

FILED

AUG 17 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY: *[Signature]*

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A SUSPENDED MEMBER) No. 08-0262
OF THE STATE BAR OF ARIZONA,)

DEBORAH L. ABERNATHY,)
Bar No. 014112)

RESPONDENT.)

**DISCIPLINARY COMMISSION
REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 8, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed June 19, 2009, recommending a 30-day suspension to run concurrent with the existing 10-month suspension imposed in matter SB-09-0017-D (2009), participation in Fee Arbitration with Barton C. Gonzales (Count One) upon reinstatement and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 30-day suspension to run concurrent with the existing 10-month suspension imposed in matter SB-09-0017-D

(2009), Fee Arbitration with Barton C. Gonzalez (Count One) upon reinstatement and costs.¹

RESPECTFULLY SUBMITTED this 17th day of August, 2009.

Jeffrey Messing/cs
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 17th day of August, 2009.

Copy of the foregoing mailed
this 18th day of August, 2009, to:

Daniel P. Beeks
Hearing Officer 7M
Mohr, Hackett, Pederson, Blakley & Randolph, P.C.
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Deborah L. Abernathy
Respondent
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and

Alternate address at:

Deborah L. Abernathy
Respondent
Sierra Winds Community
17300 North 88th Avenue, Condo 136
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¹ The Hearing Officer's Report is attached as Exhibit A.

Robert L. Tepper
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by: Evelyn Loza

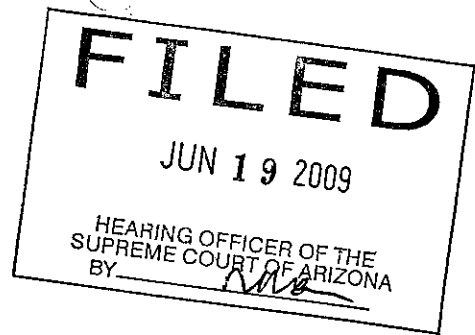
/cs

EXHIBIT

A

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BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

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

No. 08-0262

DEBORAH L. ABERNATHY,
Bar No. 014112,

HEARING OFFICER'S REPORT

Respondent

(Assigned to Hearing Officer 7M, Daniel P. Beeks)

After she withdrew from representing a client in a divorce action, respondent Deborah L. Abernathy ("Respondent" or "Abernathy") failed to provide the client with an accounting for a flat fee she had charged the client. Respondent then only partially cooperated with the State Bar's investigation of the incident, and in the current disciplinary proceedings. Based upon the evidence presented at the hearing in this matter, and the State Bar's suggestion regarding an appropriate sanction, the Hearing Officer recommends that Respondent be suspended for 30 days, with such suspension to run concurrently with her existing 10 month suspension imposed in matter number SB-09-0017.

I. PROCEDURAL HISTORY.

1. The Probable Cause Order in this matter was issued on August 27, 2008.
2. This State Bar filed its complaint on November 26, 2008. A copy of the complaint was sent to Respondent at her address of records with the State Bar.
3. When Respondent failed to file a timely answer to the complaint, a Notice of Default was entered on December 29, 2008.
4. On December 30, 2008, Respondent then filed her answer.
5. On February 24, 2009, the parties attended a Settlement Conference with

1 Settlement Officer 7I, Richard N. Goldsmith. The parties apparently reached a verbal
2 settlement during these proceedings.

3 6. Although the hearing in this matter was originally scheduled for April 21,
4 2009, the State Bar filed a Motion to Continue the Hearing because the settlement
5 reached with Settlement Officer Goldsmith had not yet been signed by Respondent, and
6 because the State Bar's primary witness was scheduled to be out of the country on
7 vacation at the time of the hearing.

8 7. In order to accommodate this request to continue the hearing, the Hearing
9 Officer filed a motion seeking an extension of the 150 day deadline within which to
10 conduct the hearing in this matter.

11 8. The Hearing Officer granted the State Bar's motion, and continued the
12 hearing until May 7, 2009.

13 9. On April 16, 2009, the State Bar filed a motion seeking to preclude
14 Respondent from presenting any evidence at the hearing because she had never served a
15 disclosure statement, as required by the Rules of the Supreme Court, despite numerous
16 follow up efforts by the State Bar.

