BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

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

GEOFFREY N. FIEGER,
Bar No. 006227

Respondent.

No. 04-1579

HEARING OFFICER'S REPORT AND RECOMMENDATION

(Assigned to Hearing Officer 8A, Kraig J. Marton)

I. PROCEDURAL HISTORY

1. The State Bar's one count complaint, filed on December 30, 2005, charged Respondent with violating Rule 42, Arizona Rules of the Supreme Court, ERs 1.4, 3.3, 4.1, 5.5, and 8.4 (a), (c) and (d), and Rules 31(b) and 33 of the Ariz. R. Sup. Ct. An answer was filed on January 30, 2006. A hearing on the merits was conducted on May 25, 2006.

II. FINDINGS OF FACT

2. Respondent was licensed to practice law in the State of Arizona on May 19, 1980.

3. At all times relevant, Respondent was also a member in good standing of the State Bars of Michigan and Florida.

4. On May 13, 1993, The Arizona Supreme Court entered an order suspending Respondent's license to practice law for failure to complete the mandatory continuing legal education credits ("MCLE") required of all active members of the State Bar of Arizona. [SB Ex. 1, BS 69-71; SB Ex. 6, BS 211][1].

5. Respondent's Arizona law license remains in suspended status to date.

6. Although Respondent received notice of the suspension in 1993, he did not contest it or demonstrate that he had met MCLE requirements. (Tr. at 129:23 - 130:23).

7. In 1996, Respondent inquired of the Arizona Bar as to the steps necessary to cure his administrative suspension. Respondent was informed by letter dated June 28, 1996, that if he wished to be reinstated, he would have to submit a letter to the State Bar requesting reinstatement and enclose proof of completion of the requisite MCLE credits and pay a $100 reinstatement fee. (R. Ex. A-6; Tr. at 131:5-14). The 1996 letter from the State Bar did not specify a time limit within which Respondent was required to fulfill these conditions.

8. Respondent testified that did not immediately seek reinstatement in 1996 because he believed he could seek such reinstatement at any time. At that

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[1] The State Bar's Exhibits will be referred to as SB Ex. __ while Respondent's. Exhibits will be R Ex. ___, followed by the Bates Stamp numbers (BS)

time, Respondent did not have any cases in Arizona. (R. Ex. A-6; Tr. at 132:14-16, 134:16-25).

9. Although admitted to the Arizona Bar in 1980, Respondent did not reside in or actively practice law in Arizona at any time prior to 2002, when, although residing in Michigan, he sought admission to appear *pro hac vice* in *Levensky, et al. v. Mercy Health Care of Arizona, Inc.*, Maricopa County case number CV 2001-022036 ("Levensky Matter"). (Tr. at 126:24 – 127:4).

The Levensky *Pro hac vice* Application

10. In late 2001, Respondent's firm was retained to represent Deborah Levensky and Gerald Lazarowicz as plaintiffs in a medical malpractice case. (Tr. at 135:1-13).

11. Respondent's firm then associated the law firm of Rudolph & Rudolph, LLC ("Rudolph Firm") and specifically enlisted the services of Paul Rudolph and Kent Hammond to act as local counsel and assist Respondent and others in gaining admission *pro hac vice* to litigate that matter in Arizona. (Tr. at 135:20 – 137:8).

12. The Rudolph firm forwarded to Respondent's office the relevant form to be completed for *pro hac vice* admission. Respondent's secretary then filled out the form, and Respondent signed it and forwarded it to the Rudolph firm for submission. (Tr. at 137:9-11; 138:2-14; 220:23 – 221:10).

13. Respondent's application, dated January 9, 2002, accurately reflects that Respondent was admitted to practice in Arizona in 1980, but it does not qualify or explain the portion of the preprinted form that says "I am not currently suspended or disbarred in any court." (SB Ex. 1, BS 005 – 006).

14. Respondent's application for *pro hac vice* admission was approved on February 5, 2002. (SB Ex. 1, BS 0014).

15. There is a logical inconsistency for Respondent to seek *pro hac vice* status to appear in an Arizona legal proceeding if he were already licensed in good standing in Arizona.

16. Neither Respondent, nor anyone with the Rudolph Firm, nor even the judge in the Levensky Matter noticed the error in Respondent's application despite the inconsistency of a member in good standing with the Arizona Bar applying for admission *pro hac vice* in Arizona. (Tr. at 137:14-16; 233:5 – 234:7).

