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HEARING OFFICER 7M

FILED

MAR 26 2009

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY R. D'Amore

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

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

No. 08-0341, 08-0819, 08-0918,
09-0140

**MICHAEL R. KARBER,
Bar No. 016230**

**HEARING OFFICER'S
REPORT**

Respondent.

(Assigned to Hearing Officer 7M,
Daniel P. Beeks)

The parties have filed a Tender of Admissions and Agreement for Discipline by Consent ("Tender"), and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") agreeing that Respondent Michael R. Karber ("Respondent" or "Karber") should: (1) be suspended for twenty-one (21) months, retroactive to July 28, 2008, the date of his interim suspension; (2) be placed on probation upon reinstatement, with terms and conditions to include participation in the State Bar's Member Assistance

1 Program; and (3) be ordered to pay all of the costs and expenses of these
2 disciplinary proceedings

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4 The State Bar was represented by Roberta L. Tepper in negotiating the
5 Tender, and Karber was represented by J. Scott Rhodes . The Hearing Officer has
6 determined that no hearing is necessary in order to rule on the Tender.

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8 By entering into the Tender, Karber has waived his right to a formal
9 disciplinary hearing to which he would otherwise have been entitled pursuant to
10 Rule 57(i), Ariz.R.Sup.Ct., and the right to testify or present witnesses on his
11 behalf at a hearing. Karber has waived all motions, defenses, objections or
12 requests that he has made or raised, or could assert, assuming that the
13 Commission and the Supreme Court approve the Tender and the Hearing
14 Officer's Report.

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16 For reasons discussed in more detail below, the Hearing Officer
17 recommends that the Tender be approved and accepted. The parties understand,
18 however, that this agreement is subject to review by the Disciplinary
19 Commission, and by the Arizona Supreme Court. The State Bar and Karber have
20 agreed that if the Tender is rejected by the Disciplinary Commission or by the
21 Arizona Supreme Court, the parties' conditional admissions and dismissals shall
22 be deemed withdrawn.
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STIPULATED FACTS

1. At all times relevant, Karber was an attorney licensed to practice law in the state of Arizona. Karber was first admitted to practice in Arizona on October 21, 1995.

2. From 1994 until February 13, 2008, Karber was licensed to practice law in the state of Oregon.

3. Karber was summarily suspended by the Board of Governors of the State Bar of Arizona effective March 21, 2008, and again effective May 30, 2008.

4. Karber was placed on interim suspension by Order of the Supreme Court of Arizona filed on July 28, 2008.

COUNT ONE (File no. 08-0341/State Bar of Arizona)

5. On or about January 8, 2008, Karber tendered his resignation from the State Bar of Oregon.

6. The Oregon Supreme Court accepted Karber's resignation from the State Bar of Oregon on February 13, 2008.

7. At the time of Karber's resignation, two disciplinary cases were pending against him in Oregon. Oregon State Bar Case No. 06-105 alleged that:

- a. Karber admits that on or about March 7, 2003, he was arrested for driving under the influence of intoxicants in Linn County, Oregon

(the "Linn DUII"), and as a result, was prosecuted in the Linn County Circuit Court, Case No. 03030637.

b. Karber admits that on June 23, 2003, he was convicted of misdemeanor driving under the influence of intoxicants in violation of Oregon law.

c. Karber admits that upon his conviction, he was placed on probation for two years with the conditions that he report monthly to a Linn County probation officer; pay court-ordered financial obligations and supervision fees; participate in an evaluation and recommended treatment; abstain from use of intoxicants and controlled substances; not move from Oregon without written permission of his probation officer; and other terms for the Linn DUII.

d. Karber admits that on or about March 25, 2003, he was arrested in Clark County, Washington for driving under the influence of intoxicants in violation of Washington law, and was prosecuted in Clark County District Court Case No. 274690 (the "WA DUII").

e. Karber admits that on or about September 22, 2003, he failed to appear for a scheduled court proceeding in the WA DUII, and that as a result, the court issued a warrant for his arrest.

