BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA, **THOMAS C. PICCIOLI,** **Bar No. 012546** RESPONDENT.	No. 03-1481 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on August 2, 2004. No hearing was held. The Disciplinary Commission held oral argument on the Tender and Joint Memo on December 11, 2004. On January 10, 2005 the Disciplinary Commission rejected the Tender and Joint Memo and remanded the matter back to this Hearing Officer. A telephonic status conference was held on January 26, 2005. The parties filed an Amended Tender of Admissions and Agreement for Discipline by Consent (Amended Tender) and an Amended Joint Memorandum in Support of Agreement for Discipline by Consent (Amended Joint Memo) on March 11, 2005. A hearing on the Amended Tender and Amended Joint Memo was held on March 24, 2005.

FINDINGS OF FACT

At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 20, 1989.

COUNT ONE (File No. 03-1481)

1. Respondent became involved in a criminal scheme with a man named Paul Scribner ("Scribner"). Respondent met Scribner, who identified himself as the Vice President of a "Merchant Banking" group in Tulsa, Oklahoma, at some point in 1998. Scribner professed to be from Branson, Missouri, where his father was a Pastor of the First Baptist Church. *See* Respondent's October 9, 2003 Response to the State Bar, attached as Exhibit 1 to Tender; *see also* Respondent's January 6, 2003 Letter to the sentencing judge, included within the documents produced by Attorney Robert Murray and attached as Exhibit 2 to Tender.

2. Scribner claimed that he (and the "Merchant Banking" group) could participate in the issuance and sale of bank debentures, notes and other debt instruments with a high profitability yield. Respondent went to Oklahoma several times and met with the Senior Partners of the Merchant Bank, who appeared to

Respondent to be well-to-do businessmen with extensive knowledge of the banking system and finance in general. *See* Exhibits 1 and 2 attached to Tender.

3. Respondent was convinced to invest $210,000 of his family's and friend's money. Respondent obtained the majority of the money ($125,000) by borrowing against his (and his wife's) pension fund and home. The remainder was obtained from Respondent's brother, his aunt, and a close friend. *See id.*

4. Later, Scribner left employment with Merchant Bank and moved to Las Vegas, where he started a new company, Pinebrook. *See* Exhibit 1 attached to Tender.

5. Scribner informed Respondent that the transaction involving Respondent's money had not "gone through," but he offered to keep the funds and pay interest to Respondent, as he was making high returns. *See id.*

6. Respondent took back $50,000 that he needed to live on and left the rest with Scribner. *See id.*

7. Respondent quit his law practice and moved to Las Vegas to work for Scribner in early 2000. *See id.*; *see also* Respondent's January 6, 2003 letter to the court included in Exhibit 2 attached to Tender.

8. Respondent's job was to involve pursuing the trading programs in bank debentures, notes and other debt investments that he understood Scribner to be proficient in. *See id.*

9. In or around the summer of 2000, Scribner and Respondent were introduced to the parties who later turned out to be the "co-conspirators" in the investment scam that led to Respondent's arrest and conviction. *See* Exhibit 1 attached to Tender.

10. These men appeared to Respondent to be high-level investors. One individual was a licensed securities dealer and the owner of a firm that "had a seat on the Chicago Board of Trade." *Id.* Another was a senior partner in a major U.S. law firm. *See id.* Because the indictment used pseudonyms, Respondent describes the co-conspirators as a Law Partner, a Broker, an Intermediary and a Junior Manager of a Wall Street investment firm. The Junior Manager later turned out to be an undercover FBI agent. *See id.*; *see also* Exhibit 2 attached to Tender.

11. The investment scam involved the preparation of a consulting agreement that guaranteed that the co-conspirators would be paid a $3.25 million consulting fee for arranging an investment plan between the "Churchill Group" and Pinebrook. Respondent was ultimately convicted for preparing an invoice that solicited the payment of the consulting fee and faxing that invoice to the undercover FBI agent (wire fraud and conspiracy to commit wire fraud). *See* Exhibits 1-2 attached to Tender; *see also* the copy of the government's pre-

sentencing report attached as Exhibit 3 and the copy of Respondent's conviction attached as Exhibit 4 to Tender.

