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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

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

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2
3 IN THE MATTER OF A SUSPENDED)
MEMBER OF THE STATE BAR OF)
4 ARIZONA,)

5 **MARK S. CLARK,**
6 **Bar No. 018280**

7 Respondent.)

No. 03-1455

**HEARING OFFICER'S REPORT
AND RECOMMENDATION**

(Assigned to Hearing Officer 9I,
Dwight M. Whitley, Jr.)

PROCEDURAL HISTORY

9 A Probable Cause Order was filed in this matter on February 11, 2004. The State Bar
10 of Arizona filed a formal Complaint on April 15, 2004. Respondent filed his Answer, dated
11 May 24, 2004.

12 Thereafter, the parties exchanged disclosure statements. A telephonic scheduling
13 conference was held on June 14, 2004, after which the Hearing Officer filed a Case
14 Management Order setting forth the discovery and hearing dates in this matter.

15 A settlement conference was held in front of the Settlement Officer on July 13, 2004.
16 The parties were unable to reach a settlement, and the case was referred back to the Hearing
17 Officer.

18 A hearing was held on August 12, 2004 and August 17, 2004 at the office the Dwight
19 M. Whitley, Jr., 33 North Stone, Suite 2100, Tucson, Arizona. Amy Rehm, Esq., appeared on
20 behalf of the State Bar. Respondent appeared *in propria persona*. At the conclusion of the
21 hearing, both parties were ordered to file proposed findings of fact and conclusions of law,
22 along with post-hearing memoranda, on or before September 14, 2004. The due date was later
23 extended to September 24, 2004.

FINDINGS OF FACT

24
25 1. Respondent was admitted to practice law in Arizona on October 18, 1997. (Answer,
26 para.1; August 12, 2004 tr. 23).

1 2. By Supreme Court Judgment and Order dated October 25, 2001, Respondent was
2 suspended from the practice of law for three years effective November 25, 2001, for conduct
3 in violation of his duties and obligations as a lawyer. (Answer, para.2, ex. 4, August 12, 2004
4 tr. 23). At the time of the hearing in this matter, Respondent's license was still suspended.
5 (August 12, 2004 tr. 24).

6 3. Respondent received notice of the suspension in October of 2001, and had actual
7 knowledge that he was suspended prior to the August 1, 2003 hearing at issue in this matter.
8 (August 12, 2004 tr. 24, Answer para.4).

9 4. Prior to his suspension, Respondent's practice consisted of litigation, mediations,
10 corporate work, and some wills and trusts. (August 12, 2004 tr. 24). Respondent testified that
11 at times during the period of suspension, he has been employed as an independent contractor
12 in the capacity of a paralegal and as a litigation manager for a corporation. (August 12, 2004
13 tr. 23).

14 5. Respondent testified that he has a long-standing relationship with Ken Orms. (August
15 12, 2004 tr. 24-28). Respondent first met Mr. Orms in March of 2000 in connection with a
16 mortgage loan for one of Respondent's clients that was being handled through Mr. Orms'
17 business, Platinum Real Estate and Financial Services, Inc. (August 12, 2004 tr. 24-25).
18 Thereafter, Respondent represented Mr. Orms and his business in connection with several
19 different matters including business and personal legal issues until approximately the time that
20 Respondent's suspension went into effect. (August 12, 2004 tr. 25-26).

21 6. Respondent testified that after November of 2001, Respondent worked for Mr. Orms
22 on a part-time contracting basis in the capacity of a litigation manager. (August 12, 2004 tr.
23 26-27).

24 7. In or about December of 2002 or January of 2003, Mr. Orms was involved in a traffic
25 accident. (August 12, 2004 tr. 29). As a result of citations that Mr. Orms received relating to
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1 the accident, including a citation for no proof of insurance, Mr. Orms' license or privilege to
2 drive was eventually suspended. (August 12, 2004 tr. 33-38).

3 8. Respondent testified extensively about the legal situation surrounding Mr. Orms'
4 license suspension. Respondent stated that a copy of Mr. Orms' proof of insurance was filed
5 with the Justice Court. Respondent did not recall whether he filed the license, or whether
6 someone else did. (August 12, 2004 tr. 32). Respondent further explained that Mr. Orms then
7 received an order of suspension in the mail, which Respondent testified was in error as the
8 proof of insurance had been filed. Thereafter, Respondent took the order of suspension along
9 with the proof of insurance filing to the clerk's office at the Justice Court and explained the
10 situation on behalf of Mr. Orms. (August 12, 2004 tr. 33). The clerk of court then provided
11 Respondent with an Order to Quash Suspension based on court error. (August 12, 2004 tr.
12 34).

