BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	File Nos. 06-1089, 06-1488, and 07-0256
PATRICK A. PLUMMER, Bar No. 012547	**HEARING OFFICER'S REPORT**
RESPONDENT	

PROCEDURAL HISTORY

1. Probable Cause was found on January 17, 2007, in Cause No 06-1089, Count One, (Simmons and Skelly), and Cause No 06-1488, Count Two, and on May 2, 2007, in Cause No 07- 0256, Count Three. A Complaint listing these counts was filed on July 31, 2007 Service was accomplished by mailing a copy of the Complaint to Respondent at his address of record on August 2, 2007

2 The undersigned Hearing Officer was assigned to the case on August 13, 2007 Respondent thereafter, on August 22, 2007, filed a Notice of Transfer from the undersigned which he later retracted on August 27, 2007 Respondent filed his Answer on September 27, 2007. A Final Hearing was set on November 26, 2007, which later had to be continued because of numerous motions and procedural issues that arose, and the appearance of new counsel for Respondent The new Final Hearing date was set on December 21, 2007, and the first day of the Hearing was held on that date Because of witness availability issues as well as the number of witnesses and exhibits in the case, the matter was also heard on January 14, 2008, and finished on January 29, 2008

FINDINGS OF FACT

3 At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on May 20, 1989

Count One (File No. 06-1089 Simmons/Skelly):

4. Count One deals with a claim that Respondent failed to provide competent representation to his client, Mr Cowart, failed to act with reasonable diligence and promptness, brought proceedings and/or asserted issues in the Cowart case without a good faith basis; failed to make reasonable efforts to expedite the litigation, knowingly disobeyed court orders, engaged in conduct involving dishonesty, fraud, deceit and/or misrepresentation; engaged in a pattern of misconduct by committing numerous discovery violations

Factual Summary:

5. The basis of the dispute in Count One is the allegation that Respondent, in the course of his representation of Plaintiff Robert Cowart ("Mr Cowart"), had in his possession a report ("Day Break Solano Report") that was harmful to Mr Cowart's case and that Respondent failed to fully and timely disclose the report that was requested during the litigation

6 The civil action on behalf of Mr Cowart was for damages caused by mold in a residence, "Saddlerock property," that Mr Cowart had previously resided in. The Day Break Report that was not disclosed indicated that there was mold in the house that Mr. Cowart subsequently and currently lives in, the Solano property (although whether the mold was harmful is contested) Whether there was mold in Mr Cowart's subsequent home was relevant to the issue of causation in his claim against the owners of his previous home

7. The Defendants in Mr Cowart's case moved to have the case dismissed because of the alleged discovery violation As a result of the motion, Mr Cowart's case was dismissed. The judge ordered Respondent, jointly and severally with Mr. Cowart, to pay Defendant's attorney's fees in the amount of $25,000 00, costs in the amount of $23,864 18 and expert witness fees in the amount of $22,939.00 This case is presently on appeal

8 There is a further claim that Respondent represented Mr Cowart while the Solano Property was being remediated for mold damage and, therefore, had knowledge that there was mold in the Solano property that should have been disclosed Respondent denies that he represented Mr Cowart during the remediation or, if he did, had no knowledge of the remediation

9 It is also alleged that many of Respondent's pleadings were disjointed and difficult to understand

Specific Facts:

10 Robert Cowart ("Mr Cowart"), rented and resided in a house owned by Saddlerock, LLC ("Saddlerock property") from May or August of 2001 until the end of 2003 (Joint Prehearing Statement ["JPS"] Para 2).[1]

11 In or about October 2003, Mr Cowart purchased a residence on Solano Drive ("Solano property") He then moved out of the Saddlerock property and into the Solano property (JPS Para 3).

[1] The citations listed herein to the Joint Prehearing Statement are to facts that were uncontested

12. In 2003, Mr Cowart hired David Rueckert ("Mr Rueckert") of Day Break Environmental Corp ("Day Break") to test the Solano property for water damage, mold contamination and other potential problems (JPS Para 4)

13 Mr Rueckert's results from his testing of the Solano property were presented in a report dated December 8, 2003, ("Day Break Report") and given to Mr Cowart and Mr Cowart's then attorney, Jim Eckley ("Mr. Eckley") (JPS Para. 5).

14 The Day Break Report found "to a reasonable degree of certainty that mold contamination exists . " at the Solano property, although again, whether the mold was of a harmful nature or not is contested (Exhibit 2, Bates Stamp Number ["BSN"] 3383, Para. 10) [2]

15 On October 29, 2004, Mr Cowart, then represented by Mr. Eckley, filed a Complaint against Saddlerock, LLC and its owners, Robert and Jackie Pazderka ("Defendants"), claiming, among other things, that Mr Cowart had been injured by water damage, mold and other contamination while he resided at the Saddlerock property, Maricopa County Superior Court cause number CV 2004-021131 (JPS Para 7)

16 In or about November 2004, Mr Cowart terminated Mr. Eckley's representation and hired Respondent as his attorney in the Cowart case (JPS Para 8)

17 If Respondent received the Solano report from Mr. Eckley when he received the file, he claims that he was unaware that it was on the Solano Residence rather than the Saddlerock property (Exhibit 5 BSN 268)

[2] The exhibit numbers listed herein are the exhibits and Bates Stamp Numbers used during the hearing in this matter At the conclusion of the hearing, at the Hearing Officer's request, Bar Counsel submitted a consolidated exhibit book of only the exhibits used at the hearing of this matter and excluding approximately 1,000 documents that were never used Unfortunately, the Hearing Officer was not clear and counsel used a different numbering system in the consolidated exhibit book that does not match the numbers referred to in the transcript, so the consolidated exhibit book is not used The exhibits were submitted to the Hearing Officer with the Bates Stamp Numbers not in chronological order, but rather organized under specific tabs, so the documents must be accessed under the specific tab

18. In 2005, Respondent and Mr Cowart retained Mitchell Payes ("Mr Payes") as an expert, and Respondent's office faxed Mr Payes many documents, including the Solano Day Break Report, on September 24, 2005, (JPS Para. 9&10)

19 On October 10, 2005, Defendants served personal injury uniform interrogatories on Respondent in the Cowart case, including interrogatory number seven that requested detailed information concerning expert witnesses and their written reports (JPS Para.11).

