

FILED
MAY 18 2006
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY C. J. [Signature]

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA
DAVID LPARTITO,
Respondent,

No. File No.: 05-0695
HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

On October 30, 2005, the Probable Cause Panelist of the State Bar issued a Probable Cause Order finding that probable cause existed to issue a Complaint against the Respondent for violation of Rule 42, Arizona Rules of the Supreme Court.

On December 30, 2005, The State Bar filed a complaint against Respondent alleging violation of Rule 42, Arizona Rules of the Supreme Court. On January 30, 2006, the Respondent filed an Answer to the Complaint.

On March 1, 2006, a Case Management Conference was held with Counsel for the State Bar, CLARENCE E. MATHERSON, JR., and Counsel for the Respondent, DEBRA A. HILL, KEITH A SWISHER. On March 3, 2006, a Case Management Order was filed in Respondent's case.

On March 20, 2006, a Notice of Settlement was filed, which advised that a Tender of Admissions And Agreement For Discipline By Consent and a Joint Memorandum In Support Of Agreement For Discipline By Consent would be filed. On March 31, 2006, the Tender of Admissions and Joint Memorandum were filed.

The delay in submitting the Hearing Officer's Report was due to the loss of the Hearing Officer's secretary of approximately twelve (12) years, which has necessitated the use of temporary secretarial services for the preparation of any legal documents.

FINDINGS OF FACT

At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 18, 1985.

COUNT ONE (File No. 05-0695)

1 11. In July 2002, Respondent asserts that he spoke to the Peltons to determine their
2 wishes concerning the case.

3 12. Respondent also asserts that, when he later attempted to contact the Peltons, their
4 telephone was disconnected.

5 13. On April 9, 2003, Respondent re-filed the action in Pima County Superior Court,
6 Cause No. C20032033.

7 14. Respondent re-filed the case on behalf of the minor daughter, even though he
8 knew the case could be filed at a later date due to the victim's age. Respondent believed,
9 however, that there were potential Statute Of Limitations claims with respect tot he parents of the
10 victim.

11 15. On August 5, 2003, Devereux again removed the case to District Court, Cause
12 No. CIV 03-402-TUC-RCC.

13 16. On August 21, 2003, the State defendants moved to have the case dismissed as to
14 the putative father due to Respondent's failure to serve him.

15 17. Respondent failed to respond to the State defendant's Motion To Dismiss the case
16 as to the putative father.

17 18. As a result of Respondent's failure to respond to the motion, the Court issued an
18 Order To Show Cause ("OSC"), ordering Respondent to provide written cause why the motion
19 should not be granted.

20 19. The Court granted defendants' motion to dismiss as to the putative father after
21 Respondent failed to comply with the OSC.

22 20. On November 20, 2003, the Court issued an order setting a Rule 16 Scheduling
23 Conference. Pursuant to the Rules Of Civil Procedure and the Court's Scheduling Order, the
24 parties were to confer and submit a joint Rule 16 Scheduling Memorandum by December 11,
25 2003.

26 21. On December 11, 2003, despite several attempts, Counsel for the defendants
27 notified the court that they had been unable to contact Respondent concerning the joint Rule 16
28

1 scheduling memorandum.

2 22. An order in the case states that the Court's Staff attempted to contact Respondent
3 without success.

4 23. Respondent asserts that he does not recall receiving any message from the Court's
5 Staff during this period, and he knows of no attempt by the Court's Staff to "contact" him.

6 24. On December 15, 2003, after no contact from Respondent, the Court allowed the
7 defendants' Counsel to file their memorandum without input from Respondent.

8 25. On December 16, 2003, Respondent contacted the Court and submitted an
9 unsigned draft of his Scheduling Memorandum.

10 26. During the Scheduling Conference on December 17, 2003, the Court expressed
11 concern about Respondent's ability to prosecute the case. Respondent assured the Court that his
12 previous conduct would not continue.

13 27. On January 14, 2004, the State defendants filed a Motion To Dismiss several
14 claims in the case. Defendant Devereaux joined in the Motion To Dismiss.

15 28. Respondent failed to respond to the January 14, 2004 Motion To Dismiss.

16 29. As a result of Respondent's failure to respond, on March 10, 2004, the Court
17 issued a second OSC to Respondent instructing him to respond to the January 14, 2004 Motion
18 To Dismiss by March 25, 2004.

19 30. Despite the Court's order, Respondent did not file a Response, and the Court
20 granted the motion on March 30, 2004.