13 9. At the hearing, Respondent testified that, when Mr. Orms first received the notice of
14 suspension, Respondent informed him that it was a court error, and explained to him how to
15 get the suspension lifted. Respondent agreed to handle the matter on Mr. Orms' behalf after
16 Mr. Orms asked him to do so. (August 12, 2004 tr. 35).

17 10. Thereafter, Mr. Orms apparently received another order of suspension for not
18 attending traffic survival school. (August 12, 2004 tr. 36). Mr. Orms discussed the matter
19 with Respondent, and then filed a notice of appeal. (August 12, 2004 tr. 37, 38).

20 11. An appeal hearing date at the Department of Transportation, Motor Vehicle Division
21 was set for August 1, 2003. (August 12, 2004 tr. 39, August 17, 2004 tr. 7).

22 12. Respondent testified that Mr. Orms asked him to go to the August 1, 2003 hearing
23 date, as Mr. Orms would be out of town. At the hearing, Respondent was to provide the
24 written documents to the hearing officer and indicate that the matter was being submitted on
25 the records. Respondent agreed to do so. (tr. 40-41).

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1 13. Respondent testified about what happened at the MVD hearing. Specifically, he stated
2 that he went to the MVD hearing location in Tucson on August 1, 2003 at the time set for the
3 hearing. After being in the waiting area for about five minutes, the Administrative Law Judge,
4 Hon. Daniel Jurkowitz, approached him. (tr. 44). Respondent states that he informed Judge
5 Jurkowitz that he was there to deliver paperwork for Mr. Orms, and that Mr. Orms intended
6 to submit the case based on the record. (tr. 44). Respondent further testified that he told Judge
7 Jurkowitz that he was an attorney, but that he was not there to represent Mr. Orms. (tr. 44).
8 Respondent testified that they then went to Judge Jurkowitz's chambers and had a brief
9 discussion about the judge's grandfather. (tr. 45). After that, Judge Jurkowitz decided to go
10 on the record, and began tape-recording the proceeding. (tr. 45).

11 14. Judge Jurkowitz also testified at the discipline hearing. Judge Jurkowitz is a member
12 of the State Bar of Arizona. (August 17, 2004 tr. 5). Judge Jurkowitz has been acting as an
13 Administrative Law Judge for three years. (August 17, 2004 tr. 5). Prior to his judgeship, he
14 was employed as a criminal and civil Deputy County Attorney in Pima County. (August 17,
15 2004 tr. 5). Judge Jurkowitz explained his duties as an Administrative Law Judge for MVD,
16 and the process of hearings in connection with appeals of administrative driver's license
17 suspensions. (August 17, 2004 tr. 5-6).

18 15. Judge Jurkowitz specifically testified that attorneys appearing on behalf of clients in
19 MVD proceedings typically do not file Notices of Appearances. Rather, the normal practice
20 is for the attorneys to just appear at the hearing. (August 17, 2004 tr. 7, 53). Attorneys
21 routinely appear at MVD hearings on behalf of clients without having filed any prior motions
22 or any other sort of pleadings. (August 17, 2004 tr. 54).

23 16. Judge Jurkowitz testified that he went out into the waiting area to call Mr. Orms' case.
24 Mr. Orms was not present, and Respondent stated that he was there for Mr. Orms. The judge
25 and Respondent then had a brief discussion about one of the judge's family members, and then
26 they went into the judge's hearing room for the hearing. (August 17, 2004 tr. 8).

1 17. Judge Jurkowitz testified that when he met Respondent in the waiting area, he
2 assumed he was an attorney, and Respondent was dressed consistent with that assumption.
3 (August 17, 2004 tr. 9).

4 18. Judge Jurkowitz testified repeatedly that Respondent never informed him that he was
5 not appearing as an attorney for Mr. Orms. (August 17, 2004 tr. 9-10,14, 21, 32).

6 19. Judge Jurkowitz testified that Respondent's actions gave him the impression that he
7 was acting as Mr. Orms' attorney. (August 17, 2003 tr. 13).

8 20. Judge Jurkowitz testified repeatedly that if he had known that Respondent was not
9 appearing as Mr. Orms' attorney, he would not have proceeded with the hearing, and would
10 not have allowed Respondent to appear on the record. (August 17, 2004 tr. 13, 21, 31, 54).

