

BEFORE A HEARING OFFICER

IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA

ALLAN BARFIELD
Bar No. 013148

RESPONDENT.

No. 06-1929

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 9J -
Mark S. Sifferman)

PROCEDURAL HISTORY

Original Proceedings in 02-0924

On March 18, 2003, a three-count Complaint was filed against Respondent. On September 15, 2003, the State Bar and Respondent submitted to the Disciplinary Commission a "Tender of Admissions and Agreement for Discipline by Consent."¹ On December 3, 2003, the Disciplinary Commission, voting 6 to 3, rejected the agreement. The majority stated that the record was insufficient to justify the stipulated discipline of censure. The dissenting members believed the agreed-upon discipline was appropriate. No review was sought, and the matter was remanded to this Hearing Officer.

¹ Under the Supreme Court Rules in effect in 2003, an Agreement for Discipline was filed directly with the Disciplinary Commission and decided by that body without a Hearing Officer Report. The Rules now require a Hearing Officer Report. *Rule 56(e), Rules of the Supreme Court*. The rule was changed because the Commission, in many cases, was not being provided an adequate factual record to judge the appropriateness of the consent agreement.

On May 4, 2004, an evidentiary hearing was held in Case 02-0924. In my subsequent Hearing Officer report, I determined that Respondent, in one matter, had violated ER 1.7(b) and, in another matter, had violated ER 1.8(b).

The violation of ER 1.7(b) arose from Respondent's concurrent representation of a client, the Respondent, and the Respondent's law firm in a lawsuit. The Respondent negligently failed to identify that a potential conflict of interest existed, and therefore he failed to obtain informed consent to the joint representation.

The violation of ER 1.8(b) occurred when Respondent borrowed funds from a client. The loan agreement was not reduced to writing and the client was not advised to seek independent legal advice.

The record at that time supported one aggravating factor - multiple offenses. Three mitigating factors were found - (a) absence of dishonest or selfish motive, (b) cooperative attitude, and (c) absence of prior discipline.

I found that no actual harm resulted from Respondent's violations of ER 1.7(b) and ER 1.8(b) and that there was no potential for harm with the ER 1.7(b) violation. However, I did find that potential harm existed from the ER 1.8(b).

I recommended that Respondent be censured and placed on probation for one year. I also recommended that Respondent be ordered to pay the costs and expenses.

In its October 1, 2004 decision, the Disciplinary Commission adopted this Hearing Officer's findings and conclusions. The Commission also adopted the recommendation of a censure with one year probation.

On November 3, 2004, a Judgment and Order was entered by the Clerk of the Arizona Supreme Court, censuring Respondent for the conduct detailed in Case 02-0924. By that Order, Respondent also was placed on probation for a period of one year effective

from the date of the signing of a Probation Contract. The terms of probation included, among other things, the following conditions:

- Respondent must maintain malpractice insurance.
- Respondent must complete the State Bar's Ethics Enhancement Program.

The Supreme Court's Judgment and Order also provided:

In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, Bar counsel shall file with the Hearing Officer a notice of non-compliance, pursuant to Rule 60(a)(5), Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be in the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

Probation Non-Compliance Proceedings

On February 16, 2006, *the day after Respondent's probation ended*,² the State Bar filed, in Case 02-0924, a Notice of Non-Compliance with the terms of Respondent's probation. The Notice of Non-Compliance alleged that Respondent had failed to (a) maintain malpractice insurance and (b) attend the Ethics Enhancement Program.

In accordance with the Supreme Court's November 3, 2004 Judgment and Order, the probation non-compliance matter was referred to this Hearing Officer. A telephonic pre-hearing scheduling conference was held in which Respondent participated. During that conference, Respondent reported that he had moved to Kansas, was not practicing law, and was not maintaining malpractice insurance. See *Hearing Officer Report, dated May 30, 2006, Finding of Fact 7*

A hearing on the Notice of Non-Compliance (of which Respondent had actual notice) was set for May 22, 2006. Respondent failed to appear. The hearing proceeded in his absence. At the conclusion of the hearing, the State Bar requested that the matter be

² See *Hearing Officer Report, dated May 30, 2006, Finding of Fact 8.*

remanded to the State Bar for a new finding of probable cause and the filing of a new Complaint. Bar Counsel stated that a probation violation typically was charged as a separate ground for discipline pursuant to Rule 53(e)

