

FILED
JUN 01 2010
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY [Signature]

HEARING OFFICER'S REPORT

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FINDINGS OF FACT

Factual Summary

2. Respondent continued a prior intimate relationship with an individual who later became her client, and during the course of representing him Respondent disclosed to another attorney, who had previously been co-counsel in the case, certain client information. As a result of this conduct, the parties are recommending a censure and no probation because Respondent is not admitted to the Bar in the state of Arizona. It is also recommended that Respondent pay all costs incurred as a result of these proceedings.
3. Respondent is an attorney licensed to practice law in the state of California, having been admitted to practice in California on December 3, 1982.¹

COUNT TWO (09-0078)

4. On or about August 2, 2005, David Reiter, an Arizona resident, filed a Maricopa County Superior Court action entitled, David Reiter v. Bernard Doherty, CV 2005-051679 ("Reiter v. Doherty").
5. Arizona Attorney Patrick Davis initially represented Mr. Reiter.
6. In November 2005, Respondent began dating Mr. Reiter continuously until the relationship ended on or about December 1, 2007.
7. In 2006, Mr. Reiter kept Respondent apprised of the legal activities in Reiter v. Doherty.
8. In 2006, Mr. Reiter began repeatedly asking Respondent to take over the representation of him in Reiter v. Doherty.

¹ Unless otherwise cited, the findings stated herein are taken from the Tender of Admissions and Agreement submitted by the parties.

9. In August 2006, Respondent acquiesced to Mr. Reiter's repeated requests and agreed to represent him in Reiter v. Doherty as pro hac vice counsel.
10. At the time Respondent agreed to the representation, she was aware that Mr. Reiter was also dating Arizona attorney Yvette Banker.
11. Soon thereafter, Mr. Davis withdrew and was replaced by Arizona attorney Merrick Firestone, who acted as local litigation counsel.
12. In September, 2006, Respondent entered into a written fee agreement with Mr. Reiter.
13. Thereafter, Respondent was temporarily admitted pro hac vice in Reiter v. Doherty on September 26, 2006. Subsequently, Respondent was admitted pro hac vice in Reiter v. Doherty on October 16, 2006.
14. In January 2007, Merrick Firestone notified Mr. Reiter that he wished to withdraw. As a result, Mr. Reiter asked Ms. Banker to become local council in Reiter v. Doherty for Respondent in February 2007, and she agreed.
15. During Ms. Banker's tenure as local council, both she and Respondent were dating Mr. Reiter.
16. In July 2007, Ms. Banker accused Mr. Reiter of assaulting her, after which she was permitted to withdraw.
17. Ms. Banker was replaced by Thomas Quigley, who became lead trial counsel in the Reiter v. Doherty action on July 27, 2007.
18. Subsequently, Ms. Banker and Mr. Reiter reconciled, Transcript of Record ("T/R"), 18:24-19:9.

19. On or about October 11, 2007, Ms. Banker contacted Respondent and asked her if there was anything she could do to help with trial preparation.
20. On October 15, 2007, Respondent sent an e-mail to Ms. Banker in which she communicated information about the status of the trial preparation in *Reiter v. Doherty*. A copy of this e-mail was sent to Mr. Reiter by Respondent and is attached to the Tender of Admissions as Exhibit 1. Respondent testified that she had permission from Mr. Reiter to communicate with Ms. Banker about the case and encouraged her to do so, T/R 19:22-20:16; 37:11-15; 20:7-10; 22:12-19.
21. At the time Respondent sent the October 15 e-mail, she did not think that the information contained therein was confidential, and she believed that she had her client's permission to communicate with her former co-counsel.
22. In the beginning of her representation, Respondent discussed the potential conflict with Mr. Reiter. Respondent contends that she disclosed to Mr. Reiter the potential harm arising from her representation while they had a personal relationship, memorialized it in writing on numerous occasions, and offered to withdraw. Respondent also contends that Mr. Reiter knowingly waived the conflict, T/R 21:1-22:2.
23. Respondent also contends that at the time, because of ethical rules applicable in the state of California, she believed she could not withdraw without prejudice to her client, and that she was ethically required to continue representation in order to avoid prejudice to the client's interests in the litigation, T/R 22:20-23:10.

