

FILED

JAN 26 2006

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

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

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3	IN THE MATTER OF A MEMBER)	No. 04-1931
4	OF THE STATE BAR OF ARIZONA,)	
5)	
6	ROGER K. SPENCER,)	
7	Bar No. 004618)	
8)	HEARING OFFICER'S REPORT
9	Respondent.)	
10)	

PROCEDURAL HISTORY

A Probable Cause Order was filed on May 5, 2005. The State Bar of Arizona filed a one-count complaint on July 29, 2005. Respondent filed his Answer on August 26, 2005.

Hearings were held on November 10 and November 18, 2005. Amy Rehm appeared on behalf of the State Bar. Respondent was represented by Scott Rhodes and Mia Jaksic. At the conclusion of the hearings, both parties were requested to file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a lawyer licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 23, 1976. (Answer, para. 1)

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Count One (File No. 04-1931)

1. Respondent, at all times material to the misconduct alleged herein, was an equity partner at Quarles & Brady Streich Lang ("QBSL"). (Answer; JPHS). Respondent first became an equity partner at the firm in 1991. (Tr. Vol. 1, p. 24).

2. Respondent's law practice at QBSL focused on commercial real estate transactions. (Tr. Vol. 1, p. 24). Respondent generally billed between 40-50 hours per week. (Tr. Vol. 1, p. 24). During the time period of the misconduct, Respondent's billing rate ranged from \$350 to \$385 per hour. (Tr. Vol. 1, p. 25).

3. Through his testimony at the hearing, and in his deposition, Respondent described the compensation structure for equity partners at QBSL. Respondent explained that QBSL partners were paid based on a percentage of the net profits of the operations of the firm, measured in September of every year. (Tr. Vol. 1, p. 25). The partners of the firm, based on recommendations of the compensation committee, voted to determine the percentage that should be allocated to each partner for the upcoming year. (Tr. Vol. 1, p. 25). One of the factors considered in the determination was the individual partner's production,

1 meaning how many billed hours resulted in collected fees. (Tr. Vol. 1, p. 26).
2 Thus, there was a relationship between the fees collected by a partner from
3 clients and that partner's compensation for future years. (Tr. Vol. 1, p. 26).
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5 4. Partners at QBSL were authorized to advance costs on behalf of
6 clients. Respondent testified that he did so from time to time during his practice
7 there. (Tr. Vol. 1, p. 26). Clients were then billed for advanced costs in the
8 month following the month in which costs were incurred. (Tr. Vol. 1, p. 27).
9 Partners at QBSL were responsible for reimbursing the firm if an advanced cost
10 was not collected from the client. Specifically, any cost billed prior to March 1
11 of any fiscal year and not collected by September 30 of that year was charged to
12 that lawyer's production. (Tr. Vol. 1, p. 27).
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16 5. From 2001 to the time that Respondent resigned from the firm, his
17 yearly compensation from the firm ranged from \$350,000 to \$400,000. (Tr. Vol.
18 1, p. 27).
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20 6. In his capacity as an equity partner at QBSL, Respondent was the
21 responsible billing attorney on numerous client matters. (Answer; JPHS). At the
22 hearing, and at his deposition, Respondent described the billing process at QBSL.
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1 Respondent stated that it was his practice to send monthly bills. (Tr. Vol. 1, p.
2 29).
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4 7. Lawyers at QBSL are required to submit their daily time at least
5 twice a month. It is then entered into the computer by the lawyer or the secretary
6 for the billing department to generate a pre-bill, referred to as a "B-memo" at
7 QBSL. (Tr. Vol. 1, p. 28).
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9 8. The B-memo is then reviewed by the responsible billing attorney,
10 and upon approval ultimately results in a bill of fees and costs to the client.
11 (Answer; JPHS).
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13 9. The B-memo included not only Respondent's time, but also time for
14 other lawyers or paralegals who worked on a case, as well as costs. (Tr. Vol. 1,
15 p. 29).
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17 10. If Respondent wanted to change a B-memo, he made a handwritten
18 notation on the B-memo, which would then be input by the billing department for
19 the final bill. (Tr. Vol. 1, p. 30, 32). No other lawyers reviewed Respondent's B-
20 memos, changes to B-memos, or final bills, unless Respondent requested another
21 lawyer to do so. (Tr. Vol. 1, p. 32). After the billing department input the
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1 handwritten changes, they generated final bills, which Respondent again
2 reviewed before sending them out. (Tr. Vol. 1, p. 32).

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4 11. The B-memos also showed past-due amounts from clients.
5 Respondent testified that he kept track of which clients did not regularly pay
6 their bills and reviewed collections reports with that information. (Tr. Vol. 1, p.
7 33). Respondent knew which clients were current and which clients were not.
8 (Tr. Vol. 1, p. 33).

