

**FILED**

FEB 08 2005

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

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

IN THE MATTER OF A MEMBER ) No. 03-2158  
OF THE STATE BAR OF ARIZONA, )  
)  
MARTIN A. BIHN, )  
Bar No. 014338 )  
)  
RESPONDENT. ) **HEARING OFFICER'S REPORT  
AND RECOMMENDATION**

**A. PROCEDURAL HISTORY**

The State Bar filed its Complaint on July 23, 2004. Respondent filed his Answer on September 1, 2004. The parties filed a Joint Tender of Admissions and Agreement for Discipline by Consent ("Tender") and a Joint Memorandum in Support of Admissions and Agreement for Discipline by Consent ("Joint Memo") on November 30, 2004. The Hearing on this matter was also held on November 30, 2004.

**B. FINDINGS OF FACTS AND CONDITIONAL ADMISSIONS**

1. Introduction

To me, this case demonstrates how well the lawyer discipline process can work. If one first reads the Complaint, in which the State Bar seeks disbarment, and then the Tender, in which the parties conditionally agree to a 60 day suspension, one wonders what happened (or at least I did). What happened is that at the settlement conference, at the direct urging of Bar Counsel (who is to be commended in this regard), Respondent finally hired a lawyer. That lawyer and Bar Counsel then worked together to interview witnesses and learn the real facts, hire a professional (Dr. Jack Potts) to examine Respondent, and then to fashion a settlement that, in my opinion, serves the purposes of lawyer discipline.

1 I will not repeat the facts. They are well set out in the Tender. Instead, I will set the  
2 stage and then get to what I think are the main issues.

3 2. Will Respondent take the MAP program seriously this time?

4 In March of 2003, Respondent and the State Bar entered into an Order of Diversion  
5 (“Order”). Respondent requested this as an alternative to a sanction in connection with two bar  
6 complaints that had been filed against him, file numbers 02-0552 (Gerardi) and 02-0904  
7 (Huebner).

8 Q: (Mr. Braud) This lead to an order of diversion. Tell me about  
9 that.

10 A: (Respondent) I asked for diversion, and that was granted.

11 Q: Why did you ask for it?

12 A: I think I read the sheet that said diversion was available for  
13 something like this, and it was not—it was not a deceitful  
14 thing, and you can ask for diversion.

15 Q: What was the deal that you made in connection with diversion?

16 A: I didn't really make a deal. I don't know who I spoke with. I  
17 think I sent the letters in and requested it. Then came the map  
18 [sic] documents back. It wasn't like I sat and negotiated with  
19 somebody. It was—I got these documents, and I think it was  
20 Diane Ellis I dealt with.

21 Q: What did you understand the purpose of the program to be?

22 A: The purpose was, if I could complete this and get my practice  
23 back in line, then I wouldn't face a formal disciplinary hearing.

24 (T. p. 35, lines 14 through p. 36 lines 7)

25 The Order was based on some unspecified “evidence” that Respondent was suffering  
from depression in 2001 and 2002 when the underlying facts leading to those complaints  
occurred. The significant matter for our purposes is Hueber. The details of that case are set  
forth in the Tender. They involved Respondent's inability (because of depression) to respond

1 to discovery and motions in a Federal Court action.<sup>1</sup> It is basically the same conduct that led to  
2 the complaint by Mr. Haro in this case.

3 As required by the Order, Respondent entered into a MAP program. He did not take the  
4 program seriously, however (he really did not think he was depressed). He eventually obtained  
5 a letter from his physician dated August 26, 2003 (Exhibit 1 to the Hearing) which reads:

6  
7 Mr. Bihn is a patient of mine we have seen since 04/01/99. In May  
8 of 2002 he was seen at that time with some difficulties with insomnia,  
9 diagnosed with depression, was started on antidepressant medications  
10 at that time. He continued on these medications for a total of 9 to 10  
11 weeks, made some changes in his professional life, had time for some  
12 vacation and has felt well since that time. On further discussion with  
13 the patient today he has no depressive symptoms and really feels he is  
14 back to his normal self. No further treatment for this will be  
15 recommended at this time. If you have any further questions please  
16 don't hesitate to contact our office.<sup>2</sup>

17 The obvious question is whether Respondent is prepared to take the MAP program  
18 seriously this time. I asked:

19 Q. (Hearing Officer) What has changed between then and now?

20 A. (Respondent) What has changed? A couple of things. The  
21 practice has changed. I think my recognition of something has  
22 to change in terms of my medical care. I can't deny it or not do  
23 it. It has to happen. I have gone a year where I have worked  
24 closely with my partner, and I have not had these problems.