24. Respondent contends that throughout her representation, Mr. Reiter refused to consent to Respondent's withdrawal as counsel. Respondent was also fearful that Mr. Reiter would harm her if she did withdraw, T/RT/R 23:11-24.
25. Respondent also contends that she believed she would be able to (and she feels that she did) compartmentalize the personal from the professional relationship with Mr. Reiter, T/R 23:25-24:23. The State Bar of Arizona contends otherwise. Under the State Bar's scenario, Respondent should have withdrawn but did not.
26. Respondent ended her representation of Mr. Reiter in November 2007.
27. Respondent contends that in December 2007 and again in January 2008, she was physically assaulted by Mr. Reiter. As a result of Mr. Reiter's attacks on Respondent, Mr. Reiter was charged with seven felonies and entered into a plea bargain. In addition, a 20 year criminal restraining order was entered by the California court, whereby Mr. Reiter cannot inter alia contact or harass Respondent.
28. The parties agreed that there was no actual harm to Mr. Reiter due to the conflict or the disclosure in the e-mail to her former co-counsel, T/R 24:22-25:12.
29. The parties agreed, and the evidence supports, that both the client information disclosure and the personal relationship with the client, was negligent conduct by Respondent, T/R 25:17-20 & 25:21-25.
30. Mr. Reiter appeared at the hearing on the Tender and Agreement and offered testimony regarding how Respondent's conduct in the state California had harmed him, T/R 4:17-9:25. This Hearing Officer explained to Mr. Reiter that the violations set forth in the Tender and Agreement had nothing to do with the

conduct of the Respondent of which Mr. Reiter complained. While Mr. Reiter was clearly frustrated by this explanation, it is clear to this Hearing Officer that the substance of Mr. Reiter's complaint against this Respondent has to do with the assault charges filed by her against him in the state of California, and not Respondent's conduct as an attorney in the state of Arizona.

31. Throughout her representation of Mr. Reiter, Respondent was going through a highly contentious and acrimonious divorce and custody battle.
32. Respondent submitted several letters attesting to her character and reputation, which were attached as Exhibit 2 to the Tender of Admissions.

CONCLUSIONS OF LAW

33. The Hearing Officer finds by clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., ER1.6(a) when she sent an e-mail to her prior co-counsel in the underlying action after that attorney had asked her if she could help, resulting in Respondent notifying her prior co-counsel in the underlying action of the status of the trial preparation. There is also clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., ER 1.7(a)(2) when she maintained a pre-existing close personal relationship with her client creating a conflict such that she should have withdrawn from representing Mr. Reiter and did not.²

² Count 1, (07-0633), as well as other allegations in Count 2, was dismissed by the State Bar because of concerns about being able to prove those allegations by the clear and convincing standard.

ABA STANDARD

34. 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; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

35. The parties submit that the Respondent's conduct violated ER 1.6(a) and ER 1.7(a)(2) and that her state of mind was "negligent". Therefore, the following ABA *Standards* are applicable:
36. *Standard* 4.23, Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and the disclosure causes injury or potential injury to a client.
37. *Standard* 4.33, Reprimand is generally appropriate when a lawyer is negligent 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 injury or potential injury to a client.

The Lawyer's Mental State

38. As noted, the parties stipulate, and this Hearing Officer can find no evidence to the contrary, that Respondent's mental state was negligent. Respondent was negligent in believing that she had her client's permission to communicate with her former co-counsel, and Respondent was negligent in believing that she could

maintain the pre-existing close personal relationship with Mr. Reiter while also representing him.

Actual or Potential Injury

39. The parties submit, and this Hearing Officer could find no evidence to the contrary, that there was no actual harm to the client, Mr. Reiter, as a result of Respondent's ethical violations.

Aggravating and Mitigating Factors

Aggravating Factors:

40. *Standard 9.22(i)*, Substantial experience in the practice of law.

Mitigating Factors:

41. Respondent felt constrained by Rule 1-100(D)(1) of the California Rules of Professional Conduct, which she felt forbade her from withdrawing from the representation of Mr. Reiter. Respondent did not withdraw from the representation of Mr. Reiter because she reasonably believed that she had a duty not to withdraw in order to avoid “foreseeable prejudice” in the litigation to her client under Rule 3-700(A)(2), California Rules of Professional Conduct. Under the California rules, Respondent felt that she could not withdraw from the representation of Mr. Reiter as long as there might be “foreseeable prejudice”. Because Respondent felt that there would be “foreseeable prejudice” to Mr. Reiter if she withdrew, she did not do so. This is a situation where we have a conflict between the expectations of the Arizona ethical rules and the California ethical rules. Given that Respondent is licensed to practice law in the state of California,

and only appeared in the state of Arizona pro hac vice the prioritization of the California Rules by Respondent is certainly understandable.

