

**FILED**

FEB 21 2008

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

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

File No. 06-1690

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY *TMQ*

**MICHAEL A. CARRAGHER,**  
**Bar No. 003366**

**HEARING OFFICER'S REPORT  
RECOMMENDING ACCEPTANCE  
OF AGREEMENT FOR  
DISCIPLINE BY CONSENT**

Respondent.

(Assigned to Hearing Officer 8W,  
Thomas M. Quigley)

Pursuant to Ariz. R. Sup Ct 56(e), the undersigned hearing officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and submits the following report.

**I. PROCEDURAL HISTORY**

The State Bar filed a Complaint on August 28, 2007. The complaint alleged one count as discussed further below. Respondent Michael A Carragher ("Respondent") filed an Answer on October 2, 2007. The parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") on January 4, 2008. No hearing has been held in this matter.

**II. FACTS**<sup>1</sup>

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been admitted to practice in Arizona on September 20, 1973.

**COUNT ONE (File No. 06-1690)**

1 Respondent was retained by Linda Coulter ("Coulter") to prepare a Qualified Domestic Relations Order ("QDRO") for retirement benefits under the Asarco Salaried Employees Benefit Plan ("Asarco")

2 On or about May 20, 2003, Respondent prepared and submitted a "draft" QDRO to the retirement plan administrator of Asarco for its comments or approval

<sup>1</sup> The following facts have been conditionally admitted and form the basis for the hearing officer's recommendation. See Agreement

1           3     On or about June 14, 2004, the plan administrator sent a letter to  
2 Respondent indicating that the draft QDRO submitted by Respondent was deficient in  
3 certain respects. In that letter, the plan administrator detailed each deficiency of the  
4 QDRO.

5           4     On or about July 26, 2005, Respondent submitted another QDRO on  
6 behalf of Coulter to Asarco with the proposed changes.

7           5.     On or about January 5, 2006, the Asarco plan administrator sent another  
8 letter to Respondent representing that additional changes and modifications had to be  
9 made.

10          6.     On October 5, 2006, Coulter filed a bar complaint against Respondent  
11 because the QDRO had yet to be completed.

12          7.     After the bar complaint, Respondent prepared another QDRO which was  
13 submitted to Asarco on or about January 31, 2007.

14          8     On May 11, 2007, Asarco again rejected the QDRO.

15          9.     On July 2, 2007, Respondent submitted another QDRO.

16          10.    Asarco accepted the last QDRO on August 6, 2007.

17 **III. DISMISSED ALLEGATIONS**

18           As part of the Agreement, the State Bar dismissed the allegation that Respondent  
19 violated ERs 1.1 and 1.4.

20 **IV. RESTITUTION**

21           There is no issue of restitution in this matter.

22 **V. THE APPROPRIATE SANCTION**

23           The purpose of lawyer discipline is not to punish the lawyer, but to protect the  
24 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d  
25 1315, 1320 (1993). Lawyer discipline should also protect the public, the profession and  
26 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet  
27 another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*,  
28 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

1 In imposing discipline, it is appropriate to consider the facts of the case, the  
2 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards")  
3 and the proportionality of discipline imposed in analogous cases *Matter of Bowen*, 178  
4 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994)

5 **A. ABA STANDARDS**

6 The Supreme Court and the Disciplinary Commission consistently use the  
7 American Bar Association Standards for Improving Lawyer Sanctions ("Standards") to  
8 determine appropriate sanctions for attorney discipline. See *In re Clark*, 207 Ariz. 414,  
9 87 P.3d 827 (2004), *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, §§ 23, 33 (2004) The  
10 Standards are designed to promote consistency in sanctions by identifying relevant  
11 factors and then applying those factors to situations in which lawyers have engaged in  
12 various types of misconduct. *Standard 1.3*, Commentary

13 In determining an appropriate sanction, the court and the Disciplinary  
14 Commission consider the duty violated, the lawyer's mental state, the presence or  
15 absence of actual or potential injury, and the existence of aggravating and mitigating  
16 factors *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990); *Standard 3.0*.

17 **1. The duty violated**

18 The misconduct in this matter involves Respondent's failure to act with  
19 reasonable diligence and promptness in representing his client. Respondent's delays  
20 likely contributed approximately two years of delays in obtaining the QDRO

21 **2. The lawyer's mental state**

22 The parties contend, and this hearing officer accepts, that Respondent's conduct  
23 was negligent "the failure to heed a substantial risk that circumstances exist or that a  
24 result will follow, which failure is a deviation from the standard of care that a reasonable  
25 lawyer would exercise in the situation." *Standards Definitions*

26 **3. The potential or actual injury caused by Respondent's conduct**

27 As noted above, the actual injury was an unreasonably long delay in obtaining the  
28 QDRO.

1           *Standard 4.43* provides for censure for negligence in a lawyer failing to act with  
2 reasonable diligence in representing a client, and causes injury or potential injury to a  
3 client. The hearing officer finds that *Standard 4.43* is the appropriate standard for the  
4 violation.