25 I don't know if this is how I'm supposed to feel or not, but I  
need to get this treatment, because that's the only thing I can do.  
I really limit what I do in terms of cases I can cover and stick  
with what I'm doing and do okay. That's what I'm trying to do.  
I have had this discussion with my wife about the medications  
and about therapy. This is not something I cannot do. It's got  
to happen.

Q. Is she supportive of your doing this?

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<sup>1</sup> Gerardi apparently involved a docketing issues which the parties agree, and I concur, is irrelevant to this case.

<sup>2</sup> During the Hearing, Dr. Potts testified that, in his opinion, the MAP program "failed miserably." (T. p.49, lines 3-4). He was especially critical of the program for accepting this one paragraph letter from a primary care physician.

1 A. Yes. She is upset I didn't come forward before.

2 Q. Do you blame her?

3 A. No. No, I don't.

4 T. 43, lines 1-19.

5 Dr. Potts also thinks that he now takes the situation more seriously than he did  
6 before. His testimony and the reasons for his conclusion are at T. 51, beginning at  
7 line 15. Particularly important to Dr. Potts is that Respondent now understands how  
8 important it is that he have help.

9 3. Will Respondent be honest in the future?

10 The central issue in the Haro matter involves Respondent's failure to disclose  
11 his malpractice to the partners of the Ryan, Woodrow & Rapp law firm when he left  
12 that firm in September of 2003. At the time the Complaint was filed, the State Bar  
13 thought Respondent did this for monetary gain. It turns out, however, this was not  
14 the case.

15 Q (Mr. Braud) Upon your departure from Ryan, Woodrow &  
16 Rapp, at this time did you understand the motivation of why  
17 you did not disclose to them the existence of the Harrow [sic]  
18 case?

19 A: (Respondent) Yes.

20 Q: Can you explain to Mr. Goldsmith what that was about.

21 A: I was scared, ashamed. I was all those things. I should have  
22 done it. I didn't. I'm not happy about it. I had concerns about  
23 what would happen and I disclosed earlier what had happened  
24 to me with the AZCOPS clients with Mr. Rapp. I didn't know  
25 what would happen. That was part of it. It is still not an  
excuse. I should have told him. The suggestion I did this to  
get the money—I mean, that cost a lot more than that to start  
the firm. The malpractice premium was not a motivating  
factor.

(T.31, lines 11-25)

During his examination of Dr. Potts, Bar Counsel specifically addressed the question of  
dishonesty in dealing with the law firm (T. 57, line 19 – T. 58, line 3). Concluding that his

1 depression had nothing to do with this, Dr. Potts discussed Respondent's personality traits that  
2 may have led to that behavior, but that these presented no insurmountable problem.

3 Counsel for the State Bar also addressed the issue of protecting the public:

4 Q. (Mr. Braud) Of course the question for me is primarily from the  
5 Bar's perspective. Our concern is protection of the public and  
6 going forward. Are these proposals that you put forward, are  
7 they going to assist Mr. Bihn with this trust issue, with the  
8 candor issue? Is that also going to help those issues, as far as  
9 you are concerned?

10 A. (Dr. Potts) I think they will. I think psychotherapy and  
11 counseling will help – also LOMAP and the probation. Just  
12 being aware of some of those judgmental issues we all make.  
13 "Whoa, I have to sit back and not be as fast to respond or to  
14 judge or whatever or stay as isolated as I was." I think the  
15 isolation contributed a lot. When you have colleagues to call up  
16 and ask, "What should I do," that's the first way to stay out of  
17 trouble. He didn't do that.

18 T. p. 59, line 13 to T. p. 60, line 2

19 It appears there were many reasons why Respondent did what he did. He was unhappy  
20 with the law firm and did not respect or trust its partners.<sup>3</sup> He was in denial. On balance, I  
21 conclude it was situational and is not a character defect.<sup>4</sup>

22 **C. CONDITIONAL ADMISSIONS**

23 Respondent conditionally admits that his conduct in Haro violated Rule. 42, Ariz. R. S.  
24 Ct., specifically: ER 1.2 (Scope of Representation), ER 1.3 (Diligence), ER 1.4  
25 (Communications), ER 3.2 (Expediting Litigation), 8.4(c) (Misconduct-involving dishonesty)  
and ER 8.4(d) (Misconduct-prejudicial to the administration of justice).

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<sup>3</sup> While the firm may have been a "snake pit" (see, for example, Exhibit 3, a letter from Respondent's current law partner who left at the same time), that does not excuse Respondent's conduct.

