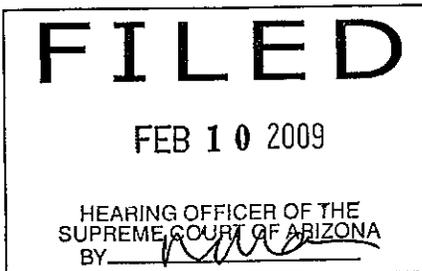


1 Stanley R. Lerner
2 Hearing Officer 7V
3 3707 North 7th Street, Suite 250
4 Phoenix, Arizona 85014-5057



5
6 **BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

7
8 **IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,**

9
10 **Hubert E Kelly,
Bar No. 001725**

11
12 Respondent.

No. 08-0351

13
14 **HEARING OFFICER'S
REPORT**

15 (Assigned to Hearing Officer 7V,
16 Stanley R. Lerner)

17
18 The State Bar of Arizona, represented by Tom McCauley and Respondent,
19 Hubert E. Kelly, who is represented in this matter by counsel, J. Randall Jue,
20 submitted their Joint Memorandum in Support of the Agreement for Discipline by
21 Consent. The Respondent appeared and gave testimony to the Hearing Officer.

22 Respondent conditionally admitted to violating the ethical rules by:

- 23
24
25
1. failing to timely provide a disclosure statement and file a motion to amend. ER 1.3.
 2. failing to make timely witness and exhibit disclosures and to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. ER 3.4(d).

1 Subject to review and acceptance by the hearing officer, the Disciplinary
2 Commission and the Supreme Court of Arizona, Respondent agreed to accept
3 imposition of an Informal Reprimand, one year probation including LOMAP, and
4 payment of the costs and expenses of this disciplinary proceeding.
5

6 The State Bar provided notice of the parties agreement for discipline by
7 consent to Complainants as required pursuant to Rule 52(b)(3), Ariz.R.Sup.Ct.
8

9 **FACTS**

10 **GENERAL ALLEGATIONS**

- 11 1. At all times relevant, Respondent was an attorney licensed to practice
12 law in the State of Arizona, having been admitted to practice in Arizona
13 on March 13, 1965.
14

15 **COUNT ONE (File no. 08-0351)**

- 16 2. On August 6, 2008, the Probable Cause Panelist of the State Bar of Arizona
17 (“Probable Cause Panelist”) found that probable cause existed to believe
18 that Respondent had violated Rule 42, Ariz.R.Sup.Ct., including but not
19 limited to ERs 1.1, 1.2, 1.3, 1.5, 3.2, 3.4, and Rule 41(g), Ariz.R.Sup.Ct.,
20 while representing clients Richard and Kymberly Tolway (“Tolways”).
21
22 3. On December 18, 2006, the Tolways met with Respondent and he agreed to
23 represent them in the lawsuit, *Tolway v. Hoebing*, in Phoenix Justice Court.
24
25

- 1 4. During the litigation the Tolways eventually instructed Respondent to
2 move the matter to Maricopa Superior Court. Respondent had advised the
3 Tolways to move the matter to the Superior Court at their initial meeting on
4 December 18, 2006.
- 5
- 6 5. Respondent did not file a motion to move the matter to Superior Court until
7 about two months after the first request to do so and only two weeks before
8 trial.
- 9
- 10 6. That motion was denied on the day of trial.
- 11 7. Defendant Hoebing's counsel, several times, demanded the Tolways'
12 Disclosure Statement.
- 13
- 14 8. Respondent did not provide Defendant Hoebing's counsel with the
15 Tolways' Disclosure Statement until the night before the trial.
- 16 9. Defendant Hoebing's counsel moved to preclude the Tolways' evidence
17 based upon late disclosure, but agreed to proceed because his clients had
18 flown into town from Nebraska for the trial and did not wish to return at a
19 later date for a new trial date.
- 20

21 **ADMISSIONS**

22

23 Respondent admitted that his conduct, as set forth in this count, violated
24 Rule 42, Ariz.R.Sup.Ct., specifically, ERs 1.3 and 3.4(d).

25

1 **DISMISSED ALLEGATIONS**

2 The State Bar agreed to dismiss allegations that Respondent violated ERs
3 1.1, 1.2, 1.5, and 3.2 and Rule 41(g), Ariz.R.Sup.Ct., in exchange for the
4 settlement in this matter and in light of evidentiary concerns. In particular,
5 Respondent has been practicing law for 55 years with no formal discipline, so
6 proof of ER 1.1 would be difficult. The allegations of ERs 1.2 and 3.2 are
7 redundant of Respondent's admission to ER 1.3. Respondent mistakenly used a
8 different fee agreement form, which violated ER 1.5, and his standard fee
9 agreement form does comply with ER 1.5. Additionally, the Complainants did
10 not ask for return of the allegedly non-refundable fee they paid. The allegation of
11 Rule 41(g), Ariz.R.Sup.Ct., related to Respondent's activities on the day of trial.
12 These appeared to be a one-time incident and the State Bar admits there would
13 have been significant proof problems with this allegation. Therefore, allegations
14 that Respondent violated ERs 1.1, 1.2, 1.5, and 3.2 and Rule 41(g),
15 Ariz.R.Sup.Ct. are dismissed.

