

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

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

**DAVID P. DE COSTA,
Bar No. 020139**

Respondent.

No. 09-1858

**REPORT AND ORDER IMPOSING
SANCTIONS**

OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

MAR 14 2011

FILED

On February 11, 2011, the Hearing Panel composed of Robert M. Gallo, a public member from Pinal County, Glen S. Thomas, an attorney member from Maricopa County, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Stephen P. Little appeared on behalf of the State Bar of Arizona ("State Bar") and David P. De Costa appeared pro se. The parties stipulated to the findings of fact and conclusions of law. The PDJ and Hearing Panel ("Panel") now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

I. ISSUE

An attorney knowingly violated his duty to the legal system by repeatedly making false statements and/or misrepresentations to the Court. What is the appropriate sanction for repeated dishonesty to the tribunal?

II. SANCTION IMPOSED:

ATTORNEY SUSPENDED FOR ONE (1) YEAR, TWO (2) YEARS OF PROBATION UPON REINSTATEMENT (FIVE (5) HOURS ANNUALLY OF CONTINUING LEGAL EDUCATION ("CLE") IN THE AREA OF ETHICS), FEE ARIBTRATION, AND COSTS OF THESE DISCIPLINARY PROCEEDINGS.

III. PROCEDURAL HISTORY

The State Bar filed its Probable Cause Order on January 6, 2010, and its Complaint on January 29, 2010. Respondent filed his Answer on March 15, 2010. The parties filed an Agreement for Discipline by Consent ("Agreement") on May 17, 2010. A hearing on the Agreement was held on June 16, 2010 and the Hearing Officer recommended accepting the Agreement providing for a six month suspension, one year of probation with the State Bar's Law Office Management Assistance Program ("LOMAP") upon reinstatement, fee arbitration if requested by the client, and costs. The matter then came before the Disciplinary Commission on

September 11, 2010. The Disciplinary Commission rejected the Agreement and remanded the matter to the Hearing Officer for further proceedings, having found that the agreed upon sanction was insufficient for the admitted misconduct.

On October 12, 2010, the parties filed a second Agreement providing for a six month and one day suspension, one year of probation (LOMAP) upon reinstatement, fee arbitration if requested by the client, and costs. The Hearing Officer recommended accepting the Agreement. The matter again came before the Disciplinary Commission on December 11, 2010. The Disciplinary Commission again rejected the Agreement having concluded that the agreed upon sanction was insufficient based on the seriousness of the misconduct and the matter was remanded to the PDJ.

On January 24, 2011, the State Bar filed a Motion to Set for Hearing on the Merits. A final case management conference was held on February 1, 2011. The State Bar filed its Prehearing Memorandum and Stipulation of Facts on February 8, 2011. An Order Accepting Stipulation was filed on February 10, 2011.

IV. FINDINGS OF FACT

1. 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 May 24, 2001.
2. On or about April 28, 2008, Aaron Chavez ("Mr. Chavez") was charged with Aggravated DUI, a Class 4 Felony, in Graham County CR-2008255.
3. Mr. Chavez retained Respondent to defend him from the criminal charges.
4. Respondent investigated and reviewed the facts of the case, and determined that "it was clear ... Mr. Chavez would be found guilty of Aggravated DUI."
5. Respondent developed and informed Mr. Chavez of a trial strategy in which Respondent would argue that Mr. Chavez was *not* the Aaron Chavez arrested, but that somebody else had been using Mr. Chavez's identity in committing the crime.
6. This strategy included performing Mr. Chavez's trial *in absentia*.
7. Respondent informed Mr. Chavez that having him fail to appear pursuant to their strategy could result in the State charging Mr. Chavez with Failure to Appear, a Class 6 Felony, but that if that happened, Respondent would represent him free of charge on that case.
8. Mr. Chavez agreed to the plan set forth by Respondent.
9. The Graham County Superior Court scheduled Mr. Chavez' criminal matter to proceed to trial on December 18, 2008.

10. On or about December 16, 2008, Respondent spoke with Mr. Chavez over the telephone.

11. During their telephone conversation, it was agreed that Mr. Chavez would not appear for his trial on December 18, 2008.

12. On or about December 18, 2008, Mr. Chavez did not appear for Court, and Mr. Chavez's matter proceeded to trial in his absence.

13. As trial began, Respondent participated in a pretrial discussion, on the record, with Judge Douglas Holt ("Judge Holt") and Deputy County Attorney Stuart Ross ("DCA Ross").

14. In response to a question from Judge Holt as to whether Mr. Chavez was present, Respondent responded, "He's not here yet, no." (Emphasis added.)

15. In response to a question from Judge Holt as to whether Respondent believed Mr. Chavez would be coming to court, Respondent responded, "I don't know. I cannot avow to the Court that he will appear."

