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

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| IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,<br><br>BERNARD M. STRASS,<br>Bar No. 013684,<br><br>RESPONDENT. | No. 06-0301<br><br>**HEARING OFFICER'S REPORT** |

## PROCEDURAL HISTORY

On September 18, 2006, State Bar of Arizona ("State Bar") Probable Cause Panelist Steven P Sherick, filed a Probable Cause Order, finding probable cause existed to issue a Complaint against Respondent Bernard M. Strass ("Respondent") for violations of Rule 42, Ariz. R. S. Ct., including but not limited to violations of ER's 1.1, 1.2, 1.3, 1.4, 1.5(c), 1.16(d), 3.2, and 8.4(d) . On October 3, 2006, the State Bar filed a Complaint against Respondent alleging one count of violating those ethics rules reference handling of a matter for client Michael A. Paz. On October 28, 2006, Respondent filed an Answer largely denying the allegations of the Complaint.

The State Bar had filed its initial discovery disclosure timely on November 16, 2006, but Respondent did not file his disclosure. An initial case management conference was held on December 4, 2006, where standard scheduling orders were entered. In that Order, Respondent was given an additional ten days to complete his discovery disclosure. When those ten days had passed, on December 14, 2006, the State Bar filed a Motion to Strike Respondent's Answer and to Compel Discovery, as well as a Motion for Rule 37(c) Sanctions. With no response to that pleading, nor any tardy disclosure of Respondent's evidence, on January 16, 2007, this Hearing Officer ruled: granting the Motion for Rule 37(c) Sanctions (precluding

Respondent from using any evidence that had not been timely disclosed); denying the Motion to Compel Discovery as moot; and, denying the Motion to Strike Respondent's Answer, without prejudice.

The matter was assigned to Patricia E. Nolan for settlement conference. A settlement conference was held on December 13, 2006, but the parties were unable to reach an agreeable resolution of the case.

On February 16, 2007, the parties filed a Tender of Admissions and Agreement for Discipline by Consent, and a Joint Memorandum in Support of Agreement for Discipline by Consent; two exhibits were filed under seal with those documents. Thereafter, two recorded telephonic conferences were held (on March 8, 2007 and April 3, 2007) to take evidence in support of the Agreement for Discipline. After the second conference, this Hearing Officer accepted the proffered Tender of Admissions and Agreement for Discipline by Consent.

## FINDINGS OF FACT

The Hearing Officer finds the following facts are true by stipulation of the parties as well as the conditional admissions of Respondent, and are supported by the facts of the case as well as the evidence taken in support of the Agreement for Discipline.

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having first been admitted to practice in Arizona on May 18, 1991. I further find that this amount of time in practice constitutes "substantial experience" in the practice of law.

2. On or about June 27, 2001, Respondent was retained by Michael A. Paz ("Mr. Paz") for representation relating to an automobile accident in which Mr. Paz had been involved, *i.e.*, Case No. CV2003-012328, *Paz v. Mistano* ("*Mistano* case").

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3. On or about September 18, 2002, Mr. Paz retained Respondent for representation in another case, *i.e.*, *Paz v. Burns* ("*Burns* case").

4. Mr. Paz instructed Respondent to initiate litigation in the *Burns* case.

5. Over a period of time starting in June 1, 2001, and extending through December of 2004, Mr. Paz made repeated requests of Respondent for information about the status of his cases.

6. Respondent either failed to provide any information or did not provide timely, accurate, or sufficient information in response to Mr. Paz's inquiries.

7. The *Mistano* case was dismissed by the Court on June 9, 2004, having been previously placed on the Court's inactive calendar.

8. Respondent did not inform Mr. Paz that the *Mistano* case had been dismissed.

9. By September of 2004, Mr. Paz had not received current information from Respondent on the status of either pending case, and had been unable to contact Respondent for a lengthy period of time.

10. On or about September 9, 2004, Mr. Paz, via e-mail, inquired of Respondent about both of his pending matters, indicating that he had not been able to contact Respondent "for a while."

11. In the same e-mail, Mr. Paz expressed concern that the Statute of Limitations deadline was quickly approaching in the *Burns* matter, and was at that time approximately nine days away.

12. In response to Mr. Paz's e-mail, Respondent replied on September 10, 2004, that the insurer was reviewing records relating to the *Mistano* matter, and requested that Mr. Paz return a signed fee agreement to him on a third legal matter.

