BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	Nos. 02-1697 and 03-1468 (and conditionally No. 04-0038)
MARK E. TURLEY, Bar No. 005044	
RESPONDENT.	**HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

Probable Cause Orders were filed on July 22, 2003 (cause no. 02-1697) and November 10, 2003 (cause no. 03-1468). A Complaint was filed on November 13, 2003 regarding both matters. Respondent filed his Answer on November 19, 2003. The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on February 11, 2004. No hearing has been held.

FINDINGS OF FACT

1. Respondent was admitted to practice law in Arizona on October 8, 1977.

2. On May 13, 2002, the Supreme Court of Arizona entered its Judgment and Order in No. SB-02-0042-D suspending Respondent for a period of six months and one day, effective June 12, 2002, for violations of ER 1.15 and Rules 43 and 44, Ariz. R. S. Ct.

3. By Supreme Court Judgment and Order in File No. SB-03-0017-D, dated March 21, 2003, the Court amended its May 13, 2002 Judgment and Order *nunc pro tunc* to increase the suspension to a one-year suspension effective from June 12, 2002, due to Respondent's failure to fulfill the terms of his probation. Respondent has not submitted an application for reinstatement to the practice of law.

Count One (02-1697)

4. Respondent conditionally admits that, while suspended, he sent a letter dated August 28, 2002 to Advantage Rent-A-Car in San Antonio, Texas, ostensibly on behalf of a purported client. The letterhead identifies Respondent as "Esquire" and the "memo" area at the top of the letter refers to "My client: Steve Dolack" along with Respondent's name, telephone number and return address in Glendale, Arizona.

5. The entire content of the letter was as follows: "The car has been repaired and I guess that the body shop is waiting for the repair draft. Have you sent it? Please let me know."

6. By his conduct as conditionally admitted in Count One, Respondent engaged in the practice of law on behalf of someone other than himself while suspended, engaged in the practice of law in Arizona while suspended, and held himself out or otherwise represented himself to be an Arizona attorney while suspended in Arizona and without having been reinstated to the practice of law.

Count Two (03-1468)

7. On or about November 29, 2000, Respondent filed and caused to be served, on behalf of Tiffany Sullivan, a complaint for recovery for injuries she sustained in an auto accident. *Tiffany Sullivan v. Daniel Pinuelas, et al.*, Maricopa County Superior Court No. CV 2000-021149.

8. Respondent failed to communicate with Ms. Sullivan regarding the progress of the lawsuit.

9. The lawsuit was dismissed for lack of prosecution by court order dated February 6, 2002.

10. Although Ms. Sullivan repeatedly requested delivery of the litigation file and personal documents that she provided Respondent, he delayed returning them to her. Respondent returned the files to Ms. Sullivan on September 24, 2003.

11. Respondent's conduct in Count Two violates the Rules of Professional Conduct and/or the Supreme Court Rules because he failed to keep his client reasonably informed about

the status of the lawsuit and promptly comply with reasonable requests for information; failed to explain the matter to the extent necessary to permit the client to make informed decisions regarding the representation; failed to expedite the litigation; failed to act with reasonable diligence in prosecuting the lawsuit; refused to abide by the client's objectives of representation; and failed to release the case file to his client in a reasonable time after request.

Count Three (both 02-1697 and 03-1468)

12. Count Three of the Complaint alleged that Respondent failed to cooperate with the State Bar in its investigation into these two matters.

13. Subsequent to the issuance of the two Probable Cause Orders, however, Respondent fully cooperated with the investigation.

14. This Count has been conditionally dismissed.

Count Four (Prior Discipline)

15. Respondent has previously been sanctioned for violations of the Rules of Professional Conduct.

16. Respondent was summarily suspended effective March 22, 2002 for non-compliance with the Mandatory Continuing Legal Education requirements set forth in Rule 45 of the Rules of the Supreme Court of Arizona.[1]

17. On May 13, 2002, Respondent was again suspended by Judgment and Order of the Supreme Court in File No. SB-03-0017-D effective June 12, 2002, for six months and one day for violations of ER 1.15 and Rules 43 and 44, Ariz. R. S. Ct.

