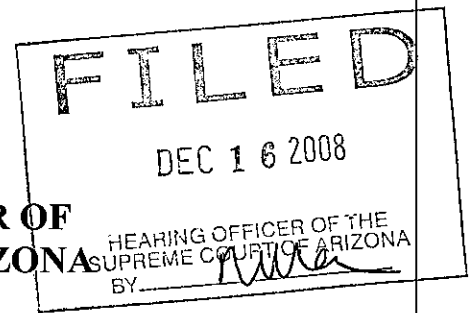




**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

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

**RORY L. WHIPPLE,
Bar No. 014093**

Respondent.

No. 08-0871

**HEARING OFFICER'S REPORT
AND RECOMMENDATION**

(Assigned to Hearing Officer 9R,
Robert J. Stephan, Jr.)

Respondent Rory L. Whipple is an Arizona attorney against whom the State Bar of Arizona filed a complaint alleging a series of ethical violations. The Bar urges that the appropriate sanction in this matter is a suspension of six months plus one day. For the reasons set forth below, the Hearing Officer finds that Respondent's conduct supports a sanction of a suspension for six months plus one day.

PROCEDURAL HISTORY

The State Bar filed its complaint herein on August 27, 2008. The complaint was served on Respondent pursuant to Ariz.R.Sup.Ct., Rule 47(c) on September 4, 2008. Respondent failed to answer or otherwise defend, and default was accordingly entered against him on October 21, 2008. A hearing on aggravation/mitigation was held on December 1, 2008, at which telephonic testimony was taken from one witness, Maria Bahr, Director of Lawyer Assistance Programs for the State Bar. Respondent did not participate in the

1 hearing, file any pleadings, or otherwise participate in these proceedings. One
2 exhibit was admitted into evidence; a letter from Davis Luna of the Lawyer
3 Assistance Program to bar counsel Edward Parker dated November 10, 2008,
4 concerning the likelihood that Respondent would benefit from a sanction
5 involving probation.
6

7 **FINDINGS OF FACT**

8 1. At all times relevant, Respondent was a lawyer licensed to practice
9 law in the state of Arizona having been first admitted to practice in Arizona on
10 October 26, 1991.
11

12 2. By Judgment and Order of the Supreme Court of Arizona filed on
13 February 12, 2008 in SB 07-0201-D (Disciplinary Commission Nos. 05-1600,
14 06-0163) ("Order of Suspension"), Respondent was suspended from the practice
15 of law for a period of thirty (30) days, effective thirty days from the date of the
16 order.
17

18 3. Respondent was further ordered to comply with all of the provisions
19 of Rule 72, Ariz.R.Sup.Ct., including but not limited to Rule 72(e), which
20 requires that Respondent file an affidavit with the Commission and with the
21 Court showing that he has fully complied with the provisions of the Order of
22 Suspension.
23
24
25

1 4. Respondent was served with the Order of Suspension on February
2 12, 2008 by certified mail, return receipt, and regular mail.

3
4 5. Rule 72(a) requires Respondent to notify the following persons by
5 registered or certified mail, return receipt requested, of the order or judgment and
6 of the fact that the lawyer is disqualified to act as lawyer after the effective date
7 of same: All clients being represented in pending matters; any co-counsel in
8 pending matters; any opposing counsel in pending matters or, in the absence of
9 such counsel, the adverse parties; and each court and division in which
10 Respondent has any pending matter, whether active or inactive.

11
12 6. Respondent filed an Affidavit for Reinstatement with the
13 Disciplinary Clerk on April 15, 2008, pursuant to Ariz.R.Sup.Ct., Rule 64.

14
15 7. In his affidavit, Respondent claims that he “has complied with the
16 requirements of the Judgment and Order...”

17
18 8. This was a false statement, because Respondent had not, in fact,
19 complied with the requirements in the order to comply with Rule 72.

