BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **SCOTT K. RISLEY,** **Bar No. 015268** RESPONDENT.	Nos. 03-1066, 03-2025 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed a Complaint on May 4, 2004. Respondent filed an Answer on June 18, 2004. The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on September 9, 2004. The complainants have been notified of this agreement. No hearing has been held.

FINDINGS OF FACT

1. 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 October 23, 1993.

2. Respondent has no prior disciplinary record.

COUNT ONE (03-1066)

3. Respondent represented Plaintiffs in *Gery L. Allen et al. v. George H. Wardner, et al.*, Yavapai County Superior Court, No. CV2001-0651/2002-0408, (hereinafter, "the lawsuit") arising from a construction dispute.

4. Randolf O. Persson, the Complainant in this matter, is President of Kenwood Mortgage & Investment, Inc. ("Kenwood") and Trustee for the Randolf O. Persson Separate Property Trust ("the Trust"), neither of which were parties to the lawsuit.

5. Plaintiffs believed that Mr. Persson had financial information about the Defendants relevant to the lawsuit.

6. On or about November 8, 2002, Respondent caused two subpoenas duces tecum to be delivered to Mr. Persson in his capacity as President of Kenwood and Trustee. On that same day, Mr. Persson sent Respondent a facsimile stating that he "object[ed] to the subpoenas."

7. On November 13, 2002, Respondent filed or caused to be filed in Yavapai County Superior Court a Motion to Compel, under the caption of the lawsuit and Respondent's signature, to require Kenwood and the Trust to produce documents "responsive to subpoenas served on them by Plaintiffs." The Motion to Compel states that a copy of the Motion was mailed to Mr. Persson.

8. On December 16, 2002, the court, the Hon. Raymond W. Weaver, Jr., by minute entry and without oral argument, denied the November 13, 2002 Motion to Compel, stating that because neither Kenwood nor the Trust were parties, the court did not have jurisdiction to grant Respondent's Motion to Compel against a non-party witness.

9. In the same Allen v. Wardner case, on March 31, 2003, Judge Weaver denied Respondent's Motion to Compel production of documents by another non-party, Wilderness Cabin Company, noting that "the Court finds that an Order to Show [Cause] is the appropriate procedure rather than a Motion to Compel, therefore, the Motion to Compel is denied." Ultimately, in June 2003, Judge Weaver ordered Wilderness Cabin Company to produce the documents requested by respondent on behalf of plaintiffs Allen.

10. On or about April 23, 2003, and in accordance with the procedure suggested by Judge Weaver in his March 31, 2003 minute entry, Respondent filed an Application for Order to Show

Cause and served the same on Mr. Persson in his capacities as President of Kenwood and Trustee. In the text of the application Respondent represented to the Superior Court that it had granted the November 13, 2002 Motion to Compel. Respondent attached an undated, unsigned copy of an Order to Show Cause to the Application to the copy served on Mr. Persson.

11. On or about May 6, 2003, Mr. Persson mailed a letter to Respondent seeking to clarify the purpose of the blank order attached to the April 23, 2003 Application. Mr. Persson notified Respondent that he had no knowledge of a ruling by the Court requiring him to produce documents.

12. On June 4, 2003, Judge Weaver, by minute entry and without oral argument, denied Respondent's April 23, 2003 Application for Order to Show Cause stating in pertinent part:

> The Court having considered the Application to Show Cause of [Plaintiff] that [Kenwood and Trust] appear and show cause why they should not be in contempt of the Court's order compelling a response to [Plaintiff's] subpoenas and the Court having reviewed Plaintiff's Motion to Compel filed November 13, 2002 and the Court's order of December 16, 2002, the Court finds that the Court specifically denied Plaintiff's Motion to Compel as to Kenwood and the Trust. Plaintiff's Application for Order to Show Cause dated April 23, 2003 misstates the Court's order. Therefore, the Court declines to set an Order to Show Cause Hearing as to Kenwood and the Trust.

