BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	No. 04-685, 04-1439 05-0211,05-1141
TIMOTHY A. FORSHEY Bar No. 013003	HEARING OFFICERS REPORT
Respondent.	

RELEVANT PROCEDURAL HISTORY

The State Bar of Arizona filed a four-count Complaint against Respondent on September 19, 2005. Respondent timely filed an Answer on October 18, 2005. At a settlement conference held on November 8, 2005, the parties were unable to reach a settlement. However, on January 9, 2006, the State Bar filed a settlement notice followed by the supporting papers on January 15, 2006.

On February 27, 2006, the prior Hearing Officer filed his report and recommended acceptance of the Tender of Admissions and Agreement for Discipline by Consent. Respondent conditionally admitted ethical violations involving Count One (File No. 04–0685, Kisseberth), Count Three (File No. 05–0211, Robin), and Count Four (File No. 05-1141, State Bar of Arizona), and the State Bar conditionally agreed to dismiss Count Two (File No. 04–1439, Kennedy). The Hearing Officer agreed

with the recommended sanction of: (1) censure; (2) one-year probation; (3) participation in the Law Office Management Assistance Program ("LOMAP"); (4) completion of the CLE course "The Ten Deadly sins of Conflict," and (5) participation in the Ethics Enhancement Program ("EEP")

Four months later, on June 15, 2006, the Disciplinary Commission filed its Report rejecting the Tender Offer and remanded the matter. The Commission noted that Respondent conditionally admitted a violation of ER 8.4(c) (conduct involving dishonesty, deceit, misrepresentation or fraud), although there was no finding that his conduct was knowing or intentional. The Supreme Court requires such a finding to support a violation of ER 8.4(c). *See, e.g., In re Clark*, 207 Ariz. 414, 417, 87 P.3d 827, 830 (2004). Additionally, because there had been no hearing where Respondent's assertion of mitigation based on family, personal, and emotional issues were examined, there was no evidence to justify a reduction of the presumptive sanction of suspension. Furthermore, the record did not reveal the degree to which his abandoned clients were injured.

Eventually, on July 13, 2006, the matter was assigned to the undersigned. With the concurrence of the Arizona Supreme Court, the

Hearing was set to commence October 3, 2006. Because of the prior settlement several matters filed in 2005, had not been resolved: (1) Respondent's motion for summary judgment on Count 2; (2) State Bar's motion in limine to preclude certain witnesses; (3) motions concerning Respondent's request for admissions and non-uniform interrogatories. At the pre-hearing conference on October 2, 2006, I decided the State Bar was not required to respond to Respondent's request for admissions and interrogatories, denied Respondent's motion for summary judgment, and the State Bar withdrew its motion in limine. The hearing commenced October 3, 2006, continued on October 4, 2006, and concluded on October 18, 2006. Following the first two days of hearing, the State Bar sought to amend counts 1, 2 and 4 of the Complaint. After briefing and argument, I denied the motion.

DISCUSSION BY COUNT

The admissions in the answer, the exhibits and evidence adduced at the hearing clearly and convincingly establish the following facts for each count.

COUNT ONE

This count charges a conflict of interest (ER 1.7). At the hearing, Respondent, Paul Kisseberth, and Lucinda Cousino testified concerning this count.

Findings of Fact

1. In December 1997, the court dissolved the marriage of Paul Kisseberth and Lucinda Kay Farley (later Cousino). Under the degree, each parent had joint custody of their son Charles; however, the parties agreed that Charles would reside with his father, and his brother, Joseph, with his mother with the children being together once a week and on weekends and holidays. (Hr. Ex. 2, at 13; Tr. 10/4/06, at 499–500, 522.)

2. On June 27, 1998, the driver of a vehicle on 83rd Avenue ran a red light and T-boned Paul Kisseberth's pick-up truck as it was traveling on Thomas Road. Kisseberth's 4-year-old son, Charles was ejected from the truck. Kisseberth reported that the seat belt broke. Hospital records narrative stated Charles was unrestrained. According to the medical records, Charles did not sustain any serious injuries, other than some scaring. Allstate Insurance Company insured both vehicles. (Hr. Ex. 87.)

3. In November 2001, Allstate offered to settle the case.

(Hr. Ex. 3.) At a hearing held November 1, 2001, Charles' mother, Cousino, objected believing that the amount was too low. (*Id.*; Hr. Ex. 7, at 25.) The court ordered the parties to consult "and attempt to reach a resolution that was mutually acceptable to both Mr. Kisseberth and Ms. Farley.") (Hr. Ex. 7, at 25.) Without an agreement, the court would dismiss the pending petition filed by Allstate for appointment of Conservator and approval of settlement on behalf of minor's father. (*Id.*)

4. In December 2001, Cousino contacted Respondent who had previously represented her in a post-dissolution custody issue against Kissenberth as well as other matters. (Hr. Ex. 5; Tr. 10/3/06, at 56–5; Tr. 10/4/06, at 498.)

5. Respondent appeared with Cousino at a court hearing held January 15, 2002, where Allstate's petition was pending. (Hr. Ex. 7.) The court stated it agreed that dismissal of the petition was not appropriate for failure to reach an agreement. (*Id.* at 25–26.) Rather, the court stated it could *only* entertain Cousino's objection, if she filed a cross-petition to be appointed Conservator. (*Id.* at 26.) Respondent was given until February 15, 2002, to file a cross-petition. (*Id.*) If the court

appointed Cousino Conservator, she would be able to negotiate on behalf of Charles. (*Id.*)

6. Two days later, Cousino executed Respondent's "Authority to Represent" authorizing Respondent to represent her "on my own behalf and on behalf of my minor son, Charles Kisseberth." (Hr. Ex. 6, at 24.)

7. On February 13, 2002, Respondent filed a petition for permanent appointment of conservatorship of a minor on behalf of Cousino, with notice to the father. (Hr. Ex. 8.) The address listed for Charles was the same address as his mother instead of his father's address. (*Id.*)

8. On February 28, 2002, the parties again appear before the court with Respondent representing Cousino. Kisseberth represented himself. Charles was also present, as was counsel for Allstate. (Hr. Ex. 9.) At the hearing, Kisseberth agreed to consult with Respondent. (*Id.* at 34.) The Minute Entry stated that if there was a disagreement concerning who will be appointed conservator, the Court would hear testimony at a hearing *to decide who would be appointed conservator. "Any settlement reached by the appointed conservator will not be subject to disapproval by the other party.*" (*Id.* at 35; emphasis added.)

9. On April 8, 2002, Respondent filed a stipulation, also signed in the name of Charles' father, stating the hearing can be vacated as "[t]he parties have reached an agreement in regard to [Respondent]'s representation of the minor child," (Hr. Ex. 10.) When no one appeared, the Court vacated the hearing based on the stipulation, and noted that "no conservator has been appointed in this matter. If the parties have agreed to the appointment of the natural mother or father as conservator, counsel may submit a stipulated form of order[.]" (Hr. Ex. at 11.)

10. On April 22, 2002, Kisseberth executed Respondent's "Authority to Represent" agreeing to have Respondent represent him "on my own behalf and on behalf of my minor son, Charles Kisseberth." (Hr. Ex. 12, at 41.)

