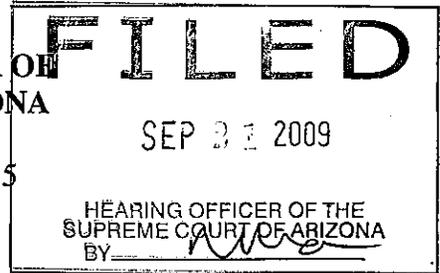


BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
VALERIE K. JUDGE-MYERS,)
Bar No. 025564)
)
RESPONDENT.)

No. 08-2215

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The parties submitted a Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent on July 7, 2009. No formal complaint has been filed. The Hearing Officer was appointed on July 13, 2009. The hearing was held on August 20, 2009. There are no issues of restitution in this matter. The State Bar is the complainant in this matter; therefore, no notice of this agreement for discipline pursuant to Rule 52(b)(3), Ariz.R.Sup.Ct., is required.

FINDINGS OF FACT

1. Respondent was conditionally admitted to the State Bar of Arizona on September 18, 2008, subject to specific terms and conditions. (TR 3:21-24)
2. Prior to being admitted, Respondent entered into an eighteen-month Member's Assistance Program ("MAP") Therapeutic Contract ("MAP contract").
3. Respondent's eighteen-month participation in the MAP contract began on September 19, 2008. (TR 4:3)
4. The MAP contract specified that Respondent was to completely abstain from using alcohol, other drugs, or any other mood-altering chemicals for a period of eighteen months. (TR 4:12)

5. On or about December 15, 2008 MAP Director, Hal Nevitt, ("Mr. Nevitt"), notified Bar Counsel that Respondent had tested positive for alcohol on December 10, 2008. (TR 7:11-18)

6. On January 9, 2009 Mr. Nevitt notified Bar Counsel that he had a second positive test for Respondent. (TR 18:19 through 19:25)

7. The second test was collected on November 18, 2008, but the results were not reported to Mr. Nevitt until January, subsequent to the receipt of the December 10, 2008 positive test results.

8. Respondent admitted to Mr. Nevitt that she consumed alcohol in December 2008. (TR 7:24; 9:12)

9. On December 17, 2008, Bar Counsel requested that Respondent respond to the December 10, 2008 positive test results.

10. On January 8, 2009, Respondent admitted the alcohol consumption and explained the circumstances surrounding her behavior.

11. On January 21, 2009, Bar Counsel notified Respondent of the second positive test results.

12. Respondent denied using alcohol since entering into the MAP contract with the exception of the drink that led to the December 2008 positive results.

13. Respondent's conduct as described in this count violated Rule 53(g), Ariz.R.Sup.Ct.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that her conduct, as set forth above, violated Rule 53(g), Ariz.R.Sup.Ct. This rule provides that a violation of a condition of admission imposed by the court or the Committee on Character and Fitness is grounds for discipline.

CONCLUSIONS OF LAW

The Hearing Officer finds that Bar Counsel has proven by clear and convincing evidence that Respondent has violated Rule 53(g). Respondent violated the condition imposed by the court or the Committee on Character and Fitness pursuant to Rule 36(a)(4)(F)(6) that Respondent not consume alcohol.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*" or "*Standard _____*") and Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction, both the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. 27 at 35, 90 P.3d at 772; *Standard 3.0*.

There are no ABA *Standards* to cover this particular situation since Respondent is charged with violating the terms of her conditional admission to the Bar. However, Respondent's conduct is most analogous to a violation of a duty owed to the profession, which implicates *Standard 7.0*.

Standard 7.3¹

Reprimand (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.

Based upon the conditional admissions in this matter, the presumptive sanction is a Censure.

A. The Duty Violated, the Lawyer's Mental State, and the Actual or Potential Injury

Respondent negligently violated her duty to the profession. There was potential injury to the profession because of Respondent's conditional admission status. No actual injury has been established.

B. Aggravating and Mitigating Circumstances

The parties agree and the Hearing Officer finds that there are no aggravating factors, and four mitigating factors. In mitigation:

Standard 9.32(a): Absence of prior disciplinary record.

