BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	File Nos. 06-1667 and 07-1658
RICHARD B. JOHNSON, Bar No. 002118	**HEARING OFFICER'S REPORT**
RESPONDENT	

PROCEDURAL HISTORY

1. Probable cause was found in this matter on April 27, 2007, and a Complaint was filed on August 24, 2007. The matter was assigned to Hearing Officer 9S on September 13, 2007. A Notice of Transfer as a Matter of Right was filed on September 17, 2007 Respondent filed his Answer on September 18, 2007. The undersigned Hearing Officer was assigned to this matter on September 26, 2007. Because it was anticipated that the State Bar was going to file a second charge against the Respondent, the final hearing date of November 19, 2007, was vacated

2. Probable cause was found on the new charge on December 18, 2007, and the First Amended Complaint including both claims was filed on December 21, 2007. Respondent's Answer to the First Amended Complaint was filed on January 8, 2008. A Notice of Settlement was thereafter filed on January 18, 2008, and a hearing on the Tender and Agreement was held on February 15, 2008.

FINDINGS OF FACT

3. At all times relevant hereto, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice in Arizona on April 6, 1968

COUNT ONE (File No. 06-1667):

4. In or about March of 1999, Respondent's firm was retained to prepare the will of Gene Birkett ("Mr Birkett"). An associate with Respondent's firm prepared Mr Birkett's will.

5. This will devised the "entire estate" of Mr. Birkett to his daughter, Martha Hall ("Ms Hall"). Mr. Birkett's will was eventually placed in a safe in Respondent's office.

6. On or about April 6, 2006, Mr. Birkett passed away at the age of 81.

7. Eight months later, on or about August 3, 2006, Ms. Hall contacted Respondent and advised him of the passing of Mr Birkett

8. On or about August 3, 2006, Ms. Hall retained Respondent to file probate on Mr Birkett's will. Ms. Hall, who was facing financial difficulties at the time, was residing in Mr. Birkett's home, which was the estate's sole asset. Ms Hall explained that, in the eight months since her father's death, she had fallen behind in the mortgage payments on the home. She had applied for a home equity loan under the mistaken belief that ownership of the home had passed automatically to her upon her father's death. However, the lender advised that it would not close on the loan until probate proceedings were filed and the home was distributed to Ms Hall. Respondent agreed to represent her in filing a probate on her father's estate at a substantially reduced legal fee of $500, which was to be paid out of the refinancing proceeds, plus costs.

9. On or about August 3, 2006, following his conversation with Ms. Hall, Respondent removed Mr. Birkett's will from his safe to confirm its dispositive provisions and

determine whether he needed additional information to file a probate application He laid the original will on his desk, believing he would keep it there until Ms. Hall came in with a check for the filing fee

10 In or about August of 2006, Respondent (or an employee of Respondent's firm) inadvertently misfiled Mr Birkett's original will in another client's file.

11 After searching his office, Respondent was unable to locate the original will.

12 Respondent subsequently met with Ms. Hall and her husband to discuss the probate. Respondent admitted that he had misplaced the original will, and advised them that, without it, he would have to file formal probate proceedings, which would delay Ms. Hall's appointment as personal representative of the estate for 60 to 90 days. This, in turn, would delay closing of the home-equity loan and payment of her past-due bills.

13. Respondent suggested to Ms Hall that they "re-execute" the will, using a copy of the original that was still in the client file.

14 Respondent presented the copy of the will to Ms. Hall, and she's signed Mr. Birkett's name to it in Respondent's presence.

15. Ms. Hall backdated the signature date on the altered will to create the appearance that Mr. Birkett had signed the will prior to his passing away.

16. Respondent then notarized the altered will, using his secretary and Ms. Hall's husband as witnesses.

17. Respondent backdated the notary date on the altered will to create the appearance that it had been notarized prior to Mr Birkett's passing away.

18. On August 9, 2006, Respondent filed an Application for Informal Probate with the Superior Court, case number PB 2006-002245.

19 Respondent attached a copy of the altered will to the Application for Informal Probate.

20. Respondent subsequently located the original will, which had been misfiled in another client's file.

21. Respondent did not immediately notify the Court of the fact he had submitted a fake will for probate.

22 In or about September of 2006, the adult children of Dennis Birkett, the previously deceased son of Mr. Birkett, and grandchildren of the deceased, received a Notice to Heirs and Devisees of Informal Probate of Will and Appointment of Personal Representative stemming from PB 2006-002245.

