

FILED
AUG 08 2007
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
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**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

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

**RUSSELL LEE ESSLINGER,
Bar No. 021767**

Respondent.

No. 06-0710
**HEARING OFFICER'S REPORT;
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
RECOMMENDED SANCTION**

(Assigned to Hearing Officer David
H. Lieberthal)

The Hearing Officer's Findings of Fact, Conclusions of Law, and
Recommended Sanction follow.

PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on April 2, 2007. That
complaint was served on Respondent by certified restricted mail/delivery and
regular first class mail as provided for in the Arizona Rules of the Supreme
Court. Respondent failed to file an answer or otherwise defend against the
allegations of that complaint. Thus, a default was entered against Respondent in
this matter on May 30, 2007. The State Bar requested permission to either appear
for an Aggravation/Mitigation Hearing, or, in the alternative, to file a brief

1 regarding the appropriate sanction The Hearing Officer granted that Motion,
2 ordering that the State Bar file its brief no later than July 12, 2007 which it did.
3

4 **FINDINGS OF FACT**

5 At all times relevant, Respondent was a lawyer licensed to practice law in
6 the state of Arizona having been first admitted to practice in Arizona on October
7 22, 2002 Respondent was summarily suspended from the practice of law in
8 Arizona from March 25, 2005 to present for failure to complete mandatory
9 continuing legal education pursuant to Rule 45, Ariz.R.Sup Ct
10

11 **COUNT ONE**

12 On or about August 2, 2004, Mr. and Mrs. Harry and Joy Schaefer
13 (hereinafter "the Schaefer") retained Respondent to draft a Will and perform a
14 Legal Name Change. The Schaefer signed a Fixed Fee Agreement with
15 Respondent agreeing to pay Respondent \$2,500.00 for the above referenced legal
16 services and gave Respondent two checks as a retainer, totaling \$825.00.
17

18 Initially, Respondent prepared the requested documents. However, there
19 were many errors, including clerical errors, spelling errors for the name change,
20 and different information in the Will from what the Schaefer provided to
21 Respondent. Therefore, the Schaefer asked Respondent to make the necessary
22 corrections.
23
24
25

1 Over the course of the next several months, the Schaefers called
2 Respondent and left many messages, but Respondent failed to return any of their
3 telephone calls. The Schaefers never received an acceptable Will, Legal Name
4 Change, or a refund.
5

6 On or about May 1, 2006, the Schaefers filed a bar complaint against
7 Respondent, and pursuant to Rule 54, Ariz R.Sup.Ct., the State Bar of Arizona
8 commenced an investigation of possible ethical violations by Respondent. By
9 letter dated May 16, 2006, from Bar Counsel to Respondent at his address of
10 record, Respondent was asked to respond and provide information relating to the
11 Schaefer's allegations no later than 20 days from the date of the letter
12 Respondent did not respond
13
14

15 By letter dated June 21, 2006, Bar Counsel reminded Respondent of his
16 obligation under the Arizona Rules of the Supreme Court to respond, and that if
17 he failed to respond to this letter within 10 days from the date of this letter, that
18 failure to respond, in itself, might be grounds for discipline. Respondent did not
19 respond.
20

21 Respondent violated one or more of the Rules of Professional Conduct as
22 follows: Respondent failed to act with reasonable diligence and promptness in
23 representing the Schaefers; Respondent failed to reasonably and promptly
24 communicate with his clients, failed to keep his clients reasonably informed as to
25

1 the status of their cases, and failed to promptly comply with reasonable requests
2 for information, Respondent charged and collected, or attempted to collect, an
3 unreasonable fee, and Respondent failed to promptly respond to requests for
4 information made by Bar Counsel in the course of the disciplinary investigation.
5

6 **CONCLUSIONS OF LAW**

7 Respondent failed to appear thru answer and his default has been properly
8 entered. Consequently, the facts are deemed admitted, pursuant to Rule 53(c)(3),
9 Ariz.R Sup.Ct. Accordingly, there is clear and convincing evidence that
10 Respondent violated 42, Ariz.R.Sup.Ct. Specifically:
11

12 **COUNT ONE**

13 Violations of ER 1.1, ER 1.2, ER 1.3, ER 1.4, ER 1.5, ER 1.16, Rule 72,
14 and Rules 53(d) and (f), Ariz.R.Sup.Ct.
15

16 **ABA STANDARDS**

17 In determining an appropriate sanction, the Hearing Officer and the
18 Disciplinary Commission are required to consider the duty violated, the lawyer's
19 mental state, the presence or absence of actual or potential injury, and the
20 existence of aggravating and mitigating factors *In re Tarletz*, 163 Ariz. 548, 554,
21 789 P.2d 1049, 1055 (1990); *Standard 3.0*.
22
23

24 In this case, Respondent failed to act as his client had instructed him, did
25 not diligently pursue his client's objectives, failed to communicate with his client

1 at all, collected \$825.00 from his clients in return for no service, and then
2 abandoned his client entirely. During the representation, Respondent did not
3 advise his clients of his summary suspension for not completing mandatory
4 continuing legal education. Furthermore, Respondent failed to respond to the
5 screening investigation initiated by the State Bar
6

7 *Standard 4.0* (Violations of Duties Owed to Clients) is applicable in
8 determining the appropriate sanction warranted by Respondent's conduct.
9 *Standard 4.42* states, "Suspension is generally appropriate when a lawyer
10 knowingly fails to perform services for a client and causes injury or potential
11 injury to a client."
12

13 *Standard 7.0* (Violations of Other Duties Owed as a Professional) also
14 applies. *Standard 7.2* states, "Suspension is generally appropriate when a lawyer
15 knowingly engages in conduct that is a violation of a duty owed as a professional,
16 and causes injury or potential injury to a client, the public, or the legal system."
17
18

19 The presumptive sanction in this case is a suspension. The following are
20 factors considered in aggravation of the presumptive sanction.

