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 DISCIPLINARY COMMISSION OF THE
 SUPREME COURT OF ARIZONA
 BY M. Smith

**BEFORE THE DISCIPLINARY COMMISSION
 OF THE SUPREME COURT OF ARIZONA**

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4	IN THE MATTER OF A MEMBER)	No. 08-1964
5	OF THE STATE BAR OF ARIZONA)	
6	NANCY D. PETERSEN,)	
7	Bar No. 017025)	DISCIPLINARY COMMISSION
8)	REPORT
9	RESPONDENT.)	
10	_____)	

11 This matter came before the Disciplinary Commission of the Supreme Court of
 12 Arizona on December 12, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of
 13 the Hearing Officer's Report filed August 21, 2009, recommending an informal reprimand,
 14 two years of probation with the State Bar's Member Assistance Program ("MAP") and/or
 15 Law Office Management Assistance Program ("LOMAP"), and costs. The State Bar filed
 16 an objection and requested oral argument. Respondent, Respondent's counsel and counsel
 17 for the State Bar were present.

18 The State Bar argues that Respondent has participated in the State Bar's
 19 rehabilitative programs since 2004 to address a consistent pattern of deficiencies with
 20 diligence and communication issues.

21 The State Bar asserts the recommended sanction is inadequate as Respondent
 22 engaged in repeated identical conduct with a likelihood of repetition and censure is the
 23 presumptive sanction based on ABA *Standard* 8.3, Prior Discipline Orders and to deter
 24 other lawyers from engaging in similar conduct.

1 The State Bar further argues that the Hearing Officer erred in concluding that
2 Respondent did not violate ERs 1.3 and 8.4 and erred in concluding that there was
3 potential injury, when actual client injury occurred.

4 In her defense, Respondent argues that the Hearing Officer correctly found that the
5 State Bar failed to prove a violation of ER 1.3 or that Respondent lied to the client in
6 violation of ER 8.4(c). Respondent advises that she is making progress with her medical
7 issues and is committed to ensuring that minor communication problems, such as those
8 present here, do not expand. Respondent admits she should have communicated to the
9 client problems she experienced in determining the status of a prior divorce proceeding in
10 another state but she was able to ultimately resolve the problem to the client's satisfaction.

11 Respondent asserts that the Hearing Officer's recommendations are appropriate and
12 consistent with the purposes of discipline.

13 Decision

14 Having found no facts clearly erroneous, the eight members¹ of the Disciplinary
15 Commission by a majority of seven,² recommend accepting and incorporating the Hearing
16 Officer's findings of fact, conclusions of law, and recommendation for an informal
17 reprimand, two years of probation (MAP and/or LOMAP) and costs of these disciplinary
18 proceedings including any costs incurred by the Disciplinary Clerk's office.³ The terms of
19 probation are as follows:
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25 ¹ Commissioner Osborne did not participate in these proceedings.

26 ² Commissioner Todd was opposed and determined that censure was the appropriate sanction based on Respondent's prior similar disciplinary offenses. See dissenting opinion below.

³ The Hearing Officer's Report is attached as Exhibit A.

Terms of Probation

1 1. Respondent shall participate in MAP and/or LOMAP at the Director's
2 discretion;

3 2. Respondent shall contact the MAP director within 30 days of the date of the
4 final order in this matter.⁴ The MAP director shall determine the specific "Terms and
5 Conditions of Probation";
6

7 3. Respondent shall abide by the MAP director's recommendations and
8 instructions including, but not limited to, any periodic reporting the MAP director deems
9 appropriate;

10 4. The MAP director shall have the authority to consult with Respondent's health-
11 care providers regarding any treatment regimen that may be prescribed;

12 5. Respondent shall furnish whatever confidential or private information
13 releases and/or authorizations the MAP director requires in order to effectuate the
14 foregoing provisions;
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16 6. In the event that Respondent fails to comply with any of the foregoing
17 probation terms, and the State Bar of Arizona receives information thereof, Bar Counsel
18 shall file a notice of noncompliance with the imposing entity pursuant to Rule 60(a)(5),
19 Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a
20 hearing at the earliest practicable date, but in no event later than 30 days following the
21 receipt of notice, to determine whether a term of probation has been breached, and if so, to
22 recommend an appropriate sanction. If there is an allegation that Respondent failed to
23

24
25 _____
26 ⁴ The Hearing Officer recommended that Respondent contact MAP within 30 days of his Report; however, this matter was appealed and that date has passed.

