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APR 26 2005
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *William*

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**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER) Nos. 03-2202, 03-2319, 04-0510
OF THE STATE BAR OF ARIZONA,)
)
THOMAS C. McDANIEL, III,) **HEARING OFFICER'S REPORT**
Bar No. 016986)
)
RESPONDENT.)
_____)

PROCEDURAL HISTORY

The State Bar filed a Complaint on November 22, 2004. Respondent did not file an answer. The Disciplinary Clerk entered a Default on January 24, 2005. The State Bar requested to be heard in aggravation and mitigation. On February 28, 2005, Jack L. Lansdale, Jr. filed a Notice of Appearance on behalf of Respondent. A hearing on mitigation and aggravation was held on March 10, 2005. The State Bar filed a Post-hearing Memorandum on March 31, 2005. Respondent's Counsel filed a Post-hearing Memorandum on April 4, 2005.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona having been admitted to practice on May 18, 1996.

1 Respondent failed to answer the complaint. All alleged violations have
2 therefore been deemed admitted. An Entry of Default was filed pursuant to Rule
3 57(d), Ariz. R.S.Ct., on January 24, 2005.

4 The hearing officer adopts the allegations in the complaint by reference as
5 her findings of fact.

6 In addition, as to the issues of mitigation and aggravation only, the Hearing
7 Officer makes the following Findings of Fact:

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10 1. Respondent had previously been the subject of an Order of Informal
11 Reprimand, Probation, LOMAP and Costs, filed May 10, 2004, in No. 03-1872,
12 involving similar conduct in that Respondent failed to adequately represent a client
13 and failed to promptly respond to the State Bar's inquiry. As part of his one-year
14 probation, Respondent agreed he would commit no ethical violations or other acts
15 violative of the Lawyer's Creed of Professionalism.

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18 2. The instant complaint was filed November 22, 2004, a time in which
19 Respondent was still on probation.

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21 3. Respondent failed to notify LOMAP he had received the instant
22 complaint or ask for their assistance. (3/10/05 transcript, pg 72).

23
24 4. Respondent agreed restitution should be made to client, Ms. Saigon, but
25 made no effort to make said restitution. (3/10/05 transcript, pg 73-74)
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1 5. Respondent testified he was shocked his efforts were not successful on
2 client's Gauch's behalf and acknowledged he had difficulty communicating with
3 the client due to the client's hearing impairment and inadequate language skills.
4 (3/10/05 transcript, pg 51-52)
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6 6. Respondent was not receiving any treatment for emotional, mental or
7 physical conditions in 2003 when he represented the complainants. (3/10/05
8 transcript, pg 76)
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10 7. Respondent began counseling shortly prior to the mitigation/aggravation
11 hearing and had participated in two sessions. (3/10/05 transcript, pg 76-77)
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13 8. Respondent testified following his representation of the complainants and
14 prior to receiving the Bar's complaint, his younger roommate got into trouble with
15 the police, moved out and committed suicide. Respondent claimed he was
16 subsequently hospitalized after learning of the suicide, and he attributes his
17 medical problems to the trauma of his roommate's suicide. In hindsight,
18 Respondent attributed a relationship between this death, his subsequent medical
19 problems and his failure to respond to the Bar inquiries. (3/10/05 transcript, pg 38-
20 45).
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23 9. Respondent also testified he suffered from agoraphobia as a teenager, and
24 claimed this caused him to develop an "emotional avoidance," which, in the
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1 instant case, caused him to avoid responding to the Bar's inquiry. (3/10/05
2 transcript, pg 50-51)

3 10. Respondent testified he had suffered from a brain hemorrhage which
4 was corrected with surgery in 1991. This caused Respondent permanent damage
5 to the fine motor skills in his right hand. Respondent he accommodates this
6 disability by taking less cases and typing more. (3/10/05 transcript, pg 36-37)
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8 11. Respondent offered no independent evidence regarding his medical
9 problems.
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11 12. Respondent has been practicing law almost nine years. (3/10/05
12 transcript, pg 48-49)
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14 **ABA STANDARDS**

