

recommended a 30 day suspension, plus probation and costs. No hearing was held on the amended pleadings

4. On June 11, 2007, the Hearing Officer filed an Amended Hearing Officer's Report. In the report, the Hearing Officer recommended acceptance of the 30 day suspension plus probation and costs.
5. On September 12, 2007, the Disciplinary Commission filed its report. In the report the Disciplinary Commission concluded that based upon the Respondent's behavior, it would " ..not accept a suspension that is less than six months and one day " (Disciplinary Commission Report filed September 12, 2007, page 2 line 5)
6. On October 4, 2007, the State Bar filed a Complaint in this matter based upon the previous finding of probable cause on February 16, 2006.
7. On October 11, 2007, the assigned Hearing Officer filed a request for a new Hearing Officer. The undersigned Hearing Officer was assigned to the case on October 19, 2007.
8. The Respondent filed an Answer to the Bar's Complaint and the matter proceeded to hearing on January 25, 2008.

FINDINGS OF FACT

9. The facts as recited in the Complaint substantially mirror the facts as recited in the original and amended Tender of Admissions, and are not materially contested by the Respondent (See Respondent's Post Hearing Memorandum page 2 line 1 - page 3 line 15.)
10. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 26, 1991.

Count One

11. In or about the year 2002, Respondent was the defendant in a legal malpractice action against him, the first of his career. Attorneys Sid Horwitz and Richard Gramlich were involved in representation of the plaintiff in that action. The legal malpractice action settled in February of 2004
12. Shortly thereafter, Respondent, under an assumed name implying that he was a prior client, engaged in an exchange of six e-mails with Mr Horwitz and Mr. Gramlich. Mr Horwitz and Mr. Gramlich were unaware that Respondent was the sender of the e-mails.
13. Some of the e-mails threatened bodily harm to Mr. Horwitz and Mr. Gramlich, and made reference to their home addresses. The e-mails further contained profane and abusive language, and some contained slurs.
14. The e-mails caused distress to Mr. Horwitz and Mr. Gramlich and their families. The distress was, in part, due to the fact that the sender's identity was unknown to the recipients and that the sender knew where they lived.
15. The police were contacted about the e-mails and, after an investigation, it was determined that Respondent sent the e-mails. Respondent was subsequently prosecuted for his actions.
16. This matter came to the attention of the State Bar by way of the Respondent's self-report of his pending plea agreement and conviction of one count of harassment, a class one misdemeanor, occurring on October 4, 2004, in CR2005-014914-001DT, in Maricopa County Superior Court related to the incident. The uncontested factual basis for the plea was that Respondent “. intended to seriously annoy and did, in fact, seriously annoy Mr. Horwitz”.

17. On or about November 16, 2005, at the change of plea and sentencing, the Respondent apologized on the record for his conduct stating that "I regret the pain that it has caused the victim and my family." The Court accepted Respondent's guilty plea to one count of harassment, a class one misdemeanor. On that same day, the Court sentenced Respondent to 10 days of unsupervised probation and a \$2,500 fine. Pursuant to the plea agreement, Respondent was not required to serve his probation provided that he paid his fine. Respondent paid his fine immediately after the Court's acceptance of the plea agreement. Therefore, Respondent was not required to serve the 10 day probationary period.

CONCLUSIONS OF LAW

18. The Hearing Officer finds that there is clear and convincing evidence that the Respondent's conduct violated Rule 42, Ariz.R.Sup.Ct., ER, 8 4(b), (c) and (d) and Rule 41(g).

ABA STANDARDS

19. ABA *Standard* 3.0 provides that four criteria should be considered. (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating and mitigating factors.

The Duty Violated:

20. A review of the Procedural History shows that the parties originally felt, and the first Hearing Officer agreed, that the appropriate *Standard* to be applied in this case would be *Standard* 5 13, which calls for a reprimand for Respondent's conduct that adversely reflected on his fitness to practice law. The Disciplinary Commission disagreed and felt that *Standard* 5 12 calling for suspension was the appropriate *Standard*, presumably

because Respondent's conduct was criminal and "seriously" adversely reflected on his fitness to practice law.

21. The undersigned Hearing Officer concludes that *Standard 5.12* is the applicable *Standard* in this matter. Specifically, *Standard 5.12* provides that "Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct ... that seriously adversely reflects on the lawyer's fitness to practice."

The Lawyer's Mental State

22. The Hearing Officer concludes that Respondent's mental state was "knowing"

Actual or Potential Injury

23. There is no question but that Respondent's conduct caused actual emotional harm to the victims in this matter. While Respondent indicates that he had no actual intention to harm the victims or their families, the victims did not know that Further, not knowing who was sending the e-mails, together with the content, which showed a knowledge of where the victims lived and their family members, had to have, and based upon the testimony of the victims, did take a serious emotional toll

Aggravating and Mitigating Factors:

Aggravating Factors

24. ABA *Standard 9.22* lists the aggravating factors to be considered. A review of those factors yields the following:
25. *Standard 9.22(a)*, Prior Discipline The Respondent has one other disciplinary matter but it is for unrelated conduct and the conduct occurred after the facts of this case. The Hearing Officer gives this no weight

26 *Standard 9.22(i), Substantial Experience in the Practice of Law* Respondent has been admitted since 1991.

Mitigating Factors

27. *ABA Standard 9.32* lists the mitigating factors to be considered. A review of those factors yields the following:

28. *Standard 9.32(a), Absence of a Prior Disciplinary Record.* At the time of these facts Respondent had no disciplinary history.

