

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

IN THE MATTER OF A MEMBER)	No. 09-0197	
OF THE STATE BAR OF ARIZONA)		
SIDNEY WOLTIZKY,)		
Bar No. 003195¹)		DISCIPLINARY COMMISSION
		REPORT
RESPONDENT.)		
_____)		

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on February 13, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer’s Report filed December 3, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent (“Tender”) and Joint Memorandum (“Joint Memorandum”) providing for censure, one year of probation continuing legal education (“CLE”) course entitled *Candor Courtesy and Confidences: Common Courtroom Conundrums*), three (3) additional CLE hours in the area of criminal law and/or procedure, and costs.

Decision

Having found no facts clearly erroneous, the eight members² of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer’s findings of fact, conclusions of law, and recommendation for censure, one year of probation (continuing legal education course entitled “*Candor Courtesy and Confidences: Common Courtroom Conundrums*”), three (3) additional CLE hours in the area of criminal

¹ The Hearing Officer inadvertently listed Bar. No. 0031195.

1 law/and or procedure, and costs of these disciplinary proceedings including any costs
2 incurred by the Disciplinary Clerk's office.³ The terms of probation are as follows:

3 **Terms of Probation**

4 1. Respondent shall successfully complete the State Bar's CLE course entitled
5 "Candor, Courtesy, and Confidences: Common Courtroom Conundrums". Respondent
6 shall provide either a certificate of completion or a copy of his notes to Bar Counsel
7 signifying he has completed the course. Respondent shall be responsible for any costs
8 associated with this course.

9 2. Respondent shall successfully complete three (3) additional hours of CLE on
10 in criminal law and/or procedure. Respondent shall provide either a certificate of
11 completion or a copy of his notes to Bar Counsel signifying he has completed the courses.
12 Respondent shall be responsible for any costs associated with this course.

13 3. Respondent shall refrain from engaging in any conduct that would violate
14 the rules of Professional Conduct or other Rules of the Supreme Court of Arizona.

15 4. In the event that Respondent fails to comply with any of the foregoing
16 conditions, and the State Bar receives information thereof, bar counsel shall file with the
17 imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct.
18 The imposing entity may refer the matter to a hearing officer to conduct a hearing at the
19 earliest practicable date, but in no event later than 30 days after receipt of notice, to
20 determine whether the terms of probation have been breached and, if so, to recommend
21 appropriate action and response. If there is an allegation that Respondent failed to comply
22
23
24
25

26 ² Commissioner Belleau did not participate in this proceeding.

³ The Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$1703.85.

with any of the foregoing terms, the State Bar of Arizona bears the burden to prove non-compliance by a preponderance of the evidence.

RESPECTFULLY SUBMITTED this 24th day of February, 2010.

Jeffrey Messing /mps
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 24th day of February 2010.

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

Hon. H. Jeffrey Coker
Hearing Officer 6R
P.O. Box 23578
Flagstaff, AZ. 86002-0001

Karen Clark
Respondent's Counsel
Adams and Clark, P.C.
520 E. Portland Street, Suite 200
Phoenix, AZ 85004-1843

Jason B. Easterday
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

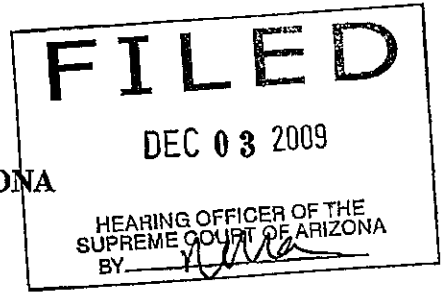
by: Deann Baker

/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. 09-0197

SYDNEY F. WOLITZKY,)
Bar No. 0031195)

HEARING OFFICER'S REPORT

RESPONDENT.)
_____)

PROCEDURAL HISTORY

1. Probable cause was found in this one count matter on July 15, 2009. Thereafter a Joint Memorandum and Tender of Admissions were filed on September 25, 2009. The case was assigned to the undersigned on October 1, 2009, and a hearing was held on the Tender and Agreement on November 3, 2009. Present at the hearing were Bar Counsel, Respondent, Respondent's counsel and this Hearing Officer.

