

APR 04 2011

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

FILED

[Signature]

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

**MICHAEL A. URBANO,
Bar No. 023029**

Respondent.

Nos. 09-1631, 09-2339

**REPORT AND ORDER IMPOSING
SANCTIONS**

On March 4, 2011, the Hearing Panel composed of Anne B. Donahoe, a public member from Maricopa County, Honorable David R. Cole (retired), an attorney member from Maricopa County, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Stephen P. Little appeared on behalf of the State Bar of Arizona ("State Bar") and Nancy A. Greenlee appeared on behalf of Respondent. The parties stipulated to findings of fact and conclusions of law in Count One and all stipulated exhibits were admitted. The PDJ and Hearing Panel ("Panel") now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

I. ISSUES

In Count One, an attorney admits that he engaged in a conflict of interest when he entered into a business transaction with a client without first disclosing the terms of the transaction in writing to the client and advising the client in writing to seek the advice of independent counsel regarding the transaction.

In Count Two, an attorney did not competently and diligently represent the client when he advised a client about a plea offer based on erroneous information and his conduct was prejudicial to the administration of justice. What is the appropriate sanction for the misconduct?

II. SANCTION IMPOSED:

**ATTORNEY SUSPENDED FOR SIX (6) MONTHS, RESTITUTION, AND
COSTS OF THESE DISCIPLINARY PROCEEDINGS ORDERED.**

III. PROCEDURAL HISTORY

The State Bar filed its Probable Cause Order in File No. 09-2339 on May 21, 2010, and File No. 09-1631 on May 26, 2010. The Complaint was filed on July 1, 2010 and Respondent filed his Answer on July 28, 2010. The parties thereafter filed an Agreement for Discipline by Consent ("Agreement") providing for censure,

six (6) hours CLE in the area of criminal law practice, one year of voluntary participation in the State Bar's Member Assistance Program ("MAP") and costs on October 28, 2010. A hearing on the Agreement, which addressed the misconduct in Count One only, was held on November 4, 2010. The Hearing Officer rejected the Agreement having concluded that the agreed upon sanction was insufficient for the misconduct and as an alternative, extended a proposed modification of the Agreement to reflect a ninety (90) day suspension and two years of probation (MAP). The parties did not accept the proposed modified sanction. Pursuant to Rule 57 (C), Ariz.R.Sup.Ct., when an agreement is rejected, all conditional admissions are withdrawn and shall not be used in subsequent proceedings.

On January 24, 2011, the State Bar filed a Motion to Set for Hearing on the Merits. A final case management conference was held on February 11, 2011. Respondent filed his Prehearing Memorandum on March 1, 2011. The State Bar filed its Prehearing Memorandum on February 14, 2011. An evidentiary hearing was held on March 4, 2011.

IV. FINDINGS OF FACT

1. At all time relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on August 26, 2004.

Count One

2. On or about May 11, 2009, Jonathan Trethewey ("Mr. Trethewey") retained Respondent to defend him from criminal charges. Mr. Trethewey was charged with armed robbery/home invasions with weapons and physical injury to at least one of the multiple victims. Mr. Trethewey had 4 prior convictions.

3. Given the facts of Mr. Trethewey's case, Respondent testified he normally would have charged a flat fee of \$25,000.00. Respondent indicates he agreed to essentially represent Mr. Trethewey pro bono. However, because Respondent believed it was better to require some minimal payment by the client in order for the client to feel as though he had a "stake" in the matter, Respondent asked Mr. Trethewey if he had anything that he would be willing to provide as minimal payment. Mr. Trethewey offered his 1999 Yamaha R-6 motorcycle. Mr. Trethewey executed a fee agreement with Respondent that provided that Mr. Trethewey would give his 1999 Yamaha R-6 motorcycle to Respondent. Although the fee agreement provided that Mr. Trethewey would pay a \$25.00 "discovery fee" as payment for any pretrial legal services, Respondent did not require that Mr. Trethewey actually pay the \$25.00 fee.

4. Should Mr. Trethewey case have proceeded to trial, the fee agreement called for Mr. Trethewey to pay an additional \$5,000 flat fee. Respondent asserts that despite what the fee agreement provided as far as a trial fee, respondent told Mr. Trethewey that he would waive the trial fee, and at the change of plea hearing before Judge Sanders, Respondent reiterated on the

record that he waived any claimed trial fee if Mr. Trethewey chose to proceed to trial.