29 *Standard 9.32(c) Personal and Emotional Problems.* Just prior to the facts in this case, the Respondent was going through a difficult dissolution of the legal partnership that he had with his brother and the estrangement of portions of his family (his mother and father) from him.

30. *Standard 9.22(e), Full and Free Disclosure and Cooperative Attitude Toward the Proceedings.* The State Bar agrees that Respondent has been forthcoming and cooperative throughout the investigative stage of these proceedings and continued to be so during the formal proceedings.

31 *Standard 9.22(g), Character and Reputation.* At the hearing in this matter, Respondent submitted five letters and one video interview attesting to his good character and reputation. All of the letters indicate that Mr. Rudolph's conduct in this matter is out of character for him. Particularly the letters from Michael Herzog and Pastor Patrick Sullivan, and the video of Evan Goldstein (a transcript of which is an exhibit to the hearing), reflect that the Respondent accepts full responsibility for his misconduct, is embarrassed by it, and makes no excuses for it. Mr. Milstead, Pastor Sullivan, Mr. Goldstein, Mr. Herzog, Mr. Ficarra and Jeff Halstead all testified at the hearing of this

matter and all felt that Respondent's conduct was not only inconsistent with his character, it would not be repeated and that he should be allowed to continue to practice law. (See transcript: Milstead page 108, Sullivan page 121, Goldstein transcript page 13, Herzog page 133, Ficarra page 140)

32. *Standard 9.32(k) Imposition of Other Penalties.* Respondent was fined \$2,500 and could have been incarcerated for up to six months in the county jail as a result of his conviction for a misdemeanor

33. *Standard 9.32(l) Remorse.* All of the witnesses, including Respondent, testified to his remorse and embarrassment. Respondent apologized to Mr. Gramlich in person and sent a letter of apology to both victims. In addition to the embarrassment of having committed reprehensible acts, owning up to them to friends and family and these proceedings, Respondent points out that his office and home were raided by a SWAT team while he was at work and his family was at home.

ANALYSIS

34. The decision of the appropriate sanction in this case turns on a weighing of the Respondent's highly offensive conduct and the lack of judgment in sending the emails, against an evaluation of his character, the sincerity of his remorse, the possibility of the conduct being repeated, as well as consideration of the aggravating and mitigating factors and a comparison to similar cases.

35. The Hearing Officer notes that the purpose of lawyer discipline is not to punish the lawyer but to achieve the following goals.

- A) Protect the public, the profession and the administration of justice
- B) Instill confidence in the lawyer regulation system.
- C) Deter the Respondent and other lawyers from similar conduct.

In re Fioramonti, 176 Ariz. 182, 859 P 2d 1315 (1993), *In re Neville*, 147 Ariz 106, 708 P.2d 1297 (1985), and *Matter of Horwitz*, 180 Ariz. 20, 881 P 2d 352 (1994).

36. The witnesses in this case all testified that Respondent's conduct was out of character and an aberration. Dr Blackwood's opinion is that the combination of the shame of these proceedings and the lessons learned by Respondent lead him to believe that it will not happen again. Therefore, the public, the profession and the administration of justice are protected to the extent that we can. It is felt that the sanction recommended herein will not only instill confidence in the lawyer regulation system, it will also deter similar conduct by other attorneys.

PROPORTIONALITY REVIEW

37. The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case and weighed against previous cases with similar facts. *In re Wines*, 135 Ariz. 203, 660 P 2d 454 (1983).
38. In the case *In re Sodikoff*, 04-1979 (2006), Mr. Sodikoff was held in direct and indirect criminal contempt for both verbally and physically assaulting opposing counsel in a dissolution case. Mr. Sodikoff was found in both direct and indirect criminal contempt, fined and ordered to spend three days in jail. Mr. Sodikoff was additionally ultimately sanctioned by the Disciplinary Commission with a 30 day suspension plus probation and costs.
39. In the case *In re Medansky*, SB 04-0120-D (2004), Mr. Medansky threatened the opposing party in a dissolution action that she " .. won't live to see your child's 15th

birthday” Mr Medansky was suspended from the practice of law for a period of 30 days

40 No other specific cases could be found which are any closer to the factual pattern of this case. There were different considerations of particular facts and circumstances even in the above-cited cases.

RECOMMENDATION

41. A review of these, as well as other cases, leads this Hearing Officer to conclude that a suspension is appropriate in this case. The question is how much is enough? While this Hearing Officer finds Respondent's words and conduct particularly offensive, after considering all of the testimony, none of which contradicts the fact that: Respondent acted totally out of character, is very remorseful for his conduct, has learned a great deal of insight about himself, has been forthright and honest with others about the inappropriateness of misconduct, that there are six mitigating factors and only one substantial aggravating factor, and the sanctions imposed in similar cases, that a period of suspension of 30 days plus probation and costs is an appropriate sanction in this case. This Hearing Officer is not unmindful of the fact that the Disciplinary Commission has previously indicated its desire for a long-term suspension. However, based upon all the considerations in this case and the sanctions imposed in other cases of similar nature, such a long suspension simply cannot be supported.

42. The undersigned Hearing Officer recommends a 30 day suspension to be followed by two years probation, which would include MAP. Respondent will also pay the costs of these proceedings.

43. In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Non-compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation had been breached, and, if so, to recommend an appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence

DATED this 12th day of March, 2008

Hon. H. Jeffrey Coker
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 12th day of March, 2008

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

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