

FEB 11 2011

BY _____ FILED *M. Smith*

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

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

LOGAN T. JOHNSTON, III
Bar No. 009484

Respondent.

No. 10-1167

**REPORT AND ORDER IMPOSING
SANCTIONS**

On January 13, 2011, the Hearing Panel composed of Robert Gallo, a public member from Pinal County, Kenneth L. Mann, 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 Daniel D. Maynard appeared on behalf of the Respondent. 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

This matter is before the Panel based on the lawyer's criminal convictions involving two Driving Under the Influence ("DUI"), Class 1 Misdemeanors, an extreme DUI, a Class 1 Misdemeanor, and Aggravated DUI, a Class 4 Felony, pursuant to A.R.S. § 28-1383. The Panel considered aggravating and mitigating factors and the appropriate sanction for Respondent's misconduct.

II. SUMMARY

The facts of this matter are not in dispute as the parties filed a Stipulation of Facts on January 12, 2011 and further stipulated to the exhibits admitted. The clear and convincing evidence shows that Respondent committed a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects and was convicted of a felony.

After careful consideration of the evidence presented, the Panel finds and concludes there is clear and convincing evidence present that Respondent violated the following rules:

- Supreme Court Rule 42, ER 8.4(b) Misconduct (commit a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects); and

- Supreme Court Rule 53(h) Conviction of a Crime (a felony).¹

The Panel finds that suspension is appropriate when a lawyer knowingly violates ER 8.4(b) and Rule 53(h).

III. PROCEDURAL HISTORY

Respondent was placed on interim suspension effective June 30, 2010. On October 14, 2010, the State Bar filed its Complaint and Respondent filed his Answer on November 5, 2010. A Case Management Conference as required by Rule 58(c) was held on November 19, 2010. A Settlement Conference was held on November 22, 2010, before Settlement Officer Richard N. Goldsmith; however, the parties were unable to reach a settlement and a hearing was set for January 13, 2011. The parties filed a Stipulation of Facts on January 12, 2011, and also stipulated to the Exhibits admitted. The Panel heard testimony from the State Bar's witness Logan T. Johnston, III (adversely) and Hal Nevitt, LCSW, LISAC, CEAP, and Respondent's witnesses, Logan T. Johnson, III, Hal Nevitt, LCSW, LISAC, CEAP, Matthew Devlin, Esq., Theodora Carter, St. Luke's Behavioral Health Center, Dorinda Lange, Administrative Law Judge, and Greg Saylor.

IV. FINDINGS OF FACT

The Panel adopts and incorporates by reference the factual background of this case fully detailed in the parties' Stipulation of Facts.

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 12, 1984.
2. On or about January 2, 2001, Respondent drove a motor vehicle while under the influence of intoxicating liquor.
3. On or about June 20, 2001, Respondent was convicted of Driving Under the Influence, a Class 1 Misdemeanor, stemming from his January 2, 2001 criminal conduct.
4. Respondent was sentenced to 10 days in jail for this conviction, but served only one day in jail since nine days were suspended.
5. On or about March 31, 2002, Respondent again drove a motor vehicle while under the influence of intoxicating liquor.

¹ Currently Rule 54(g), effective January 1, 2011.

6. On or about June 12, 2002, Respondent was convicted of Driving Under the Influence, a Class 1 Misdemeanor, stemming from his March 31, 2002, criminal conduct.

7. Respondent was sentenced to jail time and probation for his second DUI conviction.

8. On or about November 11, 2004, Respondent again drove a motor vehicle while under the influence of intoxicating liquor.

9. Respondent's blood alcohol content (BAC) at the time was in excess of .15, making the offense an Extreme DUI offense.

10. On or about February 15, 2006, Respondent was convicted of Extreme Driving Under the Influence, a Class 1 Misdemeanor, stemming from his November 11, 2004, criminal conduct.

