

FILED

MAY 18 2006

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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY W. Sullivan

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
CHRISTOPHER J. PIEKARSKI,)
Bar No. 019251)
)
RESPONDENT.)

Nos. 05-0748, 05-0857

AMENDED
HEARING OFFICER'S REPORT
NUNC PRO TUNC

I. PROCEDURAL HISTORY

On September 7, 2005, State Bar of Arizona ("State Bar") Probable Cause Panelist Edward F. Novak, filed a Probable Cause Order, finding probable cause existed to issue a Complaint against Christopher J. Piekarski ("Respondent") for violations of Rule 42, Ariz. R. S. Ct., including violations of ER's 5.5(a) (unauthorized practice of law), 8.4(c) (dishonesty), and 8.4(d) (conduct prejudicial to the administration of justice). The State Bar filed its Complaint on December 1, 2005, alleging these violations in two counts. The State Bar served Respondent with its Complaint by mail on December 2, 2005. Respondent failed to respond to that or the notice of the impending default; hence on January 26, 2006, the Disciplinary Clerk entered a default against Respondent.

With neither party requesting a hearing as to sanctions, it was ordered that the parties submit memoranda containing facts supporting mitigation or aggravation, proposed findings of fact, proposed conclusions of law, a discussion of the *ABA Standards*, a discussion on proportionality, and recommended sanctions; allowances were made for response and reply briefing.

Both parties timely submitted their memoranda. The State Bar moved to strike Respondent's memorandum, however, because he had not asked for a hearing but included facts in his pleading. This motion was denied as it was contemplated that facts could be

included and discussed in said memoranda.

1 As of April 18, 2006, the pleadings deemed submitted for this report included
2 memoranda by both parties, a responding pleading by the State Bar, and a reply pleading
3 filed by Respondent.
4

5 **II. FINDINGS OF FACT**

6 I find the following facts by default:

7 1. Respondent is an attorney licensed to practice law in the State of Arizona,
8 having been admitted to practice in Arizona on December 16, 1998.

9 2. At all times relevant hereto, Respondent was a suspended member of the
10 State Bar of Arizona, having been summarily suspended on March 25, 2005 for failure to
11 comply with Rule 45, Ariz.R.S.Ct., regarding mandatory continuing legal education
12 requirements ("MCLE").
13

14 3. By letter dated February 4, 2005, the State Bar advised Respondent by
15 certified letter sent to his address as maintained in membership records that he would be
16 summarily suspended during the March 2005 Board of Governor's meeting for his failure
17 to comply with Rule 45, Ariz.R.S.Ct.
18

19 4. By letter dated April 12, 2005, the State Bar advised Respondent by regular
20 mail sent to his address as maintained in membership records that he was summarily
21 suspended by the Board of Governors on March 25, 2005 for his failure to comply with
22 Rule 45, Ariz.R.S.Ct.

23 5. Respondent was reinstated to active status on May 9, 2005.

24 6. Respondent received notice of his summary suspension and knowingly
25 continued
26

1 to practice law during the period of March 25, 2005 through May 8, 2005. Note that due to
2 Respondent's default, his assertion now that he did not have actual knowledge of the
3 suspension can be considered only as to the appropriate sanction, and not as to violation of
4 ethics rules.

5 7. Pursuant to the State Bar's request for specific information concerning the
6 extent of his practice during the period of March 25, 2005 through May 8, 2005,
7 Respondent provided information that he:

- 8 (a) Made numerous appearances in court on behalf of clients;
9 (b) Filed pleadings on behalf of numerous clients; and,
10 (c) Continued to engage new clients and perform services for existing
11 clients.

12 8. During the period of March 25, 2005 through May 8, 2005, Respondent did
13 not advise any of his clients that he had been summarily suspended from the practice of
14 law.
15

16 9. During the period of March 25, 2005 through May 8, 2005, Respondent did
17 not advise the Court or any opposing counsel that he had been summarily suspended from
18 the practice of law.

19 **COUNT ONE (05-0748)**

20 10. On March 28, 2005, Respondent appeared at a return hearing in the matter
21 captioned, *In Re the Matter of Stephanie Bernadine Uriarte*, FC2001-091292, before the
22 Honorable Arthur T. Anderson.

23 11. Respondent represented Danny Garcia Chavez, the respondent/father in the
24 family court matter.
25
26

12. Respondent advised the court that he was unable to serve Ms. Uriarte for the return hearing. The court vacated the return hearing and reset the matter for May 9, 2005.

COUNT TWO (05-0857)

13. On May 6, 2005, Respondent filed his Notice of Appearance in case captioned, *Therese Patricia Spangler vs. Johnny Lynn Foster*, DR1998-018687, on behalf of Johnny Lynn Foster.

14. On May 6, 2005 Respondent faxed a copy of his Notice of Appearance in the *Spangler* matter to Lisa B. Johnson, Esq., counsel for Ms. Spangler.

