SUPREME COURT OF ARIZONA

In the Matter of a Non-Member of the State Bar of Arizona	)	Arizona Supreme Court No. SB-19-0022-AP
JENNIFER ANNE ELCOCK, Respondent.	)	Office of the Presiding Disciplinary Judge No. PDJ20189079
	)	**FILED: 9/27/2019**

DECISION ORDER

Respondent Jennifer Anne Elcock appealed the Hearing Panel's March 11, 2019 Decision and Order Imposing Sanctions and subsequent judgment disbarring her from the practice of law in Arizona and also barring her from applying for admission to practice law in Arizona for four years and nine months. The Panel determined Respondent had violated various ethical rules under the Rules of Professional Conduct, Rule 42 of the Rules of the Supreme Court. The Court accepts the appeal.

It is undisputed that Respondent, a member of the Massachusetts Bar first admitted in December 2013, never sought admission to the Arizona Bar. The Disciplinary Commission of this Court held in *Matter of Olsen*, 180 Ariz. 5 (1994) that the only sanction against a non-admitted member of the bar available to this court is a censure, now reprimand, *see* Rule 60(a)(3) of the Arizona Rules of the Supreme Court. We see no reason to revisit *Olsen* here, and note that the Bar recognized *Olsen* and requested a sanction of reprimand at the disciplinary hearing. Because we believe, however, that the Panel

not only exceeded its authority under *Olsen* but also misapplied the standards and erroneously concluded that the presumptive sanction would be disbarment, we review the Panel's findings, conclusions and sanction.

Facts: This complaint arose out of Respondent's dealings with a potential client ("Client"). Client operated a licensed development home for adults with developmental disabilities. Client and her son had been served with an order of protection ("OOP") in conjunction with son's marital dissolution, and Client was concerned that the OOP could jeopardize her license which was up for renewal in January 2018. A mutual acquaintance introduced Respondent to Client. After a telephone conversation, Respondent met with Client at Client's house on September 17, 2017, when Respondent advised she could represent Client in a proceeding to challenge the OOP with Arizona Attorney M.H. as part of a "tag team." Respondent indicated she wanted to help client, and although Client knew Respondent was an attorney, Respondent never told Client she was not admitted to practice law in the State of Arizona. Respondent agreed to represent both Client and Client's son in challenging the OOP for a $1500 flat fee and requested a $1000 retainer. Client's son gave Respondent $2000 and, on September 18, Client gave her three 3-ring binders with documents. For the next few weeks, Respondent made various promises to produce a fee agreement and meet with Client but failed to show up at the meetings or present any agreement.

In mid-October, Respondent arranged to attend a meeting with Client, Client's son, and the son's lawyer, Attorney S.M., at Attorney S.M.'s office. Notwithstanding the fact that she had agreed to represent the Client for a flat fee and had been paid, Respondent represented herself to Attorney S.M. as a Massachusetts attorney and "family friend" and interjected suggestions concerning legal strategies at that meeting. Respondent specifically suggested noticing the judge and filing pleadings to challenge the OOP, both strategies Attorney S.M. believed would not be in the son's best interests. Respondent never suggested becoming admitted *pro hac vice* with Attorney S.M. After the meeting, Respondent stopped communicating with Client and ignored requests that she return the $2000 and Client's documents. Client testified that the uncertainty concerning her license, the OOP and Respondent's nonresponsiveness were very stressful during that time.

On October 24, 2017, Client called Attorney M.H. to find out the status of her case, advising him that Respondent had her $2000 and documents. Attorney M.H. had never met or heard of Client and texted Respondent who texted him "no idea why she called you." In subsequent texts, Respondent told him that she had made arrangements to return the documents and $2000 to Client. Attorney M.H. then passed this information along to Client, but later called Client to confirm and discovered that Respondent had not done so and called the State Bar to report the matter.

In November 2017, Respondent made arrangements to return Client's documents to a third party, and client was able to retrieve them. Respondent also presented testimony that she gave the $2000 to a third party to deliver to Client in that same time frame. Eventually, Client never engaged counsel, the OOP was dissolved, and Client testified that Respondent's neglect did not cause her to lose a client or her license. During the course of these proceedings, in December 2018, Respondent paid Client $2250 for the refund of the retainer plus interest.

