OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

JAN 25 2013

FILED BY

BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA, **LEO R. VALVERDE,** **Bar No. 018669** Respondent.	**PDJ-2012-9102** **RULE 58(K) REPORT AND ORDER IMPOSING SANCTIONS** [State Bar No. 12-1698]

On January 14, 2013, the Hearing Panel ("Panel") composed of Jan Enderle, a public member from Maricopa County, George A. Riemer, an attorney member from Maricopa County, and the Presiding Disciplinary Judge ("PDJ") held an aggravation/mitigation hearing pursuant to Supreme Court Rule 58(d), Ariz.R.Sup.Ct. Stacy L. Shuman appeared on behalf of the State Bar of Arizona ("State Bar") and Respondent failed to appear.

PROCEDURAL HISTORY

The State Bar filed its complaint on November 5, 2012. On November 7, 2012, the complaint was served on Respondent 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. On November 13, 2012, the PDJ was assigned to the matter. A notice of default was properly issued on December 4, 2012 as Respondent failed to file an answer or otherwise defend.

On December 11, 2012, a telephonic initial case management hearing took place and Respondent failed to appear after receiving proper notice. Respondent did not file an answer or otherwise defend against the complainant's allegations and default was properly entered on December 17, 2012.

On December 17, 2012, a notice of aggravation and mitigation hearing was sent to all parties notifying them the aggravation mitigating hearing was scheduled for January 14, 2013 at 11:00 a.m. at 1501 West Washington, Court of Appeals, CR 2, Phoenix, Arizona 85007-3231. On December 24, 2012, a notice of change of location for the aggravation and mitigation hearing was sent to all parties notifying them the aggravation mitigating hearing was scheduled for January 14, 2013 at 11:00 a.m. at 1501 West Washington, Court of Appeals, Hearing Room 109, Phoenix, Arizona 85007-3231.

On January 14, 2013, the Panel, duly empanelled, heard argument.

FINDINGS OF FACT

The facts listed below are set forth in the State Bar's complaint and are deemed admitted by default.

1. Respondent represented twenty one year old Paul West (hereinafter referred to as "Client") in the Maricopa County Superior Court case of State v. West, CR2009-124034-002 DT.

2. The client and his nineteen year old co-Defendant were charged with three (3) counts of armed robbery. These offenses represent the first felony offenses for both Defendants.

3. During the representation, Respondent failed to visit his incarcerated client.

4. After bonding out of the Maricopa County jail, the client provided Respondent with the name and contact information of a potential alibi witness.

5. While client testified that Respondent purportedly agreed to contact the witness, Respondent admitted in a post-conviction relief hearing that he did not contact the witness.

6. On September 24, 2009, the co-Defendant pled guilty to two (2) counts of Armed Robbery and was later sentenced to prison for a period of three and a half years.

7. On October 13, 2009, Respondent took client to trial but failed to raise the alibi defense. Client was found guilty on all three (3) counts of armed robbery and was later sentenced to prison for a period of sixteen years.

8. On November 24, 2009, Respondent filed a notice of appeal and motion to withdraw.

9. On December 14, 2009, appellate counsel was appointed for client and a direct appeal was pursued on behalf of client.

10. On February 28, 2011, retained attorney Jay Rock (hereinafter referred to as "Rock") filed a motion to extend the time for filing a Rule 32 petition, motion to compel disclosure and a motion to compel Respondent's interview alleging, among other things, that Rock has been unsuccessful in contacting Respondent for a copy of client's file.

11. On March 4, 2011, the Court ordered Respondent to:

   a. Produce the client's entire file within 15 days of the order;

   b. Appear for an interview at Rock's offices; and

   c. File a Notice of Compliance with the Court within 30 days of the order.

12. On May 23, 2011, Rock filed a Petition for Post-Conviction Relief on behalf of client alleging the following:

a. Respondent failed to adequately communicate with client during the representation;

b. Respondent failed to contact the potential alibi witness as requested by client;

c. Respondent failed to contact other potential alibi witnesses known by the original alibi witness;

d. Respondent acted erratic and disjointed during a certain meeting with a client's friend;

e. Respondent called no witnesses, presented no exhibits and filed no substantive motions during the representation; and

f. Respondent failed to comply with all of the Court's March 4th orders including, but not limited to, providing counsel or client with a copy of the client's file.

