BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

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

JAMES T. GREGORY,
Bar No. 021499

RESPONDENT.

No. 03-2246

Hearing Officer's Report and Recommendation

PROCEDURAL HISTORY

A probable cause order was filed on October 1, 2004, followed by a single count complaint filed on October 29, 2004, alleging violations of Rule 42, Ariz. R.S.Ct. ERs 3.3(a)(1), 8.4(c) and 8.4(d). A notice of default was filed December 2, 2004. On December 7, 2004, a notice of appearance of counsel and an answer were filed on Respondent's behalf.

Pursuant to the initial case management order, a settlement conference was conducted on January 24, 2005, during which the parties reached a settlement. A minute entry to that effect was filed January 25, 2005.

After a status conference on February 22, 2005, the initial hearing date of February 25, 2005, was vacated and a new hearing was set for March 11, 2005, to consider the Tender of Admissions and Agreement for Discipline by Consent (the Tender) and Joint Memorandum in Support of the Agreement (the Memorandum). The Tender and Memorandum were filed on March 3, 2005. On the basis of earlier

faxed versions of the Tender and Memorandum, the Hearing Officer issued an order on March 1, 2005, requesting additional information from the parties. The parties filed an Addendum to the Tender and Memorandum (the Addendum). On March 11, 2005, a telephonic hearing was conducted. Bar counsel, Respondent's counsel and Respondent were present. At the close of the hearing, the matter was taken under advisement by the Hearing Officer. The transcript of the March 11 hearing was filed March 29, 2005. References to the transcript will be designed "TR" followed by the page and line numbers.

FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in Arizona, having been admitted on April 22, 2003. (Tender; Fact No. 1)

2. Between April 22, 2003, through late October 2003, Respondent was employed as a Deputy Public Defender by the Mohave County Public Defender office. (Tender; Fact No. 4)

3. When his employment began, Respondent was told by his employer that he would be assigned, among others, the case of the *State of Arizona vs. Tamara Hill*, Mohave County Justice Court, Kingman Precinct No. CR02-2044 (the Hill Case). (Tender; Fact Nos. 5, 6 and 7)

4. Respondent received the Hill Case file on June 2, 2003, but was not formerly assigned to handle the case until August 12, 2003. The Hill Case was set for trial on October 20, 2003, before the Honorable Larry D. Imus, Justice of the Peace. (Tender; Fact Nos. 9, 10, and 11)

5. On October 15, 2003, Respondent filed a written motion to continue the trial date citing the need to do additional investigation. (Tender; Fact No. 12)

6. October 20, 2003, having not received a ruling on his October 15 motion, Respondent orally re-urged the motion to continue. This time the Respondent told Judge Imus that he needed the additional time to continue his investigation and to locate a witness. He also told Judge Imus that he (the Respondent) had just become aware of the Hill case a "few weeks" earlier. (Tender; Fact No. 13)

7. Respondent requested the continuance at the insistence of his client, who did not want to go to trial without a missing witness. (Tender Fact No. 14, TR page 20, lines 10 through 18); Addendum, page 5, lines 3 through 8)

8. Respondent's statement that he needed additional time for investigation and to locate a witness was truthful. Respondent's statement that he had just become aware of the Hill case a few weeks earlier was not truthful. Ultimately, Judge Imus granted the motion for a continuance. (Addendum pages 3 and 4, lines 21 through 25 on page 3 and 1 through 15 on page 4)

9. Within a few days of granting the continuance, Judge Imus learned that the Respondent had actually been assigned to the Hill case much earlier than the Judge had been led to believe, causing Judge Imus to initiate this proceeding. (Tender; Fact No. 16)

10. The Hill Case was subsequently tried before Judge Imus and the Defendant was acquitted. (TR page 6, lines 2 through 7)

11. Judge Imus was notified of the terms of the Tender on February 10, 2005. (Tender; page 2; TR page 4, lines 13 through 19)

12. On November 7, 2003, Respondent was disciplined for a violation of ER 8.4(c) and placed on probation for two years. (Memorandum; page 3)

CONCLUSIONS OF LAW

There is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically ER 3.3(a)(1) (making a false statement of fact or law to a tribunal) and 8.4(d) (engaging in conduct that is prejudicial to the administration of justice.)[1]

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered in deciding upon an appropriate sanction after a finding of lawyer misconduct: (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.

