BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BARBARA T. BROWN,** **Bar No. 006166** RESPONDENT.	)	Nos. 02-0560, 02-1 015 **HEARING OFFICER'S REPORT AND RECOMMENDATION**

PROCEDURAL HISTORY

Probable Cause Orders were filed on September 24, 2002 and March 12, 2003. A one-count Complaint (File No. 02-0560) was filed on March 5, 2003 and served by mail on March 6, 2003. A two-count Complaint (File No. 02-1015) was filed on April 10, 2003 and served by mail on April 11, 2003. Respondent filed an Answer to the Complaint in File No. 02-0560 on April 8, 2003 and to the Complaint in File No. 02-1015 on June 2, 2003. Upon stipulation of the parties, the matters were consolidated on April 28, 2003 and a hearing was set for July 21, 2003. On July 17, 2003, Respondent's request for a continuance was granted and the hearing reset for September 18, 2003.

A settlement conference before Settlement Officer 8A took place on June 26, 2003, but failed to result in a settlement of these matters.

In an Order dated July 17, 2003, Respondent was ordered to serve a disclosure statement, as required by Rule 26.1, Ariz.R.Civ.P. and Rule 53(c)(4), Ariz.R.S.Ct., on or before August 11, 2003. The parties were further ordered to exchange a final list of witnesses and exhibits before August 29, 2003.

Respondent did not serve a disclosure statement on the State Bar, and on September 5, 2003, the State Bar moved for sanctions under Rule 37, seeking to have Respondent's answers deemed stricken. Without awaiting Respondent's response to the State Bar's motion, this Hearing Officer entered an Order dated September 15, 2003 denying the State Bar's motion, but ordering that Respondent be precluded from calling any witnesses or offering evidence at the hearing, although she could testify on her own behalf.

A hearing was held on September 18, 2003. At the outset of the hearing, Respondent moved for reconsideration of the Hearing Officer's September 15, 2003 Order, which was granted in part. (R.T. 7:9–18:11.) Respondent moved for reconsideration on the grounds that there were mitigating circumstances and that the Bar had in its possession many of the documents she intended to offer into evidence. The motion was granted in part on the grounds that the State Bar would not be prejudiced if Respondent were allowed to offer into evidence documents which the State Bar had received from Respondent during its investigation of these matters.[1] The September 15 Order was thus modified to allow Respondent to offer into evidence any document which counsel for the State Bar could confirm was in the State Bar's possession.

During the hearing, the parties waived their right to make opening statements. The State Bar called three witnesses in File No. 02-0560 (Denise Barregarye, Lauria Mason (by telephone), and Richard Mason) and one witness in File No. 02-1015 (Frank Kennemur), all of whom were cross-examined by Respondent. Respondent testified on her behalf and was cross-examined by counsel for the State Bar. Both parties made closing arguments.

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[1] Although this Hearing Officer stated on the record that Respondent had not shown good cause for her failure to serve a disclosure statement, based on additional evidence presented during the

FINDINGS OF FACT

1. Respondent was a member of the State Bar of Arizona during the time period relevant to each of these consolidated matters. She was admitted on May 10, 1980, summarily suspended for non-payment of dues on May 17, 2002, and reinstated on June 14, 2002.

2. Respondent previously has been sanctioned for violations of the former Code of Professional Responsibility and the Rules of Professional Conduct. In File No. 85-0134, et al. Respondent received a censure, probation and costs. In File No. 86-0173, Respondent received a private informal reprimand.

File No. 02-0560

3. The State Bar's Complaint in File No. 02-0560 arises from Respondent's representation of Denise Barregarye between December 2000 and February 2002 and alleges violations of ERs 1.2, 1.3, 1.4, and 1.16(d).

4. Ms. Barregarye lives in Phoenix, Arizona. (R.T. 20:21-23.)

5. Ms. Barregarye met Respondent through her uncle, Richard Mason. (R.T. 21:12-13.)

6. Respondent had a long-standing professional relationship with Mr. Mason, dating to 1989. (R.T. 61:2-10;159:24-25.)

7. At the time she met Ms. Barregarye, Respondent was representing Mr. Mason in a civil litigation matter, which concluded with a trial in February 2002. (R.T. 63:16-21.)

8. Over the years she had represented Mr. Mason, Respondent had an informal business relationship. She typically agreed to handle a particular matter for a relatively low fee and would sometimes perform work without receiving the entire amount of the fee, with Mr. Mason making irregular payments as he as able to do so. (R.T. 64:19—65:14; 71:2-17.)

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hearing he now concludes that she did so.

9. Respondent had also previously represented Mr. Mason's daughter, Lauria Mason in various matters. (R.T. 43:15-20.)

10. On December 24, 2000, Mr. Mason asked Respondent if she would represent Ms. Barregarye. (R.T. 2:2;160:24—161:1.)

11. On December 26, 2000, Mr. Mason brought Ms. Barregarye to Respondent's home. Ms. Mason was also present. (R.T. 48:20-49:9;62:2-4.)

