

FILED

JAN 28 2005

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY *Williams*

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

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5 IN THE MATTER OF A MEMBER) No. 03-0811, 03-1089, 03-1370
6 OF THE STATE BAR OF ARIZONA,) 03-1412, 03-2009, 04-0930
7) 04-1091
8 **CARMEN A. CHENAL,**)
9 **Bar No. 009428**) **AMENDED**
10) **HEARING OFFICER'S REPORT**
11)
12) **RESPONDENT.**)

11 Having considered the parties' Joint Motion to Reconsider,
12 IT IS HEREBY ORDERED granting the Motion and incorporating the
13 omitted terms of probation.

14 **PROCEDURAL HISTORY**

15 The State Bar filed a Complaint on May 11, 2004. Respondent filed an
16 Answer on June 30, 2004. On September 21, 2004, the parties filed a Joint
17 Motion for an Extension of Time within Which to Conduct Hearing asking for a
18 60-day extension. On September 28, 2004, the Disciplinary Commission granted
19 an extension for 30 days and asked the Court to grant the additional remaining 30
20 days the parties were requesting. On October 6, 2004, the Court granted
21 additional time and gave the parties until December 8, 2004 to conduct a hearing.
22 On November 8, 2004, this Hearing Officer was notified by the parties that they
23 had reached an agreement. The parties filed a Tender of Admissions and
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25

1 Agreement for Discipline by Consent (Tender) and a Joint Memorandum in
2 Support of Agreement for Discipline by Consent (Joint Memo) on December 3,
3 2004. No hearing has been held.
4

5 **FINDINGS OF FACT**

6 At all times relevant, Respondent was an attorney licensed to practice law
7 in the State of Arizona, having been admitted to practice in Arizona on May 12,
8 1984.
9

10 **File No. 03-0811**

11 Dianne Weiland retained Respondent to represent her as the plaintiff in a
12 sexual harassment/breach of contract matter.
13

14 The case was tried to a jury, resulting in a verdict for the defendant. On or
15 about March 5, 2003, defense counsel Timothy Smock, the complainant in this
16 matter, filed an Application for Attorneys' Fees and Sanctions.
17

18 On or about April 2, 2003, Respondent submitted a Response to
19 Application for Attorneys' Fees and Sanctions and Separate Application for
20 Award of Attorney's Fees and Sanctions.
21

22 In a minute entry dated May 13, 2003, the Court ordered \$7,500.00 in
23 attorneys' fees and \$2,500.00 in sanctions against Respondent and her client
24 jointly, citing A.R.S. 12-349, governing the assessment of attorneys' fees for
25 unjustified actions.

1 In the same minute entry, the Court listed several factors in support of its
2 order against Respondent, including, inter alia:

3 a. Respondent named an inappropriate party as a defendant and did not
4 provide any allegations against him in the complaint;

5 b. Respondent presented claims for Title VII and wrongful termination
6 that were barred by applicable law; and

7 c. Respondent sent disclosure statements listing many witnesses and
8 their testimony, yet only one person testified at trial and the witness' testimony
9 was not consistent with the anticipated testimony summarized in the disclosure
10 statement.
11
12

13
14 On or about August 1, 2003, Respondent submitted a Motion for
15 Reconsideration and Motion to Modify and Vacate Judgment regarding the
16 sanctions. On or about August 6, 2003, the Court denied the motions.

17
18 The conduct as set forth in Count One describes violations of Rule 42,
19 specifically ERs 3.1 and 8.4(d).

20 **File No. 04-0158**

21 In or about 2001, Richard Flickinger retained Respondent to represent his
22 company in various collection matters. Respondent litigated two cases for Mr.
23 Flickinger.
24
25

1 The first case Respondent litigated resulted in a \$5,000.00 settlement
2 award to Mr. Flickinger. Mr. Flickinger alleges that after receiving the
3 settlement, Respondent applied \$2,500.00 toward Mr. Flickinger's bill on his
4 other case without his written permission, and after he had disputed items on that
5 bill.
6

7 Regarding the second matter, upon Respondent's advice, Mr. Flickinger
8 brought a lawsuit on behalf of his company against a bank as well as other
9 defendants originally sued in the case. Respondent received a letter from the
10 bank's counsel insisting that there was no basis in fact or law for the suit.
11 Respondent filed a Motion for Summary Judgment against the bank, but
12 subsequently tried to get the bank's attorney to agree to dismiss the claim as to
13 the bank. The bank's attorney refused and filed his own Motion for Summary
14 Judgment. The Court granted the bank's motion and awarded it attorney's fees in
15 the amount of \$17,037.30.
16
17

18 Mr. Flickinger directed Respondent to file an appeal. Respondent agreed
19 to file the appeal but failed to do so. Mr. Flickinger terminated Respondent's
20 representation, retained another attorney and requested that Respondent transfer
21 his files to this new attorney.
22
23

24 Respondent's conduct as described in this count violates Rule 42, Ariz. R.
25 S. Ct., specifically, ERs 1.2, 1.3 and 1.4.