15 The ABA *Standards* list the following factors to consider in imposing the
16 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
17 actual or potential injury caused by the lawyer's misconduct, and (4) the existence
18 of aggravating or mitigating circumstances. ABA *Standard* 3.0.
19

20 Respondent violated his duties to his clients by failing to exercise due
21 diligence and competence, by failing to act timely and with candor. He failed to
22 keep his clients informed and to pursue their legitimate interests in an appropriate
23 manner. He violated his duty to the profession by failing to cooperate with Bar
24 inquiries and to respond to the complaints.
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1 Respondent has admitted most of the conduct alleged, and his default is
2 deemed an admission. None of the testimony presented by Respondent suggests
3 his mental state at the time of the offenses was anything but a “knowing”
4 awareness of his action.
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6 This Hearing Officer considered *Standard 4.42* in determining the
7 appropriate sanction warranted by Respondent’s conduct.
8

Suspension is generally appropriate when:

- 9 (a) a lawyer knowingly fails to perform services for a client and causes
10 injury or potential injury to a client, or
11 (b) a lawyer engages in a pattern of neglect and causes injury, or potential
12 injury to a client.

13 Standard 4.62 states “Suspension is generally appropriate when a lawyer
14 knowingly deceives a client, and causes injury or potential injury to a client.
15

16 “Suspension is generally appropriate when a lawyer knowingly engage in
17 conduct that is a violation of a duty owed as a professional, and causes injury or
18 potential injury to a client, the public, or the legal system.” Standard 7.2

19 The third prong of the Standards is to consider the injury or potential for
20 injury caused by Respondent’s misconduct. None of the injuries suffered by
21 Saigon or Warren were permanent, but both suffered delays and loss of fees.
22 Whether Mr. Gauch’s suffered damages is a more difficult question, since
23 Respondent did perform services, but admitted he could not communicate with his
24 own client. Mr. Gauch’s father claimed the failure of Respondent to call additional
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1 witnesses and to offer police reports at the hearing did adversely affect his son's
2 custodial arrangements. Since Respondent failed to respond to the complaint, these
3 allegations are admitted. However, there is no evidence that, had Respondent
4 offered the additional evidence, the ultimate outcome would have been different.
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6 **AGGRAVATING AND MITIGATING FACTORS**

7 Finally aggravating and mitigating factors are to be considered. The
8 applicable aggravating factors under Standards 9.22, are:
9

10 (c) a pattern of misconduct;

11 Respondent has demonstrated a pattern of misconduct in the prior offense
12 and in all three of the instant complaints.
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14 (d) multiple offenses;

15 Respondent has committed the same type of offenses on multiple occasions
16 in the instant case. Respondent argues his past history of reprimand and probation
17 should not be considered as the offenses occurred after the instant cases, but
18 probation imposed prior to this instant complaint. The Hearing Officer need not
19 address this point as aggravation can be found by the fact that three separate clients
20 were affected in the instant case. In addition, his disciplinary history is relevant for
21 a finding of aggravation in (e).
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24 (e) bad faith obstruction of the disciplinary proceeding by intentionally
25 failing to comply with rules or orders of the disciplinary agency;
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1 Despite having previously been involved in the disciplinary process, and
2 having LOMAP resources at his disposal, Respondent failed to respond to bar
3 inquiries or answer the complaint—contrary to his terms of probation.