21 31. On April 1, 2004, Respondent filed a late Response to the motion. Respondent's
22 Response did not address the Court's OSC, nor did Respondent explain why the Response was
23 nearly two months late.

24 32. The Court struck the response as untimely.

25 33. Respondent admits that he should have filed his Response to the motion sooner.

26 34. In September of 2004, defendants filed another Motion To Dismiss the case, in its
27 entirety, with prejudice.

1 35. On October 5, 2004, the Court granted defendants' motion after Respondent again
2 failed to submit a Response.

3 36. In its October 2004 Order, the Court stated that Respondent seemed completely
4 disinterested in prosecuting the case, and asserted that Respondent had filed only two pleadings -
5 the faxed portion of the Joint Scheduling Memo and the late Response to the motion - since the
6 case had been re-filed.

7 37. Respondent contends that he did take actions in the case. Respondent asserts that
8 he took the initiative to set up the meeting of Counsel prior to the Case Management Conference;
9 participated in the Conference and filed the required statement; filed a Response to the Motion to
10 Dismiss, although he recognized that the Response was late; and reviewed over 1000 pages of
11 documents that had been produced by one of the defendants in the case.

12 38. The parties do not agree as to when Respondent last spoke to the Peltons.
13 Respondent admits, however, that he did not act as diligently as he should have to try to locate
14 the Peltons once Respondent learned that the Peltons' phone had been disconnected.

15 39. Respondent asserts that after their phone was disconnected, the Peltons never
16 contacted him.

17 40. Respondent failed to act with reasonable diligence and promptness in representing
18 the Peltons.

19 41. Respondent failed to make reasonable efforts to expedite the litigation, resulting in
20 the case being dismissed with prejudice.

21 42. Respondent failed to withdraw from the representation upon his inability to
22 communicate with the Peltons.

23 43. Respondent engaged in conduct prejudicial to the administration of justice.

24 44. Respondent's conduct as described in this count violated Rule 42, Ariz.R.S.Ct.,
25 specifically ERs 1.3, 1.16, 3.2, and 8.4(d).

26 **CONCLUSIONS OF LAW**

27 The Hearing Officer finds that there is clear and convincing evidence that Respondent

1 | violated rule 42, Ariz.R.S.Ct., specifically: ERs 1.3, 1.16, 3.2, and 8.4(d) as alleged in Count I
2 | (File No. 05-0695) of the Complaint.

3 | **ABA STANDARDS**

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

7 | The *Standards* are designed to promote consistency in the imposition of sanctions by
8 | identifying relevant factors that courts should consider, and then applying these factors to
9 | situations where lawyers have engaged in various types of misconduct. *Standards* 1.3,
10 | Commentary. The *Standards* provide guidance with respect to an appropriate sanction in the
11 | matter. The Supreme Court of Arizona and the Disciplinary Commission consider the *Standards*
12 | a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re*
13 | *Kaplan*, 179 Ariz. 175, 177, 877, P.2d 274, 276 (1994). In determining an appropriate sanction,
14 | both the court and the commission consider the duty violated, the lawyer's mental state, the actual
15 | or potential injury caused by the misconduct, and the existence of aggravating and mitigating
16 | factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

17 | Given the conduct in this matter, the most applicable Standards are 4.43, 6.23, and 7.3
18 | *Standard* 4.43 provides: "[Censure] is generally appropriate when a lawyer is negligent and does
19 | not act with reasonable diligence in representing a client, and causes injury or potential injury to a
20 | client." The parties agree for the purposes of this agreement that Respondent's conduct in failing
21 | to respond appropriately to the Motions To Dismiss and the Orders To Show Cause from the
22 | Court, was negligent.

23 | Similarly, *Standard* 6.23 states: "[Censure] is generally appropriate when a lawyer
24 | negligently fails to comply with a court order or rule, and causes injury or potential injury to a
25 | client or other party, or causes interference or potential interference with a legal proceeding."
26 | The parties agree for the purposes of this agreement that Respondent's conduct was negligent
27 | when he failed to file his response to the defendants' Motions To Dismiss, and the Court's Orders
28 |

1 To Show Cause in a timely manner as required by the court.

2 Finally, *Standard 7.3* provides: “[Censure] is generally appropriate when a lawyer
3 negligently engages in conduct that is a violation of a duty owed as a professional and causes
4 injury or potential injury to a client, the public, or the legal system.” The parties agree that
5 Respondent was negligent in *failing* to recognize that he should have withdrawn from the
6 representation once he was unable to locate his clients, after making reasonable efforts to do so.