18. By Supreme Court Judgment and Order dated March 21, 2003, the Court amended its May 13, 2002 Judgment and Order *nunc pro tunc* to increase the suspension to one year effective June 12, 2002, due to Respondent's failure to fulfill the terms of his probation. The Court also imposed a two-year term of probation indicating the terms and conditions to be determined at the time of reinstatement.

[1] Administrative suspensions do not constitute prior discipline.

Additional Matter (04-0038)

19. Respondent acknowledges that another charge, No. 04-0038, is currently pending against him. That file has not been screened but the conduct alleged in that matter is similar to that alleged in Count One, negotiation of a settlement in a personal injury matter while suspended.

20. The parties have agreed to include the conduct in File No. 04-0038 in this tender in order to dispose of all currently pending matters against Respondent.

21. Respondent neither admits nor denies the allegations made by the complainants in File No. 04-0038, but chooses not to continue defending the allegations.

CONDITIONAL ADMISSIONS

Respondent, in exchange for the stated form of discipline, conditionally admits that the conduct as described in Counts One and Two and the Additional Matter violates Rule 42, Ariz. R. S. Ct., specifically ERs 1.2, 1.3, 1.4, 1.16(a)(1) and (d), 3.2, 5.5, 7.1(a), 7.5(a), 8.4(c) and (d) as well as Rules 31(b), 33(c), 53(a) and (c), 63(d) and 64(c).

DISMISSED ALLEGATIONS

In Count Two, No. 03-1468, the State Bar alleged in its complaint that, on one occasion, Respondent told his client, Ms. Sullivan, that he received a settlement check knowing that this representation was untrue. If a hearing were held, Respondent would testify that he made no such representation to Ms. Sullivan. The State Bar conditionally admits that there is no clear and convincing evidence to support a finding that Respondent intentionally misled his client in this regard.

In Count Three of the Complaint, both Nos. 02-1697 and 03-1468, the State Bar alleged that Respondent failed to cooperate with the State Bar's investigation of his conduct. However, since the Probable Cause Orders were issued, Respondent has fully cooperated with the disciplinary proceedings and has accepted full responsibility for his conduct. The State Bar conditionally agrees to dismiss Count Three of the Complaint in exchange for Respondent's agreement to settle this matter.

ABA STANDARDS

In determining the appropriate sanction in a disciplinary matter, analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from such conduct while protecting the interests of the public and the profession. *In re Kersting*, 151 Ariz. 171, 726 P. 2d 587 (1986).

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 or mitigating factors.

Given the conduct in this matter, it was appropriate to consider *Standards* 4.1, 4.4, 6.2 and 7.2. Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client [*Standard* 4.12]. Suspension is also generally appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client [*Standard* 4.42(a)] or 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* 6.22]. In addition, suspension is generally appropriate when a lawyer knowingly engages in conduct that is violative of a duty owed as a professional, and causes injury or potential injury to a client, the public or the legal system [*Standard* 7.2].

Prior to his current period of suspension, Respondent failed to diligently pursue his client's interests in a personal injury matter. After reaching agreement with defense counsel on a valuation of the lawsuit, Respondent was unsuccessful in securing final settlement of the matter. Rather than going forward with the lawsuit, Respondent took no action and the lawsuit was eventually dismissed for failure to prosecute. Respondent also delayed in returning the case file to his client. As the result of Respondent's neglect, the statute of limitation passed on his client's personal injury claim. Respondent states that, after the lawsuit was filed, he began to suffer from personal and emotional problems that caused him to avoid his obligations to his client.

In another matter, during the period of his current suspension from the practice of law, Respondent sent a letter on behalf of a client regarding claims arising from damage to a rental car. In his correspondence with the rental car company, Respondent held himself out as a lawyer acting on behalf of a client. Respondent states that he was suffering from personal and emotional problems that caused him to avoid reading the correspondence from the Arizona Supreme Court and the State Bar regarding his prior discipline and the fact that he had been suspended from law practice. Respondent reports that, in January 2003, when he was told by an acquaintance that he had been suspended from the practice of law, he notified his clients and wound down his practice. For the purposes of settlement of this matter, Respondent will not defend another charge of practice while suspended. *See supra* at ¶¶ 19 - 21. The State Bar currently has no evidence that Respondent engaged in the unauthorized practice of law since October 2002.

