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APR 06 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Mark S. Sifferman*

BEFORE A HEARING OFFICER

**IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA**

**LISE R. WITT,
Bar No. 013118**

Respondent.

File No. 04-1106

HEARING OFFICER REPORT

(Assigned to Hearing Officer 9J
Mark S. Sifferman)

PROCEDURAL HISTORY

The Complaint was filed in this matter on October 17, 2005. The Complaint was served by mail on October 18, 2005. An Answer was filed October 31, 2005. An initial Case Management Conference was held November 22, 2005 which resulted in the issuance of the Case Management Order. A settlement conference was held in December, 2005 with no settlement reached.

The State Bar and the Respondent, on January 31, 2006, submitted a Joint Pre-hearing Statement, which included certain stipulated facts. A duly noticed evidentiary hearing in this matter was held February 15, 2006. At that hearing, Respondent was present and acted *pro se*. The State Bar was represented by Loren J. Braud, Senior Bar Counsel. The parties submitted proposed findings and conclusions.

FINDINGS OF FACT

Based on the stipulated facts contained in the Joint Pre-hearing Statement and the evidence presented at the February 15, 2006 hearing, the following facts are found to exist.

RESPONDENT'S BACKGROUND

1. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on May 19, 1990. See "Standard of Uncontested Facts" in *Joint Pre-hearing Statement*, filed January 31, 2006 (hereafter "Stipulated Fact"), *Stipulated Fact 1*.
2. Respondent graduated from the Arizona State University College of Law in May 1989. *Transcript of Proceedings, February 15, 2006, ("Transcript"), page 16, lines 14 - 18.*
3. From August 1990 through July 1993, Respondent was employed as an Assistant City Prosecutor for the City of Phoenix. *Transcript, page 17, lines 11 - 22.*
4. From July 1993 through August 1997, Respondent was a sole practitioner providing defense representation in misdemeanor DUI cases. *Transcript, page 18, lines 6 - 17.*
5. Respondent transferred to inactive status with the State Bar of Arizona in approximately August, 1997. *Stipulated Fact 2.*

6. Respondent has remained on inactive status since August 1997. Further, Respondent has been on interim suspension since January 27, 2005.

BACKGROUND TO CRIMINAL CONVICTION

7. On June 15, 2004, a criminal complaint was filed against Respondent in the United States District Court for the District of Arizona, Cause No. CR04-00623-004-PHX-SRB. In addition to Respondent, named as co-defendants were Respondent's husband, Don E. Witt, Respondent's brother, Steve Nelson, and Respondent's sister-in-law, Catherine Nelson. Respondent, Respondent's husband and the Nelsons sometimes are referred hereafter as "the Defendants."

8. The criminal complaint alleged a violation of 18 U.S.C. § 1347, Health Care Fraud. *Transcript, page 9, line 3 - page 10, line 14.*

9. On the same date the criminal complaint was filed, Respondent waived indictment, made her first appearance, and pled guilty pursuant to a previously negotiated Plea Agreement. Respondent was released on her own recognizance. *Id.*

10. On June 30, 2004, the State Bar of Arizona received notification from the United States Attorney for the District of Arizona that Respondent had pled guilty to a Class D felony, i.e., violation of Title 18, United States Code, Section 1347, health-care fraud. *Stipulated Fact 4.*

11. An Amended Plea Agreement as to the Respondent was lodged with the District Court on October 19, 2004.

12. Respondent's sentencing was held December 13, 2004 before the Honorable Susan R. Bolton. Judge Bolton partially granted Respondent's request for a downward departure from the sentencing guidelines. A formal Judgment was entered against Respondent on December 13, 2004.

13. The Judgment was transmitted to the Supreme Court of the State of Arizona pursuant to Rule 53(h)(1), Ariz.R.S.Ct. The Supreme Court entered an Order of Interim Suspension pursuant to Rule 53(h)(2)(A), Ariz.R.S.Ct., on January 27, 2005. *Stipulated Fact 6.*

14. The sentencing judge in Respondent's criminal case determined Respondent's offense was a "guideline offense level 12" and on December 13, 2004 sentenced Respondent to three years of probation with six months of home detention, a \$100 special assessment, and a \$5,000 fine. *Stipulated Fact 20.*

15. As part of the settlement of the federal criminal charges filed against Respondent, Respondent and her husband agreed to pay \$125,000 to the government in lieu of a restitution order. *Stipulated Fact 19; Transcript, page 9, line 3 - page 12, line 2.*

16. Respondent and her husband paid the full amount of the ordered restitution, with their last payment being in November 2004. *Stipulated Fact 21; Transcript, page 9, line 3 - page 12, line 2.* Therefore, there is no basis for restitution to be ordered here.