12. In response to the State Bar's inquiry about the crime, the New York Prosecutor informed the State Bar's Staff Investigator that Respondent was not the ringleader of the group, but was involved in creating the contract that set forth the agreement for the scheme (presumably, the invoice) and was to receive about $70,000 for his part in the scheme.

13. Respondent originally thought that the company would receive a fee for setting up a *real* investment. He claims that he objected to Scribner as soon as he began to think something was wrong. However, Scribner brought in a third-party attorney to discuss matters and they somehow arrived at an agreement of how to do things that Respondent thought was legally acceptable. Respondent claims the "Law Partner" co-conspirator advised him that he and the Broker would make sure the transaction was completed properly, so Respondent continued with the process. *See* Exhibit 1 attached to Tender.

14. Respondent admits that by the time he faxed the invoice he was aware that something was wrong. He knew that Scribner had no intention of trying to place an investment for the Churchill Group. By this time Respondent also knew that the plan was to kickback $1.75 million to the Junior Manager (who in reality was an undercover agent), and the rest of the money was to be

split amongst the co-conspirators, although Respondent himself would only receive $70,000 of that money. *See id.*; *see also* Exhibit 2 attached to Tender.

15. When Respondent voiced his concerns, the Broker and the Law Partner again told him that everything would be okay, and that if Scribner and the Junior Manager (undercover agent) did not follow through properly, the Broker and the Law Partner would go over their head to the president of the company (Churchill). *See id.*

16. At some point, the undercover FBI agent, in his Junior Manager disguise, instructed Scribner to send him the invoice so that he could use it to go get the money. Scribner then called Respondent and told him to prepare something and fax it. At that point, Scribner was still holding approximately $160,000 of Respondent's money. *See id.*

17. Respondent states that he realizes he should not have gone forward, but based on his talks with the Law Partner and the Broker, he thought that ultimately, a legitimate transaction would occur. Respondent sent the invoice. *See* Exhibit 1 attached to Tender.

18. At some point in late January or early February, Scribner went to New York to "close on the payment of the fee" and was arrested by the special agent/Junior Manager. Initially, Scribner came back to Las Vegas and did not reveal his arrest, and Respondent continued to work with Scribner and the other

co-conspirators on a "closing" of the transaction, supposedly to occur in Zurich. *See id.*

19. Scribner eventually confessed to Respondent that he had been arrested. Respondent then "terminated the transaction" and turned himself in to the FBI. *See id.*

20. Respondent pled guilty to one count of conspiracy to commit wire fraud in violation of 18 USC § 371, and one count of wire fraud in violation of 18 USC § 1343. *See id.*; *see also* Exhibit 2 attached to Tender.

21. On or about March 25, 2003, Respondent was convicted in case number 01-CR-479, in the Federal District Court, Southern District of New York, of the crimes of conspiracy to commit wire fraud, 18 USC § 371, and wire fraud, 18 USC § 1343. *See* Exhibits 2 (specifically, sentencing hearing transcript) and 4 (the copy of Respondent's conviction) attached to Tender.

22. Respondent was sentenced to serve fifteen months in federal prison and two years of probation upon release. *See id.*

23. Respondent received the minimum allowable sentence under the Federal Guidelines with a downward departure because of his minimal role in the offense. The Federal District Court judge found that the fact that Respondent entered believing it was a valid investment, and putting up $210,000 of his family's money, indicated that he was not involved in the set up or the initial

execution of the scheme. *See* Exhibit 2 attached to Tender, specifically the sentencing hearing transcript.

24. Respondent's lawyer reported the conviction to the State Bar on April 3, 2003, and stated that Respondent would not contest interim suspension. *See* letter from Robert Murray attached as Exhibit 5 to Tender.

25. On or about June 16, 2003, the Arizona Supreme Court placed Respondent on interim suspension. *See* the Court's Order, attached as Exhibit 6 to Tender.

26. A probable cause order was entered on February 9, 2004, for violations of ER 8.4 (b) (criminal conviction) and (c) (dishonesty/fraud). *See* probable cause order attached as Exhibit 7 to Tender.

27. By committing a criminal act that reflects adversely on Respondent's honesty, trustworthiness or fitness as a lawyer, Respondent violated ER 8.4(b).

