

**FILED**  
AUG 10 2005  
DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA  
BY *[Signature]*

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**BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER ) No. 03-1957  
OF THE STATE BAR OF ARIZONA, )  
)  
**PAUL S. BANALES,** )  
**Bar No. 004313** ) **DISCIPLINARY COMMISSION**  
) **REPORT**  
)  
RESPONDENT. )  
\_\_\_\_\_ )

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on July 9, 2005, pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed March 29, 2005 recommending a 60 day suspension and costs of these disciplinary proceedings. The Respondent and the State Bar filed objections and the matter was set for oral argument. Respondent, Respondent's Counsel and Counsel for the State Bar were present.

Respondent argues that no violations occurred but, if violations of ERs 3.4(a) and 8.4(d) are upheld, censure is an appropriate sanction based on the proportional cases cited, which involve more egregious misconduct than the instant matter. Respondent asserts that the Hearing Officer erred by denying Respondent's request for a separate mitigation hearing to present mitigating evidence prior to the recommendation of a sanction. Respondent further argues that aggravating factor 9.22(i) substantial experience in the practice of law is offset by mitigating factor 9.32(a) absence of a prior disciplinary record.

The State Bar agrees with the Hearing Officer's findings of facts and conclusions of law, but argues that the Hearing Officer erred in recommending a 60 day suspension. The State Bar maintains that a six month suspension is an appropriate sanction.

**Decision**

1           The nine members of the Disciplinary Commission, by a majority of five,<sup>1</sup>  
2 recommend accepting and adopting the Hearing Officer's findings of fact and conclusions of  
3 law, but modify the recommended sanction to reflect a six month suspension and costs.

**Discussion**

5           The Disciplinary Commission's standard of review is set forth in Rule 58(b), which  
6 states that it applies a clearly erroneous standard to findings and reviews questions of law *de*  
7 *novo*. The Commission also gives great deference to the Hearing Officer's Report and  
8 recommendation. *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989).

10           The Commission, as well as the Hearing Officer, found clear and convincing evidence  
11 that Respondent violated Rule 42, Ariz. R. S. Ct., specifically ERs 3.4(a) unlawfully  
12 obstructing another party's access to evidence or unlawfully altering, destroying or concealing  
13 a document or other material having potential evidentiary value, and 8.4(d) engaging in  
14 conduct prejudicial to the administration of justice. Respondent knowingly and unlawfully  
15 obstructed the State's access to evidence. *See* Hearing Officer's Report, p. 19. The Hearing  
16 Officer's findings are *briefly* summarized as follows:

18           In July 2003, Respondent was retained to represent client Steven Doane in a pending  
19 indictment involving five counts of fraudulent schemes and artifice, forgery, and theft by  
20 control and/or misrepresentation and/or by controlling stolen property. Respondent was  
21 aware that his client had previously been convicted of similar crimes. To secure  
22 representation, Steven Doane issued check #95 made payable to Respondent's firm,  
23 *Palmisano, Reinhart and Associates*, in the amount \$1,500.00. Respondent recognized that  
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26           <sup>1</sup> Commissioners Atwood, Choate, Gutierrez and Nelson would have accepted the Hearing Officer's recommended sanction.

1 the check was from a Wells Fargo account in the name of David Doane, Steven Doane's  
2 brother. Respondent placed the check in the client file.

3 On August 4, 2003, Detective Riesgo of the Tucson Police Department Fraud Unit  
4 contacted Respondent and advised that the account on which check #95 was written had  
5 been fraudulently opened in David Doane's name by Respondent's client, Steven Doane.  
6 Respondent was further advised that if he had possession of the check, it was needed as part  
7 of their investigation. Respondent repeatedly told Detective Riesgo that he "did not accept  
8 the check," which she, in turn, interpreted as Respondent not having possession of the  
9 check. Immediately after his conversation with Detective Riesgo, Respondent contacted his  
10 assistant and directed her to destroy check #95. The assistant retrieved the check from  
11 Steven Doane's file and tore it into pieces. Based on subsequent conversations with Tucson  
12 police, the assistant was advised by other firm personnel to retrieve the torn pieces of check  
13 #95. Respondent was also made aware that the Tucson police wanted check #95, or the  
14 remnants of the check, and that the check was of evidentiary value to the police.  
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16 Later that evening, police officers Augustine and Lane went to Respondent's law  
17 office for approximately three hours to maintain the security of the location while the police  
18 attempted to obtain a search warrant for the check. Respondent, having been kept from a  
19 dinner with family, became extremely irritated. At that time, Respondent was still in  
20 possession of the check which was located somewhere within his law office. Ultimately, the  
21 police were unsuccessful in finding a judge who would issue a search warrant.  
22