12. Ms. Barregarye was having marital and financial difficulties. She had left her home with her child, was living with Mr. Mason, and wished to obtain a divorce from her husband. Her financial problems included a pending foreclosure and substantial debts. (R.T. 21:20-25; 22:1-4.)

13. During their meeting on December 26, 2000, Respondent agreed to represent Ms. Barregarye. A written fee agreement was never made. (R.T. 22:18; 23:1-4.)

14. While there was conflicting testimony at the hearing about whether the scope of the representation included both and a divorce and a bankruptcy proceeding, this Hearing Officer finds that Respondent was retained to obtain a divorce for Ms. Barregarye and to provide advice on bankruptcy-related issues, but not to initiate or pursue a bankruptcy petition.

15. Respondent and Ms. Barregarye agreed that Respondent would be paid a flat fee of $1,500.00. Those funds were paid to Respondent through a check written by Ms. Mason, who advanced the funds as a gift to Ms. Barregarye. (R.T. 22:5-17; 35:24—35:2; 59:16-19.)

16. At some time after their initial meeting, Respondent provided Ms. Barregarye with various forms that needed to be completed so that Respondent could initiate a dissolution proceeding. (R.T. 23:7-9.)

17. There was conflicting testimony at the hearing about what happened to those forms.

18. Ms. Barregarye testified that she completed the forms and sent them to Respondent, only to be told by Respondent's secretary that Respondent had not received them, and that when she sent another completed form to Respondent she was told that it had not been received. Ms. Barregarye testified that she sent six such forms to Respondent over the course of many months. (R.T. 23:9-20.)

19. For her part, Respondent testified that, despite occasional requests, she was unable to get Ms. Barregarye to complete the forms, as Ms. Barregarye was preoccupied with caring for her ill grandmother and mother and "she didn't really [seem] to want to go forward." (R.T. 163:15-20.)

20. No copies of these forms or related correspondence were offered into evidence to corroborate either account. (R.T. 40:9-13.) In general, this Hearing Officer found Respondent to more credible than Ms. Barregarye.

21. Ms. Barregarye acknowledged that she had been busy during the relevant time period caring for her mother and grandmother. (R.T. 31:12-20.) She also acknowledged that she had discussed the forms with Respondent and had been unable to provide certain information to Respondent. (R.T. 31:24—32:17.)

22. Mr. Mason corroborated Respondent's account, testifying that he was told by Respondent at some point during 2001 that she was having difficulty getting Ms. Barregarye to complete the forms. (R.T. 80:4—81:9.)

23. Ms. Barregarye testified that she called Respondent in August, 2001 to inquire about the status of the divorce proceeding and that an argument ensued over whether or not she had sent the forms to Respondent. Respondent also told Ms. Barregarye that she would not be able to initiate a dissolution proceeding unless Ms. Barregarye advanced court filing fees. Ms. Barregarye then told Respondent she intended to terminate the representation. (R.T. 24:2—25:4.)

24. Respondent denied that this conversation occurred. (R.T. 164:7-8, 21-24.)

25. Shortly thereafter, Ms. Mason called Respondent to inquire about the status of the divorce. She agreed to advance court filing fees and sent Respondent a check in the amount of $196.00. Respondent assured Ms. Mason that she would promptly initiate a divorce proceeding. (R.T. 25:6-16; 46:2-15.)

26. Respondent acknowledged having a discussion with Ms. Mason in August 2001. She did not, however, initiate a dissolution proceeding. She testified that after speaking with Ms. Mason she contacted Ms. Barregarye, again urging her to complete the necessary forms, but that Ms. Barregarye failed to do so. Respondent testified that she did not thereafter press Ms. Barregarye to complete the paperwork, assuming that Ms. Barregarye did not wish to pursue a divorce. (R.T. 166:18-169:5.)

27. Respondent claims to have also done work for Ms. Barregarye, at the request of Mr. Mason, in connection with a foreclosure action. Ms. Barregarye acknowledged that she discussed the foreclosure and related issues with Mr. Mason, but denied ever speaking to Respondent about those issues. (R.T. 36:7—38:10.) This Hearing Officer finds Respondent's claim credible.

28. Ms. Barregarye testified that she contacted Respondent in February 2002 to inquire about the status of her divorce. She said she was told by Respondent that a divorce proceeding had not been initiated because Respondent had not yet received completed forms from her. Ms. Barregarye said she asked then to have her money refunded, but Respondent refused without giving an explanation. (R.T. 26:17—17:22.)

29. Ms. Mason testified that she called Respondent in February 2002 to check on the status of the divorce. After she was told that a dissolution proceeding had not been filed, she

requested a refund of the funds she had paid. Respondent denied the request without explanation. (R.T. 47:5-13; 168:6-15.)