28. By engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, Respondent violated ER 8.4(c).

CONDITIONAL ADMISSIONS

Respondent conditionally admits his conduct violates Rule 42, Ariz. R. S. Ct., specifically ER 8.4(b) and (c).

ABA STANDARDS

In determining the appropriate sanction, the parties considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The court and commission consider the *Standards* a suitable guideline. *In re Peasley*, SB-03-0015-D, ¶¶ 23, 33 (Ariz. 2004).

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.

1) DUTY VIOLATED.

Given the conduct in this matter, it was appropriate to consider *Standard* 5.0 (Violations of Duties Owed to the Public). Absent aggravating or mitigating circumstances, upon application of the factors set out in *Standard* 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects:

> 5.11
> Disbarment is generally appropriate when:
> (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the

administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft: or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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

Standard 5.1 (Failure to Maintain Personal Integrity).

Respondent admits that he has been convicted on criminal charges stemming from his involvement in a conspiracy to commit wire fraud. Such conduct diminishes the integrity of the profession. Maintaining the integrity of the profession is a duty owed as a professional and when lawyers engage in illegal conduct the public confidence in the integrity of officers of the court is undermined. See Standards, at 5.0.

2) MENTAL STATE.

Based on the foregoing, the presumptive sanction for the admitted conduct appears to be disbarment, because Respondent's criminal conviction was for fraud. At his sentencing hearing the court noted that:

[. . .] it appears to the court [sic] that the type of scheme perpetrated by the defendant and his coconspirators was the simple form of this type of crime. The fact the defendant entered the scheme believing it

> could be a valid investment and in fact put up $210,000 of his own and his family's money suggests to the Court that he was not involved in the set up or initial execution of the crime, simple or not. Accordingly, the Court finds that the guideline offense level is 14 and not the 16 calculated by the Probation Department.

[See Exhibit 2 attached to the Tender.] Despite not being involved in the set-up of the crime, when Respondent faxed the invoice, he was aware something was wrong with the transaction and that the parties did not intend to do the transaction. Transcript of Disciplinary Commission hearing, 11/11/04, p. 15, lines 3-6. This appears to make Respondent's conduct intentional, and the Commission so held in its report, Commission's report, 1/10/05, p. 3, making the presumptive sanction in this matter disbarment. Therefore, the parties and this Hearing Officer agree that the presumptive sanction in this matter lies somewhere between suspension and disbarment, due to the enormous amount of mitigation. After determining the presumptive sanction, it is appropriate to evaluate factors enumerated in the Standards that would justify an increase or decrease in the presumptive sanction. (Discussed below) See *In re Scholl*, 200 Ariz. 222, 225-26, 25 P.3d 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995).

3) ACTUAL OR POTENTIAL INJURY.

Although no clients were harmed by Respondent's actions, the Commission in its report stated that "the potential harm to individuals was significant" in

comparison to the *Scholl* matter. Commission Report, page 4. The record is unclear as to who those individuals are, presumably other innocent investors who were involved in the scheme. This issue will be addressed further during the proportionality discussion.

4) AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer agrees with the parties that one aggravating factor applies and should be considered in this matter: (b) dishonest or selfish motive. He invested his own and his family's money and was afraid to lose that investment.

While Respondent did have substantial experience in the practice of law at the time he was arrested (approximately 11 years at that point), the parties have conditionally agreed that as Respondent's area of practice did not involve investment expertise, Respondent did not have substantial experience in an area of law that related to his conduct at issue here. This decision is based upon the following statement by the Arizona Supreme Court in its most recent published disciplinary decision: "We conclude that when there is a nexus between a lawyer's experience and the misconduct, substantial experience should be considered a relevant aggravating factor." *Peasley*, SB-03-0015-D, ¶39.