- 1 f. Karber did not appear as required and as of November 20, 2006, the
2 warrant remained outstanding. Karber denies this allegation but
3 believes that a warrant issued by the Clark County District Court
4 remains pending to date.
5
- 6 g. Upon information and belief, Karber admits that on or about
7 November 11, 2003, the Oregon Department of Motor Vehicles
8 suspended his license to operate a motor vehicle because he failed to
9 pay court-ordered financial obligations.
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- 11 h. Upon information and belief, Karber admits that because he failed to
12 provide proof of insurance and financial responsibility as required by
13 Oregon law, on or about June 22, 2004, the Oregon Department of
14 Motor Vehicles suspended his license to operate a motor vehicle.
15
- 16 i. Karber admits that on or before July 18, 2004, he consumed
17 intoxicants in violation of the terms of his probation in the Linn
18 DUII.
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- 20 j. Karber admits that on July 18, 2004, he operated a motor vehicle in
21 violation of Oregon law while his license was suspended. Karber
22 claims that he did not believe that his operation of the motor vehicle
23 was a violation of Oregon law.
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1 k. Karber admits that on July 18, 2004, he operated a motor vehicle and
2 was involved in a motor vehicle accident. Karber also admits that he
3 was arrested in Multnomah County, Oregon, for driving under the
4 influence of intoxicants, driving while suspended, driving while
5 uninsured, and other charges (the "Multnomah DUII").
6

7 l. Karber admits that on or about August 18, 2004, the Oregon
8 Department of Motor Vehicles suspended his license to operate a
9 motor vehicle because he had allegedly refused to take a breath or
10 intoxilyzer test in connection with the Multnomah DUII, but denies
11 that he actually "refused" to take a breath or intoxilyzer test.
12

13 m. Upon information and belief, Karber admits that on or about October
14 16, 2004, the Oregon Department of Motor Vehicles suspended his
15 license to operate a motor vehicle because he failed to file an
16 accident report for accident relating to the Multnomah DUII, in
17 violation of Oregon law.
18

19 n. Between about June 23, 2003, and November 2004, Karber failed to
20 comply with the conditions of probation in the Linn DUII including,
21 but not limited to, failing to complete a DUII evaluation and
22 treatment placement; using alcohol and controlled substances; failing
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to attend a victim impact panel and provide verification of his attendance to his probation officer; failing to report monthly to a Linn County probation officer; failing to pay court-ordered financial obligations and supervision fees; moving from Oregon without written permission of his probation officer; and other terms. Karber denies this allegation.

- o. On or about September 17, 2004, the court in the Linn DUII issued a warrant for Karber's arrest for violation of the terms of his probation. On or about November 8, 2004, Karber appeared before the court and admitted violating the terms of his probation. The court continued Karber's probation on the same terms and conditions. Karber does not know whether a warrant was issued, but he admits to the rest of the allegation.
- p. On or about December 28, 2004, Karber was convicted of driving while suspended and driving while uninsured, in violation of Oregon law. Karber denies that he was "convicted" of the specified offenses but admits that he was found responsible for them, and alleges that they were civil infractions, not criminal.

- 1 q. Between November 2004, and November 2006, Karber failed to
2 comply with the conditions of probation in the Linn DUII, including
3 but not limited to, failing to complete a DUII evaluation and
4 treatment placement; using alcohol and controlled substances; failing
5 to report monthly to a Linn County probation officer; failing to pay
6 court-ordered financial obligations and supervision fees; and other
7 terms. Karber denies this allegation.
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10 r. On or about April 18, 2005, the court issued a warrant for Karber's
11 arrest for violation of the terms of his probation in the Linn DUII.
12 Karber does not know whether a warrant was issued for his arrest,
13 and alleges that he has never received notice of such a warrant.
14
15 s. On or about July 13, 2006, Disciplinary Counsel of the State Bar of
16 Oregon requested Karber's explanation and account of the matter by
17 August 3, 2006. Karber did not respond. Karber denies that he did
18 not respond.
19
20 t. On or about August 4, 2006, Disciplinary Counsel of the State Bar of
21 Oregon again requested Karber's explanation and account of the
22 matter, by August 11, 2006. Karber did not respond. Karber denies
23 that he did not respond.
24
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1 u. Karber was required to, but did not, respond to a lawful demand for
2 information from a disciplinary authority pursuant to Oregon's Rules
3 of Professional Conduct. Karber denies that he did not respond.
4

5 Unless noted as being admitted above, such conduct was not proven in an
6 evidentiary proceeding in Oregon and, was not deemed admitted for purposes of
7 this disciplinary proceeding in Arizona.
8

9 8. In his resignation from the Oregon State Bar dated January 8, 2008,
10 Karber stated that he did not wish to defend against the charges brought by the
11 Oregon State Bar.
12

13 9. After receiving the above information from the Oregon State Bar,
14 Bar counsel sent Karber a letter at his address of record, making him aware of the
15 allegations against him, and requesting that he respond within 20 days.
16

17 10. Karber failed to respond to Bar counsel.
18

19 11. On April 16, 2008, Bar counsel sent Karber another letter at his
20 address of record reminding him of his obligation to respond to the inquiries and
21 cooperate in the State Bar of Arizona's investigation, and that failure to do so
22 was, in itself, grounds for discipline. Bar counsel requested a reply from Karber
23 within 10 days of the date of the letter.
24

25 12. Karber again failed to respond.

