

4. That matter was resolved via a settlement that resulted in Respondent being Censured and placed on probation for two years. The probation terms included the requirement that Respondent participate in the Law Office Management Assistance Program (“LOMAP”) and attendance at the Ethics Enhancement Program (“EEP”). The Agreement also required Respondent to contact the director of LOMAP within 30 days of the final Judgment and Order, and contact the EEP Program Coordinator within 20 days from the Judgment and Order, Hearing Exhibit (“H/E”) #2.
5. The Tender and Joint Memorandum went before the undersigned Hearing Officer on November 28, 2008, and thereafter was approved and forwarded to the Commission on December 29, 2008. The Disciplinary Commission approved the Hearing Officer’s Report on March 13, 2009, and the Supreme Court issued its Judgment and Order on June 1, 2009, H/E # 4.
6. While Respondent’s Probation officially began on June 1, 2009, Respondent knew of the requirement that he contact LOMAP and EEP as early as November 29, 2008, when he signed the Tender and Agreement, H/E #1.
7. By Respondent’s admission he did not contact the Director of LOMAP or the EEP Program Coordinator within the times prescribed by his terms of probation, Transcript of Hearing (“T/H”) p.12:2-15.
8. By letter dated July 2, 2009, sent to Respondent at his address of record, Maria Bahr, the Director of LOMAP, reminded Respondent of the Order of the Supreme Court and requested that Respondent contact her to schedule a meeting, H/E #5. Respondent did not contact Ms. Bahr, T/H p.17:14.

9. By Certified letter dated July 16, 2009, sent to Respondent at his address of record, Ms. Bahr again reminded Respondent of the Supreme Court's June 1, 2009, Judgment and Order, and requested that Respondent contact her, H/E #6. The letter went on to warn Respondent that if he did not contact her by 5:00 p.m., July 23, 2009, she would refer the matter to Bar Counsel for further action. Respondent failed to contact Ms. Bahr, T/H p.19:5-9.
10. As of the date of the filing of the Notice of Noncompliance, July 30, 2009, Respondent still had not contacted Ms. Bahr or the EEP Program Coordinator.
11. On August 12, 2009, Respondent called Ms. Bahr and left a voicemail message for her, T/H p.19:10-15. Respondent, as of the hearing on August 17, 2009, had not contacted the EEP Program Coordinator, T/H p.24:15-22. Respondent testified that he called the State Bar about the EEP program and was routed to someone who he says enrolled him in what he thought was the EEP program but is, in reality, a professionalism course, T/H p.25:13-17.
12. Respondent admitted that he was not as diligent as he should have been in taking care of his obligation on probation, T/H p. 28:2-5. During his testimony, Respondent emphasized that he has been busy taking care of his present clients and trying to implement programs in his office that will assure that his clients are taken care of, T/H p. 31:24-32:12.

CONCLUSIONS OF LAW

13. At the hearing in this matter, this Hearing Officer found by clear and convincing evidence that Respondent violated Term A of his probation, that he contact the Director of LOMAP within 30 days of the Supreme Court's Judgment and Order dated June 1, 2009. The Hearing Officer also found by clear and convincing evidence that Respondent violated Term B of his probation by failing to contact the EEP Program Coordinator within 20 days of the Supreme Court's Order dated June 1, 2009. Based upon these findings this Hearing Officer finds that Respondent violated Rule 53(e), Ariz.R.Sup.Ct.

ABA STANDARDS

14. *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 or mitigating factors.

The Duty Violated:

15. Respondent's conduct violated his duty to the profession and to the legal system. By failing to comply with the terms of his probation, Respondent evidences a cavalier attitude toward compliance with his responsibility to adhere to the rules of his profession, as well as a disrespect of the Judgment and Order of the Supreme Court.
16. *ABA Standard 8.1* states: "Disbarment is generally appropriate when a lawyer:
a) intentionally or knowingly violates the terms of a prior disciplinary order and

such violation causes injury to a client, the public, the legal system, or the profession.”