5                           **4.     The aggravating and mitigating circumstances**

6           The parties agreed, and this hearing officer finds, that certain aggravating  
7 circumstances exist:

8           *Standard 9.22(a)* Prior disciplinary offenses. This is the most significant  
9 aggravating factor. Respondent has four instances of prior discipline. Most recently,  
10 Respondent received a censure and one year probation in 2000. On three other  
11 occasions, Respondent has been disciplined. Taken as a whole the prior disciplinary  
12 record reveals a wide array of violations appearing in court while in a suspended status;  
13 failure to refund money to a client, failure to account for client property; failure to pay a  
14 retained expert witness; and, failure to account for money received from a client.

15           *Standard 9.22(i)* Substantial experience in the practice of law. Respondent was  
16 admitted to the practice of law in 1973.

17           The parties agreed that certain mitigating circumstances exist, although this  
18 hearing officer declines to find some of the mitigating circumstances proffered:

19           *Standard 9.32(b)* absence of a dishonest or selfish motive. As noted above, it is  
20 accepted that Respondent was negligent as opposed to motivated by conscious desire.  
21 However this "mitigating" factor, to the extent it exists, does not impact the overall  
22 analysis.

23           *Standard 9.32(d)* timely good faith to rectify consequences of misconduct.  
24 Although it is true that Respondent completed the QDRO, it remained his duty to do so,  
25 and therefore this factor is not applicable.

26           *Standard 9.32(e)* full and free disclosure to disciplinary board or cooperative  
27 attitude toward proceedings. This hearing officer accepts that Respondent candidly  
28 communicated through the State Bar to complete the QDRO and expressed remorse

1 regarding his actions.

2       *Standard 9.32(h) physical disability* The parties did not submit sufficient  
3 information for this hearing office to find this factor

4       *Standard 9 32(l) remorse* See above.

5       *Standard 9 32 (m) remoteness of prior offenses.* Three of four of Respondent's  
6 prior offenses occurred prior to 1983

7       Here, the aggravating factors of substantial experience and prior discipline  
8 outweigh any/all of the factors offered in mitigation. However, on balance, neither the  
9 aggravating nor mitigating circumstances justify a deviation from the presumptive  
10 sanction.

#### 11       **B.     PROPORTIONALITY REVIEW**

12       To have an effective system of professional sanctions, there must be internal  
13 consistency, and it is appropriate to examine sanctions imposed in cases that are  
14 factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the  
15 discipline in each case must be tailored to the individual case, as neither perfection nor  
16 absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re*  
17 *Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660  
18 P.2d 454, 458 (1983)).

19       The parties submit, and the hearing officer finds, that *In re Stevens*, SB-06-0157-  
20 D (2006), is an appropriate case upon which to base proportionality. In *Stevens*, the  
21 attorney received a censure and was placed on probation for two years for violations of  
22 ERs 1.2, 1.3, 1.4, and 8.4(d). The attorney had been hired to prepare and obtain a  
23 QDRO in April of 2003. By July of 2004, the QDRO had still not been received by the  
24 client, and had not been received as of June 2006. Over a three-year period, Stevens  
25 failed to complete the work for which he was retained.

#### 26       **VI.   RECOMMENDATION**

27       Upon consideration of the facts, application of the *Standards*, including  
28 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer

1 recommends acceptance of the Tender of Admissions and Agreement for Discipline by  
2 Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent  
3 providing for the following.

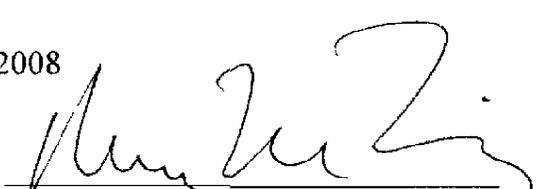
4 Respondent shall be censured and shall be placed on probation. The period of  
5 probation will begin immediately upon the issuance of the judgment and order in this  
6 matter and will continue for two years from the date Respondent signs the probation  
7 contract. The terms of probation shall include participation in the State Bar's Law  
8 Office Management Assistance Program ("LOMAP").

9 Respondent shall, within 30 days of the date of the judgment and order in this  
10 matter, contact the Director of Lawyer Assistance Programs, to schedule an appointment  
11 with a member of LOMAP to conduct an assessment of Respondent's office processes  
12 and procedures, particularly as they relate to client communication and diligence issues.  
13 Respondent shall cooperate with the staff of LOMAP and will participate in the program  
14 for the duration of the period of probation as outlined in the probation contract.

15 The failure to comply with the terms and conditions of probation will result in the  
16 filing of a notice of non-compliance by the State Bar with the Hearing Officer and a  
17 hearing will be held within thirty (30) days to determine whether the respondent has  
18 breached the agreement. A finding that the Respondent has breached the terms and  
19 conditions of probation may result in the imposition of sanctions. Ariz. R. Sup. Ct.  
20 56(c)(2)

21 Respondent shall also pay the costs and expenses of this action during the period  
22 of probation. A statement of costs and expenses by the State Bar is attached as Exhibit  
23 1.

24 DATED this 20<sup>th</sup> day of February, 2008

25  
26   
27 Thomas M. Quigley  
28 Hearing Officer 8W

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Original filed this 20<sup>th</sup> day of February,  
2008 with the Disciplinary Clerk of the Supreme Court

Copy of the foregoing mailed this 20<sup>th</sup>  
day of February, 2008, to.

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By 