County Superior Court,

4. Tim Forshey initially represented Mr. Kennedy in the Tempe Justice Court misdemeanor case, which alleged multiple counts of misconduct with a weapon arising out of an incident in the Arizona State University law Library. Mr. Kennedy was initially represented by attorney William Wingard in the Maricopa County Superior Court felony case, which alleged multiple counts of Sexual Exploitation of a Child.

5. In March 2003 Respondent filed substitutions of counsel in both the Tempe Justice Court misdemeanor case as well as the Maricopa County Superior Court Criminal case. Tim Forshey had agreed to hold for safekeeping a number

1 of firearms belonging to Mr. Kennedy because Mr. Kennedy's conditions of
2 release prohibited him from possessing firearms. Upon substituting as counsel of
3 record in the Tempe Justice Court case, Mr. Hentoff agreed to take possession of
4 the firearms from Mr. Forshey. The transfer of firearms was approved by both the
5 Deputy Maricopa County Attorney and the Justice of the Peace in the Tempe
6 Justice Court case.
7

8
9 6. On or about March 7, 2003, Respondent took possession of eleven
10 firearms belonging to Mr. Kennedy from attorney Timothy Forshey. Respondent
11 signed a receipt showing that the firearms were transferred to him on that date.
12 Respondent stored Mr. Kennedy's firearms at Respondent's home.
13

14 7. Shortly after he was incarcerated on the felony charges, Mr.
15 Kennedy's wife filed dissolution proceedings in Maricopa County Superior
16 Court. Mr. Kennedy was initially represented by Mr. Wingard in these
17 proceedings.
18

19 8. On or about October 25, 2003, William Wingard expressed a desire
20 to withdraw from representing Mr. Kennedy.
21

22 Respondent asserts that he reluctantly agreed to represent Mr. Kennedy in
23 the divorce proceedings, ostensibly to protect Mr. Kennedy's interests in the
24 criminal proceedings since his wife was the State's chief witness against him.
25 Respondent asserts that he explained to Mr. Kennedy that he does not practice

1 domestic relations law, having only had two previous domestic relations cases in
2 fifteen years of practice, and that he should hire experienced domestic relations
3 counsel if he wanted to vigorously litigate the divorce action.
4

5 9. Early in the divorce proceedings, before Respondent was counsel of
6 record for Mr. Kennedy in that case, an injunction was issued prohibiting the sale
7 or disposal of community property without the consent of both parties.
8

9 10. According to attorney Patrick Sampair, Ms. Kennedy had asserted, in
10 relation to the divorce proceedings, that the firearms were community property.
11 Respondent knew or should have known of this claim.
12

13 11. On or about June 22, 2004, attorney Barbara Fuqua substituted in as
14 counsel for Mr. Kennedy in the divorce proceedings.
15

16 12. Respondent thereafter attempted to communicate with Barbara
17 Fuqua and/or Mr. Kennedy about the disposition of the firearms in Respondent's
18 possession requesting that they make arrangements to have the firearms
19 transferred to someone who was legally able to possess the firearms. Ms. Fuqua
20 declined to take possession of the firearms.
21

22 13. In or about October of 2004, Respondent sold nine of Mr. Kennedy's
23 firearms to Bear Arms Firearms & Accessories for approximately \$1200.
24

25 14. Respondent did not have permission from Barbara Fuqua, Mr.
Kennedy, or the court to dispose of the firearms.

1 15. Respondent applied the \$1,200 to outstanding costs owed to him by
2 Mr. Kennedy. Respondent did not have permission from Mr. Kennedy to use the
3 proceeds for that purpose.
4

5 16. On or about January 7, 2005, attorney Timothy Forshey and
6 Respondent were ordered by the court to provide an accounting of the firearms.

7 17. On or about March 18, 2005, Respondent filed a "Court Ordered
8 Accounting of Personal Property" in the case, reporting that he still had three
9 additional firearms belonging to Mr. Kennedy in his possession that were
10 overlooked when the other firearms were sold, and requested that the Court allow
11 him to transfer the remaining firearms to Mr. Sampair's possession.
12

13 18. To date, the court has not made any rulings regarding the money
14 that Respondent received from the sale of the guns, and the divorce case remains
15 pending.
16

17 19. Mr. Sampair has filed a motion with the court requesting permission
18 for the transfer of the firearms to Mr. Sampair's possession for safekeeping. Mr.
19 Kennedy has filed a response in opposition to this request. There has been no
20 ruling on that motion.
21

22 20. On February 16, 2006, The Honorable Gilberto Figueroa, the Pinal
23 County Superior Court Judge presiding over Mr. Kennedy's divorce case and his
24 fraudulent conveyance case, made the following statement in open Court:
25

1 Mr. Hentoff, I listened to you today, and frankly, I have to say, I
2 admire your tenacity, and I know you're doing it for the right
3 reasons, but I think I probably would have run a long time ago.
4 You probably shared more than your [share of] adversity from
5 trying to do the right thing. I don't know how those Bar
6 complaints are going to turn out, but I can tell you from what I
7 heard from you this morning, I think you're a man of integrity. I
8 don't think I would have stood up for the battle you've taken for
9 this long.

