

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 Suspended¹ Member of
the State Bar of Arizona,

ROBERT A. GAFFNEY, JR.,
Bar No. 021491

Respondent.

PDJ-2013-9059

**REPORT AND ORDER IMPOSING
SANCTIONS**

[State Bar File Nos. 12-1947,
12-2732, 12-2815, 12-3069,
12-3145, 12-3177]

FILED: OCTOBER 21, 2013

PROCEDURAL HISTORY

The State Bar of Arizona (SBA) filed its complaint on July 9, 2013. On July 11, 2013, 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. The Presiding Disciplinary Judge of the Supreme Court of Arizona (PDJ) was assigned to the matter. A notice of default was properly filed on August 6, 2013, and served upon Mr. Gaffney. That notice cautioned him 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." Mr. Gaffney did not file an answer or otherwise defend against the allegations in the complaint and default was effective on August 27, 2013. Effective Entry of Default

¹ Respondent was summarily suspended effective February 22, 2013 for failure to comply with mandatory continuing legal education requirements.

was properly filed by the disciplinary clerk on August 27, 2013. That notice again cautioned Mr. Gaffney that “[D]efault 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.”

That Effective Entry of Default also included a notice that was sent to all parties notifying them that the aggravation/mitigation hearing was scheduled for September 19, 2013, at 9:00 a.m. at 1501 West Washington, Court of Appeals Courtroom 2, Phoenix, Arizona 85007-3231. On September 19, 2013, the Hearing Panel, comprised of attorney member Scott I. Palumbo, and public member, Richard L. Westby, and the PDJ heard the matter.

The State Bar extensively detailed the facts alleged in its complaint and then summarized the facts deemed admitted in its prehearing memorandum. Mr. Gaffney appeared telephonically and testified. The State Bar bears the burden of proof by clear and convincing evidence that Mr. Gaffney committed the violations charged. Mr. Gaffney failed to file an answer or otherwise defend against the allegations in the SBA’s complaint. Default was properly entered and effective. Mr. Gaffney’s failure to answer is therefore deemed admitted 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 nexus between a respondent’s judicially admitted behavior and the merits of the State Bar’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 mitigation. Mr. Gaffney was afforded these rights.

At the same time, the Hearing Panel does not operate in a vacuum. The State Bar properly demanded documents and records from Mr. Gaffney. The testimony of a defaulted respondent is not a reliable substitute for documents and records that were required to be disclosed but were not. A Hearing Panel is not precluded from giving consideration to the failure to cooperate or disclose records or documents.

Regardless, due process requires the 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 Panel finds that sanctions are warranted, then it independently determines which sanctions should be imposed. It is not the function of a Hearing Panel to simply endorse or "rubber stamp" any request for sanctions.

At the conclusion of the hearing, the Hearing Panel requested the State Bar file the Exhibits with the Disciplinary Clerk that undergirded those allegations deemed admitted. On September 30, 2013, the State Bar filed its Exhibits, which are admitted and incorporated into the record. The filing of the Exhibits sets forth a basis for the judicially admitted allegations within the complaint. They substantiate that which might have been veiled by abstraction in any future reinstatement hearing.

FINDINGS OF FACT

GENERAL ALLEGATIONS

We hereby adopt and incorporate by reference the factual background of this case, as fully detailed in the admitted complaint. [See the admitted complaint for further detailed findings of fact.] Mr. Gaffney was licensed to practice law in the state of Arizona on July 9, 2002, but was suspended from the practice of law in Arizona on or about February 22, 2013, because he failed to comply with the requirements of Mandatory Continuing Legal Education. Mr. Gaffney was admitted to practice law in Ohio on June 16, 2009. He is subject to this Court's jurisdiction in these disciplinary proceedings. See Rule 46 Ariz. R. Sup. Ct.