FINDINGS OF FACT

2. At all times relevant Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice in Arizona on September 23, 1972.¹

COUNT ONE (File no. 09-0197)

3. On or about January 25, 2008, Respondent, acting pursuant to his contract with the Pima County Superior Court, was appointed to represent Armando Canez ("Mr. Canez") in *State of Arizona v. Armando Canez*, CR 2007-4926.

¹ Unless otherwise cited, all facts recited herein are taken from the Tender of Admissions jointly filed by the parties in this matter.

4. Mr. Canez was charged with First Degree Hindering Prosecution arising out of a homicide he witnessed that took place on or about December 12, 2007.
5. On or about January 25, 2008, Jesse Orantez ("Mr. Orantez") was indicted for the homicide in *State of Arizona v. Jesse Orantez*, CR 2008-0323, in Pima County Superior Court.
6. On or about January 30, 2008, Mr. Canez, at Respondent's urging, went to Respondent's office and delivered a shirt worn by Mr. Canez the night of the homicide, Transcript of Hearing ("T/H") 11:16 – 12:2. Mr. Canez' shirt was covered in the homicide victim's blood.
7. The bloody shirt was evidence in the *Orantez* homicide case.
8. Respondent lost the bloody shirt shortly after he received it from Mr. Canez, and was not able to relocate it.
9. In or around March 2008, Respondent was listed as a witness in *State v. Orantez* concerning his loss of the bloody shirt.
10. On or about March 31, 2008, the Pima County Superior Court removed Respondent as Mr. Canez' attorney in *State v. Canez*.
11. Respondent had no further contact with Mr. Canez after his removal by the court.
12. On or about January 21, 2009, Respondent voluntarily submitted to a defense interview in *State v. Orantez*.
13. During the defense interview, Respondent negligently disclosed information that he had learned from Mr. Canez during the representation. This information dealt with the existence and loss of the bloody shirt and some comments about what Mr. Canez recalled about the shooting, T/H 27:4 – 25.

14. Respondent did not have Mr. Canez' consent to disclose such information.
15. During the interview, a discussion was held about whether Respondent was violating the attorney client privilege or an ethical rule.
16. Respondent negligently failed to realize his mistake and continued to answer questions relating to his representation of Mr. Canez. Respondent testified that he simply wasn't thinking when he made the disclosures, T/H 16:12 – 18:23.
17. After the interview, Respondent realized his mistake and asked the judge to suppress his comments, and the judge did so, T/H 18:4 – 19:18.
18. Mr. Canez was later assigned another attorney and accepted a favorable plea, not affected by Respondent's actions, T/H 20:24 – 22:1.
19. Respondent testified that Mr. Orantez later accepted a plea, also not affected by Respondent's actions, T/H 29:22 – 30:8.

CONCLUSIONS OF LAW

20. Respondent conditionally admitted that his conduct violated Rule 42, Ariz.R.Sup.Ct., specifically, ERs 1.6, 1.9, 1.15 and 8.4(d). Based upon the pleadings and the testimony offered at the hearing in this matter, the undersigned Hearing Officer finds that there is a factual basis to support a finding by clear and convincing evidence of the violations of these ER's.

ABA STANDARDS

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

The Duty Violated

22. Respondent violated his duty to his client under *Standard* 4.1, Failure to Preserve Client's Property, and 4.2, Failure to Preserve the Client's Confidences; and he violated his duty to the profession under *Standard* 7.0, Violation of Other Duties Owed as a Professional. The specific *Standard* to be applied in this case depends upon the mental state of the Respondent.

The Lawyer's Mental State

23. The parties submit, and the undersigned Hearing Officer could find no evidence to the contrary, that Respondent's actions were negligent rather than intentional. He negligently lost his client's property, and then thereafter negligently revealed client confidences. Respondent also negligently violated his duty to the profession when he lost evidence in a criminal case. The undersigned Hearing Officer examined the Respondent at some length about what happened to the shirt and the Respondent candidly admits that he does not know. He testified that the shirt was placed in a bag and put in a file cabinet in his office. Thereafter, the shirt could not be found by him or his staff. There was no evidence of foul play by the Respondent, nor indeed any motive in that he was the one that urged his client to bring the shirt in.