1 **File No. 03-1370**

2 Respondent agreed to represent Shelly Thomas in a domestic relations
3 matter pending in the state of Illinois because Ms. Thomas did not have the funds
4 necessary to retain counsel in Illinois. Respondent would contend that she
5 intended to withdraw from the matter if the matter could not be resolved quickly.
6 On November 6, 2002, Respondent filed a Notice of Appearance in the Circuit
7 Court of the Ninth Judicial District in Knox County, Illinois. Respondent was not
8 licensed to practice law in Illinois. If the matter proceeded to a hearing, the
9 Respondent would testify that her client did not have the funds necessary to retain
10 counsel in Illinois and that Respondent intended to withdraw if the matter could
11 not be resolved without requiring Respondent's active representation of the client
12 in the Illinois courts. Respondent would further testify that she mistakenly relied
13 on the avowal of the Illinois counsel representing her client's husband that he
14 would not proceed against Respondent's client. The client's new attorney filed a
15 Motion to Disqualify Respondent from the representation. Respondent's conduct
16 as described in this count violates Rule 42, Ariz. R. S. Ct., specifically ER 5.5(a).
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21 **File No. 03-2009**

22 On September 14, 2001, Respondent submitted check number 1151 in the
23 amount of \$150.00 to the Clerk of the Maricopa County Superior Court for
24 payment of filing fees. Check number 1151 was returned due to insufficient
25

1 funds. On November 15, 2001, Respondent submitted check number 1232 in the
2 amount of \$150.00 to the Clerk of the Maricopa County Superior Court for
3 payment of filing fees. Check number 1232 was returned due to insufficient
4 funds.
5

6 On November 20, 2001, the Clerk's office telephoned Respondent on her
7 cellular telephone. At that time, Respondent advised the Clerk's office that she
8 was going out of town but would pay the fee the following week. Respondent did
9 not pay the Clerk's office as promised during the November 20, 2001 telephone
10 call. On December 3, 2002, the Clerk's office telephoned Respondent and left a
11 message for her regarding the returned checks. Respondent did not respond to the
12 December 3, 2002 telephone call.
13
14

15 On September 14, 2003, Respondent submitted check number 1426 in the
16 amount of \$190.00 to the Clerk of the Maricopa County Superior Court for
17 payment of filing fees. Check number 1426 was returned due to insufficient
18 funds. The Clerk's office left voice messages and sent notices to Respondent
19 concerning the returned checks but received no response.
20

21 On October 31, 2003, the Clerk of the Maricopa County Superior Court
22 filed its complaint with the State Bar of Arizona. On February 11, 2004, the State
23 Bar of Arizona received a letter dated that same day addressed to the Clerk's
24 office from Respondent's undersigned attorney. Attached to the February 11,
25

1 2004 letter was a cashier's check in the amount of \$780.00 payable to the Clerk's
2 office, an amount in excess of the aggregate total of the NSF checks. In the letter
3 from Respondent's attorney, Respondent apologized for her conduct and
4 authorized the Clerk to apply any excess funds to a worthy, charitable purpose.
5

6 Respondent's conduct as described in the count violated Rule 42, Ariz. R.
7 S. Ct., specifically, ER 8.4(d).
8

9 **File No. 04-1495**

10 Respondent agreed to represent a Nigerian national regarding a medical
11 malpractice claim that a surgeon negligently removed both of Respondent's
12 client's fallopian tubes instead of one. Respondent had no prior experience
13 prosecuting medical malpractice claims, but before filing the lawsuit, Respondent
14 contacted Dr. Janet Moore to obtain an expert medical opinion regarding the
15 putative defendant's negligence.
16

17 After her meeting with Dr. Moore, Respondent sent the doctor a draft of a
18 written summary report of their conversation dated May 22, 2002. The letter
19 submitted to Dr. Moore for review was drafted in terms indicating that the
20 attending physician was responsible for removing the second fallopian tube but
21 specifically asked that the doctor make any corrections necessary to ensure that
22 the summary was accurate. Dr. Moore returned the draft to Respondent with
23 handwritten corrections in the margins of the letter. Complainant's corrections
24
25

1 substantially changed the import of the summary as it related to the putative
2 defendant's potential liability.

