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DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER) No. 08-0751
OF THE STATE BAR OF ARIZONA,)

DALE E. WHITING,
Bar No. 015357)

RESPONDENT.)

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on March 14, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed January 16, 2009, recommending a one-year suspension, two-years of probation (with terms and conditions to be determined upon reinstatement), and costs.

Decision

Having found no facts clearly erroneous, the eight members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact,² conclusions of law, and recommendation for a one-year suspension, two-years of probation (with terms and conditions to be determined upon reinstatement), and costs of these disciplinary proceedings.³

¹ Commissioner Osborne did not participate in these proceedings.

² The Hearing Officer's findings of facts as stated in paragraphs 15 and 23 do not support a violation of ER 3.4(c). The absence of this violation does not change the outcome.

³ A copy of the Hearing Officer's Report is attached as Exhibit A.

RESPECTFULLY SUBMITTED this 18th day of March, 2008.

Daisy Flores

Daisy Flores, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 18th day of March, 2009.

Copy of the foregoing mailed
this 19th day of March, 2009, to:

Thomas M. Quigley
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4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by Evelyn Loza
/cs

EXHIBIT

A

FILED

JAN 16 2009

**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

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

**Dale E. Whiting,
Bar No. 015357**

Respondent.

No. 08-0751

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY WMA

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 8W,
Thomas M. Quigley)

The undersigned hearing officer submits this report and recommends suspension for one year, imposition of two years probation upon reinstatement, and be ordered to pay all costs and expenses herein.

I. PROCEDURAL HISTORY

The State Bar filed a complaint on September 15, 2008. The complaint alleged two counts discussed below. Respondent Dale E. Whiting having failed to answer, a notice of default was entered on October 14, 2008. No answer being received, default was entered on November 4, 2008. The State Bar requested an aggravation/mitigation hearing and that hearing was held on December 5, 2008. However, the State Bar did not present additional evidence. Respondent did not appear at the aggravation/mitigation hearing. The State Bar filed proposed findings of fact and conclusions of law on December 22, 2008.

II. FINDINGS OF FACT¹

1. At all times relevant, Respondent was licensed to practice law in the state of Arizona having been admitted on October 23, 1993, and at all times since then until he was suspended beginning March 13, 2008. Complaint ¶¶ 1, 44.

COUNT I

2. Respondent and William M. Spence ("Spence") both represented Lori Forte ("Forte") in different matters, but all matters were related to her divorce.

¹ No answer being filed, the material factual allegations of the complaint are accepted as true.

1 Respondent shared office space with Spence during the time in question. Complaint
2 ¶ 2.

3 3. Respondent represented Forte in a Chapter 13 Bankruptcy case. The
4 Chapter 13 involved an attempt by Forte to keep her house. Complaint ¶ 3; Ex. 1.

5 4. Spence represented Forte in a Special Action in Maricopa County
6 Superior Court in an attempt to remove a cloud on the title to her house. Complaint ¶ 5;
7 Ex. 1.

8 5. On February 20, 2007, Spence filed the Special Action in Maricopa
9 County Superior Court seeking to clear title to the house by removing a deed of trust
10 recorded against the property by Charles Saint George Kirkland ("Charles"), Victor
11 Kirkland ("Victor") and/or Ivy Properties ("Ivy"). Complaint ¶ 6.

12 6. In the Special Action, Forte alleged that she had engaged Charles as a
13 mortgage broker to obtain refinancing on her home and that he had failed to perform.
14 Complaint ¶ 7.

15 7. Forte acknowledged that Charles advanced \$11,000.00 to stave off
16 foreclosure but claimed that no note had been executed to document that loan. As a
17 result, she alleged the recording by Charles of a "naked" deed of trust purporting to
18 secure the non-existent note was wrongful and had impaired her ability to obtain
19 refinancing from a third party source. Complaint ¶ 8.

20 8. On February 21, 2007, Respondent filed the Chapter 13 Petition with the
21 Bankruptcy Court. Complaint ¶ 9.

22 9. On June 15, 2007, Respondent filed an Adversarial Complaint in the
23 Bankruptcy Court to resolve the same lien dispute at issue in the Special Action,
24 alleging virtually identical facts as alleged in the Special Action petition. Complaint
25 ¶ 10.