COUNT TWO (File no. 08-0819/State Bar of Arizona/Judicial Referral)

13. On April 8, 2008, Karber appeared at the Scottsdale City Court for a pretrial conference with the prosecutor on behalf of a defendant, Corbin Sitton ("Mr. Sitton"), in case number M0751-TR2008005950.

14. During or at the end of the pretrial conference, Mr. Sitton advised the prosecutor, Douglas Jann ("Mr. Jann"), that Karber, who was initially present, had arrived, but appeared to be intoxicated. Karber was not in a courtroom at the time.

15. Based on his observations, Mr. Jann informed the Judge's bailiff of Karber's condition.

16. Karber subsequently left the courthouse and Mr. Sitton's matter was rescheduled.

17. Karber admits that he was intoxicated when he appeared at the courthouse and met with the prosecutor on April 8, 2009, on Mr. Sitton's behalf.

18. On May 5, 2008, Karber again appeared in Scottsdale City Court to represent a criminal defendant, Eric Harroun ("Mr. Harroun"), at trial in case number M0751-2008005892, before the Honorable Wendy S. Morton ("Judge Morton").

1 19. Karber appeared in court and spoke with Mr. Jann, who was again
2 prosecuting cases in that court.

3 20. Karber stated that he was going to file a notice of appearance and
4 represent Mr. Harroun at trial that day.

5 21. Karber then asked for a copy of the police report.

6 22. Based on the odor of alcohol on Karber's breath and his speech
7 appearing to be slurred, Mr. Jann believed that Karber was intoxicated.
8

9 23. Mr. Jann asked Karber to wait while he conducted another trial; after
10 that trial was concluded, Mr. Jann notified the courtroom bailiff of his
11 observations of Karber.
12

13 24. Judge Morton thereafter took the bench and asked Karber if he was
14 ready to proceed with Mr. Harroun's trial.
15

16 25. Karber informed Judge Morton that he was ready to proceed,
17 whereupon Judge Morton took a recess.
18

19 26. Shortly thereafter, Scottsdale police officers came to the courtroom,
20 made contact with Karber.

21 27. Karber submitted to a preliminary breath test.

22 28. Upon information and belief, Karber's blood alcohol concentration,
23 as measured by that preliminary breath test, was .046 percent.
24

1 29. Judge Morton rescheduled Mr. Harroun's trial.

2 30. At the time the trial was continued, several witnesses were present in
3 the courtroom, prepared to proceed, including two witnesses for the State of
4 Arizona and one or more witnesses who were prepared to testify for the
5 defendant.
6

7 31. Judge Morton scheduled an order to show cause hearing for Karber,
8 to be conducted on May 15, 2008.
9

10 32. Judge Morton ultimately held Karber in contempt for his failure to
11 appear at the show cause hearing.
12

13 33. Karber admits that he was intoxicated when he appeared in Court on
14 May 5, 2008.

15 34. On May 23, 2008, Bar counsel sent Karber a letter at his address of
16 record, notifying him of the commencement of a screening investigation based on
17 the facts supplied by Judge Morton, and requesting that Karber respond within 20
18 days from the date of the letter.
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20 35. Karber failed to respond. Karber affirmatively asserts that during
21 this time he was incarcerated with extremely limited access to writing materials
22 and was therefore unable to respond to the State Bar's inquiry.
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1 36. On June 25, 2008, Bar counsel sent Karber another letter (at his
2 address of record) reminding him Respondent of his obligation to cooperate with
3 the disciplinary investigation and that failure to do so was, in itself, grounds for
4 discipline.
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6 37. Bar counsel requested that Karber respond within ten days of the
7 date of the June 25, 2008 letter.
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9 38. Karber failed to respond. Karber affirmatively asserts that during
10 this time he was incarcerated with extremely limited access to writing materials
11 and was therefore unable to respond to the State Bar's inquiry.
12

13 **COUNT THREE (File No. 08-0918/Sitton)**

14 39. In or about March, 2008, Nancy Sitton ("Ms. Sitton") retained
15 Karber to represent her son, Corbin Sitton ("Mr. Sitton") in a matter before the
16 Scottsdale City Court.
17

18 40. Ms. Sitton paid Karber \$500 to represent Mr. Sitton.
19

20 41. On or about March 31, 2008, Ms. Sitton again telephoned Karber to
21 inquire about Mr. Sitton's case in advance of a court appearance scheduled for
22 April 8, 2008.
23

24 42. Karber assured Ms. Sitton that all was well and that he would see her
25 in court on April 8, 2008.