17. This Hearing Officer finds credible Respondent's explanation that he simply signed a routine form that his secretary had filled out (Tr. 137:1-138:14), and that he had no intent to mislead in doing so.

18. Respondent did not appear as counsel or perform any legal service in the Levensky Matter until August 2004, when he appeared telephonically for a pre-trial scheduling conference. (Answer ¶ 8; Tr. at 171:6-19).

The Green/Smith Matter

19. In late spring or early summer of 2003, Greg Smith ("Mr. Smith") contacted Respondent's firm, seeking to have Respondent represent him and his sister, Ann Green ("Dr. Green") in a lawsuit resulting from the death of their parents in Arizona, eventually captioned *Smith v. Kiewit Western Construction, et al* ("Smith/Green matter"). (Tr. 33:14 – 22).

20. Mr. Smith had contacted Respondent's firm because of Respondent's reputation as a trial attorney. (Tr. 33:18 – 22).

21. Respondent, along with another lawyer in his firm, Arnold Matusz ("Mr. Matusz"), met in person with Mr. Smith in late May or early June 2003. (Tr. 34:7 – 16).

22. The facts are in dispute as to what was represented at that meeting about Respondent's Arizona licensure statue:

a. Mr. Smith testified that Respondent said he was licensed in Arizona and able to try his case in Arizona. (Tr. 35:5 – 11; 53:20 – 23).

b. Respondent testified that he told Mr. Smith he was licensed in Arizona, but his license was not in good standing because of the MCLE issue. (Tr. 157:15-19).

c. This hearing officer is unable to find by clearing and convincing evidence that Respondent misrepresented his licensing status at that meeting because the facts are in direct dispute, and each party to that conversation has motives to recall the conversation differently.

23. Regardless of the resolution of this dispute, it is undisputed that Mr. Smith was informed, both orally and in writing, that local Arizona counsel would need to be retained, and that Respondent and another lawyer in his firm would have to obtain permission to appear *pro hac vice*. (Tr. 35:18-36:12; 268:10-18; 271:4-21 SB Ex. 5, BS 161 – 162).

24. The "Contract for Legal Representation" that was presented to Mr. Smith was a form written on letterhead stationery; and bears the text "Michigan, Florida and Arizona Bar" directly under Respondent's name ("Smith fee agreement"); it was signed by both Smith and Respondent. (SB Ex. 9, BS 235; Tr. 35:5 – 11; 193:16- 194:9). Essentially the same form was later also signed by Dr. Green except that this form used abbreviations for the states where Respondent was licensed ("MI, FL AND AZ BAR") (SB Ex. 9 BS 238).

25. The Smith fee agreement, as signed by Smith and later by Dr. Green, did not contain any reference to Respondent's Arizona suspension.

26. By presenting the Smith fee agreement to Mr. Smith and later to Dr. Green, Respondent held himself out to be an attorney licensed and in good standing in Arizona. This representation was false because of the Administrative suspension that had been imposed in 1993.

27. Respondent testified that the Smith fee agreement was an old form that had been in use since approximately 1998, and that he changed the form in 2004 when it was brought to his attention. (Tr. 212:11-214:1).

28. The letterhead used on the Smith fee agreement, which misrepresented Respondent's Arizona license status, was not used in any later communications with Dr. Green and Mr. Smith (Tr. at 82:11-15).

29. After the Smith fee agreement was signed, a member of Respondent's firm again contacted the firm of Rudolph and Rudolph, now Rudolph and Hammond, and arranged for them to serve as local counsel in the Smith/Green matter. (Tr. 222:14 – 223:7).

30. Respondent signed an application for admission *pro hac vice* in the Smith/Green matter on September 18, 2003. (SB Ex. 16, BS 401 – 402). This application was somewhat different from the application Respondent signed in the Levensky matter.

31. Respondent's 2003 verified application reflected that he had been admitted to the Arizona bar in 1980 and stated that Respondent's status with the

State Bar of Arizona was "inactive". The application also contained the same preprinted language as before, that he was "in good standing" in each jurisdiction in which he was admitted and that he was not "disbarred or suspended in any court". However, this application, unlike the application filled out in the Levensky matter, asked if the applicant had "been disciplined by any court", which was answered in the negative.

