

**FILED**

JUL 27 2006

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY CSA

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

IN THE MATTER OF A MEMBER OF )  
THE STATE BAR OF ARIZONA, )

File No.: 05-1928

**REX L. MARTIN** )  
Bar No. 002845, )  
RESPONDENT. )

**HEARING OFFICER'S REPORT**

**PROCEDURAL HISTORY**

The State Bar filed a Complaint on March 30, 2006. The Respondent filed his Answer on May 1, 2006. On May 25, 2006, the matter was reassigned to the present Hearing Officer. The Hearing Officer granted an extension for time to file consent documents two times in order to expedite the possibilities of settlement. On 7/5/06, a Tender of Admissions and Agreement for Discipline by Consent was filed with the Supreme Court along with a Joint Memorandum in Support of Agreement by Consent.

**FINDINGS OF FACT**

At all times relevant hereto, the Respondent was a member of the State Bar of Arizona, having been admitted on September 25, 1971.

**Count I:**

1. The clients contracted with the Respondent for legal representation for the purchase of a hotel. A retainer fee of one-thousand (\$1,000) was presented to the Respondent on the same day.
2. Over the ensuing several months, the clients contacted the Respondent about the work which involved the establishment of a corporation, but which had not been done by the Respondent.

- 1 3. The clients decided not to purchase this hotel, so they would not need the  
2 establishment of a corporation.
- 3 4. The Respondent stated to the clients that he had not done any work with regard to  
4 the incorporation and would return the full retainer.
- 5 5. After not receiving the refund of their retainer, the clients sent to the Respondent a  
6 certified letter requesting return of the retainer. This letter was not responded to by  
7 the Respondent. Three months later, after having not received any response, the  
8 clients sent another letter to the Respondent requesting a refund of their retainer.  
9 The Respondent did not respond to this letter either. The following month, the  
10 State Bar was contacted regarding the Respondent's conduct.
- 11 6. The State Bar attempted to contact the Respondent, but he failed to respond to the  
12 State Bar's letter requesting cooperation.
- 13 7. A couple of months later, the State Bar sent the Respondent a second letter  
14 advising him of the clients' complaints.
- 15 8. While Respondent did refund the one-thousand dollar (\$1,000) advance payment,  
16 it was done after the State Bar filed its Complaint.

#### 18 CONCLUSIONS OF LAW

- 19 1. The Respondent failed to act with reasonable diligence and promptness by not  
20 representing the clients adequately and also by failing to keep the clients advised  
21 of matters.
- 22 2. The Respondent failed to communicate in writing to the clients as to the basis of  
23 the rate of the fee.
- 24 3. The Respondent failed to promptly return the retainer fee to the clients.
- 25 4. The Respondent failed to respond to a lawful demand for information from the  
26 State Bar or otherwise cooperate with the State Bar's investigation of this matter.
- 27 5. Actions of the Respondent and his inactions to both the clients and to the State  
28 Bar constitute conduct which violate Rule 42, Ariz.R.S.Ct., as well as E.R. 1.3,

1 1.4, 1.5(b), 1.15, 1.16 and 8.1(b) and Rule 53(d) and (f) Ariz.R.S.Ct.

2  
3 **A.B.A STANDARDS**

4 A.B.A. Standards 3.0 provides that four criteria should be considered:

5 (a) the duty violated;

6 (b) the lawyer's mental state;

7 (c) the actual or potential injury caused by the lawyer's misconduct;

8 (d) the existence of aggravating or mitigating factors.

9 *See In re Peasley*, 208 Ariz. 27, 90 P2.d 764 (2004).

10 The most serious conduct in this case is the Respondent's failure to promptly  
11 return his clients' advanced fees as well as failing to keep them informed and his failure to  
12 respond to requests for information from the State Bar and cooperate with the State Bar. It is  
13 believed that the Respondent's conduct is a violation under Standard 7.0 which is an appropriate  
14 Standard in this matter. Standard 7.0 provides:

15 "[a]bsent aggravating or mitigating circumstances, upon  
16 application of the factors set out in Standard 3.0, the following  
17 sanctions are generally appropriate in cases involving false or  
18 misleading communication about the lawyer's services..."

18 But more appropriately it seems is Standard 7.3. Standard 7.3 provides:

19 "[r]eprimand (Censure in Arizona) is generally appropriate when a  
20 lawyer negligently engages in conduct that is a violation of a duty  
21 owed to the profession, and causes injury or potential injury to a  
22 client, the public, or the legal system."