13. Respondent's conduct in Count One violates the Rules of Professional Conduct and/or the Supreme Court Rules because he filed a procedurally inappropriate motion to compel production of documents and then misrepresented to the court and a non-party witness that the Court had issued an order compelling production of documents when the Court had denied Respondent's motion to compel (ERs 1.1, 3.3(a)(1) and 8.4(d).)

COUNT TWO (03-2025)

14. Respondent represented Michael Roth and Stacey Yamauchi in a matter encaptioned *Michael Roth and Stacey Yamauchi v. June Hersey, et al.*, Yavapai County Superior Court No. CV82003-0147, to assist Mr. Roth with securing the right to possession of part of a dwelling and compensation for his service.

15. In September 2002 and again in January 2003, Mr. Roth executed two leases with June Hersey, who was approximately 80-years old, in which Mr. Roth promised to undertake improvements to the residence in exchange for the right to reside in the garage and basement of the dwelling for a rent of $200 per month for a term 10 years and 30 years, respectively. Mr. Roth undertook improvements to the dwelling and assisted Ms. Hersey with personal matters.

16. On or about May 2003, shortly before Mr. Roth intended to move into the residence, Ms. Hersey decided to renege on the lease and locked Mr. Roth out of the premises.

17. While Mr. Roth was doing construction work on Ms. Hersey's home and at all times pertinent to the time the conduct relevant to this disciplinary matter occurred Mr. Roth resided at an apartment at 130 Horseshoe Trail, Sedona, Arizona.

18. Ms. Hersey and her daughter Linda wrote letters to Roth in May 2003 contesting Ms. Hersey's competency and the validity of the two leases, all based upon advice of counsel, the names of which the Herseys did not disclose. Thereupon Roth retained attorney Michael Hool of the law firm of Rogers & Theobold in Phoenix who wrote the Herseys on May 19 and May 27, 2003 advising them of Roth's right to possession of the property and the Herseys' liability for substantial damages. This correspondence was submitted to the Court by Respondent.

19. In late May or early June 2003, Mr. Roth and his girlfriend, Stacey Yamauchi, consulted with Respondent.

20. Respondent prepared a Verified Complaint and an Application for a Temporary Restraining Order and, after Roth read and verified each of them, filed them with the court June 11, 2003.

21. The First Claim for Relief of the Verified Complaint alleged a cause of action under the Arizona Residential Landlord and Tenant Act in pertinent part as follows:

> In reliance upon the Lease Agreements, Plaintiffs have completed much of the improvements which they agreed to complete, incurring substantial expense in excess of $12,000 for materials necessary to complete the job and spending substantial time providing labor to complete the job.
>
> On May 13, 2002, as the improvements were nearing final completion, Defendant wrote to Plaintiffs and announced that she would no longer honor the terms of the Lease Agreement. A true and correct copy of the letter from Defendant to Plaintiffs dated May 13, 2003 is attached hereto as Exhibit C.
>
> Defendant has failed and refused to restore Plaintiffs to possession of the property and has refused to pay Plaintiffs the reasonable value of the materials and labor provided by Plaintiffs for the benefit of Defendant's property
>
> Personal property of Plaintiffs in the form of tools and unused materials remains at the leased premises and Plaintiffs have had no access to this personal property since the day they were locked out of the premises.

22. The verified Application for Temporary Restraining Order Without Notice alleged in pertinent part as follows:

> [I]mmediate or irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition . . .
>
> This case presents a very simple need for a temporary restraining order, Plaintiffs, residential tenants, have been illegally locked out of the residential property they leased from Defendant. Defendant completely ignored the procedures for notice and a hearing prior to the eviction of a residential tenant as prescribed by the Arizona Landlord and Tenant Act. As the result of Defendant's illegal action,

Plaintiffs are without a place of residence (fortunately they have been able to stay temporarily with their former roommates who happen to still have a room for them at their former residence).

Plaintiffs sought the assistance of the Yavapai County Sheriff to obtain access to the leased premises but the Deputy Sheriff who was called out to the leased premises the day Defendant locked Plaintiffs out would do nothing to help Plaintiffs regain possession of the home. Based both on the letter attached as Exhibit C to the Verified Complaint and based on Defendant's response to the Sheriff's Deputy, it is apparent to Plaintiffs and to the undersigned that there is no point in attempting to discuss this matter with Defendant.

