

FILED

JUN 10 2009

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 SUSPENDED MEMBER)
OF THE STATE BAR OF ARIZONA)

Nos. 08-0341, 08-0819,
08-0918, 09-0140

MICHAEL R. KARBER,
Bar No. 016230

**DISCIPLINARY
COMMISSION REPORT**

RESPONDENT.

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on May 9, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed March 26, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum in Support of Discipline by Consent ("Joint Memorandum") providing for a 21-month suspension, retroactive to July 28, 2008, two years of probation with the State Bar's Member Assistance Program ("MAP") (with terms and conditions of probation to be determined at the time of reinstatement), and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 21-month suspension, retroactive to July 28, 2008, two years of probation (MAP) (with terms and conditions of probation to be determined at the time of reinstatement) and costs of these disciplinary

1 proceedings, including any costs incurred by the Disciplinary Clerk and the Supreme Court
2 of Arizona.¹

3 **Terms of Probation**

4 1. The probation period should commence upon the entry of any order of
5 reinstatement and continue for two years after the date that all parties have signed the
6 “Terms and Conditions of Probation”;

7 2. Respondent shall contact the director of the State Bar’s Member Assistance
8 Program (MAP) within 30 days of the date of the order of reinstatement.

9 3. Respondent shall submit to a MAP assessment.

10 4. The director of MAP shall develop “Terms and Conditions of Probation”
11 based on the assessment and terms shall be incorporated herein by reference.

12 5. Respondent shall comply with any other terms and conditions deemed
13 appropriate at the time of the reinstatement proceedings, which shall be incorporated
14 herein by reference.

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

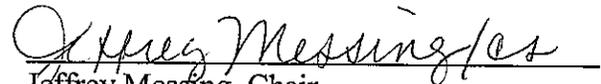
17 7. If Respondent fails to comply with any of the foregoing conditions and the
18 State Bar receives information about non-compliance, bar counsel shall file with the
19 imposing entity a Notice of Noncompliance. The imposing entity may refer the matter to a
20 hearing officer to conduct a hearing at the earliest applicable date, but in no event later
21 than 30 days after receipt of notice, to determine whether a term of probation has been
22 breached and, if so, to recommend an appropriate sanction. If there is an allegation that
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¹ The Hearing Officer’s Report is attached as Exhibit A.

1 Respondent failed to comply with any of the foregoing conditions, the burden of proof
2 shall be on the State Bar to prove noncompliance by a preponderance of the evidence.²

3 RESPECTFULLY SUBMITTED this 10th day of June, 2009.
4

5
6 
7 Jeffrey Messing, Chair
8 Disciplinary Commission

9 Original filed with the Disciplinary Clerk
10 this 10th day of June, 2009.

11 Copy of the foregoing mailed
12 this 10th day of June, 2009, to:

13 Daniel P. Beeks
14 Hearing Officer 7M
15 *Mohr, Hackett, Pederson, Blakley & Randolph, P.C.*
16 2800 North Central, Suite 1100
17 Phoenix, AZ 85004-1043

18 J. Scott Rhodes
19 Respondent
20 *Jennings, Strouss & Salmon, P.L.C.*
21 201 East Washington Street, 11th Floor
22 Phoenix, AZ 85004-2385

23
24
25
26 ² This term reflects the parties' Stipulation filed on June 1, 2009, amending the language from clear and convincing evidence to a preponderance of the evidence.

Roberta L. Tepper
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Aileen Liza

/cs

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EXHIBIT

A

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HEARING OFFICER 7M

FILED
MAR 26 2009
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *J. D'Amore*

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

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

No. 08-0341, 08-0819, 08-0918,
09-0140

**MICHAEL R. KARBER,
Bar No. 016230**

**HEARING OFFICER'S
REPORT**

Respondent.

(Assigned to Hearing Officer 7M,
Daniel P. Beeks)

The parties have filed a Tender of Admissions and Agreement for Discipline by Consent ("Tender"), and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") agreeing that Respondent Michael R. Karber ("Respondent" or "Karber") should: (1) be suspended for twenty-one (21) months, retroactive to July 28, 2008, the date of his interim suspension; (2) be placed on probation upon reinstatement, with terms and conditions to include participation in the State Bar's Member Assistance

1 Program; and (3) be ordered to pay all of the costs and expenses of these
2 disciplinary proceedings

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4 The State Bar was represented by Roberta L. Tepper in negotiating the
5 Tender, and Karber was represented by J. Scott Rhodes . The Hearing Officer has
6 determined that no hearing is necessary in order to rule on the Tender.