23. The adult children believed the signature on the altered will was not that of their grandfather, Mr. Birkett.

24 In or about September of 2006, one of the adult children confronted Respondent about the signature on the fake will.

25. Respondent admitted to the adult child that the signature was not authentic. Respondent informed the adult child that he had located the original will.

26. In or about September of 2006, the adult children contacted attorney Morris Kaplan ("Mr. Kaplan") regarding a possible claim against Mr. Birkett's estate.

27. On October 5, 2006, Mr. Kaplan sent a letter to the State Bar advising it of Respondent's conduct.

28. On November 22, 2006, the State Bar forwarded Mr. Kaplan's complaint letter to Respondent and requested a response. Respondent timely responded to the Bar's request and admitted his conduct.

29. In or about December of 2006, Respondent met in person with Angela Northrup ("Ms. Northrup"), a Deputy Registrar of the Superior Court, and her supervisor, Maridel Soileau ("Ms. Soileau") Respondent explained to Ms. Northrup and Ms. Soileau what he had done regarding the will in PB 2006-002245 Ms. Northrup and Ms Soileau advised Respondent he should file an Amended Application for Informal Probate.

30. On December 20, 2006, Respondent filed an Amended Application for Informal Probate with the Superior Court in PB 2006-002245.

31 Respondent attached a copy of the original will to the Amended Application for Informal Probate.

32 Respondent's Amended Application for Informal Probate indicated the previously filed will was not valid "because it was not signed by the decedent or properly executed."

33. Respondent's Amended Application for Informal Probate did not provide the details of what Respondent and Ms. Hall had done in creating the previously filed altered will. However, in his personal meetings with Ms Northrup and Ms. Soileau, Respondent explained the details of his actions and apologized for his conduct The State Bar confirmed this fact during its investigation

34. Based upon Respondent's Amended Application for Informal Probate, the Probate Registrar withdrew the altered will and admitted the original will to probate.

35. Upon review of Respondent's response to the Bar, the Complainant (attorney Morris Kaplan) wrote to the Bar that he accepted Respondent's explanation and believed no further action was warranted on the matter.

36. Ms Hall was the estate's sole beneficiary, and the Birkitt home was the estate's sole asset. The grandchildren had no claim to the estate and did not file a claim in the probate proceeding.

37. While admitting that his conduct was inappropriate, Respondent contends that he was motivated solely by a desire to assist Ms. Hall so that she would not risk losing the Birkett home The State Bar accepts Respondent's explanation while, at the same time, contending that Respondent's conduct also covered up the fact that he had temporarily misplaced the original will

COUNT TWO (File No 07-1658):

38 In or about 2005, Respondent was retained by Emma Harlamoff ("Ms. Harlamoff") and her daughter Victoria Weinberg ("Ms. Weinberg").

39. Respondent performed the estate planning work for both Ms Weinberg and Ms Harlamoff.

40. Ms. Weinberg passed away on December 6, 2005.

41 Respondent performed the estate administration work for the Weinberg estate.

42. Respondent estimated to Ms. Harlamoff that his legal fees to administer the Weinberg estate would be in the range of $25,000.

43. Respondent's actual legal fees for the administration work in the Weinberg estate were charged based upon his hourly rate and approximated $25,000.

44. Respondent did not execute a written fee agreement with Ms. Harlamoff.

45. In or about February of 2006, Respondent and Ms Harlamoff discussed Ms. Harlamoff's desire to sell the home she owned, and where Ms. Weinberg had resided prior to her death in Gilbert Arizona. Respondent offered to buy the home for $450,000.

46. Ms. Harlamoff consulted with her brother, Thomas Peck II, about the proposed transaction, and he recommended to Ms. Harlamoff that she sell the home to Respondent.

47. Respondent did not advise Ms. Harlamoff in writing of the desirability of seeking independent legal counsel on the transaction.

48. Respondent did not obtain written consent of Ms Harlamoff to Respondent's role in the transaction, including whether he was representing her in the transaction.

49. In an affidavit, Mr. Peck, Ms Harlamoff's brother, stated that Ms. Harlamoff understood the transaction and her right to separate counsel. (See Ex "B" attached to the Tender).

50. On or about March 1, 2006, Respondent and Ms. Harlamoff completed the transaction, with Respondent paying Ms. Harlamoff $130,000 in cash, assuming the remaining mortgage debt, and taking possession of the home. On or about March 1, 2006, Ms. Harlamoff executed a quit-claim deed to the Gilbert home in favor of Respondent and his wife

51. On or about March 1, 2006, Ms Harlamoff also executed a fourth amendment to her trust, making Respondent a co-trustee of her trust.