13. Respondent requested that Mr. Paz sign a fee agreement in which Respondent had unilaterally altered the financial terms of the agreement with Mr. Paz

relating to the *Burns* case and the third legal matter, in that respondent would receive 40% of any litigation proceeds, rather than the 33⅓% originally agreed upon. By filing the third lawsuit (in absence of a fee agreement), Respondent believed that he was protecting his client's rights, knowing that if they did not reach an agreement on fees, fee arbitration was possible.

14. By e-mail dated September 10, 2004, Respondent stated that he would draft the complaint in the *Burns* case and file it the following week to preserve Mr. Paz's rights.

15. Respondent filed a Complaint in the *Burns* case on September 17, 2004.

16. In or about October of 2004, Mr. Paz, via e-mail, requested information about the *Mistano* case, specifically whether Respondent had requested an arbitrator for the matter, as he had previously promised to do.

17. In or about December of 2004, Respondent informed Mr. Paz that he would be requesting that the *Mistano* case be arbitrated. This statement was false and known by Respondent to be false.

18. Respondent subsequently did not provide any information about the *Mistano* case to Mr. Paz.

19. On or about July 13, 2005, Respondent appeared, without his client, for arbitration in the *Burns* case. Mr. Paz failed to appear because Respondent had failed to inform him of the scheduled arbitration hearing.

20. Prior to the arbitration in the *Burns* case, Respondent had failed to respond to any discovery requests made by the opposing party, had never produced Mr. Paz and his wife for deposition, had never served a disclosure statement or propounded any discovery, and had never submitted any medical records to the insurer or the opposing party.

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21. At the July 13, 2005 arbitration, an arbitration award was granted against Mr. Paz in the *Burns* case due to the fact that Mr. Paz had failed to appear for the arbitration.

22. The arbitrator found that Mr. Paz had not participated in good faith, based on his failure to appear, and Mr. Paz was therefore unable to appeal the arbitration award.

23. In or about December of 2005, in response to repeated inquiries from Mr. Paz, Respondent informed Mr. Paz that a settlement in the *Mistano* case was imminent. This statement was false and known by Respondent to be false.

24. At the same time, Respondent informed Mr. Paz that due to Respondent suffering from anxiety, he was withdrawing from his representation of Mr. Paz and was referring Mr. Paz's cases to another attorney and that that attorney would contact Mr. Paz.

25. Mr. Paz was not contacted by another attorney and repeatedly attempted to contact Respondent to obtain information about his matters. He was unable to reach Respondent directly by telephone, and Respondent did not return any of messages left for him by Mr. Paz.

26. Mr. Paz attempted to personally contact Respondent and found that Respondent's office was closed. Mr. Paz was unable to learn of any forwarding address for Respondent.

27. Respondent failed, despite one or more requests, to provide Mr. Paz's files, or copies of files, to Mr. Paz's subsequent attorney. Respondent asserts, and the State Bar does not contest for purposes of this agreement, that Respondent requested, but did not receive, a copy of the substitution of new counsel.

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## CONCLUSIONS OF LAW

The State Bar bears the burden to prove, by clear and convincing evidence, a violation of ER's 1.1, 1.2, 1.3, 1.4, 1.5(c), 1.16(d), 3.2, and 8.4 (c & d). Arizona Supreme Court Rules 48(d). It did so as to each of these ethics rules. The Hearing Officer finds that the State Bar has proven, by clear and convincing evidence, the following conclusions of law:

1. Respondent's lack of prosecuting Mr. Paz's cases violated what is required in ER 1.1 for competent representation.

2. Respondent failed to abide by Mr. Paz's decisions on how to proceed with his case, in violation of ER 1.2(a).

3. Respondent failed utterly to act with reasonable diligence and promptness in representing Mr. Paz, in violation of ER 1.3.

4. Respondent's communications with Mr. Paz were inadequate, and violated the prompt communication requirement of ER 1.4(a).

5. Respondent's fee agreement with Mr. Paz failed to reflect accurately the understanding he had with Mr. Paz, in violation of ER 1.5(c).

5. Upon terminating his representation of Mr. Paz, Respondent failed to take steps to protect Mr. Paz's interests, in violation of ER 1.16(d).

6. Respondent failed to make efforts to expedite litigation on behalf of Mr. Paz, in violation of ER 3.2.

7. Respondent made several false statements to Mr. Paz, in violation of ER 8.(c). Furthermore, Respondent's conduct in litigating Mr. Paz's cases was prejudicial to the administration of justice, in violation of ER 8.4(d).