17 10. Respondent did not file a response to this motion, and on May 5, 2009, the
18 Hearing Officer issued an order granting most of the relief the State Bar had requested.

19 11. Respondent also did not cooperate with the State Bar in preparing the
20 Joint Pre-Hearing Statement, as ordered in the Hearing Officer's Case Management
21 Order. Therefore, the State Bar filed a Unilateral Pre-Hearing Statement.

22 12. The hearing was conducted on May 7, 2009.

23 13. Respondent failed to appear at the hearing.

24 14. The only witness to testify at the hearing was the complainant Barton C.
25 Gonzales ("Mr. Gonzales"), Respondent's client who had requested the accounting.

26 **II. FINDINGS OF FACT.**

27 15. Respondent was hired by Mr. Gonzales on July 5, 2006, to represent him
28 in his divorce.

16. Respondent charged Mr. Gonzales \$50.00 for her initial consultation.

1 *Transcript at 12:2-12:3.*

2 17. After the initial consultation, Mr. Gonzales hired Respondent and paid her
3 \$3,000.00 plus an additional \$231.00 as a filing fee. *Transcript at 12:4-12:8.*

4 18. Mr. Gonzales does not recall whether he ever signed a written fee
5 agreement with Respondent. He did not have a copy of any written fee agreement in his
6 records. *Transcript at 23:9-23:15.*

7 19. Mr. Gonzales' wife had filed for divorce on June 9, 2006. The case was
8 pending in the Superior Court of Maricopa County as matter number FC2006-004680.

9 20. According to the online docket,¹ Respondent filed a Notice of Appearance
10 in the divorce action on August 4, 2006 and filed an Answer on behalf of Mr. Gonzales
11 on August 16, 2006.

12 21. On September 29, 2006, Mr. Gonzales' wife filed a Motion for an
13 Expedited Hearing seeking an order compelling Mr. Gonzales to sign a deed relating to
14 a parcel of property located in the state of Washington that Mr. Gonzales' wife was
15 attempting to sell. *See Online Docket.*

16 22. A hearing on this motion was scheduled on October 3, 2006. *See Online
17 Docket.*

18 23. Mr. Gonzales claims that Respondent did not notify him of this
19 emergency hearing until the hearing had already taken place. *Transcript at 18:21-20:25.*
20 It is not clear whether Mr. Gonzales was in Arizona at the time the motion was filed, or
21 at the time of the hearing. He testified he had been traveling in California. *Id.*

22 24. Respondent appeared and represented Mr. Gonzales at the October 3,
23 2006 hearing. *See 10/3/06 Minute Entry.*

24 25. After the hearing, the trial court granted the wife's motion. *See 10/3/06
25 Minute Entry.*

26 26. On October 18, 2006, Respondent sent Mr. Gonzales a letter informing
27 him that she would no longer be representing him. *Transcript at 12:20-12:25.*

28 27. Mr. Gonzales hired new counsel, James J. Syme, Jr. Mr. Syme appeared

¹ The State Bar has agreed that the Hearing Officer can take judicial notice of the online docket of this matter. *See Transcript at 44:13-44:21.*

1 and represented Mr. Gonzales at an October 24, 2006 hearing on an order for protection.
2 *See 10/24/06 Minute Entry.*

3 28. Respondent did not file an actual motion to withdraw until November 10,
4 2006. Respondent then requested an accelerated ruling on the motion. *See Online*
5 *Docket.*

6 29. The trial court issued an order on November 30, 2006, formally allowing
7 Respondent to withdraw. *See Online Docket.*

8 30. On December 14, 2007 Mr. Gonzales wrote a letter to Respondent
9 requesting an itemized accounting for all fees paid for her services. This letter was sent
10 by certified mail. *See Exhibit 1 at SBA000002 to SBA000003.*

11 31. On January 4, 2008, Respondent sent a letter to Mr. Gonzales informing
12 him that she had received the December 14, 2007 letter, that due to the length of time
13 that had passed since she performed work on his case, and the "flat fee nature of our
14 contract," she would not be able to provide Mr. Gonzales with the degree of detail he
15 had requested." She stated that sometimes when she was busy she did not record her
16 time, and therefore would be forced to make estimates in preparing such an accounting.
17 She stated, however, that she would compile a statement, and that he should expect to
18 receive the statement by the end of January, 2008. *See Exhibit 1 at SBA000004 to*
SBA000005..

