BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **CHARLES ANTHONY SHAW, Bar No. 003624** Respondent.	No. 10-0602 **REPORT AND ORDER IMPOSING SANCTIONS**

On January 27, 2011, the Hearing Panel ("Panel") composed of Douglas S. Pilcher, a public member from Maricopa County, Dr. Paul D. Friedman, an attorney member from Maricopa County, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("PDJ") held a one day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Harriet Bernick appeared on behalf of the State Bar of Arizona ("State Bar") and Ralph Adams appeared on behalf of the Respondent. The PDJ and Panel now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

I. ISSUE

This matter is before the Panel based on Respondent's misrepresentation of his hourly fee and the actual amount of fees incurred while representing a client in an employment matter. The Panel considered aggravating and mitigating factors and the appropriate sanction for Respondent's misconduct.

II. SUMMARY

The facts of this matter are not in dispute and the parties stipulated to the exhibits admitted. The clear and convincing evidence shows that Respondent intentionally submitted a false fee affidavit to the Assistant Attorney General and intentionally fabricated his billing invoice.

After careful consideration of the evidence presented, the Panel finds clear and convincing evidence that Respondent violated the following rules:

- ER 4.1 (false statement of material fact or law to a *third person*)[1]
- ER 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation) and

  ER 8.4(d) (conduct prejudicial to the administration of justice)

The Panel finds suspension is generally appropriate when a lawyer knowingly violates ERs 4.1, 8.4(c) and 8.4(d). The Panel further finds that based on the aggravating and mitigating factors present, a reduction in the presumptive sanction of suspension to reprimand is justified.

SANCTION IMPOSED:

ATTORNEY REPRIMANDED AND COSTS OF THESE DISCIPLINARY PROCEEDINGS IMPOSED.

III. PROCEDURAL HISTORY

On October 4, 2010, the State Bar filed its Complaint and Respondent filed his Answer on November 1, 2010. A Case Management Conference as required by Rule 58(c) was held on November 16, 2010. A Settlement Conference was held on December 7, 2010, before Settlement Officer Richard N. Goldsmith; however, the parties were unable to reach a settlement and a hearing was set for January 27, 2011. The facts in this matter are not in dispute and the parties stipulated to the exhibits admitted. The Panel heard testimony from the State Bar's witness Charles A. Shaw (adversely), Samantha Blevins, Assistant Attorney General and Diana-Schell-Peterson and Respondent's witnesses, Charles A. Shaw, Donald Johnson, Esq., and Pastor Mark Tilly. Respondent admits that his conduct was prejudicial to the administration of justice.

IV. 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 December 4, 1973.

2. Mr. Peterson worked for the Division of Developmental Disabilities of the State Department of Economic Security. Mr. Peterson claimed that he was retaliated

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[1] ER 4.1 provides that in representing a client a lawyer shall not knowingly make a false statement of material fact or law to a *third person*. Here, Respondent submitted the false fee affidavit to opposing counsel. Although not charged, Respondent's misconduct may have also been considered under ER 3.4(b) (fairness to opposing party and counsel/falsifying evidence) but nonetheless, is also sufficiently addressed under ER 8.4(c).

against as a whistleblower about work conditions and overtime issues, but had not lost his job.

3. The State Personnel Board Hearing Officer Harold Merkow denied Mr. Peterson's claim. The hearing officer's decision was appealed to the State Personnel Board who also denied it. Mr. Peterson then filed an administrative appeal in Superior Court in Yavapai County.

4. In Respondent's fee agreement dated December 16, 2009, signed by the parties and Respondent, Respondent stated, "The Law Office's usual hourly billing rate is $250.00 per hour for the service of Charles Anthony Shaw, and this is the hourly rate which will be charged Client in this matter regarding all time the Law Office puts into this case."

5. After meeting with the Petersons on several occasions, Respondent telephoned the Assistant Attorney General assigned to the case to apprise her that he was representing the Petersons and that he wanted to try to settle the case.

