

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,**

**DONALD E. FERGUS JR.,
Bar No. 019459**

Respondent.

PDJ-2014-9060

[State Bar No. 13-3441]

FINAL JUDGMENT AND ORDER

FILED OCTOBER 27, 2014

This matter having come before the Hearing Panel of the Supreme Court of Arizona, it having duly rendered its decision; and no appeal having been filed and the time for appeal having passed, accordingly,

IT IS HEREBY ORDERED Respondent, **DONALD E. FERGUS JR.**, is disbarred from the practice of law effective September 30, 2014, and his name is stricken from the roll of lawyers for conduct in violation of his duties and obligations as a lawyer, as disclosed in the Hearing Panel's Report. Respondent is no longer entitled to the rights and privileges of a lawyer but remains subject to the jurisdiction of the court.

IT IS FURTHER ORDERED Respondent 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 Respondent shall pay restitution to the following individual in the following amount:

Restitution

Elizabeth Veker King \$1,000.00 plus interest at the legal rate until paid.

IT IS FURTHER ORDERED that Respondent pay those costs and expenses awarded to the State Bar of Arizona in the amount of \$2,000.00, within 30 days of the date of this order. 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 27th day of October, 2014.

William J. O'Neil

William J. O'Neil
Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
this 27th day of October, 2014, to:

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Respondent

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by: JAlbright

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

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

**DONALD E. FERGUS JR.,
Bar No. 019459,**

Respondent.

PDJ 2014-9060

**REPORT AND ORDER IMPOSING
SANCTIONS**

State Bar No. 13-3441

FILED SEPTEMBER 30, 2014

PROCEDURAL HISTORY

The State Bar of Arizona ("SBA") filed its complaint on July 18, 2014. On July 21, 2014, the complaint was served on Mr. Fergus 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.¹ The Presiding Disciplinary Judge ("PDJ") was assigned to the matter. A notice of default was properly issued on August 20, 2014, given Mr. Fergus' failure to file an answer or otherwise defend. Mr. Fergus did not file an answer or otherwise defend against the complainant's allegations and default was properly entered on September 15, 2014. That same date a notice of aggravation and mitigation hearing was sent to all parties notifying them the aggravation/mitigation hearing was scheduled for September 29, 2014 at 9:00 a.m., at the State Courts Building, 1501 West Washington, Hearing Room 109, Phoenix, Arizona 85007-3231. On September

¹ All references to rules are to the Arizona Rules of the Supreme Court.

29, 2014, the Hearing Panel, composed of Sandra E. Hunter, attorney member and Bruce M. Brannan, public member heard argument.

The purpose of an aggravation/mitigation hearing is not only to weigh mitigating and aggravating factors, but also to assure there is a nexus between a respondent's conduct deemed admitted and the merits of the SBA's case. A respondent against whom a default has been entered no longer has the right to litigate the merits of the factual allegations of the complaint. However, the respondent retains the right to appear and participate in the hearing concerning that nexus and the sanctions sought. Included with that right to appear is the right to dispute the allegations relating to aggravation and to offer evidence in mitigation. Mr. Fergus was afforded these rights.

Due process requires a hearing panel to independently determine whether, under the facts deemed admitted, ethical violations have been proven by clear and convincing evidence. The hearing panel must also exercise discretion in deciding whether sanctions should issue for the respondent's misconduct. If the hearing panel finds that sanctions are warranted, then it independently determines which sanctions should be imposed. It is not the function of the hearing panel to simply endorse or "rubber stamp" any request for sanctions.

FINDINGS OF FACT

The facts listed below are those set forth in the SBA's complaint and were deemed admitted by Mr. Fergus' default.

COUNT ONE of ONE (File no. 13-3441/King)

1. At all times relevant, Mr. Fergus was suspended from the practice of law in Arizona. He had been admitted to practice in Arizona on May 21, 1999.

2. While suspended from the practice of law, Mr. Fergus sent to a former client (Complainant's wife) a "Memorandum Regarding Funding of Trust."

3. The memorandum rendered legal advice by advising the client how to avoid probate of her trust upon her death.

4. The memorandum is on letterhead entitled "Donald E. Fergus Jr. Paralegal."

5. The letterhead address is a mailbox at a Mail Copy Plus business in a Lakeside, Arizona strip mall, next to a Subway restaurant, and does not belong to a law office.

