

FILED

JUN 15 2007

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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Christine S. Adams*

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

File Nos. 05-0689, 05-1264

**RAFAEL F. GALLEGO,
Bar No. 013726**

HEARING OFFICER'S REPORT

Respondent.

**(Bruce G. Macdonald
Hearing Officer 6M)**

PROCEDURAL HISTORY

A Probable Cause Order was filed by Probable Cause Panelist, Steven P. Sherick, on June 26, 2006. A Complaint was filed on November 7, 2006. Respondent filed an Answer on December 14, 2006. The State Bar filed a Notice of Settlement on January 19, 2007, indicating the parties has reached an agreement. A Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") were filed on February 21, 2007. A hearing took place in front of this Hearing Officers on April 24, 2007.

FINDINGS OF FACT

1. At all relevant times, Respondent was a lawyer licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on July 10, 1991.
2. Respondent is a criminal defense attorney in Tucson, Arizona, with over 15 years of experience. During that time, Respondent has represented hundreds of criminal defendants.

1 3. In 1999, Respondent represented Robert Sagasta Jr. (Sagasta) on two separate
2 criminal matters. On the first, Respondent represented Sagasta pro bono. On the second
3 matter, Respondent was retained by Robert Sagasta, Sr., father of the defendant, who paid
4 Respondent \$25,000 to represent his son.
5

6 4. In the first matter, the State charged Sagasta in the death of his brother. The
7 State later dropped those charges.
8

9 5. In the second matter, the State charged Sagasta with first-degree murder for
10 the shooting death of Kimo Mann.
11

12 6. In or about June 2000, Sagasta's case went to trial, and the jury convicted
13 Sagasta of first-degree murder.
14

15 7. On August 17, 2000, the Court sentenced Sagasta to life in prison without the
16 possibility of parole for twenty-five years.
17

18 8. On July 24, 2002, Sagasta retained attorney Stanton Bloom ("Bloom") to
19 review the record in his case and determine whether a petition for post-conviction relief
20 ("PCR") might be successful. Bloom ultimately determined that there were several issues
21 that might result in a successful PCR petition.
22

23 9. While preparing the PCR petition, Bloom reviewed the underlying record in
24 the matter and spoke with several of Respondent's former employees.
25

26 10. At least two of Respondent's former employees told Bloom that they had
27 reason to believe that Respondent was using illegal drugs prior to and during Sagasta's
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1 trial.

2
3 11. Bloom interviewed Respondent regarding the trial in order to prepare for the
4 PCR hearing. Respondent initially denied any type of drug use but later admitted to using
5 cocaine prior to and during the Sagasta trial.

6
7 12. Although Respondent prepared an affidavit regarding his reasons for
8 believing that he provided Sagasta with ineffective assistance, in his affidavit he did not
9 mention his cocaine use, or that his use of cocaine was a possible cause of the mistakes
10 he made during the Sagasta trial, although he did admit that he was having significant
11 personal problems.

12
13
14 13. On July 6, 2004, Bloom filed the PCR petition, along with Respondent's
15 affidavit, asserting that Sagasta received ineffective assistance of counsel during his trial.

16
17 14. On October 6, 2004, the Pima County Attorney's Office filed its response
18 requesting that the PCR petition be denied.

19 15. On April 27, 2005, the Court held a hearing on Sagasta's PCR petition.

20
21 16. Bloom planned to argue that the defendant received ineffective assistance of
22 counsel due to Respondent's cocaine use during the trial in 2000.

23
24 17. Prior to the presentation of evidence, Respondent made a statement to the
25 Court regarding his effectiveness during the Sagasta trial and the information submitted
26 in his affidavit. In that regard, Respondent stated:

27
28 There are -- with the addition that these things did affect my performance and

1 my effectiveness of Mr. Sagasta's representation, but they were amplified,
2 Judge by cocaine use. I was using cocaine. I was having a lot of problems
3 with my life, and I fell to that demon probably around four months prior to
4 Mr. Sagasta's trial and continued for about three months after.

5 It did affect my performance. I did -- about maybe several weeks prior to Mr.
6 Sagasta's trial, I used cocaine. I did use cocaine the night before the jury
7 selection and maybe once during the trial, not during the day, but at night.

8 I think it did affect my performance there, Judge. In addition, however, I
9 have not used any illicit drugs in over four years. I did -- I was in rehab,
10 Judge.

11 18. Based on Respondent's admissions, Kellie Johnson, Deputy County Attorney
12 for Pima County, agreed that Respondent provided Sagasta ineffective assistance
13 sufficient to cause the Court to grant Sagasta's PCR petition and grant him a new trial.