15. Shortly thereafter, Ms. Johnson discovered that Respondent had been summarily suspended on March 25, 2005.

16. Ms. Johnson advised the court that Respondent was suspended.

17. On May 9, 2005, Respondent appeared in Court on behalf of Mr. Foster.

18. On that day, Judge Burke informed Respondent that he could not practice in his court until Respondent was reinstated. Thereafter, Respondent's client represented himself during the proceeding.

III. CONCLUSIONS OF LAW

The State Bar met its burden of proof of all the above facts by clear and convincing evidence (in the form of Respondent's default) of violations of ER's 5.5(a), 8.4(c), and 8.4(d). I therefore reach the following conclusions of law:

19. Respondent's numerous appearances in court on behalf of clients while summarily suspended constituted the unauthorized practice of law in violation of Rule 31(b), Ariz.R.S.Ct., and Rule 42, Ariz.R.S.Ct., specifically ER 5.5(a).

20. Respondent's continued filing of numerous pleadings while he was
1 summarily suspended was the unauthorized practice of law in violation of Rule 31(b),
2 Ariz.R.S.Ct., and Rule 42, Ariz.R.S.Ct., specifically ER 5.5(a).

3 21. Respondent continued to engage new clients and perform services for
4 existing clients while he was summarily suspended. Respondent's actions constituted the
5 unauthorized practice of law. Respondent's conduct violated Rule 31(b), Ariz.R.S.Ct., and
6 Rule 42, Ariz.R.S.Ct., specifically ER 5.5(a).
7

8 22. By continuing to engage new clients and perform services for existing
9 clients, Respondent engaged in dishonest conduct in that he held himself out to be a lawyer
10 authorized to practice law when he had received notice that he was not authorized to
11 practice law. Respondent's conduct violated Rule 42, Ariz.R.S.Ct., specifically ER 8.4(c).
12

13 23. Respondent's appearance in the *Uriarte* matter while summarily suspended
14 constituted the unauthorized practice of law. Respondent's conduct violated Rule 31(b)
15 Ariz.R.S.Ct., and Rule 42, Ariz.R.S.Ct., specifically, ER 5.5(a).

16 24. Respondent's failure to notify the Court, opposing counsel or any of the
17 litigants of his suspension in the *Uriarte* matter, was dishonest and violated Rule 42,
18 Ariz.R.S.Ct., specifically, ER 8.4(c).

19 25. Respondent's failure to notify the Court, opposing counsel or any of the
20 litigants of his suspension in the *Uriarte* matter, was prejudicial to the administration of
21 justice in violation of Rule 42, Ariz.R.S.Ct., specifically, ER 8.4(d).
22

23 26. By filing a Notice of Appearance in the *Spangler* matter and by appearing
24 in court on that same matter, Respondent engaged in the unauthorized practice of law in
25 violation of Rule 31(b) Ariz.R.S.Ct., and Rule 42, Ariz.R.S.Ct., specifically, ER 5.5(a).
26

1 27. Respondent's failure to advise the court, opposing counsel or the litigants of
2 his suspension in the *Spangler* matter was dishonest in violation of Rule 42, Ariz.R.S.Ct.,
3 specifically, ER 8.4(c).

4 28. Respondent's failure to advise the court, opposing counsel or the litigants of his
5 suspension in the *Spangler* matter was prejudicial to the administration of justice in
6 violation of Rule 42, Ariz.R.S.Ct., specifically, ER 8.4(d).

7 RECOMMENDED SANCTIONS

8 I. ABA Standards

9 The Supreme Court and the Disciplinary Commission consistently use the
10 *ABA Standards* to determine the appropriate sanction for ethics rules violations. In re
11 Clark, 207 Ariz. 414, 87 P.2d 827 (2004). In determining the correct sanction, the analysis
12 should be guided by the principle that the ultimate purpose of discipline is not to punish
13 the lawyer, but to set a standard by which other lawyers may be deterred from such
14 conduct while protecting the interests of the public and the profession. In re Kersting, 151
15 Ariz. 171, 726 P.2d 587 (1986). In deciding the proper sanction, the Court and
16 Commission should consider the duty violated, the lawyer's mental state, the presence or
17 absence of actual or potential injury, and the existence of aggravation or mitigation. In re
18 Tarletz, 163 Ariz. 548, 789 P.2d 1049 (1990).

19 *ABA Standards* 6.0 (violations of duties owed to the legal system) and 7.0
20 (violations of duties owed to the profession) apply to this case. *ABA Standard* 7.0 notes
21 that violations of duties owed as a professional (including the unauthorized practice of law,
22 referenced in ER 5.5, and violating the ethics rules generally, referenced in ER 8.4(a))
23 usually do not result in actual injuries to clients or other participants in the justice system.
24 *Standard* 7.3 recommends Reprimand (Censure in Arizona), when a lawyer negligently
25 engages in a violation of his duty owed to the profession, causing little or no injury to a
26 client, the public, or the legal system.

