



BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER ) Nos. 02-0207, 02-1137, 02-1916  
OF THE STATE BAR OF ARIZONA, )

JOHN R. AUGUSTINE, JR., )  
Bar No. 013743 )

RESPONDENT. )

DISCIPLINARY COMMISSION REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on May 8, 2004, pursuant to Rule 58(e), Ariz. R. S. Ct., for consideration of the Hearing Officer's Amended Report, filed March 19, 2004, recommending a six month and one day suspension, restitution and costs. An Entry of Default was entered on February 14, 2003 and mitigation hearings were held on March 20, 2003 and on January 23, 2004.

Decision

The Commission's standard of review is set forth in Rule 58(b), which states that the Commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the Commission applies a clearly erroneous standard.

The eight<sup>1</sup> members of the Commission unanimously recommend adopting and incorporating by reference the Hearing Officer's findings of fact and conclusions of law, except for the erroneous findings and conclusions relating to the presence of mitigating factors 9.32(c) personal and emotional problems, 9.32(h) physical disability and 9.32(i) mental disability.

<sup>1</sup> Commissioner Gutierrez did not participate in these proceedings.

1 The Commission determined that the evidence for mitigating factors 9.32(c), (h) and (i) is  
2 either void or lacking and therefore, is insufficient support for the application of these  
3 factors. No evidence was offered in support of mitigating factor 9.32(c) personal and  
4 emotional problems. Case law has established that self serving testimony is not enough to  
5 prove personal or emotional problems. *Matter of Augenstein*, 178 Ariz. 133, 137, 871 P.2d  
6 254 (1994).

7 Respondent also failed to supplement the record with the affidavit of Frederick  
8 Marciano, M.D. as ordered by the Hearing Officer on March 3, 2004. No medical records  
9 were provided in support of Respondent's physical disability and no direct causation was  
10 established between the disability and the misconduct.

11 In addition, the *Standards* in 1992 established a 4-pronged criteria necessary for  
12 application of these factors because of inconsistent application by the courts. *See*  
13 *Amendments to the ABA Standards for Imposing Lawyer Sanction* effective February 1992,  
14 9.3 Mitigation and Commentary to 9.32. The State Bar also advised at the second mitigation  
15 hearing that Respondent had not met the threshold for consideration of the mental disability  
16 factor. *See* Hearing Transcript dated January 23, 2004, pp. 116-118.

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18 Hal Nevitt, Certified Independent Social Worker Substance Abuse Counselor and  
19 Certified Employee Assistance Specialist, testified that Respondent suffered from Major  
20 Depressive Recurrent and that he was unable to effectively discharge<sup>2</sup> his duties to clients,  
21 thus satisfying the first two prongs for 9.32(i). However, Respondent failed to demonstrate a  
22 sustained period of rehabilitation and that a recurrence of the misconduct is unlikely as  
23 required to satisfy mitigating factors 9.32(i)(3) and (4). Although Mr. Nevitt diagnosed  
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26 <sup>2</sup> On June 27, 2003, Respondent filed a Petition for Transfer to Disability Inactive Status  
which was later withdrawn.

1 Respondent with depression and stated that his condition affected his ability to practice law,  
2 Mr. Nevitt is not a clinical psychologist and again, no medical records were offered to  
3 support Respondent's mental disability. Mr. Nevitt testified that he conducted an overall  
4 comprehensive assessment of Respondent's biological, psychological, and social function  
5 and arrived at his diagnosis through clinical interviews and observations. He did not  
6 however perform an MMPI or paper and pencil tests specifically measuring depression. *Id* at  
7 pp. 77 - 86.

8 In his summary report, Mr. Nevitt determined that it was outside his scope to address  
9 the efficacy of medication in this case and he recommended Respondent be evaluated by a  
10 psychiatrist for the purpose of evaluating his medication.<sup>3</sup> At the second mitigation hearing,  
11 Mr. Nevitt testified that he was not aware that Respondent was currently not taking  
12 medication for depression or engaged in counseling, and that situation caused him concern.  
13 Mr. Nevitt also testified that he has not consulted with any of Respondent's treating  
14 physicians or psychiatrist. *Id* at p. 89. Respondent stated that he saw psychiatrist, Dr. Stern,  
15 but did not provide any records or testimony from him because of a financial dispute. *Id* at p.  
16 58.  
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18 Mr. Nevitt further testified that he was informed by Respondent of his chronic back  
19 pain which necessitated emergency back surgery in June of 2002, but that he had no contact  
20 with Respondent between June 2002 and June 2003 and Mr. Nevitt had no way of knowing  
21 what his true condition was during that period of time. *Id* at pp. 82-83. No other medical  
22 evidence was provided to support Respondent's claim of physical disability.  
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<sup>3</sup> See Exhibit M7, Report from Hal Nevitt dated August 20, 2003.

1 Respondent stated at the second mitigation hearing that since October of 2003, he  
2 has not continued to treat with any type of counselor, and that since November of 2003, he  
3 has not by choice taken any type of antidepressant. *Id.* at, p. 62.

4 The Commission notes that the cases offered in proportionality for similar  
5 misconduct involving harm to clients support a two-year suspension and probation.  
6 Respondent's Counsel at the second mitigation hearing suggested that a suspension between  
7 six months and one year is appropriate. *Id.* at p. 115. At the second mitigation hearing, the  
8 State Bar argued for at least a six month and one day suspension, but suggested that a two  
9 year suspension was appropriate. Although the Hearing Officer initially recommended a two  
10 year suspension, after the second mitigation hearing he found additional mitigating factors  
11 9.32(c) (g), (h) and (i) present and ultimately recommended a six month and one day  
12 suspension. The Commission however, rejects these factors because of insufficient evidence.  
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14 The Commission determined that a suspension for any period less than two years  
15 would be insufficient to protect the public and deter Respondent and others from engaging  
16 in similar misconduct in the future. Absent evidence of rehabilitation and after a  
17 proportionality analysis of similar cases involving a knowing mental state and actual harm to  
18 clients resulting, the Commission is satisfied that two year suspension is appropriate for the  
19 misconduct involved.

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21 Therefore, the Commission recommends modifying the Hearing Officer's  
22 recommended sanction to reflect a two-year suspension and restitution to clients in the  
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following amounts:

1                    Jeff and Anna North            \$ 750.00  
2                    Larry K. Hall                    \$ 2,500.00  
3                    Leonard Sloane                 \$ 9,500.00  
4                    **TOTAL**                         **\$12,750.00**

5                    RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June 2004.

6                    

7                    Craig B. Mehrens, Chair  
8                    Disciplinary Commission

9                    Original filed with the Disciplinary Clerk  
10                    this 11<sup>th</sup> day of June, 2004.

11                    Copy of the foregoing mailed  
12                    this 11<sup>th</sup> day of June, 2004, to:

13                    Martin Lieberman  
14                    Hearing Officer 7W  
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26                    by: KW Weizand

/mps