20 Mr Payes conducted several tests for contamination at the Solano property, including on December 7, 2005, (JPS Para 12)

21 On December 12, 2005, Defendants served non-uniform interrogatories on Respondent in the Cowart case, including interrogatory number 34 that asked for any and all evidence of testing for environmental hazards, such as mold, for all places in which Mr. Cowart resided from January 1, 1992, to the present (JPS Para 13).

22 Mr Payes prepared a report dated December 31, 2005, ("Payes Report") that included information about various mold testing and remediation performed at the Solano property and referred to the Day Break Report (JPS Para. 14)

23. At the time that Respondent was retained by Mr Cowart, Respondent knew that Mr Cowart had memory problems and other medical conditions (JPS Para 17).

24 Defendants filed a motion to compel, which the Court granted on January 9, 2006, ordering Respondent to fully respond to Defendants' interrogatories (JPS Para. 18)

25 Respondent partially responded to the interrogatories beginning on January 27, 2006, and submitted supplemental responses to the interrogatories starting on April 28, 2006, (JPS Para. 19)

26 Respondent did not provide Defendants with the Solano Day Break Report until it was attached to a settlement conference memorandum in February of 2006, (Exhibit 5, BSN 268) Defendant's counsel also received the Payes Report on the Solano property in April or May 2006 as a result of a subpoena to Mr. Payes (Transcript of Record "T/R", Pg 91)

27 On June 6, 2006, the Court appointed Christopher Skelly ("Mr. Skelly") as Discovery Master to make recommendations to the Court concerning numerous motions filed by the parties, including motions for sanctions, and to set rules and limits for discovery (JPS Para 23)

28 On June 30, 2006, Mr Skelly recommended that the Cowart case be dismissed as a sanction due to discovery violations by Mr. Cowart and Respondent, and recommended that they pay a portion of Defendants' attorney's fees (JPS Para. 24).

29 Mr Skelly found that Respondent's conduct was not an isolated mistake, but a pattern warranting referral to the State Bar (Exhibit 14, BSN 295)

30 On September 15, 2006, and affirmed in the Final Judgment filed on February 27, 2007, the court adopted Mr Skelly's recommendations and dismissed the Cowart case with prejudice (JPS Para 25)

31 In the Final Judgment, filed on February 27, 2007, Respondent was ordered to pay attorneys fees to Defendants in the amount of $25,000, costs in the amount of $23,864 18, and expert witness fees in the amount of $22,939 82 Respondent and Mr Cowart were ordered jointly and severally responsible for all fees, costs and interest awarded. Respondent and Mr Cowart have appealed the ruling of the court dismissing Mr Cowart's Complaint Respondent has not paid these amounts to date (JPS Para 26)

CONCLUSIONS OF LAW RELATING TO COUNT ONE

32. The Hearing Officer has considered all of the evidence, which is vast, and finds that the State Bar has not proven by clear and convincing evidence that Respondent knowingly withheld evidence from the opposing party in the Cowart litigation It is clear that Respondent had the report because he ultimately gave opposing counsel a copy of the report attached to a settlement memorandum Exactly when he received the report is open to conjecture, but it is clear that he had it past the point that it should have been disclosed if he had realized what it was Whether Respondent took the time to realize that there was a difference between this report and the other reports on the Saddlerock property and intentionally meant not to disclose it, was not proven by clear and convincing evidence Recognizing that the judge and the Special Discovery Master in the civil case had much more information before them and that the burden of proof is lower, the judge's ruling dismissing the case and awarding attorney fees is understandable However, for the purposes of this process, there was not enough evidence that Respondent's failure to disclose the report was intentional Respondent's conduct in, at the least, not knowing what he had, shows a lack of competence and diligence That conduct also caused delay in the proceedings and additional cost to the opposing party

33 The Hearing Officer finds that Respondent violated Rule 42, Ariz R Sup Ct , specifically ER 1 1 Competence, ER 1 3 Diligence, ER 3 2 Expediting Litigation, ER 8 4(d) Conduct Prejudicial to the Administration of Justice As to the remaining allegations, the Hearing Officer finds that the State has not met its burden

COUNT TWO (File No. 06-1488):

34 Count Two involves a claim that the Respondent submitted a claim for attorneys fees that were excessive, unreasonable, not actually incurred, not based upon appropriate billing methodology, and his supporting documents contained "several ethical infirmities" and revealed "numerous material falsehoods" It is also alleged that Respondent brought proceedings and/or asserted issues without a good faith basis, failed to make reasonable efforts to expedite the litigation, made false statements to the tribunal and failed to correct them, offered evidence to the court on material matters he knew to be false and failed to take reasonable remedial measures; knowingly disobeyed obligations under the rules of the tribunal, engaged in conduct involving dishonesty, fraud, deceit and/or misrepresentation, and engaged in conduct that was prejudicial to the administration of justice

Factual Summary

35. A summary of the facts in Count Two is that John Barker ("Mr Barker") had a prolonged dispute with the City Of Phoenix over the condemnation and zoning of his property, and the value of the property Respondent took over the representation of Mr. Barker after the litigation had already commenced After a tortuous procedural history the case was concluded Respondent submitted a request for attorney fees and costs in the amount of $276,101 63. After a hearing on the attorney fee request, the judge ordered that Mr Barker be reimbursed $8,906 26 as expert witness fees but otherwise rejected Respondent's claim for attorney fees, and granted the City's request for attorney fees of $10,398 00 against Mr Plummer personally The judge found that Respondent's

application for attorney fees had ". severe ethical infirmities" and had " numerous material falsehoods " (Exhibit 34, BSN 2197– 2206) [3]

