BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **JOHN T. BANTA,** **Bar No. 010550** RESPONDENT.	No. 09-1781 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 22, 2011, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed November 10, 2010, recommending a 30 day suspension, two years of probation with the State Bar's Member Assistance Program ('MAP") and costs. No objection was filed by Respondent or the State Bar of Arizona.

Decision

The six members[1] of the Disciplinary Commission by a majority of five[2] recommend accepting and incorporating the Hearing Officer's findings of fact and conclusions of law but based on *de novo* review, modify the recommended sanction to reflect a suspension of six months, two years of probation (MAP) and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[3] The terms of probation are as follows:

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[1] Commissioner Belleau and Horsley did not participate in this proceeding. Commissioner Houle recused.

[2] Commissioner Osborne was opposed and voted to recommend a six month and one day suspension and two years of probation (MAP). Commissioner Osborne determined that Respondent should be required to demonstrate his fitness to practice through formal reinstatement proceedings.

[3] The Hearing Officer's Report is attached as Exhibit A.

Terms of Probation

1. Within thirty (30) days of the date of the order of reinstatement, Respondent shall contact the Director of MAP and submit to an assessment. Respondent thereafter shall enter into a MAP contract based upon recommendations by the MAP director or designee. Probation is effective the date of the signing of the probation contract and shall conclude two years thereafter.[4] The terms shall include a requirement that Respondent continue therapy and take his prescribed medication. Respondent shall be responsible for any costs associated with MAP.

2. The State Bar shall report material violations of the terms of probation pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct., and a hearing may be held within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

Discussion of Decision

The Disciplinary Commission reviews findings of fact, including findings of aggravation and mitigation under a clearly erroneous standard. It uses a *de novo* standard in reviewing conclusions of law as well as mixed questions of law and fact or factual findings induced by an erroneous conclusion of law. *See* Rule 58(b), Ariz.R.Sup.Ct.; *State v. Altieri*, 191 Ariz. 1, 951 P.2d 866 (1997); and *Park Central Dev. Co. v. Roberts Dry Goods*, 11 Ariz.App. 58, 461 P.2d 702 (1969).

Respondent has a history of similar prior discipline. On March 23, 2005, in File No. 02-1070 et al., Respondent was censured and placed on one year of probation (MAP)

[4] Pursuant to Rule 60(b)(5), probation shall be imposed for a specific period not in excess of two years, but may be renewed for an additional two years.

for violating ERs 1.15(b), 1.15(c), 3.5(c), 4.4, 8.4(d) and Rules 41(c) and 41(g). Respondent disagreed with the judge's ruling, engaged in name calling and used profanity. His conduct was offensive and prejudicial to the administration of justice. At that time, the Disciplinary Commission put Respondent and the profession on notice that such abusive and offensive conduct is unacceptable and can not be tolerated by a self-governing profession.

In 2007, Respondent was again censured for violating ERs 1.2, 1.3, 1.4, 3.1 and 8.4(d). In that matter, Respondent failed to diligently represent, communicate, and consult with his clients concerning the object of representation. Additionally, Respondent failed to inform his client that her case was dismissed and then filed a frivolous motion to reinstate the case with little or no substantive legal basis.

Four years later, in September 2009, Respondent again disagreed with a judge's ruling. He again became abusive in open court, yelled, disregarded the judge's instructions, used profanity, and then moved aggressively towards the prosecutor in a threatening manner. Law enforcement officers in the courtroom intervened and physically prevented Respondent from reaching the prosecutor. When he was forcibly removed from the courtroom, Respondent continued his tirade and stating that he was not "quite through with the court".

As noted, Respondent's aggressive and unprofessional conduct occurred in open court where members of the public were present and felt threatened. Respondent disrupted the courtroom to such an extent that law enforcement officers had to intervene and physically remove him. His shouting and behavior frightened members of the public who have a right to attend court without fearing for their safety, especially at the hands of a

member of the Bar. Respondent's conduct put everyone present in the courtroom at risk and caused actual damage to the administration of justice as well as the judicial system as a whole.

Conclusion

Attorney discipline is intended, among other things to maintain the integrity of the profession in the eyes of the public, protect the public from unethical or incompetent lawyers, and deter other lawyers from engaging in illegal or unprofessional conduct. *In re Scholl,* 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001). Based on Respondent's repeated pattern of misconduct, the seriousness of his misconduct as well as the effect on those present, a majority of the Commission concludes that nothing less than a suspension of six months and two years of probation (MAP) will satisfy the purposes of discipline in this case.

RESPECTFULLY SUBMITTED this 9 day of February, 2011.

Pamela M. Katzenberg /mcw
Pamela M. Katzenberg, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 9 day of February, 2011.

Copy of the foregoing mailed
this 9 day of February, 2011, to:

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Copy of the foregoing hand delivered
this 9 day of February, 2011, to:

Hon. Jonathan H. Schwartz
Hearing Officer 6S
1501 W. Washington, Suite 104
Phoenix, AZ 85007

by:

/mps

EXHIBIT A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOHN THOMAS BANTA,** **Bar No. 010550** RESPONDENT.	)	No. 09-1781 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A Complaint was filed on July 9, 2010. The Hearing Officer was assigned on July 26, 2010. Respondent filed an Answer on August 10, 2010. The Initial Case Management Conference was held on August 11, 2010. The hearing was held on October 1, 2010.

FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been admitted on May 10, 1986. (TR 125:18-20)
2. On September 4, 2009 Respondent appeared before the Honorable Laura Lowery at the Surprise Municipal Court. (TR 15:14)
3. Respondent represented a defendant in a civil traffic case, *State v. Gonzales*, CT 09-06401. (Exhibit L, Banta 00150)
4. At the beginning of the proceedings Respondent told Judge Lowery that he had a notarized statement from his client waiving the client's appearance at the proceedings. (Exhibit B, Banta 00002) (The Surprise Court records each case by audio and video. Exhibit 1 is the CD of the subject proceeding. Exhibit L is a transcript of the proceeding. See Exhibit L, page 4, line 6)

5. Respondent and Judge Lowery discussed Respondent's request to proceed without his client present. The court was concerned about the defendant's ability to waive his presence without stipulating to the defendant's identification. (Exhibit L, lines 9 through 15)
6. Respondent told Judge Lowery that a lower court opinion many years ago based on a ruling by a judge in Glendale Justice Court permitted an attorney to appear for a defendant and yet not waive the issue of identification. Respondent argued that the attorney's appearance for his client meant that the trial was not proceeding in absentia. (Exhibit L, page 4, line 18 through page 6, line 2)
7. Judge Lowery asked Respondent for some authority at a level higher than a justice court. Respondent agreed that lower court opinions are not dispositive. (Exhibit L, page 6, line 6) The judge gave Respondent a rule book and asked him to cite her some authority from the Rules of Procedure. (Exhibit L, page 7, line 23)
8. Judge Lowery reminded Respondent that she had a very crowded calendar that morning and she did not have time to do independent research on this issue. She testified at the hearing that she had 14 civil traffic matters on her docket on the morning of September 4, 2009. (TR 15:8)
9. Much of the discussion between Judge Lowery and Respondent occurred while Respondent stood right in front of the bench. A review of the CD of this proceeding reveals that Judge Lowery did not preclude Respondent from approaching the bench. Exhibit 1) Respondent kept his hands clasped behind his back when he was arguing his position to the judge at the bench. (TR 165:14 through 166:6)

10. Judge Lowery asked the police officer who was in court on this civil traffic matter to get a prosecutor. The court stated, "You know what? We have so many people. This is what I'm going to do. Officer, I'm going to ask you to please go and get the prosecutor. If he wants to represent you on that issue, because I think that that's the fair thing to do. And then we'll proceed. Okay? If the prosecutor knows that you have an attorney and he doesn't want to get involved, then I just need to hear that." (Exhibit L, page 7, lines 11-18)

11. Respondent asserted that for a prosecutor to appear he or she would need to put in a 10-day notice. (Exhibit L, page 7, line 25) Respondent continued to assert that the many courts in which he had appeared permitted him to waive his client's presence without waiving the issue of identification in a civil traffic trial. Judge Lowery continued to ask for a citation to a specific rule that permitted this procedure. Respondent asked for a chance to get his glasses and review the rules. Both Judge Lowery and Respondent agreed that while he got his glasses the judge would handle a different case. (Exhibit L, page 7, line 25 through page 10, line 8)

12. After a 25 minute recess on this case, Respondent informed the judge that he was not able to find a rule that specifically addressed this issue. He stated, "They have scrubbed the rules in terms of specifics." (Exhibit L, page 10, line 9) The judge noted that a prosecutor was now present in the courtroom. Assistant City Prosecutor Joy L. Kemp announced her appearance. Ms. Kemp disagreed with Respondent on the issue in dispute. Ms. Kemp, Judge Lowery and Respondent discussed the issue for several minutes. Within four pages of the transcript of this proceeding Respondent referred to Ms. Kemp's position as "absurd" six times. The transcript also reflects that

Respondent had an equal opportunity with Ms. Kemp to elucidate his position for the court. (Exhibit L, page 10, line 17 through page 14, line 11)

13. Because the attorneys were arguing repetitively back and forth and because Respondent repeatedly referred to Ms. Kemp's position as "absurd" (as well as "not only absurd but patently ridiculous", Exhibit L page 13, line 12) Judge Lowery announced her conclusion as follows: "All right. We're going to stop with the exchange because we could be here all day with personal attacks. But we really need to stick to the rules. I do not find that the Defendant had the authority to waive his presence in the fashion that he has done. I find that the Defendant should be here. I would be willing because he is represented to give him a continuance and reschedule the matter for - -." (Exhibit L, page 14, lines 12-19)

14. Respondent told the judge that his client would not appear because the client was an over-the-road trucker who hires counsel so that the client can continue working. (Exhibit L, page 14, line 20)

15. Then Judge Lowery offered Respondent a solution; that his client should specifically request a trial in absentia. To this suggestion Respondent stated that he disagreed. Judge Lowery told Respondent that she knew he disagreed, but that her decision would not change unless she was reversed by a higher court. Respondent repeated that other judges for years have allowed Respondent to appear for the client. When the prosecutor reminded the court that this case was before Judge Lowery, Respondent very quickly rose from his chair creating a loud noise (that sounded like the banging of a hand on his table), moved quickly toward the prosecutor and yelled

at the prosecutor, "- - shut up a minute?" The prosecutor requested contempt, to which Respondent responded, "God damn it." (Exhibit L, page 15, lines 2-22)

16. Police officers reacted to Respondent's yelling "shut up a minute" at the prosecutor and Respondent's jumping to his feet and moving quickly toward the prosecutor, by placing themselves between the prosecutor and Respondent to restrain him from further approaching the prosecutor. (See Exhibit 1 the CD of the proceeding) Peoria police officer Severin Hall thought that when Respondent stood up at counsel table Respondent slammed his fist down on the table. The CD of the proceeding does not reveal that Respondent hit the table with his hand. However, the CD does reveal that in standing up something the Respondent did created a loud noise in addition to Respondent yelling "shut up a minute" at the prosecutor and making a physical move toward the prosecutor. Officer Hall testified that after Respondent told the prosecutor to "shut up", "... he started to charge at her." (TR 58:20-25)