32. Prior to Respondent's application in the Smith/Green matter, the rules regarding admission *pro hac vice* were changed, and a certificate of good standing from the State Bar of Arizona was now required to be attached to the application. See Rule 33(d)(3)(a), Ariz.R.Sup.Ct.

33. Although the record is not clear, it appears Respondent's *pro hac vice* application was submitted to the State Bar of Arizona for review, but was never submitted to the court to which the Smith/Green matter had been assigned. (Tr. at 144:1-9).

34. As Respondent's Arizona license was suspended, no certificate of good standing was provided by the State Bar, and Respondent's application was returned to local counsel. (Tr. 224:10 – 17; 228:21 – 24; 159:8 - 18).

35. Respondent's application for admission *pro hac vice* was the sent to Mr. Matusz by a Rudolph and Rudolph paralegal, on or about October 3, 2003. R. Ex. 4, BS 024.

36. After receiving back Respondent's application for admission *pro hac vice*, Mr. Hammond contacted Mr. Matusz at Respondent's firm, who informed Mr. Hammond that he would look into it. (Tr. 224:10 – 17).

37. Thereafter, a meeting between Respondent and Paul Rudolph was scheduled to occur in Respondent's Michigan office, for October 22, 2003.

Respondent's Efforts to Remediate

38. After learning in October 2003 of the problem with his *pro hac vice* application as filed in the Levensky matter, and his inability to obtain *pro hac vice* status in the Green/Smith Matter, Respondent undertook various remedial efforts.

39. Respondent met with Paul Rudolph on October 22, 2003, in the Respondent firm's Michigan offices. Mr. Matusz was also present for approximately the first half of this meeting. (Tr. at 141:5-8; 278:16 – 279:18).

40. During this meeting, the parties discussed the need to correct the matter and obtain Respondent's reinstatement. Respondent showed Mr. Rudolph the June 28, 1996 letter from the Arizona State Bar informing him that in order to gain reinstatement, Respondent would need only to complete his MCLE, pay a $100 fee and submit an application for reinstatement. (Ex. A-6; Tr. at 143:7-15).

41. Respondent reasonably believed, by the conclusion of that meeting, that he had retained Mr. Rudolph to represent him in resolving the *pro hac vice* issue. (Tr. at 145:15 – 146:7; 279:14-24).

42. In a letter dated October 29, 2003, Mr. Rudolph confirmed that he had agreed to assist Respondent with resolving the matter. His letter reflected that he had requested additional documentation from the Arizona Supreme Court, and that "after we receive that documentation we can decide how to best go about obtaining your reinstatement". (R. Ex. A-7, Bates # F000027 – F000053; Tr. at 146:8 – 148:17)[2].

43. Thereafter, Respondent relied on Mr. Rudolph to help resolve the situation involving his status with the State Bar of Arizona. (Tr. at 148:18 – 149:10).

44. Despite having undertaken to assist Respondent, there is no evidence that Mr. Rudolph took any further steps to do so. (Tr. at 237:15-22; 243:17-23; 245:23 – 246:3; 251:4 – 252:15). Apparently, Mr. Rudolph did not speak directly to Respondent again about the matter, though he did make some

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[2] While the State Bar disputes that Mr. Rudolph was retained to help resolve the *pro hac vice* matter, it is significant that complaints were filed against Respondent with the State Bar of Arizona and the State Bar of Michigan by Paul Rudolph (Tr. at 62:17 – 64:9; 99:13 -22; 100:20 – 101:5). Yet, despite his status as a principal complainant in this matter, Paul Rudolph inexplicably did not appear nor testify and was excused from compliance with the subpoena by the State Bar, without explanation, the day before the hearing. (Tr. at 328:3-12).

requests of Respondent's secretary for further documentation. (Tr. at 161:12 – 162:12).

45. On December 22, 2003, Dr. Green and Mr. Smith sent a letter to Respondent's firm, terminating their services as counsel, citing delays in the scheduling of depositions and their concern that Respondent was not personally involved enough in their case. (SB Ex. 13, BS 000280).

46. Nothing in the December 22 letter stated or suggested that the reason for the Smith/Green termination was in any way related to Respondent's Arizona Bar status. (Id.).

47. Prior to receiving the December 22 termination letter, Mr. Matusz and Respondent had been given no indication either by the Smith/Green clients or by the Rudolph firm that the clients were in any way dissatisfied with the representation of Respondent's firm. (Tr. at 281:7-20).