7 Furthermore, for the purposes of this agreement, the parties agree that there was no injury
8 or potential injury to the clients, the public, or the legal system.

9 In deciding what sanction to impose the following aggravating and mitigating factors
10 should be considered.

11 **Aggravating Factors:**

12 *Standard 9.22(d) (multiple offenses)*: Respondent’s conduct in this matter involves several
13 instances where he failed to respond timely to the Court’s Orders To Show Cause and Motions
14 To Dismiss filed by the defendants.

15 *Standard 9.22(f) (substantial experience in the practice of law)*: Respondent has been
16 licensed to practice law in Arizona since 1985.

17 **Mitigating Factors:**

18 *Standard 9.32(a) (absence of a prior disciplinary record)*: Respondent has no prior
19 discipline.

20 *Standard 9.32(b) (absence of a dishonest or selfish motive)*: Respondent has alleged, and
21 the State Bar does not dispute, that his actions of misconduct in these matters were not
22 committed with a dishonest or selfish motive.

23 *Standard 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude*
24 *towards proceedings.)*: Respondent has been forthcoming and cooperative throughout these
25 proceedings.

26 In evaluating the aggravating and mitigating factors, the parties agree that they do not
27 justify varying from the presumptive sanction of a Censure.

PROPORTIONALITY ANALYSIS

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2 To have an effective system of professional sanctions, there must be internal consistency,
3 and it is appropriate to examine sanctions imposed in cases that factually similar. *In re Shannon*,
4 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d
5 454, 456 (1983)). However, the discipline in each case must be tailored to the individual case, as
6 neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691
7 P.2d 695 (1984).

8 With regard to proportionality, several cases appear to be instructive. In *In re Huser*, SB-
9 00-0108-D (2001), the Disciplinary Commission found that Huser, while working on an insurance
10 defense matter, entered an appearance, filed an Answer, and signed a Stipulation on behalf of the
11 insured without the insured's knowledge or consent. The Disciplinary Commission found Huser's
12 conduct to be negligent. Prior to filing the Answer in the case, Huser did not have authorization
13 to represent the insured and had *no contact* with him. When Huser later realized his mistake, he
14 continued to represent the insured as if the case was a contested matter. The Disciplinary
15 Commission also found that Huser failed to withdraw from the case once it was determined that
16 the insured could not be located and then failed to disclose this fact to the Court or the opposing
17 party. The Disciplinary Commission found that his conduct violated ER 3.2, ER 3.3, ER 3.4, ER
18 4.1, ER 4.4, ER 5.1(b)¹, and ER 8.4(c) and (d). The Disciplinary Commission found one
19 aggravating factor, 9.22(e) (bad faith obstruction of the disciplinary proceedings), and two
20 mitigating factors, 9.32(a) (absence of a prior disciplinary record) and 9.32(i) (remorse). Huser
21 received a Censure and a Term Of Probation and was ordered to pay the costs of the disciplinary
22 proceedings.

23 In *In re Inserra*, SB-05-0124-D, in 1997, Inserra represented a client in a dispute against
24 his landlord after the client filed suit against the landlord for failing to return a security deposit.
25 The Defendant counterclaimed for damages to the property. Although Inserra's client got
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27 ¹ The Disciplinary Commission also found that Huser failed to properly supervise subordinate attorneys who were also
28 working on the case.

1 married in 1997, the Defendant had been unable to add his wife to the suit. Opposing Counsel
2 filed a Motion For Summary Judgment arguing that the client had not properly delivered
3 possession to the property, thus he could not sure for return of the security deposit. Inserra failed
4 to conduct any research on Landlord/Tenant Law or make nay meaningful argument opposing
5 Summary Judgement, resulting in the Court granting the Defendant Summary Judgment. Inserra
6 appealed, but then abandoned the appeal.

7 Inserra then entered into negotiations to resolve the dispute. The Defendant agreed to
8 dismiss the Counterclaim without prejudice, and a defense judgment against Inserra's client was
9 presented to the Court along with the Defendant's Motion For Attorney's Fees. Inserra also
10 agreed that the Defendant could bring a new action against his client for damages to the property
11 and his client would waive any defense that the Attorney's Fees issue had already been decided.
12 As a result, the Court entered judgement against Inserra's client in the amount \$5,900, the
13 amount of Attorney's fees incurred by the Defendant. Inserra's client had no knowledge of the
14 Motion For Summary Judgment or that judgment had been entered against him in the case.

