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**FILED**  
AUG 10 2006  
HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY C. J. [Signature]

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

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
 )  
**DONALD C. ZAVALA, JR.** )  
**Bar No. 016107** )  
 )  
RESPONDENT. )  
\_\_\_\_\_ )

Nos. 05-1468

**HEARING OFFICER'S REPORT**

**PROCEDURAL HISTORY**

A settlement conference was not scheduled as the parties had reached a prior agreement waiving their rights to a settlement conference. A Tender of Admissions, Agreement for Discipline by Consent and Joint Memorandum in the support of the Tender of Admissions and Stipulation for Protective Order was filed on April 27, 2006.

A review of the file, pleading, and hearing office notes was conducted by the undersigned.

The Tender of Admissions and Agreement for Disciplined by Consent ("Agreement") is entered into between the State Bar of Arizona, through counsel, and Respondent, Donald C. Zavala, Jr., through his counsel, Michael

D. Kimerer and Amy L. Nguyen. It is submitted pursuant to Rule 56 Ariz.R.S.Ct., and the Guidelines for Discipline by Consent issued by the Disciplinary Commission of the Arizona Supreme Court.

### **FACTS ALLEGED**

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 22, 1994.
2. In November 2003, Respondent was arrested and charged with Possession or Use of a Dangerous Drug, the prosecution of which was suspended on the condition that he enroll in and complete the TASC diversion program.
3. Respondent was discharged from the TASC diversion program after he experienced a relapse.
4. He was subsequently arrested in June of 2004 for Possession or use of a Dangerous Drug and Possession of Drug Paraphernalia.
5. On May 19, 2005, Respondent pled guilty to two counts of Possession of Drug paraphernalia, both Class 6 undesignated felonies. He was sentenced to one-year supervised probation for each count, to be served concurrently, and ordered to pay a total fine of \$2400.

6. At Respondent's request, he was ordered to enter and complete the residential treatment program at Prescott House. He entered the program on May 20, 2005, and resided there until his successful discharge on January 3, 2006.

7. Respondent was also sentenced to a deferred jail term of 45 days in the Maricopa County jail, which was deleted by the Court on January 4, 2006 due to Respondent's compliance with all terms of probation and treatment.

8. There is no issue of restitution presented in this case for the reasons set forth herein.

9. The Respondent self-reported to the State Bar and there are no complainants requiring notification pursuant to Rule 52(b)(3), Ariz.R.S.Ct.

### **CONDITIONAL ADMISSIONS**

Respondent conditionally admits that in connection with the above described facts, he committed a criminal act reflecting adversely on his fitness as a lawyer and was convicted of two misdemeanors constituting a "serious crime" involving moral turpitude in violation of Rule 42 Ariz.R.S.Ct. ER 8.4(b) and Rule 53(h) Ariz.R.S.Ct.

For purposes of this Agreement only, the State Bar conditionally admits there is no evidence Respondent's conduct involved the sale, distribution or

importation of controlled substances or any attempt, conspiracy or solicitation of another to commit such an offense.

### **CONCLUSIONS OF LAW**

This Hearing officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.S.Ct., ER 8.4(b) and Rule 53(h) of the Ariz.R.S.Ct.

### **ABA STANDARDS**

ABA Standard 3.0 lists the following factors to consider in imposing the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigation circumstances.

ABA Standard 3.1 is to promote consistency in the imposition of standards by identifying factor to be considered.

The parties indicated that Standard 5.1 (failure to maintain personal integrity) is the most applicable in this matter. A review of ABA Standards 5.1 and 5.11 indicates that disbarment is the presumptive sanction for Respondent's misconduct if sale, distribution or importation of controlled substances is the offense.

The criminal convictions were the result of Respondent's personal use of drugs as opposed to sale/distribution offenses and did not involve any of the other elements described in ABA Standard 5.11. Accordingly, the parties agree that suspension pursuant to Standard 5.12 is the presumptive sanction. In particular, ABA Standard 5.12 provides:

*Suspension is generally inappropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.*

#### **AGGRAVATING AND MITIGATING FACTORS**

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to Standards 9.22 and 9.32, respectively.

This Hearing officer agrees with the parties that there are aggravating factors if this matter.

1. 9.22(c) *a pattern of misconduct;*
2. 9.22(f) *substantial experience in the practice of law;*
3. 9.22(k) *illegal conduct, including that involving the use of controlled substances.*

*The Hearing Officer agrees that there are mitigating factors present in this case:*

1. 9.32(a) *absence of a prior disciplinary record;*
2. 9.32(b) *absence of a dishonest or selfish motive;*
3. 9.32(c) *personal or emotional problems;*
4. 9.32(e) *full and free disclosure to a disciplinary board or cooperative attitude toward proceedings;*
5. 9.32(g) *character or reputation;*

6. 9.32(i) *mental disability or chemical dependency including alcoholism or drug abuse when:*
  - (a) *there is medical evidence that the respondent chemical dependency or mental disability.*
  - (b) *the chemical dependency or mental disability caused the misconduct;*
  - (c) *the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and*
  - (d) *the recovery arrested the misconduct and recurrence of that misconduct is unlikely.*
7. 9.32(k) *imposition of other penalties or sanctions;*
8. 9.32(l) *remorse.*

### **PROPORTIONALITY REVIEW**

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at ¶ 61, 90 P.3d at 778 (citing *In re Alcom*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207 660 P. 2d 454, 458 (1983.)).