17. Officer Hall saw Peoria Police Officer Ray Johnson restrain Respondent from approaching the prosecutor's table. (TR 58:24) Officer Hall described his impression of Respondent's movement toward the prosecutor as, "... it appeared he was charging directly at her." (TR 60:6-17) Officer Hall joined Officer Johnson in restraining Respondent. Officer Hall touched Respondent to restrain him. (TR 61:20-25) On cross examination Officer Hall testified that he did not know what Respondent was going to do but that the officer "anticipated" Respondent's action and sought to stop it. (TR 62:4-14). Officer Hall also agreed that if the CD of the proceeding did not show that Respondent was slamming his hand on the table, then it was the more appropriate record. (TR 63:15-25)

18. Officer Michael Robbins testified that he saw Respondent sitting with Respondent's back against the wall in the galley of the court room with his feet on the bench in a very sluggish manner, while Respondent made loud comments about other peoples' cases. (TR 67:17-20) Respondent testified that he sat this way because he had an infection is his knee after knee replacement surgery. Respondent closed his eyes that day because Respondent has retinitis pigmentosa and the glare of the overhead lighting in the courtroom bothered him. (TR 131:18 through 132:15, 163:24) Officer Robbins described Respondent's conduct as follows, "... stood up very, very abruptly, and made a very abrupt movement towards Ms. Kemp." (TR 68:17-22) Officer Robbins thought that Respondent was going to push Ms. Kemp out of the way and take over the podium so that he could speak to the judge. (TR 69:1-5) Respondent testified that in standing up his intention was to go up to the side of the podium and show the prosecutor Rule 7 (a) which allowed a defendant to appear personally or by counsel. (TR 138:22 through 139:14, 140:15 through 141:1)

19. The transcript of the proceeding shows that after Respondent stood up quickly and told the prosecutor to "shut up", Ms. Kemp requested that Respondent be held in contempt. Respondent's next statement was, "God damn it." Then, an unidentified person (probably a police officer) told Respondent to sit down. When a police officer touched Respondent blocking his path to the prosecutor, Respondent stated, "Get your hands off me. I'm going to talk to Counsel." (Exhibit L, page 15, lines 20-25)

20. The court immediately responded, "No, you're not." Respondent started to ask the court to tell the police something, when the court stated, "No, I will not. The hearing is adjourned. I've already issued my ruling. I will give you a continuance if you'd

like. In the meantime, you can file a motion to request a trial in absentia." Respondent stated, "I'm going to file a special action." The prosecutor again asked for contempt. While Ms. Kemp was continuing to talk over him, asking for contempt for his lack of professionalism, Respondent told the court, "Your ruling is - - (Ms. Kemp interrupts) Your ruling is so - - (Ms. Kemp interrupts), - - against - -". The court said that she could not hear both Respondent and Ms. Kemp. An unidentified speaker (probably a police officer Michael Robbins, see TR 69:18) asked the judge, "Your Honor, are we done with this gentleman? Can we escort him out?" To which the judge responded, "I thought that I was... But your prosecutor was talking at the same time." As he was being escorted out of the courtroom by several police officers, Respondent then stated, "I'm not quite through with the Court." The judge stated, "I will not take any more attacks, Counsel." Respondent complained that he was being interrupted by the prosecutor and that the court chastised him for interrupting the prosecutor, while the court allowed the prosecutor to interrupt him. The court stated, "Sir, that didn't happen in my presence." Respondent asserted, "Yes, it did." (Exhibit L, page 16, line 1 through page 17, line 8)

21. Officer Raymond Johnson was the officer who cited Respondent's client Mr. Gonzales for the ticket. He testified that Respondent lunged at the back of the prosecutor. Officer Johnson did not expect how quickly Respondent moved toward Ms. Kemp. (TR 80:16-25) He power pushed Respondent to restrain him. (TR 81:9) Officer Johnson said Respondent did not de-escalate. Respondent made a sudden move that caused Officer Johnson to assume it was a hostile act. (TR 82:4 through 85:25)

22. Karen Lavelle was in the courtroom in her role as court services supervisor on September 4, 2009. She testified that after Respondent made a loud noise and startled her by yelling "shut up" at the prosecutor and the police restrained Respondent, a woman in the back of the courtroom left her seat in the first row of the galley and moved to the back of the courtroom. (TR 97:20 through 98:4) The woman to whom she referred is Dawn Pierce who also testified at the hearing. Ms. Pierce was in court for her own speeding ticket that day. She described Respondent as becoming unreasonable, belligerent and out of control and having a hostile conversation with the prosecutor. (TR 119:15 through 120:4) Respondent appeared hostile and not professional. (TR 120:11 through 121:9) Ms. Pierce had been sitting in the first row of the galley. She testified that when Respondent yelled and stood up abruptly, she became uneasy. She ducked a little and moved her seating. (TR 121:10-15, 122:3-25)

CONCLUSIONS OF LAW

The Hearing Officer finds that the State Bar has proven by clear and convincing evidence that Respondent's conduct violated the following Rules of Professional Conduct: ER 3.5 (d) conduct likely to disrupt the tribunal, ER 8.4 (d) conduct that was prejudicial to the administration of justice, Rule 41 (c) failure to maintain the respect due to courts of justice and judicial officers and Rule 41 (g) unprofessional conduct. Regardless of the merits of Respondent's arguments to the court on September 4, 2009, his conduct was disruptive of the tribunal, disrespectful of the court, prejudicial to the administration of justice and unprofessional. Respondent was both unprofessional and disruptive when he yelled at the prosecutor to shut up.

By combining the yelling of "shut up" with a quick movement to his feet and toward the prosecutor, Respondent gave the impression to every witness who testified at the hearing that he would become physically aggressive with the prosecutor. This conduct was both disruptive and disrespectful and prejudicial to the administration of justice. The police officers who stood between Respondent and the prosecutor to protect the prosecutor from Respondent were justified in their anticipation of inappropriate physical conduct.