14 19. The Court found that Sagasta had received ineffective assistance of counsel.
15 As a result of its finding, the Court set aside Sagasta's conviction and ordered a new trial.
16 Subsequently, Sagasta entered a plea of guilty to negligent homicide and was sentenced
17 to a term of eight (8) years in the Arizona State Prison.
18

19 20. The Court also ordered Respondent to self-report his conduct to the State
20 Bar.
21

22 21. On April 29, 2005, the State Bar received Respondent's self-report.
23

24 22. On or about July 7, 2005, the State Bar forwarded a letter to Respondent
25 regarding further investigation of the complaint against him.
26

27 23. On September 27, 2005, the State Bar received Respondent's response to the
28

1 allegations. Respondent denied that he lacked the competence to represent Sagasta during
2 the murder trial. Respondent further admitted to using cocaine during his representation
3 of Sagasta but stated that he had been drug free for five years.
4

5 24. On January 25, 2006, the State Bar again requested additional information
6 from Respondent, including details on the frequency of his drug use and the time frame
7 as to when he stopped using illegal drugs.
8

9 25. In response to the State Bar's additional request for more information,
10 Respondent stated that in 2000, he used cocaine approximately 15 to 20 times over a
11 nine-month period.
12

13 26. Respondent further stated in his response that he had "not engaged in any
14 substance abuse since September 2000."
15

16 27. Respondent's statement that he had not engaged in any substance abuse since
17 September 2000 was false and he knew it was false.
18

19 28. Respondent continued to use cocaine intermittently from 2001 until July
20 2006.
21

22 29. Respondent failed to provide competent legal representation to Sagasta
23 during his criminal trial by using cocaine prior to and during the trial.
24

25 30. Respondent knowingly made a false statement of material fact to the Court
26 during the Sagasta PCR hearing when he stated that his cocaine use was limited to a
27 seven-month period of time in 2000.
28

1 aware of the way they utilized denial. And again, this is an
2 unconscious process, which protects that person from themselves,
3 from psychologically harmful information. (R.T. 4/24/07, p. 19, l.
4 24—p. 20, l. 7)
5

6 While this does not excuse the knowing misstatements of Respondent in this case,
7
8 it does help to explain why an otherwise honest and productive member of the State Bar
9 might deny and/or minimize the extent and duration of his addiction. As Mr. Nevitt
10 further testified:
11

12 *Q.* Mr. Gallego had two chances to admit, or correct the
13 misstatements he made, one to Judge Sabalos (the Judge on the
14 Sagasta Rule 32) and one to the State Bar. Based on what you know
15 about Mr. Gallego, from your interactions, from the reports that you
16 have read, from the assessment that you have done, from the contact
17 that you have had with him, looking back retrospectively, were his
18 misstatements or statements to Judge Sabalos and to the State Bar
19 conscious designs to deceive them, or an unconscious response to
20 protect himself from his addiction, in your opinion?
21

22 *A.* First of all, I don't know what he said. I don't know what the
23 questions were. But if I had to pick between the two, knowing what I
24 know about him, I would believe...it would be—that it was an
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1 unconscious process, he wasn't intentionally lying. I think his
2 character is such that he wouldn't have done that.

3
4 *Q.* But for the addiction?

5 *A.* Correct. (R.T. Id, at p. 39, l. 6-24) (parenthetical added)

6
7 35. This Hearing Officer finds that Mr. Nevitt offered credible and reliable
8 testimony concerning addiction, the dynamics of addiction, proper therapeutic recovery
9 programs and the likelihood of success of individuals involved in such programs.

10
11 36. Mr. Nevitt first became acquainted with Respondent when Respondent called
12 and arranged to meet with Mr. Nevitt on July 28, 2006. Respondent explained to Mr.
13 Nevitt that he wished to voluntarily submit to an assessment by the Member Assistance
14 Program and to contract with this program because he had a substance abuse problem.
15 (R.T. Id at p. 15, l. 16-25)

16
17
18 37. Respondent did enter into a contract with MAP which required that he
19 abstain from using alcohol, cocaine and other illegal substances, continue his counseling
20 with a licensed practitioner in the Tucson area, complete an intensive out patient program
21 to address the issue of substance dependence, begin a regime of biological fluid testing as
22 determined by the State Bar, meet with a peer monitor in the Tucson area to monitor his
23 activities and meet with Mr. Nevitt on a quarterly basis. (R.T. Id at p. 16, l. 24—p. 17, l.
24 11) Respondent has satisfied and continues to satisfy each and every one of these
25 requirements. (R.T. Id at p. 17, l. 14)