4 (g) refusal to acknowledge wrongful nature of conduct;

5 Respondent acknowledged his responsibility as to Ms. Saigon, but attempted
6 to justify his conduct as to the other complainants rather than accept responsibility.
7

8 (h) vulnerability of victim;

9 Mr. Gauch was clearly vulnerable due to his disabilities.

10 (i) substantial experience in the practice of law

11 Respondent had practiced nearly nine years at the time of the mitigation
12 hearing and should have been aware of the need for adequate communication with
13 his clients and for adequate supervision of his office staff.
14

15 (j) indifference to making restitution

16 Respondent proffered the argument that Ms. Saigon deserved restitution, but
17 he believed Mr. Warren had received the benefit of his services. However, he had
18 not made any attempt to refund Ms. Saigon's payment prior to the hearing.
19 Furthermore, though he did perform some services for Mr. Warren, it was for
20 naught, as he failed to complete all of the minimally required tasks to effect
21 service. Therefore, it was as if he had done nothing for Mr. Warren.
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1 The Hearing Officer considered six possible factors in mitigation according
2 to Standards 9.32:

3 (b) absence of a dishonest or selfish motive

4 While the State Bar argued Respondent's conduct was selfish in that he
5 accepted fees and failed to do any work, it appeared to this Officer Respondent did
6 not intentionally fail to do the work requested, but instead acted in a negligent
7 manner. Respondent did represent Gauch, but failed to do all requested of him.
8 Resondent appeared to begin the representation of Warren and to a lesser degree,
9 Saigon, but failed to finish. It did not appear there were any checks and balances
10 in Respondent's practice to remind him of the need to work on these cases—they
11 just fell by the wayside. Therefore this Officer does find a mitigating factor of an
12 absence of any dishonest or selfish motive in Respondent's actions.
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16 (c) personal or emotional problems

17 (h) physical disability

18 (i) mental disability or chemical dependency including alcoholism or drug
19 abuse
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22 Respondent proffered his own testimony indicating his personal or
23 emotional problems caused him to fail to respond to the bar. He also testified his
24 past medical history and his history of agoraphobia contributed to his problems.
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1 However, the evidence presented was insufficient to establish any of these as
2 mitigating factors. *Matter of Augustein, 178 Ariz. 133, 871 P.2d 254 (1994).*

3 (g) character or reputation

4 The letters submitted by Respondent indicated support for him from his
5 lawyer friends and neighbors. All of the letters suggested Respondent was of good
6 character. Some of the lawyers who wrote these letters had opposed Respondent in
7 domestic relations matters. However, none of them could speak directly on the
8 relationship Respondent had with his clients and the manner in which he ran his
9 office. The Hearing Officer finds it relevant that Respondent has garnered the
10 respect of some of the lawyers he opposes, finds it to be a mitigating factor but
11 does not assign it much weight.
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15 (l) remorse.

16 Respondent did express remorse and appeared to be sincere in stating he was
17 overwhelmed and felt badly that these clients had complained. He genuinely
18 appeared to personally care about his clients' representation. He appeared, albeit
19 late, to recognize he had to work on the problems which contributed to his dilatory
20 behavior and began counseling toward that end. Therefore, the Hearing Officer
21 does find remorse to be a mitigating factor.
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PROPORTIONALITY REVIEW

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2 To have an effective system of professional sanctions, there must be internal
3 consistency, and it is appropriate to examine sanctions imposed in cases that are
4 factually similar. In re Shannon, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994),
5 (quoting In re Wines, 135 Ariz. 203, 207 (1983)). However, the discipline in each
6 case must be tailored to the individual case, as neither perfection nor absolute
7 uniformity can be achieved. Matter of Riley, 142 Ariz. 604, 615 (1984).
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10 Respondent has urged a decision consistent with *Gawlowski* 177 Ariz. 311,
11 858 P.2d 324 (1994) and *Kaplan* 175 Ariz. 877 P.2d 274 (1994). Neither are
12 appropriate as both involved admissions by the lawyers involved and both involved
13 a number of mitigating factors to be present.
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15 This matter is more analogous to *Mankowski*, DC No. 03-0310 et al., SB-
16 0005-02-D, who received six months suspension and one day, plus requirements
17 upon reinstatement. As in *Mankowski*, the most serious duty Respondent violated
18 was that owed to his clients. As in *Mankowski*, Respondent should be required to
19 demonstrate his fitness to practice law and his rehabilitation through a
20 reinstatement requirement.
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23 The Hearing Officer agrees with the State Bar that *Counce*, 01-2359 is also
24 appropriate to consider in reviewing proportionality. The conduct herein is similar
25 to that of *Counce*.
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1 The Hearing Officer also reviewed the supporting proportionality cases cited
2 in both *Mankowski* and *Counce* and found them to be supportive herein as well.

