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AUG 04 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY [Signature]

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

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4 IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
5)
6 **TROY L. MESSER,**)
Bar No. 020581)
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RESPONDENT.

No. 08-1521

**DISCIPLINARY COMMISSION
REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on July 11, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed May 7, 2009, recommending censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP") and the State Bar's Member Assistance Program ("MAP") upon returning to the practice of law in Arizona and costs.

Decision

Having found no facts clearly erroneous, the eight¹ members of the Disciplinary Commission unanimously recommend accepting the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP, MAP) upon returning to the practice of law in Arizona and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's Office.² The Terms of Probation are as follows:

¹ Commissioner Flores did not participate in these proceedings.

² The Hearing Officer Report is attached as Exhibit A.

Terms of Probation

1 1. Respondent shall submit to a LOMAP assessment, the terms of which shall
2 be incorporative by this reference and shall include, but may not be limited to, a
3 requirement that Respondent comply with any recommendations made by the LOMAP
4 Director. Respondent shall contact the Lawyer Assistance Program within 20 days of his
5 return to the practice of law in the State of Arizona.

6 2. Respondent shall be responsible for costs related to LOMAP.

7 3. Respondent shall contact the Director of MAP, within 20 days from the date
8 of his return to the practice of law in the State of Arizona and submit to a MAP
9 assessment.
10

11 4. Respondent shall be responsible for the costs related to MAP.

12 5. Respondent shall report, in writing, his compliance with the terms of
13 probation to the State Bar's Phoenix Office.

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

16 7. In the event that Respondent fails to comply with any of the foregoing
17 probation terms, and the State Bar receives information thereof, Bar Counsel shall file a
18 Notice of Non-Compliance with the imposing entity pursuant to Rule (60)(a)(5),
19 Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct
20 a hearing at the earliest practicable date, but in no event later than thirty (30) days
21 following receipt of notice, to determine whether a term of probation has been breached
22 and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent
23 failed to comply with any of the foregoing terms, the burden of proof shall be on the State
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EXHIBIT

A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

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

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
TROY L. MESSER,)
Bar No. 020581)
)
Respondent.)
_____)

No. 08-1521

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

1. Probable cause was found in this matter on January 7, 2009, the Complaint was filed on February 4, 2009, and service was made on February 6, 2009. The case was assigned to the undersigned Hearing Officer on February 10, 2009, and an Initial Case Management Conference was held on February 27, 2009, at which time a final hearing was set for May 4, 2009. Respondent failed to answer the Complaint so his default was entered on March 24, 2009. Thereafter the matter was set for an Aggravation/Mitigation hearing on April 20, 2009. At the Aggravation/Mitigation Hearing the Respondent appeared by phone.

FINDINGS OF FACT

2. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in this state on December 15, 2000.

Factual Summary

3. This case involves an attorney who, in June of 2007, began representing a woman by the name of Carrie Carpenter in a criminal case. During that representation, Respondent and his client engaged in a consensual intimate relationship. Respondent did not at any time during the representation advise his client to seek different criminal defense council, and did not advise his client on the potential and actual ethical conflict of interest as this personal relationship began and progressed. The criminal charges against Ms. Carpenter were ultimately resolved through a plea, wherein she served some jail time. After Ms. Carpenter's release from jail on March 25, 2008, Respondent and Ms. Carpenter were married on March 28, 2008.

COUNT ONE (08-1521)¹

4. On June 14, 2007, Carrie Carpenter ("client") met Respondent for the very first time in an initial consultation regarding potential criminal charges that could be filed against her.
5. On June 21, 2007, Carrie Carpenter was charged with Conspiracy to Commit Escape in the First Degree, a Class 4 Felony, by a Mohave County Grand Jury.
6. On June 25, 2007, Carrie Carpenter signed a written fee agreement to hire Respondent as her criminal defense attorney.
7. Samuel and Donna Carpenter, the parents of Respondent's client, paid Respondent his flat fee of \$3,000, plus an additional nonrefundable retainer charge of \$500, for a total of \$3,500.

¹ The facts set forth herein are taken from the State Bar's Complaint deemed admitted by the Respondent because of his failure to file an Answer.