24. Regarding the disclosure of client confidences, the Respondent admits that he simply wasn't thinking clearly when he told the interviewing party about the bloody shirt. Again, there is no reason to believe that Respondent acted intentionally or with a knowing mental state in disclosing to the investigator the information about his client and the bloody shirt. The Hearing Officer finds that Respondent's mental state was "negligent" in losing the shirt and then talking to the investigator about the shirt.
25. Considering the "negligent" mental state, *Standard* 4.13 is applicable because it provides that: "Reprimand [censure and Arizona] is generally appropriate when a lawyer is negligent in dealing with client's property and causes injury or potential injury to a client." *Standard* 4.23 provides: "Reprimand is generally appropriate when a lawyer negligently reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client."

The Actual or Potential Injury

26. The parties stipulated that Respondent's client received and entered into a plea agreement that was unaffected by Respondent's loss of the shirt or disclosure of the client confidences. They further stipulate that Respondent's client suffered potential injury due to the loss of the shirt, and actual injury as a result of the disclosure of the confidences. Finally, the parties stipulate that the loss of the shirt caused actual injury to the legal system because it was evidence in a homicide case. After reviewing all of the information contained in the pleadings and the testimony offered at the hearing in this matter, the undersigned Hearing

Officer concludes that the parties' agreement accurately reflects that there was both potential as well as actual injury in this case.

Aggravating and Mitigating Factors

Aggravating Factors:

27. *Standard 9.22(i), Substantial Experience in the Practice of Law:* Respondent was admitted to the practice of law in 1972 and has practiced criminal law for over 37 years.

Mitigating Factors:

28. *Standard 9.32(a), Absence of a Prior Disciplinary Record:* Respondent has had no prior formal or informal discipline in 37 years of practice.
29. *Standard 9.32(b), Absence of a Dishonest or Selfish Motive:* Respondent's conduct was not the product of monetary greed, nor was it an attempt to subvert the criminal justice system to his client's favor.
30. *Standard 9.32(d), Timely Good Faith Effort Rectifying Consequences of Misconduct:* When Respondent learned he lost the bloody shirt, Respondent contacted the assigned deputy county attorney and invited the county attorney's investigator to search his office for the shirt. Further, the day after the defense interview, Respondent filed a pleading to have his statements suppressed by the court.
31. *Standard 9.32(g), Character or Reputation:* Respondent submitted three letters from three different sources attesting to his good character and reputation. The Respondent struck this Hearing Officer as being genuinely remorseful for what

happened in this case and takes very seriously the damage that the entire incident has done to his reputation.

32. *Standard* 9.32(1), Remorse: Respondent took immediate action to inform the prosecutor about his loss of the shirt, and apologized profusely. His office assistant at that time has been replaced. Respondent's negligent disclosure of his client's confidences occurred during his attempt to cooperate with the prosecution, and his sole motivation in making the inadvertent disclosure was to be fully forthcoming concerning his mistake in losing the shirt.
33. The parties submit that the appropriate sanction in this matter is that Respondent should be censured, pay all costs and expenses of the disciplinary proceedings, be placed on probation for one year and the terms of that probation should include the continuing legal education course "Candor, Courtesy, and Confidences: Common Courtroom Conundrums", and three additional hours of continuing legal education concerning criminal law and/or procedure.

PROPORTIONALITY REVIEW

34. 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. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever all like, *In re Peaseley*, 208 Ariz. 90, 90 P.3d 772 (2004), *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*.

