



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

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

**C. KENNETH RAY II,
Bar No. 009810**

Respondent

Nos 07-0380, 07-0737

**HEARING OFFICER'S
REPORT ON TENDER OF
ADMISSIONS AND
AGREEMENT FOR
DISCIPLINE BY CONSENT**

(Assigned to Hearing Officer 8Z,
Christopher D Thomas)

This disciplinary proceeding against Arizona attorney Kenneth Ray arises out of Respondent's alleged violations of the ethical rules in two client engagements. The first was the representation of a client in a post-conviction relief matter, during the course of which Respondent is alleged by the Bar to have violated the ethical rules by failing to timely and diligently pursue his incarcerated client's claim for post-conviction relief, failing to communicate with the client, and failing to keep the client informed of the status of his case despite the client's request for information. In a second matter, Respondent is alleged to have violated the ethical rules by failing to deliver personal property of a second client to a third person, as requested by the client following his criminal conviction.

1 Respondent has conditionally admitted the alleged violations and the
2 parties jointly proposed disciplinary sanctions, including censure of Respondent,
3 in a joint Tender of Admissions and Agreement for Discipline by Consent, dated
4 June 6, 2008 ("Tender") A Hearing on the Tender was conducted June 12, 2008
5 The parties thereafter filed, on June 20, 2008, a Joint Supplement to the Tender
6 of Admissions ("Supplemental Tender")
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8 As further detailed below, the Hearing Officer finds that the admissions
9 and conditional admissions in the Tender support the violations alleged and that
10 the proposed stipulated sanction is appropriate and effective In particular, the
11 Hearing Officer notes that 1) Respondent's delay in seeking post-conviction
12 relief for the first client has not foreclosed such client from seeking such relief,
13 which he is doing via alternate counsel; and 2) Respondent's failure to convey
14 the property of the second client to the third party was the result of Respondent's
15 concern about the possibility of the second client being taken advantage of with
16 regard to the property, which had sentimental value only
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20 Accordingly, the Hearing Officer finds that the Tender should be approved,
21 and that Respondent should be censured, placed on probation, and pay the costs
22 of the disciplinary proceeding
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24 **GENERAL ALLEGATIONS**
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1 4 During this sixty-day period, Respondent failed to file a petition, failed
2 to move for a continuance, and failed to file a declaration that he had investigated
3 the merits of a petition. Tender, ¶ 4

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5 5 In the meantime, Smith had asked Respondent about the status of the
6 matter. On or about May 5, 2006, Respondent informed Smith in person that
7 he was still investigating the matter and working in the petition. Respondent had
8 received the transcripts of the proceedings before the trial court on or about April
9 7, 2006. Tender, ¶ 5

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11 6 Respondent told Smith that a psychosexual examination of Smith by an
12 expert was necessary for the preparation of the petition for post-conviction relief.
13 This evaluation was scheduled for September 2006, but apparently the expert was
14 unable to gain access to the prison facility where Smith was confined. Smith was
15 never told of this problem by Respondent and never further apprised by
16 Respondent of the status of the petition, including that the filing period for the
17 petition had expired, until Smith filed a bar complaint in February 2007. Tender,
18 ¶ 6

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21 7 Smith inquired himself with his sentencing judge as the status of the
22 petition. Smith was advised by minute entry dated June 5, 2007, that the notice
23 of post-conviction relief filed by Respondent on May 11, 2005 was being
24 dismissed for lack of prosecution. Tender, ¶ 7. Respondent testified at hearing
25

1 that the dismissal was the result of his understanding, based upon prior practice in
2 Yavapai County, that the court would issue a minute order setting a deadline for
3 filing a petition Hearing Transcript, pp 14-17
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5 8 Subsequently, Smith retained alternate counsel and was granted the
6 right to proceed with the petition for post-conviction relief pursuant to an order
7 that effectively reversed the dismissal for lack of prosecution Supplemental
8 Tender, pp. 4-6 and Exhibits L-Q, Reporter's Transcript of Proceedings, Hearing
9 on Tender, June 12, 2008 ("Hearing Transcript"), p 12.
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11 **COUNT TWO (File no. 07-0737)**