Even if Respondent's testimony as to his intention to talk to the prosecutor is believed, the manner in which he chose to do this was entirely inappropriate. After Respondent told the prosecutor to shut up and after the prosecutor requested contempt against Respondent, and after the police approached Respondent, he stated in open court, "God damn it." This comment was inappropriate, disruptive, prejudicial to the administration of justice and unprofessional. After the judge announced her ruling Respondent continued to argue with the court to say that her ruling was against something. This conduct was unprofessional and disrespectful to the court.

After the court stated that the matter was concluded and that Respondent should be escorted from the courtroom, Respondent stated to the judge, "I'm not quite through with the Court." This remark was inappropriate, disrespectful, prejudicial to the administration of justice, unprofessional and disruptive to the tribunal.

Respondent engaged in conduct described above in a court room full of people who were charged with civil traffic offenses and in front of the police officers who were waiting to testify on these matters. Respondent's conduct lessened the dignity of the court, frightened those who observed him and contributed to a general atmosphere

of shock and surprise that this kind of thing could go on in a courtroom. Judge Laura Lowery testified that she has been a defense attorney, a prosecutor and a judge and that she has never seen conduct like Respondent's on September 4, 2009. (TR 15:24 through 16:6) She was embarrassed for the public in the courtroom. She observed the reaction of the people in the galley of the court room moving away. (TR 19:4, 20:1-2) After the events described above concluded, Judge Lowery testified that other defendants wanted to plead guilty to get out of the courtroom as quickly as possible and in her words, "They just wanted to leave. It was very uncomfortable." (TR 20:4-6)

Joy Kemp testified that Respondent's conduct in this incident made her feel "extremely nervous and agitated". (TR 50:12) Edward Paine, an Assistant City Prosecutor for the City of Surprise for six years until October 2009, was also in this courtroom on September 4, 2009. He testified that Respondent was disrespectful to the judge, talking over her, and when Respondent physically approached opposing counsel at the podium in the manner in which he approached, "That was ridiculous". (TR 42:10-16) Officer Hall explained why he thought Respondent had started to charge at prosecutor in the following manner, "the amount of force and emphasis put into his movement toward her." (TR 60:6-17) Officer Robbins testified that Respondent's conduct diminished the judicial proceeding. (TR 69:22 through 70:2) This officer stated that Respondent's voice got loud, Respondent stood up and made one maybe two steps toward the podium. Officer Robbins feared danger to the prosecutor. (TR 74:23 through 75:7)

Howard Stanton is a recreational tutor for the Surprise School District. He was in court on September 4, 2009 for his own speeding ticket. He described Respondent as getting angry and aggressively moving toward the prosecutor. (TR 107:12-17) He testified that if no police had been in the court room, he would have tried to restrain Respondent. (TR 110:4-20) Although Mr. Stanton had been around parents who he was supervising and who could be difficult, he was surprised to witness disruptive behavior in the court room. (TR 108:9-25)

Respondent testified that he conceded that his behavior was rude and inappropriate for this forum. At the hearing he stated that he was wrong. (TR 160:20-25) Respondent said that it was not his intention to disrupt or prejudice the administration of justice. (TR 171:3-8) He testified that although he was defending his client who he thought was not being treated fairly he should not have acted this way. (TR 172:2-15) Respondent could not explain why he told the judge, "I'm not quite through with the Court". But he asserted that the judge was wrong to ask the prosecutor for an opinion. (TR 188:20 through 193:15)

The Comment [2007 Amendment] to Rule 41 (g) directs the reader to Rule 31 (a)(2)(E) for a definition of "unprofessional conduct". Rule 31 defines the term as "... substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona." The Creed states, "B. With respect to opposing parties and their counsel: I will be courteous and civil, both in oral and in written communication." And the Creed further states, "C. With respect to the courts and other tribunals: I will be an honorable advocate on behalf of my client, recognizing, as an officer of the court, that unprofessional conduct is detrimental to

the proper functioning of our system of justice." The Oath of Admission to the Bar states in part, "I will maintain the respect due to courts of justice and judicial officers. ... I will abstain from all offensive conduct." The conduct of Respondent described above was repetitive. He yelled at opposing counsel to shut up. He aggressively moved toward opposing counsel frightening numerous spectators and resulting in a justifiable response from police officers. When the officers approached him and after the prosecutor asked for contempt he stated "God damn it". After the judge made her ruling and permitted the police officers to escort Respondent from the court room, Respondent disrespectfully stated that he was not through with the court. The Hearing Officer concludes that the Rule 41 (g) definition of unprofessional conduct has been clearly and convincingly established in this case.

RESTITUTION

Restitution is not an issue in this matter.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and

the existence of aggravating and mitigating factors. *In re Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

The Hearing Officer determines that the specific violations in this case are covered by *Standard* 6.2 Abuse of the Legal Process. *Standard* 6.22 is specifically applicable. It states: **"Suspension is appropriate when a lawyer knowingly violates a court order or rule and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding."**

Standard 8.2 is also applicable. It states, **"Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."**

Standard 7.2 is applicable. It states, **"Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of the duty owed to a professional, and causes injury or potential injury to a client, the public, or the legal system."**

Duty Violated

Respondent violated his duty to the legal system by conducting himself in a disrespectful manner to both the prosecutor and the court. Yelling "shut up" to opposing counsel in front of a court is both disrespectful to opposing counsel and to the court. Combining that outburst with a forceful, abrupt and quick movement toward opposing counsel is also disrespectful to the legal system. After being told that the court's ruling had been made, telling the court that Respondent was "not quite through with the Court" was continuing to be disruptive and disrespectful to the court and the legal system.

Mental State

Respondent has been an attorney long enough to know that his conduct was inappropriate. Although he has presented material under seal that is designed to indicate that he could not control his behavior, the Hearing Officer thinks otherwise. Respondent has committed similar inappropriate conduct in a prior disciplinary matter for which he was censured and placed on probation. Respondent has had enough experience with the issue of his inappropriate conduct toward opposing counsel and judicial officers that he must be charged with the knowledge that his conduct in this matter was in violation of at least three Supreme Court rules: 1) ER 3.5 (d) - not to be disruptive to the tribunal 2) Rule 41 (c) - to maintain respect due to courts of justice and judicial officers and 3) Rule 41 (g) - not to engage in unprofessional conduct.

