

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

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

**HARLAN W. GREEN,
Bar No. 006688,**

Respondent.

PDJ-2011-9025

**REPORT AND ORDER IMPOSING
SANCTIONS**

Nos. 10-0732, 10-1817, 10-1859,
and 11-0448

On December, 8, 9, and 12, 2011, the Hearing Panel composed of Ben Click, a public member from Coconino County, Honorable Robert D. Myers (retired), an attorney member from Maricopa County, and Dr. Paul D. Friedman, Acting Presiding Disciplinary Judge ("APDJ") held a three day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. David L. Sandweiss and Jason B. Easterday appeared on behalf of the State Bar of Arizona ("State Bar") and Harlan W. Green appeared *pro se*. The Panel considered the testimony, the admitted exhibits, the parties' Joint Pre-Hearing Statement, Proposed Findings of Fact and Conclusions of Law, and evaluated the credibility of the witnesses. The APDJ and Hearing Panel ("Panel") now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

I. SANCTION IMPOSED:

**ATTORNEY SUSPENDED FOR SIX (6) MONTHS AND ONE (1) DAY, FEE
ARBITRATION FOR CLIENTS IN COUNTS ONE, TWO AND FOUR AND
COSTS.**

II. PROCEDURAL HISTORY

The Complaint in this matter was filed on May 31, 2011. On July 8, 2011, Respondent filed his Response to Complaint.¹ An Agreement for Discipline By Consent "Agreement") was filed on September 22, 2011 providing for a six month and one day suspension, probation and fee arbitration. The Complainants

¹ Respondent admits all allegations except those set forth in ¶¶'s 19, 27, 28, 29, 30, 31, 34, 35, 38, 39, 42, 43, 44, 49, 51, 53, 54, 56, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 73, 74, 75, 76, 81, 84, 85, 87, 90, 92, 93, 95, 96, 101, 102, 103, 104, 105, 106, 112, 113, 124, 125, 126, 129, 132, 134, 137, 142, 143, 144, 145, 146, 148, 149, 150, and 151 of the Complaint.

thereafter, filed a Rule 53 Objection. Upon review, the Presiding Disciplinary Judge ("PDJ") determined that based on the conditional admissions and multiple violations present, the agreed upon sanction was inadequate and rejected the Agreement. The PDJ requested that the sanction be modified to reflect a one year suspension, fee arbitration and costs. See Order filed October 24, 2011.

On November 9, 2011, Respondent filed a motion to withdraw from the Agreement and requested that the matter be set for an evidentiary hearing. The matter was set for a three day hearing on the merits and pursuant to Rule 57(4)(C), Ariz.R.Sup.Ct., all admissions contained within the Agreement are withdrawn and shall not be used against the parties in subsequent proceedings.

On November 29, 2011, the State Bar filed a Notice of Disclosure Violations and Motion for Sanctions. On November 30, 2011, the Disciplinary Clerk filed a Notice of Hearing re Oral Argument on the State Bar's Notice of Disclosure Violations and Motion for Sanctions. Oral argument was held on December 5, 2011. Respondent was ordered to comply with disclosure rules by November 23, 2011 and certain witnesses were precluded from testifying. In addition, because Respondent did not communicate with bar counsel regarding the parties' Joint Pre-Hearing Statement, uncontested facts set forth in Respondent's Position re Joint Pre-Hearing Statement were stricken. See Order re Disclosure Violations filed December 5, 2011.

Upon conclusion of the hearing on the merits, the APDJ ordered the parties' to submit closing arguments and proposed findings of fact and conclusions of law by January 13, 2012. See Order re Closing Arguments filed December 14, 2011. The State Bar filed its proposed facts and conclusions as ordered on January 13, 2012, however, Respondent's pleading was untimely, having been mailed on January 17, 2012.

III. FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 16, 1981.

COUNT ONE (File No. 10-0732/Winchell)

2. In or around February 2003, Complainant purchased a mobile home. Complainant had the mobile home inspected before the transaction closed. [SB Exhibit 3, Bates No. 00085]

3. Complainant is disabled and has had many medical issues including a spine injury, 10 surgeries in 14 years and complications from pain management. [SB Exhibit 3, Bates No. 00085;and Hearing Testimony]

4. In or around October 2003, Complainant discovered water damage and mold in the mobile home. [Complaint and Respondent's Response to Complaint]

5. In or around January 2004, Complainant retained Respondent regarding the mobile home. [Complaint and Respondent's Response to Complaint]

6. By letter dated January 1, 2004, addressed to "Prospective Client", Respondent outlined his rate of \$150 for 45 minutes of an initial consultation and \$195 hourly rate thereafter. The January 1, 2005, letter does not identify the client and does not list the scope of the representation. [Complaint and Respondent's Response to Complaint]

7. On January 4, 2004, Respondent had a one (1) hour teleconference with Complainant. [Complaint and Respondent's Response to Complaint]

8. Respondent did not provide Complainant a letter or other writing that explained the scope of the representation at or near the beginning of the representation. [SB Exhibit 3, Bates No. 000085 and Hearing Testimony]

9. By letter dated January 1, 2005, Respondent notified his clients that his hourly rates were increasing from \$195 to \$200 starting January 1, 2005. Respondent signed the letter as Harlan W. Green, Attorney at Law, Payson Law Center. [Complaint and Respondent's Response to Complaint]

10. On August 2, 2005, Respondent filed suit in the Gila County Superior Court against the sellers and the home inspection company. The matter was assigned court number CV2005-0196. [Complaint and Respondent's Response to Complaint]

