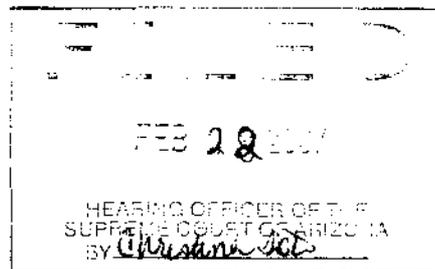


1 Daniel P. Beeks
2 2800 North Central Ave., Suite 1100
3 Phoenix, Arizona 85004
4 Telephone (602) 240-3000
5 Hearing Officer 7M
6
7



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

10 IN THE MATTER OF A MEMBER OF
11 THE STATE BAR OF ARIZONA,

File No. 06-0086

12 **HEARING OFFICER'S REPORT**

13 **LAWRENCE M. BIERMAN,**
14 **Bar No. 005225,**

(Assigned to Hearing Officer 7M,
Daniel P. Beeks)

15 Respondent.

16 The parties have filed a Tender of Admissions and Agreement for
17 Discipline by Consent (Tender) and a Joint Memorandum in Support of
18 Agreement for Discipline by Consent (Joint Memo) agreeing that Respondent
19 Lawrence M. Bierman ("Respondent") should be suspended for 90 days, and
20 placed on probation for two years thereafter for violating ERs 1.1, 1.2, 1.3, 1.4,
21 3.2, 5.5, and 8.4(d), Rule 42, Ariz.R.S.Ct.
22
23
24
25

1 The State Bar was represented by Edward W. Parker in negotiating the
2 Tender, and Respondent represented himself. The Hearing Officer has
3 determined that no hearing is necessary in order to rule on the Tender.
4

5 For reasons discussed in more detail below, the Hearing Officer
6 recommends that the Tender be approved and accepted.
7

8 STIPULATED FACTS

9 1. At all times relevant, Respondent was an attorney licensed to practice
10 law in the State of Arizona, having been admitted to practice in this state in April
11 22, 1978.

12 2. On or about October 15, 2002, Dorothy Selvia Donahue (“Donahue”)
13 sustained certain injuries in a motor vehicle accident. Donahue retained
14 Respondent to represent her in a claim for personal injuries resulting from the
15 accident.
16

17 3. On or about October 14, 2004, two days before the expiration of the
18 statute of limitations on the claim, Respondent filed a complaint on behalf of
19 Donahue against three defendants in the Superior Court of Arizona, Maricopa
20 County. The litigation was captioned Dorothy A. Selvia v. Vonavie S. Welch,
21 cause no. CV2004-092674.
22

23 4. On or about March 19, 2005, the Court issued a “150 day Order,”
24 ordering that the case be dismissed from the inactive calendar on or after
25

1 September 9, 2005, if Respondent did not comply with Rule 38.1, Arizona Rules
2 of Civil Procedure. Rule 38.1 requires plaintiff's counsel in a case to file a Motion
3 to Set and Certificate of Readiness, after which an arbitration hearing is set.
4

5 5. On or about April 8, 2005, the Court issued a Notice of Appointment
6 of Arbitration, appointing Andrew E. Rosenswieg as arbitrator. The Notice
7 provided in pertinent part that the hearing should commence on or before August
8 8, 2005.
9

10 6. On or about September 2005, Donahue called Respondent to inquire
11 of the status of the arbitration hearing. Respondent advised that a hearing date had
12 not been scheduled and he would call back once the hearing was set.
13

14 7. Despite the Court's "150 day Order," Respondent failed to file a
15 Motion to Set and Certificate of Readiness. Respondent also did not seek a
16 continuance of the case on the inactive calendar. On or about September 28, 2005,
17 the Court dismissed the case from the inactive calendar.
18

19 8. Notwithstanding the instruction to set a hearing within 60-120 days,
20 the arbitrator did not set a hearing.
21

22 9. On or about December 2005, Donahue attempted to call Respondent
23 regarding the arbitration date. Donahue learned at that time that Respondent's
24 telephone was disconnected. On or about January 2006, Donahue drove to
25

1 Respondent's office and was advised that Respondent no longer worked at the
2 office.

3
4 10. On or about January 18, 2006, nearly four months after the Court
5 dismissed the case, Respondent called Donahue to advise that he recently learned
6 that the case had been dismissed. Respondent had not spoken with Donahue since
7 the September 2005. Donahue subsequently lodged a complaint with the State
8 Bar.