On May 30, 2006, this Hearing Officer issued Findings of Fact and Conclusion of Law, including the determination that Respondent had violated the terms of his probation. See *Hearing Officer Report, dated May 30, 2006*, Finding of Fact 9. Although recognizing that, pursuant to Rule 53(e), a new disciplinary proceeding could be instituted based on the probation violations, this Hearing Officer recommended that, pursuant to Rule 60(a)(5)(C), an additional sanction of a six months and one day suspension be imposed in the original proceeding.³ See *Hearing Officer Report, dated May 30, 2006*, pages 4 and 5. This Hearing Officer believed this approach provided the quicker means to protect the public as Respondent, who only had been censured, was free to practice law while the new Complaint lumbered through an evidentiary hearing before a Hearing Officer and then review by the Disciplinary Commission. *Id.* This suggested approach also conserved disciplinary resources by, among other things, eliminating the need to repeat the May 22, 2006 evidentiary hearing.

The matter came on for review before the Disciplinary Commission on September 9, 2006. The State Bar appeared and argued that the recommendation of this Hearing Officer should be rejected, and that the matter should be remanded to the State Bar for a new probable cause determination and for the filing of a new disciplinary Complaint.

On November 21, 2006, the Disciplinary Commission issued its report. The Commission acknowledged that Rule 60(a)(5)(C) provided authority to impose an

³ There is a significant difference between a six months suspension and one for six months and a day. Under the former, reinstatement to active status is practically automatic. Under the latter, rehabilitation must be proven. *Rule 64(e), Rules of the Supreme Court.*

additional sanction in the original proceeding when the disciplined attorney violates probation. However, the Commission determined that a remand to the State Bar for the filing of a new formal Complaint "would be most effective." *Disciplinary Commission Report, dated November 21, 2006*, page 2.

On December 18, 2006, the State Bar filed a Motion for Reconsideration with the Disciplinary Commission. In that Motion, the State Bar reversed its position and asked that the Hearing Officer's recommendation of an additional sanction of a six-month and one-day suspension be adopted, without the need for a remand to file a new Complaint. On June 13, 2007, the Commission denied the Motion for Reconsideration.

The Present Proceedings on New Complaint

The present Complaint was filed with the Disciplinary Clerk on or about August 21, 2007. The Complaint was served on Respondent by certified mail (delivery restricted) sent August 22, 2007.

A First Amended Complaint was filed with the Disciplinary Clerk on August 24, 2007. The First Amended Complaint was served by certified mail (restricted delivery) sent August 29, 2007.

Respondent failed to respond to these proceedings. A Notice of Default was filed with the Disciplinary Clerk on September 14, 2007.

An evidentiary hearing was set for November 2, 2007. That hearing, however, was vacated when this Hearing Officer determined that the September 14, 2007 Notice of Default was premature. See "*Order Vacating Hearing and Striking Notice of Default*," dated October 31, 2007.

A new Notice of Default was filed November 2, 2007. The default was effective November 16, 2007, as Respondent has failed to plead to either complaint. Therefore, the

allegations of the complaint are deemed admitted. *Rule 57(d), Rules of the Supreme Court.*

The evidentiary hearing was reset to November 30, 2007 with proper notice being given. The State Bar appeared through Denise K. Tomaiko, Staff Bar Counsel. Respondent did not appear.

FINDINGS OF FACT

Based on the complete record, including the proceedings in Case 02-0924 of which judicial notice may be taken⁴ and the allegations of the First Amended Complaint which are admitted by the entry of default, the following facts are found

1. Respondent was admitted to practice law in Arizona on October 27, 1990.
2. Respondent was summarily suspended from the practice of law for non-payment of dues on March 18, 2007.
3. A final Judgment and Order in this matter was entered by the Clerk of the Arizona Supreme Court on November 3, 2004. By that Judgment and Order, Respondent was censured and placed on probation for a period of one-year effective from the date of the signing of a Probation Contract. The terms of probation included, among other things, that Respondent maintain malpractice insurance and complete the State Bar's Ethics Enhancement Program
4. Respondent's probationary term expired February 15, 2006 See *Hearing Officer Report, dated May 30, 2006, Findings of Fact 3 and 8.*
5. During his probation, Respondent failed to maintain malpractice insurance and failed to attend the Ethics Enhancement Program. See *Hearing Officer Report, dated May 30, 2006, Finding of Fact 9.*

⁴ See *In re Rorwin*, 139 Ariz. 576, 680 P.2d 107, 110 (1983); *In re Horwitz*, 180 Ariz. 20, 881 P.2d 352, 355, n. 3 (1994).