16 Respondent violated the duties owed to the public and the legal system by:

- 17
- 18 3. failing to timely provide a disclosure statement and file a motion to
19 amend. ER 1.3.
 - 20 4. failing to make timely witness and exhibit disclosures and to make a
21 reasonably diligent effort to comply with a legally proper discovery
22 request by an opposing party. ER 3.4(d).
- 23
24
25

1 determining an appropriate sanction, both the court and the commission consider
2 the duty violated, the lawyer's mental state, the actual or potential injury caused
3 by the misconduct and the existence of aggravating and mitigating factors. *In re*
4 *Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

6 Given the conduct in this matter, the most applicable *Standards* are
7 *Standards 4.4 and 6.2*.

8
9 *Standard 4.44* is relevant to the Respondent's delay in filing a motion to
10 move the matter to Superior Court and submitting the initial disclosure statement.

11 It states:

12 Admonition is generally appropriate when a lawyer is negligent and
13 does not act with reasonable diligence in representing a client, and
14 causes little or no actual or potential injury to a client.

15 *Standard 6.24* is relevant to the Respondent delay in providing the initial
16 disclosure statement to his opposing party. It states:

17 Admonition is generally appropriate when a lawyer negligently fails
18 to comply with a court order or rule, and causes little or no actual or
19 potential injury to a party, or causes little or no actual or potential
interference with a legal proceeding.

20 The parties agreed that Respondent negligently engaged in the conduct that
21 led to the admitted ethical violations. The parties further agreed that
22 Respondent's conduct may have caused injury or potential injury to his clients
23 and the opposing party. Accordingly, after considering testimony and the
24 agreements of the parties the Hearing Officer finds that the Respondent
25

1 negligently engaged in the conduct that led to the admitted ethical violations and
2 that Respondent's conduct caused injury or potential injury to his clients and the
3 opposing party.
4

5 In deciding what sanction to impose the following aggravating and
6 mitigating circumstances were considered:

7 **Aggravating Factors:**

8 *Standard 9.22(i):* substantial experience in the practice of law.
9

10 Respondent has been an Arizona attorney for 55 years.

11 **Mitigating factors include:**

12 *Standard 9.32(a):* absence of a prior disciplinary record.

13 *Standard 9.32(b):* absence of a dishonest or selfish motive.
14

15 *Standard 9.32(g):* character or reputation.

16 *Standard 9.32(h):* physical disability. (Diverticulitis)
17

18 In evaluating the aggravating and mitigating factors, the parties agreed that
19 an Informal Reprimand is an appropriate sanction for the misconduct in this case
20 and therefore, after considering the testimony the Hearing Officer imposes an
21 Informal Reprimand.
22

23 **PROPORTIONALITY ANALYSIS**

24 To have an effective system of professional sanctions, there must be
25 internal consistency, and it is appropriate to examine sanctions imposed in cases

1 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
2 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
3
4 However, the discipline in each case must be tailored to the individual case, as
5 neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz.
6 604, 615, 691 P.2d 695 (1984).

7 Probable Cause panelists have previously imposed an Informal Reprimand
8 for violation of ERs 1.3 and 3.4 in cases similar to the present case.
9

10 *In re Stephen Cox*, SB-07-1232, Cox admitted that he had failed to pursue
11 discovery for his plaintiff client, which resulted in a dismissal without prejudice,
12 thereby violating ERs 1.3, 1.4, and 3.2. Cox denied a knowing violation of ER
13 3.4 due to his recently diagnosed sleep apnea. He received an Informal
14 Reprimand and one year probation with LOMAP.

15 *In re George Tacker*, SB-070303, Tacker did not respond to discovery
16 requests and did not provide a disclosure statement. Opposing counsel asked him
17 to do so. He did not. The defendant moved for dismissal as a sanction and the
18 arbitrator granted the motion. The next day Tacker filed a response to the motion
19 for sanctions, claiming that he had been on vacation for two weeks. He claimed
20 that he had erroneously sent the discovery to the wrong address. Tacker's client
21 was a good friend who did not care that the matter had been dismissed because he
22 had been paid by his own insurance company. Tacker violated ERs 1.3, 3.2, 3.4,
23 4.4, and 8.4(d). He received an Informal Reprimand and one year probation with
24 LOMAP.
25