6. Mr. Fergus charged the client \$1,000 and invoiced her in August and September 2013 "For Legal Service Rendered in Connection With: Revised Estate Planning."

7. The described services include preparation of a will, amendment of a trust, preparation of durable financial and health care powers of attorney, and a living will.

8. Mr. Fergus told the bar in screening that while suspended he has "done sporadic paralegal projects as an independent contractor under the supervision of [attorney] Rad Vucichevich, including providing changes to [this client's] separate property trust"

9. In reality, beginning in about 2011, Mr. Fergus worked on about four or five projects for Mr. Vucichevich but none for this client ever, or for any others dating back to October 2012.

10. By rendering legal advice and legal services to Complainant's wife while suspended from the practice of law and while acting as a paralegal without supervision by an active member of the State Bar, Mr. Fergus violated Rule 42 ER 5.5, and Rule 31 (Unauthorized Practice of Law).

11. By falsely claiming to the State Bar that he was supervised by attorney Rad Vucichevich at the time he rendered paralegal services to Complainant's wife, Mr. Fergus knowingly make a false statement of material fact in violation of ER 8.1.

12. By engaging in the unauthorized practice of law while he was suspended from practicing law by order of the Arizona Supreme Court, Mr. Fergus knowingly violated a rule and order of the court in violation of Rule 54.

CONCLUSIONS OF LAW

Mr. Fergus failed to file an answer or otherwise defend against the allegations in the SBA's complaint. Default was properly entered and the allegations are therefore deemed admitted pursuant to Rule 58(d). Based upon the facts deemed admitted, the Hearing Panel finds by clear and convincing evidence that Mr. Fergus violated Rules 31 and 54, and Rule 42, specifically ERs 5.5 and 8.1.

ABA STANDARDS ANALYSIS

In a lawyer discipline case, sanctions are imposed in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* ("Standards"). Rule 58(k). In imposing a sanction, the following factors should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

Duties violated:

Rule 31 and Rule 42, ER 5.5 – Unauthorized Practice of Law.

Mr. Fergus violated his duties to a client and as a professional by engaging in the unauthorized practice of law.

Rule 31. Regulation of the Practice of Law

* * *

(a)2. *Definitions.*

A. "Practice of law" means providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions . . .
- or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

- (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d); or
- (2) using the designations "lawyer," "attorney at law," "counselor at law," "law," "law office," "J.D.," "Esq.," or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

* * *

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar.

(c) Restrictions on Disbarred Attorneys' and Members' Right to Practice. No member who is currently suspended . . . shall practice law in this state or represent in any way that he or she may practice law in this state.

(d) Exemptions. Notwithstanding the provisions of section (b), but subject to the limitations of section (c) unless otherwise stated:

18. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with ER 5.3 of the rules of professional conduct. This exemption is not subject to section (c).

Rule 42 ER 5.5 – Unauthorized Practice of Law [“UPL”]

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Rule 42, ER 8.1 – Knowingly Making a False Statement of Material Fact in Connection with a State Bar Disciplinary Matter. Mr. Fergus violated his duties

to the public and as a professional by his knowingly making a false statement of material fact in connection with a State Bar investigation. He claimed to be supervised by a licensed attorney while providing “paralegal” services when he knew that claim was false.

Rule 54. Grounds for Discipline

Grounds for discipline of members and non-members include the following:

* * *

(c) Knowing violation of any rule or any order of the court. This includes court orders issuing from a state, tribe, territory or district of the United States, including child support orders.

Mr. Fergus violated his duties to the public, the legal system, and as a professional when he engaged in the unauthorized practice of law while suspended, contrary to a Supreme Court Judgment forbidding him to practice law while suspended.

Mental State and Injury:

Mr. Fergus intentionally or knowingly committed the foregoing violations. Mr. Fergus caused actual and potential injury and serious injury to a client, the public, the legal system, and as a professional.

Based on the foregoing, the following Standards are implicated:

ER 5.5 and Rule 31 – Unauthorized Practice of Law

Standard 7.1: Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

ER 8.1 – knowing false statement of material fact to the bar

Standard 5.11(b): Disbarment is generally appropriate when: . . . (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.

Rule 54(c)- Knowing violation of any rule or any order of the court.