48. Within a few days after terminating Respondent's firm, Dr. Green and Mr. Smith retained the Rudolph firm to act as lead counsel in their case. Mr. Smith testified that his sister signed a retainer agreement with the Rudolph firm sometime between Christmas and New Year's Day 2003. (Tr. at 70:5-8).

49. At this point, Respondent believed that Messrs. Rudolph and Hammond were disserving his interests and acting to further their own interests. (Tr. at 168: 1-20). Accordingly, he undertook other remedial efforts.

50. Respondent sent a letter dated January 8, 2004, to Judge Pendleton Gaines, the presiding judge in the Levensky matter. In that letter, Respondent disclosed what he characterized as an "administrative mistake" and fully informed the judge of the error in his previously filed *pro hac vice* application. (SB Ex. 1, BS 34 – 35).

51. On that same day, Respondent wrote to the State Bar seeking reinstatement. (R. Ex. A-11, BS F000060 – F000070; Tr. at 169:3-4).

52. Also on that same day, Respondent wrote to the Rudolph Firm asking them to withdraw from the representation in the Levensky Matter. (R. Ex. A-10, BS F000057 – F000059).

53. In addition, Respondent consulted with his former partner, Michael Schwartz, former Disciplinary Counsel for the State Bar of Michigan, who wrote a letter on Respondent's behalf on February 9, 2004, to the Arizona Bar. (R. Ex. O, Tr. at 176:7 – 180:15).

54. Later, Respondent also retained Former Chief Justice Tom Zlaket to assist him in attempting to resolve his status with the Arizona State Bar. (Tr. at 186:11-13).

55. Justice Zlaket testified that he was retained to assist Respondent in extricating himself from a unique "catch-22" engendered by the State Bar's interpretation of Arizona's membership guidelines and reinstatement rules.

Justice Zlaket testified that the State Bar informed him that because more than five years had passed since Respondent's administrative suspension, Respondent could not gain reinstatement in Arizona without first taking and passing the Arizona Bar Exam. Justice Zlaket also testified that he had been informed that the State Bar would not permit Respondent to simply resign because the rules require a lawyer to be in good standing with the Bar before submitting his or her resignation. Justice Zlaket testified that under the State Bar's interpretation, unless Respondent again took and passed the Arizona State Bar Exam, Respondent would be forever barred from obtaining *pro hac vice* admission to practice in the State of Arizona. (Tr. at 296:11 – 303:12).

56. On March 10, 2005, Judge Pendleton Gaines issued an order requiring Respondent to appear and show cause why his *pro hac vice* admission in the Levensky Matter should not be revoked. (SB Ex. 14, BS 000281 – 000282).

57. Upon receiving the show cause order, Respondent requested that Justice Zlaket assist him at that hearing.

58. The show cause evidentiary hearing was held on April 1, 2005. (SB Ex. 16, BS 000377 – 000399). Respondent appeared with Justice Zlaket. At the show cause hearing, Respondent learned for the first time that his letter of

January 8, 2004 had been received in Judge Gaines' office but had not been read by Judge Gaines. (Id.; Tr. at 174:15-25).

59. The transcript of the show cause hearing reveals that Judge Gaines was sympathetic to the plight in which Respondent found himself. Upon the request of Justice Zlaket, Judge Gaines granted a continuance so that Justice Zlaket and Respondent could attempt to work out a resolution of Respondent's status with the State Bar. (Id.) However, no continued hearing was held because the Levensky matter settled.

60. The record reveals that Judge Gaines never revoked Respondent's *pro hac vice* admission and did not refer Respondent to the State Bar.

III. CONCLUSIONS OF LAW

1. The State Bar bears the burden of proving the charged violations by clear and convincing evidence (Ariz. R. Sup. Ct. 48(d) and (e)).

2. This Hearing Officer finds that the State Bar has failed to prove, by clear and convincing evidence, that Respondent violated the following charged provisions: ERs 1.4, 3.3, 4.1, 5.5 8.4 (a) and 8.4 (c), and Rule 33 of the Arizona Rules of the Supreme Court.

3. The State Bar has proved, by clear and convincing evidence, that Respondent violated ER 8.4(d) and Rule 31(b) of the Arizona Rules of the Supreme Court.

ER 1.4

4. The State Bar has failed to show by clear and convincing evidence that Respondent violated ER 1.4, which requires a lawyer to engage in prompt and reasonable communication with a client.