As of the date of the filing of the complaint, Respondent's address of record with the State Bar of Arizona was Law Offices of Robert Gaffney, 7135 East Camelback Road, Suite 230, Scottsdale, Arizona 85251. Upon information and belief, Mr. Gaffney moved to Cleveland, Ohio during or about the third quarter of 2012, at which time he changed the location from which he was providing legal services. As of at least October 12, 2012, Mr. Gaffney continued to file pleadings with the Clerk of the Superior Court of Maricopa County that included the Scottsdale address. As of December 19, 2012, Respondent had not advised the Clerk of the Superior Court of Maricopa County and the Maricopa County Superior Court administrator, separately and in writing, of his new office address and law firm affiliation, which he had a duty to do when they differed from that listed in the directory of the State Bar of Arizona. Due to Mr. Gaffney's failure to notify the appropriate entities, Maricopa County Superior Court Judge Joseph Welty entered a minute entry order on December 19, 2012, in which he directed the clerk of court

to update Mr. Gaffney's contact information to that set forth in the minute entry: 75 Public Sq. #714, Cleveland, OH 44113; gaffneylawoffices@gmail.com. [Exhibit 1, Bates No. SBA000001]

Count One - Representation of Christopher Robert Youngs

Mr. Gaffney was appointed by Division One of the Court of Appeals to represent Mr. Youngs on direct appeal from Youngs conviction on 10 counts of sexual exploitation of a minor under 15 years of age (class 2 dangerous felonies) (*State v. Youngs*, Maricopa County Superior Court File No. CR2010-006043-001). Mr. Gaffney was responsible for reviewing the record on appeal, communicating with Mr. Youngs, and pursuing any meritorious issues on appeal by filing the appropriate briefs with the Court of Appeals. [Exhibit 2, Bates No. SBA000010]

Mr. Gaffney filed a three-page *Anders* brief that was held "wholly deficient" by the Court of Appeals who found there were at least two non-frivolous issues that should have been briefed by Mr. Gaffney. The *Anders* brief was filed after two motions for extension of time were filed and granted. The record reveals at a minimum the second motion was filed in bad-faith. Mr. Gaffney filed that second motion four days after the latest deadline to file the opening brief had passed and lied to Youngs about having timely filed a motion for extension of time. [Exhibit 2, Bates Nos. SBA000019 – 022, 027-030, 034-042]

Mr. Gaffney had little communication with Youngs and the communication he did have was by means of form-like letters lacking any substantive discussion of the issues on appeal identified by Youngs or discussion of any other matters regarding the appeal addressed by Youngs numerous letters to Mr. Gaffney. Mr. Gaffney had no phone conversations with Youngs and never visited him in person to discuss the

appeal or Youngs' concerns and objectives. In addition, Mr. Gaffney did not provide his Ohio address and phone number to Youngs despite the fact Mr. Gaffney was located in Ohio during the entire time he was appointed to represent Youngs and was representing Youngs from Ohio. [Exhibit 2, Bates Nos. SBA000014, 015-018, 024-025, 026, 031, 032-033, 043]

Mr. Gaffney, upon termination of representation, failed to take reasonably practicable steps to protect Youngs' interests, such as giving reasonable notice to Youngs and surrendering documents to which Youngs was entitled. The Court of Appeals repeatedly ordered Mr. Gaffney to provide the documents requested by Youngs and needed by Youngs to prepare a supplemental brief. After five months of such orders and requests, Mr. Gaffney finally mailed Young some of the documents he was entitled to receive, but never supplied Youngs all of the documents he was entitled to. [Exhibit 2, Bates Nos. SBA000051-55, 056-058, 059, 059A, 060-061, 062-064, 065-067, 068-070, 071-073, 074-075, 078-084, 085-088, 089-093, 094-097, 101-119, 124-125]

Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 2, Bates Nos. SBA000130-131]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count One of the State Bar's Complaint and supported by the exhibits, Mr. Gaffney violated ERs 1.1, 1.3 and 3.2, ERs 1.2(a), and 1.4(a) & (b), ER 1.15(d), ER 1.16(d), ER 8.1(b), ER 8.4(d), ER 3.4(c) and Rule 54(c), Ariz. R. Sup. Ct., 7 and Rule 32(c)(3), Ariz. R. Sup. Ct.

