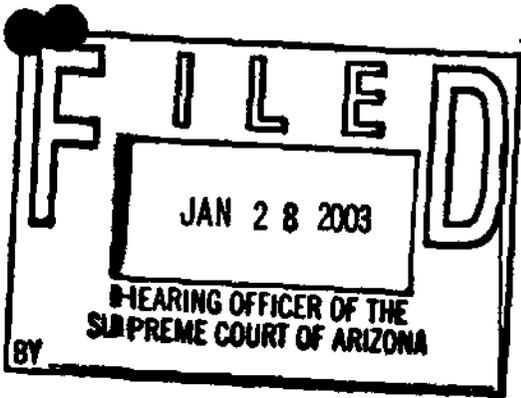


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Patricia E. Nolan — 009227  
Hearing Officer 7Y  
2702 North Third Street, Suite 3000  
Phoenix, Arizona 85004-4607  
(602) 280-1500



BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
DAVID W. COUNCE, )  
Bar No. 010822 )  
)  
Respondent )

No. O1-2359

HEARING OFFICER'S REPORT  
AND RECOMMENDATION

PROCEDURAL HISTORY

A Probable Cause Order was filed in this matter on August 19, 2002, a Complaint was filed on September 12, 2002 and served by mail on September 13, 2002. Respondent did not file an answer and, therefore, the Disciplinary Clerk filed a Notice of Default on October 15, 2002 and an Entry of Default on November 5, 2002.

Neither party requested to be heard in aggravation or mitigation and this Hearing Officer filed an Order on December 3, 2002 ordering that the parties submit simultaneous memoranda on or before December 17, 2002, at which time the matter would be deemed admitted. The State Bar filed its Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions on December 16, 2002. Respondent filed nothing.

**FINDINGS OF FACT**

1  
2 Given the entry of Respondent's default, the facts set forth in the Complaint have been  
3 deemed admitted by Respondent.

4  
5 1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona,  
6 having been admitted on October 25, 1986.

7  
8 2. Respondent filed a complaint on behalf of Anthony Lanzone in the Maricopa County  
9 Superior Court on February 24, 2000, as case number CV 2000-003474 (the "Lanzone  
10 Complaint").

11  
12 3. Respondent was summarily suspended from the practice of law for non-payment of  
13 dues on April 20, 2001 but was reinstated on April 27, 2001.

14  
15 4. Subsequent to the filing of the Lanzone Complaint, Mr. Lanzone wrote letters to  
16 Respondent and sent them to Respondent's fax number or by certified mail. Respondent's office  
17 confirmed the receipt of these letters as well as Mr. Lanzone's telephone calls. Mr. Lanzone also  
18 left messages at Respondent's home. Respondent failed to respond to Mr. Lanzone's many  
19 requests for communication.

20  
21 5. When Mr. Lanzone failed to hear from Respondent, he checked the Maricopa County  
22 Superior Court website and located the docket sheet for his case, discovering that the Lanzone  
23 complaint had been dismissed on June 6, 2001.

24  
25 6. By letter dated October 3, 2001, Mr. Lanzone informed Respondent that he was fired  
26 and asked for his file back. Respondent failed to return Mr. Lanzone's file.

27  
28 7. Stanley J. Marks took over representation of Mr. Lanzone and made a request to  
Respondent to turn over Mr. Lanzone's file. Respondent never responded to Mr. Marks.

1 8. On December 3, 2001, the State Bar received a charge against Respondent from Mr.  
2 Lanzone.

3 9. On December 14, 2001, the State Bar sent Respondent a letter with Mr. Lanzone's  
4 allegations. Respondent failed to respond.  
5

6 10. On January 31, 2002, the State Bar sent a second letter to Respondent asking him to  
7 respond to Mr. Lanzone's allegations. Respondent failed to respond to the second letter.

8 11. Bar counsel sent an email to Respondent's email address on file with the State Bar and  
9 left a telephone message on Respondent's voicemail. Respondent failed to contact bar counsel.  
10

11 12. Respondent was summarily suspended from the practice of law for non-compliance  
12 with Mandatory Continuing Legal Education on March 22, 2002 and remains suspended as of this  
13 writing.

14 **CONCLUSIONS OF LAW**

15 This Hearing Officer finds that there is clear and convincing evidence that Respondent violated  
16 Rule 42, Ariz.R.S.Ct., in the following ways:  
17

18 a. ER 1.1: Respondent failed to provide Mr. Lanzone with competent representation in  
19 that Respondent did not adequately prosecute Mr. Lanzone's case.