35. In *In re Patton*, SB-08-0121-D (2008), Patton was censured and ordered to pay all costs associated with the disciplinary proceedings. Patton filed an Answer in a justice court lawsuit that improperly disclosed personal and confidential information about clients and prospective clients. Some of the information involved client's medical information. Also, attached to Patton's answer were e-mails that contained access codes to client's medical and legal files. Patton acted with a knowing mental state. The one aggravating factor present was 9.22(i) substantial experience in the practice of law. There were five mitigating factors: 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, 9.32(d) timely good faith effort to rectify the consequences of misconduct, 9.32(e) full and free disclosure, and 9.32(l) remorse. Patton was sanctioned for violation of Rule 42 Ariz.R.Sup.Ct., specifically ER is 1.6(a) and 1.15.
36. In *In re Zeigler*, SB-08-0162-D (2008), Ziegler was censured, ordered to pay all costs of the disciplinary proceedings, and placed on one year of probation. Ziegler represented an organization client and learned confidential information from the representation. Upon termination, Ziegler disclosed confidential information to a third-party contractor building a training facility for Ziegler's former client. Further, Ziegler informed the U.S. government that his former client voted to withdraw its application for a grant when in fact no such vote took place and Ziegler was not authorized to make such a statement. Ziegler

negligently disclosed confidential information. The one aggravating factor present was 9.22(i) substantial experience in the practice of law. There were four mitigating factors: 9.32(b) absence of dishonest or selfish motive, 9.32(e) full and free disclosure to disciplinary board, and 9.32(l) remorse. Ziegler was sanctioned for violation of Rule 41(f), Ariz.R.Sup.Ct., and Rule 42, specifically ER's 1.6, 1.9, 8.4(c), and 8.4(d).

37. In *In re Hayes*, SB-04-0092-D (2004), Hayes was censured and ordered to pay all costs associated with the disciplinary proceedings. Hayes represented a client regarding a deceased relative's estate. Hays divulged confidential client information to a creditor of the estate. After withdrawing from the representation, Hayes represented a creditor of the estate and prepared a creditor's claim. Hayes acted with a negligent mental state. The one aggravating factor present was 9.22(i) substantial experience in the practice of law. There were three mitigating factors found: 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, and 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Hayes was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.6(a) and 1.9(b).

RECOMMENDATION

38. 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).

39. 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).
40. As noted previously, Respondent simply made a mistake both in losing the shirt and then talking about the fact that his client had given him the shirt and his loss of the shirt to people not authorized by his client. Respondent has practiced law for 37 years without any prior disciplinary action against him and he appeared to be duly concerned that his negligent actions have now besmirched that record. The recommended sanction, together with the terms of his probation, appear to be appropriate consequences for his misconduct and reasonable safeguards that this will be the one and only time that the Respondent comes before the system.
41. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and the proportionality analysis, this Hearing Officer recommends following:
 1. Respondent shall be censured;
 2. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings, and shall also pay costs incurred by the Disciplinary Commission, the Supreme Court of Arizona, and the Disciplinary Clerk's Office in this matter.

3. Respondent shall be placed on probation for an initial period of one year on the following terms and conditions:

- a) Respondent shall successfully complete the State Bar's continuing legal education course entitled "Candor, Courtesy, and Confidences: Common Courtroom Conundrums". Respondent shall provide either a certificate of completion or a copy of his notes to Bar Counsel signifying he has completed the course. Respondent shall be responsible for any costs associated with this course;
- b) Respondent shall successfully complete three additional hours of continuing legal education in criminal law and/or procedure. Respondent shall provide either a certificate of completion or a copy of his notes to Bar Counsel signifying he has completed the courses. Respondent shall be responsible for any costs associated with this course;
- c) 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;
- d) In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, 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 date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if

so, to recommend an appropriate sanction. 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 of Arizona to prove noncompliance by a preponderance of the evidence.

- e) The probation period shall begin to run as of the date of the Supreme Court's Judgment and Order.
- f) In the event Respondent successfully completes his above listed continuing legal education courses, Bar Counsel shall review the recommendation to ascertain whether an early termination of probation is appropriate. If early termination of probation is appropriate, Bar Counsel shall file a Notice of Successful Completion of Probation.

DATED this 3rd day of December, 2009.

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

Original filed with the Disciplinary Clerk
this 3rd day of December, 2009.

Copy of the foregoing mailed
this 4 day of December, 2009, to:

Karen Clark
Respondent's Counsel
Adams & Clark PC
520 E Portland Street, Suite 200
Phoenix, AZ 85004-1843

Jason Easterday
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Deann Barker