The duty violated by Respondent was one owed to the legal system; specifically his fundamental duty as an officer of the court to be truthful with a judge. As to Respondent's mental state, the admitted facts established that Respondent knowingly misled Judge Imus when he told the court that he had only become aware of the Hill case a few weeks earlier. His motivation was to obtain a continuance of the trial date at the insistence of his client. There is no evidence that Respondent's conduct caused any actual injury to a party or any significant adverse effect on the

[1] In exchange for Respondent's conditional admissions, the State Bar agreed to dismiss the alleged violation of ER 8.4(c).

Hill case, although the potential for some harm was present. *Standard* 6.0 is therefore applicable to determine the appropriate sanction for Respondent's admitted misconduct.

The parties agree that *Standard* 6.12 applies. It says:

> "Suspension is generally appropriate when a lawyer knows 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 a legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding."

Were it not for the fact that Respondent's conduct did not cause serious or potentially serious injury to a party or a significant or potentially significant adverse effect on the Hill case, the Hearing Officer believes that *Standard* 6.11 would apply. [2] But there is no evidence of serious harm to anyone or a significant adverse effect on the legal proceeding. Accordingly, the Hearing Officer agrees that the presumptive sanction in this case is suspension. The question now becomes whether there are aggravating or mitigating factors that warrant a greater or lesser sanction.

AGGRAVATION AND MITIGATION

There is one factor properly considered in aggravation; a history of prior discipline. (*Standard* 9.22(a)). On November 7, 2003, the Respondent was placed

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[2] *Standard* 6.11 is the applicable standard for cases of intentional false statements to a tribunal. It says:

> "Disbarment is generally appropriate when a lawyer, with the intent to deceive the Court, makes a false statement, submitting a false statement, or improperly withhold material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding."

Respondent conditionally admits he made a false statement to the court to obtain a continuance. There is no suggestion he did so other than intentionally within the *Standards* definition of "intent" (the conscious objective or purpose to accomplish a particular result).

on two years probation for a violation of ER 8.4(c). The detailed facts underlying that discipline are set forth in the Addendum. In a nutshell, Respondent stated in an application for employment with the Cochise County Public Defender's office, received by them on April 14, 2003, that his current position was that of Attorney I with the Mohave County Public Defender's office and that he performed all pre-trial functions, including oral arguments and hearings and participated in pre-trial negotiations and rendered legal advice to clients. In fact, when the application was submitted, Respondent was employed as an intern, was not admitted to the practice of law and was not doing the type of work claimed in the application. The Respondent post-dated the application to May 7, 2003, (a date after he was to be admitted to practice) to cover himself if what his "current" position was on the application date was ever questioned. The Respondent claimed the misstatements were not intentional misrepresentations but rather mere "puffing" done to get the job. In addition to being placed on probation, Respondent was required to take the Ethics Enhancement Program and participate in counseling.[3]

The parties agree that four mitigating factors are present; the absence of a dishonest or selfish motive (*Standard* 9.32(b)); full and free disclosure or cooperative attitude in the disciplinary proceedings (*Standard* 9.32(e)); inexperience in the practice of law (*Standard* 9.32(f)); and remorse (*Standard* 9.32(l)).

[3] The conditionally admitted conduct in this case occurred about three weeks before Respondent was formally placed on probation for the prior offense. The State Bar does not therefore consider the conduct in this case to be a violation of Respondent's probation and does not intend to pursue a probation violation. (TR page 5, lines 2 through 25, page 6, lines 1 through 11.

It does appear that Respondent was motivated to go beyond the truth to obtain a continuance in the Hill Case because he was under pressure to do so from his client. Respondent's belief is misguided.[4] However, even if misguided, there is no evidence that the Respondent's motive in misrepresenting the facts to Judge Imus was dishonest or selfish, at least in the sense that he intended to benefit himself rather than his client. *Standard* 9.32(b) is therefore applicable.