20 9. In particular, Respondent failed to comply with the requirements of
21 Rule 72(e), in that he did not file with the Commission and the Court, within ten
22 (10) days of his suspension, an affidavit showing:

23
24 A. Respondent has fully complied with the provisions of the order and
25 with the rules;

1 B. All other states, federal and administrative jurisdictions in which
2 Respondent is admitted to practice;

3 C. Respondent's residence and other addresses where communications
4 may thereafter be directed; and
5

6 D. Respondent has served a copy of such affidavit upon bar counsel.
7

8 10. The State Bar filed a Response to Respondent's Rule 64 affidavit on
9 April 23, 2008, bringing to the Court's attention that Respondent had failed to
10 comply with Rule 72(e), had failed to comply with the Judgment and Order of
11 Suspension, and had filed a false statement.

12 11. Respondent filed a Reply in the Supreme Court on May 2, 2008.
13

14 12. In his Reply, Respondent asserted that upon receipt of the Order of
15 Suspension he "enlisted temporary help to prepare for his suspension."

16 13. Respondent claimed he had prepared an affidavit in compliance with
17 Rule 72(e), but: "It apparently did not get filed due to oversight, inadvertence or
18 mistake."
19

20 14. Respondent claimed he "believed his (Rule 72) affidavit had been
21 filed when he filed his affidavit for reinstatement and did not believe it contained
22 any false statements."
23

24 15. On May 1, 2008 Respondent submitted an affidavit to belatedly
25 demonstrate his compliance with Rule 72.

1 16. By letter dated May 22, 2008, the State Bar asked Respondent to
2 respond to the charges of violation, addressing ERs 3.3(a), 3.4(c), 5.3, 8.4(b), (c)
3 & (d), and Rule 41(e).
4

5 17. By letter dated May 28, 2008, the State Bar requested more
6 information from Respondent, including a copy of his Rule 72 notification letter
7 and his proofs of service on the recipients of the letter, as well as identifying
8 information on all persons involved in the preparation of his Rule 72 affidavit,
9 including their skills to complete such a project and what instructions
10 Respondent provided to them.
11

12 18. Respondent is required pursuant to Rule 72(f) to maintain records
13 constituting compliance with the rule.
14

15 19. Respondent requested and was granted an extension of time to
16 respond to the State Bar's inquiry until July 7, 2008.
17

18 20. Respondent failed to provide any response to the State Bar's
19 inquiries.
20

21 21. By his conduct in this Count, Respondent knowingly made a false
22 statement of fact or law to a tribunal; knowingly disobeyed an obligation under
23 rules of a tribunal; failed to make reasonable efforts to ensure that a nonlawyer
24 employee's conduct was compatible with Respondent's professional obligations;
25 knowingly failed to respond to a lawful demand for information from a

1 disciplinary authority; engaged in conduct involving dishonesty, fraud, deceit or
2 misrepresentation; engaged in conduct that was prejudicial to the administration
3 of justice; sought to mislead the Justices of the Arizona Supreme Court by false
4 statements of fact or law; refused to cooperate with officials and staff of the State
5 Bar; and refused to furnish information to or respond promptly to inquiries from
6 bar counsel.
7

8 **CONCLUSIONS OF LAW**

9
10 The facts as deemed admitted above, and as supported by the documentary
11 record and hearing testimony, establish that Respondent committed multiple
12 violations of Rule 42, Ariz.R.Sup.Ct., specifically ERs 3.3(a), 3.4(c), 5.3, 8.1(b),
13 8.4(c) & (d), and Rules 41(e) and 53(d) & (f), Ariz.R.Sup.Ct.
14

15 **RECOMMENDED SANCTION**

16 This recommendation is based upon the applicable *ABA Standards for*
17 *Imposing Lawyer Sanctions* ("Standards"), 1991 Edition, including the duty
18 violated, the lawyer's mental state, the presence or absence of actual or potential
19 injury, the existence of aggravating and mitigating factors, and proportional case
20 law. *In re Peasley*, 208 Ariz. 27, 33, 90 P.3d 764, 772 (2004); *Standard 3.0*.