23 On August 8, 2003, Tucson police Captain Garrigan wrote to Respondent informing  
24 him that they believed he was in possession of the check which was "evidence in an ongoing  
25 criminal investigation." On August 18, 2003, Respondent was still in possession of the  
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1 check. On August 19, 2003, Respondent gave his secretary the envelope with the check  
remnants and told her to take it from the office for safekeeping.

2 On August 27, 2003, Respondent informed Captain Garrigan by letter that although  
3 he had avowed to "not destroy or do away with the check" and that since his avowal was not  
4 accepted, "it is withdrawn and I will dispose of the check in any manner I deem  
5 appropriate." That same day, Respondent directed the secretary to dispose of the envelope  
6 he had earlier given her. The secretary forgot to do this and the check remnants are still in  
7 existence.  
8

9 On September 8, 2003, the Pima County Prosecutor's Office filed a Motion to  
10 Compel Respondent to turn over the check. Respondent did not answer the Motion in  
11 writing but did appear at the hearing on the Motion on September 29, 2003 before Judge  
12 Virginia Kelly and testified as follows:  
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14 Mr. Banales: "Very simply, Judge, I got rid of the check. There is no more  
15 check, so there is nothing to compel disclosure of. I threw it away like I have  
16 done other client's checks. It's gone. I got rid of it after the police tried to  
17 obtain it. They kept me at my office for 3 hours one night. They did not  
18 accept my avowal I would keep the check in its condition for them until they  
19 had an opportunity to go the next day in front of a Judge to try to get a search  
20 warrant....I don't have to keep the check. It was not evidence in any existing  
21 case, Judge. ...I was free to do whatever I wanted to do with it. It's gone.  
22 It's not in existence anymore."

23 The Court: "You knew the police wanted it in connection with this  
24 investigation, generally?"

25 Mr. Banales: "I knew the police wanted it generally."

26 The Court: "This wasn't a particularly cumbersome thing to hang on to? It  
wasn't like having an elephant in your living room."

Mr. Banales: "It was quite cumbersome to me, Judge. ...there is nothing, no  
law or legal requirement that requires me to hold on to that check." (See  
Transcript of hearing, pp. 8-12)

1 During the hearing, Respondent never advised Judge Kelly that the check had been  
2 torn into pieces on August 4, 2004. During the proceedings, Respondent maintained that he  
3 had done nothing wrong. Respondent also opined that the check was not his property but  
4 belonged to his client. See Hearing Officer's Report, pp. 12-14 and January 28<sup>th</sup> transcript,  
5 pp. 98 and 105. When contacted by a newspaper reporter on May 3, 2004, Respondent is  
6 quoted as saying "I am satisfied I did the right thing," a comment which he affirmed was  
7 accurate at the disciplinary hearing.

8 In determining the appropriate sanction, our Supreme Court considers the ABA  
9 *Standards for Imposing Lawyer Sanctions (Standards)* a suitable guideline. *In re Kaplan*,  
10 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Disciplinary Commission  
11 are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney  
12 discipline. In imposing a sanction after a finding of misconduct, consideration is given to  
13 the duty violated, the lawyer's mental state, the actual or potential injury caused by the  
14 misconduct, and the existence of aggravating and mitigating factors. See *Standard 3.0*.

