BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 09-0716 and 09-0826
BERT L. ROOS, Bar No. 006960	)	**HEARING OFFICER'S REPORT**
Respondent.	)	

PROCEDURAL HISTORY

1. Probable cause was found in 09-0716 and 09-0826 on January 27, 2010, and thereafter a Joint Memorandum and Tender of Admissions were direct filed on April 23, 2010. The matter was assigned to the undersigned on May 3, 2010, and went to hearing on the agreement on July 8, 2010.

FINDINGS OF FACT

2. 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 October 17, 1981.[1]

COUNT ONE (File no. 09-0716 Denton)

3. In or around 2008, Jeremy and Ginger Denton ("the Dentons") initiated a *pro se* Chapter 13 bankruptcy proceeding.

[1] Unless otherwise cited, the facts found herein are from the Tender of Admissions filed by the parties.

4. On or about October 30, 2008, the Bankruptcy Court ordered the Dentons to make a payment of $1,500 on November 15, 2008, and to provide proof of insurance on certain real estate the Complainants owned.

5. On December 8, 2008, counsel for creditors lodged a proposed order lifting the automatic stay citing the Dentons' failure to make the $1,500 payment and provide proof of insurance.

6. On or about December 10, 2008, the Dentons objected to the creditor's request stating the payment had been made and the insurance procured.

7. The Court deferred ruling on the issue until after a previously scheduled hearing set for December 11, 2008, was held.

8. On or about December 10, 2008, the Dentons filed a motion to continue the December 11, 2008, hearing.

9. The Bankruptcy Court denied the motion to continue and advised Mrs. Denton that she could appear by telephone.

10. Neither of the Dentons appeared, either in person or telephonically, at the hearing conducted on or about December 11, 2008.

11. As a result of the Dentons' nonappearance, the Bankruptcy Court granted the creditor's motion to lift the stay on or about December 15, 2008.

12. On or about December 24, 2008, the Dentons, *in Propria Persona*, filed a motion to reconsider the Court's December 15, 2008, order.

13. On or about December 31, 2008, the Dentons hired Respondent for representation in their Chapter 13 bankruptcy proceeding.

14. The Bankruptcy Court denied the Dentons' *pro per* motion to reconsider on or about January 5, 2009.

15. On or about January 15, 2009, Respondent, on the Dentons' behalf, filed a Notice of Appeal to the Bankruptcy Appellate Panel ("BAP") to appeal the Court's December 15, 2008, and January 5, 2009, orders. Respondent requested the Dentons pay an additional $500 fee plus all costs of the appeal. The Dentons only paid Respondent $255 that he advanced for the filing fee of the appeal.

16. On or about January 23, 2009, Respondent, on the Dentons' behalf, filed a motion to continue the automatic stay and a motion for an emergency ruling concerning the motion to continue the automatic stay.

17. On or about January 26, 2009, the BAP denied Respondent's motion to continue the automatic stay.

18. On or about January 26, 2009, the BAP issued a briefing order directing that the Dentons' opening brief and appendix be filed no later than March 12, 2009.

19. On or about January 27, 2009, Respondent, on the Dentons' behalf, filed a motion to reconsider the motion to continue the automatic stay, and a separate motion for an emergency ruling on the motion to reconsider.

20. On or about January 29, 2009, the BAP denied Respondent's motion to reconsider.

21. On or about March 16, 2009, four days after the brief was due, Respondent filed a motion to extend the time to file the opening brief and a separate motion to withdraw as the Dentons' counsel. Respondent cited the Dentons' failure to pay

and the deterioration of the attorney-client relationship as the reasons he was seeking to withdraw.

22. On or about April 1, 2009, the BAP extended the time to file the Dentons' opening brief to April 13, 2009.

23. Also on or about April 1, 2009, the BAP denied Respondent's motion to withdraw citing the fact that the opening brief was already overdue and that the "issues of payment of attorney fees are necessarily subordinate to counsel's responsibilities to the clients, opposing party, and the Court."