52 Ms. Harlamoff passed away on April 15, 2006.

53. After Ms. Harlamoff's death, Respondent continued to act as the sole remaining trustee of Ms. Harlamoff's trust and as Personal Representative of Ms. Harlamoff's estate.

54. On or about July 6, 2006, Respondent charged $6,902.50 to the estate At least part of this charge was an inadvertent double charge from the prior month's invoice, and was improper to the extent of the double charge and payment.

55. Between February 2, 2006, and August 3, 2007, Respondent charged a total of $54,591.84 for work on Ms. Harlamoff's trust and estate. Respondent withdrew amounts he billed from the balance of the estate and/or trust as he billed them.

56. Respondent did not execute a written fee agreement with the beneficiaries of the Harlamoff estate and trust.

57. On or about September 13, 2007, Respondent sent a letter to Thomas Asimou, attorney for a beneficiary of Ms. Harlamoff's trust. In this letter, Respondent admitted that the payment dated July 6, 2006, was a double payment of a prior month's invoicing in the amount of $5,257.50, and was improper to the extent of the double payment.

58. Respondent also admitted that the total fees received were inadequately disclosed and arguably excessive.

59. Respondent offered in his letter to refund $19,591.84 that he had billed back to the estate in an attempt to settle a claim based upon the same allegations as set forth in this Count that is pending in Probate Court.

60 Respondent refunded the amount of the double payment to the estate.

61. The Probate Court has not yet ruled on the viability of the claims regarding Respondent's attorney fees or the appropriate remedy.

CONCLUSION OF LAW

62. The parties submit, and the Hearing Officer finds, that Respondent's conduct as set forth above violated the following Rules of Professional Conduct.

Count One: Rule 42, Ariz R Sup.Ct.

ER 1.2(d), counseling or assisting a client in fraudulent conduct

ER 3.3, candor toward the tribunal

ER 3.4(b), falsify evidence

ER, 8 4(c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation

ER 8 4(d), engaging in conduct that is prejudicial to the administration of justice

Count Two Rule 42, Ariz.R.Sup.Ct.

ER 1.5, unreasonable fees

ER 1 8, conflict of interest

ABA STANDARDS

63 ABA *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; (4) the existence of aggravating or mitigating factors.

The Duty Violated:

64. Respondent's most serious misconduct in this matter is in Count One regarding his failure in his duty to the profession and the legal system, specifically, his creation and submission of falsified evidence Respondent's conduct, in violation of the Rules set forth above, implicates *Standard* 6.1 *Standard* 6.12 provides that: "suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding or causes an adverse or potentially adverse effect on the legal proceeding."

65. In Count Two Respondent violated a duty to the estate to submit accurate billings and charge a reasonable fee Respondent also violated a duty to his client to have her sign the appropriate acknowledgement/waiver documents.

The Lawyer's Mental State:

66 Respondent's conduct in Count one was knowing, and his mental state in Count two was negligent.

Injury Caused:

67. In Count One, while the grandchildren had no claim to the estate, they had to at least consult with another attorney to determine what should be done regarding the altered will.

68 In Count Two, Ms. Harlamoff's brother, who was also her financial adviser, states that the terms of the sale of the Gilbert home to Respondent were fair. With respect to the fees that Respondent charged to the estate, Respondent has refunded the $6,902 50 double billing and offered an additional $19,591.84, which indicates that Respondent admits to at least the possibility of injury to the estate.

Aggravating and Mitigating Factors

Aggravating Factors:

69 *Standard* 9 22(d), Multiple offenses. Respondent has admitted to two separate counts in this matter, stemming from the representation of two separate clients.

70. *Standard* 9.22(i), Substantial experience in the practice of law. Respondent was admitted to practice on April 6, 1968

Mitigating Factors:

71 *Standard* 9.32(a), Absence of a prior disciplinary record Respondent has been practicing law almost 40 years without any prior discipline

72. *Standard* 9.32(e), Full and free disclosure to disciplinary board. Respondent admitted his conduct to the State Bar when investigated.

73 *Standard* 9.32(l), Remorse Respondent is genuinely sorry for his conduct and regrets his actions.

