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JAN 21 2010

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA)

No. 09-1643

BRUCE E. ROSENBERG,
Bar No. 014022

**DISCIPLINARY COMMISSION
REPORT**

RESPONDENT.)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 9, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed December 10, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), Member Assistance Program ("MAP"), and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP and MAP), and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.¹ The terms of probation are as follows:

¹ The Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$1,200.00.

Terms of Probation²

1 1. Respondent will consult with, participate in and successfully complete the
2 LOMAP for office management issues and MAP for life balance issues;

3 2. Respondent's probation in File Number 07-1763 will continue for an
4 additional two years to begin at the time of the Judgment and Order in this matter, and will
5 conclude two years from that date;

6 3. Respondent shall, assuming that Mrs. Nash authorizes and cooperates with
7 him, within 90 days of the signing of the Order, have completely resolved the Medicare
8 lien at his own expense up to an amount of 3% of \$12,967, and that any part of the 3% not
9 expended in paying the Medicare lien, shall be refunded to Mrs. Nash within that time.
10 Should Mrs. Nash refuse to authorize Respondent to deal with Medicare on her behalf, and
11 the State Bar is not able to arrange for another attorney to assist Mrs. Nash, Respondent
12 shall tender 3% of \$12,967 to Mrs. Nash and she will be responsible for the Medicare lien.
13

14 4. In the event that Respondent fails to comply with the terms of probation and
15 information thereof is received by the State Bar, Bar Counsel shall file a Notice of
16 Noncompliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The
17 imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the
18 earliest practicable time, but in no event later than 30 days after receipt of the notice, to
19 determine whether a term of probation has been breached, and if so, to recommend an
20 appropriate sanction and response. If there is an allegation that Respondent failed to
21
22
23
24

25 _____
26 ² The terms in the Hearing Officer's Report differ from those contained in the Tender; the parties
however, have stipulated to the amended terms.

1 comply with any of the foregoing terms, the burden of proof shall be on the State Bar to
2 prove noncompliance by a preponderance of the evidence.³

3 4. In the event that Respondent fails to comply with any of the foregoing
4 conditions, and the State Bar receives information thereof, bar counsel shall file with the
5 imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct.
6 The imposing entity may refer the matter to a hearing officer to conduct a hearing at the
7 earliest practicable date, but in no event later than 30 days after receipt of notice, to
8 determine whether the terms of probation have been breached and, if so, to recommend
9 appropriate action and response. If there is an allegation that Respondent failed to comply
10 with any of the foregoing terms, the State Bar of Arizona bears the burden to prove non-
11 compliance by a preponderance of the evidence.

12 RESPECTFULLY SUBMITTED this 21ST day of January, 2010.

13
14 Jeffrey Messing / mps
15 Jeffrey Messing, Chair
16 Disciplinary Commission

17 Original filed with the Disciplinary Clerk
18 this 21ST day of January, 2010.

19 Copy of the foregoing mailed
20 this 22 day of January, 2010, to:

21 Hon. H. Jeffrey Coker
22 Hearing Officer 6R
23 P.O. Box 23578
24 Flagstaff, AZ 86002

25 _____
26 ³ The Hearing Officer's Report and Tender inadvertently states that non-compliance is to be proven by clear and convincing evidence.

1 David L. Anderson
2 Respondent's Counsel
3 2262 East Escondido
4 Gilbert, AZ 85234

5 and

6 David L. Anderson
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8 2650 E. Southern Avenue
9 Mesa, AZ 85204-5413

10 David L. Sandweiss
11 Bar Counsel
12 State Bar of Arizona
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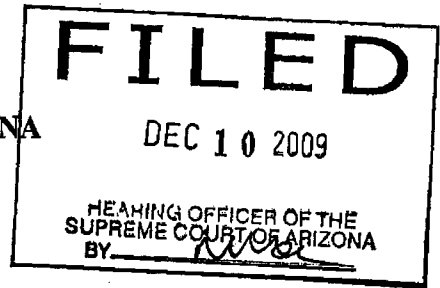
15 by: Deann Barker