7
8 By entering into the Tender, Karber has waived his right to a formal
9 disciplinary hearing to which he would otherwise have been entitled pursuant to
10 Rule 57(i), Ariz.R.Sup.Ct., and the right to testify or present witnesses on his
11 behalf at a hearing. Karber has waived all motions, defenses, objections or
12 requests that he has made or raised, or could assert, assuming that the
13 Commission and the Supreme Court approve the Tender and the Hearing
14 Officer's Report.

15
16 For reasons discussed in more detail below, the Hearing Officer
17 recommends that the Tender be approved and accepted. The parties understand,
18 however, that this agreement is subject to review by the Disciplinary
19 Commission, and by the Arizona Supreme Court. The State Bar and Karber have
20 agreed that if the Tender is rejected by the Disciplinary Commission or by the
21 Arizona Supreme Court, the parties' conditional admissions and dismissals shall
22 be deemed withdrawn.
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STIPULATED FACTS

1. At all times relevant, Karber was an attorney licensed to practice law in the state of Arizona. Karber was first admitted to practice in Arizona on October 21, 1995.

2. From 1994 until February 13, 2008, Karber was licensed to practice law in the state of Oregon.

3. Karber was summarily suspended by the Board of Governors of the State Bar of Arizona effective March 21, 2008, and again effective May 30, 2008.

4. Karber was placed on interim suspension by Order of the Supreme Court of Arizona filed on July 28, 2008.

COUNT ONE (File no. 08-0341/State Bar of Arizona)

5. On or about January 8, 2008, Karber tendered his resignation from the State Bar of Oregon.

6. The Oregon Supreme Court accepted Karber's resignation from the State Bar of Oregon on February 13, 2008.

7. At the time of Karber's resignation, two disciplinary cases were pending against him in Oregon. Oregon State Bar Case No. 06-105 alleged that:

- a. Karber admits that on or about March 7, 2003, he was arrested for driving under the influence of intoxicants in Linn County, Oregon

1 (the "Linn DUII"), and as a result, was prosecuted in the Linn
2 County Circuit Court, Case No. 03030637.

3
4 b. Karber admits that on June 23, 2003, he was convicted of
5 misdemeanor driving under the influence of intoxicants in violation
6 of Oregon law.

7
8 c. Karber admits that upon his conviction, he was placed on probation
9 for two years with the conditions that he report monthly to a Linn
10 County probation officer; pay court-ordered financial obligations and
11 supervision fees; participate in an evaluation and recommended
12 treatment; abstain from use of intoxicants and controlled substances;
13 not move from Oregon without written permission of his probation
14 officer; and other terms for the Linn DUII.

15
16 d. Karber admits that on or about March 25, 2003, he was arrested in
17 Clark County, Washington for driving under the influence of
18 intoxicants in violation of Washington law, and was prosecuted in
19 Clark County District Court Case No. 274690 (the "WA DUII").

20
21 e. Karber admits that on or about September 22, 2003, he failed to
22 appear for a scheduled court proceeding in the WA DUII, and that as
23 a result, the court issued a warrant for his arrest.
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- 1 f. Karber did not appear as required and as of November 20, 2006, the
2 warrant remained outstanding. Karber denies this allegation but
3 believes that a warrant issued by the Clark County District Court
4 remains pending to date.
- 5
- 6 g. Upon information and belief, Karber admits that on or about
7 November 11, 2003, the Oregon Department of Motor Vehicles
8 suspended his license to operate a motor vehicle because he failed to
9 pay court-ordered financial obligations.
- 10
- 11 h. Upon information and belief, Karber admits that because he failed to
12 provide proof of insurance and financial responsibility as required by
13 Oregon law, on or about June 22, 2004, the Oregon Department of
14 Motor Vehicles suspended his license to operate a motor vehicle.
- 15
- 16 i. Karber admits that on or before July 18, 2004, he consumed
17 intoxicants in violation of the terms of his probation in the Linn
18 DUI.
- 19
- 20 j. Karber admits that on July 18, 2004, he operated a motor vehicle in
21 violation of Oregon law while his license was suspended. Karber
22 claims that he did not believe that his operation of the motor vehicle
23 was a violation of Oregon law.
- 24
- 25

1 k. Karber admits that on July 18, 2004, he operated a motor vehicle and
2 was involved in a motor vehicle accident. Karber also admits that he
3 was arrested in Multnomah County, Oregon, for driving under the
4 influence of intoxicants, driving while suspended, driving while
5 uninsured, and other charges (the "Multnomah DUII").

7 l. Karber admits that on or about August 18, 2004, the Oregon
8 Department of Motor Vehicles suspended his license to operate a
9 motor vehicle because he had allegedly refused to take a breath or
10 intoxilyzer test in connection with the Multnomah DUII, but denies
11 that he actually "refused" to take a breath or intoxilyzer test.

