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SEP 22 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

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

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4	IN THE MATTER OF A SUSPENDED MEMBER)	No. 08-1811	
5	OF THE STATE BAR OF ARIZONA,)		
6	ANDREW R. PROPER,)		
7	Bar No. 011295)	DISCIPLINARY COMMISSION	
8	RESPONDENT.)	REPORT	

9 This matter came before the Disciplinary Commission of the Supreme Court of
10 Arizona on September 12, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of
11 the Hearing Officer's Report filed August 12, 2009, recommending acceptance of the
12 Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint
13 Memorandum in Support of Tender of Admissions and Agreement for Discipline by
14 Consent ("Joint Memorandum") providing for a two year suspension retroactive to January
15 31, 2009, two years of probation with the State Bar's Member Assistance Program
16 ("MAP") upon reinstatement, and costs.

Decision

19 Having found no facts clearly erroneous, the six members¹ of the Disciplinary
20 Commission unanimously recommend accepting and incorporating the Hearing Officer's
21 findings of fact, conclusions of law, and recommendation for a two year suspension
22 retroactive to January 31, 2009,² two years of probation (MAP) upon reinstatement, and
23

¹ Commissioners Gooding, Horsley and Todd did not participate in these proceedings.

² The date of Respondent's interim suspension.

costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.³ The terms of probation are as follows:

Terms of Probation

1. Respondent shall contact the director of MAP within 30 days of reinstatement to schedule a MAP assessment. Respondent shall submit to a MAP assessment. The director of MAP shall develop a probation contract based upon the assessment, and its term shall be incorporated herein by reference. The probation period will begin to run at the time of reinstatement.

2. Any other terms that are deemed appropriate by the Hearing Officer and approved by the Disciplinary Commission and Supreme Court at the time of the reinstatement proceedings.

3. In event that Respondent fails to comply with any of the foregoing probation terms and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of

³ The State Bar's total costs are \$1,346.76. The Hearing Officer's Report is attached as Exhibit A.

Arizona to prove noncompliance by a preponderance of the evidence.

1 RESPECTFULLY SUBMITTED this 22nd day of September, 2009.

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4 Jeffrey Messing /mps
5 Jeffrey Messing, Chair
Disciplinary Commission

6 Original filed with the Disciplinary Clerk
7 this 23rd day of September, 2009.

8 Copy of the foregoing mailed
9 this 23rd day of September, 2009, to:

10 Hon. H. Jeffrey Coker
11 Hearing Officer 6R
12 P.O. Box 23578
13 Flagstaff, AZ 86002

14 Ralph W. Adams
15 Karen Clark
Respondent's Co-Counsel
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16 Amy Rehm
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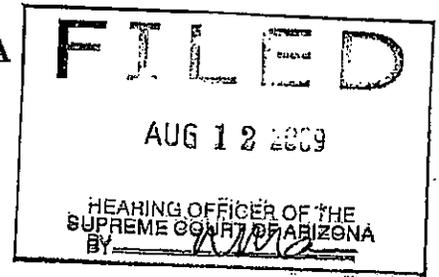
19 by: Evelyn Laza

20 /mps
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25
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EXHIBIT

A

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



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

File No. 08-1811

ANDREW R. PROPER,)
Bar No. 011295)

HEARING OFFICER'S REPORT

RESPONDENT.)
_____)

PROCEDURAL HISTORY

1. Probable cause was found in this matter on February 25, 2009. Thereafter, on April 7, 2009, the State Bar filed a one count Complaint against Respondent. A Motion to Extend Time for Service of the Complaint was thereafter filed by the State Bar because Respondent was serving a term in the Arizona Department of Corrections and could not be served at his address of record. Accordingly, the time for service was extended to April 22, 2009, and Respondent was thereafter served. Respondent, through counsel, filed an Answer to the Complaint on May 8, 2009. The Initial Case Management Conference was held on May 14, 2009, and a Final Hearing was set on July 14, 2009. On June 30, 2009, the parties filed a Notice of Settlement and the matter went to hearing on the agreement on July 14, 2009.

FINDINGS OF FACT

2. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice in Arizona on May 19, 1987.