10 Reporter's Transcript of Proceedings, Joanne Knight Kennedy vs. Kate Stone and
11 Bradley William Kennedy, No. CV 2003-010254 (February 16, 2006).

12 **COUNT TWO (File No. 05-0381)**

13 21. In or about September 2003, Laura Fisher contacted Respondent
14 regarding representing her brother, Walter Elze, Jr., in filing a successor petition for
15 post-conviction relief in his capital murder case.

16 22. Respondent had previously represented Mr. Elze in the underlying
17 murder case. Mr. Elze had pled guilty to capital first-degree murder with no
18 agreements as to sentencing, which made him eligible for the death penalty. The
19 sentencing phase was complicated by the factual basis of the plea: admitting that he
20 murdered a 78 year old woman with a hammer and a knife after she learned that he
21 had embezzled money from her investment account.

22 23. Respondent asserts that he charged Mr. Elze a flat fee of \$3000 to file
23 a Motion to Withdraw from his plea agreement alleging, among other legal issues,
24 the ineffective assistance of his court appointed attorneys. When the Maricopa
25

1 County Legal Defenders Office moved to withdraw from representing Mr. Elze in
2 the case due to these allegations, Respondent agreed to take over representation of
3 Mr. Elze in the case pro bono, without any further legal fees.
4

5 24. Respondent asserts that he represented Mr. Elze in the capital
6 sentencing phase of his murder case, and was successful in arguing against the
7 imposition of the death penalty. Mr. Elze received a sentence of natural life in
8 prison.
9

10 25. Before terminating his representation of Mr. Elze, Respondent filed a
11 Notice of Post Conviction Relief and a request for the appointment of counsel.
12

13 26. Mr. Elze's court appointed counsel filed an *Anders* brief, avowing to
14 the Court that there were no legal issues to be raised in the Petition. Mr. Elze was
15 given an opportunity by the Court to file a Supplemental Brief, which he failed to
16 do, and the Petition for Post Conviction Relief was dismissed by the Court.
17

18 27. Respondent subsequently agreed to represent Mr. Elze in filing a
19 second petition for post-conviction relief. Respondent charged Ms. Fisher a
20 \$10,000 flat fee for the representation.
21

22 28. In or about October 2003, Ms. Fisher paid the \$10,000 flat fee in full
23 for the representation. Respondent and Ms. Fisher signed a retainer agreement on
24 receipt of the retainer.
25

1 29. Respondent informed Ms. Fisher that he would send Mr. Elze a
2 separate fee agreement to sign within 30 days. Respondent visited Mr. Elze in
3 prison within sixty days of receiving the retainer, but had inadvertently not brought
4 the retainer with him to the prison for Mr. Elze's signature.
5

6 30. Respondent asserts that he subsequently mailed the retainer agreement
7 to Mr. Elze. Mr. Elze claims he never received a copy of the retainer agreement.
8 Respondent asserts he subsequently sent Mr. Elze a second copy of the fee
9 agreement a few months later, after Ms. Fisher made multiple inquiries about it, Mr.
10 Elze finally returned a signed copy of the retainer agreement to Respondent on or
11 about March 1, 2004.
12

13 31. In February 2004, via email, Respondent stated that he would try to
14 file the petition for post-conviction relief by the end of the month. Respondent
15 failed to file it.
16

17 32. Respondent asserts that in June 2004, he visited Mr. Elze in prison for
18 a second time and had him sign a copy of the Notice of Post Conviction Relief.
19 Respondent informed Mr. Elze that he should be able to file the petition for post
20 conviction relief by the end of the month. Respondent failed to file it.
21

22 33. Respondent asserts that he explained in writing to Ms. Fisher that the
23 reason for the delay in filing the successor petition was due to cases that were then
24
25

1 pending in the Arizona Court of Appeals and Supreme Court, that could impact on
2 the legal issues in Mr. Elze's case

3
4 34. In January 2005, Ms. Fisher sent an email and certified letter to
5 Respondent terminating his services and requesting a refund of the \$10,000 fee as
6 Respondent had still failed to file the petition on behalf of her brother.

7
8 35. Upon receiving no response to her letter, Ms. Fisher filed a bar charge
9 against Respondent on March 1, 2005.

10
11 36. Respondent asserts that on or about May 31, 2005, he visited Mr. Elze
12 in prison for the third time regarding the matter and inquired whether he concurred
13 in Ms. Fisher's stated desire to terminate his services. At that time, Mr. Elze said he
14 would have to consult with his sister. Respondent informed Mr. Elze that he would
15 need to terminate his service in writing.