This Hearing Officer agrees with the parties that six factors are present in mitigation: (a) - absence of a prior disciplinary record: Respondent has no prior discipline with the State Bar. (c) personal or emotional problems - Respondent states that he had "enormous personal and emotional problems which affected [his] conduct." [*See* Exhibits 1 and 2 attached to the Tender.] He had also been seeing a counselor since 1995. (*See* Hearing Exhibit 6, attached hereto) Respondent explains that by the time he engaged in the illegal conduct, he was overwhelmed by the situation he found himself in and frightened that if he did not comply with his superior's instructions, he would lose his life's savings as well as his family's investments. *See id.* For purposes of this agreement, the State Bar agrees that Respondent's personal problems affected his conduct. (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings - The parties agree that Respondent made full and free disclosure to both law enforcement and the State Bar, has had a completely cooperative attitude toward proceedings. It is also relevant that Respondent turned himself in to the FBI, admitted and accepted responsibility for his actions by pleading guilty, so that the federal government was not burdened with the time and expense of preparing for trial. This is in marked contrast to the Respondent in *Scholl, supra.* Likewise, Respondent is willing to enter into a consent agreement rather than burden the State Bar with the time and expense required to pursue the matter through formal

hearing. Additionally, at the hearing in this matter, Bar Counsel emphasized that Respondent has been honorable and respectful to the Bar throughout this matter, in fact, she characterizes his cooperation as "refreshing." (Hearing Transcript, p. 24, line 1) (l) remorse – Respondent has exhibited extreme remorse. Respondent has expressed in letters to Bar Counsel that he sincerely regrets his conduct and has further explained the circumstances surrounding his involvement with the criminal scheme. [*See* Exhibits 1 and 2 to the Tender.] (g) character or reputation – This is an additional mitigating factor that the parties agree is applicable in this matter. Specifically, Respondent's attorney submitted more than 60 letters in support of Respondent's character to the sentencing judge in Respondent's case. The letters were written by Respondent's family members, friends, and business acquaintances in the Tucson community that range from former employers, clients, co-workers and other lawyers in the community to doctors, accountants, and a former member of the Arizona House of Representatives. Each letter describes Respondent as a fine person who made a horrible mistake. [*See* Exhibit 2 attached to the Tender.] (k) imposition of other penalties or sanctions - Respondent was sentenced to 15 months in prison, and was placed on probation for two years following his release. (Fifteen months was the minimum sentence possible under the federal sentencing guidelines. Respondent was actually released in 13 months, and his probation officer had

advised Respondent, at the time of the hearing on March 24, 2005, that she intended to attempt early termination of his supervision in June, 2005, making his probation one year rather than two. Hearing Transcript, p. 10, lines 1-4. Respondent's good behavior during his incarceration is further testimony to his cooperative attitude.) Additionally, Respondent and his wife were forced to file bankruptcy shortly before he was incarcerated. Respondent lost all the money he and his family had invested.

Finally, Respondent's conduct did not cause any client harm. Although this is not an enumerated mitigating factor under the Standards, the court and commission have placed great weight on this factor in previous case law. See, e.g., *Scholl*, 200 Ariz. at 224-25, 25 P.3d at 12-13; *Matter of Rivkind*, 164 Ariz. 154, 157-58, 791 P.2d 1037, 1040-41 (1990).

At the hearing in this matter, Respondent presented additional letters of support. Exhibits 1, 2, 3, 4, and 5. Following the hearing, and upon request of the Hearing Officer, Respondent submitted a letter by Candace Lienhart, attached hereto as Exhibit 6. Ms. Lienhart is Respondent's counselor and holistic healer. Respondent has been seeing her for approximately ten years.

The parties have identified what they believe to be the relevant aggravating and mitigating factors. The parties believe that the abundance of mitigating factors justify a significant decrease in the presumptive sanction in this case. As

the presumptive sanction was between suspension and disbarment, the parties and this Hearing Officer believe that the mitigating factors tip the balance in favor of suspension. The appropriate length of suspension is the next question.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*, SB-03-0015-D, ¶¶ 33, 61. However, the discipline in each case must be tailored to the facts of the individual case. *Id.* at ¶ 61 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

Review of criminal conviction case law revealed one matter that specifically involved a conviction for wire fraud and conspiracy to commit wire fraud. *See In re Adornato*, 165 Ariz. 580, 799 P.2d 1354 (1990). In that decision, Adornato was disbarred, *nunc pro tunc*, effective December 31, 1984. A copy of the decision and its supporting materials is attached as Exhibit A to Tender. In its Memorandum of Points and Authorities to the Supreme Court, the State Bar observed that Mr. Adornato had been convicted of the crimes on October 4, 1982. *See* Exhibit A to Tender. The Supreme Court entered an order suspending Mr. Adornato on June 25, 1984. *See id.* No further action was taken to bring the disciplinary proceeding to final resolution until 1990. *Id.* The State Bar observed

conviction became final prior to February 1, 1985, it was governed by former Rule 29(c), Ariz. R. S. Ct. That rule provided:

> A member shall be automatically suspended from the practice of law ten days after his conviction of a felony under either state or federal law . . . . Suspension under this rule shall also end in disbarment upon such conviction becoming final.