Therefore, in order to expedite Plaintiffs' return to the premises so that they can have a place to live and have access to their personal property, it was necessary to proceed in this case with an ex parte application for a temporary restraining order.

23. At the time Respondent prepared and filed the Verified Complaint and Application for Temporary Restraining Order, he knew that neither Mr. Roth nor Ms. Yamauchi had yet moved into the Hersey residence.

24. At the time Respondent prepared and filed the Verified Complaint and Application for Temporary Restraining Order Respondent was negligent in determining whether Mr. Roth and Ms. Yamauchi were irreparably harmed because they were not dwelling in the premises when Ms. Hersey locked them out.

25. On June 12, 2003, the Hon. David L. Mackey, Judge, Arizona Superior Court for Yavapai County, granted the Temporary Restraining Order in an ex parte proceeding.

26. After the court granted Respondent's application for the Temporary Restraining Order on behalf of Mr. Roth, the Sheriff's Office refused to enforce the order and require Ms. Hersey to permit Mr. Roth to enter the premises.

27. On June 20, 2003, the court heard testimony on the Temporary Injunction or Permanent Injunction. On the basis of Mr. Roth's testimony the Court voided the Temporary Restraining Order finding that:

> In reviewing this matter, the court was very concerned abut the issuance of the Temporary Restraining Order as there were terms in the purported lease agreements themselves that certainly put this matter out of the realm of a normal residential landlord/tenant action. While I have gone back through and carefully reread the Application for Temporary Restraining Order as well as the Verified Complaint, I can't really find the words that the plaintiffs represented they were living in this residence. Certainly that was implied in what was presented to the Court and certainly that was the reason that this Court even considered entering such an extraordinary remedy as the issuance of a Temporary Restraining Order. In looking at the Arizona Landlord-Arizona Landlord and Tenant Act, it's very clear that a rental agreement under 33-1310(12) applies to a dwelling unit and premises.
>
> And while the testimony has been that certainly Ms. Hersey was living there, the portions that this agreement applied to were not habitable and the plaintiffs were not residing in those units and they weren't even ready for occupation.
>
> I also find even in Roth's own testimony there are a number of the issues that raise the conscionability of the agreement whether I applied 33-1310(12) or not. His testimony was replete with references that would give me the same concerns that Ms. Hersey's daughter has with respect to his conduct involving her mother.
>
> I find that the Temporary Restraining Order is void for the misrepresentation to the Court that the plaintiffs were actually living in - on the premises.
>
> And restraint's keeping me from saying anything else.

28. During the proceedings the attorneys met with the Hon. David L. Mackey in chambers. One of the State Bar's Staff investigators interviewed Judge Mackey about the June 20, 2003 proceedings. The investigator reported the substance of the interview in a March 24, 2003, Investigative Report which provides in pertinent part as follows:

> Judge Mackey advised that it was clear to him during Roth's testimony on the hearing for the TRO that there was misrepresentation as to what was stated in the TRO and what Roth was saying. Judge Mackey's "general sense" during the

time of the hearing when Mike Roth was testifying, based solely on Roth's demeanor, was that he did not find Roth to be "extremely credible." Judge Mackey reported that he did not jump to any conclusion that [Respondent] was the source of the misrepresentation. Judge Mackey reported that [Respondent] has appeared before him on more than this occasion, and that he finds Respondent to never come close to violating the ethical standards. Judge Mackey indicated that he did no investigation into the source of the misrepresentation; however, during a recess after the misrepresentation came to light, he met with the attorneys involved. Judge Mackey advised that from this meeting, his feeling is that Respondent did not get the full story from Mr. Roth. Judge Mackey did not make any finding or ruling concerning the misrepresentation; however, he did say that because of Roth's demeanor on the stand, and from what was told to him by Roth in chambers, he could only assume that Roth was no upfront with [Respondent].