20 b. ER 1.2: Respondent failed to abide by Mr. Lanzone's decisions concerning the  
21 representation and failed to consult with Mr. Lanzone before allowing his case to be  
22 dismissed.  
23

24 c. ER 1.3: Respondent failed to act with reasonable diligence and promptness in  
25 representing Mr. Lanzone.

26 d. ER 1.4: Respondent failed to keep Mr. Lanzone reasonably informed about the  
27 representation. Respondent failed to explain matters to the extent reasonably necessary  
28 so that Mr. Lanzone could make informed decisions concerning the representation.

- 1 e. ER 1.16(d): Respondent failed to take steps reasonably practicable to protect Mr.  
2 Lanzone's interest following the termination of Respondent in that he failed to return Mr.  
3 Lanzone's file to him or to his new attorney upon request that Respondent do so.  
4  
5 f. ER 3.2: Respondent failed to expedite the Lanzone litigation consistent with the  
6 interests of Mr. Lanzone.  
7  
8 g. ER 8.1 and Supreme Court Rule 51(h) and (i): Respondent failed to respond to lawful  
9 demands for information from the State Bar, failed to furnish information to or respond  
10 promptly to a request from bar counsel, and failed to cooperate with State Bar staff.

#### 11 ABA STANDARDS

12 ABA *Standard 3.0* provides that four criteria should be considered when imposing discipline:  
13 (1) the duty violated; (2) the lawyer's mental state, (3) the actual or potential injury caused by the  
14 lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

15 This Hearing Officer considered *Standards 4.42 and 7.2* in determining the appropriate sanction  
16 warranted by Respondent's conduct in this case. These standards provide that:

17 4.42 Suspension is generally appropriate when:

- 18 (a) a lawyer knowingly fails to perform services for a client and causes  
19 injury or potential injury to a client; or  
20 (b) a lawyer engages in a pattern of neglect and causes injury or potential  
21 injury to a client.

22 7.2. Suspension is generally appropriate when a lawyer knowingly engages in conduct  
23 that is a violation of a duty owed to the profession, and causes injury or potential  
24 injury to a client, the public, or the legal system.

25 Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client  
26 or when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession  
27 and causes injury or potential injury to a client, the public, or the legal system. In this case, Mr.  
28 Lanzone wrote letters to Respondent and sent them to Respondent's fax number or by certified mail.

1 Respondent's office confirmed the receipt of these letters as well as Mr. Lanzone's telephone calls.  
2 Mr. Lanzone also left messages at Respondent's home. Respondent failed to respond to Mr.  
3 Lanzone's many requests for communication. Respondent allowed the Lanzone Complaint to be  
4 dismissed and then failed to inform Mr. Lanzone of the dismissal. Respondent failed to return Mr.  
5 Lanzone's file to either Mr. Lanzone or to Mr. Lanzone's new counsel. Respondent also failed to  
6 participate in the disciplinary proceedings. There was no suggestion made by Respondent that such  
7 actions were negligent and the undersigned Hearing Officer hereby determines that Respondent's  
8 actions were taken knowingly.  
9

10 After misconduct has been established, aggravating and mitigating circumstances pursuant to  
11 Standards 9.22 and 9.32 are to be considered in determining sanctions. Although no aggravation/  
12 mitigation hearing was requested by either party, the undersigned Hearing Officer finds the following  
13 factors should be considered.  
14

15 In aggravation:

16 *Standard 9.22(e)* bad faith obstruction of the disciplinary proceeding by  
17 intentionally failing to comply with the rules or orders of  
18 the disciplinary agency. Respondent utterly failed to  
19 respond to repeated requests for information and to  
20 participate in the formal disciplinary process.  
21

22 *Standard 9.22(g)* refusal to acknowledge wrongful nature of conduct  
23 *Standard 9.22(i)* substantial experience in the practice of law. Respondent  
24 has been a member of the State Bar for sixteen years.  
25

26 In mitigation:

27 *Standard 9.32(a)* absence of a prior disciplinary record  
28

## PROPORTIONALITY REVIEW

1  
2 The Supreme Court has held that, to achieve proportionality when imposing discipline and to  
3 achieve the purposes of discipline, in each situation such discipline must be tailored to the individual  
4 facts of the case. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz.  
5 49, 847 P.2d 94 (1993). However, because sanctions against lawyers must have internal consistency  
6 to maintain an effective and enforceable system, cases that are factually similar are particularly  
7 instructive. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988).