11. In or around November 2007, the home inspection company settled for \$33,750 [SB Exhibit 3, Bates No. 000100-101].

12. On November 1, 2007, Respondent had a .5 hour teleconference with Complainant and charged an hourly rate of \$260/hour for a total of \$130. [Complaint and Respondent's Response to Complaint]

13. Respondent received the settlement check and on December 14, 2007 and deposited the full \$33,750 in his IOLTA. [SB Exhibit 3, Bates No. 000102]

14. Respondent was owed approximately \$12,000 of the \$33,750 settlement proceeds which represented fees and costs. [Hearing Testimony]

15. Respondent held the settlement funds in his trust account by agreement with Complainant while Respondent assisted Complainant in finding a new mobile home. [SB Exhibit 3, Bates Nos. 000098-000099]

16. On November 28, 2007, Respondent had a 1 hour consultation with Complainant regarding a will and power of attorney and billed at \$200 per hour. [Complaint and Respondent's Response to Complaint]

17. On December 3, 2007, Respondent received a telephone call from Complainant regarding Complainant's broken pipes. Respondent met Complainant at Complainant's home and called a plumber. Although no legal services were performed, Respondent charged his legal rate of \$260 per hour for 1.5 hours of work. [Hearing Testimony]

18. Beginning in January 2008, Respondent consistently billed Complainant at a rate of \$260 per hour, except in 2 instances on April 29, 2008, and October 2, 2008. [Complaint and Respondent's Response to Complaint]

19. As of June 24, 2008, Respondent stated he, "own[ed] and earned fifty percent (50%) of the \$33,750 received from the settlement with the home inspector." [SB Exhibit 3, Bates No. 000500]

20. On April 24, 2009, Respondent wrote a check to himself (Payson Law Center) from the IOLTA in the amount of \$2,000. Between April 2009 and October 2, 2009, Respondent withdrew his fees and costs. The checks were made out to the Payson Law Center and totaled \$14,875. [SB Exhibit 3, Bates Nos. 000098-99]

21. On September 24, 2009, Respondent billed .5 hours of work at a rate of \$260 per hour for calls negotiating Complainant's credit card debt. [SB Exhibit 1, Bates No. 000024]

22. As of April 14, 2010, \$14,446.38 of Complainant's settlement money remained in Respondent's IOLTA. [SB Exhibit 3, Bates No. 000098-99]

23. Respondent's invoice dated May 9, 2010, refers to Respondent's office as the "Payson Law Center". [SB Exhibit 1, Bates No. 000022]

24. Respondent's client trust account checks are marked "IOLTA Payson Law Center, Harlan W. Green Trust Account." [SB Exhibit 3, Bates No. 000103-107]

25. On May 13, 2010, during the investigation of this matter, Respondent faxed material to the State Bar listing his address as "Payson Law Center, 814 North Beeline Hwy., Suite L, Payson, Arizona 85541." [Complaint and Respondent's Response to Complaint]

26. Respondent's address of record with the State Bar is 814 North Beeline Hwy. Suite L, Payson Arizona. [Complaint and Respondent's Response to Complaint]

27. Respondent admitted his use of "Payson Law Center" constituted the use of a trade name. [Hearing Testimony]

28. By letter dated February 3, 2011, mailed to Respondent's address of record, bar counsel requested Respondent provide additional, specific information and material no later than February 10, 2011. [SB Exhibit 4, Bates Nos. 000643-000644]

29. At hearing, Respondent acknowledged he received the State Bar's letter dated February 3, 2011, but failed to respond. [Hearing Testimony]

30. Respondent was previously disciplined for similar misconduct. On September 25, 2002, Respondent was disciplined, in part, for failing to cooperate with the State Bar in violation of ER 8.1(b) and then Rules 51(h) and 51(i), Ariz. R. Sup. Ct. (2002). [Count Two, SB Exhibit 101, Bates No. 001519]

IV. CONCLUSIONS OF LAW

COUNT ONE (File No. 10-0732/Winchell)

The Panel finds clear and convincing evidence is present that Respondent violated Rule 42, Ariz.R.Sup.Ct, specifically ERs 1.5(a) (unreasonable fee), 1.5(b) (writing outlining to the client basis/rate of the fee and the scope of the representation), 1.15(a) (safekeeping property), 7.5(a) (prohibition of trade names); 8.1(b) (knowingly failure to respond to discipline authority), and Rules 43(a) (prohibition of the commingling of the lawyer's funds with client funds), and Rule 54(d)(2) (failure to furnish information to bar counsel). At hearing, the State Bar dismissed the alleged violation of ER 1.5(b).

Respondent charged an unreasonable fee by charging his legal rate for non-legal services (plumbing work) performed at Complainant's mobile home in violation of ER 1.5(a) and violated of ER 1.5(b) by failing to explain the scope of his representation in writing to the client.

All of the client's settlement proceeds funds were deposited into Respondent's trust account on December 14, 2007 and Respondent began withdrawing his fees in April 2009. The remaining fees were not withdrawn until October 2009. Respondent co-mingled his own funds with the client's funds in violation of ER 1.15(a) and Rule 43(a), Ariz.R.Sup.Ct.

In addition, Respondent violated ER 7.5(a) by his use of "Payson Law Center" as a trade name. Respondent also failed to respond to the State Bar's request for additional information in violation of ER 8.1(b) (knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority) and Rule 54(d)(2), Ariz.R.Sup.Ct., (failure to furnish information or respond promptly to any inquiry or request from bar counsel).