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11 12. Respondent had the authority as a partner at the firm to reduce fees
12 or waive fees for a client. (Tr. Vol. 1, p. 31). Respondent also could waive costs.

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14 13. In September 2004, QBSL discovered that Respondent had
15 apparently improperly transferred costs and/or fees from the B-memo of one
16 client to that of another. (Answer; JPHS). Kent Stevens, QBSL's managing
17 partner for the Phoenix office, was told of the improper billing by Respondent's
18 secretary. (Tr. Vol. 1, p. 112). Mr. Stevens reviewed the B-memo in question
19 and discussed the issue with Pat Ryan, the national managing partner for QBSL.
20 (Tr. Vol.1 p. 113). Mr. Stevens and Mr. Ryan decided that Mr. Stevens should
21 confront Respondent with the B-memo that appeared to show improper transfers
22 of fees from one client to an unrelated client. (Tr. Vol. 1, p. 114).

1 14. Respondent was confronted with the improper B-memo on
2 September 20, 2004 by Kent Stevens and Dan Muchow. (Tr. Vol. 1, p. 54).
3
4 Respondent was initially confronted with the B-memo for Shindel Realty. This
5 was a matter he was handling for his father-in-law, which showed several
6 improper transfers of fees/costs to unrelated clients. (Tr. Vol. 1, p. 43, State
7 Bar's ex. 12). Kent Stevens testified that he showed Respondent the B-memo in
8 question and asked him for an explanation. (Tr. Vol. 1, p. 115). Mr. Stevens
9 further testified that Respondent responded by saying "how can I make this go
10 away?" (Tr. Vol. 1, p. 115). Respondent was unable to offer any explanation for
11 the transfers. At that meeting, Kent Stevens told Respondent that the firm would
12 investigate his billing practices further. (Tr. Vol. 1, p. 56, 117). Respondent did
13 not deny making the improper transfers. (Tr. Vol. 1, p. 134).

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17 15. Thereafter, QBSL investigated all matters in which Respondent was
18 the billing attorney between October 1, 2001 and September 30, 2004. (Answer;
19 JPHS). Kent Stevens asked attorney Bob Miles, QBSL's loss prevention partner
20 at that time, to undertake the investigation. Bob Miles has since left QBSL and is
21 now a Maricopa County Superior Court judge. (Tr. Vol. 1, p. 97).
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1 16. Judge Miles testified at hearing regarding the investigation of
2 Respondent's billing practices. At the time Judge Miles was first notified of the
3 issue only one improper billing statement had been identified. (Tr. Vol. 1, p. 99).

