

Count 3 (File No. 06-1190)

4. In or about July of 2005, Derek W. Melton ("Mr Melton") hired Respondent to pursue an appeal of the Forcible Entry and Detainer ("FED") Judgment issued against him by a Justice Court.
5. Mr. Melton followed Respondent's directions by filing a Notice of Appeal and paying the associated costs.
6. Over the next five to six months, Mr. Melton left numerous messages for Respondent in reference to his appeal Respondent failed to return Mr. Melton's phone calls.
7. Respondent did not file any motions or take any action in pursuit of Mr. Melton's appeal.
8. On or about October 26, 2005 the Court dismissed Mr. Melton's case because Respondent did not pursue the appeal as promised.
9. On or about July 21, 2006, the State Bar of Arizona received a Bar Complaint from Mr. Melton, alleging professional misconduct by Respondent.
10. By letter dated August 1, 2006, the State Bar of Arizona requested a response to Mr Melton's allegations.
11. The letter was sent to Respondent's address as maintained by membership records. Respondent did not respond.
12. By letter dated September 20, 2006, Bar Counsel reminded Respondent of his obligation under the Arizona Rules of the Supreme Court to respond, and that his failure to respond, in itself, might be grounds for discipline
13. The letter was sent to Respondent's address as maintained by membership records. Respondent did not respond.

14. On or about October 11, 2006, Respondent contacted the State Bar by telephone and requested a two-week extension to submit his response. The State Bar granted his extension request.
15. Respondent did not thereafter respond despite his request for and receipt of an extension of time to respond.

Count 4 (File No. 07-0052)

16. In December of 2005, Danielle Tucker ("Ms. Tucker") retained Respondent to represent her in connection with the filing of a Chapter 7 Bankruptcy, the securing of a Bankruptcy Discharge and to get two of her garnished paychecks returned.
17. Ms. Tucker paid Respondent \$500 for his representation.
18. In February 2006, Respondent requested Ms. Tucker provide him with proof of her paycheck garnishment.
19. In February 2006, Ms. Tucker gave the requested documentation to Respondent.
20. Over the next 10 months, Ms. Tucker left numerous messages with Respondent regarding her case.
21. Respondent failed to respond to Ms. Tucker's numerous calls.
22. Respondent filed a Petition and participated in the first meeting of creditors, but failed to take any further action in furtherance of Ms. Tucker's case.
23. On or about December 15, 2005, the Bankruptcy Court dismissed Ms. Tucker's case for failure to file a Statement of Monthly Income and failure to file a declaration regarding payment advices.
24. Respondent contends that he has reviewed the Bankruptcy Court docket and file and determined that there is no mention of the Bankruptcy Court ever sending Respondent a

notice of deficiency, which the Bankruptcy Court issues prior to dismissing a bankruptcy. Respondent contends that had he received such a notice, it would have been an easy matter to file a Statement of Monthly Income and declaration regarding payment advices. The State Bar does not dispute Respondent's claims, and the Hearing Officer could find insufficient evidence to prove or disapprove this claim.

25. On or about January 10, 2007, the State Bar of Arizona received a Bar Complaint from Ms. Tucker alleging professional misconduct by Respondent.
26. By letter dated February 8, 2007, the State Bar of Arizona requested a response to Ms Tucker's *allegations*
27. The letter was sent to Respondent's address as maintained by membership records Respondent did not respond.
28. By letter dated March 9, 2007, the State Bar of Arizona reminded Respondent of his *obligation under the Arizona Rules of the Supreme Court to respond, and that his failure to respond, in itself, might be grounds for discipline.*
29. The letter was sent to Respondent's address as maintained by membership records. Respondent did not respond.

CONCLUSIONS OF LAW

30. The Hearing Officer finds by clear and convincing evidence that the Respondent violated *the following Rules of Professional Conduct on both Counts:*

ER 1.2: Respondent failed to abide by his clients' decisions concerning the objectives of representation and failed to consult with his clients as to the means by which the objective of representation were to be pursued

ER 1.3. Respondent failed to act with reasonable diligence and promptness in representing his clients.

