

FILED

SEP 22 2004

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

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

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3 **IN THE MATTER OF A MEMBER) No. 03-1633**
4 **OF THE STATE BAR OF ARIZONA,)**
5 **JAMAL A. HARRISON,)**
6 **Bar No. 017262)**
7 **RESPONDENT.) HEARING OFFICER'S REPORT**
8)

9 **PROCEDURAL HISTORY**

10 The State Bar filed a Complaint on April 23, 2004 Respondent filed an
11 Answer on June 8, 2004. The parties filed a Tender of Admissions and
12 Agreement for Discipline by Consent (Tender) and a Joint Memorandum in
13 Support of Agreement for Discipline by Consent (Joint Memo) on September 15,
14 2004. No hearing has been held.
15

16 **FINDINGS OF FACT**

17 At all times relevant, Respondent was an attorney licensed to practice law
18 in the State of Arizona, having been admitted to practice in Arizona on May 17,
19 1997.
20

21 **COUNT ONE (File No. 03-1633)**

22
23 1. Respondent represented the plaintiff Gregory T. Smith ("Mr.
24 Smith") in an employment discrimination case brought under the Americans With
25 Disabilities Act ("ADA") in the United States District Court for the District of

1 Arizona entitled *Gregory T. Smith v. Farmer's Insurance Exchange*, case number
2 CV-01-2282-PHX-FJM.

3 2. The opposing counsel, Jane Reddin ("Ms. Reddin"), served
4 plaintiff's first counsel with a basic set of interrogatories and request for
5 production in August 2002. Respondent was retained in early January 2003. Ms.
6 Reddin had to repeatedly request the responses that Respondent finally supplied
7 on February 24, 2003. The responses were inaccurate and incomplete.
8

9 3. Specifically, in response to discovery requests, Mr. Smith (through
10 Respondent) stated that he had been unable to obtain subsequent employment
11 since being fired by the defendant employer ("Farmers Insurance"). However,
12 Mr. Smith had in fact been employed by Lorillard Tobacco subsequent to having
13 been fired by Farmers Insurance. Further, Lorillard had fired Mr. Smith and Mr.
14 Smith and had filed a lawsuit against Lorillard on August 8, 2002. Respondent
15 was Mr. Smith's attorney in the lawsuit against Lorillard.
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18 4. Plaintiff also failed to disclose the Lorillard lawsuit in response to an
19 interrogatory specifically asking if he had been involved in any lawsuits. Mr.
20 Smith, through Respondent, answered no.
21

22 5. Respondent was also uncooperative in updating the responses to
23 discovery and in expediting Mr. Smith's deposition.
24
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1 6. On or about June 20, 2003, Complainant filed a motion for summary
2 judgment based on plaintiff's dishonesty and discovery abuses.

3 7. On or about August 21, 2003, the court issued an order specifically
4 finding:
5

- 6 • Respondent had been uncooperative;
- 7 • Respondent had failed to correct his client's dishonest answers;
- 8 • Respondent submitted inaccurate or incomplete responses to
9 discovery requests; and
- 10 • Respondent, even as of the date of the Defendant's reply, had
11 failed to adequately and completely supplement disclosures as
12 requested.
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15 8. The court specifically stated in its order that Respondent's "conduct
16 is professionally unacceptable" and ordered Respondent pay the costs and
17 attorney's fees associated with defendant's motion for summary judgment
18 regarding plaintiff's dishonesty and discovery abuse.
19

20 9. In his response to the State Bar, Respondent admitted not being
21 diligent in responding to defendant's discovery requests, but denied the
22 allegations of dishonesty. Respondent claimed that any allegations of dishonesty
23 were directed at his client's misrepresentations rather than his own. Respondent
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1 stated that he had not become aware of his client's dishonesty until
2 Complainant's motion for summary judgment was filed.

3
4 10. The State Bar requested that Respondent explain the allegations in
5 the complaint that he was aware of the employment at Lorillard and the lawsuit
6 regarding Lorillard. In his second response, Respondent stated that his failure to
7 disclose the prior lawsuit was based on his belief that information about the prior
8 lawsuit was privileged and confidential.
9

10 11. A probable cause order was entered on March 15, 2004 for
11 violations of Rule 42, Ariz. R. S. Ct., including but not limited to ERs 1.2(e), 1.3,
12 1.16, 3.2, 3.3, 3.4, 4.1, 8.1 and 8.4(c) & (d).
13

14 12. By failing to act with reasonable diligence and promptness,
15 Respondent violated ER 1.3.

