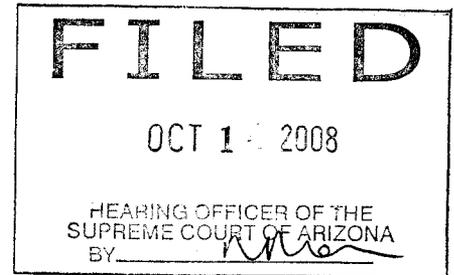


BEFORE A HEARING OFFICER OF  
THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A SUSPENDED )  
MEMBER OF THE STATE BAR OF )  
ARIZONA, )  
)  
**MARK F. BRINTON,** )  
**Bar No. 007674** )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

Nos. 07-2104, 08-0126

**HEARING OFFICER'S REPORT**

**PROCEDURAL HISTORY**

1. Probable Cause was found in this matter on April 23, 2008, and a Complaint was filed on June 2, 2008. The matter was assigned to the undersigned Hearing Officer on June 3, 2008. Respondent Filed an Answer on June 24, 2008. After an Initial Case Management Conference was held on June 17, 2008, the State Bar filed a Motion for Leave to File Amended Complaint on July 2, 2008, and thereafter filed a Motion for Leave to File Second Amended Complaint on July 28, 2008. The State Bar's Motions to Amend were granted by the undersigned Hearing Officer. A Notice of Settlement was thereafter filed on August 4, 2008, and the matter proceeded to a hearing on the Tender of Admissions and Agreement for Discipline by Consent, and Joint Memorandum in support thereof on September 2, 2008.

**FINDINGS OF FACT**

2. Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to the practice in Arizona on May 14, 1983.

3. The Supreme Court of Arizona, by Judgment and Order dated November 1, 2007, ordered Respondent to be suspended for six (6) months and one day.
4. On December 1, 2007, the Order referred to above went into effect and Respondent was suspended from the practice of law in the state of Arizona on that date.
5. Respondent did not appear for the hearing on the Tender and Joint Memorandum, so the facts of this case were ascertained from the pleadings submitted and the explanations offered by the State Bar at the hearing on the Agreement.

**COUNT ONE (File no. 07-2104)**

6. Count One deals with Respondent's conduct during the period between the Supreme Court's Judgment and Order dated November 1, 2007, and the effective date of the order, December 1, 2007.
7. On November 28, 2007, Respondent conducted an initial consultation with Connie Sparks ("Ms. Sparks") to discuss the filing of a claim on her behalf against the Arizona State Compensation Fund ("SCF").
8. During her initial consultation, Respondent disclosed to Ms. Sparks that he would be suspended from practicing law effective December 1, 2007.
9. During her initial consultation, Respondent offered to help Ms. Sparks until his suspension went into effect. Respondent also advised Ms. Sparks that she would need to obtain new counsel to represent her after his suspension went into effect.
10. Ms. Sparks decided to utilize Respondent's services.
11. On November 30, 2008, Respondent telephoned SCF to inquire about the process of filing a proper Notice of Claim ("Notice").

12. The parties stipulated that William Sheldon ("Mr. Sheldon") would testify that he was general counsel for SCF at all times relevant to this matter.
13. Respondent spoke to Mr. Sheldon via telephone when he called SCF and informed Mr. Sheldon he would be sending him the Notice.
14. Respondent informed Mr. Sheldon that Respondent would be suspended from the practice of law effective December 1, 2007. Mr. Sheldon asked Respondent who Mr. Sheldon should respond to once the Notice was received. Respondent told Mr. Sheldon to contact Respondent, and that Respondent would forward all information to whomever took over Ms. Sparks case.
15. After talking with Mr. Sheldon, Respondent drafted the Notice, dated November 30, 2007. The Notice demanded a settlement of \$326,488 and was drafted on the letterhead of "LAW OFFICE OF MARK F. BRINTON."
16. After drafting the Notice, Respondent drafted a fee agreement for Ms. Sparks. The fee agreement provided that Ms. Sparks would pay Respondent \$85 per hour for his work, plus an additional 6% of any amount Ms. Sparks received as a settlement of her claim.
17. Respondent faxed the fee agreement to Ms. Sparks on the evening of November 30, 2007. Ms. Sparks signed and dated the fee agreement on November 30, 2007.
18. On December 1, 2007, Respondent's suspension from the practice of law for a period of six (6) months and one day took effect.
19. Ms. Sparks faxed the fee agreement back to Respondent on December 2, 2007.
20. On December 3, 2007, Respondent spoke with Ms. Sparks and asked her to supply him with a copy of her paycheck to include in his file.