36 It is also alleged that Respondent· unnecessarily prolonged the case by filing baseless motions and pleadings, filed a false and dishonest request for attorney fees, filed pleadings that were frequently incomprehensible, not in compliance with local rules and lacking in logic and below the standard of pro se litigants (See Complaint, paragraphs 84 and 85, and (T/R, testimony of Judge Peter Swann pages 124 and 125)

Specific Facts:

37. John Barker ("Mr Barker") owned real property in the city of Phoenix ("the City") that held a concrete block bungalow, along with some other buildings (JPS Para 27)

38 In May 2001, the City brought a condemnation action against Mr. Barker's property in the Maricopa County Superior Court case number CV2001-008301 ("condemnation action"), alleging blight (JPS Para 28)

39. In doing so, the City was obligated to financially compensate Mr Barker, but the City and Mr Barker had different ideas on what amount of financial compensation was appropriate (JPS Para 29)

40. Mr Barker asserted that the City intentionally ignored the historic significance of the bungalow in a concerted effort to minimize the value of his property, and therefore the amount that the City would have to pay him in taking possession of his property (JPS Para 30)

[3] The Hearing Officer recognizes that the judge in a civil action has a lower standard of proof, preponderance, than the higher standard of clear and convincing evidence required in these proceedings Any findings in this order are the result of this Hearing Officer's independent review of the evidence

41 In early 2003, Mr Barker retained attorney Mark Tynan ("Mr Tynan") to represent him in the condemnation action (JPS Para 31)

42 In August 2003, the City applied to rezone Mr Barker's property to place a historical preservation overlay on it due to the alleged historical significance of the bungalow (JPS Para 32)

43 Beginning about September 2004, Respondent was a legal consultant and eventually became co-counsel to Mr Barker concerning the condemnation action and the rezoning application (JPS Para 33)

44 In October 2004, the City applied to rezone the entire neighborhood including Mr Barker's property as historic and attempted to withdraw its initial 2003 rezoning application concerning Mr Barker's property alone (JPS Para. 34)

45 Mr Barker objected to including his property with the rest of the neighborhood and wanted his property designated as historic on its own (JPS Para. 35)

46 In October 2004, Mr Barker filed a special action, Maricopa County Superior Court case number 2004-021908, to compel the City to proceed with the 2003 application for historic preservation of Mr Barker's property separate from the rest of the neighborhood (JPS Para 36)

47 On November 4, 2004, the City moved to voluntarily dismiss its 2001 condemnation action, but Mr Barker objected (JPS Para 37)

48 On February 16, 2005, the City approved the individual historic preservation overlay for Mr Barker's property as sought in its 2003 application (JPS Para 38)

49 By February 25, 2005, Respondent became attorney of record for Mr Barker in all pending actions (JPS Para 39)

50 On February 25, 2005, Respondent, on behalf of Mr Barker, sought a declaration that the city's 2001 condemnation action could not be abandoned as a matter of law, and filed counterclaims in the condemnation action against the City and three of its employees alleging, among other things, interference with contract, federal preemption, conspiracy, civil rights violations, concealment, conversion, fraud, bad-faith and negligence (JPS Para 40)

51. On or about February 2005, Respondent, on behalf of Mr Barker, filed petitions for special action claiming many claims, including, but not limited to, a request for a determination of damages occurring during the City's possession of the property and the determination of the effect of the historical overlay decision on the value of the property in Maricopa County Superior Court case numbers LC 2005-000028 and LC 2005-000177 (JPS Para 41)

52 The Court entered an order of withdrawal for Mr. Tynan on March 2, 2005, (JPS Para 42)

53 In March 2005, the Court removed all of the pending cases to federal court at the request of the City (JPS Para 42)

54 In November 2005, Mr Barker claimed that he wanted the City to keep the property and pay him full value for it The City agreed that the condemnation action could proceed as a "takings" case (JPS Para 44)

55 On October 21, 2006, however, Mr Barker asked that the city return the property to him, which the City ultimately agreed to do (JPS Para. 45)

56 In March 2006, the parties entered into a stipulation to dismiss many of the actions Based upon that agreement, the court remanded all of the cases from the Federal Court to State Court on March 30, 2006, and, on April 5, 2006, dismissed CV2001-00830 and LC2005-000028 without prejudice as to the party's right to seek attorney's fees and costs. Only LC 2005-000177, which concerned damages during the City's possession of the property, was not dismissed (JPS Para 46)

57. Respondent, Mr Tynan and the City's counsel then filed requests in the various cases for payment of their fees and expenses from the opposing side (JPS Para 47)

58. Based upon an agreement of all parties, the Court ordered the City to pay Mr Tynan $22,082 for his attorney's fees and costs in the condemnation action (JPS Para 48)

59 The Court also ordered the City to pay $8,906 25 to Mr. Barker for expert fees incurred as part of the condemnation action (JPS Para 49)

60 Respondent, on behalf of Mr Barker, applied to the Court to order the City to pay him a total of $276,101 63 for his attorney's fees and costs incurred in the Barker cases (JPS Para. 50).

61 In a minute entry filed on September 6, 2006, the Court denied Respondent's applications, other than the reimbursement of expert fees described above, and granted in part the City's request for fees (JPS Para 51)

62 The Court awarded attorney's fees in favor of the City and against Mr. Plummer personally in the total amount of $10,398, which amount the Court stated included $2,973 50 spent on the removal to federal court, $3,424 50 spent defending the claims against individual City employees, and $4,000 00 towards the amount incurred by unnecessary motion practice (JPS Para 52)

Attorney Fee Application.

