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JAN 03 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *William*

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

IN THE MATTER OF A SUSPENDED MEMBER) No. 05-1489
OF THE STATE BAR OF ARIZONA,)

FRANK GOTTESMAN,)
Bar No. 021799)

**HEARING OFFICER'S
REPORT**

RESPONDENT.)
_____)

RELEVANT PROCEDURAL HISTORY

On September 7, 2005, a probable cause order directed the State Bar to prepare and file a complaint against Respondent for ethical violations. At the time, Respondent was on suspended status. On September 23, 2005, the State Bar filed a one-count complaint asserting Respondent willfully violated a court order or rule, evaded service and refused to cooperate with the State Bar, violated terms of his probation contract, failed to respond to a disciplinary investigation and violated his conditional of admission. When Respondent failed to answer the complaint, the Disciplinary Clerk filed a notice of default on October 25, 2005. The Disciplinary Clerk entered default on November 16, 2005. At the request of the State Bar, a mitigation and aggravating hearing was held on December 8, 2005.

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FINDINGS OF FACT

Based on the complaint, the following facts are deemed admitted. Rule 57(d), Ariz. R. Sup. Ct.

1. Following Respondent's consent to specific terms, the Supreme Court conditionally admitted Respondent on October 24, 2003.

2. Among the terms, the State Bar required Respondent to file quarterly reports concerning financial obligations. Respondent assured the State Bar that he would timely fulfill this reporting requirement.

3. Despite several letters from the State Bar, Respondent failed to timely file reports in February 2004, May 2004 and August 2004.

4. By letter dated August 13, 2004, Bar Counsel informed Respondent that he had again failed to timely file his quarterly report and that disciplinary proceeding would commence within five day, unless the State Bar received the quarterly report.

5. On or about August 31, 2004, the State Bar received Respondent's quarterly report due August 2, 2004. Include was a note that read, "[s]orry this is late. I have been sick. Will keep up from now on."

6. From a review of Respondent's August 2004 report, it appeared that individual financial obligations previously listed on prior reports were no longer

1 listed. Respondent replied to an inquiry from the Staff Examiner concerning the
2 omission, but failed to reply to Bar Counsel's inquiry.

3 7. Bar Counsel sent two letters to Respondent in October 2004 reminding
4 Respondent of his obligation to cooperate with a disciplinary investigation. Bar
5 Counsel's second letter was returned to the State Bar as undeliverable.

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7 8. As a result, following a probable cause panelist order dated November
8 18, 2004, finding Respondent in violation of ER 8.1(b) and Rules 53(f) and (g),
9 Respondent was placed on probation for a period of two years.

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11 9. As terms of his probation Respondent, the State Bar ordered
12 Respondent to: (a) report his compliance with the terms and conditions of his
13 probation to the State Bar's Phoenix Office, (b) to submit to a Member's
14 Assistance Program Therapeutic Contract, (c) to contact the MAP director
15 within 20 days, and (d) to sign the probation contract within 20 days.

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17 10. The Order of Probation mailed to Respondent's address of record was
18 returned as undeliverable.

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20 11. Nevertheless, Respondent did contact MAP and scheduled an
21 appointment for an assessment for January 18, 2005.

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23 12. On or about February 25, 2005, the State Bar received Respondent's
24 probation contract dated February 10, 2005, bearing his signature.
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13. By letter dated May 9, 2005, MAP advised Respondent that he had failed to maintained weekly telephone contact and had failed to have a monthly personal meeting with his peer support monitor in violation of his probation contract.

14. By letter dated May 19, 2005, the State Bar gave Respondent until June 3, 2005, to comply with the terms of his probation contract.

15. Still Respondent failed to contact his peer support monitor, in violation of his probation contract.

16. On May 20, 2005, the State Bar's Board of Governors summarily suspended Respondent for non-payment of dues.

17. On or about June 10, 2005, the State Bar filed a Notice of Non-Compliance stating that Respondent had failed to comply with the terms of his probation contract, specifically the provisions regarding his peer support monitor.

18. Although Respondent was provided an opportunity to respond to the Notice of Non-Compliance, he failed to do so.

19. Respondent had notice of this proceeding based on the State Bar mailing all notices to Respondent's address of record according to the State Bar's Membership Records Department.