Count Two - Representation of Israel Christian Legliu

Mr. Gaffney was appointed by Maricopa Superior Court Judge Paul McMurdle to represent Mr. Legliu in his Rule 32 post-conviction relief proceeding after Legliu filed a pro se Notice of Post-Conviction Relief. Mr. Gaffney was ordered to file a petition for post-conviction relief within 60 days. (*State v. Legliu*, Maricopa County Superior Court File No. CR2007-009026-002). Mr. Gaffney was responsible for reviewing the record, communicating with Mr. Legliu, and pursuing any meritorious issues in the petition for post-conviction relief on Mr. Legliu's behalf. [Exhibit 3, Bates Nos. SBA000137-138]

Mr. Gaffney filed a Notice of Completion of Post-Conviction Review which he stated he would not be filing a petition for post-conviction relief because there were no meritorious issues justifying the filing of a petition. The Notice was filed after two motions for extension of time were filed and granted. The record reveals that Mr. Gaffney knew direct appeal was still pending as his extension motions were based upon appellate counsel having the record and file and not providing it to him for review in preparation of filing a Rule 32 petition. Mr. Gaffney filed the second motion five days after the latest deadline to file the post-conviction petition had passed. Mr. Gaffney filed his notice of completion of post-conviction review fifteen days after the deadline set as a result of his second extension motion. [Exhibit 3, Bates Nos. SBA000139-140, 141, 142-143, 144, 145-146]

Mr. Gaffney, was ordered to remain in an advisory capacity to Mr. Legliu until the Superior Court made a final determination on any post-conviction relief. Maricopa Superior Court Judge Welty ordered Mr. Gaffney to provide Mr. Legliu his complete appellate file within 15 days of June 27, 2012, and to file a notice of

compliance once the file was surrendered to Mr. Legliu. Despite repeated requests by Mr. Legliu and others on his behalf, and multiple orders by the Superior Court to provide Mr. Legliu his file, Mr. Gaffney did not produce the file or file a notice of compliance until October 12, 2012 – four months after he was originally order to do so. [Exhibit 3, Bates Nos. SBA000147-148, 149, 150, 151-152]

Mr. Gaffney had no communication with Legliu. Mr. Gaffney had no phone conversations with Legliu and never visited him in person to discuss the Rule 32 petition and Legliu's concerns and objectives. In addition, Mr. Gaffney did not provide his Ohio address and phone number to Legliu despite the fact Mr. Gaffney was located in Ohio during the entire time he was appointed to represent Legliu and was representing Legliu from Ohio. Mr. Gaffney also failed to notify the Superior Court his current address preventing the court from contacting him in relation to Mr. Legliu's additional pro se petition and requests for his file. [Exhibit 3, Bates Nos. SBA000153-154, 155, 156-157, 158]

Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 3, Bates Nos. SBA000164-165]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count Two of the State Bar's Complaint and supported by the exhibits, Mr. Gaffney violated ERs 1.2, 1.3, 1.4(a) & (d), 1.15, 3.4(c) and ER 8.1(b) and Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 32(c)(3), Ariz. R. Sup. Ct.

Count Three – Representation of Brian Dean Christ

Mr. Gaffney was appointed by Maricopa Superior Court Judge Paul McMurdle to represent Mr. Christ in his Rule 32 post-conviction relief proceeding after Christ filed a pro se Notice of Post-Conviction Relief. (*State v. Christ*, Maricopa Superior Court File No. CR2009-118151-003). Mr. Gaffney was ordered to file a petition for post-conviction relief within 60 days. Mr. Gaffney was responsible for reviewing the record, communicating with Mr. Christ, and pursuing any meritorious issues in the petition for post-conviction relief on Mr. Christ's behalf. [Exhibit 4, Bates Nos. SBA000179-180]

Mr. Gaffney filed a Notice of Completion of Post-Conviction Review in which he stated he would not be filing a petition for post-conviction relief because there were no meritorious issues justifying the filing of a petition. The Notice was filed after two motions for extension of time were filed and granted. The record reveals that both motions were filed days after the preceding deadlines had passed. Mr. Gaffney claimed the Public Defender's Office has sent the entire file to Christ and Christ had not forwarded it to him. The Notice of Completion of Post-Conviction Review was filed based on available records and not the entire file. [Exhibit 4, Bates Nos. SBA000181-182, 183, 184-185]

