

**FILED**

SEP 08 2008

DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA  
BY *[Signature]*

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

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
**JAMES T. GREGORY,** )  
**Bar No. 021499** )  
)  
RESPONDENT )  
\_\_\_\_\_ )

No 05-0868

**DISCIPLINARY COMMISSION  
REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 9, 2008, pursuant to Rule 58, Ariz R Sup Ct , for consideration of the Hearing Officer's Report filed June 9, 2008, recommending acceptance of the Modified Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Modified Joint Memorandum ("Joint Memorandum") providing for censure, one year of probation with the State Bar's Trust Account Program ("TAP"), Trust Account Ethics Enhancement Program ("TAEPP") and costs including costs associated with TAP totaling \$175 00, within 30-days of the date of the Supreme Court's final Judgment and Order

**Decision**

Having found no facts clearly erroneous, the seven members<sup>1</sup> of the Disciplinary Commission by a majority of six,<sup>2</sup> recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, one year of probation (TAP and TAEPP), and costs of these disciplinary proceedings including any

<sup>1</sup> One lawyer member seat remains vacant Commissioners Belleau and Katzenberg did not participate in these proceedings Mark Sifferman, Esq , a hearing officer from Phoenix participated as an ad hoc member

<sup>2</sup> Commissioner Osborne was opposed See dissenting opinion below

1 costs incurred by the Disciplinary Clerk's office, and \$175 00 to TAP<sup>3</sup> Although the  
2 majority shares the dissent's concern, the Commission is confident that Respondent will  
3 receive the message and not be back before us

4 The terms of probation are as follows

5 **Terms of Probation**

6 1 Respondent shall meet with the State Bar Staff Examiner for Trust  
7 Accounts, Gloria Barr, within 30-days after the execution of the Memorandum of  
8 Understanding ("MOU") to schedule an assessment of his client trust account procedures  
9 Following the assessment, Respondent shall enter into a TAP contract based upon  
10 recommendations of Ms Barr The TAP contract thereafter, shall be incorporated by  
11 reference into the MOU Respondent shall comply with all recommendations or  
12 requirements made by Ms Barr in relation to TAP

13 2 Respondent shall complete TAEEP during the probation period

14 3 Respondent shall pay all costs and expenses associated with this additional  
15 term of probation

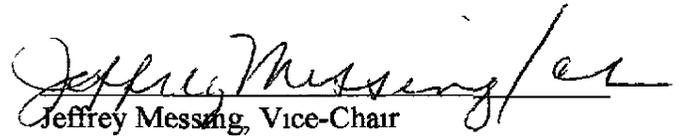
16 4 Respondent shall refrain from engaging in any conduct that would violate  
17 the Rules of Professional Conduct or other rules of the Supreme Court of Arizona

18 5 In the event that Respondent fails to comply with any of the foregoing  
19 conditions, and the State Bar receives information, bar counsel shall file with the imposing  
20 entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz R.Sup Ct The  
21 Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to  
22 determine whether the terms of probation have been violated and if an additional sanction  
23  
24

25 <sup>3</sup> A copy of the Hearing Officer's Report is attached as Exhibit A The State Bar's costs and  
26 expenses total \$600 00

1 should be imposed In the event there is an allegation that any of these terms have been  
2 violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by  
3 clear and convincing evidence

4 RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of September 2008

5  
6   
7 Jeffrey Messing, Vice-Chair  
8 Disciplinary Commission

9 *Commissioner Osborne dissenting*

10 I respectfully dissent and would have rejected the agreement Given Respondent's  
11 prior discipline history, which includes a pattern of misconduct, a more severe sanction  
12 may be necessary to ensure that Respondent takes his professional responsibilities  
13 seriously