The record also supports the conclusion that, after a somewhat slow start, the Respondent did cooperate with the State Bar and make a full and free disclosure of the facts and circumstances surrounding the case. *Standard* 9.32(e) is therefore applicable.

When this misconduct occurred, Respondent had been admitted to practice for less than two years. So there is evidence to support a finding that the Respondent was inexperienced in the practice of law. However, it is questionable whether his inexperience should mitigate Respondent's conduct.

Respondent had been a lawyer long enough to know that lying to a judge was not acceptable. The Respondent believes his inexperience was a factor in this case, not because he didn't know that lying to a judge was wrong, but because he lacked sufficient experience in the practice to effectively control his client and thus allowed himself to be pushed into doing the wrong thing. While client control is indeed a learned skill, the Hearing Officer is not persuaded that any lawyer, however inexperienced, would reasonably believe that the conditionally admitted conduct in

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[4] As our Supreme Court noted in In re Fee, 182 Ariz. 597, 898 P.2d 957 (1995): "The system cannot function as intended if an attorney, a sworn officer of the court, can lie to or mislead judges in the guise of serving their clients. "Zealous advocacy" has limits. It clearly does not justify ethical breaches." (182 Ariz. at 601).

this case was justified. Every lawyer is expected to be truthful regardless of the length of time he has practiced. *In re* Savoy, 181 Ariz. 368, 371; 891 P.2d 236, 239 (1995). Therefore, while there is a factual basis for a finding of the applicability of *Standard* 9.32(f), the Hearing Officer assigned it little weight.

Respondent testified at the hearing that he was remorseful. Shortly after the incident occurred, Respondent left the Mohave County Public Defender's office and relocated to Yuma. However, his relocation had nothing directly to do with the misconduct in this case.[5] After an agreement was reached at the Settlement Conference, the Respondent wrote a letter to Judge Imus. For convenience, the letter is attached as Exhibit "A" to this report.

On its face, Exhibit "A" is not particularly helpful to Respondent. It does not admit any wrongdoing and says it was written at the direction of the State Bar. However, the facts surrounding this letter were explained in greater detail at the hearing. The Respondent did not apologize to Judge Imus before the Settlement Conference because Respondent's attorney thought it would be inappropriate for Respondent to talk with the Judge (the complaining party) while the case was ongoing. After the parties reached a settlement, the Respondent asked Bar Counsel how he could best demonstrate his remorse. Bar Counsel suggested a letter, but the letter was not written as a requirement of the settlement.[6] The Respondent wrote the letter himself, without the assistance of his attorney.[7]

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[5] TR page 8, lines 2 through 12.

[6] TR page 10, lines 7 through 13.

[7] TR page 11, lines 12 through 15.

Respondent's seeking mitigation relief based upon remorse must present a showing of more than having said they are sorry. (*In re Augenstein*, 173 Ariz. 133, 137, 871 P.2d 254 (1994)) In this case, however, it is difficult to see how the Respondent could do much more than he has done to demonstrate his remorse. The Hearing Officer found Respondent's testimony on this issue to be credible. *Standard* 9.32(l) is therefore applicable.

PROPORTIONALITY REVIEW

The Supreme Court has held that, in order to achieve proportionality in imposing discipline, the discipline in each situation must be tailored to the facts of the case. (In re Wines, 135 Ariz. 203, 660 P.2d 454 (1983) and In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993)).

The proposed sanction in this case is a censure with a two year term of probation and the imposition of costs. Restitution is not an issue, since there is no evidence of financial harm to anyone. The question is whether the proposed sanction is proportional to actions taken by the Court and the Commission in similar cases.

The Court and the Commission have historically viewed violations of ER 3.3(a)(1) as very serious. Consequently, most recent cases involving violations of ER 3.3(a)(1) have resulted in either disbarment or suspension. For example, the Supreme Court suspended respondents for six months and six months and a day respectively in *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600 (2002) and *In re Moak*, 205 Ariz. 351, 71 P.3d 343 (2003). Both of those cases involved respondents who concealed pertinent facts from the Court and caused serious harm to parties and the

legal system. The Supreme Court disbarred a respondent who intentionally presented false testimony in two murder trials, again causing serious harm to the system and the parties. (*In re Peasley*, 208 Ariz. 27, 90 P.3d 760 (2004)).

In *In re* Kirkland, SB-03-001-D, the Commission accepted an agreement for discipline by consent calling for a four year suspension in a case where the respondent submitted false pleadings and failed to take corrective action to lessen the damage caused by his misconduct. In that case, there was also a serious adverse effect on the legal proceeding and harm to the parties.

All of these cases are distinguishable from this case because each of them involved misconduct more serious than the misconduct conditionally admitted by the Respondent and all involved serious harm to the legal system and the parties, a factor not present here.

The Hearing Officer has found only three cases where the Court or Commission has approved censure as a sanction for a violation of ER 3.3(a)(1).[8] The Supreme Court has imposed censure only once in recent years for a violation ER 3.3(a)(1). That occurred in *In re Fee*, supra.

In *In re Fee*, the Court rejected a hearing committee recommendation for a thirty day suspension and a Commission recommendation for a sixty day suspension in favor of a censure in a case where the respondent knowingly failed to disclose the existence of a separate agreement with his client on attorney fees to a settlement

[8] The Commission has twice decided that lawyers lying about their professional status in other cases while applying for *pro hac vice* status in Arizona should be disbarred. (*In re Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994) and *In re Zackraisek*, Supreme Court No. SB-03-0100-D). However, since the lawyers in both of those cases were not admitted in Arizona they could not be disbarred so the sanction actually imposed was censure, the most severe sanction available for a non-admitted lawyer. These cases are not representative of cases where the Commission has found censure to be an appropriate sanction for a violation of ER 3.3(a)(1).

judge. The Court found no factors in aggravation and several factors in mitigation, including no prior discipline, no selfish motive, full and free disclosure and cooperation through the disciplinary process. The Court seemed sympathetic to the difficult position the respondent found himself in during the settlement process as a consequence of conflicts between the respondent and the settlement judge.

The Commission approved censure as a sanction for a violation of ER 3.3(a)(1) in two cases; *In re Risley*, SB-05-0015-D and *In re Hansen*, 179 Ariz. 229, 877 P.2d 802 (1994).

In *Risley*, the Commission approved an agreement for discipline by consent for censure, plus probation for one year, in a case where the respondent filed a procedurally inappropriate motion and then misrepresented to the Court and a non-party witness that the motion had been granted. He also filed an ex-party application for a temporary restraining order without a good faith basis. The Commission found aggravation in a selfish motive, multiple offenses and substantial experience in the practice. In mitigation, it found cooperation in the disciplinary process, evidence of good character and no prior discipline.

In *Hansen*, the respondent, a prosecutor in a City Prosecutor's office, lied to the Court and opposing counsel to keep them from finding out that she had prematurely released a trial witness. The Commission imposed a censure, finding only one aggravating factor (a selfish motive) and several mitigating factors (no disciplinary history, remorse, cooperation during the disciplinary process and inexperience in the practice of law). But there was an additional factor present in that case that was significant to the Commission; specifically that the respondent had

resigned her position with the City Prosecutor's office on the same day the conduct occurred out of remorse and embarrassment.

Of the cases where censure has been imposed for a violation of ER 3.3(a)(1), *Hansen* comes closest to mirroring the facts of this case. Respondent's conduct in this case could be viewed as less egregious than the conduct in *Hansen* because the Respondent here was motivated by a desire to help his client by carrying out her apparently pressing demands for a continuance of her trial date rather than for some purpose intended to benefit himself. In *Hansen*, the respondent lied to cover her error. But unlike *Hansen*, this case does not include the additional factor the Commission found significant. Respondent did not resign his employment or suffer any other adverse consequence as a result of his misconduct.