1 *Standard* 6.1 notes that lawyers, as officers of the court, must always
2 operate within the bounds of the law, and cannot misrepresent matters in court or to parties
3 or clients. *Standard* 6.13 recommends Reprimand (Censure in Arizona), when a lawyer: is
4 negligent in determining when material information is being withheld, and causes
5 potentially adverse effect on a legal proceeding. I find that there was little or no injury to a
6 party, the court, or the profession by Respondent's continuing to practice law subsequent
7 to his suspension; indeed, the State Bar has not alleged nor offered any evidence of any
8 such injury. Nonetheless, there certainly was potential adverse effect on legal proceedings
9 by the possibility of any matter Respondent appeared on being vacated due to his
10 suspended status.

11 **B. Aggravating and Mitigating Factors**

12 The State Bar advances two factors in aggravation, *i.e.*, multiple offenses
13 (*Standard* 9.22(d)), and substantial experience in the practice of law (*Standard* 9.22(i)).
14 The State Bar contends that there is only one factor in mitigation, *i.e.*, absence of a prior
15 disciplinary record (*Standard* 9.32(a)). Respondent, on the other hand, contends that there
16 are no aggravating factors. He claims, however, five factors in mitigation, *i.e.*, no prior
17 disciplinary record (*Standard* 9.32(a)), no dishonest or selfish motive (*Standard* 9.32(b)),
18 full cooperation with the disciplinary proceedings and responding immediately to the Bar's
19 inquiries (*Standard* 9.32(e)), remorse (*Standard* 9.32(l)), and the fact that disciplinary
20 action was not initiated as the result of a client's complaint (a factor not considered by the
21 *ABA Standards*).

22 This Hearing Officer rejects some of the parties' proposed factors.
23 Technically, there are multiple offenses in this case. Nonetheless, practicing law without a
24 license is in the nature of a "continuing offense," so that every single act done in
25 furtherance of any client matter during the period of suspension could constitute another of
26 "multiple" offenses. Moreover when the continued unauthorized practice arose as a result
of negligence, the fact that he continued with several clients' work does not aggravate his

1 conduct. Therefore, I find that the State Bar has failed to prove by clear and convincing
2 evidence the aggravating factor of "multiple offenses" under *Standard 9.22(d)* here..

3 Cooperation with disciplinary proceedings can hardly be urged in mitigation
4 when Respondent failed to answer the Complaint, eventuating in default. "Responding
5 immediately to the Bar's inquiries" is not evident in the record before this Officer.
6 Furthermore, although Respondent claims remorse, that sentiment is also not convincingly
7 apparent in the evidence in the proceeding nor in his sanctions memoranda. It is not clear
8 and convincing to this Hearing Officer that failing to file an Answer to the Complaint
9 exemplified contrition – as opposed to further disregard of Bar correspondence. Finally,
10 that a client had not initiated discipline is of no moment to this case. It does not constitute
11 mitigation under the *ABA Standards*. This Officer recognizes that mitigation outside that
12 prescribed by the *ABA Standards* may be considered, and so does consider it in deciding
13 the appropriate sanction. However, under the facts and circumstances here, it does not rise
14 to the level of being a mitigating factor. Therefore, I find that Respondent has failed to
15 prove by clear and convincing evidence the mitigating factors of cooperation with
16 disciplinary proceedings, remorse, and that a client had not instituted discipline.

17 I find the following aggravating factor applies in this case: substantial
18 experience in the practice of law under *Standard 9.22(i)*. Respondent had been in practice
19 a little over six years when this offense occurred. The quantum of practice necessary to
20 satisfy this standard depends on the complexity of the violation or the obscurity of the rule
21 to an unschooled practitioner. Although six years of practice would not *per se* constitute
22 "substantial experience," given the nature of the violation here, it does: Respondent was
23 without question aware of the need to address both CLE requirements and Bar
24 interventions. Consequently, I find this as an aggravating factor.

25 I find the following mitigating factors apply in this case: lack of prior
26 disciplinary record, and absence of a dishonest or selfish motive. There is no prior
discipline, and that clearly mitigates respondent's conduct, given the substantial amount of

1 time he had practiced law. Both parties agree with this mitigation. *Standard* 9.32(a). I
2 credit Respondent's contention in his sanction memoranda that he did not see the letter
3 notifying him of his suspension from practice. As Respondent candidly conceded, that
4 does not excuse him from being responsible for knowing its contents nor isolate him from
5 discipline (since he has an obligation to receive mail from the Bar and review it). However
6 the fact that he immediately rectified his CLE deficiency after Judge Burke informed him
7 of his suspension supports his contention that he had not been actually aware of it
8 beforehand. Therefore I find that he was not motivated by a dishonest or selfish interest in
9 his negligent unauthorized practice of law. *Standard* 9.32(b).

