

FILED

JUN 09 2009

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *MMG*

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

Scott K. Risley,
Bar No. 015268

Respondent.

No. 07-0992

HEARING OFFICER'S REPORT
(AMENDED)

(Assigned to Hearing Officer 8W,
Thomas M. Quigley)

The undersigned hearing officer submits this report and recommends acceptance of the parties' agreement for discipline. This amended report is submitted to correct and clarify the terms of probation.

I. PROCEDURAL HISTORY

The State Bar filed its one count complaint in this matter on July 18, 2008. Respondent Scott K. Risley ("Respondent") filed his Answer on August 18, 2008. The parties filed a first Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on December 17, 2008. The parties tentatively agreed to a ninety day suspension, with probation and conditions to be imposed upon reinstatement. This hearing officer recommended modification of the Agreement for Discipline by consent by report dated February 3, 2009 (recommending censure). The parties filed a Modified Tender of Admissions and Agreement for Discipline by Consent on April 2, 2009 (the "Agreement") and a Modified Joint Memorandum in Support of the Modified Tender of Admissions and Agreement for Discipline by Consent on April 2, 2009 (the "Joint Memoradum") agreeing to a 30 day suspension, with probation and conditions to be imposed upon reinstatement.

1 **II. FACTS¹**

2 1. Respondent was a lawyer licensed to practice law in the state of Arizona,
3 having first been admitted to practice in Arizona on October 23, 1993, at the time
4 relevant to this report.

5 **COUNT ONE (File no. 07-0992)**

6 2. In September 2000, Open Inn, Inc. ("Open Inn"), a non-profit organization,
7 hired Mud & Stud, Inc. ("Mud & Stud") as a general contractor for a construction
8 project in Prescott, Arizona.

9 3. In September 2001, Respondent began representing Open Inn on a *pro bono*
10 basis. Respondent was never paid for any of the legal services he provided to Open Inn.

11 4. On December 5, 2001, Douglas Ekren ("Ekren"), an employee of Mud &
12 Stud, notified the City of Prescott of a change in general contractors from Mud & Stud
13 to Walker Development in the construction project.

14 5. On December 19, 2001, John R. Thornton ("Thornton"), Mud & Stud's
15 attorney, wrote a letter to the City of Prescott informing the City that Mud & Stud had
16 suspended work on the construction project. The letter stated in part, "[u]nless and until
17 further written notice Mud & Stud shall take no responsibility for any construction, nor
18 any contract, nor subcontract, performed by or for Open Inn." The December 19th letter
19 also stated that Ekren was no longer employed by Mud & Stud and had no authority to
20 contract or act under Mud & Stud's licenses or permits.

21 6. Thornton did not provide a copy of this letter to the City to Respondent.

22 7. Also On December 19, 2001, Thornton wrote a second, separate letter to
23 Respondent in which Thornton stated that Mud & Stud was "no longer on the job."

24 8. International Business Mercantile Reassurance Company ("International")
25 issued a statutory contractor's license bond ("bond") in favor of Mud & Stud that took
26 effect on or about December 27, 2001.

27
28 ¹ The following facts have been conditionally admitted and form the basis for the hearing
officer's recommendation. *See* Agreement.

1 9. Respondent did not receive a copy of Ekren's December 5, 2001 letter to
2 the City nor the Thornton December 19, 2001 letter to the City. Ekren continued to
3 work on the Open Inn job after December 19, and neither Respondent nor Open Inn
4 were aware that Ekren had submitted the December 5, 2001 letter to the City. Open Inn
5 did not give Ekren permission to submit the December 5 letter to the City.

6 10. On December 31, 2001 Respondent and his wife began divorce
7 proceedings.

8 11. On January 3, 2002, Respondent wrote to Thornton acknowledging receipt
9 of the letter December 19 letter from Thornton to Respondent on December 19, 2001
10 (but not the separate letter Thornton wrote to the City of Prescott on that same day).
11 Respondent's letter also acknowledged Mud & Stud was no longer the general
12 contractor on the construction project.

13 12. After Respondent's January 3, 2002 letter, Ekren continued to work on the
14 Open Inn job.

15 13. On January 7, 2002, Respondent filed a complaint on behalf of Open Inn in
16 the Yavapai Superior Court, CV 2002-0012, against Mud & Stud, International, and
17 other parties involved in the construction project. In the complaint, among other causes
18 of action, Respondent alleged a surety liability claim against International based upon
19 the bond.