21 **ABA STANDARDS**

22 ER 3.3(a), ER 3.4(c), ER 8.4(c) & (d), and Rule 41(e):

23 **Standard 6.0: Violations of Duties Owed to the Legal System**

24 **6.1 False Statements, Fraud, and Misrepresentation**

25 Absent aggravating or mitigating circumstances, upon application of the factors
set out in Standard 3.0, the following sanctions are generally appropriate in cases

1 involving conduct that is prejudicial to the administration of justice or that
2 involves dishonesty, fraud deceit, or misrepresentation to a court:

3 6.11: Disbarment is generally appropriate when a lawyer, with the intent to
4 deceive the court, makes a false statement, submits a false document, or
5 improperly withholds material information, and causes serious or potentially
6 serious injury to a party, or causes serious or potentially serious adverse effect on
7 the legal proceeding.

8 6.12: Suspension is generally appropriate when a lawyer knows that false
9 statements or documents are being submitted to the court or that material
10 information is improperly being withheld, and takes no remedial action, and
11 causes injury or potential injury to a party to the legal proceeding, or causes an
12 adverse or potentially adverse effect on the legal proceeding.

13 6.13: Reprimand (Censure in Arizona) is generally appropriate when a lawyer is
14 negligent either in determining whether statements or documents are false or in
15 taking remedial action when material information is being withheld, and causes
16 injury or potential injury to a party to the legal proceeding, or causes an adverse
17 or potentially adverse effect on the legal proceeding.

19 **Standard 6.2: Abuse of the Legal Process**

20 Absent aggravating or mitigating circumstances, upon application of the
21 factors set out in 3.0, the following sanctions are generally appropriate in cases
22 involving failure to expedite litigation or bring a meritorious claim, or failure to
23 obey any obligation under the rules of a tribunal except for an open refusal based
24 on an assertion that no valid obligation exists:
25

1 6.21: Disbarment is generally appropriate when a lawyer knowingly violates a
2 court order or rule with the intent to obtain a benefit for the lawyer or another,
3 and causes serious injury or potentially serious injury to a party, or causes serious
4 or potentially serious interference with a legal proceeding.

5 6.22: Suspension is appropriate when a lawyer knowingly violates a court order
6 or rule, and there is injury or potential injury to a client or a party, or interference
7 or potential interference with a legal proceeding.

8 6.23: Reprimand (Censure in Arizona) is generally appropriate when a lawyer
9 negligently fails to comply with a court order or rule, and causes injury or
10 potential injury to a client or a party, or interference or potential interference with
11 a legal proceeding.

12
13 ER 5.3:

14 **Standard 7.0: Violations of other Duties Owed as a Professional**

15 7.2: Suspension is generally appropriate when a lawyer knowingly engages in
16 conduct that is a violation of a duty owed as a professional, and causes injury or
17 potential injury to a client, the public, or the legal system.

18 7.3: Reprimand (Censure in Arizona) is generally appropriate when a lawyer
19 negligently engages in conduct that is a violation of a duty owed as a
20 professional, and causes injury or potential injury to a client, the public, or the
21 legal system.

22
23 ER 8.1(b) and Rule 53(d) & (f):

24 **Standard 5.0: Violations of Duties Owed to the Public**

25 **5.1: Failure to Maintain Personal Integrity**

1 Absent aggravating or mitigating circumstances, upon application of the
2 factors set out in 3.0, the following sanctions are generally appropriate in cases
3 involving commission of a criminal act that reflects adversely on the lawyer's
4 honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with
5 conduct involving dishonesty, fraud deceit, or misrepresentation:

6 5.11: Disbarment is generally appropriate when:

7 (a) a lawyer engages in serious criminal conduct, a necessary element of which
8 includes intentional interference with the administration of justice, false swearing,
9 misrepresentation, fraud, extortion, misappropriation, or theft: or the sale,
10 distribution or importation of controlled substances; or the intentional killing of
11 another; or an attempt or conspiracy or solicitation of another to commit any of
12 these offenses; or

13 (b) a lawyer engages in any intentional conduct involving dishonesty, fraud,
14 deceit, or misrepresentation that seriously adversely reflects on the lawyer's
15 fitness to practice.