63 Respondent based his application for attorney's fees and costs in part on the statutes governing condemnation actions (JPS Para. 53)

64 The fee agreement between Respondent and Mr Barker reflected an hourly rate for services provided, capped at a percentage of the recovery (See Modified Fee Agreement dated December 21, 2004, Exhibit 20, BSN 1131) The fee agreement is essentially a contingent fee agreement that allows that "continued periodic payments/contributions will be required from the client as necessary to allow the attorney to perform diligently "

65 Respondent, during his representation of Mr Barker, periodically sent Mr. Barker requests for payment without providing billing invoices that specifically quantified the work performed and the amount of time spent (JPS Para 54).

66. Mr Barker then usually provided payment by check to Respondent. Mr Barker paid approximately $73,000.00 total for attorney fees and costs during the time Respondent represented him in this case (Exhibit 29, BSN 960)

67 Respondent kept few time records in the Barker cases (JPS Para. 56), and kept some records of costs in Barker's cases (Exhibit 23, BSN 583 – 588)

68 For the most part, Respondent did not base the amount that he sought in his fee application upon time records entered contemporaneously with the services provided (JPS Para 57) Respondent estimated and reconstructed his fees at the time he drafted his fee application (JPS Para 58).

69 Respondent filed his first request for attorney fees (not the subject of this Count) on January 27, 2005, for services rendered from September 29, 2004, to November 12, 2004, (Exhibit 32, BSN 1845 – 1848) The City filed a response, dated February 18, 2005,

objecting to the application on the basis that Respondent failed to set forth the work performed, the time spent, billing rates charged, "fails to meet the most basic requirements of China Doll" and did not pertain to the condemnation action (for which fees are recoverable) but rather to the historic designation, for which attorney fees are not recoverable under the authority cited by Respondent, ARS 12-1129(b) Respondent's fees are also characterized as "excessive" (Exhibit 32, BSN 1849–1852) and were not supported by the required affidavit

70 On March 8, 2005, Respondent filed a reply to the City's response contesting the City's position and submitting the required affidavit (Exhibit 32, BSN 1854)

71 The Hearing Officer could find nothing in the record of the Court's ruling on this first fee request What is clear is that at least as early as February 2005, Respondent was on notice that he was not going to be allowed to simply submit a deficient application for fees without the required supporting information

72 Respondent's second fee application, and the subject of this count, was filed on June 19, 2006, (Exhibit 32, BSN 619-693). This application is over 74 pages long with approximately 53 pages of itemization In his supporting affidavit Respondent states that he is billing Mr Barker " on an hourly rate basis as indicated in the fee matrix exhibit 1 " (Exhibit 32, BSN 692, line 19) Later, when Respondent testified before Judge Swann, he stated that the fee agreement is a contingency fee agreement (Exhibit 33, BSN 1917, line 16) The State Bar contends that Respondent is being dishonest by giving two different answers to the same question

73 More than just whether the Respondent was being honest with the Court on what kind of fee arrangement Respondent had with Mr Barker, there are several other issues of Respondent's candor with the Court Respondent submitted an extensive application for fees that was sworn to, and then later in oral argument before judge Swann regarding his application and his fees Respondent made numerous comments that indicate that he acknowledged that the application was erroneous (Exhibit 33, BSN 1910 – 1919)

74. This Hearing Officer has reviewed the Respondent's application for attorney fees, the transcript of the hearing conducted by judge Swann on July 28, 2006, (Exhibit 33, BSN 1909- 1927), and Judge Swann's detailed ruling on the issue of attorney fees (Exhibit 34, BSN 2197 – 2206) Listed herein are some of judge Swann's findings in his ruling dated September 6, 2006, (Exhibit 34, BSN 2197-2206)

A Respondent was not honest in his representation that he recorded the time spent contemporaneously and accurately enough to measure in tenths of an hour (Exhibit 34, BSN 2199)

B The time recorded is facially suspect (Exhibit 34, BSN 2199)

C On at least two days Respondent billed for 30 hours, each time reporting separate tasks at 15 hours each (Exhibit 34, BSN 2199).

D That Respondent claimed to have "some" contemporaneous records supporting his time, but was evasive and unable to point to the portion of the billing supported by the contemporaneous records (Exhibit 34, BSN 2201)

E Respondent's argument devolved into an attempted negotiation over hours that could not be proven by any other means (Exhibit 34, BSN 2201)

F. It is "painfully apparent" to the Court that Respondent's summary is nothing more than speculation and that Respondent's sworn affidavit is false (Exhibit 34, BSN 2202).

G That Respondent was dishonest with the Court on the nature of the fee agreement between Respondent and Mr Barker (Exhibit 34, BSN 2203)

H That Respondent's conduct in connection with the application would render unconscionable an award of fees to him (Exhibit 34, BSN 2204)

I While typographical errors are possible, " further examination of these issues at oral argument revealed that no such innocent explanation exists." (Exhibit 34, BSN 2199)

75. Judge Swann went on to find that Respondent (and only Respondent) was liable for a portion of the City's attorney fees Judge Swann found that Respondent litigated the case in a grossly expansive manner that impeded, rather than furthered, the efficient litigation of the case on its merits and the ability of the parties to reach a reasonable and informed settlement (Exhibit 34, BSN 2205) The City was awarded $10,398 00 in attorney fees against Respondent

76 Finally, Judge Swann found that the nature of the written advocacy not only fell below the standards one would expect of a competent practitioner, but required additional work from the City to address During his testimony at these disciplinary proceedings Judge Swann testified that Respondent's pleadings were frequently incomprehensible, difficult to discern what he was trying to say, and below the level that he normally sees from pro per litigants (T/R pg 124 line 10 – 25, 125 line 1 – 3, 7 – 14)