ER 1.4(a)(3). Respondent failed to keep his clients reasonably informed about the status of their cases.

ER or 1.4(a)(4). Respondent failed to promptly complying with reasonable requests for information by the Bar.

ER 1.4(b): Respondent failed to explain the matter to the extent reasonably necessary to permit his clients to make informed decisions regarding his representation.

ER 8 1(b) & Rule 53(f): Respondent failed to furnish information to or respond promptly to inquiries and requests from Bar Counsel made pursuant to the Rules of the Supreme Court.

ABA STANDARDS

31. 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

The Duty Violated

32. The Hearing Officer finds that Respondent violated his duties to his clients, the administration of justice and to the profession as set forth above.

The Lawyer's Mental State

33. The Hearing officer finds that Respondent acted negligently.

The Actual or Potential Injury

- 34. There was actual injury in Count 3 in that Mr. Melton's appeal was dismissed. Although Mr. Melton did not pay Respondent for the appeal, and Respondent did not feel that the appeal was merited, Respondent did not adequately communicate with Mr. Melton to allow Mr. Melton to proceed with the appeal on his own or retain other counsel.
- 35. In Count 4 Respondent was paid by Ms Tucker for services as a bankruptcy attorney, and he essentially abandoned his client part way through the process Ms Tucker's bankruptcy was ultimately dismissed. Respondent owes Ms. Tucker \$500 in restitution for her retainer.
- 36. Respondent refused to respond to the numerous inquiries of the State Bar, unnecessarily delaying these proceedings.
- 37. The combined acts of Respondent caused not only harm to his clients, but to the profession and the administration of justice as well.

Presumptive Sanction

- 38. *Standard 4.43* provides that censure is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. The Respondent was negligent in prosecuting his clients' cases, failing to return phone calls, and in not keeping them informed on their cases. As a result, both clients' cases were dismissed and as to Ms Tucker, she suffered actual harm while Mr. Melton suffered potential harm

Aggravating and Mitigating Factors

- 39. The parties submitted, and the Hearing Officer agrees, that the following factors should be considered in aggravation and mitigation:

Aggravating Factors

40. *Standard 9.22(a)* - Prior disciplinary offenses. Respondent received an Informal Reprimand for violation of ER's 1.4, 8.1, and Rule 53 on March 5, 2004. Respondent received an Informal Reprimand for violation of ER's 1.3, 1.4, 5.3, 1.16, and Rule 53 on November 17, 2004. Respondent received an Informal Reprimand for violation of ER's 5.5 and 8.4 on November 14, 2005
41. *Standard 9.22(d)* - Multiple offenses Respondent admitted to two separate counts in this matter, stemming from the representation of two separate clients.
42. *Standard 9.22(i)* - Substantial experience in the practice of law. Respondent was admitted to practice on May 10, 1980.

Mitigating Factors

43. *Standard 9.32(b)* – Absence of a dishonest or selfish motive. Respondent admitted to offenses that are negligent in nature because the allegations are that Respondent was negligent in his representation of clients. Respondent's actions were neither intentional nor aimed at deriving pecuniary value
44. *Standard 9.32(c)* - Personal or emotional problems. Exhibit 'A' to the hearing on the Tender is a letter from Respondent's licensed psychotherapist, which explains the nature of Respondent's personal and emotional problems. The parties submit that Exhibit 'A' contains private, personal, and medical information that should be subject to a protective order, and the Hearing Officer concurs.
45. *Standard 9.32(l)* - Remorse. Respondent is sorry for his failures in representation and his inability to respond to the State Bar.