Id. Because the order of disbarment had never issued, the State Bar recommended an order *nunc pro tunc* so that Respondent would be eligible for reinstatement. *See id.* Respondent had no objections and the Court so ordered. *See id.*

In the matter at hand, former Rule 29 does not govern. In 1985, the rule was amended and discipline in cases of felony convictions is now determined on a case-by-case basis. *See Rivkind*, 164 Ariz. at 158, 791 P.2d at 1041. Specifically, Rule 57(a)(3), Ariz.R.S.Ct., governs Respondent's case.[1] Rule 57(a)(3) provides that a "lawyer shall be disciplined as the facts warrant upon conviction . . . of any felony." *Id.* In the *Rivkind* case, the Supreme Court stated that disbarment would no longer be the presumptive sanction in a felony conviction case. *See id.* at 159, 791 P.2d at 1042. Instead, the Court explained that discipline would be tailored to the particular facts of the case, because the

---

[1] Effective December 3, 2003, the rules were amended and considerable renumbering occurred. Former Rule 57(a) is now Rule 53(h), Ariz. R. S. Ct. This memorandum cites to Rule 57(a) because that was the designation in effect at the time of Respondent's conviction and interim suspension.

goal of disciplinary proceedings is to protect the public in the future rather than to punish the offender as in the criminal context. *See id.*

> In certain cases, protection of the public may not call for permanent disbarment or for a pre-ordained period of suspension. The circumstances in which the misconduct occurred or subsequent efforts at rehabilitation or contrition may indicate that the conduct is not likely to recur and that disbarment would be excessive. At times, other remedies, such as a closely supervised probation, might adequately protect the public so that a harsher discipline would become purely vindictive and punitive.

Rivkind, 164 Ariz. at 159, 791 P.2d at 1042 (citing cases). Rivkind had been convicted of a possessory drug felony in violation of ER 8.4(b). *See id.* The Court found one aggravating factor—repeated violation of the law (repeated drug use). *See id.* at 158, 791 P.2d at 1041. In mitigation, the Court found extensive evidence of rehabilitation and contrition, and cooperation with the court and the disciplinary process. *See id.* In view of the mitigation and because the drug use had not progressed to the point of impacting the respondent's legal practice, the Court held that a two-year retroactive suspension, with two years of probation, was appropriate. *Rivkind*, 164 Ariz. at 160-61, 791 P.2d at 1043-44. The suspension was retroactive because the Court determined that it was "fair to give respondent credit for the time spent on suspension" because to do otherwise, in light of the compelling rehabilitation evidence, would be "merely punitive and vindictive." *Id.* at 160, 791 P.2d at 1043.

In re Savoy, 181 Ariz. 368, 891 P.2d 236 (1995), is an example of a felony conviction case that does not involve substance abuse. Savoy was convicted of perjury for lying during a Grand Jury proceeding, and was sentenced to two years criminal probation and imposed a $15,000 fine. *Id.* at 369, 891 P.2d at 237. The Supreme Court adopted the Disciplinary Commission's recommendation that Savoy be suspended for two years. *See id.* The Disciplinary Commission determined that Savoy had violated ER 3.3(a)(1) by making a false statement of material fact to a tribunal; ER 8.4(b) by committing a criminal act that reflected adversely on his honesty, trustworthiness, and/or fitness as a lawyer; 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and ER 8.4(d) by engaging in conduct prejudicial to the administration of justice. *Id.* at 370, 891 P.2d at 238.