5. Respondent indicates that the motorcycle provided to Respondent was not in working condition, did not have tires, or working brakes and was not registered or insured. Respondent spent \$1,400.69 for repairs to the motorcycle, and approximately \$300.00 for registration, insurance, and emission testing. Respondent then donated the motorcycle to a former client so that the former client would have transportation to and from college.

6. Respondent did not advise Mr. Trethewey in writing of the desirability of seeking, or give Mr. Trethewey a reasonable opportunity to seek, the advice of independent legal counsel on the barter of his motorcycle.

7. Respondent did not obtain informed consent, in writing, of Mr. Trethewey to the essential terms of the transaction and Respondent's role in the transaction, including whether Respondent was representing Mr. Trethewey on the transaction.

Count Two

8. On or about July 18, 2009, Sergio Valles ("Mr. Valles") retained Respondent to defend him from the Sale or Transportation of Narcotic Drug charges.

9. Respondent obtained discovery from the State, including the Direct Complaint and the relevant police reports.

10. The Direct Complaint indicated that Mr. Valles was charged with Sale or Transportation of Narcotic Drugs, a Class 2 Felony.

11. The State did not allege, and never filed nor threatened to file any allegation that, the drugs involved were over the statutory threshold amount.

12. The relevant police reports indicated that Mr. Valles was arrested for selling 30 Oxycodone pills to an informant for \$400.00.

13. The amount was lower than the statutory threshold amount for Oxycodone (\$1,000.00).

14. On or about September 17, 2009, the State extended a plea offer to Mr. Valles, through Respondent, that required Mr. Valles to serve six months in jail. That offer was based on the assumption of the prosecutor that the drugs were over the threshold. The offer was not improper, did not violate the law and was well within the sanctions a defendant could receive for such a violation of law. As a result it is highly unlikely any judicial officer would have deviated from the plea terms even if the erroneous presumption of the prosecutor had been later discovered.

15. Mr. Valles did not accept the plea, but rather, terminated Respondent's services and obtained new counsel.

16. On or about December 2, 2009, Mr. Valles filed a complaint with the State Bar about the representation Respondent provided him and demanded a refund of the \$6,025.00 he had paid Respondent.

The Sale or Transportation of a Narcotic Drug, a Class 3 Felony is a probation eligible offense pursuant to A.R.S. §§13-3401, 13-3408, 13-3418, 13-701, 13-702, and 13-801]. For any such felony offense a judge could sentence a defendant up to twelve months in the county jail as a term of probation.

Despite having the police report that stated the drugs were under threshold amount and the charging document that showed the State had not filed an allegation of over threshold amount, Respondent gave erroneous legal advice to Mr. Valles, based upon his failure to do any legal analysis of the documents in his possession of the evidence in the case. Respondent advised that he should accept the State's plea offer because if Mr. Valles went to trial and was convicted of the offense, prison time was mandatory which was untrue.

The trial date had been set prior to Respondent withdrawing from the case.

Jason Diekelman, Deputy County Attorney

Mr. Diekelman testified that he has been employed by the county attorney's office for 4 years. Mr. Valles case was one of the first cases he was assigned in that department and due to his inexperience, he did not initially catch the mistake made in formulating the plea agreement. RCC's plea offer was based on the erroneous assumption Mr. Valles had a prior felony conviction and the amount of drugs exceeded the statutory threshold limit.

Mr. Diekelman stated he also assumed the drug value amount was over the threshold because Mr. Valles did not have a prior felony conviction and the original plea offered by RCC also provided for six months in jail and probation. Mr. Diekelman further stated that it was the county attorney's policy to offer a harsher plea than what RCC would have originally offered.

Mr. Diekelman also testified that during the discussions and negotiations he had with Respondent they discussed that the plea was based on his assumption that the drugs were over the threshold amount. Respondent never challenged the assumption that the drugs were assumed to be over the statutory threshold. Mr. Diekelman further testified that the Direct Complaint did not charge that the drugs were over the statutory threshold limit and that he never threatened to charge the offense as being over the threshold limit.

When Mr. Valles obtained new counsel, he met with his supervisor to discuss going to trial and why the plea offer was not accepted; that is when the error in formulating the plea was discovered.

The Panel found the testimony of Mr. Diekelman to be credible and found his testimony to be truthful.

Mark Nermyr, Esq.

Mark Nermyr testified that when he took Mr. Valles' case in November 2009, it was in the pre-trial stages and a trial management conference was scheduled for January. He then received a plea offer via e-mail from Jason Diekelman, which was accepted.