14 As members of the Commission, we are often reminded that one of the purposes of  
15 attorney discipline is to deter similar misconduct by other attorneys *In re Klemdienst*, 132  
16 Ariz 95, 644 P 2d 249 (1982) This purpose is especially important in non-compliance  
17 matters, as we do not send a message to other attorneys that they do not have to act  
18 responsibly and comply with court orders in a timely fashion Here, we are censuring  
19 Respondent and allowing him to repeat his failed term of probation Attorneys, especially  
20 those already familiar with the discipline process, should know the importance adhering to  
21 the terms of their probation contracts, and should proactively seek assistance when they are  
22 experiencing difficulties in doing so

23  
24 Although Respondent was represented by counsel, he did not attend the hearing in  
25 this matter and absent his testimony, I am not persuaded that he truly understands his  
26

ethical duties and responsibilities and moreover, that there will not be a recurrence of  
1 misconduct

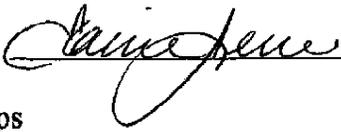
2 Original filed with the Disciplinary Clerk  
3 this 8<sup>th</sup> day of September, 2008

4 Copy of the foregoing mailed  
5 this 8<sup>th</sup> day of September, 2008, to

6 Larry Suci  
7 Hearing Officer 7A  
8 101 East Second Street  
9 Yuma, AZ 8564-1411

10 Robert M Cook  
11 *Law Offices of Robert M. Cook, P.L.L.C.*  
12 Missouri Commons, Suite 185  
13 1440 East Missouri Avenue  
14 Phoenix, AZ 85014-0001

15 Matthew E McGregor  
16 Bar Counsel  
17 State Bar of Arizona  
18 4201 North 24th Street, Suite 200  
19 Phoenix, AZ 85016-6288

20 by   
21 /mps  
22  
23  
24  
25  
26

FILED

JUN 09 2008

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA  
HEARING OFFICER OF THE SUPREME COURT OF ARIZONA  
BY: *AMM*

1  
2  
3  
4 IN THE MATTER OF A MEMBER OF THE  
STATE BAR OF ARIZONA,

No. 05-0868

5  
6 JAMES T. GREGORY,  
Bar No. 021499

HEARING OFFICER'S REPORT  
AND RECOMMENDATION

7  
8 RESPONDENT.

(Assigned to Hearing Officer 7A-  
Larry W. Suci)

9  
10 **Procedural History**

11 On March 24, 2008, the State Bar filed a notice of non-compliance and  
12 request for an order to show cause why the Respondent should not be found in  
13 violation of the probation contract the Respondent signed pursuant to the judgment  
14 and order of the Supreme Court entered in this case on February 22, 2007. A  
15 hearing on the State Bar's request was scheduled for April 18, 2008, and later  
16 rescheduled at the State Bar's request for April 29, 2008.  
17

18 The Respondent did not attend the April 29 hearing, but was represented by  
19 counsel. The parties advised the Hearing Officer that they had reached an  
20 agreement for discipline by consent. The Hearing Officer directed the parties to  
21 prepare and file a tender of admission and agreement for discipline by consent,  
22 together with a supporting memorandum no later than May 9, 2008. The  
23 documents were timely filed. A transcript of the April 29 hearing was filed on May 6,  
24 2008.<sup>1</sup>  
25

26  
27  
28 <sup>1</sup> The tender of admissions will be referred to as the "Tender" followed by the  
paragraph number.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

## Findings of Fact

The Tender supports the following findings of fact:

1. At all times relevant, Respondent was an attorney licensed to practice in Arizona on April 22, 2003. (Tender No 1).

2. On February 22, 2007, the Respondent was censured by the Supreme Court for conduct in violation of his duties and obligations as a lawyer in SB-07-0013-D (Tender No. 2).