There is no evidence Mr. Gaffney called, wrote or visited Christ. Mr. Christ complained to the Superior Court that he could not reach Mr. Gaffney; letters were being returned and the Arizona phone number he had was "not a good number." In addition, Mr. Gaffney did not provide his Ohio address and phone number to Christ despite the fact Mr. Gaffney was located in Ohio during the entire time he was

appointed to represent Christ and was representing Christ from Ohio. [Exhibit 4, Bates Nos. SBA000188, 191-192]

Mr. Gaffney, was ordered to remain in an advisory capacity to Mr. Christ until the Superior Court made a final determination on any post-conviction relief. Maricopa Superior Court Judge Welty ordered Mr. Gaffney to provide Mr. Christ his complete appellate file within 15 days of June 27, 2012, and to file a notice of compliance once the file was surrendered to Mr. Christ. Despite repeated requests by Mr. Christ and multiple orders by the Superior Court to provide Mr. Christ his file, Mr. Gaffney never provided any of the file he possessed or responded to any of the Superior Court's orders. [Exhibit 4, Bates Nos. SBA000186-187, 193-205, 206, 207-208, 209-210, 211-214]

Mr. Gaffney also failed to notify the Superior Court his current address. Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 4, Bates Nos. SBA000217-218]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count Three of the State Bar's Complaint and supported by the exhibits, Mr. Gaffney violated ERs 1.2, 1.3, 1.4(a) & (b) 1.15, 1016(d) and ERs 3.2 and 3.4(c) and ERs 8.1(b), 8.4(d) and Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 32(c)(3), Ariz. R. Sup. Ct.

Count Four – Representation of Mitchell Wilson Nolan, Jr.

Mr. Gaffney was appointed by Maricopa Superior Court Judge Paul McMurdle to represent Mr. Nolan in his Rule 32 post-conviction relief proceeding after Mr. Nolan filed a pro se Notice of Post-Conviction Relief. (*State v. Nolan*, Maricopa

Superior Court File No. CR2010-128199-001). Mr. Gaffney was ordered to file a petition for post-conviction relief within 60 days. Mr. Gaffney was responsible for reviewing the record, communicating with Mr. Nolan, and pursuing any meritorious issues in the petition for post-conviction relief on Mr. Nolan's behalf. [Exhibit 5, Bates Nos. SBA000222-225]

Mr. Nolan communicated to the Superior Court that he and his fiancé has not been able to reach Mr. Gaffney by phone and that he had sent a letter detailing his concerns and potential claims for the post-conviction petition and had received no response to that letter. The record indicates Mr. Nolan and prison officials attempted to contact Mr. Gaffney repeatedly for months to no avail. Mr. Gaffney's first and only contact with Mr. Nolan regarding the merits of any claims for a post-conviction petition was five months after he was appointed to represent Mr. Nolan. [Exhibit 5, Bates Nos. SBA000226, 227-228]

Mr. Gaffney failed to file a Petition for Post-Conviction Relief or a Notice of Completion of Post-Conviction Review within the original deadline set by the Superior Court. Based upon communication from Mr. Nolan the Court ordered Mr. Gaffney to file a pleading within 20 days despite having missed the original deadline. Three days later Mr. Gaffney filed a motion for an extension of time stating he had received no materials related to the case from Mr. Nolan's prior counsel. Nearly a month later Mr. Gaffney communicated by letter – his first and only communication with Mr. Nolan – that there were no meritorious claims identified justifying a Petition and he subsequently filed a Notice of Completion of Post-Conviction Review indicating there were no issues justifying the filing of a Petition. Subsequently, after the Superior Court removed Mr. Gaffney from the

case because it was unable to locate him in relation to this case and others and subsequent to Mr. Nolan's effort's to file a pro se Petition for Post-Conviction Relief, Maricopa Superior Court Judge Welty found Mr. Nolan had raised a colorable claim to permit his Rule 32 proceeding to move forward. [Exhibit 5, Bates Nos. SBA000229, 232, 233-234, 240-263, 264-265]