<sup>4</sup> At the Hearing, Respondent was nervous, candid, straightforward and made a good impression. I was particularly impressed with his commitment that something like this will not happen again.

1 **D. ABA STANDARDS**

2 The ABA *Standards* list the following factors to consider in imposing the appropriate  
3 sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury  
4 caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating  
5 circumstances. ABA *Standard* 3.0.

6 The ABA *Standards for Imposing Lawyer Sanctions* are designed to promote  
7 consistency in the imposition of sanctions by identifying relevant factors that courts should  
8 consider and then applying these factors to situations where lawyers have engaged in various  
9 types of misconduct. ABA *Standard* 1.3, Commentary. The Court and Commission consider  
10 the *Standards* a suitable guideline. *In re Peasley*, 427 Ariz. Adv. Rep. 23, 90 P.3d 764, §§ 23,  
11 33 (2004); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274 (1994); *In re Rivkind*, 164 Ariz.  
12 154, 157, 791 P.2d 1037, 1040 (1990).

13 According to the American Bar Association *Standards for Imposing Lawyer Sanctions*,  
14 ("ABA Standards") and *In re Cassalia*, 173 Ariz. 372, 843 P.2d 654 (1992), where there are  
15 multiple acts of misconduct, a lawyer should receive one sanction consistent with the most  
16 serious instance of misconduct, and the other acts should be considered as aggravating factors.  
17 Respondent engaged in a pattern of knowingly failing to diligently represent clients, not  
18 communicating with his clients and deceiving other members of his law firm. The ABA  
19 *Standards* identify the sanction for misconduct involving dishonesty that does not rise to the  
20 level of criminal activity as less than that for a knowing failure to exercise diligence and  
21 communicate with clients.  
22

23 Accordingly, the parties have agreed that the most serious misconduct in this case is  
24 Respondent's pattern of neglect of clients and his failure to communicate with them. ABA  
25

1 *Standard 4.4 (Lack of Diligence)* identifies appropriate sanctions for cases involving a  
2 lawyer's failure to act with reasonable diligence and promptness in representing a client and  
3 failing to communicate with a client.

4 *ABA Standard 4.42* provides:

5 Suspension is generally appropriate when:

6 (a) a lawyer knowingly fails to perform services for a client and causes injury or  
7 potential injury to a client, or

8 (b) a lawyer engages in a pattern of neglect and causes injury or potential injury  
9 to a client.

10 Respondent also engaged in deception of certain members of his law firm concerning  
11 the cases in which he failed to exercise diligence. *ABA Standard 5.1 Failure to Maintain*  
12 *Personal Integrity* identifies appropriate sanctions for cases involving a lawyer's engaging in  
13 conduct involving dishonesty, fraud, deceit, or misrepresentation. As Respondent's conduct  
14 in this matter did not rise to the level of a criminal act, the parties agree *ABA Standard 5.13*  
15 applies:

16 *ABA Standard 5.13* provides:

17 Reprimand [Censure in Arizona] is generally appropriate when a lawyer  
18 knowingly engages in any other conduct that involves dishonesty, fraud, deceit,  
19 or misrepresentation and that adversely reflects on the lawyer's fitness to  
20 practice law.

21 **E. AGGRAVATING AND MITIGATING FACTORS**

22 I also considered aggravating and mitigating factors in this case, pursuant to *Standards*  
23 *9.22* and *9.32*, respectively. The parties conditionally agreed that three aggravating factors  
24 apply and should be considered in this matter: (b) - dishonest or selfish motive; (c) - pattern of  
25 misconduct; and (d) - multiple offenses. I will accept this, but if the matter were to go to  
Hearing, I would need to give more thought to question of motive.

1 I agree with the parties that six factors are present in mitigation: (a) - absence of a prior  
2 disciplinary record<sup>5</sup>; (c) - personal or emotional problems; (d) timely good faith effort to make  
3 restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary  
4 board or cooperative attitude toward proceedings; (g) character or reputation; and (l) remorse.  
5 There is no additional restitution that needs to be made.

6 A review of the aggravating and mitigating factors support the presumptive sanction of  
7 a suspension as the appropriate sanction in this case.  
8

9 **F. PROPORTIONALITY REVIEW**

10 An effective system of professional sanctions requires internal consistency.  
11 Accordingly, it is appropriate to examine sanctions imposed in cases that are factually similar.  
12 *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994), (quoting *In re Wines*, 135, Ariz.  
13 203, 207 (1983)). However, the discipline in each case must be tailored to the individual case,  
14 as neither perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz. 604,  
15 615 (1984).