24. On April 7, 2009, Respondent filed a motion to reconsider the motion to withdraw and in the alternative an extension of time to file the opening brief. Respondent cited the Dentons' failure to pay the costs for a transcript and a failure to provide information regarding the appeal as the reasons he should be permitted to withdraw.

25. On or about April 9, 2009, the BAP denied Respondent's motion to reconsider the motion to withdraw and extended the time to file the opening brief to April 24, 2009.

26. Respondent did not file the opening brief on or before April 24, 2009. If this matter had proceeded to a contested hearing, Respondent would testify that the Dentons' refusal to provide necessary information for the appellate brief, as well as providing the funds to obtain a necessary transcript, made it impossible for him to file the appellate brief. For the purposes of the agreement, the State Bar does not contest Respondent's assertion.

27. On or about May 18, 2009, the Dentons filed a notice of *pro se* appearance and a *pro se* opening brief.

28. By order filed and dated May 21, 2009, the BAP accepted the Dentons' *pro se* opening brief. Further, the BAP reserved the right to consider sanctions or take other action against Respondent for any violation or evasion of the BAP's prior orders denying Respondent's request to withdraw.

29. On or about June 17, 2009, Respondent filed another motion to withdraw as the Dentons' counsel, and filed an addendum to the motion on or about June 23, 2009.

30. On or about July 14, 2009, the BAP denied Respondent's June 17, 2009, motion to withdraw.

31. On or about September 17, 2009, the Dentons' bankruptcy matter was voluntarily dismissed in the bankruptcy trial court.

32. On or about September 21, 2009, the BAP ordered the Dentons' appeal taken off the hearing calendar for September 23, 2009, and further requested a written response within 14 days explaining how the appeal was not moot or the BAP would dismiss the appeal.

33. No written notice was filed explaining how the appeal was not moot.

34. On or about November 16, 2009, the BAP dismissed the appeal as moot pursuant to its September 21, 2009 order.

COUNT TWO (File 09-0826 Klatt)

35. On or about April 3, 2007, James Klatt ("Mr. Klatt") hired Respondent for representation in a criminal matter.

36. On the same date, Respondent provided Mr. Klatt an engagement letter that required a $2,500 "Flat Fee Engagement Fee" and stated that the matter would cost a minimum of $5,000.

37. Shortly thereafter, Respondent and Mr. Klatt learned the criminal matter involved eighteen felony counts.

38. Because the pending charges were greater than anticipated, Respondent increased his fee to a $10,000 "engagement fee" and stated the minimum fee for his representation would be $10,000.

39. In both the original and supplemental engagement letters, Respondent stated that he would charge an hourly rate of $250.

40. Mr. Klatt paid Respondent $10,000.

41. On or about April 12, 2007, approximately nine days after having retained Respondent and paying Respondent $10,000, Mr. Klatt terminated Respondent's representation.

42. As a result of the fact that there was a dispute between Respondent and Mr. Klatt about the amount due to Respondent for services rendered to Mr. Klatt during the period of representation, Respondent and Mr. Klatt agreed to resolve the resulting fee dispute through the use of the State Bar's Fee Arbitration Program.

43. Following the presentation of evidence at the Fee Arbitration Hearing, Respondent and Mr. Klatt agreed that Respondent would keep $2,000 as earned

fees and would refund $8,000 to Mr. Klatt. Pursuant to their agreement, the $8,000 was to be paid in $1,500 monthly increments beginning May 20, 2008.

44. On or about May 4, 2008, the Fee Arbitrator issued an award and incorporated the parties' agreement into his award.

45. Respondent failed to make any payments pursuant to the agreement and fee arbitration award.

46. Mr. Klatt hired an attorney and on or about September 3, 2008, obtained a judgment against Respondent based upon the fee arbitration award of $8,000, in case number CV 2008-052504. The total judgment against Respondent was $8,230; the additional amount of $230 representing the filing costs necessary to obtain the judgment.

