

FILED

MAR 26 2008

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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *N. M. ...*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,
MICHAEL J. NYSATHER,
Bar No. 015222,

RESPONDENT.

No. 07-0475

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

On October 5, 2007, State Bar of Arizona ("State Bar") Probable Cause Panelist Stephen M. Dichter filed a Probable Cause Order, finding probable cause existed to issue a Complaint against Respondent Michael J. Nysather ("Respondent") for violations of Arizona Rules of the Supreme Court Rule 42, including but not limited to violations of ER1.1, ER 1.3, ER 3.2, ER 3.3, ER 3.4, ER 4.1, ER 5.1, and ER 8.4(d), as well as Rule 53(c). The parties are to be commended on their early spirit of cooperation: before the State Bar issued a Complaint, they had reached a settlement of the case. On December 26, 2007, the State Bar filed a Tender of Admissions and Agreement for Discipline by Consent, and a Joint Memorandum in Support of Agreement for Discipline by Consent.

A telephonic hearing on the agreement was set for February 14, 2008. Shortly before that hearing, on February 11, 3008, Respondent associated in J. Scott Rhodes (as co-counsel with Lynda Shely) to appear at the hearing.

1 The hearing on the agreement took place as scheduled and was
2 recorded. The parties¹ discussed the propriety of their agreement. They
3 additionally offered evidence and proffered evidence in support of the agreement.
4 At the close of the hearing, this Hearing Officer concluded that she would accept
5 their settlement agreement and the stipulated sanctions.

6 CONDITIONAL ADMISSIONS

7 Respondent waived his right for a formal disciplinary proceeding,
8 including all his rights attendant to such a hearing. He voluntarily conditionally
9 admits, for purposes of this Tender of Admissions and Agreement for Discipline
10 by Consent, that his conduct in the Findings of Fact violated Arizona Rules of the
11 Supreme Court, Rule 42, specifically ER 1.1, ER 1.3, ER 3.2, ER 3.4(c), ER 5.1,
12 and ER 8.4(d), and Rule 53(a). He tenders these admissions in exchange for the
13 agreement to discipline described in the section on Sanctions, below.

14 The State Bar conditionally agrees to dismiss the charges alleging
15 violation of ER 3.3 and ER 4.1, as well as Rule 53(c), as it has concluded that it is
16 unlikely to be able to sustain its burden of proof by clear and convincing evidence
17 that Respondent knowingly or willfully violated rules or orders, or misled the
18 Court.

19 FINDINGS OF FACT

20
21 1. At all relevant times, Respondent was an attorney licensed to practice
22 law in the State of Arizona, having been admitted to practice originally on
23 February 15, 1994.

24
25 ¹ Respondent was represented by both Ms. Schely and Mr. Rhodes in that
26 proceeding.

1 2. On November 13, 2001, Respondent was retained to represent
2 Emmanuel Gortarez, a minor, in connection with bodily injuries suffered in a motor
3 vehicle collision.

4 3. In December of 2003, Respondent, on the minor's behalf, reached a
5 settlement with the liable driver's liability insurer for payment of the sum of
6 \$7,568.00. The settlement was subject to court approval of the amount and terms
7 thereof (including deductions for attorney fees and costs), appointment of a
8 conservator, and investment of the net settlement funds in a restricted account.
9

10 4. On December 9, 2003, Respondent filed an Application for Approval
11 of the Settlement and Appointment of Josephine Gortarez (the minor's mother) as
12 Conservator.
13

14 5. On February 17, 2004, Respondent and Ms. Gortarez appeared before
15 Maricopa County Superior Court Commissioner Jane Bayham-Lesselyong for a
16 hearing on the above-referenced scheduled matters. Commissioner Bayham-
17 Lesselyong directed Respondent to submit a more detailed attorney fee affidavit
18 and proof of publication of notice of the hearing (the whereabouts of the minor's
19 father were unknown, so personal service of notice was impossible). Commissioner
20 Bayham-Lesselyong also issued an order appointing Ms. Gortarez conservator and
21 approving the gross amount of the settlement. Finally, Commissioner Bayham-
22
23
24
25
26

1 Lesselyong ordered Respondent to obtain a new hearing date to conclude the matter
2 once the foregoing steps were taken.

3 6. On November 15, 2004, nine (9) months after the date of
4 Commissioner Bayham-Lesselyong's orders, Respondent filed an affidavit of
5 publication.