V. FINDINGS OF FACT

COUNT TWO (File No. 10-1817/Virginia Sparks)

31. On February 12, 2010, Virginia Sparks ("Complainant") and her brother, Michael DeWees, co-trustees of the DeWees Family Trust, met with Respondent to form LLC as an income tax-saving measure. [SB Exhibit 6, Bates No. 001227, SB Exhibit 22, Bates Nos. 1257-1258]

32. Complainant previously paid \$45.00 to the Arizona Corporation Commission to reserve the company name "DESPAR" for 45 days. [SB Exhibit 6, Bates No. 001227, SB Exhibit 22, Bates Nos. 1257-1258, and SB Exhibit 23, Bates No. 001259-60]

33. Respondent charged Complainant and Mr. DeWees \$1,000.00 which they paid by check signed by Complainant on February 12, 2010, on the account of "The DeWees Family Trust". [SB Exhibit 6, Bates No. 001227 and Exhibit 22, Bates Nos. 1257-1258].

34. Respondent did not delineate between fees and expenses in the \$1,000.00 charge. [Complaint and Respondent's Response to Complaint]

35. Respondent did not designate the \$1,000.00 charge as a flat fee or otherwise and did not term the \$1,000.00 charge "nonrefundable" or "earned upon receipt". [Hearing Testimony]

36. Respondent did not deposit all or any portion of the \$1,000.00 into his client trust account. [Complaint and Respondent's Response to Complaint]

37. Respondent did not communicate in writing to Complainant the basis or rate of the fees and expenses for which Complainant was responsible. [Complaint and Respondent's Response to Complaint]

38. On July 2, 2010, Complainant called Respondent regarding the status of her action and scheduled an appointment for July 6, 2010. [SB Exhibit 22, Bates No. 1257 and Hearing Testimony]

39. At the appointment on July 6, 2010, Complainant and Mr. DeWees signed Articles of Organization ("Articles"); however, because two (2) additional LLC member signatures were needed, the Complainant and Mr. DeWees took the Articles with them. [Complaint and Respondent's Response to Complaint]

40. The Articles Respondent gave to the clients were incomplete in that they failed to include signature spaces for the Statutory Agent's consent or for the organizer to acknowledge the effective date, pursuant to Article XV of the Articles. [SB Exhibit 22, Bates No. 1257 and Hearing Testimony]

41. The Articles were returned the following day or the day after bearing the required signatures of all LLC members, but the forms did not contain the required signatures of the statutory agent and organizer.

42. On July 21, 2010, Complainant contacted Respondent and left a message for him to return her call. Neither Respondent nor any member of his office staff returned her call. [SB Exhibit 22, Bates No. 1257 and Hearing Testimony]

43. On September 7, 2010, Mr. DeWees went to Respondent's office and signed the Article XV effective date acknowledgment. [SB Exhibit 15, Bates no. 001248]

44. On September 8, 2010, Complainant again contacted Respondent and advised his staff that she would file a bar charge if Respondent did not return her call. Respondent did not return her call. [Complaint and Respondent's Response to Complaint].

45. On September 13, 2010, Respondent filed Articles of Organization with the ACC, but incorrectly sent a check for an Articles of Incorporation expedited filing fee in the amount of \$95.00. [Complaint and Respondent's Response to Complaint].

46. The ACC would not accept Respondent's filing and returned the Articles of Organization to him on September 16, 2010 and notified him that the expedited filing fee for Articles of Organization was \$85.00. [Respondent's Response to Complaint and SB Exhibit 13, Bates No. 001241]

47. Because Respondent would not return her calls, Complainant called the State Bar of Arizona On September 21, 2010. [Complaint and Respondent's Response to Complaint]

48. Bar counsel then contacted Respondent regarding the Complainant's concerns. Respondent denied he represented Complainant and advised he represented another party (Michael DeWees), despite the fact that Complainant signed the check at the meeting on February 12, 2010. [SB Exhibit 5, Bates No. 001226, SB Exhibit 6, Bates No. 001299 and Hearing Testimony]

49. Respondent resent the Articles of Organization to the ACC on September 23, 2010, and included a check with the correct filing fee (\$85.00). [SB Exhibit 17, Bates No. 001250 and SB Exhibit 33, Bates No. 001280]

50. Thereafter, Respondent attended to publication of the Articles of Organization and completed the LLC formation. [Respondent's Response to Complaint and Exhibit 37, Bates No. 001288-001289]

51. Because of Respondent's delay in forming the LLC, Complainant was unable to transfer trust property and the trust was taxed at 50%. [SB Exhibit 22, Bates No. 001258 and Hearing Testimony]

52. Respondent did not communicate his attorney fees (\$658.34) or expenses (\$166.66) in writing. [SB Exhibits 17, 28, 32 and 33]

53. In his prospective client letter, Respondent referred to his law office as "The Payson Law Center". [SB Exhibit 28, Bates No. 001271]

54. Respondent directed Complainant to make the check for \$1,000.00 payable to "Payson Law Center". [Respondent's Response to Complaint and SB Exhibit 9, Bates 001237].

VI. CONCLUSIONS OF LAW

COUNT TWO (File No. 10-1817/Virginia Sparks)

The Panel finds clear and convincing evidence is present that Respondent violated Rule 42, Ariz.R.Sup.Ct, specifically ERs 1.3 (diligence), 1.4 (communication), 1.5(b)(fees/writing outlining to the client basis/rate of the fee and the scope of the representation), 1.5(d)(3) (basis or rate of earned upon receipt or non-refundable fee in writing), 1.15 (safekeeping property) and 7.5 (prohibited trade name).