20 14. On March 5 and 13, 2002, Respondent spoke with Edward Rubacha
21 ("Rubacha"), counsel for International. Rubacha asked Respondent to reconsider
22 naming International as a party since International's bond became effective after the
23 actions alleged in Respondent's complaint took place.

24 15. On March 21, 2002, Rubacha filed International's answer to the complaint
25 in CV 2002-0012.

26 16. On March 25, 2002, Respondent caused a subpoena to be issued to the City
27 of Prescott asking for a complete copy of all documents held by the City related to the
28 Open Inn project.

1 17. On March 27, 2002, Rubacha mailed Respondent a letter requesting
2 documentation supporting a claim against International. Rubacha also requested an
3 immediate dismissal if Open Inn had no documentation showing liability on
4 International's part.

5 18. On June 11, 2002, Rubacha mailed Respondent a letter requesting Open
6 Inn's initial disclosure statement.

7 19. On June 18, 2002, Rubacha mailed Respondent a letter requesting Open
8 Inn's initial disclosure statement.

9 20. On July 1, 2002, Respondent mailed Open Inn's initial disclosure statement
10 pertaining to International to Rubacha.

11 21. On July 16, 2002, Respondent spoke by telephone with the Prescott City
12 Attorney regarding the subpoena served March 25, 2002. The City Attorney advised
13 that the City had at first misplaced the subpoena and then discovered that the Open Inn
14 file itself had been misplaced. The City never answered this subpoena.

15 22. On August 13, 2002, Rubacha filed a motion for sanctions and to compel
16 disclosure against Respondent. The motion requested the trial court impose sanctions
17 on Respondent pursuant to Rule 11, on the basis that Respondent provided an untimely
18 and inaccurate disclosure statement.

19 23. Rubacha attached a copy of Ekren's December 5, 2001 letter to the City to
20 International's Motion for Sanctions as well as a copy of Thornton's December 19,
21 2001 letter to the City. This was the first time that Respondent had been provided a
22 copy of those letters.

23 24. On August 15, 2002, Respondent and his wife filed for bankruptcy
24 protection under Chapter 7.

25 25. On or about August 23, 2002, Respondent filed Open Inn's Response in
26 Opposition to Motion for Sanctions and Motion to Compel Disclosure. In Respondent's
27 response, he argued that he did not have Ekren's December 5th letter or the separate
28 letter written by Thornton on December 19, 2001 to the City of Prescott (but not copied

1 to Respondent) until International attached those letters to its Motion for Sanctions.

2 26. On August 23, 2002, Respondent filed a motion to dismiss International
3 from the suit based upon documentation first disclosed by International as attachments
4 to the August 13, 2002 Motion for Sanctions.

5 27. On October 8, 2002, the Superior Court held a hearing concerning the
6 Motion for Sanctions.

7 28. On December 9, 2002, the Superior Court granted the Motion for Sanctions
8 against Respondent.

9 29. In the Court's December 9, 2002, minute entry, the Court found
10 Respondent failed to properly investigate and analyze Open Inn's claim against
11 International prior to filing the complaint. The Court also found Respondent failed to
12 prepare disclosure statements in a timely and accurate manner. The Court ordered
13 Respondent to pay \$2,500 in attorney's fees to International.

14 30. On February 6, 2003, Respondent and his wife received a discharge under
15 Chapter 7 of the Bankruptcy Code. However, Respondent's bankruptcy matter did not
16 discharge the court ordered sanction.

17 31. On February 18, 2003, the Court entered a final judgment regarding the
18 imposition of sanctions against Respond.

19 32. On March 17, 2003, Respondent filed a Notice of Appeal regarding the
20 sanctions.

21 33. On December 4, 2003, the Court of Appeals affirmed the Superior Court's
22 Rule 11 sanction in a memorandum decision.

23 34. On December 12, 2003, Rubacha wrote to Respondent demanding payment
24 of the sanction. Respondent failed to respond to the letter or pay the sanction.

25 35. Respondent did not file a motion for reconsideration or a petition for review
26 of the decision of the Court of Appeals within the prescribed time.

27 36. On January 6, 2004, the Court of Appeals issued a mandate commanding
28 the Superior Court to take all actions consistent with the memorandum decision.

1 37. On January 16, 2004, Rubacha wrote to Respondent demanding payment of
2 the sanction. Respondent failed to respond to the letter or pay the sanction.

3 38. On September 16, 2004, Rubacha wrote to Respondent demanding payment
4 of the sanction. Respondent failed to respond to the letter or pay the sanction.

5 39. Between September 16, 2004 and June 5, 2007, Rubacha took no other
6 action to enforce the Superior Court's February 18, 2003 judgment and did not contact
7 Respondent regarding the judgment.