6 7. On December 2, 2004, Respondent filed an affidavit of attorney fees.
7 To support a one-third (1/3) contingent fee of \$2,523.00, the affidavit reflected 2
8 hours of work (pertaining to the Conservatorship, only, and nothing for working on
9 the tort/motor-vehicle case), and claimed \$400.00 in costs but with only \$203.00 in
10 supporting receipts.
11

12 8. Prior to December 2, 2004, due to normal judicial rotations, the
13 Conservatorship case was reassigned to Commissioner Dean Fink. On December 2,
14 2004, Commissioner Fink conducted a Hearing on the Petition for Appointment of
15 Conservator. He acknowledged receiving Respondent's fee statement as previously
16 ordered by Commissioner Bayham-Lesselyong and stated in a minute entry that he
17 would confer with her. Commissioner Fink ordered Respondent to present a form
18 of order within one week.
19
20
21

22 9. On January 4, 2005, Commissioner Fink issued a minute entry in
23 which he observed that Respondent had not complied with the requirement of the
24 December 2, 2004 minute entry that Respondent submit a proposed form of order
25
26

1 within one week. Commissioner Fink noted further that the Application for
2 Approval of Attorney Fees and Costs requested reimbursement to Respondent of
3 \$400.00 in costs but the Statement of Costs attached as an exhibit supported only
4 \$203.00. Also, the fee application described only 2 hours of work, restricted to the
5 Conservatorship issue, which did not support the full 1/3 contingent fee requested.
6 Commissioner Fink ruled that if other time was expended, including on the
7 underlying bodily injury case, the fee application should be supplemented, and that
8 a form of Order and a Supplemental Statement of Costs and Fees must be received
9 by January 18, 2005, failing which all attorney fees would be denied.
10
11

12 10. On February 10, 2005, Commissioner Fink issued another minute
13 entry. In it, he restated that Respondent had not filed the form of order required by
14 the December 2, 2004 minute entry. Commissioner Fink observed further that
15 Respondent had not filed the form of Order by January 18, 2005, or submitted other
16 information as required by the January 4, 2005 minute entry. Hence, Commissioner
17 Fink ordered that Respondent must lodge a form of Order no later than February
18 28, 2005, the failure of which would result in the issuance of an Order to Show
19 Cause ("OSC") why Respondent ought not be held in contempt.
20
21

22 11. On February 18, 2005, Respondent supplemented his Application for
23 Attorney Fees. In that application, Respondent asserted that the itemization of his
24 time at regular reasonable hourly rates exceeded the amount of the contracted 1/3
25
26

1 contingency fee; hence, the 1/3 fee was reasonable. Were this matter to proceed to a
2 hearing, Respondent would testify that he thought he also timely submitted the
3 form of Order initially required by Commissioner Fink on December 2, 2004.

4 12. On June 22, 2005, Commissioner Fink issued a minute entry setting an
5 OSC for August 3, 2005. In that minute entry, Commissioner Fink ordered
6 Respondent personally to appear and explain his failure to comply with the minute
7 entry of February 10, 2005. Were this matter to proceed to a hearing, Respondent
8 would testify that he never received this minute entry, probably due to a failure in
9 the system by which mail is forwarded to a new address (the firm moved in April
10 2005).
11

12 13. On July 25, 2005, Respondent discovered the June 22 Order through a
13 routine check of the court's online docket. Respondent immediately submitted an
14 Order for signature. Were this matter to proceed to a hearing, Respondent would
15 testify that he believed this to be the second time he lodged an Order with
16 Commissioner Fink, mistakenly having believed he had already submitted a first
17 Order.
18

19 14. On July 27, 2005, Commissioner Fink issued a minute entry changing
20 the time of the August 3 OSC. In the minute entry, Commissioner Fink stated that
21 Respondent's failure to appear may result in the Court issuing a fiduciary or civil
22 arrest warrant.
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

15. Were this matter to proceed to a hearing, Respondent would offer testimony from his paralegal Jessie Solis that on July 29, 2005, Ms. Solis called Commissioner Fink's Judicial Assistant and confirmed with "Jory" that the firm could appear by telephone on August 3; that Respondent's associate, Donn Coolidge was handling all further matters related to the underlying case; and that Jory confirmed that Mr. Coolidge could appear by phone on behalf of the firm. Respondent would further testify that he was not personally involved in such discussions. Were this matter to proceed to a hearing, Commissioner Fink and his judicial assistant Jory would deny that Respondent was advised by anyone associated with Commissioner Fink that Mr. Coolidge could appear by phone in place of Respondent, the latter of whom was ordered to personally appear.