55. Respondent delayed acting on Complainant's behalf without justification and violated ER 1.3.

56. Respondent failed to keep Complainant reasonably informed about the status of her matter and failed to promptly comply with Complainant's reasonable requests for information and violated ER 1.4.

57. Respondent did not communicate in writing to Complainant the basis or rate of the fee and expenses for which Complainant was responsible and violated ER 1.5(b).

58. Respondent did not distinguish fees from expenses in the \$1,000.00 that he charged and violated ER 1.5(b).

59. Respondent did not designate the \$1,000.00 charge as a flat fee as opposed to a deposit toward some other basis for calculating the total fee and violated ERs 1.5(b) and (d)(3).

60. Respondent did not term the \$1,000.00 charge "nonrefundable" or "earned upon receipt" but treated Complainant's \$1,000.00 payment as nonrefundable and violated ER 1.5(b) and (d)(3).

61. Respondent did not advise Complainant in writing that she may discharge him at any time and possibly obtain a full or partial refund and violated ER 1.5(d)(3).

62. Respondent did not deposit the \$1,000.00 in his IOLTA and violated ER 1.15.

63. Respondent used the trade name "Payson Law Center" in reference to his private practice and violated ER 7.5.

VII. FINDINGS OF FACT
COUNT THREE (File no. 10-1859)
(Janet Zimmer, Gladys Grubbs and Randi Reger)

64. Respondent represented Mr. Blaine Sauder and over several years prepared a will, deeds and other documents for Mr. Sauder in order to comply with his changing wishes on how to dispose of property upon his death. [SB Exhibit 38, Bates Nos. 001301-1305, 001319-001322 and 1327-1331]

65. In February 2009, Respondent prepared a new will for Mr. Sauder to sign that complied with Mr. Sauder's wishes. [SB Exhibit 38, Bates No. 1301-1305]

66. A trust was established for Mr. Sauder's granddaughter to provide for her education. The trust was to be funded with money Mr. Sauder derived from a reverse mortgage on his home. [SB Exhibit 39, Bates No. 001336-1342]

67. Mr. Sauder used some reverse mortgage money to fund cruises and intended to use the remaining funds for his granddaughter's education. The mortgage company would then take the house upon his death. [SB Exhibit 39, Bates No. 001339 and 001341]

68. Respondent visited Mr. Sauder in the convalescent center in April of 2009 to remind him to complete the reverse mortgage transaction. Mr. Sauder agreed to attend to the transaction when he returned home. [Complaint and Respondent's Response to Complaint]

69. Mr. Sauder's condition deteriorated and he died of COPD on May 4, 2009, before he completed the transaction. [Complaint and Respondent's Response to Complaint]

70. The will stated that certain personal property was to be distributed according to a separate list. In the screening of this matter, Respondent did not produce that list. [SB Exhibit 39, Bates No. 001336 and Exhibit 42, Bates No. 001348-001352]

71. The personal property included watercolors that Respondent's secretary Candy Arnold painted and which Mr. Sauder bought from her, and a

grandfather clock. According to Respondent, Mr. Sauder wanted Ms. Arnold to have all of those items upon his death. [SB Exhibit 39, Bates No. 1338]

72. Respondent gave Ms. Arnold all of the above-listed items of personal property. [SB Exhibit 39, Bates No. 1338]

73. Ms. Arnold gave some of the paintings to Mr. Sauder's daughter (to whom Mr. Sauder left \$1.00 in his will "for reasons known to her"), she gave the grandfather clock to Mr. Sauder's granddaughter, and she kept paintings she'd made of a barn and castle. [SB Exhibit 39, Bates No. 1338]

74. In the will, Mr. Sauder left a car to Complainant Grubbs, a dog and money from a bank account for the dog's care to Complainant Zimmer, and another dog and money from a bank account for the dog's care to Complainant Reger. [Complaint and Respondent's Response to Complaint]

75. Respondent stated that because Mr. Sauder did not fully access his reverse mortgage allocation, Respondent used money in the bank accounts, and from the proceeds of sale of the house and car, to pay for home repairs to prepare it for sale, estate administration expenses and funding for the granddaughter's trust. [Complaint and Respondent's Response to Complaint]

76. The Complainants Zimmer and Reger received the dogs but not the money for the dogs' care. [Complaint and Respondent's Response to Complaint]

77. Complainant Grubbs did not receive the car. [Complaint and Respondent's Response to Complaint]

78. Respondent sold the car to the mother of his daughter's friend. [Hearing Testimony]

79. Respondent stated that he advertised the car for sale, spent money on repairs, sold it for \$5,800, and had documentation of all transactions related to the car. [Hearing Testimony]

80. Respondent, however, failed to furnish copies to the State Bar or offer into evidence at hearing the documentation that would have objectively corroborated his testimony. Respondent testified:

Q. Do you have detailed records of all receipts and expenses of the estate regarding the Toyota Camry?

A. Yes.

Q. Where are they?

A. In my office.

Q. Why aren't they here in this courtroom?

A. I haven't filed a final accounting and I think that's the appropriate way to deal with it. [Disclosure Statements and Hearing Testimony]

81. On June 23, 2009, Respondent opened an informal probate of Mr. Sauder's will in Gila County Superior Court. On July 12, 2009, Judge Peter Cahill entered an order admitting Mr. Sauder's will into probate and naming Respondent as personal representative of Mr. Sauder's estate [Complaint and Respondent's Response to Complaint]