16 5.12: Suspension is generally appropriate when a lawyer knowingly engages in
17 criminal conduct which does not contain the elements listed in Standard 5.11 and
18 that seriously adversely reflects on the lawyer's fitness to practice.

19 5.13: Reprimand (Censure in Arizona) is generally appropriate when a lawyer
20 knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or
21 misrepresentation and that adversely reflects on the lawyer's fitness to practice
22 law.

23 THE DUTIES VIOLATED

24 The *Standards* identify four distinct categories in which a lawyer has
25 specific duties; to the client, to the general public, to the legal system and to the

1 profession. Respondent's duties to the legal system, to the public, and to the
2 profession are all implicated in this matter.

3 **THE LAWYER'S MENTAL STATE**

4 Respondent acted knowingly as to the conduct in this case. The language
5 of the Judgment & Order, to comply with all of the provisions of Rule 72, was
6 clear and unambiguous. Also, the language of the Rule itself, to which
7 Respondent is subject, is clear. Respondent was aware of the requirements of the
8 Rule, because he filed a Reply in the Supreme Court on May 2, 2008, claiming he
9 had prepared an affidavit in compliance with the Rule (Finding of Fact #13). In
10 addition, Respondent was aware that the Bar had requested information from him
11 about this conduct, because he requested (and was granted) an extension of time
12 to respond to the Bar's inquiry (Finding of Fact #19).

13 **ACTUAL OR POTENTIAL INJURY**

14 Respondent's disregard for the Rules of Professional Conduct resulted in
15 actual or potential injury to the public, whom the Rules are designed to protect, to
16 the legal system, whose tribunals and disciplinary authorities are entitled to and
17 need honest compliance with the Rules, and to the profession, the integrity of
18 whose members is placed at risk by such conduct.

19 **AGGRAVATION/MITIGATION**

20 Aggravating factors include:

21
22 *Standard 9.22(a)* prior disciplinary offenses.

23 The Bar previously filed a Notice of Prior Discipline herein, indicating:

- 24 • Probable Cause Panelist Order of Informal Reprimand, dated
25 November 10, 1999, in file no. 98-1076.

- Probable Cause Panelist Order of Informal Reprimand and Costs, dated October 17, 2000, in file no. 00-1091.
- Probable Cause Panelist Order of Probation with LOMAP, dated February 1, 2006, in file no. 05-0809.
- Final Judgment and Order of the Supreme Court of Arizona, dated February 12, 2008, in file No. SB-07-021-D, Disciplinary Commission Nos. 05-1600, 06-0163, imposing a suspension of one month, plus probation and costs.
- Probable Cause Panelist Order of Informal Reprimand and Costs, dated May 28, 2008, in file no. 08-0212.

Standard 9.22(f) submission of false statement.

Standard 9.22(i) substantial experience in the practice of law:
Respondent has been an Arizona attorney for 17 years.

Mitigating factors include: None.

PROPORTIONALITY

In *In re Brown*, 184 Ariz 480, 910 P.2d 631, SB-95-0018-D (1996), DC No. 93-1413, Respondent received a 9-month suspension. Respondent failed in a guardian/conservator action to communicate with and advise his client, appear at court hearings, cooperate with other counsel, comply with court orders, inform the court, client or opposing counsel of his suspension and properly withdraw from representation. Respondent failed to cooperate with the State Bar in its investigation. The court cited *In re Davis*, 181 Ariz 263, 266, 889 P.2d 621 (1995) in stating, "Failure to respond to inquiries from the State Bar shows a disregard for the Rules of Professional Conduct and borders on contempt for the legal system." The court also held that, "Inaction serves to undermine the profession's efforts at self-regulation, damaging both its credibility and

1 reputation. Additionally, Respondent's disregard of court orders casts a shadow
2 over the integrity of the justice system." The Rules that were violated were: ERs
3 1.1, 1.3, 1.4, 3.2, 3.3, 8.1(b), 8.4(d), SCR 51(e), (f), (h), (i) & (k). Respondent's
4 disciplinary history included a suspension, 3 censures, 3 informal reprimands, a
5 period of probation; the Court noted Brown's apparent indifference to
6 disciplinary process.

