

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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

**KEVIN ORIN TORREY,
Bar No. 022300**

Respondent.

PDJ-2013-9115

**REPORT AND ORDER IMPOSING
SANCTIONS**

State Bar No. 13-1035, 13-1261, 13-
1262, 13-1584

FILED MARCH 11, 2014

PROCEDURAL HISTORY

The State Bar of Arizona ("State Bar") filed its complaint on December 6, 2013. On December 11, 2013, the complaint was served on Mr. Torrey by certified, delivery-restricted mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a) (2), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge ("PDJ") was assigned to the matter. A notice of default was properly issued on January 7, 2014, given Mr. Torrey's failure to file an answer or otherwise defend. That notice cautioned Mr. Torrey that "[a]n effective entry of default shall not be set aside except in cases where such relief would be warranted under Rule 60(c) of the Arizona Rules of Civil Procedure." Despite that notice, Mr. Torrey did not file an answer or otherwise defend against the allegations in the complaint and the default entered by the Disciplinary Clerk was effective on January 28, 2014.

An aggravation and mitigation hearing was then scheduled for February 10, 2014 at the State Courts Building, 1501 West Washington, Phoenix, Arizona 85007-3231. Mr. Torrey's failure to answer is deemed an admission to the allegations contained within the complaint pursuant to Rule 58(d), Ariz. R. Sup. Ct. The purpose of the aggravation/mitigation hearing is not only to weigh mitigating and aggravating factors, but also to assure there is a causal connection or nexus between a respondent's conduct deemed admitted by default and the merits of the State Bar's case.

A respondent who has defaulted no longer has the right to litigate or present a defense to the merits of the factual allegations of the complaint. However, the respondent retains the right to appear at the aggravation/mitigation hearing concerning that nexus and address the sanctions sought. Included with that right to appear at the aggravation/mitigation hearing is the right to dispute the allegations relating to aggravation circumstances and to offer evidence in mitigation. Mr. Torrey was afforded these rights, appeared and was permitted to testify telephonically despite the lateness of his request. On the morning of the hearing, Mr. Torrey called the disciplinary clerk requesting permission to participate telephonically and the State Bar did not object; the request was granted by the PDJ.

Notwithstanding the rights above mentioned, the Hearing Panel does not operate in a vacuum. The State Bar properly demanded documents and records from Mr. Torrey. He knew of his duty to respond and did not. A defaulted

respondent cannot better a position with personal testimony or personal assurances that non-disclosed documents and records would more objectively detail. A Hearing Panel is not precluded from considering such a failure to disclose.

For a defaulted respondent, the failure to cooperate is compounded in a practical sense when, as in this matter, a respondent indirectly attempts to litigate factual issues under the guise of mitigation that are precluded through the default process. We are not blind to the fact that parts of his testimony would have been undergirded or undermined by the documents and records he failed to supply to the State Bar despite multiple requests and the filing of this complaint. The failure to supply the sturdy foundation of records and documents inevitably increases the risk of the hearing panel viewing the statements of a respondent as being built upon the shifting sand of rhetoric and hyperbole.

Any defaulted respondent would do well to review *Ariz. Dep't of Revenue v. Superior Court ex rel. Ariz. Tax Court*, 165 Ariz. 47, 49, 796 P.2d 479, 481 (App. 1990). There the defaulted party "refused to review settlement offers". The defaulted party apparently also did not disclose exhibits or witnesses nor give any indication "that they intended to offer evidence at all..." The opinion cautions that the law does not preclude the court "from considering such factors in determining the participation at default hearing of the party in default."

Due process requires a hearing panel to independently determine whether the requisite burden of proof, based on the facts deemed admitted by default, has been met. The hearing panel must also exercise its discretion in

imposing sanctions and consults the *ABA Standards for Imposing Lawyer Sanctions* as a guideline. If the hearing panel finds that sanctions are warranted, it independently imposes an appropriate sanction as set forth in Rule 60, Ariz. R. Sup. Ct. The hearing panel does not endorse or "rubber stamp" the State Bar's request for sanctions.

The Hearing Panel ("Panel"), composed of Teri M. Rowe, attorney member, Thomas C. Schleifer, public member, and William J. O'Neil, the PDJ, held the hearing. The Panel carefully considered the Complaint, the State Bar's Pre-hearing Statement, admitted exhibits, and Mr. Torrey's telephonic testimony. The Panel now issues the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz. R. Sup. Ct.

I. SANCTION IMPOSED

MR. TORREY IS SUSPENDED FOR TWO YEARS. RESTITUTION AND COSTS OF THESE DISCIPLINARY PROCEEDINGS ORDERED.

II. BACKGROUND AND PROCEDURAL HISTORY

Mr. Torrey is a lawyer licensed to practice law in the state of Arizona since September 9, 2003. The State Bar filed its complaint on December 6, 2013, serving Mr. Torrey on December 11, 2013, by certified, delivery-restricted mail, as well as by regular first-class mail, pursuant to Rules 47(c) and 58(a) (2), Ariz. R. Sup. Ct. As a result of Mr. Torrey's default, the following facts are deemed admitted as set forth in the State Bar's four count complaint, alleging violations of the following Arizona Rules of Professional Conduct: 1.3, 1.4, 1.5, 1.16, 3.2, 3.3, 3.4, 8.4(c), 8.4(d) and Ariz. Sup. Ct. Rules 54(d)(1) and (2).