1 20. Respondents failure to cooperate and fulfill his State Bar obligations
2 are willful.

3 **DISCUSSION AND CONCLUSIONS OF LAW**

4 On this record there are many unanswered questions and numerous
5 possible defenses. However, Respondent has declined to defend or to offer
6 evidence in mitigation of his actions and omissions. Thus, based on the
7 complaint, there is clear and convincing evidence that Respondent violated Rule
8 53 of the Arizona Rules of the Supreme Court in many ways, specifically: Rule
9 53(c) (willfully violated court orders and rules), Rule 53(d) (refused to cooperate
10 with officials and staff of the state bar), Rule 53(e) (violated terms and
11 conditions of his probation); Rule 53(f) (refused to respond promptly to any
12 inquiry or request from bar counsel), and Rule 53(g) (violated condition of
13 admission).
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17 **DISCUSSION OF SANCTIONS**

18 The State Bar believes that Respondent's conduct warrants a sanction of
19 six months and a day. (Tr. 12/8/05, at 5.) Such a recommendation is entitled to
20 serious consideration. *Matter of Kleindienst*, 132 Ariz. 95, 102, 644 P.2d 249,
21 256 (1982).
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ABA STANDARDS

1 To promote and maintain confidence in the bar's integrity, there are two
2 main purposes for disciplining an attorney: "(1) to protect the public and the
3 courts and (2) to deter the attorney and others from engaging in the same or
4 similar misconduct." *Matter of Zawada*, 208 Ariz. 232, ¶ 12, 92 P.3d 862
5 (2004).
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8 The ABA's *Standards for Imposing Lawyer Sanctions* (1992 rev.)
9 ("*Standards*"), can be a useful starting point in deciding what would be an
10 appropriate and just sanction, although the Arizona Supreme Court has not held
11 that the *Standards* are the only method for deciding an appropriate sanction. *See*
12 *Matter of Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996). In applying the
13 *Standards* the Supreme Court considers (a) the type of duty violated; (b)
14 Respondent's mental state; (c) the injury or potential injury to the client, public,
15 administration of justice; and (d) any aggravating or mitigating circumstances.
16 *See Matter of Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989).
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20 Here, Respondent since 2003 had a duty to comply with court rules,
21 orders, and cooperate with the State Bar. He repeatedly failed to do so. The
22 State Bar conditioned Respondent's admission to the bar. He failed to comply
23 with the conditions. The State Bar place Respondent on probation. He failed to
24 comply with the terms and conditions of his probation. The Board of Governors
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1 summarily suspended Respondent for non-payment of dues. He willfully failed
2 to cooperate with the disciplinary investigation or even answer the complaint.
3 For two years, the State Bar has expended scarce resources on Respondent in
4 efforts to assist him and obtain compliance without success. This is an actual
5 serious injury in my view. *See Standard 7.1* (violations of duties owed the
6 profession). Such conduct borders on contempt and “casts a shadow over the
7 integrity of the justice system.” *Matter of Brown*, 184 Ariz. 480, 483, 910 P.2d
8 631, 635 (1996).

10 Under *Standard 7.1* disbarment is the appropriate sanction if an attorney
11 knowingly engages in this type of conduct and causes serious or potentially
12 serious injury to the public or legal system, if he has the intent to obtain a
13 benefit for himself or another. Using this *Standard* as a guide and given the
14 totality of the circumstances including his conditional admission, violation of
15 probation, and suspension for non-payment of dues, disbarment is appropriate.
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18 If Respondent cannot even meet his obligations to the State Bar, I am
19 deeply concerned about potential serious injury to others and am not confident
20 that he can meet his obligations to his clients or the courts. Although the
21 practice of law is a right, it is limited to persons who have the necessary mental,
22 physical and moral qualities required. *Matter of Ronwin*, 139 Ariz. 576, 580,
23 680 P.2d 107, 111 (1983); *cf. Matter of Hamm*, Sup. Ct. No. SB-04-0079-M
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1 (2005), at ¶ 12 (an applicant for admission to the bar must have good moral
2 character). Respondent's conduct with the State Bar over the past two years
3 demonstrates the lack of requisite qualities to continue the practice of law.