13 m. Upon information and belief, Karber admits that on or about October
14 16, 2004, the Oregon Department of Motor Vehicles suspended his
15 license to operate a motor vehicle because he failed to file an
16 accident report for accident relating to the Multnomah DUII, in
17 violation of Oregon law.

19 n. Between about June 23, 2003, and November 2004, Karber failed to
20 comply with the conditions of probation in the Linn DUII including,
21 but not limited to, failing to complete a DUII evaluation and
22 treatment placement; using alcohol and controlled substances; failing
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1 to attend a victim impact panel and provide verification of his
2 attendance to his probation officer; failing to report monthly to a
3 Linn County probation officer; failing to pay court-ordered financial
4 obligations and supervision fees; moving from Oregon without
5 written permission of his probation officer; and other terms. Karber
6 denies this allegation.
7

8
9 o. On or about September 17, 2004, the court in the Linn DUII issued a
10 warrant for Karber's arrest for violation of the terms of his probation.
11 On or about November 8, 2004, Karber appeared before the court
12 and admitted violating the terms of his probation. The court
13 continued Karber's probation on the same terms and conditions.
14 Karber does not know whether a warrant was issued, but he admits to
15 the rest of the allegation.
16

17
18 p. On or about December 28, 2004, Karber was convicted of driving
19 while suspended and driving while uninsured, in violation of Oregon
20 law. Karber denies that he was "convicted" of the specified offenses
21 but admits that he was found responsible for them, and alleges that
22 they were civil infractions, not criminal.
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- 1 q. Between November 2004, and November 2006, Karber failed to
2 comply with the conditions of probation in the Linn DUII, including
3 but not limited to, failing to complete a DUII evaluation and
4 treatment placement; using alcohol and controlled substances; failing
5 to report monthly to a Linn County probation officer; failing to pay
6 court-ordered financial obligations and supervision fees; and other
7 terms. Karber denies this allegation.
8
9
10 r. On or about April 18, 2005, the court issued a warrant for Karber's
11 arrest for violation of the terms of his probation in the Linn DUII.
12 Karber does not know whether a warrant was issued for his arrest,
13 and alleges that he has never received notice of such a warrant.
14
15 s. On or about July 13, 2006, Disciplinary Counsel of the State Bar of
16 Oregon requested Karber's explanation and account of the matter by
17 August 3, 2006. Karber did not respond. Karber denies that he did
18 not respond.
19
20 t. On or about August 4, 2006, Disciplinary Counsel of the State Bar of
21 Oregon again requested Karber's explanation and account of the
22 matter, by August 11, 2006. Karber did not respond. Karber denies
23 that he did not respond.
24
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1 u. Karber was required to, but did not, respond to a lawful demand for
2 information from a disciplinary authority pursuant to Oregon's Rules
3 of Professional Conduct. Karber denies that he did not respond.
4

5 Unless noted as being admitted above, such conduct was not proven in an
6 evidentiary proceeding in Oregon and, was not deemed admitted for purposes of
7 this disciplinary proceeding in Arizona.
8

9 8. In his resignation from the Oregon State Bar dated January 8, 2008,
10 Karber stated that he did not wish to defend against the charges brought by the
11 Oregon State Bar.

12 9. After receiving the above information from the Oregon State Bar,
13 Bar counsel sent Karber a letter at his address of record, making him aware of the
14 allegations against him, and requesting that he respond within 20 days.
15

16 10. Karber failed to respond to Bar counsel.
17

18 11. On April 16, 2008, Bar counsel sent Karber another letter at his
19 address of record reminding him of his obligation to respond to the inquiries and
20 cooperate in the State Bar of Arizona's investigation, and that failure to do so
21 was, in itself, grounds for discipline. Bar counsel requested a reply from Karber
22 within 10 days of the date of the letter.
23

24 12. Karber again failed to respond.
25

1 **COUNT TWO (File no. 08-0819/State Bar of Arizona/Judicial Referral)**

2 13. On April 8, 2008, Karber appeared at the Scottsdale City Court for a
3 pretrial conference with the prosecutor on behalf of a defendant, Corbin Sitton
4 (“Mr. Sitton”), in case number M0751-TR2008005950.

6 14. During or at the end of the pretrial conference, Mr. Sitton advised the
7 prosecutor, Douglas Jann (“Mr. Jann”), that Karber, who was initially present,
8 had arrived, but appeared to be intoxicated. Karber was not in a courtroom at the
9 time.
10

11 15. Based on his observations, Mr. Jann informed the Judge’s bailiff of
12 Karber’s condition.