1 38. In fact, Respondent has exceeded what is expected in terms of contact with
2 his peer monitor and Mr. Nevitt. (Nevitt testimony, R.T. Id at p. 18, l. 3-11 and p. 25, l.
3 12-17) Respondent is highly motivated in his efforts to overcome his addiction and has
4 availed himself of the various opportunities provided by the State Bar. (R.T.Id at p. 18, l.
5 11-13)
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8 39. Importantly, it no longer appears that Respondent is in denial, nor is he
9 minimizing the extent and duration of his addiction, or the impact that this addiction has
10 had upon his life and professional career. Mr. Nevitt explained this turn around as
11 follows:
12

13
14 I believe that the intensive out patient program that he went to was the
15 deciding factor here. There was a degree of willingness in him to
16 address this issue in the beginning, and it has significantly widened
17 with his participation. And not only in the intensive out patient
18 program, but I introduced him to an attorney who is a recovering
19 alcoholic here in the Tucson area, who is a member of my member
20 assistance committee. And I believe that went a long way toward
21 reducing the defensiveness, the shame, the guilt and the overall
22 malaise of admitting his dependence upon those sources. (R.T. Id at p.
23 20, l. 9-19)
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28 It should be noted that Respondent began the out patient program that Mr. Nevitt

1 alluded to three (3) days after his first meeting with Mr. Nevitt on July 28, 2006. (R.T. Id
2 at p. 21, l. 24-25
3

4 40. Respondent also agreed to voluntary and random drug testing which has been
5 conducted in conjunction with the intensive out patient program (i.e., Balance) and under
6 the auspices of his contract with MAP. Although Mr. Nevitt was not privy to each of the
7 drug tests performed by Balance, Respondent did sign a release which authorized MAP to
8 communicate with Balance concerning Respondent's participation in that program, which
9 Respondent has successfully completed. (R.T. Id at p. 26, l. 1-2) Had there been any issue
10 with any of the drug tests performed by Balance, this would have been a critical violation
11 and Mr. Nevitt would have been informed. (R.T. Id at p. 23, l. 21-24) With respect to the
12 drug testing which has taken place directly through the MAP program, Mr. Nevitt
13 testified that Respondent had been given approximately twenty (20) random urine tests
14 since August 17, 2006 and that all had been negative. (R.T. Id at p. 24, l. 5-23)
15 Respondent will continue to be tested as long as he participates in the MAP program,
16 which is a requirement of the Discipline by Consent Agreement. (R.T. Id at p. 24, l. 24—
17 p. 25, l. 3)
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24 41. Respondent has taken the initiative and has already talked to one of the
25 professors at the University of Arizona, College of Law, about speaking to classes of law
26 students concerning addiction and his own personal experiences. (R.T. Id at p. 27, l. 13-
27 21) Once he learned about a similar program in which Mr. Nevitt was involved,
28

1 Respondent volunteered to go with Mr. Nevitt and become part of the process in August,
2 2007. (R.T. Id at p. 27, l. 25—p. 28, l. 2)

3
4 42. Mr. Nevitt testified that Respondent has gone “above and beyond what is
5 normal” (R.T. Id at p. 28, l. 6-7) and had this to say about Respondent and his chances for
6 recovery:
7

8 So this process, this has been particularly painful to him
9 psychologically. And I just think it’s worth mentioning that this has
10 been a difficult process for this guy to go through. And he has come
11 through it in a way—in an exemplary fashion. And I believe that’s
12 worth noting.
13

14
15 I don’t have any reservation about his ability to recover from this. I
16 don’t have any reservation about his motivation to do the things that I
17 have asked him to do. And I think if he continues doing them at the
18 level that he’s doing them now, he will effect a substantial recovery
19 from the addiction. (R.T. Id at p. 33, l. 4-14)
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21

22 Based upon the testimony of Mr. Nevitt, as well as the testimony of other
23 witnesses, and Respondent’s own sworn statements, this Hearing Officer finds that
24 Respondent is sincere, highly motivated in terms of dealing with his addiction, has
25 assumed responsibility for his actions, and is absolutely committed to his successful
26 recovery and rehabilitation.
27
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1 43. There is no evidence that Respondent's abuse of cocaine affected any other
2 case, besides the Sagasta case previously discussed. Paul Eckerstrom, an Assistant
3 Arizona Attorney General testified that he had been acquainted with Respondent since
4 they both attended Tucson High School in the "late 70's". (R.T. Id at p. 40, l. 24) Mr.
5 Eckerstrom also practiced with the Public Defender's Office here in Tucson for a number
6 of years. (Id at p. 44, l. 25—p. 41, 4) He was familiar with the behaviors of persons who
7 were under the influence of drugs. (Id at p. 53, l. 15-25) Mr. Eckerstrom had this to say:

11 You know, I have been practicing now since 1988, of situations like
12 this where people were having problems with substance abuse. And
13 their whole practice fell apart. They weren't near the attorneys that
14 they were when they were at the top of their game. And you could just
15 see it. With Raf (Respondent) I didn't see any evidence of that. (Id at
16 p. 47, l. 5-11)
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19 Anita Royal, the Pima County Public Fiduciary, testified that she had first met
20 Respondent in law school, had maintained contact with him throughout the years and was
21 unaware of any other case or situation where it was alleged that he was under the
22 influence of drugs while in court or that his competence had been called into question. (Id
23 at p. 61, l. 7-15)
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25

26 When cross-examined about his contacts with Respondent over the years,
27 including the time frames involved in this case, Pima County Superior Court Judge
28

1 Richard Fields, said that Respondent had always enjoyed a very good reputation and that
2 he would rate Respondent "at least an 8.5" on a scale where 10 would represent the most
3 accomplished, skilled and ethical defense attorney he could imagine. (Id at p. 5-25)
4

5 44. While Respondent's use and/or abuse of cocaine in the Sagasta case did
6 reflect adversely upon his fitness to practice law and the administration of justice, and he
7 was not entirely candid about the extent and duration of his cocaine addiction, with either
8 the Court or the State Bar, he did minimize the prejudice to his client by admitting,
9 during the Rule 32 proceedings, that he did use cocaine and was, therefore, ineffective in
10 his representation of his client.
11
12

13 45. This Hearing Officer acknowledges the testimony that Respondent is a very
14 capable attorney who cares about his clients and works very hard to protect their
15 interests. (See, testimony of P. Eckerstrom, Id at p. 42, l. 14-18 and p. 44, l. 5-8 and l. 15-
16 21 and l. 11-13)
17
18

19 46. As evidenced by the testimony presented during the hearing on April 24,
20 2007, Respondent enjoys a very good reputation in the Tucson legal community. (See,
21 Judge Field's testimony, Id at p. 12, l. 15-24; testimony of Anita Royal, Id at p. 61, l. 19-
22 23) Respondent gets along well with Judges, staff and other attorneys and is well thought
23 of in terms of his competence, professionalism and integrity. Judge Fields testified that
24 Respondent got along well with his adversaries and was always "ethical, always
25 professional, and always very friendly towards the people involved in the process". (Id at
26
27
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1 p. 9, l. 21-25)

2 47. Respondent, even before his admission to practice, was very active and
3 making significant contributions to the profession. During his second year of law school,
4 Respondent served as President of the Minority Law Student's Association. During his
5 third year, Respondent served as President of the Student Bar Association of University
6 of Arizona, College of Law. During his second and third years, Respondent attended
7 conferences sponsored by the National Hispanic Bar Association. Respondent helped to
8 establish the Tucson Chapter of this organization. (See, Respondent's Memorandum in
9 Support of Consent Agreement and Respondent's sworn testimony, Id at p. 66, l. 7-11)
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14 48. As an attorney, Respondent served as the President of the Arizona Minority
15 Bar Association from 1992-1994. Respondent helped to organize five (5) separate fund
16 raising events, which provided scholarships for minority law students. Respondent was
17 also on the committee, which was responsible for distributing the funds raised. From
18 1997-2000, Respondent was the Lawyer Representative to the Ninth Circuit Court of
19 Appeals. Respondent was appointed to that position by the Honorable John Roll, Federal
20 District Court Judge for the District of Arizona. He was involved in the formulation and
21 amendment of Rules of Procedure and Ethical Rules. He also helped to organize and
22 sponsor a CLE conference in Tucson, Arizona, in 1997, which was attended by Federal
23 Judges and members of the Federal Bar. (Id.)
24
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28 49. Respondent also serves as General Counsel for the University of Arizona

1 Hispanic Alumni Association. This involves pro bono work having to do with various
2 legal issues which arise as part of the work done by this University based organization.

3
4 (Id.)

5 50. Respondent is also a Board Member of an organization called Los
6 Changuitos Feos (the Ugly Monkeys). This group was founded approximately fifty (50)
7 years ago by a Catholic Priest. The group raises scholarship monies for deserving young
8 Hispanic musicians who are interested in attending college in order to pursue a career in
9 the arts. Respondent is actively involved in soliciting and distributing funds for this
10 organization. (Id.)

