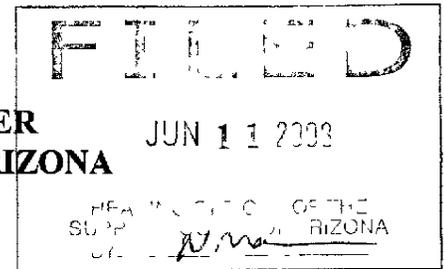


BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A)
SUSPENDED MEMBER OF THE)
STATE BAR OF ARIZONA)
)
GARY F. FORSYTH,)
Bar No. 007586)
)
RESPONDENT)
_____)

File No. 06-1630, 07-0524, 07-1035

HEARING OFFICER'S REPORT

Procedural History

1. The State Bar filed a complaint in this matter on November 16, 2007. Service on the Respondent was accomplished pursuant to Rule 47(c), Ariz.R.S.Ct by certified mail/delivery restricted to addressee and also by First Class mail to Respondent at his address of record provided to the membership records department of the State Bar of Arizona.
2. Respondent did not file an answer.
3. A Notice of Default was issued by the Disciplinary Clerk on December 28, 2007 and served on Respondent at his address of record. Respondent still failed to file an answer.
4. On January 22, 2008 Disciplinary Clerk filed an entry of Default in this matter.

5 On February 5, 2008, the State Bar requested the matter be set for an aggravation/mitigation hearing. An aggravation/mitigation hearing was set for April 4, 2008 in Holbrook, Arizona.

6. On March 26, 2008 State Bar filed a motion for change of venue and requested an expedited ruling. State Bar's motion for change of venue was mailed to Respondent at his last available address.

7. After receiving the State Bar's motion for change of venue, the Hearing Officer requested that the Disciplinary Clerk's office make additional attempts to contact Respondent to determine whether he would be present or would be participating at the upcoming hearing. The Disciplinary Clerk's office made the following attempts to contact Respondent regarding the motion:

- (a) The Disciplinary Clerk's Office called the Respondent on Tuesday, April 1, 2008 at the phone number that he had last provided to the State Bar. The number was no longer in service.
- (b) Disciplinary Clerk's office contacted Respondent's prior counsel, Nancy Greenlee, to obtain additional contact information.
- (c) On April 1, 2008 Disciplinary Clerk's Office attempted to call Respondent at a mobile number that they had obtained. The number was no longer in service.

(d) On April 1, 2008, the Disciplinary Clerk's Office sent an email to Respondent. No response was received from the Respondent

8. On April 3, 2008, having received no objection or contact from Respondent, the Hearing Officer granted the State Bar's motion for a venue change for the aggravation/mitigation hearing to Phoenix

9 On April 4, 2008 the aggravation/mitigation hearing was held in Phoenix, Arizona Respondent did not appear. Prior to the commencement of the hearing, testimony was taken from a member of the Disciplinary Clerk's Office regarding efforts to contact the Respondent for the hearing. *Reporter's Transcript of Proceedings for April 4, 2008* (hereafter, RTP¹), for: 11-6:9.

Findings of Fact

1 Pursuant to Rule 57(d), Ariz.R S Ct., based upon other Respondent's failure to answer the complaint, all allegations in the complaint are deemed admitted. Based upon the record in this matter, this Hearing Officer makes the following findings of fact:

2. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 23, 1982.

COUNT 1, 06-1630 (Pardons)

3 On or about February 14, 2006, Larry and Judith Pardon hired Respondent to defend them in a criminal case in which they had been charged with forgery and fraud schemes

4 The Pardons paid Respondent \$3,000 as a retainer to take the case.

5 The Pardons contend that they were erroneously charged in the criminal case. The case involved alleged crimes concerning a business. The Pardons contend that the initial report that led to the charges was false, and was not submitted by the real owners of the business. The real owner of the business submitted information to the prosecutor's office to clear up the charges against the Pardons.

6 During the period of representation, the Pardons provided written information to Respondent from the real owner of the business

7 Respondent cancelled and/or continued a few court appearances in the matter.

8 Thereafter, the State filed a Motion to Dismiss the charges based on the information provided directly to the State by the real owners

9 By order dated April 16, 2006, the criminal charges against the Pardons were dismissed

¹ Page numbers are to the left of the colon, line numbers are to the right of the colon

10 Thereafter, the Pardons left numerous phone messages for Respondent asking for an accounting and refund. Respondent failed to return any of those messages.