17. Respondent served her home detention from January 28, 2005 to July 26, 2005. *Stipulated Fact 21; Transcript, page 11, lines 12 - 17.*

FACTS RELATING TO CRIMINAL CONVICTION

18. As a general description, Respondent participated in a scheme to defraud Medicare. *Stipulated Fact 7.*

19. Catherine Nelson, Respondent's then sister-in-law, a CPA, and Steve Nelson, Respondent's brother and Catherine's then-husband, came up with the idea of starting a CMHC, which is a federally entity specifically set up under Medicare laws and regulations as an out patient alternative to hospitalization for severely mentally ill persons. *Transcript, page 19, lines 6 - 10.*

20. The Nelsons, along with Respondent and her husband, Don Witt, created and/or operated a CMHC known as Friendship CMHC, Incorporated ("Friendship") in Phoenix, Arizona from 1995 through 2000. *Stipulated Fact 8.*

21. The Witts invested over \$100,000 to start Friendship, of which approximately \$90,000 was obtained by charging on credit cards. *Transcript, page 100, line 22 - page 101, line 2.*

22. Respondent worked at Friendship as the assistant administrator.

23. The Nelsons and Friendship were never Respondent's clients.

24. Friendship could receive income through Medicare cost reimbursements. Such cost reimbursements required the submission of cost reports which reflected, among other things, amounts paid by Friendship to others in connection with provision of Medicare services.

25. Cost reports are submitted to and audited by a Medicare "fiscal intermediary." For the latter part of the Defendants' operation of Friendship, the fiscal intermediary was Blue Cross/Blue Shield of Arizona ("BCBS"). *Stipulated Fact 16.*

26. A corporation known as Medibill Systems, Inc. ("Medibill") was created for the purpose of falsely creating expenses, which Medicare would pay under its established cost reimbursement system. *Transcript, page 13, line 21 - page 14, line 14; page 27, lines 15 - 23; Hearing Exhibit 2.*

27. A fraudulent contract was created between Medibill and Friendship purporting to state that Medibill was performing billing services for Friendship. *Id.*

28. Invoices were falsified for the alleged services provided by Medibill for Friendship. *Id.* Friendship issued checks to Medibill, which were deposited in Medibill's bank account, which was opened and controlled by Respondent and the other defendants. *Id.*

29. Under federal law, Friendship was required to be a non-profit organization. *Transcript, page 23, lines 10 - 13.*

30. From the beginning, the Nelsons controlled Friendship's bank account and finances. Respondent never wrote a Friendship check without Steve Nelson's approval. *Transcript, page 54, lines 12 - 14.*

31. The Nelsons were responsible for the preparation of annual Medical cost reports. Respondent's only real contribution to the annual cost reports was the billings. *Transcript, page 35, line 24 - page 36, line 5.*

32. Respondent incorporated and acted as the statutory agent of Medibill.

33. The purported president and secretary of Medibill were respectively, Sheila and Ernest Cortez, the biological mother and stepfather of Respondent's husband. The Cortezes and Medibill were never Respondent's clients.

34. Sheila Cortez was picked to be the president of Medibill because she did not meet the strict legal definition of a "related party" and would therefore not have to be disclosed on cost reports submitted for payment by Medicare. *Transcript, page 29, line 3 - page 30, line 11.*

35. Respondent and her husband approached Sheila Cortez with the notion of being president of Medibill. *Transcript, page 37, lines 3 - 6, page 51, lines 10 - 18; Hearing Exhibit 19.*

36. The Defendants had a stamp made of Sheila Cortez's signature that they affixed to contracts, correspondence and other documents purporting to show activities by Medibill.

37. Respondent personally performed the billing services that were subsequently attributed to Medibill and submitted for reimbursement by Medicare. *Transcript, page 30, line 12 - page 37, line 5.*

38. Respondent personally endorsed the checks from Friendship payable to Medibill using the Sheila Cortez signature stamp, and deposited them into Medibill's bank account, ultimately depositing approximately \$234,000. *Transcript, page 48, line 4 - page 50, line 3.*

39. Respondent wrote checks out of the Medibill account, using the Sheila Cortez signature stamp. The checks from the Medibill account were used to give money to Respondent's children, and to transfer money to Respondent and her husband since they could not draw salaries from Friendship. *Transcript, page 63, line 5 - page 64, line 24, page 66, line 15 - page 67, line 3.*

40. Respondent prepared three six-month contracts between Medibill and a legitimate outside billing company, Bill Source, employed to pursue collection of co-pays. Respondent used Sheila Cortez's signature stamp to execute the contracts. These contracts were made to look as though they were between Bill Source and Medibill. The fees paid by Friendship to Bill Source possibly were rolled into the Medibill listings on the cost reports submitted to Medicare. *Transcript, page 53, line 11 - page 57, line 6; Hearing Exhibit 19.*

41. Friendship's records reflected payments to Medibill of \$96,000 per year from 1997, 1998, 1999.

42. In the course of an audit of Friendship's June 30, 2000 cost report, BCBS detected that Friendship had not actually paid the \$96,000 to Medibill for 1996.