11 21. Judge Jurkowitz had not met Respondent prior to the hearing date, nor did he know
12 anything about him. (August 17, 2004 tr. 9).

13 22. At the discipline hearing, the State Bar offered the tape-recorded hearing into
14 evidence. (ex. 3).

15 23. At the beginning of the hearing, Judge Jurkowitz stated, "Counsel may introduce
16 yourself for the record." Respondent responded: "My name is Mark Clark. I am here for Mr.
17 Orms." (ex.3). Judge Jurkowitz believed that Respondent was stating his appearance as
18 counsel on the record for Mr. Orms. (August 17, 2004 tr. 53).

19 24. Judge Jurkowitz addressed Respondent during the hearing on two occasions as
20 "counsel". (ex. 3). Respondent did nothing to correct those statements, or to clarify that he
21 was not appearing as counsel for Mr. Orms. (August 17, 2004 tr. 13).

22 25. Respondent believes that, notwithstanding his suspension from the practice of law,
23 because he has a law degree, "he may properly be addressed as 'lawyer', 'attorney', or
24 'counsel'." (Respondent's Proposed Findings of Fact, paragraph (e).)

25 26. Respondent further believes that he "does not have an affirmative duty to advise any
26 person, including other members of the State Bar, that he is in 'suspended' status, provided

1 that Respondent does not himself use the words 'lawyer', 'attorney', or 'counsel' to improperly
2 suggest or infer that he is actively licensed to practice law." (Respondent's Proposed Findings
3 of Fact ¶ (f)).

4 27. Respondent never stated on the record that he was not appearing as counsel for Mr.
5 Orms, or that he was only present to deliver documents. (ex. 3, August 12, 2004 tr. 49).

6 28. Respondent testified as follows as to his conduct at the hearing:

7 Q Did you make suggestions to Mr. Jurkowitz as to how
8 to resolve the license suspension?

9 A What I did was what lawyers do, whether they are
actively licensed or not. . . .

10 . . . We had an interesting point in front of us, which
11 was, can Arizona take action against a Montana driver's
12 license, and so we got into a discussion, which Mr.
Jurkowitz invited by saying, please, show me what you
have here.

13 We got into a discussion over the significance of the
14 documents, and whether Arizona had power over Mr.
Orms' Montana driver's license. We did what lawyers
15 do naturally, what we do at home - - we got into a
16 technical discussion about fine points of law, and what
a document meant, and so on, and so forth. (August 12,
2004 tr. p. 48 l. 10 - p. 49 l. 5)

17 29. After the tape-recorded hearing, there were no further substantive conversations
18 between Respondent and Judge Jurkowitz. (August 12, 2004 tr. 47; August 17, 2004 tr. 10).

19 30. It is undisputed that Respondent never affirmatively informed the judge that he was
20 suspended from the practice of law, even after informing him that he was an attorney. (August
21 17, 2004 tr. 10; August 12, 2004 tr. 52).

22 31. If Respondent told Judge Jurkowitz that he was not appearing on behalf of Mr. Orms,
23 Judge Jurkowitz either did not hear the remark or did not appreciate the distinction Respondent
24 was attempting to draw.

25 32. The Respondent was not hired by Mr. Orms to attend the hearing as his attorney.

26 33. The Respondent was not paid by Mr. Orms to attend the hearing as his attorney.

1 34. The Respondent was not authorized by Mr. Orms to appear at the hearing as his
2 attorney.

3 35. After the conclusion of the MVD hearing, Judge Jurkowitz went to his office to type
4 his decision. At that time, he attempted to look up Respondent's name in the bar directory to
5 mail him a copy of the decision. When he could not locate Respondent's name, Judge
6 Jurkowitz called the State Bar and learned that Respondent was suspended from the practice
7 of law. (August 17, 2004 tr. 13).

8 36. Judge Jurkowitz's conduct is consistent with his testimony that he believed
9 Respondent was acting as counsel for Mr. Orms when he appeared at the hearing. Judge
10 Jurkowitz's recollection of events is corroborated by the tape of the MVD hearing wherein
11 Respondent introduces himself as counsel, responds to Judge Jurkowitz's questions addressing
12 him as "counsel", makes legal arguments on the record, and fails to state on the record that he
13 is not appearing as Mr. Orms' attorney.