9
10 11. Respondent failed to submit to the State Bar of Arizona his
11 "Affidavit of Compliance with Rule 45, Ariz.R.S.Ct." for the year of 2003/2004
12 ("the Affidavit"), representing that he had complied with his mandatory
13 continuing legal education ("MCLE") requirements for that year.

14
15 12. On or about February 8, 2005, Respondent received notice from the
16 State Bar via certified mail that he would be suspended from practice pursuant to
17 Rule 62, Ariz.R.S.Ct., unless Respondent filed a response within ten (10) days
18 demonstrating "good cause" for failing to file his MCLE affidavit.

19
20 13. Respondent failed to respond to the notice of suspension. On March
21 25, 2005, the State Bar's Board of Governors summarily suspended Respondent
22 from the practice of law. On or about April 12, 2005, a letter was sent to
23 Respondent indicating he was suspended from the practice of law.
24
25

1 14. Respondent requested an extension from the State Bar to complete
2 his MCLE hours for 2003-04. On June 21, 2005, the State Bar granted
3 Respondent's request for a 90-day extension, and reinstated Respondent.
4 Respondent apparently failed to complete his MCLE hours within the extended
5 deadline. As a result, in November, 2005, the State Bar again notified
6 Respondent that the Board of Governors would vote to suspend him at its
7 December meeting for failing to complete his MCLE. After receiving another
8 extension, Respondent finally submitted his affidavit of compliance in May 2006.
9
10

11 15. During the period when Respondent was suspended from practice
12 between April, 2005 and June, 2005, Respondent was counsel for Donahue in the
13 case referenced above. Additionally, Respondent was counsel of record in at least
14 three other cases pending in the Superior Court of the State of Arizona, Maricopa
15 County, including State of Arizona v. Philip Charles Munoz, CR2004-042644-
16 001SE. Respondent appeared in Court at a pre-trial conference in the Munoz case
17 on or about April 19, 2005, while he was suspended.
18
19

20 16. Respondent has knowingly waived his right to a formal disciplinary
21 hearing to which he would otherwise be entitled pursuant to Rule 57(i),
22 Ariz.R.Sup.Ct., as well as his right to testify and present witnesses on his behalf
23 at such a hearing. Respondent has further waived all motions, defenses,
24 objections or requests that he has made or raised, or could assert hereafter,
25

1 provided that the conditional admissions and stated forms of discipline are not
2 rejected by the Disciplinary Commission or the Arizona Supreme Court.

3
4 17. Although the Hearing Officer has on several occasions strongly
5 recommended that Respondent retain counsel to represent him in connection with
6 these disciplinary proceedings, Respondent has elected to represent himself.

7
8 18. Respondent has acknowledged that he has read and reviewed the
9 Tender, and that he has submitted the Tender freely and voluntarily, and without
10 coercion or intimidation, and is aware of the Supreme Court Rules with respect to
11 discipline.

12
13 **CONDITIONAL ADMISSIONS**

14 19. Respondent has conditionally admitted that his conduct, as set forth
15 above, violated the following Rules of Professional Conduct:

- 16 a. Rule 42, Ariz.R.Sup.Ct., ER 1.1: failure to provide competent
17 representation to his client.
- 18
19 b. Rule 42, Ariz.R.Sup.Ct., ER 1.2: failure to abide by the client's
20 decisions concerning the objectives of representation; and failure
21 to consult with the client as to the means by which the objectives
22 are to be pursued.
- 23
24 c. Rule 42, Ariz.R.Sup.Ct., ER 1.3: failure to act with reasonable
25 diligence and promptness in representing a client.

- 1 d. Rule 42, Ariz.R.Sup.Ct., ER 1.4: failure to keep a client
2 reasonably informed about the status of a matter and to promptly
3 comply with reasonable requests for information; and failure to
4 explain a matter to the extent reasonably necessary to permit a
5 client to make informed decisions regarding the representation.
6
7 e. Rule 42, Ariz.R.Sup.Ct., ER 3.2: failure to make reasonable
8 efforts to expedite litigation consistent with the interests of a
9 client.
10
11 f. Rule 42, Ariz.R.Sup.Ct., ER 5.5: practicing law in the State of
12 Arizona while summarily suspended.
13
14 g. Rule 42, Ariz.R.Sup.Ct., ER 8.4(d): engaging in conduct
15 prejudicial to the administration of justice.