8 40. Between September 16, 2004 and June 5, 2007, Respondent did not contact
9 Rubacha regarding the judgment.

10 41. On June 5, 2007, Rubacha filed a bar charge against Respondent. A bar
11 investigation subsequently began.

12 42. On September 20, 2007, Respondent submitted his first response in the bar
13 investigation. In the submission, Respondent admits not paying the court ordered
14 sanction.

15 43. Respondent contends he was and remains financially incapable of paying
16 the \$2,500 Court ordered sanction. Respondent provided bankruptcy, medical billing
17 and tax lien documents in his September 20, 2007 response.

18 44. The judgment expired on February 18, 2008.

19 45. Respondent has not paid the court ordered sanction.

20 46. Currently, Respondent is an associate history professor and does not
21 actively practice law.

22 **III. DISMISSED ALLEGATIONS**

23 No allegations are dismissed as part of the tender.

24 **IV. RESTITUTION**

25 Respondent has not paid the sanction or interest thereon.

26 **V. THE APPROPRIATE SANCTION**

27 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
28 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d

1 1315, 1320 (1993). Lawyer discipline should also protect the public, the profession and
2 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet
3 another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*,
4 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

5 In imposing discipline, it is appropriate to consider the facts of the case, the
6 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards")
7 and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178
8 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

9 A. ABA STANDARDS

10 The *Standards* are designed to promote consistency in the imposition of
11 sanctions by identifying relevant factors that courts should consider and then applying
12 these factors to situations where lawyers have engaged in various types of misconduct.
13 *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an
14 appropriate sanction in this matter. The Court and Commission consider the *Standards* a
15 suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re*
16 *Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994).

17 In determining an appropriate sanction, both the Court and the Commission
18 consider the duty violated, the lawyer's mental state, the actual or potential injury
19 caused by the misconduct and the existence of aggravating and mitigating factors. *In re*
20 *Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); *Standard* 3.0.

21 1. The Duty Violated

22 Respondent violated a duty owed to the legal profession and the duty of
23 diligence. Respondent conditionally admits his conduct violates ERs 1.3, 3.1, 3.2,
24 3.4(c), 8.4(d) and Ariz. R. Sup. Ct. 53(c).

25 2. Respondent's Mental State

26 The admitted facts demonstrate that Respondent acted with a knowing mental
27 state concerning the duty owed to the profession. The admitted facts demonstrate that
28 Respondent acted with a negligent mental state concerning the duty of diligence.

1 admitted to practice law on October 23, 1993.

2 The parties agreed, and this hearing officer finds, four mitigating factors.

3 Standard 9.32(b) Absence of a Dishonest or Selfish Motive: Respondent's initial
4 filing and his continuing inability to pay the financial sanction imposed against him as a
5 result of his personal financial condition were not motivated by selfishness or
6 dishonesty.

7 Standard 9.32 (c) Personal or Emotional Problems: At the same time
8 Respondent was handling Open Inn's case, he and his wife were involved in a divorce
9 action. The divorce, as well as Respondent's personal bankruptcy, constitutes personal
10 or emotional problems that distracted Respondent from his professional duties.

11 Standard 9.32(e) Full and Free Disclosure to a Disciplinary Board or Cooperative
12 Attitude Toward Proceedings: Respondent provided full and free disclosure and has
13 cooperated in good faith with the Bar's investigation and these proceedings.

14 Standard 9.32(j) Delay in Disciplinary Proceedings: A majority of the conduct
15 in this disciplinary matter occurred in late 2001 to 2002.

16 On balance, the aggravating and mitigating factors militate in favor of a short
17 suspension rather than a longer.

18 B. PROPORTIONALITY REVIEW

19 To have an effective system of professional sanctions, there must be internal
20 consistency, and it is appropriate to examine sanctions imposed in cases that are
21 factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the
22 discipline in each case must be tailored to the individual case, as neither perfection nor
23 absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In*
24 *re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207,
25 660 P.2d 454, 458 (1983)).

27 ² The parties also submitted, in mitigation *Standard 9.32(m) Remoteness of Prior Offenses*,
28 which this hearing officer declines to find.