17. ABA *Standard* 8.2 states: “Suspension is generally appropriate when a lawyer has been reprimanded [Censure in Arizona] for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.”
18. ABA *Standard* 8.3 states: “Reprimand is generally appropriate when a lawyer:
 - a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession;”

The Lawyer’s Mental State:

19. Respondent’s conduct in not complying with the terms of his probation was knowing, especially after receiving two notices from Ms. Bahr that he was not in compliance and needed to remedy that noncompliance, yet refused to do so.

The Actual or Potential Injury:

20. Respondent’s conduct in ignoring his agreement and the Court’s Judgment and Order caused injury to the profession and the legal system. The foundation of our profession and legal system is compliance with the rules and mandates of the Court. For an attorney to evince such a casual attitude toward his agreements and an Order of the Court undermines the basis upon which we derive our moral and actual authority. Further, Respondent’s actions caused additional work by Bar Counsel, the Disciplinary Clerk and the Court.

21. There was also the potential for injury in that Respondent was not getting the assistance from the programs (LOMAP and EEP) that could help him avoid the problems that brought him into the disciplinary process originally (failing to respond to client demands).

Aggravating and Mitigating Factors

Aggravating Factors:

22. *Standard 9.22(a)*, prior disciplinary offenses.

In the matter that brought Respondent before the disciplinary process originally, Respondent was found to have violated Rule 42, Ariz.R.Sup.Ct., specifically ER's 1.15 and 1.16 and Rule 53(f) for not responding to the demands of his client and being late in responding to the Bar on the charge.

23. *Standard 9.22(c)*, pattern of misconduct.

Respondent is repeating the conduct which got him in trouble originally.

24. *Standard 9.22(d)*, multiple offenses.

Respondent violated two of the conditions of his probation.

Mitigating Factors:

25. Respondent failed to prove any mitigating factors or give a satisfactory explanation to the why of his failure to abide by the terms of his probation. Respondent was given time after the hearing in this matter to file a Post Hearing Memorandum with mitigating factors and his own proportionality cases, but he did not do so.

PROPORTIONALITY REVIEW

26. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is “an imperfect process” because no two cases are alike, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *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.
27. In this case the State Bar is asking that Respondent be suspended for six months and one day and cites to the following cases to support that recommendation.¹
28. In *In re Brown*, SB-08-0143-D (2008), Brown was suspended for six months and one day with two years probation upon reinstatement for her failure to comply with the terms of her probation. Brown had previously been censured and placed on probation on the underlying matter. Brown had “failed to cooperate with the State Bar with neither the specific requirements of the Judgment and Order nor the spirit of the Judgment and Order.” Specifically, Brown refused to sign an addendum to a Member’s Assistance Program contract, refused to sign a consent and waiver form for MAP to obtain access to Brown’s physician reports, refused to sign a LOMAP contract, and refused to pay LOMAP fees. There were no

¹ At the conclusion of the hearing on this matter, this Hearing Officer explained to Respondent the importance of submitting a post hearing memorandum citing his own proportionality cases. Respondent indicated that he intended to, however he did not do so.

aggravating or mitigating factors listed. Brown was sanctioned for violating Rule 42, Ariz.R.Sup.Ct., specifically ER 8.1 and Rule 53(e).

29. In *In re Barfield*, SB-08-0064-D (2008), Barfield was suspended for six months and one day for his failure to comply with probation terms. In the underlying disciplinary matter, Barfield was censured and placed on one year of probation. Barfield's terms of probation were to maintain malpractice insurance and complete EEP, which he failed to do. Barfield was found to have acted with a knowing mental state when he failed to maintain malpractice insurance and complete EEP. There were four aggravating factors: 9.22(a) prior disciplinary offense, 9.22(d) multiple offenses, 9.22(g) refusal to acknowledge the wrongful nature of his misconduct, and 9.22(i) substantial experience in the practice of law. There were no mitigating factors. Barfield was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ER 8.1(b) and Rules 53(d), 53(e), and 53(f).
30. In *In re Casper*, SB-06-0176-D (2007), Casper was suspended for six months and one day after failing to comply with probation. Casper was originally placed in the State Bar's diversion program and ordered to participate in the State Bar's LOMAP and MAP programs. Casper failed to return a signed copy of the Memorandum of Understanding ("MOU") concerning both LOMAP and MAP. The Probable Cause Panelist subsequently issued an informal reprimand and probation order based in part on Casper's failure to sign and return the MOU. Casper then failed to comply with the probation order by failing to contact the State Bar to schedule an assessment, despite receiving the Bar's letters urging him to do so. Casper was found to have acted with a knowing mental state. There were