16 13. By failing to make reasonable efforts to expedite litigation consistent
17 with the interests of his client, Respondent violated ER 3.2.
18

19 14. By failing to make reasonably diligent efforts to comply with a
20 legally proper discovery request by an opposing party, Respondent violated ER
21 3.4(d).
22

23 15. By engaging in conduct prejudicial to the administration of justice,
24 Respondent violated ER 8.4(d).
25

1 Respondent's conduct as described in this count violates Rule 42, Ariz. R.
2 S. Ct., specifically, ERs 1.3, 3.2, 3.4(d) and 8.4(d).

3 **CONDITIONAL ADMISSIONS**

4 Respondent conditionally admits, for purposes of this agreement
5 only, his conduct as described above violated Rule 42, Ariz. R. S. Ct.,
6 specifically, ERs 1.3, 3.2, 3.4(d), and 8.4(d).

7 The State Bar conditionally agrees, for purposes of this agreement only,
8 to dismiss the alleged violations of ERs 1.4(a)(5)¹, 1.16(a)(1), 3.3(a)(1), 3.4(c),
9 4.1, 8.1 and 8.4(c), Rule 42, Ariz. R. S. Ct.

10 **ABA STANDARDS**

11 In determining the appropriate sanction, the parties considered both the
12 American Bar Association's *Standards for Imposing Lawyer Sanctions*
13 ("*Standards*") and Arizona case law. The *Standards* provide guidance with
14 respect to an appropriate sanction in this matter. The Court and Commission
15 consider the *Standards* a suitable guideline. *In re Peasley*, 427 Ariz. Adv. Rep.
16 23, 90 P.3d 764, §§ 23, 33 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d
17 1037, 1040 (1990).

18 The ABA *Standards* list the following factors to consider in imposing the
19 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
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¹ Effective December 1, 2003, rules relating to discipline and disability were renumbered, revised and/or reorganized. The current ER 1.4(a) was formerly ER 1.2(e).

1 actual or potential injury caused by the lawyer's misconduct, and (4) the
2 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*

3
4 Given the conduct in this matter, it was appropriate to consider *Standards*
5 4.4 (Lack of Diligence), 6.0 (Violations of Duties Owed to the Legal System), 6.2
6 (Abuse of the Legal Process) and 7.0 (Violations of Duties Owed to the
7 Profession).

8 4.4 Lack of Diligence

9 4.43

10 Reprimand is generally appropriate when a lawyer is *negligent*
11 *and does not act with reasonable diligence* in representing a
12 client, and causes injury or potential injury to a client.

13 6.0 Violations of Duties Owed to the Legal System

14 6.13

15 Reprimand is generally appropriate when a lawyer is *negligent*
16 *either in determining whether statements or documents are false*
17 *or in taking remedial action when material information is being*
18 *withheld, and causes injury or potential injury to a party to the*
19 *legal proceeding, or causes an adverse or potentially adverse*
20 *effect on the legal proceeding.*

21 6.2 Abuse of the Legal Process

22 6.23

23 Reprimand is generally appropriate when a lawyer *negligently*
24 *fails to comply with a court order or rule, and causes injury or*
25 *potential injury to a client or a party, or interference or potential*
interference with a legal proceeding.

26 7.0 Violations of Other Duties Owed as a Professional

27 7.3

28 Reprimand is generally appropriate when a lawyer negligently
29 engages in conduct that is a violation of a duty owed as a
30 professional, and causes injury or potential injury to a client, the
31 public, or the legal system.

1 Respondent conditionally admits that he failed to act with reasonable
2 diligence and promptness; failed to make reasonable efforts to expedite litigation
3 consistent with the interest of his client; failed to make reasonably diligent efforts
4 to comply with a legally proper discovery request by an opposing party, and
5 engaged in conduct that was prejudicial to the administration of justice.
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8 Based on the foregoing, the presumptive sanction for the admitted conduct
9 under the Standards is censure. After determining the presumptive sanction, it is
10 appropriate to evaluate aggravating and mitigating factors enumerated in the
11 Standards that would justify an increase or decrease in the presumptive sanction.
12 See *In re Scholl*, 200 Ariz. 222, 225-26, 25 P.3d 710, 713-14 (2001); *In re Savoy*,
13 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995).
14

15 AGGRAVATING AND MITIGATING FACTORS

16
17 This Hearing Officer then considered aggravating and mitigating factors in
18 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer
19 agrees with the parties that one aggravating factor applies and should be
20 considered in this matter: (c) a pattern of misconduct.
21

22 This Hearing Officer agrees with the parties that four factors are present in
23 mitigation: (a) absence of a prior disciplinary record: Respondent has no prior
24 discipline with the State Bar. (b) absence of a dishonest or selfish motive. (f)
25 inexperience in the practice of law. (k) imposition of other penalties or sanctions.