30. Respondent acknowledged speaking with Ms. Mason in February 2002, but denied speaking to Ms. Barregarye. (R.T. 164:7-9; 168:6-8.)

31. Ms. Barregarye and Ms. Mason then retained attorney Joseph Collins to represent Ms. Barregarye in connection with her divorce. (R.T. 27:23-25.)

32. On March 19, 2002, Mr. Collins wrote to Respondent, demanding that she refund the $196.00 she had received for a filing fee. (State Bar Exhibit 1.)

33. Respondent told Mr. Collins she would refund the $196.00, but would have to make monthly payments of $50.00, as she did not have the funds to immediately repay the entire amount. (R.T. 173:23-25.) Respondent did not make any payments to Ms. Barregarye because of a subsequent letter from Mr. Collins alleging that she had defrauded Ms. Barregarye. Had he not done so, she would have refunded the $196.00. (R.T. 175:8-13.)

34. Respondent acknowledged at the hearing that she had not performed $1500.00 of services for Ms. Barregarye, valuing the services she had rendered for both the divorce and the foreclosure, had they been calculated under an hourly fee agreement as being between $500.00 and $800.00. (R.T. 169:16—170:10.)

35. Respondent explained that she decided in February 2002 to decline to refund to Ms. Barregarye the unearned portion of the $1,500.00 fee she had received from Ms. Mason because Mr. Mason had not paid her for the work she was performing for him in his lawsuit (which was then on the eve of trial) and she believed that Ms. Mason had in the past paid for Mr. Mason's legal bills. She reasoned that it was therefore appropriate to retain the balance of the funds she had received from Ms. Mason. (R.T. 168:6-23.) She testified that she had told Mr. Mason at the time

that she would retain the funds received from Ms. Mason and apply them to the amounts Mr. Mason owed her for his litigation matter, and that Mr. Mason had not objected. (R.T. 172:9—173:2.)

36. Mr. Mason denied that he owed Respondent any money or that he had agreed Respondent could keep the balance of the funds Ms. Mason had paid her. (R.T. 79:20—80:2.)

37. As between the accounts of Respondent and Mr. Mason on their financial arrangement and discussions about the disposition of the funds Respondent had received from Ms. Mason, this Hearing Officer finds Respondent to be more credible.

38. Ms. Mason acknowledged that she had in the past given money to her father "when he asks for it if he needs it." (R.T. 57:3-4.) She denied that she had ever agreed with Respondent or Mr. Mason that Respondent could retain, as a setoff against monies Mr. Mason owed Respondent, the balance of the monies she had paid Respondent to represent Ms. Barregarye. (R.T. 58:11-13.)

File No. 02-1015

39. The State Bar's Complaint in File No. 02-1015 arises from Respondent's representation of Frank Kennemur between May 2001 and November or December 2001 and alleges violations of ERs 1.2, 1.4, 1.5, 1.15, 1.16 and 3.2, and Arizona Supreme Court Rules 43(d) and 44(b)(3).

40. Mr. Kennemur is a resident of Chino Valley, Arizona. (R.T. 83:10-11.)

41. Mr. Kennemur retained Respondent in May 2001 after the attorney who had previously represented him withdrew from the representation or was fired by Mr. Kennemur. (R.T. 83:19-23; 84:6-7; 118:9-17.)

42. Mr. Kennemur's former counsel had represented Mr. Kennemur in a two-day proceeding that Mr. Kennemur had brought before the Arizona Registrar of Contractors against Paul Nicholson, a licensed contractor who had done work at Mr. Kennemur's home. (R.T. 84:12-25.)

43. Mr. Kennemur's former counsel had also represented Mr. Kennemur in a breach of contract action against Mr. Nicholson that had been filed and was pending in Yavapai County Superior Court at the time Mr. Kennemur retained Respondent. (R.T. 91:12-23.)

44. The record suggests that Mr. Kennemur was a difficult and demanding client for each of the three lawyers who represented him in these matters.

45. At the time of the hearing in this matter, Mr. Kennemur was in the process of filing a lawsuit against his former counsel. (R.T. 118:16-20.)

46. Regrettably the State Bar did not obtain and present as evidence at the hearing any documents regarding these two matters, such as pleadings and other documents filed with the Registrar of Contractors or a court, court dockets, and the correspondence files of other lawyers involved in the proceedings. Moreover, the State Bar did not call those other lawyers to testify about Respondent's conduct. Without any written records or third-party testimony this Hearing Officer had only the testimony of Mr. Kennemur and Respondent to understand Respondent's conduct in those proceedings. As to most matters, this Hearing Officer found Respondent's account to be more credible than Mr. Kennemur's.