21. On December 3, 2007, Respondent asked a process server to serve the Notice. On December 5, 2007, service of the Notice was made on SCF.
22. The parties stipulated that Scott Gibson ("Mr. Gibson") would testify that he is a partner in the law firm Gibson, Ferrin & Riggs, PLC, and that Mr. Gibson would further testify that Gibson, Ferrin and Riggs, PLC is one of several outside law firms that represent SCF in legal matters.
23. The parties further stipulated that Mr. Gibson would testify that he was assigned to defend Ms. Spark's claim against SCF. Mr. Gibson would further testify that he attempted to telephone Respondent on three separate occasions to discuss the Notice and find out who would now be representing Ms. Sparks. Mr. Gibson would also testify that he was unable to reach Respondent, and did not leave any messages.
24. On January 17, 2008, Mr. Gibson drove to Respondent's office. Respondent's office was located at 1745 S. Alma School Road, Suite 100 in Mesa, Arizona. The building directory 1745 S. Alma School Road included a reference to "Brinton, Mark F -- Attorney at Law."
25. Respondent did not mail notice of his suspension to Mr. Sheldon. The parties stipulated that Respondent did not engage or receive any communication from Mr. Gibson, and did not learn of his representation of SCF in Ms. Sparks' matter until Mr. Gibson's Bar Complaint was delivered to Respondent by the State Bar.

**COUNT TWO (File no. 08-0126)**

26. In May of 2006, Respondent was retained by Sabinus Ekeh ("Mr. Ekeh"). Respondent filed a Complaint on behalf of Mr. Ekeh in Maricopa County Superior Court, CV 2006-092595, on December 8, 2006.
27. On October 1, 2007, Respondent filed an Application to Withdraw as Mr. Ekeh's attorney.
28. Respondent began to serve a suspension for six (6) months and one day on December 1, 2007. On December 5, 2007, Respondent's Application to Withdraw was granted.
29. By letter dated December 26, 2007, ("Letter"), Respondent wrote to the State Bar Committee on Arizona Rules of Civil Procedure ("Committee"). The Letter was written on behalf of Mr. Ekeh. In the Letter, Respondent refers to Mr. Ekeh as "my client".
30. In the letter dated December 26, 2007, Respondent asks the Committee for clarification on Rule 30(c), Ariz.R.Civ.P., as it related to required payment for copies of deposition transcripts.
31. Respondent wrote the Letter in an effort to help Mr. Ekeh reduce his ongoing litigation costs in CV2006-092595. The letter was written on the letterhead of the "PARALEGAL OFFICE OF MARK F. BRINTON."
32. An active member of the State Bar of Arizona did not supervise Respondent when he drafted the Letter. An active member of the State Bar of Arizona did not review the Letter after Respondent drafted it. Respondent is not a licensed paralegal.

## CONCLUSIONS OF LAW

### COUNT ONE

33. Respondent admits that, as to Count One, he: practiced law or represented that he may practice law in Arizona while he was suspended from the practice of law; practiced law in Arizona in violation of the regulation of the legal profession in Arizona; established an office or other systematic and continuous presence in Arizona while suspended from the practice of law in Arizona; held himself out to the public or otherwise represented he was admitted to the practice of law in Arizona while suspended from the practice of law; failed to notify, by registered or certified mail, opposing counsel in a pending matter of the fact that Respondent was disqualified to act as a lawyer after December 1, 2007; and practiced law between the entry and effective date of the judgment of suspension for a client whose matter was not pending on the entry date of the judgment of suspension (Tender of Admissions 1:21).
34. As to Count one, the Respondent admits, and the Hearing Officer finds, that there is clear and convincing evidence that Respondent's conduct violated Rule 31(c) Ariz.R.Sup.Ct., Rule 42, Ariz.R.Sup.Ct., specifically, ER's 5.5(a) and 5.5(b), and Rule 72(a)(3) and 72(d) Ariz.R.Sup.Ct. (which forbids the practice of law between the entry of the judgement and effective date, except completing matters that were pending on the entry date).

## **COUNT TWO**

35. Respondent admits that, as to Count Two, he: practiced law in Arizona while he was suspended from the practice of law and practiced law in Arizona in violation of the regulation of the legal profession in Arizona (Tender of Admissions 2:15 – 18).
36. Respondent admits, and the Hearing Officer finds, that there is clear and convincing evidence that Respondent's conduct violated Rule 31(c), Ariz.R.Sup.Ct., and Rule 42, Ariz.R.Sup.Ct., specifically ER 5.5(a).