two aggravating factors: 9.22(c) pattern of misconduct and 9.22(e) bad faith obstruction of the disciplinary proceeding. Casper was sanctioned for violation of Rule 53(e), Ariz.R.Sup.Ct.

RECOMMENDATION

31. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice, and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *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).
32. 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).
33. This Hearing Officer found Respondent to be personable and a likable person. He seems to have good intentions and appears to be sincere. This Hearing Officer is well aware of the difficulty of obtaining and importance of keeping a license to practice of law so the sanction sought by the State Bar seemed somewhat harsh given that Respondent's conduct caused no actual damage. However, several factors have weighed on the side of accepting and recommending to the Commission the State Bar's recommendation of a suspension.
34. The ABA *Standards* imply that "knowing" behavior is going to be treated more severely than "negligent" behavior. *Standard* 8.1 could be read to call for

disbarment in these proceedings. Respondents conduct was “knowing” and was the same or similar as the conduct that earned him a Censure previously. After considering the examples given in the *ABA Standards*, Respondent’s conduct is not quite as serious, nor fraught with the same degree of harm.

35. A review of Respondent’s original case shows that he failed to respond to his client’s demands for his file and then, after several representations that he had given the client his file, did not comply. It was only later that Respondent finally gave his client the requested file. Additionally, in the original action, Respondent was asked by Bar Counsel to provide certain other information and Respondent was late in providing that information as well. Respondent was given several months² to prepare for the opportunity of LOMAP and MAP in these proceedings, but Respondent failed to do so within the 30 and 20 day time period specified. Then, even after two reminders by the Director of LOMAP, Respondent still failed to contact these programs. It was only after the Notice of Noncompliance was filed on July 30, 2009, that Respondent contacted Ms. Bahr on August 12, 2009, and left a message that he had called.
36. Thereafter, at the last minute after this matter had already been set for approximately two weeks and was pending three days hence, Respondent tried to have the matter continued. Finally, Respondent failed to file any written response to the Notice of Noncompliance and failed at the hearing in this matter to give any reasonable explanation for why he did not comply with the Court’s Judgment and Order.

² From the date of signing the agreement, November 29, 2008, to the Court’s Judgment and Order on June 1, 2009.

37. Respondent has shown a remarkably cavalier attitude toward his responsibility to the profession and the Court. Where this cavalier attitude comes from could not be determined by this Hearing Officer. As stated, Respondent is personable and seems well intended but lacks focus and a sense of responsibility. Respondent's casual attitude toward his client's desires and this Court's orders bodes very badly for Respondent and potentially the public in the future unless he has a significant change in his work habits and sense of obligation toward his clients and this profession. After considering Respondent's conduct, the *ABA Standards* and other cases with similar facts, it is with reluctance but certainty that this Hearing Officer recommends that:

1. Respondent be suspended from the practice of law for six months and one day;
2. Should Respondent seek and be granted reinstatement to the practice of law, it is recommended that Respondent be placed on probation for two years under terms and conditions to be determined at the time of reinstatement. The terms, however, should include participation in the State Bar's Law Office Management Program ("LOMAP") including the use of a practice monitor, and attendance at the Bar's EEP Program. Respondent shall be responsible for any costs associated with LOMAP;
3. Respondent shall pay all costs and expenses of this disciplinary proceeding, including the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Disciplinary Commission and the Supreme Court of Arizona.

DATED this 1st day of October, 2009.

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

Original filed with the Disciplinary Clerk
this 1st day of October, 2009.

Copy of the foregoing mailed
this 1st day of October, 2009, to:

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