82. On July 12, Judge Cahill also entered an Order to Personal Representative and Acknowledgement and Information to Heirs. [Complaint and Respondent's Response to Complaint]

83. Complainants repeatedly tried to obtain information from Respondent regarding the dogs, money and the car, as well as to obtain a copy of Mr. Sauder's will, but Respondent refused to provide any of that information. [SB Exhibit 38, Bates Nos. 001295-001300, SB Exhibit 43, Bates Nos. 001355-001356, SB Exhibit 44, Bates Nos. 001357-001358, SB Exhibit 48, Bates No. 001368, SB Exhibit 55, Bates Nos. 001420-001421, SB Exhibit 58, Bates No. 001426-001427, and SB Exhibits 63-65, Bates Nos. 001570-001575]

84. Complainants were not informed that Respondent opened a probate case. [SB Exhibit 38, Bates No. 001295-001300]

85. On February 9, 2010, Complainants received a letter from Respondent informing that the bulk of the assets had been liquidated, bank funds were used to pay house-related expenses, the car was sold to raise cash to finalize the estate and tax returns were due which Respondent hoped to finalize in 30 days. No specific accounting was provided. [Complaint and Respondent's Response to Complaint]

86. Through July of 2010, Complainants persistently tried to get information from Respondent but were unsuccessful. [SB Exhibit 38, Bates No. 001295-001300]

87. In July of 2010, Complainants obtained a copy of an "Inventory and Appraisalment" dated July 8, 2010 from Respondent's staff, Candy Arnold. This was the first time they learned that there were probate proceedings. The "Inventory" was incomplete and, regarding the car, stated only that it was sold to a "private party" for \$5,000. [Complaint and Respondent's Response to Complaint].

88. On September 30, 2010, Complainants filed the bar charge, and copied Judge Cahill. [Complaint and Respondent's Response to Complaint]

89. On October 12, 2010, Judge Cahill issued an order stating: "This long standing probate matter has had no court filings since July 13, 2009. In addition, the Court received a copy of the disciplinary complaint by Ms. Zimmer, Ms. Grubbs and Ms. Reger. It is ordered setting a Status Hearing for Tuesday, November 2, 2010 at 11:30 p.m. in Payson." [SB Exhibit 50, Bates No. 001375 - 001376]

90. On November 2, 2010, Respondent filed a "Status Report" explaining among other things that he had yet to complete 2009 and 2010 tax returns, he sold the house and car to raise funds for estate administration and turned the household items over to the granddaughter's family due to its "de-minimus value". [Complaint and Respondent's Response to Complaint].

91. At the status hearing, Complainants told Judge Cahill that the Status Report was unsatisfactory. Judge Cahill advised them to "take further legal steps if they so choose." [SB Exhibit 50, Bates No. 001375]

92. Complainant Grubbs complained that Respondent sold the car without consulting her or giving her an option to buy it. She asked who bought it, and where it was. [SB Exhibit 52, Bates No. 001381]

93. Judge Cahill asked Respondent who bought the car. Respondent answered that he did not know who bought the car and would have to research his bank statements and checks to determine the identity of the buyer. [Complaint and Respondent's Response to Complaint]

94. Judge Cahill questioned Respondent's honesty, asking him if he had sold the car to a stranger on the street. Respondent said he would provide information regarding who bought the car. [SB Exhibit 43, Bates No. 001355]

95. Complainant Reger submitted an invoice for dog care that Respondent refused to pay. Respondent promised to pay the invoice. [Complaint and Respondent's Response to Complaint]

96. Judge Cahill concluded his November 2, 2010 minute entry: "The court recommends more communication among Mr. Green and the heirs." He ordered Respondent to provide an accounting of his handling of Mr. Sauder's estate to Complainants. [Complaint and Respondent's Response to Complaint]

97. On November 17, 2010, Judge Cahill entered an Order in which he acknowledged receipt of Respondent's November 2, 2010 Status Report, and put the matter on the Court's Non-appearance Calendar of February 24, 2011, for further status review. [Complaint and Respondent's Response to Complaint]

98. As of March 1, 2011, Respondent still had not provided an accounting to Complainants. [Complaint and Respondent's Response to Complaint]

99. Candy Arnold was Respondent's most senior administrative assistant who was in charge of his other support staff. [Hearing Testimony]

100. Ms. Arnold's only supervisor was Respondent. [Hearing Testimony]

101. According to Ms. Arnold, Respondent's caseload exceeded his staff's capacity to complete tasks in a timely manner. [Hearing Testimony]

102. Although Respondent's staff members brought to his attention their inability to get things done on time, he did nothing to rectify that situation. [Hearing Testimony]

103. Respondent knew independently that documents were not timely filed in court. [Hearing Testimony]

VIII. CONCLUSIONS OF LAW

C. COUNT THREE (File No. 10-1859) (Janet Zimmer, Gladys Grubbs and Randi Reger)

The Panel finds clear and convincing evidence is present that Respondent violated ERs 1.7, 3.3, 4.4, 5.3, 8.4(c), 8.4(d) and Rule 53. The Panel further finds that clear and convincing evidence is not present that Respondent violated ER 1.15.

104. By selling Mr. Sauder's car to the mother of his daughter's friend for a reduced price rather than trying to realize more money on its sale such as by advertising it for sale or offering it to the Complainant, Respondent violated ER 1.7.

105. By knowingly telling Judge Cahill, falsely, that he did not know to whom he sold the car, Respondent violated ERs 3.3 and 8.4(c).

106. By disobeying a number of provisions from Judge Cahill's order expressing Respondent's duties as personal representative of Mr. Sauder's estate, Respondent violated ER 3.4(c) and former Rule 53, Ariz.R.Sup.Ct.