Respondent testified that during this period of time she was frequently moving, had been threatened by her ex-husband and police had advised her to carry a gun, and that the $1000 she requested was to pay for two $505 *pro hac vice* fees, she kept the cash in an envelope and was initially unaware that it was $2000, and that she had planned to ask Attorney M.H. to take the matter *pro bono*. She also testified that she was uncertain about the process to become admitted *pro hac vice* and that during this time she and Client began spending more time together and mutually decided not to pursue *pro hac vice* admission.

Violations: The Panel found Respondent "knowingly offered to provide legal services in Arizona for a flat fee, which was paid to and accepted by her from clients who retained her as an attorney" in violation of ER 1.2 (scope of representation). It also found she "knowingly failed to act with commitment or dedication on her

client's behalf" in violation of ER 1.3 (diligence). It also found she "knowingly failed to reasonably communicate with her client and abide by her client's requests" in violation of ER 1.4 (communication). Because Respondent had no ability to do the legal work for which she charged in violation of ER 1.5(a) (unreasonable fees), it also found that her flat fee was unreasonable. The Panel also found Respondent "intentionally failed to communicate in writing the scope of representation and provide a written fee agreement" in violation of ER 1.5(b) (writing pertaining to scope of representation and fee agreement). It determined that the funds were not promptly delivered to Client when they were due, and that Respondent failed to promptly return Client's documents, and instead entrusted the property to a third party against her client's directive in violation of ERs 1.15(d) (prompt return of client funds or other property) and 1.16(d) (duties upon termination). It also found she knowingly failed to communicate her termination and abandoned her client in violation of ER 1.16(d). The Panel also determined that she offered to provide legal services and made suggestions to Attorney S.M. and commented on the attorney's work product in violation of ER 5.5 (unauthorized practice of law).

The Panel also found Respondent violated ER 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) by 1) advising Client that she could represent her as an attorney in Arizona, 2) advising client that Attorney M.H. would be involved as

local counsel, and 3) texting Attorney M.H. that she had no idea why the Client would call him.

Standards: The Panel applied the American Bar Association Standards 4.42(a), 4.62, and 7.2 which would impose a sanction of suspension. The Panel also applied Standards 4.11 calling for disbarment for failure to preserve client property, and 5.11(b) calling for disbarment for failing to maintain personal integrity where a lawyer engaged in intentional conduct, other than serious criminal conduct, involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on a lawyer's fitness to practice for the 8.4(c) violation.

In applying aggravating and mitigating factors, the Panel concluded that Standard 9.22(b) (dishonest or selfish motive), Standard 9.22(g) (refusal to acknowledge wrongful nature of conduct), and Standard 9.22(j) (indifference to making restitution) applied. It found two mitigating factors, Standard 9.32(a) (absence of a prior disciplinary record) and Standard 9.32(f) (inexperience in the practice of law), and considered Respondent's arguments that Standard 9.32(c) (personal or emotional problems) and Standard 9.32(g) (character or reputation) should apply, and concluded that the presumptive sanction was disbarment.

Analysis: The Court accepts the Panel's factual findings unless they are clearly erroneous; findings are clearly erroneous if they are not supported by reasonable evidence. See *In re Alexander*, 232

Ariz. 1, 5 ¶ 11 (2013). The Court is always the "ultimate trier of fact and law" in disciplinary proceedings. *In re Abrams*, 227 Ariz. 248, 252 ¶ 21 (2011). The Court reviews questions of law and the sanction imposed *de novo*, and enters the sanction that aligns with the sanction for the most serious finding of misconduct. See Ariz. R. Sup. Ct. 59(j); see also *Alexander*, 232 Ariz. at 13 ¶ 50.

A lawyer who is admitted in another jurisdiction may provide legal services on a temporary basis in association with a lawyer who is admitted to practice in Arizona under ER 5.5(c). Any such actions must be in or reasonably related to a pending or potential proceeding before a tribunal in Arizona if the lawyer reasonably expects to become authorized to appear in the proceeding. *See* ER 5.5(c)(2). Respondent's initial indications that she wanted to help Client, and could represent her as part of a "tag team" could reasonably be interpreted as falling within ER 5.5(c)(2). Failing to advise Client that she was not admitted to practice in Arizona as required under ER 5.5(f), accepting Client's documents and money on Client's behalf, failing to confirm the terms of representation in writing or move forward with a timely association with local counsel and a *pro hac vice* application, however, fall outside reasonable activities under ER 5.5(c).

