

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

FILED
OCT 11 2007
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY PHM

1
2 IN THE MATTER OF A MEMBER)
3 OF THE STATE BAR OF ARIZONA)
4 **GARETH HYNDMAN, II**)
5 **Bar No. 019500**)
6 **RESPONDENT.**)

No 06-1689; 06-1808

HEARING OFFICER'S REPORT

Assigned to Hearing Officer 6K
Philip M. Haggerty

PROCEDURAL HISTORY

9 Probable Cause Orders were issued on April 15, 2007 in Cases No. 06-1689
10 and No. 1808. A two count complaint was filed on May 15, 2007. Service was
11 accepted by Respondent's Counsel, Gregory J. Navazo and filed on May 25, 2007.
12 A Notice of Intent to Use Prior Discipline was filed by the State Bar on July 16, 2007.

13 Pursuant to the Case Management Order a Settlement Conference was set for
14 August 9, 2007, but the parties reached a settlement prior thereto and filed their
15 Notice of Settlement on August 9, 2007, requesting that the Hearing on the Merits be
16 vacated. The parties filed their Joint Tender of Admissions and Agreement for
17 Discipline by Consent, together with their Joint Memorandum in Support of
18 Agreement on September 6, 2007

19 Following a review of these documents the Hearing Officer requested a Joint
20 Telephonic Hearing on the Tender and Agreement to resolve certain issues raised by
21 the documents. A Telephonic Conference was held on October 3, 2007. Respondent
22 personally participated in the conference along with his Counsel and Bar Counsel. As
23 a result, an Amended Joint Memorandum in Support of Agreement for Discipline by
24 Consent was filed on October 9, 2007.
25
26

AGREED FACTS

1 1. At all relevant times, Respondent was an attorney licensed to practice
2 law in Arizona, having been admitted to practice in this State on May 19th, 2000.

3 2. Respondent was suspended by a Judgment and Order of the Supreme
4 Court of Arizona in Case No. SB-06-0170-D, filed February 9th, 2007, effective 90
5 days from the date of that Order (March 11, 2007)

6 3. On June 27, 2007, Respondent filed a Notice of Compliance with the
7 probationary terms contained in the Suspension Order pursuant to Rule 72(e)
8 ARIZ.R.Sup.Ct and an Affidavit of Reinstatement pursuant to Rule 65(c)(2). The
9 State Bar filed an objection to Respondent's request for reinstatement based on this
10 current and still outstanding disciplinary matter.

11 4 On August 7, 2007, Respondent voluntarily withdrew his request to be
12 reinstated, has not renewed this request and therefore remains suspended

COUNT ONE (06-1689)

13 Without repeating verbatim all the detailed facts set forth in the Tender of
14 Admissions, the record reveals the following:

15 5. Thomas Trzaska retained Respondent to represent him in a Maricopa
16 County Superior Court civil suit, *Trzaska v Hines et al*, No. CV 2005-018557, filed
17 December 2, 2005.

18 6. Respondent failed to file a Rule 26 Disclosure Statement by February
19 28, 2006 as required under Rule 26.1, Rules of Civil Procedure; and failed to respond
20 to opposing counsel's Motion to Compel Disclosure Statement and Discovery
21 Responses and Motion for Expenses and Attorney's Fees, all filed on November 1,
22 2006 and granted without objection on November 30, 2006

23 7. On February 21, 2007 a Stipulation for Substitution of Counsel was
24 filed in the *Trzaska v Hines* matter, substituting another counsel for Respondent.
25 This stipulation was approved by the Court on February 27, 2007.
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

8. On June 14, 2007, Mr. Trzaska was ordered by the Superior Court to pay \$813.00 attorney's fees to opposing counsel, apparently in enforcement of the order filed on November 30, 2006.

9. On October 10, 2006, Mr. Trzaska filed a bar complaint against Respondent.

10. The State Bar initiated inquiry to Respondent regarding this complaint, requesting his response, by letter dated November 17, 2006.

11. Respondent acknowledged receipt of this complaint in a letter dated December 5, 2006 and E-mail the next day, requesting an extension of time to respond.

12. Despite repeated request by the Bar, Respondent made no response until sending an E-mail response on April 25, 2007, stating he would be sending other documents.

13. No further documentation or response was provided to the Bar prior to these proceedings.

14. At various times during the correspondence, letters to Respondent were returned from the address provided to the Bar, plus three other possible addresses.

15. Until a Staff Investigator from the State Bar located Respondent's father at one of these addresses, the Bar was unable to verify from Respondent's father his new address, phone number, address and E-mail address.

COUNT TWO

16. Behrooz Shahidi retained Respondent to represent him in a Maricopa County Civil Action entitled *Shahidi v. Performance Capital, L L.C.* CV 2004-007859, filed April 22, 2004.