26 10. Respondent was seeking, on behalf of Forte, a declaration that the deed of
27 trust filed by Charles was invalid because of lack of an underlying promissory note.
28 Complaint ¶ 11.

1 11. In the early stages of the case, the Bankruptcy Court directly confronted
2 the issue of how best to address and resolve the lien dispute given the pendency of the
3 Special Action. Complaint ¶ 12.

4 12. At the September 12, 2007 hearing, the Bankruptcy Court decided, with
5 the concurrence of Respondent, that the issue would be resolved in Bankruptcy Court.
6 Complaint ¶ 13.

7 13. Respondent agreed to and was ordered by the Bankruptcy Court to file a
8 Motion for Summary Judgment on the issue of whether the deed of trust was invalid for
9 lack of a note, even though consideration had been paid. Complaint ¶ 14.

10 14. Respondent failed to file the Motion for Summary Judgment prior to the
11 next hearing held on October 31, 2007. Complaint ¶ 15.

12 15. Respondent informed the Bankruptcy Court at the October 31, 2007
13 hearing that he had not filed the Motion for Summary Judgment because Spence's
14 paralegal, who was drafting the motion, was not allowed to proceed because Spence
15 now wanted to resolve the case in the Special Action because Victor was in default in
16 that proceeding for failing to respond to service by publication. Complaint ¶ 16.

17 16. The Bankruptcy Court stated in its Order that the "strategy [of seeking a
18 default for failure to appear] apparently adopted by both [Spence and Respondent] for
19 Forte is particularly distasteful given that Victor . . . stated repeatedly that he had been
20 in contact with Spence by phone and email numerous times and in fact had answered
21 the amended complaint in bankruptcy court." Ex. 1 at p. 4, ls. 13-16.

22 17. During the October 31, 2007 hearing, and after ascertaining that no factual
23 disputes on the purportedly dispositive issue existed, the Bankruptcy Court set an
24 accelerated schedule for the filing of summary judgment motions. Complaint ¶ 18.

25 18. The Bankruptcy Court also ordered Spence to not file any further
26 pleadings in the Superior Court case and ordered Respondent to file a Notice with the
27 Superior Court Judge to that effect. Complaint ¶ 19.

28

1 19. Respondent filed the Motion for Summary Judgment in Bankruptcy Court
2 on November 7, 2007, but abandoned his prior arguments and requested summary
3 judgment on a theory not pled. Ex. 1 at p. 5, ls. 10-21.

4 20. Since Respondent had failed to plead the "fraudulent scheme theory" in
5 the Adversarial Complaint, the Bankruptcy Court granted Victor's Motion for Summary
6 Judgment and denied Forte's Motion for Summary Judgment. Complaint ¶ 21.

7 21. In its December 14, 2007 Order, the Bankruptcy Court gave Respondent
8 20 days to "amend the complaint in this adversary proceeding. If no amended
9 complaint is filed by January 3, 2008, this adversary proceeding will be dismissed."
10 Complaint ¶ 22.

11 22. Respondent did not file a Motion for Leave to Amend the Complaint.
12 Complaint ¶ 23.

13 23. During a February 13, 2008, hearing, Respondent informed the
14 Bankruptcy Court that he and Spence had purposely decided not to amend within the
15 twenty day period so the adversarial proceeding would be dismissed. Complaint ¶ 24.

16 24. Notwithstanding the Bankruptcy Court's clear direction in earlier hearings
17 and Respondent's agreement with those directions, Respondent took the position at the
18 February 13, 2008 hearing that the Bankruptcy Court's December 14, 2007 Order meant
19 that following the dismissal, the matter could proceed in Superior Court. Complaint
20 ¶ 25.

21 25. Respondent argued at the February 13, 2008 hearing he would need
22 additional discovery before he could file a second amended complaint in Bankruptcy
23 Court, in effect admitting that he did not yet have sufficient evidence for alleging his
24 new fraudulent scheme theories. Complaint ¶ 26.

25 26. Notwithstanding his assertions to the Bankruptcy Court during the
26 February 13, 2008 hearing, Respondent filed a second amended complaint on February
27 18, 2008, alleging his "fraudulent schemes theory" without benefit of any additional
28 factual development. Complaint ¶ 27.