There is only evidence that Mr. Gaffney wrote Mr. Nolan one time. There is no evidence he returned any calls from Mr. Nolan or responded to any of Mr. Nolan's letters. In addition, Mr. Gaffney did not provide his Ohio address and phone number to Nolan despite the fact Mr. Gaffney was located in Ohio during the entire time he was appointed to represent Christ and was representing Nolan from Ohio. [Exhibit 5, Bates Nos. SBA000270, 271]

Mr. Gaffney, was ordered to remain in an advisory capacity to Mr. Nolan until the Superior Court made a final determination on any post-conviction relief. Maricopa Superior Court Judge McGurdle ordered Mr. Gaffney to provide Mr. Nolan his complete appellate file within 15 days of September 29, 2011, and to file a notice of compliance once the file was surrendered to Mr. Nolan. Despite repeated requests by Mr. Nolan and multiple orders by the Superior Court to provide Mr. Nolan his file, Mr. Gaffney finally provided the file in June 2012 - nearly eight month after he was ordered to do so. [Exhibit 5, Bates Nos. SBA000235-237, 254-263]

Mr. Nolan tried repeatedly to represent himself in his post-conviction proceedings, but his pleadings were rejected because Mr. Gaffney remained counsel of record. Mr. Nolan had to make multiple attempts to have Mr. Gaffney removed due to Mr. Gaffney never responding to his letters and calls seeking advisement as

to his post-conviction petition. [Exhibit 5, Bates Nos. SBA000266-268, 269, 272, 273-278, 279-280]

Mr. Gaffney also failed to notify the Superior Court his current address. Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 5, Bates No. SBA000281]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count Four of the State Bar's Complaint and supported by the exhibits, Mr. Gaffney violated ERs 1.2, 1.3, 1.4(a) & (b) 1.15(d), 1.16(d) and ERs 3.2 and 3.4(c) and ERs 8.1(b), 8.4(d) and Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 32(c)(3), Ariz. R. Sup. Ct.

Count Five - Representation of Adrian Joshua Espinoza

Mr. Gaffney was appointed by Maricopa Superior Court Judge Paul McMurdle to represent Mr. Espinoza in his Rule 32 post-conviction relief proceeding after Espinoza filed a pro se Notice of Post-Conviction Relief. Mr. Gaffney was ordered to file a petition for post-conviction relief within 60 days. (*State v. Espinoza*, Maricopa County Superior Court File No. CR2005-009026-001). Mr. Gaffney was responsible for reviewing the record, communicating with Mr. Espinoza, and pursuing any meritorious issues in the petition for post-conviction relief on Mr. Espinoza's behalf. [Exhibit 6, Bates Nos. SBA000296-297]

Mr. Gaffney filed a Notice of Completion of Post-Conviction Review which he stated he would not be filing a petition for post-conviction relief because there were no meritorious issues justifying the filing of a petition. The Notice was filed after a request for an extension of time to file because the Office of the Legal Advocate had

sent its file to Espinoza and Espinoza had not responded to Mr. Gaffney's requests to forward him the file so he could evaluate whether there were potential claims for a post-conviction petition. Mr. Gaffney finally filed his Notice of Completion of Post-Conviction Review a month after the last deadline set by the court's granting of his untimely motion for extension of time to file. In the Notice, Mr. Gaffney indicated he had communicated with Mr. Espinoza. [Exhibit 6, Bates Nos. SBA000298-299, 300, 301-302]

Mr. Gaffney, was ordered to remain in an advisory capacity to Mr. Espinoza until the Superior Court made a final determination on any post-conviction relief. Maricopa Superior Court Judge Welty ordered Mr. Gaffney to provide Mr. Espinoza his complete appellate file within 15 days of October 7, 2011, and to file a notice of compliance once the file was surrendered to Mr. Espinoza. Despite repeated requests by Mr. Espinoza Mr. Gaffney never produced the file or filed a notice of compliance. [Exhibit 6, Bates Nos. SBA000303-304, 333-336, 337-338]