5. The operating principle behind ER 1.4 is reasonableness. The comments to ER 1.4 explain that "the guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests." Ariz. R. Sup. Ct. 42, ER 1.4, cmt. 5.

6. Respondent and Mr. Matusz initially informed Mr. Smith and Dr. Green of the need to obtain local counsel and seek admission *pro hac vice* in order to try their case in Arizona. Respondent had been admitted *pro hac vice* in the Levensky matter prior to his retention by the Smith/Green Clients, and had no reason to believe he would not be admitted *pro hac vice* in their case.

7. Respondent first learned of the denial of his *pro hac vice* application in the Smith/Green Matter in October 2003. The Smith/Green Clients terminated Respondent's firm on December 22, 2003. The Hearing Officer finds that Respondent's actions during that period were reasonable under the circumstances.

8. Upon learning of the denial of his *pro hac vice* application, Respondent believed he had retained his local counsel to resolve the *pro hac vice*

issue, and based upon the 1996 letter from the State Bar, respondent believed the matter could be resolved in a relatively brief period of time. Respondent reasonably believed that the initial denial of his *pro hac vice* application would not in any way materially affect his representation of the Smith/Green Clients, nor was the Respondent ever made aware of any concerns on the part of the Smith/Green Clients regarding his bar status until some time after his firm had been terminated. Therefore, the Hearing Officer finds that Respondent's failure to immediately communicate further about his bar status situation with the Smith/Green Clients does not rise to the level of a violation of ER 1.4.

ER 3.3

9. The State Bar failed to show by clear and convincing evidence that Respondent violated ER 3.3.

10. ER 3.3 provides that a lawyer "shall not *knowingly* make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer". The terminology section of the Rules of Professional Conduct defines the term "knowingly" as denoting "actual knowledge of the fact in question." Ariz. R. Sup. Ct. 42, E.R. 1.0. Knowledge may be inferred from the circumstances, but the Supreme Court has made clear that "a mere showing that the attorney reasonably should have known her conduct was in violation of the rules, without

more, is insufficient." *In re Tocco,* 194 Ariz. 453, 457, 984 P.2d 539, 543 (Ariz. 1999).

11. Respondent's *pro hac vice* application submitted to the Court in the Levensky Matter contained inaccurate statements of material fact relating to his bar status in Arizona. However, the Hearing Officer finds that Respondent's characterization of these misstatements as an administrative error is a fair characterization. Respondent did not personally fill out the *pro hac vice* application, and Respondent acknowledged that he failed to review the application carefully when signing it. Given the inherent inconsistency in Respondent representing himself as an active member of the Arizona Bar while simultaneously seeking *pro hac vice* admission in Arizona, the Hearing Officer finds that Respondent did not knowingly or intentionally falsify his *pro hac vice* application. Moreover, the fact that local counsel, opposing counsel, and even the judge in the Levensky case failed to recognize the inherent inconsistency in the *pro hac vice* application lends support to the finding that this was an unintentional oversight.

12. The application Respondent completed in the Green/Smith matter can not be the basis for a violation of ER 3.3 because it was never submitted to a tribunal, but, apparently, only sent to the State Bar in order to obtain a certificate of good standing. Further, this application was completed in such a way that

there is no clear and convincing evidence that it contained knowingly false statements. While this application does affirm that the Respondent's Arizona license is "in good standing", Respondent in this application added that his Arizona license was "inactive". The application implies that "good standing" is intended to refer to disciplinary matters, as the application specifically asks whether the applicant has "been disciplined by any court". Since a suspension for failure to complete MCLE is more an administrative action than disciplinary, there is no clear and convincing evidence that the Smith/Green application contained any intentionally false statement.

13. The Hearing Officer further finds that the State Bar failed to show by clear and convincing evidence that Respondent failed to take appropriate remedial measures once he learned of the misstatements in the *pro hac vice* application.

14. Respondent believed he had retained his local counsel, Paul Rudolph, in late October 2003 to resolve the problem. Upon learning in late December 2003 or early January 2004 that Mr. Rudolph had not taken appropriate or necessary measures to remedy the situation, Respondent took additional measures, including writing to Judge Gaines and the State Bar, informing the Court and the State Bar of the misstatements on the *pro hac vice* application; writing to the State Bar seeking reinstatement; and ultimately

retaining former Chief Justice Zlaket to assist him in extricating him from the procedural catch-22 in which he found himself.