The Commission found that although disbarment appeared to be the only appropriate outcome for a lawyer who commits perjury, the aggravating and mitigating factors present allowed for suspension. *Id.* at 370-72, 891 P.2d at 238-40. Specifically, the Commission considered the imposition of other penalties or sanctions, full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings, the remoteness of prior offenses, no selfish or dishonest motive, and Savoy's character and reputation as mitigating factors. *See id.* The Commission found no aggravating factors. *See id.* The Commission also

considered it relevant that one Standard indicated that disbarment was warranted while another did not. *See id.* Because the Commission believed that Savoy posed no danger to the public, the majority determined that a two-year suspension would best serve the interests of discipline. *See id.*

The *Scholl* case is also instructive in the case at hand. Scholl was a judge who was convicted in federal court on four counts of filing false tax returns and three counts of structuring currency transactions to avoid treasury-reporting requirements. *Scholl*, 200 Ariz. at 223, 25 P.3d at 711. Scholl was not sentenced to any time in prison, but received criminal probation with several conditions. *See id.* at 223, 25 P.3d at 711. The State Bar sought Scholl's disbarment citing the felony convictions as violations of ER 8.4(b). *See id.* The *Scholl* Court determined that Scholl had clearly violated ER 8.4(b) by compromising the integrity of the legal profession and contributing to a loss of public confidence in the legal system. *See id.* at 224-25, 25 P.3d 712-13.

The Court found the following mitigating factors: absence of a prior disciplinary record; imposition of other penalties or sanctions; full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings; and character and reputation.[2] *See id.* at 226, 25 P.3d 714. In

---

[2] Several witnesses had testified favorably for Scholl at the hearing.

addition, there was extensive evidence of rehabilitation. "Scholl's rehabilitation has been witnessed and attested to by judges, lawyers, and mental health professionals." *See id.* at 228, 25 P.3d 716. The Court also observed that there was no evidence that Scholl's actions had resulted in any harm to clients, lawyers or other judges. *See id.* at 224, 25 P.3d 712. Because of the extensive mitigation and the fact that there was "scant" possibility that Scholl's conduct would recur, the Court held that a six-month suspension was appropriate. *Id.* at 228, 25 P.3d 716.

In *Matter of Riches*, the Disciplinary Commission found that Riches had misappropriated funds from his law firm in violation of ERs 8.4 (b) and (c). 179 Ariz. 212, 213, 877 P.2d 785, 786 (1994). Although such conduct would presumptively warrant disbarment under *ABA Standard* 5.11, the Commission mitigated the sanction down to a three-year suspension, retroactive to the date of interim suspension, with two years of probation to follow. *See id.* at 214-216, 877 P.2d at 787-89. The Commission found the following mitigating factors: mental disability, some evidence of interim rehabilitation and no client harm. *See id.* The Commission also observed that discipline should be deterrence motivated rather than punitive, and that the three-year suspension would serve as a deterrent to other lawyers. *See id.*

Two additional cases appear to be instructive in the instant matter, *In the Matter of Moak*, No. SB-03-0007-D (6/16/03) and *In the Matter of Arrotta*, No. SB-04-0015-R (8/25/04). *Moak* involved a pattern of misrepresentations to a tribunal, and *Arrotta* is a reinstatement case with extensive discussion of rehabilitation which can be applied to this case.

Moak was charged with three counts of misconduct, which included a violation of 8.4(c), dishonesty, fraud, deceit or misrepresentation. Moak was found to have committed his ethical violations "knowingly", that is, he acted with a "conscious awareness of the nature or attendant circumstances of the conduct but was without the conscious objective or purpose to accomplish a particular result." ABA Standards. Moak repeatedly failed to disclose to his opponent a subsequent injury that occurred to his client prior to trial on the accident involving the first injury. The trial court later concluded that Moak's non-disclosure tainted the original verdict and ordered a new trial. Moak was ordered to pay his opponent's attorneys' fees, in the amount of $31,493.82. Moak's client suffered harm because a verdict in his favor was vacated. However, once Moak accepted responsibility for his misconduct, he took steps to rectify the effects of his conduct on his client. Four aggravating factors were established against Moak, including a pattern of misconduct. The Supreme Court suspended Moak

for six months and one day, an increase from the Commission's recommendation for a six month suspension.

