

**FILED**  
JUL 03 2007  
HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY: *R. Bondurant*

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

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IN THE MATTER OF A MEMBER ) File No. 06-1302  
OF THE STATE BAR OF ARIZONA, )  
)  
ANDREW R. PROPER, )  
Bar No. 011295 )  
)  
RESPONDENT )  
)

**HEARING OFFICER'S REPORT  
AND RECOMMENDATION**

**A. INTRODUCTION**

"No matter how far you have gone the wrong, turn back," is a wonderful old proverb. This Respondent, stubborn cowboy that he is, has learned the hard way that he was barreling down that wrong road. The evidence presented at the hearing has convinced me he is committed to turning back. One hopes he will succeed.

On May 16, 2007, I held a hearing to determine whether to recommend acceptance of the Tender of Admissions and Agreement for Discipline by Consent (the "Tender"). To assist the Commission in considering my recommendation I will present testimony dealing primarily with the mitigating factors, and whether the Respondent has really turned back.

**B. WITNESSES**

1 DeDe Bondurant Ms. Bondurant is a supervisor with the Gila County Probation Department. She has been with that department for 17 years. She did the pre-sentence report for Respondent, and is the indirect case load probation officer<sup>1</sup>. She was a very impressive witness. knowledgeable, experienced and unbiased.

In addition to the standard probation terms, she testified that sentencing Judge Duber gave Respondent several special conditions, holding him to a much higher standard than usual. When I

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<sup>1</sup> Since Respondent is on probation in Gila County but lives in Maricopa County, he has local probation officers who report to Ms. Bondurant

1 asked why, Ms. Bonderant responded "In my experience, sometimes Judge, when he has  
2 somebody in front of him who perhaps is a professional man or better educated, he just thinks  
3 they ought to know better, it seems to me." T 50, Lines 1-4.

4 Besides being sentenced to three years probation and 90 days in jail (of which  
5 Respondent served 37), Respondent was ordered to sell his car, was prohibited from visiting his  
6 children for some of time<sup>2</sup>, fined over \$6,000 and, most significantly, required to wear an ankle  
7 bracelet (called a SCRAM monitor – for Secure Continuing Alcohol Remote Monitor) which  
8 measures alcohol through perspiration. He was ordered to wear this for four months

9 Ms. Bonduant is convinced Respondent is headed down the right road:

10 **A:** And in my opinion, Andy finally got it. He learned his lesson there  
11 He – after the initial shock wore off of what – how much he was going  
12 to have to do and how painful that was going to be, he just said, "I'm  
13 going to do this I'm going to be a perfect probationer" And he has  
14 been. T 55, Lines 6-11.

15 **Q: (Mr. Adams)** Overall, do you have an opinion about Mr. Proper as  
16 a probationer compared to other probations?

17 **A:** He's exemplary.

18 **Q:** Have you in your business, your work, developed a methodology or  
19 an opinion about whether certain persons will re-offend?

20 **A:** Well, we have several things. We have a standardized risk needs  
21 instrument. It's a research-based – research-based standardized  
22 instrument And we use that We have – all POs have a gut instinct, but  
23 that doesn't hold up all that well in court. So our basic measure for – for  
24 risk to re-offend would be that standardized instrument.

25 **Q:** And have you run Andy's case through that standard base?

**A:** Well, I thought that this morning. I did the original when I did the  
pre-sentence report. I'm sure the PO that he reports to has done a  
reassessment since then. But I forgot to print it But when I did this  
May 10, '06, just a year ago, out of 44 points, Andy scored a 4. And  
probably one of those was alcohol He scored two points, two out of  
three points on alcohol at that time. Since then he's completed alcohol  
treatment, and that score would probably come down But I don't have  
the evaluation form with me.

**Q:** Can you help us understand what those numbers mean. There was a  
44 point possibility?

**A:** Yeah. There were 44 items on the risk needs tool.

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<sup>2</sup> Respondent has two children, a boy 14 and a girl 19 months younger, who live in Flagstaff with their mother.

1 Q: How did Andy measure up?

2 A: He scored a 4.

3 Q: Is that good or bad?

4 A: Oh, that's fairly good. That's fairly good.

5 Q: And according to that standardized test or standardized evaluation,  
6 he's not likely to offend; is that correct?

7 A: 4 is an extremely low-level risk. And it has probably come down at  
8 least one point since then. He would probably score a 3 now.