Regarding fees, Mr. Nermyr stated he normally charges a \$3,500 flat fee for similar legal services. Mr. Valles paid him approximately \$1,500.00 for his legal services. Mr. Nermyr further testified that the amount of drugs involved were below the statutory limit and the State never alleged otherwise. Mr. Nermyr stated that the prosecutor recognized his error and Mr. Valles ultimately entered into a plea agreement on January 6, 2010, that provided for supervised probation.

Sergio Valles

Sergio Valles testified that he originally had a public defender to represent him and subsequently, Respondent represented him from the end on July until October and he made court appearances on his behalf.

Respondent advised him that jail time was mandatory for his offense and if he did not take the plea and went to trial, he would receive 2 years of prison time. Mr. Valles further testified he repeatedly told Respondent he did not have a prior felony conviction and that he would not accept a plea agreement that called for any jail time. Mr. Valles stated that Respondent never discussed the threshold limit with him and he asked Respondent for a refund or all or unused funds when he fired him.

Hal Nevitt, MAP director

Mr. Nevitt testified that he evaluated Respondent in conjunction with his prior suspension and probation. Respondent was diagnosed with Attention Deficit Disorder stated that medication has helped Respondent with issues such as impulse control and establishing boundaries. Respondent also completed anger management training and currently attends a member support group. Mr. Nevitt stated that Respondent now has a new level of awareness and is genuinely remorseful for his prior misconduct. Mr. Nevitt further testified that Respondent discussed his current matters with him and Respondent believes he did not act inappropriately with regards to the allegations in Count Two.

V. CONCLUSIONS OF LAW

In Count One, Respondent admits he entered into a business transaction with his client and failed to comply with the disclaimer requirements. Respondent's conduct violated E.R. 1.8(a).

In Count Two, Respondent failed to competently and diligently represent his client in a criminal matter and his conduct was prejudicial to the administration of justice. Respondent's conduct violated E.R. 1.1, 1.3, and 8.4(d).

VI. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("ABA Standards") and Arizona Supreme Court case law are the guiding authorities used in imposing sanctions for lawyer misconduct. The appropriate sanction depends upon the facts and circumstances of each case.

Respondent's most serious misconduct is his lack of competence and diligence in failing to review the criminal statute, charging documents and police report regarding the statutory threshold amount and to give competent legal advice and options to his client about the plea offer.

Analysis under the ABA STANDARDS

In imposing a sanction after a finding of lawyer misconduct, the Panel considered the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

Standard 4.42 Lack of Diligence, provides that Suspension is generally appropriate when a lawyer:

- (a) knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- (b) engages in a pattern of neglect and causes injury or potential injury to a client.

The presumptive sanction for knowing misconduct involving a lack of diligence is suspension.

A. THE DUTY VIOLATED

The Panel finds Respondent violated his duty to the client.

B. THE LAWYER'S MENTAL STATE

The Panel finds Respondent's mental state was negligent as to Count One and knowing as to Count Two.

C. THE ACTUAL OR POTENTIAL INJURY

The Panel finds that there was potential injury to the Client in Count One and serious potential injury to the client in Count Two as the client would have been sentenced to six months in jail.

D. AGGRAVATING FACTORS, ABA STANDARD 9.2

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel considered evidence of the following aggravating circumstances in determining the appropriate sanction.

Prior Disciplinary Offenses, 9.22(a)

Based on the evidence presented at hearing, the Panel finds this factor is present. Respondent received a sixty (60) day suspension and one year of probation (MAP) was imposed on May 22, 2008 for violating ERs 1.4, 1.7, 4.2, 8.4(c) and 8.4(d). Respondent was also placed on two (2) years of probation effective July 29, 2009 for violating Rule 41(g).

Although not considered a prior disciplinary offense, Respondent was ordered to participate in Diversion (CLE) on June 4, 2005, for violating ER 1.1 (competence) and 8.4(d) (conduct prejudicial to the administration of justice), similar violations present in the instant matter. See State Bar's Exhibit 9 which was admitted for the limited purpose of considering the appropriate sanction pursuant to Rule 56(e), Diversion.

Multiple Offenses, 9.22(d)

The Panel finds Respondent engaged in two separate counts of misconduct.

Refusal to acknowledge wrongful nature of conduct, 9.22(g)

The Panel finds this factor is present. Respondent asserts that he acted with competence and diligence in Count Two and he appropriately relied on the prosecutor's contention that the drugs were over the statutory amount, even though the police report clearly indicated that the client was arrested for selling 30 Oxycodone pills to an informant for \$400.00.