Injury

Respondent caused actual injury to the legal system. The facts cited above demonstrate that all of the individuals in the courtroom on September 4, 2009 who testified at the hearing were upset by Respondent's conduct. At least one of the observers moved from her seat in the first row of the galley to the back row of the courtroom. Judge Lowery was embarrassed at what occurred in her court. Respondent is an officer of the court. Instead of upholding the dignity of the courtroom and the proceeding, he lessened that dignity by his conduct. His inappropriate behavior was witnessed by members of the public. Most citizens will contact the legal system in traffic court. It is very important that when coming to court citizens have confidence that they will receive a fair hearing according to legal procedures in an atmosphere of safety. Respondent shocked not only the court personnel, but police officers and members of the public who were simply trying to have their traffic offenses fairly and appropriately adjudicated. Respondent interfered with the legal proceeding in court that day.

The Commentary to *Standard* 6.22 states in part: "Suspension is also appropriate where the lawyer interferes directly with the legal process. For example, in *In re Vincenti,* 92 N.J. 591, 458 A.2d 1268 (1983), the court imposed a suspension of one year and until further order of the court where the lawyer made repeated discourteous, insulting and degrading verbal attacks on the judge and his rulings which substantially interfered with the orderly trial process. The court noted that it was not confronted with 'an isolated example of loss of composure brought on by the emotion of the moment; rather, the numerous instances of impropriety pervaded the proceedings over a period of three months.' 458 A.2d at 1274" The Hearing Officer recognizes that Respondent's behavior was not in this instance as egregious as *In re Vincenti.* However in the next section of this report, Respondent's prior discipline for similar behavior will be discussed.

Aggravating Factors

Prior Disciplinary Offenses – In 02-1070, 02-1628, 02-2066 Respondent was censured on March 2, 2005 and placed on probation for one year with Member Assistance program (MAP) terms for three counts of misconduct. In Count One Respondent represented a plaintiff in a personal injury matter. Plaintiff received an award in the case and Respondent notified medical lien holders of his proposal for how to distribute the funds among the medical providers. Respondent became upset with Dr. Siegal, one of the lien holders. During a discussion with Dr. Siegal's staff on July 24, 2001, Respondent referred to Dr. Siegal as a "fucking asshole". (Exhibit 3, SBA 000003)

In Count Two, on August 8, 2002, after appearing in the Glendale Justice Court on a forcible detainer action, Respondent went into the lobby of the court and said to Clerk's staff that some non-attorney pro tem justices of the peace "are fucking lousy". (Exhibit 3, SBA 000004) In

Count Three on September 27, 2002 during a pre-trial conference Respondent called opposing counsel "a liar". Judge Donahoe was called for a ruling on a claim of privilege. After Judge Donahoe ruled, Respondent called the ruling "crazy". Then during a heated telephonic discussion Respondent called Judge Donahoe names and was cited for contempt. Respondent apologized and the contempt citation was withdrawn. During a deposition of his client on March 20, 2002, Respondent told opposing counsel to "go perform an unnatural sex act on himself." (Exhibit 3, SBA000005)

The Hearing Officer commented that conduct like Respondent's permeated the profession and that a close scrutiny of many lawyers would yield similar conduct. The Commission disagreed, "If such conduct is indeed pervasive in our profession, then it is time to send a message to our colleagues that it must cease. In general, abusive and offensive conduct by lawyers should not be tolerated, especially in a self-governing profession. As set forth in the former and current *Preamble*, every lawyer is responsible for observing the Rules of Professional Conduct and lawyers should aid in securing the observance of the rules by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves. ... In future cases involving offensive and grossly improper conduct by a lawyer, depending on the willfulness and seriousness of the violation, the sanction may be even greater than the sanction recommended herein." (Exhibit 3, SBA 0000 13)

On October 8, 2007, the Supreme Court of Arizona again sanctioned Respondent, in case number 06-0115. Respondent received a censure for failing to adequately consult with a client as to the means by which the representation was to be pursued, failing to act with reasonable diligence and promptness in representing the client, failing to keep the client reasonably informed about the status of her case, and for filing a frivolous motion. In this case Respondent

was representing his client as a plaintiff in a lawsuit. Respondent failed to respond to the defendants' Motion to Dismiss. His client's case was dismissed due to his failure to respond. In an attempt to "placate" the client after Respondent informed her that her case had been dismissed, Respondent filed a Motion to Reinstate and Motion to Amend Complaint to Reflect Declaratory Action that he knew had no substantive legal basis to support the motion. (Exhibit 7, SBA 000029)

Pattern of Misconduct - Respondent has been disrespectful to both the court and opposing counsel and has engaged in unprofessional behavior in his prior disciplinary matter set forth above and again in the instant case.

Multiple Offenses - Respondent violated several ethical rules in this case.

Substantial Experience in the Practice of Law - Respondent has been an attorney in Arizona since 1985.

Mitigating Factors

Personal or Emotional Problems - Respondent has set forth in the sealed exhibits evidence that substantiates he has numerous personal and emotional problems. There is no medical testimony that these conditions contributed to his conduct in the instant case. Respondent was under financial strain at the time of the events in this case. (TR 161:15 through 162:18)

Character or Reputation - Respondent has provided letters from the following judges attesting to his reputation as a professional and courteous attorney who specializes in hearings on trucking violations: Judge Lori Metcalf - City of Phoenix Municipal Court, Judge Thomas Robinson - Tempe Municipal Court, Judge Alison Kolomitz – Winslow Justice Court, Judge Maria Brewer - Chandler City Magistrate, Judge G. M. Osterfeld – Estrella Mountain Justice of

the Peace, Judge Frank Conti - Justice of the Peace Dreamy Draw Justice Court, Judge Rick Lambert – Kingman/Cerbat Justice Court and Judge E. M. Williams - Quartzite Justice Court. (Exhibit C.)