1 comply with any of the foregoing terms, the burden of proof shall be on the State Bar of
2 Arizona to prove noncompliance by a preponderance of the evidence;

3 7. Respondent is responsible for any costs associated with the MAP
4 participation;

5 8. Respondent is responsible for the payment of costs and expenses of these
6 disciplinary proceedings;

7 9. Respondent shall refrain from engaging in any conduct that would violate
8 the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

9 RESPECTFULLY SUBMITTED this 5th day of January, 2010.

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13 Jeffrey Messing, Chair
14 Disciplinary Commission

15 ***Commissioner Todd respectfully dissenting:***

16 Given the unique circumstances of this case, the majority's position to agree with
17 the Hearing Officer's recommendation is certainly reasonable. Nevertheless, I believe the
18 State Bar has the better position concerning the appropriate sanction. Respondent has not
19 availed herself of the opportunities for change. Censure is an appropriate sanction that
20 might better protect the public and deter other lawyers.

21 Original filed with the Disciplinary Clerk
22 this 5th day of January, 2010.

23 Copy of the foregoing mailed
24 this 5 day of January, 2010, to:

25 Hon. H. Jeffrey Coker
26 Hearing Officer 6R
P.O. Box 23578
Flagstaff, AZ 86002-0001

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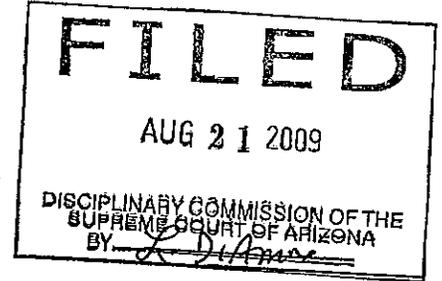
by: Deann Barker

/mps

EXHIBIT

A

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



IN THE MATTER OF A MEMBER) No. 08-1964
OF THE STATE BAR OF ARIZONA,)
)
NANCY D. PETERSEN,) **HEARING OFFICER'S REPORT**
Bar No. 017025)
)
RESPONDENT.)
_____)

PROCEDURAL HISTORY

1. The State Bar filed a Complaint on March 31, 2009, and thereafter served Respondent on April 1, 2009. The undersigned Hearing Officer was assigned to the case on April 10, 2009, and an ICMC was set on April 24, 2009. At the ICMC the matter was set for final hearing on July 13, 2009. After a Motion to Extend Time to Answer, Respondent, through Counsel, filed an Answer on May 8, 2009. The matter then proceeded to a contested hearing on the merits on July 13, 2009.

FINDINGS OF FACT

2. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice in Arizona on December 17, 1996. Respondent was also admitted to practice law in the State of California in 1989.¹

¹ Unless otherwise indicated, the findings of fact set forth herein are from the stipulated facts set forth in the Joint Pre-Hearing Statement.

Summary of allegations

3. This case involves allegations that Respondent failed to diligently represent her client by not timely proceeding with a dissolution action, failing to provide her client requested information, not communicating with her client and not being honest with her client. It is also alleged that Respondent had a duty to advise her client that she was on probation for a prior informal reprimand for previous misconduct, and finally, that she mislabeled her “flat fee” agreement as a “retainer” agreement.
4. On March 3, 2008, Respondent agreed to represent Mr. Cardwell in a dissolution matter for a fee of \$1,500 plus costs, with costs estimated to run \$500.
5. Respondent agreed to provide legal services of “preparation of all filings, attendance at court appearances, and full representation in the matter.”
6. Respondent termed her written communication to Mr. Cardwell regarding the fees and costs to be charged and the services to be performed as a “retainer agreement” and she termed the \$1,500 fee a “retainer fee”. Respondent testified that the “retainer agreement” was, in reality, a flat fee agreement, Hearing Exhibit (“Ex.”) 3.
7. Mr. Cardwell paid Respondent \$2,000 on March 25, 2008, with a Wells Fargo Bank check number 3437, which Respondent collected and which posted to his account on April 1, 2008.
8. Mr. Cardwell's payment to Respondent was not a fee paid in advance merely to insure Respondent's availability.