15 The Disciplinary Commission reviewed *Standard 6.0 Violations of Duties Owed to*  
16 *the Legal System. Standard 6.12 False Statements, Fraud, and Misrepresentation* provides:  
17

18 Suspension is generally appropriate when a lawyer knows that  
19 false statements or documents are being submitted to the court  
20 or that material information is improperly being withheld, and  
21 takes no remedial action, and causes injury or potential injury  
22 to a party to the legal proceeding, or causes an adverse effect  
23 on the legal proceeding."

24 The Commission agrees with the Hearing Officer that suspension is the presumptive  
25 sanction for a knowing violation of ER 3.4(a). The record clearly supports that Respondent  
26 knowingly, if not intentionally, obstructed the State's access to evidence having potential

1 evidentiary value. See Hearing Officer's Report, p 28. Respondent then compounded his  
2 misconduct by not being candid with the Court. *Id* at 13 and 30.

3 Respondent knowingly violated his duty to the legal system and his misconduct  
4 caused actual harm to the legal system. In addition, Respondent's misconduct caused  
5 potential harm to the legal system by depriving the State of evidence in an ongoing case.  
6 That evidence may have served as the basis for additional charges against Respondent's  
7 client. *Id.* at. 29.

8 Based on the holdings in *Hitch v. Pima County Superior Court*, 146 Ariz. 588, 708  
9 P.2d 72 (1985) and *Hyder v. Maricopa County Superior Court*, 128 Ariz. 253, 625 P.2d 316  
10 (1981), Respondent had a duty to preserve the check or to seek a judicial determination on  
11 the issue. However, Respondent failed to preserve the check until a judicial determination  
12 regarding the evidence was made. Respondent's failure to preserve the check until such  
13 determination could be made and his failure to advise the Tucson Police of the condition of  
14 the check was prejudicial to the administration of justice. Respondent also did not provide a  
15 candid response to the State Bar regarding the true circumstances concerning the destruction  
16 of the check. *Id* at 14.

17  
18 The Disciplinary Commission, having concluded that suspension is warranted,  
19 reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors respectively, to  
20 determine the appropriate length of suspension. The extent of discipline imposed is not  
21 based on a fixed formula, but instead is based on balanced consideration of relevant factors.

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23 The Commission agrees with the Hearing Officer that three aggravating factors are  
24 supported by the record: 9.22(b) dishonest or selfish motive, 9.22(g) refusal to acknowledge  
25 the wrongful nature of conduct, and 9.22 (i) substantial experience in the practice of law.  
26 The record supports that Respondent was admitted to practice law in Arizona in October

1 1975. Thereafter, he worked as a prosecutor for the Pima County Attorney's Office for  
2 approximately ten years, with five years specifically in the Criminal Division assisting the  
3 police and requesting search warrants. Respondent subsequently went into private practice  
4 handling criminal defense matters and, from 1999 through 2002, he was a full-time Pro-tem  
5 Superior Court Judge presiding over criminal and juvenile matters. Respondent then  
6 returned to private practice. Respondent has considerable knowledge and experience in the  
7 area of criminal law. See Hearing Officer's Report, p. 3, findings of fact #1-3. Respondent  
8 acknowledged that his practice of law is concentrated in the area of criminal defense. See  
9 hearing transcript dated January 27, 2005, pp. 101-102. Previous case law has held that  
10 when there is a nexus between a lawyer's experience and the misconduct, substantial  
11 experience should be considered a relevant aggravating factor. *In re Peasley*, 208 Ariz. 27,  
12 90 P.3d 764 (2004). The Commission also agrees that one factor is present in mitigation,  
13 9.32(a) absence of a prior disciplinary record.  
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15 In reviewing the Hearing Officer's recommended sanction *de novo*, the Disciplinary  
16 Commission gives significant weight to aggravating factors 9.22(g) and (i). Throughout this  
17 matter, Respondent has remained unrepentant and continually maintained that he did  
18 nothing wrong.<sup>2</sup> This continued refusal to acknowledge his wrongful conduct and his lack  
19 of remorse is most disturbing. The Commission, therefore, is convinced that a lesser  
20 sanction would not deter other attorneys from engaging in similar misconduct. Respondent  
21 engaged in serious misconduct and then compounded his misconduct by demonstrating a  
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25 <sup>2</sup> The 2005 *Rules of Professional Conduct*, ER 3.4(a), Comment [2] states in part that "Applicable  
26 law in many jurisdictions makes it an offense to destroy material for purpose of impairing its  
availability in a pending proceeding or *one whose commencement can be foreseen.*" [emphasis  
added]. cf. A.R.S. §13-2809.