The record does not indicate Mr. Gaffney had any communication with Espinoza. Mr. Gaffney had no phone conversations with Espinoza and never visited him in person to discuss the Rule 32 petition and Espinoza's concerns and objectives. In addition, Mr. Gaffney did not provide his Ohio address and phone number to Espinoza despite the fact Mr. Gaffney was located in Ohio during the entire time he was appointed to represent Espinoza and was representing Espinoza from Ohio. Mr. Gaffney also failed to notify the Superior Court his current address.

Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 6, Bates Nos. SBA000341-342]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count Five of the State Bar's Complaint and supported by the exhibits, Mr. Gaffney violated ERs 1.2(a), 1.3, 1.4(a) & (d), 1.15(d), 1.16(d) and ERs 3.2, 3.4(c), 8.1(b) and 8.4(c) and Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 32(c)(3), Ariz. R. Sup. Ct.

Count Six - Representation of Garcia Sanabria, Francis Sermenon, Tyrone Thompson, Joey Reineke, Ronald Lee Larsh, Jr., James Odom, Johnny Shane McNeel, Paul Henry Gudino, Juan Herrera, Tiger Flowers, Jr. and Anthony Lamar Roper

Mr. Gaffney was appointed to represent eleven other criminal defendants either on direct appeal or in relation to Rule 32 post-conviction proceedings. In all of these cases Mr. Gaffney was removed by the Superior Court of Maricopa County for failure to communicate with those he represented, for failure to timely file pleadings he was appointed and ordered to file and for failure to update his contact information with the court, leaving the court unable to locate him. [Exhibit 7, Bates Nos. SBA000350-351, 357-358, 359-361, 362; Exhibit 8, Bates Nos. SBA000393-394, 398, 399-401, 402; Exhibit 9, Bates Nos. SBA000414-415, 455; Exhibit 10, Bates Nos. SBA000464-465, 466, 467-469, 470; Exhibit 11, Bates Nos. SBA000545-546, 559, 560-562, 563; Exhibit 12, Bates Nos. SBA000573-574, 584-585, 586-587, 588; Exhibit 13, Bates Nos. SBA000604-605, 606, 607-608, 609; Exhibit 14, Bates Nos. SBA000616-618, 624, 625-626, 627; Exhibit 15, Bates Nos. SBA000636-637, 650-651, 652; Exhibit 16, Bates Nos. SBA000664-665, 675, 677; Exhibit 17, Bates Nos. SBA000688-689, 693-694, 695]

The evidence is clear that Mr. Gaffney had little to no communication with the Maricopa County Superior Court, and in one case the Arizona Court of Appeals, Division One, for months. In many of these eleven cases he filed no pleadings, had no contact with his clients and had no contact with the court. In a few of the cases he filed motions for extension of time to file, once claiming he did not even know he had been appointed to a case, but never filed any substantive pleadings on his clients' behalf or otherwise represented their interests. In fact, the evidence indicates Mr. Gaffney had little to no contact with these eleven clients and far less contact with these clients than with the clients that are the subject of the first five counts discussed herein.

The Maricopa County Superior Court was made aware of the lack of representation, and the lack of filing pleadings within deadlines as well as the inability of the Rule 32 Management Unit to locate Mr. Gaffney. Mr. Gaffney was ordered to appear and explain why he had abandoned his clients and his responsibilities to the court. Mr. Gaffney failed to appear and failed to communicate with the court regarding the orders that he appear to explain himself. The court had to expend the resources to order extensions of time, to set a hearing, to set a second hearing, which it later canceled and instead removed Mr. Gaffney from all eleven cases summarily. The court then had to appoint new counsel and further delay proceedings in these eleven cases while new counsel obtained the record and met with the defendants and prepared pleadings.