1 43. Mr. Sitton's matter was scheduled to be heard by the Court at 9:30
2 a.m. on April 8, 2008.

3 44. Ms. Sitton and Mr. Sitton were both present; Ms. Sitton had missed
4 work to be present and Mr. Sitton had missed a day of school.

6 45. Karber did not appear in court on April 8, 2008, until 10:30 a.m.

7 46. When Karber did appear and speak to Ms. Sitton and Mr. Sitton, it
8 was apparent to them that Karber was intoxicated.
9

10 47. Mr. Sitton's matter was rescheduled, apparently due to Karber's
11 intoxicated condition.

12 48. Upon information and belief, Ms. Sitton terminated Karber's
13 representation after the April 8, 2008 court appearance. Ms. Sitton did not
14 receive a refund of any portion of the fee she had paid to Karber.
15

16 49. In a June 26, 2008 letter sent to Karber's address of record, Bar
17 counsel notified Karber of Ms. Sitton's allegations, and requested that he respond
18 within 20 days from the date of the letter.
19

20 50. Karber failed to respond. Karber affirmatively asserts that during
21 this time he was incarcerated with extremely limited access to writing materials
22 and therefore was unable to respond to the State Bar's inquiry.
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1 51. In an August 11, 2008 letter sent to Karber at his address of record,
2 Bar counsel reminded Karber of his obligation to cooperate with the disciplinary
3 investigation, and that failure to do so was, in itself, grounds for discipline.
4

5 52. Karber failed to respond. Karber affirmatively asserts that during
6 this time he was incarcerated with extremely limited access to writing materials
7 and was therefore unable to respond to the State Bar's inquiry.
8

9 **COUNT FOUR (File No. 09-0140/Self-report)**

10 53. On January 21, 2007, Karber was observed driving a motor vehicle
11 within Maricopa County.
12

13 54. Witnesses contacted law enforcement officials, who found Karber in
14 the driver's seat of the vehicle, with the keys to the vehicle in his hand.

15 55. Blood testing was performed on Karber and showed a blood alcohol
16 concentration of .396.
17

18 56. Karber thereafter entered guilty pleas to Endangerment, a Class 6
19 undesignated felony, and Driving Under the Influence ("DUI"), a Class 1
20 misdemeanor. Karber was sentenced to concurrent probationary terms.
21

22 57. As a condition of probation in the DUI, Karber served a term of
23 incarceration in the Maricopa County Jail, from May 16, 2008 to October 20,
24 2008.
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- a. Karber shall be suspended for 21 months, retroactive to July 28, 2008,
the effective date of the interim order suspending Karber;
- b. Should Karber be reinstated to the practice of law, Karber shall be
placed on probation for a period of two years, with the terms and
conditions of probation to be determined at the time of reinstatement,
but to include, at a minimum, the following:
 1. The probation period should commence upon the entry of any
order of reinstatement and continue for two years after the date
that all parties have signed the "Terms and Conditions of
Probation";
 2. Karber shall be required to contact the director of the State
Bar's Member Assistance Program (MAP) within 30 days of
the date of the order of reinstatement;
 3. Karber shall be required to submit to a MAP assessment;
 4. The director of MAP shall be required to develop "Terms and
Conditions of Probation" based upon the assessment and the
terms should be incorporated into the order of probation;
 5. Karber shall be required to comply with any other terms and
conditions deemed appropriate at the time of the reinstatement

proceedings, which shall be incorporated into the order of probation;

6. Karber shall be required to refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona;

7. If Karber fails to comply with any of the foregoing probation terms, and the State Bar receives information regarding such non-compliance, Bar Counsel shall file with the Probable Cause Panelist a Notice of Noncompliance, and the Probable Cause Panelist may refer the matter to a hearing officer to conduct a hearing at the earliest applicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Karber has failed to comply with any of the foregoing conditions, the burden of proof shall be on the State Bar to prove noncompliance by clear and convincing evidence.

c. Karber shall be required to pay all costs incurred by the State Bar in bringing these disciplinary proceedings, as described in the Itemized

1 Statement of Costs and Expenses attached to the Tender as Exhibit

2 "A.."