The weight given to this factor should be balanced with other testimony at the hearing on Respondent's reputation. Edward Paine, an Assistant City Prosecutor, testified that in his prior dealings with Respondent he found Respondent to be combative and somewhat difficult. (TR 39:20-25) Karen Lavelle, the court services supervisor, thought that Respondent had a controlling, aggressive personality. (TR 101:14 through 102:7) In the sealed exhibits to the hearing the Commission may refer to Exhibit G at BANTA 00065 for an example of conduct on the part of Respondent in a non-legal system setting that is relevant to the issue of character or reputation.

Remorse - Respondent testified that his conduct was inappropriate. The Hearing Officer would give greater weight to this factor if Respondent had apologized to opposing counsel and the court for his conduct on September 4, 2009. When the Hearing Officer asked Respondent how we can be assured that the misconduct of September 4, 2009 will not happen again, Respondent stated, "I don't think I can assure it would not happen again." (TR 184:10 through 22) Respondent said he would like to do it over but he can't. (TR 194:3) But Respondent clarified that what he was worried about after this incident was having difficulty representing his trucker clients and negotiating good plea agreements for them in Surprise, Arizona. (TR 194:3-8)

The Hearing Officer is concerned with the reasons offered by Respondent for his conduct on September 4, 2009. When he was asked at the hearing to explain why he told the judge he was "not quite through with the court", he could not explain that comment except to say that he blamed the judge for asking the prosecutor for an opinion. (TR 188:20 through 193:15) In

Respondent's Post-Hearing Memorandum the explanation is offered that this comment was an attempt by Respondent to complete the record. Respondent also offered the explanation that he was frustrated with the judge allowing the prosecutor to interrupt him, while stopping him from interrupting the prosecutor. What Respondent leaves out of this explanation is that before the prosecutor came in the court room the judge gave Respondent plenty of time (without anyone to argue the contrary) to explain his position on the in absentia issue. (See Exhibit 1 the CD of this incident and Exhibit L the transcript)

The judge permitted Respondent to make this argument while standing directly in front of the bench. The judge patiently listened to Respondent's points. In addition, the judge handed Respondent the court's rule book and gave him extra time to show her some authority. The judge treated Respondent with kid gloves. As Judge Lowery saw how insistent Respondent was in his argument, she described her conduct as deliberately avoiding a confrontation with Respondent because she perceived that she was being challenged by Respondent. (TR 18:21)

When at the hearing Respondent was asked why he did not show the rule to the judge instead of moving toward the podium to show it to the prosecutor, Respondent said he felt whipsawed because the judge gave the prosecutor wide latitude. Respondent thought the prosecutor was "... babbling on about the same sentence every time..." (TR 142:14 through 145:17)

Respondent seems to be offering an explanation of frustration as either relevant to his argument that he committed no serious ethical violation on September 4, 2009, or if he did violate any ethical rule, the sanction should be mitigated because of his frustration with the fact that in his opinion the prosecutor and the judge did not understand the law. First, if an attorney disagrees with a judge's ruling that does not permit the attorney to be disrespectful to the court.

Second, if an attorney disagrees with the legal argument of an opposing counsel that does not permit the attorney to engage in abusive and offensive conduct toward the opposing attorney either in or out of court. Therefore, the Hearing Officer has not used the "frustration" argument of Respondent to affect: 1) the conclusion whether Respondent violated the ethical rules alleged and 2) the recommended sanction.

It appears to this Hearing Officer that what really frustrated Respondent was the fact that he could not control the judge's ruling. He said that he was fearful his client would get a suspended license or be defaulted and that this would ruin his client's livelihood. (TR 147: 18-25, 158:5 through 159:22) However, as previously noted his fear was irrational because Judge Lowry never mentioned that she was inclined to default his client or issue a warrant. Instead, the judge offered a continuance, offered Respondent an opportunity to have his client apply for a trial in absentia, or even a telephonic appearance. (Exhibit L, page 14, line 24)

The Hearing Officer has not found that aggravating factor 9.32 (i) (mental disability or chemical dependency including alcoholism or drug use) has been established in this case. Only the first element of this aggravating factor has been proven. It has not been established that a mental disability caused the misconduct on September 4, 2009. Further it has not been proven that the recurrence of the misconduct is unlikely.

RECOMMENDATION

The Hearing Officer recommends that Respondent be suspended for 30 days and that upon reinstatement Respondent will be placed on probation for a period of two years. The terms of the probation will be set upon reinstatement and should include the following:

1) Respondent shall be placed on two years of probation with participation in the Member Assistance Program (MAP) effective on the date of the signing of the

probation contract, and shall pay all costs and expenses associated with the compliance of the probation terms, including those incurred by the State Bar as a result of the administration and enforcement of those terms.

2) The probation terms will include a requirement that Respondent continue in therapy and that he take his prescribed medication.

3) Respondent shall contact the Director of MAP within 30 days of reinstatement and submit to an assessment. Respondent thereafter will enter into a MAP contract based upon recommendations made by the MAP Director or designee.

4) In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the appropriate entity a Notice of Non-Compliance, pursuant to Rule 60, Ariz. R. S. Ct. The Hearing Officer shall conduct the hearing within 30 days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanctions should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by a preponderance of the evidence.

5) The Hearing Officer further recommends that Respondent shall be assessed costs of the disciplinary proceedings.

The reasons for this recommendation are that the conduct of Respondent in this matter should not be tolerated. The State Bar recommends a suspension of six months and a day. Respondent recommends a censure with two years of probation and terms to include requirements that Respondent continue with therapy and take his medication. This is

Respondent's second disciplinary case for disrespectful and unprofessional conduct toward opposing counsel and the court.