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5 Judge Miles then spoke to Respondent's secretary, who indicated that it was not
6 uncommon for there to be many transfers on Respondent's B-memos. (Tr. Vol.
7 1, p. 100). Judge Miles first examined one year's worth of Respondent's B-
8 memos. After reviewing those and determining that they contained a number of
9 questionable transfers, Judge Miles had another two year's worth of B-memos
10 pulled. He testified that after going back three years, he felt he had gotten the
11 gist of the false billings; also, it was getting more difficult to locate the older B-
12 memos. After Judge Miles reviewed the B-memos, he met with Respondent and
13 reviewed the transfers with him to determine which were improper.
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17 17. Respondent cooperated with QBSL's internal investigation of the
18 billings. (JPHS; Tr. Vol. 1, p. 105). However, Respondent did not provide any
19 names of affected clients or dates to assist QBSL in its investigation as he could
20 not recall any. (Tr. Vol. 1, p. 103).
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23 18. QBSL ultimately identified 26 clients for whom Respondent had
24 made improper transfers of costs and/or fees during the above time period
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1 resulting in billing to clients for fees or costs that should have been billed to
2 other clients. (Answer). Respondent alleges that there were arguably 16, rather
3 than 26, affected clients, because QBSL's figure does not reflect that some of the
4 26 clients were related entities or individuals. (JPHS). Respondent made
5 numerous false billing transfers for many of the clients. (Tr. Vol. 1, p. 37).
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8 19. The B-memos showing the improper transfers were admitted into
9 evidence. (State Bar's ex. 10, 11, 12). Those B-memos show that Respondent at
10 times transferred the entire entry (including a description of the work performed)
11 from one client to another unrelated client. At other times, Respondent changed
12 the descriptions of the work performed prior to transferring it so that the second
13 client would not realize that it was a false billing entry. (Tr. Vol. 1, p. 35, 36).
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16 20. Respondent did likewise for costs on numerous occasions, i.e., he
17 often changed the description of the cost on the B-memo to make it appear a
18 valid cost on another client's matter. (Tr. Vol. 1, p. 36).
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20 21. At the time of Respondent's false transfers, Respondent knew that
21 the transfers would result in clients paying for services that they had not
22 received, or for costs that had not been incurred on their cases or matters. (Tr.
23 Vol. 1, p. 36).
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1 22. At the first hearing, the parties stipulated to the admission of a chart,
2 authored by attorney Bob Miles of QBSL, showing the dates of the improper
3 transfers, and the amounts, by client. (State Bar's Ex. 5). Judge Miles compiled
4 this chart based upon his review of Respondent's B-memos during 2001 through
5 2004. (Tr. Vol. 1, p. 106). The chart shows that, during that time period,
6 Respondent improperly transferred fees or costs 116 times.
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9 23. At the first hearing, Respondent testified that he made the false
10 transfers to relieve his anxiety about a client rejecting him, rejecting payment of
11 the bill, or firing him if they received an accurate bill. (Tr. Vol. 1, p. 38).
12 Respondent did not explain why he had that anxiety about the clients he
13 eliminated costs and fees from but not about the clients to whom he was
14 transferring the costs and fees. (Tr. Vol. 1 p. 39).
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17 24. Respondent testified that in determining whom to eliminate costs
18 and fees from, he did not consider whether they were clients who complained
19 about their bills, or whether they were clients who did not pay their bills, or what
20 clients set limitations on fees. (Tr. Vol. 1, p. 39). Mr. Stevens concluded that
21 the client that most often ended up with the improper charges transferred to its
22 statements was one of some substance, a client that received billings on a
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1 somewhat regular basis, and a client who did not pay close attention to its
2 statements. (Tr. Vol. 1, p. 119, 120). However, Mr. Stevens stated that he never
3 directly discussed that issue with Respondent.