1 Specifically, the federal district court ordered Respondent to pay the costs and
2 attorney's fees associated with defendant's motion for summary judgment
3 regarding plaintiff's dishonesty and discovery abuse.
4

5 PROPORTIONALITY REVIEW

6 To have an effective system of professional sanctions, there must be
7 internal consistency, and it is appropriate to examine sanctions imposed in cases
8 that are factually similar. *Peasley, supra*, ¶¶ 33, 61. However, the discipline in
9 each case must be tailored to the individual case, as neither perfection nor
10 absolute uniformity can be achieved. *Id.* at ¶ 61 (citing *In re Alcorn*, 202 Ariz.
11 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454,
12 458 (1983)).
13
14

15 A case that is relevant to the matter at hand is *Matter of Huser*, Arizona
16 Supreme Court No. SB-00-0108-D, Disciplinary Commission No. 96-1818,
17 filed January 12, 2001. In that case, the respondent received a censure with
18 probation for violations of ERs 3.2, 3.3, 3.4, 4.1, 4.4, 5.1(b) and 8.4(c) and (d).
19 The Commission found that Huser, in an insurance defense matter, *negligently*
20 entered an appearance and filed an answer on behalf of an insured without the
21 insured's knowledge or consent. Huser had no contact with and no authority to
22 represent the insured. Huser continued to represent the insured even after
23 realizing his mistake and failed to withdraw from the case once it was
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1 determined that the insured could not be located. Huser also failed to disclose
2 this information. In addition, Huser, failed to supervise additional attorneys
3 involved in the case, one of whom filed a false and misleading disclosure
4 statement.²

6 The hearing officer had recommended a three-month suspension, but the
7 Commission instead recommended censure and probation. The Commission
8 found one aggravating factor present, bad faith obstruction of the disciplinary
9 proceedings by intentionally failing to comply with rules or orders of the
10 disciplinary agency. *Standard 9.22(e)*. The Commission found two factors
11 present in mitigation: the absence of a prior disciplinary record, and remorse.
12 The Commission relied on ABA Standard 6.13, which states that censure is
13 appropriate where a lawyer is *negligent* either in determining whether
14 statements are false or in taking remedial action when material information is
15 being withheld. *See id.*

19 A comparison of the sanctions imposed for similar conduct in other
20 disciplinary cases also indicates that censure is proportional. *See, e.g., In re*
21 *Garnice*, 172 Ariz. 29, 833 P.2d 700 (1992) (finding censure appropriate where
22 the respondent made unintentional misrepresentations to the court); *In re*
23

25 ² The junior attorney received an informal reprimand for filing the false and misleading disclosure statement.

1 *Heinzl*, 169 Ariz. 161, 818 P.2d 146 (1991) (finding censure appropriate where
2 the respondent failed to diligently represent his client and negligently misled
3 the court).

4
5 In the instant case, Respondent was retained by the client in early January
6 2003. The opposing party issued the discovery requests months prior to
7 Respondent's involvement in the case. Nevertheless, Respondent could have
8 expedited the transmission of discovery materials to the opposing party.
9

10 Regarding the opposing party's Motion for Summary Judgment, a close
11 reading reveals that the allegations of dishonesty are directed at the client for not
12 divulging prior employment on his employment application (well prior to the
13 law suit), failing to disclose that information in discovery and failing to divulge
14 a prior law suit pursuant to a discovery request. The State Bar alleged that
15 Respondent knowingly participated in the dishonest acts of the client and,
16 further, submitted false statements to the Bar during its investigation. The State
17 Bar alleged that Respondent, when asked to respond to the original letter of
18 complaint alleging dishonesty, stated that the allegations of dishonesty were
19 directed by the complainant in the Motion for summary judgment at his client.
20 The State Bar requested that Respondent explain the allegations in the complaint
21 that he was aware of the employment at Lorillard and the lawsuit regarding
22 Lorillard. In his second response, Respondent stated that his failure to disclose
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1 the prior lawsuit was based on his belief that information about the prior lawsuit
2 was confidential.