Mr. Gaffney failed to keep his address current with the State Bar and knowingly failed to respond to a lawful demand for information from a disciplinary authority. [Exhibit 17, Bates Nos. SBA000700-701]

The Panel agrees with the conclusions of the State Bar and finds that by engaging in the conduct generally set forth in Count Six of the State Bar's Complaint and supported by the Exhibits, Mr. Gaffney violated ERs 1.2(a), 1.3, 1.4(a) & (d), 1.16(d) and ERs 3.2, 3.4(c), and 8.4(c) and Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 32(c)(3), Ariz. R. Sup. Ct.

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 be considered: (1) the duties 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 clients by violating ER 1.1, ER 1.2(a), ER 1.3, ER 1.4(a) & (b), ER 1.15(d), ER 1.16(d), ER 3.2 and ER 8.4(d); his duty to the public by violating ER 8.4(d); his duty to the legal system by violating ER 3.4(c), ER 8.4(d) and Rule 54(c), Ariz. R. Sup. Ct.; and his duty to the legal profession by violating ER 8.1(b) and Rules 32(c)(3) and 54(d), Ariz. R. Sup. Ct.

The Lawyer's Mental State

Respondent engaged in most of—if not all—of the misconduct with a knowing or intentional state of mind (e.g., Respondent was aware of the duties he owed to his clients and the existence of various court orders, including deadlines for filing documents on his clients' behalf, but failed to honor his duties or comply with court orders).

The Extent of the Actual or Potential Injury

Respondent's conduct resulted in actual harm to his clients to the extent that he failed to adequately communicate with his clients regarding their cases; caused delay in the processing of his clients' cases (and, in some cases, failed to file any substantive pleadings on his clients' behalf); and failed to provide some of his clients with all relevant records, even when ordered by the court to do so (some clients were unable to thoroughly prepare their *pro se* petitions for post-conviction relief due to Respondent's failure to provide them with the files he maintained on their behalf). There was actual harm to the public insofar as there was delay in the processing of felony criminal cases and the public's interest in the finality of serious criminal charges that had been filed. There was actual harm to the profession because Respondent failed to respond to bar counsel during the State Bar's screening investigation, failed to participate in the formal disciplinary proceeding, and failed to provide the State Bar with a current address where staff could communicate with him. There was actual harm to the legal system insofar as various courts had to undertake efforts to attempt to locate Respondent and remove him as counsel due to his abandonment of his clients.

Applicable Presumptive Standards

Respondent violated his duty to his clients, thereby implicating *Standard 4.41*. *Standard 4.41* states, "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.” In this case, Respondent failed to adequately communicate with his clients, failed to diligently and promptly represent them. Respondent abandoned his clients and failed to take reasonable steps upon termination of representation to protect his clients’ interests. For example, Respondent failed to notify his clients that he was no longer going to represent them and failed to provide his clients or their subsequent counsel with the files he maintained on their behalf, which could have resulted in serious harm to his clients’ legal rights.

Respondent also violated his duty to the legal system, which implicates *Standard 6.21*. *Standard 6.21* states, “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.” In this case, Respondent failed to comply with court orders directing him to file, or to timely file, petitions for post-conviction relief on his clients’ behalf and failed to provide his clients or their subsequent counsel with the files he maintained on their behalf, as ordered by the court, and did so to avoid the effort required for appropriate representation (it appears Respondent lost interest in his clients when he moved from Arizona to Ohio).

Respondent also violated his duty owed as a professional, which implicates *Standard 7.0*. *Standard 7.2* states, “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.” In this case, Respondent violated his duty owed as a professional by abandoning his clients, failing to respond to bar counsel during the State Bar’s

investigation into charges of misconduct, and failing to participate in the formal disciplinary proceeding.