19 32. When Mr. Gonzales did not receive the promised statement, he wrote a
20 letter to the State Bar on February 13, 2008 complaining about Respondent. *Exhibit 1 at*
21 *SBA000001.*

22 33. On February 28, 2008, the State Bar sent Respondent a copy of Mr.
23 Gonzales' letter of complaint, and requested that she contact Mr. Gonzales and provide
24 him with the requested accounting. *Exhibit 2.*

25 34. On March 3, 2008, Respondent wrote to Mr. Gonzales again. She
26 acknowledged that she had received a copy of his letter of complaint to the State Bar.
27 She stated that her office had been moved, and that his file had been placed in storage.
28 She concluded by stating "We are using our best efforts to keep the closed files

1 organized, but yours has escaped so far. We will notify you as soon as we locate it." *See*
2 *Exhibit 4.*

3 35. On March 16, 2008, Mr. Gonzales notified the State Bar of this letter, and
4 that he still had not received an accounting from Respondent. *See Exhibit 3.*

5 36. On March 19, 2008, the State Bar again wrote to Respondent requesting
6 that she provide a written response to the allegations made by Mr. Gonzales within 10
7 days of the date of the letter. *See Exhibit 5.*

8 37. On April 16, 2008, the State Bar wrote to Respondent again requesting
9 response within 20 days to the allegations made Mr. Gonzales. This letter reminded
10 Respondent that the failure to cooperate with a disciplinary investigation is grounds, in
11 itself, for discipline. *See Exhibit 6.*

12 38. On April 22, 2008, Respondent wrote to the State Bar acknowledging that
13 her deadline to respond to Mr. Gonzales' complaint had passed. She went on to state
14 that she intended to cooperate with the State Bar's investigation, and that she was
15 continuing to search for Mr. Gonzales' file so that she could respond in more detail.
16 *Exhibit 7.*

17 39. On April 24, 2008, Bar Counsel wrote to Respondent informing her that
18 the State Bar would grant her an extension until May 6, 2008 to provide a written
19 response to Mr. Gonzales' complaint. Bar Counsel advised Respondent that if she was
20 still unable to locate Mr. Gonzales' file by that time, she should provide a response based
21 on her best recollection of the matter. *See Exhibit 8.*

22 40. On May 16, 2008, the State Bar wrote to Respondent, again reminding her
23 that she had not yet responded, and requesting that a response be submitted before May
24 30, 2008. *See Exhibit 9.*

25 41. The State Bar wrote another letter following up on this matter on June 30,
26 2008. This letter advised Respondent that if she failed to respond within ten days, Bar
27 Counsel would recommend that a probable cause order be issued against Respondent.
28 Bar Counsel also discussed resources that were available to Respondent through the
State Bar's Member Assistance Program. *See Exhibit 10.*

1 42. Respondent did not respond to these follow up letters.

2 43. On August 27, 2008, the Probable Cause Order was issued on this matter.

3 44. On August 28, 2008, the State Bar wrote to Respondent, providing her
4 with a copy of the Probable Cause Order, and inviting her to discuss potential settlement
5 with the State Bar. *See Exhibit 11.*

6 45. Respondent was apparently never able to locate Mr. Gonzales' file. She
7 never returned the file to him, and she never provided him or the State Bar with the
8 requested accounting (or even any explanation) of the time she had spent in connection
9 with representing Mr. Gonzales.

10 46. Respondent never filed a Disclosure Statement, as required by Rule 57(e),
11 Arizona Rules of the Supreme Court, despite three follow up letters sent by the State
12 Bar reminding her of her obligation to do so. *See State Bar's "Notice of Failure to
13 Comply with Discovery Rule; Request for Sanctions" dated April 16, 2009.*

14 47. Respondent also failed to comply with the Hearing Officer's Cse
15 Management Order requiring the preparation and submission of a joint prehearing
16 statement.