Standard 9.32(b): Absence of dishonest or selfish motive.

Standard 9.32(e): Cooperative attitude towards the proceedings.

Respondent has cooperated with the State Bar, as evidenced by her willingness to consent to a sanction without the necessity of the State Bar filing its formal complaint. Respondent has cooperated with MAP and is in full compliance with the terms of her therapeutic contract.

Standard 9.32 (l): Remorse. Aside from her family, her career is the next most important thing in Respondent's life. She is ashamed and embarrassed that in a moment of weakness during

¹ At the Hearing counsel for the parties agreed that the Joint Memorandum in Support of the Tender of Admissions contained an error when at page 4, line 12 it cited *Standard 7.4*. Counsel meant to cite *Standard 7.3* (TR 26:21 through 27:4)

her new mother's meeting, she consumed alcohol. She deeply regrets this conduct and will not make this mistake again. Respondent has supported her testimony of remorse with her conduct. In fifteen tests for alcohol and drugs since January 2009, Respondent has been clean. (TR 14:1-7)

The parties and the Hearing Officer believe that the presumptive sanction of public Censure with probation is appropriate in these circumstances.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at ¶ 61, 90 P.3d at 778, (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The following cases are instructive.

In *In re Charles*, SB-08-0011-D (2008), Charles was a conditional admittee who used alcohol on two separate occasions at a time when his MAP contract specified that he was to completely abstain from using alcohol, other drugs, or any other mood-altering chemicals, for four years. Charles' conduct was a violation of the duty he owed to the profession. Although Respondent violated no laws, his conduct was a violation of the terms of his conditional admission. There were no aggravating factors and five mitigating factors. Charles' mental state was negligent and there was no actual harm as a result of the misconduct. Charles was censured, and his MAP contract was continued as probation until his original term expired.

In *In re Hilzendeger*, State Bar file number 06-0883 (2006), Hilzendeger was conditionally admitted to the State Bar of Arizona subject to the terms of a therapeutic contract for substance

abuse. Without consulting anyone at the State Bar, Respondent moved to San Francisco. There were no provisions in the contract that required him to consult with anyone at the State Bar about moving outside of Arizona. The State Bar was notified by the office of MAP Medical Director, Dr. Michael Sucher (“Dr. Sucher”), that Hilzendeger failed to appear for a random biological fluid testing. The State Bar opened a screening file. Hilzendeger retained an attorney who assured the State Bar that Hilzendeger had made arrangements for biological fluid testing and had tested once already, that he had contacted his monitor, that he had secured counseling and had scheduled regular sessions. Shortly thereafter, Dr. Sucher’s office notified the State Bar that Hilzendeger again failed to appear for a random biological fluid test. Respondent’s monitor, Austin Potenza, notified the State Bar that Respondent was not in compliance with the MAP contract with regard to contacting Mr. Potenza. Respondent was taken off conditional admission status and placed on probation with terms that clearly delineated Hilzendeger’s responsibility to comply with the contract. The parties agreed that Hilzendeger's conduct was negligent, there was no actual harm, and there were no aggravating or mitigating factors.

The conduct in the instant case is more egregious than Hilzendeger’s conduct since Hilzendeger simply neglected to comply with the contract due to his move to another state, and there was no proof that Hilzendeger had actually failed any random biological fluid tests. However, the conduct in the instant case is similar to *Charles* and should be treated in a similar manner.

This agreement provides for a sanction that meets the goals of the disciplinary system. The terms of the agreement serve to protect the public, instill confidence in the public, deter other lawyers from similar conduct and maintain the integrity of the Bar.