9 Q: Do you have a gut reaction to him?

10 A: I think Andy got it. I don't think Andy's coming back. I would be –  
11 I never guarantee anybody's behavior, even including my own. But I  
12 would be extremely surprised if we ever see him again.

13 T 59, Line 9 to T 61, Line 3.

14 In response to my question as to whether she thought Respondent was

15 remorseful, she replied:

16 Well, I'm familiar with remorse as a mitigating factor from writing pre-  
17 sentence reports. And I also teach PSR writing. And one of the things I  
18 teach our POs is that I never mention remorse in a pre-sentence report  
19 unless there's something very tangible, something tangible either that  
20 shows a person is really remorseful or something – or they say, "I'm  
21 really remorseful" and I have something tangible to show that that's not  
22 true. T 63, Lines 15-23.

23 ..

24 So the point of all that is I'm familiar with remorse, and I very rarely  
25 talk about it unless there's something tangible. And in Andy's case, yes,  
I see a lot of tangible things. I think the first thing I saw was how much  
it really bothered him that he couldn't be with kids. I mean, he only has  
weekend visitation. And he probably doesn't see them more than twice  
a month. But when Judge told him he couldn't see his kids for two  
times and he had to explain to his fairly small children that he couldn't  
come see them because he had really messed up his life and he had to  
deal with it, I think that was hard for him. And – and just all the things  
that he's done, he's been absolutely exemplary. He knows what he did  
to mess up his life, and he knows what he's had to do to get through this.

26 Q: (Hearing Officer) I guess there's probably a whole body of  
27 literature on remorse which I'm unaware. But I take it what I'm hearing  
28 from you is that you believe that, in fact, he is remorseful and that that  
29 would be supported by your experience over the years, that mitigating  
30 factor.

31 A: Yes, sir, it is. And I don't usually do this for probation clients. Very  
32 few of them deserve it.

33 Q: What's "this"?

1 A: I'm here. I'm here. Everything I've said is absolutely true. But  
2 there are very few probation clients who have earned the – such – have  
3 earned a good report that I can give for Andy.

4 Q: As if you want to be here.

5 A: As if I want to be here?

6 Q: You want to be here.

7 A: Well, I have a subpoena.

8 Q: But you're pleased to do this.

9 A: Yes. Yes.

10 T 64, Line 16 through T.66, Line 2

11 2 Michael Sucher, MD Dr Sucher is an independent contractor with the State Bar on  
12 addition issues. Among other tasks, he evaluates and monitors participants or potential  
13 participants with substance abuse issues in the Member Assistance Program. Dr Sucher testified  
14 that, to a reasonable degree of medical certainty, Respondent is an alcoholic and that the  
15 alcoholism caused the misconduct. T.122, Lines 1-23.

16 In Dr Sucher's opinion, the one year that Respondent has been sober is a "sustained  
17 period of rehabilitation."

18 Q: (Mr. Adams) Do you have an opinion about what is an appropriate  
19 length of time for sobriety to have taken place prior to equating it with a  
20 what the ABA has referred to as a sustained period of rehabilitation?

21 A: I think he does fit that threshold. He's now over one year sober. And  
22 that really is kind of the threshold they use where the probability of  
23 sustained recovery goes up significantly.

24 Q: So the last and final factor, according to the ABA, of course, is the  
25 misconduct likely to recur. Do you have an opinion in that regard?

A: Well, again, because he's been able to be abstinent for a year, more  
than a year, that the likelihood is that it won't recur. So the likelihood –  
it's more likely than not that he will be able to maintain sobriety than  
not.

T 123, Lines 10-25.

Q: (Hearing Officer) We had a witness earlier today who is the Gila  
County Probation Officer. Dede? Was that her name?

A: Yes.

Q: I was very, very impressed with Dede. And one of the things that  
she said that I found interesting was basically – and she is responsible  
for doing the sentencing report and making the recommendation to the  
Judge. And I suspect will be asked when the request for early probation  
or termination of probation – that she'll be asked for her opinion again,  
which was "I've been doing this a long time and I get some feelings one

1 way or other about how sincere people are." Is that fair in your case as  
2 well.