9. Mr. Cardwell provided to Respondent documents from a divorce and child custody case pending in a Utah court that had not concluded.
10. Respondent did not advise Mr. Cardwell that she was on probation as a result of informal discipline in five previous cases, and diversion in three cases, Transcript of Hearing "T/H" 42:14-18, and Respondent admitted this in her Answer, paragraph 18. Mr. Cardwell found this information out as a result of his own efforts when contacting the Bar.
11. Respondent testified that Mr. Cardwell did not tell her that he was in a hurry to get divorced, in fact he said that he was in no hurry because he was not anxious to get married again, T/H 91:3-22, 190:22-191:10.
12. From March 25 through October 4, 2008, Mr. Cardwell attempted to communicate with Respondent about his case and obtain updates and copies of documents from Respondent, but testified that he was unable to do so due to Respondent's failure to return his phone calls, "T/H" p. 25:4-7, 26:10-11, 27:3-7, 44:5-11 and Ex 1.
13. Respondent testified that she did have some contact with Mr. Cardwell in July 2008 regarding visitation issues, and this is somewhat born out by her contact notes, Ex. 39-B.
14. During the course of representation from March 25 through October 4, 2008, Mr. Cardwell attempted to obtain details from Respondent about a parenting class he was to attend. Respondent assured him that she would provide information to him, but failed to do so, T/H 31:1-14.

15. During the summer of 2008, not having heard from Respondent for several weeks and after leaving many unreturned voice-mail messages for Respondent, Mr. Cardwell went to Respondent's office to make sure she was all right. When Mr. Cardwell met with Respondent, Respondent told Mr. Cardwell that she planned to be in Florence two weeks hence and would then update him on the status of his case. (Admitted by Respondent in her Answer)
16. Mr. Cardwell testified at the hearing in this matter that during the foregoing office visit, Respondent assured him that the documents for his case had been filed, T/H 46:3-47:5 and that the "paperwork was on the judge's desk waiting to be signed." T/H 34:18-35:5, 35:24-36.
17. Respondent testified that her recollection of this meeting with Mr. Cardwell at her office was a hurried affair as he had just dropped by without an appointment and she was in a hurry. She confirms that she told him she would check on the status of his case but denied telling him the paperwork was on the judge's desk, T/H 104:21-105:4 & 106:7-13. Respondent testified that she can only guess that Mr. Cardwell misunderstood a discussion of paperwork concerning parenting classes.
18. After this office visit in the summer of 2008, Mr. Cardwell testified that Respondent failed to communicate with him and failed to update him on his case as she had promised, T/H 36:7-19, 38:19-23. On September 22, 2008, after not hearing from Respondent, he called Pinal County and learned that no Petition for Dissolution had been filed.²

² Mr. Cardwell, in error, called the Recorders office, but the petition had not, by Respondent's admission, been filed.

19. Respondent testified during the hearing in this matter that, because she had no cooperation from Mr. Cardwell's previous attorney in Utah to confirm that the previous Utah dissolution action had been terminated, and she had had a previous case wherein there was a problem because the out of state dissolution proceedings had not been resolved, she could not file the dissolution action in Arizona, T/H 92:3-24.
20. Respondent conceded that: 'it may very well be that he (Mr. Cardwell) left messages with me that did not get returned.' T/H 106:1-3
21. Respondent also testified that she made repeated efforts to determine the status of the case in Utah, but because the attorney in Utah would not communicate with her, it took some time, T/H 92:25-94:25, Ex.'s 17, 18, & 19. Respondent also testified that she is "not sure" she told Mr. Cardwell of these problems, T/H 95:8-12.
22. By early September, Respondent had confirmed that the dissolution action in Utah had been resolved and so prepared Mr. Cardwell's Petition for Dissolution on September 19, 2008, T/H 101:6-12 & 102:1-2, Ex. 19.
23. On October 4, 2008, Mr. Cardwell sent Respondent a letter requesting a refund as he considered the "contract breached" by Respondent, and requested a full refund of the \$2,000, to be paid back to him within 30 days. The letter was sent by certified mail, return receipt requested and was signed for by Respondent's office on October 7, 2008, Ex. 5.