7 In *In re Merchant*, SB-00-0057-D, DC No. 98-2026, (2000), Respondent
8 received a suspension of 6 months & 1 day, plus restitution. Respondent
9 knowingly failed to comply with the rules of the tribunal and failed to comply
10 with the court's order when she failed to fulfill her court-ordered duties as an
11 arbitrator, and then knowingly failed to appear as ordered at the Order to Show
12 Cause hearing. Respondent further failed to respond or cooperate with the State
13 Bar's investigation of this matter. The Rules were: ERs 3.4, 8.1(b), 8.4, SCR
14 51(e), (h), (i) & (k). Respondent's conduct was deemed admitted by default.
15 Factors in Aggravation: 9.22(d) & (e). Factors in Mitigation: 9.32(a) & (k).

16 In *In re Wagner*, SB-05-0175-D, DC Nos. 04-1678, et al. (2006),
17 Respondent was disbarred. Respondent engaged in the unauthorized practice
18 of law while summarily suspended for failure to comply with Rule 45, MCLE
19 requirements. Respondent appeared in court representing a father in a child-
20 dependency case and thereafter, failed to obey a court order and abandoned her
21 law practice. Respondent also failed to cooperate with the State Bar's
22 investigation. The Rules were: ERs 1.4, 3.2, 3.4, 5.5, 8.1, 8.4(d) and Rule
23 53(c), (d) & (f). Conduct deemed admitted by default. Factors in Aggravation:
24 9.22(c), (e), (g), (h), (i) & (j); Factors in Mitigation: 9.32(d). Mental State:
25 Knowing. Injury or potential injury.

1 In *In re Yates*, SB-02-0069-D, DC Nos. 00-1293, 00-1416, (2002),
2 Respondent received a 3-year Suspension, plus 2-year Probation & LOMAP.
3 Respondent engaged in the unauthorized practice of law while summarily
4 suspended for non-payment of bar dues and made false statements concerning his
5 status to the tribunal. Respondent also failed to notify clients and opposing
6 parties of his suspension and failed to respond to or cooperate with the State
7 Bar's inquiry of this matter. The Rules involved were: ERs 1.4(b), 3.3, 3.4(c),
8 4.1, 5.5, 8.1(b), 8.4(c) & (d), SCR's 31(a)(3), 51(e), (f), (h) & (k). Factors in
9 Aggravation: 9.22(a), (b), (c), (d), (e), (i). Factors in Mitigation: None.

10 CONCLUSION

11 The Supreme Court "has long held that 'the objective of disciplinary
12 proceedings is to protect the public, the profession and the administration of
13 justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 41 P.3d 600,
14 (2002), quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.3d 75, 78 (1966).

16 The Hearing Officer believes that the protection of the public and the
17 profession, and the administration of justice, require that Respondent be
18 suspended for six months plus one day, and that Respondent be assessed the costs
19 and expenses incurred in these disciplinary proceedings.
20

21
22
23 DATED this 16th day of December, 2008.

24
25 Robert J. Stephan, Jr. / RM
Robert J. Stephan, Jr.
Hearing Officer 9R

1 Original filed this 16th day
2 of December, 2008, with:

3 Disciplinary Clerk of the Supreme Court of Arizona
4 1501 W. Washington Street
5 Phoenix, Arizona 85007

6 Copies of the foregoing mailed this 17th day
7 of December, 2008, to:

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16 by: 
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