107. By persistently delaying and burdening Complainants by refusing to provide to them relevant information, having no other substantial purpose, Respondent violated ER 4.4.

108. By failing to make reasonable efforts to adopt measures giving reasonable assurance that Respondent's office staff timely handled the demands of his caseload, Respondent violated ER 5.3.

109. By delaying administering Mr. Sauder's estate and failing to provide relevant information to Complainants, thereby causing Judge Cahill to schedule court proceedings in connection with an informal probate in which court proceedings rarely occur or are required, Respondent violated ER 8.4(d).

IX. FINDINGS OF FACT

COUNT FOUR (File No. 11-0448/Susan M. Mesner-Waszak)

110. Complainant Susan Waszak had been a client of Respondent for at least several months to over a year. [Hearing Testimony]

111. In the various matters for which Respondent represented Ms. Waszak, he did not employ written fee agreements or communicate to Ms. Waszak in writing the basis of the fee or expenses for which she was responsible. [Hearing Testimony]

112. In January 2010, Complainant Susan Waszak's treating psychiatrist changed her medication which exacerbated rather than eased her mental illness. [Complaint and Respondent's Response to Complaint]

113. On January 15, 2010, Ms. Waszak went to the Gila County Superior Court in Payson to obtain an Order of Protection against her husband. [Complaint and Respondent's Response to Complaint]

114. Law enforcement reports state that Ms. Waszak became argumentative and combative. She was arrested on two counts of disorderly conduct and jailed. [Complaint and Respondent's Response to Complaint]

115. Ms. Waszak alleged that she was physically abused during her arrest and while in custody. [Complaint and Respondent's Response to Complaint]

116. Attorney Barry Standifird was appointed to represent Ms. Waszak but on February 27, 2010, she asked the court to remove him from her case due to ineffective assistance of counsel. Attorney Tait Elkie was appointed as Mr. Standifird's replacement. [Complaint and Respondent's Response to Complaint]

117. On March 1, 2010, Ms. Waszak wrote a check to Respondent for \$3,500 for "crim x 2" and "file DR-". [SB Exhibit 76, Bates No. 001438]

118. According to Respondent, "file DR-" refers to Ms. Waszak's "other issue of her missing personal friend." [SB Exhibit 87, 001460]

119. Respondent deposited the check into his operating account. [Complaint and Respondent's Response to Complaint]

120. On March 26, 2010, Respondent entered an appearance in the criminal matter. [Complaint and Respondent's Response to Complaint]

121. Respondent gave a "Dear Prospective Client" letter dated March 1, 2010, to Ms. Waszak. [Complaint and Respondent's Response to Complaint]

122. The "Dear Prospective Client" letter was not addressed specifically to Ms. Waszak and was given to her at her initial consult. [Complaint and Respondent's Response to Complaint]

123. The "Dear Prospective Client" letter did not describe the scope of the representation, and stated that the prospective client's initial consultation fee was \$175.00. Later in the letter it stated, "We will discuss the range of services, fees and costs for assisting you. As legal matters may sometimes be routine, a flat fee will be offered when possible. All other matters require a fee agreement, which is based upon hours of services and costs incurred, which are to be paid by the client." Respondent defined his normal hourly rate as \$260 per hour. [Complaint and Respondent's Response to Complaint]

124. The "Dear Prospective Client" letter also emphasized to the client the importance of providing concise, accurate and detailed information on "the attached New Client Information Sheet." [Complaint and Respondent's Response to Complaint]

125. Ms. Waszak signed the "New Client Information Sheet" dated March 1 in which she identified "the Nature of your problem:" by checking the boxes for "Criminal" and "Divorce". [Complaint and Respondent's Response to Complaint]

126. The "New Client Information Sheet" also contained boxes for "Civil" and "Other" but Ms. Waszak did not check those or write "civil rights", "police brutality" or anything else indicating that she wanted Respondent to represent her in a civil rights case. [Complaint and Respondent's Response to Complaint]

127. On the "New Client Information Sheet", in answer to the question "What relief do you seek?" Ms. Waszak wrote, "Fire the Sherriffs [*sic*]". [Complaint and Respondent's Response to Complaint]

128. On April 6, 2010, the State dismissed the criminal cases without prejudice and referred Ms. Waszak for involuntary commitment proceedings. She thereafter agreed to one year of court-ordered treatment. [Complaint and Respondent's Response to Complaint]

129. In March 2010, Respondent told Ms. Waszak he would obtain and review the tape of her beating to prepare a civil rights claim. [SB Exhibit 96, Bates No. 001483]

130. Respondent did not keep Ms. Waszak informed of his progress, however, and in August 2010 told her that there was no tape or, if there had been one, it was destroyed. [SB Exhibit 86, Bates No. 001459 and SB Exhibit 96, Bates No. 001483]

131. Respondent explained to Ms. Waszak that the incident at Superior Court was recorded and he would obtain the video or DVD of the alleged incident. After six months, however, Respondent told Ms. Waszak that there was no recording and that it may have been destroyed. [SB Exhibit 96, Bates No. 001483]

132. Personnel at the Gila County Jail make recordings on a DVR but they are recorded over after 7 days, although there is a chance a particular recording can be recovered if requested. [Complaint and Respondent's Response to Complaint]

133. Complainant and Respondent met periodically but Respondent did not update her on her remaining cases (divorce and civil rights). [Complaint and Respondent's Response to Complaint]