ER 4.1

15. The State Bar has failed to show by clear and convincing evidence that Respondent violated ER 4.1. ER 4.1 prohibits a lawyer from "knowingly mak[ing] a false statement of material fact or law to a third person".

16. The complaint (paragraph 6) alleges that Respondent misled Mr. Hammond. However, as discussed in conclusions 9 and 10 above, no *knowingly* false statement was made by Respondent in connection with the Levensky *pro hac vice a*pplication. Further, Mr. Hammond testified during the hearing that he did not communicate with Respondent prior to submitting his *pro hac vice* application to the Court in the Levensky matter. Therefore, the only evidence of a "statement" made by Respondent which Mr. Hammond might claim was misleading was Respondent's *pro hac vice* application. However, Mr. Hammond testified that he failed to review that application before submitting it to the court.

17. The complaint also alleges, in paragraph 10, that the Smith/Green clients were mislead about Respondent's licensing status. However, there is no clear and convincing evidence, either, that Respondent directly made any such representation to Dr. Green or that he knowingly misrepresented his status to Mr. Smith.

18. Although not specifically pled in the complaint, the Smith/Green application, as presented to the State Bar, did not contain any knowingly false statements, either, for the reasons set forth in Conclusion 12 above.

ER 5.5 and Rule 33(c)

19. The State Bar failed to show by clear and convincing evidence that Respondent violated ER 5.5 and Supreme Court Rule 33(c) governing the unauthorized practice of law.

20. In order to prove that Respondent violated these provisions, the State Bar must show by clear and convincing evidence that Respondent was not authorized to practice law in Arizona at the time he appeared in the Levensky matter.

21. Respondent first appeared in the Levensky Matter in August 2004. The record clearly shows that Respondent had a court order dated February 5, 2002, authorizing him to practice in Arizona on a *pro hac vice* basis in the Levensky Matter. Judge Gaines never revoked this order, even after he was specifically made aware of the inaccuracies in Respondent's *pro hac vice* application.

22. Since Respondent was authorized, by Court Order, to practice law in Arizona, he did not violate these specific provisions.

ER 8.4(a)

23. The State Bar failed to show by clear and convincing evidence that Respondent violated ER 8.4(a) by *knowingly* inducing another to violate the Rules of Professional Conduct.

24. ER 8.4(a) provides in pertinent part that it is "professional misconduct to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another". The Complaint alleges that Respondent knowingly induced Messrs. Rudolph and Hammond to violate the ethical rules by submitting a false *pro hac vice* application on Respondent's behalf.

25. To meet its burden, the State Bar must show that Respondent *knowingly* included false statements in his application and that he *knowingly* misled Mr. Hammond about his status. I have already concluded that Respondent did not *knowingly* make false statements in his *pro hac vice* application. Moreover, the State Bar presented no evidence that Respondent knowingly misrepresented his State Bar status to Messrs. Hammond and Rudolph. Indeed, Mr. Hammond testified that, like Respondent, he failed to review Respondent's *pro hac vice* application, while Mr. Rudolph never testified.

ER 8.4(c)

26. The State Bar failed to show by clear and convincing evidence that Respondent violated ER 8.4(c).

27. ER 8.4(c) defines "professional misconduct" as, inter alia, "engage[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation". Ariz. R. Sup. Ct. 42, E.R. 8.4. The Arizona Supreme Court has held that ER 8.4(c) requires more than mere negligent action. *In re Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995).

28. Here, Respondent failed to review his application for *pro hac vice* admission. As a result, the application submitted to the Court contained false information regarding Respondent's status with the State Bar of Arizona. Once Respondent was made aware of the misstatements on his application, he informed the Court of the inaccuracy and took other appropriate remedial measures to address and correct the problem created by his misstatements.

29. Respondent acted negligently in completing his application *pro hac vice*, and this negligence is insufficient to find a violation of ER 8.4(c).

ER 8.4(d)

30. The State Bar has shown by clear and convincing evidence that Respondent violated ER 8.4(d) by engaging in conduct prejudicial to the administration of justice.

31. By filing a false *pro hac vice* application, Respondent was able to appear in the Levensky matter, and was able to continue serving as counsel.

32. Respondent's own expert, Justice Zlacket, testified that Respondent would probably not have been admitted *pro hac vice* in the Levensky matter had he properly disclosed his administrative suspension. (Tr. 312:17-313:1).