10 C. Proportionality Analysis

11 The Supreme Court held that in order to achieve proportionality when
12 imposing discipline, the discipline in each situation must be tailored to the individual facts
13 of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660
14 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

15 As noted in *Matter of Kahn*, SB-04-0154 (2005), assessing proportionality
16 in cases of unauthorized practice of law is difficult, given the wide range of sanctions
17 imposed in these cases, predominantly based on other facts. Hence cases involving
18 unauthorized practice of law had harsh sanctions when they included other, more serious
19 breaches of the ethics rules. *E.g.*, *In re MacAskill*, 163 Ariz. 354, 788 P.2d 87 (1990)
20 (disbarred for practicing after being suspended, but also for dishonesty, other ethics
21 violations in representation he did while suspended, failure to cooperate with the Bar, and
22 moving without leaving a forwarding address); *In re Phelps*, 154 Ariz. 516, 774 P.2d 428
23 (1987) (disbarred for practicing while suspended, but he clearly *knew* he had been
24 suspended, and had been suspended only a year before for unprofessional conduct).

25 On the other hand, several cases sanctioned the errant lawyer less severely
26 when the facts were less egregious. *E.g.*, in *Matter of Stevens*, 178 Ariz. 261, 872 P.2d 665
(1994), the attorney was censured because he had practiced law after being suspended (due

1 to challenging Bar requirements, not malpractice), and the suspension was for a brief
2 period of time, as well as substantial mitigating factors. Of note: "the absence of a
3 deceptive motive leads the Commission to conclude that a suspension would be
4 inappropriately harsh" under those circumstances." Id., 178 Ariz. at 23, 872 P.2d at 667.
5 In Matter of Bayless, No. SB-04-0053 (2004), censure was appropriate when his practice
6 while suspended for a brief period of time was negligent rather than knowingly had
7 violative, and his clients had suffered no injuries.

8 **D. Discussion of Appropriate Sanction**

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

15 In selecting the appropriate sanction, the hearing officer should consider the
16 facts of the case, the *ABA Standards*, and the proportionality of discipline being imposed in
17 related cases. Matter of Bowen, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). I have
18 considered all these matters. I find that Respondent's conduct here was negligent, in that
19 he failed to set up a mail review system in his office that would bring to his attention
20 notices sent to him by the State Bar. It is significant that there was no evidence of actual
21 injury to any clients, although potential adverse impact on the judicial system remained. It
22 is furthermore significant that he had immediately corrected the CLE deficiency when he
23 learned of his suspension. In accordance with Stevens, I therefore reject the State Bar's
24 request for imposition of a suspension from practice. I do so with some reservations, given
25 what *may* be a pattern of disregard to Bar obligations (failure to complete CLE, failure to
26 read Bar correspondence, and failure to Answer the Complaint); but given the lack of prior
disciplinary matters, there is no long-term pattern of this established. Respondent should

1 be well-advised to take this proceeding to heart, becoming highly diligent about Bar
2 matters in the future so that this singular disciplinary action will be an isolated occurrence.

3 Upon consideration of the facts, application of the *ABA Standards*, aggravating and
4 mitigating factors, and a proportionality analysis, this Hearing Officer recommends the
5 following:

- 6
- 7 1. Respondent shall receive a Censure.
 - 8 2. Respondent shall be placed on Probation for a period of one year, effective
9 upon the signing of the probation contract. Bar Counsel is to notify the
10 Disciplinary Clerk of the date that this probation begins. The terms of
11 probation follow:
 - 12 a. Respondent will meet with the director of the Member Assistance
13 Program ("M.A.P.") who will assess the effectiveness of
14 Respondent's mail and correspondence handling in his office.
 - 15 b. Respondent will comply with any changes suggested by MAP, and
16 permit MAP personnel access to his office and staff to confirm that
17 those changes have been accomplished and remain in effect.
 - 18 3. Respondent shall pay the costs and expenses incurred in these disciplinary
19 proceedings, pursuant to Rule 60(b), Ariz.R.S.Ct.
- 20
21
22

23 DATED this 18th day of May, 2006.

24 
25 Donna Lee Elm
26 Hearing Officer 6N

1 Original filed with the Disciplinary Clerk
2 this 18th day of May, 2006,

3 Copy of the foregoing mailed
4 this 19th day of July, 2006, to:

5 Christopher J. Piekarski
6 Respondent
7 3411 North 32nd Street
8 Phoenix, AZ 85018-5606

9 Maret Vesella
10 Deputy Chief Bar Counsel
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12 4201 North 24th Street, Suite 200
13 Phoenix, AZ 85016-6288

14 by: M. Samaniego
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