3
4 d. Karber shall also be required to pay all costs incurred by the
5 Disciplinary Commission, the Supreme Court and the Disciplinary
6 Clerk's Office in this matter.

7 **APPROPRIATENESS OF AGREED UPON SANCTIONS**

8 65. In determining the appropriate sanction, Arizona generally looks to
9 the American Bar Association Standards for Imposing Lawyer Discipline (1992)
10 ("ABA Standards"). *In re Van Dox*, 214 Ariz. 300, 303, ¶ 11, 152 P.3d 1183,
11 1186 (2007).
12

13 66. The ABA Standards list the following factors to be considered in
14 imposing the appropriate sanction:
15

- 16 a. the duty violated;
17 b. the lawyer's mental state;
18 c. the actual or potential injury caused by the lawyer's misconduct; and
19 d. the existence of aggravating or mitigating circumstances.
20

21 ABA Standard 3.0. *Van Dox* at ¶ 11.

22 67. The Hearing Officer has considered all of these required factors.
23
24
25

1 **Duties Violated**

2 68. Karber has conditionally admitted that he violated the following
3 duties:

- 4 a. ER 1.3 (Diligence);
5
6 b. ER 1.4 (Communication);
7
8 c. ER 1.16(d) (Termination of Representation);
9
10 d. ER 8.1(b) (Failure to Respond to Disciplinary Authority);
11
12 e. ER 8.4(b) (Criminal Act Reflecting Adversely on Attorney);
13
14 f. ER 8.4(d) (Engaging in Conduct Prejudicial to Administration of
15 Justice);
16
17 g. Rule 53(d), Ariz.R.Sup.Ct. (Refusing to Cooperate with State Bar);
18 and
19 h. Rule 53(f), Ariz.R.Sup.Ct (Failure to Furnish Information in
20 Disciplinary Investigation).

21 **Karber's Mental State**

22 69. Karber and the State Bar did not expressly discuss Karber's mental
23 state in either the Tender or the Joint Memorandum.

24 70. In the Joint Memorandum, however, Karber and the State Bar agreed
25 that the appropriate provisions of the ABA Standards were Standard 5.12 and 7.2,
both of which apply when a respondent acts "knowingly."

1 71. The ABA standards define “knowledge” as the “conscious awareness
2 of the nature or attendant circumstances of the conduct but without the conscious
3 objective or purpose to accomplish a particular result.”
4

5 72. It appears to the Hearing Officer that some of Karber’s violations,
6 particularly his violations of ER 8.4 (criminal acts, and conduct prejudicial to the
7 administration of justice) arising out of his criminal convictions in Oregon which
8 are the subject of Count One, may have been intentional. *See, e.g., In re Conduct*
9 *of McDonough*, 77 P.3d 306, 310 (Ore. 2003) (repeated convictions for driving
10 while suspended and driving while intoxicated in violation of Oregon law were
11 intentional and demonstrated a substantial disrespect for the law). A conviction of
12 a crime is conclusive evidence of guilt of the crime, and its associated mental
13 state. *See* Rule 53(h)(1), Rules of the Supreme Court; *In re Lassen*, No. 06-1529
14 (Disciplinary Commission, Feb. 9, 2009). Oregon law, however, provides that
15 defendants can be convicted of both driving while intoxicated and driving while
16 suspended without any showing of a culpable mental state. *State v. Miller*, 366,
17 788 P.2d 974 (Ore. 1990) (no mental state required for conviction of driving
18 under the influence of intoxicants); *State v. Buttrey*, 651 P.2d 1075 (Ore. 1982)
19 (no mental state required for conviction of driving while suspended).
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1 73. The Hearing Officer finds that even if some of Karber's criminal acts
2 in Washington and/or Oregon were considered to have been committed
3 intentionally, the stipulated sanctions would still be appropriate.
4

5 **Actual or Potential Injury**

6 74. Karber's actions caused actual injury to the Sittons and to Harroun.