22 Based upon the Conditional Agreement and the facts, Censure is appropriate.

23 **A: The Duty Violated**

24 The Respondent failed to return the unearned fees and failed to respond to  
25 requests for information and otherwise cooperate with the clients. The conduct violated the duty  
26 to his clients and to the profession.

27 **B: The Lawyer's Mental State**

28 The lawyer's mental state was negligent in failing to respond to the clients'

1 requests as to the work and failed to immediately return the advanced fee as well as the failure to  
2 respond to the State Bar. This failure to cooperate with the State Bar resulted from personal and  
3 emotional problems of alcoholism.

#### 4 **C: Actual or Potential Injury**

5 The parties agree that the way the Respondent conducted himself in this matter  
6 caused injury to his clients in that they were deprived of the use of the money and any interest  
7 that could have been obtained during the time it was in the Respondent's hands.

#### 8 **D: Aggravating and Mitigating Circumstances**

9 Aggravating Circumstances (2): Standard 9.22 (a) prior informal reprimands; In  
10 1997 the Respondent was informally reprimanded for failing to diligently represent the client  
11 and communicate with his client, and Standard 9.22(I); The Claimant has been practicing a  
12 substantial period of time; since September 25, 1971.

13 Mitigating Circumstances (4): Standard 9.32(b) absence of a dishonest or selfish motive;  
14 Standard 9.32(c) personal or emotional problems; The Respondent has had abuse problems for  
15 more than twenty years for which Respondent is under treatment; 9.32(l) remorse; The  
16 Respondent has apologized to his clients and refunded the full advanced fee even though he spent  
17 some time for these clients, and Standard 9.32(m) remoteness of prior offenses; Respondent  
18 received the informal reprimand in 1997, which was was remote in time.

#### 19 **PROPORTIONALITY**

20 The Supreme Court has held that in order to achieve consistency, proportionality  
21 must be used when imposing discipline. The discipline must be tailored to the individual facts of  
22 the case in order to achieve the purpose of discipline. *In re Wines* 135 Ariz. 203, 660 P.2d 454  
23 (1983); *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600, (2004). In *In re Adair*, SB-03-0116-D (2003),  
24 the Respondent failed to prepare a Writ of Habeas Corpus after being paid. The family could not  
25 find the Respondent to find out if he was doing the work. The Respondent did not do the work,  
26 and he also failed to return the retainer. The Respondent also failed to respond to the State Bar.  
27 One aggravating circumstance and four mitigating factors were present. Two of the mitigating  
28 factors was an emotional problem as well as remorse, both of which are present in this case.

1 There was a Censure and a one-year probation.

2 *In re Hooper*, SB-04-0093-D (2004), the Respondent was paid \$500 dollars to  
3 have a felony conviction expunged. The pleading was filed but rejected by the court. Respondent  
4 prepared a second document but did not file it. The client inquired into the status of the case and  
5 Respondent failed to return the calls. When the client did talk with the Respondent it was a vague  
6 and very evasive conversation as to what the Respondent was doing. The client filed a charge  
7 with the State Bar and the Respondent failed to respond to the State Bar's inquiries. The  
8 Respondent was found to have two aggravating factors; prior disciplinary offense and substantial  
9 experience in the law, (which is present in the case at bar). There were two mitigating factors;  
10 remorse and cooperating with the Disciplinary Board. (Which is present in the case at bar). The  
11 Respondent received a censure and a one-year of probation and restitution. In both of the above  
12 there was only one year of probation. In this case, there are two aggravating factors and four  
13 mitigating factors.

14 **CONCLUSION**

15 In order to achieve consistency in imposing discipline, this Hearing Officer must  
16 reject part of the Tender of Admissions and Agreement for Discipline by Consent, and hereby  
17 find that the Respondent should be censured, but with only one-year of probation. It is also this  
18 Hearing Officer's opinion that the participation in the MAP Assessment Program and payment of  
19 costs and expenses of the Disciplinary Proceedings would be appropriate additional sanctions

20 ...

21 ...

22 ...

23  
24 By   
25 Harlan J. Crossman, Esq.  
26 Hearing Officer  
27  
28

1 COPIES of the foregoing  
mailed this 24<sup>th</sup> day of July 2006:

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