PROPORTIONALITY

46. The Supreme Court has held that in order to achieve the purpose of discipline, the discipline in each situation must be tailored to the individual facts of the case. Proportionality is also a goal of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 27, 90 P.2d 764 (2004).
47. In *In re Leather*, SB-07-01260D (2007), the lawyer was censured with two years probation after failing to preserve client property, failing to communicate with clients, failing to diligently represent clients, failing to discuss the fees in writing, and failing to timely refund any unearned fees, all while on probation, in violation of ER's 1.2, 1.3, 1.4, 1.5, 1.16.
48. In *In re McElwee*, SB-07-0144-D (2007), the lawyer was censured with two years of probation after failing to properly communicate with clients by not informing them that their matter was dismissed for over three years in violation of ER's 1.3, 1.4, 1.16, and 8.4.
49. In *In re Shaw*, SB-07-0129-D (2007), the lawyer was censured with one year probation after failing to adhere to trust account rules, by failing to meet filing deadlines, failing to communicate with clients, failing to expedite litigation, and failing to promptly respond to the State Bar, in violation of ER's 1.2, or 1.3, 1.15, 3.2, and Rules 43, 44, and 53.
50. In *In re Abernathy*, SB-05-0171-D (2006), the lawyer was censured with one year probation after engaging in a pattern of neglect in handling client matters, failing to represent clients diligently, failing to comply with court orders, failing to appear at

hearings, and generally failing to expedite litigation, in violation of ER's 1.1, 1.2, 1.3, 1.4, 3.2, 3.4, and 8.4

51. In *In re Bendalin*, SB-0600175-D (2006), the lawyer was censured with one year probation after failing to act with reasonable diligence and promptness, failing to keep clients informed about the status of their cases, and failing to adhere to trust account rules and guidelines, in violation of ER's 1.3, 1.4, 1.15, and Rules 43 and 44.

Proposed Sanction

52. The parties submit that an appropriate sanction in this matter, after considering the aggravating and mitigating factors, is a Censure, payment of restitution, and two years of probation.

RECOMMENDATION

53. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice, and deter future misconduct. Yet another purpose is to instill public confidence in the Bar's and integrity.
54. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases.
55. The undersigned Hearing Officer found Respondent to be remorseful and to have taken steps to address his emotional issues. He is getting counseling and has a practice monitor. Respondent claims to have pared his practice down, and is looking forward to the assistance of LOMAP to help assure that there are not any future complaints.

56. Of note to the Hearing Officer was that the Respondent's remorse that he finds himself in the circumstances he is in, seems to trump any remorse that his actions caused his clients not only inconvenience, but money as well. Respondent's focus should be not only on not repeating the same mistakes that he committed in this matter, but assuring that there are no future victims as a result of his inability to deal with the pressures of practicing law. Respondent not only let himself down, he let his profession and his clients down as well, and during his probationary term, needs to address head-on the emotional issues that got him here.
57. Stephen R. Lankton, Respondent's Counselor, prepared a report that was not submitted until well after the final hearing. A review of this report helps explain the basis of Respondent's failure to adequately represent his clients and his failure to respond to the Bar.
58. While Counselor Lankton is optimistic about Respondent not returning to the "level of severity of avoidance he exhibited in late 2006" (see page 7 of Stephen Lankton's report, Exhibit 1 to the hearing on the Tender of Admissions), this Hearing Officer notes that Respondent represented to Mr. Lankton that he was intending on ". . . switching jobs to financial management" (id. page 4). The Respondent did not mention this intention during the hearing and focused instead on reducing stress in his practice.
59. It is hoped that Respondent successfully addresses his anxiety whatever course he chooses. Should he choose to remain a practicing attorney, then this Hearing Officer recommends that his probation terms include not only continued counseling to help resolve his anxiety, but supervision and monitoring to assure that he is able to deal with the significant stress of being an attorney.

60. It is a recommendation of the Hearing Officer that the proposed sanction of Censure, restitution of \$500 to Danielle Tucker, and two years of probation, including MAP and LOMAP, be accepted by the commission.
61. Respondent is to pay all costs and expenses incurred by the State Bar in this proceeding.
62. In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation had been breached, and, if so, to recommend an appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence.

DATED this 10th day of December, 2007.

Hon H. Jeffrey Coker / s/
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 10th day of December, 2007.

Copy of the foregoing mailed
this 10th day of December, 2007, to

Nancy A. Greenlee
Respondent's Counsel
821 East Fern Drive North
Phoenix, AZ 85014

Stephen P. Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: 