74. *Standard* 9.32(b), Absence of a dishonest or selfish motive. There is disagreement between the Bar and Respondent whether *Standard* 9.32(b) applies in this case or not. It is the State Bar's contention that Respondent's motive in submitting the copy of the will was to cover up his prior mistake in mislaying the original. Respondent contends that his motive was to assist his client, who was in dire need of expediting the probate of her father's will before she lost her home This Hearing Officer can see both sides of the issue. Having witnessed Respondent's demeanor and presentation at the hearing on the agreement, and also weighing the fact that Respondent has practiced law for close to 40 years with no prior disciplinary actions against him, this Hearing Officer is persuaded that, while there might have been an element of trying to cover a mistake, Respondent's primary purpose was to assist his desperate client. Therefore, the Hearing Officer does give some weight to this mitigating factor.

PROPORTIONALIY REVIEW

75 The Supreme Court has held that in order to achieve the goals of discipline, there should be proportionality in each case with other cases of like disposition, bearing in mind that discipline in each situation must be tailored to fit the individual facts of the case. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983), and *In re Wolfram*, 174 Ariz. 49, 847 P 2d 94 (1993). The Supreme Court has also recognized that the concept of proportionality review is "an imperfect process" and that no two cases "are ever alike", *In re Owens*, 182 Ariz 121, 893 P.2d 1284 (1995).

76. *In the Matter of Matheny*, Commission #06-0215 (Supreme Court Order pending), Mr. Matheny attempted to submit a will for informal probate, but it was rejected for lacking witness signatures Mr. Matheny met with his client, a beneficiary of the will, and in his presence and with his knowledge, the beneficiary signed two false witness signatures to the will While it was contested whether Mr. Matheny directed the beneficiary to do so, it was uncontested that Mr. Matheny knew that the beneficiary was doing it and assisted her. Mr. Matheny then submitted the altered will for probate When confronted by opposing counsel regarding the execution of the will, Mr. Matheny lied about the execution on several occasions. Mr. Matheny was found to have violated ERs 1.1, 1.2, 1.5, 1.7, 3.3, and 8 4. The Disciplinary Commission rejected the Hearing Officer's recommended 90 day suspension and instead recommended that Mr. Matheny be suspended for one year with probation and 15 hours of CLE to be completed upon reinstatement The case is pending before the Arizona Supreme Court. Unlike the present case, the will in the Matheny case was likely to be contested and, moreover, Mr. Matheny lied to the court, stating that there were no relatives or heirs when he knew there were. Mr. Matheny also continued to represent the client after his misconduct had been discovered, thus engaging in a conflict of interest, and he lied to the State Bar during its investigation.

77 In *In re Everett,* (02-1133), Mr. Everett falsely listed his own P.O Box address as his client's on every out-of-town client's bankruptcy petition, thereby protecting his clients from motions for change of venue. He had committed such intentional misconduct on other occasions, and he had prior disciplinary offenses and had been admonished on two previous occasions for similar misrepresentations to the bankruptcy court. The

Disciplinary Commission increased Everett's recommended sanction of censure to a 30 day suspension. Unlike the present case, Mr Everett's conduct, while serious, affected the venue of the bankruptcy actions In this case, Respondent submitted an altered will in a probate matter that involved that same will.

78. In *In re Cheryl,* Case (04-2103), the Respondent filed an affidavit based on the client's representations that contained material omissions and misrepresentations, which the Respondent failed to remediate after she discovered the truth. Respondent was suspended for 90 days. The current case is somewhat different from Cheryl, because Cheryl involved an innocent misrepresentation followed by a failure to remediate, and this case involves a knowing misrepresentation followed by remediation.

79. In *In re Moak,* SB-03-0007-D, Mr. Moak failed to disclose to the court his client's injuries from a second car accident before the first accident case proceeded to trial. Mr. Moak was found to have violated ERs 1.2, 1 3, 1.4, 1.7, 1.8, 1.9, 3.3, 4.1, and 8.4. Mr. Moak was suspended for six months and one day.

80. In *In re Shannon,* SB-92-0001-D, Mr. Shannon engaged in a conflict of interest by representing clients with adverse interests, failed to keep his client properly informed about the case, and prepared answers to interrogatories without his clients review, then submitted those answers to the court after his client informed him they were incorrect. He was found to have violated ERs 1 4, 1 7, 1.15, 3.2, 3.4, and 8.4. Mr. Shannon was suspended for one year with probation to begin upon reinstatement.