11. Respondent was sentenced to 60 days in jail for his third DUI conviction. Respondent served 60 days of his sentence and during that time period he was on work release and continued to practice law.²

12. On or about March 22, 2010, Respondent again drove a motor vehicle while under the influence of intoxicating liquor.

13. Respondent's license to drive was still suspended at the time due to his February 15, 2006, DUI, making the offense an Aggravated DUI offense.

14. Phoenix police impounded a sample of Respondent's blood, which showed Respondent's BAC at the time was .20.

15. On or about May 25, 2010, Respondent was convicted of Aggravated Driving Under the Influence, a Class 4 Felony.

16. Respondent was sentenced and served four months imprisonment in the Department of Corrections for his felony conviction.

IV. CONCLUSIONS OF LAW

The Panel unanimously finds clear and convincing evidence Respondent violated ER 8.4(b) (commit a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects) and Rule 53(h) Conviction of a Crime as alleged in Count One of the Complaint.

² At hearing, the parties agreed to this correction of the amount of time sentenced and served.

V. 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.

Standard 5.0, Violations of Duties Owed to the Public is applicable for violations of ER 8.4(b) and Rule 53(h). *Standard 5.12* provides that:

Suspension is generally appropriate when a lawyer *knowingly*³ engages in criminal conduct which does not contain the elements listed in *Standard 5.11* and that *seriously* adversely reflects on the lawyer's fitness to practice.

A. THE DUTY VIOLATED

The Panel finds Respondent violated his duty to the public and his duty owed as a professional by engaging in criminal conduct.

B. THE LAWYER'S MENTAL STATE

The Panel finds Respondent's state of mind was knowing. Respondent's mental state is foreclosed by his criminal conviction and establishes conclusively that Respondent's mental state was knowing.

C. THE ACTUAL OR POTENTIAL INJURY

The Panel finds Respondent's criminal conduct caused potentially serious injury to the public and actual injury to the integrity of the profession.

D. AGGRAVATING FACTORS, ABA STANDARD 9.2

³ 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."

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.

Pattern of Misconduct - 9.22(c)

Respondent committed four separate criminal offenses involving driving while under the influence of alcohol on four separate occasions.

Substantial Experience in the Practice of Law - 9.22(i)

Respondent was admitted to practice law in Arizona on May 12, 1984.

Illegal Conduct - 9.22(k)

Respondent was convicted of a total of three DUI misdemeanors and one felony DUI.

E. MITIGATION FACTORS, ABA STANDARD 9.3

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

Absence of Prior Discipline, 9.32(a)

An absence of a prior disciplinary record is present based on the evidence presented in these proceedings.

Absence of Selfish or Dishonest Motive, 9.32(b)

An absence of selfish or dishonest motive is present based on the evidence in these proceedings.

Personal and Emotional Problems, 9.32(c)

Respondent testified that he has an alcohol addiction and has experienced marital and financial problems because of his addiction.

Mental Disability or Chemical Dependency, 9.32(i)

Respondent asserts that mitigating factor 9.32(i) chemical dependency is present. However, Respondent failed to establish two of the four-pronged criteria for application of this factor. The Panel determined that Respondent failed to demonstrate: (i) a meaningful and sustained period of successful rehabilitation and (ii) that a recurrence of that misconduct is unlikely. See Mitigating Factor 9.32(i)(3) and (4). As discussed more fully *infra*, there was expert testimony that the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") is a learned

treatise, and that the DSM-IV regards an absolute minimum of one year of complete abstinence from alcohol before an alcohol dependent person is considered in "sustained full remission." (The current state of medical science deems alcoholism to be an incurable disease, so the operative word is remission, not cured.)

Cooperative attitude towards disciplinary proceedings, 9.32(e)

Respondent demonstrated a cooperative attitude in these proceedings and with the State Bar.

Character or Reputation, 9.32(g)

The Panel finds mitigating factor 9.32(g) is present from the evidence presented in these proceedings. Respondent also filed letters of support from Judge Donald Daughton, Judge Kenneth Mangum, and John Dacey. The parties stipulated and it was ordered that the letters are treated the same as oral testimony.

Imposition of Other Penalties or Sanctions, 9.32(k)

The evidence demonstrates that Respondent was imprisoned for four months and ordered to pay fines and probation fees as a result of his criminal convictions.

Remorse, 9.32(l)

At hearing, Respondent demonstrated remorse for his misconduct.

F. NON-ABA FACTORS CONSIDERED IN MITIGATION

Respondent admitted his misconduct and self-reported his 2004 and 2006 conviction to the State Bar.

Respondent showed initiative by actively obtaining in-patient treatment and taking other active steps to control his alcohol dependence.

The Panel finds that based on the evidence presented at hearing, Respondent's conduct caused no actual harm to clients.

The illegal conduct of Respondent caused no physical injury to others or property.

VI. DISCUSSION

While Respondent acknowledges his transgressions, he has repeatedly failed to obey the law and an attorney's obedience to the law is crucial. *Matter of Rivkind*, 164 Ariz. 154, 791 P.2d 1037 (1990). Respondent testified that his license was not reinstated after his 2006 conviction, yet he continued to drink alcohol and drive.

Lawyers, as officers of the court, are required to uphold the law and in doing so, maintain the integrity of the profession in the eyes of the public.

The Panel notes in each of Respondent's DUI's, the circumstances are similar. Respondent testified he was "swerving" and subsequently pulled over by police as a result of his unsafe driving. This behavior is of serious risk to the public. Such repetitive behavior, spread out over the course of years, brings the profession into disrepute as well.

The parties offered numerous cases for a proportionality analysis in which suspensions ranging from six (6) months to two (2) years were imposed for felony convictions. The Panel finds those cases instructive but none were directly on point. Arizona case law has established that when imposing discipline, each case should be considered on its own merits. *Matter of Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *Matter of Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). Here, Respondent's conduct is distinguished in that he has been convicted of DUI on four occasions, and has not yet successfully completed his criminal probation.

Given the serious nature of Respondent's misconduct, and to ensure protection of the public, the Panel could appropriately follow the recommendations of the State Bar for a two year suspension and require Respondent to participate in formal reinstatement proceedings. This would require him to demonstrate his rehabilitation by clear and convincing evidence. See Rule 65(b)(2). There is nothing unreasonable in the position taken by the State Bar. The argument of Respondent's counsel that his client's repeatedly driving under the influence "is not in and of itself misconduct," while technically correct, is not persuasive and minimizes Respondent's actions. As the ABA *Standards* state:

The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct.

ABA Standards at 5. See also Arizona Supreme Court Rule 41(a): "The duties and obligations of members [of the Bar] shall be ... [t]o support the laws of the United States and of this state."

However, discipline should be tailored to the individual case. See *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997). In this case, there are multiple individual unique factors which this Panel has weighed in accordance with *In re Scholl*, 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001).

The stated objectives of disciplinary proceedings are: (1) maintenance of the integrity of the profession in the eyes of the public, (2) protection of the public from unethical

or incompetent lawyers, and (3) deterrence of other lawyers from engaging in illegal or unprofessional conduct. *In re Murray*, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). *Additionally, we view discipline as assisting, if possible, in the rehabilitation of an errant lawyer. In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987). *The object of disciplinary proceedings is not to punish. In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988). [Emphasis added]

In *Scholl*, which we view as equally or more egregious than the instant facts, and which is relevant to determining the appropriate discipline as a precedent under the "proportionality" test, a six month suspension was imposed on a former judge with a gambling addiction for multiple federal felony convictions of knowingly filing false federal income tax returns over several years and currency structuring. However, his conduct caused no actual loss to IRS because no tax was actually due on his net gambling. For this he had been sentenced to probation without incarceration.