8. On July 5, 2007, the Mohave County Attorney's office issued to Respondent's client, through Respondent, its first plea offer.
9. On or before August 7, 2007, the Mohave County Attorney's office disclosed to Respondent's client, through Respondent, its Initial Disclosure of Evidence against her in the criminal case.
10. In or around August 2007, Respondent began a personal relationship with his client when Respondent met his client at a local bar for drinks.
11. Respondent did not, at any time during the representation, advise his client to seek different criminal defense council and did not advise his client on the potential and actual ethical conflict of interest as this personal relationship began and progressed.
12. Respondent did not withdraw from the representation of his client after the personal relationship began.
13. In the beginning of September 2007, Respondent began a sexual relationship with his client. Respondent's sexual relationship with his client lasted for the entire duration of Respondent's representation of his client.
14. On January 18, 2008, Respondent's client, through Respondent, accepted a plea offer from the Mohave County Attorney's office and pled guilty.
15. On February 15, 2008, Respondent's client was sentenced to 30 days in jail, which was the maximum time allowable pursuant to the plea agreement. The 30 day jail sentence was scheduled to begin on February 26, 2008.

16. Before Respondent's client began her jail sentence, Respondent and his client agreed to get married.
17. On March 25, 2008, Respondent's client was released from jail, and thereafter, on March 28, 2008, Respondent married his client.
18. Through a combination of events, including the loss of his law practice and difficulties in his marriage, Respondent was made destitute and he had to stop practicing law in the State of Arizona and move to the State of Missouri and live with his mother. In Respondent's words:

"I have lost everything.... The only thing I have left in this world, save for said books and cd's, is my daughter. I have been basically unemployed since September, 2008.... I live with my mother and look for work. I can't even get a job at Taco Bell, Papa John's, Quizno, Wendy's, Pizza Inn, or Arby's and tens of other places that I've looked. I can't pay my Bar dues because I don't have any money. I can't pay my child support, because I don't have any money."²

CONCLUSIONS OF LAW

19. The undersigned Hearing Officer finds that there is clear and convincing evidence that Respondent failed to avoid a concurrent conflict of interest when there was a significant risk that the representation of his client would be materially limited by Respondent's personal interest, and that Respondent failed to avoid a conflict of interest with his current client when he engaged in sexual relations with his client subsequent to the formation of the attorney-client relationship. This conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.7(a)(2) and 1.8(j).

² See page one to Exhibit E to State Bar's Aggravation and Mitigation Brief.

ABA STANDARDS

20. 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; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

21. Respondent violated his duty to avoid a conflict of interest and therefore violated ER's 1.7(a)(2) and 1.8(j) which implicates *Standard* 4.3. *Standard* 4.32 provides: "Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client."
22. As pointed out by the State Bar, in many proportional cases *Standard* 4.33 has also been cited. *Standard* 4.33 states: "Reprimand (Censure in Arizona) is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests,... and causes injury or potential injury to a client."
23. Under the American Bar Association *Standards*, the presumptive sanction in this matter would be suspension because Respondent was not "negligent" in determining whether his representation of Ms. Carpenter would be materially affected by his own interests. Rather, Respondent knew of the conflict of interest and did not fully disclose the effect of that conflict to his client.

The Lawyer's Mental State

24. By Respondent's own admission, he knew that there was a conflict of interest in having a personal relationship with his client, and therefore his mental state was "knowing".

Injury

25. The complaining party, Respondent's wife's parents, did not appear at the Aggravation/ Mitigation hearing, nor did Respondent's client (now wife). No evidence was offered that there was any injury to Carrie Carpenter or that Respondent's representation of her was harmed by the personal relationship that existed between the two of them. Therefore, the injury in this matter is "potential."

Aggravating and Mitigating Factors:

Aggravating factors

26. The State Bar submits that there is one aggravating factor, *Standard* 9.22(b) Dishonest or Selfish Motive, in that Respondent's loyalty to Carrie Carpenter, and her interests in the context of her criminal defense, were at least potentially impaired by Respondent's own interest in a personal and sexual relationship with her. Respondent denies that his representation of his client was affected by the personal relationship with her, but admitted that he broke the rules and took responsibility for it. Both sides concur that there was no element of dishonesty or malice in the personal relationship between the Respondent and Carrie Carpenter, Transcript ("Tr.") p.10:12-20 & 14:11-15

Mitigating Factors

27. The State Bar submits that there are three mitigating factors:

Standard 9.32(a) Absence of Prior Disciplinary History

Standard 9.32(c) Personal or Emotional Problems

Standard 9.32(e) Full and Free Disclosure to Disciplinary Authority

28. This Hearing Officer finds that aggravating factor *Standard 9.22(b)* is applicable.

Once an attorney starts a personal relationship with his client, even though it turns into marriage at a later date, there cannot be the dispassionate and objective representation expected by the rules and any standard of professionalism. While Respondent was not “dishonest”, his motives and ethics are called into question when he knows that he should not be having a personal relationship with his client, and yet proceeds anyway. Selfish does fall within the description of his behavior and *Standard 9.22(b)*.