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13
14 51. Respondent was and is very proud of being a lawyer and a member of the
15 Arizona State Bar. He is genuinely remorseful and embarrassed by his cocaine addiction
16 and failure to be more truthful with the court and the State Bar about his addiction. He is
17 also saddened that his behavior has reflected adversely on the profession. During his
18 sworn testimony on April 24, 2007, Respondent offered the following statement:

19
20
21 I'm very remorseful for my actions, in which I take full responsibility.
22
23 It would be easy to lay blame on others — sorry, this is very
24 emotional. It would be easy to lay blame on others, or the stressors of
25 life. However, the blame is mine. I own it. I made poor choices during
26 that dark period of my life, including, but not limited to, being less
27 than candid to the Bar and to the Court. Those poor choices have
28

1 caused many negative consequences. I have brought disappointment
2 and embarrassment to my family, my friends, and my colleagues, to
3 many people I love and hold dear in my life. I have also tarnished the
4 profession that I truly revere. I can only make amends by my actions
5 that I have taken and will continue to take. (Id at p. 66, l. 19—p. 67, l.
6 7)
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8

9
10 52. This Hearing Officer is satisfied that Respondent has accepted full
11 responsibility for his actions and is committed to a full and speedy recovery. Certainly,
12 the fact that Respondent has agreed to a condition of probation which provides that he
13 will automatically be disbarred if he is even once found to have used an illegal substance
14 speaks directly to this commitment. As Respondent said, “actions always speak louder
15 than words”. (Id at p. 67, l. 14-15)
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17

18 53. Respondent has been tested randomly for the past ten (10) months in order to
19 insure that he is not using cocaine or any other illegal substances. Each and every time
20 the negative test results have demonstrated that he is not using any illegal substance. (Id
21 at p. 24, l. 3-23)
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24 54. Respondent has taken a number of significant steps towards recovery. He has
25 volunteered to appear at the University of Arizona, College of Law and discuss his own
26 addiction and how this has affected his practice and his life. This alone may help others
27 to understand the consequences of drug use and addiction and how this can ruin a career
28

1 and reflect badly upon the profession. (Nevitt testimony, Id at p. 27, l. 13—p. 27, l. 12)

2
3 55. Respondent has been described as an “exemplary” MAP participant. He has
4 done everything asked of him in terms of a recovery program. (Nevitt, Id at p. 33, l. 8)

5
6 56. There is no evidence to suggest that Respondent ever involved any client in
7 his use and/or abuse of cocaine. Nor is there any evidence that Respondent was ever
8 under the influence of cocaine, or any other drug, while appearing in court. In fact,
9 Respondent was described as a defense attorney who seemed to genuinely care about the
10 clients he represented (Eckerstrom, Id at p. 46, l. 3-15) and never appeared to have been
11 under the influence in court or in such a manner as to adversely affect the interests of
12 those clients. (Eckerstrom, Id at p. 46, l. 19—p. 47, l. 11; Anita Royal, Id at p. 60, l. 12—
13 p. 61, l. 15)

14 15 16 ADMISSIONS

17
18 Respondent has admitted that his conduct violated the following Rules of
19 Professional Conduct:

- 20
- 21 1. Rule 42, Ariz. R. Sup. Ct., ER 1.1: By failing to provide competent
22 representation to his client.
 - 23 2. Rule 42, Ariz. R. Sup. Ct., ER 1.5(a): By charging unreasonable fees due to his
24 providing ineffective assistance of counsel; by charging unreasonable fees due
25 to his cocaine use prior to and during the trial.
 - 26 3. Rule 42, Ariz. R. Sup. Ct., ER 1.16: By not withdrawing from representation
27
28

1 when his physical or mental condition materially impaired his ability to
2 represent his client; by failing to withdraw from the representation when it
3 resulted in him violating the Rules of Professional Conduct or other law.
4

5 4. Rule 42, Ariz.R.Sup.Ct., ER 3.3: By knowingly making a false statement of
6 fact or law to a tribunal; by failing to correct a false statement of material fact
7 or law previously made to the tribunal.
8

9 5. Rule 42, Ariz.R.Sup.Ct., ER 8.1: By knowingly making false statements of
10 material fact; by failing to disclose a fact necessary to correct a
11 misapprehension known by him to have arisen in the matter.
12

13 6. Rule 42, Ariz.R.Sup.Ct., ER 8.4(b): By committing a criminal act that reflects
14 adversely on his honesty, trustworthiness, or fitness as a lawyer in other
15 aspects.
16