29. Respondent's conduct as described in Count Two violated Rule 42, Ariz. R. S. Ct., specifically ERs 3.1 and 8.4(d).

CONDITIONAL ADMISSIONS

Respondent, in exchange for the stated form of discipline, conditionally admits that the conduct as described in Count One, violates Rule 42, Ariz. R. S. Ct., specifically ERs 1.1 (competence) and 3.3(a)(1) (making a false statement of material fact to a tribunal), the conduct described in Count Two violates Rule 42, Ariz. R. S. Ct., ER 3.1 (meritorious claims or contentions) and the conduct in Counts One and Two violated ER 8.4(d) (conduct prejudicial to the administration of justice).

DISMISSED ALLEGATIONS

Regarding the allegations in Count One, the State Bar dismisses the allegations that Respondent violated Rule 42, ER 4.1 (false statement to a third party), 4.4 (conduct burdening or embarrassing a third party), because those allegations, if proven by clear and convincing evidence, would not result in imposition of a more serious sanction against Respondent. The State Bar also dismisses the alleged violation of ER 8.4(c) (acts involving dishonesty, deceit, or

misrepresentation) because, that charge is duplicative of the conditionally admitted violation of ER 3.3(a)(1).

Regarding the allegations in Count Two, if this matter went to hearing the State Bar would argue that Respondent failed to follow the direction of his client by filing pleadings misleading the court about Mr. Roth's residency at the Hersey home in violation of ER 1.2. At hearing, the State Bar would offer testimony that Mr. Roth advised Respondent that he was troubled by the allegations in the Complaint and the Application for Temporary Restraining Order, but Respondent advised him that it would not be any problem. Respondent denies this and would offer testimony that he was misled by his clients and that during the representation; Respondent followed his clients' directions and did not misrepresent anything to the Court. The State Bar dismisses this charge because, if proved by clear and convincing evidence, it would not result in imposition of a more severe sanction on Respondent.

Also, if this matter went to hearing the State Bar would argue that Respondent violated ER 3.3(a)(1)(lack of candor to the tribunal) and ER 8.4(c)(dishonesty) when Respondent filed the Complaint and Application for a Temporary Restraining Order that induced the court to conclude that Mr. Roth and Ms. Yamauchi had been locked out of their place of abode, when Respondent knew or should have known that his Mr. Roth and Ms. Yamauchi did not and had never resided at the Hersey dwelling, and knew or should have known that Mr. Roth and Ms. Yamauchi were not irreparably harmed when Ms. Hersey locked them out of the dwelling. At hearing Respondent would testify that his clients misled him, that Mr. Roth carefully reviewed and verified the facts in the Complaint, and that Respondent had reason to believe that his clients were irreparably harmed by Ms. Hersey's decision to lock them out of the property.

In consideration of the uncertain impact of the text of the Staff Investigator's interview of Judge Mackey on the ability of the State Bar to prove by clear and convincing evidence the mental state required by ER 3.3(a)(1) and 8.4(c), the State Bar and Respondent agree that the conduct in Count Two describes a violation of ER 3.1 and 8.4(d). Because Respondent failed to take reasonable steps to verify whether his clients were irreparably harmed when the landlord locked them out of the premises, Respondent did not have a good faith basis for filing the ex parte Application for a Temporary Restraining Order.

ABA STANDARDS

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.

In determining the appropriate sanction, the parties considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions,* (1991) ("*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 Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1999); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994).

Given the conduct in this matter it is appropriate to consider *Standard* 6.1. 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* 6.12. Reprimand

(censure in Arizona) is generally appropriate when a lawyer is negligent, either in determining whether statements or documents are false or in taking remedial action when material information is being withheld 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* 6.13.

Regarding the motion to compel, the non-party witness (Persson) alerted Respondent that he was unaware of any order of the court compelling him to produce documents, but Respondent made no effort to verify or confirm his representation to the court or Mr. Persson. Regarding the Application for a Temporary Restraining Order in Roth, Respondent negligently failed to take reasonable steps to verify whether his clients were irreparably harmed before he filed the verified ex parte application.