16 /mps

EXHIBIT

A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

No. 09-1643

BRUCE E. ROSENBERG,)
Bar No. 014022)

HEARING OFFICER'S REPORT

RESPONDENT.)
_____)

PROCEDURAL HISTORY

1. This matter originated with a Probable Cause Order dated August 26, 2009. Thereafter there was a direct file of a Tender of Admissions and Joint Memorandum in Support of Agreement for Discipline by Consent, filed on October 2, 2009. The matter was assigned to this Hearing Officer on October 6, 2009, and proceeded to hearing on the agreement on November 2, 2009. Present at the hearing were Bar counsel, Respondent and his counsel, and the undersigned.

FINDINGS OF FACT

2. At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on October 26, 1991.¹
3. In a previous discipline file, File Number 07-1763, Respondent failed to disperse funds from a bodily injury settlement in a timely manner and failed to expeditiously address a Medicare lien and doctor's lien (Dr. Michael Warwick) against the recovery.

¹ Unless cited to other sources, the facts herein are taken from the Tender of Admissions.

4. In that previous file, on May 15, 2008, Respondent was issued an Order of Informal Reprimand, placed on probation and ordered to pay costs for violating ERs 1.3, 1.4, 1.5 and 1.15; and Rules 43 and 44.
5. Respondent's terms of probation included the following:
 - a) Probation shall last for one year or the length of time it takes for Respondent to completely conclude all aspects of Mrs. Nash's case (including properly distributing her settlement funds), whichever is shorter;
 - b) Respondent shall furnish monthly status reports to Bar counsel detailing the steps taken and progress made to completely conclude Mrs. Nash's case (including properly distributing her settlement funds);
 - c) Respondent shall furnish to Bar Counsel copies of his trust account bank statements on a monthly basis;
 - d) 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;
 - e) At the conclusion of Respondent's probation, Respondent shall report, in writing to the State Bar's Phoenix office, his compliance with the terms of probation;
 - f) Respondent shall pay all costs of these proceedings pursuant to Rule 60(b), Ariz.R.Sup.Ct., as set forth in the Statement of Costs and Expenses, within 30 days of receipt of the Order;
 - g) Probation will start on the date that the Order is entered herein;
 - h) If Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information thereof, Bar Counsel shall file with the Probable

Cause Panelist a Notice of Non-Compliance. The Probable Cause Panelist shall determine whether the conditions of probation have been breached and, if so, order appropriate action and response to such breach. If there is an allegation that Respondent has failed to comply with any of the foregoing conditions, the burden of proof thereof shall be on the State Bar to prove noncompliance by clear and convincing evidence.

6. Respondent violated his probation terms (a) through (e).
7. On June 22, 2009, the State Bar of Arizona filed, in File Number 07-1763, a Notice of Non-Compliance with Terms of Probation, and Request for Order to Show Cause Why Respondent Should Not be Found in Violation of the Order of May 15, 2008.
8. On July 15, 2009, an Order to Show Cause was filed in File Number 07-1763.
9. Respondent filed his response to the Order to Show Cause through his counsel on August 14, 2009, admitting to violating his probation terms (a) through (e).
10. Respondent stated in his response that he handled the underlying case pro bono and just recently distributed the funds to Mrs. Nash.
11. Respondent stated that he did not negotiate the settlement for Mrs. Nash in the underlying matter. Rather, at the request of a mutual friend, Respondent intervened for Mrs. Nash for free simply to handle the settlement funds and address a Medicare lien and a healthcare provider lien (Dr. Michael Warwick).
12. Respondent testified that he took no fee in the underlying case and that the settlement funds are all accounted for, Transcript of Hearing ("T/H") 11:25-12:2 & 15:10-18. Respondent further testified at the hearing in this matter that he holds

no funds on behalf of Mrs. Nash having sent her a check for the full amount of her settlement, \$12,967.00, on August 12, 2009, T/H 9:17-21. While Respondent has sent the money to Mrs. Nash, she has not, as of the date of the hearing, cashed his check, T/H 9:22-25.