7 75. Karber's other actions caused at least potential injury.
8

9 76. Because Standard 7.2 applies to both actual and potential injury, it
10 matters little whether Karber's other conduct caused actual, or only potential
11 injury. The presumptive sanction is the same – suspension.
12

13 **Aggravating and Mitigating Circumstances**

14 77. The parties have agreed that the following aggravating factors are
15 applicable.¹
16
17

18 ¹ Although not mentioned by the parties, Standard 9.22(e), bad faith
19 obstruction of the disciplinary proceedings, might also be applicable. The
20 Tender establishes that Karber initially failed to respond to the State Bar's
21 April, 2008 written request for information regarding his issues in Oregon.
22 Although Karber blames some of his later failures to respond to inquiries from
23 the State Bar on the fact that he was in jail and had limited access to writing
24 materials, he was not jailed until May 16, 2008. There is no excuse in the
25 Tender for why he could not have cooperated before we went to jail.
Ultimately, however, he retained counsel and cooperated in the disciplinary
process, agreeing to enter into the Tender. This ultimate cooperation would be
a mitigating factor that would balance out the initial failure to cooperate. *See,*
e.g., In re Van Doo, 214 Ariz. 300, 307, ¶ 37 152 P.3d 1183, 1190 (2007).

1 a. Standard 9.22(a) Prior disciplinary history. Karber was censured by
2 the Supreme Court of Arizona in a reciprocal discipline matter in
3 Supreme Court NO. SB-07-0033-RD (2007), based on discipline
4 imposed in the State of Washington. This conduct which was the
5 subject of this prior discipline appears to overlap with the current
6 violations, and is therefore given little to no weight.

7
8 b. Standard 9.22(c) Pattern of misconduct. Respondent's repeated
9 convictions for driving under the influence, driving while suspended,
10 and driving without insurance, as well as his repeated appearances in
11 court while intoxicated, demonstrate a pattern of misconduct.²

12
13 c. Standard 9.22(d) Multiple offenses. The pattern of misconduct
14 discussed in the previous paragraph demonstrates multiple instances of
15 misconduct.
16

17 d. Standard 9.22(i) Substantial experience in the practice of law.

18 Although Karber has been a licensed attorney since 1994, when he was
19 admitted in Oregon, the parties have conditionally agreed, and the
20
21

22 ² The fact that Karber was arrested several times, both before and after
23 being involved in alcohol related motor vehicle accidents, indicates that even
24 after being forcefully put on notice that his conduct was criminal, Karber was
25 unwilling or unable to conform his behavior to the law. *In re Horwitz*, 180
Ariz. 20, 28, 881 P.2d 352, 360 (1994).

1 Hearing Officer agrees, that the misconduct in the instant matter is not
2 the kind of conduct that is more or less likely based on the experience
3 level of the attorney.³ Because the Hearing Officer cannot say that
4 Karber's experience would make it more likely that he "would have
5 known better" than to drive or appear in court while intoxicated, no
6 weight has been given to this factor.
7

8
9 78. The parties have agreed that the following mitigating factors are
10 applicable:

11 a. Standard 9.32(c) Personal or emotional problems. Karber clearly
12 suffers from alcohol dependency. The Hearing Officer has reviewed
13 the evidence supporting this mitigating factor that was attached to
14 the Joint Memorandum as Exhibit "A", but which was filed under
15 seal. The Hearing Officer agrees that the evidence supports the
16 conclusion that Karber's alcohol dependency was the primary, if not
17 sole, cause of his misconduct.
18

19
20 b. Standard 9.32(k) Imposition of other penalties or sanctions.
21 Respondent served a four-month active sentence in the Maricopa
22 County Jail as a condition of his probationary sentence in the
23

24 ³ *In re Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994).
25

1 Endangerment/DUI case. He was also held in contempt by Judge
2 Morton. *See In re Cheadle*, No. SB-01-0116-D, 2001 Ariz. LEXIS
3 156 (2001) (prior jail time for alcohol offenses, and finding of
4 contempt held to be mitigating factors under Standard 9.32(k)).
5

6 **Application of Standards**

7 79. The theoretical framework analysis contained in the ABA Standards
8 states that where there are multiple acts of misconduct, the sanction should be
9 based upon the most serious misconduct, with the other acts being considered as
10 aggravating factors. *See also In re Moak*, 205 Ariz. 351, 353, ¶ 9, 71 P.3d 343,
11 345 (2003).
12

13 80. The parties have stipulated in the Joint Memorandum, and the
14 Hearing Officer agrees, that Karber's failures in his duty to his clients, the
15 profession and the legal system, by his recent conviction for Endangerment, a
16 Class 6 undesignated felony, and misdemeanor Driving Under the Influence, and
17 by his appearances in court while under the influence of alcohol, as described in
18 Counts One and Two of the Tender, are the most serious violations.
19 Counts One and Two of the Tender, are the most serious violations.
20

