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 DEC 15 2008
 DISCIPLINARY COMMISSION OF THE
 SUPREME COURT OF ARIZONA
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**BEFORE THE DISCIPLINARY COMMISSION
 OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)	No. 08-0277
OF THE STATE BAR OF ARIZONA,)	
)	
ERIN M. ALAVEZ,)	
Bar No. 021108)	DISCIPLINARY COMMISSION
)	REPORT
RESPONDENT.)	
_____)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on November 15, 2008, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed September 22, 2008, which concluded that the Respondent had violated ER 8.1(b) and Rule 53(d) and (f), but rejected the Bar's contention that Respondent also violated ERs 1.3, 3.2, 3.4(c) and 8.4(d), and recommended censure. The State Bar appealed and requested oral argument. Respondent did not file an Answering Brief or appear for oral argument.

The State Bar argues that the Hearing Officer erred in dismissing four of the six violations alleged in the Complaint in light of Respondent's default. The Bar argues that the default established the ethical violations alleged in addition to the facts. In the alternative, the Bar argues the facts alleged in the Complaint, which the Hearing Officer found were admitted by reason of Respondent's default, established that Respondent did, in fact, commit all of the ethical violations alleged in the Complaint. The Bar argues that in light of the violations established, the aggravating and mitigating factors present, Respondent should receive a suspension of six months and one day.

Decision

1 The Nine members of the Disciplinary Commission unanimously adopt the Hearing
2 Officer's Findings of Fact which were taken from the factual allegations of the Complaint
3 and admitted by Respondent's default. Based on its *de novo* review of the Hearing
4 Officer's Conclusions of Law, the Commission concludes that the Hearing Officer
5 correctly held that Respondent violated ER 8.1(b) and Rule 53(d) and (f), but erred in not
6 holding that Respondent also violated ERs 1.3, 3.2, 3.4(c) and 8.4(d).
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Discussion

Background

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10 The Bar filed a one-count Complaint based on a report forwarded by Judge
11 Teilborg of the United States District Court. Respondent was representing a defendant in a
12 criminal case before Judge Teilborg. On September 17, 2007, her client entered into a plea
13 agreement. At that time, Respondent informed the judge she wanted to withdraw as
14 counsel based on disagreements with her client. The Judge told her he would grant the
15 withdrawal upon submission of a proper substitution of counsel.
16

17 Respondent told the judge she would be out of State until October 16 and as a
18 result, he scheduled the sentencing for that date. On October 10, Respondent filed a
19 motion to continue the sentencing stating she would be out of State until October 23. The
20 Judge rescheduled the sentencing for October 24. Respondent did not appear at the
21 October 24 sentencing hearing. The Judge reset the hearing for October 31 and set an
22 Order to Show Cause for the same time for Respondent to explain her failure to appear on
23 October 24. Respondent did file a Motion to Withdraw as counsel on October 30, but that
24 pleading did not comply with the Local Rules of the District Court.
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1 Respondent appeared at the October 31 OSC hearing and explained she had been
2 paying another attorney to cover her calendar, her e-mail was not working and she was
3 caring for a sick child. Judge Teilborg sanctioned her \$100 for failing to follow court
4 orders and appear at the hearing. He also ordered that the transcript of the OSC hearing be
5 forwarded to the Bar. Respondent did not pay the sanction for four months, until after
6 Judge Teilborg set another OSC hearing based on her failure to do so. The second OSC
7 hearing was vacated after Respondent paid the sanction.

8 After receiving Judge Teilborg's referral, the Bar wrote to Respondent asking for
9 an explanation of the matters it raised. Respondent did not respond to the Bar's letters.
10 The subsequently filed Complaint specifically alleged (in paragraph 38) that Respondent:

- 11 1) failed to act with reasonable diligence and promptness in
12 representing her client;
- 13 2) failed to make reasonable efforts to expedite litigation consistent
14 with the interests of the client;
- 15 3) knowingly disobeyed an obligation under the rules of a tribunal;
- 16 4) knowingly failed to respond to lawful demands for information by
17 the Bar;
- 18 5) engaged in conduct prejudicial to the administration of justice;
- 19 6) refused to cooperate with the Bar and failed to promptly respond to
20 the Bar.

