

FILED

AUG 22 2007

**BEFORE THE DISCIPLINARY COMMISSION OF THE
OF THE SUPREME COURT OF ARIZONA**

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

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IN THE MATTER OF A MEMBER)	No. 06-1100
OF THE STATE BAR OF ARIZONA,)	
)	
NICHOLAS S. HENTOFF,)	
Bar No. 012492)	DISCIPLINARY COMMISSION
)	REPORT
RESPONDENT.)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 11, 2007, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed May 21, 2007, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") in Support of Agreement for Discipline by Consent providing for censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), and costs

Decision

The eight members¹ of the Disciplinary Commission unanimously recommend accepting and adopting the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP), and costs of these disciplinary proceedings² The terms of probation are as follows:

¹ Commissioner Todd did not participate in these proceedings
² A copy of the Hearing Officer's Report is attached as Exhibit A. The Hearing Officer inadvertently stated that one aggravating factor is present. His findings and the record however, support the existence of three aggravating factors. See Hearing Officer's Report, p 8

Terms of Probation

1 1. Respondent shall participate in continued monitoring by LOMAP
2 Respondent shall enter into an amended probation contract for any new terms deemed
3 necessary by the director of LOMAP or designee based upon the violations in this matter.
4 Probation shall commence upon the date of the final judgment and conclude two years
5 after signing the addendum to the probation contract. If no addendum is necessary,
6 probation shall conclude two years from the date of the final Judgment and Order. Should
7 Respondent find new employment prior to the commencement of the probation that does
8 not include his acting as an attorney in private practice, the LOMAP portion of this matter
9 will be deferred. If Respondent returns to private practice within of the final Judgment and
10 Order in this matter, he shall then enter into a new LOMAP contract under the terms and
11 conditions of this probation for an additional two years
12

13 2 Respondent shall refrain from engaging in any conduct that would violate
14 the Rules of Professional Conduct or other rules of the Supreme Court.
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16 3 Respondent shall pay costs incurred by the State Bar and Disciplinary
17 Clerk's Office in connection with these proceedings.

18 4 In the event that Respondent fails to comply with any of the foregoing
19 conditions, and the State Bar receives information, bar counsel shall file with the Hearing
20 Officer a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The
21 Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to
22 determine whether the terms of probation have been violated and if an additional sanction
23 should be imposed. In the event there is an allegation that any of these terms have been
24 violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by
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clear and convincing evidence.

RESPECTFULLY SUBMITTED this 22nd day of August, 2007



J. Conrad Baran, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 22nd day of August, 2007.

Copy of the foregoing mailed
this 22nd day of August, 2007, to:

Honorable H Jeffrey Coker
Hearing Officer 6R
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Flagstaff, AZ 86002

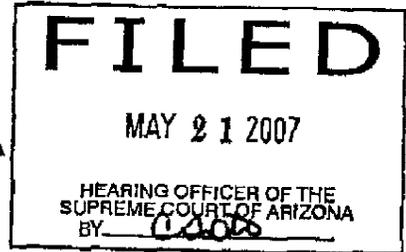
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by 

/mps

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



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

NICHOLAS S. HENTOFF,)
Bar No. 012492)

RESPONDENT)

File No 06-1100

HEARING OFFICER'S REPORT
ON TENDER OF ADMISSIONS
AND AGREEMENT FOR
DISCIPLINE BY CONSENT

PROCEDURAL HISTORY

The State Bar filed a complaint against the Respondent, Nicholas Hentoff, on December 4, 2006. Respondent was thereafter served by certified mail at the address provided by him to the State Bar. Notice of Default was thereafter sent out by the Disciplinary Clerk's office on January 30, 2007. Prior to entry of the Default, Respondent filed a motion to extend time to answer and the Hearing Officer granted a brief extension.

An initial case management hearing was held on March 8, 2007, and final hearing was set on April 3, 2007. Pursuant to a stipulated motion to continue, the final hearing was reset to May 1, 2007. Prior to the final hearing, the parties settled this matter and gave notice on April 20, 2007, that the case had been resolved.