11. On July 12, 2002, Kisseberth left a voice mail message for Respondent apparently upset because Respondent had been communicating with his former wife. (Hr. Ex. 13.) Respondent wrote back explaining that Cousino was "as much my client as you are. This case involves her son as well as yours." (*Id.*)

12. More than a year later, on October 3, 2003, Respondent filed a Memorandum seeking approval of the settlement and appointment of Conservator. (Hr. Ex. 14.) Specifically, Respondent asked the court to

appoint Cousino as Conservator and approve the settlement and his attorney's fees. (*Id.* at 43.)

13. Three days later, Respondent appeared in court with counsel from Allstate. (Hr. Ex. 16.) The record does not reflect that either Cousino or Kisseberth were present. (*Id.*) A commissioner new to the case appointed Cousino conservator and approved the settlement of $20,250. (*Id.*; *see also* Hr. Ex. 15.)

14. In November 2003, Allstate issued two checks to the attention of Respondent for the settlement of the case, one for $20,250 and a second check for $3,503. (Hr. Ex. 17.) On November 24, 2003, Respondent filed proof of the restricted account. (Hr. Ex. 18.)

15. In April 2004, Kisseberth filed a bar complaint against Respondent, asserting among other items, that (a) Respondent incorrectly listed Charles as residing with his wife, not him, and (b) Respondent told him he could serve as Conservator. (Hr. Ex. 1.)

16. In October 2004, Respondent answered Kisseberth's complaint. (Hr. Ex. 20.) In the letter, Respondent stated "I obtained a waiver of potential conflict of interest from both of these divorced parents in an abundance of caution, despite the fact that my actual client was their child, Charles. (*Id.* at 53.) Respondent also stated that Kisseberth was

aware of the 2001 petition and "had every opportunity to file an objection to the appointment had he desired to do so." (*Id.* at 54.)

17. Respondent did not obtain a waiver of conflict from Kisseberth. (Tr. 10/3/06, at 65; 112.)

18. In the fall of 2003, prior to accepting the settlement and filing for appointment of conservator, Respondent did not discuss these matters with Kisseberth. (Tr. 10/3/06, at 133–34; Tr. 10/4/06, at 525, 527–29; *see* Hr. Ex. 117–20.)

19. Respondent's failure to obtain a waiver was inadvertent.

Conclusions of Law

The State Bar alleged Respondent violated ER 1.7. This ER provides that an attorney "shall not represent a client if the representation involves a concurrent conflict interest." Such a conflict exists when the representation of one client will be "directly adverse to another client." Both parents wanted the best settlement for their son, Charles. (Tr. 10/3/06, at 123–24, 126, 132; Tr. 10/4//06, at 502–03, 506, 509). Respondent was representing Charles' interest through the parents. Kisseberth agreed. He thought Respondent was representing his son "to get him more money." (Tr. 10/3/06, at 132.)

According to Cousino, however, it was "shortly" after she established the conservatorship bank account in November 2003, that she became aware Kisseberth had a problem with the type of settlement and her being conservator. (Tr. 10/4/06, at 514.) In hindsight, I find that a conflict of interests existed between Kisseberth and Cousino. While Cousino now testified she did not care who would be conservator (Tr. 10/4/06, at 507, 512), under the court's rulings she had to, and did, oppose her ex-husband's desire to be conservator. Based on the evidence, Respondent's actions favored Cousino over Kisseberth in his communications and final decision.

Essentially, Respondent argues that this is not significant, because a conservatorship does not allow either parent to disburse funds without a court order and only on behalf of Charles. In my view, this misses the point. From the outset, the conservatorship was a central issue for Kisseberth in the case. While who is conservator may not be a significant legal issue, it certainly can be a substantial emotional issue between divorced parents. Particularly in a case such as this where Charles resides primarily with Kisseberth. Hence, there was a conflict, and there is no evidence that Respondent obtained any written waiver from either party, or of Kisseberth agreeing to the terms of the settlement.

For Respondent to argue, if Kisseberth wanted to be conservator, "he had several opportunities to do so, and did not," is somewhat surprising and disturbing. After April 2002, Respondent represented Kisseberth in this matter and, as a lay person, Kisseberth had the right to expect Respondent to be acting on his behalf on the issue of conservatorship arising out of the settlement of the motor vehicle case, even if his primarily interest was to obtain more money for Charles. Prior to April 2002, Kisseberth's conservator petition had been pending. On February 28, 2002, the court gave the parties an opportunity to consult, however, if a disagreement still existed over who would serve as conservator, the court would hear testimony, decide the matter, and the other party would not have a voice concerning any settlement. (Hr. Ex. 9.) A month later, Kisseberth was Respondent's client. (Hr. Ex. 10.) He did not learn that he was not going to be conservator until the court, at Respondent's urgings, appointed his ex-wife. Kisseberth did not have a fair opportunity to object to the appointment of a conservator.

This said, I do not believe Respondent acted with impure motives or intentionally violated ER 1.7. I can understand how Respondent viewed the issue of conservorship insignificant as a legal issue, and it being easier to proceed with the pending cross-petition. I can also see,

however, how Kisseberth could view Respondent's actions as a way to deny him the conservatorship and a voice in the settlement. A written waiver would have benefited Respondent and alerted Kisseberth to clarify that Respondent would seek his appointment as conservator.

COUNT TWO

This count charges an unethical business transaction with a client (ER 1.8) and failure to recognize his client's diminished capacity (ER 1.14). Respondent, Elizabeth Ortiz (telephonically), and JoAnn Kennedy testified concerning Count 2.

Findings of Fact

1. Dr. Bradley Kennedy, D.D.S., married JoAnn, in 1994. Together they had two children. Kennedy had a child, Austin, from a previous marriage. JoAnn Kennedy had two children from a prior marriage. Kennedy practiced dentistry from his home. (Tr. 10/4/06, at 393–95.) Kennedy had an on-going legal dispute with his former wife over custody and child support issues involving his son, Austin Kennedy. (*Id.* at 395–96.)

2. On January 26, 2003, Arizona University Police responded to the law school and arrested Kennedy for false reporting to law enforcement and for carrying a concealed weapon in the law library. (Hr.

Ex. 36.) Following Kennedy's arrest, officers discovered four pistols in his possession, all fully loaded and with the Glock having a round chambered. (*Id.* at 290.) Additionally, he had several cuff keys. (*Id.*) According to the officers, when they escorted Kennedy to a patrol car, Kennedy did a front flip and landed on his back. (*Id.*) Paramedics responded and, although they could not detect any physical injury, he was transported to County Hospital. (*Id.*) Officers found in his car a list of Arizona Judges and their family's addresses, as well as other suspicious items. (*Id.*)

3. Three days later, on January 29, 2003, Maricopa Medical Center's psychiatric unit admitted Kennedy on a petition alleging danger to "self and danger to others." (Hr. Ex. 25, at 84.)