77 The Hearing Officer has reviewed Respondent's attorney fee application and notes the following.

78. February 21, 2006, thirty hours billed @ $250 00 = $7,500 00 for one day's work (Exhibit 32, BSN 639)

79 March 4, 2005, thirty four hours billed @ $250 00 = $8,500 00 for one day's work (Exhibit 32, BSN 649)

80 February 21, 2006, thirty hours billed for a Reply @ $250 00 = $7,500 00 for one day's work (Exhibit 32, BSN 6390).

81 April 14, 2005, twenty nine hours billed @ $250 00= $7,250 00 for one day's work (Exhibit 32, BSN 648)

82 May 16, 2005, twenty three hours billed @ $250 00 = $5,750 00 for one day's work (Exhibit 32, BSN 646)

83 October 3, 2005, thirty three hours billed @ $250 00 = $8,250 00 for one day's work (Exhibit 32, BSN 642)

84 December 6, 2005, fifteen hours billed for the preparation of a notice of service (Exhibit 32, BSN 641).

CONCLUSIONS OF LAW ON COUNT TWO

85 Based upon this Hearing Officer's review of the evidence, I must concur with Judge Swann By clear and convincing evidence the Respondent was trying to submit a bill for attorney fees that contained more than just egregious errors, there were outright fabrications While the Respondent did do substantial work for Mr. Barker, it is clear from the fee application that Respondent had an amount in mind that the total should be and worked toward that end

86 While there is no prohibition on a hybrid fee arrangement, there still must be a relationship between the amounts requested and the work performed Here, Respondent

charged on some days more hours than there are in a day as well as unbelievable amounts for certain work performed (Exhibit 33, BSN 1912-1915) Very telling is Respondent's response to the judge when confronted with these errors Rather than explain how the errors occurred, Respondent tried to negotiate (Exhibit 33, BSN 1913, 1915, 1916, & 1926) This tells the Hearing Officer that Respondent, rather than being confident in his sworn application for fees, knew that his fee application was suspect and was just winging it hoping for the best he could get The Rules require more of an attorney that files a pleading, particularly with a sworn affidavit Respondent's submission of this dishonest document caused not only delay of the proceedings, more work for opposing counsel and so more expense to the opposing party, it also prejudiced the administration of justice

87 The Hearing Officer also finds that the Respondent's competence is called into question as a result of the confusing and unprofessional writing contained in his pleadings

88 There was very little evidence presented to the Hearing Officer regarding the findings of Judge Swann that Respondent unnecessarily expanded the proceedings Although a review of Respondent's billing, the findings of Judge Swann and the Special Discover Master all seem to indicate that Respondent did unnecessarily expand the litigation. That does not mean that the clear and convincing standard has been met The Hearing Officer finds that the State Bar has not proven this allegation by the clear and convincing standard.

89. The Hearing Officer finds that Respondent, by clear and convincing evidence, violated Rule 42 Ariz R Sup Ct , Specifically ER 1 1 Competence, ER 1 5(a) Charging an Unreasonable Fee, ER 3.3(a) Candor Toward a Tribunal, ER 3 4(b) Fairness to Opposing

Party, ER 3 4(c) Knowingly Disobey an Obligation Under the Rules, ER 8 4(c) *Dishonesty, ER 8 4(d) Conduct Prejudicial to the Administration of Justice*

COUNT THREE (File No. 07-0256):

90. Count Three has two separate cases, and both cases involve the allegation that the Respondent failed to provide competent representation to his clients, brought proceedings without good-faith basis, failed to make reasonable efforts to expedite the litigation, knowingly made false statements of fact and/or law to the tribunals and failed to correct such statements, unlawfully concealed and/or falsified evidence, sought to act as both an advocate and a witness, engaged in conduct involving dishonesty, fraud, deceit and/or misrepresentation, and Respondent engaged in conduct that was prejudicial to the administration of justice

Factual Summary.

91 The first case ("Lainez") involves the Respondent not checking and listing the correct owner of a business before initiating suit, and the Respondent filing a notice of change of judge that was neither factually nor legally sustainable The second case ("Chiefo") involves the Respondent filing incomprehensible pleadings, and yet again filing a motion for change of judge that lacked a legal or factual basis

Specific Facts:

92 The first claim is that Respondent represented John Barker ("Mr Barker") in another case entitled Barker v Lainez, Maricopa County Superior Court case number CV2005-003456 ("Lainez") Respondent's theory of liability in the Complaint rested on his client, Mr Barker, being the owner of a company known as Jelly Fish Too, LLC. (JPS Para 61)

93 At the time that the Complaint was filed by Respondent in the Lainez case, the Articles of Organization for Jelly Fish Too, LLC, listed Mr Barker as the statutory agent but not as the Owner (JPS Para 62)

94 At the time that the Complaint was filed by Respondent in the Lainez case, the Warranty Deed for the property that was the subject of the litigation listed Jelly Fish Too, LLC as the owner of the subject real property (JPS Para 63)

95 Respondent did not check the title to the real property or the corporate documents prior to filing the Lainez Complaint, and as a result, the opposing party was granted summary judgment based on Respondent's client's lack of standing (JPS Para. 64, 65, 66, Exhibit 46, BSN 1324)

96 Another component of this case is the allegation that on September 1, 2005, Respondent filed a clearly erroneous and defective motion for change of judge against Judge Fields (Exhibit 46, BSN 1353) The Motion was heard by Judge Baca, and on November 11, 2005, Judge Baca denied Respondent's motion In the Order denying Respondent's motion and ruling on a cross motion for sanctions, Judge Baca found that Respondent did not make reasonable inquiry into the factual basis of his motion, provided no factual basis for the claim of bias, and made accusations against Judge Fields based on speculation and information found on an internet website called "Corrupt Arizona Courts" with no effort by Respondent to check on the reliability of the information cited (Exhibit 46, BSN 1325 - 1327)