COUNT ONE (File No 08-1811)

3. On September 13, 2008, in Prescott, Arizona, Respondent was arrested for Aggravated DUI, a class four felony.
4. The arrest stemmed from an incident that occurred earlier on the same day when Respondent had been stopped for driving too closely. Respondent performed poorly on the field sobriety tests. Respondent's attempt at the breathalyzer test showed an inadequate sample.
5. A search warrant was obtained for a blood draw, and Respondent's blood was drawn and tested. Respondent's blood tested over the legal limit.
6. Respondent was subsequently charged, by a four count Information, as follows:
 - a. Count One: Aggravated DUI by driving under the influence of alcohol while impaired to the slightest degree having previously been convicted of three or more violations of DUI within 84 months, a class four felony;
 - b. Count Two: Aggravated DUI by driving with a blood alcohol concentration of .08 or more within two hours of driving, having previously been convicted of three or more violations of DUI within 84 months, a class four felony;
 - c. Count Three: Aggravated DUI by driving with a blood alcohol concentration of .15 or more within two hours of driving, having previously been convicted of three or more violations of DUI within 84 months, a class four felony; and,

- d. Count Four: Knowingly disobeying or resisting a lawful order, process or mandate of the justice court, a class one misdemeanor.
7. On December 9, 2008, Respondent pled guilty to one count of Aggravated DUI (as amended), a class four felony, and was sentenced to seven years of probation and four months in prison. Respondent's plea agreement and sentencing minute entry are attached to the Tender of Admissions as Exhibit "A".
8. Respondent's prior record consists of three convictions for DUI that preceded his December 9, 2008, conviction:
 - a. On January 8, 2004, Respondent committed, and on March 22, 2004, was convicted, of DUI.
 - b. On January 18, 2004, Respondent committed, and on February 25, 2004, was convicted of DUI.
 - c. On September 5, 2005, Respondent committed, and on June 12, 2006, Respondent was convicted of DUI.
9. Respondent has served his four-month term in the Department of Corrections and is presently on probation. He testified that he is in full compliance of the terms and conditions of his criminal probation, is attending AA meetings, as well as counseling sessions to help him get a handle on his alcohol addiction.

CONCLUSIONS OF LAW

10. Respondent admitted, and this Hearing Officer finds by clear and convincing evidence, that his conduct as set forth above violated Rule 42, Ariz.R.Sup.Ct., specifically ER 8.4(b) Misconduct, by committing a criminal act that reflects

adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer, and Rule 53(h) Ariz.R.Sup.Ct., Grounds for Discipline, Conviction of a Crime.

ABA STANDARDS

11. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and mitigating factors.

The Duty Violated:

12. Respondent committed a criminal act by driving under the influence of alcohol in violation of the Arizona Revised Statutes. His conduct also violated his Supreme Court Rules and Rules of Professional Conduct. *Standard* 5.0, Violation of Duties Owed to the Public, is the appropriate *Standard* to consider:
"Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct, which does not contain the elements listed in *Standard* 5.11, and that seriously adversely reflects on the lawyer's fitness to practice." *Standard* 5.12.

13. The presumptive sanction then is suspension.

The Lawyer's Mental State:

14. Respondent admitted that he "knowingly" made the decision to drive while under the influence, and that he knew that his conduct was in violation of the criminal statutes of the State of Arizona, and the Rules of Professional Conduct.

Actual or Potential Injury:

15. The parties stipulated that Respondent's conduct caused no harm to his clients, and this Hearing officer could find no contrary evidence. Respondent's actions, however, had the potential for injury to the public due to Respondent's driving under the influence of alcohol. Additionally, Respondent acknowledges that his felony conviction causes harm to the profession as a whole.

Aggravating and Mitigating Factors

Aggravating Factors:

16. *Standard 9.22(a) Prior Discipline.*

In SB 07-0183-D (2008), Respondent was suspended for 90 days and placed on probation for a period of two years upon reinstatement by judgment and order entered January 8, 2008. In that matter, Respondent was convicted of Aggravated DUI, a class six undesignated offense, which was committed on September 5, 2005. Respondent was found to have violated ER 8.4(b).

17. *Standard 9.22(K) Illegal Conduct.* Respondent pled guilty to a class four felony.

Mitigating Factors:

18. *Standard 9.32(b) Absence of Dishonest or Selfish Motive.* Respondent did not act out of any dishonest or selfish motive, rather his actions were due to his alcoholism.

19. *Standard 9.32(d) Timely Good Faith Effort to Rectify Consequences of Misconduct.* Respondent pled guilty in the criminal proceedings, and has not contested this disciplinary charge. In addition, Respondent has been compliant with all criminal sanctions including his incarceration and criminal probation.