4. That evening, Kennedy's wife contacted Respondent after she learned that Sheriff's deputies intended to execute a search warrant on the family home. (Hr. Ex. 28, at 100–01, 108; Tr. 10/4/06, at 401, 408, 456–57.) She also was concerned about the media. (Tr. 10/4/06, at 401–02). She called Respondent because both Kennedy and she were members of the Caswell's Shooting Range, and Kennedy's brother had gotten Respondent's name from Caswell as an attorney familiar with guns. (*Id.* at 400–01.) Respondent had not represented her before. (Tr. 10/18/06, at

578.) The "Authority to Represent" signed by Kennedy's wife was dated this day, January 29th. (Hr. Ex. 28, at 101.) For a flat fee of $5,000, Respondent agreed to represent Kennedy on misdemeanor charges related to the law library arrest. (*Id.* at 100.) Her husband never signed this agreement or any other agreement for the misconduct involving weapons case. (Tr. 10/18/06, at 577.)

5. When JoAnn Kennedy retained Respondent on behalf of her detained husband; she told Respondent that she and Kennedy were having martial problems because of his obsession with custody over Austin and unwillingness to obtain help for this obsession. (Tr. 10/4/06, at 451–53.) She told Respondent, however, that the ASU arrest might cause him to seek help. (*Id.* at 453.)

6. The next day, January 30, 2003, the deputy sheriffs searched Kennedy's home. (Hr. Ex. 29, at 110.) Prior to their arrival, JoAnn Kennedy removed personal items, as well as, several of her husband's pornographic videos and magazines she found following his arrest, and possibly other items. (Tr. 10/4/06, at 457–59, 463.) Respondent advised her concerning the removal of some of the items. (*Id.* at 460, 462.)

7. Respondent owned guns before his marriage to JoAnn, and bought and sold guns during the marriage. (Tr. 10/4/06, at 464–65.)

While the deputies, JoAnn, Respondent and Respondent's paralegal and her husband were present, Respondent opened Kennedy's gun safes and inventoried over 60 guns. (*Id.* at 419–20; Hr. Ex. 29, at 112–20; Tr. 10/18/06, at 596.) With the consent of the deputies, some of the guns were taken to Caswell for sale on consignment, some were sold in private sales, and subsequently Respondent purchased two guns, a .40 caliber Smith & Wesson Beretta Model semi-automatic pistol and Glock 23 .40 caliber pistol. (Tr. 10/4/06, at 411–12; 416–19; Tr. 10/18/06, at 597; Hr. Ex. 29, at 106–07.) All the guns were removed from the home either on January 30 or 31st. (Tr. 10/18/06, at 601.) JoAnn Kennedy used money from the sales to maintain the household while her husband was detained. (Tr. 10/4/06, at 465.)

8. Respondent and JoAnn Kennedy discussed the gun sales with Kennedy. (Tr. 10/4/06, at 410–11, 413, 472–73; Tr. 10/18/06, at 616; Hr. Ex. 33, at 262.)

9. Two receipts reflect the sale of the two pistols to Respondent. (Ex. Hr. 29, at 106–07; Tr. 10/4/06, at 415–18.) Both are signed by JoAnn Kennedy. (*Id.*) One is dated February 3, 2003 (Beretta Model), and the second one February 20, 2003 (Glock). (*Id.*) Respondent has no

writing from Brad Kennedy transferring ownership of the two guns. (Tr. 10/18/06, at 603–04, 607, 610.)

10. Also on February 3, 2003, Kennedy signed a document notarized by Respondent placing JoAnn Kennedy "back on" her husband's business accounts, including a Bank One account. (Hr. Ex. 26; Tr. 10/4/06, at 439–40, 479; Tr. 10/18/06, at 592–94.) Respondent did not personally pay Kennedy for the Beretta this date of the receipt, although Respondent may have taken actual possession of the gun before then and paid JoAnn before then. (Tr. 10/18/06, at 599–601.)

11. Additionally, on February 3, 2003, the Treatment Team recommended that Kennedy remain for inpatient treatment for a period not to exceed 180 days followed by outpatient treatment for up to a year. (Hr. Ex. 25, at 80.) The concern was he would be a danger to self or others. (*Id.*)

12. On February 6, 2003, three different doctors executed affidavits in support of a petition for court ordered treatment. (Hr. Ex. 22, 23, 24.) Additionally, the social worker's court report was dated this date as well as the petition. (Hr. Ex. 25, at 82, 84.) The petition asserted that Kennedy is a danger to self and others. (*Id.* at 81.)

The social worker's report stated that his wife reported Kennedy had been showing signs of mental illness for two years. (*Id.* at 84–85.)

Dr. Maira-Jesus Bailon's affidavit stated a probable diagnosis of mostly likely a delusional disorder, persecutory type, and need to investigate possible bipolar disorder. (Hr. Ex. 22.) The affidavit noted Kennedy exhibited very paranoid behavior by his refusal to answer questions without his attorney present and his desire to have the interview recorded. Additionally, he expressed paranoid thoughts. The affidavit refered to Dr. Kao's findings of mood instability and prominent delusions. The affidavit also noted Kennedy's "[t]hought process appeared to be logical," "alert and appeared aware of his surroundings," and he had not exhibited any danger to self or other behaviors since admission. (*Id.* at 64.)

Dr. Andrew W. Parker's affidavit stated a probable diagnosis of mood disorder, and need to investigate multiple other possible diagnoses. (Hr. Ex. 23.) Kennedy refused to be interviewed based on the *Miranda* warnings, nevertheless, Dr. Parker opined that his "thoughts and cognition were "impaired." (*Id.* at 69.) Dr. Parker concluded that Kennedy has "decompensated." (*Id.* at 71.)

Dr. Samuel P. Hand's affidavit stated a probable diagnosis of delusional disorder, persecutory type. (Hr. Ex. 24.) The affidavit noted Kennedy was involuntarily brought to the center on January 26, 2003, and after being medically cleared, he was "involuntarily petitioned" by Dr. Bailon, and was brought to the psychiatric unit on January 29, 2003, but his "COE" was dropped when it was not filed in time. (*Id.* at 72.) Kennedy agreed to be interviewed by Dr. Hand after it was agreed Respondent would be present and the interview recorded. (*Id.* at 73.) Dr. Hand believed that Kennedy appeared to understand their conversation and did not want to jeopardize his criminal case by disclosing too much information. (*Id.* at 75.) Dr. Hand concluded that Kennedy was "[a]lert and fully oriented." (*Id.* at 76.) "Insight and judgment limited." (*Id.*) While a "bright individual," his delusional beliefs "seem to have overwhelmed him." (*Id.* at 78.)

13. On February 7, 2003, at the hospital Bradley and JoAnn Kennedy executed two of Respondent's "Authority to Represent," one for "Mental Health Care v. Brad Kennedy through hearing on Court Ordered Treatment," and one for "Board of Dental Examiners temporary suspension of Dental License and hearing . . . through April, 2003." (Hr. Ex. 28, at 102–05; Tr. 10/4/06, at 446–47.) At the time, JoAnn Kennedy

had not seen Dr. Bailon's affidavit or the other affidavits. (Tr. 10/4/06, at 447–48, 469.)