29. This Hearing Officer also finds the mitigating factors to be as recited in the State Bar's Aggravation and Mitigation Brief:

Standard 9.32(a), Absence of a Prior Disciplinary History. Bar Counsel verified that Respondent does not have any prior disciplinary history.

Standard 9.32(c), Personal or Emotional Problems. This issue is dealt with in more detail in the e-mails from Respondent to the Bar attached to the State Bar's Aggravation and Mitigation Brief, and later in this Report.

Standard 9.32(e), Full and Free Disclosure to Disciplinary Authority. Even though Respondent failed to answer the Complaint filed in this matter, he did

provide written responses to the Bar Charge and was honest about his failure to abide by the Rules of Professional Conduct when discussing the matter with Bar Counsel prior to the Aggravation and Mitigation hearing, and with this Hearing Officer at the Aggravation and Mitigation hearing, Tr. p. 13:6-11 & 17:17 18:4.

PROPORTIONALITY REVIEW

30. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline in cases with similar facts. It is also recognized that the concept of proportionality is “an imperfect process” because no two cases are ever alike. *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994) and *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved. *Peasley, supra*.
31. In this case the State Bar is recommending that Respondent be Censured for his misconduct, and that he be placed on probation for a period of two years with specific conditions. The State Bar cites to the following cases for the proposition that, while the presumptive sanction might be suspension, in prior cases suspension was only invoked in cases where not only was there a conflict of interest, but also some other violation, such as dishonesty or failing to obey a court order, Tr. p. 7:14-8:12. Because Respondent had no other violations other

than the conflict of interest, according to the State Bar, he should be entitled to a Censure rather than a suspension.

32. In *In re Loss*, SB-08-0076-D (2008), Edward Loss was Censured and placed on probation for one year (LOMAP/MAP) for making an attempt to engage in a sexual relationship with his client. Mr. Loss then insulted the client verbally and in writing to try and discredit her claims that Mr. Loss tried to engage in a sexual relationship with her. Mr. Loss violated ER 1.7(a)(2), and Rule 41(g). The parties agreed that Mr. Loss' mental state was negligent. The Hearing Officers cited *Standards* 4.33, 5.13 and 5.14. Two aggravating factors (Selfish Motive and Substantial Experience) weighed against five mitigating factors (Lack of History, Timely Good Faith Effort to Rectify, Cooperation, Good Character, and Remorse).
33. In *In re Pearlstein*, SB-03-0155 (2004), Mr. Pearlstein was suspended for 60 days with two years of probation. The lawyer subjected a client to unwelcome commentary of a sexual nature. In the second matter, the lawyer failed to keep his client informed as to the matter, and failed to act with diligence, and failed to properly supervise his staff in violation of the ERs 1.4, 1.7, 1.15, 1.16 and 5.3.
34. In *In re Marquez*, SB-03-0072 (2003), the lawyer was suspended for 30 days with one year of probation. The lawyer made unwelcome sexual comments and unwelcome touching of an opposing party, who was representing herself pro per. The lawyer denied his conduct until confronted with a tape recording of the incident. Violation of ERs 1.7, 8.1 and 8.4 were found.

35. In *In re Spence*, SB-05-0026-D (2005), the lawyer made inappropriate and sexually explicit comments to clients. The lawyer also disobeyed an obligation under the tribunal, willfully disobeying a court order. Violation of the ERs 1.7, 3.4, 8.4, Rule 41(g) and 51(e) was found. Mr. Spence was suspended for 30 days.
36. In *In re Walker*, SB-00-0096-D (2001), Mr. Walker was censured for failing to avoid a conflict of interest when he tried to enter into a consensual sexual relationship with his client. Mr. Walker violated ER 1.7. The Court cited *Standard* 4.33, found zero aggravators in contrast to seven mitigator's, including lack of selfish motive. Mr. Walker also paid a \$2,500 malpractice deductible and was arrested for sexual indecency and prostitution. The Court overturned the Commission's recommended sanction of suspension.
37. In *In re Moore*, SB-02-0043-D (2002), Mr. Moore was censured for directing sexually suggestive comments and questions towards his domestic relations client. Mr. Moore also asked to see his client's breasts before and after breast augmentation surgery. Mr. Moore violated ER 1.7. *Standard* 4.33 was cited. Two aggravators, including Selfish Motive and Substantial Experience, contrasted to three mitigators, including Lack of History, Cooperative Attitude, and Remorse. *In Moore, Walker (supra)* was the only cited case in proportionality.
38. In *In re Piatt*, SB-96-0064-D (1998), Mr. Piatt was censured for making improper sexual advances to vulnerable female divorce clients. Mr. Piatt also implied the representation would not continue, or would cost more, if the clients did not cooperate. Mr. Piatt violated ER 1.7. *Standard* 4.33 was also cited. Four aggravators, including Selfish Motive, were found against two mitigating factors.