6. Soon thereafter, Respondent prepared a draft demand letter to the Assistant Attorney General ("AG") and emailed it to the Petersons. In his January 14, 2010 email, Respondent informed the Petersons that he believed he could get the State to pay $5,000 in attorney's fees and costs because of the time it took for him to come up to speed and complete the matter.

7. Respondent also stated in his email, "I will charge you only what you have agreed in the fee agreement with me. If this case settles quickly, you will not have incurred $5,000, and whatever we receive above what I have incurred will essentially go to you as damages. They don't need to know and have no right to know the details of our fee agreement."

8. On January 15, 2010, Respondent sent the formal demand for settlement to Assistant Attorney General assigned to the Peterson's case, Samantha Blevins. Respondent requested $25,000 to settle the case. In the formal demand letter, Respondent stated the following: "The offer is simply that the State shall pay W. Scott Peterson the sum of $20,000.00 as a onetime payment, and all parties agree to dismiss this case with prejudice. The monetary amount is to compensate the Petersons for the loss of income Scott has sustained in not obtaining the Human Service Specialist III position he applied for within the past two years, damages for defamation and emotional distress, and $5,000 for the attorney's fees and costs he has incurred in this case." Later in the letter, Respondent explains the reason why he is asking for the $5,000 in attorney's fees as follows: "...Scott has incurred substantial expense in this litigation thus far, including the extensive Personnel Board proceedings, and my attorney's fees in reviewing the mass of materials and getting up to speed. The amount set forth for this expense of $5,000 is considered very reasonable."

9. On February 9, 2010, Ms. Blevins called Respondent and informed him that the State would make a monetary offer of $10,000 for compensatory damages and $5,000 for attorneys' fees.

10. Respondent emailed the Petersons the same date with the State's settlement offer.

11. After negotiating with the Petersons about additional terms in the settlement agreement with the State, Respondent sent a counter offer to Ms. Blevins by email on February 11, 2010. The email noted that "Mr. Peterson will lower his initial offer to the sums of $14,000 as a one-time payment for compensatory damages and $5,000 for attorneys' fees as the monetary portion of the settlement." Respondent also requested the Department expunge two reprimands from Mr. Peterson's official personnel file as well as seal two PASE evaluations issued by Rene Perdock.

12. On February 12, 2010, Respondent received a voice mail from Ms. Blevins stating the State would not agree with the expungement or sealing PASE evaluations, but that they would pay the total of $15,500 in damages plus attorney's fees incurred up to the maximum of $5,000.

13. Ms. Blevins at 8:05 AM also emailed Respondent on February 12, 2010, regarding the settlement offer. Ms Blevins stated, "DES will pay $15,500 in compensatory damages and payment of the actual attorneys costs thus accrued pursuant to an executed fee agreement, not to exceed $5,000...".

14. Respondent conveyed this offer to the Petersons and advised them that the offer should be immediately accepted in light of the problems in the case and that he felt that he could easily justify the attorneys' fees in an amount of at least $5,000, and that "the Petersons would get the benefit of the attorneys' fees paid if it was greater than what they paid him."

15. Respondent emailed his clients informing them the agreement included "...actual attorneys' fees incurred up to a maximum of $5,000. I can get a verification of reasonable attorneys' fees up to the maximum of $5,000, and if it is more than what you will actually owe me pursuant to our fee agreement by the time this matter is finally wrapped up, then you will get the benefit of the excess. Accordingly, I believe this settlement will get you a little more than $15,500 net-after payment of all attorneys' fees."

16. At the time of writing such correspondence to his clients, Respondent knew the agreement provided for the payment of the actual attorneys' fees thus accrued pursuant to an executed fee agreement, not to exceed $5,000.

17. On February 17, 2010, Ms. Blevins emailed Respondent to re-emphasize her February 12, 2010 offer. Ms. Blevins stated, "DES will pay $15,500 in compensatory damages and payment of the actual attorney costs thus accrued pursuant to an executed fee agreement, not to exceed $5,000...."

