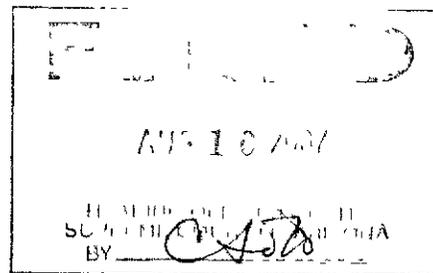


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Hearing Officer 8T
Frderick K. Steiner, Jr , Arizona Bar No 000656
2915 E Sherran Lane
Phoenix, Arizona 85016-7057



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

**IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA**

**RORY L. WHIPPLE,
State Bar No. 014093,**

Respondent

) File Nos. 05-1600, 06-0163
)
) **HEARING OFFICER'S**
) **RECOMMENDATIONS**

Procedurally, this case goes to the Disciplinary Commission for the second time
In its Report dated February 12, 2007, the Commission unanimously rejected a submitted
Tender of Admissions and Agreement for Discipline by Consent and remanded the case
to Hearing Officer 8S, from whom it was reassigned to me for hearing, on the basis that
the original record was insufficient to justify a reduction to censure (the proposed
sanction under the Tender) from the presumptive sanction of suspension. Suspension
under the conditionally admitted facts would be the appropriate sanction for the conduct
if there were no mitigating factors. The Commission was concerned that no hearing had
been held to make a factual record that there were facts in mitigation sufficient to justify
censure rather than suspension.

1 The matter was heard before me on June 27, 2007. Despite my urging,
2 Respondent and the State Bar were unable to reach agreement, either before or after the
3 hearing, as to what would be an appropriate sanction. Before the hearing, and at it, the
4 Respondent and Bar Counsel were in agreement, and so stipulated, that the record
5 justified the sanction of suspension if mitigating circumstances were not taken into
6 account. The hearing, therefore, dealt only with mitigating circumstances and, at the
7 request of Bar Counsel, with possible further aggravating circumstances beyond those
8 already previously established. Thus, there is no need here to make findings concerning
9 the predicate facts, although, should it be deemed necessary or appropriate, I adopt the
10 findings that appear in the original Hearing Officer's Report of November 17, 2006.

11 According to the State Bar, the factors to be considered in aggravation are
12 Standard 9.22(a), prior disciplinary offenses, 9.22(b), dishonest or selfish motive, 9.22(c),
13 pattern of misconduct, 9.22(g), refusal to acknowledge wrongful nature of conduct, and
14 9.22(i), indifference to making restitution. In mitigation the Bar admits applicable
15 Standard 9.32(c), personal or emotional problems. Beyond these, I have taken into
16 account other possible factors in aggravation and mitigation. What weight, if any, I
17 should give to various aggravating and mitigating factors are separate considerations.

18 Overall, the picture painted was of an attorney more than a little slipshod in his
19 practice, as shown not only in the instances before me but in prior disciplines at the low
20 end of the discipline scale, informal reprimand, reprimand, and an order of probation, and
21 of an attorney who was indifferent and sluggish in response to the Bar's requests for
22 information, which Respondent should have known would arouse the Bar's ire, as it did
23 in spades. The Bar characterizes the Respondent's delays and failures to respond to the
24 Bar requests as violations of Standards 9.22(c) pattern of misconduct, 9.22(d), multiple
25 offenses, and 9.22(e), bad faith obstruction of disciplinary proceedings. The Bar asserts

1 further aggravation due to Respondent's dilatory behavior up to the very day of the
2 hearing

3 At the least, Respondent's insouciance understandably greatly irritated Bar
4 Counsel, but I do not find that it went so far as to be a violation of any Standard
5 Standard 9 22(e), bad faith obstruction of the disciplinary procedure and intentional
6 failure to comply with rules or orders of the disciplinary agency, very clearly requires a
7 showing of deliberate intent to derail the disciplinary procedure, bad faith. It requires
8 something more than the carelessness and indifference Respondent has shown. No claim
9 was made by the State Bar that Respondent embarked on calculated interference with the
10 disciplinary procedure. It is only 9 22(e) that explicitly treats aggravations arising out of
11 the disciplinary proceeding itself. It is reaching farther than I am willing to go to claim—
12 which would bypass the bad faith *scienter* element of 9 22(e)—that Respondent's
13 dilatory behavior also violated 9 22(c), pattern of misconduct, and 9 22(d), multiple
14 offenses. 9 22(c) and 9.22(d) to me go to the underlying circumstances justifying
15 sanction, not to the discipline procedure itself.