17 7. Rule 42, Ariz.R.Sup.Ct., ER 8.4(d): By engaging in conduct prejudicial to the
18 administration of justice.
19
20

21 SANCTIONS

22 Respondent and the State Bar agree that the following disciplinary sanctions
23 should be imposed:
24

- 25 1) Respondent will receive a one-year suspension for violating Rule 42,
26 Ariz.R.Sup.Ct., specifically ERs 1.1, 1.5(a), 1.16, 3.3, 8.1, 8.4(b) and 8.4(d).
27
28 2) Two (2) years probation, which will begin upon his reinstatement into active

1 status, and will terminate no sooner than two (2) years following the date on
2 which Respondent executes all necessary initial LOMAP and MAP contracts,
3 with the following terms;
4

5 3) LOMAP and MAP assessments, and agreement to and compliance with initial
6 and subsequent contracts deemed appropriate by LOMAP and MAP. At a
7 minimum, the MAP contract will require that:
8

9 (a) Respondent submit to periodic drug testing during his probation;
10

11 (b) Any and all information provided to or obtained by MAP that in any
12 manner whatsoever pertains to Respondent, even if furnished by
13 Respondent, and even if otherwise deemed privileged or confidential,
14 may and will be disclosed to bar counsel and may be used by the State
15 Bar in any subsequent proceeding herein for any purpose;
16

17 (c) Respondent agrees that all information release forms he has previously
18 signed by which his privileged or confidential information may be
19 obtained by the State Bar will remain in effect for the duration of his
20 probation. If deemed necessary by the State Bar, Respondent will sign
21 and provide new such authorizations;
22

23 (d) Should Respondent be determined to possess or use illegal drugs (such
24 as, but not necessarily limited to, by being observed or apprehended
25 with or using illegal drugs, or testing positive for illegal drug use),
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1 Respondent consents to his immediate interim suspension and
2 disbarment and agrees not to contest State Bar proceedings to effectuate
3 his interim suspension and disbarment; and
4

5 (e) Respondent further agrees that a positive test result for illegal drug use
6 obtained by MAP, or a MAP report of the same, will be dispositive and
7 conclusive of Respondent's possession and/or use of illegal drugs and
8 he agrees not to contest such a result or report.
9
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11 4) Respondent agrees to participate in and initiate SBA Fee Arbitration with
12 Robert Sagasta, Sr.
13

14 5) Respondent will pay all costs and expenses incurred by the State Bar in this
15 disciplinary proceeding.
16

17 6) In the event that Respondent fails to comply with the foregoing terms of
18 probation, and information thereof is received by the SBA, State Bar counsel
19 shall file a Notice of Non-Compliance with the imposing entity, pursuant to
20 Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a
21 hearing officer to conduct a hearing at the earliest practicable time, but in no
22 event later than 30 days after receipt of notice, to determine whether a term of
23 probation has been breached, and, if so, to recommend an appropriate action
24 and response. If there is an allegation that Respondent failed to comply with
25 any of the foregoing terms, the burden of proof shall be on the State Bar of
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1 Arizona to prove noncompliance by clear and convincing evidence.

2 **SANCTION ANALYSIS**

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4 In determining whether the sanction agreed upon between the State Bar and
5 Respondent is appropriate, this Hearing Officer has considered both the American Bar
6 Association's Standards for Imposing Lawyer Sanctions (Standards) and Arizona case
7 law. The Standards provide guidance with respect to an appropriate sanction in this
8 matter. The Supreme Court and the Disciplinary Commission consider the Standards a
9 suitable guideline. See, *In Re Peasley*, 208 Ariz. 27, 33, 90 P3d 764 (2002); *In Re*
10 *Rivkind*, 164 Ariz. 154, 157, 791 P2d 1037, 1040 (1990). The ultimate sanction imposed
11 should at least be consistent with the sanction for the most serious instance of
12 misconduct. See, Standards, p.6, *In Re Redeker*, 177 Ariz. 305, 868 P2d 318 (1994).

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17 The most serious misconduct in this case is Respondent's criminal act of using
18 cocaine prior to and during his client's trial, which rendered him ineffective. The second
19 most serious misconduct is Respondent's false statements about his continued use of
20 cocaine. The parties agree, and this Hearing Officer concurs, that Standards 5.1, Failure
21 to Maintain Personal Integrity; 6.1, False Statements, Fraud and Misrepresentation, and
22 7.0, Violations of Duties Owed as a Professional, are the most appropriate Standards.