47. A debtor's exam was scheduled for March 13, 2009.

48. On or about March 11, 2009, Respondent and Mr. Klatt, who was still represented, settled the matter again. The agreement consisted of canceling the March 13 debtor's exam; payment of $1,000 by Respondent to Mr. Klatt by March 13, 2009; payment of $500 by Respondent to Mr. Klatt by March 24, 2009; payment of $1,000 by Respondent to Mr. Klatt by April 24, 2009; and $500 payments each subsequent month until the $8,000 principle was paid. The agreement also called for Respondent to pay Mr. Klatt's attorney's fees of $1,750.

49. On or about March 12, 2009, Respondent issued a check payable to Mr. Klatt for $1,000. Had the matter proceeded to contested hearing on the merits, Respondent would testify that he ensured that he had the funds to cover the check when he

wrote it on March 12, 2009. For purposes of their agreement, the State Bar does not contest this assertion.

50. On or about March 14, 2009, Mr. Klatt presented Respondent's check to the bank for payment. There were insufficient funds in Respondent's account to negotiate the check at the time it was presented.

51. Respondent thereafter did not make the agreed upon March 24 and April 24 payments.

52. Respondent testified that the combination of going through a divorce, and the attendant child support and spousal maintenance payments, combined with a reduction in his income concurrent with the downturn in the economy, caused him not to be able to make the payments to Mr. Klatt that he had committed to pay, Transcript of Record ("T/R") 18:21-19:19.

53. As of January 20, 2010, Respondent paid a total of $2,200 toward the amount in question. As of the date of the hearing in this matter, Respondent had paid Mr. Klatt a total of $3,700, leaving a balance of $4,300 plus interest and Mr. Klatt's costs, T/R 12:20-13:9.

CONCLUSIONS OF LAW

54. The undersigned Hearing Officer finds that there is clear and convincing evidence that Respondent, under Rule 42, Ariz.R.Sup.Ct., violated the following ER's:

55. **Count One (09-716 Denton):** ER 1.3, Diligence; ER 3.2, Expediting litigation; and ER 8.4(d), Conduct prejudicial to the administration of justice.

56. **Count Two (09-826 Klatt):** ER 1.5, Fees; ER 1.16, Declining or terminating representation; and ER 8.4(d), Conduct prejudicial to the administration of justice.[2]

ABA STANDARDS

57. 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.

Duty Violated

58. In the Denton matter, while the Dentons' refusal to cooperate contributed to the dilemma Respondent found himself in, Respondent's conduct violated his duty as a professional: ER 1.3 diligence; 3.2 Expediting litigation; 8.4(d) Conduct prejudicial to the administration of justice. In the Klatt matter, Respondent violated his duty to his client: ER 1.5 Unreasonable fee; 1.16 Representation of client. The Respondent violated *Standards* 4.4, "Lack of Diligence"; 6.2, "Abuse of Legal Process"; and 7.0, "Violations of Other Duties Owed as a Professional". *Standard* 4.43 provides that "Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client." *Standard* 6.23 provides that "reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a

[2] The parties have not cited ER 8.4(c) due to the State Bar's concern that it is unclear that it could show the requisite "knowing" mental state.

client or a party, or interference or potential interference with a legal proceeding."

59. *Standard* 7.3 provides that "reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."

60. The presumptive sanction in this matter appears to be censure.

The Lawyer's Mental State

61. In the Denton matter, this Hearing Officer could easily find that the Respondent's conduct was negligent in taking on a client without receiving full payment for all fees and costs. Additionally, it was not his fault that the Dentons refused to cooperate with him. Respondent's refusal/inability to file the appropriate pleadings was due in large part to the Dentons' refusal to cooperate and pay the appropriate costs.

62. The Respondent's mental state is a bit more problematic in the Klatt matter. Upon first reading, it seems that Respondent made promises that he had no intention of keeping and therefore his state of mind would have been "knowing". At the hearing in this matter the State Bar submitted its reasons why it felt that Respondent mental state was "negligent" rather than "knowing", T/R 14:1-15:6. After hearing the testimony of the Respondent at the hearing in this matter, this Hearing Officer is convinced that Respondent did not intentionally lie to his client. Respondent is guilty of being perhaps overly optimistic on the amount of revenue that his firm could generate and under appreciated the difficulty of meeting all of his expenses at the time. Based upon this, this Hearing Officer

cannot find by clear and convincing evidence that the Respondent intentionally or knowingly made promises that he knew he could not keep. Therefore, in the Klatt matter, this Hearing Officer finds that Respondent's mental state was negligent.