III. FINDINGS OF FACT

Mr. Torrey was properly served. [Exhibit 1]. The State Bar made multiple attempts to locate or contact Mr. Torrey after receiving the bar charges in State Bar's Case No. 13-1035. A State Bar investigator went to Mr. Torrey's address of record. Upon arrival, the leasing agent for the office space notified the investigator that Mr. Torrey had broken the office lease in mid-April, 2013, by vacating the leased premises without notification. The leasing agent was unable to provide a new address for Mr. Torrey. Moreover, calls to Mr. Torrey's phone number of record went unanswered and indicated that the voicemail box was full. Text messages to the phone number and emails to two of Mr. Torrey's email addresses were not returned as undeliverable, but also received no responses from Mr. Torrey.

After contacting Mr. Torrey's wife at the time, Ms. Torrey, the State Bar investigator was informed by her that the couple was annulling their marriage and that Mr. Torrey was "severely depressed and completely off the deep end." Ms. Torrey also stated that Mr. Torrey was living in Apache Junction with a former employee. Upon receiving this information, the investigator identified both a street address and a P.O Box for the former employee. Bar Counsel sent correspondence to both addresses in a further effort to communicate with Mr. Torrey, but Mr. Torrey did not respond. [Exhibit 2].

COUNT ONE (File no. 13-1035/Judicial Referral)

Jeff Stebbins retained Mr. Torrey in August 2012 to represent him relating to his claimed interest in the development and production of a tankless water heating

system. During the course of the representation, Mr. Stebbins paid Mr. Torrey \$12,000 for legal services.

On September 21, 2012, Mr. Torrey filed two complaints with the Maricopa County Superior Court, on behalf of Mr. Stebbins. [Exhibit 10, Bates Nos. 26-60]. Both complaints were based on the same set of facts, naming nearly identical defendants and arising under similar causes of action. It is unclear why Mr. Torrey filed two substantially duplicative complaints on the same day. Mr. Torrey testified that they could have been one complaint. In both cases, different attorneys represented two separate groups of defendants. Attorney Steven Mahaffy represented one group, the Sturm Defendants, and attorney John Starkey represented the other group, the Cole Defendants.

Upon filing the Second Complaint, Mr. Torrey also filed a request for a temporary restraining order and a preliminary injunction. [Exhibit 10, Bates Nos. 62-63]. The court set the matter for hearing on October 2, 2012. [Exhibit 10, Bates Nos. 68-69]. At the hearing, the court declined issuing a temporary restraining order or preliminary injunction. Furthermore, the court directed that a commissioner hear a pending motion to consolidate filed by the Sturm Defendants, and ordered Mr. Torrey to file an Amended Complaint specifically alleging that the plaintiff held certain promissory notes upon which he sought relief.

On October 30, 2012, the court granted the Sturm Defendant's motion to consolidate the pending cases under the First Complaint. [Exhibit 10, Bates No. 93]. On October 18, 2012, the Sturm Defendants filed a motion to dismiss the First Complaint for failure to state a claim under Rule 12(b)(6) and further alleged that

the statute of limitations had run on plaintiff's claims. [Exhibit 10, Bates Nos. 74-85]. On November 5, 2012, Mr. Torrey filed a response to the Sturm Defendants' motion to dismiss the First Complaint. [Exhibit 10, Bates Nos. 94-108]. The Sturm Defendants filed a timely reply and the court set the pending motion for hearing on December 10, 2012. After the hearing, the court concluded that the plaintiff lacked standing to bring the action and that the complaint failed to state a claim upon which relief could be granted, and thus dismissed the First Complaint without prejudice.

On December 7, 2012, the Sturm Defendants filed a motion to dismiss the Second Complaint for the same reasons as the related case. [Exhibit 10, Bates Nos. 125-26]. Mr. Torrey filed a response to the motion on December 24, 2012, wherein he argued that the motion was moot because he had caused the Amended Complaint to be "re-filed simultaneously with the instant response." [Exhibit 10, Bates No. 133-34]. Later in the response, he reiterated that "the Complaint has been amended and is being submitted contemporaneously with this Response." However, Mr. Torrey had not done so, nor did he do so before he was eventually replaced as counsel of record for the Plaintiff.

The Sturm Defendants timely replied to Plaintiff's response to the motion to dismiss and the court set the matter for oral argument on March 25, 2013. [Exhibit 10, Bates Nos. 157-58]. At the hearing, Mr. Torrey provided the court and opposing counsel with a proposed amended complaint. [Exhibit 10, Bates Nos. 159-61]. The court found Mr. Torrey's actions "dilatatory" and ordered him to pay the Sturm Defendant's attorney's fees of \$1,300. However, the court also stayed

its ruling on the pending motion to dismiss so Mr. Torrey could file a written motion for leave to amend the complaint. The court ordered this motion be filed by April 8, 2013, and set hearing on it for May 2, 2013.

On April 29, 2013, Attorney Keith Beauchamp filed an application for substitution of counsel on behalf of Mr. Stebbins. [Exhibit 10, Bates Nos. 162-63]. In response, the Sturm Defendants filed a notice of non-compliance. Although the defendants did not object to the substitution of counsel, they advised the court that Mr. Torrey had failed to pay the attorneys' fees as ordered by the court.