17 48. Mr. Gonzales could not recall his discussions with Respondent during
18 their initial meeting regarding whether the \$3,000.00 he paid was to be flat fee or
19 simply an initial advance deposit. *See Transcript at 24:19-26:7.* The only evidence of
20 the nature of the fee agreement is contained in Respondent's January 4, 2008
21 correspondence to Mr. Gonzales in which she stated that the fee was a "flat fee." Based
22 on this evidence, the Hearing Officer concludes that the fee agreement was intended to
23 be a "flat fee," and not an advance deposit.

23 **III. CONCLUSIONS OF LAW.**

24 49. Arizona Ethics Opinion 99-02 discusses the ethical obligations of an
25 attorneys who seek to charge their clients flat fees, and the circumstances under which
26 an attorney may be obligated to refund all or part of such a flat fee. The ethics opinion
27 states in relevant part:

28 The ethical rules limit a lawyer's freedom to agree with a
 client that a flat fee paid in advance will be nonrefundable.

1 **If the service is not completed and the flat fee was paid**
2 **in advance, then client may rightfully expect that the**
3 **unearned portion of the fee will be returned.**

4 Accordingly, a flat fee paid in advance presumptively
5 remains the property of the client until the lawyer has
6 completed the contracted-for service....The attorney cannot
7 change this and avoid returning an unearned fee, merely by
8 labeling a flat fee paid in advance "nonrefundable." In order
9 to comply with the ethical rules, the attorney must explicitly
10 describe what justifies treating the entire portion of the flat
11 fee as non-refundable or "earned on receipt."

12 50. The ethics opinions goes on to state that a lawyer using a flat fee
13 arrangement "should provide the client with a statement containing itemization or detail
14 sufficient to explain the basis or rate of the fee, including the time spent on the case if
15 that is a relevant factor."

16 51. The Hearing Officer finds that Respondent violated her duties to Mr.
17 Gonzales in connection with the "flat fee" arrangement, by failing to provide Mr.
18 Gonzales with a statement containing itemization and detail sufficient to disclose the
19 time she spent on his case, despite numerous demands from Mr. Gonzales and Bar
20 Counsel.

21 52. Respondent only partially and sporadically cooperated with the State Bar
22 in the investigation of Mr. Gonzales' complaint, and in the pursuit of the present
23 disciplinary proceeding.

24 53. Respondent's failure to keep adequate records of the fees paid, and her
25 failure to adequately safeguard Mr. Gonzales' file constitute violations of E.R. 1.15 and
26 E.R. 1.6.

27 54. Respondent's failure to respond to requests for information from the State
28 Bar, and her failure to fully cooperate in these disciplinary proceedings violated E.R.
 8.1(b), and Rules 53(d) and 53(f) of the Arizona Rules of the Supreme Court.

29 IV. SANCTION.

30 55. The purpose of lawyer discipline is not to punish the lawyer, but to protect
31 the public, the profession, and the administration of justice, and to deter similar conduct

1 by other lawyers. *In Re Alcorn*, 202 Ariz. 62, 74, ¶ 41, 481 P.3d 600, 612 (2002); *In Re*
2 *Fioramonti*, 176, Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Another purpose of
3 lawyer discipline is to install public confidence in the State Bar's integrity. *In Re*
4 *Horwitz*, 180, Ariz. 20, 29, 881 P.2d 352, 361 (1994).

5 56. Arizona applies the American Bar Association's Standards for Imposing
6 Lawyer Discipline ("ABA Standards") in determining appropriate sanctions in lawyer
7 discipline cases. *In Re Zawada*, 208 Ariz. 232, 236, 92 P.3d 862, 866 (2004).

8 57. In imposing discipline, it is appropriate to consider the facts of the case,
9 the ABA Standards, and the proportionality of discipline imposed in similar cases. *In Re*
10 *Bowen*, 178 Ariz. 283, 283, 872 P.2d 1235, 1238 (1994).

11 58. In applying the ABA Standards, consideration must be given to the duty
12 violated, the lawyer's mental state, the actual potential injury caused by the misconduct,
13 and the existence of aggravating or mitigating factors. *See Standards 3.0*.