33. While Ariz. R. Sup. Ct. 38(a)(3) provide some discretion in granting *pro hac vice* admission, the Rules also are clear that Respondent should not have applied at all, since he was already a member of the Arizona State Bar. Ariz. R. Sup. Ct. 38(a)(1). If Respondent had disclosed his suspended status, his application would have been denied. As a result, by failing to disclose his suspended status, Respondent was admitted to practice in the Levensky matter when he should not have been.

34. His actions surrounding the *pro hac vice* application, while not intentional or knowingly false, were negligent.

35. The Arizona Supreme Court has held that a lawyer's negligent actions may be grounds for finding a violation of ER 8.4(d). *In re Manning*, 177 Ariz. 496, 498, 869 P.2d 172, 174 (1994).

36. Entering an appearance and serving as counsel when he was not entitled to do so caused potential harm to the legal system and participants. While there is no evidence of actual harm, there is always a potential for harm when a person practices law in a forum where he should have been unauthorized to do so.

Supreme Court Rule 31(b)

37. The State Bar has shown by clear and convincing evidence that Respondent violated Rule 31(b) by "represent[ing] in any way that he or she may practice law in this state unless the person is an active member of the state bar".

38. Respondent violated Rule 31(b) when he signed and initialed a form fee agreement with Mr. Smith and Dr. Green that represented that he was licensed to practice law in Arizona. That representation was false since his license was suspended.

39. Respondent argues that this use was a "technical violation" which should not give rise to discipline, based on *In re Neville,* 147 Ariz. 106, 115, 708 P.3d 1297, 1306 (1985). However, in *Neville*, the letterhead used there contained a misstatement of partnership status, and was a short term unintentional use. Here, Respondent was using what he called an old form for possibly six years, and there were at least two versions of that form, one saying "Michigan, Florida and Arizona Bar" and a second using abbreviations ("MI, FL AND AZ BAR").

40. While I do not find that Respondent intended to defraud or mislead through the use of a form letterhead fee agreement, that use was more than a technical violation.

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III. ABA STANDARDS

I recommend that Respondent be censured for his conduct. This recommendation is based on the applicable *ABA Standards for Imposing Lawyer Sanctions* ("Standards"), 1991 edition, including the relevant aggravating and mitigating factors, as well as my review of the applicable case law and prior disciplinary cases regarding proportionality of the proposed sanction.

The Standards provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the Standards a suitable guideline. *In re Peasley*, 208 Ariz. 27, ¶ 23, ¶ 33, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction, the Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the presence or absence of actual or potential injury, and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at ¶ 33, 90 P.3d at 772; ABA *Standard* 3.0.

A. The Duty Violated

Respondent violated his duties to the legal system, abused the legal process, and violated the duties owed to the professions. As a result, the following standards are implicated:

> 6.13 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.
>
> 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
>
> 7.3 Reprimand 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, the public, or the legal system.

These standards apply because Respondent's conduct was negligent and because there was potential interference with a legal proceeding and potential injury to the legal system by obtaining *pro hac vice* status which he would not otherwise have obtained. Standards 6.12, 6.22 and 7.2, which all deal with suspension, are not involved because they talk of knowing misconduct, while Respondent's conduct was negligent.

Therefore, the presumptive sanction for Respondent's misconduct is censure.

B. Aggravation And Mitigation

Once the presumptive range of sanction has been determined, it is appropriate to review the aggravating and mitigating factors.

In aggravation, the following factor applies:

Standard 9.22(i) (Substantial experience in the practice of law). Respondent testified that he has been engaged in the active practice of law for more than 27 years.

The following factors apply in mitigation:

Standard 9.32(a) (Absence of a prior disciplinary record). Respondent has never been sanctioned in Arizona or, to the State Bar's knowledge, by any Bar of which he is a member.

Standard 9.32(e) (Full and free disclosure to disciplinary board or cooperative attitude toward proceedings). The record reflects timely responses and cooperation with the Arizona Bar and appropriate participation in these proceedings.

Standard 9.32(g) (Character or reputation). Respondents' testimony, coupled with Mr. Smith's testimony, demonstrates that Respondent is well known and widely respected.