3 . That you also, besides the tests that you've given and the questions  
4 that you ask, do your years of experience give you sort of a gut  
5 experience if you will

6 **A:** Yeah I felt he was very open in disclosure. And I felt really he's got  
7 the message He knows he's alcoholic. He knows he needs to stay sober.  
8 I feel he's committed to that.

9 T.130, Line 4 through T 131, Line 1.

10 3 Lori Lynn Duchaine. Ms. Duchaine is a substance abuse counselor who was  
11 responsible for monitoring the 56 hours of DUI education that was ordered as a part of  
12 Respondent's probation. Among other things, he participated in group sessions:

13 **Q: (Mr. Adams)** How would you characterize his participation in that  
14 group?

15 **A:** He was no absences, always on time, prepared for sessions,  
16 positively approached every session with a positive attitude about  
17 treatment, very involved in discussions, very supportive of other group  
18 members and their sobriety, encouraged motivation for himself and  
19 other group members also

20 T 28, Lines 18-25.

21 Ms. Duchaine was also asked whether she thought Respondent would have a further  
22 problem with alcohol

23 **Q: (Mr. Adams)** Have you over time develop the -- a good guessing  
24 mechanism for who will return and who won't?

25 **A:** Yes Right away Usually the first session

**Q:** What's that based on? How do you tell?

**A:** Their ability to accept responsibility for the events that occurred.

**Q:** In your opinion, what was Mr. Proper's ability to accept  
responsibility?

**A:** I believe on the first progress note that I did, I said that he accepted  
responsibility And that was on September 15 of '06, he started a  
program with me on 7-17-06.

**Q:** Do you have an opinion about whether or not Mr Proper is a likely  
candidate to come back?

**A:** I put very unlikely.

**Q:** Why -- why would you say that?

**A.** His attitude toward treatment was always positive. His -- his level of  
motivation was always very strong He -- his consequences that he  
suffered because of the DUI had a great effect on his life. And usually  
when someone has consequences that affects their lifestyle in such a  
way, that way reduces their recidivism rate. Other people that don't

1 have consequences, in other words, a job consequence or a family  
2 consequence, financial consequence, then their likelihood is much more  
3 greater.

4 **Q.** What were the kind of consequences that you had in mind about Mr.  
5 Proper?

6 **A.** Loss of his – his job, the disciplinary action with the job, which then  
7 had a chain reaction with financial Financial often times, not just with  
8 him, but also can lead to other stressful situations, possibly family,  
9 possibly loss of housing, certain things like that, so –

10 **Q.** Okay. So is your opinion about Mr Proper that he will or – would  
11 or would not return to you through a subsequent offense?

12 **A.** Would not

13 T 31, Line 25 through T.33, Line 13.

14 4. Character Witnesses Dr Albert Chavez, Kevin Beckwith and Mervin Braude all  
15 testified as to Respondent's good character and reputation I find that Respondent has introduced  
16 sufficient evidence to support this mitigating factor.

17 5. Respondent Andrew Proper Respondent testified at length about his background and  
18 the events in question He was straight-forward and candid. He was, and is, a cowboy (although  
19 he no longer rides in rodeos). Character witness Kevin Beckwith described him as “ . painfully  
20 honest He will tell you what he thinks You don't have to wonder if he's not telling you the full  
21 story” T.40, Lines 14-16.

22 As Respondent candidly admitted, it took a while to get his attention:

23 When Lori was talking about accepting responsibility and consequences,  
24 I sat there and thought to myself, yeah, no kidding. In all fairness to the  
25 system, and I don't mean any disrespect, but they didn't get my attention  
the first two times [prior DUI's]. I didn't take it seriously. There  
weren't enough consequences I had kind of a cavalier attitude And I  
didn't learn my lesson. I certainly did the third time It messed my life  
up more ways than I can count And I got the point, as Judge Duber has  
said – Dede said, I got the point. T 83, Lines 5-15

26 It appears it was the SCRAM bracelet that may have done the trick:

27 But honestly, as bad as I hated wearing that thing – it was  
28 uncomfortable Believe me Don't do it if you have a choice – that was  
29 the best thing Judge Duber did That's what made me quit drinking.  
30 Because it made you honest real fast. You can't cheat or lie on that  
31 thing.

1 And as I've told Ralph and Dede and 42,000 other people, it seems, the  
2 first ten days, maybe 14 days, it was hard not to be reaching for a beer to  
3 drink because it was such a damned habit. But after that first 10 or 14  
4 days, and I got used to not drinking beer, I haven't missed it a bit. And  
5 after having worn it for apparently three months, as I said, I thought it  
6 was four, I don't miss it and I don't want to go back.