16 As to the underlying facts, there was little, if any, actual harm done to clients.
17 The Bar's efforts to show actual damage were more hypothetical than real (that a writ not
18 obtained might or might not have been successful), trivial (that the clients lost for a while
19 the use of retainer funds until the retainers were ultimately fully returned) or relatively
20 minor (that refunds were made only after complaints had been filed with the Bar).

21 I do not find enough evidence to justify finding a violation of Standard 9.22(b),
22 dishonest or selfish conduct. At worst, Respondent was not dishonest, but neglectful of
23 his clients. He was selfish no more than the rest of us are in daily life. I find that his
24 intentions were good but that his performance fell short. In sum, I find as aggravating
25 factors, all relating to past and underlying facts, not to the disciplinary proceeding itself,

1 prior disciplinary offenses under Standard 9.22(a), multiple offenses under 9.22(d) and
2 substantial experience in the practice of law under 9 22(i)

3 On the side of mitigation, I find to be a mitigating factor the absence of dishonest
4 or selfish motive, via Standard 9.32(b), rather than an aggravating factor under Standard
5 9 22(b) I also find in mitigation grudging but still timely good faith effort to make
6 restitution or rectify consequences under Standard 9 32(d) But neither of these
7 mitigating factors weigh heavily in Respondent's favor By far the greatest mitigating
8 circumstances fall under Standard 9 32(c), personal or emotional problems Respondent
9 has had something akin to the tribulations of Job or to the plagues Moses brought down on
10 the Egyptians. Yet he has not been as blameless as Job He has done much, as did the
11 Egyptian Pharaoh, to bring his troubles down on his own head Also, his lapses as a
12 lawyer do not appear to have been entirely caused by his personal and emotional
13 problems but in part due to character weakness or to lack of commitment to the highest
14 standards of the practice of law

15 Nevertheless, he has had great emotional trauma An ill-advised extra-marital
16 affair led to a divorce and later remarriage, and the remarriage led to more infidelity and
17 to renewed marital problems that generated problems with the upbringing of his children
18 He was excommunicated from his church, which greatly disturbed him, for he had been a
19 dedicated parishioner of rank and standing Like Job, he was also afflicted with ills not
20 his fault, the death of a relative of his wife and then a serious injury to his wife in an
21 accident in which the driver of the other car, the driver at fault, died I find there to have
22 been strong mitigating circumstances under Standard 9.32(c), although diminished by his
23 own fault as having done much to bring them about

24 Also in mitigation in addition to absence of dishonest or selfish motive under
25 Standard 9 32(b) and personal or emotional problems under 9.32(c) I find under

1 Standards 9 32(d), (j) and (l) three more mitigating factors, Respondent's restitution by
2 return of retainers paid, Respondent's rehabilitative efforts that I discuss below, and
3 Respondent's expressed remorse But there is a common thread that runs through this
4 case—there is hardly any positive factor that is not weakened by something negative, nor
5 any negative factor not softened by some positive element Much weakening the
6 mitigating factors were that the restitutions were late and made under pressure, the lasting
7 effect of rehabilitation efforts could be evanescent, and it is hard to distinguish
8 expressions of remorse as made from genuine emotion or made for theatrical effect—
9 maybe a little of both