Although the Hearing Officer has taken into consideration material that is sealed in this matter which demonstrates that Respondent faces emotional and personal challenges, his conduct in this situation was not just inappropriate, but unnecessary. Although Respondent testified that he became very concerned that the court and prosecutor were talking about "default", and "warrant" and driver's license "suspension", the record establishes that the judge did not threaten these consequences. Instead, the judge offered Respondent and his client a continuance, the ability to testify telephonically, and additional time to file a formal request for trial in absentia. Instead of the inappropriate behavior that Respondent demonstrated out of his alleged frustration with the prosecutor and the court, Respondent could have used the additional time to file a special action. But Respondent testified that filing the special action would be financially difficult for him because he charged $300 per case and he operated on a slim profit margin. (TR 156:23 through 157:12)

Respondent was asked how his participation in the Member Assistance Program on his previous probation helped him. He described this experience as "worthless". (TR 218:22) When asked if his previous probation required him to address his anger, he said he did not remember. (TR 220:7) When he was asked if his previous probation made an impression on him, he first said "yes". But when asked to describe the impression it made on him he said, "I don't remember". (TR 220:20 through 221:2)

The purpose of attorney discipline is not to punish the lawyer, but to protect the public. Other recognized purposes for discipline are to deter this attorney and other attorneys from similar misconduct. The Hearing Officer is not sure Respondent will be deterred. But other

attorneys should know that this type of conduct is unacceptable. A first occasion of disruptive, disrespectful, and unprofessional conduct may result in a censure. But a second instance should be treated with a more significant consequence.

This Hearing Officer thinks that the Bar's recommendation is too severe and the Respondent's recommendation is not severe enough. A suspension of six months and a day is not necessary to protect the public or deter Respondent or other attorneys. A 30 day suspension accomplishes those goals. It informs Respondent that he will have to notify his clients, opposing counsel and judges where his cases are pending of the suspension, and he will need to make arrangements for other counsel to cover his cases during the suspension. This notification will result in Respondent being embarrassed to tell his clients, other lawyers and judges of his suspension. This should serve as a reminder to him that he cannot continue with this type of conduct and that he must take further steps to deal with his emotional challenges.

The 30 day suspension will inform other lawyers that while a first violation of unprofessional, disruptive and disrespectful conduct may result in censure and probation, a second violation will lead to a suspension. To do less in this instance as suggested by Respondent's counsel would be to invite more of this type of inappropriate behavior in our courts.

PROPORTIONALITY

Sanctions against lawyers must have internal consistency to maintain an effective and enforceable system; therefore, the Court looks to cases there are actually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 760 P.2d 1161, 1171 (1988) The Supreme Court has held that in order to achieve proportionality when imposing discipline each situation must be

tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P. 2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P. 2d 94 (1993)

Respondent cites a number of cases concerning the discipline of judges. In *In re Goodfarb,* 179 Ariz. 400, 880 P.2d 620 (1994) the Superior Court judge use the term "fucking niggers" and referring to lawyers, "got their brains fucked up". The judge had been previously admonished by the Judicial Conduct Commission for using the words "little son of a bitch" and "goddamn bullshit." The Commission recommended suspension without pay for three months. The Supreme Court of Arizona suspended the judge for the remainder of his term, which expired in less than six months. The Hearing Officer thinks that the conduct of Respondent was not as egregious as the conduct in *Goodfarb*. But as was the case with Judge Goodfarb, Respondent is now before the Hearing Officer for repetitive misconduct.

Respondent also cites the case of *In re Jeffrey C. Mehrens*, No. 07-0521. (Exhibit I) Mr. Mehrens was defending an individual on a criminal charge when Mr. Mehrens went to the Maricopa County Attorney's office to interview two police officers. Mr. Mehrens wore a shirt with the slogan "Let the fucking begin". In another criminal case where Mr. Mehrens was defense counsel, Mr. Mehrens was speaking to one deputy County Attorney about Ms. Green the deputy County Attorney prosecuting Mr. Mehrens' client. Mr. Mehrens referred to Ms. Green as "an unethical piece of trash".

In a third incident Mr. Mehrens sent a prosecutor a 6-issue gift subscription to Modern Drunkard Magazine. The Bar alleged that Mr. Mehrens violated ER 4.4, failure to respect the rights of others by not embarrassing them, and Rule 41 (g) failing to abstain from all offensive personality by engaging in unprofessional conduct. The Hearing Officer found that the slogan on the shirt and the reference to Ms. Green were not done to embarrass anyone. The magazine

subscription was not done in the representation of a client. The Hearing Officer found that the conduct was not an ethical violation because it was no more than inappropriate. The Hearing Officer stated, "It cannot be said to be clearly unethical. And some would argue whether it is unprofessional, which always must be measured within the context of the event and the perception of the observer and a framework of what has been declared so unprofessional as to warrant a sanction." (Exhibit I, BANTA 00121)

In *Mehrens* the complained of conduct did not occur in court. The deputy County Attorney who saw the slogan on the shirt was not offended or embarrassed, but thought it was inappropriate. The deputy County Attorney who heard Mr. Mehrens' remarks about Ms. Green was not delayed or burdened, but was embarrassed. The deputy County Attorney who received the magazine subscription did not think Mr. Mehrens sent it to embarrass her, but intended it as a joke. (Exhibit I, BANTA 00119-00120) The fact that the Hearing Officer in the *Mehrens* case did not find an ethical violation is irrelevant. The facts and circumstances of the cases are substantially different. The testimony at the hearing on the instant case was clear and convincing that the witnesses who observed Respondent's conduct thought that the court proceedings were disrupted by Respondent.

