

FILED

MAR 11 2008

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: [Signature]

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4 IN THE MATTER OF A NON-MEMBER)
OF THE STATE BAR OF ARIZONA,)
5 EMIL J MOLIN,)
Bar No 14733)
6 Respondent)

No 07-0682, 07-0743, 07-0773

**HEARING OFFICER'S
REPORT**

PROCEDURAL HISTORY

8 The State Bar filed its Complaint in this matter on August 31, 2007. The Complaint was
9 served on Respondent by certified mail/delivery restricted to addressee, and regular first class
10 mail to Respondent at his address of record as provided by Respondent to the Membership
11 Records Department of the State Bar of Arizona Respondent failed to file an Answer Notice of
12 Default was issued by the Disciplinary clerk on October 3, 2007, and served on Respondent by
13 mail at his address of record Respondent failed to file an Answer The Disciplinary Clerk filed
14 Entry of Default on October 23, 2007

15 A Hearing on Aggravation and Mitigation was held on January 24, 2008 Respondent did
16 not appear The State Bar was heard on the issue of sanction The Hearing Officer ordered that
17 the State Bar submit its proposed Findings of Fact and Conclusions of Law thereafter

FINDINGS OF FACT

19 The following facts are deemed admitted by default

20 1 At all times relevant hereto, Respondent was an attorney licensed to practice law
21 in the State of Indiana, having been first admitted to practice in Indiana on October 14, 1988

22 2 Respondent has never been licensed to practice law in the State of Arizona,
23 though Respondent maintained a law office in Tucson, Arizona

24 3 Upon information and belief, Respondent's practice of law in the State of Arizona
25 was limited to the Federal practice are of Immigration and Naturalization

COUNT ONE (File no. 07-0682)

26
27 4 On or about April 27, 2005, Lourdes Beeson retained Respondent to represent her
28 in an immigration matter for Adjustment of Status to Lawful Permanent Resident

1 16. Since the time, Mr Moreno left several more messages for Respondent, with no
2 response

3 17 No additional work was performed for Mr Moreno, and he has never been
4 informed by Respondent that the office was closing

5 18 On or about August 7, 2007, the State Bar sent Respondent a screening letter
6 along with Mr Moreno's Bar Charge requesting a response within 10 days Respondent failed to
7 respond to the Bar Charge

8 **COUNT THREE (File no. 07-0773)**

9 19 On or about February 8, 2006, Luis Assamar Rodriguez retained Respondent to
10 represent him in an immigration matter Respondent was to assist Mr Rodriguez in obtaining an
11 Adjustment of Status

12 20. Mr Rodriguez paid Respondent a total of \$3,000 00 in fees for the services, and
13 an additional \$50.00 to translate his birth certificate

14 21 Respondent informed Mr Rodriguez that it would be best if he waited to pursue
15 the matter until another pending legal matter concerning Mr. Rodriguez concluded

16 22 The other pending matter was resolved in or about December 2006, and
17 Respondent was informed of that

18 23 Beginning in April 2006, Mr Rodriguez made numerous attempts to contact
19 Respondent to ascertain the status of his case and left several messages. No one returned the
20 messages.

21 24 Mr Rodriguez went to Respondent's office, and discovered it was empty and
22 dark, with no forwarding address.

23 25 Mr Rodriguez was informed by a former staff employee of Respondent, Anna
24 Cesario, that Respondent retired

25 26 Respondent never informed Mr Rodriguez that he was retiring, never performed
26 any work on Mr Rodriguez's case, and never refunded any unearned fees

27 27 On or about June 14, 2007, the State Bar sent Respondent a screening letter along
28

1 with Mr Rodriguez's Bar Charge requesting a response within 20 days Respondent failed to
2 respond to the Bar Charge.

3 **CONCLUSIONS OF LAW**

4 **COUNT ONE:** This Hearing Officer finds that there is clear and convincing evidence that
5 Respondent violated one or more of the Rules of Professional Conduct as follows
6 Respondent failed to abide by the client's decisions concerning the objectives of the
7 representation, Respondent failed to diligently represent the client, Respondent failed to
8 adequately communicate wit the client, Respondent failed to promptly return client funds to the
9 client or to render her a timely accounting, Respondent failed to protect the client's interests
10 upon termination of the representation, and Respondent failed to respond to the State Bar's
11 screening investigation.

12 Respondent's conduct as described in this count violated Rule 42, Ariz R Sup Ct ,
13 specifically, ER 1 2, ER 1.3, ER 1 4, ER 1.15, ER 1 16(d), ER 8.1(b), and Rule 53)(d) and (f),
14 Ariz.R Sup Ct .