24. Respondent testified that she did not file the prepared Petition for Dissolution for Mr. Cardwell because she received his letter of October 4, 2008, terminating her services, T/H 102:5-12.
25. On November 6, 2008, the State Bar received Mr. Cardwell's charge against Respondent.
26. On November 11, 2008, the State Bar sent to Respondent a copy of the charge with instructions to respond within 20 days, Ex. 7.
27. On the 20th day following November 11, 2008, (December 1, 2008), which was Respondent's deadline to respond to the Complainant's charge, Respondent wrote to the State Bar requesting an extension to respond, Ex. 8. Respondent's reason for requesting an extension was: "I expect to be able to retain counsel in this matter this week, but have not been able to do so prior to this writing due to the unavailability of my choice of counsel. I believe it is important to have counsel in this matter and request an extension until December 16, 2008, to be able to retain counsel and file an appropriate response." (Admitted by Respondent in her Answer.)
28. The State Bar granted Respondent's request for an extension to respond to the charge to December 16, 2008.
29. Respondent did not respond to the charge by December 16, 2008, although she claims that she thought her counsel had filed the Answer.
30. On December 24, 2008, the State Bar sent to Respondent a reminder letter that her response was overdue and her failure to respond to the charge or cooperate with the State Bar of Arizona were themselves violation of the Rules of Professional

- Responsibility for lawyers in Arizona, and independent grounds for the imposition of discipline, Ex. 9. (Admitted by Respondent in her Answer.)
31. On January 6, 2009, and then again on January 7, 2009, Respondent responded to the charge on her own behalf and not by counsel, Ex.'s 10 and 11.
 32. In her response to the State Bar, dated January 7, 2009, Respondent claims to have mailed to Mr. Cardwell a "Withdrawal of Attorney" by which she sought Mr. Cardwell's signature and consent to Respondent's withdrawal as his attorney.
 33. Respondent testified that, subsequent to the filing of her Answer to the Bar's Complaint, she spoke with Mr. Cardwell, and after explaining all the problems that she had getting confirmation that the Utah case had been dismissed, Mr. Cardwell authorized Respondent to continue to represent him with regard to the dissolution. Mr. Cardwell recalls that the meeting was in January 2009, but Respondent's memory is that it was in November or early December 2008, T/H 108:12-15. At that meeting, after Respondent explained the problems she had, Mr. Cardwell stated that this was the first he had heard of these problems and he wished that he had known this information T/H 60:18-61:11. Respondent apologized to Mr. Cardwell at this meeting, T/H 109:15-22.
 34. There was testimony by Mr. Cardwell that Respondent refunded to him half of his retainer, or \$1,000. Respondent testified that she had no recollection of making such a refund and has no check to show that she did so.
 35. Respondent thereafter filed Mr. Cardwell's Petition for Dissolution and the hearing on the Dissolution is to be resolved shortly. Mr. Cardwell has

subsequently had Respondent do other work for him and he is satisfied with her services, T/H 116:19-21, 49:14-50:1.

36. Both Hal Nevitt, Director of Member Assistance for the State Bar, and Kathe Reitman, Respondent's treating Psychiatric Nurse Practitioner, testified that Respondent has "recurring depression" that, when untreated, acts to cause her to avoid communication with her clients, T/H 73:6-7, 83:15-84:15, 121:17-122:5, 123:21-124:1. They both opined that Respondent is not intentionally causing these problems, but when her depression kicks in she goes into avoidance mode, T/H 83:15-84:15.
37. They both also testified that the combination of medications and the assistance of the State Bar seem to be assisting Respondent in her practice, T/H 73:22-74:17, 126:17-127:8, 144:8-145:6.
38. Mr. Nevitt also recommended that Respondent see a nurse Practitioner, which she did T/H 72:10-73:1. He also testified that Respondent has been compliant in meeting with those people that she has been directed to meet with.
39. Respondent testified that she has made several changes to her law practice to help assure that these communication issues do not rise again T/H 194:25-197:6. Respondent also: meets with her nurse practitioner monthly to monitor her medications; attends a lawyer support group; has a practice monitor and support from another attorney, T/H 197:7-199:21.
40. Respondent's disciplinary record is as follows:
 - Probation in file number 06-0523, filed August 7, 2006 for violating ERs 1.3, 1.4, 1.5(d)(3), 1.15 and 1.16;

-Informal Reprimand/Probation in file number 06-0878, filed November 1, 2006 for violating ERs 1.3, 1.4 and 1.16;

-Informal Reprimand/Probation in file number 07-0571 filed November 30, 2007, for violation of ERs 1.2, 1.3, and 1.4;