Standard 6.21: Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

Standard 8.1: Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

The “most common case” in which disbarment is the appropriate sanction is when “a lawyer has been suspended but, nevertheless, practices law.” *Standards, Commentary to Standard 8.1.* Mr. Fergus intentionally and knowingly violated the terms of his order of suspension by engaging in UPL. Also, he was suspended for

dishonest behavior and acted similarly dishonestly in his false statements to the bar during the screening investigation.

AGGRAVATING AND MITIGATING FACTORS

The Hearing Panel finds the following aggravating factors are present in the record:

Standard 9.22(a), prior disciplinary offenses.

November 30, 2010, SBA File No. 08-2061, suspension for three years and probation for one year following reinstatement on terms to be determined at that time. Respondent instructed in or assisted in the forgery of his deceased client's name on a power of attorney, and in the use of the fraudulently obtained power of attorney to execute trust documents. He then falsely told his secretary that he had witnessed the signatures and instructed her to notarize both documents. After the widow hired an attorney to challenge the probate of the estate, he denied wrongdoing. An investigation followed and he was ultimately terminated from employment. Aggravating factors included: dishonest or selfish motive, substantial experience in the practice of law, and indifference to making restitution. Mitigating factors included: absence of prior disciplinary offenses, character or reputation, and full and free disclosure to the disciplinary board or cooperative attitude toward proceedings. Respondent violated ERs 1.7 (conflict of interest), 8.4(a) (violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another), 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

August 8, 2012, SBA File No. 11-2116, admonition, ERs 1.15 (failure to promptly render a full accounting of fees to a client), 1.16 (failure to refund the unearned portion of an advance fee payment), and Rules 72(a) and (d) (failure to comply with duties following suspension).

Standard 9.22(b), dishonest or selfish motive;

Standard 9.22(c), a pattern of misconduct (dishonesty);

Standard 9.22(d), multiple offenses;

Standard 9.22(f), submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

Standard 9.22(g), refusal to acknowledge wrongful nature of conduct;

Standard 9.22(i), substantial experience in the practice of law;

There are no mitigating factors present in the record.

CONCLUSION

The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.'" *Alcorn*, 202 Ariz. 62, 74, ¶ 41, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). It is the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). And, it is a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the SBA. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

The Hearing Panel has determined the appropriate sanction using the facts deemed admitted, the *Standards*, the aggravating factors, the absence of any mitigating factors, and the goals of the attorney discipline system. Based upon the above, the Hearing Panel orders as follows:

IT IS ORDERED:

1. Mr. Fergus is disbarred from the practice of law effective the date of this Order;
2. Mr. Fergus shall pay restitution of \$1,000.00 plus interest at the maximum statutory rate to Elizabeth Veker King;
3. Mr. Fergus shall pay all costs and expenses incurred by the SBA, plus interest at the maximum statutory rate; and
4. A final judgment and order will follow

DATED this 30th day of September, 2014.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Bruce M. Brannan

Volunteer Public Member

Sandra E. Hunter

Volunteer Attorney Member

Copies of the foregoing mailed/emailed
this 30th day of September, 2014, to:

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Respondent

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Respondent.

No. PDJ-2014-9060

**EFFECTIVE ENTRY OF DEFAULT
AND NOTICE OF AGGRAVATION
/MITIGATION HEARING**

State Bar No. 13-3441

FILED: SEPTEMBER 12, 2014

EFFECTIVE ENTRY OF DEFAULT occurred on September 9, 2014, pursuant to Rule 58(d) of the Rules of the Arizona Supreme Court. The allegations in the complaint are deemed admitted. 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.

NOTICE IS HEREBY GIVEN by the Presiding Disciplinary Judge that an aggravation/mitigation hearing has been set before the Hearing Panel on **Monday, September 29, 2014, at 9:00 a.m.** The hearing is set for 1.5 hours. The location of hearing is State Courts Building, 1501 West Washington, Hearing Room 109, Phoenix, AZ 85007-3231.

DATED this 12th of September, 2014.

Jennifer R. Albright

Jennifer R. Albright, Disciplinary Clerk
Office of the Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
this 12th day of September, 2014.

COPY of the foregoing e-mailed/mailed
this 12th day of September, 2014, to:

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by: JAlbright