17. Opposing counsel in the action filed a Motion to Vacate Judgment Entered in Error and for Attorney's Fees. Respondent replied with a Motion to Strike, which was not ruled on by the Court.

AGREED SANCTIONS

1 The parties have modified their original agreement to agree to a suspension for
2 six months and one day, retroactive to August 7, 2007, the date of Respondent's
3 withdrawal of his request for reinstatement from the prior suspension. Also agreed
4 was the payment of State Bar costs and expenses, restitution to Mr. Trzaska, through
5 his Counsel, of the \$813.00 award entered by the court; agreement to a contract with
6 both LOMAP and MAP as required upon reinstatement; agreement to participate in
7 and abide by the decision of any client initiated fee arbitration, and any additional
8 terms deemed appropriate by the Hearing Officer, the Disciplinary Commission or the
9 Supreme Court at the time of reinstatement.

ABA STANDARDS APPLICABLE

9 *ABA Standard 3* provides that four matters should be considered; the duty
10 violated; the lawyer's mental state; the actual or potential injury caused by the
11 misconduct and the existing of aggravating or mitigating factors.

12 *ABA Standard 4 42* states that:

13 Suspension is generally appropriate when (a) a lawyer knowingly
14 fails to perform services for a client and causes injury or potential
15 injury to a client; or (b) a lawyer engages in a pattern of neglect
16 and causes injury or potential injury to a client

17 *ABA Standard 8.4(d)* states that:

18 Suspension is appropriate when a lawyer knowingly violates
19 a court order or rule, and there is injury or potential injury to a client
20 or a party, or interference or potential interference with a legal
21 proceeding.

22 *ABA Standard 7.2* states that

23 Suspension is generally appropriate when a lawyer engages
24 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.

1 It is clear that the failure of Respondent to follow the basic Rules of Procedure
2 for civil actions caused both actual and potential harm to his clients. The fact that he
3 paid \$15,000 00 to settle Mr. Shadihi's case indicated this client's potential exposure
4 in at least that amount.

5 The failure to follow court discovery and disclosure rules constitutes potential,
6 if not actual interference with judicial proceedings. Our crowded courts demand
7 prompt action by attorneys to keep the system working.

8 The Respondent's prior discipline proceedings indicated a similar pattern of
9 neglect, not only in the management of a client's bankruptcy proceeding through
10 failures to perform strikingly similar to the behavior at issue here; but also in his
11 failure to comply with State Bar directives to participate in the LOMAP program.
12 Respondent's failure to respond to the Bar, and his failure to maintain a current
13 address are additional symptoms of a pattern of neglect of one's duty as a lawyer

14 All of the admissions clearly constitute violations of ERs.1 3; 3.4(d); 8.1(b);
15 8.4(d) and Rule 53(d) and (f).

16 AGGRAVATION

17 Three aggravating matters were alleged and considered in this matter. There
18 were two other discipline proceedings involving Respondent. In November 2004,
19 Respondent received an Informal Reprimand for what was essentially client neglect
20 through mismanagement of that client's case. This Reprimand and Order contained a
21 requirement to participate in an Ethics Enhancement Program, pay certain restitution,
22 participate in a LOMAP program and pay certain costs. On February 9, 2007
23 Respondent was suspended for three months and placed on probation with conditions
24 attached, by order of the Supreme Court. The violations included failure to follow the
25 orders to participate in the Ethics Program, make restitution, participate in the
26

1 LOMAP program, and pay all costs as previously ordered. In addition, Respondent
2 was found to have violated ERs 3.2; 3.4(c); 8 4(d) in connection with representation
3 of a client and ER 8 1(b) and Rule 53(f) for failure to respond to Bar inquiries.

4 The second factor in aggravation is that under ABA Standard 9 22(c), the
5 Respondent has engaged in a pattern of misconduct. The matters forming the basis
6 for the prior reprimand and suspension occurred apparently in 2003 for the first matter
7 and 2005 in the second matter. The litigation matters considered in this proceeding
8 took place in 2004, 2005 and 2006. The failure to respond to the Bar and failure to
9 cooperate ran through the same period.

10 The third aggravating matter is the fact that Respondent has engaged in
11 multiple offenses, as is made clear in the recitations above

12 MITIGATION

13 The parties agree, and it is supported in the record, that there are two
14 mitigating factors. Under Standard 9 32(b) there is no evidence of a dishonest or
15 selfish motive on the part of Respondent. Respondent stated that he prevented any
16 loss to Mr. Shahidi by paying a settlement figure; and he has agreed to restitution in
17 the Trzaska matter. He also stated that he did, even after the filing of the Bar
18 complaint by Mr. Trzaska, complete the Initial Disclosure statement and negotiated
19 and prepared a Joint Pre-Trial Memorandum with opposing counsel in anticipation of
20 the substitution of counsel.