RECOMMENDATION

The Hearing Officer noted some significant aspects of Respondent's testimony at the Hearing. The reason the court placed conditions when Respondent was admitted as an attorney in September 2008, was that she informed the court in her application for admission of a DUI conviction she incurred in 2006. (TR 5:4-23). In 2006 Respondent had just graduated from law school. Respondent also had a juvenile record for what she described as letting people who were under 21 years old drink alcohol in her house. (TR 7:1)

The concern in Respondent's case is that she violated the condition of abstinence from alcohol within about six weeks from her first drug/alcohol test. She drank alcohol on December 10, 2008. She had been admitted to practice on September 18, 2008. She was pregnant with her first child when she was admitted to practice. Her daughter was born on October 8, 2008. (TR 7:24) Her testing in the MAP program did not start while she was pregnant. Her delivery was by C-section. Her doctor ordered her not to drive for several weeks after the birth. The Bar agreed not to test her until she could drive to the testing location. The testing did not start until the third or fourth week of October, 2008. (TR 8:10-20)

Respondent explained why she drank alcohol on December 10, 2008. She was attending a young mother's book club when she became emotional about the stress she felt from trying to parent her newborn. She was overwhelmed by trying to care for her child while maintaining her new legal career. When she began crying at the book club about her frustrations, other club members suggested she relax by drinking a glass of wine. Her mistake of course was having the glass of wine. However, her violation should be understood in context.

Respondent stayed at home for about four weeks after her daughter was born. When she returned to work at the law firm she brought her infant with her. Respondent recognized that trying

to care for her baby while at work was not satisfactory. Respondent spoke of having to pump breast milk at her office. (TR 20:5) Respondent searched for a person who would care for her baby while Respondent was at work. Respondent found a person to care for her child. But Respondent felt guilty because Respondent did not know this person. In a way Respondent felt that she was leaving her newborn with a stranger.

Respondent was not sleeping well, as is the case with parents of newborns. Basically all of Respondent's frustrations came out at the book club meeting. She felt that she was not a good mother. In this state of mind Respondent forgot her obligations under the conditions imposed at the time of her admission to practice. (TR 9:3 through 12:9)

When she was asked about changes she has made since December 2008 Respondent testified that she has learned to ask for help when she is feeling overloaded. Her husband works at a gym. She asks him to share child care responsibilities with her. She no longer has the same child care worker (who was very good), but the care her daughter is now receiving is excellent. Respondent's stress level over her daughter is now far less than it was in the first 60 days after the child's birth. (TR 11:4 through 12:9; 13:5-11) These changes support the Hearing Officer's conclusion that Respondent's statement of remorse at the Hearing is genuine. (TR 11:19 through 15:11)

The Hearing Officer explained to Respondent that three times her connection to alcohol has interfered with her life; 1) the juvenile finding about letting under age people drink alcohol at Respondent's house, 2) the 2006 DUI and 3) the December 10, 2008 violation of her condition to abstain from alcohol. (TR 25:17 through 26:20) There is hope that Respondent understands the significance of this disciplinary proceeding. Respondent stated that she realizes that she "...could have caused a disservice to something I hold in very high regard." (TR 15:13 through 16:11)

Respondent's record of passing her alcohol tests from January through August 2009 demonstrates her current commitment to her conditions.

Another matter that should be addressed is that the Bar sent Respondent results from another alcohol test that showed that Respondent had consumed alcohol in November 2008. (TR 18:21 through 19:4) Respondent testified that she was not consuming alcohol in November because she was still nursing her daughter. Respondent had resumed smoking cigarettes and she was rinsing her mouth out so she would not smell of smoke. Respondent surmised that the mouthwash Listerine may have contained some alcohol. (TR 19:11-25) Respondent also thought that the hand sanitizer she was using to remove the smell of cigarettes from her hands might have contained alcohol. Respondent stated that she understood that her conditions required her not to consume alcohol in any form including mouthwash or hand sanitizer. (TR 20:9-22)

The record at the hearing does not contain an explanation of how using hand sanitizer can lead to a positive test for consuming alcohol. The record contains no information that there is enough alcohol in mouthwash to cause a positive result on the test. Respondent did not admit violating her conditions with reference to the November 2008 test. The Bar did not attempt to establish at the Hearing that Respondent violated her conditions in November 2008 by consuming an alcoholic beverage. Therefore, the Hearing Officer concludes that although the explanations offered by Respondent for the November 2008 positive test are concerning, the record does not support a conclusion that Respondent violated the abstinence condition in November 2008 by drinking alcohol.

CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *Peasley, supra*, at ¶ 64, 90 P.3d at 778. Recognizing

that determination of the appropriate sanction is the prerogative of the Disciplinary Commission and the Supreme Court, the State Bar and Respondent and the Hearing Officer believe that the objectives of discipline will be met by the imposition of the proposed sanction of a public Censure, probation, and the imposition of costs and expenses. Probation will take the place of Respondent's conditions of admission. The probation will begin to run at the time the Judgment and Order is signed in this case and will end when the conditions would have ended, March 19, 2010.

SANCTIONS

The Hearing Officer recommends that the following disciplinary sanctions shall be imposed:

1. Respondent shall receive a public Censure for violating Rule 53(g), Ariz.R.Sup.Ct.
2. Respondent is currently subject to a MAP contract that will expire on March 19, 2010. Respondent will be placed on probation to begin at the time the Judgment and Order is signed in this matter. The term of Respondent's probation in this matter is to continue with that contract until March 19, 2010. The probation will include all of the terms of the current MAP contract.
3. Once the Judgment and Order has been issued, Respondent will no longer be on conditional admission status.
4. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided in the State Bar's statement of costs and expenses, attached hereto as Exhibit A and incorporated herein.

In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about her failure, Bar Counsel will file a Notice of Non-Compliance with the Disciplinary Clerk. A hearing officer will conduct a hearing at the earliest practical date, but in no

event later than thirty days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by a preponderance of the evidence.²

DATED this 21st day of September, 2009.

Hon. Jonathan Schwartz
Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 21st day of September, 2009.

Copy of the foregoing mailed
this 21st day of September, 2009, to:

Nancy Greenlee
Respondent's Counsel
821 E Fern Drive North
Phoenix, AZ 85014

Shauna Miller
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Evelyn Loza

² Counsel for the parties agreed at the Hearing that the Tender of Admissions at page 5, line 8 incorrectly stated that the Bar's burden of proof on a probation violation would be by clear and convincing evidence. (TR 27:5-17)

Exhibit A

1 **Statement of Costs and Expenses**

2 In the Matter of a Member of the State Bar of Arizona,
3 Valerie K. Judge-Myers, Bar No. 025564, Respondent

4 File No(s). 08-2215

5 **Administrative Expenses**

6 The Board of Governors of the State Bar of Arizona with the consent of the
7 Supreme Court of Arizona approved a schedule of general administrative
8 expenses to be assessed in disciplinary proceedings. The administrative
9 expenses were determined to be a reasonable amount for those expenses
10 incurred by the State Bar of Arizona in the processing of a disciplinary matter.
11 * An additional fee of 20% of the general administrative expenses will be
12 assessed for each separate file/complainant that exceeds five, where a violation
13 is admitted or proven.

14 General administrative expenses include, but are not limited to, the following
15 types of expenses incurred or payable by the State Bar of Arizona:
16 administrative time expended by staff bar counsel, paralegals, legal assistants,
17 secretaries, typists, file clerks and messengers; postage charges, telephone
18 costs, normal office supplies, and other expenses normally attributed to office
19 overhead. General administrative expenses do not include such things as travel
20 expenses of State Bar employees, investigator's time, deposition or hearing
21 transcripts, or supplies or items purchased specifically for a particular case.

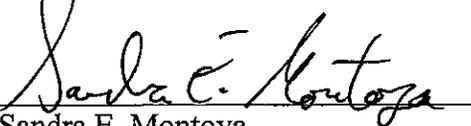
22 **General Administrative Expenses for above-numbered proceedings = \$600.00**

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

25 **Staff Investigator/Miscellaneous Charges**

Total for staff investigator charges \$0.0

TOTAL COSTS AND EXPENSES INCURRED \$600.00

26 
Sandra E. Montoya

8-20-09
Date

Lawyer Regulation Records Manager