As the *Standards* do not contemplate multiple charges of misconduct, the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations. *Standards*, Theoretical Framework, at pg. 6; *Matter of Redeker*, 177 Ariz. 305, 868 P.2d. 318 (1994).

The presumptive sanction for the admitted conduct is, therefore, suspension. Having determined the presumptive sanction, it is appropriate to evaluate factors enumerated in the *Standards* that justify an increase or decrease in the presumptive sanction.

AGGRAVATING AND MITIGATING FACTORS

The undersigned has considered aggravating and mitigating factors in this case pursuant to *Standards* 9.22 and 9.32. In the Joint Memorandum in Support of the Agreement to Discipline by Consent, Respondent and the State Bar suggest that there are three factors present in aggravation:

9.22(a) prior disciplinary offenses;

9.22(d) multiple offenses; and

9.22(i) substantial experience in the practice of law.

The undersigned agrees. In the Joint Memorandum, Respondent and the State Bar suggest that there are four factors present in mitigation:

9.32(b) absence of dishonest or selfish motive;

9.32(c) personal or emotional problems;

9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and

9.32(l) remorse.

While the undersigned agrees that factors 9.32(b) and 9.32(e) are present, the record is inadequate to support a finding under 9.32(c) or 9.32(l).

With regard to mitigation under 9.32(c), Respondent and the State Bar have offered only copies of certain portions of Respondent's medical records as support for a finding of personal or emotional problems that contributed to the situation here at issue. The "intake" notes and "progress notes" made by M. Trugoot, Ph.D. seem only to be an accounting of what Respondent said to Dr. Trugoot. Mere self-serving statements, without more, cannot support a finding under 9.32(c). *Matter of Augenstein*, 178 Ariz. 133, 871 P.2d 254 (1994). The objective analysis of Robert A. Block, Ph.D., P.C. also does not justify a finding of mitigation based on 9.32(c). Rather, those findings indicate that Respondent's thinking was "logical and clear" and that he demonstrated adequate judgment and insight. There was no evidence of any delusional thinking and Dr. Block reported that there was no significant psychopathology. Dr. Block's treatment plan indicated that his proposed therapy would be designed to teach Respondent stress management techniques and relaxation skills. There simply is insufficient evidence to support mitigation under 9.32(c).

The only evidence offered by Respondent and the State Bar in support of a finding of mitigation under 9.32(l) are statements made by Respondent in his Answer to the Complaint. In his Answer, Respondent acknowledged that he made repeated mistakes, that he "erred greatly" by some of his actions, and that there was no excuse for some of his behavior. Absent, however, is any suggestion of remorse for his action and his behavior.

Having examined the aggravating and mitigating factors, there is no reason for the undersigned to not recommend suspension as the appropriate sanction in this matter. However, the presumed period of suspension is only six months and one day. *See Standard* 2.3 (suspension of an attorney contemplates reinstatement after a process demonstrating rehabilitation and fitness to practice law). The undersigned considers that insufficient. Respondent has already been suspended for that period. He violated the terms of his probation and a disciplinary order imposing a suspension of one year was entered against him. In view of the substantial ethical violations by Respondent in this matter, an additional two years of suspension with two years probation is more appropriate.

PROPORTIONALITY REVIEW

Proportionality requires that the sanction be tailored to fit the facts and circumstances of the case. *Matter of Scholl*, 200 Ariz. 222, 227, 25 P.3d 710, 715 (2001). Significantly, the purpose of lawyer discipline is not to punish the Respondent, but to protect the public and the administration of justice from attorneys who are either unable or unwilling to discharge their professional obligations to clients, the public and the profession. *Rivkind*, 164 Ariz. at 157, 791 P.2d at 1040; *see also Standard* 1.1. Accordingly, sanctions against lawyers must have internal consistency to maintain an effective and enforceable system. Therefore, it is appropriate to consider cases that are factually similar to the current matter. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988).

In *Matter of McGuire*, SB-99-0029-D (1999), the lawyer was the subject of a four-count complaint alleging that he did not adequately communicate with his clients, failed to prepare necessary documents, abandoned the clients and, in at least two instances, failed to return unearned retainers and personal property belonging to the clients. In the investigation of these matters, McGuire failed to cooperate with the State Bar. In aggravation, the Disciplinary Commission agreed that the matter involved multiple offenses and the lawyer engaged in bad-faith obstruction of the disciplinary process by failing to respond to the State Bar in its investigation. McGuire's lack of a prior disciplinary history was considered in mitigation of

the misconduct. The lawyer was suspended for two years.