12 9 On or about April 2006, Respondent was retained by John Haggerty
13 ("Haggerty") to represent him in a criminal matter pending in Yavapai Superior
14 Court On or about June 13, 2006, Haggerty was taken into custody on the matter
15 and certain personal property, including jewelry, watches, keys, a wallet and
16 other items were delivered to Respondent. Tender, ¶ 8.
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19 10 Following completion of the trial court proceedings (jury trial and
20 sentencing on January 23, 2007), Haggerty requested that Respondent deliver his
21 personal property to a third party Respondent, however, failed to abide by these
22 requests until January 8, 2008 Tender, ¶ 9
23

24 11 In his response to Respondent's bar complaint on the issue,
25 Respondent stated, "I recognize that [Haggerty] has requested I turn it over to the

1 [third party]. However, as indicated, I am less than confident that such property
2 (though not of great value but of significant personal value to Mr Haggerty) will
3 be safely maintained and secured for Mr Haggerty Mr Haggerty has been taken
4 advantage of in the past and I do not want that to happen to him again with
5 respect to his personal effects which I know are very important to him. I do not
6 want there to be any claim of negligence in my transfer of possession of these
7 items Thus, I unilaterally determined to maintain them in my custody and
8 safekeeping ” Tender. ¶ 10 Respondent’s testimony at hearing was to the same
9 effect Hearing Transcript, pp 18, 21
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12 CONDITIONAL ADMISSIONS

13 **COUNT ONE (File no. 07-0380)**

14 Respondent conditionally admitted in the Tender that his conduct, as set
15 forth in Count One, violated Rule 42, Ariz.R Sup Ct , specifically, ERs 1 3, and
16 1 4
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18 **COUNT TWO (File no. 07-0737)**

19 Respondent conditionally admitted in the Tender that his conduct, as set
20 forth in this count, violated Rule 42, Ariz.R.Sup Ct , specifically, ER 1.15(d)
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22 SANCTIONS

1 Respondent and the State Bar proposed, on the basis of the conditional
2 admissions contained in the Tender, that the appropriate disciplinary sanctions in
3 this matter are as follows
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5 1) That Respondent receive a censure,

6 2) That Respondent be placed on probation for a period of one year
7 under the following terms and conditions

8 a Respondent shall contact the director of the State Bar's Law
9 Office Management Assistance Program (LOMAP) within 30 days of the
10 date of the final judgment and order Respondent shall submit to a
11 LOMAP examination of his office's procedures for compliance with ERs
12 1 3, 1 4, and 1 15(d), including but not limited to client communications,
13 calendaring and terminating representation procedures for compliance with
14 ERs 1 3, 1 4, and 1 15(d) The director of LOMAP shall develop "Terms
15 and Conditions of Probation" that shall include, but are not limited to
16 supervision by a Practice Monitor. The "Terms and Conditions of
17 Probation" shall be incorporated herein by reference. The probation period
18 will begin to run at the time of the judgment and order, and will conclude
19 one year from the date that all parties have signed the "Terms and
20 Conditions of Probation" Respondent shall be responsible for any costs
21 associated with LOMAP
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1 b Respondent shall refrain from engaging in any conduct that
2 would violate the Rules of Professional Conduct or other rules of the
3 Supreme Court of Arizona.
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5 c In the event that Respondent fails to comply with any of the
6 foregoing probation terms, and information thereof is received by the State
7 Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the
8 imposing entity, pursuant to Rule 60(a)(5), Ariz R Sup.Ct. The imposing
9 entity may refer the matter to a hearing officer to conduct a hearing at the
10 earliest practicable date, but in no event later than 30 days after receipt of
11 notice, to determine whether a term of probation has been breached and, if
12 so, to recommend an appropriate sanction. If there is an allegation that
13 Respondent failed to comply with any of the foregoing terms, the burden
14 of proof shall be on the State Bar of Arizona to prove noncompliance by
15 clear and convincing evidence.
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19 3) That Respondent pay all costs and expenses incurred by the State
20 Bar in bringing these disciplinary proceeding, and in addition pay all costs
21 incurred in this matter by the Disciplinary Commission, the Supreme Court, and
22 the Disciplinary Clerk's Office
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1 The Hearing Officer finds the proposed sanctions to be appropriate, after
2 consideration of to the American Bar Association's *Standards for Imposing*
3 *Lawyer Sanctions* ("Standards") and Arizona case law
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5 The *Standards* are designed to promote consistency in the imposition of
6 sanctions by identifying relevant factors that courts should consider and then
7 applying these factors to situations where lawyers have engaged in various types
8 of misconduct *Standards* 1 3, Commentary The *Standards* provide guidance
9 with respect to an appropriate sanction in this matter. The court and commission
10 consider the *Standards* a suitable guideline *In re Peasley*, 208 Ariz 27, 33, 35,
11 90 P 3d 764, 770, 772 (2004), *In re Rivkind*, 164 Ariz 154, 157, 791 P 2d 1037,
12 1040 (1990) *In re Kaplan*, 179 Ariz 175, 177, 877 P 2d 274, 276 (1994) In
13 determining an appropriate sanction, both the court and the commission consider
14 the duty violated, the lawyer's mental state, the actual or potential injury caused
15 by the misconduct and the existence of aggravating and mitigating factors *In re*
16 *Tarletz*, 163 Ariz 548, 789 P 2d 1049 (1990), ABA *Standard* 3 0
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20 Given the conduct in this matter, the most applicable *Standard* is 4 0,
21 regarding the Duties Owed to the Client, and specifically *Standard* 4 1 for failure
22 to preserve client property (ER 1 15(d)), *Standard* 4.4 for lack of diligence (ERs
23 1 2, 1 3 and 1 4), and *Standard* 4 5 for lack of competence (ER 1.1) *Standard*
24 4 13 provides "[Censure] is generally appropriate when a lawyer is negligent in
25