8  
9 The Hearing Officer found three cases critical to the determination of an appropriate sanction  
10 in this case. In *Matter of Kobashi*, 177 Ariz. 584, 870 P.2d 402 (1994), Kobashi was suspended for  
11 six months and one day for failing to diligently pursue and handle a client's case, for failing to file  
12 the client's lawsuit before the statute of limitations ran, and for failing to participate in the  
13 disciplinary proceedings. Kobashi was found to have violated ERs 1.1, 1.3, 1.4 and 8.1(b), and  
14 Supreme Court Rules 51(h) and (i).

15  
16 In *Matter of Yates*, SB-01-0127-D (2001), Yates was suspended for six months and one day for  
17 failing to act diligently by failing to file a client's petition in a civil action. Yates failed to return his  
18 client's telephone calls and failed to tell his client that her petition had not been filed. Yates failed  
19 for a period of time to return the client's file and he failed to participate in the disciplinary  
20 proceedings. Yates was found to have violated ERs 1.1, 1.3, 1.4, 1.16, 3.2, 8.1(b) and 8.4, and  
21 Supreme Court Rules 51(h) and (i). There were four aggravating factors and one mitigating factor.

22  
23 In *Matter of Blaine*, SB-02-0071-D (2002), Blaine was suspended for six months and one day  
24 and placed on two years probation for failing to consult with clients concerning the objectives of  
25 their representation, failing to abide by the clients' decisions, failing to act with reasonable diligence,  
26 failing to communicate with his clients, and failing to cooperate in the disciplinary process. Blaine  
27  
28

1 was found to have violated ERs 1.2, 1.3, 1.4, 8.1 and 8.4, and Supreme Court Rules 51(h) and (i).  
2 There were three aggravating factors and two mitigating factors.

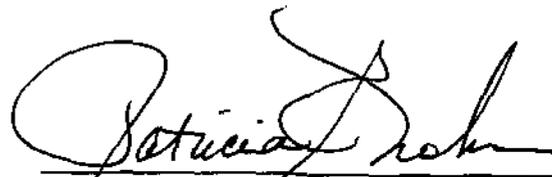
### 3 RECOMMENDATION

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter  
5 future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1 315, 1320 (1993). It is also  
6 the objective of lawyer discipline to protect the public, the profession and the administration of  
7 justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public  
8 confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

9  
10 Upon consideration of the facts, application of the *Standards*, including aggravating and  
11 mitigation factors, and a proportionality analysis, this Hearing Officer recommends that:

- 12 1. Respondent be suspended from the practice of law for six months and one day after he  
13 is otherwise eligible for reinstatement from his current suspension for failure to comply  
14 with mandatory continuing legal education;
- 15 2. If Respondent successfully applies for reinstatement, he be placed on probation for two  
16 years following such reinstatement with a practice monitor and full compliance with a  
17 LOMAP program (the terms of which should be determined upon application for  
18 reinstatement); and
- 19 3. Respondent be ordered to pay the costs and expenses incurred in these disciplinary  
20 proceedings.

21  
22  
23 DATED this 28<sup>th</sup> day of January, 2003.



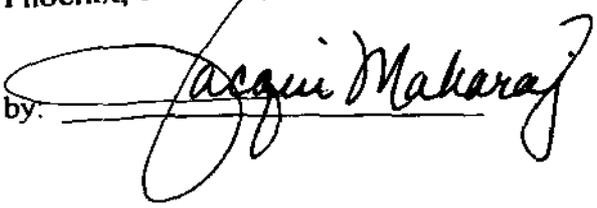
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26 Patricia E. Nolan  
27 Hearing Officer 7Y  
28

1 Original, filed with the Disciplinary Clerk  
2 this 28<sup>th</sup> day of January, 2003.

3 Copy of the foregoing mailed  
4 this 28<sup>th</sup> day of January, 2003, to:

5 David W. Counce  
6 Respondent  
7 7501 North 16<sup>th</sup> Street, Suite 200  
8 Phoenix, AZ 85020-4601

9 Shauna R. Miller  
10 Bar Counsel  
11 State Bar of Arizona  
12 111 West Monroe, Suite 1800  
13 Phoenix, AZ 85003-1742

14 by: 

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