14. On February 11, 2003, JoAnn Kennedy met with sheriff deputies at Respondent's office. (Tr. 10/4/06, at 425–32.) She learned that Kennedy had attempted to use photographs of their son to get back at Judge David Roberts and Kennedy's ex-wife's attorney Sterling Threet. (*Id.* at 430–31.) Believing he had a potential conflict, Respondent provided JoAnn Kennedy with the name of another attorney, Alan Simpson. (*Id.* at 428.) After meeting with Simpson, JoAnn Kennedy confronted her husband alone at the hospital where JoAnn Kennedy reported he confessed. (*Id.* at 429–31.) When Respondent arrived at the hospital, Kennedy wanted his wife present when he spoke with Respondent, so Respondent had each of them sign a written waiver of any potential conflict of interest. (Hr. Ex. 27; Tr. 10/4/06, at 440–41.) Subsequently, JoAnn Kennedy employed another attorney, Pat Sampair, to represent her in her divorce. (Tr. 10/4/06, at 433–34.)

15. On March 6, 2003, Respondent appeared in Tempe Justice Court on behalf of Kennedy at a change of plea hearing on the gun case and learned that Kennedy had retained Nicholas Hentoff to represent him in the other cases. (Tr. 10/4/2006, at 495; Hr. Ex. 33, at 263–64.)

16. On September 6, 2006, jurors convicted Kennedy of seven felony counts of sexual exploitation of a minor under 15 years of age and one felony count of forgery arising out his use of photographs of their son. (Tr. 10/4/06, at 437–39; *See* CR2003–031405.)

17. During his month long representation, Respondent met with Kennedy and kept him informed of the actions he was taking on Kennedy's behalf.

18. During the period of his representation, JoAnn acted as Kennedy's agent in dealing with Respondent.

Conclusions of Law

In this count, the State Bar alleged that Respondent violated ER 1.8(a) by entering into a business transaction with his client: (1) without properly and fully disclosing the terms of the business transaction to the client, (2) giving the client the opportunity to seek independent advice, and (3) without obtaining the client's informed consent in writing. The parties agree that ER 1.8 in effect prior to December 1, 2003, governs this count. That version prohibited an attorney from engaging in a business transaction with a client unless the terms are "fair and reasonable," "fully disclosed and transmitted in writing," the client has a "reasonable

opportunity" to obtain independent counsel," and the client "consents in writing."

The State Bar failed to prove by clear and convincing evidence that on February 3, 2003, JoAnn Kennedy was not acting as her husband's agent. Nor did the State Bar establish by clear and convincing evidence any of the other elements of the first gun transaction. The fact that both the receipt and the notarized authorization are dated February 3rd is troublesome, leading to an inference that Respondent could have had Kennedy sign both. However, there are many possible explanations why Kennedy did not sign both.

The second gun transaction is even a much closer question. According to writer, that transaction occurred after Respondent recognized that 9 days before a potential conflict existed between JoAnn Kennedy and her husband. Hence, the evidence is ambiguous whether JoAnn Kennedy was acting for her husband in this transaction or in her own interest. However, there is no evidence that Respondent unfairly gained an advantage in this transaction, nor is there clear and convincing evidence that JoAnn Kennedy was not acting for her husband in the sale of the Glock. Her husband waived any conflict 9 days before concerning the felony allegations, and JoAnn Kennedy testified that she continued to

help her husband with his criminal charges. (Tr. 10/4/06, at 432–33.) Respondent did not profit from the purchase of the two firearms. (Tr. 10/18/06, at 642.) Given the totality of the circumstances and the existing record, Respondent's actions were reasonable in dealing with JoAnn in these transactions.

In this count, the State Bar also charged that Respondent failed to recognize that Kennedy was operating with a diminished capacity violating ER 1.14. The State Bar failed to prove by clear and convincing evidence that Kennedy's capacity "to make adequately considered decisions in connection with the representation" was diminished or that Respondent's actions were inconsistent with ER 1.14(b). Rather, the evidence indicated the contrary. During the limited period of representation, Kennedy was housed in a mental health facility and Respondent primarily worked with Kennedy's wife in addressing the legal issues. The affidavits from the doctors support Respondent's position as much as they hurt it. They show that Kennedy was aware that it was ill advised to speak with the doctors without the presence of counsel, and was only detained because he was a possible danger to self or others. While the affidavits infer some general diminished capacity, they do not clearly establish diminish capacity in his dealings with either his wife,

Respondent, or in connection with the representation. Even if facts existed that Kennedy capacity's was so diminished that he was at risk of "substantial physical, financial or other harm," and could not adequately act in his own interest, Respondent's actions in working with JoAnn and proceeding with the ASU case seemed reasonable.

This count is dismissed for insufficient evidence.

COUNT THREE

This count charges lack of competence (ER 1.1), lack of diligence (ER 1.3), improper fee (ER 1.5(b)), lack of candor towards the tribunal (ER 3.3), misrepresentation to a third party (ER 4.1), failure to supervise (ER 5.3), and misconduct involving misrepresentation prejudicial to the administration of justice (ER 8.4(c)(d)). Respondent and Colleen Robin (formerly Sterne) testified concerning this count.

Findings of Fact

1. In November 2000, a California court issued new custody and visitation orders in the case of *Terrence Sterne v. Colleen Sterne*. (Hr. Ex. 44.) The court awarded joint custody, with Colleen Robin as the custodial parent of Taylor Sterne (DOB: 10/15/94) with father having visitation twice a month with the exchange in Blythe, California as well as summer visitation. (*Id.* at 328–29.) The court further ordered father to enroll in a

domestic violence program. (*Id.* at 329.) Six days later, Robin's new husband contacted Respondent, but neither he nor Robin followed up. (Hr. Ex. at 89.)

2. Nearly two years later, when Terrence Sterne's summer vacation visitation began June 5, 2004, a problem arose between Sterne and his ex-wife Colleen Robin. (Hr. Ex. 48, at 348.) On June 17, 2004 and June 23, 2004, Robin contacted Respondent and informed him that Sterne wanted to take her to court, that Sterne had moved to Arizona in May of 2003, and she wanted to have the case domesticated in Arizona. (Hr. Ex. 57, at 375; Tr. 10/3/06, at 211–12.)

3. On June 24, 2004, Robin learned that she must appear on June 28, 2004, in court in California. (Hr. Ex. 48, at 349.) She advised Respondent of Sterne's California attorney's name and that Sterne was moving back to California. (Hr. Ex. 57, at 375; Hr. Ex. 89; Tr. 10/3/06, at 214.) Respondent advised Robin to appear in court in California and explain to the court that she would be seeking to have the case transferred to Arizona. (Tr. 10/3/06, at 214.)

4. The following day, Robin signed an agreement with Respondent to assist her pro per in the domestication of the California dissolution degree, as well as, ancillary services for a flat fee of $1,000 and a $200

filing fee. (Hr. Ex. 40; Tr. 10/3/06, at 137–38, 212–13.) Additionally, Robin had discussions with Respondent's paralegal concerning the California hearing and other matters. (Hr. Ex. 57, at 375–76.) On June 26, 2004, Robin emailed Respondent parcel information concerning her ex-husband's Scottsdale residence. (Hr. Ex. 89.)

5. On June 28, 2004, the California court reserved jurisdiction for "Attorney Fees," and set an Order to Show Cause hearing concerning Child Custody, Visitation, and Attorney Fees for July 21, 2004. (Hr. Ex. 48, at 351, 353, 355; Tr. 10/3/06, at 215–16.) Robin's mother wrote Respondent another check for $1,000 dated June 28, 2004. (Hr. Ex. 41.) Robin waited for the court's minute entry and brought it with other papers concerning her case to Respondent's paralegal the next day. (Tr. 10/3/06, at 144, 216–19, 231; *cf. id.* at 192.) Respondent drafted the foreign judgment papers on June 28. (Hr. Ex. 57, at 376.)