1 lack of candor. A misrepresentation to the tribunal is by itself considered a serious ethical  
2 breach because it directly affects the administration of justice, ER 8.4(d).

3 The Court has consistently indicated that the purpose of lawyer discipline is not to  
4 punish the offender, but to protect the public, the profession, and the administration of  
5 justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). The Disciplinary Commission  
6 determined, but for Respondent's unblemished record in the practice of law for over 37  
7 years, a lengthier suspension requiring formal reinstatement proceedings may have been  
8 warranted.

9 Sanctions against lawyers must have internal consistency to maintain an effective  
10 and enforceable system; therefore, the Court looks to cases that are factually similar to the  
11 case before it. *Matter of Pappas*, 159 Ariz. 516, 526, 768 P. 2d 1161, 1171 (1988). In a case  
12 of first impression, the Court may consider somewhat analogous cases. *Matter of Rivikind*,  
13 164 Ariz. at 160, 791 P.2d at 1043 (1990).

14 A proportionality review of cases offered with similar misconduct indicates that  
15 censure is normally imposed for negligent violations of ER 3.4(a). In *Matter of Hoyt*, SB-  
16 001-0068-D (2001), an Agreement for censure and one year of probation (CLE) was  
17 accepted for violating ERs 3.4, 4.1, 8.4(c) and 51(b); *In re Davidon*, SB-02-0015-D (2001),  
18 an Agreement for censure for violating ERs 3.4(a) and (c), 3.8(d) and 8.4(d) was accepted;  
19 *In re Manning*, 177 Ariz. 496 (1994), censure and restitution was imposed for violating ERs  
20 3.2, 3.4 and 8.4(d); and *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004), censure and  
21 probation was imposed for violating ER 8.4(d).

22 As found by the Hearing Officer, there are no Arizona cases on point involving the  
23 intentional or knowing destruction of evidence and a lack of candor to the court. Holdings  
24 from other jurisdictions are not considered binding, but nonetheless are instructive and  
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1 demonstrate that a suspension from 60 days to two years is within the range for similar  
2 misconduct.

3 The Hearing Officer considered *Idaho State Bar v. Gantenbein*, 986 P.2d 339 (Idaho,  
4 1999), in which a two year suspension (18 months withheld upon meeting special  
5 conditions) was imposed for violating ERs 3.4(a), (b) and (d); and *In re Zeiger*, 692 A.2d  
6 1351 (D.C.1997), where a 60 day suspension was imposed for violating ERs 3.4(a), 4.1(a)  
7 and 8.4(c).

8 The Disciplinary Commission independently considered two additional matters to  
9 provide further guidance in recommending an appropriate length of suspension. In *Attorney*  
10 *Grievance Commission v. Elvira M. White*, 354 Md. 346, 731 A.2d 447 (Maryland, 1999),  
11 the attorney's destruction of evidence and giving of false testimony warranted disbarment.  
12 In *Matter of Forrest*, 265 A.D.2d 12, 706 N.Y.S.2d 15 (New York, 2000), a six month  
13 suspension was imposed for an attorney's failure to disclose a material fact to the tribunal,  
14 unlawful obstruction of another party's access to potentially valuable evidence, and conduct  
15 involving dishonesty, deceit or misrepresentation. The Commission is satisfied that a six  
16 month suspension is within the range of that imposed in other cases involving similar  
17 misconduct.  
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### 19 Conclusion

20 Clearly, public interest is served when the sanction demonstrates to the legal  
21 profession that such conduct shall not be tolerated. To maintain the integrity of the judicial  
22 system, the Commission determined that a six month suspension is appropriate and  
23 proportional. A lesser sanction would undermine the disciplinary process and, moreover,  
24 would not fulfill the general purposes of discipline which are: to protect the public and deter  
25 similar conduct by other lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986);  
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