21 *Standard 9.22(b)* – Dishonest or selfish motive. Respondent took \$825.00
22 of the Schaefer's money without providing them anything in return, other than a
23 draft will with multiple mistakes. The Schaefer's have yet to receive anything in
24 return for their money from Respondent
25

1 Apker had retired from the practice of law and left the State. When the State Bar
2 investigated, Apker failed to respond. The Disciplinary Commission agreed with
3 the Hearing Officer's conclusions that *Standard 4.42* applied. Five aggravating
4 factors were found, including a pattern of misconduct and bad faith obstruction of
5 the disciplinary proceedings. There was one mitigating factor found; remoteness
6 of prior offenses. Apker was suspended for six months and one day with
7 restitution and costs.
8

9
10 In *In Re Counce*, SB-03-0071-D (2003), Counce filed a civil complaint on
11 behalf of his client in Maricopa County Superior Court. Despite receiving many
12 letters, faxes, and phone calls from his client, Counce did not respond to his
13 client's requests for information. The client later found out that the civil
14 complaint had been dismissed. Counce never turned over the client's file and
15 failed to respond to the State Bar during their investigation. Counce violated ERs
16 1.1, 1.2, 1.3, 1.4, 1.16, 3.2, and 8.1, along with Rule 51. The Disciplinary
17 Commission applied *Standard 4.42* and *Standard 7.2* in determining the proper
18 sanction. There were three aggravating factors found against Counce; including
19 bad faith obstruction of the disciplinary proceeding and refusal to acknowledge
20 wrongful nature of conduct. The Disciplinary Commission found one mitigating
21 factor; absence of prior disciplinary record. Counce was suspended for six months
22 and one day with two years probation upon reinstatement and costs.
23
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25

1 In *In Re Yates*, SB-01-0127-D (2001), Yates failed to file his client's
2 petition in a civil action, did not inform his client of this, and did not return his
3 client's telephone calls. Yates also did not return his client's file. Yates failed to
4 respond to the State Bar's screening investigation. The Disciplinary Commission
5 found Yates violated ERs 1.1, 1.3, 1.4, 1.16, 3.2, 8.1(b), and 8.4, along with Rule
6 51. Four aggravating factors were found in contrast to one mitigating factor
7 Yates was suspended for six months and one day.
8

9
10 Respondent's conduct is most similar with the *Counce* matter and warrants
11 a suspension for six months and one day. Under the circumstances as stated,
12 Respondent should be required to prove his fitness to practice law prior to being
13 reinstated.
14

15 RECOMMENDATION

16 The Supreme Court "has long held that 'the objective of disciplinary
17 proceedings is to protect the public, the profession and the administration of
18 justice and not to punish the offender'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d
19 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78
20 (1966)). It is also the purpose of lawyer discipline to deter future misconduct. *In*
21 *Re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993) It is also a goal
22 of lawyer regulation to protect and instill public confidence in the integrity of
23
24
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1 individual members of the State Bar. *Matter of Horwitz*, 180 Ariz. 20, 29, 881
2 P.2d 352, 361 (1994)

3
4 Upon consideration of the facts, the ethical rules violated, the applicable
5 Standards, the aggravating and mitigating factors, and an analysis of proportional
6 cases, as Hearing Officer, I recommend the following.

7
8 1. Respondent shall be suspended from the practice of law for six
9 months and one day

10 2 Respondent shall be placed on a term of probation, the length and
11 terms of which shall be decided upon reinstatement.

12 3. Respondent shall pay Restitution to Mr. and Mrs Harry and Joy
13 Schaefer in the amount of \$825.00.

14 4. Respondent shall pay the costs and expenses incurred in this
15 disciplinary proceeding.
16

17 DATED this 8th day of August, 2007.

18
19
20 David H. Lieberthal /cs
21 David H. Lieberthal
22 Hearing Officer 9H
23

24 Original filed with the Disciplinary Clerk
25 this 8th day of August, 2007.

1 Copy of the foregoing mailed
2 this 8th day of August, 2007, to:

3 Russell Lee Esslinger
4 Respondent
5 4942 North Sunrise Avenue
6 Tucson, AZ 85705-0001

7 Copy of the foregoing hand-delivered
8 this 8th day of August, 2007, to

9 Matthew E. McGregor
10 Bar Counsel
11 State Bar of Arizona
12 4201 North 24th Street, Suite 200
13 Phoenix, AZ 85016-6288

14 by: Christina Ash