1 dealing with client property and causes injury or potential injury to a client ” The
2 parties in this matter believe that Respondent was negligent in his failure to
3 return the client’s property to a third-person identified by the client *Standard*
4 4.43 provides. “[Censure] is generally appropriate when a lawyer is negligent and
5 does not act with reasonable diligence in representing a client, and causes injury
6 or potential injury to a client ” In addition, *Standard* 4.53 provides. “[Censure] is
7 generally appropriate when a lawyer (a) demonstrates failure to understand
8 relevant legal doctrines or procedures and causes injury or potential injury to a
9 client, or (b) is negligent in determining whether he or she is competent to handle
10 a legal matter and causes injury or potential injury to a client ” Respondent acted
11 negligently in his failure to communicate with his client and failure to diligently
12 pursue his client’s post-conviction relief Respondent’s conduct caused potential
13 injury to the client
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17 In deciding what sanction to impose the following aggravating and
18 mitigating circumstances should be considered
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20 **Aggravating Factors:**

- 21 • *Standard* 9.22(a) (prior disciplinary offenses) Respondent received an
22 Informal Reprimand in 1990 for ER 1.3 due to his “delay in obtaining for
23 client the med-pay monies to which she was entitled ” Respondent also
24 received an Informal Reprimand in 2003 for violations of ER 1.3 (failed to
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1 diligently pursue the federal habeas corpus relief in the client's case-same
2 issue as present case); ER 1.4 (failed to communicate with client that R's
3 partner was responsible for pursuing the habeas corpus relief and failing to
4 communicate with client when he complained about not having heard from
5 Respondent's partner; and ER 1.5 (failing to have reasonable measures in
6 place to ensure the partner's compliance with the Rules of Professional
7 Conduct)
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10 • *Standard 9 22(c)* (pattern of misconduct): Although several years apart,
11 Respondent's discipline demonstrates a pattern of failing to diligently
12 pursue client matters and failures to communicate with the clients when
13 they attempt to communicate with Respondent to find out the status of their
14 cases
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16 • *Standard 9 22(i)* (substantial experience in the practice of law)
17 Respondent has been an Arizona attorney for 24 years
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19 **Mitigating factors include:**
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21 • *Standard 9 32(b)* (absence of a dishonest or selfish motive) With regard
22 to Count Two, Respondent has testified, and the State Bar does not dispute,
23 that he was genuinely concerned that if he transferred the client's property
24 to a third party, the property would become lost or stolen
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1 injury to the clients Factors found in aggravation were prior disciplinary
2 offenses, *Standard 9 22(a)*, (Leather was on probation at the time), pattern of
3 misconduct, *Standard 9 22(c)*, multiple offenses, *Standard 9 22(d)* (six counts);
4 and substantial experience in the practice of law, *Standard 9 22(i)* Factors found
5 in mitigation were absence of a selfish or dishonest motive, *Standard 9 32(b)*,
6 full and free disclosure to the State Bar, *Standard 9 32(e)*, and character or
7 reputation, *Standard 9.32(g)*