21 The Complaint also alleged (in paragraph 39) that Respondent's conduct violated
22 ER 1.3 (Diligence); 3.2 (expediting litigation); 3.4(c) (knowingly disobey rule of tribunal);
23 8.1(b) (knowingly fail to respond to demand for information from the bar); 8.4(d) (engage
24 in conduct prejudicial to the administration of justice); Rule 53(d) (refusal to cooperate
25 with the Bar); and 53(f) (failure to furnish information to the Bar).

26 **Effect of Default**

As noted, the Bar argues that Respondent's default established not only the facts it
pled in its Complaint, but also the legal conclusion that certain rules were violated, as well.

1 The Arizona disciplinary cases do not provide any real guidance on this issue. They state
2 that upon a default, the allegations of the Complaint are deemed admitted. *E.g., In re*
3 *Galusha*, 164 Ariz. 503, 504, 794 P.2d 136, 137 (1990). But they are not specific as to
4 whether that admission includes only factual allegations or legal ones, as well.

5 The general rule in Arizona civil cases is that a default establishes the factual
6 allegations contained in the Complaint, but not the legal conclusions. "A default is not
7 treated as an absolute confession by the defendant of his liability and of the plaintiff's right
8 to recover. All well-pleaded facts are admitted by a default, but the defendant is not held
9 to admit facts that are not well-pleaded or to admit conclusions of law." *So. Ariz. School*
10 *for Boys v. Clery*, 119 Ariz. 277, 281-82, 580 P.2d 738, 742-43 (App. 1978). A complaint
11 that does not allege a valid legal cause of action cannot support a valid judgment, even if
12 the defendant defaults. 119 Ariz. at 282, 580 P.2d at 743.

13 The Bar, however, cites legal authorities from a number of other jurisdictions for
14 the proposition that in Bar discipline cases, a default establishes not only the well-pleaded
15 facts, but also the charges, *i.e.*, the ER violations. *See, e.g., People v. Richards*, 748 P.2d
16 341 (Colo. 1987) (citing cases from other jurisdictions).

17 The language of Arizona Supreme Court Rule 57 differs from that of the Colorado
18 Rule. But the Arizona Rule does require the Bar Complaint to "be sufficiently clear and
19 specific to inform a respondent of his alleged misconduct." Ariz.Sup.Ct. Rule 57(c). After
20 a default, "the allegations in the complaint shall be deemed admitted." Ariz.Sup.Ct. Rule
21 57(d). The term "allegations" is arguably broader than the phrase "well-pleaded facts"
22 used in the civil default cases, but we do not need to decide that issue because even under
23 the civil standard, the well-pleaded facts alleged in the Complaint in this case are sufficient
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1 to support the ER violations. The Hearing Officer's decision to dismiss those violations
2 was a legal conclusion which we review *de novo*.

3 **Facts Alleged and the Hearing Officer's Conclusions**

4 The Hearing Officer acknowledged that Respondent's failure to file a proper
5 motion to withdraw or appear at the continued sentencing hearing caused a two-week delay
6 in sentencing. Nonetheless, he concluded it was not "abnormal" and did not constitute
7 either an "unreasonable lack of diligence" (ER 1.3) or a failure to expedite litigation (ER
8 3.2). The Hearing Officer expressly dismissed Respondent's conduct as "de minimus."

9 Unfortunately, it is true that our case law is replete with more egregious examples
10 of non-diligent lawyers who have failed to expedite litigation. But we cannot agree that a
11 lawyer's failure to file a motion to withdraw or attend a scheduled hearing does not
12 demonstrate a lack of diligence or a failure to expedite litigation. As the commentary to
13 ER 3.2 notes "it is not a justification that similar conduct is often tolerated by the bench
14 and bar."

15
16 The full comment is instructive in this regard.

17 Dilatory practices bring the administration of justice into
18 disrepute. Delay should not be indulged merely for the
19 convenience of the advocates, or for the purpose of
20 frustrating an opposing party's attempt to obtain rightful
21 redress or repose. It is not a justification that similar conduct
22 is often tolerated by the bench and bar. The question is
23 whether a competent lawyer acting in good faith would
24 regard the course of action as having some substantial
25 purpose other than delay. Realizing financial or other
26 benefit from otherwise improper delay in litigation is not a
legitimate interest of the client.

ER 3.2 Comment. *See also* ER 1.3 Comment ("Perhaps no professional shortcoming is
more widely resented than procrastination.").