The *Arrotta* matter involved an attorney disbarred for felony convictions involving two counts of mail fraud, bribery, fraudulent schemes and practices, and disclosure of confidential information. After serving a year in prison and waiting eight years to apply, Arrotta was seeking reinstatement. In finding that Arrotta had not established rehabilitation and therefore denying his application for reinstatement, the Supreme Court re-emphasized the need of a disbarred applicant to demonstrate rehabilitation. In evaluating an application for reinstatement, the Court stated it considers four factors: character and standing prior to disbarment, the nature and character of the charge for which he was disbarred, conduct subsequent to disbarment, and the time elapsed since the disbarment. The "bottom line", the Court stated, "must always be whether the applicant has 'affirmatively shown that he has overcome those weaknesses that produced his earlier misconduct,' i.e., whether he has been rehabilitated", quoting *In re Robbins,* 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992). To show rehabilitation, an applicant must establish by clear and convincing evidence that he has identified what weaknesses caused the misconduct and then demonstrate that he has overcome those weaknesses.

The instant case has various similarities to *Rivkind*, *Riches*, *Savoy*, *Scholl*, *Moak* and *Arrotta*. Here, the actual misconduct involved a felony offense, committed for personal gain. Respondent turned himself in to the FBI, admitted criminal responsibility, successfully completed his term of imprisonment, fully cooperated with the authorities and the disciplinary board and has been fully cooperative throughout the proceedings. Respondent has no prior disciplinary history and has provided evidence of substantial community support. Respondent has shown extreme regret for his actions, the public was not adversely affected by his conduct, and it is extremely unlikely that the conduct will occur again. Thus, the effective date of the suspension should run from the date that Respondent voluntarily withdrew from the practice of law, because the purpose of bar discipline is not to punish the respondent, but to protect the public. *See Matter of Nicolini*, 168 Ariz. 448, 449-50, 814 P.2d 1385, 1386-87 (1991). In sum, while Respondent's conduct warrants a demonstration of rehabilitation, it does not warrant disbarment or an excessive term of suspension, based on the specific facts of the case. At the hearing, in this Hearing Officer's opinion, it was painfully apparent that Respondent is completely honest and forthcoming in regards to both his rehabilitation and remorse. If he cannot come up with an adequate explanation for committing this mistake it is simply because he refuses to make any of the typical excuses that many Respondents use in these types of

proceedings. He has admitted it was an isolated mistake committed based upon a totality of circumstances at a particular time. He can simply do no more.

With all due respect to the Commission, it is difficult for this Hearing Officer to reconcile the facts and findings in *Moak* and *Scholl* with the Commission's findings in the instant case. Both *Moak* and *Scholl* involved clear patterns of misconduct, yet their actions only earned them six months' and one day and six months' suspension, respectively. Moak's conduct was deemed only to be knowing, despite there being a pattern of misconduct and clear intention to affect the outcome of the case. *Scholl* particularly is instructive, with similar mitigating factors to Respondent's case, including lack of harm to any client. The Commission in its report here indicated that it felt that in this case the potential harm to individuals was significant, "and in *Scholl* there was no attempt to defraud individual investors or clients." Commission Report, p. 4. Scholl defrauded the United States government, and in effect the potential harm, although not found by the Court, could have included every taxpayer in this country. The harm in the instant case is not any greater than the "potential" harm in *Scholl.* This Hearing Officer is unable to conclude that a four-year suspension is appropriate, as suggested by the Commission's report, in light of the foregoing proportionality review, particularly *Scholl.*

The above-cited cases evaluate criminal conduct and establish that the recommended sanction is appropriate given the facts of this case. This agreement provides for a sanction that meets the goals of the disciplinary system. A suspension of at least two years requires Respondent to establish rehabilitation and fitness to practice law prior to being reinstated, and a two-year probation term provides for Respondent to be closely monitored upon reinstatement. Respondent has already demonstrated that he is well on his way to rehabilitation, based on the exhibits he submitted at the hearing on this matter. The terms of the agreement serve to protect the public, deter other lawyers from similar conduct and maintain the integrity of the bar. Any additional sanctions would appear to be punitive in this matter.

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 mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent providing for the following:

1. Respondent shall be suspended for two years and six months. The effective date of the suspension shall be retroactive to June 16, 2003, the date that the Supreme Court placed Respondent on interim suspension with his consent. This will provide an approximately additional six months' suspension time from June 16, 2005.

2. Respondent shall be placed on probation for two years upon his reinstatement to practice. The terms of the probation are to be determined at the time of Respondent's application for reinstatement.

3. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding within 30 days of the Supreme Court's final judgment and order.