3
4 After the lawsuit was filed, Respondent deposed Dr. Moore. A copy of the
5 May 22, 2002 letter, without the doctor's handwritten corrections, was produced
6 at the deposition. However, during the deposition, Dr. Moore produced a copy of
7 her corrected letter.

8
9 Apparently, a copy of the May 22, 2002 letter, without Dr. Moore's
10 handwritten corrections, had been submitted to opposing counsel in the medical
11 malpractice case. On the copy produced by defense counsel, the doctor's
12 handwritten notes appeared to have been altered or "whited out" by some other
13 means. One of the defense counsel filed a complaint against the Respondent
14 alleging that she purposely altered Dr. Moore's medical report before providing it
15 to defense counsel. Respondent listed Dr. Moore as a standard of care witness
16 despite having failed to obtain Dr. Moore's agreement to serve in that capacity.

17
18
19 If this matter went to hearing, the Respondent would argue that while the
20 uncorrected "whited out" copy of Dr. Moore's report may have been mistakenly
21 sent to defense counsel, there was no deliberate attempt to mislead opposing
22 counsel. Respondent would further argue that if she had intended to misrepresent
23 Dr. Moore's report she would not have sent a draft of the statement to Dr. Moore
24 for review and correction and contends would contend that the fact that defense
25

1 counsel ultimately received the corrected report neutralizes any contention that
2 Respondent was attempting to conceal the corrected report from opposing
3 counsel. Respondent would deny altering the corrected version of Dr. Moore's
4 report with "white-out" fluid or by any other means. If the matter went to
5 hearing, the State Bar would contend that there was sufficient circumstantial
6 evidence that Respondent had altered the document to prove that fact by clear and
7
8 convincing evidence.
9

10 In consideration of Respondent's agreement to discipline in this matter, the
11 State Bar conditionally agrees that Respondent's distribution of the "whited out"
12 medical opinion of Dr Moore to opposing counsel was the result of negligence
13 rather than a deliberate attempt to mislead opposing counsel.
14

15 The parties conditionally agree that the conduct set forth in file no. 04-1495
16 describes violations of Rule 42, Ariz.R.S.Ct., specifically ERs 1.1 (competence),
17 and 3.4 (fairness to opposing party).
18

19 **File No. 04-1091**

20 On or about June 7, 2002, Sheryl Dusch retained Respondent to pursue her
21 claim against a construction contractor. Ms. Dusch claims that she was unable to
22 contact Respondent between early January 2003 to mid-February 2003 and June
23 2003 through January 2004. During this time Respondent changed employers,
24 but failed to provide Ms. Dusch with updated contact information. Ms. Dusch
25

1 claims that Respondent failed to diligently prosecute her case. Respondent
2 admits that she violated ER 1.4 (communications with a client) during the periods
3 that she was moving her office. Respondent denies that the lack of
4 communications was as extensive as Ms. Dusch claims and if the matter went to
5 hearing, the Respondent would testify that Ms. Dusch frequently failed to
6 communicate with Respondent and often failed to return Respondent's phone
7 calls. Respondent also denies that she did not diligently prosecute Ms. Dusch's
8 case. After consultation with her client, Respondent nonetheless continued to
9 represent Ms. Dusch in this matter even after the client filed a complaint with the
10 State Bar of Arizona. Further, the matter has now been resolved to Ms. Dusch's
11 satisfaction.
12
13
14

15 The parties conditionally agree that the conduct set forth in file no. 04-1091
16 describes a violation of Rule 42, Ariz. R. S. Ct., ER 1.4 (failure to keep client
17 reasonably informed about the status of the representation).
18

19 **DISMISSED ALLEGATIONS**

20 **File No. 03-0811**

21 In consideration of Respondent's consent to discipline in this matter, in
22 recognition of the fact that the evidence developed during the investigation of this
23 charge indicates that several of the original charges cannot be proved by clear and
24 convincing evidence, and in light of the mitigation evidence presented by
25

1 Respondent, the State Bar agrees to dismiss allegations that Respondent violated
2 ERs 3.3 (making a false statement of material fact or law to a tribunal), 3.4
3 (falsification of evidence), and 8.4(c) (conduct involving fraud and deceit).
4