21 81. The parties have stipulated, and the Hearing Officer agrees that the
22 balance of the aggravating and mitigating factors does not justify any variance
23 from the presumptive sanction of a suspension.
24 from the presumptive sanction of a suspension.
25

1 82. The commentary to Standard 2.3 indicates that when a suspension is
2 warranted, a minimum 6-month suspension is generally necessary to protect the
3 public. The commentary also indicates that it is preferable to suspend an attorney
4 for a period of greater than six months to protect the public and ensure that the
5 attorney is required to establish that he or she has been rehabilitated before being
6 readmitted to the practice of law. *See also In re Shannon*, 179 Ariz. 52, 71, 876
7 P.2d 548, 567 (1994) (purpose of the presumption that a suspension should be for
8 at least six months is to protect the public and to ensure effective demonstration
9 of rehabilitation).

12 83. The parties have stipulated to a 21 month suspension, retroactive to
13 July 28, 2008, the date of his interim suspension. The Hearing Officer finds that
14 the agreed upon suspension of 21 months, which will not expire until April of
15 2010 is adequate to protect the public and will allow sufficient time for Karber to
16 demonstrate that he has overcome his addiction, and maintained a sufficient
17 period of sobriety to establish that he has been rehabilitated.

20 84. Retroactive suspensions are appropriate in cases such as this,
21 involving interim suspensions resulting from substance abuse problems. *See, e.g.,*
22 *In re Loftus*, 171 Ariz. 672, 675-76, 832 P.2d 689, 692-93 (1992).

1 85. The Hearing Officer believes that the public will be adequately
2 protected after Karber's 21 month retroactive suspension by the terms of the
3 probation agreed upon in the Tender.
4

5 **PROPORTIONALITY**

6 86. The last step in determining if a particular sanction is appropriate is
7 to assess whether the discipline is proportional to the discipline imposed in
8 similar cases. *In re Peasley*, 208 Ariz. 27, 41, ¶ 62, 90 P.3d 764, 778 (2004).
9 "This is an imperfect process because no two cases are ever alike." *In re Owens*,
10 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). As the Arizona Supreme Court
11 has observed:
12

13 Consideration of the sanctions imposed in similar cases is
14 necessary to preserve some degree of proportionality,
15 ensure that the sanction fits the offense, and avoid
16 discipline by whim or caprice. . . . Proportionality review
17 however, is an imperfect process. . . . Normally the fact
18 that one person is punished more severely than another
19 involved in the same misconduct would not necessarily
20 lead to a modification of a disciplinary sanction. Both the
21 State Bar in its capacity as prosecutor and the
22 Disciplinary Commission in its quasi-judicial capacity
23 have broad discretion in seeking discipline and in
24 recommending sanctions.
25

In re Dean, 212 Ariz. 221, 225, ¶ 24, 129 P.3d 943, 947 (2006).

23 87. Because perfect uniformity cannot be achieved, the Arizona Supreme
24 Court has long recognized that the discipline in each situation must be tailored for
25

1 the individual case. *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997).
2 The Hearing Officer has evaluated the agreed upon sanction to make sure that it is
3 adequately tailored for the individual case, while keeping in mind the State Bar's
4 broad discretion in recommending sanctions. *See In re Dean*, 212 Ariz. 221, 225,
5 ¶ 24, 129 P.3d 943, 947 (2006) (State Bar, in its capacity as prosecutor has broad
6 discretion in seeking discipline and in recommending sanctions).
7

8
9 88. The Hearing Officer has considered the cases cited by the parties in
10 the Joint Memorandum, and has performed independent research regarding
11 similar cases.

12
13 89. The cases cited by the parties in the Joint Memorandum demonstrate
14 that the 21 month retroactive suspension is within the range of sanctions imposed
15 in similar cases involving attorneys suffering from addiction.

16
17 90. In addition to those cases cited by the parties in the Joint
18 Memorandum, the Hearing Officer has also relied upon *In re Byrd*, No. SB-02-
19 0132-D, 2002 Ariz. LEXIS 225 (2002) and *In re Loftus*, 171 Ariz. 672, 832 P.2d
20 689 (1992).

21
22 91. In *Byrd*, an attorney received an 18 month retroactive suspension as
23 a result of numerous ethical violations related to his substance abuse problems,
24
25

1 where the attorney had acknowledged his addiction, the consequences of his
2 misconduct, and had sought treatment for his addiction.

3
4 92. In *Loftus*, the attorney received a two year retroactive suspension for
5 numerous ethical violations related to alcoholism, despite the fact that the
6 attorney did not cooperate with the discipline process. Notably, the retroactive
7 date resulted in no future suspension.