Hearing was held on the Tender of Admissions and Joint Memorandum on May 1, 2007

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on June 6, 1989

COUNT ONE (File No. 06-1100)

Based upon the Joint Memorandum signed by the Respondent, his attorney and Bar Counsel, as well as the testimony of the Respondent wherein he acknowledged his misconduct, the Hearing Officer finds the following facts

On or about February 2005, Respondent was retained to defend Lester Smith ("Mr Smith") in Mayer Justice Court in Yavapai County. Mr. Smith had been charged with two misdemeanor counts of animal abuse. Shortly after being retained, Respondent learned, and communicated to the court and prosecutors, that Mr. Smith had been diagnosed with terminal cancer.

By order dated July 19, 2005, the criminal case was set for a non-jury trial in the Mayer Justice Court for August 23, 2005. This was the first trial setting.

Respondent believed that he had an agreement with the prosecutor to continue the trial because he had scheduled witness interviews with the prosecutor's office for the week following the first trial setting and had communicated his intention of requesting a continuance for that purpose. Respondent did not file a written motion to continue prior to the first trial setting, assuming that the prosecutor would not oppose his verbal motion to continue. Respondent did not tell Mr. Smith of the precise time and date of trial, and informed him that he need not appear at the trial because it would be continued and that he could waive his presence pursuant to Rule 9.1, Ariz R Crim P.

Respondent appeared on August 23, 2005, without his client. The prosecutor appeared with her witnesses and announced she was ready for trial and opposed a continuance. Respondent asserts that he had received no notice from the prosecutor that she would oppose the motion to continue that Respondent was requesting in order to conduct the previously scheduled witness interviews

Over the objection of the State, the court granted Respondent's motion to continue the trial. In lieu of the court's stated intention of proceeding with the trial in absentia or issuing a bench warrant for his client's arrest, Respondent offered to self-report to the State Bar the failure to have his client present on the day of trial. Judge Kennedy, Justice of the Peace for Mayer Justice Court, issued an order that required Respondent to notify the court by September 6, 2005, that Respondent had self-reported to the State Bar.

On or about September 20, 2005, a copy of Respondent's letter to Ms. Rehm at the State Bar was received by the Mayer Justice Court

The logs maintained by the State Bar's receptionist do not indicate that Respondent's letter addressed to Ms. Rehm was received anytime during the month of September 2005. The State Bar has no record of receiving Respondent's September 20, 2005, self-report letter

Mr. Smith was diagnosed with an aggressive form of terminal thyroid cancer. Mr. Smith's condition worsened, including that he rapidly lost his power of speech and was dependent on continuous oxygen, a feeding tube, and a wheelchair to keep him alive. Nevertheless, the prosecutor refused to dismiss the case and insisted on proceeding with trial

Respondent asserts that he gave his client the option of going to trial quickly or delaying the trial until his imminent death from terminal cancer. Respondent asserts that Mr. Smith instructed him to delay the trial so that he would not have to deal with the extreme discomfort and humiliation of being brought to trial in his physical state during the last days of his life.

On or about January 17, 2006, Respondent filed a motion for a criminal Rule 11 prescreen to determine whether his client was too sick to assist with his defense.

On or about February 21, 2006, the Mayer Justice Court ordered Respondent to provide the defendant's medical records to the prosecutor on or before February 24, 2006.

On or about March 2, 2006, the State filed a request for an order to show cause hearing based on Respondent's failure to comply with the court's order regarding discovery. Respondent, who experienced difficulty in obtaining his client's voluminous medical records, had already complied with the court's order regarding production of the medical records prior to receiving the State's request for an order to show cause.

The case was transferred to Yavapai County Superior Court for the purpose of adjudicating the Rule 11 issue.

The Superior Court filed an Order on March 29, 2006, setting a Rule 11 prescreening examination for Mr. Smith on April 14, 2006. Respondent received a copy of the Order several days later.

Mr. Smith failed to appear for the prescreening examination because Respondent determined that there was insufficient time to notify him of the appointment.

On or about May 1, 2006, the Superior Court held a status conference regarding the Rule 11 proceedings.

During the status conference, Respondent admitted to the court that he had failed to inform Mr. Smith of the Rule 11 evaluation appointment because: (a) he had not received the court's order in time to do so; (b) the order had been overlooked for a few days due to the fact that the processing of Respondent's mail had been delayed because Respondent did not have a secretary; and (c) Respondent could not communicate with Mr. Smith by telephone due to his inability to speak, and the only address that Respondent had for Mr. Smith was a post office box.

The court initially insisted on issuing a bench warrant for Mr. Smith. Respondent asserts that, in order to prevent the court from issuing the bench warrant, Respondent accepted full responsibility for Mr. Smith's failure to appear and suggested that the court set an order to show cause hearing in lieu of issuing a bench warrant for Mr. Smith. The court then set an order to show cause hearing for May 19, 2006, to address Respondent's failure to keep his client informed of relevant dates.