16. Respondent's statements to the Court were false and/or misleading, as Respondent was already aware that Mr. Chavez would not be appearing for the trial.

17. In response to a question from Judge Holt as to when the last time Respondent talked to Mr. Chavez, Respondent responded, "Actually I talked to him yesterday. My basis in fact is I was going to be his ride to court this morning. He was not at my office when I departed my office this morning. He does not have a valid driver's license, did not have transportation to court. Therein lies my concern. He won't be present today."

18. Respondent's statement to the Court was false and/or misleading, as Respondent never had any intention of transporting Mr. Chavez to Court that morning.

19. Respondent's statement to the Court was also false because Respondent was aware that Mr. Chavez had previously received rides to court from his wife and that he could get a ride to court from his wife if he needed to appear.

20. Respondent asked Judge Holt, "Had he called the Court? Did the Court receive any message from him?" (SIC)

21. Judge Holt indicated he had no information, and Respondent offered, "My girls don't show up until nine, so I'll call my office at nine."

22. Court recessed and reconvened at 9:15 a.m., at which time Respondent told the Court, "My client is in Phoenix. He left a message for probation approximately 7:49 a.m. this morning saying that he was waiting for me to pick him up. At approximately 7:49 this morning, I would have been on the east side of Globe, I would guess somewhere in San Carlos Reservation area."

23. Respondent's statements to the Court were false and/or misleading, as Respondent was previously aware that Mr. Chavez would not be appearing and that the phone message was manufactured to support his failure to appear.

24. Respondent stated to the Court, "I'd also like to object to proceeding in absentia because I don't believe my client has voluntarily absented himself from trial."

25. The Court asked where and when Mr. Chavez was supposed to meet Respondent, and Respondent responded, "At my office, 6 a.m."

26. The Court asked whether Respondent told Mr. Chavez to be there at his office, and Respondent responded, "Yes, sir."

27. Respondent added, "I waited until about 6:18 because it's a long drive."

28. Respondent's statements were false and/or misleading, as Respondent was aware Mr. Chavez had voluntarily absented himself from trial and that Mr. Chavez was not supposed to meet Respondent at his office.

29. Respondent did not, at any time, inform Judge Holt or DCA Ross about his strategy to have Mr. Chavez tried *in absentia*, or that he and his client had agreed Mr. Chavez would not appear.

30. Mr. Chavez's trial proceeded *in absentia*.

31. Mr. Chavez was convicted on all counts.

32. At sentencing, Mr. Chavez was sentenced to five months of prison and five years of probation.

33. Mr. Chavez was charged with Failure to Appear, a Class 6 Felony.

34. Respondent represented Mr. Chavez on the Failure to Appear case, and DCA Ross eventually voluntarily dismissed the Failure to Appear charges without prejudice.

35. On or about August 3, 2009, Mr. Chavez, through subsequent counsel, filed a Petition for Rule 32 Post Conviction Relief.

36. On or about November 18, 2009, Judge Holt granted the Rule 32 Petition for Relief and ordered the conviction vacated.

37. In ruling on the Petition, Judge Holt made factual findings that Respondent had lied to the Court.

38. Mr. Chavez eventually pled to a reduced charge, Extreme Driving Under the Influence, a class 1 misdemeanor, and was sentenced to five months in the Department of Corrections with credit for five months served.

39. On information and belief, Mr. Chavez was not deported and retained his legal residency status.

V. CONCLUSIONS OF LAW

1. Respondent employed for the purpose of maintaining causes confided to him means other than those consistent with truth and sought to mislead the judges by an artifice or false statement of fact or law in violation of Rule 41(e), Ariz.R.Sup.Ct.

2. Respondent knowingly made a false statement of fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal by Respondent, in violation of E.R. 3.3(a)(1), Rule 42, Ariz.R.Sup.Ct.

3. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of E.R. 8.4(c), Rule 42, Ariz.R.Sup.Ct.

4. Respondent engaged in conduct that was prejudicial to the administration of justice, in violation of E.R. 8.4(d), Rule 42, Ariz.R.Sup.Ct.

VI. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA Standards") and Arizona Supreme Court case law are the guiding authorities used in imposing sanctions for lawyer misconduct. The appropriate sanction depends upon the facts and circumstances of each case.