47. When Mr. Kennemur retained Respondent in May 2001, they agreed that Respondent would be paid an initial "flat fee" of $2200.00 to review the file and represent her in

the two matters Mr. Kennemur's former counsel had handled. (R.T. 83:24-25; 87:8-10; 91:13-23; 100:20-25;176:3-21.)[2]

48. Respondent did not deposit these funds into her trust account because she believed the $2200.00 payment was a flat fee that was "earned as paid." (R.T. 174:20-23; 206:15-20.)

49. This Hearing Officer finds no support for the allegation in Paragraph 12 of the Complaint that "Respondent performed little work on behalf of Mr. Kennemur."

50. Respondent did not keep time records, having agreed to a flat fee, but was able to testify about the work she performed for Mr. Kennemur in sufficient detail. That testimony was supported by records maintained by her secretary and documents from her files. (R.T. 9:9-17; 12:15-21; 201:9-19.)

51. After being retained, Respondent reviewed the file, including a transcript of the Registrar of Contractors' two-day proceeding, filed a notice of appeal with the Registrar of Contractors, corresponded with Mr. Nicholson's counsel, traveled to Chino Valley to meet with Mr. Kennemur and tour his home, and attend a settlement conference in mid-June in the pending civil action in Yavapai County Superior Court. (R.T. 91:25—92:2; 103:2—104:3; 177:11—178:18; Respondent's Exhibits 1, 2, 4.)

52. When it became clear at the mid-June settlement conference that the matter could not be settled at that time, Respondent reached an agreement with Mr. Kennemur that she would be paid a monthly "flat fee" of $600.00 per month for pursuing both an administrative appeal of the Registrar of Contractors' decision and the civil action in Yavapai County Superior Court. (R.T. 87:2-5;177:5-24.)

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[2] The Complaint incorrectly states that the only matter Respondent was retained to handle was the administrative appeal. Complaint, ¶2.

53. The monthly "flat fee" payments Mr. Kennemur made to Respondent were as follows:

DATE	AMOUNT
June 18, 2001	$600.00
July 1, 2001	$450.00
July 1, 2001	$150.00
August 6, 2001	$500.00
September 7, 2001	$600.00
November 12, 2001	$600.00

(R.T. 87:11-23 and State Bar Exhibit 5.)

54. Respondent did not deposit these funds into her trust account because she believed each monthly fee was a flat fee that was "earned as paid." (R.T. 174:20-23; 206:15-20.)

55. In the Registrar of Contractors action, Respondent pursued an administrative appeal by filing a complaint in the Maricopa County Superior Court on June 29, 2001. (R.T. 102:13-18; 181:17-24; Maricopa County Superior Court website, Civil Court Case Information – Case History.)

56. Respondent filed an amended complaint on July 11, 2001. (Maricopa County Superior Court website, Civil Court Case Information – Case History.)

57. Respondent took steps to pursue the administrative appeal, such as ordering transcripts. (Respondent's Exhibit 6.)

58. On September 20, 2001, a motion to transfer the administrative appeal to Yavapai County Superior Court was granted. (Maricopa County Superior Court website, Civil Court Case Information – Case History.)

59. Respondent took steps to cause the administrative appeal to be filed and served in Yavapai County. (Respondent's Exhibits 4, 6.)

60. As for the civil action pending in Yavapai County Superior Court, the Complaint accurately alleges in Paragraph 9 that "Respondent failed to appear at a motion for partial summary judgment hearing in Prescott, claiming that she had not received any notice of the hearing," but this Hearing Officer finds that Respondent's conduct with respect to that motion is not material to any of the allegations in the Complaint.

61. At the time Respondent took over the case from Mr. Kennemur's former counsel, there was a pending motion for partial summary judgment filed by the defendant, which had been fully briefed. (R.T. 180:8-14; 181:4-7.)

62. The motion was apparently based on prior counsel's failure to comply fully with A.R.S. § 12-1602, which requires a party alleging negligence on the part of a licensed professional to file with the complaint a preliminary expert opinion affidavit addressing issues of duty and causation. (R.T. 180:16-18.)

63. At some point during the summer of 2001, the defendant's motion for partial summary judgment was set for oral argument.

64. Respondent did not receive notice of the hearing and therefore did not attend it. (Complaint, ¶ 9; Answer, ¶ 1.)

65. No evidence was presented at the hearing that Respondent knowingly failed to attend the hearing.

66. It appears from the limited record that some time around July 18, 2003 the Yavapai County Superior Court issued an order granting the defendant's motion.

67. It was only upon receipt of this order that Respondent learned that a hearing had been scheduled. (Respondent's Exhibit 6.)

68. After receiving the order, Respondent filed a motion to vacate the order, essentially asking for oral argument on defendant's motion for summary judgment. (Respondent's Exhibit 6.)