13. Respondent also offered to Mrs. Nash to reimburse her an additional 3% of the \$12,967 that is the amount of her settlement for the loss of use of her funds, and intends to pay off the Medicare liability from that money. Therefore, Mrs. Nash will receive the full benefit of her settlement and, in effect, Respondent will be responsible for negotiating and paying off the Medicare lien, T/H 16:8-19. Mrs. Nash has not responded to Respondent's offer.
14. Unfortunately, Mrs. Nash has, as of March 2009, refused to communicate with Respondent and this has further exacerbated trying to bring closure to the matter. Additionally, Mrs. Nash has withdrawn Respondent's authority to negotiate with Medicare, T/H 8:8-11.
15. When Respondent was asked why he did not get Mrs. Nash's money to her he responded that he has been going through a time of severe personal turmoil: Respondent's mother was ill and he spent time with her in Florida before she passed away, difficulties in dealing with the Medicare lien and the breakdown in communication between himself and Mrs. Nash contributed to the delay. However, Respondent takes full responsibility in simply not giving it the priority it deserved, T/H 18:21-19:10.

CONCLUSIONS OF LAW

16. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 53(e), Ariz.R.Sup.Ct.

ABA STANDARDS

17. *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

18. Respondent engaged in professional misconduct by not complying with his probation terms in the previous file, No. 07-1763, in violation of the Supreme Court Rules and the Rules of Professional Conduct. Respondent's probation originally was imposed based on his violation of duties owed to his client. Respondent admitted that his probation violation adversely reflects on his fitness as a lawyer and, taken as a whole, violated his duties owed to the public, the legal system and the legal profession.

19. The presumptive sanction for a violation of the duties set forth herein is Censure.

The Lawyer's Mental State

20. The Parties submitted that, for the purpose of their agreement, Respondent negligently failed to comply with his probation terms in the previous file. After a somewhat extensive examination of Respondent during the hearing on the

Agreement, this Hearing Officer concludes that his mental state was in fact negligent.

Actual or Potential Injury

21. The Parties submit that Respondent's conduct caused actual injury to his client when Respondent failed to distribute funds to his client in a timely manner and also failed to expeditiously address a Medicare lien against the client's recovery. The Parties further submit that there was actual injury to the public, the legal system and the legal profession when Respondent failed to comply with the terms of his probation. After a review of the pleadings as well as the testimony offered at the hearing in this matter, the undersigned Hearing Officer agrees with the parties that there was actual injury both to the client as well as, by way of his violating the terms of his probation, actual injury to the public, the legal system and the legal profession.

Aggravating and Mitigating Factors

Aggravating Factors

22. *Standard 9.22(a)*, Prior disciplinary offenses: Respondent has received one prior disciplinary sanction. In File Number 07-1763 (the underlying matter in which probation was imposed), Respondent received an Informal Reprimand and was placed on probation for a violation of ERs 1.3, 1.4, 1.5 and 1.15; and Rules 43 and 44, by Order, which was filed on May 15, 2008.
23. *Standard 9.22(c)*, Pattern of misconduct: Respondent's probation and probation violation cases both involved ERs 1.3 and 1.4.
24. *Standard 9.22(d)*, Multiple offenses.

25. *Standard 9.22(h), Vulnerability of victim:* Respondent's client in File Number 07-1763 is elderly and she had no means of obtaining her settlement money held in Respondent's trust account without Respondent's active cooperation.
26. *Standard 9.22(i), Substantial experience in the practice of law:* Respondent was admitted to the practice of law in 1991.