## RECOMMENDED SANCTIONS

In determining the appropriate sanction, this Hearing Officer has considered both the American Bar Association's *Standards for Imposing Lawyer*

*Sanctions* ("*Standards*") as well as Arizona case law; I have also considered the nature of the duty violated, the lawyer's mental state at the time, any actual injury to Mr. Paz, and aggravating as well as mitigating factors. In re Peasley, 208 Ariz. 27, 35, 90 P.2d 764, 772 (2004); In re Tarletz, 163 Ariz. 548, 789 P.2d 1049 (1990). In determining the correct sanction, the analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from such conduct while protecting the interests of the public and the profession. In re Kersting, 151 Ariz. 171, 726 P.2d 587 (1986).

**A. ABA *Standards***

The *Standards* provide guidance as to an appropriate and reasonable sanction in Respondent's case. The Arizona Supreme Court, as well as the Disciplinary Commission, consider the *Standards* to be a suitable guideline. Peasley, 208 Ariz. at 33-35, 90 P.2d at 770-72; In re Rivkind, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

The Hearing Officer concurs with the parties that Respondent's most serious misconduct was the failure of his duty to represent Mr. Paz coupled with dishonesty to him. Due to Respondent not communicating with his client nor being diligent about representation in the *Burns* case, Respondent caused injury to Mr. Paz by the arbitration award being entered against him; the client was further harmed by being unable to appeal or undo the award. This reveals a pervasive pattern of neglect as to Mr. Paz.

Respondent's knowingly untruthful statements to Mr. Paz, in violation of ER 8.4(c), implicate *Standard* § 4.6. Subsection 4.62 provides that suspension from practice is warranted when a lawyer "knowingly deceives a client, and causes injury" to the client. The more serious sanction of disbarment is available in § 4.61, but that applies when the lawyer "deceives the client with the intent to benefit the lawyer and

causes the client serious injury." Although Respondent's misrepresentations to Mr. Paz were completely unacceptable, and appear to have been concocted to avoid being immediately confronted with wrongdoing, I find that this does not rise to the level of a "benefit" for Respondent to trigger application of §4.61. Therefore, this Hearing Officer finds that § 4.62 is the appropriate *Standard* for Respondent's dishonest misconduct.

The demonstrated lack of diligence in pursuing Mr. Paz's cases is a significant violation of ER's 1.3, 1.5, & 8.4(c), calling for sanction under *Standard* § 4.4. Subsection 4.42(b) provides for suspension when an attorney "engages in a pattern of neglect and causes injury ... to a client." As discussed above, Respondent engaged in such a pattern of neglect regarding Mr. Paz's cases. Nonetheless, Respondent continued representation and provided some services to Mr. Paz, so the more serious § 4.41 (calling for disbarment when abandoning clients or the practice) is not applicable. Therefore, the Hearing Officer finds that § 4.42 is the appropriate *Standard* to apply as to Respondent's lack of diligence in representing Mr. Paz.

**B. Aggravating and Mitigating Factors**

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* §§ 9.22 and 9.32, respectively. The Hearing Officer finds the following two factors are present in aggravation:

1. *Standard* § 9.22(b): Respondent's false statements to his client were compounded by his selfish or dishonest motive for doing so. Respondent provided false or misleading information, and failed to provide accurate information, to Mr. Paz about the *Mistano* case while trying to secure Mr. Paz's approval to represent him in a third case. This is compounded because the false representations and omissions served to cover up his failure to prosecute adequately Mr. Paz's two existing cases. Selfish motivation aggravates his sanction, pursuant to § 9.2. Specifically, § 9.22(b)

considers misconduct aggravated when undertaken with a "dishonest of selfish motive." I nonetheless find that this is mitigated, accepting as fact that by filing the third lawsuit (in absence of a fee agreement), Respondent believed that he was protecting his client's rights, knowing that if they did not reach an agreement on fees, fee arbitration was possible.

2. *Standard* § 9.22(i): Respondent's misconduct is additionally aggravated by his having had substantial experience in the practice of law. He had been in practice in Arizona from 1991, and in Nebraska from 1988. Having had "substantial experience in the practice of law" aggravates his sanction, pursuant to § 9.22(i).

This Hearing Officer also finds two factors are present in mitigation:

1. *Standard* § 9.32(c): Respondent's conduct is mitigated most significantly by his documented "personal or emotional problems" during the time frame in issue here. *See* sealed documents in Exhibits B &C to the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent, and Transcript of Proceedings dated March 8, 2007, at 5-7. Due to these problems, Respondent was impaired in, although not justifiably prevented from, carrying out his professional responsibilities to Mr. Paz. I find that this mitigating factor is substantial.