8
9 93. Based upon a review of Arizona cases involving attorneys receiving
10 discipline for issues resulting from severe alcoholism, the Hearing Officer finds
11 that the 21 month retroactive suspension agreed upon by the parties is within the
12 range of sanctions imposed in similar cases.

13
14 94. Therefore, the Hearing Officer finds that the stipulated suspension is
15 proportional to sanctions imposed in similar cases.

16 **CONCLUSION**

17
18 95. For the reasons discussed above, the Hearing Officer recommends
19 that the following punishment be imposed upon respondent Michael R. Karber:

- 20 a. Karber should be suspended for 21 months, retroactive to July 28,
21 2008, the effective date of the interim order suspending Karber;
22
23 b. Should Karber be reinstated to the practice of law, he should be
24 placed on probation for a period of at least two years, with the terms
25

1 and conditions of probation to be determined at the time of
2 reinstatement, but to include, at a minimum, the following:

- 3
- 4 i. The probation period should commence upon the entry of any
5 order of reinstatement and continue for two years after the date
6 that all parties have signed the "Terms and Conditions of
7 Probation";
- 8
- 9 ii. Karber should be required to contact the director of the State
10 Bar's Member Assistance Program (MAP) within 30 days of
11 the date of the order of reinstatement;
- 12
- 13 iii. Karber should be required to submit to a MAP assessment;
- 14
- 15 iv. The director of MAP should be required to develop "Terms
16 and Conditions of Probation" based upon the assessment and
17 the terms should be incorporated into the order of probation;
- 18
- 19 v. Karber should be required to comply with any other terms and
20 conditions deemed appropriate at the time of the reinstatement
21 proceedings, which should be incorporated into the order of
22 probation
- 23
- 24
- 25

1 vi. Karber should be required to refrain from engaging in any
2 conduct that would violate the Rules of Professional Conduct
3 or other rules of the Supreme Court of Arizona;
4

5 vii. If Karber fails to comply with any of the foregoing probation
6 terms, and the State Bar receives information regarding such
7 non-compliance, Bar Counsel should be obligated to file with
8 the Probable Cause Panelist a Notice of Noncompliance, and
9 the Probable Cause Panelist should refer the matter to a
10 hearing officer to conduct a hearing at the earliest applicable
11 date, but in no event later than 30 days after receipt of notice,
12 to determine whether a term of Karber's probation has been
13 breached and, if so, to recommend an appropriate sanction. If
14 there is an allegation that Karber has failed to comply with any
15 of the foregoing conditions, the burden of proof should be
16 placed on the State Bar to prove noncompliance by clear and
17 convincing evidence.
18
19
20

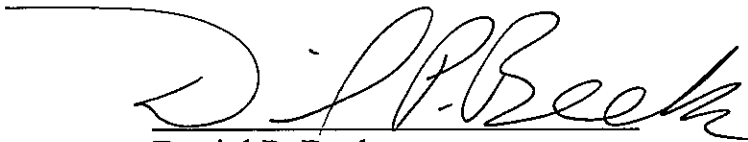
21 c. Karber should be required to pay all costs incurred by the State Bar
22 in bringing these disciplinary proceedings, as described in the
23
24
25

1 Itemized Statement of Costs and Expenses attached to the Tender as
2 Exhibit "A.."

3
4 d. Karber should also be required to pay all costs incurred by the
5 Disciplinary Commission, the Supreme Court and the Disciplinary
6 Clerk's Office in this matter.

7 **DATED** this 25th day of March, 2009.

8
9
10 Hearing Officer 7M

11 

12
13 Daniel P. Beeks
14 2800 North Central Avenue
15 Suite 1100
16 Phoenix, Arizona 85004-1043

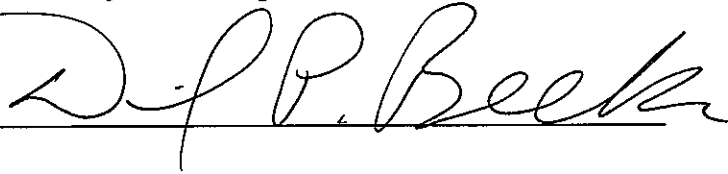
17 ORIGINAL of the foregoing mailed for
18 filing on March 25, 2009, to:

19 Disciplinary Clerk
20 Supreme Court of Arizona
21 1501 West Washington, Suite 104
22 Phoenix, Arizona 85007-3231

23 With copies of the foregoing mailed to:

24 Roberta L Tepper
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