

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

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

THOMAS J. WHELAN
Bar No. 022754,

Respondent.

PDJ-2013-9013

[State Bar File No. 12-0474]

**REPORT AND ORDER IMPOSING
SANCTIONS**

PROCEDURAL HISTORY

The State Bar of Arizona ("SBA") filed its complaint on January 31, 2013. On February 4, 2013, the complaint was served on Respondent by certified, delivery restricted mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a) (2), Ariz.R.Sup.Ct. The Presiding Disciplinary Judge ("PDJ") was assigned to the matter, along with lawyer panel member Judge Cecil B. Patterson, Jr., (Retired), and public panel member Nance A. Daley. On February 5, 2013, the State Bar filed its Notice of Additional Service of Complaint. On March 6, 2013, the disciplinary clerk issued an entry of default and notice of default. Respondent did not file an answer or otherwise defend against the allegations and default was entered on March 22, 2013, at which time a notice of aggravation and mitigation hearing was sent to all parties notifying them the aggravation mitigating hearing was scheduled for April 10, 2013, at 10:30 a.m. at 1501 West Washington, Room 109, Phoenix, Arizona 85007-3231. On April 10, 2013, the Hearing Panel, duly empanelled, heard argument.

FINDINGS OF FACT

COUNT ONE (File No. 12-0474/Stern)

Mr. and Mrs. Stern purchased a house that ended up costing them \$23,000.00 in repairs due to a problem with the sewage system. Their real estate agent suggested they sue, because the sewage problem should have been disclosed. On December 19, 2008, they retained Respondent to represent them and told him they did not want to spend more than \$5,000 – 10,000 to recover \$23,000. Respondent did not file the complaint until March 16, 2009, and did not inform them that if they lost the case they could be subject to payment of the opposing party's attorney's fees. Mr. and Ms. Stern lost at arbitration and the arbitrator awarded one of the opposing parties \$40,000 in attorney's fees. At this point, Mr. Stern told Respondent he did not want to appeal anything except the award of attorney's fees. Mr. Stern later found out that Respondent had appealed the entire judgment.

On May 5, 2011, Respondent was summarily suspended by the Presiding Disciplinary Judge and was ordered to comply with Rule 72(a). This included advising the Sterns of his suspension; but Respondent failed to do so. When the court in the Stern lawsuit found out Respondent was suspended, it issued a minute entry that included an order that Respondent advise the Sterns he was suspended. Respondent again failed to follow a court order.

Respondent mishandled the case, failed to follow the Sterns' wishes, and turned a lawsuit, in which they hoped to recover \$23,000.00, into a judgment against them for approximately \$140,646.90 in opposing parties' attorneys' fees.

ER 1.2(scope of representation), Respondent exceeded the scope of the representation by failing to comply with the Sterns' stated objectives by appealing the arbitrator's decision instead of just contesting the amount of attorney's fees awarded to the opposing parties.

ER 1.3 (diligence), Respondent failed to diligently represent the Sterns

ER 1.4(communication), Respondent failed to communicate with the Sterns in any meaningful way to allow them to make informed decisions about the representation.

ER 1.16(d)(withdrawal from representation), Respondent was required to withdraw from the representation when he was suspended, he failed to do so and failed to take reasonable measures to protect the Sterns' interests.

ER 8.4(d)(prejudicial to the administration of justice), Respondent's conduct wasted scarce judicial resources, caused opposing clients to incur unreasonable fees and costs, and caused the Sterns to appeal a matter that they did not want continued.

Rule 32(c)(change in member's contact information shall be reported to the State Bar within thirty days of its effective date), Respondent is still a member of the State Bar, even while suspended, and he failed to update his contact information with the State Bar.

Rule 54(c)(knowing violation of a court order), Respondent failed to comply with the PDJ's May 5, 2011 order and the Superior Court's May 26, 2011 order.

Rule 54(d)(obligations during an investigation), Respondent failed to respond to the State Bar's request for information.

Rule 72(a)(notice to clients, adverse parties and other counsel), Respondent failed to notify the appropriate people and entities of his summary suspension.

CONCLUSIONS OF LAW

Respondent failed to file an answer or otherwise defend against the allegations in the SBA's complaint. Default was properly entered and the allegations are therefore deemed admitted pursuant to Rule 58(d), Ariz. R. Sup. Ct. Based upon the facts deemed admitted, the Hearing Panel finds by clear and convincing evidence that Respondent violated the following: Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.2, 1.3, 1.4, 1.16, 8.4(d), and Rule 32(c), 54(c) and (d), Ariz.R.Sup.Ct.

ABA STANDARDS ANALYSIS

After finding an ethics rule violation, the Court relies on the American Bar Association's Standards for Imposing Lawyer Sanctions (*Standards*) in determining an appropriate sanction. Rule 57(a)(2)(E), Ariz.R.Sup.Ct. The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the

misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

Respondent violated ERs 1.2, 1.3, 1.4, 1.16, 8.4(d), Rules 32(c), 54(c) and (d), and 72(a), Ariz.R.Sup.Ct., therefore *Standards* 4.4, 6.2, and 7.2 are the appropriate Standards given the facts and circumstances of this matter. *Standard* 4.22¹ provides that suspension is appropriate when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. *Standard* 6.22² provides 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. *Standard* 7.2³ 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.

Respondent's most egregious behavior is his knowing failure to follow court orders to notify his client's about his suspension that occurred between May 5, 2011 until September 2, 2011. This failure, at the very least, caused actual injury and harm to the Sterns.

The duty violated

As described above, Respondent's conduct violated his duty to his clients, as a professional, and the legal system.

¹ERs 1.2, 1.3, 1.4

²Rule 54(c)

³ER 1.16

The lawyer's mental state

Respondent acted knowingly and his conduct was in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury

There was actual harm to his clients and the legal system. Mr. and Mrs. Stern paid opposing lawyer fees of \$107,166.07 to defendant Krasner and \$33,480.83 to defendant Inspec Home Inspections LLC. The court had to deal with all of the appeal matters after Respondent was suspended and because he failed to notify his clients they needed to hire a new lawyer.

Aggravation/Mitigation

The presumptive sanction in this matter is suspension. The following aggravating and mitigating factors should be considered in determining the appropriate sanction.

9.21 – Aggravating Factors include:

- (a) prior discipline:
 - Summary Suspension for Contempt – May 9, 2011 until September 3, 2011.
 - One Year Suspension effective June 1, 2012 – Violation of ERs 1.7(a), 3.1, 3.3(a), 4.1(a), 8.4(c) and (d), Rule 41(g) ERs 1.15(b) and 8.1(b) and Rules 43(b)(1)(A and C), (b)(2)(A-D), (d)(3) and 54(d). Two years probation upon reinstatement. Respondent is still currently suspended.

- Informal Reprimand – Respondent violated Rule 53(c) and (e) when he failed to abide by the Order of Diversion filed on April 28, 2009. Respondent violated Rule 53(f) by failing to respond to the State Bar’s charging letter dated November 17, 2009.

(c) a pattern of misconduct; See *Matter of Levine*, 174 Ariz. 146, 172, 847 P.2d 1093, 1118 (1993)(a pattern has been found in the past under circumstances in which a respondent either has a prior disciplinary record involving the same or similar wrongdoing, or when a respondent's misconduct involves multiple clients). Respondent previously violated ER 8.4(d) and Rule 54(d).

(h) vulnerability of victim; Mr. Stern had significant medical problems during the period of representation, including a stroke. The impact of his stroke was demonstrative to the Panel at hearing.

(i) substantial experience in the practice of law; See *In re Peasley*, 208 Ariz. at 36-37, 90 P.3d at 773-74(2004)(When there is a nexus between a lawyer's experience and the misconduct, substantial experience should be considered a relevant aggravating factor). Respondent has been practicing long enough and has been involved in disciplinary actions before to understand his conduct in this matter was unethical.

9.32 Mitigating factors: The State Bar does not believe there are any mitigating factors.

Since the *Standards* do not account for multiple charges of misconduct, the ultimate sanction imposed should be consistent with the most serious sanction.

Other violations, such as Respondent's violation of the ERs 1.2, 1.3, 1.4, 1.16, 8.4(d), and Rules 32(c) and 54(d), should be considered in aggravation. *ABA Standards for Imposing Lawyer Sanctions*, II. Theoretical Framework, at 7. Suspension is the presumptive sanction for violation of Rules 54(c) and 72(a), Ariz.R.Sup.Ct. Add to that the other ethical rule violations, the significant aggravating factors including Respondent's prior disciplinary offenses, and the serious injury that occurred to the client, the Panel determined the only appropriate sanction is disbarment.

RESTITUTION

Mr. and Mrs. Stern paid Respondent \$17,000.00 in fees to Respondent, and \$3,000.00 in costs. They also paid opposing lawyer fees of \$107,166.07 to defendant Krasner and \$33,480.83 to defendant Inspec Home Inspections LLC.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley*, 208 Ariz. at 64, 90 P.3d at 778. The objectives of discipline will be met by disbarring Respondent and requiring Respondent to pay the costs and expenses of these proceedings. Therefore,

IT IS ORDERED Mr. Whelan is disbarred effective immediately.

IT IS FURTHER ORDERED that Mr. Whelan pay restitution to Mr. Arthur Sterns, III in the amount of \$160, 646.90.

IT IS FURTHER ORDERED that Mr. Whelan pay costs and expenses of

these disciplinary proceedings.

DATED this 10th day of April, 2013.



Honorable William J. O'Neil
Presiding Disciplinary Judge



Nance A. Daley
Volunteer Public Member



Judge Cecil B. Patterson, Jr. (Retired)
Volunteer Lawyer Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 10th day of April, 2013.

Copies of the foregoing mailed/emailed
this 10th day of April, 2013, to:

Thomas J. Whelan
Whelan Law Group, PLC
PO Box 4173
Prescott, AZ 86302-4173
Email: thomas.whelan@azbar.org
Respondent

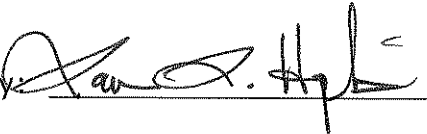
Thomas J. Whelan
911 E. Goodwin Street (Alternate Address)
Prescott, AZ 86303
Respondent

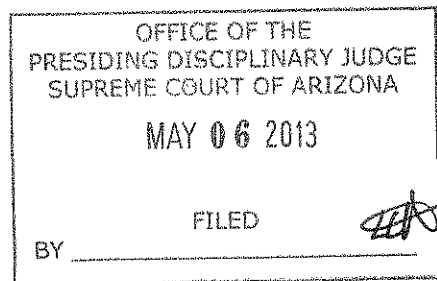
Thomas J. Whelan
7701 E. Osborn, #282 (Alternate Address)
Scottsdale, AZ 85251
Respondent

Copy of the foregoing emailed
this 10th day of April, 2013 to:

Shauna R. Miller 015197
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by:  _____



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

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

THOMAS J. WHELAN,
Bar No. 022754

Respondent.

PDJ-2013-9013

[State Bar File No. 12-0474]

FINAL JUDGMENT AND ORDER

This matter having come on for hearing before the Hearing Panel of the Supreme Court of Arizona, it having duly rendered its decision; and no appeal having been filed and the time for appeal having passed, accordingly,

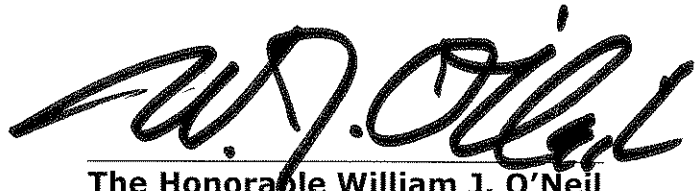
IT IS HEREBY ORDERED that Respondent, **Thomas J. Whelan**, is hereby disbarred from the State Bar of Arizona and his name is hereby stricken from the roll of lawyers. Mr. Whelan is no longer entitled to the rights and privileges of a lawyer but remains subject to the jurisdiction of the Court. Mr. Whelan shall immediately comply with the requirements relating to notification of clients and others, and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED that Respondent, **Thomas J. Whelan**, pay restitution to Mr. and Mrs. Arthur Stern, III, in the amount of \$160,646.90 within thirty (30) days from the date of service of this Order.

IT IS FURTHER ORDERED granting Judgment to the State Bar of Arizona for costs in the amount of \$2,120.06 with interest as provided by law.

IT IS FURTHER ORDERED that Mr. Whelan pay those costs and expenses awarded to the State Bar of Arizona in the amount of \$2,120.06, within thirty (30) days from the date of service of this Order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 6th day of May, 2013.


The Honorable William J. O'Neil
Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 6th day of May, 2013.

Copies of the foregoing mailed/mailed
this 6th day of May, 2013, to:

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by: 