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5 25. Several of the improper transfers were transfers of fees and costs
6 from bills for matters Respondent handled for his father-in-law and his wife. (Tr.
7 Vol. 1, p. 40).
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9 26. Respondent was deposed in this case on September 23, 2005. At the
10 deposition, Respondent was asked whether any of the matters involving the false
11 transfers included cases handled for his family members. During the deposition,
12 Respondent only testified about the case involving his father-in-law, but did not
13 reveal his wife's case. (Tr. Vol. 1, p. 40). Respondent corrected that information
14 later, after the State Bar provided the B-memos to him. Respondent testified that
15 he had no independent recollection at the time of his deposition that some of the
16 matters involved his wife. (Tr. Vol. 1, p. 41).
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20 27. On several occasions, Respondent falsely transferred fees/costs from
21 his wife's bill to bills of other clients. (Tr. Vol. 1, p. 41). Respondent
22 acknowledged that those fees were normally paid from his and his wife's
23 checking account. (Tr. Vol. 1, p. 41). Respondent acknowledged that he could
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1 waive fees for his wife for legal services he performed for her. (Tr. Vol. 1, p.
2 42).

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4 28. As a result of QBSL's investigation, it was determined that
5 Respondent's false billings for fees and costs totalled \$16,601.12. QBSL
6 calculated interest at 10% for any transfers made in 2004, 20% for any transfers
7 made in 2003 and 30% for any prior transfers, for a total of \$2,408.01. QBSL
8 then wrote to all the affected clients advising them of the over-billings and made
9 restitution to them of a total of \$19,009.13. (Answer; JPHS).
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12 29. Respondent, through his attorney, drafted a proposed letter for
13 QBSL to use in notifying the affected clients of the false billings. (Tr. Vol. 1, p.
14 62; State Bar's Ex. 7). The firm did not use the proposed letter, but instead sent
15 another. (Tr. Vol. 1, p. 62; State Bar's Ex. 6).
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17 30. Subsequent to the letters being sent to the clients, Respondent
18 contacted some of the affected clients by telephone to further discuss his ethical
19 misconduct. Respondent was able to reach some clients but not others. (JPHS).
20 Respondent testified that he left messages for approximately 16 of his clients,
21 telling them that they would be getting a refund check, and inviting them to
22 contact him about the issue. (Tr. Vol. 1, p. 65). Approximately 12 clients spoke
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1 to Respondent directly about the issue. Respondent informed those clients that
2 he lost focus on his billing relationship to them, and allowed charges to be
3 transferred to their accounts that shouldn't have been, due to personal problems.
4 (Tr. Vol. 1, p. 65). Two affected clients testified at the hearing. R. Jeffrey Smith
5 of Sunbelt Management Company testified about Respondent's phone call to him
6 about the billings. Mr. Smith testified that Respondent did not inform him of the
7 specifics of the false billings, but told him that he "took his eye off the ball"
8 regarding his billings. (Tr. Vol. 2, p. 163).
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12 31. No clients terminated the law firm's representation due to the false
13 billings. (Tr. Vol. 1, p. 66).
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15 32. Respondent testified that prior to the firm's discovery of the false
16 billings in September of 2004, no one at the firm had ever questioned him about
17 the false transfers. He also testified that he did not recall any clients ever
18 questioning any of the false entries on their bills. (Tr. Vol. 1, p. 67, 68).
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20 33. Respondent resigned from his position at QBSL effective January
21 31, 2005. (JPHS; Tr. Vol. 1, p. 24). Respondent testified that his resignation
22 from the firm was a mutually agreed upon decision between him and Pat Ryan,
23 QBSL's managing partner. Tr. Vol. 1, p. 58). Mr. Stevens testified that the firm
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1 told Respondent that they would ask for his resignation. (Tr. Vol. 1, p. 127). Mr.
2 Stevens further testified that Respondent asked him to reconsider that decision.
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4 (Tr. Vol. 1, p. 127).