-Informal Reprimand/Probation in file number 07-0565, filed November 30, 2007, for violation of ERs 1.3 and 1.4;

-Informal Reprimand/Probation in file number 07-0243, filed December 3, 2007 for violation of ERs 1.3 and 1.4;

-Diversion in file numbers 04-1146, 04-1170, and 04-1211. In file numbers 04-1146 and 04-1170, as part of the diversion for violation of ERs 1.1, 1.3, 1.4, 3.1 and 4.1, Respondent was ordered to participate in LOMAP, MAP, and EEP and also ordered to obtain a Practice Monitor. In file number 04-1211, as part of the diversion for violation of ERs 1.3, 1.4, 1.5 and 3.2, Respondent was ordered to participate in LOMAP, MAP, EEP and Fee Arbitration, and to obtain a Practice Monitor.

CONCLUSIONS OF LAW

41. **Failure to Inform Client of Previous Informal and Diversion History, ER 1.4(a)(1)(b):**
42. Much of the State Bar's Post Hearing Memorandum addressed its contention that Respondent had a duty, under ER 1.4 Communication, (duty to get informed consent) and ER 1.0 Terminology definition of "informed consent," to tell Mr. Cardwell of her prior informal discipline and diversion from 2006 and 2007. The State Bar's position is that Respondent had an obligation to advise Mr. Cardwell

about the material risks of being represented by a lawyer that was on probation and receiving professional aid for failing to abide by diligence and communication rules. Further, the State Bar argues that Respondent failed to communicate adequate information and explain to Mr. Cardwell about reasonably available alternatives to being represented by her as opposed to different counsel who was not being counseled on how to practice law ethically. Finally, the State Bar argues that Respondent failed to explain to Mr. Cardwell, the dynamics of being represented by a lawyer with a known penchant for violating diligence and communication rules necessary to permit Mr. Cardwell to make an informed decision about whether he wanted Respondent to represent him. As a result of this failure to disclose, the State Bar contends that Mr. Cardwell did not have sufficient information to agree to the proposed course of conduct of having a probationary lawyer represent him in his divorce. See State Bar's Post Hearing Memorandum, pages 3-4.

43. The State Bar cites to no Arizona authority to support this contention, but does cite authority in other states that arguably support this contention.
44. This Hearing Officer has reviewed the Rules, and simply cannot find support for the State Bar's position. To find that Respondent has some duty to disclose informal discipline and diversion programs to her clients in a situation such as this case, to this Hearing Officer, would require a specific Rule addressing that issue, and is not a duty that can be drawn from inference. Therefore, this Hearing Officer does not find that Respondent violated any Rule or ER because she did not advise Mr. Cardwell of her previous informal discipline history.

45. **Failing to Diligently Represent Mr. Cardwell, ER 1.3:**
46. The State Bar alleges that Respondent failed to reasonably, promptly and diligently prepare all filings, provide full representation and diligently represent Mr. Cardwell in violation of ER 1.3. Respondent responds that Mr. Cardwell told her at one of their initial meetings that he was not in a particular hurry to get divorced because he did not want to get remarried, and that he also already had custody of his daughter. Respondent responds further that, due to the uncooperative conduct of Mr. Cardwell's previous attorney in Utah, she could not get confirmation that the Utah dissolution had been dismissed, and subsequently was required to publish notice to Mr. Cardwell's wife because Mr. Cardwell did not have a good address for her.
47. While it is easy in hindsight to say that Respondent should have been acting faster in the resolution of Mr. Cardwell's case, it must be borne in mind what Respondent understood Mr. Cardwell's aims were, and that was that he was in no hurry to get divorced.
48. After reviewing the exhibits in this matter, and considering the testimony provided by both Mr. Cardwell as well as Respondent, this Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that Respondent was not prompt and diligent in the preparation of the pleadings or in the representation of Mr. Cardwell. There were reasonable explanations for the delay in getting the dissolution filed here in the State of Arizona, and, shortly after the preparation of the Petition for Dissolution, Mr. Cardwell terminated Respondent's representation of him. Once Mr. Cardwell was made aware of the

difficulties that Respondent was encountering in getting information that she needed to be assured that the Utah action had been dismissed, he stated that he wished he had known that, and then proceeded to have Ms. Peterson not only finish the dissolution action, but had her do other legal work for him to his satisfaction.