3 Respondent explains that he was not aware of the client's prior
4 employment (other than with Lorillard) and therefore did not knowingly aid his
5 client in failing to disclose the information in discovery and the deposition. In
6 addition, Respondent did believe, in error, that information about the prior
7 lawsuit was confidential. Evidence of this belief is the attached deposition
8 transcript wherein Respondent objects to questions about the prior lawsuit based
9 on confidentiality. (Exhibit A to Joint Memo, p. 68, l. 6-8; p. 73, l. 2-6).
10 Respondent admits this as error, but, asserts that it demonstrates that he
11 committed no "knowing" violations. Respondent asserts that he did not
12 therefore violate ER's 3.3(a)(1), 3.4(c), 4.1, or 8.4(c) which all require a
13 "knowing" mental state. Moreover, his statements to the State Bar are consistent
14 when considered in light of his knowledge and beliefs. The first statement was
15 accurate that the allegations of dishonesty in the Motion for Summary Judgment
16 were directed at his client. The second statement was also accurate in that he
17 believed the information to be confidential.

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22 Although Respondent's conduct does not warrant disbarment or a term of
23 suspension it does demand recognition of wrongdoing. This agreement provides
24 for a sanction that meets the goals of the disciplinary system. The terms of this
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1 agreement serve to protect the public, instill confidence in the public, deter other
2 lawyers from similar conduct and maintain the integrity of the bar.

3 RECOMMENDATION

4
5 The purpose of lawyer discipline is not to punish the lawyer, but to protect
6 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
7 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
8 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
9 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
10 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
11 (1994).
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13
14 In imposing discipline, it is appropriate to consider the facts of the case, the
15 American Bar Association's *Standards for Imposing Lawyer Sanctions*
16 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
17 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
18

19 Upon consideration of the facts, application of the *Standards*, including
20 aggravating and mitigating factors, and a proportionally analysis, this Hearing
21 Officer recommends acceptance of the Tender of Admissions and Agreement for
22 Discipline by Consent and the Joint Memorandum in Support of Agreement for
23 Discipline by Consent providing for the following:
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- 25
1. Respondent shall receive a censure.

1 2. Respondent shall be placed on probation for a period of two years. The
2 terms of probation are as follows:

- 3
- 4 a. Respondent shall comply with the Court's assessment of
5 attorneys' fees against him, subject to any remedies legally
6 available to Respondent.
- 7
- 8 b. An audit of his practice shall be conducted by the Director of
9 the Law Office Management Assistance Program (LOMAP)
10 of the State Bar or her designee. The recommendations of
11 the LOMAP Director shall then be incorporated as additional
12 terms of the Probation ordered pursuant to the agreement.
- 13
- 14 c. Respondent shall obtain a practice monitor acceptable to the
15 State Bar. The practice monitor with whom Respondent is
16 currently working is acceptable to the State Bar.
- 17
- 18 d. In the event that Respondent fails to comply with any of the
19 foregoing conditions, and the State Bar receives information,
20 bar counsel shall file with the Hearing Officer a Notice of
21 Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct.
22 The Hearing Officer shall conduct a hearing within thirty
23 days after receipt of said notice, to determine whether the
24 terms of probation have been violated and if an additional
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1 sanction should be imposed. In the event there is an allegation
2 that any of these terms have been violated, the burden of proof
3 shall be on the State Bar of Arizona to prove non-compliance
4 by clear and convincing evidence.
5

6 3. Respondent shall pay the costs and expenses incurred in this
7 disciplinary proceeding.

8 DATED this 22nd day of September, 2004.

9
10 
11 Steven M. Friedman
12 Settlement Officer 9Q
13
14

15 Original filed with the Disciplinary Clerk
16 this 22nd day of September, 2004.

17 Copy of the foregoing was mailed
18 this 22nd day of September, 2004, to:

19 Daniel P. Beeks
20 Hearing Officer 7M
21 *Mohr, Hackett, Pederson, Blakley & Randolph, P.C.*
22 2800 North Central, Suite 1100
23 Phoenix, AZ 85004-1043

24 Ralph Adams
25 Respondent's Counsel
714 North 3rd Street, Suite 7
Phoenix, AZ 85004

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