At the May 19, 2006, hearing, Respondent explained in more detail his difficulties due to not having a secretary, and Respondent informed the court that he was attempting to hire a secretary. Ultimately, the court did not impose any additional sanctions upon Respondent, but submitted the matter to the State Bar.

The Rule 11 proceedings were then concluded and the matter was sent back to the Mayer Justice Court. Respondent's client passed away in or about June 2006, without being brought to trial or convicted of any crime.

After receiving information from the Superior Court, the State Bar commenced a screening investigation. By letter dated July 21, 2006, Respondent was notified of the charge and requested to provide a response within 20 days.

By letter dated August 24, 2006, the State Bar sent a second letter to Respondent, reminding him of his duty to respond, and requiring a response within 10 days of the date of the letter.

The State Bar then sent a third letter to Respondent dated October 17, 2006, requiring a response to the initial matter and a response to the concern that Respondent had not, in fact, self-reported his conduct. A response was required within 10 days of that letter. Respondent did not submit a response to the State Bar.

If this matter were to proceed to hearing, Respondent would testify that he hired a secretary within two weeks of the May 19, 2006, hearing. During the time he was without a secretary, Respondent became overwhelmed with having to handle his case-load and attend to secretarial duties and calendaring. As a result, he allowed things to pile up and lost track of deadlines and response dates. Respondent's law practice has been monitored by LOMAP, and he has been implementing new practices which, combined with the employment of at least one full-time secretary, has resulted in Respondent's ability to be much more efficient in his handling of all matters related to his practice.

The Hearing Officer finds that the Respondent's conduct violated Rule 42, Ariz R Sup Ct, ERs 1.3, 8.1(b), and Rule 53 (d) and (f). The State Bar agreed to dismiss the alleged violations of ER 1.4 and ER 3.2 based upon the conclusion that Respondent's

conduct was mainly the result of lack of diligence and not a failure to adequately communicate with his client or expedite the litigation.

The State Bar also agreed to dismiss ER 8 4(c) and ER 3.3 because of concerns that it could meet its Burden of Proof. This claim is that Respondent failed to self-report alleged misconduct to the Bar. Respondent states emphatically that he did deliver the self-report to the State Bar office personally. The State Bar has no record of the self-report, but does not feel that it can prove that Respondent did not deliver his self-report.

CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R S Ct., specifically ERs 1.3, 8.1(b), and Rule 53(d) and (f)

ABA STANDARDS

ABA Standard 3 0 provides that 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 or mitigating factors

Given the conduct in this matter, it is most relevant and appropriate to consider *Standard 7 0* (Violation of Duties Owed as a Professional)

- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and cause injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand (censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system

The Duty Violated

Respondent violated his duty to the profession when he failed to respond to the State Bar's screening investigation. In addition, he violated his duty owed to his client when he failed to diligently attend to court deadlines and requirements while defending his client in the underlying criminal case.

The Lawyer's Mental State

Respondent's mental state was negligent in both instances. His diligence issues were a result of not having a secretary, and the lack of secretarial assistance also contributed to Respondent not responding to the State Bar. Respondent would testify that he had allowed matters to pile up on his desk and that he failed to adequately calendar his response times, and then became overwhelmed by all of his client obligations.

Potential or Actual Injury

The client was not actually harmed by Respondent's lack of diligence, nor was the State Bar actually harmed by Respondent's failure to respond. However, there was potential injury in both instances.

AGGRAVATING AND MITIGATING FACTORS

Based upon the pleadings, the consent and the Joint Memorandum, the Hearing Officer finds the following one aggravating factor and three mitigating factors:

Aggravating Factors.

Standard 9.22(a) – Prior disciplinary offenses.

In File No. 97-1875, Respondent received an order of Informal Reprimand and Probation for violations of ERs 1.2, 1.3, 1.4, 1.16 and 3.2. In File No. 99-0012, Respondent received an order of Informal Reprimand and Restitution for violation of ER 1.16(d). In Supreme Court File No. SB-06-0145-D, Respondent was censured and placed on one year of probation for violations of ERs 1.4, 1.8(a), 1.15 and 1.16(d).

Standard 9.22(e) – Bad faith obstruction of disciplinary proceeding by failing to cooperate.