134. On September 13, 2010, Complainant fired Respondent in writing and asked him to send her a statement of fees due from her original retainer and refund any balance. [SB Exhibit 75, Bates No. 001437]

135. Respondent furnished two accountings to Complainant on November 9, 2010. One was "In Reference to: Dissolution Matter/Mental Health Issues" and the other was "In Reference to: Criminal Matter/Missing Person Locate." [Complaint and Respondent's Response to Complaint]

136. Respondent stated that he charged Complainant \$1,000 for the criminal cases. [Complaint and Respondent's Response to Complaint]

137. The "missing person" matter was to do search for a person thought to be long dead but whom, according to Respondent, Complainant claimed to have seen alive in a dream. [Hearing Testimony]

138. The accountings show that Respondent charged \$2,000 for the Dissolution and Mental Health cases, and \$1,500 for the Criminal and Missing Person matters. [Complaint and Respondent's Response to Complaint]

139. Respondent's accounting for the Criminal and Missing Person matters reflect 5.10 hours (erroneously recorded as 6.10 hours) at \$260/hour, for total fees of \$1,326.00, \$1,500 paid, and a balance due to Complainant of \$174.00. [Complaint and Respondent's Response to Complaint]

140. Respondent's accounting for the Dissolution and Mental Health Issues cases included a charge for 1.3 hours for "Office conference RE: Missing Person Update" (which should have appeared on the other accounting) and .5 hours for "Preparation of Correspondence to Client re: Return of All Originals and Closing of File". Total charges, including costs, were \$2,131.00 and the payment was \$2,000, so Respondent concluded that there was no balance due to Complainant. [SB Exhibit 86, Bates No. 001456-001457]

141. Respondent's "Dear Prospective Client" form letter refers to his practice as "The Payson Law Center." [Complaint and Respondent's Response to Complaint]

142. On February 23, 2011, the State Bar of Arizona sent to Respondent a screening letter asking that he respond and address several ERs. His response was due March 21, 2011. [Complaint and Respondent's Response to Complaint]

143. Respondent did not respond by March 21, 2011. The State Bar sent him a reminder letter on March 22, 2011 and his response deadline was April 12, 2011. [Complaint and Respondent's Response to Complaint]

144. Respondent did not respond by April 12, 2011. [Complaint and Respondent's Response to Complaint]

X. CONCLUSIONS OF LAW

COUNT FOUR (File No. 11-0448/Susan M. Mesner-Waszak)

145. Respondent did not diligently pursue preservation of the recording of the incident in which Complainant was abused and violated ER 1.3.

146. Respondent failed to maintain reasonable communications with Complainant regarding her potential civil rights claim and violated violating ER 1.4.

147. Respondent included \$338 of charges in his flat fee for "representing" a mentally ill client in connection with a deceased "missing person" that the client "found" in a dream and violated ER 1.5(a).

148. Respondent included \$130 of charges in his flat fee in connection with returning to Complainant her file and violated ER 1.5(a).

149. Respondent did not communicate in writing to Complainant the scope of the representations and violated ER 1.5(b).

150. Respondent deposited Complainant's flat fee into his business account rather than his trust account, treating the fee as "earned upon receipt" and "nonrefundable" but without simultaneously advising in writing that the client may nevertheless discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation and violated ER 1.5(d).

151. Respondent did not term the fee "earned upon receipt" or "nonrefundable", requiring him to deposit Complainant's fee check into his trust account and bill against it as he rendered services and violated ER 1.15(a).

152. Respondent failed to refund to Complainant the unearned portion of the flat fee he charged her and violated ER 1.16(d).

153. Respondent employed the forbidden trade name "Payson Law Center" and violated ER 7.5.

154. Respondent failed to respond to formal screening and violated ER 8.1 and Rule 54, Ariz R.Sup.Ct.

XI. SANCTIONS

In determining an appropriate sanction, Court generally utilizes the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction depends on the facts and circumstances of each case.

Analysis under the ABA STANDARDS

When imposing a sanction, consideration is given to 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.

The *Standards* however, do not account for multiple charges of misconduct and advise that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct. See *Standards, Theoretical Framework*, p. 7.

In this matter, Respondent violated duties owed to clients, the legal system and as a professional and caused actual and potential injury. The Panel applies the following *Standards* to the most serious misconduct involving a knowing mental state.

Standard 4.12, Failure to Preserve the Client's Property, provides that:

Suspension is 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.

Respondent knowingly kept his earned fees and costs in his trust account for an extensive period of time and commingling his funds with his client's funds and knowingly failed to safekeep client funds.

Standard 7.2, Violations of Duties Owed As A Professional, is applicable to Respondent's failure to respond to the State Bar's request for further information and provides that:

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.

Respondent knowingly failed to respond to the State Bar's investigating screening letter dated February 3, 2011. Additionally, Respondent knowingly failed to timely return the unearned funds to the client in Count Four after providing erroneous accountings which caused actual injury to the client.

Standard 4.32, Failure to Avoid Conflicts of Interest provides:

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Respondent knowingly sold the estate's car to the mother of his daughter's friend and failed to produce evidence that the sale was an arms-length transaction.

In addition, Respondent knowingly misled the court by stating to Judge Cahill in the probate proceedings that he did not know to whom he sold the estate's car.

Standard 6.12, False Statements, Fraud, and Misrepresentations 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.

Respondent thereafter, took no remedial measures to correct his false statements and those statements had a potentially adverse effect on the estate's legal proceeding.