On May 2, 2013, Attorney Beauchamp filed a declaration executed by Mr. Stebbins, affirming that Mr. Torrey was nonresponsive and had failed to communicate with Mr. Stebbins since approximately February 14, 2013. [Exhibit 10, Bates Nos. 167-68]. The declaration also noted Mr. Torrey's failure to advise Mr. Stebbins of the March 25th hearing and the court's ruling directing the filing of a motion for leave to amend the complaint. Mr. Torrey did not advise Mr. Stebbins of the filing of the Notice of Non-Compliance. Mr. Torrey's phone mailbox was full and unable to accept messages since at least April 22, and his website was out of operation since that time. As of May 2, 2013, Mr. Torrey had neither transferred the client file to Attorney Beauchamp nor responded to multiple requests for the file.

On May 8, 2013, the court granted the Application for Substitution of Counsel. [Exhibit 10, Bates No. 171]. On May 17, 2013, Attorney Beauchamp filed a notice of dismissal as to the Sturm Defendants and a motion for leave to file an amended complaint. [Exhibit 10, Bates Nos. 172-73]. On May 24, 2013, the court

held a show cause hearing and found Mr. Torrey to be in contempt of court for failing pay the Sturm Defendant's attorney fees as previously ordered. [Exhibit 10, Bates Nos. 177-78]. On June 21, 2013, the court dismissed the Sturm Defendants and granted the motion to file an amended complaint. [Exhibit 10, Bates Nos. 179-81]. As of the date of this report, the litigation continues.

Mr. Torrey initially communicated with Mr. Stebbins, talking frequently by phone and e-mail. The two also met six (6) to eight (8) times. However, by late 2012, communications declined drastically and Mr. Torrey seemed to disappear for weeks at a time. Mr. Torrey did not reply to Mr. Stebbins' e-mail messages and his voicemail box was full. The last communication Mr. Stebbins had with Mr. Torrey was by phone on February 14, 2013. During the call, Mr. Stebbins asked for a status update on his case, but Mr. Torrey only wanted to discuss payment of outstanding invoices for legal fees. Mr. Torrey also told Mr. Stebbins that his practice was slow and that he was thinking about closing it.

On May 21, 2013, Bar Counsel sent Mr. Torrey a screening letter to his address of record with the State Bar and asked him to respond to the bar charge. [Exhibit 5]. A few weeks later, Bar Counsel sent Mr. Torrey a copy of the court's May 24, 2013 order holding him in contempt. Neither letter was returned, but Mr. Torrey failed to respond to both. The screening letter was re-sent to two possible addresses for Mr. Torrey in Camp Verde, Arizona, but again received no response. [Exhibits 7 and 9].

COUNT TWO (File no. 13-1261/Judicial Referral)

On March 19, 2011, Sandra Abasta fell and was injured at her home. After receiving medical care at Banner Estrella Hospital ("Banner"), she retained Mr. Torrey sometime around May 2011. Mr. Torrey was hired on a contingency fee basis to handle a medical malpractice claim relating to Ms. Abasta's allegations that the doctors at Banner failed to diagnose her with a lumbar spine fracture.

During the representation, Ms. Abasta met with Mr. Torrey approximately five (5) or six (6) times, and Mr. Torrey assured Ms. Abasta that her case looked "good" and was proceeding. Ms. Abasta and Mr. Torrey also spoke by telephone approximately three (3) times throughout the representation, but Ms. Abasta found it difficult to reach Mr. Torrey, as he rarely answered and did not return her messages. Nonetheless, on February 27, 2012, Mr. Torrey filed a complaint on behalf of Ms. Abasta in the Maricopa County Superior Court against Banner and certain doctors. [Exhibit 16, Bates Nos. 206-13]. Mr. Torrey served the Complaint only on Defendant Banner, but not on the other named defendants.

As statutorily required, the complaint certified that an expert opinion was necessary to prove the standard of care and liability in the case. However, by November 13, 2012, Mr. Torrey had failed to comply with the statute by not submitting any preliminary expert affidavits. Mr. Torrey testified he paid the experts out of his own pocket. He blamed his sister in law and wife for "trying to sink my practice." He swore that the experts changed their opinions and seemed to be again blaming his sister in law and wife for the changed opinions. None of this was disclosed or raised by him in any pleading to the trial court.

The failure to submit any preliminary expert affidavits caused the Defendant's to file a motion to dismiss, or alternatively, to stay discovery pending statute compliance. Mr. Torrey's December 24, 2012, response to the motion requested the court deny it as "moot" because, he claimed, the Plaintiff's two expert witnesses would be in compliance "before the Court [could] rule," and further that an affidavit of the Plaintiff's radiology expert was being submitted to the Defendant simultaneously therewith. [Exhibit 11, Bates Nos. 190-91]. Mr. Torrey also stated that the second affidavit was delayed due to a "monetary dispute" with the expert, but that a newly secured expert's affidavit would be provided "before the Defendant's reply is due."