23
24
25 Standards 5.1 and 5.12 provide that a suspension is generally appropriate when the
26 lawyer knowingly engages in criminal conduct, which seriously and adversely reflects on
27 the lawyer's fitness to practice.
28

1 Standards 6.1 and 6.12 also provide that suspension is generally appropriate when
2 a lawyer knows that false statements or documents are being submitted to the court or
3 that material information is improperly being withheld and takes no remedial action and
4 causes an adverse or potentially adverse effect on the legal proceedings. Standards 7.0
5 and 7.2 provide that suspension is generally appropriate when a lawyer engages in
6 conduct that is a violation of a duty owed as a professional with the intent to obtain a
7 benefit for the lawyer or another, and cause serious or potentially serious injury to a
8 client, the public or the legal system.
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12 The parties agree, and this Hearing Officer finds that Respondent acted knowingly
13 and violated his duty to his client and the profession. There was injury to Respondent's
14 client in that Respondent was ineffective in his representation.
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18 AGGRAVATING and MITIGATING CIRCUMSTANCES

19 The parties agree, and this Hearing Officer finds that the following aggravating
20 circumstances exist:
21

- 22 - Standard 9.22(c)...a pattern of misconduct (Respondent used alcohol and
23 illegal drugs over a significant period of time)
- 24 - Standard 9.22(f)...submission of false evidence, false statements, or other
25 deceptive practices during the disciplinary process (Respondent was less than
26 truthful during the process, most specifically when he stated that he had not
27
28

1 used cocaine since 2000, when, in fact, he had)

- 2 - Standard 9.22(i)...substantial experience in the practice of law (Respondent
3 was admitted to practice in 1991)
- 4
- 5 - Standard 9.22(j)...failure to make restitution. (On the advice of his attorney,
6 Respondent has not refunded fees paid by his client's father. Although
7 Respondent did considerable and difficult work on the case, he later admitted
8 and the court found that his representation was ineffective. However,
9 Respondent has not refunded any fees, as yet, on the advice of counsel, but
10 Respondent has agreed to fee arbitration through the State Bar.)
- 11
- 12 - Standard 9.22(k)...illegal conduct (Respondent used cocaine prior to and
13 during trial, although not during court.)
- 14
- 15
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- 17

18 The parties agree, and this Hearing Officer finds that the following circumstances
19 should be considered in mitigation:

20

- 21 - Standard 9.32(a)...absence of prior disciplinary record (Respondent has been
22 the subject of only one informal reprimand which occurred in August, 2000.
23 Respondent has not been the subject of any other formal or informal
24 disciplinary matters. The only informal reprimand occurred as the result of
25 Respondent's staff misplacing a complaint that had been filed against him.
26 Respondent was, therefore, unaware of the complaint or the need to file a
27
28

1 response. When contacted, after the time for filing a response had passed,
2 Respondent explained what had occurred and was allowed to file an
3 appropriate response. The complaint was ultimately dismissed. However,
4 Respondent received an informal reprimand as the result of his staff
5 misplacing the complaint which resulted in a timely response not being filed)
6

- 7 - Standard 9.32(b)...absence of a dishonest or selfish motive
- 8
- 9 - Standard 9.32(c)...personal or emotional problems (Respondent was
10 experiencing marital problems which contributed to his use of illegal
11 substances)
12
- 13 - Standard 9.32(i)...mental disability or chemical dependency including
14 alcoholism and drug use (Respondent used cocaine and alcohol intermittently
15 over the course of several years) when
16
17 1.) there is medical evidence that Respondent is affected by a chemical
18 dependency or mental disability
19
20 2.) the chemical dependency or mental disability caused the misconduct
21
22 3.) Respondent's recovery from the chemical dependency or mental
23 disability is demonstrated by a meaningful and substantial period of
24 successful rehabilitation, and
25
26 4.) the recovery arrested the misconduct and recurrence of that misconduct
27 is unlikely
28

- 1 - Standard 9.32(l)...remorse
- 2
- 3 - Standard 9.32(m)...remoteness of prior offenses
- 4

5 **PROPORTIONALITY**

6
7 To have an effective system of professional sanctions, there must be internal
8 consistency and it is appropriate to examine sanctions imposed in cases that are factually
9 similar. See, *In Re Peasley*, 208 Ariz. 27, 90 P3d 764 (2002) However, the discipline in
10 each case must be tailored to the individual circumstances, as neither perfection nor
11 absolute uniformity can be achieved. *In Re Alcorn*, 202 Ariz. 62, 41 P3d 600 (2002); *In*
12 *Re Wines*, 135 Ariz. 203, 660 P2d 454 (1983). The cases set forth below demonstrate
13 that a one year suspension, followed by a two year probationary term, with stringent
14 conditions, is a fair, just and appropriate sanction in this case.
15
16
17