49. **Failing to Keep the Client Reasonably Informed, ER 1.4(a)(3):**

50. While there are reasons not to find violations of the previous allegations, there is certainly well substantiated cause to find that the Respondent did not keep her client reasonably informed about the status of his case. Not only did Respondent fail to adequately inform Mr. Cardwell of the difficulties she was having in confirming the resolution of the Utah case, she did not provide him with the information that he requested on the status of his case or on the parenting classes.

51. While it can be understood that there was confusion as to what Respondent told Mr. Cardwell at their impromptu meeting at her office about documents being on the judge's desk, there is insufficient evidence to show by clear and convincing standard that Respondent "fibbed" to him. However, there is no question but that part of the confusion was due to the Respondent's not taking a reasonable amount of time in communicating with her client, and then also not following up on her commitment to get back to him on the status of his case.

52. By Respondent's own admission, she did not adequately communicate with her client, and therefore, this Hearing Officer finds that there is clear and convincing evidence that Respondent violated ER 1.4(a)(3) Communication. Additionally, there is clear and convincing evidence that Respondent did not promptly comply

with Mr. Cardwell's reasonable requests for information in violation of ER 1.4(a)(4). These ER violations provide a basis for a finding of a violation of ER 8.4(a) Misconduct.

53. **Improper Wording on Fee Agreement:**

54. The State Bar appropriately cites to the fact that Respondent's fee agreement is improperly labeled as a "retainer agreement" when in fact it was a "flat fee agreement." Respondent admitted this error and the Hearing Officer finds a violation of the ER 1.5.

55. Neither Respondent nor her client ever thought of their agreement as anything other than a flat fee agreement, and there was no confusion caused by the improper wording. Respondent has changed the wording of her fee agreement to accurately reflect the intent of the parties. This Hearing Officer finds that this violation is minimal.

ABA STANDARDS

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

The Duty Violated:

57. The State Bar submits that because Respondent had numerous referrals for essentially the same conduct in her prior cases, *Standard* 8.3 (which deals with prior discipline orders) is the most applicable *Standard* in this case. *Standard* 8.3(b) provides as follows:

Reprimand (Censure) is generally appropriate when a lawyer:

(b) has received an admonition for the same or similar misconduct, and engages in further acts of misconduct that causes injury or potential injury to a client, the public, the legal system, or the profession.

58. Respondent, on the other hand, submits that *Standard 4.4* Lack of Diligence is the most appropriate *Standard* to consider. The difference between a Reprimand (Censure), under *Standard 4.43*, and an Admonition (Informal Reprimand) under *Standard 4.44* hinges upon whether the lawyer's lack of diligence caused "injury or potential injury to a client" (4.43), or "little or no actual or potential injury" (4.44).
59. A review of the ABA *Standards* shows that while "Lack of Diligence" is addressed, the specific violation in this case is a failure to "communicate." Failing to communicate with one's client, however, could be considered to be a lack of diligence.
60. This Hearing Officer finds that either *Standard* could be applicable, and it will depend on the aggravating and mitigating factors to decide whether Respondent receives a Censure or Informal Reprimand.

The Lawyer's Mental State:

61. This Hearing Officer finds that Respondent's mental state was negligent.

Injury Caused:

62. Respondent's failure to communicate with her client did cause Mr. Cardwell potential injury.

Aggravating and Mitigating Factors

Aggravating Factors:

63. *Standard 9.22(a)* prior disciplinary offenses. Respondent has had multiple prior disciplinary offenses, all occurring in the 2004-2006 timeframe, resulting in either Diversion or Informal Reprimand.

Mitigating Factors:³

64. *Standard 9.32(b)* absence of dishonest or selfish motive. All of the evidence in this case indicates that Respondent's failure to communicate with her client was not done as a result of a dishonest or selfish motive. It appears that Respondent's failure to communicate with her client was born out of her misunderstanding of his desires concerning the resolution of his dissolution case, and perhaps more importantly, a side effect of her depression.
65. *Standard 9.32(c)* personal or emotional problems. Both Hal Nevitt as well as Respondent's nurse practitioner testified that Respondent suffers from re-current depression, and that this condition is exacerbated by issues in her personal life as well as pressures in her professional life.
66. *Standard 9.32(d)* timely good faith effort to rectify consequences. Apparently at Mr. Cardwell's request, after the filing of his Bar Charge with the State Bar, Respondent met with him and explained to him the difficulties she had encountered in trying to proceed with his dissolution. Mr. Cardwell was satisfied with Respondent's explanation and asked Respondent to continue to represent him in his dissolution, which she has done.