## **GENERAL CONCLUSIONS OF LAW**

37. The Hearing Officer finds by clear and convincing evidence that Respondent was well aware of his ordered suspension. Respondent's agreement to take on the responsibilities of a new client, Ms. Sparks, during the period between the Supreme Court's Judgment and the effective date of his suspension created a potential interference and delay as Respondent knew that he would be unable to aid Ms. Sparks further as her case progressed. Also, while Respondent did advise Mr. Sheldon verbally that he would be suspended from the practice of law effective December 1, 2007, he failed to comply with the written notification requirement of the Rules, which would have avoided the confusion with Mr. Gibson when he had difficulty determining exactly who Ms. Spark's lawyer was in order to respond to her Notice of Claim.
38. In Count Two, Respondent attempted to help a pre-existing client by requesting an opinion from the State Bar Committee on the Rules of Civil Procedure well

after the effective date of his suspension under the guise of a “paralegal”. While this is not the most serious of infractions and may have been well intentioned, it betrays, at best, a blindness to the Rules and, at worst, deviousness.

### **RESTITUTION**

39. The Complainants have been notified regarding the consent agreement, and have submitted no evidence in connection with either Count that implicates financial harm as a result of Respondent's conduct in this matter. There was no evidence offered that Respondent received anything of value from either client during the period of his suspension.

### **DISMISSALS**

40. The State Bar agreed, for purposes of the tendered agreement only, that as to Counts One and Two, to dismiss the alleged violations of Rule 53(c), Ariz.R.Sup.Ct. on the basis of evidentiary concerns and in exchange for the agreement.

### **ABA STANDARDS**

41. 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. *In re Peasley*, 208 Ariz. 27, 90 P.2d 764 (2004).

### **The Duty Violated**

42. The Hearing Officer finds that the most serious misconduct in this case is Respondent's failure in his duty to his clients, the legal system and the profession

by practicing law while he was suspended. Respondent's conduct, in both counts, violated Rule 31(c), Ariz.R.Sup.Ct., which provides:

“No member who is currently suspended... shall practice law in this state or represent in any way that he or she may practice law in this state.”

43. Respondent's conduct in both Counts also violated Rule 42, Ariz.R.Sup.Ct., specifically, ERs 5.5(a) and 5.5(b) which state that a lawyer shall not practice law in this jurisdiction in violation of the regulation of the legal profession, and that a lawyer shall not establish an office or other systematic and continuous presence in this jurisdiction for the practice of law or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

44. These violations implicate *Standard 7.2* which provides that:

“Suspension is generally appropriate when a lawyer knowingly 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.”

45. The parties stipulate, and the Hearing Officer finds, that as to both Counts Respondent's ability to practice law was suspended by Judgment of the Arizona Supreme Court issued November 1, 2007. Per the Court's Order, the suspension became effective December 1, 2007. Respondent knew of his suspension and its effective date, and therefore, Respondent knew of his duty not to practice law, or hold himself out as able to practice law, while the suspension was in place. Respondent also practiced law by advocating for a former client and negotiating legal rights for his former client during his suspension. The duty Respondent owed as a professional was not to practice law when so ordered, thereby following court orders and upholding his role as an Officer of the Court.

Respondent's conduct caused potential injury to his clients, in both Counts, by potentially causing delays or confusion in their respective matters regarding Respondent's ability to practice. Respondent's conduct, in both counts, caused actual injury to the legal system as he failed to comply with the specific Court Order preventing him from practicing law at the time of his conduct.

46. In regard to Count One only, Respondent's conduct also violated Rule 72(a)(3), Ariz.R.Sup.Ct., which required that Respondent, within 10 days after the date of the order or judgment imposing discipline of suspension, notify any opposing counsel in pending matters by registered or certified mail, return receipt requested, of the order or judgment and of the fact that the lawyer is disqualified to act as lawyer after the effective date of the same. Also as to Count One, Respondent violated Rule 72(d), Ariz.R.Sup.Ct., which provides that after the entry of a judgment of suspension, an attorney shall not engage in the practice of law, except for during the period between the entry and the effective date of the order, an attorney may complete on behalf of any client all matters that were pending on the entry date.
47. This conduct implicates *Standard* 6.2 which states that:  
  
"Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding."
48. Therefore, the presumptive sanction in this matter is a suspension.