As the *Standards* do not account for multiple charges of misconduct, the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations. *Standards,* Theoretical Framework at pg. 6; *Matter of Redeker*, 177 Ariz. 305, 868 P.2d. 318 (1994).

Based on the foregoing, the presumptive sanction for the admitted conduct is either suspension or censure. After determining the presumptive sanction, it is appropriate to evaluate factors enumerated in the *Standards* that justify an increase or decrease in the presumptive sanction.

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 three aggravating factors apply and should be considered in this matter: (b) dishonest or selfish motive - Respondent misrepresented facts in Count One for the purpose of securing an advantage for his client; (d) multiple offenses B there are two counts in this Complaint; and, (i) - substantial experience in the practice of law - Respondent has been admitted to the practice of law for eleven years.

This Hearing Officer agrees with the parties that three factors are present in mitigation: (a) - absence of a prior disciplinary record - Respondent has no prior disciplinary record; other than the matters that are the subject of this consent. Respondent has not received any other complaints; (e) - full and free disclosure to disciplinary board or cooperative attitude toward proceedings: Respondent has consistently manifested a cooperative attitude throughout the State Bar's investigation of these matters and throughout these proceedings; and, (g) - character or reputation - Respondent has a reputation for ethical conduct before the courts.

Under the facts of this case, the most probative aggravating and mitigating factors are Respondent's absence of a disciplinary record, Respondent's good reputation as a lawyer, and Respondent's cooperative attitude toward the State Bar. The mitigating factors out weigh the aggravating factors, because the aggravating factors under the facts of this case are not probative. The probity of the Multiple Offenses factor is weakened by the fact that the conduct in Count One resulted in no substantial harm to the subject of the subpoena and is substantially different

from the conduct subject to Count Two. Respondent's experience in the practice of law does not inform the determination of the appropriate sanction in this case.

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 somewhat factually similar. *In re Struthers,* 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994); *In re Levine,* 174 Ariz. 146, 174-75, 847 P.2d 1093, 1121-22 (1993). To achieve proportionality, discipline must be tailored to the facts of each case. *In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993).

In *In re Hustad,* SB-97-0080-D, the lawyer was retroactively suspended for one year for violation of ER 3.1, 3.3(a)(1), 3.4(c), 8.4(c) after the lawyer willfully misrepresented facts to court when he submitted form of order for signature containing a discrepancy with the minute entry order, and asserted a frivolous defense to a subsequent motion for new trial. The Court sanctioned Hustad for violation of Rule 11. Respondent made statements to Bar that contradicted allegations to court during hearing on Rule 11 sanction. Aggravating factors included: prior disciplinary history, selfish and dishonest motive, pattern of conduct, multiple offenses, and indifference to making restitution, and there were no mitigating factors.

In *In re Moak*, S.B. file 00-0258, the lawyer was suspended for six months and one day for violation of ER's 1.2, 1.3, 1.4, 1.8, 4.1, 8.4(c) and 8.4(d), after the lawyer failed to disclose to the court that his client in a personal injury action suffered from injuries in a second incident. Moak also had a conflict of interest in that Moak's wife loaned money to a client Moak was representing. Aggravating factors included selfish and dishonest motive, pattern of misconduct,

multiple offenses, and failure to cooperate with the State Bar. Mitigating factors included: no prior history, personal and emotional problems, other penalties, and remorse.

In *In re Alcorn & Feola*, SB-01-0075 the lawyers were suspended for six months for violation of ER 3.3(a)(1), 8.4(c), 8.4(d) after the lawyer entered into a confidential agreement with plaintiffs and deceived trial judge about true situation concerning trial.

In *In re Coffee*, SB-01-0095-D, the lawyer consented to a thirty-day suspension for violation of ER's 3.3, 4.1, 8.4(c), 8.4(d) after the lawyer willfully failed to update pleadings to modify support requirement to reflect assets not previously disclosed, the lawyer said there were none even though he knew that his client had and additional $50,000. Aggravating factors include: selfish and dishonest motive, and substantial experience. Mitigating factors include: no prior history, delay.