5 **File No. 03-0189**

6 In consideration of Respondent's consent to discipline, her agreement to
7 refund fees in the amount of \$2,500.00 to Richard Flickinger, and in light of the
8 mitigation evidence presented by Respondent, the State Bar agrees to dismiss the
9 allegation that Respondent violated ER 1.15 (failure to promptly deliver
10 settlement proceeds to client) in recognition of the risk that the State Bar may not
11 be able to prove by clear and convincing evidence that Respondent failed to
12 disburse part of the \$5,000.00 settlement check to Mr. Flickinger. Respondent
13 agrees that she did apply \$2,500.00 to Mr. Flickinger's bill from the other matter,
14 but contends that there was no dispute as to the fees owed and that she applied the
15 funds only after receiving Mr. Flickinger's consent to do so. The State Bar of
16 Arizona cannot prove by clear and convincing evidence that Respondent did not
17 obtain the consent of Mr. Flickinger before applying the \$2,500.00 to the
18 outstanding balance from the other matter, and therefore, withdraws this charge.
19 However, the Respondent is unable to provide evidence that Mr. Flickinger
20 consented to the payment, and therefore, Respondent agrees to refund the
21 payment.
22
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1 not be able to prove the knowing or intentional mental state that is an element of
2 violations of ER 8.4(c), and that Respondent has satisfied her obligations to the
3 court shortly after the matter came to the attention of the State Bar.
4

5 CONDITIONAL ADMISSIONS

6 Respondent conditionally admits that she:

7 1. failed to provide competent representation to her clients in one
8 matter in violation of ER 1.1;
9

10 2. failed to abide by her client's decision regarding the objectives the
11 representation in one matter, a violation of ER 1.2;

12 3. failed to act with diligence and promptness in one matter, a violation
13 of ER 1.3;
14

15 4. failed to keep her clients informed about the status of their cases in
16 two matters, in violation of ER 1.4;

17 5. brought a proceeding or asserted issues without having a good faith
18 basis for doing so in one matter, in violation of ER 3.1;
19

20 6. engaged in conduct that was unfair to the opposing party in one
21 matter, in violation of ER 3.4;

22 7. represented a client in a matter in violations of the rules of admission
23 of a foreign state, in violation of ER 5.5(a); and
24
25

1 also violated her duty to the legal profession in count 3 and File 04-1091. In
2 Count 3, Respondent admits to knowingly engaging in the unauthorized practice
3 of law when she agreed to represent a client in a domestic relations matter
4 pending in Illinois. Respondent undertook this representation in order to assist a
5 person who could not engage counsel in Illinois and with the understanding that
6 she would withdraw from representation if the matter proceeded to the point
7 where it required active representation in a court of law. Though Respondent
8 would contend that she was motivated by altruistic reasons, and not by pecuniary
9 gain, she still knowingly engaged in the unauthorized practice of law.
10
11

12 As fully addressed in the Tender, Respondent was under substantial
13 emotional stress during the period in which her misconduct occurred. The extent
14 and nature of the stress was such that Respondent was not able to devote the time
15 required to her law practice, and as a result engaged in the unauthorized practice
16 of law, thereby violating ER 5.5(a).
17
18

19 If this matter were to proceed to a hearing, Respondent would take the
20 position that her actions did constitute misconduct; however, there are numerous
21 and mitigating factors. Respondent would also take the position that except for
22 the unauthorized practice of law, all of her misconduct was due to negligence. As
23 to the unauthorized practice of law, Respondent would admit she knowingly
24 engaged in the unauthorized practice of law, but did so for altruistic reasons and
25

1 not for pecuniary gain. Finally, Respondent would take the position that she has
2 resolved the issues that were the underlying cause of her misconduct, including
3 leaving the private practice of law and taking a position as in-house counsel.
4 Therefore, a suspension not to exceed four months is in keeping with the stated
5 goals of imposing lawyer discipline – to protect the profession and public, and not
6 punish the lawyer.
7

8 AGGRAVATING AND MITIGATING FACTORS

9
10 This Hearing Officer then considered aggravating and mitigating factors in
11 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer
12 agrees with the parties that two aggravating factors apply and should be
13 considered in this matter: (d) multiple offenses and (i) substantial experience in
14 the practice of law.
15

16 This Hearing Officer agrees with the parties that five¹ factors are present in
17 mitigation: (a) absence of a prior disciplinary record: Respondent has no prior
18 discipline with the State Bar; (b) absence of a dishonest or selfish motive; (c)
19 personal or emotional problems²; (e) full and free disclosure to disciplinary board
20 or cooperative attitude toward proceedings; and (l) remorse³.
21
22

23
24 ¹ Although the parties agreed upon mitigating factor (g) character or reputation, there is no
25 evidence in the record to support this factor; therefore, this Hearing Officer does not find this
factor and notes that it does not affect the outcome.

² See Exhibit C attached to Joint Memo.

³ See Exhibit B attached to Joint Memo.