15
16
17
18
19
20
21
22
23
24
25
26

16. On August 3, 2005, Commissioner Fink presided over the OSC. Ms. Gortarez was present. Respondent, believing that he was not required to personally attend, did not attend. Mr. Coolidge appeared by telephone. Commissioner Fink ordered Mr. Coolidge to contact Respondent and inform him that he must call the court immediately. Four (4) minutes later, Respondent called the court, immediately apologized to the Court and explained that he believed he had been excused from appearing as he was no longer directly handling the case. Commissioner Fink admonished Respondent for failing to personally appear as ordered in the minute entries of June 22 and July 27, 2005. A discussion of the minor's needed dental

1 work ensued; Commissioner Fink told Respondent and Ms. Gortarez that a motion
2 must be filed to release funds from the restricted account for this purpose. Based on
3 the petition filed December 9, 2003 and testimony at prior hearings, Commissioner
4 Fink appointed Ms. Gortarez conservator for the minor and approved the gross
5 amount of the settlement. Commissioner Fink further ordered that counsel file proof
6 of establishment of the restricted account within 30 days, or file a petition
7 explaining why an extension was needed. In explaining why he might not be able to
8 meet the 30-day deadline, Respondent told Commissioner Fink, "We don't do this
9 kind of work" (referring to Conservatorships). Respondent told Commissioner Fink
10 that the "settlement" may no longer be valid given the delay in getting it approved,
11 and that the insurer may not be willing to go through with the deal. Commissioner
12 Fink ordered that if the settlement were no longer valid, counsel should file a status
13 report in lieu of the proof of restricted account. Finally, Commissioner Fink ruled
14 that, based on Respondent's failure to comply with the court's orders of January 4,
15 2005 and February 18, 2005, and Respondent's failure to appear at the OSC hearing
16 as previously ordered, Respondent's firm's ("W&N") request for any attorney fees
17 was denied.
18
19
20
21
22

23 17. Were this matter to proceed to a hearing, Respondent would offer
24 evidence that Ms. Gortarez was informed that Mr. Coolidge took over the case from
25 Respondent. Were this matter to proceed to a hearing, the State Bar would offer
26

1 into evidence a CD of the August 3, 2005 hearing, in which one can hear Ms.
2 Gortarez ask Commissioner Fink, "Should I call the attorneys or will they call me?
3 I haven't ever talked to Coolidge." Respondent would testify further that based on
4 the court's displeasure with his firm (despite the firm's compliance with orders), the
5 inability to complete the Conservatorship and the increasing cost to the minor,
6 Respondent told the insurer that the settlement was null and void unless it paid for
7 new counsel to finalize the disbursement of settlement money and establish the
8 restricted account at its expense.
9

10
11 18. On September 7, 2005, Lisa Lubbers, the attorney for the responsible
12 liability insurer, wrote to Respondent that she was hired by the insurer to complete
13 the Conservatorship. She enclosed medical authorizations to Respondent for "your
14 client" to sign in order to determine the existence of any medical liens. She asked
15 Respondent to let her know "[I]f you prefer that I contact your client directly."
16

17
18 19. On September 13, 2005, Mr. Coolidge filed a "Notice of Status
19 Report" stating that the previous settlement "offer" of \$7,568.00 is now null and
20 void and that, therefore, Ms. Gortarez and her minor son move to withdraw the
21 Petition for Approval of Settlement and Appointment of a Conservator. Were this
22 matter to proceed to a hearing, Respondent would contend that this notification was
23 necessary because the terms of the prior settlement had changed in that the insurer,
24 while still agreeing to pay the settlement amount, had also agreed to retain counsel
25
26

at its expense to complete the Conservatorship and establish the restricted account.
1 Were this matter to proceed to a hearing, the State Bar would contend that this is
2 more a product of Respondent's negligent effort to handle a legal matter in which
3 he lacked the requisite competence than a knowing misrepresentation. The
4 settlement was not "null and void", the terms of the settlement had not changed,
5 and the only change was the immaterial fact of which lawyer (Respondent, Mr.
6 Coolidge, someone else at W&N, or Ms. Lubbers) would conclude the
7 Conservatorship proceedings.
8
9

10 20. On October 28, 2005, Commissioner Fink issued a minute entry,
11 stating that he had received the Notice of Status Report from Mr. Coolidge
12 indicating that the settlement offer was null and void. Commissioner Fink stated his
13 concern that the settlement offer may have lapsed due to inaction of the minor's
14 attorney. Commissioner Fink set a new OSC for December 22, 2005, at which
15 "[A]n attorney at Wade & Nysather PC shall personally appear and show cause
16 why they should not be sanctioned for their mishandling of this litigation, including
17 but not limited to paying to the minor the settlement funds he should have received.
18 **The representative of Wade & Nysather shall appear personally in the**
19 **courtroom and will not be permitted to appear telephonically. Failure to**
20 **appear will result in the court entering judgment against Wade & Nysather,**
21
22
23
24
25
26

1 **P.C. in favor of Emmanuel Gortarez for the full amount of the prior**
2 **settlement.”** (*emphasis in original*)

3 21. On December 22, 2005, Commissioner Fink conducted the second
4 OSC. Attorney Lubbers for the insurer was present. Ms. Gortarez was present on
5 her own behalf. No one from W&N appeared. Commissioner Fink issued an order
6 withdrawing/severing the attorney-client relationship between Ms. Gortarez and
7 W&N. Commissioner Fink observed that Respondent had said the settlement was
8 nullified but attorney Lubbers said the settlement was still viable. Commissioner
9 Fink ordered attorney Lubbers to file an amended petition or submit a status report
10 within 90 days. Commissioner Fink observed also that he previously had ordered an
11 attorney at W&N to personally appear, not by telephone, and that their failure
12 would result in a judgment against W&N for the full amount of the prior settlement.
13 Commissioner Fink took that matter under advisement.