16 *In re Feeley*, 168 Ariz. 436, 814 P.2d 777 (1991), the lawyer was suspended for six  
17 months and ordered to pay restitution and costs in connection with a two count complaint.  
18 Violations found included ER 1.1 (Competence), ER 1.3 (Diligence), ER  
19 1.4(a)(Communication), and ER 8.4(c) (Misconduct- involving dishonesty.). ABA Standard  
20 4.42 which recommends a suspension for knowingly failing to perform services for a client or  
21 engaging in a pattern of neglect and ABA Standard 4.62 which recommends suspension when a  
22 lawyer knowingly deceives a client, causing him injury or potential injury were found  
23 applicable. No specific *ABA Standard* aggravating or mitigating factors were found.  
24

25 \_\_\_\_\_  
<sup>5</sup> Respondent was admitted to practice in Arizona in 1992.

1           *In re Anderson*, 163 Ariz. 362, 788 P.2d 95 (1990), ER 1.3 (Diligence), Respondent  
2 received a three month suspension and was ordered to pay restitution and costs in connection  
3 with a four count complaint. Violations found included ER 1.4 (Communications), 8.1(b) (Bar  
4 Admission and Disciplinary Matters: knowingly failing to respond to a lawful demand for  
5 information from a disciplinary authority), 51(h) (Grounds for Discipline: Failure to furnish  
6 information or respond promptly to any inquiry or request from bar counsel) and 51(i)  
7 (Grounds for Discipline: refusal to cooperate with officials and staff of the state bar). Non-  
8 ABA aggravating and mitigating factors were cited.

9  
10           In *In re Cassalia*, 173 Ariz. 372, 843 P.2d 654 (1992), the lawyer was suspended for  
11 six months, assessed costs and given probation for violations of ER 1.1 (Competence), 1.3  
12 (Diligence), 1.4 (Communications), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing  
13 Party and Counsel), and ER 8.4 (Misconduct). *ABA Standard 4.42* was found applicable.  
14 Aggravating factors found included a pattern of misconduct, vulnerability of his clients,  
15 indifference toward making restitution and prior misconduct (a censure).

16           In *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994), the lawyer received a censure and  
17 was ordered to pay restitution and costs in connection with a two count discipline by consent.  
18 Violations found included ER 1.1 (Competence), 1.3 (Diligence), 1.4 (Communications), and  
19 1.16 (Declining or Terminating Representation). Factors found in aggravation included  
20 multiple offenses, substantial experience, and prior discipline (two informal reprimands).  
21 Factors found in mitigation included absence of a dishonest or selfish motive, full and free  
22 disclosure to the disciplinary board and cooperative attitude towards the proceedings and  
23 remorse. as well as non *ABA Standard* mitigation included the lawyer's efforts to modify his  
24  
25

1 office practices to prevent a recurrence of similar problems and his willingness to submit to and  
2 comply with the recommendations of a LOMAP audit.

3 **G. RECOMMENDATION**

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public  
5 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320  
6 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the  
7 administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another  
8 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,  
9 29, 881 P.2d 352, 361 (1994).

10 In imposing discipline, it is appropriate to consider the facts of the case, the American  
11 Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and the  
12 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,  
13 872 P.2d 1235, 1238 (1994).

14 Upon consideration of the facts, application of the *Standards*, including aggravating and  
15 mitigating factors, and a proportionality analysis, I recommend acceptance of the Tender and  
16 Joint Memo providing for the following:

- 17 1. Respondent should be suspended for a period of 60 days.
- 18 2. Respondent should be placed on probation for a period of two years after

19 reinstatement and on the signing the probation contract with the following terms:

- 20 a. Respondent must undergo a Law Office Management Assistance  
21 Program ("*LOMAP*") assessment and enter into a probation agreement, incorporating all  
22 recommendations made by the LOMAP director or her designee. The probation agreement  
23 must include the selection of a practice monitor, subject to approval by the Director of LOMAP  
24  
25



1 Original filed with the Disciplinary Clerk  
this 8<sup>th</sup> day of February, 2005.

2  
3 Copy of the foregoing was mailed  
this 8<sup>th</sup> day of February, 2005, to:

4 Ralph Adams  
5 Respondent's Counsel  
714 North 3<sup>rd</sup> Street, Suite 7  
6 Phoenix, AZ 85004

7 Loren J. Braud  
8 Senior Bar Counsel  
State Bar of Arizona  
111 West Monroe, Suite 1800  
9 Phoenix, AZ 85003-1742

10  
11 by: P. Williams