1 The Hearing Officer also rejected the proposed ER 3.4(c) violation (knowingly
2 disobeyed an obligation under the rules of the tribunal), concluding that Rule 3.4(c) only
3 applied to conduct that results in unfairness to the opposing party or counsel, the United
4 States or the US Attorney in this case. Thus, he concluded, Respondent's failure to pay the
5 sanction for four months until threatened with another OSC hearing violated neither ER
6 3.4(c) nor ER 8.4(d) (administration of justice).

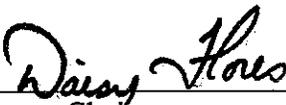
7 The Bar's brief cites a number of cases in which the Supreme Court has applied ER
8 3.4(c) to court orders of this type which do not directly affect the opposing party. *E.g., In*
9 *re Beskind*, SB-07-0156- (2007) (3.4(c) violation for failing to appear at trial and failing to
10 pay the Court's OSC sanctions); *in re Bower*, SB-07-0054-D (2007) (3.4(c) violation for
11 failure to appear at a Court Status Conference in the attorneys' own case); *In re Coe*, SB-
12 06-0854-D (2007) (3.2 and 3.4(c) violations for failing to appear at a hearing and the
13 subsequent OSC hearing). Apparently, the Hearing Officer focused on the small amount
14 of the fine in question (\$100.00), rather than the importance that the system places on
15 lawyers' prompt compliance with Court orders.
16

17 The Hearing Officer agreed that Respondent's failure to respond to the Bar
18 established violations of ER 8.1(b) and Rule 53(d). The Bar concedes that Respondent's
19 underlying conduct was negligent and that, but for Respondent's failure to respond to the
20 Bar inquiries, the recommended sanction of censure would be appropriate. The Hearing
21 Officer did not make a finding as to Respondent's mental state in connection with the ER
22 8.1(b) and Rule 53(d) violations, but as the Bar notes, given its extensive efforts to contact
23 Respondent and her complete failure to respond her mental state was clearly knowing and
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1 therefore, the ER 8.1(b) and Rule 53(d) violations carry a presumptive sanction of
2 suspension.

3 In light of the foregoing and based on its *de novo* review of the appropriate sanction
4 in this case, the Commission recommends that Respondent be suspended for six months
5 and a day and ordered to pay the costs of these proceedings.

6 RESPECTFULLY SUBMITTED this 15th day of December, 2008.

7
8 
9 _____
Daisy Flores, Chair
Disciplinary Commission

10 Original filed with the Disciplinary Clerk
11 this 15th day of December, 2008.

12 Copy of the foregoing mailed
13 this 16th day of December, 2008, to:

14 Philip M. Haggerty
15 Hearing Officer 6K
16 2018 North Northview
17 Phoenix, AZ 85020-5659

18 Erin M. Alavez
19 Respondent
20 41 Brook Mill Lane
21 Chesterfield, Missouri 63107

22 and

23 Erin M. Alavez
24 Respondent
25 5715 South Broken Trail
26 Tucson, Arizona 85747

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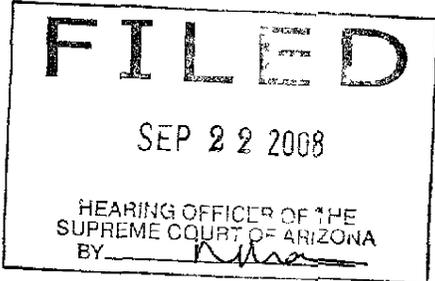
by: Stephen P. Little

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

IN THE MATTER OF A MEMBER) No. 08-0277
OF THE STATE BAR OF ARIZONA)
) **HEARING OFFICER'S FINDINGS**
) **AND**
ERIN ALAVEZ) **RECOMMENDATION**
Bar No. 021108,)
)
Respondent.)

PROCEDURAL HISTORY.

The State Bar file a one count Complaint against Respondent on May 27, 2008.

The complaint was served upon Respondent by Certified Mail sent to her address on file with the State Bar, said address being in Missouri

No answer was file to the Complaint. The Default of Respondent was entered by the Disciplinary Clerk of July 16, 2008; and Notice of the Entry of Default was mailed to Respondent on June 25

On July 17 the State Bar filed a Request for Mitigation Aggravation Hearing Notice of that hearing was sent to Respondent at the original Missouri address and a supplemental Tucson address on July 18; scheduling the hearing for August 27, 2008.