Standard 9.22(i) – Substantial experience in the practice of law

Respondent has been admitted to the practice of law since 1989.

Mitigating Factors:

Standard 9.32(b) – Absence of a dishonest or selfish motive

Respondent's lack of diligence and failure to respond were not a result of dishonest or selfish motive, but were a result of Respondent's lack of a secretary and inherent difficulty in managing a sole practice.

Standard 9.32(g) – Character or reputation.

Respondent has and continues to devote between 10 to 25% of his active caseload to pro bono or reduced fee work on behalf of non-profit organizations and indigent individuals. Respondent is a member of the Arizona Civil Liberties Union's Legal Panel and does work as a cooperating attorney with the AZCLU, Respondent is currently handling pro bono a class action lawsuit on behalf of prisoners for the ACLU.

Standard 9.32(1)-Remorse.

The Respondent acknowledges and understands his responsibility to respond to all Bar matters in a timely fashion. Respondent exhibited remorse in his failure to do so. Respondent has taken advantage of LOMAP assistance and feels that his practices have improved as a result. Respondent also acknowledges that he would prefer not to practice law in matters that involve day-to-day client responsibilities, particularly those faced by sole practitioners. Respondent is seeking employment in an area involving policy matters with a goal of closing his private practice.

No other aggravating or mitigating factors were found.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, 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) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

In *In re Stevens*, SB-06-0175-D (2006), the lawyer was censured and placed on probation for violation of ERs 1.3 and 1.4. In that case, the lawyer failed to timely file a QDRO for his client, and failed to adequately communicate with the client about the issue. Respondent had been previously censured.

In *In re Robinson*, SB-05-0014-D (2005), the respondent received a censure and two years of probation (LOMAP) for negligent violations of ERs 1.1, 1.3 and 1.4, in a two-count complaint. Both counts involved the lawyer's negligent failure to communicate or follow through on cases for clients. In the second count, Mr. Robinson's

dilatory conduct resulted in adverse court rulings against his client, which he then failed to communicate to the client. In aggravation, Mr. Robinson had significant prior discipline (three informal reprimands and a censure), multiple offenses, and substantial experience in practice of law. One mitigating factor was found: character/reputation.

The hearing officer in *Robinson* considered the case *In re Roberson*, SB-00-0074-D, (2000) Ariz. LEXIS 92 (2000), and that case is also proportional here. The lawyer in *Roberson* received a censure and two years of probation for violations of ERs 1.3, 1.4, and 8.1. *See id.* The lawyer had four aggravating factors, including prior disciplinary violations, and two mitigating factors. *See id.*

In another 2005 case, *In re Inserra*, SB-05-0124-D (2005), the respondent's lack of diligence resulted in a judgment of approximately \$11,800 being entered against the client. In that case, the lawyer failed to inform the client about the judgment and had neglected to inform the client about any of the events that led up to the judgment. By way of a consent agreement, the lawyer admitted to violations of ERs 1.1, 1.2, 1.3, 1.4, 3.2 and 8.4(d). The lawyer had a previous censure and probation—in fact, some of the conduct in the case happened while the respondent was on probation. In mitigation, the lawyer was found to have had personal and emotional problems of a significant nature, the absence of a selfish or dishonest motive, and a cooperative attitude toward the proceedings. The hearing officer also found it relevant that the client had been made whole by a malpractice lawsuit and the lawyer's agreement to pay any judgment awarded to the client in the lawsuit.

Finally, there are cases in which a censure has been imposed when a lawyer fails to cooperate with a disciplinary investigation. For instance, in *In re Anderson*, SB-01-

0173 (2001), the lawyer was censured for failing to respond to the disciplinary investigation in two cases

The Hearing Officer noted the Respondent's disciplinary history as an aggravating circumstance. The parties urge that, given the unique circumstances of this case, the representation of a terminally ill client, and that the Respondent had not yet participated in LOMAP, as a basis for a censure and probation. The Hearing Officer has reviewed the evidence and witnessed the Respondent at the hearing in this matter. Based upon this review, the Hearing Officer concurs with the recommendation.

CONCLUSION

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

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

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

1. Respondent be censured
2. Respondent be placed on probation for two years with LOMAP
3. Respondent pay costs of \$915 71

DATED this 16 day of MAY, 2007



H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 21st day of May, 2007.

Copy of the foregoing mailed
this 21st day of May, 2007, to

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