16 **SANCTION/DISPOSITION**

17 **Agreed Upon Sanction**

18
19 The Hearing Officer agrees that based on the conditional admissions, the
20 following sanctions agreed upon by the State Bar and Respondent should be
21 imposed:

22 20. Respondent should be suspended for 90 days;

23 21. Respondent should be placed on probation for two years following
24 his reinstatement into active status, with the terms and conditions of probation to
25

1 include LOMAP and MAP assessments, and agreement to any subsequent
2 contracts deemed appropriate by LOMAP and MAP; and

3
4 22. Respondent should be required to pay costs and expenses incurred by
5 the State Bar in this disciplinary proceeding in the amount of \$711.23.

6 **Appropriateness of Agreed Upon Sanction**

7
8 23. In determining the appropriate sanction, Arizona generally follows
9 the ABA Standards for Imposing Lawyer Sanctions (the “Standards”). *In re*
10 *Zawada*, 208 Ariz. 232, 92 P.3d 862 ¶ 12 (2004).

11 24. The Standards list the following factors to consider in imposing the
12 appropriate sanction:

- 13 a. the duty violated;
- 14 b. the lawyer’s mental state;
- 15 c. the actual or potential injury caused by the lawyer’s
- 16 misconduct; and
- 17 d. the existence of aggravating or mitigating circumstances.
- 18
- 19

20 ABA Standard 3.0. *Zawada* at ¶ 12. The Hearing Officer has considered all of the
21 required factors.

22
23 25. The theoretical framework analysis contained in the *Standards* states
24 that where there are multiple acts of misconduct, the sanction should be based
25 upon the most serious misconduct, with the other acts being considered as

1 aggravating factors. *See also In re Moak*, 205 Ariz. 351, 353, 71 P.3d 343, 345
2 (2003).

3
4 26. **The Duty Violated.** Based on the conditional admissions,
5 Respondent has violated the following ethical duties:

<u>Ethical Rule</u>	<u>Number of Violations</u>
ER1.1 (Competence)	One
ER1.2 (Client's Objectives of Representation)	One
ER1.3 (Diligence)	One
ER1.4 (Communication)	One
ER3.2 (Expediting Litigation)	One
ER 5.5 (Unauthorized Practice of Law)	One
ER8.4(d) (Conduct Prejudicial to Justice)	One

14 27. **The Lawyer's Mental State.** In the Joint Memo, Respondent
15 agreed that his conduct in missing the 150-day deadline in the Donahue matter,
16 his subsequent failure to diligently represent Donahue, and his engaging in the
17 practice of law while summarily suspended were all done **knowingly.**

18
19 28. **Actual or Potential Injury.** It appears that Donahue suffered actual
20 injury in having her personal injury claim dismissed, at a time when the statute of
21 limitations had expired. The Hearing Officer takes judicial notice that
22 Respondent filed a motion to vacate the dismissal, which was denied. This
23 constitutes **serious injury.** *See, e.g., In re Parks*, 1999 Ariz. LEXIS 100 at *7
24 (1999) (finding "serious injury" when a claim was barred by statute of
25

1 limitations). There is no evidence that Respondent's unauthorized practice of law
2 while suspended for failure to comply with his continued legal education
3 obligations caused any serious harm.
4

5 29. Aggravating or Mitigating Circumstances. The parties have
6 stipulated to the following aggravating and mitigating circumstances:

- 7
- 8 a. Standard 9.22(b)- dishonest or selfish motive. Respondent
9 benefited from his actions by earning and collecting fees
10 during his suspension and by holding himself out as an
11 attorney in good standing during his suspension.
 - 12 b. Standard 9.22(d)- multiple offenses. Respondent represented
13 multiple clients in several cases throughout his suspension.
 - 14 c. Standard 9.22(e)- bad faith obstruction of disciplinary
15 proceeding. Respondent intentionally failed to comply with
16 rules and orders of the Arizona Supreme Court by failing to
17 timely file his answer and his disclosure statement.
 - 18 d. Standard 9.22(i)- substantial experience in the practice of law.
19 Respondent has been a member of the bar since 1978.¹
20

21
22 ¹ It is not clear that substantial experience should be an aggravating factor in this
23 case because failing to work on a case and failing to return calls from a client do not
24 seem to be the type of misconduct upon which experience would have any effect. *In re*
25 *Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994). The Hearing Officer cannot
say that because of experience, it is more likely that Respondent "would have known
better" than to engage in such misconduct. *Id.* To the extent experience can be
considered an aggravating factor, it is offset by Respondent's relatively small number
of prior disciplinary complaints. *Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994),
modified in part or other grounds, 181 Ariz. 307, 890 P.2d 602 (1994).