The Respondent did not appear at the Hearing.

FINDINGS OF FACT:

Inasmuch as the Respondent suffered an entry of default against her, the allegations of the complaint are deemed admitted.

1 The complaint was based on a report of inappropriate actions taken (or not taken) in
2 a criminal trial before Judge James Teilborg of the United Stated District Court in
3 Tucson. The Respondent informed the Court that she would withdraw as counsel for
4 Defendant Marcos Martinez-Acosta; this information being provided on September
5 17, 2007, at the time Mr. Martinez-Acosta entered into a plea agreement. The
6 Respondent did not immediately file the Motion to Withdraw, but asked for and was
7 granted a continuance of the sentencing until October 24.
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9
10 The Respondent did not file the Motion, did not appear at the sentencing, and did not
11 contact the Court. The sentencing was reset to October 31. The Court issued an OSC
12 directed to Respondent to require her to explain her absence at the October 24
13 sentencing.

14
15 On October 30 Respondent filed a Motion to Withdraw which did not comply with
16 the Rules of Practice for the District Court, was typographically deficient and "did
17 not make sense". [Count One, ¶ 21.]

18 Respondent appeared at the October 31 hearing with an explanation of her failure to
19 appear based on her allegation that she was dealing with a sick child and had left
20 someone else to take care of her calendar.

21
22 Judge Teilborg fined the Respondent \$100.00 and advised Respondent that the
23 transcript of the hearing would be sent to the State Bar; which he did on February 11,
24 2008. On February 21, 2008 he entered an OSC order returnable March 24, 2008
25 against Respondent for failure to pay the \$100.00 fine
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1
2 On February 26 The State Bar sent a copy of Judge Teilborg's rulings and remarks to
3 Respondent, requesting a response by March 24.

4 On or about February 26 she paid the \$100.00 fine and Judge Teilborg vacated the
5 OSC hearing.

6 Respondent did not respond to the February 26 request for a response, and the State
7 Bar sent a further request for a response by April 5, 2008. No response was made by
8 Respondent by that date, and none since.
9

10 CONCLUSIONS OF LAW

11 The Complaint alleges violation of ER 1.3 and 3.2; that is, failure to act with
12 reasonable diligence in representing a client (ER 1.3) and failure to make a
13 reasonable effort to expedite litigation (ER 3.2). It would appear that Respondent's
14 failure to file a proper Motion to Withdraw and failure to appear at the continued
15 sentencing date of October 24 caused the sentencing of Mr. Martinez-Acosta to be
16 delayed two weeks; from October 16 to October 31. Such a delay is hardly
17 abnormal, and does not constitute an "unreasonable" lack of diligence. It certainly
18 does not constitute a "failure to *expedite litigation consistent with the interests of the*
19 *client*", under ER 3.2. Even with establishment of the truth of all the factual
20 allegations of the complaint, the purported violation's of these ERs is not established
21 under the doctrine of *de minimis* in the case of ER 1.3; and totally unsupported in the
22 case of ER 3.2.
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25 The Complaint further alleges that the Respondent "knowingly disobeyed an
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1 obligation under the rules of the tribunal” and in doing so violated ER 3.4(c). ER 3 4
2 is entitled “Fairness to Opposing Party and Counsel”. The notes to this ER make it
3 clear that this was intended to deal with matters relating to discovery, evidence and
4 witnesses. There is no showing from the facts of the Complaint that either the
5 United States (opposing party) or the United States Attorney (opposing counsel) was
6 treated *unfairly* by any acts of the Respondent.

7
8 The Complaint further alleges that Respondent engaged in conduct prejudicial to the
9 administration of justice in violation of ER 8.4(d). It is difficult to imagine how a
10 delay in the payment of a \$100.00 fine is prejudicial to *the administration* of justice.

11 The Respondent sought and received a continuance of the sentencing from October
12 16 to October 24. Therefore the only delay she improperly caused was one from
13 October 24, October 31; a period of one week. Again, it is difficult without any
14 further elaboration of special circumstances, to see how this prejudiced the
15 administration of justice in the case of *United States v Marcos Martinez-Acosta*.