43. When BCBS called that outstanding balance into question, the Defendants produced a purported Settlement Agreement prepared on the advice of Friendship's accounting consultants and purportedly signed by Sheila Cortez on behalf of Medibill settling the balance due with a payment of \$72,000.

44. Subsequently, without Respondent's knowledge, Respondent's brother, Steve Nelson, wrote a \$75,000 check against the Medibill account payable to Respondent's husband in November 2000.

45. Respondent personally created the aforementioned Settlement Agreement between Friendship and Medibill, which was presented to BCBS, which purportedly settled the \$96,000 dispute for \$72,000. Respondent testified that the Settlement Agreement was "probably" back-dated and signed by Respondent using the Sheila Cortez signature stamp. *Transcript, page 93, line 21 - page 96, line 15, page 112, lines 2 - 11; Hearing Exhibit 19.*

46. Respondent cooperated with federal authorities to such an extent that the Assistant U.S. Attorney prosecuting the case spoke to the judge on Respondent's behalf at Respondent's sentencing. *Transcript, page 87, lines 15- 25.*

47. Respondent's crime was not publicized at all except for a very small press release issued by the United States Attorney's Office on its website. *Transcript, page 70, lines 3 - 10.*

48. The Cortezes and Medibill were never Respondent's clients.

49. While it is true that Respondent acted as a lawyer to assist the Medicare fraud, she did not abuse her position as a lawyer to commit the wrongful acts. In other words, Respondent did not use any skills or advantages learned as a lawyer to assist the Medicare fraud.

FACTS RELATING TO AGGRAVATION AND MITIGATION

50. Respondent presented testimony from witnesses, including herself, two friends, her husband and her employer (attorney Michael J. Sheridan), as well as a Christmas card from the administrative assistant in charge of student ministries at her church as evidence of her good character, reputation for honesty and community service. *Transcript, page 37, line 22 - page 40, line 2, page 85, line 8 - page 86, line 5, page 108, line 24 - page 109, line 7, page 119, lines 9 - 15, page 125, lines 7 - 17.*

51. Respondent also presented testimony of many physical health problems she suffered from 1993 to 2000, which caused extreme fatigue. These were: childbirth, burst ovarian cyst, severe allergies, septic sickness, lingering side-effects from gall bladder removal, and being overweight. *Transcript, page 72, line 4 - page 74, line 24.*

52. Respondent testified she has a genetic predisposition to depression and has had bouts of depression on and off since she was fifteen. Respondent did not realize it was depression until 1999. A major trigger for depression is fatigue. The largest bout of depression Respondent has ever experienced occurred from 1983 through 2000. *Transcript, page 74, line 25 - page 75, line 6.*

53. Respondent and her husband testified as to personal emotional problems Respondent suffered from 1995 to 2000, including her depression, her health, her dealings with BCBS, her relationship with her brother, Steve Nelson, and her relationship with her children. *Transcript, page 104, line 24 - page 108, line 8.*

54. Respondent was fully cooperative in the disciplinary process. The factual record was almost completely undisputed. The major area of contention involved the proportionality analysis.

55. Respondent has shown remorse, evidenced, in part, by her disclosure of the criminal conviction in her Bible Study group. Respondent, however, does temper her remorse by noting her difficulties with her brother and the strictness of BCBS' auditing procedures. It may be that Respondent has not totally accepted responsibility for her actions, and if so, that fact may make it difficult for Respondent to prove her eligibility for reinstatement. *Matter of Arrotta, 208 Ariz. 509, 96 P.3d 213 (2004)* (an applicant for reinstatement must prove rehabilitation, which necessarily requires the applicant to first establish what weaknesses caused the underlying misconduct and then demonstrate that those weaknesses have been overcome.)

CONCLUSIONS OF LAW

1. Based on the foregoing, this Hearing Officer concludes that there is clear and convincing evidence that Respondent violated Rule 42, Rules of the Supreme Court, ER 8.4(b) and 8.4(c).