In *Matter of McFadden*, SB00-0072-D (2000), the lawyer was suspended for a period of two years for his failure to perform services for which he was retained. McFadden failed to communicate with his clients and failed to respond to their repeated inquiries. McFadden also failed to return unearned retainers and respond to the State Bar. There were three factors considered in aggravation of the misconduct: multiple offenses, bad-faith obstruction of the disciplinary process and substantial experience in the practice of law. McFadden had no prior disciplinary record, which was considered in mitigation.

In *Matter of McCarthy*, SB-01-0121-D (2001), a lawyer was the subject of a three-count complaint alleging his failure to communicate with clients, failure to act with reasonable diligence and failure to respond to the State Bar in its investigation of the matter. McCarthy was suspended for two years for his misconduct. Three factors were considered in aggravation: a pattern of misconduct, multiple offenses and bad-faith obstruction of the disciplinary process. McCarthy's lack of a disciplinary history was a mitigating factor.

In *In re Blaine*, Supreme Court No. SB-02-0071-D, the Respondent was suspended for six months and one day and given two years probation for two counts of lack of diligence. Because of Blaine's neglect, the statute of limitations passed for one of his client's claims. Blaine had a disciplinary history and failed to cooperate with the State Bar.

Unlike *McGuire*, *McFadden*, *McCarthy* and *Blaine*, Respondent fully and freely cooperated with the State Bar subsequent to the issuance of the Probable Cause Orders against him. However, in contrast to *McGuire*, *McFadden* and *McCarthy*, Respondent has a disciplinary history. Under the facts of this case, and given Respondent's current suspension and his violation of his earlier probation, a two-year suspension is consistent with *McGuire*, *McFadden* and *McCarthy*. In contrast to *Blaine*, a suspension of six months and a day is inappropriate in this case because Respondent has previously ignored the terms of his probation, and has been suspended for a one-year period.

In *Matter of Coburn*, 181 Ariz. 250, 889 P.2d 608 (1995), the attorney consented to a

two-year suspension for four counts of practicing while suspended. The attorney delayed winding up his practice after the order of suspension was issued. Respondent's lack of a selfish motive and cooperative attitude with the State Bar were mitigating factors. *Id.* at 253, 889 P.2d at 611.

In *Matter of Taylor*, 180 Ariz. 290, 883 P.2d 1046 (1994), an attorney consented to three years suspension for actively litigating a case while on administrative suspension. Taylor also represented two other clients during the period of suspension. Taylor also failed to diligently prosecute the litigation. It is noteworthy that the *Taylor* court distinguished two cases in which attorneys were disbarred for practicing while suspended because in one case the misconduct included dishonesty, while the other case involved two instances of unauthorized practice during separate periods of suspension. *Id.* at 293, 883 P.2d at 1049.

The proposed sanction is consistent with *Coburn* and *Taylor*. Coburn was suspended for two years for four counts of unauthorized practice during a disciplinary suspension. Taylor was suspended for three years for three instances of unauthorized practice, including active litigation of a matter, during separate periods of suspension. Taylor's conduct also included dishonesty. In Respondent's case, two charges of practicing while suspended were filed with the State Bar. Respondent has cooperated with the Bar and his conduct does not include dishonesty.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the

proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors and a proportionality analysis, this Hearing Officer recommends the following:

1. Respondent shall be suspended for a period of two years.

2. Respondent shall successfully complete the Trust Account Ethics Enhancement Program (TAEEP) prior to reinstatement.

3. Respondent shall be placed on probation for a period of two years upon reinstatement with the terms and conditions of probation to be determined upon reinstatement.

4. Respondent shall pay the costs of these proceedings as a condition to application for reinstatement.

DATED this 10th day of March, 2004.

Patricia E. Nolan
Hearing Officer 7Y

Original mailed to the Disciplinary Clerk
for filing this 10th day of March, 2004.

Copy of the foregoing mailed
this 10th day of March, 2004, to:

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