4 Additionally, there are several factors in aggravation: *Standard* 9.22(c)
5 (pattern of misconduct), 9.22(d) (multiple offenses), 9.22(e) (intentional failure
6 to comply with rules or orders of the State Bar). These aggravators do not add
7 weight because they overlap with the Rule 53 violations.
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9 In mitigation, Respondent's inexperience in the practice of law is entitled
10 to some weight. *See Standard* 9.32(f). However, his conduct here is not
11 directly related to the practice of law. There is some evidence in the record of
12 mental disability. *See Standard* 9.32(i). On January 20, 2005, the Member
13 Assistance Director performed a comprehensive assessment on Respondent.
14 While there was "no data to suggest the presence of a thought disorder, or
15 personality disorder," Respondent reported "depressive symptoms" and an
16 inability to cope with daily living activities. (Hr. Exh. 1, at 1.) In this record,
17 however, there is no evidence of a sustained period of recovery or that any
18 conduct caused by depression will not reoccur. Thus, even if there were
19 sufficient evidence of a mental disability, it would not be mitigating. Finally,
20 although there is an absence of a prior disciplinary record, given Respondent's
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1 failure to comply with his conditional admission and short time in practice, this
2 mitigator is not entitled to weight. *See Standard 9.32(a)*.

3 PROPORTIONALITY REVIEW

4 Although not required by rule, in the past the Arizona Supreme Court
5 often consulted similar cases in an attempt to assess the proportionality of the
6 sanction. *See Matter of Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994).
7 More recently, the Arizona Supreme Court has criticized the concept of
8 proportionality review as “an imperfect process.” *Matter of Owens*, 182 Ariz.
9 121, 127, 893 P.2d 1284, 1290 (1995). This is because no two cases “are ever
10 alike.” *Id.*; *see also State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566, 584
11 (1992) (abandoning proportionality review in death penalty cases).

12 In support of its recommendation, the State Bar submitted a published
13 opinion and two unpublished cases. In the *Davis* case, Respondent ignored
14 repeated efforts by the State Bar to fulfill her terms of probation. The Supreme
15 Court found this conduct warranted a 60-day suspension. *Matter of Davis*, 181
16 Ariz. 263, 889 P.2d 621 (1995).

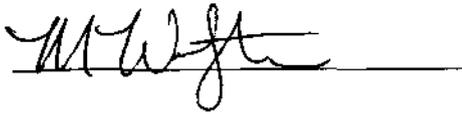
17 In the *Turley* case, the Hearing Officer originally recommended
18 disbarment; the Disciplinary Commission recommended a suspension of six
19 months and a day; in an Order filed May 13, 2002, the Supreme Court agreed
20 and ordered that by June 13, 2002, Respondent contact MAP. *Matter of Turley*,

1 No. SB-02-0042-D. On September 2, 2002, the State Bar filed a Notice of Non-
2 Compliance because Respondent had failed to timely contact MAP. Respondent
3 did not respond and did not appear at the scheduled hearing. Although the
4 Hearing Officer found that “Respondent has ignored these disciplinary
5 proceedings from their inception,” the officer only recommended an increase in
6 the term of suspense to a year. *Matter of Turley*, No. 00-0608 (R&R filed Nov.
7 14, 2002), at 4. The State Bar did not submit the final disposition of the 2002
8 case for Responded Mark E. Turley; however, three years later he is not listed in
9 the 2005-2006 Bar Directory. These chains of events support disbarment as the
10 appropriate sanction.
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13 In the final submitted case, the Supreme Court—despite prior discipline
14 resulting in informal reprimands—agreed with the recommendation of censure
15 for Respondent’s failure to cooperate with the State Bar. *Matter of Bayless*, No.
16 SB-03-0098-D (filed June 30, 2003). Comparing the circumstances of that case
17 with the instant case, it is apparent that the cases are not at all alike. Rather, this
18 case is more similar to the recent case before the Disciplinary Commission of
19 *David Son*, No. 04-1345 (2005). Although there was clearly serious injury to a
20 client in that case coupled with failure to cooperate, the total disregard of court
21 rules by suspended members in both cases creates an unacceptable risk to
22 clients.
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