On January 7, 2013, Defendant Banner filed a reply stating that it had not received any expert affidavits from Mr. Torrey and again asked that the complaint be dismissed or, in the alternative, that Plaintiff be ordered to produce the statutorily mandated expert affidavits. [Exhibit 11, Bates Nos. 192-95]. The court conducted a telephonic status conference regarding the pending motions on April 1, 2013. [Exhibit 11, Bates Nos. 199-200]. No one appeared on behalf of Plaintiff, and Defendant's counsel informed the court that they had been unable to reach Mr. Torrey. The court ordered Mr. Torrey to file affidavits for both experts by May 1, 2013, and stayed discovery until May 14, 2013, setting another telephonic status conference for that date. At the status conference, due to Mr. Torrey's continued failure to file expert affidavits, the court granted Defendant Banner's motion to dismiss.

Ms. Abasta was unaware that her case was dismissed until later that month, and she only found out by contacting the State Bar's Attorney/Consumer Assistance Program. In fact, the last time Ms. Abasta saw Mr. Torrey was approximately January 2013, when he came to her home and told her that he was closing his law practice in February 2013. Mr. Torrey told Ms. Abasta that he was going through a difficult divorce, but that he was going to continue to work on her case from his home. Mr. Torrey still possesses Ms. Abasta's file, including her medical records, thereby preventing her from seeking another attorney to advise whether she still has a cause of action.

On May 30, 2013, Bar Counsel sent Mr. Torrey a screening letter to his address of record with the State Bar and asked him to respond to the bar charge. [Exhibit 12]. The letter was returned to the State Bar marked "return to sender; no such number; unable to forward." Thereafter, the State Bar's investigator found two possible addresses for Mr. Torrey in Camp Verde, Arizona. Bar Counsel re-sent the screening letters to Mr. Torrey at both addresses. Both letters were returned to the State Bar. [Exhibits 14, 15].

COUNT THREE (File no. 13-1262/Judicial Referral)

Mr. Torrey was retained to defend Tameka Carson in a criminal matter pending in Maricopa County Superior Court, Case No. CR2011-006380-002 DT. One of Ms. Carson's family members apparently hired Mr. Torrey in the matter and paid a portion of his retainer. On January 31, 2012, the court denied Mr. Torrey's oral request for substitution of counsel and directed him to file a written motion.

[Exhibit 21, Bates No. 228]. The written notice of substitution of counsel was finally filed on April 25, 2012. [Exhibit 21, Bates No. 233].

It is unclear what took place with respect to the representation for almost a year. But on April 3, 2013, Ms. Carson filed a motion to withdraw Mr. Torrey as counsel and requested appointment of a public defender. [Exhibit 21, Bates No. 235]. Some of the reasons cited for withdrawing Mr. Torrey as counsel included his statement to Ms. Carson that he was closing his legal practice, her lack of contact with him for four months, and her belief that he was not "in a good place mentally to represent [her] interests." [Exhibit 21, Bates No. 234]. Moreover, Ms. Carson asserted she was unable to afford a new private attorney.

On April 16, 2013, the court granted Ms. Carson's *pro se* motion during a case management conference, withdrawing Mr. Torrey as counsel and directing the Office of Public Defense Services to appoint Ms. Carson new counsel. The court also set a hearing for May 8, 2013, ordering Mr. Torrey's personal appearance to show cause as to why he should not be held in contempt for his failure to appear that day as well as on other set hearing dates. On May 1, 2013, during the course of an unrelated hearing, the court affirmed the May 8, 2013 Order to Show Cause hearing date. [Exhibit 21, Bates No. 240]. However, Mr. Torrey again failed to appear, prompting Judge Reinstein's referral of the matter to the State Bar. Judge Reinstein's referral noted that his division "repeatedly" attempted to contact Mr. Torrey's office without success.

Ultimately, after being appointed a public defender, Ms. Carson pled guilty to a number of charges and was sentenced on June 12, 2013. During the

representation, Ms. Carson spoke with Mr. Torrey a few times by phone and saw him in court on two occasions. During one of the phone conversations, Mr. Torrey began crying and told Ms. Carson that he was depressed, \$50,000 in debt, and closing his office on February 1, 2013. However, Mr. Torrey also reassured Ms. Carson that he would continue to represent her. At a hearing a few days later, Mr. Torrey acted as if nothing had happened. That was the last time that Ms. Carson had any contact with the Mr. Torrey. By that time, Mr. Torrey had already missed a number of hearings, resulting in Ms. Carson's co-defendant's attorney, Jocquese Blackwell, to stand in for Mr. Torrey.

In fact, the trial court's docket does not reflect any substantive filings by Mr. Torrey before he abandoned Ms. Carson. Nonetheless, according to Ms. Carson, Mr. Torrey charged her \$5,000 for the representation. One of Ms. Carson's family members paid Mr. Torrey \$2,500 and Ms. Carson personally paid Mr. Torrey \$400. Ms. Carson believes \$2,100 remained due and owing under the fee agreement when she terminated the representation.

On May 30, 2013, Bar Counsel sent Mr. Torrey a screening letter to his address of record with the State Bar and asked him to respond to the bar charge. [Exhibit 18]. The letter was returned to the State Bar marked "return to sender; not deliverable as addressed; unable to forward." Thereafter, the State Bar investigator found two possible addresses for Mr. Torrey in Camp Verde, Arizona. Bar Counsel re-sent the screening letter to Mr. Torrey at both addresses. Only one of those letters was returned to the State Bar. [Exhibits 19, 20].