In *In re Gregg Griffith*, SB-00-0038 the Disciplinary Commission recommended a censure for violation of ER's 1.3, 1.4, 3.3(a)(1), 4.1, 8.4(c) after the lawyer failed to notify his client, a criminal defendant, of the decision of court denying appeal and about alternatives resulting in passing of deadlines for client to file motion for reconsideration or petition of review, misrepresented the position of the State in his reply brief to the Court of Appeals by arguing that State had conceded that jury instructions were inadequate when the State's position was clearly the contrary. Aggravating factors included: failure to acknowledge wrongfulness, and substantial experience in the practice of law. Mitigating factors included no prior disciplinary history and delay.

In *In re Rodney Johnson*, SB-00-0063-D, the lawyer consented to a censure for violation of ERs 3.3(a)(1), 4.1 when the lawyer failed to disclose pre-trial settlement agreement between

the parties to trial court in a medical malpractice action. The lawyer did not know of the settlement agreement until the trial was underway. Aggravating factors include: substantial experience. Mitigating factors included no prior disciplinary history, no selfish or dishonest motive, full and free cooperation, and remorse.

In *In re Auerbach*, SB-96-0019-D, the lawyer consented to a censure for violation of ERs 3.3(a)(1), 8.4(c), 8.4(d) when the lawyer, while representing a client in a federal narcotics case, challenged the witness supporting the search warrant. Counsel for co-defendant notified Respondent that the tape of the testimony supporting the affidavit was missing. Respondent met with defendant and client accepted a favorable plea bargain. At sentencing client informed judge that Respondent never informed him of the missing tape. Client filed for post-conviction relief. Attached to the Motion for Post Conviction Relief was the lawyer's affidavit that he had not learned of the missing tape until client's sentencing, and that he had never been informed of its loss. Respondent claims that although he knew that the tape was missing, he was not aware that it was permanently lost until the sentencing. Respondent conditionally admitted that the affidavit was negligently misleading. Aggravating factors included substantial experience in the practice of law. Mitigating factors included no prior disciplinary history, full and free disclosure, other penalties, and remorse.

In Matter of Garnice, 172 Ariz. 29 (1992) respondent misrepresented foreign law to the Court and wrongfully applied child support payments to his bill for legal services. The Court applied Standards 6.13 and 4.1 and imposed censure rather than suspension. Notwithstanding aggravating factors of prior discipline and selfish motive the Court recognized that any

suspension can be viewed as devastating to a sole practitioner. A censure was deemed to more effectively serve the purposes of discipline.

Review of the cases demonstrates that censure is the appropriate sanction in this matter. In Count One Respondent's conduct supporting a presumptive sanction of suspension posed little or no potential of harm to the subject of the subpoenas. Unlike Hustad, Respondent has no disciplinary history. The conduct supporting suspension in *Moak,* and *Alcorn & Feola* resulted in egregious abuse of judicial resources including unnecessary trials or unnecessary extension of trial time. Nor did the conduct in the instant case result in the nondisclosure of substantial assets from an opposing party in a dissolution proceeding supporting the suspension imposed on Coffee. In the instant case, count One involving misrepresentation involved a discovery request directed to a non-party.

Although Respondent's filing of the non-meretorious application for a temporary restraining order resulted in a waste of judicial resources and posed significant potential harm to the opposing party, the underlying conduct arose from Respondent's negligent failure to take reasonable steps necessary to verify that his clients would be irreparably harmed before filing an ex parte application. The conduct in this case is comparable to the conduct supporting a censure in *Griffith, Johnson,* and *Auerbach.*

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 proportionally 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 receive a censure.
2. Respondent shall serve a one-year term of probation beginning on the date of the final order and judgment in this matter. Within thirty days of the date of the final judgment and order, Respondent shall make arrangements to participate in the State Bar's Ethics Enhancement Program.

In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of

Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

3. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 4th day of October, 2004.

C. Eileen Bond/ps

C. Eileen Bond
Hearing Officer 7N

Original filed with the Disciplinary Clerk
this 4th day of October, 2004.

Copy of the foregoing mailed
this 4th day of October, 2004, to:

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