10 There is no question but that Respondent has dug himself into a deep hole from
11 which he is trying to extricate himself by efforts across the board He has voluntarily
12 signed on to LOMAP and MAP programs He has sought professional counseling and is
13 embarked on a long road toward being readmitted to his church Most important,
14 perhaps, is that he and his wife have reconciled, a second start toward divorce has been
15 abandoned, and his wife now is not only a strong supporter but active in helping ^{him} in his
16 practice, such as by tracking client telephone calls and making sure they are returned
17 Yet, even here, there is the overcast of doubt as to whether all of this is more show than
18 substance Does Respondent find it too easy to make promises that he will not keep and
19 to start on the road to reform only to soon turn from the straight and narrow? I give him
20 the benefit of the doubt

21 There is little question in my mind, too, that the case became impossible to settle
22 by cooperative effort of Respondent and counsel for the State Bar because of increased
23 antipathy between them, fueled no doubt by Respondent's stubborn belief that he ought
24 to be punished no more than the censure to which the Bar once agreed and by the Bar's
25 growing frustration with what it perceives to be Respondent's continued delays and

1 failures to respond to Bar inquiries (which Respondent either denies or proffers
2 somewhat lame excuses) I find that there were delays and failures not excused, but not
3 so serious that the Bar could treat them as instances of *lese majesty*, nor, using the State
4 Bar's words, as something that "borders on contempt for the legal system."

5 The message thus is mixed, a very human, somewhat confused, and sometimes
6 overlapping, set of plusses and minuses, not a problem that can be summarily resolved by
7 formulistic adding and subtracting of aggravating and mitigating elements From the
8 evidence before me I conclude that my recommendation should be somewhere between
9 the extremes of the light penalty of censure urged by Respondent and the heavier one
10 urged by the State Bar of suspension for six months and a day But where?

11 The authorities cited by the State Bar in one way or another are all on point, and
12 my task has not been made easier by Respondent's failure to file a post hearing brief It
13 is not to be held against him Although I requested the parties to try to reach accord, I did
14 not require post-hearing briefing Still, Respondent did less than he might have done to
15 further his case, symptomatic, perhaps, of a general tendency to let matters slide that call
16 for immediate attention and action

17 In the cases cited by the State Bar, the sanctions assessed ranged from censure to
18 suspension for six months and a day, giving me great latitude for my recommendation
19 But I get the most guidance from the principle stated in the State Bar's post hearing
20 memorandum that consistency of sanctions among like cases is important, yet facts differ
21 from case to case, and discipline must be tailored to each individual case As stated in
22 the Commentary to the Standards "While these standards set forth a comprehensive
23 model to be used in imposing sanction, they also recognize that sanctions imposed must
24 reflect the circumstances of the individual lawyer " Sanctions, Pt IV, Commentary to
25 Provision 1 3, page 18

1 In this case the factor that has most inclined me toward the position of the State
2 Bar is that Respondent has shown himself to be careless and inattentive, not only to his
3 clients but to the legitimate expectations of the State Bar and ultimately to the legal
4 system itself, and that his behavior in this respect seems to me to go beyond a temporary
5 condition attributable to the present stresses in his life but to a longer-lasting
6 lackadaisical approach to his work, his profession and his family. Also, he has found
7 promises to reform to be easier to make than to keep.

8 In Respondent's favor I was most influenced by several things. First, the original
9 submission to the Commission was a joint tender acceptable to the Bar that had as
10 sanction only censure. The Commission in sending the case back for further hearing did
11 not say that censure was inappropriate, only that a hearing record had not been made of
12 facts that would justify less than suspension. Such a hearing has been held, and I have
13 heard testimony and received evidence that would support the lesser penalty of censure.
14 What has changed since the original tender? A fair amount that favors Respondent has
15 happened, but not much that furthers the position of the State Bar, only some more
16 dallying by Respondent that has further gotten under the State Bar's skin and hardened its
17 heart.

18 Second, on his own, Respondent has mended fences with his wife who has
19 assumed an active role in helping her husband in his practice, particularly in injecting
20 order in such mundane but essential things as keeping a record of telephone calls.