20. *Standard 9.32(e) Cooperative Attitude.* The State Bar acknowledged that Respondent has been extremely cooperative in these proceedings.
21. *Standard 9.32(g) Character or Reputation.* Respondent submitted a character letter after the hearing on the Agreement, dated July 24, 2009. The letter is not sufficiently substantive for this Hearing Officer to give this mitigating factor any weight.
22. *Standard 9.32(i) Mental Disability or Chemical Dependency.* The parties stipulate that Respondent's conduct in this matter is related to his alcoholism. Based upon the testimony given by the Respondent at the hearing on the Agreement, this Hearing Officer concurs.
23. *Standard 9.32(k) Other Penalties or Sanctions.* Respondent pled guilty to a class four felony, was incarcerated for four months, paid substantial fines related to his conviction, and is serving seven years of criminal probation.
24. *Standard 9.32(l) Remorse.* At the hearing on the Agreement, Respondent expressed what appeared to be sincere remorse about his conduct in this matter. Respondent recognizes the hold that alcoholism has on him, and feels very badly for letting himself, his supporters and the profession down.

Recommended Sanction:

25. Recognizing that the presumptive sanction in this matter is suspension, after weighing the aggravating and mitigating factors, the parties submit that a two-year suspension, retroactive to January 31, 2009, is an appropriate sanction in this matter.

PROPORTIONALITY REVIEW

26. The Supreme Court has held that, while the discipline in each situation must be tailored to the individual facts of the case, one of the goals of attorney discipline is consistency in cases with similar facts, *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983), and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
27. In *In re Wasson*, SB-05-0079-D (2005), Wasson entered into an agreement for discipline by consent, providing for a two-year suspension and two years of probation, with MAP terms. Wasson was convicted of two counts of Aggravated DUI in April and June of 2003, was sentenced to four months in the Arizona Department of Corrections, and was placed on supervised probation for a period of four years. Wasson admitted to violations of Rule 42, Ariz.R.Sup.Ct., ER 8.4(b) and Rule 53(h). There was one aggravating factor and five mitigating factors. Wasson's conduct was knowing, and although there was no actual harm, there was potential harm.
28. In *In re Politi*, SB-00-0106-D (2001), Politi entered into an agreement for discipline by consent providing for a two-year retroactive suspension and two years probation with MAP/LOMAP terms. Politi pled guilty to a misdemeanor DUI and an aggravated DUI, a class four felony. Politi also represented two opposing parties in a lawsuit, advising one against the other. There were two aggravating factors and five mitigating factors.
29. The parties cite two other cases in which a lawyer was convicted of a class four felony, aggravated DUI, which have resulted in two-year suspensions from the

practice of law: *In re Cifelli*, SB-07-0154-D (2007), and *In re Masters*, SB-07-0182-D (2008).

RECOMMENDATION

30. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice; deter future misconduct; and instill public confidence in the Bar's integrity, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994). In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions*, and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).
31. As previously mentioned, at the hearing on the Agreement, Respondent evidenced a man very much embarrassed by the control alcohol has over him. He has paid a very significant price for his consumption of alcohol and driving, having lost his driver's license, substantially fined, placed on probation for seven years, and sentenced to the Department of Corrections. The loss of his license to practice law has also had a significant financial impact on him. His present employment is acting as a handyman whenever and wherever he can find work, and transportation to that work.
32. Respondent testified that he is regularly attending AA meetings and going to counseling. He seems to recognize that he must place himself in an environment that reinforces his sobriety and understands that he cannot consume even one

drink of alcohol. No one can predict whether Respondent will choose to drink and drive again, but at present, Respondent seems committed to his sobriety. Given all of the factors in this case, the proposed sanction of suspension of his license to practice law for two years, to be followed by a period of two years of probation under specific terms and conditions, appears to be an appropriate and fair sanction. At the time of Respondent's application for readmission, there will have been a sufficient period of time to gauge Respondent's ability to control his addiction.

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

1. Respondent shall be suspended from the practice of law for a period of two years. The suspension shall be retroactive to January 31, 2009, the date upon which Respondent was placed on interim suspension by the Supreme Court of Arizona based on the felony conviction at issue herein.
2. Upon reinstatement, Respondent shall be placed on probation for a period of two years under the following terms and conditions:
 - a. Respondent shall contact the director of the State Bar's Member Assistance Program (MAP) within 30 days of reinstatement to schedule a MAP assessment. Respondent shall submit to a MAP assessment. The director of MAP shall develop a probation contract based upon the assessment, and its term shall be incorporated herein by reference. The probation period will begin to run at the time of reinstatement.

- b. Any other terms that are deemed appropriate by the Hearing Officer and approved by the Disciplinary Commission and Supreme Court at the time of the reinstatement proceedings.
3. In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, Bar Counsel will file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5) Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days following receipt of the notice, and will determine whether the terms have been breached, and if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by a preponderance of the evidence.
4. Respondent shall pay all costs incurred by the State Bar in bringing these proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter.

DATED this 12th day of August, 2009.

Hon. H. Jeffrey Coker
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 12th day of August, 2009.

Copy of the foregoing mailed
this 13th day of August, 2009, to:

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