- 1 e. Standard 9.32(a)-absence of a prior disciplinary record.
2 Respondent has been the subject of only four other bar
3 complaints in his many years of practice.
- 4 f. Standard 9.32(b)-absence of a dishonest or selfish motive. In
5 regards to Count One, Respondent reasonably believed that the
6 arbitration hearing would be set within 60 to 120 as required
7 by the Court's order to the arbitrator, and the confusion caused
8 by the arbitrator's failure to comply with the court's order
9 contributed to Respondent's failure to act to avoid dismissal.
- 10 g. Standard 9.32(h)-physical disability. Respondent experienced
11 a health condition during the pendency of this proceeding
12 culminating in laproscopic surgery on January 5, 2007 for the
13 removal of his gall bladder and a post surgical infection with
14 partially disabling effect during the week of January 12, 2007
15 through January 17, 2007.²
- 16 h. Standard 9.32(m)- remoteness (in degree) of prior offenses.³

18
19 ² The Hearing Officer gives this alleged disability very little weight in mitigation
20 since it appears to have arisen long after Respondent's ethical lapses, and does not
21 appear to have contributed to such lapses. The commentary to Standard 9.32 (1992
22 amendments) states that little weight should be given to physical disabilities if there is
23 no evidence of direct causation between the disability and the offense. At most,
24 Respondent's gall bladder problems may have contributed to his untimely filing of his
25 disclosure statement, which has been treated as an aggravating factor rather than an
independent violation.

24 ³ The Hearing Officer has given this mitigating factor no weight. Although the
25 parties asserted in the Joint Memo that Respondent's last offense was a suspension for
MCLE violations in 2005, that suspension forms a basis of the present claims subject to
the Tender. The parties have not provided any information regarding Respondent's
prior disciplinary complaints.

1 30. The Hearing Officer agrees with the parties' observation in the Joint
2 Memo that the aggravating factors outweigh the mitigating factors in the present
3 matter.
4

5 31. The Hearing Officer agrees with the parties' observation in the Joint
6 Memo that the most serious violation was allowing the Donahue matter to be
7 dismissed at a time when the statute of limitations had expired.
8

9 32. Standard 4.42 provides that suspension is generally appropriate
10 when: (a) a lawyer knowingly fails to perform services for a client and causes
11 injury or potential injury to a client; or (b) a lawyer engages in a pattern of
12 neglect and causes injury or potential injury to a client.
13

14 33. Standard 7.2 similarly provides that suspension is generally
15 appropriate when a lawyer knowingly engages in conduct that is a violation of a
16 duty owed as a professional, and causes injury or potential injury to a client, the
17 public, or the legal system. Suspension is the appropriate discipline when an
18 attorney knowingly continues to practice law while suspended. *In re Stevens*, 178
19 Ariz. 261, 263, 872 P.2d 665, 667 (1994) ("The unauthorized practice of law is a
20 serious ethical violation, and one that would usually result in a suspension, at
21 least."); *In re Sodaro*, 2002 Ariz. LEXIS 125 at *10-11 (2002) ("the presumptive
22 sanction for the unauthorized practice of law in Arizona is suspension.").
23
24
25

1 34. Based on the conditional admissions, Standard 4.42 and Standard
2 7.2, the Hearing Officer believes that a suspension is the appropriate sanction in
3 this case.
4

5 35. The commentary to Standard 2.3 indicates that when a suspension is
6 warranted, a minimum 6-month suspension is generally necessary to protect the
7 public. However, if it appears that a respondent attorney appears can be
8 rehabilitated in less than six months, shorter suspensions may be imposed. *See,*
9 *e.g., In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994).
10

11 36. The Hearing Officer believes that Respondent can be rehabilitated
12 with a suspension of less than six months, and that the terms of Respondent's
13 probation, including the possibility of a MAP and LOMAP contract will be
14 sufficient to protect against similar violations in the future.
15