14 37. Attorney Barry Corey testified on behalf of Respondent. Mr. Corey testified that he
15 previously represented Platinum Mortgage, and was acquainted with Respondent in that
16 regard. Mr. Corey testified that during his dealings with Respondent, Respondent did not
17 engage in any activities or discussions that Mr. Corey considered to be practicing law.
18 (August 12, 2004 tr. 87). Mr. Corey had no personal knowledge concerning Respondent's
19 involvement in the MVD proceedings at issue in these discipline proceedings. (August 12,
20 2004 tr. 91).

21 38. Attorney Leonard Teiber testified on behalf of Respondent. Mr. Teiber testified that
22 during the time of Respondent's suspension, Respondent has done paralegal work for Mr.
23 Teiber. (August 12, 2004 tr. 100). Mr. Teiber testified that Respondent informed him of his
24 suspension, and did not do anything that would constitute the practice of law. (August 12,
25 2004 tr. 105). Mr. Teiber had no personal knowledge concerning Respondent's involvement
26 in the MVD proceedings at issue in these discipline proceedings. (August 12, 2004 tr. 106).

1 **CONCLUSIONS OF LAW**

2 1. The State Bar has proven by clear and convincing evidence that Respondent violated
3 ER 5.5 in his appearance at the MVD proceeding on behalf of Mr. Orms.

4 2. Although Respondent, at the hearing, indicated that it was appropriate to refer to
5 himself as "counsel," and that he had no affirmative duty to correct anyone's use of that term,
6 pursuant to Rule 31(a)(2)(B)(2), the unauthorized practice of law includes using the
7 designations "'lawyer,' 'attorney at law,' 'counselor at law,' 'law,' 'law office,' 'J.D.,' 'Esq.,'
8 or other equivalent words by any person or entity who is not authorized to practice law in
9 this state . . . the use of which is reasonably likely to induce others to believe that the person
10 or entity is authorized to engage in the practice of law in this state." In this matter, Respondent
11 represented to a judicial officer that he was an attorney, was referred to, and treated as, counsel
12 in a legal proceeding in which he made legal arguments. As a suspended attorney, this
13 conduct violates ER 5.5.

14 3. Although a conflict exists between the recollections of Judge Jurkowitz and
15 Respondent, as to whether he affirmatively stated, prior to the hearing, that he was not
16 representing Mr. Orms. The record does not support the conclusion that Respondent was
17 knowingly making a false statement of material fact or being dishonest. The State Bar has not
18 proven by clear and convincing evidence violations of ER 8.1(a) and 8.4 (c) and (d).

19 **RECOMMENDED SANCTION**

20 In arriving at the appropriate sanction, the Disciplinary Commission and the Arizona
21 Supreme Court generally rely on both the case law and the ABA Standards for Imposing
22 Lawyer Sanctions.

23 **ABA STANDARDS**

24 The ABA Standards for Imposing Lawyer Sanctions provide guidance with respect to
25 an appropriate sanction in this matter. The Supreme Court and the Disciplinary
26 Commission are consistent in utilizing the Standards to determine appropriate sanctions for

1 attorney discipline. In re Kaplan, 179 Ariz. 175, 877 P.2d 274 (1994). The Standards
2 provide that four factors should be considered in determining the sanction: the duty
3 violated; the lawyer's mental state; the actual or potential injury; and aggravating and
4 mitigating factors.

5 Respondent engaged in the unauthorized practice of law by appearing on behalf
6 of Mr. Orms at the MVD hearing, and thereafter. Standard 7.2, applicable to the
7 unauthorized practice of law violation provides: "Suspension is generally appropriate
8 when a lawyer knowingly engages in conduct that is a violation of a duty owed as a
9 professional, and causes injury or potential injury to a client, the public, or the legal
10 system." Standard 8.1(a), dealing with the violation of a prior disciplinary order by
11 practicing law while suspended states: "Disbarment is generally appropriate when a
12 lawyer: (a) intentionally or knowingly violates the terms of a prior disciplinary order
13 and such violation causes injury or potential injury to a client, the public, the legal
14 system, or the profession."

15 Respondent, despite his protestations to the contrary, knew or should have known,
16 that his conduct at the hearing constituted the unauthorized practice of law.
17 Suspension is the presumptive sanction in this matter. The next step under the
18 Standards is consideration of aggravating and mitigating factors. Standard 9.1. An
19 analysis of the aggravating and mitigating factors further supports the imposition of
20 a suspension in this matter.

21 The Hearing Officer finds the following aggravating factors:

- 22 1. Prior disciplinary offenses: In SB-01-0104-D, Respondent was suspended
23 from the practice of law by Judgment and Order of the Arizona Supreme
24 Court dated October 25, 2001, for violation of ERs 1.7, 1.8, 4.1, 8.1, 8.4(c),
25 and Rules 31(c)(3), and 51(h) and (I), Ariz.R.S.Ct.