97. Judge Baca found that Respondent failed to meet the requirements of Rule 11 ARCP that he certify that to the best of his knowledge formed after reasonable inquiry that the motion is well grounded in fact Judge Baca then awarded the opposing party $2,795 00

against Respondent personally as a sanction for violating Rule 11 ARCP (Exhibit 46, BSN 1328)

98 In that Respondent has offered no explanation in these proceedings to counter the conclusions of Judge Baca or what a reading of Respondent's pleading shows, this Hearing Officer must conclude that, by clear and convincing evidence, Respondent filed a pleading the factual basis of which he had made no reasonable inquiry to confirm; made allegations against Judge Fields based on speculation; and gave no factual basis for the motion, all as set forth by judge Baca

99 The second claim in Count Three involves another matter, Chiefo v. Four One Five Six Three Six Ontario Limited, Maricopa County Superior Court case number CV2003-006272 ("Chiefo"), Respondent represented the plaintiff, Anthony Chiefo

100 In or before July 2005, Respondent filed several motions in the Chiefo case, including a Motion to Enlarge the Time for Disclosure of Expert/Lay Witness Testimony/Opinions, Disclosure's Statements, Enlarge the Time to Complete Discovery (JPS Para 71)

101 In a minute entry dated July 11, 2005, the Honorable Margaret H Downey, Judge, denied the motion to enlarge time and found " much of plaintiff's motion is incomprehensible. To the extent that the court can understand the arguments set forth in the motion, good cause has not been established" (JPS Para 72) Judge Downey confirmed this in her testimony at the hearing on this matter and went on to say that what she found incomprehensible was "everything" and had trouble just reading the document (T/R pg 190 line 12 – 25).

102 On or about September 13, 2005, Respondent filed a motion to disqualify Judge Downey, which was ultimately denied (JPS Para 73)

103 A review of Respondent's motion to change judge reflects that Respondent did argue that Judge Downey was biased because of ruling against him in the case Respondent then attached his own affidavit as a factual witness in support of the motion (Exhibit 47, BSN 1401 – 1411) Both of these factors are wholly inappropriate in a motion to change judge

CONLUSIONS OF LAW ON COUNT THREE

104. The Hearing Officer finds that Respondent violated ER 1 1 Competence, and ER 3 1 Meritorious Claim, in the Lainez case Also in the Lainez case, the Respondent filed a notice of change of judge that was not just deficient, it was in such blatant disregard to the requirements of a verified pleading that the Hearing Officer can come to no conclusion other than that Respondent knew that it was in violation of ER 3 3, Candor Toward the Tribunal Respondent's conduct in Lainez and Chiefo violated ER 3 4 Fairness to Opposing Counsel, and ER 3 2 Expediting Litigation in filing the defective notice of change of judge, in Chiefo, ER 3 7 Lawyer as a Witness, in both Lainez and Chiefo, ER 8 4 Misconduct by Engaging in Conduct that is Prejudicial to the Administration of Justice

ABA STANDARDS

105 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 and mitigating factors

The Duty Violated:

106 The ABA *Standards* provide that a lawyer has a specific duty not only to his client, but also to the general public, the legal system and the profession Respondent's clients did

not seem displeased with his services to them Therefore, the inquiry is whether the Respondent violated a duty to the general public, the legal system and the profession The Hearing Officer has found that the Respondent did violate his duty to the public, the legal system and the profession

107 The Hearing Officer considered the following *Standards* in determining the appropriate sanction warranted by Respondent's conduct

108. *Standard* 7 3 provides that a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system

109 All of the violations set forth in Count One were found to be negligent, the issue of Respondent's competence is a negligence issue in Count Two, and the competence and meritorious claims issues in Count Three are all negligent conduct.

110 *Standard* 7 2 states that suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public or the legal system

111 The Hearing Officer has found that Respondent was dishonest with the Tribunal in two of the counts In Count Two he was dishonest in his fee application, and in Count Three the Hearing Officer found Respondent to have been not candid with the Tribunal in filing the notice of change of judge

112 *Standard* 6 22 provides that suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with the legal proceeding

113 Respondent's conduct in all three Counts betrays a lack of compliance with the rules of court, causing not only delay to the proceedings, but also cost and delay to the opposing parties

114 *Standard* 4 43 provides that reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

115 In Count Two, Respondent failed to perform the basic requirements of determining the ownership of the business that was the subject matter of the lawsuit, thus resulting in dismissal of the lawsuit

The Lawyer's Mental State:

116 The Hearing Officer finds that Respondent's mental state in Count One was negligent In Count Two, the Respondent's mental state was knowing as to all of his conduct, except for the poor state of his pleadings which was negligent. In Count Three, Respondent's mental state was negligent as to his failure to list the proper party and the quality of his pleadings, but knowing as to the filing of the motion for change of judge.

Injury Caused:

117 In Count One, the Hearing Officer finds that Respondent's actions caused harm to the opposing party and counsel who were forced to conduct greater discovery than otherwise should have been necessary, forced to file motions to address Respondent's conduct, and incur additional costs and expenses to defend the suit Respondent's conduct resulted in the dismissal of Mr Cowart's claim and, although the matter is on appeal, there is substantial delay to Mr Cowart and additional expense

118 In all of the counts, the judicial system and the legal profession were harmed as a result of the Respondent's actions causing protraction of the litigation and the performance of unnecessary work

119. There is also injury to the profession by the fact that the Respondent does not seem to be able to write at even a basic minimum level such that the judges and opposing counsel can comprehend his arguments and advocacy This problem of communication harms not only the profession, but Respondent's clients as well.

Aggravating and Mitigating Factors

120. The aggravating and mitigating factors are set forth in *Standards* 9 22 and 9 32 respectively.

Aggravating Factors:

121 *Standard* 9 22 provides the aggravating factors that should be considered, and the Hearing Officer finds the following in this case

(b) Dishonest or selfish motive

(d) Multiple offenses

(g) Refusal to acknowledge wrongful nature of conduct

(i) Substantial experience in the practice of law

Mitigating Factors:

122 *Standard* 9 32 provides the mitigating factors that should be considered, and the Hearing Officer finds the following in this case

(a) Absence of prior disciplinary record

(c) Personal or emotional problems

(e) Full and free disclosure to a disciplinary board or cooperative attitude toward proceedings

(h) Physical disability

(i) Mental disability

(k) Imposition of other penalties or sanctions

(l) Remorse

ANALYSIS

123 A review of the Hearing Officer's findings herein shows that Respondent committed knowing violations of the rules While Respondent committed some negligent violations, specifically, Count One and the competence issues in Counts Two and Three, and the meritorious claim issue in Count Three, the more serious charges are the knowing violations set forth in Counts Two and Three

The Negligence Violations:

124 Respondent submits that his various physical and mental disabilities make all of his violations negligent This Hearing Officer does not agree While the Respondent may well suffer from "executive function disorder", sleep apnea, ADHD and other disorders, these maladies would only explain his poor writing and verbalization skills There was no testimony or other evidence in the record that Respondent's claimed mental and emotional deficits would cause him to lose the ability to know the difference between right and wrong, or the truth from fiction.

125 Respondent implores this Hearing Officer to essentially excuse his conduct in toto because of his claimed disabilities, and the Hearing Officer will concede that

Respondent's inability to write or speak coherently at times could well be attributable to his various conditions His doctor, Dr Nichols, testified that Respondent has·

> " . difficulties with sustained attention, shifting attention, and working memory Working memory implies the ability to keep the goal in mind as you work toward a task Mr Plummer's stream of consciousness reflects loss of that goal and easy distractibility He starts talking about one thing, which reminds him of something, and he starts talking about that, which goes off on a tangent and he starts talking about that If you stick with it over 30 pages, you get back to where you were going But in the process, you find yourself going, "what is he talking about" as you read " (T/R pg 282 – 283)

126 There are really three questions at play on this issue. First, does the Respondent have ailments that affect his performance as an attorney? The evidence clearly shows that Respondent does suffer some disability, whether at any given moment it is the result of attention deficit disorder, executive function disorder, or sleep apnea This Hearing Officer does not believe that Respondent is intentionally writing pleadings that one judge described as being worse than pro se litigant pleadings This Hearing Officer has read some of Respondent's pleadings and they are a mess, but I do not believe Respondent does this intentionally

127 The second question is, do Respondent's problems excuse his conduct? The evidence brought before the Hearing Officer indicates that Respondent's problems with his pleadings have been known to him for many years It has been brought to his attention by lawyers as well as judges for a long time. In fact this Hearing Officer brought it to Respondent's attention in one of the pleadings he filed in these proceedings Respondent's response to this Hearing Officer was what I suspect to have been his response to others over the years Respondent claimed dyslexia and that he was entitled to have extra time to work on his pleadings because of this disability

128 It appears that recently Respondent has gone to other doctors and learned that what he had thought was dyslexia could be a combination of sleep apnea, ADHD and "executive function disorder" Respondent further claims that with this new diagnosis he has been able to develop treatment strategies that are helping him to communicate better and handle a smaller workload So do we excuse Respondent's conduct?

129 Troubling to this Hearing Officer is the fact that Respondent has known about his incapacity for a long time and has turned a blind eye to it to the repeated detriment of himself, his clients, opposing counsel and the legal system Whether this is borne out of a stubborn refusal to acknowledge his shortcomings, or a fear of confronting the truth, this Hearing Officer cannot speculate A review of all of the evidence supports a finding that Respondent has had notice of his problems for a long time, and has used his disability as a crutch to excuse the messes he makes.

130 Given the length of time that the Respondent has been aware of this problem, and his refusal to previously address it, this Hearing Officer finds that Respondent's condition is part of an explanation of why he was acting the way he was, but does not excuse it

131 The third question is, can Respondent be brought to a level of competency where he can satisfactorily practice law? Dr Nichols expressed the opinion that, with assistance, Respondent can do better (T/R pg 289 – 293) Dr. Nichols also stated that Respondent needs to "own up" to his disability and accept responsibility for the fact that he needs to improve rather than simply make do (T/R pg 291) or, as he has done in the past, insisted that attorneys, parties and the process make accommodation for his inadequate oral and written presentations

132 Dr. Nichols also stated that with specific testing and benchmarks it can be determined if and when Respondent can safely resume the practice of law (T/R pg. 304 – 405)

133 It is hoped that with the recommendations set forth herein Respondent can show competency and at some point resume the practice of law with safeguards that assure that he will not become a bane to his clients, opposing parties or the legal system

The Knowing Violations:

134 Of greater concern to this Hearing Officer are the Respondent's knowing violations The submission of a false billing, charging unreasonable fees, refusal to expedite the litigation, candor towards the tribunal, fairness to opposing party, knowingly disobeying an obligation under the rules, dishonesty, conduct that was prejudicial to the administration of justice, and other misconduct are not the result of sleep apnea, dyslexia, ADHD, or executive function disorder. These violations are the result of a deficiency in the Respondent's moral fiber and integrity. While this Hearing Officer has no question that the Respondent was, in the words of his attorney, "trying very hard", he seemed to be more bent on winning or doing it 'his way' than doing what was the right thing to do or what the rules required

135 The State Bar has met its burden of proof by clear and convincing evidence that Respondent knowingly violated the Rules and ERs The question then becomes, what do the *Standards* provide, what are the aggravating and mitigating factors, and what sanctions have other similar cases provided?