5 34. Between the time that Respondent's false billings were discovered
6 and the time that he left the firm, Respondent's billings were monitored by Dan
7 Muchow of the firm. (Tr. Vol. 1, p. 127).

9 35. After the false billings were discovered by QBSL and Respondent
10 was confronted about it, he contacted the State Bar's Membership Assistance
11 Program ("MAP"). He also sought legal advice regarding his ethical
12 responsibilities to his clients and the profession and his legal responsibilities to
13 QBSL. (JPHS).
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16 36. Hal Nevitt, the director of MAP for the State Bar, testified at the
17 hearing. Mr. Nevitt testified that Respondent contacted him on September 21,
18 2004 about the billing issues. Mr. Nevitt recommended that Respondent
19 immediately seek the assistance of a psychiatrist, and also contact Dr. Sucher,
20 MAP's medical director, for further assistance. (Tr. Vol. 2, p. 178). Respondent
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22 later entered into a voluntary MAP contract. (JPHS). MAP contracts generally
23 address mental health issues and set forth a treatment plan for a lawyer. (Tr. Vol.
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1 2, p. 185). As part of the MAP contract, Respondent has monthly meetings with
2 Mr. Nevitt. Respondent was also required to meet with Dr. Sucher, and to
3 continue treating with his psychiatrist, as well as meet with his MAP monitor.
4 (Tr. Vol. 2, p. 191). Respondent complied with all of the MAP contract terms.
5 (Tr. Vol. 2, p. 181, 209).
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8 37. Maria Bahr, of the State Bar, serves as Respondent's MAP monitor.
9 (JPHS). Ms. Bahr described her role as a "peer" monitor, rather than a practice
10 monitor. (Tr. Vol. 2, p. 219). Her role was to help ensure compliance with
11 Respondent's MAP contract by meeting with him or speaking with him on a
12 regular basis. (Tr. Vol. 2, p. 219). Ms. Bahr did not counsel Respondent on his
13 office practices, as that was not her role in this case. (Tr. Vol. 2, p. 225). She
14 was not involved in monitoring his billing practices at his new office. (Tr. Vol.
15 2, p. 230).
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19 38. Respondent reimbursed QBSL in full for the restitution made by
20 QBSL to the affected clients. (JPHS).
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22 39. Respondent engaged forensic psychiatrist Steven E. Pitt, D.O., to
23 conduct an independent psychiatric examination. (JPHS). Dr. Pitt evaluated
24 Respondent on October 18, 2004. (Tr. Vol. 2, p. 275). Dr. Pitt's report of his
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1 evaluation was admitted into evidence as State Bar's Ex. 1E. Dr. Pitt also
2 conducted a follow-up interview with Respondent on July 7, 2005, and authored
3 a supplemental report which was admitted into evidence as Respondent's Ex. 7.
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5 40. Dr. Pitt opined, during his testimony at the hearing, that while he did
6 not have enough information to diagnose Respondent with a personality disorder,
7 he believed that Respondent suffered from narcissistic and obsessive-compulsive
8 personality traits. (Tr. Vol. 2, p. 279). Dr. Pitt testified that he did not believe
9 that the misconduct was impulsive, nor did he believe that it was committed with
10 the intent to harm others. (Tr. Vol. 2, p. 281). As far as the likelihood of
11 recurrence of the misconduct, Dr. Pitt testified that as long as appropriate
12 safeguards were in place and Respondent continued with a treatment plan, he
13 believed that Respondent's long-term prognosis was guarded, but that he was
14 cautiously optimistic that he would refrain from the conduct. (Tr. Vol. 2, p. 286).
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19 Dr. Pitt testified that the mental disability was principally responsible for the
20 misconduct. (Tr. Vol. 2, p. 288). Dr. Pitt further stated that Respondent's
21 rehabilitation is an on-going process, and that safeguards of treatment and
22 monitoring were important. (Tr. Vol. 2, p. 295). Dr. Pitt, in his initial report,
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1 recommended that Respondent's billing practices be monitored as one of the
2 safeguards. (Tr. Vol. 2, p. 301-303).
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4 41. Respondent attended a week-long intensive therapy program at The
5 Meadows in Wickenburg, Arizona. (JPHS).
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7 42. Upon recommendation of Dr. Pitt, Respondent began weekly long-
8 term psychiatric counseling with Lisa Jones, M.D. (JPHS). Dr. Jones also
9 testified at the hearing and her treatment notes were admitted into evidence.
10 (State Bar's Ex. 23). Respondent first began treating with Dr. Jones in
11 November of 2004, and had regularly continued treatment with her through the
12 date of the hearing. (Tr. Vol. 2, p. 312). Dr. Jones diagnosed Respondent with
13 narcissistic and obsessive-compulsive personality disorder. (Tr. Vol. 2, p. 316).
14 Dr. Jones further testified about the causes of the disorders, their symptoms, and
15 Respondent's treatment to date.
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19 43. In November 2004, Respondent reported the above ethical
20 misconduct involving false billings to clients to the State Bar of Arizona.
21 (Answer; JPHS). Respondent testified that he was never told by anyone at QBSL
22 that the firm would report his conduct to the State Bar if he did not self-report.
23 (Tr. Vol. 1, p. 59). Kent Stevens testified that he told Respondent that if he did
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1 not self-report, the firm would report him to the State Bar. (Tr. Vol. 1, p. 129).
2 Dr. Sucher testified that Respondent told him that he had asked the firm to
3 reconsider its position on reporting him to the State Bar, although Respondent
4 did ultimately self-report. (Tr. Vol. 2, p. 206).
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6 44. Respondent underwent a psychological evaluation with H. Daniel
7 Blackwood, Ph.D., at the request of the State Bar, on October 5, 2005. (Tr. Vol.
8 1, p. 82). As a result of the examination, Dr. Blackwood authored a report that
9 was admitted into evidence at the hearing as State Bar's Ex. 16. Dr. Blackwood
10 also testified at the hearing. Dr. Blackwood's evaluation consisted of reviewing
11 records from Dr. Pitt and Dr. Jones, administering three different behavioral or
12 personality questionnaires, and interviewing Respondent. (Tr. Vol. 1, p. 82,
13 State Bar's Ex. 16). Dr. Blackwood opined that Respondent suffers from a
14 narcissistic personality disorder. (Tr. Vol. 1, p. 86). Dr. Blackwood also opined
15 that there was nothing about Respondent's condition that would have prevented
16 him from acting knowingly. Dr. Blackwood testified, "I do not think that his
17 personality disorder would have prevented him from acting with full intent, full
18 awareness of his actions, potential consequences of his actions, those sorts of
19 things." (Tr. Vol. 1, p. 88). Dr. Blackwood further stated that Respondent could
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1 understand the difference between right and wrong, and control his actions. (Tr.
2 Vol. 1, p. 88, 89). Dr. Blackwood also opined that Respondent's mental
3 disability (the personality disorder) substantially contributed to the misconduct.
4 (Tr. Vol. 1, p. 90). Dr. Blackwood also testified that in his opinion, the
5 misconduct was unlikely to recur. (Tr. Vol. 1, p. 91) Dr. Blackwood qualified
6 that opinion by stating that he assumed that Respondent would continue in
7 treatment and be supervised and monitored.
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11 45. Respondent opened his own law office on February 1, 2005. (JPHS;
12 TR. Vol. 1, p. 23).

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14 46. Respondent continues to practice as a solo practitioner. He has one
15 staff employee, an assistant. (Tr. Vol. 1, p. 70). Since opening his new law
16 practice, Respondent had not had anyone regularly monitor his billings as of the
17 date of the hearing.
18