10 In *In re Stevens*, SB-06-0157-D (2006), Stevens entered into an agreement
11 for discipline by consent for a censure and two-years probation with MAP and
12 LOMAP terms and ordered to pay restitution for violations of ERs 1.2, 1 3, 1.4
13 and 8 4(d) Stevens failed to complete work over a three-year period and failed
14 to adequately communicate with his client Stevens' conduct was negligent and
15 that there was potential injury to the client Prior discipline, *Standard 9.22(a)*, and
16 substantial experience in the practice of law, *Standard 9.22(i)* were factors found
17 in aggravation There were four factors were found in mitigation *Standard*
18 *9.32(b)* absence of a dishonest or selfish motive, *Standard 9 32(c)* personal or
19 emotional problems, *Standard 9 32(e)* cooperative attitude towards proceedings;
20 and *Standard 9 32(g)* character or reputation

21 In *In re Bradley*, SB-08-0026-D (2008) Bradley was censured and placed
22 on one-year probation, with practice monitor and LOMAP terms, for violations
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1 of ERs 1 1, 1 2, 1.3, 1 4, 3 2 and 8 4(d) Bradley failed to pay adequate attention
2 to his client's case, failed to diligently and promptly pursue the legal claim and
3 allowed the statutory limitation period to lapse. Bradley also failed to keep the
4 client reasonably informed, failed to abide by the client's decisions regarding the
5 objective of the representation, failed to consult with the client as to the means by
6 which the objectives of the representation were to be pursued, and failed to
7 comply with reasonable requests for information Bradley's conduct was found
8 to have been prejudicial to the administration of justice The hearing officer
9 found that Bradley negligently failed to communicate with the client and to
10 expedite the client's claim causing actual injury Factors found in aggravation
11 included dishonest or selfish motive *Standard 9 22(b)*, multiple offenses,
12 *Standard 9 22(d)*, submission of false evidence, false statement or other
13 deceptive practices during the disciplinary process, *Standard 9 22(f)*, and,
14 substantial experience in the practice of law, *Standard 9.22(i)* Factors
15 considered in mitigation included *Standard 9 32(e)*, full and free disclosure to a
16 disciplinary board or cooperative attitude toward proceedings; *Standard 9 32(g)*,
17 character or reputation, and *Standard 9 32(l)*, remorse.

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23 The cited cases similarly involve to failure to diligently represent clients
24 and failure to communicate with clients Like Respondent, Leather and Stevens
25 had prior disciplinary offenses Bradley had been diverted in a prior disciplinary

1 matter, and therefore the hearing officer did not consider *Standard 9.32(a)* as a
2 mitigating factor. All respondents in the proportional cases had substantial
3 experience in the practice of law and had their character and reputation
4 considered as a mitigating factor.
5

6 Based on the *Standards* and case law, the parties proposed, and the
7 Hearing Officer concludes, that censure and one-year probation are within the
8 range of appropriate sanction in this case and will serve the purposes of lawyer
9 discipline. The sanction will serve to protect the public, instill confidence in the
10 public, deter other lawyers from similar misconduct, and maintain the integrity of
11 the bar.
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14 **CONCLUSION**
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16 For the reasons set forth above, the Hearing Officer concludes that the
17 Tender should be approved and the Respondent sanctioned as described
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19 Dated this 4th day of August, 2008.
20

21 

22 Christopher D. Thomas
23 Hearing Officer 8Z

24 by
25 See

1 Original filed with the Disciplinary Clerk
2 of the Supreme Court of Arizona
3 this 4th day of August, 2008

4 Copies of the foregoing mailed
5 this 4th day of August, 2008, to

6 C Kenneth Ray II
7 C Kenneth Ray II, PC
8 P O Box 2521
9 Prescott, Arizona 86302-2521
10 Respondent

11 James L. Burke
12 Staff Bar Counsel
13 State Bar of Arizona
14 4201 N. 24th Street, Suite 200

15 Copy of the foregoing hand-delivered this
16 4th day of August, 2008, to

17 Lawyer Regulation Records Manager
18 State Bar of Arizona
19 4201 N 24th Street, Suite 200
20 Phoenix, Arizona 85016-6288

21 by Andra Reuber
22
23
24
25