7 I've been getting involved with AA and actually my barber is an old -  
8 he calls himself an old timer, 25, 27 years, something like that. And he  
9 said something to me that kind of - is so simple, it's amazing, that the  
10 simple things don't always click with you, but he's, like, "Did you ever  
11 notice that every time you get in trouble, alcohol is involved?"

12 No kidding. What a brilliant deduction.

13 "Yeah, I did notice that now that you mention it "

14 T.94, Line 9 through T 95, Line 5

15 I also questioned Respondent:

16 **Q:** Tell me again how you feel about not drinking.

17 **A:** Good My life has improved substantially A, I get more work  
18 done. B, it's something that needed to happen in the sense of every time  
19 I ever have any problems, alcohol has been involved And I don't have  
20 to worry about having problems that involve alcohol if I don't drink  
21 T 98, Lines 3-10.

22 ..

23 **Q:** Think you'll drink again.

24 **A:** No, I don't Honestly, I don't. I have no intention to. And I don't  
25 want to No, I don't I've been sober a year. Close enough And, no  
T.102, Lines 10-13

26 ...

27 **A:** . I messed up big time, and I understand I messed up, and I'm  
28 sorry And I won't do it again.

29 **Q:** You're lucky is what you are

30 **A:** You know what? I am lucky, and the reason I'm lucky is because  
31 God loves me And I mean that with all sincerity I am lucky God's  
32 watching out for me fortunately And I mean truly very fortunately. For  
33 all the damned DUI's I've had, I haven't had an accident or killed  
34 anybody Because so often the ones you read about in the newspaper,  
35 somebody if they didn't get killed, they got run over. And I don't need  
to knock on wood because I'm not ever going to drink again But, I'm  
grateful and fortunate that I never actually physically hurt anybody as a  
result of my drinking And I recognize that because we read about it and  
all that

T 106, Lines 1-18.

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Q: Do you feel tempted?

A: Not particularly, but in all honesty, the thought has crossed my mind from time to time.

I'll give you an example. On this acre and a third irrigated pasture house of mine, I don't know the exact dimension, but the front yard is, say, maybe a quarter of an acre. Big enough you don't want to do a push mower, I'll put it that way. So I got this little John Deere riding mower. And when I'm out there mowing the lawn - not now, but initially. You know where I'm going with this, don't you

Q: Sure. Many times.

A: When I'm out there mowing the lawn, it's like, shit, man, I'd normally have a beer here. But no, Pepsi or a bottle of water is the right answer. But, yeah, in all honesty, it's crossed my mind from time to time. I've resisted the temptation. That's why I say Judge Duber did me the biggest favor anybody could do me when he said, "You're going to wear that SCRAM." And that trained me. That was forced training. That was not voluntary. And that was the best thing that could have happened with me. That broke the habit right there. And once I got that habit broke - Dede told me - we were talking about it one time.

Dede told me I could drink this non-alcoholic beer. Because it's - it's still 05 percent, which I actually investigated. That is - it would take eight and a half of those, I think is what I came up with. It would take eight and a half of those to equal one can of regular beer. And she said, you know, "If you want to drink NA beer, I don't have a problem with that because it's such a low content.

I said, "You know, Dede, that's nice of you, but no. Because that would be the first step down the wrong road, and then I'll" - that's why I drank so much beer. I liked the flavor, plus it was a good way to drown my problems.

I said, "No, I'm not even going to go down the road." Zero is the right answer. And I've maintained that.

T 99, Line 25 through T 101, Line 15.

Even Respondent now recognizes that he was headed down the wrong road.

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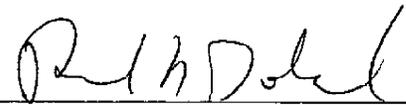
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1 **C. RECOMMENDATION**

2 Based on the above, I am comfortable recommending that the Commission accept the  
3 Tender and approve the agreed upon sanction.

4 DATED this 2nd day of July, 2007.

5   
6 Richard N Goldsmith  
7 Hearing Officer

8 Original filed with the Disciplinary Clerk  
9 this 2nd day of July, 2007.

10 Copy of the foregoing was mailed  
11 this 2nd day of July, 2007, to:

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