11 Finally, in late June, 2006, Ms. Pardon went to Respondent's office trying to get an accounting and refund. At that time, Respondent provided her with a partial refund, but no accounting

12. Subsequently, the Pardons continued to telephone Respondent's office to request an accounting. Respondent failed to return those calls, and failed to provide the requested accounting

13 In his response, Respondent admitted that he had failed to return some phone calls from the Pardons

14. Respondent further admitted that he had not provided a written accounting.

15. Respondent stated that he had provided a refund in the amount of \$1665. He admits, however, that the amount was simply an estimate, and not based on a final written accounting

16. Respondent also included a time record for the clients showing that he earned \$782 in the representation Respondent included a handwritten notation indicating that approximately 2 more hours should have also been included

17. Respondent also provided copies of his trust account checks written in relation to the case. However, the total of the checks, which included multiple

checks written to himself for earned fees as well as the refund check, totaled more than the \$3,000 Respondent had in the trust account for the Pardons.

18. Subsequently, Respondent was asked by the State Bar to provide additional information including additional trust account records. Respondent failed to respond to that request.

Count 2, 07-0524 (Larson)

19 Respondent represented James Larson in a domestic relations matter in the Navajo County Superior Court.

20. On or about November 20, 2006, the case was set for a final hearing. At that time, the parties informed the court that a settlement had been reached. The court instructed the parties to file the stipulated settlement, and set a review date for December 11, 2006.

21 As of December 11, 2006, no settlement agreement had been filed in the matter.

22. On or about December 12, 2006, the court ordered that the settlement agreement or other appropriate pleadings to set further proceedings be filed within three weeks.

23 Respondent failed to comply with the court's order.

24 In or about March, 2006, James Larson contacted the court directly to ascertain the status of his case as Respondent had failed to communicate with him about the matter.

25. By letter dated April 13, 2007, the State Bar sent a charging letter to Respondent requiring a response on or before May 3, 2007. Respondent failed to submit a response by that date, but requested an extension of time until May 31, 2007 to respond. The extension was granted.

26. Thereafter, Respondent failed to submit any response to the bar charge.

Count 3, 07-1035 (Trust Account)

27. On or about June 18, 2007, the State Bar received a copy of an overdraft notice on Respondent's Wells Fargo client trust account.

28. On June 11, 2007, a check in the amount of \$340 attempted to pay against the account when there was only \$305.63 in the account.

29. By letter dated June 22, 2007, Respondent was sent a copy of the overdraft notice by the State Bar, and asked to respond in writing to the charge and to provide trust account records.

30. Respondent failed to submit a response to the bar charge or to provide any of the requested trust account documents.

31. As to Count Two, the Respondent retained funds of client James Larson in the amount of \$2,500, *RTP, Exhibit 1*.

32. As to Count One, the Respondent retained funds of clients Larry and Judith Pardon in the amount of \$553.00. *RTP, Exhibit 3*.

Conclusions of Law for Count 1

1 Respondent violated Ethical Rule 1.3, Rule 42. Ariz.R.S Ct (hereafter, "ER ") by not acting with reasonable diligence and promptness while representing the Pardons.

2 Respondent violated ER 1.4 (Communication) by failing to reasonably consult and communicate with the Pardons after their repeated attempts to communicate with Respondent.

3. Respondent violated ER 1.5 (Fees) by charging the Pardons for fees not earned. Respondent further violated ER 1.5 by not communicating and accounting to the Pardons in writing in a reasonable time regarding the fees that Respondent charged.

4. Respondent violated ER 1.15 (Safekeeping Property) when he failed to maintain complete records of trust account funds belonging to the Pardons and allowing portions of those funds to be unaccounted for

5. Respondent violated ER 1.16(d) (Duties upon Termination of Representation) when he failed to refund the Pardons the advance payment of a fee that was not earned after they had requested the refund and an accounting

6 Respondent violated ER 8.1(b) (Discipline Disclosure) by failing to provide the State Bar with additional trust account records that had been requested

7 Respondent violated Rule 43 Ariz.R. Ct by failing to maintain complete records of the trust account funds for the Pardons.

8. Respondent violated Rule 44 Ariz.R.S Ct (Safeguarding Trust Accounts) when he failed to safeguard trust account funds provided to him by the Pardons.

9. Respondent violated Rule 53(f) Ariz.R.S.Ct. (Failure to Furnish Information), when he failed to promptly respond to the State Bar and failed to furnish information requested pursuant to the Pardons' complaint.