81. In *In Re Charles,* 174 Ariz. 91, 847 P.2d 592 (1993), Mr. Charles twice forged his client's name on a power of attorney and used the client's valid power-of-attorney once after it was revoked as a result of the client's death. He did so in furtherance of his

client's wishes and not for his own benefit. Later, the litigation of a dispute over the Respondent's handling of the estate as personal representative harmed the estate by reducing its assets. The Arizona Supreme Court found that the conduct was "dishonest, notwithstanding that Respondent intended no personal gain " Id at 93, 847 P 2d at 594

82. The Court in Charles concluded that Mr. Charles had a conflict of interest in handling the estate because the client was also a lifelong friend and, as a result, Respondent became too personally involved in the management of the estate The Court, recognizing that suspension may have been appropriate, censured Mr Charles based on the mitigation of his compassion for his client and lack of selfish intent. In this case, Respondent had not had a lifelong relationship with the client in Count One, and the Bar's position is that the compassion he showed for the client was at least in part intended to cover up his own error In addition, the Charles case involved conduct related to the same client, whereas this case involved two counts related to two different clients.

83. In the Joint Memorandum the parties submit one further case, *Florida v Kicklıter*, 559 So.2d 1123 (1994), that the Hearing Officer finds to be too different factually to be considered in this case.

84 Based upon the cases submitted above, the parties believe that the specific facts in this case, including mitigation, call for a suspension of six months and one day as the appropriate sanction.

RECOMMENDATION

85. The Hearing Officer had an opportunity to witness both the demeanor and presentation of the Respondent during the hearing on the agreement. What the Hearing Officer saw was an elderly gentleman, struggling to maintain his self-respect and emotions. It is not

without shame that the Respondent comes before this process After almost 40 years of good solid blemish free service to his clients and his profession the Respondent finds himself closing out his career under a cloud The Respondent was physically shaking and barely in control of his emotions from the embarrassment and humiliation of having committed this misconduct, and the prospect of having this process be the capstone of his legal career.

86. While certainly Respondent's conduct cannot be condoned, and this Hearing Officer is particularly sensitive to the offense of misrepresentation to a tribunal, when viewed in the light of the circumstances under which both counts occurred, the significance of the infractions are somewhat muted.

87 This Hearing Officer, while still relatively new to this process, has now had the opportunity to witness cases involving attorneys that have no remorse or feign remorse, and attorneys with genuine remorse and I have no question but that the Respondent herein has been shaken to the very core of what he values. There was no defiance or resentment in the eyes of this man, just a humble acceptance that he crossed a line that he never dreamed he would cross.

88. While it is hard to argue that the proposed sanction of suspension for six months and one day is not proportional to other cases, it is also difficult to ignore the fact that the Respondent has served his clients and profession well for many years without incident, thus reflecting both a good moral character and integrity, and perhaps a deserved tipping of the scales in his favor when questioning his motives.

89. While the recommendation suggested in the Tender and Joint Memorandum is for a long term suspension of six months and a day, and that sanction could certainly be supported

by the proportionality cases cited, this Hearing officer would suggest to the Commission something less.

90 This Hearing Officer has not been in this process long enough to fully appreciate all of the considerations that push a case from being a short term suspension to a long term suspension and would defer to the experience of counsel and the Commission on whether the Respondent's conduct in this case meets those considerations and he, therefore, is deserving of a long term suspension.

91. These proceedings often recite that our purpose is not to punish the lawyer but to protect the public, the profession and the integrity of these proceedings as well as deter this kind of conduct in others. It is this Hearing Officer's opinion that all of these objectives have been met and any more than a four month suspension is punishing the attorney and not warranted in this case.

92 Again, this is not a rejection of the six month and a day suspension set forth in the Tender and Joint Memorandum such that Rule 56(e)(2) is triggered. This Hearing Officer has considered all of the facts and the law in this case and feels that the Commission wants more from me than just to approve or disapprove. I defer to the greater experience of counsel and the members of the Commission whether the proposed sanction is appropriate. This Hearing Officer simply wants the Commission to have the insight that was gained by a personal observation of the Respondent.

93. Whatever the period of suspension, that period is to be followed by a period of probation if the Respondent chooses to practice law again rather than retire. The length and terms of probation should be determined at that time. Respondent is also to pay the costs of this proceeding.

DATED this 28th day of March, 2008

Hon. H. Jeffrey Coker, Ret.
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 28th day of March, 2008.

Copy of the foregoing mailed
this 28th day of March, 2008, to.

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