69. After obtaining a transcript of the oral argument, Respondent concluded that the court had not granted the defendant's motion, but had instead, sua sponte, imposed sanctions under Rule 37 which would limit expert testimony to matters set forth in the preliminary expert opinion affidavit. (R.T. 180:21—181:15.) Respondent then moved to supplement the motion she had previously filed, seeking reconsideration or, alternatively, clarification. (Exhibit 6.)

70. While no evidence was presented at the hearing about the disposition of the motion Respondent filed, this Hearing Officer finds, based on the evidence presented, that Respondent adequately informed Mr. Kennemur about her inadvertent failure to attend the oral argument on defendant's motion for summary judgment and her subsequent efforts to vacate or seek clarification of the court's ruling on that motion. (R.T. 104:8—105:1.)

71. This Hearing Officer finds no support for the allegation in Paragraph 12 of the Complaint that Respondent "failed to depose the defendant, despite Mr. Kennemur's insistence that she do so," and does not find credible Mr. Kennemur's testimony as to this issue. (R.T. 88:20--89:17.)

72. During the late summer or early fall of 2001, Respondent discussed with Mr. Kennemur whether to take Mr. Nicholson's deposition. (R.T. 106:14-17.)

73. In August and September, Respondent communicated with Mr. Nicholson's counsel about setting a date for the deposition. (R.T. 204:6—205:4.)

74. Respondent did not take Mr. Nicholson's deposition because Mr. Kennemur was unwilling or unable to advance the cost of taking the deposition. (R.T. 107:21—108:10; 205:5-11.)

75. By October or November 2001, in light of the problem Respondent had experienced receiving notice of the partial summary judgment hearing and given the transfer of the administrative appeal from Maricopa County to Yavapai County, Respondent advised Mr. Kennemur that he should retain counsel in Prescott to handle the two matters. Respondent suggested that Mr. Kennemur's new counsel take Mr. Nicholson's deposition. (R.T. 105:21—106:7.)

76. Mr. Kennemur did not pay Respondent the agreed upon $600 per month flat fee in October 2002. He did, however, pay her $600 in November 2002. This was the last payment Mr. Kennemur made to Respondent.

77. In late November or early December 2001, Mr. Kennemur told Respondent in a telephone call that she was "fired" and that he had hired another attorney in Prescott, Alex Vakula. (R.T. 94:94:6-13.)

78. In November or December 2001, Respondent spoke with Mr. Vakula on the phone and then met with him in Phoenix during the latter half of December 2001 to discuss the two matters and provided him with documents, including relevant pleadings. (R.T. 108:23—109:9.)

79. Mr. Vakula told Respondent that he was not then representing Mr. Kennemur because he had not yet been paid. (196:8-14.)

80. At some point thereafter, Mr. Kennemur retained Mr. Vakula. (199:5-9.)

81. In January 2002, Respondent prepared a notice of substitution of counsel and sent it to Mr. Vakula but Mr. Vakula did not return it. (R.T. 190:14-22.)

82. At some later date, Respondent received a notice from the Yavapai County Superior Court indicating that Mr. Vakula was representing Mr. Kennemur. (199:5-9.)

83. Mr. Vakula did not depose Mr. Nicholson. (R.T. 116:2-6.)

84. In March or April 2003, Mr. Kennemur settled the claim he had brought against Mr. Nicholson for $8,000.00. (R.T. 93:3-6; 95:12-21; 145:17-25.)

85. With respect to records Respondent received from Mr. Kennemur and their disposition after Mr. Kennemur terminated Respondent and retained Mr. Vakula, the evidentiary record is sparse. The State Bar did not call Mr. Vakula to testify about the state of the file he received nor did it offer any documentary evidence. Again, this Hearing Officer had only the testimony of Respondent and Mr. Kennemur to consider and generally found Respondent's account to be more credible than Mr. Kennemur.

86. During the course of the representation, Respondent asked Mr. Kennemur to make copies of original documents in Mr. Kennemur's possession, with Respondent retaining only copies of those documents. (R.T. 116:10-19; 191:1-17; State Bar Exhibit 5, ¶¶ 7,8.)

87. In late November 2001, after Mr. Kennemur had terminated Respondent's representation and told her he would retain Mr. Vakula, Respondent met with Mr. Kennemur and gave him most of the documents in her possession. (124:4-11; R.T. 196:22—197:16; 203:9-20.)

88. The documents that Respondent did not turn over were copies of documents Mr. Kennemur had. (*Id.*)

89. Mr. Kennemur did not make a subsequent demand on Respondent for documents or an accounting. (R.T. 208:2-11.)

90. After this action was commenced Respondent provided Mr. Kennemur with the remaining documents in her possession. (R.T. 206:24-207:6.)

91. This Hearing Officer finds no support for the allegation in Paragraph 7 of the Complaint that Respondent did not adequately communicate with Mr. Kennemur and does not find credible Mr. Kennemur's testimony as to this issue. (R.T. 89:18—91:5.) To the contrary, the record shows that between May 2001 and October 2001 when the representation ended, Respondent met with Mr. Kennemur in Phoenix on at least seven occasions, met with him in Chino Valley on at least one occasion, and communicated with Mr. Kennemur by phone and mail.