COUNT FOUR (File no. 13-1584/Judicial Referral)

On August 28, 2012, Juan Loredó was arrested on suspicion of driving under the influence. The Cave Creek Municipal Court set a pre-trial hearing on Mr. Loredó's Case No. TR2012-0387 for November 21, 2012. Mr. Loredó retained Mr. Torrey to represent him in the matter and paid Mr. Torrey \$500 cash. Mr. Torrey provided Mr. Loredó, who is illiterate, a receipt that read: "Client paid \$500.00 for today's appearance and for Initial Pre-trial. I will put in my notice and get his initial discovery, review it and meet with him to discuss it." [Exhibit 24].

On November 21, 2012, Mr. Torrey filed his notice of appearance on behalf of Mr. Loredó and filed his first of three motions to continue. While at the courthouse for the second continued pre-trial hearing, Mr. Loredó gave Mr. Torrey \$1,000 cash. Mr. Torrey provided him with a receipt that read: "paid \$1000 for all motion work." [Exhibit 25]. After receiving this payment, Mr. Torrey filed the third motion to continue. This motion was granted and the hearing date was set for May 15, 2013. Mr. Loredó appeared for the third continued pre-trial hearing, but Mr. Torrey did not. Mr. Loredó stated on the record that he made numerous attempts to contact Mr. Torrey to determine what was going on and to ask for a refund. However, Mr. Torrey failed to respond to Mr. Loredó's telephone calls. The court continued the hearing to June 19, 2013 due to Mr. Torrey's failure to appear.

On May 31, 2013, the court appointed Attorney Kenneth Bemis to represent Mr. Loredó. On June 19, 2013, Mr. Loredó appeared in front of Judge Pro Tempore, Lawrence Scaringelli for the continued pre-trial hearing. Mr. Loredó was accompanied by his court-appointed counsel, Attorney Bemis, and proceeded to enter into a plea agreement thereby resolving the case. Following resolution of the

case, Judge Scaringelli referred Mr. Torrey to the State Bar because of his abandonment of Mr. Loredo. [Exhibit 22].

On July 10, 2013, Bar Counsel sent Mr. Torrey a letter to an address in Camp Verde, seeking his response to the bar charges. The letter was not returned to the State Bar, but Mr. Torrey did not respond. [Exhibit 27].

The trial court's docket does not reflect any substantive filings by Mr. Torrey on behalf of Mr. Loredo. To be sure, Mr. Torrey filed motions to continue, but these were standard court forms that required only checking appropriate boxes and simple, one-sentence explanations for making the requests accompanied by a signature. It appears that Mr. Torrey's only service to Mr. Loredo was the postponement of his case.

IV. CONCLUSIONS OF LAW AND DISCUSSION OF DECISION

Due to Mr. Torrey's failure to file an answer or otherwise defend against the allegations in the State Bar's complaint, default was properly entered and the allegations are therefore deemed admitted pursuant to Rule 58(d), Ariz. R. Sup. Ct. Based upon the facts deemed admitted, the Panel finds by clear and convincing evidence that Mr. Torrey violated the ethical rules detailed below.

ER 1.3

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 1.3 in all four counts. ER 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client. During the representation, Mr. Torrey abandoned all four clients by failing to appear at various hearings or to comply with court orders. Mr. Torrey allowed dismissal of both the first and second complaints

during the course of representing Mr. Stebbins. With respect to Ms. Abasta's representation, Mr. Torrey's failure to comply with the court's order to file expert affidavits resulted in dismissal of that complaint as well. While representing Ms. Carson, Mr. Torrey did not make any substantive filings and failed to appear at multiple hearings, resulting in the court securing appointed counsel to represent her. Likewise, Mr. Torrey's failure to submit substantive filings on behalf of Mr. Loredo and his subsequent abandonment forced Mr. Loredo to secure new counsel.

ER 1.4

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 1.4, requiring a lawyer to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. Sadly, in all four matters Mr. Torrey failed to keep his clients reasonably informed about the status of the matter and failed to promptly comply with reasonable requests for information. Moreover, Mr. Torrey ultimately abandoned his clients without warning.

ER 1.5

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 1.5, prohibiting a lawyer from charging unreasonable fees. In light of Mr. Torrey's failure to provide the services contracted for, fees collected from two of his clients were unreasonable. Ms. Carson and her mother paid Mr. Torrey \$2,900. However, the trial court's docket does not reflect any substantive filings by Mr. Torrey. Furthermore, other attorneys attended hearings on his account when he failed to appear. Mr. Torrey ultimately abandoned Ms. Carson and she was forced to seek

court-appointed counsel to represent her. Likewise, Mr. Loredo paid Mr. Torrey \$1,500 for his services, but the trial court's docket does not reflect any substantive filings by Mr. Torrey. There is also no evidence that Mr. Torrey interviewed potential witnesses or conducted discovery before abandoning Mr. Loredo. Mr. Loredo was then forced to retain new counsel to represent him.