1 27. The Bankruptcy Court denied the motion to file a second amended
2 complaint, dismissed the adversarial proceeding with prejudice, and found that
3 Respondent had abused the litigation process and knowingly acted in a manner
4 inconsistent with the Bankruptcy Court's orders. Complaint ¶ 28.

5 28. Judge Case stated in part:

6 This situation requires the Court to take such action [dismissal of the
7 complaint with prejudice as a sanction]. It would be a mockery of the
8 orders issued in this case were Forte able to leave bankruptcy court
9 unscathed and return to superior court to litigate these new theories. The
10 opportunity existed here to litigate these issues, the process for taking
11 advantage of it was clearly outlined, yet it was flatly eschewed by
12 Respondent. The result must be that the complaint is dismissed with
13 prejudice. It is the Court's intention with this order, lest there be any
14 doubt, that the dismissal of this complaint with prejudice is intended to be
15 a full and final adjudication of all claims that were or could have been
16 brought by Forte against these three defendants, to the full extent allowed
17 under the doctrine of res judicata or claim preclusion."

18 Ex. 1 at p. 9, ls. 10-23.

19 COUNT II

20 29. By Arizona Supreme Court judgment and order dated February 12, 2008
21 (SB - 07-0189-D), Respondent was suspended for six months and one day, beginning
22 on March 13, 2008. Ex. 3.

23 30. Respondent failed to notify the courts, his clients, adverse parties and
24 opposing counsel by registered or certified mail, return receipt requested, of his
25 suspension. Complaint ¶ 45.

26 **III. CONCLUSIONS OF LAW**

27 31. Respondent's conduct in relation to Count One violated ERs 3.4(c),
28 4.4(a), and 8.4(d), and Rule 53(c).²

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² The State Bar also argued that Respondent's conduct violated ER 3.1, 3.3(a), 4.1 and 8.4(c). This hearing officer declines to find such violations by clear and convincing evidence. However, such additional violations, if they existed, would not change the recommendations herein. The facts found demonstrate that Respondent deliberately ignored court orders in an attempt to game the simultaneous court proceedings and are best described as violations of ER 3.4(c), ER 4.4(a) and ER 8.4(d).

1 32. Respondent's filing of the Motion for Summary Judgment with the
2 Bankruptcy Court was frivolous and was not filed in good faith.

3 33. Respondent's filing of the Motion to file the Second Amended Complaint
4 with the Bankruptcy Court was frivolous and was not filed in good faith.

5 34. Respondent attempted to delay the proceeding for no substantial purpose
6 other than delay when he told the Bankruptcy Court he needed additional discovery
7 before he could file a Second Amended Complaint.

8 35. Respondent knowingly disobeyed an obligation under the rules of the
9 tribunal when he failed to file the Motion for Summary Judgment on the issues outlined
10 by the Bankruptcy Court.

11 36. Respondent knowingly disobeyed an obligation under the rules of the
12 tribunal when he failed to stop the Special Action proceedings as ordered and failed to
13 litigate the Note issue in the Bankruptcy Court.

14 37. Respondent engaged in conduct prejudicial to the administration of justice
15 when he took the position at the February 13, 2007 hearing that following dismissal in
16 the Bankruptcy Court, he was allowed to proceed in the Superior Court.

17 38. Respondent's actions in this matter, attempting to manipulate two
18 simultaneous Court proceedings in a manner designed to avoid a decision on the merits
19 while at the same time attempting to obtain favorable result on the underlying issues on
20 a non-merits basis, was prejudicial to the administration of justice.

21 39. Respondent willfully violated the Bankruptcy Court's order when he
22 failed to file the Notice with the Superior Court to prevent further pleadings being filed
23 with it.

24 40. Respondent's conduct as described in Count II violated Rule 72(a), as he
25 failed to give notice of his suspension to clients, adverse parties, other counsel and the
26 courts.

27

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IV. RECOMMENDED SANCTION

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).

A. The ABA Standards for Imposing Lawyer Sanctions

ABA *Standard* 3.0 provides that four criteria should be considered when imposing discipline: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. The ABA *Standards* indicate that the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious." *Matter of Taylor*, 180 Ariz. 290, 292; 883 P.2d 1046 (1994).

1. The Duty Violated.

The Respondent violated ERs 3.4, 4.4, and 8.4(d). Pursuant to ABA *Standard* 6.22: "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."