39. The State Bar takes the position that, had Respondent continued to absent himself from these proceedings, the State Bar would likely have recommended a suspension. However, on April 2, 2009, Respondent contacted Bar Counsel and stated that he was willing and able to participate in these proceedings until their resolution. Given Respondent's joining of this process after his default had been entered, and the fact that Respondent had no other violations other than the conflict of interest, the State Bar submits that Respondent is entitled to a Censure and probation rather than a suspension.

RECOMMENDATION

40. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), and *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill public confidence in the Bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
41. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).
42. This case is a sad case. On the one hand Respondent's conduct, even though consensual with his client and future wife, is clearly a violation of our Rules and is unprofessional. On the other hand, one need only review exhibits B through E of the State Bar's Aggravation and Mitigation Brief to see that Respondent has

- paid an extremely high price for his misconduct as well as other factors. Respondent has lost his practice, is flat broke, lives with his mother and is trying to find a job anywhere he can to support himself and his daughter. There is no evidence that Respondent somehow took advantage of his relationship with Ms. Carpenter to get her favors, rather, it appears that it was entirely mutual by both parties. Further, there is no evidence that Ms. Carpenter's criminal case suffered as a result of the personal relationship with Respondent.
43. Bar counsel should be commended for reaching out to Respondent in the e-mails in an effort to get him to join in this process and help him through these proceedings, Tr. p. 8:13-9:24. Respondent ultimately did join in these proceedings and, based not only on his comments in his letters to the Bar and e-mails but his testimony, he took full responsibility for his violation of the Rules and accepts that his conduct is a violation of his duty not only to his client but to the profession as well.
44. This Hearing Officer was advised post hearing that Respondent is going on inactive status.
45. While Respondent's problems do not excuse his misconduct, when they are considered in light of Respondent's acceptance of responsibility, his remorse, the totality of the facts, as well as the standard which seems to have been set in prior disciplinary cases that a Censure will be imposed unless there is a violation of some other ER or Rule, this Hearing Officer recommends that the proposed sanction of Censure with probation for a period of two years be imposed.
46. It is recommended that:

1. Respondent shall be Censured for his misconduct;
2. Respondent shall be placed on a term of Probation for a period of two years under the following terms and conditions;
 - a. Should Respondent return to the practice of law in the state of Arizona during the two-year term of Probation, then the following conditions of Probation shall apply.
 - i) Respondent shall submit to a LOMAP assessment, the terms of which shall be incorporative by this reference and shall include, but may not be limited to, a requirement that Respondent comply with any recommendations made by the LOMAP Director. Respondent shall contact the Lawyer Assistance Program within 20 days of his return to the practice of law in the State of Arizona.
 - ii) Respondent shall be responsible for costs related to the LOMAP Program.
 - iii) Respondent shall contact the Member Assistance Program (MAP) Director and submit to a MAP assessment. Respondent shall contact the MAP Director within 20 days from the date of his return to the practice of law in his State of Arizona.
 - iv) Respondent shall be responsible for the costs related to the MAP program.
 - b. Respondent shall report, in writing, his compliance with the terms of probation to the State Bar's Phoenix office.

i) If Respondent fails to comply with any of the foregoing conditions, and information thereof is received by the State Bar, Bar Counsel shall file with the imposing entity a Notice of Non-Compliance.

ii) The imposing entity shall determine whether the conditions of probation have been breached and, if so, order appropriate action in response to such breach. If there is an allegation that Respondent has failed to comply with any of the foregoing conditions, the burden of proof thereof shall be on the State Bar to prove noncompliance by a preponderance of the evidence.

3. Pursuant to Rule 60(b), Ariz.R.Sup.Ct., Respondent shall pay the costs and expenses of these proceedings as set forth in Exhibit A to the State Bar's Aggravation and Mitigation Brief, Statement of Costs and Expenses, as well as all costs incurred by the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerk's Office in this matter.

DATED this 7th day of May, 2009.

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

Original filed with the Disciplinary Clerk
this 7th day of May, 2009.

Copy of the foregoing mailed
this 7th day of May, 2009, to:

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