Analysis under the ABA STANDARDS

In imposing a sanction after a finding of lawyer misconduct, the Panel considered the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

Respondent's most serious misconduct is his repeated misleading statements to the court. *Standard 6.0, Violations of Duties Owed to the Legal System* is applicable for violations of E.R. 3.3(a) (candor towards the tribunal). *Standard 6.11* provides that:

Disbarment is generally appropriate when a lawyer, with the *intent to deceive the court*, makes a false statement,

submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or *causes serious or potentially serious adverse effect on the legal proceeding.*

Standard 6.12 provides that:

Suspension is generally appropriate when a lawyer knows¹ that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The parties have stipulated that Respondent's mental state was knowing. That stipulation is not binding upon this Panel. It is a powdery fine line that differentiates "knowing" from "intentional." It is a contrasting chasm of difference between the ensuing consequences that arise as a result of these differing mental states. When one intentionally or knowingly or even recklessly misleads the court, the enveloping black shadow of potential for serious adverse effect on the legal proceedings is always an attendant harbinger of injustice. The Panel finds that Respondent's mental state was knowing, if not intentional. Had Respondent coupled his deceit by eliciting false testimony, presenting false evidence to the court with a jury present or in closing, misleading the jury regarding the absence of his client, disbarment would likely have been ordered.

A. THE DUTY VIOLATED

The Panel finds Respondent violated his duty to the legal system and as a professional by failing to be truthful with the court and failing to be competent. Respondent also violated his duty to his client.

B. THE LAWYER'S MENTAL STATE

The Panel shall address this issue later in this ruling. The Panel finds Respondent knowingly, if not intentionally violated the Rules of Professional Conduct.

C. THE ACTUAL OR POTENTIAL INJURY

In addition, the Panel finds there was actual injury to the legal system. We find clear and convincing evidence to support the judge's finding that Respondent's conduct placed the integrity of the judicial proceedings in jeopardy. As importantly,

¹ See ABA *Standards, Definitions*. "Knowledge is the conscious awareness of the nature or attendant of the conduct but without the conscious objective or purpose to accomplish a particular result."

he violated a duty to his client. Under the ABA *Standards* Definitions. "Potential injury" is harm to a client . . . that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

Respondent's advice held enormous potential for damage to his client who was in this country *legally*. He faced deportation, as well as the potential of another felony conviction. The course of action plotted by Respondent demonstrated that he did not understand or declined to adhere to the most fundamental legal doctrines.

D. AGGRAVATING FACTORS, ABA STANDARD 9.2

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel considered evidence of the following aggravating circumstances in determining the appropriate sanction.

Prior Disciplinary Offenses, 9.22(a)

Based on the evidence presented at hearing, the Panel finds this factor is present. A one year period of probation (complete the State Bar's Ethics Enhancement Program) was imposed on Respondent on February 26, 2006 for violating E.R. 1.3. This prior misconduct did not involve dishonesty but the seminar should have enhanced Respondent's attention to his ethical duties. Probation was successfully completed on November 5, 2007.

Dishonest of selfish motive, 9.22(b)

The Panel finds that Respondent's conduct involved dishonesty and misrepresentations.

Substantial experience in the practice of law, 9.22(i)

The Panel finds this factor is present. Respondent was admitted to practice law in Arizona on May 24, 2001.

E. MITIGATION FACTORS, ABA STANDARD 9.3

The Panel considered evidence of the following mitigating circumstances in determining the appropriate sanction:

Personal or emotional problems, 9.32(c)

Respondent asserts that he was experiencing severe legal problems which caused him financial turmoil and to ultimately lose his law practice. The Panel gives little weight to this factor. Dishonesty to the court is not a natural, anticipated or foreboding result of any such existent anxiety.

Cooperative attitude towards proceedings, 9.32(e)
Remorse – 9.32(l)

As with the differences between “knowing” and “intentional,” there is also a fine line that is exceedingly difficult to determine between being cooperative and being compliant. However, there is a tremendous sweeping landscape of divergence between the two. The former seeks a collaborative process of an all-inclusive restoration centered in the prerequisite internal analysis necessary to recognize any wrong and its actual or potential far-reaching impact. Meaningful remorse naturally arises from the seeds of such deeper contemplation. The latter too often tends to smolder merely out of pity for one’s own plight. A twisted form of remorse of circumstances is more often the bitter, self-centered fruit that is born of such attitude. Respondent responded truthfully to the State Bar’s investigation of this matter and was truly cooperative during the formal proceedings. Respondent’s remorse for his misconduct is genuine. He recognizes that serious consequences must follow his egregious conduct. Furthermore, he recognizes the need to address and resolve the inner frailties which enabled his actions.

VII. DISCUSSION

One of the most fundamental duties of a lawyer is the duty of honesty and truthfulness, especially to the court. It does not matter that the circumstances of this case are unusual. Respondent undertook a sham in front of the judge and opposing counsel. In an effort to help his client, Respondent planned a legal strategy that assured the commission of a felony and blithely joined in its perpetration. His concluding actions were of moral turpitude. He engaged in an indifferent disregard of his professional responsibilities. Good intentions do not legitimize impropriety.