16
17 37. On or about September 8, 2005, Respondent responded to the bar
18 charge. He indicated that only Mr. Elze could terminate his services. He also
19 indicated that he had not filed the petition because of recent legal developments
20 impacting upon sentencing procedures in capital murder cases, including a recent
21 United States Supreme Court case that required jury sentencing of aggravating
22 factors in capital murder cases. Mr. Elze had raised these issues during the
23 sentencing phase of his criminal case, Respondent asserted that there were no time
24 limits to filing a successor petition for post conviction relief and that the delay in
25

1 filing the petition was due to the fact that he was waiting for the resolution of cases
2 then pending before the Arizona appellate courts that would directly impact upon
3 Mr. Elze's second petition for post conviction relief.
4

5 38. On or about September 30, 2005, Mr. Elze wrote Respondent a letter
6 terminating his services and requesting a refund.

7 39. Respondent has refunded \$5,000 of the fees to Ms. Fisher, and will
8 refund the remaining \$5,000 as part of this agreement, even though Respondent did
9 perform work on the case.
10

11 40. Respondent asserts that he did not fail to diligently pursue Mr. Elze's
12 matter as Respondent had a good faith belief that there was a relevant change of law
13 occurring in the state that could impact Mr. Elze's legal issues. For purposes of this
14 agreement, the State Bar does not dispute this assertion.
15

16 **CONDITIONAL ADMISSIONS & DISMISSALS**

17 **COUNT ONE (File No. 05-0132)**

18 Respondent conditionally admits that he failed to adequately safeguard Mr.
19 Kennedy's property; failed to protect Mr. Kennedy's interests upon termination of
20 the representation; and engaged in a conflict of interest.
21

22 Respondent conditionally admits that his conduct as described in this count
23 violated Rule 42, Ariz.R.S.Ct., specifically, ER 1.15, ER 1.16(d), and ER 1.8(a).
24
25

1 In Count One, the State Bar has agreed to dismiss allegations that
2 Respondent violated ERs 3.4(c) and 8.4(d), and Rule 53(c) in exchange for the
3 settlement in this matter and in light of evidentiary concerns. Respondent asserts
4 that he did not mentally make the connection that the guns in his possession were
5 considered community property, so that their disposal would violate the order.
6 Thus, the violation of court order was negligent. Respondent further asserts that
7 he did not regularly handle domestic relations cases, and that he explained his
8 lack of experience to Mr. Kennedy. For purposes of this agreement, the State Bar
9 does not dispute Respondent's assertions.
10
11

12 **COUNT TWO (File No. 05-0381)**

13 Respondent conditionally admits that he failed to adequately communicate
14 with Mr. Elze and failed to timely refund unearned legal fees.
15

16 Respondent conditionally admits that his conduct as described in this count
17 violated Rule 42, Ariz.R.S.Ct., specifically, ER 1.4, ER 1.15, and ER 1.16(d).
18

19 In Count Two, the State Bar has agreed to dismiss allegations that
20 Respondent violated ERs 1.2, 1.3, and 8.4(d) in exchange for the settlement in
21 this matter and in light of evidentiary concerns. Respondent asserts that the delay
22 in filing Mr. Elze's post-conviction relief petition was based on Respondent's
23 belief that a change in the state of the law was occurring in Arizona at that time
24
25

1 that would impact on the issues in the petition. For purposes of this agreement,
2 the State Bar does not dispute that assertion.

3 RESTITUTION

4 In Count One, Respondent will disgorge the \$1,200 he received from the
5 sale of the guns. Respondent will provide the funds to Mr. Sampair to hold in
6 trust if the divorce court approves that arrangement. Otherwise, Respondent will
7 transfer the funds to wherever the court directs him. If there is no applicable
8 court approval or order regarding the funds, Respondent shall interplead the funds
9 with the court.
10
11

12 In Count Two, Respondent has agreed to refund \$10,000 to Ms. Fisher
13 even though he did earn some fees on the case. He has already provided a refund
14 of \$5,000 and will refund the additional \$5,000 within 60 days of the judgment
15 and order in this matter if not done earlier.
16

17 ABA STANDARDS

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

23 The parties indicated that *Standard* 4.0 (Violations of Duties Owed to
24 Clients) is the most applicable in this matter. A review of ABA *Standard* 4.3
25

1 (Failure to Avoid Conflicts of Interest) indicates that censure is the presumptive
2 sanction for Respondent's misconduct. *Standard 4.33* specifically provides:

3
4 Reprimand (censure in Arizona) is generally appropriate
5 when a lawyer is negligent in determining whether the
6 representation of a client may be materially affected by the
7 lawyer's own interests, or whether the representation will
adversely affect another client, and causes injury or
potential injury to a client.