### **The Lawyer's Mental State**

49. The Hearing Officer finds that as to Count One, Respondent's mental state was "negligent." In Count Two, the Hearing Officer finds Respondent's mental state was "knowing."
50. Actual or Potential Injury: Respondent's conduct in both counts caused injury to the profession in that Respondent held himself out to be an attorney when he knew he should not have been doing so. In Count One, this conduct also caused confusion and delay.

### **Aggravating Factors**

51. *Standard 9.22(a) Prior Disciplinary Offenses.* Respondent received a 30 day suspension in three separate counts in File Nos. 02-1473, 03-0042, and 03-0440. Respondent was sanctioned for failing to follow his client's directions concerning the scope of his representation; failing to diligently represent his client; failing to adequately communicate with his client; be candid with the court; be truthful in statements made to an opposing party; making statements involving misrepresentation; engaging in conduct prejudicial to the administration of justice; and various trust violations. Respondent was found to be in violation of Rule 41(c) Rule 42, specifically ERs 1.2, 1.3, 1.4, 1.15, 3.3, 4.1, 8.4(c), and 8.4(d), Rule 43(d), and Rule 44, Ariz.R.Sup.Ct..
52. Respondent received a six month and one day suspension for four separate counts of misconduct in File Nos. 06-0139, 06-0939, 06-1332, and 06-2084. Respondent was sanctioned for revealing confidential information about a client; failed to safe-keep client property; made false statements of fact or law to a tribunal; made

statements involving misrepresentation; engaged in conduct prejudicial to the interest of justice; failed to comply with his probation terms; and committed various trust account violations. Respondent was found to be in violation of Rule 42, specifically ERs 1.6, 1.15, 3.3, 8.4(c), and 8.4(D), Rule 43, Rule 44, and Rule 53(e) Ariz.R.Sup.Ct..

53. *Standard 9.22(d) Multiple Offenses.* Respondent engaged in the practice of law while he was suspended no less than two separate times on behalf of two separate clients.
54. *Standard 22(i) Substantial Experience in the Practice of Law.* Respondent was first admitted to practice law on May 14, 1983.

#### **Mitigating Factors**

55. *Standard 9.32(b) Absence of a Dishonest or Selfish Motive.* Although Respondent did not appear for the hearing on this Tender and so offered no testimony, he submits in the Joint Memorandum that, in connection with Count Two, he did not write to the State Bar Committee on Arizona Rules of Civil Procedure for monetary gain. Respondent submits that he wrote his letter in an effort to aid a former client, whom he thought needed help without recompense to himself. No contrary evidence was submitted to this Hearing officer.
56. *Standard 9.32(e) Cooperative Attitude Toward Proceedings.* Bar Counsel stipulates that the Respondent promptly and fully complied with the State Bar's investigation in this matter.
57. *Standard 9.32(l) Remorse.* The Joint Memorandum lists "Remorse" under *Standard 9.32(i)* as a mitigating factor and further indicates that Respondent

“...will testify that he is genuinely sorry for his conduct and will express the extent of his remorse during the hearing” (Joint Memorandum 9:5-7). Because Respondent failed to attend the hearing in this matter his remorse could not be determined and therefore cannot be found as a mitigating factor.

### PROPORTIONALITY REVIEW

58. 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, *Peasley* 208 Ariz. 90, 90 P.2d 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 at p. 90.
59. In this case, the State Bar is recommending, and the Respondent has accepted, a sanction of an additional six-month suspension to begin at the conclusion of his previous six month and one day suspension (T/R 4:10 -5:9).
60. In *In re Dunaway*, SB 07-0142-D (2007), Mr. Dunaway accepted a suspension for six months and one day. Mr. Dunaway had been summarily suspended for failing to comply with his Mandatory Continuing Legal Education requirements. During the time of his suspension, Mr. Dunaway continued to practice law. Mr. Dunaway was also found to be practicing under a trade name. Two aggravating

factors were considered, including multiple offenses, and Mr. Dunaway's substantial experience in the practice of law. Three mitigating factors were considered, including Mr. Dunaway's lack of disciplinary history, the absence of a dishonest or selfish motive, and remorse. Mr. Dunaway was found to have a knowing mental state.