Punishment in the instant case was carried out by the criminal justice system in each of Respondent's convictions. The Panel is aware that it is by sheer good fortune that Respondent caused no physical injury to anyone. But for such grace of circumstances, Respondent may well have had entirely different criminal and disciplinary sanctions facing him. However, it is not necessary for this Panel to analyze further what might have been. It is easy to analyze his conduct from a horizontal perspective of measuring only the number and frequency of his convictions. The Panel is aware, as should be Respondent, that a DUI is often condemned by the public and can, as a result, take center stage with urgency removing all other factors. However, this Panel is compelled to apply the ABA *Standards* that also mandate a vertical consideration of aggravators and mitigators. The more pertinent inquiry for this Panel is how Respondent has addressed this repetitive failing in his life that has reaped a harvest of DUI convictions.

Respondent discussed his history of addiction and the stressors in his life. From his educational achievements at Yale and Harvard to his ten year national commitment of service in the National Guard, Respondent's dedication and achievements were impressive. Notwithstanding, in 1991 Respondent sought in-patient treatment at Sierra Tucson for his alcohol dependence. Respondent was divorced in 1995 and filed bankruptcy. He remarried in 1997 and experienced problems blending families and went through dissolution of his law firm.

Respondent testified that he has relapsed 5-6 times but was sober for over 5 years prior to the 2010 felony conviction. He began attending Alcohol Anonymous ("AA") meetings in 2001. After his 2004 conviction, he self-reported his conduct to the State Bar and met with the Director of the State Bar's MAP, Hal Nevitt. At Mr. Nevitt's direction, Respondent voluntarily entered into a MAP contract and has complied with the terms of that contract. In April of 2010, Respondent again contacted Hal Nevitt seeking a formal connection with MAP and submitted to

intensive out-patient treatment at St. Luke's Behavioral Health from April – June of 2010.

Respondent testified he has attempted sobriety on several occasions but ultimately relapsed. Although he testified he has faithfully attended AA meetings in the past, Respondent acknowledged that he did not obtain an AA sponsor until his most recent conviction. Respondent further testified he has been sober since March 29, 2010 and urges the Panel to consider the impact a long-term suspension will have on his family and his ability to provide for his family. We are reminded however, that the Supreme Court does not consider the "nature of the lawyer's practice, the effect on the lawyer's livelihood, or the level of pain inflicted when determining the appropriate sanction in a disciplinary case." *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001).

The Director of State Bar's MAP, Hal Nevitt, testified that Respondent was diagnosed with alcohol dependency, family interruption and depression. Mr. Nevitt further testified that based on the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) model, an alcohol dependent person is considered in "sustained full remission" if they have maintained sobriety for a period of one year. If they have abstained for less than one year, they are considered in "early partial remission." Mr. Nevitt stated that practicing law can increase the likelihood to relapse because of stressors, and if not addressed, those stressors (both personal and professional) pose significant risks.

Respondent testified that he believed he drank because of his inability to deal with stress appropriately. Respondent testified that since treatment, he is now able to verbalize stress and has developed a coping system and a network of support. He no longer feels the need to escape from stressful situations, as he now knows they will pass. The Panel applauds not only Respondent's efforts at rehabilitation but his self-reporting to the State Bar when not obligated to do so. Such self-reporting is of significance to the Panel in determining both remorse and desire to overcome his dependency. However, given Respondent's repeated failure to obey the law, this Panel determined more is needed to protect the public and the profession than a retroactive suspension.

At the same time, the Panel tempers its decision by the uniqueness of the circumstances of this matter. These include Respondent's self-reporting and his consistent efforts to overcome his acknowledged alcohol dependence. Such circumstances also include a strong coupler that has been stipulated to. There is no legal client that has been or apparently will be harmed by his alcohol dependence. His clients, his opponents and the judges before whom he has appeared all encourage his immediate return to the practice of law. The witnesses were united in their shock that Respondent even had an alcohol dependency. Most were completely unaware that he even drank alcoholic beverages and none had ever even detected his use of alcohol despite working closely with him. This Panel expressly does not find his alcoholism to be an extraordinary circumstance warranting leniency. However, it does have to consider the precedent of *Scholl*, *supra*, and also, as there, weighs favorably the absence of injury to any client,

court or legal adversary. His legal performance is stipulated to be a virtual unblemished record of professional conduct as opposed to his personal failing to control his alcohol dependence.