ER 1.16

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 1.16(d), requiring a lawyer take reasonable steps to protect a client's interests before terminating representation. Such reasonable steps may include providing the client sufficient notice to obtain new counsel, surrendering the client's files and refunding unearned payments. Mr. Torrey abandoned all four of his clients during the course of representing them and failed to turn over their files. Mr. Torrey also failed to refund unused fees to clients. Furthermore, in Ms. Abasta's case, Mr. Torrey's abandonment of her resulted in dismissal of her complaint and her inability to further pursue legal action or seek new counsel due to Mr. Torrey's failure to return her medical records. As a result of Mr. Torrey's abandonment in Ms. Carson's case, she was forced to secure court-appointed counsel before eventually accepting a plea deal. Mr. Loredo, after being abandoned by Mr. Torrey, was also forced to seek new counsel.

ER 3.2

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 3.2, requiring a lawyer to make reasonable efforts in expediting litigation consistent with the client's interests. In Mr. Stebbins's matter, Mr. Torrey failed to file the

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court ordered amended complaint resulting in the court ordering that he pay sanctions for his dilatory actions. Ms. Abasta's case was dismissed by the trial court as a result of Mr. Torrey's failure to file the expert witness affidavits. Mr. Torrey failed to appear at several scheduled hearings in Ms. Carson's case and he ended up abandoning her. This forced Ms. Carson to secure court-appointed counsel before eventually accepting a plea deal. Similarly, Mr. Torrey failed to appear at a scheduled hearing in Mr. Loredo's case and the trial court had to re-continue the hearing. Mr. Torrey ultimately abandoned Mr. Loredo without notice and he was forced to secure new counsel.

ER 3.3

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 3.3, prohibiting a lawyer from knowingly making false statements of fact or law to a tribunal. Mr. Torrey advised the court that he had filed an amended complaint as previously ordered, but that was a false statement. Not only had he not filed the amended complaint at that time, but he never did so before being replaced by successor counsel.

ER 3.4

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 3.4, prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal. Mr. Torrey knowingly disobeyed an obligation under the rules of a tribunal by failing to file an amended complaint as ordered by the court. He also failed to pay the \$1,300 sanction entered against him. Mr. Torrey further failed to file expert witness affidavits ordered by the trial court and offered no explanation to

the trial court for his failure to do so. Moreover, Mr. Torrey failed to attend multiple hearings, including the continued pre-trial hearing on May 15, 2013.

ER 8.4(c)

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 8.4(c), prohibiting lawyers from engaging in dishonest, fraudulent, or deceptive conduct. With respect to the first count, Mr. Torrey advised the court that he had filed an amended complaint as previously ordered. Not only had he not done so, but he never did so before being replaced by successor counsel. In the second count, Mr. Torrey responded to a motion to dismiss on December 24, 2012, avowing that an affidavit of Ms. Abasta's radiology expert was being submitted to the defendant simultaneously therewith. This statement was false.

ER 8.4(d)

The Panel finds clear and convincing evidence that Mr. Torrey violated ER 8.4(d), prohibiting lawyers from engaging in conduct that is prejudicial to the administration of justice. Prior to the abandonment of Mr. Stebbins, Mr. Torrey was sanctioned by the court for being "dilatory" and ordered to pay the defendant's attorney fees of \$1,300. The court later conducted a show cause hearing and found Mr. Torrey in contempt for failure to pay the sanction. In Ms. Abasta's case, Mr. Torrey failed to produce preliminary expert affidavits, as required by A.R.S. § 12-2603, and that were necessary according to his own certified complaint, to prove the standard of care and liability in the case. This, along with his abandonment of Ms. Abasta, resulted in dismissal of the complaint. In Mr. Torrey's representation of Ms. Carson, he failed to appear at scheduled hearings, which necessitated coverage

by a co-defendant's attorney. Mr. Torrey abandoned Ms. Carson, and as a result, she was forced to secure court-appointed counsel. Similarly, Mr. Torrey failed to appear at Mr. Loredó's continued pre-trial hearing on May 15, 2013. As a result, the trial court had to continue the hearing again and Mr. Loredó was forced to secure new counsel.

Ariz. Sup. Ct. Rule 54

Mr. Torrey's violations of the ERs described above provide a basis for disciplining Mr. Torrey pursuant to Ariz. Sup. Ct. Rule 54. The grounds applicable here include Mr. Torrey's violations of professional conduct rules, Rule 54(a), his refusal to cooperate with staff of the State Bar, Rule 54(d)(1), and his failure to timely provide the State Bar with requested information, Rule 54(d)(2). In all four counts, Mr. Torrey refused to cooperate with State Bar staff and failed to furnish information upon inquiry from Bar Counsel. Mr. Torrey failed to respond to screening letters or to return telephone calls from the State Bar.

V. SANCTIONS

In determining an appropriate sanction, the Panel considers the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline. Rule 58(k), Ariz. R. Sup. Ct. The appropriate sanction turns on the unique facts and circumstances of each case. *In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993).

Analysis Under the ABA Standards

Generally, when determining the appropriate sanction, the Panel considers 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 Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). See also *Standard 3.0*.

Although the *Standards* do not account for multiple charges of lawyer misconduct, the sanction imposed should at least be consistent with the sanction for the most serious misconduct found. *Theoretical Framework*, p. 7. Consideration is also given to the degree of harm caused by the misconduct. *Matter of Scholl*, 200 Ariz. 222, 224-225, 25, P.3d 710 (2001).

