

FILED

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

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY 11-2204

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

Nos 05-0689, 05-1264

RAFAEL F. GALLEGO,)
Bar No. 013726)

**DISCIPLINARY COMMISSION
REPORT**

RESPONDENT)

This matter first came before the Disciplinary Commission of the Supreme Court of Arizona on August 11, 2007, pursuant to Rule 58(e), Ariz R Sup Ct , for consideration of the Hearing Officer's Report filed June 15, 2007, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent (Tender) and Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memorandum), providing for a one-year suspension, two years of probation with the State Bar's Member Law Office Management Assistance Program (LOMAP), and Member Assistance Program (MAP), fee arbitration, and costs

Upon review, the Commission ordered the parties to file briefs addressing the appropriateness and enforceability of the agreed-upon sanction and the terms of probation as set forth in paragraphs 3(d) and (e)¹ of the sanction portion of the Hearing Officer's Report,

¹ Paragraph 3(d) provides that should Respondent be determined to possess or use illegal drugs (such as, but not necessarily limited to, by being observed or apprehended with or using illegal drugs, or testing positive for illegal drug use), Respondent consents to immediate interim suspension and disbarment and agrees not to contest State Bar proceedings to effectuate his interim suspension and disbarment. Paragraph 3(e) provides that Respondent further agrees that a positive test result for illegal drug use obtained by MAP, or a MAP report of the same, will be dispositive and conclusive of Respondent's possession and/or use of illegal drugs and he agrees not to contest such a result or report

1 and set the matter for oral argument ² On September 7, 2007, the parties filed separate briefs
2 stating that the terms were appropriate and enforceable as Respondent suggested the terms to
3 demonstrate his commitment to protect the public and to ensure his successful return to the
4 practice of law In addition, the parties advised that Respondent has knowingly and
5 intelligently waived his constitutional rights on these provisions and he has not been denied
6 due process

7 This matter again came before the Disciplinary Commission on September 15, 2007

8 **Decision**

9 Having heard oral argument, the nine members considering this matter unanimously
10 reject the Tender and Joint Memorandum and remand this matter to Hearing Officer 6M for
11 further proceedings Of the nine Commission members considering this matter, a majority
12 of five,³ may accept the Agreement if the parties amend the provisions set forth in paragraph
13 3(d) and (e) to satisfy the Commission's concerns set forth below
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15 **Discussion**

16 The Commission continues to have concerns regarding the appropriateness of the
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² See Commission Order filed August 13, 2007

20 ³ Commissioners Atwood, Flores, and Katzenberg concurred in the decision that the agreement
21 should be rejected In their view a consent to disbarment that contains a provision for future
22 contingent disbarment is inappropriate and not provided for in the Rules of the Arizona Supreme
23 Court The imposition of attorney discipline, even by consent, requires consideration of the
24 particular misconduct at issue and the proportionality of the sanction, among other factors See Rule
25 56, Ariz R Sup Ct Similarly, the consequences of any probation violation or other future
26 misconduct by Respondent should be determined through the ordinary discipline process Moreover,
the minority concluded that approval of this agreement might have a problematic impact as
precedent In particular, it could be interpreted to stand for the proposition that a Respondent's
Agreement to future contingent disbarment is a justification for imposing a lighter sanction that
would otherwise be warranted Commissioner Osborne also concurred in rejecting the agreement
but she concluded that the agreed-upon sanction is insufficient for the misconduct and that
disbarment may be appropriate

1 terms of probation The Commission determined that paragraphs 3(d) and (e) would
2 constrain and usurp the authority of the Disciplinary Commission and the Supreme Court to
3 determine and impose discipline, should Respondent violate any terms of his probation
4 Secondly, the Commission has concerns about the vague description of events that may
5 trigger disbarment If Respondent is arrested for possession or use of illegal drugs, even if
6 the arrest does not result in a conviction, Respondent would be subject to interim suspension
7 and ultimately disbarment given the terms as written In addition, should Respondent
8 encounter a false positive in his random drug screenings, no remedies are available to
9 challenge those results

10 **Conclusion**

11 Therefore, the Tender and Joint Memorandum are unanimously rejected and this
12 matter remanded to Hearing Officer 6M for further proceedings.

13 RESPECTFULLY SUBMITTED this 1st day of October 2007

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18 J Conrad Baran, Chair
19 Disciplinary Commission

20 Original filed with the Disciplinary Clerk
21 this 1st day of October 2007

22 Copy of the foregoing mailed,
23 this 1st day of October 2007 to

24 Bruce G Macdonald
25 Hearing Officer 6M
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