

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

IN THE MATTER OF A MEMBER)	
OF THE STATE BAR OF ARIZONA,)	NO. 08-0086
)	
GARRETT L. SMITH)	HEARING OFFICER'S
Bar No. 015307)	FINDINGS AND
)	RECOMMENDATION
Respondent.)	
)	
)	
)	

This having come on before the Hearing Officer on the Complaint filed by the State Bar on May 30, 2008, the Answer filed by Respondent through his Counsel on June 23, 2008, a Notice of Intcnt to Use Prior Discipline, filed by the State Bar on July 3, 2008 and the Tender of Admissions and Agreement for Discipline by Consent, together with a Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent, both filed on September 22, 2008; and the Hearing Officer being fully advised in the premises; the following Findings and Recommendations arc made:

FINDINGS OF FACT

1. At all relevant times, Respondent Smith was a lawyer licensed to practice in the State of Arizona, having been admitted on October 23, 1993.
2. In October 2006 Respondent undertook the representation of Linda Bishop-Lemmers ("Ms. Bishop-Lemmers") in the Apache Junction Justice Court, Case No. TR2006-4020.

3. Respondent did not communicate the scope of this representation and/or the basis for his attorney's fees in writing to Ms. Bishop-Lemmers.
4. On or about October 11, 2006 Respondent filed his notice of appearance in the case.
5. On or about February 22, 2007, while still represented by Respondent, Ms. Bishop-Lemmers pled guilty to the charge in TR2006-4020.
6. On or about February 22, 2007, Ms. Bishop-Lemmers was sentenced in Case No. TR2006-4020.
7. Pursuant to their retention agreement, Respondent's representation of Ms. Bishop-Lemmers terminated upon sentencing.
8. Respondent did not immediately file a motion to withdraw as counsel or record following sentencing.
9. Although Respondent's stated purpose for failing to immediately withdraw as counsel for Ms. Bishop-Lemmers was to remain a contact person between the court and Ms. Bishop-Lemmers, his failure to withdraw would have the effect that Respondent, and not Ms. Bishop-Lemmers might receive any further notices from the court, including possible notifications of future court dates at which Ms. Bishop-Lemmers would be required to appear.
10. On or about October 11, 2007, the Justice Court ordered Ms. Bishop-Lemmers to appear for an Order to Show Cause hearing on November 29, 2007.
11. Ms. Bishop-Lemmers learned of this hearing from the Court.

12. On or about November 29, 2007, the scheduled Order to Show Cause hearing was continued to December 4, 2007.
13. On or about November 29, Respondent and Ms. Bishop-Lemmers spoke via telephone, during which conversation Respondent offered to represent Ms. Bishop-Lemmers at the Order to Show Cause hearing for an additional fee of \$500.00.
14. Ms. Bishop-Lemmers declined to retain Respondent.
15. On or about November 30, 2007, Respondent filed his notice of withdrawal as counsel of record in Ms. Bishop-Lemmer's case.
16. On or about December 4, 2007, Ms. Bishop-Lemmers wrote to the Apache Junction Justice Court complaining about Respondent and notifying the Court, in part, that if Respondent had not withdrawn as her attorney, he was no longer her attorney.

CONCLUSIONS OF LAW

The single count of this complaint alleged violations of: Rule 42, Ariz.R.Sup.Ct; ERs 1.2; 1.3; 1.5; and 1.16. The State Bar must prove the allegations of such violations by clear and convincing evidence. Ariz.R.Sup.Ct. Rule 57 (i)(3).

ER1.2 is entitled: "Scope of Representation and Allocation of Authority between Client and Lawyer". It reads, in pertinent part; "...a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by ER1.4, shall consult with the client as to the means by which they are to be pursued."

Perhaps a very strained extrapolation of the facets herein presented would allow one to conclude that the Respondents' failure to withdraw from further representation

of Ms. Bishop-Lemmers, as agreed, was a failure to abide by a client's decision "concerning the *objectives* of [that] representation". While the violation of this ER is conditionally admitted, there is still considerable doubt that the "clear and convincing evidence" rule has been met with respect to this violation.

ER 1.5 relates to fees; and ER 1.5(b) specifically states that "the basis or rate of the fee. . .shall be communicated to the client in writing". The failure to follow this ER was specifically admitted by the Respondent. In conclusion, the record supports a finding of violation of ER 1.5 as set forth above.

The alleged violations of ERs 1.3 and 1.16 were conditionally dismissed by the Bar.

AGREED SANCTION

The agreed sanction herein is that Respondent shall receive an informal reprimand followed by two years probation under terms and conditions to be set by the Director of LOMAP ; plus all costs.

ABA Standards

ABA Standard 4.6 refers to "lack of candor" and 4.64 specifically states that "Admonition is generally appropriate where a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information and causes little or no actual or potential injury to the client". The failure to provide the written basis for Respondent's fees is within this standard, and since there is no other instance at issue, and no suggestion of actual or potential injury to the client,

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“admonition“, which in Arizona means “informal reprimand” is presumptively appropriate.

Aggravating Factors

ABA Standard 9.22 (a); Prior Disciplinary Offenses.