Indifference to making restitution, 9.22(j)

The client paid Respondent \$6,025.00 for legal services and requested a refund after terminating Respondent; however, Respondent has not returned any of the clients' funds. Respondent testified that he felt he earned the fee. The client hired another attorney and incurred additional legal expenses. The Panel finds \$1,500 should be returned to reimburse for the fees paid to his subsequent attorney, Mark Nermyr.

E. MITIGATION FACTORS, ABA STANDARD 9.3

The Panel considered evidence of the following mitigating circumstances in determining the appropriate sanction:

Character or reputation, 9.32(g)

The Panel finds this factor is present. Numerous witnesses testified favorably to Respondent's character and reputation.

Commissioner Mendez testified on behalf of Respondent. Commissioner Mendez stated that Respondent is a "stand up guy" and has offered on several occasions to help defendants *pro bono* in court. He is always respectful to the court.

William Lee Morris, Esq. testified that Respondent has been a mentor for him. He has observed him in court and finds him to be a competent and focused attorney.

Greg Clark, Esq., testified that Respondent is a good lawyer with an excellent reputation in the community. Mr. Clark stated Respondent is always prepared and produces an excellent work product. He cares about his clients and is not looking for a quick buck.

Mr. Jake Wagner testified that Respondent represented him *pro bono* in a criminal matter and helped to integrate back into society after being released from military service. Mr. Wagner stated that he was experiencing post traumatic stress disorder and Respondent as his attorney saved him from prison time and had his offense reduced to a misdemeanor.

Non-ABA mitigation factor

Respondent provides many hours of *pro bono* services to clients and routinely assists his fellow veterans with legal issues and participates in military court on Thursdays.

VII. DISCUSSION

In Count Two, two errors occurred in formulating a plea agreement: 1) it was believed defendant had a prior felony conviction; and 2) whether the threshold amount over statutory limit and if offense was probation eligible. Respondent testified that in reviewing the plea offer, he trusted the prosecutor and relied on his incorrect assumptions that the value of the drugs was over the statutory threshold limit. His testimony was not credible. He testified he trusted the prosecutor based on his extensive dealings with him. However Mr. Diekelman testified it was one of his first cases. He believes it was his first dealings with Respondent. The only consistency in their respective testimonies was the inconsistencies. Only one was telling the truth while the other was not. This Panel finds as a matter of fact that Mr. Diekelman was truthful. As a result it significantly discounted the testimony of Respondent and was troubled by its inconsistency that was telling.

Respondent asserts that although the police report indicated 30 Oxycodone pills were sold for \$400.00, police reports often contain inaccurate information regarding the amount of drugs and the price of the drugs.

While this may be true, Respondent clearly has a duty to his client in preparing his defense to review and verify the accuracy of the information and to challenge any erroneous information. The panel finds he failed to do anything meaningful in defending his client. Respondent failed to take the basic steps to defend his client. Respondent testified that he had not conducted any further investigation at that time because he was still in "plea negotiation mode." However a trial date had already been set and he was strongly encouraging the defendant to accept a plea agreement emphasizing that "mandatory" prison would be the result of going to trial. Rather than analyze the police report and take the charging document on its face, he assumed the drugs were over the threshold and performed no independent analysis. Instead he relied on the assumption of an inexperienced prosecutor and tried to convince his client to take a prison plea based on his unpreparedness. The Rules of Professional conduct require an attorney to discharge his professional responsibilities diligently and competently, "with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." [ER 1.1]

Respondent argues that the prosecutor is responsible for the error, however, once the error was discovered; the prosecutor admitted his mistake in formulating the plea, explained the basis for his misunderstanding and immediately made a better plea offer. Here, Respondent has not only consistently refused to admit his error but created an implausible story to mask his lack of investigation and basic duty of loyalty to his client and failed in his duty to act zealously for his client.

Respondent's testimony was more than not credible. Despite his counsel's excellent representation of him, the documents he filed with the State Bar prior to his obtaining her services undermine his testimony. Those letters demonstrate a troublesome writhing undercurrent within him that prior disciplinary matters have been unsuccessful in aiding him to overcome. The Panel found his testimony to be

untruthful. It does not believe that his prior relationship and high regard for the prosecutor was the reason for his faulty analysis. There was no prior lengthy relationship. This was simply made up on the witness stand by Respondent. There were no lengthy prior experiences with the prosecutor to base a high regard and trust upon. This was made up, whole cloth, on the witness stand and such rationalization is more than troubling. This internal failure to address his own shortcomings has apparently short circuited his reasoning and led him to distort the facts in an effort to cover his own deficient conduct. While his counsel did her best to broad stroke these extraordinary and disturbing inconsistencies with her usual paintbrush of eloquence, it remains a portrait not suitable for framing.