13 16. Karber subsequently left the courthouse and Mr. Sitton’s matter was
14 rescheduled.
15

16 17. Karber admits that he was intoxicated when he appeared at the
17 courthouse and met with the prosecutor on April 8, 2009, on Mr. Sitton’s behalf.
18

19 18. On May 5, 2008, Karber again appeared in Scottsdale City Court to
20 represent a criminal defendant, Eric Harroun (“Mr. Harroun”), at trial in case
21 number M0751-2008005892, before the Honorable Wendy S. Morton (“Judge
22 Morton”).
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1 19. Karber appeared in court and spoke with Mr. Jann, who was again
2 prosecuting cases in that court.

3 20. Karber stated that he was going to file a notice of appearance and
4 represent Mr. Harroun at trial that day.

5 21. Karber then asked for a copy of the police report.

6 22. Based on the odor of alcohol on Karber's breath and his speech
7 appearing to be slurred, Mr. Jann believed that Karber was intoxicated.
8

9 23. Mr. Jann asked Karber to wait while he conducted another trial; after
10 that trial was concluded, Mr. Jann notified the courtroom bailiff of his
11 observations of Karber.
12

13 24. Judge Morton thereafter took the bench and asked Karber if he was
14 ready to proceed with Mr. Harroun's trial.
15

16 25. Karber informed Judge Morton that he was ready to proceed,
17 whereupon Judge Morton took a recess.
18

19 26. Shortly thereafter, Scottsdale police officers came to the courtroom,
20 made contact with Karber.

21 27. Karber submitted to a preliminary breath test.

22 28. Upon information and belief, Karber's blood alcohol concentration,
23 as measured by that preliminary breath test, was .046 percent.
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29. Judge Morton rescheduled Mr. Harroun's trial.

30. At the time the trial was continued, several witnesses were present in the courtroom, prepared to proceed, including two witnesses for the State of Arizona and one or more witnesses who were prepared to testify for the defendant.

31. Judge Morton scheduled an order to show cause hearing for Karber, to be conducted on May 15, 2008.

32. Judge Morton ultimately held Karber in contempt for his failure to appear at the show cause hearing.

33. Karber admits that he was intoxicated when he appeared in Court on May 5, 2008.

34. On May 23, 2008, Bar counsel sent Karber a letter at his address of record, notifying him of the commencement of a screening investigation based on the facts supplied by Judge Morton, and requesting that Karber respond within 20 days from the date of the letter.

35. Karber failed to respond. Karber affirmatively asserts that during this time he was incarcerated with extremely limited access to writing materials and was therefore unable to respond to the State Bar's inquiry.

1 36. On June 25, 2008, Bar counsel sent Karber another letter (at his
2 address of record) reminding him Respondent of his obligation to cooperate with
3 the disciplinary investigation and that failure to do so was, in itself, grounds for
4 discipline.
5

6 37. Bar counsel requested that Karber respond within ten days of the
7 date of the June 25, 2008 letter.
8

9 38. Karber failed to respond. Karber affirmatively asserts that during
10 this time he was incarcerated with extremely limited access to writing materials
11 and was therefore unable to respond to the State Bar's inquiry.
12

13 **COUNT THREE (File No. 08-0918/Sitton)**

14 39. In or about March, 2008, Nancy Sitton ("Ms. Sitton") retained
15 Karber to represent her son, Corbin Sitton ("Mr. Sitton") in a matter before the
16 Scottsdale City Court.
17

18 40. Ms. Sitton paid Karber \$500 to represent Mr. Sitton.
19

20 41. On or about March 31, 2008, Ms. Sitton again telephoned Karber to
21 inquire about Mr. Sitton's case in advance of a court appearance scheduled for
22 April 8, 2008.
23

24 42. Karber assured Ms. Sitton that all was well and that he would see her
25 in court on April 8, 2008.

1 43. Mr. Sitton's matter was scheduled to be heard by the Court at 9:30
2 a.m. on April 8, 2008.

3 44. Ms. Sitton and Mr. Sitton were both present; Ms. Sitton had missed
4 work to be present and Mr. Sitton had missed a day of school.

5 45. Karber did not appear in court on April 8, 2008, until 10:30 a.m.

6 46. When Karber did appear and speak to Ms. Sitton and Mr. Sitton, it
7 was apparent to them that Karber was intoxicated.
8

9 47. Mr. Sitton's matter was rescheduled, apparently due to Karber's
10 intoxicated condition.
11

12 48. Upon information and belief, Ms. Sitton terminated Karber's
13 representation after the April 8, 2008 court appearance. Ms. Sitton did not
14 receive a refund of any portion of the fee she had paid to Karber.
15

16 49. In a June 26, 2008 letter sent to Karber's address of record, Bar
17 counsel notified Karber of Ms. Sitton's allegations, and requested that he respond
18 within 20 days from the date of the letter.
19

20 50. Karber failed to respond. Karber affirmatively asserts that during
21 this time he was incarcerated with extremely limited access to writing materials
22 and therefore was unable to respond to the State Bar's inquiry.
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1 51. In an August 11, 2008 letter sent to Karber at his address of record,
2 Bar counsel reminded Karber of his obligation to cooperate with the disciplinary
3 investigation, and that failure to do so was, in itself, grounds for discipline.
4

5 52. Karber failed to respond. Karber affirmatively asserts that during
6 this time he was incarcerated with extremely limited access to writing materials
7 and was therefore unable to respond to the State Bar's inquiry.
8

9 **COUNT FOUR (File No. 09-0140/Self-report)**

10 53. On January 21, 2007, Karber was observed driving a motor vehicle
11 within Maricopa County.