92. On May 14, 2002, Mr. Kennemur, pro per, filed a complaint against Respondent in Maricopa County Superior Court for breach of contract, fraud, and professional negligence, seeking $75,000, and alleging generally that he had been forced to settle his litigation with Mr. Nicholson for a lesser amount of money than he believed he should have received.

93. Shortly thereafter, Mr. Kennemur filed a charge with the State Bar which was based upon the allegations in his civil action against Respondent. (R.T. 147:10-15.)

94. Respondent did not learn of the civil action Mr. Kennemur had filed against her until she received a copy of a default judgment. (199:10-21.)

95. Respondent moved to set aside the default. (*Id.*)

96. At a hearing in October to set aside the default Mr. Kennemur proposed and Respondent agreed to resolve the matter by having Respondent pay Mr. Kennemur half the amount she had been paid. Respondent did so not because she believed she had failed to properly represent Mr. Kennemur, but only because she wished to promptly settle the dispute and avoid litigation. (R.T. 200:16-25; 212:23—213:6.)

97. On December 5, 2002, Respondent stipulated to entry of judgment in the amount of $2,500, pursuant to which she has paid Mr. Kennemur $100 per month. (147:16-24.)

Evidence of Aggravation and Mitigation

98. Respondent has had financial problems for some time, before, during, and after the time she represented Ms. Barregarye and Mr. Kennemur.

99. In the fall of 2001, her computer failed and she did not have money to buy another one. At the same time, her office telephone was disconnected because she could not pay her bill, making it impossible for Respondent to receive facsimile transmissions. Because of her financial problems, Respondent was unable to pay her Bar dues. (R.T. 215:3-10.)

100. Respondent has also experienced health problems. While no medical records were introduced at the hearing, Respondent testified that she has been diagnosed as having a Serious Mental Illness in the form of manic depression, for which she is taking medication. (R.T. 211:8-14.) She has also been deemed eligible for disability benefits from the Social Security Administration, retroactive to November 1991. (R.T. 210:405; 211:8-14.) She further testified that during 2002 she was declared eligible, by virtue of her low income, to receive free psychiatric care from Maricopa County. (R.T. 11:20-25.)

101. Despite her health problems, Respondent has been able to practice law, but her mental condition limits her ability to work and to deal with stress. She has therefore attempted, since the fall of 2000, to limit her practice to only a few matters. (R.T. 8:15-16; 11:8-9; 15:2-11; 161:1-2; 211:8-~~2~~12:22.)

102. Respondent's mental condition and its effect on her practice were corroborated by Mr. Mason. (R.T. 63:22-~~6~~4:18; 67:3-~~6~~8:4.)

103. Respondent has not taken any new clients for some time and is in the process of withdrawing from the practice of law. (R.T. 213:13-22; 214:3-~~2~~15:2.)

104. In File No. 02-0560, Respondent acknowledged during the hearing that her decision to retain the funds she had received from Ms. Mason may have been wrong, saying that she believed at the time that she was entitled to retain the funds, but that "if my thinking was wrong then I was wrong." (R.T. 222:14-15.) She further stated, "I should have never treated them like a family entity because that's the way I have always seen them. That was bad perspective. That was looking for trouble. So it wasn't a good judgment call." (R.T. 213:9-12.)

CONCLUSIONS OF LAW

File No. 02-0560

A. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.2, as alleged in Paragraph 6 of the Complaint. This Hearing Officer finds credible Respondent's contention that delays in pursuing the dissolution proceeding were caused in part by Ms. Barregarye's failure to pursue the matter and/or her disinclination to do so, and thus does not find that Respondent failed to abide by Ms. Barregarye's decisions concerning the objectives of the representation.

B. The State Bar has established by clear and convincing evidence that Respondent violated ER 1.3, as alleged in Paragraph 7 of the Complaint. While this Hearing Officer finds credible Respondent's contention that delays in pursuing the dissolution proceeding were caused in part by Ms. Barregarye, Respondent nevertheless had a duty to act with reasonable diligence and promptness, which she failed to do.

C. The State Bar has established by clear and convincing evidence that Respondent violated ER 1.4, as alleged in Paragraph 8 of the Complaint. While this Hearing Officer finds credible Respondent's contention that delays in pursuing the dissolution proceeding were caused in part by Ms. Barregarye, Respondent nevertheless had a duty to take reasonable steps to

communicate with Ms. Barregarye about the matter, which Respondent failed to do. Respondent's failure to communicate with Ms. Barregarye about her reasons for failing to refund the unearned portion of the fee she had been paid was an additional violation of ER 1.4.