Respondent further disobeyed Judge Cahill's order and delayed and burdened the Complainants by refusing to provide them with relevant information as required by the order. *Standard 6.22, Abuse of the Legal Process* provides:

Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Respondent knowingly violated the court's order and repeatedly failed to provide the Complainants with information about the estate. Because of this failure, the

court was burdened, judicial resources wasted and additional probate proceedings were needed, which caused actual and potential injury to the legal system.

Aggravating and Mitigating factors

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel finds the following aggravating factors are present in this matter:

1. *Standard 9.22(a)*, prior disciplinary offenses. Respondent received an Order of Informal Reprimand and Probation with the State Bar's Ethics Enhancement Program effective September 25, 2002, for violating ERs 3.1, 8.1(b), and Rules 51(h) and 51(i) (currently Rule 54), Ariz.R.Sup.Ct.

Although not considered prior discipline, an Order of Diversion in File No. 09-0228 effective November 11, 2009 was imposed for violating ERs 1.2, 1.4(a)(2) and 1.7(a). Respondent was ordered to obtain 2.5 hours of CLE in the area of ethics and client development and to participate in the State Bar Law Office Management Assistance Program ("LOMAP"). To date, Respondent is currently in diversion for similar ethical rule violations present here. [SB Exhibit 100, Bates No. 001515-001517]

2. *Standard 9.22(b)*, dishonest or selfish motive. In Count Three, Respondent demonstrated a dishonest or selfish motive.
3. *Standard 9.22(c)*, a pattern of misconduct. Respondent engaged in a pattern of misconduct involving numerous matters and clients.
4. *Standard 9.22(d)*, multiple offenses. Respondent violated multiple ethical rules.
5. *Standard 9.22(e)*, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency. Respondent did not respond to bar counsel's inquiry for information related to Count One. Additionally, Respondent did not respond to the State Bar's investigatory letters in Count Four, willfully failed to comply with the disclosure rules, and failed to timely file his closing brief. See also APDJ's Order filed December 5, 2011.
6. *Standard 9.22(g)*, refusal to acknowledge wrongful nature of conduct. Respondent failed to acknowledge the wrongful nature of his conduct by placing the blame on his clients, staff, Judge Cahill, and the State Bar.

7. *Standard* 9.22(h), vulnerability of victim. The client in Count One is disabled and an unsophisticated person. The client in Count Four has been diagnosed with a mental illness.
8. *Standard* 9.22(i), substantial experience in the practice of law. Respondent has been practicing for 30 years.

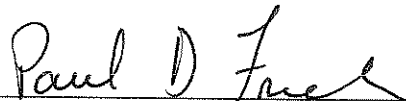
Although Respondent offered no evidence of mitigation, the Panel finds the following mitigating factor is present in this matter:

9. *Standard* 9.32(m), remoteness of prior offenses. While Respondent's Informal Reprimand is nine years old, the Panel determined that no weight should be given to this factor as the instant matter involves similar misconduct of failing to respond and/or cooperate with the State Bar.

CONCLUSION

Therefore, based on the facts in this matter, consideration of the *Standards* including the numerous aggravating factors present, the Panel imposes a suspension of six (6) months and (1) one day, participate in fee arbitration with the clients in Counts One, Two, and Four, and costs of these disciplinary proceedings.

DATED this 13th day of February, 2012.



**Paul D. Friedman, Acting Presiding Disciplinary Judge
Office of the Presiding Disciplinary Judge**

CONCURRING

Judge Robert E. Meyers (Retired), Volunteer Attorney Member,

Ben Click, Volunteer Public Member

Original filed with the Disciplinary Clerk

7. *Standard 9.22(h)*, vulnerability of victim. The client in Count One is disabled and an unsophisticated person. The client in Count Four has been diagnosed with a mental illness.
8. *Standard 9.22(i)*, substantial experience in the practice of law. Respondent has been practicing for 30 years.

Although Respondent offered no evidence of mitigation, the Panel finds the following mitigating factor is present in this matter:

9. *Standard 9.32(m)*, remoteness of prior offenses. While Respondent's Informal Reprimand is nine years old, the Panel determined that no weight should be given to this factor as the instant matter involves similar misconduct of failing to respond and/or cooperate with the State Bar.

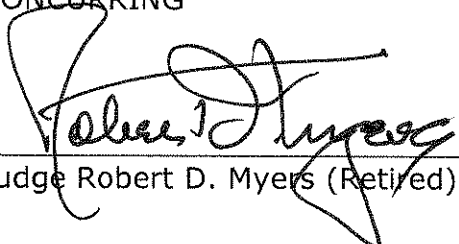
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DATED this _____ day of February, 2012.

**Paul D. Friedman, Acting Presiding Disciplinary Judge
Office of the Presiding Disciplinary Judge**

CONCURRING



Judge Robert D. Myers (Retired), Volunteer Attorney Member

Ben Click, Volunteer Public Member

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CONCLUSION

Therefore, based on the facts in this matter, consideration of the *Standards* including the numerous aggravating factors present, the Panel imposes a suspension of six (6) months and (1) one day, participate in fee arbitration with the clients in Counts One, Two, and Four, and costs of these disciplinary proceedings.

DATED this 8th day of February, 2012.

**Paul D. Friedman, Acting Presiding Disciplinary Judge
Office of the Presiding Disciplinary Judge**

CONCURRING

Judge Robert E. Meyers (Retired), Volunteer Attorney Member,



Ben Click, Volunteer Public Member

Original filed with the Disciplinary Clerk

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 13th day of February, 2012.

Copies of the foregoing mailed/emailed
this 13th day of February, 2012, to:

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