³ Because of the Respondent's problems in responding to the Bar on these charges, 9.32(e) cooperative attitude could not be found.

67. *Standard 9.32(1)* remorse. Both in her pleadings as well as in person during her testimony, Respondent conveyed sincere remorse for not only being in trouble again, but also the problems that she caused her client. Respondent evidenced a self awareness of not only how her emotional condition affects her, but the side effects it can have on her clients. Both Hal Nevitt as well as Respondent's nurse practitioner testified that Respondent is making every effort to address her problems and do everything she can both in her personal life as well as her office procedures to make sure that this is not a recurring problem.

PROPORTIONALITY REVIEW

68. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is “an imperfect process” because no two cases are ever alike, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed on cases that are factually similar, *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasley*, supra.
69. Neither Bar Counsel nor Respondent's counsel submitted any cases to this Hearing Officer concerning proportionality. This Hearing Officer consulted the Supreme Court website matrix, and reviewed many cases trying to find cases that could give some proportionality guidance in this case, and none could be found.

What we have in this case is a situation where the Respondent has received the benefit of remedial services from the State Bar and has done a pretty good job of staying out of trouble for three years from her last infractions, but is yet again involved in the disciplinary process, albeit for a fairly minor issue. This Hearing Officer suspects that the reason there are no cases to be found that can give proportionality guidance is because these facts are fairly unique and cases such as this are generally dealt with in the informal process so they do not come before the formal process such that the matrix would capture them.

RECOMMENDATION

70. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill public confidence in the Bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
71. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Associations *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).
72. Respondent's conduct in this case presents several challenges. Were it not for the fact that Respondent was previously cited for the same misconduct, this matter would have been resolved informally and much sooner. Although it must be

recognized that this is repetitive behavior, failure to communicate with a client which does not cause direct injury, is pretty low on the scale of infractions. In this case, had Respondent simply told her client of the problems she was having with the attorney in Utah, this whole process would not have been started.

73. As mentioned previously, a presumptive sanction of either Censure or Informal Reprimand could be supported under the *Standards*. Some would say that Respondent has already been given her chance and it is time to Censure her. Were it not for the testimony that Respondent is not intentionally causing these problems, this Hearing Officer would concur. In the end, this Hearing Officer is persuaded by the numerous mitigating factors which show that Respondent has, and is taking significant steps to address her depression and implementing practice reforms that hopefully will guard against a recurrence. Particularly persuasive is the greater self awareness that Respondent seems to have of the onset of her depressive symptoms and how to address them.

74. Respondent is cautioned that should there be further problems or misunderstandings between her and her clients either as a result of her mental health issues or her failure to adequately understand her client's wishes, the consequences will be much more severe.

75. It is, therefore, the finding of this Hearing Officer that Respondent shall receive an Informal Reprimand plus probation for two years from the date of this Report under the following terms:

1) Respondent shall participate in the Member Assistance Program (MAP) and/or LOMAP at the Director's discretion;

- 2) Respondent shall contact the director of the State Bar Membership Assistance Program within 30 days of the date of this Report. The MAP Director shall determine the specific "Terms and Conditions of Probation";
- 3) Respondent shall abide by the MAP director's recommendations and instructions including, but not limited to, any periodic reporting the MAP Director deems appropriate;
- 4) The MAP Director shall have the authority to consult with Respondent's health-care providers regarding any treatment regimen that may be prescribed;
- 5) Respondent shall furnish whatever confidential or private information releases and/or authorizations the MAP Director requires in order to effectuate the foregoing provisions;
- 6) In the event that Respondent fails to comply with any of the foregoing probation terms, and the State Bar of Arizona receives information thereof, Bar Counsel shall file a notice of noncompliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days following the receipt of notice, to determine whether a term of probation has been breached, and if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence;
- 7) Respondent is responsible for any costs associated with the MAP participation;

8) Respondent is responsible for the payment of costs and expenses of these disciplinary proceedings;

9) Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

DATED this 21st day of August, 2009.

H. Jeffrey Coker / UA
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 21st day of August, 2009.

Copy of the foregoing mailed
this 21st day of August, 2009, to:

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