Mitigating Factors

27. *Standard 9.32(a), Absence of a prior disciplinary record:* Respondent has not received any prior disciplinary sanctions other than the underlying probation violation.
28. *Standard 9.32(b), Absence of a selfish or dishonest motive:* Respondent's misconduct was negligent. In File Number 07-1763, Respondent received no money for the representation of his client, and all money has been accounted for.
29. *Standard 9.32(c), Personal or emotional problems:* Respondent closed his sole practice and joined a firm in Prescott but maintained some of his sole practice clients. During this transition, his office management was inept, and his sole practice client matters, including the one that is the basis for File Number 07-1763, were neglected. Respondent's new job with the Prescott law firm was more demanding and stressful than he anticipated. In addition, during his transition, Respondent's mother became ill, so he spent considerable time with her in Florida before she died, which not only rendered him unavailable to his clients, but also caused emotional trauma.

30. *Standard 9.32(e)*, Full and free disclosure to a disciplinary board or cooperative attitude toward proceedings: Respondent was cooperative during this matter and admitted to the violations of his probation terms.
31. *Standard 9.32(l)*, Remorse: Respondent has expressed remorse for neglecting the terms of his probation and not meeting the needs of Mrs. Nash. At the hearing in this matter, this Hearing Officer found Respondent to be genuine in his regret and remorse for letting not only his client down, but his profession as well.

PROPORTIONALITY REVIEW

32. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. 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 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). 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.
33. In this case, the State Bar is recommending, and the Respondent has accepted, a sanction of Censure with probation for two years with specific terms.
34. In *In re Harris*, SB-06-0150-D (2006), the Commission deferred to the Hearing Officer's recommendation for a Censure even though a majority of the Commission stated that a 30 day suspension would also have been appropriate.

Unlike this case, Harris involved misconduct in addition to a probation violation. On the probation violation, Harris failed to file quarterly reports, much like this case in which Respondent: failed to furnish monthly status reports to Bar counsel detailing the status of his case, monthly trust account bank statements to Bar counsel and a report to the State Bar's Phoenix office at the conclusion of his probation detailing his compliance with the terms of his probation. Harris was censured and placed on probation for one year.

35. In *In re Howell*, SB- 07-0014-D (2007), too, there was misconduct in addition to probation violations. Howell's breach of probation included failing to pay required costs and complete the Ethics Enhancement Program. Howell also practiced law while under summary suspension, had a history of prior discipline and committed multiple offenses. In mitigation, there was lack of a dishonest motive. Howell was censured and placed on probation for six months by the Supreme Court.
36. In *In re Gregory*, SB-08-0153-D (2008), Gregory failed to comply with the terms of his probation imposed in File Number SB-07-0013-D (2007). Specifically, he failed to file timely quarterly trust account reports, properly reconcile his trust account and pay the Trust Account Program fee. The discipline imposed for his probation violation was Censure and one year of probation.

RECOMMENDATION

37. 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).

38. 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).
39. In this case, Respondent agreed to help a friend of a friend on a pro-bono basis to try and resolve a Medicare lien, and another medical lien (Dr. Michael Warwick). The amount of the settlement was arrived at prior to Respondent being involved in the case, and his role was to get the liens resolved. Respondent was placed on probation because he did not get the liens resolved and the money disbursed to the client in a timely fashion. Because of Respondent, and other factors outside of his control, the money was not transferred to the client within the time of his probation. Ultimately, Respondent tendered to the client all of the funds and offered to take responsibility for the Medicare lien and, given that the second lien is to her currently treating physician, Mrs. Nash is to take care of the second lien to her doctor. Mrs. Nash has not responded to this proposal.
40. Mrs. Nash's personal injury settlement of \$12,967 was in Respondent's trust account, and he derived absolutely no benefit from the delay. On the surface, it appeared that all Respondent needed to do was to write a check from his trust account to pay Mrs. Nash. However, there is a little more to it than that. Part of

the delay in Respondent paying Mrs. Nash was the fact that Medicare had a lien against Mrs. Nash's funds. Respondent testified at the hearing in this matter of the extraordinary difficulty in dealing with Medicare in resolving the lien. Even today, after all of his efforts, Respondent still has not resolved the Medicare lien.