3. As a part of that judgment, Respondent was placed on probation for a period of one year and was ordered to execute a probation contract (Probation Contract), enter the trust account program (TAP) and pay all costs associated with the probation. Respondent's probation was to commence upon execution of the Probation Contract. (Tender Nos. 3 and 4)

4. Respondent signed the Probation Contract on April 5, 2007. Under the terms of the Probation Contract, the Respondent agreed to do the following:

(a) Submit to a trust account assessment,

(b) Submit quarterly trust account reports due May 21, 2007; August 20, 2007; November 19, 2007; and February 18, 2008,

(c) Conduct a three-way reconciliation and balance the Respondent's trust account on at least a monthly basis,

(d) Pay the \$175.00 cost of the TAP within 30 days of April 5, 2007. (Tender Nos. 6, 7, 8 and 9)

5. Respondent participated in the TAP, but failed to pay the \$175.00 fee and was late filing all of the quarterly reports required by the Probation Contract.

1 The report due May 21 was not filed until June 12 The report due August 20 was  
2 not filed until September 19. The quarterly report due November 19 was not filed  
3 until December 21 and the final quarterly report due March 18, 2008, was not filed  
4 until April 12, 2008. (Tender Nos. 11, 12, 14 and 16).  
5

6 6. The Respondent failed to reconcile and balance his trust account by  
7 three-way reconciliation as a part of the quarterly report due August 20, 2007, and  
8 November 19, 2007. (Tender Nos. 13 and 15)  
9

10 7 Respondent has been disciplined on three prior occasions; November  
11 2003 in No 03-1427, November 14, 2005, in No. 03-2246 and on February 22,  
12 2007, in this case.

### 13 Conclusions of Law

14 The Respondent's conditionally admitted misconduct establishes, by clear  
15 and convincing evidence, a violation of Rule 53(e), Ariz. R. Sup. Ct (violation of a  
16 condition of probation or diversion).  
17

### 18 Sanction

19 The Respondent and the State Bar propose that the Respondent be  
20 censured for his probation violation and that he be ordered to pay the \$175.00 TAP  
21 fee and all of the costs incurred in connection with these proceedings.<sup>2</sup>  
22

23 In imposing discipline, it is appropriate to consider the facts of the case, the  
24 *American Bar Association's Standards for Improving Lawyer's Sanctions* (the  
25 Standards) and the proportionality of discipline imposed in analogous cases (*Matter*  
26

---

27 <sup>2</sup> Restitution is not an issue since there is no evidence that any client suffered a financial loss as a  
28 consequence of Respondent's misconduct.

1 of *Bowen*, 178 Ariz 283, 286, 872 P 2d 1235, 1238 (1994)). Standard 3.0 directs  
2 consideration of four criteria. (1) the duty violated; (2) the lawyer's mental state, (3)  
3 the actual or potential injury caused by the misconduct; and (4) the existence of  
4 aggravating or mitigating factors. Each criteria will be considered separately.  
5

6 1. **Duty Violated.** Respondent violated a prior disciplinary order  
7 Accordingly, Standard 8.0 applies. Standard 8.2 says:

8 "Suspension is generally appropriate when a lawyer has  
9 been reprimanded for the same or similar misconduct  
10 and engages in further acts of misconduct that cause  
11 injury or potential injury to a client, the public, the legal  
12 system or the profession."

13 Standard 8.3(a) says.

14 "Reprimand (censure in Arizona) is generally appropriate  
15 when a lawyer negligently violates the terms of the prior  
16 disciplinary order and such violation causes injury or  
17 potential injury to a client, the public, the legal system or  
18 the profession."

19 Standard 8.2 is not applicable here because the misconduct constituting a  
20 breach of the Probation Contract is not the same misconduct involved in the  
21 underlying case. In the underlying case, Respondent was censured because he  
22 wrote an insufficient funds check on his trust account. In this proceeding, the  
23 Respondent's misconduct consists of failing to timely file four quarterly trust account  
24 reports, failing to properly reconcile his trust account and failing to pay the TAP fee  
25 as agreed in the Probation Contract. There is no evidence that Respondent again  
26 overdrew his trust account. Since the Respondent has not been previously  
27 sanctioned for the same conduct involved in this case, Standard 8.3 (a) applies  
28 rather than 8.2

1           The presumptive sanction for a violation of the duty owed under Standard  
2 8.3(a) is censure

3           **2. The Lawyer's Mental State.**     The parties agree that the  
4 Respondent's failure to comply with the Probation Contract was the result of  
5 negligence, not intentional defiance. The conditionally admitted facts support that  
6 conclusion.  
7

8           Although Respondent was late on each, the four quarterly reports were  
9 eventually filed and two of the four contained the necessary trust account  
10 reconciliations. Respondent claims his failure to pay the \$175.00 TAP fee was the  
11 result of confusion in his office over whether it had or had not been paid. Given the  
12 number of payment reminders that were sent to Respondent by the State Bar, it is  
13 difficult to understand why the Respondent was not more proactive in resolving any  
14 confusion, but the Hearing Officer assumes if the State Bar had evidence that  
15 Respondent's misconduct was other than negligent, it would have been presented.  
16  
17

18           **3. Actual or Potential Injury.**     Respondent's misconduct did not  
19 harm any client, although it had the potential to cause harm to the legal system.  
20 Any time a lawyer fails to live up to the conditions imposed by order of the Supreme  
21 Court, neither the legal system nor the perception of the public regarding the legal  
22 system is enhanced. For the public to have confidence in the legal system, it is  
23 important that lawyers, as officers of that system, show due deference and respect  
24 for all court orders. Anything that suggests a lawyer may ignore an order of the  
25 court with impunity, could suggest to the public that such orders need not be taken  
26 seriously.  
27  
28

1           **4. Aggravation and Mitigation**     The parties agree that there are two  
2 *matters in aggravation, a history of prior disciplinary offenses (Standard 9.22(a))*  
3 *and a pattern of misconduct (Standard 9.22(c)), and that there is one matter in*  
4 *mitigation, lack of a dishonest or selfish motive (Standard 9.22(b)).*

6           Respondent has been disciplined on three prior occasions. On November  
7 10, 2003, he was placed on two years probation by the Probable Cause Panelist for  
8 *violation of ER 8 4(c) for making false statements on an application for employment*  
9 *with the Cochise County Public Defender's office. On December 19, 2005, he was*  
10 *censured by the Supreme Court for violation of ER 3 3(a)(1) (making a false*  
11 *statement or fact of law to a tribunal) and ER 8.4(d) (engaging in conduct that is*  
12 *prejudicial to the administration of justice). In that case, Respondent was found to*  
13 *have lied to a judge in order to obtain a continuance of a trial date. In addition to a*  
14 *censure, Respondent was placed on two years probation, ordered to submit to a*  
15 *LOMAP audit and to an assessment by the State Bar's Members Assistance*  
16 *Program. No evidence was presented that Respondent failed to successfully*  
17 *complete his probation in either of the two prior cases. On February 22, 2007, in*  
18 *this case, the Respondent was censured by the Supreme Court for issuing a trust*  
19 *account check on insufficient funds. In addition to the censure, Respondent was*  
20 *again placed on probation; the probation he conditionally admits violating in this*  
21 *proceeding. These facts establish that the Respondent has a history of prior*  
22 *discipline and also establish a pattern of misconduct.*

26           In mitigation, the parties agree that the Respondent's mental state was  
27 negligent and that he had no selfish or dishonest motive. That conclusion is  
28



1 hearing on the complaint commenced. In this case, Respondent at least made an  
2 effort to file the required reports on time.

3         *Howell* also involved separate misconduct combined with violations of  
4 probation. *Howell's* breach of probation included failing to pay required costs and  
5 failing to complete the Ethics Enhancement Program, but he also practiced law  
6 while under summary suspension, had a history of prior discipline and committed  
7 multiple offenses. In mitigation, there was a finding of a lack of dishonest motive.  
8 *Howell* was censured and placed on probation for six months by the Supreme  
9 Court. *Harris* was censured and placed on probation for one year.

10         *Harris* and *Howell* are similar enough to this case to be difficult to distinguish.  
11 Since the only charges against Respondent are probation violations that do not  
12 include the other independent misconduct present in *Harris* and *Howell*, the  
13 Respondent's misconduct could be viewed as less serious than the misconduct in  
14 those cases.

15         In this case, Respondent claimed that his inability to properly manage  
16 his trust account was primarily due to his relatively recent entry into private practice  
17 and thus limited exposure to trust account management. In agreeing to the  
18 proposed censure with probation, this Hearing Officer observed:

19                 "The Respondent's misconduct here is a result of sloppy  
20 office procedures. There was no apparent dishonest motive and no client was harmed. He has taken actions  
21 to set things straight in his office and hopefully will benefit from the terms of his probation to the end that the  
22 public will be protected against further difficulties with Respondent's trust account. Protection of the public  
23 rather than punishment of the Respondent is the goal of lawyer discipline." (*In re Fioramonti*, 176 Ariz. 182, 187,  
24 859 P.2d 1315, 1320 (1993)). (Hearing Officer's Report

1 and Recommendation filed August 25, 2006, in 05-0868,  
2 page 5 )

3  
4 Although Respondent made some effort to comply with the terms of his  
5 probation, it does not appear that his efforts have accomplished the desired result  
6 Respondent's sloppy office procedures do not seem to have improved, and he is  
7 still unable to consistently reconcile his trust account. It cannot therefore be said  
8 that Respondent benefited from the prior probation order or that the public has  
9 gained added protection against further difficulties with Respondent's trust account.  
10

11 Any sanction imposed that does not include a requirement that Respondent  
12 successfully repeat his probation, under its original terms, rewards the Respondent  
13 for his own misconduct and, more importantly, fails to address the paramount goal  
14 of protecting the public. Respondent has demonstrated that he still needs help  
15 managing his trust account. Protection of the public requires that he get that help  
16 There is no assurance Respondent will seek out the help he needs voluntarily, so  
17 the best that can be done is requiring him to do so through another period of  
18 probation.  
19

#### 20 Recommendation

21  
22 For the foregoing reasons, the Hearing Officer recommends, pursuant to  
23 Rule 56(e)(2), that the Agreement for Discipline by Consent be modified to include a  
24 requirement that in addition to censure, payment of the TAP fee and all costs  
25 incurred in these proceedings, the Respondent be required to repeat his one year  
26 period of probation under the exact terms and conditions set out in the Supreme  
27  
28

1 Court's judgment and order filed February 22, 2007, including, without limitation,  
2 payment of all costs associated with the additional period of probation.

3 The parties shall have not less than ten (10) nor more than thirty (30) days  
4 after this report is filed to execute the proposed modification and file the modified  
5 agreement and joint memorandum for consideration. If the parties fail to submit a  
6 modified agreement within the time period provided and no request for additional  
7 time has been submitted, the agreement for discipline by consent shall be deemed  
8 rejected by the Hearing Officer  
9

10  
11 Dated this 5<sup>th</sup> day of June, 2008

12  
13   
14 Larry W. Suci  
15 Hearing Officer 7A

16  
17  
18  
19 Original filed with the Disciplinary Clerk  
20 this 9<sup>th</sup> day of June, 2008.

21 Copy of the foregoing mailed this 9<sup>th</sup>  
22 day of June, 2008, to

23 Matthew E. McGregor, Esq.  
24 State Bar Counsel  
25 State Bar of Arizona  
26 4201 N. 24<sup>th</sup> Street, Suite 200  
27 Phoenix, AZ 85016-6288  
28 Staff Bar Counsel

1 Robert M. Cook, Esq.  
2 The Law Offices of Robert M Cook, PLLC  
3 Missouri Commons, Suite 185  
4 1440 East Missouri Avenue  
5 Phoenix, AZ 85014-0001  
6 Attorney for Respondent

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
By Neta Marek