*Matter of Wasson*, DC Nos.03-1206., et. al.; Supreme Court No. SB-05-0079-D (Arizona 6/29/05); the lawyer received a two-year suspension and two years probation for two convictions for aggravated DUIs consisting of class 4 felonies, one on April 16, 2003 and a second on June 2, 2003. The lawyer's conduct was found to have violated ER 8.4(b) and 53(h). One aggravating

factor was 9.22(k) illegal conduct, including that involving the use of controlled substances. Five mitigating factors found included 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, 9.32(c) personal or emotional problems, 9.32(e) full and free disclosure to a disciplinary board or cooperative attitude toward proceedings and 9.32(k) imposition of other penalties or sanctions.

*Matter of Vice*; DC No. 00-0170; Supreme Court Case No. SB-02-0 007-D (3/28/02), the lawyer received a six-month suspension for misconduct consisting of his committing criminal acts associated with arrests for class 4 felony drug possession and class 6 possession of drug paraphernalia which did not result in convictions because the lawyer was given a TASC diversion. The lawyer also found to have made false statement of material fact in the related discipline matter and thereby engaged in conduct involving dishonesty. Four aggravating factors found included 9.22(b) dishonest or selfish motive, 9.32(f) inexperience in the practice of law, 9.32(g) character or reputation and 9.32(k) imposition of other penalties or sanctions. Two mitigating factors found included 9.32(a) absence of a prior disciplinary record and 9.32(k) imposition of other penalties or sanctions.

Other potentially relevant cases include: *Matter of Rose* (2/9/03), agreement for three-year retroactive suspension for class 3 felony theft for stealing \$103,000 from brother's trust fund; *Matter of Saidel* (10/29/03), six-month retroactive suspension one-year probation for conviction of class 6

felony (sic) for speeding resulting in serious injuries two passengers; *Matter of the Politi* (2/16/01), agreement for two-year suspension retroactive for 1998 misdemeanor DUI, 1999 class 4 felony aggravated DUI and engaging in a conflict of interest in representing opposing parties in the same lawsuit.

### **CONCLUSION**

The ABA Standards suggest that suspension is the appropriate presumptive sanction. Moreover, the case law suggests that suspension is appropriate. In light of the substantial mitigation evidenced in this matter as discussed herein, it is therefore the position of the State Bar and Respondent that a one-year suspension retroactively effective on May 20, 2005, followed by a two-year term of probation, and an assessment of costs and expenses, is appropriate and will service the purposes of lawyer discipline. The Respondent agrees. Therefore, this Hearing Officer accepts the Tender of Admissions, Joint Memorandum in Support, and Stipulation for Protective Order filed in this matter.

### **RECOMMENDATIONS**

1. Respondent shall receive a one-year suspension, retroactive to the date of his admission to Prescott House on May 20, 2005.

2. Upon reinstatement, Respondent shall be placed on probation for two years:

a. Respondent shall continue with addiction counseling or other appropriate psychiatric or psychological treatment during his suspension and term of probation and shall substantiate his participation by authorizing his counselor or health care provider to provide a quarterly written confirmation of his continued participation to the director of the Members Assistance Program (MAP).

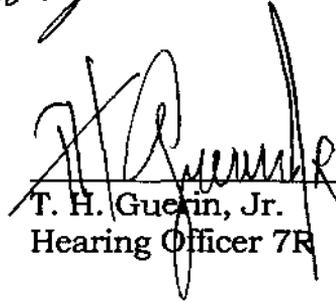
b. In the event Respondent fails to provide such confirmation, bar counsel may require Respondent to submit to a MAP assessment and monitoring.

3. Respondent shall pay all costs and expenses, which is \$600.00, that were incurred in the disciplinary proceedings within 30 days of the Supreme Court's final judgment and order, pursuant to Rule 60(b), Ariz.R.S.Ct.

4. The Parties acknowledge that Respondent's criminal probation imposed as part of the sentence in the underlying matter expires on May 19, 2006. Accordingly, parties agree that in the event Respondent does not successfully complete such criminal probation, the State Bar, in its sole discretion may withdraw from this agreement and institute formal lawyer discipline pursuant to the Arizona Rules of the Supreme Court.

It is further recommended that the Parties stipulate pursuant to 61(h) to seal the "Appendix" filed contemporaneously with the Tender of Admissions and Agreement for Discipline by Consent and Joint memorandum be granted.

DATED this 9 day of August, 2006.

  
T. H. Guerin, Jr.  
Hearing Officer 7R

Original filed with the Disciplinary Clerk  
this 9<sup>th</sup> day of August, 2006.

Copy of the foregoing mailed  
this 9<sup>th</sup> day of August, 2006, to:

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By: 