19 CONCLUSIONS OF LAW

20 **Count One (File No. 04-1931)**

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22 The complaint filed against Respondent charged Respondent with
23 violations of ER 1.4, ER 1.5, ER 4.1, and ER 8.4(c). I find that the State Bar has
24 proven all of the charged violations by clear and convincing evidence.
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1 In his answer to the complaint, Respondent admitted that his misconduct
2 violated ERs 1.4, and 1.5. Charging clients for work not performed on their
3 cases or for costs not incurred on their cases clearly violates ER 1.5, prohibiting
4 unreasonable fees. Similarly, that same misconduct violates ER 1.4, requiring
5 adequate communication with clients, in that clients were misinformed as to tasks
6 performed on their behalves or costs incurred on their behalves.
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9 At the first hearing, Respondent admitted that his misconduct also violated
10 ER 4.1. That ER prohibits a lawyer from knowingly making a false statement of
11 material fact or law to a third person. Respondent repeatedly submitted false
12 billing statements to his clients, and to his law firm. Respondent admits that his
13 conduct, in regard to that ethical rule, was committed knowingly.
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16 Respondent has denied culpability for a violation of ER 8.4(c), prohibiting
17 a lawyer from engaging “in conduct involving dishonesty, fraud, deceit, or
18 misrepresentation”. I conclude that Respondent’s admission that he made false
19 statements in regards to ER 4.1 also constitutes a violation of ER 8.4(c). At
20 closing, Respondent appeared to argue that he was not liable for violations of ER
21 8.4(c) because he did not act with a conscious intent to commit a dishonest act or
22 to cause harm to anyone. There is no law of which I am aware requiring an intent
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1 to be dishonest, or an intent to cause harm, as a prerequisite to finding a violation
2 of ER 8.4(c). In *Matter of Clark*, 207 Ariz. 414, 87 P.3d 827 (2004), the Court
3 held that ER 8.4(c) requires either an intentional or knowing mental state. Since
4 Respondent has admitted that his mental state was knowing, I conclude that he
5 violated ER 8.4(c) by knowingly making the false transfers.
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8 ABA STANDARDS

9 The *ABA Standards for Imposing Lawyer Sanctions* provide guidance
10 with respect to an appropriate sanction in this matter. The Supreme Court and
11 the Disciplinary Commission are consistent in utilizing the *Standards* to
12 determine appropriate sanctions for attorney discipline. *In re Kaplan*, 179 Ariz.
13 175, 877 P.2d 274 (1994). The *Standards* provide that four factors should be
14 considered in determining the sanction: the duty violated; the lawyer's mental
15 state; the actual or potential injury; and aggravating and mitigating factors. Also,
16 according to the *Standards* and *In re Cassalia*, 173 Ariz. 372, 843 P.2d 654
17 (1992), where there are multiple acts of misconduct, the Respondent should
18 receive one sanction that is consistent with the most serious instance of
19 misconduct, and the other acts should be considered as aggravating factors.
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1 In this case, there were clearly multiple acts of misconduct, as
2 Respondent's false billings occurred on multiple occasions. However, it is not
3 necessary to consider the instances separately since they were all committed
4 under the same general fact pattern. All of the violations of ERs charged and
5 proven in this matter relate to the false billings.
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7
8 I have concluded that *Standard* 4.62 is the most applicable presumptive
9 standard to the facts of this case. That standard states:
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11 “Suspension is generally appropriate when a lawyer knowingly deceives a
12 client and causes injury or potential injury to a client.”
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14 The actual injury caused to Spencer's clients over a period of
15 approximately three years prior to restitution made by QBSL, and ultimately
16 Spencer, was \$19,009.13 (see Finding #28, *supra*).
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18 The potential injury to Spencer's clients had his misconduct not been
19 arrested is quite speculative, but, assuming his pattern of misconduct had
20 continued unabated, would have been an additional amount of approximately
21 \$6,300.00 annually ($\$19,000 \div 3$).
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23 The next step under the *Standards* is consideration of aggravating and
24 mitigating factors. *Standard* 9.1.
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1 Application of the aggravating factors listed in *Standard 9.22* to the facts
2 proven at hearing indicates that the following two aggravating factors are
3 present and should be considered:
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- 5 1. 9.22 (c) and (d) pattern of misconduct and multiple offenses; and
- 6 2. 9.22(i) substantial experience in the practice of law.
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8 Application of the mitigating factors listed in *Standard 9.32* to the facts
9 proven at hearing indicates that eight mitigating factors are present and should
10 be given great weight, particularly 9.32(i), mental disability, and interim
11 rehabilitation. These are:
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- 13 1. 9.32(a) absence of a prior disciplinary record;
- 14 2. 9.32(c) personal or emotional problems;¹
- 15 3. 9.32(d) timely good faith effort to make restitution or to rectify
16 consequences of misconduct;
- 17 4. 9.32(e) full and free disclosure to disciplinary board or
18 cooperative attitude toward proceedings;
- 19 5. 9.32 (i) mental disability, including medical evidence, proof of
20 causal nexus, proof of a meaningful and sustained period of interim
21 rehabilitation.
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26 ¹ See reports of Dr. Pitt, State Bar's Ex. 1E and Respondents Ex. 7 and Dr. Blackwood, State Bar's Ex. 16.