14
15
16
17 22. Were this matter to proceed to a hearing, Respondent would testify
18 that neither he nor any other attorney in his firm appeared at the December 22, 2005
19 hearing because they believed that attorney Lubbers agreed to appear for them as
20 counsel for the minor and Conservator in addition to appearing as counsel for the
21 liability insurer. This mistaken belief was based upon telephone conversations that
22 the W&N paralegal had with attorney Lubbers regarding her attending the hearing
23 on behalf of both the minor and the firm. Were this matter to proceed to a hearing,
24
25
26

1 the State Bar would offer a CD of the hearing in which attorney Lubbers stated that
2 she appeared on behalf of the insurer and that she was not appearing in place of
3 anyone from W&N; rather, she was appearing **in addition** to someone at W&N.

4 23. On February 7, 2006, Commissioner Fink issued a minute entry in
5 which he stated the following: "In this Court's minute entry dated October 28,
6 2005, the Court set an Order to Show Cause hearing and ordered a representative of
7 Wade & Nysather to personally appear and show cause why the law firm should not
8 be sanctioned for mishandling this litigation and violating court orders. The Court
9 specially noted: 'Failure to appear will result in the court entering judgment against
10 Wade & Nysather in favor of Emmanuel Gortarez for the full amount of the prior
11 settlement.' This minute entry was endorsed to two attorneys with Wade &
12 Nysather, including one of the firm's name partners, Michael J. Nysather.
13 Nonetheless, Wade & Nysather failed to appear at the December 22 Order to Show
14 Cause Hearing. (The Court notes that Mr. Nysather failed to appear at a prior Order
15 to Show Cause hearing to which he had been ordered to personally appear in this
16 matter)." Commissioner Fink granted judgment in favor of the minor against W&N
17 for \$7,568.00, plus interest, payable to the estate of the minor by his conservator,
18 Ms. Gortarez.
19
20
21
22
23

24 24. On February 21, 2006, W&N filed a Motion for Clarification of the
25 Judgment against them for \$7,568.00. It contended that in the minute entry dated
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
October 28, 2005, a lawyer from Respondent's firm was "requested" to appear to show cause whether the litigation had been mishandled. Were this matter to proceed to a hearing, the State Bar would offer into evidence the minute entry, which states that an attorney at Respondent's firm was ordered, not "requested", to appear. Respondent contended further that, pursuant to an explicit agreement with attorney Lubbers, insurance attorney Lubbers appeared on behalf of the minor and Respondent's firm to explain that the settlement had not been mishandled and that Lubbers was designated to finalize the Conservatorship and account. Respondent's understanding of Lubber's role at court was based upon communications between Lubbers and Respondent's paralegal in which Respondent's paralegal understood that Lubbers would appear for the firm. Were this matter to proceed to a hearing, the State Bar would offer evidence that attorney Lubbers anticipated that her appearance would be in addition to, not instead of, an appearance by an attorney at Respondent's firm. Respondent further contended that the agreement with Lubbers to appear on behalf of Respondent was explained to Commissioner Fink's Judicial Assistant, Jory, the latter of whom said that an attorney from Respondent's firm need not appear. Were this matter to proceed to a hearing, the State Bar would offer testimony from Commissioner Fink and Jory rebutting this contention.

24 25. On March 9, 2006, Commissioner Fink issued a minute entry ruling
25 that the judgment against W&N in the sum of \$7,568.00 was in addition to funds
26

1 received in settlement from the insurer, and was intended as a sanction for
2 Respondent's failure to obey court orders and for his egregious mishandling and
3 neglect of the case. Also, Commissioner Fink found that attorney Lubbers did not
4 appear "on behalf of" W&N at the December 22 OSC. The electronic transcript of
5 the December 22 hearing shows she said she had been in contact with a paralegal at
6 W&N, that Respondent was aware of the hearing, and that "They asked me to come
7 here **in addition to them being present.**" Also, at the December 22, 2005 hearing,
8 the court was told that there were unresolved medical liens. The liens should have
9 been addressed prior to the first hearing on February 17, 2004 and prior to the
10 approval of any settlement. Respondent has paid the full principal amount of the
11 sanction, \$7,568.00, to the estate of the minor.
12
13