12 54. Witnesses contacted law enforcement officials, who found Karber in
13 the driver's seat of the vehicle, with the keys to the vehicle in his hand.
14

15 55. Blood testing was performed on Karber and showed a blood alcohol
16 concentration of .396.
17

18 56. Karber thereafter entered guilty pleas to Endangerment, a Class 6
19 undesignated felony, and Driving Under the Influence ("DUI"), a Class 1
20 misdemeanor. Karber was sentenced to concurrent probationary terms.

21 57. As a condition of probation in the DUI, Karber served a term of
22 incarceration in the Maricopa County Jail, from May 16, 2008 to October 20,
23 2008.
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CONDITIONAL ADMISSIONS

58. Karber has tendered the following admissions in exchange for the form of discipline stated below.

59. Karber conditionally admits that his conduct, as described above, violated Rule 42, Ariz.R.Sup.Ct., specifically:

- a. ER 1.3 (Diligence);
- b. ER 1.4 (Communication);
- c. ER 1.16(d) (Termination of Representation);
- d. ER 8.1(b) (Failure to Respond to Disciplinary Authority);
- e. ER 8.4(b) (Criminal Act Reflecting Adversely on Attorney);
- f. ER 8.4(d) (Engaging in Conduct Prejudicial to Administration of Justice);
- g. Rule 53(d), Ariz.R.Sup.Ct. (Refusing to Cooperate with State Bar);
- and
- h. Rule 53(f), Ariz.R.Sup.Ct (Failure to Furnish Information in Disciplinary Investigation).

1 a. Karber shall be suspended for 21 months, retroactive to July 28, 2008,
2 the effective date of the interim order suspending Karber;

3
4 b. Should Karber be reinstated to the practice of law, Karber shall be
5 placed on probation for a period of two years, with the terms and
6 conditions of probation to be determined at the time of reinstatement,
7 but to include, at a minimum, the following:

8
9 1. The probation period should commence upon the entry of any
10 order of reinstatement and continue for two years after the date
11 that all parties have signed the "Terms and Conditions of
12 Probation";

13
14 2. Karber shall be required to contact the director of the State
15 Bar's Member Assistance Program (MAP) within 30 days of
16 the date of the order of reinstatement;

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18 3. Karber shall be required to submit to a MAP assessment;

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20 4. The director of MAP shall be required to develop "Terms and
21 Conditions of Probation" based upon the assessment and the
22 terms should be incorporated into the order of probation;

23
24 5. Karber shall be required to comply with any other terms and
25 conditions deemed appropriate at the time of the reinstatement

1 proceedings, which shall be incorporated into the order of
2 probation;

3
4 6. Karber shall be required to refrain from engaging in any
5 conduct that would violate the Rules of Professional Conduct
6 or other rules of the Supreme Court of Arizona;

7
8 7. If Karber fails to comply with any of the foregoing probation
9 terms, and the State Bar receives information regarding such
10 non-compliance, Bar Counsel shall file with the Probable
11 Cause Panelist a Notice of Noncompliance, and the Probable
12 Cause Panelist may refer the matter to a hearing officer to
13 conduct a hearing at the earliest applicable date, but in no
14 event later than 30 days after receipt of notice, to determine
15 whether a term of probation has been breached and, if so, to
16 recommend an appropriate sanction. If there is an allegation
17 that Karber has failed to comply with any of the foregoing
18 conditions, the burden of proof shall be on the State Bar to
19 prove noncompliance by clear and convincing evidence.
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21

22
23 c. Karber shall be required to pay all costs incurred by the State Bar in
24 bringing these disciplinary proceedings, as described in the Itemized
25

1 Statement of Costs and Expenses attached to the Tender as Exhibit
2 "A.."

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4 d. Karber shall also be required to pay all costs incurred by the
5 Disciplinary Commission, the Supreme Court and the Disciplinary
6 Clerk's Office in this matter.

7 **APPROPRIATENESS OF AGREED UPON SANCTIONS**

8 65. In determining the appropriate sanction, Arizona generally looks to
9 the American Bar Association Standards for Imposing Lawyer Discipline (1992)
10 ("ABA Standards"). *In re Van Dox*, 214 Ariz. 300, 303, ¶ 11, 152 P.3d 1183,
11 1186 (2007).