In these matters, Mr. Torrey knowingly violated his duties owed to the legal system, his former clients, and as a professional.

Standard 4.4, Lack of Diligence, is applicable to Mr. Torrey's violations of ERs 1.3, 1.4, and 1.16.

Standard 4.41 provides:

Disbarment is generally appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Standard 4.42 provides:

Suspension is generally appropriate when:

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

Mr. Torrey violated ER 1.3 by knowingly abandoning all four of his clients and by failing to appear at various hearings or to comply with court orders. This disregard of his clients resulted in direct injury to each of them. However, in Ms.

Abasta's case, Mr. Torrey's abandonment of her resulted in dismissal of her complaint and her inability to further pursue legal action or seek new counsel due to Mr. Torrey's failure to return her medical records. We find this to be serious injury. Furthermore, Mr. Torrey violated ER 1.4 by failing to keep his clients reasonably informed about the status of their matters and by failing to promptly comply with reasonable requests for information. There is a clear pattern of neglect. This pattern caused injury to all four of his clients. Mr. Torrey also violated ER 1.16(d) by failing to take reasonable steps to protect each of his client's interests before terminating representation. He did not provide them with sufficient, if any, notice before terminating representation, and he failed to return their files and unearned fees.

Standard 4.1, Lack of Candor, is applicable to Mr. Torrey's violations of ER 1.5. *Standard 4.12* provides:

Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Mr. Torrey violated ER 1.5 by collecting fees from two of his clients without performing any legal services for them. These fees may well have been reasonable if he had followed through with representing the clients. However, due to his abandonment, the fees necessarily became unreasonable when he did not return them to his clients.

Standard 6.1, False Statements, Fraud, and Misrepresentation, is applicable to Mr. Torrey's violations of ERs 3.2, 3.3, 3.4 and 8.4. *Standard 6.12*¹ provides:

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

Among other things, in Count II of this matter, Mr. Torrey knowingly made a false statement of fact to a tribunal by advising the court that he had filed an amended complaint as previously ordered, when in fact he had not.

Standard 7.0, Violation of Duties Owed as a Professional, is applicable to Mr. Torrey's violation of ER 8.1. *Standard 7.2*² provides:

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

Mr. Torrey knowingly failed to respond to lawful demands for information from the State Bar. Moreover, this violation harmed the legal profession and the legal system. Mr. Torrey also caused injury to all four of his clients by abandoning them during the representation. We recognize that people undergo difficult times in their lives, and people may react to these difficulties in various ways, such as falling into depression. However, absent some extreme extenuating circumstance, like serious physical injury or illness, strictly emotional setbacks rarely, if ever,

¹ We acknowledge that the State Bar alleges that disbarment is appropriate here, as implicated by *Standard 6.11*. However, we do not find that Mr. Torrey acted with the requisite intent to deceive the court in making his false statement. Although he likely knew his statements were false, it is highly probable from his testimony that his personal life was seriously unraveling during this time.

² Again we acknowledge the State Bar's assertion that disbarment is appropriate in this case, as implicated by *Standard 7.11*. However, for the reasons previously stated, we find that disbarment is inappropriate here.

provide excusable reasons for failing to fulfill professional obligations owed to clients. There are multiple ways to terminate representing a client when levels of depression become debilitating, but unfortunately, in this case, Mr. Torrey neglected to utilize any of these terminating means. To the contrary, it appears Mr. Torrey reassured all or some of his clients that despite his personal issues, he would still zealously represent them in their cases. We do not find that Mr. Torrey had malicious intentions in making these reassurances because he probably truly did hope to continue helping them. Nonetheless, these false promises were detrimental to the clients because they were left with the impression that they did not need to find new counsel until many months later when Mr. Torrey's abandonment was clear. The steps to avoid this result were relatively simple, but Mr. Torrey failed to even make the first movement.

As discussed above, we remain mindful and have not ignored that the failure to cooperate or timely disclose documents or evidence precludes any opportunity for a proper testing of such evidence in a practical sense. Failing to cooperate or disclose evidence can facilitate a defaulted party's hiding of information harmful to that party's position which the defaulted party would prefer not to be admitted into evidence. A failure to disclose or cooperate can be evidence of an absolute indifference to the responsibilities to the opposing party and the justice system.

Standard 9.0, Aggravating and Mitigating Factors

In attorney discipline proceedings, aggravating factors need only be supported by reasonable evidence. *In re Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel finds the evidence supports the existence of the following

aggravating factors: 9.22(c) a pattern of misconduct, 9.22(d) multiple offenses, 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, 9.22(h) vulnerability of victim, 9.22(i) substantial experience in the practice of law, 9.22(j) indifference to making restitution.

The Hearing Panel finds the following mitigating factors apply: 9.32(a) absence of a prior disciplinary record, and 9.32(c) personal and emotional problems. Mr. Torrey testified that he was suffering from depression and he was previously treated for depression approximately seven years ago. He further testified that he was going through a difficult divorce and his wife had cleaned out their bank account and locked him out of their residence. He further stated his wife and her sister were also sabotaging his law office by deleting appointments from his calendar and they locked him out of his law office. Mr. Torrey however, admitted that he took no action to regain access to his residence or law office. We do not ignore that his self serving statements are not undergirded by any objective records supporting his testimony. Although Mr. Torrey's testimony was self serving and no evidence was provided, there were statements in the record from his clients that support his statements. (See by example Ms. Carson's statements in Count III above.) The Panel determined that a suspension is the appropriate sanction in this matter and would fulfill the purposes of discipline.