42. *Standard 9.32(a)*, Absence of a prior disciplinary record. Respondent has been practicing law for 28 years and has no prior disciplinary record.
43. *Standard 9.32(b)*, Absence of dishonest or selfish motive.
44. *Standard 9.32(c)*, Personal and emotional problems. Respondent was going through a difficult divorce and was fearful of her client.
45. *Standard 9.32(e)*, Full and free disclosure to disciplinary board or cooperative attitude towards proceedings. Respondent fully cooperated during the three year-long investigation by the State Bar.
46. *Standard 9.32(g)*, Character or reputation. Respondent, according to the letters submitted on her behalf, has an excellent reputation in the California legal and social community as a competent, honest and ethical attorney.
47. *Standard 9.32(j)*, Delay in the disciplinary proceedings. The information regarding Respondent's representation of Mr. Reiter was first brought to the attention of the Bar in 2007, and the Bar brought its Complaint against Respondent in November of 2009. Respondent testified that due to the length of the investigation, certain materials, specifically information contained on computers, was lost and or stolen to her prejudice. The State Bar feels that this mitigating factor should not be given much weight and this Hearing Officer concurs.
48. *Standard 9.32(l)*, Remorse. Respondent testified at the hearing that she has learned a great deal as a result of these proceedings, feels very badly that her

integrity has been brought into question by her conduct and states that the lessons she has learned will keep her from repeating the mistakes she made in this case. This Hearing Officer found her testimony to be persuasive and her regret sincere.

49. Other Mitigation. Respondent submits that she was physically assaulted by Mr. Reiter resulting in permanent physical damage; Mr. Reiter has injected himself into Respondent's divorce proceedings by making false claims and testimony; and Respondent has been sued unsuccessfully by Mr. Reiter for legal malpractice in which Mr. Reiter's allegations were dismissed with prejudice (Mr. Reiter was sanctioned by the Court for bringing the action in the first place).

PROPORTIONALITY

50. To have an effective system of professional sanctions, there must be an internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar, *Peasley*, 208 Ariz. 35, 90 P.3d 778, *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983).
51. In *In re Messer*, 08-1521, Messer was censured and placed on probation for two years. Messer, while representing a client in a criminal matter, failed to avoid a concurrent conflict of interest when there was a significant risk that the representation would be materially limited by Respondent's personal interests. Respondent further failed to avoid a conflict of interest by engaging in a consensual intimate relationship with his current client, in violation of ERs 1.7(a)(2), and 1.8(j). There was one aggravating factor, 9.22(b) dishonest motive,

and three mitigating factors: no prior discipline, emotional problems and full disclosure. The mental state was: knowing.

52. In *In re Gorey*, 07-0264, Gorey was censured with one year of probation. Respondent engaged in a conflict of interest by providing financial assistance to a client in connection with pending litigation. Respondent further failed to obtain his client's informed written consent to the conflict in violation of ERs 1.7 and 1.8(e). There was one aggravating factor: Substantial experience; and three mitigating factors: absence of prior discipline, full disclosure, remorse. The mental state was negligent.

RECOMMENDATION

53. 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).
54. 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).
55. In this case, we have an attorney that is licensed in the state of California practicing in Arizona pro hac vice on a specific case representing her boyfriend

who was a party. Respondent's violations are twofold. First, she agreed to become Mr. Reiter's attorney while maintaining an ongoing relationship with him, and secondly communicating with an attorney who had previously represented Mr. Reiter, relating certain facts about the status of the case.

56. While Respondent insists that she was able to appropriately “compartmentalize” her feelings for Mr. Reiter and effectively act as his attorney, the language of the e-mail she sent to the previous co-counsel would say otherwise. While the actual information disclosed to the previous co-counsel is not really very significant, the fact that it was disclosed as well as the fact that Respondent found herself in a difficult situation with Mr. Reiter further supports why the rules discourage a personal relationship between an attorney and her client.
57. It is clear from the testimony of both Mr. Reiter as well as the Respondent that these two have gone through a very tumultuous time together, but that is not the focus of these proceedings. There was no evidence presented that Respondent's performance as Mr. Reiter's lawyer fell below any standard of competency, or that the disclosure that she made to the previous co-counsel hurt Mr. Reiter's case in any way. As noted, Respondent felt that her communication with the previous co-counsel was specifically approved by Mr. Reiter, and she sent a copy of the subject e-mail to him.
58. Regarding Respondent maintaining a personal relationship with Mr. Reiter while also concurrently representing him, Respondent stayed in the case long beyond a point she should have. According to the Respondent, she stayed in the case because of her understanding of the California ethical rules which said she could

not withdraw from representation of the client if there was foreseeable harm to the client. Additionally, Mr. Reiter, according to Respondent, was adamant that he did not want her to withdraw. However, the potential for not only conflict but harm to the client was still certainly there.

59. This Hearing Officer is satisfied that Respondent's state of mind was negligent and, therefore, the proposed sanction is appropriate when measured against the ABA *Standards* and the proportionality cases. A Censure is the highest sanction that can be imposed upon an attorney licensed in another state that is practicing pro hac vice in this state.
60. 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 be Censured;
 2. 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 and the Disciplinary Clerks Office in this matter.

DATED this 1st day of June, 2010.

H. Jeffrey Coker / L. D'Amore
H. Jeffrey Coker,
Hearing Officer 6R

Original filed with the Disciplinary Clerk
this 1st day of June, 2010.

Copy of the foregoing mailed
this 1 day of June, 2010, to:

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/jsa