18. After the Petersons authorized Respondent to accept the offer, Respondent emailed Ms. Blevins on February 17, 2010. Respondent stated, "Mr. Peterson will accept the Division's offer. That is a cash offer of $15,500 for compensatory damages plus attorneys' fees up to a maximum of $5,000. I understand the attorneys' fees to depend upon my presenting an affidavit of attorneys' fees, itemizing my time and stating my reasonable hourly rate, but that the amount of fees will be limited to $5,000. I want you to know that, based upon the fact that I have had to read a lot of this voluminous file and conduct legal research, the attorneys' fees will almost certainly be more than the maximum of $5,000, but I will send you the documentation in due course. Therefore, the total amount of cash exchanged will most likely be $20,500." Respondent made such statements with intent to deceive and mislead opposing counsel.

19. The Settlement Agreement provided for the payment of "Plaintiff's attorney fees thus accrued, not to exceed $5,000. Plaintiff's counsel will provide a fee affidavit within seven days of executing this agreement." Respondent signed the Settlement Agreement knowing the amount of attorney fees were limited to those accrued and that the amount would be based upon his sworn word.

20. On or about February 25, 2010, Respondent intentionally prepared a false affidavit for attorneys' fees in the case. The affidavit stated that he had practiced law for twenty five years and his reasonable hourly rate for employment work was $350.00 per hour when in fact his written fee agreement limited his attorney fees to $250 per hour. Respondent also stated that "The rate used in my work for Scott Peterson is $350.00 per hour, and this rate is applied to my billing statement, which is attached hereto." This statement was false and Respondent knew it to be false at the time of his affidavit. It was made with the intent to deceive opposing counsel.

21. Attached to Respondent's affidavit was a document which he swore was his "billing statement". The document was not a billing statement but was intentionally designed to appear to be a billing statement in a further effort to deceive opposing counsel.

22. On April 26, 2010, Ms. Blevin wrote to Respondent that she had received a check for $461.20 from Ms. Peterson. In her letter, Ms. Peterson asserts that although your affidavit of fees listed attorneys' fees in excess of $5,000.00, you only billed the Peterson's $4,538.80. Obviously Ms. Peterson's claim is concerning to the Department, who only agreed to pay the accrued legal fees.... Please provide information concerning the cause of this billing discrepancy and verify the actual amount billed to the Petersons."

23. On May 28, 2010, Respondent's attorney wrote to Ms. Blevins on behalf of Respondent, as follows: "Your letter correctly states that Mr. Shaw billed the Petersons $4,538.80 and that his affidavit of attorneys 's listed fees in excess of $5,000.00. Mr. Shaw's affidavit was based on his mistaken belief that the State of Arizona agreed to pay $5,000.00 in attorney fees based on a reasonable hourly rate."

24. On June 15, 2010, Ms. Blevins wrote to Respondent's attorney. Ms. Blevins wrote that she appreciated Respondent's willingness to reimburse the State for the difference between the amount of fees paid by the State and the actual amount billed. Ms. Blevins also wrote, "However, I do not agree with your description of the settlement negotiations. While the very first offer was made for $5,000 in attorneys' fees, each additional offer specifically referenced the 'payment of actual attorney costs thus accrued pursuant to an executed fee agreement, not to exceed $5,000.' Moreover, the settlement agreement also references 'attorneys' fee thus accrued, not to exceed $5,000."

25. On June 29, 2010, Respondent's attorney wrote to Ms. Blevins and enclosed a check from Respondent in the amount of $461.20 made payable to the Arizona Department of Economic Security.

V. CONCLUSIONS OF LAW

Attorney ethical violations must be found by clear and convincing evidence. The Panel unanimously finds clear and convincing evidence Respondent violated ERs 4.1, 8.4(c) and 8.4(d) as alleged in Count One of the Complaint.

VI. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992) ("*Standards*") and Arizona Supreme Court case law are the guiding authorities used in imposing sanctions for lawyer misconduct. The appropriate sanction depends upon the facts and circumstances of each case.

Analysis under the ABA *STANDARDS*

In imposing a sanction after a finding of lawyer misconduct, the Panel considers the following factors:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

Standard 6.0 *Violations of Duties Owed to the Legal System* is applicable for violations of ER 4.1. *Standard* 6.12, False Statements, Fraud and Misrepresentation provides that:

> 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.