Since his admission in 2004, his prior disciplinary history gave this Panel strong reason to consider a longer suspension. His first suspension came as a result of his repeated unauthorized conduct with his client's estranged wife without the consent of the lawyer representing the estranged wife or the consent of Respondent's client. His second discipline arose when he lost self-control and cursed at a mediator in Justice Court. Respondent was near the end of his first probation when he committed the misconduct stipulated to in Count One. He was to begin his second probation term when he committed the misconduct in Count Two. The strong support of Hal Nevitt and his attorney's aid in directing him to the membership support group she helped start were persuasive factors. However, this Panel cannot emphasize more strongly that Respondent's actions are unacceptable. While his efforts to aid others are commendable those actions do not act as any counter weight to any balancing scales of justice. Two rights do not excuse two wrongs. The purpose of attorney discipline is to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). His good conduct towards some individuals serve as no protection to the public, the profession or the administration of justice.

VIII. CONCLUSIONS

The purpose of attorney discipline is 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).

Therefore, given the facts of this matter and in consideration of the ABA *Standards* including aggravating and mitigating factors, the Panel unanimously concludes that a six month suspension, restitution and the imposition of costs is the appropriate sanction in this matter and will fulfill the purposes of discipline. The request for reduced costs is denied.

IX. ORDER

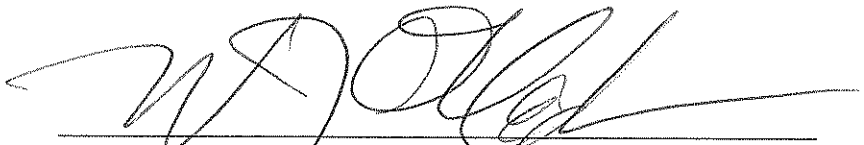
The Panel therefore ORDERS:

1. MICHAEL A. URBANO Bar No. 023029 is hereby **SUSPENDED FOR A PERIOD OF SIX (6) MONTHS**, effective thirty (30) days from the date of this Order.
2. Respondent shall pay restitution to Sergio Valles in the amount of \$1,500.00.
3. Respondent shall comply with all applicable provisions of Rule 72, Ariz.R.Sup.Ct.
4. Respondent shall comply with all rule provisions regarding reinstatement proceedings.
5. Respondent shall pay the costs of these proceedings. The State Bar shall submit a Statement of Costs and Expenses pursuant to Rule 60(b), Ariz.R.Sup.Ct. Respondent may file objections within five (5) days of service of the Statement of Costs and Expenses and shall serve a copy on the State Bar and the Disciplinary Clerk.

Review by the Court

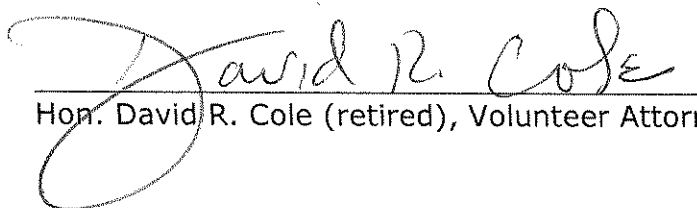
Within ten (10) days after service of this Report, Respondent or the State Bar may appeal by filing with the Disciplinary Clerk a notice of appeal and serve a copy on the opposing party. An opposing party may file a notice of cross appeal within 10 days from the service of the notice of appeal and serve a copy on the opposing party, pursuant to Rule 59, Ariz.R.Sup.Ct.

DATED this 4 day of April 2011.

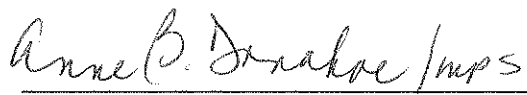


THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:



Hon. David R. Cole (retired), Volunteer Attorney Member



Anne B. Donahoe, Volunteer Public Member

Original filed with the Disciplinary Clerk
this ^{7th} day of April, 2011.

COPY of the foregoing e-mailed and mailed this
^{5th} day of April 2011, to:

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