The Panel also considered the services which the State Bar offers through its MAP. It has been helping Arizona lawyers navigate through issues of addiction, stress and other difficulties for over a decade. Its Director is state licensed and certified nationally as a professional and has over 20 years of experience of assessing, evaluating and assisting people with substances dependency. That Director testified of the unique candor of Respondent and the initiative of Respondent in seeking and adhering to the plans for assistance that have been outlined for him. Mandating MAP as a condition of probation with random testing will offer a support system that will aid Respondent and protect the public and profession. It may well serve the public and the profession for Respondent to consider helping others as a mentor which in turn will likely strengthen him. Sharing with others his struggle may be therapeutic as well.

This Panel believes it highly unlikely that such a unique set of circumstances as was demonstrated in this matter will likely be encountered again. To that end, it believes its judgment to be of strong deterrent effect for members of the State Bar. Respondent's initiative, immediate self-reporting, having served four months in state prison, and his apparently sincere efforts to address his alcohol dependency, coupled with the lack of any perceptible injury to his clients, opponents or the court and the good fortune of no physical injuries to persons or property arising from his conduct, cause us to conclude a departure by this Panel from *Scholl* by imposing a suspension of more than six months is inappropriate.

VI. 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, and proportionality to prior disciplinary cases that appear most relevant, the Panel determines that a six (6) month suspension is the appropriate sanction and will fulfill the purposes of discipline. The six month suspension, however, is to be stayed pending satisfactory completion of a two-year probationary period as elaborated below.

VII. ORDER

IT IS THEREFORE ORDERED:

1. LOGAN T. JOHNSTON, III, Bar No. 009484, is hereby SUSPENDED from the practice of law for a period of SIX (6) MONTHS.

2. The suspension is stayed pending a two-year probationary period.
3. Respondent SHALL be placed on two (2) years of PROBATION.⁴ The terms of probation are as follows:
 - A. Respondent shall contact the MAP director and schedule an assessment. Respondent shall thereafter enter into a contract based upon the recommendation made by the MAP director or designee. The contract shall include a provision for random urinalysis testing. In addition, Respondent shall obtain a MAP mentor and shall mentor others in similar circumstances through outreach or community service programs and/or through the State Bar CLE or other programs as and to the extent the MAP Director determines it will aid his resolve and the Bar's efforts to combat the adverse effects of alcohol dependency among members of the legal profession. Respondent shall comply with all recommended terms and pay costs associated with MAP.
 - B. Respondent shall wear an ankle bracelet until March 29, 2011 if directed by the MAP director.⁵
 - C. 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.
4. Respondent shall successfully complete his criminal probation.
5. 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.

⁴ Pursuant to Rule 60(a)(5)(A) the length of probation may be renewed for an additional two (2) years if deemed appropriate by the MAP director.

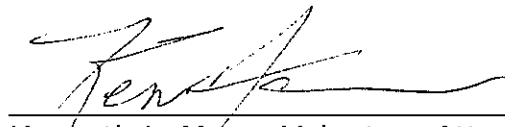
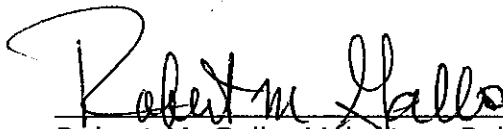
⁵ At hearing, Respondent agreed to this term of probation and offered to wear the bracelet for a period of 90 days. The Panel recognizes Respondent may have the need for such assistance and therefore grants it as a potential term to March 29, 2011 (one year since Respondent's last alcohol per his testimony) if deemed appropriate by the MAP Director.

6. The Order of Interim Suspension effective June 30, 2010 is hereby vacated.

DATED this 11th day of February, 2011.


THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:


Kenneth L. Mann, Volunteer Attorney Member
Robert M. Gallo, Volunteer Public Member

Original filed with the Disciplinary Clerk
this 11th day of February, 2011.

COPY of the foregoing e-mailed and mailed this
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