1 The parties submitted several cases for proportionality review, of which, *In re*
2 *Levy*, SB-07-0140-D (2007) is sufficient to demonstrate proportionality. In *Levy*, the
3 respondent was suspended for thirty days and ordered to participate in the State Bar's
4 Ethics Enhancement Program after he failed to comply with numerous court orders.
5 Specifically, Levy failed to timely pay a sanction, failed to self-report his misconduct to
6 the State Bar, and failed to file an Affidavit of Compliance. Levy further failed to
7 maintain respect for the court by expressing his lack of respect and regard for a judge
8 with whose rulings in which he disagreed. There were four aggravating factors: 9.22(c)
9 pattern of misconduct, 9.22(d) multiple offenses, 9.22(g) refusal to acknowledge
10 wrongful nature of conduct, and 9.22(i) substantial experience in the practice of law.
11 There were five mitigating factors: 9.32(a) absence of a prior disciplinary record,
12 9.32(b) absence of a dishonest or selfish motive, 9.32(e) full and free disclosure to
13 disciplinary board or cooperative attitude toward proceedings, 9.32(g) character or
14 reputation, and 9.32(k) imposition of other penalties or sanctions.

15 **VI. RECOMMENDATION**

16 Based on the admitted facts, the duties violated, Respondent's mental state, the
17 actual injury to International, the aggravating and mitigating factors, and the
18 proportionality review, it is recommended that:

- 19 1. Respondent shall be suspended from the practice of law for thirty (30) days;
- 20 2. Respondent shall pay all costs incurred by the State Bar in bringing these
21 disciplinary proceedings. In addition, Respondent shall pay all costs
22 incurred by the Disciplinary Commission, the Supreme Court of Arizona,
23 and the Disciplinary Clerk's Office in this matter;
- 24 3. Respondent shall pay restitution in the amount of \$2,500 to International
25 within 30 days of the judgment and order of the Supreme Court;
- 26 4. Upon reinstatement, if Respondent returns to the active practice of law
27 and/or represents a client in a legal matter, Respondent shall be placed on
28 probation for a period of two (2) years under the following terms and

1 conditions:

- 2 a. Respondent shall contact the Director of LOMAP at (602) 340-7313
3 within 10 days of returning to the active practice of law and/or
4 agreeing to represent a client in a legal matter. The active practice of
5 law shall include the opening of a law office, holding himself out as a
6 practicing lawyer, and/or advertising, soliciting or consulting with
7 prospective clients, agreeing formally or informally to represent any
8 person in any legal action, and/or any act defined as the practice of
9 law by the Rules of the Supreme Court. Respondent shall submit to
10 a LOMAP examination of his office's procedures, including, but not
11 limited to, compliance with ERs 1.3, 3.1, 3.2, 3.4(c), 8.4(d), and
12 Ariz. R. Sup. Ct. 53(c), The Director of LOMAP shall develop
13 "Terms and Conditions of Probation", and those terms shall be
14 incorporated herein by reference. The probation period will begin to
15 run at the time of the judgment and order and will conclude two
16 years from the date on which Respondent signs the "Terms and
17 Conditions of Probation." Respondent shall be responsible for any
18 costs associated with LOMAP.
- 19 b. Respondent shall, within 5 days of returning to the active practice of
20 law, as referenced above, notify the State Bar's Lawyer Regulation
21 Department that he has done so.
- 22 c. Respondent shall refrain from engaging in any conduct that would
23 violate the Rules of Professional Conduct or other rules of the
24 Supreme Court of Arizona.

25 In the event that Respondent fails to comply with any of the foregoing probation
26 terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall
27 file a Notice of Noncompliance with the imposing entity, pursuant to Ariz. R. Sup. Ct.
28 60(a)(5). The imposing entity may refer the matter to a hearing officer to conduct a

1 hearing at the earliest practicable date, but in no event later than 30 days after receipt of
2 notice, to determine whether a term of probation has been breached and, if so, to
3 recommend an appropriate sanction. If there is an allegation that Respondent failed to
4 comply with any of the foregoing terms, the burden of proof shall be on the State Bar of
5 Arizona to prove noncompliance by a **preponderance of the evidence**.

6
7 **DATED** this 9th day of June, 2009.

8
9 Thomas M. Quigley
10 Thomas M. Quigley
11 Hearing Officer 8W

12 Original filed this 9th day of June,
13 2009 with the Disciplinary Clerk of the Supreme Court

14 Copy of the foregoing mailed this 10th
15 day of June, 2009, to:

16 Jason B. Easterday
17 Staff Bar Counsel
18 State Bar of Arizona
19 4201 N. 24th Street, Suite 200
20 Phoenix, Arizona 85016-6288

21 Scott K. Risley
22 P. O. Box 2471
23 Prescott, AZ 86302
24 Respondent

25
26
27
28
By: Evelyn Lopez