6. Prior to the expiration of his probation, Respondent moved to Kansas and ceased practicing law without resolving the open issue of his probation violations. See *December 12, 2005 letter from Respondent attached as Exhibit B to the State Bar's December 18, 2006 Motion for Reconsideration.*

7. The State Bar sent letters to Respondent on June 14, 2007, and July 10, 2007, requesting his response to allegations that he violated the ethical rules and failed to comply with the requirements of his probation. Respondent failed to respond to either letter.

8. A probable cause order was filed on August 14, 2007 against Respondent.

9. Respondent knowingly violated the terms of probation set in Case 02-0924 by not maintaining professional liability insurance and by not completing the State Bar's Ethics Enhancement Program.

CONCLUSIONS OF LAW

There is clear and convincing evidence that Respondent:

1. knowingly violated the terms of his probation *Rule 53(e), Rules of the Supreme Court.*

2. knowingly failed to respond to a lawful demand for information from a disciplinary authority and to otherwise cooperate with disciplinary authorities. *Rule 42 [ER 8.1(b)], Rule 53(d) and (f), Rules of the Supreme Court.*

APPROPRIATE SANCTION

ABA Standards

In determining the appropriate sanctions, the American Bar Association's *Standards for Imposing Lawyer Sanctions* provide guidance. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). Those *Standards* instruct that, in determining the proper sanction, four criteria should be considered: (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 and/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA *Standard* 3.0 Where there are multiple acts of misconduct, there should only be one sanction with the multiple instances of misconduct considered as an aggravating factor. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

As to the duty violated, both ABA Standard 7.0 and 8.0 are applicable. As to the lawyer's mental state, the violations were knowingly made

ABA Standard 7.0 provides:

7.1. Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for a lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

ABA Standard 8.0 provides:

8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such a violation causes injury or potential injury to a client, the public, the legal system, or the profession; . . .

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar conduct and engages in further acts of misconduct that causes injury or potential injury to a client, the public, or the legal system.

There was no injury or potential injury to a client or the public, but Respondent's conduct did cause harm.⁵ His conduct caused unnecessary expenditure of resources by the State Bar, this Hearing Officer, the Disciplinary Commission, and the Attorney Discipline Unit of the Supreme Court. See *In re Alcorn*, 202 Ariz. 62, 71, 41 P.3d 600, 609 (2002); *In re Shannon*, 179 Ariz. 52, 67, 876 P 2d 548, 563 (1994). Moreover,

⁵ Standard 7.1 is not applicable as *serious* (i e. substantial) harm is not present.

Respondent's unilateral decision to cease practicing law without working through the disciplinary process to resolve his open disciplinary issues and instead refusing to be involved in the disciplinary procedures he caused evidences a complete disregard for the Supreme Court's regulation of attorneys.

Aggravating and Mitigating Factors

The following aggravating circumstances exist: (1) prior disciplinary offense, (2) multiple offenses, (3) refusal to acknowledge wrongful nature of conduct, and (4) substantial experience in the practice of law. There are no mitigating circumstances. Respondent's unilateral decision to cease practicing law is neither an aggravating nor a mitigating circumstance. *ABA Standard 9.4 (d)*.

Proportionality

The Commentary to ABA Standard 8.0 states in general terms that disbarment is the appropriate sanction when an attorney knowingly violates a prior disciplinary order and causes injury. The Arizona Supreme Court quoted this Commentary in *Matter of Tarletz* 165 Ariz. 243, 244, 798 P.2d 381, 382 (1990) where the Court ordered the disbarment of an attorney who continued to practice while suspended. That attorney, however, already had been disbarred for eight different ethics violations. Moreover, when that attorney filed her Answer to the disciplinary Complaint, she drew a smiley face instead of signing the pleading.