16
17 Finally, there remain the allegations that the Respondent did not respond to either the
18 State Bar letter of February 26 or the follow-up letter of March 26. These constitute
19 violations of ER 8.1(b) [“ . . .failure to respond to a lawful demand from . . . [a] . .
20 .disciplinary authority . .] and Rules 53(d) and (f), Ariz R Sup.Ct. [“(d) . .refusal to
21 cooperate with officials and staff of the state bar“; and “(f) The failure to furnish
22 information to or respond promptly to and inquiry or request from bar counsel . .”]

23
24 These violations are supported by the Complaint. However it is impossible to support
25 the allegations of violation of ERs 1.3, 3.2, 3.4(c) and 8.4(d)
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AGGRAVATION AND MITIGATION

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2 As Bar Counsel noted in the hearing, it is difficult to make many conclusive findings
3 because of the lack of evidence. It would appear in mitigation that there was no
4 dishonest or selfish motive involved and a suggestion of personal problems. The
5 State Bar felt that "inexperience in the practice of law" would not be applicable, but
6 the Supreme Court recognized this as a mitigating factor for a lawyer with Bar No.
7 22069 , *In the Matter of Randy J. Tunac*, Supreme Court SB-08-014-D The
8 Respondent's Bar No. is 21108; which is somewhat close.

9
10 The principal aggravation matters urged were twofold. One was prior discipline, a
11 2006 Informal Reprimand with Probation consisting of compliance with
12 LOMAP/Practice Monitor provisions. This matter involved a late filing of a motion
13 for summary judgment and failure to appear for the hearing on the motion.
14 Apparently no client prejudice resulted from this.

15
16 Of more serious import was the statement made by Bar Counsel that Respondent had
17 been involved in discipline involving six counts which has resulted in a
18 recommendation for disbarment by the assigned Hearing Officer. However, this
19 tribunal has nor record of those proceedings before it, and in the absence of a final
20 conclusion cannot consider these other cases.

PROPORTIONALITY

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23 This is a case in which the sole remaining allegations forming the basis for discipline
24 consists of the Respondent's failure to respond to the State Bar. No case has been
25 cited in which the failure to respond to allegations which were subsequently
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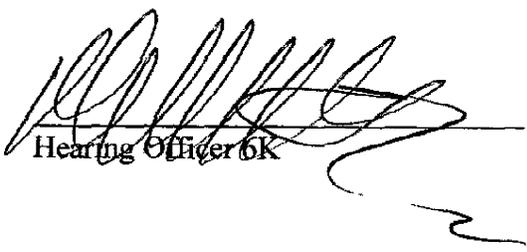
1 dismissed formed the basis for serious discipline, especially since the underlying
2 matters complained of were concluded by the Respondent, and no issues of
3 restitution or the necessity of other remedial acts remained. Nor was the Bar
4 inconvenienced or put to extra work because of the failure to respond, since all of the
5 allegations were contained in communications from the United States District Court.
6 If one compares this case to the facts of *In the Matter of Percival R. Bradley*,
7 Supreme Court SB-08-0026-D, any serious discipline would seem totally
8 inappropriate. Mr. Bradley failed to file a personal injury case after repeated efforts
9 to discuss settlement made by defendant's insurance carrier were ignored. The cause
10 was lost through the running of the statute of limitations. Aggravating factors
11 included a dishonest or selfish motive, multiple offenses, substantial experience in
12 the practice of law [Bar No 17149] and submission of false evidence. The
13 mitigating factors were absence of prior discipline, full disclosure, character or
14 reputation and remorse. Despite the great harm done to a client, and the record in the
15 case, only a censure was imposed by the Supreme Court.
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18 RECOMMENDATION

19 It is recommended that Counts 1 through 30 and Count 32 related to alleged
20 violations of ERs 1.3; 3.2; 3.4(c) and 8.4(d) be dismissed. It is further recommended
21 that an order of censure against the Respondent for violation of ER 8.1(b) and Rules
22 53(d) and (f). Ariz R Sup Ct be entered against the Respondent.
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1 Dated this 21st day of September, 2008

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Hearing Officer 6K

Copy of the foregoing filed this
22nd day of September, 2008

and

mailed this 23rd
day of September, 2008 to:

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Staff Bar Counsel
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4201 North 24th Street
Phoenix AZ 85016

and to:

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and

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Tucson, AZ 85747