18 In *In Re Grondin*, SB-04-0122-D (2004) Grondin was suspended for three years
19 and placed on probation for two years based, in part, on his use of illegal drugs. Grondin
20 was a contract public defender and failed to appear for hearings and trials without
21 attempting to contact the court while under the influence of methamphetamine. Grondin
22 failed to keep his clients reasonably informed about the status of their cases, failed to
23 expedite litigation, abandoned several client's cases, failed to return unearned portions of
24 fees paid to him and mismanaged files. In April 2003, Grondin disappeared after
25 accepting approximately \$10,000 in legal fees from Yavapai County. He was later
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1 convicted of theft for allowing drug dealer acquaintances access to his ex-girlfriend's
2 garage to remove items to sell to pawn shops in exchange for drugs. Six mitigating
3 factors were found: absence of prior disciplinary record, absence of dishonest/selfish
4 motive; personal or emotional problems; full and free disclosure to the disciplinary board
5 or cooperative attitude toward the proceedings; inexperience in the practice of law; and
6 remorse.
7

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10 In *In Re Rivkind*, 164 Ariz. 154 (1990), Rivkind was suspended for two years
11 (retroactive) and placed on probation for one year. In January, 1986, Rivkind was
12 stopped for a traffic violation. The officer saw Rivkind trying to hide something. Rivkind
13 was searched and the officers found .19 milligrams of cocaine in his possession. Rivkind
14 was found guilty of attempted possession of cocaine, a class five felony. One aggravator
15 was found: multiple offenses. Nine mitigating factors were found: absence of
16 dishonest/selfish motive; personal/emotional problems; timely good faith effort to make
17 restitution or to rectify consequences of misconduct; full and free disclosure to the
18 disciplinary board or cooperative attitude towards the proceedings; character/reputation;
19 delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or
20 sanctions and remorse.
21
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24

25 26 CONCLUSION

27
28 Much, if not all, of Respondent's misconduct is the direct result of his addiction.

1 Respondent has already taken very significant and positive steps towards his recovery.
2 His commitment to sobriety seems sincere. The evidence offered in support of
3 Respondent and this agreement demonstrates that Respondent is entirely capable of
4 successful rehabilitation. Respondent is and has been an exemplary MAP participant. He
5 is no longer in denial, nor is he minimizing the extent or duration of his addiction. This
6 alone is a major step towards recovery. Respondent is remorseful about and embarrassed
7 by his conduct. Respondent recognizes that any negative consequences, including this
8 suspension, are his responsibility. Failure is not an option because failure will result in
9 his immediate interim suspension and disbarment.
10
11
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14 In the case of *Matter of Arrick*, 180 Ariz. 136, 882 P2d 943 (1994) the Court
15 reiterated its commitment to creating an incentive for attorneys who reform and
16 rehabilitate themselves. Respondent's agreement that a single relapse will result in an
17 immediate interim suspension and disbarment is the best evidence of his commitment to
18 sobriety and rehabilitation.
19
20

21 In addition, for almost a year now (since last July), Respondent has been
22 monitored and supervised by the State Bar through his participation in the MAP
23 program. Accordingly, there is empirical evidence upon which this Hearing Officer can
24 project Respondent's potential for success and the reasonableness of the agreed upon
25 sanction.
26
27

28 Moreover, by the time this case is reviewed by the SBA Disciplinary Committee

1 and the Arizona Supreme Court, Respondent will have been participating in the MAP
2 program for one year. This also effectively constitutes an additional year of supervision
3 on top of the time already agreed to in the consent agreement.
4

5 The State Bar is to be commended for reaching an agreement in this case, which
6 accomplishes the dual purpose of protecting the public and providing an errant lawyer
7 with the opportunity to reform and rehabilitate.
8

9 Based upon all of the foregoing circumstances, this Hearing Officer finds that the
10 *Tender of Admissions and Agreement for Discipline by Consent* is a fair, just and
11 appropriate resolution, accepts the same and recommends that it be accepted as written.
12

13
14 DATED: June 15^m, 2007.

15
16 Bruce G. Macdonald /cs
17 Bruce G. Macdonald
18 Hearing Officer 6M
19

20 Original filed with the Disciplinary Clerk
21 this 15^m day of June, 2007.

22 Copy of the foregoing mailed
23 this 15^m day of June, 2007, to:

24 Richard J. Gonzales
25 Respondent's Counsel
26 *The Gonzales Law Firm, P.C.*
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