CONCLUSION

The objective of lawyer discipline is not to punish a lawyer but, rather, to protect the public, the profession, and the administration of justice; deter similar

conduct among other lawyers; preserve public confidence in the integrity of the bar; foster confidence in the legal profession and the self-regulatory process; and assist, if possible, in the rehabilitation of an errant lawyer. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004); *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001); *In re Walker*, 200 Ariz. 155, 24 P.3d 602 (2001); *In re Rivkind*, 164 Ariz. 154, 791 P.2d 1037 (1990); *In re Hoover*, 161 Ariz. 529, 779 P.2d 1268 (1989); and *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985).

The Panel has made the above findings of fact and conclusions of law. The Panel has determined the appropriate sanction using the facts deemed admitted, the *Standards*, the aggravating factors, the mitigating factors, and the goals of the attorney discipline system.

IT IS ORDERED:

1. Mr. Torrey shall be suspended from the practice of law for two (2) years effective thirty (30) days from the date of this Order.
2. Upon reinstatement, Mr. Torrey shall be placed on two (2) years of probation with the State Bar's Law Office Management Assistance Program (LOMAP) and Member Assistance Program ("MAP"). Specific terms and conditions shall be determined at the time of reinstatement.
3. Mr. Torrey shall pay the following in restitution:
 - a. Count III: \$2,900 to Tameka Carson.
 - b. Count IV: \$1,500 to Juan Loreda.
4. Mr. Torrey shall pay all costs and expenses in these proceedings.

5. A final judgment and order will follow.

DATED this 11th day of March, 2014.

William J. O'Neil

**Honorable William J. O'Neil
Presiding Disciplinary Judge**

Thomas C. Schleifer

**Thomas C. Schleifer, Ph.D.
Volunteer Public Member**

Teri M. Rowe

**Teri M. Rowe
Volunteer Attorney Member**

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 11th day of March, 2014.

Copy of the foregoing mailed/ emailed
this 11th day of March, 2014, to:

Kevin Orin Torrey
The Law Office of Kevin O. Torrey PLLC
4700 E. Thomas Road, Ste. 205
Phoenix, AZ 85018-7703

Kevin Orin Torrey
c/o Francel Lizotte
P.O. Box 4379
Camp Verde, AZ 86322
Email: ktorrey@torreylaw.com
ktorreyesq@yahoo.com
Respondent

Copy of the foregoing emailed/hand-delivered
this 11th day of March, 2014, to:

Stacy L. Shuman
Staff Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Sandra Montoya
Lawyer Regulation Records Manager
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266

by: [MSmith](#)

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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

KEVIN ORIN TORREY,
Bar No. 022300

Respondent.

PDJ-2013-9115

[State Bar File Nos. 13-1035, 13-
1261, 13-1262, 13-1584]

FINAL JUDGMENT AND ORDER

FILED APRIL 1, 2014

This matter having come on for an aggravation/mitigation hearing before the Hearing Panel of the Supreme Court of Arizona, it having duly rendered its decision and no notice of appeal having been filed, accordingly:

IT IS HEREBY ORDERED that Respondent, Kevin Orin Torrey, is suspended from the practice of law for a period of two (2) years effective the date of this Order, for conduct in violation of his duties and obligations as a lawyer, as disclosed in the Hearing Panel's Report and Order Imposing Sanctions.

IT IS FURTHER ORDERED that Mr. Torrey shall immediately comply with the requirements relating to notification of clients and others, and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED that Mr. Torrey shall pay the following in restitution:

Restitution

- a. Count III: \$2,900 to Tameka Carson.
- b. Count IV: \$1,500 to Juan Loreda.

IT IS FURTHER ORDERED that upon reinstatement, Mr. Torrey shall be placed on two (2) years of probation with the State Bar's Law Office Management Assistance Program and Member Assistance Program. Specific terms and conditions shall be determined at the time of reinstatement.

IT IS FURTHER ORDERED that Mr. Torrey pay the costs and expenses awarded to the State Bar of Arizona in the amount of \$2,214.13. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 1st day of April, 2014.

William J. O'Neil

**The Honorable William J. O'Neil
Presiding Disciplinary Judge**

Original filed with the Disciplinary Clerk
this 1st day of April, 2014.

COPY of the foregoing e-mailed/mailed
this 1st day of April, 2014, to:

Kevin Orin Torrey
The Law Office of Kevin O. Torrey PLLC
4700 E. Thomas Road, Ste. 205
Phoenix, AZ 85018-7703

and

Kevin Orin Torrey
c/o Francel Lizotte
P.O. Box 4379
Camp Verde, AZ 86322
Email: ktorrey@torreylaw.com
ktorreyesq@yahoo.com
Respondent

Stacy L. Shuman
Staff Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Sandra Montoya
Lawyer Regulation Records Manager
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6288

by: [MSmith](#)