14
15 26. In the two years in which Respondent represented the minor and the
16 minor's Conservator, Ms. Gortarez, he failed to conclude an *ex parte*, unopposed,
17 proceeding to obtain approval of a minor's bodily injury case, obtain the settlement
18 funds, determine the existence and arrange for the payment of a medical lien, and
19 invest the net funds.
20

21 27. Respondent's conduct in this count violated Rule 42, Ariz.R.Sup.Ct.,
22 specifically, ERs 1.1, 1.3, 3.2, 3.4(c), 5.1, 8.4(d), and Rule 53(a), Ariz.R.Sup.Ct.
23

24 **CONDITIONAL ADMISSIONS**
25
26

1 Respondent conditionally admits that his conduct, as set forth above, violated
2 Rule 42, Ariz.R.Sup.Ct., specifically, ERs 1.1, 1.3, 3.2, 3.4(c), 5.1, 8.4(d), and Rule
3 53(a), Ariz.R.Sup.Ct. The State Bar conditionally agrees to dismiss the charges
4 alleging violations of ERs 3.3 and 4.1, and Rule 53(c), on the ground that it is not
5 likely to sustain its burden of proof by clear and convincing evidence that
6 Respondent knowingly or willfully violated rules or orders, or misled the court.
7 Respondent's admissions are being tendered in exchange for the form of discipline
8 stated below.
9
10
11

12 **CONCLUSIONS OF LAW**

13 1. The State Bar bears the burden to prove by clear and convincing
14 evidence a violation of the Arizona Rules of the Supreme Court, Rule 42,
15 specifically ER 1.1, ER 1.3, ER 3.2, ER 3.4(c), ER 5.1, and ER 8.4(d), and Rule
16 53(a).

17 2. Respondent admitted these violations. Furthermore, both parties
18 presented evidence and proffers of evidence in support of finding these violations.
19 From both the admissions and evidence/proffers presented, I conclude that the
20 State Bar has proven by clear and convincing evidence that Respondent violated
21 those rules.
22

23 **STIPULATED SANCTIONS**

24 1. Respondent will receive a censure for violating Rule 42, Ariz.R.Sup.Ct.,
25 specifically, ERs 1.1, 1.3, 3.2, 3.4(c), 5.1, 8.4(d), and Rule 53(a), Ariz.R.Sup.Ct.
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

2. Respondent shall be placed on probation for a period of one year, under the following terms: a) Respondent shall enter into a contract and Memorandum of Understanding with LOMAP for a law office review including supervision of subordinate attorneys, contact with court personnel, and calendaring and docket control procedures; and b) Respondent shall complete a CLE program regarding law office management.

3. Respondent shall pay all costs incurred by the State Bar in connection with these proceedings. A statement of costs and expenses incurred by the State Bar to date in this disciplinary proceeding is attached hereto as Exhibit "A".

RECOMMENDATIONS

I. A.B.A. STANDARDS

A. Applicable Standards

In determining the appropriate sanction, this Hearing Officer has considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as well as Arizona case law; I have also considered the nature of the duty violated, the lawyer's mental state at the time, any actual injury to clients, and aggravating as well as mitigating factors. In re Peasley, 208 Ariz. 27, 35, 90 P.2d 764, 772 (2004); In re Tarletz, 163 Ariz. 548, 789 P.2d 1049 (1990). In determining the correct sanction, the analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from such conduct while

1 protecting the interests of the public and the profession. In re Kersting, 151 Ariz.
2 171, 726 P.2d 587 (1986).

3 The A.B.A. *Standards* list the following factors to consider in
4 imposing the appropriate sanction. (1) the duty violated; (2) the lawyer's mental
5 state; (3) the actual or potential injury caused by the lawyer's misconduct, and (4)
6 the existence of aggravating or mitigating circumstances. A.B.A. *Standards* 3.0.

7 *Standards* 4.0 (Violations of Duties Owed to Clients), 6.0 (Violations
8 of Duties Owed to the Legal System), and 7.0 (Violations of Duties Owed tot the
9 Profession) are implicated in this case. Given the conditional admissions and
10 evidence adduced or proffered at the hearing, the parties and this Hearing Officer
11 all agree in particular that *Standards* 4.53, 4.43, 6.23, and 7.3 should be considered
12 in determining the appropriate sanction.

13 *Standards* 4.53 provides:

14 Reprimand (or censure, in Arizona) is generally
15 appropriate when a lawyer: (a) demonstrates failure to
16 understand relevant legal doctrines or procedures and
17 causes injury or potential injury to a client; or (b) is
18 negligent in determining whether he or she is competent
19 to handle a legal matter and causes injury or potential
20 injury to a client.