15 **COUNT TWO:** This Hearing Officer find that there is clear and convincing evidence that
16 Respondent violated one or more of the rules of Professional Conduct as follows Respondent
17 failed to abide by the client's decisions concerning the objectives of the representation,
18 Respondent failed to diligently represent the client, Respondent failed to adequately
19 communicate with the client, Respondent failed to promptly return client funds to the client or to
20 render him a timely accounting, Respondent failed to protect the client's interests upon
21 termination of the representation, and Respondent failed to respond to the State Bar's screening
22 investigation

23 Respondent's conduct as described in this count violated Rule 42, Ariz.R Sup Ct.,
24 specifically, ER 1 2, ER 1 3, ER 1 4, ER 1 15, ER 1 16(d), ER 8.1(b), and Rule 53)(d) and (f),
25 Ariz R Sup.Ct

26 **COUNT THREE:** This Hearing Officer find that there is clear and convincing evidence that
27 Respondent violated one or more of the rules of Professional Conduct as follows Respondent

1 failed to abide by the client's decisions concerning the objectives of the representation,
2 Respondent failed to diligently represent the client; Respondent failed to adequately
3 communicate with the client, Respondent failed to promptly return client funds to the client or to
4 render him a timely accounting; Respondent failed to protect the client's interests upon
5 termination of the representation, and Respondent failed to respond to the State Bar's screening
6 investigation

7 Respondent's conduct as described in this count violated Rule 42, Ariz R Sup Ct ,
8 specifically, ER 1 2, ER 1 3, ER 1 4, ER 1.15, ER 1 16(d), ER 8 1(b), and Rule 53)(d) and (f),
9 Ariz R Sup Ct

10 ABA STANDARDS

11 This recommendation is based on the applicable *ABA Standards for Imposing Lawyer*
12 *Sanctions* ("Standards"), 1991 edition, including the relevant aggravating and mitigating factors,
13 as well as its review of the applicable case law regarding proportionality of the proposed
14 sanction

15 **A. APPLICABLE STANDARDS**

16 The Standards provide guidance with respect to an appropriate sanction in this matter
17 The Supreme Court and Disciplinary Commission consider the Standards a suitable guideline *In*
18 *re Peasley*, 208 Ariz 27, ¶ 23, ¶ 33, 90 P 3d 764, 770, 772 (2004), *In re Rivkind*, 164 Ariz 154,
19 157, 791 P 2d 1037, 1040 (1990)

20 The Supreme Court and the Disciplinary Commission consistently use the *Standards* to
21 determine appropriate sanctions for attorney discipline *See In re Clark*, 207 Ariz. 414, 87 P 3d
22 827 (2004). The *Standards* are designed to promote consistency in sanctions by identifying
23 relevant factors the Court should consider, and then applying these factors to situations in which
24 lawyers have engaged in various types of misconduct *Standard 1 3, Commentary*

25 In determining an appropriate sanction, the Court, and the Disciplinary Commission
26 consider the duty violated, the lawyer's mental state, the presence or absence of actual or
27 potential injury, and the existence of aggravating and mitigating factors *Peasley*, 208 Ariz at ¶

1 33, 90 P 3d at 772, ABA *Standard 3 0*

2 The *Standards* identify four distinct categories in which a lawyer has specific duties, to
3 his client, to the general public, to the legal system and to the profession. Respondent's duties to
4 his clients and to the profession are the duties implicated in this matter

5 "The *Standards* do not account for multiple charges of misconduct. The ultimate
6 sanction imposed should at least be consistent with the sanction for the most serious instance of
7 misconduct among a number of violations, it might well be and generally should be greater than
8 the sanction for the most serious conduct." *Standards, p 6 In re Redeker, 177 Ariz 305, 868*
9 *P 2d 318 (1994)*

10 Respondent's failure to cooperate with the State Bar during the course of their
11 investigation of these matters, including his failure to promptly provide information when
12 requested, including responses to the allegations of the complainants, implicate *Standard 7 0*

13 Specifically, *Standard 7 2* provides

14 Suspension is generally appropriate when a lawyer
15 knowingly engages in conduct that is a violation of a duty
16 owed as a professional, and causes injury or potential
injury to a client, the public, or the legal systems

17 Respondent's misconduct specifically relating to his representation of his clients
18 implicates *Standard 4 4*. *Standard 4 42* provides:

19 Suspension is generally appropriate when.

- 20 (a) a lawyer knowingly fails to perform services for a
21 client and causes injury or potential injury to a
22 client, or
- (b) a lawyer engages in a pattern of neglect and causes
injury or potential injury to a client

23 There is no reasonable conclusion other than Respondent's conduct, in all three counts, is
24 anything other than knowing.

25 The presumptive sanction in this matter is, therefore, suspension

26 Once the presumptive range of sanction has been determined, to determine where in that
27 range the sanction should fall, it is appropriate to review the aggravating and mitigation factors.