4. There are no issues of restitution in this case because no clients were involved.

DATED this 10th day of May, 2005.

Anne H. Phillips
Hearing Officer 9Y

Original filed with the Disciplinary Clerk
this 9th day of May, 2005.

Copy of the foregoing was mailed
this 10th day of May, 2005, to:

Thomas C. Piccioli
Respondent
5757 North Camino Esplendora
Tucson, AZ 85718-4053

and

Thomas C. Piccioli
Respondent
5004 East Cecelia Street
Tucson, AZ 85711

Denise M. Quinterri
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: PWilliams

EXHIBIT 6

LIENHART

April 19, 2005

Anne H. Phillips
Hearing Officer 9Y
State Bar of Arizona

Dear Ms. Phillips:

I am writing this letter on behalf of Thomas Piccioli, and ask that it be entered into the record in his case before the State Bar of Arizona.

My name is Candace Lienhart. I am a wholistic healer and counselor in the Native Kahuna Tradition of Hawaiian Shaminism. I have been in full time practice in Tucson, Arizona, since 1987. During that time I have traveled extensively, teaching classes and seminars, and counseling people on an individual basis. Tom Piccioli originally came to see me around ten years ago. He was referred by a mutual friend, and did personal work with me in various areas which were not related to the situation that developed in his career in 2001. Tom contacted me in the fall of 2001, having recently returned to Tucson, and scheduled an appointment. At that time, he reported his arrest for wire fraud in New York. Over the next year and a half, Tom met with me regularly for counseling sessions. He also attended my monthly group seminar. I am neither a physician nor a psychologist, nor do I pretend to be. In my field of expertise, all things must be considered in reviewing the behavior, events and circumstances that occur in a person's life.

During our discussions, Tom reported his diagnosis and treatment by both medical doctors and naturopathic physicians. He reported various treatments for depression, anxiety and panic attacks. At one time he reported that he was being treated for an adrenal system shutdown, due to an overload caused by anxiety. As time went on, his condition worsened, and he reported being treated with a variety of psychotropic medications. From his reports to me, Tom was vehemently opposed to taking the prescribed medication, but he was dysfunctional without them. I encouraged him to do what he had to do to get through the process, and to follow the advice of his physicians. His prison term began while he was on medication, and he was not allowed to continue after his prescriptions ran out. I taught him various spiritual techniques to assist his withdrawal, when the time came. Ultimately, he was able to withdraw from all medication, after less than two months of incarceration. In my experience, the average

3961 W. WILDLIFE PL. TUCSON, ARIZONA 85745 TELE: (520) 743-0113 FAX: (520) 743-9339

withdrawal period from such medications is much longer than two months, which is a testament to Tom's character.

In my opinion, Tom did not have any problem accepting responsibility for the actions that led to his arrest, and ultimately to his conviction. On the contrary, the problem he did have, which led to his depression, was centered around an extraordinary level of guilt, and self deprecation. Tom understood that he made a mistake, and was willing to accept both the responsibility and the consequences of that mistake. What he could not deal with at the time, but ultimately did deal with, was the fact that he had permitted that mistake to happen, and that it would hold such devastating consequences for his family, particularly his wife and adopted son.

From my experience, Tom Piccioli has based his life and practice on the highest ethics code, with every regard for doing what is right for humanity. He is a person with extreme devotion to spiritual values and to our Creator. His "fall from grace" was as much a surprise to him as it was to all of us who know him. His mistake was the most difficult challenge he has faced in his personal and professional career. He submitted to the guidance of the law and did his time with obedience and humility. I believe that he has been fully rehabilitated. I continued working with Tom while he was incarcerated, and can report that he did his very best to facilitate the growth and education of other inmates. I also believe that his service was invaluable to their character as well as redemptive to himself. If you were to ask me, I would predict with great certainty that it would be impossible for Tom to repeat that behavior in any part of his future. Although he has not been allowed to practice law since his release, he has continued as a legal servant to other attorneys, which to me, is demonstrative of his dedication to his profession.

I strongly urge you to reinstate Tom Piccioli's license to practice law, and allow him to serve our community as the valuable asset he has become. There is no doubt in my mind that this would be your best choice. If there is any additional information that you would like me to provide, you may reach me at 520-743-0113.

Sincerely,

Candace Lienhart