13. On August 31, 2011, the State filed a Stipulation to Set a Rule 32 Evidentiary Hearing stating in part "[t]he State must so stipulate because, like present defense counsel, it has not been able to occasion meaningful contact with trial defense counsel concerning Defendant's factual allegations...The State notes, however, that it is expressly *not* conceding error, only that Defendant should have an opportunity to flesh out his claims."

14. On October 17, 2011, Rock filed a Motion to Compel Respondent's interview claiming that all of the allegations set forth in his May 23 motion have

remained unchanged. The Court ordered Respondent to appear for an interview on October 31st.

15. On October 29, 2011, Respondent was jailed during a child support warrant round up for an arrest warrant issued in the Maricopa County Superior Court family law case of *Jakobe v. Valverde*, FC2010000387 for failing to comply with child support orders[1].

16. On November 4, 2011, the Family Court permitted Respondent to participate in the work release program.

17. On December 5, 2011, Rock interviewed Respondent regarding his representation of client and Respondent admitted that he was using cocaine on a daily basis during the time of trial. Respondent also indicated that he would sign the release forms necessary for client to obtain records regarding his drug addiction and rehabilitation. Respondent further indicated that his father was scheduled for potentially life-threatening surgery during the time of trial.

18. On April 6, 2012, the Court held an evidentiary hearing wherein Respondent admitted most of the allegations contained in the original petition. On April 9, 2012, the Court granted client's petition for post-conviction relief.

19. On August 20, 2012, the State dismissed the case against Client.

20. On June 27, 2012, the State Bar sent an initial screening letter to Respondent, directing him to submit a written response to the charges made by Complainant within 20 days of the date of his letter. Respondent was also warned

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[1] Respondent was previously sanctioned for his repeated failure to comply with the child support orders in State Bar File No. 10-1216 (Complainant, Carissa Jakobe).

that a failure to cooperate with a disciplinary investigation is a violation of ER 8.1(b) and Rule 54(d).

21. On July 25, 2012, the State Bar sent a second letter directing Respondent to submit a written response to the charges filed by Complainant within 10 days.

22. Respondent failed to respond to the State Bar inquiries.

VIOLATIONS

1. By failing to contact a potential alibi witness and failing to present an alibi defense, Respondent failed to demonstrate competence in the practice of law in violation of Rule 42, Ariz. R. Sup. Ct., ER 1.1.

2. By failing to contact a potential alibi witness, Respondent failed to abide by the instructions and requests of the client in violation of Rule 42, Ariz. R. Sup. Ct., ER 1.2.

3. By failing to contact a potential alibi witness, Respondent failed to act diligently during his representation of his client in violation of Rule 42, Ariz. R. Sup. Ct., ER 1.3.

4. By failing to adequately communicate and keep the client informed of the status of his case throughout the representation, Respondent violated Rule 42, Ariz. R. Sup. Ct., ER 1.4(a)(2), 1.4(a)(3), (a)(4), (a)(5) and (b).

5. By failing to comply with the March 4, 2011 court orders in the underlying case, Respondent knowingly disobeying an obligation under the rules of a tribunal in violation of Rule 42, Ariz. R. Sup. Ct., ER 3.4(c).

6. By failing to respond to the lawful demand for information by the State Bar of Arizona, Respondent knowingly failed to respond to the disciplinary authority in violation of Rule 42, Ariz. R. Sup. Ct., ER 8.1.

7. By using cocaine on a daily basis during the time of his client's trial, Respondent committed criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in violation of Rule 42, Ariz. R. Sup. Ct., ER 8.4(b).

8. Respondent repeatedly engaged in conduct that was prejudicial to the administration of justice in his client's case in violation of Rule 42, Ariz. R. Sup. Ct., ER 8.4(d).

9. Respondent knowingly disobeyed the Court's March 4, 2011 orders in violation of Rule 54(c), Ariz. R. Sup. Ct.

10. Respondent has refused to cooperate with officials and staff of the State Bar during the investigation of the above-referenced violations in violation of Rule 54(d), Ariz. R. Sup. Ct.