2. The Lawyer's Mental State.

Respondent acted knowingly.

3. Actual or Potential Injury.

1 Here, the potential injuries actually occurred. Respondent's client suffered a
2 dismissal with prejudice; the legal proceeding was interfered with; and a party suffered
3 needless litigation.

4 4. Aggravating and Mitigating Factors.

5 In this case, the following aggravating factors are present:

6 *Standard 9.22(a)* prior disciplinary offenses. Respondent is currently on a six
7 month and 1 day suspension. He could have applied for reinstatement as of September
8 14, 2008, but has not done so.

9 *Standard 9.22(e)* bad faith obstruction of disciplinary process. Respondent has
10 failed to respond in the formal matter.

11 *Standard 9.22(i)* substantial experience in the practice of law. Respondent has
12 been an Arizona attorney for 15 years.

13 There are no mitigating factors.

14 **B. Proportionality Analysis**

15 Sanctions against lawyers must have internal consistency to maintain an effective
16 and enforceable system; therefore, the court looks to cases that are factually similar to
17 the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171, (1988).

18 The State Bar presented the following matter, which this hearing officer finds
19 sufficiently similar to demonstrate proportionality. In *In re Cayce*, SB-06-0177-
20 D(2007), the lawyer filed a Guardianship Petition and appeared at the hearing without
21 giving prior notice to the mother. She filed incomplete and misleading documents with
22 the court and thereafter, failed to take reasonable measures to remedy the situation. Ms.
23 Cayce violated ERs 1.1, 1.4(a), 1.4(b), 3.1, 3.3, 3.4, 4.1 and 4.4(a). In aggravation: she
24 had substantial experience in the practice of law. In mitigation, she: had no prior
25 disciplinary record, she made a timely good faith effort to rectify the consequences of
26 her misconduct, there was full and free disclosure, other penalties and sanctions were
27 imposed and she was remorseful. Her mental state was "knowingly" and there was
28 actual and potential injury. Ms. Cayce was suspended for 90-days, and placed on one

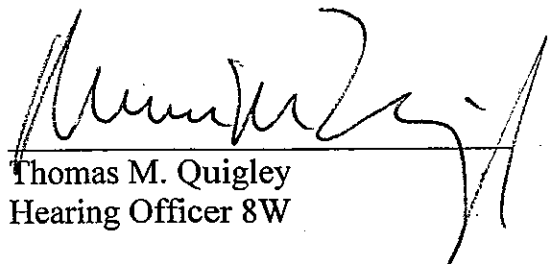
1 year probation.

2 The conduct in Count One involved here is somewhat similar to Cayce.
3 However, here, Respondent has prior discipline, and made no efforts to rectify his
4 actions or participate in this matter. Moreover, Respondent also has failed to comply
5 with his professional obligations arising out of his prior discipline.

6 **V. CONCLUSION**

7 Upon consideration of the facts, application of the *Standards*, including
8 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer
9 recommends suspension for one year, imposition of two years probation upon
10 reinstatement with such conditions as may be appropriate to be determined upon
11 reinstatement, and be ordered to pay all costs and expenses herein.

12 DATED this 15th day of January, 2009.

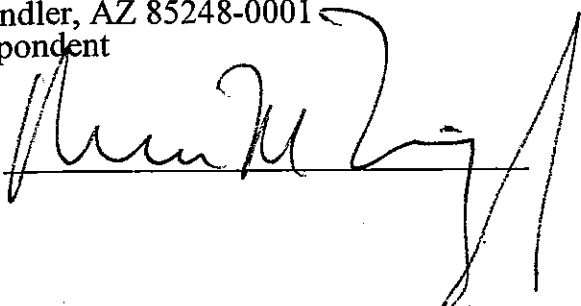
13
14 
15 Thomas M. Quigley
Hearing Officer 8W

16 Original filed this 15th day of January,
17 2009 with the Disciplinary Clerk of the Supreme Court

18 Copy of the foregoing mailed this 15th
19 day of January, 2009, to:

19 Shauna R. Miller
20 Senior Bar Counsel
21 State Bar of Arizona
4201 N. 24th Street, Suite 200
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22 Dale E. Whiting
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24 Respondent

25 By: 
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