Actual or Potential Injury Caused

63. In the Denton matter, there was the potential for injury due to Respondent's actions and failure in his duties to the Dentons and the Bankruptcy Appellate Panel. In the Klatt matter, there was actual injury to Mr. Klatt due to Respondent's failure to refund money owed to Mr. Klatt.

Aggravating and Mitigating Factors

Aggravating Factors:

64. *Standard* 9.22(a) Prior Disciplinary History:

In State Bar File Numbers 08-925 and 08-1478, Respondent was placed on one year of probation for a violation of Rule 42, Ariz.R.Sup.Ct., specifically ER's 1.5, 1.15(a) and Rules 43 and 44. In SB-00-0094-D (2001), Respondent was suspended for 90 days for violation of Rule 42, Ariz.R.Sup.Ct., specifically ER's 1.15, 8.4 and Rules 43 and 44. In 1991, Respondent was informally reprimanded for violation of Rule 42, Ariz.R.Sup.Ct., specifically ERs 8.4(c) and 8.4(d).

65. *Standard* 9.22(d) Multiple Offenses:

Respondent violated numerous ethical rules and duties on two separate matters.

66. *Standard* 9.22(i) Substantial Experience in the Practice of Law:

Respondent was admitted to the practice of law in 1981 and has practiced law for approximately 29 years.

Mitigating Factors:

67. *Standard* 9.32(c) Personal or Emotional Problems:

Respondent is in a state of financial hardship. Respondent testified at the hearing on the agreement that he was going through a divorce at the time of his difficulties with Mr. Klatt, and was paying a substantial monthly amount both for child support as well as spousal maintenance. Respondent further testified that he had every intention of making the payments to Mr. Klatt, but the revenue to his practice fell off significantly concurrent with the economic downturn. Respondent has also been making an effort to pay down the amount that he owes to Mr. Klatt, having paid, at the time of the hearing in this matter, $3,700 to Mr. Klatt.

68. *Standard* 9.32(e) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings:

Respondent timely and fully responded to all of the State Bar's requests for information while undertaking its investigation of these matters.

PROPORTIONALITY REVIEW

69. 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. to 16, 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.

70. In *In re Finch*, SB-08-0066-D (2008), Finch was censured for violations of Rule 42, specifically ERs 1.3, 1.4, 3.2, and 8.4 and was placed on probation for 18 months, the terms of which included LOMAP and Fee Arbitration. Finch failed to ensure the timely filing of an appeal before the Ninth Circuit for one client and further failed to file an Application for Cancellation of Removal for a different client. There were four aggravating factors: *Standards* 9.22(a), prior disciplinary offenses; 9.22(c), pattern of misconduct; 9.22(d), multiple offenses; and 9.22(i), substantial experience in the practice of law. Four mitigating factors were found: *Standard* 9.32(b), absence of a dishonest or selfish motive; 9.32(d), timely good-faith effort to make restitution or to rectify consequences of misconduct; 9.32(e), full and free disclosure to Disciplinary Board or a cooperative attitude; and 9.32(l), remorse.

71. In *In re Frisbee,* SB-07-0196-D (2007), Frisbee was censured, placed on probation and ordered to pay restitution for violations of Rule 42, specifically ERs 1.5(d)(3), 1.15(a), 1.15(c), and 1.16(d). Frisbee's probation terms included the State Bar's Trust Account Ethics Enhancement Program ("TAEEP"), and a two hour training session with LOMAP. Frisbee failed to refund an advance payment of a fee that was not earned upon termination of the representation and further failed to deposit unearned fees into his trust account. The sole aggravating factor

was *Standard* 9.22(i), substantial experience in the practice of law. The sole mitigating factor was *Standard* 9.32(a), absence of a prior disciplinary record.