16 Proportionality

17 37. The last step in determining if a particular sanction is appropriate is
18 to assess whether the discipline is proportional to the discipline imposed in
19 similar cases. *In re Peasley*, 208 Ariz. 27, 41, 90 P.3d 764, 778 (2004). "This is
20 an imperfect process because no two cases are ever alike." *In re Owens*, 182
21 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). As the Arizona Supreme Court
22 stated in a very recent discipline case:
23
24

25 Consideration of the sanctions imposed in similar cases is
necessary to preserve some degree of proportionality, ensure

1 that the sanction fits the offense, and avoid discipline by whim
2 or caprice. . . . Proportionality review however, is an imperfect
3 process. . . . Normally the fact that one person is punished more
4 severely than another involved in the same misconduct would
5 not necessarily lead to a modification of a disciplinary sanction.
6 Both the State Bar in its capacity as prosecutor and the
7 Disciplinary Commission in its quasi-judicial capacity have
8 broad discretion in seeking discipline and in recommending
9 sanctions.

10 *In re Dean*, 212 Ariz. 221, 225, 129 P.3d 943, 947 (2006).

11 38. Because perfect uniformity cannot be achieved, the Arizona Supreme
12 Court has long recognized that the discipline in each situation must be tailored for
13 the individual case. *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997).

14 39. The Hearing Officer has considered the cases cited by the parties in
15 the Joint Memo, and has performed independent research regarding similar cases.
16 Based on this review of prior Arizona decisions, the Hearing Officer has
17 attempted to tailor the sanction in the present case to match the specific
18 circumstances presented.

19 40. In *In re Rhees*, SB-01-0161-D, 2001 Ariz. LEXIS 181 (2001), an
20 attorney was suspended for failing to submit his MCLE affidavit. *Id.* at *6. He
21 filed three motions, and attended one hearing while suspended. *Id.* at *7. He
22 received a four month suspension followed by two years of probation. *Id.* at *12.

23 41. In *In re Giles*, 178 Ariz. 146, 871 P.2d 693 (1994), the respondent
24 failed to diligently pursue matters, failed to communicate with a client, and
25

1 caused a client's lawsuit to be dismissed by not filing required documents, and
2 then did not inform the client of the dismissal. *Id.* at 148, 871 P.2d at 695. The
3 respondent in that case was suspended for 90 days and ordered to pay restitution.
4 *Id.* at 151, 871 P.2d at 698.

6 42. In *In re Gawlowski*, 177 Ariz. 311, 868 P.2d 324, (Ariz. 1994), a
7 tender for discipline by consent was approved whereby the respondent was only
8 censured although the respondent failed to communicate with clients and allowed
9 several cases to be dismissed.

11 43. In *In re Alcorn*, 2002 Ariz. LEXIS 171 (2002), the respondent was
12 suspended for 30 days followed by one year of probation after allowing a client's
13 case to be dismissed, and failing to communicate with the client.

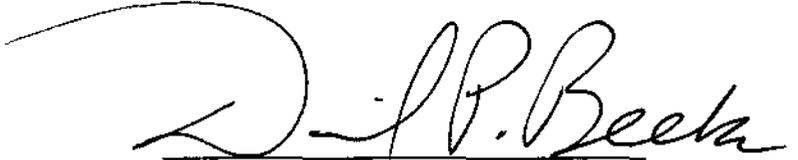
15 44. The Hearing Officer finds that the stipulated 90 day suspension,
16 followed by two years of probation, is proportional to the discipline imposed in
17 other similar cases.

19 CONCLUSION

20 45. For the reasons discussed above, the Hearing Officer recommends
21 that Respondent receive a 90 day suspension, and two years of probation to
22 begin upon his reinstatement into active status, with the terms and conditions of
23 probation to include LOMAP and MAP assessments and agreement to any
24 subsequent contracts deemed appropriate by LOMAP and MAP. In addition,
25

1 Respondent should be ordered to pay the costs and expenses incurred in this
2 disciplinary proceeding in the amount of \$711.23.

3
4
5 **DATED** this 22nd day of February, 2007.

6
7 

8 Daniel P. Beeks
9 Hearing Officer 7M

10 Original filed with the Disciplinary Clerk
11 of the Supreme Court of Arizona, this 22nd
12 day of February, 2007,

13 Disciplinary Clerk
14 of the Supreme Court of Arizona
15 1501 West Washington, Suite 104
16 Phoenix, Arizona 85007-3231

17 Copies of the foregoing mailed this 22nd
18 day of February, 2007, to:

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24 Lawrence M. Bierman
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Respondent