The Court therefore accepts the findings that Respondent knowingly accepted a retainer and failed to define the scope of representation in violation of ER 1.2, knowingly failed to diligently

represent Client's interest in violation of ER 1.3, knowingly failed to communicate with client in violation of ER 1.4, collected unreasonable fees for legal work she could not perform in violation of ER 1.5(a), intentionally failed to memorialize the scope of representation and basis or rate for the fee in violation of 1.5(b), failed to return the Client's funds and property in violation of ER 1.15(b), and knowingly failed to communicate her termination and abandoned the Client in violation of ER 1.16(d), and these acts, in conjunction with comments made to and about Attorney S.M. concerning Client's legal options constituted the unauthorized practice of law under ER 5.5.

The Court rejects, however, the Panel's finding that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation constituting an ER 8.4(c) violation by 1) advising Client that she could represent her as an attorney in Arizona, 2) advising client that Attorney M.H. would be involved as local counsel, and 3) texting Attorney M.H. that she had no idea why the Client would call him. The first two communications could conceivably fall within the ER 5.5(c) exception, and these initial intentions may not always congeal into a *pro hac vice* relationship. Also, in this case, the "no idea why she called you" text is too vague and isolated to constitute a misrepresentation supporting an ER 8.4(c) violation. *See, generally, In re Johnson*, 106 Ariz. 73, 75 (1970)("Isolated, trivial incidents ... not involving a fixed pattern

of misbehavior ... have none of the elements of moral turpitude, arising more out of the infirmities of human nature.”)

The Panel correctly noted that “Restitution that is forced or compelled constitutes neither an aggravating nor a mitigating factor—at most, it is neutral.” *In Matter of Augenstein*, 178 Ariz. 133, 137 (1994). Repayment of the funds with interest and the Client’s admitted receipt of the documents, do, however, weigh in Respondent’s favor because the injury was temporary, there was ultimately little ongoing risk of potential injury in light of the short time frame here, and, fortunately, the Client suffered no prejudice with regards to any legal rights. Thus, the injury incurred has in some measure been alleviated. *See generally Matter of Levine*, 174 Ariz. 146, 174, *reinstatement granted*, 176 Ariz. 535, (1993) (“Failure to consider this alleviation of injury in imposing a disciplinary sanction would result in punitive action, which is not the object of these proceedings.”)

On the other hand, although the injury was in some measure alleviated, Respondent’s conduct was not harmless. The Panel found that Respondent’s misconduct was intentional and knowing, and affected not only the Client and a family member facing serious legal proceedings causing undue stress, it also burdened two attorneys.

In *Matter of Arrick*, 161 Ariz. 16, 21 (1989), this Court found the respondent, a member of the Arizona Bar, substantially delayed compliance with a court order that directed him to refund $2,659.15

due to his client for more than a year. This Court found that such failure was more than negligent, and, in light of other ethical violations concerning his failure to properly advise his client and filing a misleading creditor's claim in a probate matter, a six-month suspension was warranted.

Respondent may be facing reciprocal discipline and was engaged in the unauthorized practice of law in Arizona. Although we accept the Panel's findings of aggravating and mitigating factors, we believe the Panel failed to properly weigh the mitigating factors, specifically Respondent's lack of prior disciplinary history under Standard 9.32(a) and inexperience in the practice of law under Standard 9.32(f). Had Respondent been admitted to practice law in Arizona, the Court believes an appropriate suspension would have been a two-month suspension along with an appropriate term of probation based on the one incident, over a limited period of time, where Respondent refunded all fees plus interest, the actual and potential injury were fortunately likewise limited, and in light of the absence of any disciplinary history and inexperience in the practice of law. The Court therefore rejects the conclusion that disbarment would have been warranted had Respondent been a member of the State Bar of Arizona.

IT IS ORDERED reprimanding Respondent and directing counsel for the State Bar of Arizona to forward this order to the State Bar of Massachusetts.

IT IS FURTHER ORDERED denying the request for oral argument.

DATED this 27th day of September, 2019.

_____/S/_____
ROBERT BRUTINEL
Chief Justice

TO:
Daryl M Williams
David L Abney
Craig D Henley
Sandra Montoya
Maret Vessella
Don Lewis
Beth Stephenson
Mary Pieper
Raziel Atienza
Lexis Nexis
Edward F Novak
David W Lunn
Catherine Montemayor