Conclusions of Law for Count 2 (James Larson)

10 Respondent violated ER 1.3 (Diligence) by not acting with reasonable diligence and promptness while representing Mr. Larson

11 Respondent violated ER 1 4 (Communication) by not reasonably consulting with Mr Larson and failing to keep the client reasonably informed about the status of his case

12 Respondent violated ER 8 4(d) by engaging in conduct that was prejudicial to the administration of justice.

13. Respondent violated ER 8.1(b) by failing to respond to the State Bar inquiry regarding the James Larson matter.

14. Respondent violated Rule 53(f) Ariz.R.S.Ct. (Failure to Furnish Information) when he failed to promptly respond and furnish information requested pursuant to the Larson's complaint

Conclusions of Law for Count 3 (Trust Account)

15. Respondent violated ER 1 15 (Safekeeping Property) by failing to safeguard trust account funds.

16. Respondent violated ER 8.1(b) (Discipline Disclosure) when he failed to respond and disclose requested information to the State Bar pertaining to an overdraft of his trust account

17 Respondent violated Rule 43 Ariz.R.S.Ct (Trust Account) when he failed to provide complete records regarding the handling, maintenance and disposition of his trust account.

18. Respondent violated Rule 44 Ariz R.S.Ct. (Safeguarding Trust Accounts) by failing to safeguard the property of clients maintained in his trust account.

19. Respondent violated Rule 53(f) Ariz.R.S.Ct. by failing to respond and furnish information to the State Bar relating to an overdraft of Respondent's client trust account.

ABA Standards

In determining an appropriate sanction, the American Bar Association's Standards for Imposing Lawyer Sanctions (*Standards*) should be considered. *In re Rivkind*, 164 Ariz. 154, 157, 791, P.2d 1037, 1040 (1990). The *Standards* list the following factors to consider in imposing an appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the misconduct, and (4) the existence of aggravating and mitigating factors.

Duty violated and lawyer's mental state:

According to the *Standards* and *In re Cassalia*, 173 Ariz. 372, 843 P 2d 654 (1992), where there are multiple acts of misconduct, a lawyer should receive one sanction consistent with the most serious instance of misconduct. The other acts should be considered as aggravating factors. *Id* Respondent engaged in a pattern of knowingly failing to diligently represent clients and failing to communicate with his clients. These are both serious violations.

ABA Standard 4.42 provides

Suspension is generally appropriate when

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Standard 4.42 applies because of the pattern of neglect. Respondent neglected three separate clients in two separate cases.

Respondent's failure to participate in these discipline proceedings is also troublesome. *Standard 7.0, Violations of other Duties Owed as a Professional*, is applicable to conduct concerning a lawyer's conduct in connection with a lawyer discipline matter.

ABA Standard 7.2 provides:

Suspension is generally appropriate when a lawyer knowingly engages 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.

Respondent's failure to provide records and documents requested by bar counsel and his failure to file an answer to the investigative correspondence support a conclusion that Respondent's failure to cooperate, failure to respond to the State Bar and failure to participate in these disciplinary proceedings should be deemed "knowing" conduct such that Standard 7.2, would apply.

Actual or potential injury caused by the misconduct.

The ABA Standards do not distinguish between "actual injury" and "potential injury" in determining an appropriate sanction. The ABA standards to make distinctions between various levels of actual or potential injury for purposes of determining an appropriate sanction. ABA standard 4.42 provides for suspension when the lawyer's lack of diligence causes "injury or potential injury to a client."

Potential or Actual Injury

There was actual injury to clients Parsons and Larson in Counts One and Two. There was potential injury to the legal profession in all of the counts.

The Aggravating and Mitigating Circumstances

The presumptive sanction for this type of knowing infraction is a suspension.

The following (5) factors were considered in aggravation:

Standard 9.22(a) – Prior disciplinary offenses Respondent has a discipline history regarding the same type of misconduct as present in the instant matter. Respondent previously received an order of informal reprimand and probation (fee

arbitration), restitution and costs on December 10, 2003, in File No. 03-0969 for violations of Rule 42, Ariz.R.S.Ct., specifically ERs 1.3 and 1.4

Although diversion cases are not considered prior discipline, it is important to note that Respondent has previously received help from the State Bar, albeit in 1995 and 1996, to correct what were previously considered as minor infractions of the ethical rules. These now constitute a continuing pattern of misconduct. Respondent previously received an order of diversion in expunged File No 95-0795, for violation of ERs 1.2, 1.3 and 1.4, in expunged File No. 95-2003, for violation of ERs 1.2, 1.3 and 1.4; and in expunged File No 96-0034, for violation of ERs 1.2, 1.3 and 1.4.

More troubling is the Respondent's most recent prior discipline case, SB-08-0034-D. There, in the Supreme Court's order dated April 22, 2008 the Respondent was suspended for six months. Respondent was found to have 17 violations involving more than seven different clients. That matter involved six violations of the ER 1.4 (Communication), two violations of ER 1.3 (Diligence) and other failures to cooperate and furnish information to the State Bar. It is also disturbing that some of the Respondent's failures to cooperate in the instant case occurred at the same time that the prior case was pending.

Standard 9 2(c) and (d) – A pattern of misconduct/ multiple offenses There are three separate files in the State Bar's complaint.