136. After weighing all of the evidence, the Hearing Officer concludes that *Standard* 7.21, which provides that suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury

or potential injury to a client, the public, or the legal system, and *Standard* 6 22 that provides suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party or interference or potential interference with the legal proceeding, are the most applicable *Standards*

137 Five aggravating factors have been found and seven mitigating factors have been found and weighed by the Hearing Officer

138 A review of the case law indicates that a period of suspension for six months and one day is a sanction that is not only called for by the evidence of this case, but is proportional with sanctions of other cases with similar factual patterns

PROPORTIONALITY REVIEW

139 The Supreme Court has held that, while discipline in each situation must be tailored to the individual facts of the case, one of the goals of discipline, must be to have consistency of punishment between cases that are similar. *In re Wines*, 135 Ariz 203, 660 P 2d 454 (1983), and *In re Wolfram*, 174Ariz 49, 847 P 2d 94 (1993)

140 In *In re Bowen*, 178 Ariz 283, 872 P 2d 1235 (1994), Bowen was suspended for one year in a matter involving two unrelated cases. In the first case, Bowen was found to have violated Rule 42, Ariz R Sup Ct , ERs 1 3 and 1 4 and Rule 51(h) and (i). In the second case, Bowen filed an answer specifically denying that his clients were indebted to a supplier when he had knowledge that the clients were liable for at least part of the debt He also filed a Chapter 13 petition, although he knew that the clients were ineligible for such proceedings Bowen was found to have violated Rule 42, Ariz R Sup Ct , ERs 3.1, 3.3, and 3 4(c) The Court found that Bowen failed to act with the professionalism

expected of an attorney even though he obtained favorable judgments for his clients The Court found that Bowen engaged in litigious maneuvers with the sole purpose of causing unnecessary delay and expense The Court gave little weight to the following mitigating factors: attempts to rectify the consequences of his conduct, alcohol abuse causing physical and mental impairment (but no causation found), and interim rehabilitation Other mitigating factors included· absence of a dishonest or selfish motive and good character or reputation In aggravation, it was found that Bowen had received two censures in the past for similar misconduct

141 In *In Re Moak*, 205 Ariz 351, 71 P 3d 343 (2003), Moak was suspended for six months and one day for knowing misrepresentations He failed to disclose injuries from a second car accident during the trial of a prior car accident Moak was found to have violated Rule 42, Ariz R Sup Ct , ERs 1 2, 1 3, 1 4, 1 9, 3 3, 8 4(c) and (d) in Count One, ERs 3 3, 4 1, 8 4(c) and (d) and Rule 51(e), Ariz R Sup Ct in Count Two, and ERs 1 7(b) and 1 8 in Count Three. Aggravating factors included dishonest and selfish motive, pattern of misconduct, multiple offenses, and substantial experience in the practice of law. Mitigating factors included absence of a prior disciplinary record, full and free disclosure, imposition of other penalties or sanctions and remorse

142 In *In Re Higgins*, SB 97-0026-D (1997), Higgins received a two-year suspension after he was found to have violated Rule 42 Ariz.R.Sup Ct , ERs 1 3, 1.4, 1 5, 1.7, 1.9, 1 16, 3 3 and 8 4(c). Higgins submitted documents to the Court containing misinformation to justify his request for an extension of time, and during the disciplinary hearing, submitted statements with false information concerning the amount of work performed to the State Bar and made misrepresentations to the State Bar concerning his fee agreement

Aggravating factors included dishonest/selfish motive and prior disciplinary history. He was found to have significant mitigation that reduced the sanction from disbarment to a suspension, including substance abuse, personal and emotional problems and no pending discipline

RECOMMENDATION

143. During the course of these proceedings, the Hearing Officer found Respondent to be a pleasant and amiable person As one of the judges that testified at the Final Hearing stated, he was always polite and respectful Several witnesses testified to Respondent's commitment to his clients and willingness to take on tough cases against better funded opponents It is hard to reconcile that person with the person that committed the very serious violations of the ethical rules that occurred in this case The submission of false documents to the court were done out of greed (Count Two) and an intentional misinterpretation of the Rules (Count Three) that cannot be explained away by Respondent's disabilities.

144 This Hearing Officer has given great weight to Respondent's disabilities and feels that he has been struggling to compensate for them However, what this Hearing Officer never heard from Respondent was a recognition that his poor lawyering and integrity have had a very harmful impact on parties and the legal system. What Respondent fails to grasp is that it is not just about his disabilities and the need of others to accommodate him, it is also about his duty to the legal system and profession to act honestly and competently at all times, and if he cannot do this he should voluntarily not practice law. Respondent's numerous and serious violations call not only for a sanction of suspension, Respondent also must show the Court that he has a greater self awareness of, and taking responsibility

for, his disabilities and limitations such that he quits blaming others and the system for not accommodating him when his actions cause harm.

145. This Hearing Officer is not unmindful of the fact that, at Respondent's age, this will be a serious and difficult sanction It is just unfortunate that the Respondent has not paid attention to the many and multiple instances in the past wherein he was again and again confronted with the fact that not only were his pleadings and oral arguments deficient, and he therefore was not serving his clients or the profession well, he was progressively getting worse

146 It is recommended that the Respondent receive a suspension of six months and one day, to be followed by a period of probation, the terms and length of which would be determined after a complete review of not only his progress in addressing his disabilities, but also his competency. It is further recommended that Respondent pay the costs of these proceedings

DATED this 14th day of April, 2008

H Jeffrey Coker JVM
H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 14th day of April, 2008.

Copy of the foregoing mailed
this 15th day of April, 2008, to.

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