Aggravation and Mitigation

The Hearing Panel finds the following aggravating and mitigating factors are supported by reasonable evidence.²

Aggravating Factors

Standard 9.22(b): dishonest or selfish motive (Respondent accepted fees but simply abandoned multiple clients instead of performing the work he was court-appointed to complete);

Standard 9.22(c): a pattern of misconduct;

Standard 9.22(d): multiple offenses;

Standard 9.22(e): bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency (i.e., Respondent failed to respond to bar counsel's letters regarding the State Bar's investigation into the allegations of misconduct);

Standard 9.22(h): vulnerability of victims (Respondent's clients were incarcerated and did not have access to their record/file or sufficient legal material to adequately represent themselves); and

Standard 9.22(i): substantial experience in the practice of law (Respondent was admitted to practice law in Arizona on July 9, 2002, and in Ohio on June 16, 2009).

² Factors that may aggravate or mitigate the presumptive sanction "need only be supported by reasonable evidence." *In re Abrams*, 227 Ariz. 248, 252 ¶27, 257 P.3d 167, 171 (2011) (quoting *In re Peasley*, 208 Ariz. 27, 36 ¶36, 90 P.3d 764, 773 (2004)).

Mitigating Factors

Standard 9.32(a) – absence of a prior disciplinary history.

RESTITUTION

The Hearing Panel finds that restitution is not an issue in this case since Respondent was court-appointed to represent the clients and the State Bar presented no evidence that any client, or anyone on any client's behalf, paid any funds to Respondent.

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." *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 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 similar conduct by other lawyers." *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993) (citing *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990)). It is also a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the State Bar. *In re Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994) (citing *In re Loftus*, 171 Ariz. 672, 675, 832 P.2d 689, 692 (1992)).

The Exhibits in this case were extensive and the review of those documents time consuming. At the same time, the panel recognized that the time required evaluating those exhibits offered additional time for Mr. Gaffney to file a motion to set aside the default, if he were so inclined. A Civil Rule 60(3) motion must be filed within a "reasonable time." Regardless, no such motion was filed. Under Rule 60(c), neglect may be defensible if it equates with the actions of a reasonably

prudent person in the same circumstances. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 871 P.2d 698 (Ct. App. Div 1, 1993). The record lends no support for a 60(c) excusable neglect argument.

The Hearing Panel has made the above findings of fact and conclusions of law, and determined an appropriate sanction based upon the facts deemed admitted, the ABA *Standards*, the presence of aggravating and mitigating factors, and the goals of the attorney discipline system. Based upon the above, the Hearing Panel orders as follows: Respondent shall be disbarred from the practice of law effective immediately and pay costs of these disciplinary proceedings. A final Judgment and Order will follow.

DATED this 21st day of October, 2013.

/s/ William J. O'Neil

The Honorable William J. O'Neil
Presiding Disciplinary Judge

CONCURRING:

/s/ Scott I. Palumbo

Scott I. Palumbo, Attorney Member

/s/ Richard L. Westby

Richard L. Westby, Public Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 21st day of October, 2013.

Copies of the foregoing mailed/emailed
this 22nd day of October, 2013, to:

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Respondent

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Respondent's Alternative Address

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Respondent's Alternative Address

Copy of the foregoing hand-delivered/emailed
this 22st day of October, 2013, to:

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Sandra Montoya
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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 SUSPENDED
MEMBER OF THE STATE BAR OF ARIZONA,

ROBERT A. GAFFNEY, JR.

Bar No. 021491

Respondent.

PDJ-2013-9059

FINAL JUDGMENT AND ORDER

[State Bar No. 12-1947, 12-2732,
12-2815, 12-3069, 12-3145 and
12-3177]

FILED NOVEMBER 12, 2013

IT IS HEREBY ORDERED that Respondent, **Robert A. Gaffney**, is hereby disbarred for his conduct in violation of the Arizona Rules of Professional Conduct, effective immediately and his name is hereby stricken from the roll of lawyers. Mr. Gaffney 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 that, pursuant to Rule 72 Ariz. R. Sup. Ct., Respondent shall immediately comply with the requirements relating to notification of clients and others.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$2,429.36, within thirty (30) days from the date of service 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 12th day of November, 2013.

William J. O'Neil

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

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 12th day of November, 2013.

Copies of the foregoing mailed/emailed
this 12th day of November, 2013, to:

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Respondent's Alternative Address

Copy of the foregoing hand-delivered/emailed
this 12th day of November, 2013, to:

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