12
13 66. The ABA Standards list the following factors to be considered in
14 imposing the appropriate sanction:

- 15
16 a. the duty violated;
17 b. the lawyer's mental state;
18 c. the actual or potential injury caused by the lawyer's misconduct; and
19 d. the existence of aggravating or mitigating circumstances.

20
21 ABA Standard 3.0. *Van Dox* at ¶ 11.

22 67. The Hearing Officer has considered all of these required factors.
23
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1 71. The ABA standards define “knowledge” as the “conscious awareness
2 of the nature or attendant circumstances of the conduct but without the conscious
3 objective or purpose to accomplish a particular result.”
4

5 72. It appears to the Hearing Officer that some of Karber’s violations,
6 particularly his violations of ER 8.4 (criminal acts, and conduct prejudicial to the
7 administration of justice) arising out of his criminal convictions in Oregon which
8 are the subject of Count One, may have been intentional. *See, e.g., In re Conduct*
9 *of McDonough*, 77 P.3d 306, 310 (Ore. 2003) (repeated convictions for driving
10 while suspended and driving while intoxicated in violation of Oregon law were
11 intentional and demonstrated a substantial disrespect for the law). A conviction of
12 a crime is conclusive evidence of guilt of the crime, and its associated mental
13 state. *See* Rule 53(h)(1), Rules of the Supreme Court; *In re Lassen*, No. 06-1529
14 (Disciplinary Commission, Feb. 9, 2009). Oregon law, however, provides that
15 defendants can be convicted of both driving while intoxicated and driving while
16 suspended without any showing of a culpable mental state. *State v. Miller*, 366,
17 788 P.2d 974 (Ore. 1990) (no mental state required for conviction of driving
18 under the influence of intoxicants); *State v. Buttrey*, 651 P.2d 1075 (Ore. 1982)
19 (no mental state required for conviction of driving while suspended).
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1 73. The Hearing Officer finds that even if some of Karber's criminal acts
2 in Washington and/or Oregon were considered to have been committed
3 intentionally, the stipulated sanctions would still be appropriate.
4

5 **Actual or Potential Injury**

6 74. Karber's actions caused actual injury to the Sittons and to Harroun.

7 75. Karber's other actions caused at least potential injury.
8

9 76. Because Standard 7.2 applies to both actual and potential injury, it
10 matters little whether Karber's other conduct caused actual, or only potential
11 injury. The presumptive sanction is the same – suspension.
12

13 **Aggravating and Mitigating Circumstances**

14 77. The parties have agreed that the following aggravating factors are
15 applicable:¹
16
17

18 ¹ Although not mentioned by the parties, Standard 9.22(e), bad faith
19 obstruction of the disciplinary proceedings, might also be applicable. The
20 Tender establishes that Karber initially failed to respond to the State Bar's
21 April, 2008 written request for information regarding his issues in Oregon.
22 Although Karber blames some of his later failures to respond to inquiries from
23 the State Bar on the fact that he was in jail and had limited access to writing
24 materials, he was not jailed until May 16, 2008. There is no excuse in the
25 Tender for why he could not have cooperated before we went to jail.
Ultimately, however, he retained counsel and cooperated in the disciplinary
process, agreeing to enter into the Tender. This ultimate cooperation would be
a mitigating factor that would balance out the initial failure to cooperate. *See,*
e.g., In re Van Dox, 214 Ariz. 300, 307, ¶ 37 152 P.3d 1183, 1190 (2007).

1 a. Standard 9.22(a) Prior disciplinary history. Karber was censured by
2 the Supreme Court of Arizona in a reciprocal discipline matter in
3 Supreme Court NO. SB-07-0033-RD (2007), based on discipline
4 imposed in the State of Washington. This conduct which was the
5 subject of this prior discipline appears to overlap with the current
6 violations, and is therefore given little to no weight.

7
8
9 b. Standard 9.22(c) Pattern of misconduct. Respondent's repeated
10 convictions for driving under the influence, driving while suspended,
11 and driving without insurance, as well as his repeated appearances in
12 court while intoxicated, demonstrate a pattern of misconduct.²

13
14 c. Standard 9.22(d) Multiple offenses. The pattern of misconduct
15 discussed in the previous paragraph demonstrates multiple instances of
16 misconduct.

17
18 d. Standard 9.22(i) Substantial experience in the practice of law.

19 Although Karber has been a licensed attorney since 1994, when he was
20 admitted in Oregon, the parties have conditionally agreed, and the
21

22 ² The fact that Karber was arrested several times, both before and after
23 being involved in alcohol related motor vehicle accidents, indicates that even
24 after being forcefully put on notice that his conduct was criminal, Karber was
25 unwilling or unable to conform his behavior to the law. *In re Horwitz*, 180
Ariz. 20, 28, 881 P.2d 352, 360 (1994).

1 Hearing Officer agrees, that the misconduct in the instant matter is not
2 the kind of conduct that is more or less likely based on the experience
3 level of the attorney.³ Because the Hearing Officer cannot say that
4 Karber's experience would make it more likely that he "would have
5 known better" than to drive or appear in court while intoxicated, no
6 weight has been given to this factor.
7

8
9 78. The parties have agreed that the following mitigating factors are
10 applicable:

11 a. Standard 9.32(c) Personal or emotional problems. Karber clearly
12 suffers from alcohol dependency. The Hearing Officer has reviewed
13 the evidence supporting this mitigating factor that was attached to
14 the Joint Memorandum as Exhibit "A", but which was filed under
15 seal. The Hearing Officer agrees that the evidence supports the
16 conclusion that Karber's alcohol dependency was the primary, if not
17 sole, cause of his misconduct.
18

19
20 b. Standard 9.32(k) Imposition of other penalties or sanctions.
21 Respondent served a four-month active sentence in the Maricopa
22 County Jail as a condition of his probationary sentence in the
23

24 ³ *In re Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994).
25

1 82. The commentary to Standard 2.3 indicates that when a suspension is
2 warranted, a minimum 6-month suspension is generally necessary to protect the
3 public. The commentary also indicates that it is preferable to suspend an attorney
4 for a period of greater than six months to protect the public and ensure that the
5 attorney is required to establish that he or she has been rehabilitated before being
6 readmitted to the practice of law. *See also In re Shannon*, 179 Ariz. 52, 71, 876
7 P.2d 548, 567 (1994) (purpose of the presumption that a suspension should be for
8 at least six months is to protect the public and to ensure effective demonstration
9 of rehabilitation).

10
11
12 83. The parties have stipulated to a 21 month suspension, retroactive to
13 July 28, 2008, the date of his interim suspension. The Hearing Officer finds that
14 the agreed upon suspension of 21 months, which will not expire until April of
15 2010 is adequate to protect the public and will allow sufficient time for Karber to
16 demonstrate that he has overcome his addiction, and maintained a sufficient
17 period of sobriety to establish that he has been rehabilitated.

18
19
20 84. Retroactive suspensions are appropriate in cases such as this,
21 involving interim suspensions resulting from substance abuse problems. *See, e.g.,*
22 *In re Loftus*, 171 Ariz. 672, 675-76, 832 P.2d 689, 692-93 (1992).
23
24
25

1 85. The Hearing Officer believes that the public will be adequately
2 protected after Karber's 21 month retroactive suspension by the terms of the
3 probation agreed upon in the Tender.
4

5 **PROPORTIONALITY**

6 86. The last step in determining if a particular sanction is appropriate is
7 to assess whether the discipline is proportional to the discipline imposed in
8 similar cases. *In re Peasley*, 208 Ariz. 27, 41, ¶ 62, 90 P.3d 764, 778 (2004).
9 "This is an imperfect process because no two cases are ever alike." *In re Owens*,
10 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). As the Arizona Supreme Court
11 has observed:
12

13 Consideration of the sanctions imposed in similar cases is
14 necessary to preserve some degree of proportionality, ensure that the sanction fits the offense, and avoid
15 discipline by whim or caprice. . . . Proportionality review
16 however, is an imperfect process. . . . Normally the fact
17 that one person is punished more severely than another
18 involved in the same misconduct would not necessarily
19 lead to a modification of a disciplinary sanction. Both the
20 State Bar in its capacity as prosecutor and the
21 Disciplinary Commission in its quasi-judicial capacity
22 have broad discretion in seeking discipline and in
23 recommending sanctions.

24 *In re Dean*, 212 Ariz. 221, 225, ¶ 24, 129 P.3d 943, 947 (2006).

25 87. Because perfect uniformity cannot be achieved, the Arizona Supreme
Court has long recognized that the discipline in each situation must be tailored for

1 the individual case. *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997).
2 The Hearing Officer has evaluated the agreed upon sanction to make sure that it is
3 adequately tailored for the individual case, while keeping in mind the State Bar's
4 broad discretion in recommending sanctions. *See In re Dean*, 212 Ariz. 221, 225,
5 ¶ 24, 129 P.3d 943, 947 (2006) (State Bar, in its capacity as prosecutor has broad
6 discretion in seeking discipline and in recommending sanctions).
7

8
9 88. The Hearing Officer has considered the cases cited by the parties in
10 the Joint Memorandum, and has performed independent research regarding
11 similar cases.

12
13 89. The cases cited by the parties in the Joint Memorandum demonstrate
14 that the 21 month retroactive suspension is within the range of sanctions imposed
15 in similar cases involving attorneys suffering from addiction.