2. Based upon the foregoing, this Hearing Officer concludes that there is clear and convincing evidence that Respondent has been convicted of a felony such that she must be disciplined as the facts warrant as provided for by Rule 53(h), Rules of the Supreme Court.

RECOMMENDATION

CONSIDERATION OF THE ABA STANDARDS

In determining the appropriate sanction, the American Bar Association's *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). Those *Standards* counsel that, in determining the proper sanction, four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA *Standard* 3.0. Where there are multiple charges of misconduct, there should only be one sanction with the multiple instances of misconduct considered as aggravating factors. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

The duty violated by Respondent was one owed to the public. ABA Standard 5.0. In particular, the applicable standard in this case is ABA Standard 5.1 (Failure to Maintain Personal Integrity) which establishes the presumptive sanction for misconduct involving serious criminal conduct or intentional dishonesty or fraud:

... in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other

respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

In particular, ABA Standard 5.11 provides:

Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

[Emphasis added]

AGGRAVATING AND MITIGATING FACTORS

The following aggravating factor is present:

9.22(b) dishonest or selfish motive.

The following mitigating factors are present:

9.32(a) absence of a prior disciplinary record

9.32(c) personal or emotional problems

9.32(e) full and free disclosure to a disciplinary board or cooperative attitude toward proceedings

9.32(g) character or reputation

9.32(k) imposition of other penalties or sanctions

9.32(l) remorse

A comment must be made regarding the evidence of mitigating personal problems faced by Respondent. The evidence was not overwhelming, but it was undisputed.

However, there was no strong showing that the financial and personal problems were a contributory factor in the misconduct, or that Respondent has made an effective effort to resolve those problems. For example, although Respondent recognizes a predisposition to depression, she has not undergone serious professional treatment or care. It ultimately may prove to be ineffective to deal with it oneself.

The following factors are neither aggravating nor mitigating:

9.4(a) forced or compelled restitution

9.4(b) agreeing to the client's demand for certain improper behavior or result

PROPORTIONALITY ANALYSIS

The purpose of professional discipline is twofold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in similar misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985); *In re Swartz*, 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984). Disciplinary proceedings are not to punish the attorney. *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004); *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1994).

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar: *In re Shannon*, 179 Ariz. 52 (1994); *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). The most relevant and

recent cases are *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001) and *In re Piccioli*, DC No. 03-1481 (Ariz. 5/10/05).

The *Scholl* case involved a superior court judge who was convicted of seven federal felonies for filing false tax returns for 1990, 1991, 1992 and 1994, and three counts of structuring currency transactions to avoid treasury reporting requirements. All these violations arose from the respondent's gambling habit. Each criminal charge included the elements of knowledge or an intent to violate the law. The conviction resulted in six-months home detention and five years probation. Mitigating factors were: absence of a prior disciplinary record; imposition of other penalties or sanctions; full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and character and reputation. In addition, there was extensive evidence of actual rehabilitation. *In re Scholl*, supra, 200 Ariz. at 228, 25 P.3d at 716. Considering the substantial mitigating circumstances plus the lack of injury to clients or the courts, a six-month suspension was determined to be appropriate.

Piccioli involved an attorney who became involved in an investment scam. Mr. Piccioli pled guilty to federal charges of one count of conspiracy to commit wire fraud and one count of wire fraud. The factual basis for respondent's plea was that he knowingly prepared and faxed an invoice for services when he had no intention of performing the work described in the invoice. Respondent was sentenced to fifteen months in a federal prison camp and two years probation upon release. His aggravating

factor was dishonest or selfish motive. His mitigating factors were: absence of a prior disciplinary record; personal or emotional problems; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; remorse; character or reputation; and imposition of other penalties or sanctions. Mr. Piccioli was suspended for two years and six months, retroactive to the date the Supreme Court placed him on interim suspension.

Here, there are numerous mitigating factors which were present in *Scholl* and *Piccioli*: absence of a prior disciplinary record; imposition of other penalties or sanctions; full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and character and reputation. There is no extensive evidence of actual rehabilitation as in *Scholl*. While *Piccioli* differs in that this Respondent was more directly involved in the wrongdoing than Mr. Piccioli, the facts of this matter are not so different to justify a departure from the sanction imposed in *Piccioli*.

CONCLUSION

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

- a. That Respondent be suspended for two years and six months, retroactive to the date the Supreme Court placed her on interim suspension.

b. That Respondent, after the term of her suspension and after reinstatement, be placed on probation for two (2) years, the terms of which should be set upon reinstatement.

c. That Respondent be ordered to pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 5th day of April, 2006.



Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this ^{7th}
day of April, 2006, to:

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