21 Third, he has voluntarily enrolled in the LOMAP and MAP programs and sought
22 private and spiritual counseling, steps in the right direction, although it remains to be seen
23 whether he has the fortitude and persistence to see them through.

24 Fourth, the risk to the public appears to be small. Maria Bahr, the witness from
25 LOMAP, said that Respondent was typical of those who came to LOMAP (five on a scale

1 of ten) and the LOMAP was generally an effective program Mr Nevitt of MAP was
2 quite sanguine, saying that in his judgment, if Respondent stuck to the MAP program,
3 Respondent would represent a low risk to the public and that Mr. Nevitt would be in good
4 position throughout to monitor Respondent

5 Finally, I think it appropriate to take into account financial reality Respondent is
6 a sole practitioner with a wife and five children Any suspension will impose a
7 substantial financial strain; a long one could be catastrophic, with no commensurate
8 benefit to the public or the profession

9 I have determined that a short suspension is the appropriate recommendation But
10 this is not the end of it. I must recommend as to whether Respondent should be placed on
11 probation and as to conditions of any probation

12 As to probation, my task is fairly simple There is already in place a voluntary
13 LOMAP Probation Contract dated June 28, 2006, with a two year term and a Voluntary
14 Therapeutic Contract with MAP dated June 4, 2007, with a one year term. I recommend
15 that both contracts be extended through December 31, 2009, that both be made
16 mandatory, and that Respondent's period of probation be through 2009

17 As to further conditions of probation, the full arsenal of restrictions and controls
18 proposed by the State Bar seems contra-productive Respondent is not a wild mustang in
19 need of a check rein, snaffle-bit and sharpened rowels, but someone more in need of
20 attentive guidance toward fully accepting and performing his responsibilities as a lawyer
21 and freeing himself of rationalization and self-indulgence He needs to learn to meet his
22 full professional responsibilities on the free range of real life, not inside a corral of
23 restrictions. Participation in the two State Bar programs and monitoring by Mr Nevitt or
24 someone else on the MAP staff seem to me both sufficient and best

25

RECOMMENDED SANCTION

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3 I recommend to the Disciplinary Commission

4 1 That Respondent be suspended from the practice of law for one month

5 2 That Respondent be placed on probation through December 31, 2009.

6 3 That Respondent be required to continue to participate in both the State Bar

7 Law Office Management Assistance Program (LOMAP) and the Member Assistance

8 Program (MAP) through December 31, 2009.

9 4 That Respondent not be readmitted to active practice unless and until the
10 Disciplinary Commission receives from Mr. Nevitt of MAP, or some other MAP person

11 designated by the Director of MAP, an opinion that Respondent is competent and likely

12 to practice thereafter consistently up to the standards of the profession as set out in Rule

13 42 of the Rules of Professional Conduct. In so recommending, I am aware, as

14 Respondent should be made aware, that until such opinion is obtained, or the opinion

15 waived by the Disciplinary Commission or the Arizona Supreme Court, Respondent

16 could be effectively barred from the practice of law for some time after his suspension

17 has expired.

18 5 That if the State Bar comes to believe that Respondent has violated any term of

19 Respondent's suspension or related conditions it may file with the Commission Notice of

20 Claimed Non-Compliance, in which case the matter shall be set for hearing before a

21 Hearing Officer, heard, and appropriate relief granted or relief denied in accordance with

22 applicable Disciplinary Commission rules and practice.

23 6. That the record in this case may be either sealed or not, at the discretion of the

24 Commission. As Hearing Officer, I heard no compelling reason to seal the record but

1 understand that to do so, or to seal portions of it relating to Respondent's extra-marital
2 excursions, may spare feelings and avoid unnecessary embarrassment

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4 Respectfully submitted (by fax) this 5th day of August, 2007.

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Frederick K. Steiner, Jr.
Frederick K. Steiner, Jr,
Hearing Officer 8T

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

Copy of the foregoing mailed
this 13th day of August, 2007, to:

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Bar Counsel
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by: Christina J. H.