14 59. The theoretical framework provided in the ABA Standards states that if
15 there are multiple acts of misconduct, the sanction should be based upon the most
16 serious violation, with other violations being considered as aggravating factors. *See In*
17 *Re Moak*, 205 Ariz. 351, 353, 71 P.3d 343, 345 (2003).

18 60. In the present case, the Hearing Officer finds that Respondent's failure to
19 safeguard Mr. Gonzales' file, and to account for the time spent in the representation
20 constitutes the most serious violation, and will consider the failure to fully cooperate
21 with the State Bar's investigation as an aggravating factor.

22 61. **Duties Violated.** The duties violated by Respondent in this case overlap
23 somewhat, and include violations of duties owed to clients and to the profession.
24 Standards 4.1 deals with failure to preserve client property, and Standard 7.0 deals with
25 violations or duties relating to attorneys' fees.

26 62. **Respondent's Mental State.** It is not clear from the evidence whether
27 Respondent acted knowingly in failing to properly keep track of time spent so that
28 issues relating to flat fees could be properly accounted for if necessary in the future.
Even if Respondent did not subjectively know of the requirements, she should have

1 known of these requirements if she had read the Applicable Ethics Opinions and Case
2 Law. Therefore, the Hearing Officer finds that she was at least grossly negligent in
3 failing to keep sufficient records from which she could provide an accounting. It is not
4 at all clear to the Hearing Officer that Respondent actually did work that would justify
5 \$3,000.00 of fees in this case.

6 63. The commentary to Standard 4.13 provides that "lawyers that are grossly
7 negligent in failing to establish proper accounting procedures should be suspended."

8 64. Similarly, the commentary to Standard 7.2 provides that suspension is
9 appropriate when a lawyer knowingly charges excessive or improper fees.²

10 65. **Injury or Potential Injury.** The next relevant consideration is the extent
11 of actual or potential injury to Mr. Gonzales. It is not clear to the Hearing Officer
12 whether or not Respondent did \$3,000.00 worth of work. Her failure to account for the
13 time she spent, and her failure to provide her file to Respondent caused at least potential
14 injury.

15 V. AGGRAVATING OR MITIGATING CIRCUMSTANCES

16 66. **9.22(a) Prior Disciplinary Offenses.** The conduct at issue in this matter
17 is virtually identical to Respondent's prior disciplinary proceedings in SB-09-0017, in
18 which Respondent was recently suspended for 10 months (*Exhibit 12*). Respondent's
19 prior disciplinary history also includes: (a) being censured in 2006 in matter SB-05-
20 0171 (*Exhibit 13*); (b) receiving an informal reprimand in 1999 in No. 99-0337 (*Exhibit*
21 *14*); and (c) receiving an informal reprimand in matter No. 95-0269 (*Exhibit 15*).
22 Therefore, Respondent's prior disciplinary offenses constitute an aggravating factor in
23 this case.

24 67. **9.22(b) Dishonest or Selfish Motive.** As the Hearing Officer has
25 previously observed, it is difficult to tell whether Respondent did \$3,000.00 worth of
26 work for Mr. Gonzales. If she did not do this much work, then retaining the \$3,000.00
27 fee, without refunding a portion of it to Mr. Gonzales, would be dishonest or selfish.

28 ² This same type of conduct was at issue Respondent's prior disciplinary actions in SB-
09-0017. In that prior disciplinary action, Respondent was suspended in part for failing to
refund an advance payment of fees upon withdrawal.

1 Given the scant evidence in the records, however, the Hearing Officer finds that the
2 State Bar has not established this aggravating factor by clear and convincing evidence.

3 68. **9.22(c) Patter of Misconduct.** As mentioned above, the conduct at issue
4 in this matter is very similar to the conduct which recently led to Respondent's 10
5 month suspension. Therefore, the Hearing Officer finds that there has been a pattern of
6 misconduct.

7 69. **9.22(d) Multiple Offenses.** There is only one client at issue in this matter.
8 However, Respondent compounded her problem by failing to cooperate with the State
9 Bar. Although the Hearing Officer finds that this aggravating factor has been
10 established, he gives it no weight, as the failure to cooperate is already being counted as
11 an aggravating factor below.