8 Respondent was negligent in failing to obtain permission from Mr. Kennedy
9 prior to disposing of his property.

10
11 **AGGRAVATING AND MITIGATING FACTORS**

12 This Hearing Officer then considered aggravating and mitigating factors in
13 this case, pursuant to *Standards 9.22* and *9.32*, respectively.

14 This Hearing Officer agrees with the parties that two aggravating factors
15 are present in this matter:

- 16
17 (a) prior disciplinary offenses; and,
18 (d) multiple offenses.

19 This Hearing Officer agrees with the parties that two factors are present in
20 mitigation:

- 21
22 (b) absence of a dishonest or selfish motive; and,
23 (e) full and free disclosure to disciplinary board or cooperative attitude
24 toward proceedings;
25

1 mitigation, the Commission cited the lawyer's cooperation with the disciplinary
2 process.

3
4 *In re Clemmens*, 172 Ariz. 501, 838 P.2d 1262 (1992), also involved a
5 violation of ER 1.8(a) for which the lawyer was censured. In that case, the
6 lawyer subleased a vehicle from his client. He prepared the sub-lease document,
7 which did not fully protect the interests of the client. He then failed to make
8 timely payments on the lease. A censure was imposed in that case because it did
9 not appear that the lawyer was intentionally attempting to gain at his client's
10 expense. Rather, the respondent acted negligently in failing to follow ER 1.8(a).

11
12 In *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), the lawyer entered
13 into several complex real estate transactions with a client in violation of the
14 predecessor to ER 1.8(a) (DR 5-104). In imposing a censure, the Court noted that
15 there was no evidence of fraudulent intent on behalf of the lawyer. Another case
16 in which a lawyer was sanctioned for his failure to follow ER 1.8(a) is *In re*
17 *Marce*, 177 Ariz. 275, 867 P.2d 845 (1993). The lawyer in that case also received
18 a censure for failing to strictly follow ER 1.8(a) when he entered an agreement
19 with his clients to buy out a lien that was encumbering their home. The lawyer
20 did not intend to harm his client, and the client suffered no injury.

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22
23
24 Similarly, lawyers who have failed to timely refund unearned fees have
25 been censured in some cases. For instance, in the recent case of *In re Cawood*,

1 SB-05-0147 (2005), the lawyer was censured and placed on probation for failing
2 to return unearned fees, and other negligent trust account violations.

3 RECOMMENDATION

4
5 The purpose of lawyer discipline is not to punish the lawyer, but to protect
6 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
7 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
8 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
9 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
10 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
11 (1994).
12

13
14 In imposing discipline, it is appropriate to consider the facts of each case,
15 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
16 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
17
18 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

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

- 25
1. Respondent shall be censured.

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

5
6 a. Respondent shall contact the director of the State Bar's Law Office
7 Management Assistance Program (LOMAP) within 30 days of the date of the
8 final judgment and order. Respondent shall submit to a LOMAP examination of
9 his office's client communications, calendaring and terminating representation
10 procedures. The director of LOMAP shall develop a probation contract, and its
11 terms shall be incorporated herein by reference. The probation period will begin
12 to run at the time of the judgment and order, and will conclude one year from
13 the date that all parties have signed the probation contract.

14
15
16 b. Respondent shall refrain from engaging in any conduct that would
17 violate the Rules of Professional Conduct or other rules of the Supreme Court of
18 Arizona.

19
20 c. Respondent will refund \$5,000 to Ms. Fisher within 60 days, if not
21 already done prior to the commencement of this probation.

22
23 d. Respondent will disgorge \$1200 in accordance with the restitution
24 paragraph above.

1 e. In the event that Respondent fails to comply with any of the
2 foregoing conditions, and the State Bar receives information, bar counsel shall file
3 with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5,
4 Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days
5 after receipt of said notice, to determine whether the terms of probation have been
6 violated and if an additional sanction should be imposed. In the event there is an
7 allegation that any of these terms have been violated, the burden of proof shall be on
8 the State Bar of Arizona to prove non-compliance by clear and convincing
9 evidence.
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11

12 3. Respondent shall pay the costs and expenses incurred in this disciplinary
13 proceeding.
14

15 DATED this 26th day of April, 2006.

16
17 
18 Robert J. Stephan, Jr.
Hearing Officer 9R

19 Original filed with the Disciplinary Clerk
20 this 26th day of April, 2006.

21 Copy of the foregoing was mailed
22 this 26th day of April, 2006, to:

23 Nicholas S. Hentoff
24 Respondent
25 2390 East Camelback Road, Suite 105
Phoenix, AZ 85016

1 Amy K. Rehm
2 Senior Bar Counsel
3 State Bar of Arizona
4 4201 North 24th Street, Suite 200
5 Phoenix, AZ 85016-6288
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by: Christina Soto