72. In *In re Crimmins*, SB-01-0043-D (2001), Crimmins was censured for violation of Rule 42, specifically ERs 1.1, 1.3, 1.4, 1.16(d), and 8.4(d). Crimmins was retained for a DUI matter and failed to interview two witnesses. On the eve of trial, Crimmins and the client discussed the chances of prevailing at trial and Crimmins offered to refund $100 of his fee immediately and $300 within 30 days if the client pled guilty. The client pled guilty and Crimmins immediately refunded $100. Crimmins was not able to refund the $300 until a year later due to financial constraints. There were three aggravating factors found: *Standard* 9.22(a), prior disciplinary offenses; 9.22(i), substantial experience in the practice of law; and 9.22(j), indifference to making restitution. Three mitigating factors were found: *Standard* 9.32(b), absence of a dishonest or selfish motive; 9.32(e), full and free disclosure to Disciplinary Board or a cooperative attitude; and 9.32(g), character or reputation.

RECOMMENDATION

73. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is also the objective of lawyer discipline to protect the profession and the administration of justice, *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the Bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352, (1994). 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).

74. This Hearing Officer is concerned about Respondent's previous interactions with the disciplinary process, see discussion at T/R 7:10-12:8. In the 2008 matters, Respondent was placed on one year of probation after he was found to have an insufficient fee agreement, and depositing money in an operating account instead of his trust account. In the 2001 matters, Respondent was suspended for 90 days for violation of trust account rules. In the 1991 matter, Respondent was informally reprimanded for some personal financial issues. What these prior disciplinary matters as well has the issues involved in the present cases exhibit is that Respondent does not handle his personal financial issues very well, which causes a negative impact on his attorney-client relationship, as well as his obligations to the court.

75. In the Denton matter, to what extent Respondent took on the Dentons' case because of financial necessity without getting all of the required costs upfront, it is not known, but certainly seems plausible. In the Klatt matter, Respondent was paid a substantial amount of money upfront, which he could not refund when he did not earn it.

76. Whether Respondent intentionally pushes right to the edge of propriety and sometimes over because he is irresponsible and/or reckless was not shown by clear and convincing evidence. However, at some point, the accumulation of instances of financial impropriety could lead one to no other conclusion.

77. This Hearing Officer is willing to go along with the recommendations set forth in the Tender of Admissions and Agreement, but cautions the Respondent that he had better get his financial house in order, quit skirting the edge of impropriety, and understand that his next contact with the disciplinary process could well lead to a long-term suspension.

78. Based upon the findings of fact, the conclusions of law, together with the ABA *Standards* and the aggravating and mitigating factors, this Hearing Officer recommends:

1) Respondent shall be censured;

2) Respondent shall be placed on probation for a period of two years under the following terms and conditions:

a) Respondent shall satisfy the civil judgment Mr. Klatt obtained in case number CV 2008-052504;

b) Respondent shall contact the Director of LOMAP within 30 days of the date of the final judgment and order. Respondent shall submit to a LOMAP examination of his office procedures, including, but not limited to, compliance with ERs 1.3, 1.5, 1.16, 3.2, and 8.4(d). The Director of LOMAP shall develop "Terms and Conditions of Probation" and those terms shall be incorporated within this order by reference. The probation period will begin to run at the time of the judgment and order. Respondent shall be responsible for any costs associated with LOMAP;

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

d) In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, 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 after 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

e) In the event the director of LOMAP recommends early termination from probation (conditional on Respondent fully reimbursing Mr. Klatt), Bar Counsel shall review the recommendation to ascertain whether early termination of probation is appropriate. If early termination of probation is appropriate, Bar Counsel shall file a Notice of Successful Completion of Probation.

3) Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by

the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerk's Office in this matter.

DATED this 11th day of August, 2010.

H. Jeffrey Coker for P. D'Amore
H. Jeffrey Coker 6R
Hearing Officer

Original filed with the Disciplinary Clerk
this 11th day of August, 2010.

Copy of the foregoing mailed
this 12 day of August, 2010, to:

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