Standard 5.0, *Violations of Duties Owed to the Public* is applicable for violations of ER 8.4(c). *Standard* 5.13 Failure to maintain Personal Integrity provides that:

> Reprimand is generally appropriate when a lawyer *knowingly*[2] engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

The presumptive sanction for knowing misconduct involving dishonesty falls between suspension and reprimand.

A. THE DUTY VIOLATED

The Panel finds that Respondent violated his duty to the legal system, the public, and as a professional by engaging in dishonest conduct.

B. THE LAWYER'S MENTAL STATE

The Panel finds that Respondent's state of mind was knowing, if not intentional. Had Respondent filed the false fee affidavit with the, court with the intent to benefit himself, a more severe sanction including disbarment may have been appropriate. Here, Respondent considered the attorney fee overage as compensatory damages for the client and the excess would have benefited the client.

C. THE ACTUAL OR POTENTIAL INJURY

The Panel finds that Respondent's dishonest conduct caused actual and/or potential injury to the legal system (*Standard* 6.12) and the public (*Standard* 5.13).

D. AGGRAVATING FACTORS, ABA *STANDARD* 9.2

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 considered evidence of the following aggravating circumstances in determining the appropriate sanction.

Dishonest or selfish motive - 9.22(b)

Respondent engaged in dishonest conduct when he knowingly, if not intentionally, made a false statement of material fact and knowingly, if not intentionally, misrepresented his attorneys' fees incurred to the AG's office.

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[2] *See* ABA *Standards, Definitions*. "Knowledge is the conscious awareness of the nature or attendant of the conduct but without the conscious objective or purpose to accomplish a particular result."

Refusal to acknowledge wrongful nature of misconduct, 9.22(g)

Although Respondent admits he filed an affidavit and billing statement that was not accurate, Respondent maintains that he inadvertently used his reasonable hourly rate of $350.00 instead of the $250.00 actual rate he charged his client. Respondent vehemently denies that he knowingly submitted the false affidavit and billing statement.

Substantial Experience in the Practice of Law - 9.22(i)

Respondent was admitted to practice law in Arizona on December 4, 1973. Attorneys are expected to be truthful, regardless of the number of years they have practiced law.

E. MITIGATION FACTORS, ABA *STANDARD* 9.3

The Panel considered evidence of the following mitigating circumstances in determining the appropriate sanction:

Absence of Prior Discipline, 9.32(a)

An absence of a prior disciplinary record is present based on the evidence presented in these proceedings. Respondent has practiced law for approximately 38 years with no discipline imposed. The Panel gives great weight to this mitigating factor in determining the appropriate sanction.

Cooperative attitude towards disciplinary proceedings, 9.32(e)

Respondent demonstrated a cooperative attitude in these proceedings and with the State Bar.

Character or Reputation, 9.32(g)

Respondent submitted character letters and presented witnesses who testified in support of this factor. Respondent is a decorated veteran and is active in his church and community. The uncontroverted evidence shows that Respondent has established a good reputation and competence in his area of expertise in the Prescott community. The Panel gives great weight to this mitigating factor in determining the appropriate sanction.

VII. DISCUSSION

Respondent's fee agreement and accounting to his client reflected $250.00 per hour for legal services but his affidavit submitted to opposing party avowed that his hourly rate was $350.00. Misconduct involving dishonesty is considered serious misconduct that is relevant to the practice of law. The Oath of Admission to the State Bar of Arizona includes the avowal, "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor..."

The Panel was not persuaded by Respondent's testimony that he mistakenly filed the fee affidavit and billing invoice with his reasonable rate as opposed to his actual rate. To the contrary, the Panel found he knowingly if not intentionally misled opposing counsel and was knowing if not intentional in his dishonesty. He disowned his attorney's Herculean efforts which included well written letters pleading to the State Bar misunderstanding and "error on his part". Instead Respondent's remorse was the hay and stubble of a regret of inconveniencing the State Bar and Panel, not the brick and mortar of genuine regret for his actions. He appears to believe the end justified the means because he apparently perceives his actions were to the benefit of his client. They were the opposite. His client was directly impacted by his dishonesty and the result was that client reported him to the State Bar. His client could not ethically permit the dishonest actions of his attorney to bring him profit. The profession fell in the eyes of that client as a result. With his actions he has added another thread to the miserable tapestry of jokes, bottom dweller images and increasing public cynicism towards lawyers and the legal profession. As important, the profession remains injured by his rationalization of his conduct as much as the conduct itself.