D. The State Bar has established by clear and convincing evidence that Respondent violated ER 1.16, as alleged in Paragraph 9 of the Complaint. Respondent acknowledges that the $1500.00 fee she was paid was not reasonable in light of the work she performed and that she therefore should have refunded all or part of the fee, together with the $196.00 filing fee. While this Hearing Officer finds credible Respondent's contention that she had reached an agreement with Mr. Mason to apply the unearned portion of her fee to pay for work she was performing for Mr. Mason, Respondent could not do so without Ms. Barregarye's consent, since the funds had been advanced by Ms. Mason as a gift to Ms. Barregarye.

File No. 02-1015

E. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.2, as alleged in Paragraph 13 of the Complaint. Respondent consulted with Mr. Kennemur about his objectives in pursuing a civil claim against Mr. Nicholson and the related administrative appeal of the Registrar of Contractors proceeding. As set forth above, Respondent's ability to pursue those objectives was limited by Mr. Kennemur's ability to pay the costs associated with pursuing the civil action, including the cost of deposing Mr. Nicholson.

F. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.4, as alleged in Paragraph 14 of the Complaint. As set forth above, Respondent reasonably communicated with Mr. Kennemur about the civil action and the administrative appeal.

G. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.5, as alleged Paragraph 15 of the Complaint. The total fee charged was not unreasonable under the factors set forth in the Rule.

H. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.15, as alleged in Paragraph 16 of the Complaint. The funds paid to Respondent were not an advanced payment, to be withdrawn as fees were earned or expenses incurred, but were instead a "flat fee" which Respondent reasonably believed was earned on receipt and thus did not have to be deposited into a trust account. *See* Ariz.Ethics.Op. 99-02.

I. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 1.16, as alleged in Paragraph 17 of the Complaint. As set forth above, at the termination of the representation, Respondent surrendered to Mr. Kennemur all papers he was entitled to receive.

J. The State Bar has failed to establish by clear and convincing evidence that Respondent violated ER 3.2, as alleged in Paragraph 18 of the Complaint. As set forth above, Respondent took reasonable steps to expedite the litigation.

K. The State Bar has failed to establish by clear and convincing evidence that Respondent violated Rules 43 and 44, Ariz.R.S.Ct., as alleged in Paragraphs 19 and 20 of the Complaint. Respondent testified, and her conduct demonstrates, that she reasonably regarded the payments she received from Mr. Kennemur as "earned on receipt" which should not have been deposited into her trust account. *See* Ariz.Ethics.Op. 99-02.

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

This Hearing Officer considered *Standard* 4.4, *Lack of Diligence*, in determining the appropriate sanction warranted by Respondent's violation of ERs 1.3 and 1.4 in File No. 02-0560. Specifically, *Standard* 4.43 provides:

> Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

This Hearing Officer finds that Respondent acted negligently in pursuing a dissolution proceeding for Ms. Barregarye and communicating with her about the matter, but that Respondent's conduct resulted in little or no actual or potential injury to Ms. Barregarye, whose conduct suggests that she was not in a particular hurry to obtain a divorce.

This Hearing Officer considered *Standard* 7.0, *Violations of Duties Owed to the Professsion*, in determining the appropriate sanction warranted by Respondent's violation of ER 1.16 in File No. 02-0560. Specifically, *Standard* 7.3 provides:

> Reprimand [censure in Arizona] is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client.

This Hearing Officer finds that Respondent acted negligently in failing to refund the unearned portion of the fee she had been paid, causing injury or potential injury to Ms. Barregarye.

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively.

There are two aggravating factors:

- 9.22(a) -- prior disciplinary offenses; and
- 9.22(i) -- substantial experience in the practice of law.

There are six mitigating factors:

- 9.32(b) -- absence of a dishonest or selfish motive;
- 9.32(c) -- personal or emotional problems;
- 9.32(e) -- full and free disclosure to disciplinary board or cooperative attitude toward proceedings[3];
- 9.32(i) -- mental disability;
- 9.32(l) – remorse; and
- 9.32(m) -- remoteness of prior offenses.

No other aggravating or mitigating factors are found.

PROPORTIONALITY REVIEW

The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

The following cases were found by this Hearing Officer to be instructive:

In *In re Martinez,* 174 Ariz. 197, 848 P.2d 282 (1993), the respondent violated ERs 1.4, 1.16(d), and 8.1 and Arizona Supreme Court Rule 51 by failing to: communicate with clients in four separate matters; return client files in two of those matters; refund a retainer in one of the matters; and initially cooperate with the State Bar. Two factors were found in aggravation (prior

[3] While Respondent failed to provide the State Bar with a disclosure statement, she cooperated with the State Bar's investigation, providing copies of all documents in her possession. This

discipline and multiple offenses), while five were found in mitigation (absence of dishonest or selfish motive, inexperience in the practice of law, character or reputation, full and free disclosure to disciplinary board or a cooperative attitude, personal problems). Pursuant to an agreement for discipline by consent, the respondent was censured and ordered to pay restitution to one client.