1 clients in three matters, failed to return client files in three matters, and practiced
2 law while he was on administrative suspension. The presumptive sanction was
3 suspension based on *Standards* 4.42(b) and 7.2. Aggravating factors included:
4 prior disciplinary offenses, pattern of misconduct, substantial experience in the
5 practice of law. Mitigating factors include: absence of a selfish or dishonest
6 motive, personal and emotional problems, full and free disclosure, good
7 character, and remorse.
8

9
10 In *In re Geare*, SB-03-0139-D (2003), a lawyer consented to a 90-day
11 suspension and a one-year term of probation after he failed to competently
12 represent clients in two matters, failed to diligently represent clients in five
13 matters, failed to properly disburse client funds in five matters, and failed to
14 properly manage his client trust account. The presumptive sanction was
15 suspension under *Standard* 4.12 and 4.42. Aggravating factors include: pattern of
16 conduct, multiple offenses, and vulnerability of the victim. Mitigating factors
17 include: absence of disciplinary history, absence of a selfish or dishonest motive,
18 personal and emotional problems, good faith effort to make restitution, full and
19 free disclosure, good character, mental disability (chemical dependency), delay in
20 disciplinary proceedings, and remorse.
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24 The agreed-upon sanction in this matter is commensurate with *Stevens*,
25 *Cimino* and *Geare*. Both *Cimino* and *Geare* involved multiple instances of

1 ethical violations arising from contemporaneous mismanagement of litigation
2 matters. *Geare* received a 90-day suspension for violations involving five files,
3 and like Respondent in this matter, Mr. Geare demonstrated that his conduct was
4 the result of physical or mental stress. *Cimino* received a six-month term of
5 suspension, which is greater than the 120-days recommended for Respondent.
6 However, unlike respondent, *Cimino* had a prior disciplinary history.
7

8
9 In light of the holdings in *Cimino* and *Geare* coupled with the facts of this
10 case, and the aggravating and mitigating factors, Respondent and the State Bar of
11 Arizona agree that a 120-day suspension is appropriate. The Recommended
12 sanction is serious and protects the legal system and the profession. The 120-day
13 suspension will allow Respondent the time necessary to take all actions necessary
14 to ensure her rehabilitation is complete. The two-year probation with
15 participation in MAP will ensure that Respondent continues to practice law
16 within the professional rules once her suspension is completed. Finally, the
17 evidence establishes that Respondent was suffering from severe emotional stress
18 which constituted a significant factor in Respondent's conduct. Significantly,
19 Respondent has demonstrated that she recognizes her problems and has taken
20 significant steps that have resolved them.
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1 **RECOMMENDATION**

2 It is also the objective of lawyer discipline to protect the public, the
3 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708
4 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's
5 integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).
6

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

12 Upon consideration of the facts, application of the *Standards*, including
13 aggravating and mitigating factors, and a proportionality analysis, this Hearing
14 Officer recommends acceptance of the Tender of Admissions and Agreement for
15 Discipline by Consent and the Joint Memorandum in Support of Agreement for
16 Discipline by Consent providing for the following:
17

- 18
- 19 1. Respondent shall be suspended for a period of 120 days.
 - 20 2. Respondent shall be placed on probation for a period of two years
21 beginning from the date of execution of a memorandum of understanding
22 between the State Bar and Respondent describing the terms of Respondent's
23 participation in the State Bar's Member Assistance Program. Within 30 days of
24 the entry of the judgment and order in this matter or Respondent's return to active
25

1 status, whichever is later, Respondent shall contact the Director of the Law Office
2 Management Assistance Program (LOMAP) and arrange for a MAP assessment.

3
4 3. In the event that Respondent returns to private practice as a sole
5 practitioner or in a law firm during the term of probation, Respondent agrees that
6 within 30 days of the date of her return to private practice, she will contact the
7 State Bar's LOMAP Director and schedule a LOMAP assessment. Respondent
8 further agrees that she will agree to abide by the recommendations of the LOMAP
9 director including and not limited to appointment of a practice monitor, and
10 further agrees to extend the term of probation for one year if necessary to
11 accomplish the recommendations of the LOMAP director.
12

13
14 4. Respondent shall pay restitution as follows:

15 Richard Flickinger \$2,500.00

16 5. Respondent shall pay the costs and expenses incurred in this
17 disciplinary proceeding⁴.

18
19 DATED this 28th day of January, 2005.

20
21 Christopher D. Thomas
22 Christopher D. Thomas
23 Hearing Officer 8Z

24 Original filed with the Disciplinary Clerk
25 this 28th day of January, 2005.

⁴ See Exhibit A attached to the Tender.