Ethical behavior is demonstrated not only in how people speak and act toward others but also in how they treat property that doesn't belong to them. Respondent curiously argues he has the right to do with his earned fees as he chooses. But such argument is flawed. It is flawed because these were not earned fees. Further he never treated those funds as earned fees. He treated those funds as never having been his. He did not deposit them into his personal account, nor intend to pay tax on that income and then gift the money to Respondent. Instead he schemed to have his client receive attorney fees without Respondent ever truly earning them. He never even suggested these funds were part of his own income which he was receiving and then "gifting" to his client. The monies were not recompense for his client's injury, but rather contorted by Respondent's subterfuge into something entirely different.

More to the point, Respondent's own client knew Respondent had made untruthful statements to opposing counsel. It is only through a dangerous rationalization that Respondent justifies his actions. The subterfuge began with Respondent informing his client that "If the case settles quickly, you will not have incurred nearly $5,000 and whatever we receive above what I have incurred will essentially go to you as damages. They don't need to know and have no right to know the details of our fee agreement. But the settlement offer *requires* the opposing party know and Respondent and his client accepted that offer. In exhibit

13, Respondent began paving the road for his unethical actions within his letter to his opposing counsel. There he stated "Scott has *incurred* substantial expense in this litigation, including the extensive Personnel Board proceedings, and my attorneys' fees in reviewing the mass of material and getting up to speed. The amount set forth for this expense of $5,000 is considered very reasonable. (Emphasis added). His client had not yet "incurred" an expense of $5,000. He not only knew this, he had informed his client of that fact. But Respondent's intent to receive "reasonable" fees of $5,000 is apparent as opposed to actual incurred fees required by the settlement he negotiated.

On February 16, 2010, Respondent advised his client that the counteroffer proposed by them was declined. "Their offer now is $15,500 as a one-time payment for compensatory damages plus the actual attorneys fees *incurred* up to a maximum of $5,000." (Emphasis added).. There is no question Respondent knew what that word meant. Respondent followed that sentence to his client with "I can get a verification of *reasonable* attorneys' fees up to the maximum of $5,000 and if it is more than what you will actually owe me pursuant to our fee agreement by the time this matter is finally wrapped up, then you will get the benefit of the excess." In the space of two sentences, Respondent spells out his knowledge that the agreement is for *actual* attorney's fees *incurred* and his intentional plot to mislead opposing counsel through dishonesty. His intent to pay no attention to the truth through a twisting of his words to meet his own goal is made manifest.

The email from opposing counsel on February 17, 2010, at 8:11 a.m., made clear the terms of the agreement. "...payment of the actual attorney costs thus accrued pursuant to an executed fee agreement, not to exceed $5,000..." In response by email of February 17, 2010, 2:55 p.m. Respondent stated to opposing counsel "Mr. Peterson will accept the Division's offer." No hint of counteroffer is raised. That Respondent read in detail the proposed settlement agreement is made clear by his February 21, 2010 email to opposing counsel outlining the errors in the agreement submitted to him. Respondent corrects the compensatory damages to $15,500. He states further changes must be made regarding the potential for filing claims. Third, he states there is no confidentiality in the original offer. Never is there even a suggestion that attorney fees should be modified to state "reasonable" as opposed to the written terms "actual" fees "incurred" under "executed fee agreement." He knew what his "actual" fees "incurred" were and what his "executed fee agreement" stated. He also knew his opposing counsel knew none of those things but his apparent sense of entitlement blistered his integrity.