21 As a second mitigating factor, Respondent admits to severe personal and
22 emotional issues for which he has sought counseling. He states that he has suffered
23 from persistent clinical depression since 2003, and has been under a doctor's care for
24 this condition since 2004. His law firm broke up in 2003 and in 2005 a corporate
25 employer became insolvent and failed to meet payroll for several months. In addition
26 he has become personally involved in a hostile corporate takeover action in Delaware.
In 2006 he took another job as in-house counsel, which required him to commute
between Sedona and Anthem daily

PROPORTIONALITY

1 A consideration of the proportionality guidelines as applied to this case and
2 approximately similar cases reveals the following. In *In Re Blaine*, SB-02-0071-D
3 (2002) the Respondent was suspended for six months and one day for two separate
4 violations of the same ERs at issue herein, and were even more similar in that they
5 involved pre-trial procedures. As in this case the aggravating factors were, a prior
6 discipline history, a pattern of misconduct and multiple offenses. Also present were
7 the same mitigating factors of the absence of a dishonest motive and emotional
8 problems. Also in point is *In Re Hatfield*, SB-04-0010-D (2004) in which there was a
9 pattern of neglect of several clients, failure to respond to the State Bar and prior
10 discipline. Mitigating factors in the form of absence of dishonesty, emotional
11 problems and remorse were also found. Ms. Hatfield was suspended for 30 days, but
12 there had been no prior suspension by the Supreme Court. In view of the agreement of
13 the parties, and in light of all the circumstances, it appears that the agreed sanctions,
14 including suspension for six months and one day meets the proportionality
15 requirements of the Court.

RETROACTIVITY OF THE AGREED SUSPENSION

16 The Bar and Respondent initially agreed that the suspension be retroactive to
17 March 11, 2007, the effective date of the prior Suspension by the Supreme Court
18 After the telephonic hearing following the filing of the Joint Memorandum in Support
19 of Agreement for Discipline by Consent, the parties agreed to a modification making
20 the suspension retroactive to August 7, 2007, the date of Respondent's withdrawal of
21 his application for reinstatement from the prior suspension.

22 In support of this, the parties have considered the following matters to be of
23 weight.

24 The client neglect issues involved in all three cases occurred approximately
25 within the same time from of 2005 and 2006, and the matters raised in this proceeding
26 preceded prior discipline by several months. The Bar and Respondent believe that

1 had all matters been considered together, the resulting suspension would have been
2 what is agreed here, six months and one day. This would appear to be an accurate
3 evaluation. In addition, Respondent voluntarily removed himself from the practice of
4 law by withdrawing his application for Reinstatement. In addition, Respondent has
5 stated that he will agree to impose restrictions and limitations on his type of practice,
6 if and when he is reinstated following a Rule 65 application. This limitation would
7 include limiting his practice to representing his father's commercial property
8 management firm, with no more than five clients. Respondent has further stated that
9 he will associate counsel, who will have full knowledge of his disciplinary history, in
10 any Superior Court litigation, and that he will agree to cooperate with a practice
11 monitor.

12 The parties also feel that, given the time periods involved in both these
13 proceedings, and the time required to process a Rule 65 application, that
14 Respondent's suspension will actually be longer than one year.

15 It is felt that with this modification, and the additional recommendations
16 concerning limitations on practice following any reinstatement; that the interests of
17 the protection of the public, the profession and the administration of justice will be
18 served.

19 RECOMMENDATION

20 1. That the Respondent be suspended from the practice of law for a
21 period of six months and one day, retroactive to August 7, 2007.

22 2. That Respondent shall pay all costs and expenses incurred by the State
23 Bar in these proceedings within 30 days of the Final Order of the Supreme Court.

24 3. That Respondent, within the same time period, pay restitution in the
25 amount of \$813.00 as ordered by the Court in *Trzaska v. Hines, supra*.

26 4. That, upon reinstatement to the practice of law by Order of the Court
insure the limitation of his practice to representation of his father's business firm and
no more than 5 clients, with such further conditions as may be placed on such practice
by the Directors of LOMAP and MAP.

1 5. That Respondent participate in any fee arbitration proceeding
2 conducted by the State Bar if requested by any client; and abide by the findings and
3 orders of the arbitrator(s) therein.

4 6. That the Respondent shall abide by any additional terms or conditions
5 deemed appropriate by the Disciplinary Commission or the Supreme Court.

6 DATED this 10th day of October, 2007;

7
8 
9 Philip M. Haggerty
10 Hearing Officer 6K

11 Original filed with the Disciplinary Clerk
12 this 11th day of October, 2007

13 Copy of the foregoing mailed this
14 11th day of October, 2007 to:

15 Matthew E. McGregor
16 Bar Counsel
17 State Bar of Arizona
18 4201 North 24th Street
19 Phoenix, AZ 85016-7240
20 and

21 Gregory Navazo
22 Palmisano and Associates
23 2530 South Rural Road ; Suite 4
24 Tempe, Arizona 85283-2429
25 Counsel for Respondent

26 By 
" "