We cannot overstate that integrity is not merely expected of lawyers as officers of the court; it is obligatory. Respondent in his zeal to sear his own brand on the proceedings overlaid the pivotal presence of the trial judge with his own distorted sense of justice. To fail to understand that the judge is more than a nonchalant ritualistic percipient of the proceedings is to fail the course in the most rudimentary facets of the American adversarial justice system. Especially in criminal proceedings, the judge is the impartial agent for ensuring that justice is accomplished according to the rules, procedures and applicable laws. Hoodwinking the judge is a sure way to wrap one’s fingers around the throat of the public’s confidence in our justice system.

Respondent repeatedly violated this duty and his dishonest misconduct relates directly to his practice of law. His theory of defense was dishonesty. He was deceitful in response to the relevant questions by the trial judge. The mitigating factors present do not serve to reduce his fundamental deficiencies and his deceptive misconduct.

The parties previously stipulated to a suspension of six months which was rejected by the Commission. They then stipulated that a suspension of six months and one day was the appropriate sanction. That stipulation was also rejected by the Commission. This Panel independently made the analysis of the appropriate sanction, notwithstanding those stipulations and their respective rejections.

As stated above, the mental state of the Respondent is pivotal. The evidence holds such weight that this panel, despite the prior stipulators reflecting the analysis and recommendation of Bar Counsel (that were rejected by the Commission) contemplated disbarment as appropriate. However, the presumption of disbarment under the ABA Standards does not always apply. Each case is unique and calls for an analysis based upon more than the presumption alone. Hearing Panels must carefully weigh any mitigating factors that might overcome what might otherwise be the presumed sanction of disbarment. Respondent is a young, naïve, and inexperienced lawyer, rather than a lawyer who is fundamentally dishonest or beyond rehabilitation. We believe Respondent genuinely acknowledged responsibility for his ethical violations to his client and the legal system, a factor we find to be the "foremost" among the mitigating factors. This factor in mitigation is also persuasive that Respondent acted knowingly, if not intentionally. This warrants a suspension of a year rather than disbarment. Given the seriousness of Respondent's misconduct, the Panel determines that such suspension fulfills the purposes of discipline. Respondent must establish his fitness to practice through formal reinstatement proceedings.

VIII. CONCLUSIONS

The purpose of attorney discipline is to maintain the integrity of the profession in the eyes of the public, protect the public from unethical or incompetent lawyers, and deter other lawyers from engaging in illegal or unprofessional conduct. *In re Scholl*, 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001).

Therefore, given the facts of this matter and in consideration of the ABA *Standards* including aggravating and mitigating factors, the Panel unanimously concludes that a one year suspension is the appropriate sanction in this matter and will fulfill the purposes of discipline. Weighing the mitigation as discussed above against the aggravation, the Hearing Panel finds that this suspension with the inherent strict conditions required for reinstatement will protect the legal profession and the public.

IX. ORDER

The Panel therefore ORDERS:

1. **DAVID P. DE COSTA**, Bar No. 020139 is hereby **SUSPENDED FOR A PERIOD OF ONE (1) YEAR**, effective thirty (30) days from the date of this Order.

2. That suspension shall be followed by two years of probation upon reinstatement. The terms of probation are as follows:
 - a. Respondent shall obtain five (5) hours annually of CLE in the area of ethics. This requirement is in addition to his mandatory continuing legal education requirements set forth in Rule 45.
 - b. The State Bar shall report material violations of the terms of probation pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct., and a hearing may be held within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.
3. Respondent shall participate in fee arbitration if requested by the client.
4. Respondent shall comply with all applicable provisions of Rule 72, Ariz.R.Sup.Ct.
5. Respondent shall comply with all rule provisions regarding reinstatement proceedings.
6. Respondent shall pay the costs of these proceedings. The State Bar shall submit a Statement of Costs and Expenses pursuant to Rule 60(b), Ariz.R.Sup.Ct. Respondent may file objections within five (5) days of service of the Statement of Costs and Expenses and shall serve a copy on the State Bar and the Disciplinary Clerk.

DATED this 14 day of March 2011.

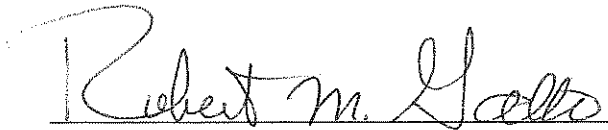


THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:



Glen S. Thomas, Volunteer Attorney Member


Robert M. Gallo, Volunteer Public Member

Original filed with the Disciplinary Clerk
this 14th day of March, 2011.

COPY of the foregoing e-mailed and mailed this
15th day of March 2011, to:

Stephen P. Little
STATE BAR OF ARIZONA
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

David P. De Costa
The Law Office of David P. De Costa
P.O. Box 27717
Tempe, AZ 85285-001