21 *Standards* 4.53 applies to this case because Respondent undertook representation
22 in a field of practice that he had virtually no experience in and little knowledge of.
23 He both demonstrated a dearth of procedural knowledge in Conservatorships and
24 negligently failed to assess whether he was competent to handle a Conservatorship.
25 Ultimately, the client was made whole and suffered no sanctions due to his
26 lawyer's errant conduct, so only potential injury to a client applies to this case.

Standards 4.43 provides:

Reprimand (or censure, in Arizona) 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.

1
2
3
4
5
Standards 4.43 applies to this case because Respondent was negligent in failing to file documents (necessary to represent his client in a Conservatorship) timely. Ultimately, the client was made whole and suffered no sanctions due to his lawyer's errant conduct, so only potential injury to a client applies to this case.

6
7
8
9
Standards 6.23 provides:

Reprimand (or censure, in Arizona) is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

10
11
12
13
14
15
Standards 6.23 applies to this case because Respondent's failure to provide competent representation in the Conservatorship was negligent. As mentioned, the client was not in fact injured, but Respondent's failures to act on the case and in response to Court Orders in fact interfered substantially with a number of legal proceedings.

16
17
18
19
Standards 7.3 provides:

Reprimand (or censure, in Arizona) is generally appropriate when a lawyer negligently 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.

20
21
22
23
24
25
26
Standards 7.3 applies to this case because Respondent violated his duty to the profession by failing to comply with numerous Court Orders, resulting in Order to Show Cause ("OSC") proceedings and Court-imposed sanctions. His apparent disregard of the respect for the authority of Superior Court potentially damaged the public's trust in the legal system.

B. The Duty Violated

1 *Standard 7.3:* Reprimand (censure, in Arizona) is generally
2 appropriate when a lawyer negligently engages in conduct that is a
3 violation of a duty owed as a professional, and causes injury or
4 potential injury to a client, the public, or the legal system.

5 Based on the conditional admissions, the presumptive sanction for the
6 admitted conduct under the *Standards* is censure. To determine the applicability of
7 these *Standards* in this case, the factors listed in the theoretical framework must be
8 considered.
9

10 **A. The duty violated**

11 This case arises out of Respondent's decision to undertake a
12 Conservatorship when he had limited prior experience in that field of law and
13 where, notwithstanding the Court's efforts to focus his attention adequately on the
14 case, he failed to appreciate the importance of timely filing necessary documents
15 and personally appearing in court. As a result, the case lingered unnecessarily.
16 Thus, Respondent failed to provide competent representation to a client as to
17 finalizing the conservatorship, failed to act with reasonable diligence and
18 promptness in representing a client, failed to make reasonable efforts to expedite
19 litigation consistent with the interests of his client, failed to make reasonable
20 efforts to ensure that his firm had in effect measures giving reasonable assurance
21 that all lawyers in the firm conformed to the Rules of Professional Conduct, and
22 that all lawyers in the firm conformed to the Rules of Professional Conduct, and
23 that all lawyers in the firm conformed to the Rules of Professional Conduct, and
24 that all lawyers in the firm conformed to the Rules of Professional Conduct, and
25 that all lawyers in the firm conformed to the Rules of Professional Conduct, and
26

1 engaged in conduct that is prejudicial to the administration of justice. Respondent
2 conditionally admits that his conduct, taken as a whole, has violated his duty to his
3 clients, the profession, and the legal system.

4 **C. Respondent's Mental State**

5
6 **The lawyer's mental state**

7 The parties agree that Respondent acted negligently in the manner described
8 above and in the accompanying Tender of Admissions and Agreement for Discipline
9 by Consent. Respondent's conduct did not arise out of a knowing or willful
10 determination to avoid or ignore his responsibilities to the court and his client.
11 Rather, Respondent breached his ethical requirements by being slow to address the
12 court's frustration and his duties and obligations to complete tasks necessary to
13 complete the underlying settlement through a Conservatorship proceeding.
14 Respondent's negligent failure to comply with certain court orders also resulted from
15 mistake regarding his duty to appear personally in Court, upon specific Court orders
16 to that effect, when he negligently believed the court's administrative assistant had
17 excused his personal appearance.
18
19
20
21

22 **D. Potential or Actual Injury Caused**

23 There was potential injury to the clients involved in the Conservatorship
24 matter in which Respondent represented a minor and his mother. The parties agree
25 that Respondent's lack of experience in Conservatorship proceedings is largely to
26 blame for his ethical transgressions. While the State Bar contends, and Respondent
conditionally admits, that it took Respondent and his firm too long to appreciate the