6. Two days later, Respondent filed the paper work purportedly necessary to initiate transfer the case to Arizona. (Hr. Ex. 42, at 322, 324; Hr. Ex. 43; Hr. Ex. 45.) The papers Respondent filed on June 30, 2004, apparently were five separated documents. (Hr. Ex. 42, 43, 44, 45.)

(a) Form Family Court Cover Sheet

(b) Request to Domesticate Foreign Judgment

(c) Affidavit Substantiating Foreign Judgment

(d) California Order Modifying Judgment (dated 11/6/2000)

(e) Notice of Filing Foreign Judgment

Respondent's office mailed notice of filing a foreign judgment to Sterne at the Scottsdale address, but did not served him. (Hr. Ex. 45; Tr. 10/3/06, at 142.) Prior to filing, Robin did not see the paperwork; she did not sign the affidavit substantiating the foreign judgment. (Tr. 10/3/06, at 219, 226–27, 232.) Rather, Respondent signed the affidavit attesting that he knew of his "own knowledge that the facts stated therein are true and correct." (Hr. Ex. 43, at 327.) Neither the June nor the July California proceedings are mentioned in this paperwork.

7. On July 20, 2004, Robin had an extended phone conversation with Respondent's paralegal concerning the OSC hearing in California the next day and discussed her ex-husband plans "to move back to California." (Hr. Ex. 57, at 376; Tr. 10/3/06, at 146, 169.) Respondent's notes for July 20, 2004 on this case, reference the court appointment the next day. (Hr. Ex. 89.) Respondent was aware of the California proceedings. (Tr. 10/3/06, at 197–98.)

8. The next day, the OSC hearing took place in California with Robin appearing telephonically. (Tr. 10/3/06, at 219.) Following the

hearing, she had an extended phone conversation with Respondent concerning the outcome of the hearing. (Hr. Ex. 57, at 376; Tr. 10/3/06, at 148.) Respondent understood that the case had been "shelved." (Tr. 10/3/06, at 148, 162, 173, 200.)

9. Subsequently, Robin learned that her ex-husband bought a house on August 2, 2004, in California. (Tr. 10/3/06, at 223–24.) After learning this, Robin called Respondent's office and communicated this information to his paralegal who said she would tell Respondent. (*Id.*, at 224.)

10. On August 3, 2004, Robin had a telephone conference with Respondent concerning the status of the domestication and plan to modify access and support. (Hr. Ex. 57, at 376.) She wanted to know if there was anything more she needed to do. (Hr. Ex. 89.)

11. On August 12 or 13, 2004, Robin again spoke with Respondent and told him that her son was ready to start school and wanted to know the status of her petition to modify. (Hr. Ex. 89; Hr. Ex. 57, at 376.)

12. On August 17, 2004, Respondent prepared the Petition for Modification of Access and Child Support, which was the stated reason for domesticating the foreign judgment. (Hr. Ex. 42, at 324; Hr. Ex. 57, at 376.) The petition, dated the next day, was filed on August 18, 2004. (Hr. Ex. 46.) The petition stated that a copy was mailed to Robin's ex-

husband's Scottsdale address. (*Id.* at 334.) The petition represented that Robin's ex-husband resided in Arizona, although "[f]ather has expressed his desire to relocate back to State of California." (*Id.* at 333.) Robin never saw the petition before it was filed. (Tr. 10/3/06, at 225–26, 232; *cf. id.* at 166.) Robin's ex-husband moved back to California sometime in the month of August or September. (*Id.* at 226, 229.)

13. In August, Robin had several phone conversations with Respondent concerning the petition to modify. (Hr. Ex. 57, at 376–77; Hr. Ex. 89.)

14. There is no clear evidence when Sterne moved back to California or when Respondent learned that Sterne no longer resided in Arizona. Respondent served Sterne in California in October. (Tr. 10/3/06, at 149, 153–54.)

15. On September 22, 2004, the Arizona court ordered that "copies of petition" and the order be served by November 9, 2004. (Hr. Ex. 47.) On September 22, Respondent learned this date from Robin that Sterne had an Arizona attorney. (Hr. Ex. 57, at 377; Hr. Ex. 89.)

16. On October 5, 2004, Robin had a conversation with Respondent's paralegal and Respondent had an extended phone conversation with Sterne' attorney, Suzan Pearlstein. (Hr. Ex. 57, at 377.)

She told Respondent there was still a custody case pending in California. (Tr. 10/3/06, at 175.) Respondent wanted to resolve the case economically because Robin did not have much money. (*Id.* at 175–76) Pearlstein appeared receptive, but wished the case to remain in California. (*Id.* at 176.) Later that month, Respondent received proof of service. (Hr. Ex. 57, at 378; Tr. 10/3/06, at 174.)

17. On November 17, 2004, Pearlstein filed a motion to dismiss Respondent's petition. (Hr. Ex. 48.) Respondent was surprised. (Tr. 10/3/06, at 176.) Pearlstein's motion asserted that "on or about" August 19, 2004, Sterne was living in California. (Hr. Ex. 48, at 338.) To support this allegation, Pearlstein argued that the "proof of mailing" filed in the June 2004 California proceeding, reflected that Sterne's address was "7281 Dumosa Avenue, Suite 6 Yucca Valley CA 92284." (*Id.* at 339.) That address was the law office address of Sterne's California attorney. (*Id.* at 353.) When Respondent filed his Request to Domesticate Foreign Judgment, Pearlstein contended there "was a proceeding pending in" California. (*Id.* at 338.) She further alleged that two days after personally appearing in California, "Mother signed an Affidavit stating that Respondent's last know address was" the Scottsdale address; although Robin was "fully aware at the time of filing her

pleading that Father was residing in California." (*Id.* at 339.) Respondent reviewed the motion and sent copy to Robin, and discussed the matter with Robin. (Hr. Ex. 57, at 378; Hr. Ex. 49; Hr. Ex. 88; Hr. Ex. 89; Tr. 10/3/06, at 180, 227–33.) In the stipulated continuance, the parties acknowledged that Sterne now resided in California. (Hr. Ex. 50; Tr. 10/3/06, at 199.)

18. On November 24, 2004, Respondent filed an essentially 1-page response to the motion to dismiss. (Hr. Ex. 51.) Respondent did argue that Sterne was living in Scottsdale when Respondent filed his Request to Domesticate Foreign Judgment. Respondent did inform the court that Robin thought the pending California matter had been resolved, the reasons why the case should be domesticated in Arizona, and agreed to a UCCJEA conference. (*Id.* at 359–60.) He did not, however, include items in the response that he had discussed with Robin, nor did Robin review his response. (Tr. 10/3/06, at 227–35.) The fact that Robin had not signed the June 30th affidavit was apparent from the court's record. When Respondent filed this response, there was nothing pending in California.

19. On January 26, 2005, the trial court filed its order granting the motion to dismiss and expressly found that "Mother appears to not have

been forthcoming with the Arizona Court in the representations made and importantly, representations not made, such as the fact of the California proceedings, in her Petition for Modification." (Hr. Ex. 52, at 362.) It further found that "Mother" failed to comply with Arizona statutes concerning registering the California Judgment/Order, providing Father notice and an opportunity to contest the registration. (*Id.*) Respondent did not seek reconsideration of this order.