3 **RECOMMENDATION**

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect
5 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
6 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
7 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
8 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
9 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).
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12 In imposing discipline, it is appropriate to consider the facts of the case, the
13 American Bar Association's *Standards for Imposing Lawyer Sanctions*
14 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
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16 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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18 Upon consideration of the facts, application of the *Standards*, including
19 aggravating and mitigating factors, and a proportionality analysis, this Hearing
20 Officer recommends the following:
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- 22 1) Respondent shall be suspended for six months and a day;
23 2) Restitution shall be ordered in the amount of \$500 for Ms. Saigon and
24 \$450 for Mr. Warren;
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1 3) Upon reinstatement, Respondent shall be placed on two years probation,
2 commencing upon Respondent executing a Memorandum of Understanding with
3 LOMAP. The terms of probation shall be as follows:

4 a. Respondent shall, within thirty days of the issuance of an order of
5 Reinstatement, contact the State Bar's LOMAP program to schedule participation
6 in an audit, the terms of which shall be incorporated by this reference and shall
7 include, but may not be limited to, a requirement that Respondent comply with any
8 recommendations made by the LOMAP director concerning Respondent's office
9 systems.
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11 b. Respondent shall submit to the assignment of a LOMAP practice monitor.
12 The reporting terms shall be developed by LOMAP.
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14 c. Respondent shall be responsible for the costs and expenses associated
15 with his participation in the LOMAP program.
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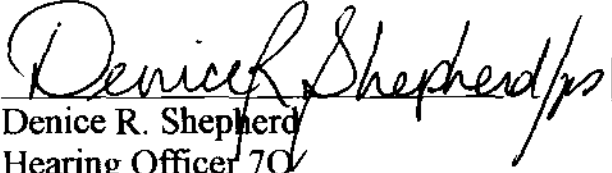
17 d. Respondent shall commit no ethical violations or other acts which violate
18 the Lawyer's Creed of Professionalism, unanimously adopted by the Board of
19 Governors, State Bar of Arizona, on May 19, 1989;
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21 e. If Respondent fails to comply with any of the foregoing conditions, and
22 information thereof is received by the State Bar, bar counsel shall file with the
23 Probable Cause Panelist a Notice of Non-Compliance. The Probable Cause
24 Panelist shall determine whether the conditions of probation have been breached
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1 and, if so, to order appropriate action and response to such breach. If there is an
2 allegation that Respondent has failed to comply with any of the foregoing
3 conditions, the burden of proof thereof shall be on the State Bar to prove non-
4 compliance by clear and convincing evidence.
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6 4) Respondent shall pay the costs and expenses of these proceedings.

7 DATED this 26th day of April, 2005.

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9 
10 Denice R. Shepherd
11 Hearing Officer 7Q

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13 Original filed with the Disciplinary Clerk
14 this 26th day of April, 2005.

15 Copy of the foregoing was mailed
16 this 26th day of April, 2005, to:

17 Jack L. Lansdale, Jr.
18 Respondent's Counsel
19 177 North Church Avenue, Suite 200
20 Tucson, AZ 85701-1191

21 Angela M. B. Napper
22 Bar Counsel
23 State Bar of Arizona
24 4201 North 24th Street, Suite 200
25 Phoenix, AZ 85016-6288

26 by: P. Williams