The parties suggested other factors which are not considered as either mitigatory or aggravating, as follows:

Respondent suggests that *Standard 9.32(d)* (Timely good faith effort to make restitution or rectify consequences of misconduct) applies. While Respondent did make efforts to rectify his actions, they were not necessarily

timely. For example, Respondent knew of the problem with his *pro hac vice* application in October 2003, yet he did not disclose it to Judge Gaines until January 2004. While Respondent was relying on local counsel, this is too long to wait to clarify such an error, even when relying on others. While the failure to act more promptly does not give rise to a violation of the disciplinary rules, it still should not be considered mitigatory.

The State Bar suggests that the following are aggravating factors:

Standard 9.22(b) (Dishonest or selfish motive). While it is easy to argue that Respondent had this motive, it is just as likely that Respondent had a motive of helping his clients. The negligent conduct in completing an application was just that.

Standard 9.22(c) (Pattern of misconduct). It is true that Respondent signed an application in 2002 containing false statements, and it is also true that Respondent improperly used a form fee agreement in 2004. However, this is not a "pattern" because the events are not the same conduct. To the extent it is a pattern, it is more in the nature of a continuation of the same misconduct, and is not considered a factor here.

Standard 9.22(g) (Refusal to acknowledge wrongful nature of conduct). Respondent did admit that he was not careful and did accept responsibility for his error. This factor is not considered.

A consideration of the applicable aggravating and mitigating factors demonstrates that the presumptive sanction should apply.

IV. PROPORTIONALITY

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or proportionality review is "an imperfect process". *In re Owens,* 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike". *Id.*

The most applicable cases demonstrate that censure, rather than suspension, is the more appropriate sanction.

In *Matter of Stevens*, 178 Ariz. 261, 872 P.2d 665 (1994) a censure was imposed when a lawyer negligently practiced law while suspended for failure to complete MCLE requirements. Significantly, the Disciplinary Commission felt a suspension was too harsh because the conduct was found to be negligent, but the commission also refused to impose an informal reprimand, saying "an informal reprimand is an inadequate sanction for any conduct involving the unauthorized practice of law, regardless of the circumstances". (178 Ariz at 263, 872 P.2d at 667).

In re Weller, Comm. No. 03-1734, it is somewhat analogous. The Disciplinary Commission imposed an informal reprimand on *Weller* for negligently misleading the court regarding his *pro hac vice* status by misrepresenting on pleadings that he was pending *pro hac vice* admission when, in fact, no application had yet been filed. However, in *Weller*, there was a finding of no injury or potential injury, while here, Respondent was admitted to practice when he should not have been.

In *Matter of Charles,* 174 Ariz. 91, 847 P.2d 592 (1993) a censure was imposed where a lawyer signed a client's name on a power of attorney and also presented a power of attorney for a deceased client when he knew it was revoked by the client's death. Finding no intent to defraud or intent to personally gain, the Court upheld the Disciplinary Commission's censure. While the facts are different in that case, it demonstrates that a lawyer's state of mind is critical in determining sanction, and that the state of mind of what might otherwise be far more sanctionable conduct can result in a censure.

Finally, in *In re Risley*, (SB-05-0015-D) (2005), the attorney was censured and placed on probation pursuant to a consent agreement, for violations of ERs 3.3(a) and 8.4(d), as well as a violation of ER 1.1 and 3.1. The attorney falsely represented to the court that it had previously granted a motion that had, in fact, been denied, and then in a separate matter, failed to determine whether his clients

actually qualified for a temporary restraining order and falsely alleged in the application that they did.

V. RECOMMENDED SANCTION

The purpose of discipline is "to protect the public from further acts by respondent, to deter others from similar conduct, and to provide the public with a basis for continued confidence in the Bar and the judicial system". *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987).

After reviewing all of the facts of this matter, the applicable *Standards*, including the relevant aggravating and mitigating factors, as well as the proportional case law, and taking into account Respondent's current suspended status[3], this Hearing Officer recommends that Respondent be censured for his conduct, and that he also pay the costs of these proceedings.

DATED this 15th day of August, 2006.

Kraig J. Marton
Hearing Officer 8A

[3] This Hearing Officer disagrees with the State Bar's position that Respondent should not be reinstated to the active practice of law unless he sits for and passes the Arizona Bar Examination. While outside the scope of these disciplinary proceedings, this Hearing Officer feels that imposing the requirement of passing the bar on this Respondent is unnecessary and inappropriate. Respondent is and has been an active and respected member of the Michigan Bar and no purpose would be served by requiring him to take any bar examination.

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on this 15th day of August, 2006.

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