Standard 9.22(i) – Substantial experience in the practice of law Respondent was admitted to practice in Arizona on October 12, 1982, and has been an attorney for 37 years

Standard 9.22(e) – Bad faith obstruction of the disciplinary proceeding. Respondent has shown bad faith obstruction in the disciplinary proceeding by failing to comply with the requests, rules, and orders of the disciplinary agency. Respondent did not respond to two State Bar disciplinary investigations and did not participate in the formal disciplinary proceedings.

The following factor was considered in mitigation:

Standard 9.32(c) – Personal or emotional problems As previously noted, the conduct in this matter is very close in time to the conduct that arose in Respondent's case, SB-08-0034-D. In that prior case, there was substantial documentation as to the personal and emotional problems that the Respondent was suffering under. This was documented in a sealed exhibit in that matter. This Hearing Officer is familiar with those facts as he was the Hearing Officer in SB-08-0034-D. The State Bar agreed that the Hearing Officer could take judicial notice of this mitigating factor and apply it to the present case. *RTP 22.3-22.*

Proportionality Analysis

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers*, 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality review is “an imperfect process.” *In re Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases “are ever alike.” *Id*

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. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002), *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

Cases in which lawyers have failed to diligently represent clients and then failed to cooperate with the State Bar have resulted in sanctions ranging from suspension for six months and one day, to suspensions for much longer periods to disbarment.

In *In re Brown*, SB 07-0061-D (2007), the lawyer failed to diligently represent the client and failed to adequately communicate with the client in one count. The lawyer also failed to respond to the bar charge and defaulted in formal proceedings. The hearing officer recommended a sanction of four months, but the Commission increased the

recommendation to six months and one day based upon the facts that the lawyer had failed to cooperate, and had a prior case based on similar misconduct

Similarly, in *In re Augustine*, SB 04-0114-D (2004), the lawyer was suspended for a period of two years for misconduct in three client matters including failing to represent the clients diligently, failing to provide an accounting, and failing to cooperate with the State Bar's investigations.

In *In re Bryn*, SB-05-0098-D (2005), the lawyer, in addition to trust account violations, was found to have abandoned multiple clients after having agreed to and been paid for representation. The respondent lawyer failed to cooperate with the State Bar during the investigation of the three pending charges, and then failed to participate in the formal discipline process until after default was entered against him. Unlike Respondent in the instant matter, the lawyer did appear at the aggravation and mitigation hearing, and did present evidence relating to three mitigating factors. Bryn was suspended for six months and one day.

In *In re Allen*, SB-07-0103-D (2007) the Respondent was suspended for six months and one day for a situation that arose out of an insufficient funds check that resulted in a negative balance to her trust account of \$305.00. Thereafter, the Respondent made partial responses to the State Bar investigator. By and large, she failed to cooperate and provide records requested by the State Bar pertaining to her trust account. Four aggravating factors were present and one mitigating factor was noted (absence of a prior disciplinary record).

While none of the above cases are directly on point with the Respondent's current case, they do point to a long-term suspension as being appropriate when an attorney has multiple instances for failing to communicate and act with due diligence coupled with failing to cooperate with the State Bar or with investigators.

Respondent's situation is markedly more serious than that found in *Allen, supra*. His prior discipline record is also substantially more noteworthy.

Recommended Sanction

Upon consideration of the facts, application of the *Standards*, including the aggravating and mitigating factors, and the proportionality analysis, this Hearing Officer makes the following recommendation:

1. That the Respondent be suspended for seven months;
2. That the Respondent be placed on probation for two years upon reinstatement;
3. That the two-year period of probation shall commence upon the date of the signing of the probation contract by Respondent. The two-year period of probation should have the following terms:
 - a) Respondent shall undergo a Law Office Management Assistance (LOMAP) audit; and
 - b) Respondent shall comply with all the recommendations made in the LOMAP audit;

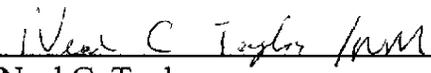
4 That the Respondent is to enter into a two-year Member Assistance Program (MAP) contract prior to being reinstated,

5. That the Respondent is to obtain comprehensive evaluation by Dr. Sucher or another suitable physician selected by the State Bar of Arizona prior to reinstatement;

6. That the Respondent shall pay restitution to Larry and Judith Pardon in the amount of \$553, and restitution to Mr. Larson in the amount of \$2500; and

7 That Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 11th day of June, 2008.



Neal C. Taylor
Hearing Officer 81

Original filed with the Disciplinary Clerk
this 11th day of June, 2008

Copy of the foregoing mailed
this 12th day of June, 2008, to

Amy K. Rehm
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, Arizona