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1 2. Substantial experience in the practice of law. Prior to his admission to the
2 State Bar of Arizona, Respondent was admitted to practice in
3 Massachusetts. He actively practiced for twenty-five (25) years prior to his
4 suspension.

5 3. Refusal to acknowledge the wrongful nature of his conduct. At no time during
6 the proceeding did Respondent acknowledge that his conduct may have been
7 perceived as being inappropriate.

8 4. The Hearing Officer finds no mitigating factors present in the record.

9 **CASE LAW**

10 In terms of proportionality of the proposed discipline, a period of suspension has been
11 the sanction approved by the Disciplinary Commission and Arizona Supreme Court for
12 similar misconduct in other matters.

13 To have an effective system of professional sanctions, there must be internal
14 consistency and it is therefore appropriate to examine sanctions imposed in cases that
15 are factually similar: In re Shannon, 179 Ariz. 52 (1994) (quoting In re Wines, 135
16 Ariz. 203 (1983)), In re Pappas, 159 Ariz. 516, 768 P.2d 1161 (1988). However, the
17 discipline in each situation must be tailored to the individual case, as neither perfection
18 nor absolute uniformity can be achieved.

19 While there are numerous cases sanctioning attorneys for practicing while on
20 administrative suspensions (i.e. for failing to pay dues, or complete MCLE), there are
21 few cases sanctioning lawyers for practicing during disciplinary suspensions.
22 Nonetheless, the following cases are instructive in providing an appropriate range of
23 discipline:

24 In Matter of Axford, SB 02-0115-D (2002), the attorney was suspended for one
25 year for practicing law while on a disciplinary suspension. In that matter, the
26 unauthorized practice of law was limited to a single instance in which the lawyer wrote

2 numerous aggravating factors present and little mitigation.

3 In Matter of Bayless, SB-04-0053-D (2004), the attorney received a censure for
4 practicing law while on a disciplinary suspension. However, it is important to note
5 that the misconduct in that matter was found to be negligent, rather than knowing, as
6 the evidence showed that the lawyer mistakenly believed that he had been reinstated.

7 Respondent's conduct falls somewhere in between the circumstances of the two
8 cases referenced above. Respondent's unauthorized practice of law is limited to a
9 single instance where he appeared before a Hearing Officer in an administrative
10 proceeding. These proceedings are admittedly less formal than other court
11 proceedings. Nonetheless, Respondent's conduct clearly led Judge Jurkowitz to
12 believe that Respondent was appearing as "counsel," "on behalf of Mr. Orms." By his
13 own description, Respondent "did what lawyers do." This conduct constitutes a clear
14 violation of ER 5.5.

15 More problematic is Respondent's refusal to acknowledge that he crossed the line
16 into the practice of law, and his continued insistence that it is proper for him to
17 represent himself as an attorney, without qualification which would alert the person
18 to whom he made the representation that, although he is technically an attorney, he is
19 not currently licensed to practice.

20 Based on the foregoing, a six (6) month suspension is recommended. The State
21 Bar is awarded its costs associated with this proceeding.

22 Respondent is currently serving a three (3) year suspension, which will require
23 a petition for reinstatement. The imposition of the recommended sanction in this
24 proceeding will not alter the requirements for re-admission to the State Bar.

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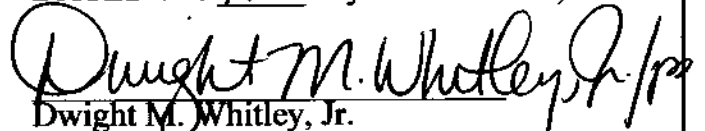
RESTITUTION

As there was no evidence that Mr. Orms paid a fee to Respondent in this matter, and no other evidence that would indicate that a restitution order would be appropriate.

CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). The Hearing Officer's recommendation is not made to punish the Respondent, but to serve the goal of protecting the public, deterring other lawyers from similar misconduct, and giving the public confidence in the integrity of the bar and the disciplinary process and its ability to self-regulate and impose appropriate sanctions on its members.

DATED this 19th day of November, 2004.


Dwight M. Whitley, Jr.
Hearing Officer 91

Original filed with the Disciplinary Clerk
this 19th day of November, 2004.

Copy of the foregoing mailed
this 19th day of November, 2004, to:

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