1 extent of the court's frustration and the need to complete the Conservatorship, the
2 parties contend that a censure and probation, combined with the Court-ordered
3 sanctions that Respondent has already paid, are sufficient to protect the public. For
4 purposes of this agreement, the parties agree that the undue delay in completing a
5 simple Conservatorship matter with investment of settlement funds subjected the
6 minor to a loss of investment income. The parties further conditionally agree that,
7 while not excusing Respondent's conduct, his clients ultimately benefited
8 economically from the Court's rulings that Respondent must personally pay to the
9 minor an amount of money out of his own funds equal to the amount of the
10 settlement achieved with the liable third-party (i.e., a double recovery for the
11 minor--two payments of \$7,568.00) and that Respondent may not collect his
12 attorney fees (\$2,522.66) for the underlying personal injury case he settled or
13 obtain reimbursement of his costs advanced from the settlement funds (i.e., free
14 representation). Respondent has paid the principal amount of the sanctions in the
15 sum of \$7,568.00 and has foregone his attorney fees and costs.

16 E. Aggravating and Mitigating Circumstances

17 I have considered the following three factors in aggravation:
18 *Standards* 9.22(d) (multiple offenses), *Standards* 9.22(h) (vulnerable victim), and
19 *Standards* 9.22(i) (substantial experience in the practice of law). I find that the
20 State Bar has met its burden of proving by clear and convincing evidence that there
21 were numerous and distressingly repetitive offenses, that the client of the
22 Conservatorship was unusually vulnerable, and that Respondent had been
23 practicing continuously since 1994.

24 I have also considered the following eight factors proposed in
25 mitigation: *Standards* 9.32(g)(no prior discipline), *Standards* 9.32(b) (no dishonest
26 or selfish motive), *Standards* 9.32(c) (personal problems – divorce – during the
pendency of the Conservatorship), *Standards* 9.32(d) (timely good faith efforts to
rectify his misconduct), *Standards* 9.32(e) (full and free disclosure to the Bar),
Standards 9.32(f) (inexperience in the practice of Conservatorships), *Standards*
9.32(g) (imposition of other sanctions), and *Standards* 9.32(h) (considerable
remorse). Although all these have been submitted by the parties, when one of the

1 ethics violations was undertaking a matter that Respondent was not competent to
2 handle, he can hardly be heard to argue that his conduct is mitigated by his
3 inexperience in that field; consequently, I find that *Standards* 9.32(f) does not
4 apply to this case. On the other hand, its absence is compensated for by the
5 considerable strength of several mitigators related to character that are quite
6 compelling in this case. Those include lack of selfish motive, successful and
7 prompt efforts to make the client whole, and remorse. Moreover, the Court already
8 confronted and imposed sanctions on Respondent; whatever the Supreme Court
9 could do in this disciplinary proceeding is likely to pale in comparison with what
10 guilt and shame Respondent felt in the final Court hearings centering on his
11 misconduct. I thus find that the parties have met the burden of proving, by clear
12 and convincing evidence, all these mitigating factors except *Standards* 9.32(f).

12 **II. PROPORTIONALITY ANALYSIS**

13 The Arizona Supreme Court has stated that, "In determining the
14 sanction to impose in a lawyer disciplinary matter, this court has often consulted
15 similar cases to assess proportionality." Matter of Horwitz, 180 Ariz. 20, 28-29,
16 881 P.2d 352 (1994). "In most cases, consideration of the Standards and the
17 sanctions imposed in similar cases is necessary to preserve some degree of
18 proportionality, ensure that the sanction fits the offense, and void discipline by
19 whim or caprice." Matter of Struthers, 179 Ariz. 216, 226, 877 P.2d 789 (1994).

20 The parties propose, and this Hearing officer concurs, that
21 Respondent's most serious misconduct involved his failure to represent his clients
22 competently coupled with his failure to abide by direct Court Orders (regarding
23 filing documents and appearing in Court). Cases touching on those issues,
24 therefore, can be instructive to consider in a proportionality review.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
In *In re Abernathy*, SB-05-0171-D (2006), the respondent engaged in a pattern of neglect in handling client matters. She failed to represent clients diligently and competently; knowingly failed to comply with a court order or rule by failing to provide the court with the ordered proof of not charging her client legal fees; failed to appear at a show cause hearing; failed to properly request a continuance of the hearing; and failed to appear at the return hearing. The respondent failed to expedite litigation and engaged in conduct that was prejudicial to the administration of justice. There were two aggravating factors and five mitigating factors. Her mental state was "knowing," and there was minimal injury to her clients. Given the considerable mitigation, the respondent received a censure and one year of probation (LOMAP) for violating Rule 42, Ariz.R.Sup.Ct., ERs 1.1, 1.2, 1.3, 1.4, 3.2, 3.4 and 8.4(d).