1 rehabilitation, and expert testimony showing that Respondent is unlikely to
2 engage in recidivism;

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5 6. interim rehabilitation²;

6 7. 9.32 (k) imposition of other penalties and sanctions³; and

7 8. 9.32(l) remorse.

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9 9.32(i) mental disability requires close analysis of the evidence presented
10 at the hearing. Pursuant to the *Standards*, Respondent must show four elements
11 to establish this mitigating factor: (1) there is medical evidence that the
12 Respondent is affected by a mental disability; (2) the mental disability caused
13 the misconduct; (3) the Respondent's recovery from the mental disability is
14 demonstrated by a meaningful and sustained period of successful rehabilitation;
15 and (4) the recovery arrested the misconduct and recurrence of that misconduct
16 is unlikely.
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20 A substantial amount of evidence was introduced at the hearing
21 concerning this mitigating factor. I believe that Respondent has met all four
22

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24
25 ² Previously 9.32(j). I am aware that "interim rehabilitation" is no longer part of the Standards;
26 however, the Arizona Supreme Court continues to recognize it as a mitigating factor. *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004).

³ Being required to resign from QBSL.

1 criteria of the standard, and thus this mitigating factor should be given
2 significant weight in determining the appropriate sanction.
3

4 All three medical experts opined that Respondent suffers from a mental
5 disability, although there was some disagreement as to the Respondent's precise
6 diagnosis. All experts agreed that Respondent suffers from a narcissistic
7 personality disorder or traits thereof. Notwithstanding his condition, it appears
8 that Respondent functioned as a competent lawyer and consistently fulfilled his
9 day to day duties.
10
11

12 The medical experts also testified that the mental disability was
13 instrumental in causing the misconduct. Under the comments to the *Standards*,
14 the degree of causation is relevant. Those comments state, in part:
15

16 "Direct causation between the disability or the chemical
17 dependency and the offense must be established.
18 If the offense is proven to be attributable solely to
19 a disability or chemical dependency, it should
20 be given the greatest weight. If it is principally
21 responsible for the offense, it should be given very
22 great weight; and if it is a substantial contributing
23 cause of the offense, it should be given great weight."

24 *Standard 9.32*, commentary. In Respondent's case, there was no testimony that
25 the offenses were *solely attributable* to the disability. Rather, the testimony
26 from the experts differed somewhat as to the causation level. Dr. Pitt,

1 Respondent's expert, opined that the disability was "principally responsible"
2 entitling it to very great weight. (State Bar's Ex. 1E). The State Bar's expert, Dr.
3 Blackwood, opined that the disability "substantially contributed" to the
4 misconduct, entitling it to great weight. (State Bar's Ex. 16).
5

6
7 As to the third and fourth facets of the disability test, I believe that the
8 evidence supports a finding that those criteria were met and give them
9 considerable weight.
10

11 Other than those discussed hereinabove, no other aggravating or
12 mitigating factors are found. Based on a review of the pertinent aggravating and
13 mitigating factors in this case, under the totality of the circumstances, including
14 the specific evidence underlying these factors, as well as the nature of
15 Respondent's misconduct, I believe that a downward deviation from the
16 presumptive sanction of suspension is indicated.
17
18

19 PROPORTIONALITY

20 To have an effective system of professional sanctions, there must be
21 internal consistency, and it is appropriate to examine sanctions imposed in cases
22 that are factually similar. *Peasley, supra*, 208 Ariz. at 33, 90 P.3d at 772.
23 However, the discipline in each case must be tailored to the individual case, as
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26

1 neither perfection nor absolute uniformity can be achieved. *Id.* 208 Ariz. at 61,
2 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In*
3 *re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

5 Arizona case law has held that a mental illness is not a complete defense to
6 misconduct in disciplinary proceedings. It does not bar the imposition of
7 significant discipline but is more appropriately considered in mitigation.⁴ If
8 causation *is* established, it should be given great weight. *See* 1992 Amendments
9 to the ABA *Standards*, 9.3 Mitigation, Commentary to 9.32. Given the
10 significant mitigating factors present in the instant matter, I have determined that
11 a reduction in the presumptive sanction of suspension is justified.

12 In conducting a proportionality analysis of similar cases involving
13 financial misconduct, I found the following cases most instructive:

14
15 *Matter of Riches*, 179 Ariz. 212, 877 P.2d 785 (1994). Riches regularly
16 misappropriated money belonging to his law firm for personal use over a five
17 year period. An Agreement for a 3 year retroactive suspension was accepted for
18 violating ERs 8.4(b) and (c).

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⁴ *In re Hoover I*, 155 Ariz. 192, 198-199, 745 P.2d 939, 945-946 (1987) and *In re Hoover II*,
161 Ariz. 529, 779 P.2d 1268 (1989).