Moreover, these circumstances led Respondent to his decision to quit the practice of law and return to his less stressful (and certainly as noble) profession as a high school teacher. Given that resignation from the practice, the concern that he will in the future continue to inadequately represent legal clients is of no weight. This does not mitigate his conduct, *see Standards* § 9.4(d), but it strongly shows Respondent's willingness to "police himself" and cooperate with discipline, a matter discussed below.

2. *Standard* § 9.32(e): Respondent is credited with having been forthright and honest in cooperating with this investigation and disciplinary prosecution.

Moreover, rather than actively contest the allegations, he quickly entered into a settlement agreement with the State Bar. Additionally, Respondent's decision to leave the practice of law and return to teaching – though it does not mitigate his conduct, *see Standards* § 9.4(d) – it strongly shows Respondent's willingness to "police himself" and cooperate with discipline. Hence, he engaged in "full and free disclosure to the disciplinary board or cooperative attitude toward proceedings" as recognized in § 9.32(e).

**C. Proportionality Analysis**

Because no two cases are ever alike, the Supreme Court has recognized that the concept of proportionality is "an imperfect process." In re Owens, 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). However, the Court has held that in order to have an effective system of professional sanctions, there must be internal consistency, so it is appropriate to examine sanctions imposed in factually similar cases. Peasley, 208 Ariz. at ¶ 33, 90 P.2d at 772. In order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *See* Id., at ¶ 61, 90 P.2d at 208; *see also* In re Wines, 135 Ariz. 203, 660 P.2d 454 (1983); In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993).

In accordance with the case law discussed below, suspension from practice is an appropriate sanction for Respondent.

Three cases discuss attorney misconduct similar to Respondent's, though some of their aggravating factors are absent in the instant matter and some of Respondent's mitigation is absent in those reported cases. In In re Turley, DC-02-1697, 03-1468 (2005), the lawyer failed to communicate with his client or adequately explain the status of the matter with the client, and failed to act with reasonable diligence to expedite the client's legal matter. As a result, the client's lawsuit was

dismissed for failure to prosecute it. This is analogous to Respondent's case, except Turley had also violated terms of his disciplinary probation – a fact *not* present in the instant matter. Turley was therefore suspended from practice for two years.

In In re Gieszl, SB-06-0013-D (2006), the lawyer failed to file his client's case timely and similarly deceived the client over a period of time about that misconduct. This case was aggravated by the lawyer creating fictitious settlement documents to appease the client and prevent her from learning the truth about his dereliction. Gieszl also suffered from "personal and emotional problems." This is similar to the instant case except that Gieszl additionally created fictitious documents and led the client on falsely for a significantly longer period of time than Respondent had here. Gieszel was therefore suspended from practice for one year.

In In re Pulito, SB-04-0134-D (2005), the lawyer also failed to prosecute a case timely, deceiving the client over a lengthy period of time about the status of the matter. He also had the benefit of substantial mitigation. Pulito is thus similar to Respondent's case factually, except that Pulito's deceit proceeded for a much longer time than Respondent's, and Pulito also created false billing statements to support his deception. Pulito was therefore suspended from practice for one year.

Because these cases featured factors more aggravating than Respondent's matter, case law supports a sanction lower than those suffered by Turley, Gieszl, and Pulito.

**D. Discussion of Appropriate Sanction**

The purpose of attorney discipline is not to punish the lawyer, but to protect the public and deter future misconduct. In re Fioramonti, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the object of lawyer discipline to protect the public, the profession, and the administration of justice. In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). Another purpose attorney discipline serves is to instill public

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confidence in the bar's integrity. Matter of Horwitz, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994). In selecting the appropriate attorney disciplinary sanction, it is appropriate to consider the facts of the case, the *Standards,* and the proportionality of discipline imposed in analogous cases. Matter of Bowen, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). This Hearing Officer has considered all these factors.

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent shall be suspended from the practice of law in Arizona for a period of six months and one day.

2. If Respondent applies for reinstatement to practice, he shall be placed on probation for a period of three years (if deemed appropriate and necessary at the time of any possible future reinstatement); any terms of said probation must include proof of on-going medical treatment and monitoring of his practice to best ensure that future injuries to the public and the profession are avoided.

3. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding, pursuant to Arizona Rules of the Supreme Court 60(b).

4. No restitution is ordered. *See* Transcripts of Proceedings dated March 8, 2007 at 10-17, and April 3, 2007 at 3-7.

Dated this 21st day of May, 2007.

Donna Lee Elm/cs
Donna Lee Elm
Hearing Officer 6N

Original filed with the Disciplinary Clerk
this 21st day of May, 2007.

Copies of the foregoing mailed
this 21st day of May, 2007, to:

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