12 70. **9.22(e) Failure to Cooperate in the Disciplinary Proceedings.**
13 Respondent, for the most part, failed to cooperate in the State Bar's investigation, and in
14 these disciplinary proceedings. Although she did, on occasion, participate and provide
15 information; more often than not, she only did so after repeated prodding by the State
16 Bar. The fact that she totally failed to serve a disclosure statement, or to cooperate in the
17 preparation of the required Pre-Hearing Memorandum, and that she did not appear at the
18 hearing supports the finding that she did not cooperate with the disciplinary
19 proceedings. Especially after she was suspended for ten months in her prior disciplinary
20 action, Respondent totally failed to participate in this matter.

21 "Failure to cooperate with disciplinary authorities is a significant aggravating
22 factor." *In Re Pappas*, 159 Ariz. 516, 527, 768 P.2d 1161, 1172 (1988). Respondent's
23 disregard of the State Bar's requests for information in this disciplinary proceeding
24 borders on contempt for the legal system, undermines the profession's efforts at self-
25 regulation, and casts a shadow over the integrity of the judicial system. *In Re Brown*,
184 Ariz. 480, 483, 910 P.2d 631, 634 (1996).

26 The Hearing Officer finds that this aggravating factor has been established, and
27 is entitled to significant weight.

28 71. **9.22(i) Substantial Experience in the Practice of Law.** Respondent has

1 been practicing since May, 1993. Given her experience and prior involvement in
2 disciplinary system, Respondent should have been keenly aware of the need to
3 cooperate with the State Bar, and also should have been aware of the restrictions placed
4 upon on flat fee agreements. The Hearing Officer finds that this aggravating factor has
5 been established.

6 72. **9.22(i) Indifference to Making Restitution.** It is a close call as to
7 whether this aggravating factor has been established. As previously discussed, it is
8 impossible to tell, based on the evidence in the record, whether Respondent performed
9 \$3,000.00 worth of work. If she did not, she should have refunded the unearned portion
10 of her fee. Even if she did performed \$3,000.00 worth of work, there is the possibility
11 that she should have refunded at least a portion of the \$3,000.00 fee to the extent that it
12 reflected work that had to be redone by Mr. Gonzales' new attorney when she chose to
13 withdraw. The Hearing Officer is troubled that the lack of evidence is due in significant
14 part to Respondent having lost Mr. Gonzales' file, and by her failure to appear and
15 testify in these disciplinary proceedings.

16 The Hearing Officer finds, however, that this aggravating factor has not been
17 established by clear and convincing evidence.

18 73. The Hearing Officer finds that there are no mitigating factors.

19 VI. LENGTH OF SUSPENSION

20 74. The Hearing Officer finds that the presumptive sanction in this case is a
21 suspension.

22 75. The commentary to Standard 2.3 indicates that when a suspension is
23 warranted, a minimum 6-month suspension is generally necessary to protect the public.
24 However, if it appears that a respondent attorney can be rehabilitated in less than six
25 months, shorter suspensions may be imposed. *See, e.g., In re Shannon*, 179 Ariz. 52,
26 71, 876 P.2d 548, 567 (1994).

27 76. In the present case, Respondent has already been suspended for ten
28 months, and she already will have to apply for reinstatement if she is ever to return to
the practice of law in the future.

1 77. Had the complaint from Mr. Gonzales been received slightly earlier, it is
2 likely that the Gonzales matter would have been consolidated with SB-09-0017. If that
3 had been the case, the Gonzales violations would have been just another part of a
4 pattern of misconduct, and constituted multiple offenses. It is unlikely that a
5 significantly longer suspension would have been imposed.

6 78. The State Bar, in its role as prosecutor in disciplinary matters, has broad
7 discretion in recommending appropriate sanctions. *In re Dean*, 212 Ariz. 221, 225, ¶ 24,
8 129 P.3d 943, 947 (2006).

9 79. The State Bar has requested a 30 day suspension to run concurrently with
10 the existing 10 month suspension. In light of the unique facts of this case, the Hearing
11 Officer finds that a 30 day suspension, to run concurrently with the existing 10 month
12 suspension is appropriate, and will adequately protect the public, the profession, the
13 administration of justice, and the integrity of the judicial system.