1 *Matter of Hoover*, 161 Ariz. 529, 779 P.2d 1268 (1989). Hoover
2 misappropriated substantial sums from his client and fraudulently billed for
3 personal expenses. He suffered from bipolar manic depressive psychosis and
4 was found to be "McNaughten insane". He was suspended for six months.
5

6 *Matter of Cotton*, SB-01-0036-D (2001). Cotton negligently submitted
7 unauthorized charges to his firm for personal expenses although charges often
8 had not been incurred or else had previously been calculated. Cotton
9 additionally submitted excessive per diem charges to a client without prior
10 written approval. In aggravation were factors 9.22(c) and (i). In mitigation were
11 factors 9.32(a), (b) and (d). Cotton agreed to a censure and one year of probation
12 (EEP) for violating ERs 1.4, 4.1, 8.4(c) and (d).
13
14
15

16 *Matter of Delgado*, SB-97-0091-D (1998). Delgado issued firm checks
17 reimbursing himself for travel he did not do and submitted false billing
18 statements and time sheets to his employer. Delgado violated ERs 1.3, 4.1, 1.5,
19 4.1 and 8.4. An 18 month conditional suspension with two years of probation
20 (MAP) and restitution was imposed. An additional 18 months suspension would
21 have been imposed if MAP had not been successfully completed. The false
22 billings did not result in overcharging clients but Delgado had not repaid his
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1 employer, which was considered an aggravating factor. In mitigation, Delgado
2 had no prior discipline, expressed remorse, and had significant personal and
3 emotional problems.
4

5 I believe *Cotton* is the most analogous case. I agree with Respondent that
6 *Cotton* is authority for the proposition that not all conduct that results in financial
7 improprieties must *per se* result in disbarment or censure.
8

9 I believe that *Delgado* is less compelling precedent than *Cotton* because
10 Spencer's rehabilitation is far more substantial than was Delgado's. For
11 example, Mr. Delgado had gone into seclusion for at least six months. The
12 Respondent, in contrast, cooperated with QBSL, communicated with his clients,
13 and started and has sustained a successful period of rehabilitation. By the time
14 this matter went to hearing, the extent of the Respondent's rehabilitation was
15 apparent to all.
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19 In *Riches* and *Hoover*, the conduct of the Respondent was designed to
20 bring them considerable financial gain, whereas the financial benefit to Spencer
21 was *de minimus*.
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1 in *Florida Bar v. Grigsby*, 641 So.2d 1341 (FL 1994), that although the
2 Respondent's illness *explained* his conduct, it did not *excuse* it.
3

4 Determining the appropriate sanction in this case is difficult because the
5 Respondent's motivation was different from that of a lawyer who steals or lies to
6 obtain advantage. However, the need for protection of the public and integrity in
7 the demonstration of justice is as great as that which exists in the case of
8 dishonest lawyers; accordingly I do not feel the sanction suggested by the
9 Respondent is sufficient, *In re conduct of Loew*, 642 P.2d 1171 (OR 1983).
10
11

12 Upon consideration of the facts, application of the *Standards*, including
13 aggravating and mitigation factors, and a proportionality analysis, I recommend
14 the following:
15

- 16 1. Respondent shall be censured.
- 17 2. Respondent shall be placed on probation for a period of two years,
18 effective upon the signing of the probation contract. The State Bar will notify the
19 Disciplinary Clerk of the exact date of commencement of probation. The terms of
20 probation are as follows:
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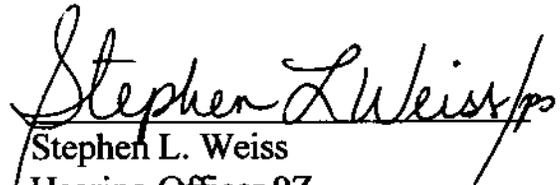
1 a. Respondent shall complete his current Voluntary Therapeutic
2 Contract through the State Bar's Member Assistance Program (MAP) and its
3 renewal in 2006.
4

5 b. Respondent shall participate in the State Bar's Law Office
6 Management Assistance Program (LOMAP), through which he will receive
7 oversight of his billing practices from a practice monitor, until the end of his
8 probationary period.
9

10 3. No further restitution is indicated.
11

12 4. Respondent shall pay the costs and expenses incurred in these
13 disciplinary proceedings.
14

15 DATED this 26th day of January, 2006.

16 
17 Stephen L. Weiss
18 Hearing Officer 9Z
19
20
21

22 Original filed with the Disciplinary Clerk
23 this 26th day of January, 2006.

24 Copy of the foregoing mailed
25 this 26th day of January, 2006, to:
26

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