61. In the present matter, Respondent was suspended for prior misconduct. Respondent then engaged in the practice of law on behalf of two distinct clients. Respondent's discipline history is more severe than Mr. Dunaway's. The nature of Respondent's suspension at the time he engaged in the unauthorized practice of law was also more severe than Mr. Dunaway's. Like Mr. Dunaway, Respondent also knew of his suspension and knew it was effective when he engaged in the conduct at issue here.
62. *In Re Lynch*, SB-06-0042-D (2006), Mr. Lynch accepted a suspension for 90 days. Mr. Lynch was also placed on one year of probation. Mr. Lynch had been summarily suspended for failing to comply with his MCLE requirements. During the time of his suspension, Mr. Lynch continued to practice law. Mr. Lynch also violated the terms of his probation. In aggravation the Hearing Officer considered two factors: First, there were multiple offenses, and, second, that Mr. Lynch had substantial experience in the practice of law. Four mitigating factors were considered: Mr. Lynch's lack of a prior disciplinary record, a good-faith effort to rectify his misconduct, a cooperative attitude with the proceedings, and remorse. Mr. Lynch was found to have a knowing mental state.

63. In the present matter, Respondent was suspended for prior misconduct, and then engaged in the unauthorized practice of law. Respondent's prior disciplinary history is more severe than Mr. Lynch's. Both the existence and nature of Respondent's disciplinary history, when compared to Mr. Lynch, supports the contention that Respondent's suspension should be greater than 90 days.
64. In *In re Hansen*, SB-05-0020-D (2005), Mr. Hansen, accepted an agreement for a six-month suspension. Mr. Hansen had been suspended for the unauthorized practice of law, but continued to practice law unauthorized during that suspension. The two aggravating factors that were considered were Mr. Hansen's prior disciplinary history and his substantial experience in the practice of law. The four mitigating factors considered were Mr. Hansen's lack of a selfish motive, his personal or emotional problems, his cooperative attitude towards the proceedings, and remorse. Mr. Hansen was found to have a negligent mental state.
65. Like Mr. Hansen, Respondent has a prior disciplinary history that supports a longer-term suspension. Respondent has not repeated his prior misconduct in the current matter, however, Respondent admitted to a "knowing" mental state in Count Two, which is greater than that found in *In Re Hansen*. *In Re Hansen* supports a six-month suspension for Respondent.
66. The parties submit, and the Hearing Officer does not disagree, that these cases support a six month suspension.

## RECOMMENDATION

67. 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).
68. 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).
69. In this case, Respondent had previously been suspended for much more serious behavior for six months and a day. That suspension ran from December 1, 2007, to June 1, of 2008. The recommended sanction in this matter is for six months additional suspension beginning June 2, 2008 and running through December 2, 2008.
70. In evaluating the Respondent's conduct in these two counts, the Hearing Officer finds that he acted negligently in Count One in not realizing that he could not take on any new clients between the order of the Supreme Court and the effective date of his suspension (T/R 7:4 – 9). The Hearing Officer finds that Respondent acted knowingly in Count Two when he undertook to assist Mr. Ekeh after the date of his suspension. However, the Respondent's efforts on behalf of Mr. Ekeh were not for personal gain, and any more than an additional six-month suspension does

not appear to this Hearing Officer to be warranted in this matter. Respondent will still have to reapply for admission to the State Bar given his previous six months and one day suspension, he just cannot do so for an additional six months, meaning that he will be suspended from the practice of law for a total of one year and one day.

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

1. Respondent shall be suspended for a period of six months beginning in June 2, 2008;
2. Respondent will be subject to the terms and conditions of probation recommended at the time of his previous suspension for six months and one day, plus any additional terms and conditions deemed appropriate at the time;
3. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona;
4. In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Non-Compliance 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 time, but in no event later than thirty days after receipt of notice, to determine whether a term of probation had been breached, and, if so, to recommend an appropriate action and response. 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 to prove non-compliance by clear and convincing evidence.

5. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 14<sup>th</sup> day of October, 2008.

Hon. H. Jeffrey Coker / N.M.  
H. Jeffrey Coker, Hearing Officer 6R

Original filed with the Disciplinary Clerk  
this 14<sup>th</sup> day of October, 2008.

Copy of the foregoing mailed  
this 14<sup>th</sup> day of October, 2008, to:

Mark F. Brinton  
Respondent  
Law Office of Mark F. Brinton  
1745 S. Alma School Rd, Suite 100  
Mesa, AZ 85210

Russell Anderson  
Bar Counsel  
State Bar of Arizona  
4201 North 24<sup>th</sup> Street, Suite 200  
Phoenix, AZ 85016-6288

by: Clavie Jensen