15 In August 2000, in order to attach the community property, the Defendant filed suit
16 against Inserra's client and his wife. Inserra never advised his client or his client's wife that they
17 had been sued, and did not consult them prior to filing an Answer in the case. Inserra further
18 failed to advise the client that the defendant filed a Motion For Summary Judgment, and that
19 Inserra waived the clients' right to a Trial on the property damage issue without informing the
20 clients. The court ultimately entered judgment against Inserra's clients.

21 In Inserra's disciplinary matter, the Disciplinary commission accepted the parties' Consent
22 Agreement and found that Inserra was negligent in failing to competently represent his client and
23 failed to consult with his client about two judgments, a Mediation Hearing, the filing of an
24 Answer in a civil case, and the Waiver Of Trial. The Disciplinary commission also found that
25 Inserra failed to diligently pursue the client's matter, failed to expedite the litigation, failed to keep
26 the client reasonably informed about the representation, and committed conduct prejudicial to the
27 administration of justice. Inserra's conduct violated ER 1.1, ER 1.2(a), ER 1.3, ER 1.4(a), ER
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1 3.2, and ER 8.4(d). The Disciplinary Commission found one aggravating factor, 9.22(a) (prior
2 disciplinary offenses), and three mitigating factors, 9.32(b) (absence of a dishonest or selfish
3 motive), 9.32(c) (personal or emotional problems), and 9.32(e) (full and free disclosure to a
4 disciplinary board or cooperative attitude toward proceedings). Inserra received a Censure and a
5 Term Of Probation, and was ordered to pay the costs of the disciplinary proceedings. The
6 Hearing Officer found, and the disciplinary Commission agreed, that a higher sanction was not
7 warranted in this matter due to Inserra's mitigation testimony regarding a serious health
8 condition, and because the client was made whole through a malpractice action against Inserra.

9 In this matter, Respondent's conduct was similar to that seen in *Huser*, Respondent
10 negligently failed to recognize that he should have withdrawn from the representation once he
11 could not locate his clients after reasonable attempts to do so. Additionally, his conduct was
12 negligent when he continued to pursue the litigation and failed to timely respond to the Motions
13 To Dismiss and the Court's Orders To Show Cause. Furthermore, unlike in *Inserra*, Respondent
14 lost contact with his client and was unable to re-establish contact after attempting to do so.
15 Respondent further asserts that he acted in the manner he did to protect his clients. Based on the
16 *Standards* and the applicable case law, this Hearing Officer believes that the agreed upon sanction
17 is appropriate.

18 RECOMMENDATION

19 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and
20 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is
21 also the objective of lawyer discipline to protect the public, the profession and the administration
22 of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill
23 public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
24 (1994).

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

1 1238 (1994).

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

4 1. Respondent shall receive a Censure for violating Rule 42, Ariz.R.S.Ct.,
5 specifically ERs 1.3, 1.16, 3.2, and 8.4(d);

6 2. Respondent shall be placed on Probation for a period of one year, under the
7 following terms and conditions:

8 a. Respondent shall enroll in and successfully complete the State Bar's Ethics
9 Enhancement Program.

10 b. Respondent shall refrain from engaging in any conduct that would violate
11 the Rules of Professional Conduct or other rules of the Supreme Court of
12 Arizona.

13 c. In the event Respondent fails to comply with any of the foregoing
14 probation terms, and information thereof is received by the State Bar, Bar
15 Counsel shall file a Notice Of Non-compliance with the imposing entity,
16 pursuant to Rule 60(a)(5), Ariz. R.S.Ct. The imposing entity may refer the
17 matter to a Hearing Officer to conduct a hearing at the earliest practicable
18 date, but in no event not later than 30 days after receipt of the Notice, to
19 determine whether a Term Of Probation has been violated and, if so, to
20 recommend an appropriate action and response. If there is an allegation
21 that Respondent failed to comply with any of the foregoing terms, the
22 burden of proof shall be on the State Bar to prove noncompliance by clear
23 and convincing evidence.

24 3. Respondent shall pay all costs and expenses incurred by the State Bar in this
25 disciplinary proceeding.

26 DATED this 15th day of May, 2006.

Juan Pérez-Medrano
HEARING OFFICER 9D

Copy of the foregoing mailed
this 9th day of May, 2006 to:

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