On July 25, 2007 in State Bar File No. 06-1634, Respondent was informally reprimanded and placed on probation for violations of Rule 42, Ariz.R.Sup.Ct., ERs 1.5(d), 1.15 (a) and 1.15(d). On November 1, 2007, in State Bar File No. 07-0600 Respondent was informally reprimanded for violations of Rule 41(c) and 41(g), Ariz.R.Sup.Ct.

ABA Standard 22.(I); Substantial Experience in the Practice of Law.

Respondent was admitted to practice law in Arizona on October 23, 1993.

Mitigating Factors

ABA Standard 9.32 (e); Full and Free Disclosure to a Disciplinary Board or Cooperative Attitude toward Proceedings.

Respondent cooperated with the State Bar’s investigation and all proceedings in this matter.

ABA Standard 9.32(h); Absence of a Dishonest or Selfish Motive.

None of the Respondent’s conduct involved dishonesty or selfishness.

PROPORTIONALITY REVIEW

While perfect proportionality between all cases is impossible, and while each imposition of discipline must be individually tailored; internal consistency is a desired

goal so long as the objective of protecting the public, the profession and the administration of justice is achieved.

Three cases were submitted as supporting the sanction herein recommended. In all three; *In re Whipple*, State Bar File No. 08-0212; *In re Thomas*, State Bar File No. 08-0300 (2008) and *In re Gaertner*, State Bar File No. 04-1683 (2005), the respondents failed to provide written fee agreements. In the *Whipple* case there was an additional failure to notify the client that Respondent was terminating the representation and a delay in returning client documents. An informal reprimand, apparently without probation, was ordered. In the *Thomas* case, the Respondent's failure to provide a written fee agreement was also a violation of a prior diversion agreement. An informal reprimand and probation were ordered. In the *Gaertner* matter there was not only a failure to provide a written fee agreement, but a failure to explain that a portion of the flat fee might be refundable, and a further failure to make a refund of the unearned portion. In this case an informal reprimand and probation were ordered. In the instant case we have only an admitted failure to provide a written fee agreement in the case. But we do have a record of two other reprimands, one of which involved fees and client's property. On balance it would appear that the recommended sanction is appropriate.

RECOMMENDED SANCTION

Based upon the foregoing, the following are the Recommended Sanctions:

1. Respondent shall receive an informal reprimand. The language of the informal reprimand shall read as follows:

Respondent failed to communicate in writing the scope of the representation and the basis or rate of the fee and expenses for which the client was responsible before or with a reasonable time after the commencement of the representation began. Respondent's conduct violated Rule 42, Ariz.R.Sup.Ct, specifically ERs 1.2 and 1.5(b).

2. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court of Arizona and the Disciplinary Clerk's Office in this matter. The State Bar's Itemized Statement of Costs and Expenses is attached as Exhibit "A" and is incorporated herein by reference.

3. Respondent shall be placed on probation for a period of two years under the following terms and conditions:

a. Respondent shall contact the Director of LOMAP at 602-340-7313 within 30 days of the date of final judgment and order. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 1.2; 1.3; 1.5 and 1.16. The Director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of the judgment and order and will conclude two years from the date on which Respondent signs the "Terms and Conditions of Probation."

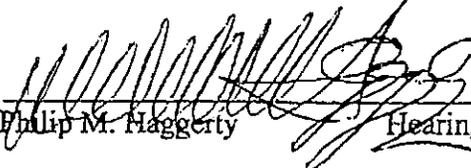
Respondent shall be responsible for any costs associated with LOMAP.

b. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

c. In the event that the Director of LOMAP recommends early termination from probation, Bar Counsel shall review the recommendation to ascertain whether early termination of probation is appropriate. If Bar Counsel determines that early termination of probation is appropriate, Bar Counsel shall file a Notice of Successful Completion of Probation.

4. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance 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 date, but in no event later than 30 days from the receipt of notice, to determine whether a condition of probation has been breached and, if so, to recommend an appropriate sanction. 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 of Arizona to prove noncompliance by clear and convincing evidence.

Dated this 20th of October, 2008


 Philip M. Haggerty Hearing Officer 6K

Original filed with the Disciplinary Clerk
this 20th day of October, 2008.

Copy of the foregoing mailed
this 20th day of October, 2008, to:

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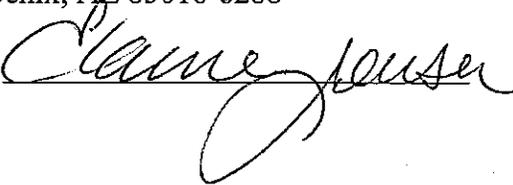
by: 

Exhibit "A"

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Garrett L. Smith, Bar No. 015307, Respondent

File No(s). 08-0086

Administrative Expenses

The Board of Governors of the State Bar of Arizona has adopted a schedule of administrative expenses to be assessed in disciplinary proceedings, depending on at which point in the system the matter concludes. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. An additional fee of 20% of the administrative expenses is also assessed for each separate matter over and above five (5) matters due to the extra expense incurred for the investigation of numerous charges.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

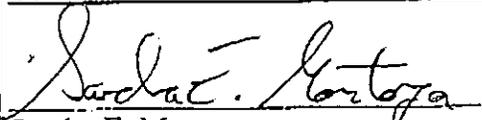
General Administrative Expenses for above-numbered proceedings = \$600.00

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED **\$600.00**


Sandra E. Montoya
Lawyer Regulation Records Manager

8-18-08
Date