Respondent also cites *In re Wilenchik*, No. 07-1692 and 07-1761. The Bar decided not to file a complaint against Mr. Wilenchik in these matters. The attorney commented before Judge Timothy Ryan that the prosecutor's office believed that the judge's rulings on bond for allegedly illegal immigrants constituted a danger to public safety. The record does not establish that the attorney stated this position in a disrespectful manner. There was no evidence that the attorney's conduct disrupted the courtroom. There was no evidence that the attorney told opposing counsel to "shut up". There was no evidence that the attorney said "God damn it" or that the attorney told

the judge that he "was not quite through with the court" after the court issued its ruling. The fact that the Bar did not find the alleged conduct of this attorney in violation of an ethical rule is not relevant for the instant case. There will never be two cases that are factually identical. However, *Mehrens* and *Wilenchik* are too dissimilar to the instant case to be of much help in a proportionality analysis.

The State Bar cites *Matter of Ziman*, 174 Ariz. 61, 847 P.2d 106 (1993) (Ziman I). Although the attorney in that matter did not engage in disrespectful behavior in court, in a telephone conversation he said to a court-appointed arbitrator who had dismissed his case, "Fuck you" and hung up on the arbitrator. The attorney was suspended for 90 days and placed on one year of probation. Respondent did not swear at a judicial officer as the attorney in *Ziman* did. His curse of "God damn it" could be interpreted as a reaction to the police presence, even though it was unprofessional and disruptive. It is not interpreted by this Hearing Officer as directed at the judge. If that were the case the recommendation would be for a longer suspension. Except for Respondent's comment about "not being through with the court", Respondent did not directly attack the judge. Respondent did not call the judge's rulings "absurd" or "patently ridiculous". He did not tell the judicial officer to "shut up". These facts do not minimize the fact that he mistreated opposing counsel and acted unprofessionally in front of the judge. However, they lead the Hearing Officer to conclude that Respondent's conduct was not as egregious as the conduct in *Ziman.*

Not many cases can be found in which violations of ER 3.5 (d) or Rules 41 (c) or (g) are involved. One such case is *In re Honchar* Nos. 07-1522 and 07-1936 (2009). In this matter, the report of the Hearing Officer does not recite the specific facts in the Tender of Admissions. A review of that Tender reveals that the attorney admitted that there was clear and convincing

evidence that she violated Rule 41 (g) when she represented a client in a Family Court matter and the attorney failed to abstain from all offensive personality. (See Tender of Admissions, page 24, lines 1-4) In a conference in chambers with opposing counsel and the judicial officer, opposing counsel became angry with the attorney and threw a pad against the wall several feet from where the attorney was sitting and directed profane language at her, ("f[xx]k you"). The Bar would have presented evidence that the attorney went into the court room, raised her arm in a victory sign and stated to those present including the opposing party (whose lawyer was not present) that she had gotten the opposing lawyer to say "f[xx]k you."

The Bar would also have presented evidence that the attorney said to the opposing party, "Looks like I got your lawyer to say f[xx]k. That's not very professional, is it? Looks like you might want a different lawyer." (Tender of Admissions, page 10, lines 9-20) The Bar and the offending attorney in this matter agreed to no Censure and/or Reprimand, but a probation of no less than one year and no more than two years with participation in the Member Assistance Program and an agreement by the attorney never to accept any clients for representation in a Domestic Relations or Family Court matter.

Once again the conduct in *Honchar* is significantly different from the instant case. In *Honchar* the attorney had no prior disciplinary record, much less a prior disciplinary offense for similar misconduct. It appears from the Tender of Admissions that when the attorney made her comments in court no proceeding was ongoing at that time.

Respondent in a Supplement to Post-Hearing Memorandum asked the Hearing Officer to consider a minute entry from a Superior Court Commissioner in which the Commissioner commented on a male lawyer calling his opposing counsel (who happened to be a female) "a sick

broad". This case was not in the attorney or judicial disciplinary system.[1] The Hearing Officer thinks it is not instructive. First, there is no indication that the offending lawyer had a history of inappropriate conduct such as is the case with Respondent. Second, the offending comment was not made in front of the judicial officer who was on the bench in a court proceeding. Instead it was made at a deposition. Although the fact that the remark was made at a deposition does not lessen the inappropriate nature of this conduct, it is not as disruptive as engaging in the same unprofessional conduct in court.

Third, the resolution reached by the Commissioner, not granting the victim lawyer's request for an order directing the offending lawyer to apologize for the remark, was based on the Commissioner's assessment that to order an apology would lead to an insincere apology. No one would assert that calling opposing counsel "a sick broad" was not unprofessional. The fact that the Commissioner decided not to impose the specific consequence requested by the victim of this misconduct is simply irrelevant to the Hearing Officer's recommendation as to Respondent's conduct in the instant case, because the two circumstances are so dissimilar.

SANCTION

1) Respondent shall be suspended for 30 days.
2) Respondent shall be placed on two years of probation with participation in the Member Assistance Program (MAP) effective on the date of the signing of the probation contract, and shall pay all costs and expenses associated with the compliance of the probation terms, including those incurred by the State Bar as a result of the administration and enforcement of those terms.
3) The probation terms will include a requirement that Respondent continue in therapy and that he take his prescribed medication.

[1] The Hearing Officer does not know if the Commissioner referred this incident to the State Bar for investigation.

4) Respondent shall contact the Director of MAP within 30 days of reinstatement and submit to an assessment. Respondent thereafter will enter into a MAP contract based upon recommendations made by the MAP Director or designee.

5) In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the appropriate entity a Notice of Non-Compliance, pursuant to Rule 60, Ariz. R. S. Ct. The Hearing Officer shall conduct the hearing within 30 days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanctions should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by a preponderance of the evidence.

6) The Hearing Officer further recommends that Respondent shall be assessed costs of the disciplinary proceedings.

DATED this 10 day of November, 2010.

Jonathan H. Schwartz

Hon. Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 16 day of November, 2010.

Copy of the foregoing mailed
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