41. The problems with the Medicare lien aside, Respondent fully accepted responsibility for not resolving Mrs. Nash's problems during the period of his probation. While Respondent was in the process of closing his practice, taking on a new job with a new firm, not receiving any pay for his services, and the death of his mother, he does not make any excuses for not taking care of Mrs. Nash. Respondent admits that Mrs. Nash had a right to expect better from him and should have.
42. Respondent has now tendered his trust account check to Mrs. Nash in the full amount of her settlement and proposed to her that he be responsible to her for 3% of the full amount of the settlement to pay the Medicare lien in recognition of her loss of use of her money. If he is able to resolve the Medicare lien for less than the 3%, he has agreed to pay her the difference.
43. This Hearing Officer found Respondent to be open and honest about his shortcomings in dealing with Mrs. Nash, and his failure to comply with the terms of his probation. While he did have other things going on in his life, Respondent was not reticent in accepting responsibility for everything that has taken place.
44. While Mrs. Nash certainly was injured as a result of Respondent's inability to resolve the Medicare lien, as well as his negligence in attending to the matter, it

appears that everything has been done to try and bring closure to her case, save for the resolution of the Medicare lien.

45. While this Hearing Officer appreciates the difficulty of dealing with Medicare, I would propose that resolving the Medicare lien be made a priority and Respondent be given a limited period of time within which to resolve that issue. This Hearing Officer recommends that the agreement of the parties be amended to provide that Respondent has 90 days from the entry of the order to have completely and finally resolved the Medicare lien out of the 3% he proposes reimbursing to Mrs. Nash, and refund to her any amount of the 3% not used to pay off the debt Medicare lien. This of course is dependent on Mrs. Nash cooperating with and authorizing Respondent to deal with Medicare on her behalf. If Mrs. Nash refuses to give Respondent authority to deal with Medicare on her behalf, it appears that all he can do is tender the 3% to her and leave it to her to resolve. Alternatively, perhaps Bar Counsel can find a different attorney that would agree to help Mrs. Nash with the Medicare lien if she would approve.
47. For these reasons, and after consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, as well as a proportionality analysis, the undersigned Hearing Officer recommends that the proffered sanction be imposed:
- 1) Respondent shall be Censured;
 - 2) Respondent shall be placed on probation for a period of two years;

- 3) Respondent consult with, participates in and successfully completes the SBA's Law Office Management Assistance Program ("LOMAP") for office management issues and Member Assistance Program ("MAP") for life balance issues;
- 4) Respondent's probation in File Number 07-1763 will continue for an additional two years to begin at the time of the judgment and order in this matter, and will conclude two years from that date;
- 5) Respondent shall, assuming that Mrs. Nash authorizes and cooperates with him, within 90 days of the signing of the order, have completely resolved the Medicare lien at his own expense up to an amount of 3% of \$12,967, and that any part of the 3% not expended in paying the Medicare lien, shall be refunded to Mrs. Nash within that time. Should Mrs. Nash refuse to authorize Respondent to deal with Medicare on her behalf, and the State Bar is not able to arrange for another attorney to assist Mrs. Nash, Respondent shall tender 3% of \$12,967 to Mrs. Nash and she will be responsible for the Medicare lien.
- 6) Respondent shall pay all costs and expenses incurred in this disciplinary proceeding;
- 7) 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 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 time, but in no event later than 30 days after receipt of the notice, to determine whether a term of probation has been breached, and if so, to recommend an appropriate sanction 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 noncompliance by clear and
convincing evidence.

DATED this 10th day of December, 2009.

Hon. H. Jeffrey Coker / NM
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 10th day of December, 2009.

Copy of the foregoing mailed
this 10 day of December, 2009, to:

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by: Deann Barker