16
17
18
19
20
21
22
23
24
25
26
In *In re Sammons*, SB-03-0150-D (2003), the respondent acted as conservator and guardian to a victim of a motor vehicle collision who was left with the mental capacity of a child. Respondent failed to comply with state law regulating private fiduciaries, failed to file tax returns for the Conservatorship, failed to communicate with or pay the CPA for preparing returns, and failed to appropriately manage the financial affairs of the Conservatorship. In other matters, Respondent missed court hearings, in addition to other failures. There were three aggravating factors and five mitigating factors. Respondent received a censure and

1 probation for violating Rule 42, Ariz.R.Sup.Ct., ERs 1.3, 1.4, 1.15 and 8.4(d), and
2 Rule 51(k) (since re-numbered 53(c), Ariz.R.Sup.Ct.

3 The parties considered three other proportionality cases. In *In re Allen*, SB-
4 00-0097-D (2000), the respondent failed to provide diligent and competent
5 representation in a guardianship/Conservatorship matter and a criminal case. The
6 Disciplinary Commission determined that censure is an appropriate sanction when
7 a lawyer is negligent and does not act with reasonable diligence or competence
8 when representing a client, demonstrates a failure to understand relevant legal
9 doctrines or procedures, engages in conduct that is a violation of a duty owed to
10 the profession and causes injury or potential injury to a client, the public or the
11 legal system. There were four aggravating factors and five mitigating factors.
12 Respondent received a censure and an 18-month period of probation for violating
13 Rule 42, Ariz.R.Sup.Ct., ERs 1.2, 1.3, 1.4, 1.15, 1.16, 3.2, 3.4, 8.4(c) and 8.4(d).
14
15

16
17 Finally, in both *In re Olcott*, SB-05-0149-D (2005), and *In re Kirkorsky*, SB-
18 01-0125-D (2001), the Respondents violated the statutory requirements relating to
19 Conservatorships for minors in connection with injury cases and received a censure
20 and probation (six months for Olcott and one year for Kirkorsky). Olcott had three
21 aggravating factors, two mitigating factors, and was found to have violated Rule
22 42, Ariz.R.Sup.Ct., ERs 1.3, 1.4, 1.15 and 8.4(d). Kirkorsky had two aggravating
23
24
25
26

1 factors, four mitigating factors, and violated Rule 42, Ariz.R.Sup.Ct., ERs 1.1, 1.5,
2 1.15 and 8.4.

3 Here, although Respondent failed to comply with certain court orders, his
4 mental state was negligent, there was no actual harm to the client, and he also has
5 significant mitigation, indicating that a sanction no more severe than censure and
6 probation is warranted.
7

8 Given that the objective of disciplinary procedures is the protection of
9 the public rather than simply to punish the offending lawyer, In re Alcorn, 202
10 Ariz. 62, 74, 41 P.3d 600, 612 (2003), I find that the proposed sanctions appear to
11 be well-taken. Moreover, they are proportional to the sanctions imposed in
12 analogous cases.

13 CONCLUSION

14 Considering the facts of this case, application of the *Standards*,
15 including aggravating and mitigating factors, laudable aspects of Respondent's
16 character and behavior, and a proportionally analysis, this Hearing Officer accepts
17 the Tender of Admissions and Agreement for Discipline by Consent. I thus agree
18 fully with the Sanctions advanced by the parties, to wit:

- 19 1. Respondent shall be censured.
- 20 2. Respondent shall be placed on Probation, under terms discussed in the
21 Sanction section above, for a period of one year
- 22 3. Respondent shall pay the costs and expenses incurred in these
23 proceedings as set forth in Exhibit A to the Amended Joint Memorandum in
24 Support of Tender of Admissions and Agreement for Discipline by Consent.

25 DATED this 21st day of March, 2008.
26

1
2 Donna Lee Elm/AM

3 Donna Lee Elm
4 Hearing office 6N

5 Original filed with the Disciplinary Clerk
6 this 26th day of March, 2008.

7 Copy of the foregoing was mailed this
8 26th day of March, 2008, to:

9 Lynda C. Shely
10 Respondent's Counsel
11 The Shely Firm, P.C.
12 6501 East Greenway Parkway, Suite 103-406
13 Scottsdale, AZ 85254

14 J. Scott Rhodes
15 Respondent's Counsel
16 Jennings, Strouss & Salmon, P.L.C.
17 201 East Washington Street, 11th floor
18 Phoenix, AZ 85004

19 Copy of the foregoing ^{mailed} ~~hand-delivered~~ this
20 26th day of March, 2008, to:

21 David L. Sandweiss
22 Bar Counsel
23 State Bar of Arizona
24 4201 North 24th Street, Suite 200
25 Phoenix, AZ 85016

26 By: Neeta Munelkar