20. Without resolving the factual question of when Sterne changed his residence from Arizona back to California or clarifying the status of the California proceedings, Respondent in essentially a 1-page response opposed Sterne's motion for legal fees and costs. (Hr. Ex. 54.) The court awarded $2,643.50, plus interest, against Robin. (Hr. Ex. 59.) Robin has not paid that judgment. (Tr. 10/3/06, at 246.) She and her mother paid Respondent a total of $2,200 to represent her in this matter. (*Id.* at 246.)

21. In Respondent's opinion as stated in his initial response to the Bar, he "in no way contributed to the dismissal of this case." (Hr. Ex. 55, at 370.)

22. Colleen Sterne Robin's testimony was credible. Nothing in the record suggested that Robin was not being candid.

23. Respondent did not intentionally or knowingly mislead the Arizona court either by a material misrepresentation or by omission. There is no evidence that when Respondent filed his Request to Domesticate on June 30, 2004, Sterne resided in California. There is no evidence that when Respondent filed his Petition for Modification in August, that the California case was anything but dormant.

Legal Conclusions

In my view, this is the most troubling count given the harm to the client. Respondent's failure to investigate and address the factual and legal issues presented in the motion to dismiss resulted in his client labeled a liar in a public record in addition to having $2,643.50 judgment against her. According to Respondent, at the time of the motion to dismiss the known facts, including the fact that by October, Sterne resided in California, were not fatal to Robin's case. Based on the court's order the fatal flaw was the appearance that Robin had misled the court—an appearance that Respondent made no real effort to resolve. Respondent does not contest he had a legal obligation to serve Sterne when he initially filed the foreign judgment, *but see* A.R.S. § 25–1055(B). Instead, he argues his failure to serve was a "technical" error that did not materially affect his client. Had Respondent served Sterne in June, however, there

would be documentation establishing where Sterne resided in June. Had he been served in Scottsdale that certainly would have undercut the motion to dismiss. Furthermore, had Respondent more fully investigated and addressed the issue of the California proceedings, if not in his original filing, in his response to the motion to dismiss, there would have been no serious question of lack of candor. *See* A.R.S. § 25–1039(D).

By clear and convincing evidence, the State Bar established that Respondent's conduct in this matter violated ER 1.1 (competence) and ER 1.3 (diligence). The State Bar failed to prove by clear and convincing evidence that Respondent violated ERs 3.3(a) (candor towards the court), 4.1(a) (truthfulness in statements to others), 5.3 (failure to supervise staff), 8.4(c) and (d) (engaged in deceitful conduct or conduct prejudicial to the administration of justice). Based on this record, Respondent's failure to alert the court to the California proceedings appears more a function of unfamiliarity with the requirements of title 25 and sloppy legal work than any knowing and intentional desire to mislead the court. Perhaps the underlying cause was Respondent's willingness to accept the initial matter at a low fee and his belief that his client had limited resources.

COUNT FOUR

This count is in two parts: (a) the *Caroline Anne Newcomb, et al. v. James R. Bair, et al.*, CV 1992–022705 case, and (b) the *John Murphy v. Richard A. Mickel, et al.* CV 2002-000066 case. This count charges ethical violations of ERs 1.3 (diligence), 3.2 (expediting litigation), 3.4 (fairness to opposing party, re: discovery), and 8.4(d) (conduct prejudicial to administration of justice). This count is very troubling from the standpoint of the administration of justice. Respondent and John R. Murphy testified concerning this count. There is little dispute concerning the facts.

Findings of Fact

There is no clear evidence that Respondent abandoned his clients in either the *Newcomb* or the *Murphy* case. In *Murphy*, the evidence is clear that Respondent did not abandon his client. In *Newcomb*, there was no clear evidence that Respondent abandoned Newcomb by the decision not to pursue the appeal. Newcomb did not testify and his understanding of the circumstances surrounding the decision not to pursue the appeal is not in the record. The remaining findings relate to each case separately.

Newcomb

1. This has been a tragic case for the parties and many of the attorneys. *See, e.g., In the matter of Alcorn*, 202 Ariz. 62, 41 P.3d 600 (Ariz. 2002). It arose in the context of a medical malpractice action filed by a father, Newcomb, in December 1992, on his own behalf and on behalf of his infant daughter against Dr. James R. Bair and Scottsdale Memorial Health Services. Mother presented with placenta previa. Because of heavy hemorrhaging during childbirth, mother lost her life on January 5, 1991, and the child was deprived of oxygen suffering catastrophic injuries, including extreme case of cerebral palsy. Dr. Bair's insurer was insolvent. (Hr. Ex. 75; Tr. 10/4/06, at 307–12.)

2. By the time Respondent entered the case in 2001, the theory had changed from just an OB malpractice case to one involving malfeasance and fraud involving a pathologist. (Tr. 10/4/06, at 312.) On March 30, 2001, Newcomb signed a fee agreement with Respondent entitling Respondent to receive 1/3rd of the remaining contingency fee after prior counsel was paid, and Peter Mineo, a Florida attorney, would receive 2/3rd of the remaining fee. (Hr. Ex. 92.) The contingency fee was 40% of the damage award before trial, 50% after trial. (*Id.*) Although the agreement provided that Peter Mineo, Jr. was lead counsel and would advance the

costs, Respondent reserved the right to take over the lead if he chose. (*Id.*) On April 2, 2001, Respondent filed a stipulated substitution of counsel for his firm and the trial court permitted it. (Hr. Ex. 80, 81.)

3. On May 2, 2001, Respondent advised the other attorneys that Mineo was "lead counsel" and papers should be mailed directly to Mineo with a copy to Respondent, and if the attorneys had any questions, they should not "hesitate to contact me." (Hr. Ex. 94.) At the time Respondent sent this letter, Mineo was not an attorney of record in the case.

4. The same day, Mineo filed an application for admission *pro hac vice*. (Hr. Ex. 98.) In accordance with Supreme Court Rule 33(d) the application stated that Mineo was "in association with" Respondent, Respondent "has agreed to serve as local counsel" and others can "*readily communicate*" with him and *serve papers on him.* (*Id.*; emphasis added) Respondent expressly consented to the designation, explicitly stating he was the person "with whom the Court and opposing counsel may readily communicate regarding the conduct of this matter and *upon whom papers in the actions are also to be served.*" (*Id.*; emphasis added). It was not until June 21, 2001, that the court admitted Mineo. (Hr. Ex. 75, at 463.)

5. During this interlude before Mineo became an attorney of record, opposing counsel looked to Respondent for discovery and

responses, while Respondent looked to Mineo. (Hr. Ex. 79, 93, 95, 96, 97.) Even after Mineo became one of the attorneys of record in this case, between July 2001 and March 2002, Respondent ignored his obligations as local counsel to opposing counsel and the court. (Hr. Ex. 76, 77, 78, 82, 84, 93, 99.) Respondent's various "Call Me Now" letters to Mineo did not discharge his responsibilities as local counsel. (Hr. Ex. 101, 102, 103, 104.)

6. Yet, despite this pattern in March 2002, the Arizona Court of Appeals admitted Mineo *pro hac vice* with Respondent's as local sponsor in a special action arising out of this case. (Hr. Ex. 98; Tr. 10/4/06, at 372–73, 376.)

7. Less than a month later, on April 8, 2002, the trial court resolved various pending motions. (Hr. Ex. 84.) Pending before the court were three motions for summary judgment and a motion to dismiss. "To none of these motions has a response been filed. No motion to extend the time to respond has been filed." (*Id.* at 502.) Although the Plaintiffs had moved for a stay, it had been denied. (*Id.*) "The time to respond ha[d] passed by 30 days." (*Id.*) After discussing the evidence in the record and lack of controverting evidence, the trial court granted all three motions for summary judgment and dismissed several defendants. (*Id.* at 502–05.)

Respondent testified that until Mineo failed to respond to the motions for summary judgments, while nearly tardy Mineo had "made it under the wire" for the previous deadlines (Tr. 10/4/06, at 378.) Although the record is somewhat ambiguous on this point, nothing clearly contradicts this testimony.

8. The Court entered judgment in May 2002. (Hr. Ex. 85.) Thereafter, Plaintiff's filed a notice of appeal, but abandoned it. (*Id.* at 506.) New counsel, in November 2004, attempted to vacate the judgments pursuant to Arizona Civil Procedure Rule 60(c)(6); the trial court denied relief. (*Id.* at 506–08; Hr. Ex. 86.)

Conclusions of Law

Respondent's reliance on Mineo did not give him license to abandon his status as local counsel of record. In addition to his obligation to the court and his client, he had a pecuniary stake in the outcome. It does not matter what his understanding was with Mineo and his client. He was an attorney of record jointly responsible for the case. Yet despite this legal and personal stake in the outcome, his attitude was basically do not bother me. When it became apparent that Mineo was not responding to the motions for summary judgment, during the 30 days after the responses were due and before the trial court ruled, Respondent had an

obligation to seek at least an extension of time in which to respond. His lack of files—a choice he made—did not prevent him from seeking an extension of time and explaining to the court his reason for doing so. There is clear and convincing evidence Respondent violated ER 1.3 (diligence). Although a close question, the evidence is not clear that he violated ER 3.2 (expediting litigation).

Murphy

1. On January 2, 2000, John Raymond Murphy went to Tempe St. Luke with a piece of meat stuck in his esophagus. (Hr. Ex. 66, at 428–29.) Eventually, he was transferred to Phoenix St. Luke. (*Id.*) During the course of his treatment, he suffered a perforated esophagus. (*Id.*) On January 2, 2002, Respondent filed a medical malpractice action naming various defendants. (Hr. Ex. 62.)

2. The docket reflects a Notice of Settling Defendant on October 25, 2002. (Hr. Ex. 61, at 407.)

3. In January 2003, the trial court granted unopposed motions for summary judgment for two of the defendants. (Hr. Ex. 62.) Two months later, Respondent notified the court that he would not oppose motions filed on behalf of three more defendants, except for sanctions, costs and fees. (Hr. Ex. 63.) Respondent filed a "joint pretrial memorandum" the

following month noting that four additional defendants have motions for summary judgment predicated on discovery issues and failure to prosecute. (Hr. Ex. 64)

4. The docket reflects a Notice of Partial Settlement on April 18, 2003. (Hr. Ex. 61, at 405.) Later that month, on April 28, 2003, the court held a hearing on the motions. (Hr. Ex. 65.) Without objection from Respondent, the trial court granted the summary judgment motions of two additional defendants (Kaldawi and McEown). (*Id.* at 424–25.) Following argument, the court granted Defendant Gellert's motion. (*Id.* at 425.) As the three remaining defendants (Thomas, McFadden, and Altman), the court gave Respondent until May 1, 2003, to file the appropriate controverting affidavits.

5. On May 1, 2003, Respondent filed the affidavit of Dr. Ree, his expert. (Hr. Ex. 66.) The next day, the trial court denied defendant McFadden's and Thomas' motions for summary judgment, but granted defendant Altman's. (Hr. Ex. 67, at 444–46.) The court also denied the defendants' motions to dismiss based on inordinate delay. (*Id.* at 444.) Nevertheless, the court noted "Mr. Forshey has had ample opportunity to respond to the [Thomas' msj] including the extension of time to file an affidavit, even though no affidavit was filed timely as required under the

rules." (*Id.* at 444.) The court further noted it would consider motions for sanctions, if counsel cannot agree on appropriate sanctions. (*Id.*)

6. The trial court subsequently ruled that Respondent's disclosure of the damage claim against McFadden was "inadequate." (Hr. Ex. 68.)

7. In May 2003, Respondent settled with defendants McFadden and Thomas, and agreed that if he would dismiss with prejudice, they would not proceed on the issue of sanctions. (Hr. Ex. 107, 108.)

8. In August 2003, a different trial court heard the motions for sanctions. (Hr. Ex. 69.) The court rejected Respondent's argument that he was overwhelmed by discovery requests and noted that Respondent had failed to seek additional time. (*Id.* at 449.) The trial court denied Rule 11 sanctions, but granted Rule 26(f) sanctions. (*Id.*) Additionally, the trial court granted sanctions pursuant to A.R.S. § 12–349 because Respondent "maintained this action against these Defendants *without substantial justification when he failed to dismiss voluntarily once he became aware that there was not a good faith basis to proceed against them.*" (*Id.*; emphasis added.) Because Defendants had not proved by clear and convincing evidence that Respondent's claims were groundless and not made in good faith, the trial court denied sanctions based on A.R.S. § 12–341.01(C). (*Id.*)

9. Subsequently, the court awarded $22,345.50 in costs and attorney fees to three of the defendants. (Hr. Ex. 70, 71, 72.) Additionally, the court granted Kaldawi motion for summary judgment. (Hr. Ex. 72.) Respondent paid the sanctions from his own resources. (Tr. 10/4/06, at 539; Tr. 10/18/06, at 564.) His client received his full share of the settlement proceeds. (Tr. 10/18/06, at 564.)

10. Respondent, at some point, had obtained a settlement from three of the defendants for his client. (Tr. 10/4/06, 537; Tr. 10/18/06, 560.) His client had approved the settlement, felt it was appropriate, and was pleased with it. (*Id.*) After discussing the case with his medical consultant, Rose Oldham, Respondent concluded there was no liability against the remaining defendants. (Tr. 10/18/06, at 561.)

Conclusions of Law

The record clearly substantiates that Respondent violated ERs 1.3 (diligence), 3.2 (expediting litigation), 3.4(d) (fairness in pre-trial proceedings to opposing counsel), and 8.4(d) (conduct prejudicial to the administration of justice). Once Respondent concluded he had no case against the remainder of the defendants, his ethical obligation was to dismiss, not negotiate the issue of sanctions.

DISCUSSION OF SANCTIONS

There are two main purposes for disciplining an attorney: "(1) to protect the public and the courts and (2) to deter the attorney and others from engaging in the same or similar misconduct." *In Matter of Zawada*, 208 Ariz. 232, ¶ 12, 92 P.3d 862 (2004) (the goal is to promote and maintain confidence in the bar's integrity). The purpose of discipline is not, however, to punish the offending attorney. *In Matter of Couser*, 122 Ariz. 500, 502, 596 P.2d 26, 28 (1979). Even though punishment is a collateral effect of a sanction, the Supreme Court does not consider the impact upon Respondent's livelihood or any resulting psychological pain in affirming the appropriate sanction. *See In re Alcorn*, 202 Ariz. 62, ¶ 41, 41 P.3d 600 (2002); *In re Scholl*, 200 Ariz. 222, ¶ 10, 25 P.3d 710 (2001).

The State Bar believes the appropriate sanction is suspension and a suspension of 6 months and a day should be considered. Such a recommendation is entitled to serious consideration. *In Matter of Kleindienst*, 132 Ariz. 95, 102, 644 P.2d 249, 256 (1982). Respondent sees the case differently. If not outright dismissal, he suggests a reprimand with probation and participation in LOMAP would be warranted. In his view, a censure would be an extreme sanction.

In deciding upon the appropriate sanction, it is generally appropriate to consider the facts of the case, the ABA Standards, and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

ABA *Standards*

The intent of the ABA Standards for Imposing Lawyer Sanctions (1992 rev.) ["*Standards*"] is to promote consistency in imposing sanctions. ABA *Standard* 1.3, Commentary. *Standard* 3.0 provides that four criteria should be considered: (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 factors. *See In Matter of Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989).

While not required for determining attorney discipline, the *Standards* can be a useful starting point in determining an appropriate and just sanction. *See In Matter of Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996); *see also In Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004) (*Standards* can be considered for guidance). When multiple ethical violations are found, generally an attorney should be sanctioned for the most serious instance of misconduct, with the additional instances

of misconduct treated as aggravating factors. *In re Cassalia*, 173 Ariz. 372, 375, 843 P.3d 654, 657 (1992).

The State Bar suggests that the appropriate *Standards* are 4.32 (Count 1) and 4.42 (Counts 3 and 4) with suspension as the recommended sanction. Not believing that any of the allegations had been proved by clear and convincing evidence, Respondent does not suggest a *Standard*.

For Count 1, I believe that *Standard* 4.34 should be the starting point because Respondent was negligent in not resolving the conflict interest and given the nature of harm Kisseberth suffered. For Counts 3 and 4, I believe that *Standard* 4.43 is the appropriate starting point because Respondent's injurious conduct in those counts is closer to negligence than knowing.

In aggravation, Respondent had a remote prior disciplinary offense, engaged in a pattern of misconduct was found responsible for multiple offenses, refused to acknowledge; *fully* the wrongful nature of his conduct and has a substantial experience in the practice of law. *See Standards* 9.22(a)(c)(d)(g)(i); 9.32(m).

In mitigation, Respondent did not have a dishonest or selfish motive, in one case he made timely good faith effort to rectify the consequences of his misconduct, he cooperated with the disciplinary

proceedings, he suffered *some* sanctions for his misconduct, and he showed *some* remorse. *See Standards* 9.32(b)(d)(e)(k)(l).

Proportionality Review

Although not expressly required by the ethical rules, in the past the Arizona Supreme Court often consulted similar cases in an attempt to assess the proportionality of the sanction. *See In Matter of Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994). At one time, the Court thought it helpful if the Commission's orders set forth proportionality considerations in its sanction recommendations. *In Matter of Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988). More recently, the Arizona Supreme Court has criticized the concept of proportionality review as "an imperfect process." *In Matter of Owens*, 182 Ariz. 121, 127, 893 P.2d 1284, 1279 (1995). This is because no two cases "are ever alike." *Id.* Here neither party cited to any particular cases for purposes of proportionality review. In my view, that was appropriate because I do not believe such review would lead to a more just or appropriate sanction than a principled discussion of the options.

Discussion

The State Bar argues, and the evidence supports, that Respondent was not out "to do terrible things to people." (Tr. 10/18/06, at 722.)

"[H]e's demonstrated in many instances he was trying to do what he understood was helpful to people." (*Id.*) On the other hand, I share the State Bar's concern that Respondent "flat doesn't get it," that he does not appear to appreciate that he committed any unethical conduct. (*Id.* at 747.) The basic question concerns how much of a threat is Respondent to the public. The fact that Respondent was not proceeding out of malice weighs in favor of finding he is not a threat to the public (although negligent conduct certainly can harm the public as occurred here). His lack of full understanding of his conduct weighs in favor of the need of protecting the public.

The sanction of suspension, in my view, is very draconian both for the attorney and for any existing clients. If an attorney's ethical lapses are so serious that he is a clearly a danger to the public, he should be suspended for more than 6-months and a day or disbarred. Depriving an attorney of his livelihood for a less time seems counterproductive to his existing clients. Nor do I believe such a short suspension serves as a clear deterrence. Such suspensions, I surmise are extremely difficult to monitor and enforce.

While in hindsight a close question, when viewed in context and the then existing circumstances, I do not find Respondent's ethical

misconduct serious enough to warrant a draconian sanction. The conduct was negligent, not motivated for profit or evil. While Respondent's mistakes resulted in some harm both to his clients and to the administration of justice, under these unique circumstances they were not the type that warrant a suspension.

RECOMMENDATION

Therefore, I recommend the following:

1. Respondent be censured.

2. Respondent be placed on probation and participate in LOMAP for 2 years with the following terms and conditions, in addition to any standard terms and conditions normally employed where probation is imposed.

a. Respondent on a pro bono basis amend the Conservatorship in the Kisseberth case to substitute Paul Kisseberth as custodian, and provide legal assistance in resolving any outstanding medical claims. Lucinda Cousino testified she did not have a problem with such an arrangement. (Tr. 10/4/06, at 512.)

b. Respondent refund $500 to Colleen Robin. *See* Hr.Ex. 50, at 369. Although Respondent's records in terms of time support a fee

much greater than he charged her, his failure to properly litigate the matter does not justify the fee he received. *See* ER 1.5(a)(4).

c. Respondent on a pro bono good faith basis explore the possibility to setting aside the judgment in *Colleen Sterne v. Terrence Sterne*, Maricopa Superior Court No FC2004-007929.

d. Completion of the CLE course "The Ten Deadly Sins of Conflict"

e. Participate in the Ethics Enhancement Program ("EEP")

3. Pursuant to Rule 60(b), Respondent be assessed the costs and expenses related to Counts One, Three and Four of this disciplinary proceeding.

#126414

DATED this 7 day of dec, 2006

John Pressley Todd

John Pressley Todd
Hearing Officer, 7X

Original filed with the Disciplinary Clerk
This 7 day of dec, 2006.

Copy of the foregoing mailed
This 7 day of DEC, 2006, to:

John Pressley Todd
Hearing Officer 7X
Office of the Attorney General
1275 West Washington
Phoenix, AZ 85007

Kevin D. Neal, Esquire
Jones, Skelton & Hochuli, PLC
2901 North Central, Suite 800
Phoenix, AZ 85012
(Attorney for Respondent)

David D. Dodge
Lieberman, Dodge, Gerding & Anderson, Ltd.
3003 North Central Avenue, Suite 1800
Phoenix, AZ 85012-3909
(Attorney for Respondent)

Copy of the foregoing hand-delivered:
this 7 day of DEC, 2006.

Robert B. Van Wyck
Chief Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288