In *In re Crimmins*, 2001 Ariz. Lexis 39, the respondent violated ERs 1.1, 1.2, 1.4, 1.16(d), and 8.4(d) by failing to: adequately represent his client by interviewing two potential witnesses; and promptly return a portion of the client's retainer. Three factors were found in aggravation (prior discipline, substantial experience in the practice of law, indifference to making restitution), while three were found in mitigation (absence of dishonest or selfish motive, full and free disclosure to disciplinary board or a cooperative attitude, and character or reputation). Pursuant to an agreement for discipline by consent, the respondent was censured and ordered to pay restitution.

In *In re MacDonald*, 2000 Ariz. Lexis 93, the respondent violated ERs 1.3, 1.4, 3.4, 8.1(b) and Supreme Court Rule 51 by failing to: act with reasonable diligence in representing a client in a domestic relations proceeding; keep the client reasonably informed about the representation; respond to a court order requiring him to file appropriate documents with the court; surrender the client's papers and property in a timely manner; and respond initially to the State Bar's investigation. One factor was found in aggravation (prior discipline), while four were found in mitigation (not enumerated in the opinion). The Disciplinary Commission accepted the Hearing Officer's recommendation that the respondent by censured and placed on six month's probation.

Hearing Officer found Respondent to have been completely forthright throughout the course of

In *In re Shaver*, 2001 Ariz. Lexis 100, the respondent violated ERs 1.2, 1.3, 1.4, 1.5, 1.15 and 1.16 in five different matters by failing to provide adequate attention to the files, failing to be diligent, failing to communicate with his client, and failing to resolve fee disputes. Two factors were found in aggravation (multiple offenses and substantial experience in the practice of law), while six were found in mitigation (absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal problems, timely good faith effort to rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and remorse). Pursuant to an agreement for discipline by consent, the respondent was censured and placed on six month's probation.

In *In re Odneal*, 2001 Ariz. Lexis 91, the respondent violated ERs 1.3, 1.15, 1.16, 4.4, 8.1, and Arizona Supreme Court Rules 43, 44 and 51 by: holding undisputed funds in her trust account for three months and thereafter failing to promptly disperse the funds to her client; disbursing disputed funds to herself before the matter was resolved; in another matter failing to promptly return the unused portion of a retainer; in another matter, contacting an opposing party at work despite requests that she not do so; and failing to respond to the State Bar's investigation. Three factors were found in aggravation (multiple offenses, bad faith obstruction of the disciplinary proceedings, and substantial experience in the practice of law), while one was present in mitigation (absence of a prior disciplinary record). Pursuant to an agreement for discipline by consent, the respondent was censured and placed on one year's probation.

In *In re Lenaburg*, 177 Ariz. 20, 864 P.2d 1052 (1993), the respondent, a managing partner of a law firm, violated ERs 1.4. 1.16(d), and 5.1 by failing to: communicate with clients over difficulties with the firm's representation of them and their request for a refund; ensure that

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this proceeding.

the clients received a refund of their unearned retainer; and make reasonable efforts to ensure that the conduct of subordinate lawyers conformed to the Rules of Professional Conduct. Four factors were found in aggravation (pattern of misconduct, multiple offenses, substantial experience in the practice of law, and prior misconduct), while three were found in mitigation (absence of a dishonest or selfish motive, full and free disclosure during and cooperative attitude toward the disciplinary proceedings, and remorse). Pursuant to an agreement for discipline by consent, the respondent was censured and placed on two year's probation.

While none of these cases is precisely analogous to this one, together they suggest that the appropriate sanction in this case is, at a minimum, for Respondent to be censured and ordered to make restitution to Ms. Barregarye. Restitution of the entire $1,696.00 that Respondent was paid is warranted, as there is not sufficient evidence in the record that Ms. Barregarye received a tangible benefit from the work Respondent performed on her behalf.

Whether Respondent should also be placed on probation presents a more difficult question. *Crimmins* suggests that probation is not warranted, since Respondent's conduct arises from only a single case, and the cases in which probation was imposed involved additional acts of misconduct (*MacDonald)* or misconduct in multiple representations. Moreover, Respondent has already limited her case load and intends to withdraw from the practice of law. This Hearing Officer therefore concludes that imposing a term of probation is neither necessary or warranted.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill

public confidence in the bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen,* 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards,* including aggravating and mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent shall be censured.

2. Respondent shall pay restitution to Denise Barregarye in the amount of $1,696.00, together with interest at the statutory rate of 10 percent per annum from February 15, 2002.

3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 30th day of November, 2003.

Geoffrey M.T. Sturr
Hearing Officer 8X

Original filed with the Disciplinary Clerk
this 1st day of December, 2003.

Copy of the foregoing mailed
this 1st day of December, 2003, to:

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