CONCLUSIONS OF LAW

Respondent failed 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 Respondent violated the following:

Count 1: Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.1, 1.2, 1.3, 1.4(a)(2), 1.4(a)(3), (a)(4), (a)(5) and (b), 8.1, 8.4(b), 8.4(d), Rule 54(c) and Rule 54(d);

ABA STANDARDS ANALYSIS

The American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* are a "useful tool in determining the proper sanction." *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). In imposing a sanction, the following factors should consider: (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:

Respondent violated his duty to his client by violating ERs 1.1, 1.2, 1.3, 1.4(a)(2), 1.4(a)(3), (a)(4), (a)(5) and (b), 8.4(b) and 8.4(d). Respondent violated his duty to the public and the administration of justice by violating ERs 3.4(c), 8.4(c), and 8.4(d). Respondent also violated his duty owed as a professional by violating ER 8.1 and Rules 54(c) and (d).

Mental State and Injury:

ER 1.1: <u>Competence</u>

Standard 4.53, Reprimand is generally appropriate when a lawyer: (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

ERs 1.2, 1.3, 1.4: <u>Authority/Diligence/Communication</u>

Standard 4.41, Disbarment is generally appropriate when: (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.

ERs 3.4, 8.4(d): Fairness to Opposing Party and Counsel/Disobey Court Order

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

ERs 8.4(b): Criminal Act

Standard 5.12, Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

ERs 8.1, Rule 54 (c) and (d): Failure to Respond/Cooperate with Disciplinary Investigation and Proceedings

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.

Aggravating and Mitigating Factors:

The Panel finds the following aggravating factors are present in this matter:

- *Standard* 9.22(a) prior disciplinary offenses.
    1. File Nos. 10-1118, 10-1216, 10-2362: Respondent was suspended for one (1) year retroactive to February 25, 2011 for violating ERs 1.3, 3.4(c), ER 8.1(b), ER 8.4(d), and Rules 53(c), (d) & (f), Ariz. R. Sup. Ct. [effective 2010].

2. Administrative suspension effective February 25, 2011 for failure to comply with Rule 45, Ariz.R.Sup.Ct., Mandatory Continuing Legal Education requirements.

- *Standard* 9.22(c) pattern of misconduct.
- *Standard* 9.22(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency.
- *Standard* 9.22(i) substantial experience in the practice of law [15 years].
- *Standard* 9.22(k) illegal conduct, including that involving the use of controlled substances.

The Panel further finds that no mitigating factors are present in this matter.

Based upon the foregoing, the Panel determined that immediate disbarment is the appropriate sanction.

PROPORTIONALITY

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or proportionality review is "an imperfect process." *In re Owens,* 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *See In re Peasley,* 208 Ariz. 27, 35, 90 P.3d 764, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In re: Jeff C. Jackson, SB-09-0079, Respondent was disbarred for violating ERs 1.3, 1.4(a), 1.4(a)(4), 1.5(a), 1.5(b), 1.15(d), 1.16, 3.2, 3.4(a), 3.4(d), 8.1(b), 8.4(d) and Rule 53(c), 53(d) and 53(f). In multiple counts, Respondent failed to adequately communicate and diligently represent clients and virtually abandoned clients. Respondent collected retainers and fees from clients and then failed to perform any legal services. Respondent further failed to pay court ordered child support and failed to cooperate with the State Bar's investigation.

This case is similar to the above in that it involves an attorney that has violated a substantial number of rules of professional conduct involving his representation of a client, his personal conduct, and in connection with his duties as a member of the bar.

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. at 74, 41 P.3d at 612 (2002)(quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966). It is also the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is also a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the State Bar. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

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

IT IS ORDERED:

1. Respondent shall be immediately disbarred from the practice of law.
2. Respondent shall pay all costs and expenses incurred by the State Bar and the Office of the Presiding Disciplinary Judge in this proceeding within thirty days of the execution of the Final Judgment and Order in this matter.
3. A Final Judgment and Order will follow.

DATED this 25 day of January, 2013.

W. J. O'Neil

Honorable William J. O'Neil
Presiding Disciplinary Judge

Jan Enderle / mps

Jan Enderle, Volunteer Public Member

George A. Riemer Volunteer Attorney Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
this 25 day of January, 2013.

Copies of the foregoing mailed/<u>emailed</u>
this 25 day of January, 2013, to:

Leo R. Valverde
1748 East South Fork Drive
Phoenix, Arizona 85048-4187
Email:lrbalver@asu.edu
Respondent

Craig D. Henley
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

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

by: