BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No 06-0817
STUART J. REILLY, Bar No 005275,	)	**HEARING OFFICER'S REPORT AND RECOMMENDATION**
RESPONDENT.	)	

I. PROCEDURAL HISTORY

On September 15, 2006, State Bar of Arizona ("State Bar") Probable Cause Panelist Steven P Sherrick filed a Probable Cause Order, finding probable cause existed to issue a Complaint against Respondent Stuart J Reilly ("Respondent") for violations of Rule 42, Ariz R. S Ct , including but not limited to violations of ER's 1 1, 1 2, 1 3, 1 4, 1 7, 3 2, 8 4(c, d), and 53(d, f). Three months later, on December 22, 2006, the State Bar filed a Complaint against Respondent alleging one count of violating those ethics rules Unable to locate Respondent for personal service, the State Bar served the Complaint on him by mail on January 10, 2007

Respondent's Answer was due February 5, 2007 When no Answer had been received as of February 12, 2007, the State Bar filed a Notice of Default Respondent filed his Answer untimely (but before Default was entered against him) on February 22, 2007

An initial case management conference was held on March 15, 2007, where standard scheduling orders were entered The State Bar timely provided its disclosure and

issued subpoenas for the hearing On March 14, 2007, it also filed a Notice of Intent to Use Prior Discipline [1] Respondent filed no disclosure

The matter was assigned to the Honorable H Jeffrey Coker for settlement. A settlement conference was held on March 30, 2007, where the parties succeeded in agreeing to a resolution of the matter without hearing. By May 10, 2007, the parties filed their Tender of Admissions and Agreement for Discipline by Consent, as well as Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent. *This Hearing Officer granted their motion to seal Appendix B to the latter* pleading

On May 17, 2007, a hearing was held as to grounds for and propriety of the settlement agreement This Hearing Officer has serious reservations about the propriety of the agreement, but at length agreed to it. The Hearing Officer indicated her intention to accept it, and subsequently sealed the transcript of that proceeding

As the Hearing Officer reviewed documentation in drafting the Hearing Officer Report, she began reconsidering whether acceptance of an agreement to only eighteen months suspension was justifiable On June 20, 2007, after reviewing additional records from the prior disciplinary cases, she entered an Order for the State Bar to disclose documentation of Respondent's compliance on his two prior grants of probation.

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[1] The prior discipline consisted of:

SB-01-0190-D: Combining 5 Complaints from the 1990's, Respondent was suspended from practice for six months and placed on probation for two years including MAP, LOMAP/PM terms

SB-04-0006-D. Censuring Respondent.

Recognizing that the report would not be ready timely, on July 2, 2007, this Hearing Officer motioned the Supreme Court for an extension of time to complete her Report, which was granted until August 20, 2007

On July 26, 2007, a teleconference was held with the parties during which time the Hearing Officer detailed what she had learned from the records review, and explained that she could not accept the stipulated sanctions. The parties filed an Amended Tender of Admissions and Agreement for Discipline by Consent, as well as Amended Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent on August 9, 2007, this time calling for a stipulated four-year suspension and, if Respondent reapplies for admission, probation with various treatment and monitoring terms. A brief hearing was held that day to discuss the propriety of this agreement, and this Hearing Officer accepted it.

II. FINDINGS OF FACT

1 At all times relevant to this proceeding, Respondent was an attorney licensed to practice in Arizona, having been admitted to practice on April 22, 1978.

2. Respondent was suspended from the practice of law in Arizona from March 28, 2002, until December 30, 2002, pursuant to judgment issued by the Supreme Court of Arizona in Case No. SB-01-0190-D (2002).

3. Respondent was retained on or about November 2000 by Susan and Christopher Wilson ("the Wilson's") for representation of Ms. Wilson relating to alleged substandard treatment she had received at John C Lincoln Hospital on September 1, 1999.

4. The Statute of Limitations on her claim tolled on or before September 1, 2001

5 Respondent was aware of the date of the injury from the beginning of his representation of the Wilson's, as reflected in the fee agreement Respondent sent to Mrs Wilson with a letter from Respondent, dated November 10, 2000.

6 Respondent failed to file timely a lawsuit on behalf of the Wilson's prior to the expiration of the Statute of Limitations, or take any action to otherwise preserve their claim.

7. Respondent failed to inform the Wilson's that he had not timely filed their action

8 Respondent informed the Wilson's that he had, in fact, filed their lawsuit This statement was false and known to Respondent to be false It was uttered for the purpose of deceiving them.

9 During the period of time between his retention in 2000 and January 2004, Respondent knowingly made numerous false statements and provided false information to the Wilson's about their "lawsuit," for the purpose of deceiving them about the fact that the lawsuit had never been filed.

10 Respondent also failed to inform the Wilson's that he was suspended from the practice of law from March 28, 2002 until December 30, 2002, during which time Respondent represented, and/or purported to represent, Mrs Wilson.

11 As of late July 2003, if not later, Respondent continued to discuss Mrs. Wilson's case with her, pretending that it had been timely filed, and failed to inform the Wilson's that the Statute of Limitations period had expired

12 On or about January 15, 2004, approximately three years after the Statute of Limitations had run on Mrs. Wilson's claim, Respondent informed the Wilson's for the first time that he had failed to file their lawsuit.

13. Respondent entered into negotiations with the Wilson's, attempting to settle his failure to file their case and/or preserve their claims He offered a good faith amount, but due to the concession of the State Bar, I find that there is insufficient evidence to support that the offer was the $150,000 figure contended by the Wilson's

14 Nonetheless, Respondent failed to follow through with the settlement offer that he had made to pay the Wilson's.

15. Respondent thereafter retained counsel to represent himself relating to his representation of the Wilson's

16 In February 2004, the Wilson's retained Paul McGoldrick to represent them as to this conflict with Respondent .

17. After Mr. McGoldrick sent a demand letter to Respondent's counsel, Respondent, through counsel, offered to settle the Wilson's claim against him for $30,000.

18. Respondent's offer, relayed to Mr. McGoldrick by letter dated September 29, 2004, was accepted by Mr. McGoldrick on behalf of the Wilson's by letter dated October 1, 2004.

19. Respondent subsequently failed to pay the $30,000 as promised.

20. On or about December 1, 2004, Mr McGoldrick filed suit on behalf of the Wilson's against Respondent to enforce the settlement previously reached, in Maricopa County Superior Court, case number CV2004-022985

21. Although Respondent was served the Complaint of this lawsuit on or about January 14, 2005, he failed both to answer it timely and defend it

22 Respondent, through counsel, and then Respondent himself, separately filed Answers in case number CV2004-022985 on or about February 28, 2005 These were not timely filed

23. After default judgment had been entered against Respondent in CV 2004-022985, he filed a Motion to Set Aside the Default Judgment

24. As memorialized in a June 7, 2005 Minute Entry, the Court found that Respondent had "failed to demonstrate excusable neglect or good cause," and denied his motion.

25 On or about August 31, 2005, the Court entered default judgment against Respondent for $30,000 plus $3,812 attorney's fees, and costs of $397 06.

26. On December 9, 2006, Mr. McGolkdrick issued a subpoena *duces tecum* on the Wilson's behalf ordering Respondent to disclose information about his financial status for purposes to assist them in executing their judgement against Respondent. It was subsequently served on Respondent

27. Respondent was aware, based on the letter to him from his attorney dated January 19, 2006, that Mr McGoldrick had agreed to forego a deposition of Respondent as long as Respondent provided the information requested in the subpoena *duces tecum.*

28 Respondent attended a meeting with Mr. McGoldrick on January 27, 2006, but provided none of the information sought by the subpoena

29. Respondent, on or about January 27, 2006, promised to contact Mr. McGoldrick no later than February 16, 2006, about paying the outstanding judgment

against him with proceeds from another case, reportedly scheduled for settlement conference on February 14, 2006

30. Respondent failed to contact Mr. McGoldrick as promised

31 Respondent has, to date, made no effort to satisfy the judgment against him relating to the Wilsons' lawsuit against him.

32 Between February 26, 2002 and February 26, 2006, Respondent served two consecutive two-year terms of probation with the State Bar as sanctions for Files No. SB-01-0190-D and SB-04-0006-D. The terms of his probation included working with a Practice Monitor (including the obligation to periodically report the status of all his cases).

33. The Practice Monitor in fact required Respondent to produce lists of his active cases and their progress Those lists should have included the Wilson's case which Respondent had undertaken before, and continued throughout, his Probation Respondent complied with producing the lists, but at no time during those four years did Respondent include the Wilson's case on the list or report the case to his Practice Monitor

34. By letter dated May 18, 2006, Mr. McGoldrick informed the State Bar of Arizona of Respondent's misconduct relating to representation of the Wilson's.

35 By letter dated June 8, 2006, mailed to Respondent at his address of record with the State Bar, Bar Counsel informed Respondent of the allegations against him, the commencement of an investigation pursuant to Rule 54(b), Ariz R S Ct , and asked him to respond no later than June 28, 2006

36 Respondent failed to respond to Bar Counsel's letter.

37. By letter dated July 6, 2006, again mailed to Respondent at his address of record with the State Bar, Bar Counsel reminded Respondent of his obligation to provide

the State Bar with information, and informed him that his failure to cooperate with a disciplinary investigation was grounds, in itself, for discipline

38 Respondent failed to respond to that letter as well

CONCLUSIONS OF LAW

1 The State Bar bears the burden to prove by clear and convincing evidence a violation of ER's 1.1, 1 2, 1 3, 1 4, 1 7, 3 2, 8.4(c, d), and 53(d, f). It therefore must prove that it is highly probable that its allegations in the Complaint are true

2 Respondent engaged in professional misconduct that violated duties owed to his clients, the legal system, the profession of law, and the public by· failing to represent the Wilson's competently (by not filing their lawsuit timely), failing to abide by the Wilsons' decisions concerning the objectives of their representation, in that the Wilsons' goals were never achieved; failing to act with reasonable diligence and promptness in representing the Wilson's, by allowing the Statute of Limitations to toll without filing their lawsuit, failing to inform the Wilson's promptly and reasonably about the status of their case, and failing to explain circumstances about the case to them; continuing representation of the Wilson's after a conflict of interest arose (when Respondent's personal interests regarding his liability to the Wilson's made his position adverse to their interests), failing to take reasonable efforts to expedite litigation on behalf of the Wilson's; knowingly engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in communicating with the Wilson's about the purported progress in their case; engaging in conduct prejudicial to the administration of justice when failing to respond to the lawsuit filed by Mr. McGoldrick against Respondent; refusing to cooperate with staff of the State Bar of Arizona acting in the course of their duties investigating the Wilsons' complaint,

and finally, failing to furnish information and respond promptly to Bar Counsel during the course of a disciplinary investigation

3. I therefore conclude that the State Bar has proven by clear and convincing evidence that Respondent violated ER's 1 1, 1.2, 1 3, 1 4, 1.7, 3 2, 8 4(c, d), and 53(d, f)

IV. RECOMMENDATION

A. ABA *Standards*

In determining the appropriate sanction, this Hearing Officer has considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as well as Arizona case law; I have also considered the nature of the duty violated, the lawyer's mental state at the time, any actual injury to the Wilson's, and aggravating as well as mitigating factors In re Peasley, 208 Ariz. 27, 35, 90 P.2d 764, 772 (2004); In re Tarletz, 163 Ariz 548, 789 P 2d 1049 (1990). In determining the correct sanction, the analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from such conduct while protecting the interests of the public and the profession In re Kersting, 151 Ariz. 171, 726 P 2d 587 (1986).

There are three overreaching issues of concern in applying the *Standards* to this case· (1) Respondent's initial utter lack of diligence in filing the Wilson's lawsuit, (2) his reprehensible and long-term deceit of the Wilson's about this failure,[2] and (3) the interplay between this case and Respondent's conduct in prior disciplinary cases. In their Amended

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[2] I have also considered Respondent's on-going lack of diligence in responding to the State Bar's attempts to address and redress the first two issues. However, this issue does not appear to fit under ABA *Standard* § 7.0, and I find it is more appropriately addressed, as indeed the parties recommend, as a factor in aggravation

Joint Memorandum, the parties only discussed ABA *Standard* 4 6 (regarding dishonesty), coupled with sanction enhancement *Standards* 8.1 & 8 2 (based on prior, similar misconduct), the parties treat the third issue identified above as an aggravating factor I am, nonetheless, considering the first two aspects of misconduct under *Standards* §§ 4 4 & 4.6.

***Standard* § 4.4: Lack of Diligence in Representation**

Respondent's lack of diligence regarding the Wilsons' case implicates *Standard* § 4 4. *Standard* § 4 4 provides that disbarment is generally appropriate when, per subsection 4.41(b), a lawyer "knowingly fails to perform services for a client and causes serious injury . to a client."

Further, as Respondent's prior disciplinary history includes sanctions imposed for similar conduct, *Standards* 8.1 & 8 2 are implicated as well *Standard* 8.1 provides for disbarment for intentional or knowing misconduct that is the same or similar to conduct for which an attorney had previously been suspended. *Standard* 8 2 provides that suspension is generally appropriate for the same or similar misconduct where the lawyer has previously been reprimanded (censure under Arizona rules).

In SB-01-0190-D, Respondent was ultimately suspended for six months and placed on probation for Count 1, failing to communicate an offer to settle a civil case to his client and, based on further inaction prosecuting the case, letting the case be dismissed with prejudice; Count 4, delaying the case by failing to abide by numerous deadlines and Court-ordered discovery, and failing to file a motion to continue the case on the inactive calendar, resulting in its dismissal, and Count 5, failing to prosecute the case, resulting in its dismissal, coupled with failing to provide the complete file to new counsel In SB-04-

0006-D, Respondent was censured and placed on probation for Count 1, failing to prosecute timely a civil case I find that the type of conduct involved in the present case is of the same type that Respondent engaged in previously in both prior disciplinary matters, and that such conduct was a substantial part of his suspension for six months. Thus, the diligence issue is properly considered under *Standards* §§ 4.4 & 8 1

***Standard* § 4.6: Lack of Candor toward a Client**

Respondent's dishonesty in dealing with his clients, the Wilson's, implicates *Standard* § 4 6 *Standard* § 4.61 provides that disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer . and causes serious injury to a client."

Further, as Respondent's prior disciplinary history includes sanctions imposed for similar conduct, *Standards* 8.1 & 8.2 are implicated as well. *Standard* 8.1 provides for disbarment for intentional or knowing misconduct that is the same or similar to conduct for which an attorney had previously been suspended. *Standard* 8.2 provides that suspension is generally appropriate for the same or similar misconduct where the lawyer has previously been reprimanded (censure under Arizona rules).

In SB-01-0190-D, Respondent was ultimately suspended for six months and placed on probation for Count 1, after failing to communicate an offer to settle a civil case to his client and allowing the case be dismissed with prejudice (plus Respondent misled his client concerning the status of that case starting sometime after 1988 and continuing until 1994), Count 2, after converting a client's conservatorship funds, lying to his client that there had been an error in bookkeeping rather than admitting he had unlawfully converted the funds; and Count 4, after having delayed the case by failing to abide by numerous deadlines and

Court-ordered discovery, failing to file a motion to continue the case on the inactive calendar, and thus having the case dismissed, Respondent continued the charade that the case remained vital by failing to inform his client of the dismissal for almost a year. In SB-04-0006-D, Respondent was censured and placed on probation for. Count 1, after having failed to prosecute timely a civil case, two months after its dismissal (and without telling his clients that the case had been dismissed), suggesting that they agree to dismiss the case due to inability to recover damages. I find that the type of conduct involved in the present case is of the same type that Respondent engaged in previously in both prior disciplinary matters, and that such conduct was a substantial part of his suspension for six months. Thus, the dishonesty issue is appropriately considered under *Standards* §§ 4.61 & 8.1.

B. Aggravating and Mitigating Factors

1. Aggravating Factors

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. I found the following five factors are present in aggravation:

a. *Standard* § 9.22(a): Prior Disciplinary Offenses

Respondent has been previously suspended for six months and placed on probation for two years in File No. SB-01-0190-D: Respondent was subsequently censured, again with a term of probation, in File No. SB-04-0006-D, for similar offense conduct arising from the same time frame as the case resulting in suspension. It bears noting that, with the exception of conversion of client funds previously and failure to cooperate with the Bar disciplinary investigation and prosecution in this case, the types of conduct in all three of

Respondent's Bar files are disconcertingly similar. Prior discipline, therefore, *substantially* aggravates the sanction.

b. *Standard* § 9.22(b): Selfish Motive

I find that Respondent's motive for his misconduct here was selfish He sought to avoid potential malpractice liability, Bar disciplinary referral, and any financial incurment to make the Wilson's whole for their loss by how he conducted himself Moreover, as discussed in the Addendum, I find that he was motivated in part to continue to mislead the Wilson's so as to receive more favorable treatment by the Disciplinary Commission and Supreme Court in his then-pending prior discipline cases.[3] Selfish motive, consequently, *substantially* aggravates the sanction.

c. *Standard* § 9.22(c): Pattern of Misconduct

I further find that Respondent's conduct in the instant case reveals a continued pattern of the same nature of unprofessional behavior as was manifested in the two prior disciplinary cases. This Hearing Officer considers this pattern to be the most troubling aggravating factor, given that Respondent has twice previously had it brought to his attention, twice previously claimed the same nature of mitigating circumstances, and yet

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[3] Shortly after "blowing" the Wilson's Statute of Limitations, Respondent was embroiled in litigation trying to preserve his career from disbarment in File No. SB-01-0190-D; although the Hearing Officer in that case had agreed to a six-month suspension, the Commission and Supreme Court had rejected that. By fabricating favorable progress reports to the Wilson's, Respondent avoided having this serious instance of misconduct reported to the Bar, Commission, and Supreme Court while his professional fate was being decided Moreover, once he was on his first term of probation, the second Bar Complaint was filed in File No SB-04-0006-D, he thus continued to misrepresent their case to the Wilson's, successfully again avoiding having this grave misconduct arise while the second Bar file was pending Indeed, it was just a month before his second term of probation expired that Respondent finally informed the Wilson's that he had not, in fact, ever filed their lawsuit

not only failed to recognize its recurrence here, but also continued down the same path over many years, repeating his errant performance. The pattern of misconduct, as a result, *severely* aggravates the sanction

d. *Standard* § 9.22(e): Bad Faith Obstruction of the Disciplinary Process

In a continuing pattern of disregard, Respondent failed to respond to Bar inquiries, file an Answer until past the deadline, and provide disclosure. On the other hand, given that he may have anticipated settlement, his non-response also saved the Court, public, and State Bar from unnecessary litigation I do find that Respondent's failure to respond to Bar inquiries and subsequent dereliction of some of his obligations in these proceedings constitutes an aggravating factor Nevertheless, I also find that Respondent's forebearance from contesting the charges, in conjunction with his eventual cooperation in settlement, weighs against that.

There is a second, more serious matter touching upon Bad Faith Obstruction of the Disciplinary Process the juxtaposition of the events in the instant matter against Respondent's probation arising from his prior discipline.[4] As mentioned in footnote 3, above, during the time that Respondent continued to mislead the Wilson's, he was on probation, reporting to a Practice Monitor In addition, he was ordered to be in mental health treatment for issues that had contributed to the misconduct underlying the first disciplinary File No SB-01-0190-D Despite terms of his probation requiring him to

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[4] This conduct could sustain separate, additional counts However, it became apparent to the Hearing Officer and State Bar only after an in-depth investigation into the prior Files after the parties had reached their initial settlement in this case Although there is room to argue that Respondent had had notice of his wrongdoing in this regard (having successfully hidden it from the State Bar, Disciplinary Commission, and Supreme Court for years), he was not given formal notice nor charges. Hence, this Hearing Officer accepts the parties stipulation that this issue be considered instead as an aggravating factor.

report to his Practice Monitor and treatment professionals his status both legally and mentally, he failed to do so accurately[5] As a consequence, his non-cooperation with this process and failures to report the Wilson's case during his probation *substantially* aggravate the sanction in this case

e. *Standard* § 9.22(i): Substantial Experience in the Practice of Law

Respondent has been in practice, except for approximately nine months surrounding his suspension, since 1978. Hence, I find that his considerable practice experience aggravates his sanction.

2. Mitigating Factor

This Hearing Officer considered the following factor in mitigation:

a. *Standard* § 9.32(c): Personal or Emotional Problems

Discussion of this factor is placed in a sealed Addendum to this Report As explained in detail there, I find that Respondent indeed has suffered from some mental afflictions and personal/emotional problems that, *at times*, during his representation of the Wilson's have hampered his ability to conduct himself ethically.

C. Proportionality Analysis

The Supreme Court has held that in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts

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[5] Respondent asserts that his failure to do so is a symptom of the mental health issues with which he was then grappling, and continues to deal with to this date, the State Bar charitably agreed that his mental condition tempers the severity of this aggravating conduct. However, as demonstrated in the Addendum, Respondent has repeatedly shown himself to lie to the Bar and Disciplinary Commission to protect his self-interests, including false self-reports about his mental health. Because his claims of impaired mental status are thus inherently *unreliable*, this Hearing Officer cannot credit any such self-serving and uncorroborated claims.

of the case in order to achieve the purposes of discipline. In re Wines, 135 Ariz. 203, 660 P 2d 454 (1983); In re Wolfram, 174 Ariz. 49, 847 P 2d 94 (1993). In the past, the Supreme Court has consulted analogous cases in an attempt to assess the proportionality of the recommended sanction. In re Struthers, 179 Ariz. 216, 222, 887 P 2d 789, 799 (1994) For an effective system of attorney sanctions, there must be internal consistency, so it is appropriate to consider factually similar cases Peasley, 208 Ariz. at ¶33, 90 P 3d at 772 However, no two cases are alike, and the concept of proportionality review remains an "imperfect process." In re Owens, 182 Ariz. 121, 127, 893 P 2d 1284, 1290 (1995) Moreover, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved Peasley, 208 Ariz at ¶61, 90 P 3d at 778; In re Alcorn, 202 Ariz 62, 76, 41 P.3d 600, 614 (2002); Wines, 135 Ariz 203, 207, 660 P 2d 454, 458 (1983).

Three cases have similar facts concerning dereliction of duties to and misrepresenting their cases to the clients In In re Turley, DC-02-1697, 03-1468 (2005), the lawyer failed to communicate with his client, did not adequately explain the status of the matter to the client, and failed to act with reasonable diligence to expedite the client's legal matter. Ultimately, the lawsuit was dismissed for lack of prosecution Turley had been previously disciplined as well As a result, the Supreme Court suspended Turley from practice for two years In In re Gieszel, SB-06-0013-D (2006) as well as In re Pulito, SB-04-0134-D (2005), the lawyers failed to timely file or prosecute their clients' lawsuits; both lawyers knowingly deceived their clients over a lengthy period of time, both creating false documentation to support their lies. These attorneys were suspended for one year, despite significant mitigation of personal/emotional problems evident in Gieszel's case

These cases, however, lack certain aggravating factors present in the instant case. Respondent's priors (especially considering that the first one represented a consolidation of five Bar Complaints spanning almost a decade) are far more weighty than theirs; moreover, he was on probation with the State Bar when deliberately hiding his misconduct in this case from his Practice Monitor and treatment professionals. That suggests that a far greater time of removal from the practice (beyond the one- or two-year suspensions imposed in those three cases) is called for here

On the other hand, in In re Bryn, SB-06-0127-D (2006), the lawyer abandoned his clients entirely and failed to participate in the Bar disciplinary process. It is noteworthy that his misconduct also occurred while he was involved in disciplinary proceedings on another matter Bryn was disbarred. His misconduct, although somewhat different from Respondent's, was far more egregious Furthermore, although Respondent has been less than punctual about responding to the State Bar and this disciplinary process, he has consistently participated in it in good faith. Bryn consequently suggests that a sanction less than disbarment may be appropriate here.

Between those cases is In re Kraeger, SB-06-0176 (2006). Kraeger abandoned numerous clients during their emotional and personal crisis, and had several very aggravating factors. She had no prior discipline record, however Thus, she was suspended from practice for four years. Respondent's misconduct here is worse in some aspects and better in some aspects than Kraeger's. It is less serious because Respondent injured a single client, and that client was not in a vulnerable position at the time, it is more serious, nevertheless, because of his prior discipline and fact he was then on probation but noncomplying with his reporting obligations. Therefore, Kraeger suggests

that, in the balance, a four-month suspension would be in keeping with Respondent's misconduct.

D. Discussion of Appropriate Sanction

The purpose of attorney discipline is not to punish the lawyer, but to protect the public, and deter future misconduct. In re Fioramonti, 176 Ariz. 182, 187, 859 P 2d 1315, 1320 (1993) Indeed, it is also the object of lawyer discipline to protect the public, the profession, and the administration of justice In re Neville, 147 Ariz. 106, 708 P 2d 1297 (1985) Another purpose attorney discipline serves is to instill public confidence in the bar's integrity Matter of Horwitz, 180 Ariz. 20, 29, 881 P 2d 352, 361 (1994) In selecting the appropriate attorney disciplinary sanction, it is appropriate to consider the facts of the case, the *Standards,* and the proportionality of discipline imposed in analogous cases Matter of Bowen, 178 Ariz 283, 286, 872 P 2d 1235, 1238 (1994) This Hearing Officer has considered all these factors

There is no question that Respondent's misconduct in this case, especially in light of his prior disciplinary measures, can justify the sanction of disbarment. This Hearing Officer gave very serious consideration to recommending it. It is completely justified by the *Standards*, presumptive sanctions under both *Standards* § 4.4 (lack of diligence in representation) as well as § 4 6 (lack of candor toward a client) are disbarment Aggravating factors bear considerable weight as well § 9.32(c) (pattern of misconduct) is "severe," §§ 9 32 (a, b, e) (prior disciplinary offenses, selfish motive, and bad faith obstruction of the disciplinary process) are "substantial," and § 9 32(i) (substantial experience in the practice of law) aggravates. His prolonged lying to clients and to agencies in the disciplinary process is reprehensible Nonetheless, there is reason to

believe that Respondent does suffer from a number of personal and emotional problems which have, periodically, made it more difficult for him both to conduct his practice ethically and diligently, but also to face his failings; this mitigates his misconduct.

As to the proportionality review, it suggests that a suspension of four years is not *in*appropriate in this case

Beyond those issues, however, given Respondent's history, protecting the public from further misconduct at Respondent's hands is a high priority. Fioramonti. Several important facts are considered in that regard First, although not a mitigating factor to be considered under the *Standards*, Respondent reports that he has voluntarily quit the practice of law. He states he has only one client presently, and that matter is close to resolution He has moved to Texas where he intends to work in mediation as a non-lawyer. There are practical implications to this fact, presuming it is true. He will not be in a position to harm other legal clients during a period of ordered non-practice. The State Bar and this Hearing Officer share the opinion that Respondent is a bright, experienced lawyer who knows the law, rules, and procedures. Given the short time frames and lack of need for follow-through in a mediation practice, it is likely that he will fare quite well in such a non-lawyer practice, moreover, he will not be plagued with the sorts of problems that he faced in a trial practice, that led to his series of Bar Complaints As a result, Respondent is likely to be more successful as a private mediator than he was as an attorney, and he may not want nor need to return to the practice of law. Hence concern for protecting the public four years from now may be ameliorated if he succeeds in this non-lawyer mediation business This does not mitigate his conduct, but it does suggest that there may be less worry now for public protection.

Second, Respondent is now 62 By the end of a four-year suspension, he will be 66, and even if he sought reinstatement, that realistically would probably not occur until he is 67 or 68. The fact that he has relocated to Texas and started his life anew there, given his age, also suggests that he is less likely to return to Arizona to attempt to resume his legal career Again, this factor informs us as to whether he will likely seek reinstatement and so whether the public will need to be protected from him four years hence

Third and finally, the realities of attorney sanctions are that a disbarred attorney can apply for reinstatement after five years, essentially facing the same reinstatement hurdles put to the suspended attorney with the exception of re-taking the Bar Examination. There has been no question that Respondent is quite familiar with the law, rules, and practice; so, interposing a Bar Examination does not seem either necessary or appropriate in this case. The sanction of four years Suspension will remove Respondent from practice almost as long as a Disbarment would. More importantly, he would have to face the same rigors of showing rehabilitation and that his return to the practice would not result in the same problems as a disbarred lawyer would face [6]

This Hearing Officer concludes that the agreed-upon four-year suspension with probation is appropriate instead of disbarment. Protection of the public will not be significantly enhanced by disbarment as opposed to a lengthy suspension However, that protection can best be assured by assembling a detailed record (including Respondent's false statements regarding his mental status - stable if it helps him return to practice,

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[6] This would prove to be a substantial undertaking given his admissions that his mental afflictions cannot be kept in check with medicine, treatment, and monitoring offered in mitigation in the instant case *See* Letter of Dr Cain (offered by Respondent in the instant case), Exhibit AAA to the Addendum; Affidavit of Respondent, Exhibit EEE.

unstable if it prevents suspension-, lies to those monitoring him during probation, and use of medical testimony which is inherently unreliable to support his ends) to the Commission that may some day hear his petition for reinstatement. This Hearing Officer has undertaken such an assemblage in the Addendum, supporting documents, and timeline, and hopes that it will be of use for the Commission or Supreme Court considering any potential reinstatement at a later date

Therefore, upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionally analysis, this Hearing Officer recommends the following

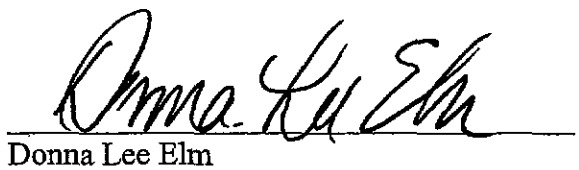
1 Respondent shall be suspended from the practice of law for a period of four years.

2 If reinstated to the practice of law, Respondent shall be placed on probation for a period of two years effective upon the signing of the probation contract after being reinstated to practice. That probation includes MAP monitoring and treatment as well as a Practice Monitor, in addition to other terms and conditions deemed appropriate by the Disciplinary Commission

3. Respondent shall pay, as restitution, all monies owed to the Wilson's in Maricopa County Superior Court cause No CV2004-022985 in full *before* he is permitted to apply for reinstatement to the practice of law And,

4. Respondent shall pay the costs and expenses incurred in these proceedings as set forth in Exhibit A to the Amended Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent.

Dated this 20th day of August, 2007.



Donna Lee Elm
Hearing Officer 6N

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this 20th day of August, 2007

Copy of the foregoing mailed
this 3rd day of October 2007, to:

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