

FILED
MAY 04 2010
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY A. D. Amuse

No. 09-0353

HEARING OFFICER'S REPORT

Respondent.

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3. In July 2007, Respondent agreed to represent pro bono Joseph Patterson, a defendant in AAA Full Transportation System v. Russell Wilson et al., (“AAA Cab v. Wilson”) CV 2006-011153, in the Maricopa County Superior Court.
4. Respondent and his wife were also defendants in this same litigation, but were represented by counsel.
5. At the time Respondent accepted the representation, Respondent was also a defendant in the same litigation, and therefore it was very likely that Respondent would be a necessary witness on a contested issue in the litigation.
6. Respondent did actually testify in the trial on contested issues while he was representing Mr. Patterson.

CONCLUSIONS OF LAW

7. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically: ER 3.7

ABA STANDARDS

8. 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

9. A review of the ABA *Standards* shows that *Standard* 4.3, Failure to Avoid Conflict of Interest, is the most applicable *Standard*. *Standard* 4.34 states:

“Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.”

The Lawyer's Mental State

10. The parties submitted, and this Hearing Officer could find no evidence to the contrary, that Respondent's conduct in this matter was negligent.

Injury Caused

11. The parties submitted, and this Hearing Officer could find no evidence to the contrary, that there was not only no injury caused to anyone as a result of Respondent's conduct, there are no restitution issues to be addressed.

Aggravating and Mitigating Factors

Aggravating factors:

12. *Standard 9.22(i)*, Substantial experience in the practice of law.
Respondent has been practicing law for 37 years.

Mitigating Factors:

13. *Standard 9.32(a)*, Absence of a prior disciplinary record.
Respondent has been an attorney for 37 years without a disciplinary record.
14. *Standard 9.32(b)*, Absence of a dishonest or selfish motive.
Respondent represented Mr. Patterson pro bono due to Mr. Patterson's financial condition.

PROPORTIONALITY REVIEW

15. 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 in 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*.
16. The parties cite to the fact that there are very few cases dealing specifically with ER 3.7 and this Hearing Officer concurs.
17. In *In re Hineman*, 06-0823, there was an agreement for Censure and one year of probation because Respondent engaged in a conflict of interest by simultaneously representing a father and daughter in a Guardianship and Conservatorship case. The father had a diminished capacity and Respondent failed to consult with the Public Fiduciary before filing a Legal Separation. Respondent further brought or defended an issue without a good-faith legal basis by claiming that his client was not incapacitated and that no conflict of interest existed, attested to his client’s competency in an affidavit, and failed to provide competent representation related to the Guardian and Conservatorship. Respondent was cited for violating ERs 1.1, 1.14, 1.16, 3.1, 3.7 and 8.4(d). The following factors were found in aggravation:

prior discipline, vulnerable victim, and substantial experience. In mitigation, the following factors were found: full disclosure, remorse.

18. In *In re Droeger*, 08-0462, there was an agreement for Censure when Respondent engaged in a conflict of interest by representing a client with interests directly adverse to a will and codicil that Respondent drafted and witnessed for another client. Respondent further delayed the probate process and caused additional costs to be incurred against the estate. Respondent was cited for violating ERs 1.7, 3.7 and 8.4(d). The following was found in aggravation: Substantial experience. In mitigation: absence of discipline, remorse. Respondent's mental state was negligent and there was actual injury.
19. These two cases involve additional Ethical Rule violations that are not applicable in the instant case and involve actual injury, which is not present in the case at hand. Given these cases, as well as the aggravating and mitigating factors, the parties submit that an Informal Reprimand is an appropriate sanction.

RECOMMENDATION

20. 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).

21. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *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).
22. As the parties pointed out, the underlying litigation was a complex, multi-defendant case involving events that took place well before Respondent became an Arizona attorney. The alleged conflicts were hotly contested by the State Bar and Respondent. The State Bar asserted that certain individuals associated with Respondent's former company clients were also former clients of Respondent. Respondent strenuously denied this. Respondent would also have testified that former company clients had waived any conflict and that there was no material adversity between his representation of Mr. Patterson, his former company clients, and his own self-interest.
23. In this Hearing Officer's dealings with Respondent, Respondent presented himself as very committed to his client, and the notion of fairness. Respondent denied vehemently the State Bar's ER 1.7 and 1.9 violations and felt that he was fully justified in taking the position that he took in the underlying litigation. Respondent does admit to violating ER 3.7, agreeing to represent a client when it was likely that the Respondent would be a necessary witness.
24. For its part, the State Bar found that the interrelationship between the defendant individuals and the defendant client companies was complicated. There was incomplete documentary evidence and many potential witnesses that are in other

states, or are dead. With one exception, these witnesses would be adverse to the State Bar's case.

25. Based upon the difficulties involved in proving this case, the State Bar agreed to dismiss the ER 1.7 and ER 1.9 in exchange for Respondent's admission to the ER 3.7 violation.
26. The proposed sanction in this matter is that Respondent will receive an Informal Reprimand and that he will submit a letter of resignation of his membership in the State Bar of Arizona to the Arizona State Bar Board of Governors to be effective August 1, 2010. While the sanction might seem to be harsh given that an Informal Reprimand is recommended, there are other considerations at play in this matter which this Hearing Officer feels support the recommended sanction.
27. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following:
 - 1) Respondent shall receive an Informal Reprimand;
 - 2) Respondent shall submit his letter of resignation from the State Bar of Arizona to the Arizona State Bar Board of Governors no later than August 1, 2010.

DATED this 4th day of May, 2010.

H. Jeffrey Coker / L. S. Amore
H. Jeffrey Coker
Hearing Officer

Original filed with the Disciplinary Clerk
this 4th day of May, 2010.

Copies of the foregoing mailed
this 5 day of May, 2010.

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