14 **VII. PROPORTIONALITY.**

15 80. The last step in determining if a particular sanction is appropriate is to
16 assess whether the discipline is proportional to the discipline imposed in similar cases.
17 *In Re Peasley*, 208 Ariz. 27, 41, ¶ 62, 90 P.3d 764, 778 (2004). This is an imperfect
18 process because no two cases are ever alike. *In Re Owens*, 182 Ariz. 121, 127, 893 P.2d
1284, 1290 (1995).

19 81. Because perfect uniformity cannot be achieved, the discipline in each
20 situation must be tailored for the individual case. *In Re Piatt*, 191 Ariz. 24, 31, 951 P.2d
21 889, 896 n. 5 (1997).

22 82. The Hearing Officer has carefully considered all of the evidence,
23 aggravating and mitigating factors, the prior disciplinary cases, and sanctions imposed
24 in similar cases, including SB-09-0017. The Hearing Officer finds that imposition of a
25 one month suspension for this additional act which is similar to the actions that led to
26 the prior discipline in SB-09-0017 falls within the broad range of sanctions imposed in
somewhat similar cases.

27 83. For these reasons, the Hearing Officer recommends that Respondent
28

1 receive a one month suspension, to run concurrently with her 10 month suspension in
2 SB-09-0017. The Hearing Officer believes that the probation imposed in SB-09-0017 is
3 sufficient and that no additional terms of probation are necessary based on the current
4 violation.

5 **VIII. RESTITUTION.**

6 84. The Hearing Officer struggled in deciding the issue of restitution. It was
7 discussed at some length with Bar Counsel on the record during the hearing.

8 85. A review of the online docket indicates that Respondent did at least some
9 work in the present case for which she was entitled to be paid. She filed an answer, and
10 attended a hearing. It is likely that she spent time meeting with Mr. Gonzales in
11 preparing to file the numerous financial disclosures that are necessary in divorce
12 proceedings. Whether the work she performed justified a \$3,000.00 fee, however, is
13 hard to determine. Much of the problem is that Respondent lost Mr. Gonzales' file, and
14 then did not participate in the hearing on this matter, so that she could be questioned
15 about the work she had performed.

16 86. Therefore, there was insufficient evidence for the Hearing Officer to
17 determine whether any restitution is appropriate, and if so what amount of restitution
18 would be appropriate. There simply was not enough evidence for the Hearing Officer to
19 determine any rational award of restitution to Mr. Gonzales.

20 87. The Hearing Officer therefore recommends that as a condition of any
21 potential future reinstatement, Respondent should be required to engage in State Bar
22 Fee Arbitration with Mr. Gonzales to determine the reasonable value of the work she
23 performed. The burden of persuasion should be placed on Respondent during such
24 arbitration. If the arbitrator finds that the work she performed did not justify the
25 \$3,000.00 fee, she should be required to refund any amounts determined by the
26 arbitrator to Mr. Gonzales as a precondition to being reinstated.

27 **IX. CONCLUSION**

28 88. For the reasons discussed above, the Hearing Officer recommends that
Respondent Deborah L. Abernathy be suspended for 30 days, with such suspension to

1 run concurrently with her existing 10 month suspension imposed in matter number SB-
2 09-0017. The Hearing Officer further recommends that as a condition to any future
3 reinstatement, Respondent should be required to engage in State Bar Fee Arbitration
4 with Mr. Gonzales and to refund to Mr. Gonzales any amounts determined by the
5 arbitrator.

6
7 DATED this 19th day of June, 2009

8 HEARING OFFICER 7M

9
10 By 
11 Daniel P. Beeks

12 ORIGINAL of the foregoing mailed
13 for filing on June 19, 2009, to:

14 Disciplinary Clerk
15 Supreme Court of Arizona
16 1501 West Washington, Suite 104
17 Phoenix, Arizona 85007-3231

18 COPY of the foregoing mailed
19 June 19, 2009, to:

20 Roberta L. Tepper
21 State Bar of Arizona
22 4201 North 24th St., Suite 200
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24 Senior Bar Counsel

25 Deborah L. Abernathy
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27 Peoria, Arizona 85382
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