His concluding statements in that February 21, 2010 email make clear his deceptive resolve. "In all other respects the Agreement looks good, and I want you to know that I expect to have my attorney's fee affidavit finished on or about next Tuesday." That Respondent argues (not his attorney) that his words can be contorted into a counteroffer, unknown and unapproved by his client, leaving him as the sole arbiter of what is reasonable and which changes the written settlement agreement language from "Plaintiff's attorney fees thus accrued, not to exceed $5000.00" to "reasonable" attorney fees is falsehearted.

This is more than mere dishonesty or untruthfulness because it is coupled with a darker complete absence of remorse. It is precisely the kind of duplicity that is remarkably difficult to uncover. If Respondent has a practice of being untruthful on similar affidavits of attorney fees, opposing counsel would virtually never be able to determine it. But for the honesty of his client this deceit would never have been uncovered. The Panel finds Respondent furthered his deception by trying to keep his own client from knowing the method of his deception. Such conduct undermines the very essence of the professional relationship to a client, to opposing counsel, to the profession and the public itself. There is no room for such calculated dishonesty in the profession any more than there is room for the rationalization that Respondent has vented. A long term suspension is entirely appropriate for such calculated deceit as it strikes at the very heart of the profession.

Notwithstanding, it is the duty of the Panel to weigh mitigating factors in determining sanctions. What is clear is that a term of probation holds scant hope of curing such dishonesty. Such behavior will only be altered by a change of mind, which Respondent's present attitude offers little evidence of.

Proportional cases offered by the State Bar were helpful but distinguished in that they involve additional rule violations not present in the instant matter, and the false statements in those instances were submitted to the court and/or the State Bar during the disciplinary proceedings. Here, Respondent's false statements were sent to the opposing party in support of the settlement negotiations. The Panel also considered *Matter of Blair*, SB-08-0084-D (2008), in which censure was imposed for knowing violations of ERs 4.1 and 8.4(c). While not directly on point, *Standard* 5.13 (reprimand), as discussed above, was implicated in *Blair* for lying to a third party in a business setting.

Here, Respondent clearly violated his fundamental duty of truthfulness but the absence of any prior disciplinary record suggests this to be aberrant conduct. Thus, a sanction involving even a short term suspension, while not punitive, is under the circumstances not as likely to turn Respondent to the light.

VIII. CONCLUSIONS

The purpose of attorney discipline is to maintain the integrity of the profession in the eyes of the public, protect the public from unethical or incompetent lawyers, and deter other lawyers from engaging in illegal or unprofessional conduct. *In re Scholl,* 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001).

Therefore, given the facts of this matter and in consideration of the ABA *Standards* including aggravating and the weight given to the significant mitigating factors present, the Panel concludes that a reprimand rather than suspension is the appropriate sanction in this matter and moreover, will fulfill the purposes of discipline.

IX. ORDER

The Panel therefore ORDERS:

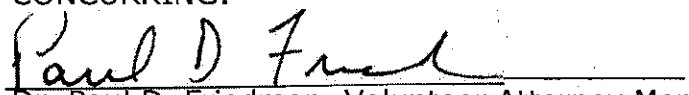
1. **CHARLES A. SHAW** Bar No. 003624 is hereby **REPRIMANDED.**

2. Respondent shall pay the costs of these proceedings. The State Bar shall submit a Statement of Costs and Expenses pursuant to Rule 60(b), Ariz.R.Sup.Ct. Respondent may file objections within five (5) days of service of the Statement of Costs and Expenses and shall serve a copy on the State Bar and the Disciplinary Clerk.

DATED this 28th day of February, 2011.

THE HONORABLE WILLIAM J. O'NEIL
PRESIDING DISCIPLINARY JUDGE

CONCURRING:



Dr. Paul D. Friedman, Volunteer Attorney Member

Douglas S. Pilcher, Volunteer Public Member

Original filed with the Disciplinary Clerk
this 28th day of February, 2011.

COPY of the foregoing e-mailed and mailed this
28th day of February, 2011, to:

Harriet M. Bernick
STATE BAR OF ARIZONA
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

Ralph Adams
Karen Clark
Adams and Clark
520 E. Portland Street, Suite 200
Phoenix, AZ 85004
Attorneys for Respondent Charles A. Shaw