What makes Respondent's conduct more egregious than the conduct in *Hansen* is Respondent's prior disciplinary history. There was no record of prior discipline in *Hansen*. This Respondent not only has a record of prior discipline, but a record of discipline for conduct involving dishonesty, the gravamen of the complaint in this case. While Respondent was not technically on probation at the time of the misconduct here, he was certainly aware that he was about to be disciplined for making false statements on an employment application. Yet he made the false statements to Judge Imus just the same. If Respondent's first encounter with the State Bar over the falsified employment application was not sufficient to deter him from lying to Judge Imus, what assurance is there that this encounter will deter him from similar misconduct in the future?

In somewhat similar circumstances, the Supreme Court decided that the goal of deterrence of future misconduct required the imposition of an enhanced sanction. *In re Bowen*, 178 Ariz. 283, 288, 872 P.2d 1235 (1994). There are three reported *Bowen* decisions, referred to by the Court as *Bowen I, II* and *III*.[9] The respondent had been censured in *Bowen I* and *Bowen II* for conduct that was similar to the misconduct in *Bowen III*, generally neglect, failure to communicate with clients, abusing the legal system and delay in legal proceedings. Some of the misconduct in the three cases occurred while discipline in the other cases was pending. In those circumstances, both the Commission and the Court decided the misconduct in *Bowen III*, that would otherwise warrant a third censure, instead warranted a one year suspension.

The Respondent's discipline record does not yet rise to the level present in *Bowen III* so the reasoning of the Court there does not require an enhanced sanction here based solely on the Respondent's prior discipline.

On balance, the Respondent's lack of selfish motivation, remorse and cooperation in the disciplinary process outweigh his prior record of discipline and warrant a sanction less severe than suspension. The proposed sanction is therefore proportional to the sanction imposed in other cases, especially *Hansen*.

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).

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[9] *Bowen I* is *In re Bowen*, 144 Ariz. 92, 695 P.2d 1130 (1985), *Bowen II* is *In re Bowen*, 160 Ariz. 558, 774 P.2d 1348 (1989), *Bowen III* is *In re Bowen* supra.

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors and a proportionality analysis, this Hearing Officer recommends that the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support, together with the Addendum thereto, be accepted and that pursuant thereto that:

1. Respondent receive a censure.

2. Respondent be placed on probation for a period of two (2) years from the date of execution of a Memorandum of Understanding between Respondent and the State Bar, specifying the terms of probation. The State Bar shall notify the Disciplinary Clerk of the date of commencement of probation. The terms of probation are as follows:

a.) Respondent shall submit to an audit by the State Bar's Law Office Management Assistance Program (LOMAP). Respondent shall comply with the recommendations of the LOMAP director or her designee; and,

b.) Respondent shall meet with the director of the State Bar's Member Assistance Program (MAP), who will conduct an assessment. Respondent shall comply with the recommendations of the MAP director or his designee.

3. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of

these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

4. Restitution is not applicable in this case.

5. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 7th day of April, 2005.

Larry W. Suciu
Hearing Officer 7A

Original filed with the Disciplinary Clerk
this 7th day of April, 2005.

Copy of the foregoing mailed
this 7th day of April, 2005, to:

Robert M. Cook
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Angela M. B. Napper
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by: PWilliams

EXHIBIT A

JAMES T. GREGORY
217 South Second Avenue
Yuma AZ 85364
(928) 343-2705

February 15, 2005

Honorable Larry D. Imus
Kingman Justice Court
P.O Box 29
Kingman, AZ 86402

Dear Judge Imus:

I want to unequivocally apologize for any statement of fact which I may have made in connection with the continuance in the Hill case. The State Bar of Arizona has requested I write this letter. I want to assure you that I have intended throughout to communicate directly with you once the matter was resolved. From the bottom of my heart, I respectfully request that you forgive me for my mistake.

IT WILL NOT HAPPEN AGAIN either in your Court or any other Tribunal. My practice goes well in Yuma but I want to be able to come back to Mojave County on occasion as the practice requires. I come as a repentant yet redeemed attorney.

Please accept my apology and please, in your heart, forgive me for my transgression

Sincerely,

JAMES T. GREGORY

EXHIBIT "A"

RECEIVED FEB 16 2005