It seems apparent that disbarment is not the presumptive sanction whenever a term of probation is violated. Instead, some consideration is given to the ethics violation which gave rise to the probation, the sanction originally imposed, and the nature of the probation violation. In this regard, I find relevant the following decisions *In re Casper*, SB 05-2180; *In re Vice*, SB 02-0007 and *In re Gottsman*, SB 05-1489.

Casper seems the most relevant. There, an attorney was informally reprimanded and placed on probation. Mr. Casper failed to comply with the terms of probation and failed to cooperate with the State Bar in resolving those probation violations. Aggravating factors were found with no mitigating factors present. Mr. Casper had ceased practicing law, and his conduct caused little or no injury to clients. Hearing Officer Daniel Beeks noted his inclination to recommend disbarment, but after extensively reviewing a number of probation violation cases, he recommended a suspension for six months and one day. *Hearing Officer Report, filed July 25, 2006*. This recommendation was unanimously accepted by the Disciplinary Commission. *Disciplinary Commission Report, filed July 27, 2006*.

Vice involved an attorney suspended for six months and placed on one year probation. As part of his probation, Mr. Vice was ordered to enroll in the Member Assistance Program (“MAP”). While Mr. Vice entered into a MAP contract, he failed to comply with the terms of that MAP contract because the costs of compliance was prohibitive. The approved sanction for the probation violation was an increase of the suspension from six months to one year.

Gottzman involved an attorney who was conditionally admitted to the practice of law in Arizona. One condition of admission was that Mr. Gottzman file quarterly financial reports. Mr. Gottzman failed to comply with these conditions plus he failed to respond to the State Bar’s investigations. For these violations, Mr. Gottzman was placed on probation, with which he then failed to comply. The Hearing Officer applied ABA Standard 7.1 and recommended disbarment. The Disciplinary Commission found that ABA Standard 7.1 was not applicable, and applied Standard 7.2 instead. The Disciplinary Commission rejected the recommendation of disbarment, opting for a long term suspension

I also considered the following decisions: *In re Apker*, SB 03-0029; *In re Clark*, SB 05-0027, and *In re Pohto*, SB 03-0145

In *Apker*, the attorney failed to diligently pursue a client's matter and failed to communicate with the client. The attorney moved out of state without notifying the client, failed to protect the client's interests upon termination of representation, and failed to respond to the State Bar's investigation. The attorney simply retired. A sanction of six months and one day suspension was imposed.

The *Clark* matter involved an attorney who was serving a three year suspension. The attorney was found to have engaged in the unauthorized practice of law when he represented a client at an MVD proceeding during the suspension. He was suspended for an additional six months.

Pohto involved the unusual circumstance of an attorney being conditionally admitted to the State Bar subject to the terms of a therapeutic contract for substance abuse. The attorney failed to comply with the terms of his conditional admission, was charged with driving under the influence, and tested positive for alcohol. By consent, the attorney was suspended for six months and a day.

Disbarment and extremely long suspensions appear to be reserved for the most egregious probation violations such as where the original proceeding resulted in a suspension plus probation, there was serious harm, and acts of overt contempt. Where the original sanction was less than suspension and the probation violation did not cause serious harm, a suspension beyond six months seems to be the sanction most consistently imposed.

RECOMMENDATION

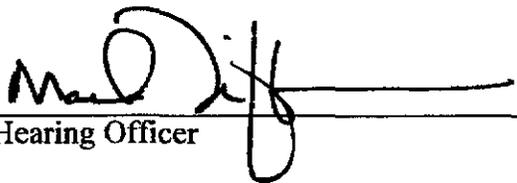
The purpose of lawyer discipline is not to punish. Rather, its objective is to protect the public, the profession and the administration of justice, while deterring future

misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315, 1320 (1993); *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). It is hoped that thereby public confidence in the bar's integrity will be fostered. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

Upon consideration of the facts, application of the *Standards*, including the aggravating factors and lack of mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following:

1. That Respondent be suspended for six months and a day.
2. That Respondent be ordered to pay the costs and expenses incurred in these proceedings.

DATED this 13th day of December, 2007


Hearing Officer

ORIGINAL filed with the
Disciplinary Clerk of the
Supreme Court of Arizona and
copies mailed this 8th day of
December, 2007, to:

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