1 **B. AGGRAVATING AND MITIGATING FACTORS**

2 The following aggravating factors, set forth in *Standard 9 22* apply

3 *Standard 9 22(a)* Prior disciplinary offense Respondent received an Informal Reprimand
4 in file no 06-0080 for violation of ERs 1.4, 1 16(d), and 8.1(b) in 2006

5 *Standard 9 22(c)* Pattern of misconduct Respondent's failure to communicate with his
6 clients is mirrored in his failure to cooperate with the State Bar, as well as his failure to
7 participate in the formal disciplinary proceedings

8 *Standard 9 22(e)* Bad faith obstruction of the disciplinary proceeding by intentionally
9 failing to comply with rules and orders of the disciplinary agency Respondent did not respond in
10 two State Bar disciplinary investigations, and then did not participate in the formal disciplinary
11 proceedings

12 *Standard 9 22(i)*: Substantial experience in the practice of law Respondent was admitted
13 to the practice of law in Indiana in 1988

14 There are no applicable mitigating factors apparent from the record

15 **PROPORTIONALITY REVIEW**

16 In the past, the Supreme Court has consulted similar cases in an attempt to assess the
17 proportionality of the sanction recommended See *In re Struthers*, 179 Ariz. 216, 226, 887 P 2d
18 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality review is
19 "an imperfect process" *In re Owens*, 182 Ariz 121, 127, 893 P 3d 1284, 1290 (1995) This is
20 because no two cases "are ever alike" *Id*

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

27 Cases in which lawyers have abandoned clients and then failed to cooperate with the

1 State Bar have resulted in sanctions ranging from suspension for six months and one day, to
2 suspensions for much longer periods, to disbarment

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

10 In *In re Christof*, SB-06-0100-D (2006), the respondent lawyer was suspended for two
11 years based on findings that he had failed to respond to the State Bar during the investigation,
12 had failed to participate in the formal discipline process, and for failures to communicate with
13 and represent his clients diligently. As in the instant matter, the lawyer was also non-compliant
14 in a diversion matter. Violations ERs 1 2, 1 3, 1 4, 1 5 and Rule 53 (d) and (f) were among the
15 violations found.

16 In *In re Son*, SB-05-0173-D (2006), the lawyer was found to have violated ERs 1 2, 1 3,
17 1 4, and 1 5, and Rule 53(d) and (f) for misconduct similar to that seen in the instant matter.¹
18 Son was found to have failed to perform work for clients, having been paid to do so, failed to
19 refund monies paid, and failed in his duties of diligence and communication with clients in six
20 client-related counts. As in the instant matter, the lawyer failed to cooperate with the State Bar
21 during the investigation and then failed to participate in the formal discipline process. Son was
22 disbarred. *See also, In re McGuire*, SB-99-0029-D (1999) (lawyer suspended for two years for
23 abandonment of clients, failure to return property and failure to cooperate with State Bar.)

24 However, even though the proportionality cases call for a long-term suspension, because
25 Respondent is not a licensed Arizona attorney, the greatest discipline that can be imposed is a

26 ¹Son was administratively suspended at the time the discipline was imposed for MCLE violations,
27 but had no disciplinary history. Trust account violations, a violation of ER 1 16 was also found.

1 censure See *In re Olsen*, 180 Ariz 5 (1994) (holding that because th lawyer in that case was not
2 a member of the State Bar, the Court could not suspend or disbar him from that association.)

3 **RECOMMENDATION**

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and
5 deter future misconduct. *In re Fioramonti*, 176 Ariz 182, 187, 859 P 2d 1315, 1320 (1993) It is
6 also the objective of lawyer discipline to protect the public, the profession, and the administration
7 of justice *In re Neville*, 147 Ariz 106, 708 P.2d 1297 (1985) Yet another purpose is to instill
8 public confidence in the bar's integrity *Matter of Horwitz*, 180 Ariz 20, 29, 881 P.2d 352, 361
9 (1994).

10 In imposing discipline, it is appropriate to consider the facts of the case, the American
11 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards"), and the
12 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz 283, 286,
13 872 P 2d 1235, 1238 (1994)

14 Upon consideration of the facts, application of the *Standards*, including aggravating and
15 mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following

16 1 Respondent shall receive a censure, only because he is not a licensed Arizona
17 attorney Respondent's misconduct would have warranted a long-term suspension had he been a
18 licensed Arizona attorney

19 2 Respondent pay restitution to Lourdes Beeson in the amount of \$3,000.00

20 3 Respondent pay restitution to Ivan Moreno in the amount of \$1,100.00

21 4. Respondent pay restitution to Luis Assamar Rodriguez in the amount of
22 \$3,050 00

23 5. Respondent shall pay all costs incurred by the State Bar of Arizona in connection
24 with these proceedings.

1 DATED this 10th day of March, 2008

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4 JUAN PÉREZ-MEDRANO
5 Hearing Officer 9D
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17 Original filed this 10th day
18 of March, 2008, with

19 Disciplinary Clerk of the
20 Supreme Court of Arizona
21 1501 W Washington Street
22 Phoenix, Arizona 85007

23 Copies of the foregoing mailed
24 this 11th day of March, 2008 to.

25 Emil J Molin
26 1661 N. Swan Rd., Suite 250
27 Tucson, Arizona 85712-4053
28 Respondent

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