16
17 90. In addition to those cases cited by the parties in the Joint
18 Memorandum, the Hearing Officer has also relied upon *In re Byrd*, No. SB-02-
19 0132-D, 2002 Ariz. LEXIS 225 (2002) and *In re Loftus*, 171 Ariz. 672, 832 P.2d
20 689 (1992).

21
22 91. In *Byrd*, an attorney received an 18 month retroactive suspension as
23 a result of numerous ethical violations related to his substance abuse problems,
24
25

1 where the attorney had acknowledged his addiction, the consequences of his
2 misconduct, and had sought treatment for his addiction.

3
4 92. In *Loftus*, the attorney received a two year retroactive suspension for
5 numerous ethical violations related to alcoholism, despite the fact that the
6 attorney did not cooperate with the discipline process. Notably, the retroactive
7 date resulted in no future suspension.

8
9 93. Based upon a review of Arizona cases involving attorneys receiving
10 discipline for issues resulting from severe alcoholism, the Hearing Officer finds
11 that the 21 month retroactive suspension agreed upon by the parties is within the
12 range of sanctions imposed in similar cases.

13
14 94. Therefore, the Hearing Officer finds that the stipulated suspension is
15 proportional to sanctions imposed in similar cases.

16 **CONCLUSION**

17
18 95. For the reasons discussed above, the Hearing Officer recommends
19 that the following punishment be imposed upon respondent Michael R. Karber:

- 20 a. Karber should be suspended for 21 months, retroactive to July 28,
21 2008, the effective date of the interim order suspending Karber;
22
23 b. Should Karber be reinstated to the practice of law, he should be
24 placed on probation for a period of at least two years, with the terms
25

1 and conditions of probation to be determined at the time of
2 reinstatement, but to include, at a minimum, the following:

- 3
- 4 i. The probation period should commence upon the entry of any
5 order of reinstatement and continue for two years after the date
6 that all parties have signed the "Terms and Conditions of
7 Probation";
- 8
- 9 ii. Karber should be required to contact the director of the State
10 Bar's Member Assistance Program (MAP) within 30 days of
11 the date of the order of reinstatement;
- 12
- 13 iii. Karber should be required to submit to a MAP assessment;
- 14
- 15 iv. The director of MAP should be required to develop "Terms
16 and Conditions of Probation" based upon the assessment and
17 the terms should be incorporated into the order of probation;
- 18
- 19 v. Karber should be required to comply with any other terms and
20 conditions deemed appropriate at the time of the reinstatement
21 proceedings, which should be incorporated into the order of
22 probation
23
24
25

1 vi. Karber should be required to refrain from engaging in any
2 conduct that would violate the Rules of Professional Conduct
3 or other rules of the Supreme Court of Arizona;

4
5 vii. If Karber fails to comply with any of the foregoing probation
6 terms, and the State Bar receives information regarding such
7 non-compliance, Bar Counsel should be obligated to file with
8 the Probable Cause Panelist a Notice of Noncompliance, and
9 the Probable Cause Panelist should refer the matter to a
10 hearing officer to conduct a hearing at the earliest applicable
11 date, but in no event later than 30 days after receipt of notice,
12 to determine whether a term of Karber's probation has been
13 breached and, if so, to recommend an appropriate sanction. If
14 there is an allegation that Karber has failed to comply with any
15 of the foregoing conditions, the burden of proof should be
16 placed on the State Bar to prove noncompliance by clear and
17 convincing evidence.
18
19
20

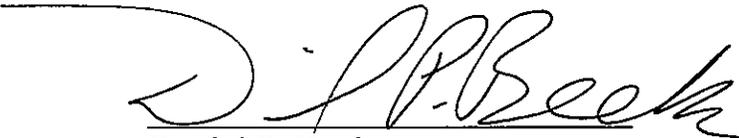
21 c. Karber should be required to pay all costs incurred by the State Bar
22 in bringing these disciplinary proceedings, as described in the
23
24
25

1 Itemized Statement of Costs and Expenses attached to the Tender as
2 Exhibit "A.."

3
4 d. Karber should also be required to pay all costs incurred by the
5 Disciplinary Commission, the Supreme Court and the Disciplinary
6 Clerk's Office in this matter.

7 **DATED** this 25th day of March, 2009.

8
9
10 Hearing Officer 7M

11 

12
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14 2800 North Central Avenue
15 Suite 1100
16 Phoenix, Arizona 85004-1043

17 ORIGINAL of the foregoing mailed for
18 filing on March 25, 2009, to:

19 Disciplinary Clerk
20 Supreme Court of Arizona
21 1501 West Washington, Suite 104
22 Phoenix, Arizona 85007-3231

23 With copies of the foregoing mailed to:

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