

**FILED**

SEP 19 2005

DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA

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

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3 IN THE MATTER OF A MEMBER ) Nos. 04-0507, 04-0732  
4 OF THE STATE BAR OF ARIZONA, )  
5 **BRIAN E. FINANDER,** )  
6 **Bar No. 007739** ) **DISCIPLINARY COMMISSION**  
7 ) **REPORT**  
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RESPONDENT. )

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 20, 2005 pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed May 10, 2005 recommending censure, two years of probation effective upon the signing of the probation contract with the State Bar's Member Assistance Program (MAP), the Ethics Enhancement Program (EEP), and costs of these proceedings. Respondent filed an objection and the Disciplinary Commission set the matter for oral argument. Respondent and Counsel for the State Bar were present.

Respondent argues that the underlying causes are without merit. Respondent states that his Answer was timely, pursuant to 6(e), Ariz. R. Civ. P., and the Hearing Officer erred by setting aside Respondent's Answer and entering a default, thereby violating his due process rights. Respondent asserts that the Hearing Officer further erred in discussing underlying facts at the aggravation and mitigation hearing and made biased remarks about Respondent's age and loss of mental faculties. *See* hearing transcript dated April 14, 2005, pp. 60-65, and Hearing Officer's Report, p. 8:19. Respondent rejects the Hearing Officer's recommendations and requests dismissal; in the alternative, Respondent requests a remand and that a new Hearing Officer be appointed.

1 The State Bar argues for acceptance of the Hearing Officer's findings of fact,  
2 conclusions of law, and recommendation. The State Bar asserts that the Hearing Officer  
3 properly set aside Respondent's Answer and appropriately inquired about the facts deemed  
4 admitted in the Complaint as they relate to the *Standards*, aggravating and mitigating  
5 factors, and proportional case law. Respondent was given additional time to respond, but  
6 failed to timely do so, thus, the allegations in the Complaint were deemed admitted by  
7 default. The Hearing Officer's recommendation is appropriate. The Hearing Officer found  
8 that, in two separate counts, Respondent knowingly made a false statement to the tribunal  
9 and/or failed to correct a false statement of fact. The State Bar asserts that the range of  
10 sanction for this conduct is between censure and suspension.

#### 11 Decision

12 The Disciplinary Commission's standard of review is set forth in Rule 58(b), Ariz.  
13 R. S. Ct., which states that the commission reviews questions of law *de novo*. In reviewing  
14 findings of fact made by a hearing officer, the commission applies a clearly erroneous  
15 standard. Mixed findings of fact and law are also reviewed *de novo*.

16 The nine<sup>1</sup> members of the Disciplinary Commission unanimously recommend  
17 accepting and adopting the Hearing Officer's findings of fact and conclusions of law,<sup>2</sup> and  
18 recommendation for censure, two years of probation (MAP and EEP), and costs of these  
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24 <sup>1</sup> Commissioner Atwood did not participate in these proceedings. Former Commissioner William  
25 Rubin, an attorney from Tucson, participated as an ad hoc member.

26 <sup>2</sup> The Commission determined *de novo* that the Hearing Officer's findings and conclusions support  
a knowing mental state; therefore, *Standard 6.12* (suspension) is applicable. See Hearing Officer's  
Report, p. 6:14. The Commission is convinced that the Hearing Officer's recommended sanction  
with an additional LOMAP component is proportional and fulfills the purposes of discipline.

1 proceedings.<sup>3</sup> The Commission further recommends an audit with the State Bar's Law  
2 Office Management Program (LOMAP). The terms of probation are as follows:

3 **Terms of Probation**

4 1. Within thirty (30) days from the entry of the final Judgment and Order  
5 Respondent shall contact MAP, LOMAP and EEP in order to participate in these programs  
6 and Respondent shall fully comply with the requirements thereof.

7 2. In the event that Respondent fails to comply with any of the foregoing  
8 conditions and the State Bar receives information, bar counsel shall file with the Hearing  
9 Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing  
10 Officer shall conduct a hearing within thirty days after receipt of said notice to determine  
11 whether the terms of probation have been violated and if an additional sanction should be  
12 imposed. In the event there is an allegation that any of these terms have been violated, the  
13 burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and  
14 convincing evidence.  
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16 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of September, 2005.

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19 Cynthia L. Choate, Chair  
20 Disciplinary Commission

21 Original filed with the Disciplinary Clerk  
22 this 19<sup>th</sup> day of September, 2005.

23 Copy of the foregoing mailed  
24 this 20<sup>th</sup> day of September, 2005, to:  
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<sup>3</sup> The Hearing Officer's Report is attached as Exhibit A.

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16 by: *K. Weigand*

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