

FILED

JAN 30 2009

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

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

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

No. 07-1604

KENNETH J. MIKAL,
Bar No. 004355

RESPONDENT.

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 10, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Amended Report filed November 24, 2008, recommending disbarment, restitution 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 disbarment, restitution and costs.¹ The amount of restitution is as follows:

Restitution

\$5,000.00 to the estate of Timothy Monnig, PB 2005-003051

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

[Signature: Daisy Flores]

Daisy Flores, Chair
Disciplinary Commission

¹ The Hearing Officer's Report is attached as Exhibit A.

Original filed with the Disciplinary Clerk
this 30th day of January, 2009.

Copy of the foregoing mailed
this 2nd day of February, 2009, to:

Hon. H. Jeffrey Coker
Hearing Officer 6R
P.O. Box 23578
Flagstaff, AZ 86002

Kenneth J. Mikal
Respondent
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and

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Matthew McGregor
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State Bar of Arizona
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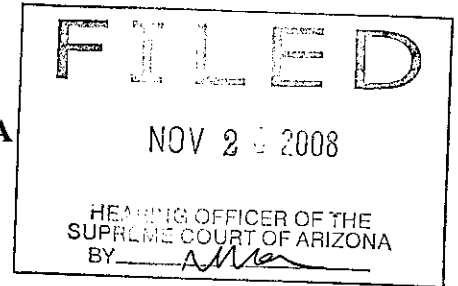
by: Evelyn Lopez

/mps

EXHIBIT

A

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



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

No. 07-1604

KENNETH A. MIKAL,

Bar No. 004355

RESPONDENT.

AMENDED¹
HEARING OFFICER'S REPORT

PRECEDURAL HISTORY

1. Probable Cause was found in this matter, on July 22, 2008. The State Bar's Complaint was filed on July 30, 2008. Service was thereafter accomplished by sending a copy of the Complaint to the Respondent at his address of record. Respondent failed to respond to the Complaint within the time limits and his default was entered on September 23, 2008. The matter proceeded to an Aggravation/Mitigation hearing on October 10, 2008.

FINDINGS OF FACT

2. At all times relevant hereto, Respondent was an attorney licensed to practice law in the state of Arizona, having been first admitted to practice law in Arizona on December 2, 1975.
3. On September 22, 2006, Respondent was summarily suspended from the practice of law in the state of Arizona, pursuant to Rule 62(a)(3), Ariz.R.Sup.Ct., for

¹ Hearing Officer's Report filed on October 30, 2008 contained an incomplete mailing certificate.

failure to complete Mandatory Continuing Legal Education requirements.² As of the date of the filing of the Complaint, Respondent has not been reinstated to the practice of law in the state of Arizona.

COUNT ONE

4. In late 2006, Respondent was the attorney of record for and represented the personal representative, Michael Justin Monnig ("Mr. Monnig"), in the matter of the estate of his father, Timothy Monnig ("the Decedent"), PB 2005-003051, in Maricopa County Superior Court.
5. Subsequent to the effective date of Respondent's summary suspension on September 22, 2006, as reflected in the Minute Entries dated September 26, 2006, November 7, 2006, December 7, 2006, December 12, 2006, December 29, 2006, and January 2, 2007, Respondent remained the attorney of record for Mr. Monnig.
6. Respondent failed to notify the Court, opposing counsel and Mr. Monnig that he had been summarily suspended from the practice of law in the state of Arizona on September 22, 2006. Respondent also failed to obtain substitute counsel before the effective date of his summary suspension.
7. Respondent failed to move to withdraw from the representation of Mr. Monnig once the summary suspension became effective.
8. On December 7, 2006, during a telephonic status conference, the Court stated for the record that the Court's attempts to contact Respondent for his participation in the status conference were unsuccessful. Mr. Monnig also stated for the record

² Due to Respondent's failure to answer the Complaint, the factual allegations set forth in the Complaint are deemed to be admitted. Except where noted, all facts cited herein are from the Complaint.

- that he had been unable to contact Respondent to participate in the status conference.
9. In or about January 2007, attorney Harold Bliss began to work with Mr. Monnig to take over the representation from Respondent as attorney of record for Mr. Monnig.
 10. On January 31, 2007, Respondent e-mailed Mr. Bliss regarding the logistics of transferring the case to Mr. Bliss, as well as answering some questions posed in a prior e-mail from Mr. Bliss. Respondent told Mr. Bliss: "I have a little more cash in my trust account and I'll get it all to you."
 11. The funds Respondent claimed were still located in his client trust account were proceeds generated from an estate sale of items from the Decedent's home, which occurred in late 2005 or early 2006, and which was arranged by Respondent.
 12. Mr. Bliss never received any of the estate sale proceeds from the Respondent. Mr. Bliss estimates that the amount of the estate sale proceeds is between \$4,500. and \$5,00. This amount is based upon Mr. Bliss' review of documents from the entities that actually performed the sales (Transcript of Hearing 20:2-8).
 13. On February 22, 2007, a third party in the Monnig probate matter filed a Petition for Order to Show Cause, alleging that Mr. Monnig had failed to provide an accounting or inventory for the estate, as well as alleging that Mr. Monnig mismanaged the major assets of the estate. A Hearing on the Petition was set.
 14. On June 14, 2007, Mr. Bliss appeared with Mr. Monnig for a telephonic status conference. Mr. Bliss notified the Court that he had been unsuccessful in resolving the issues of the estate sale proceeds with Respondent, and that he had

- not received the funds Respondent stated he had been holding in his client trust account.
15. As of June 14, 2007, Respondent had been served with an Order to appear at the Hearing which had been set for June 27, 2007. On June 27, 2007, Respondent failed to appear at the Hearing.
 16. At the June 27, 2007, Hearing, Mr. Bliss notified the Court that he had still been unsuccessful in resolving the issues of the estate sale proceeds with Respondent, and had not received the funds from Respondent that Respondent stated he had been holding in his client trust account.
 17. Due to Respondent's failure to appear and comply with Court Orders, a Civil Arrest Warrant was issued for Respondent. The Warrant was held in abeyance for 30 days from June 27, 2007, in case Respondent appeared and complied with the Court Orders in the interim period.
 18. On August 1, 2007, at a telephonic status conference, Mr. Bliss informed the Court that Respondent had failed to comply with the Court Orders. The Civil Arrest Warrant was issued for Respondent in full force and effect.
 19. On August 9, 2007, the Court issued its decision on the Petition for Order to Show Cause filed by the third-party against Mr. Monnig. The Court noted for the record that all parties agreed that Respondent might hold estate information and assets, but that efforts to obtain that information and assets had been unsuccessful. The Court dismissed the Petition for Order to Show Cause filed by the third-party against Mr. Monnig.

20. Respondent's conduct in his handling of the Monnig estate caused a delay in the ultimate resolution of the estate, an uncertain resolution of the financial issues in the estate, and the disappearance of \$4,500 to \$5,000 in estate funds (Transcript of Hearing 13:2-19)
21. On September 24, 2007, Mr. Bliss filed a Bar charge against Respondent.
22. On October 2, 2007, the State Bar notified Respondent of Mr. Bliss' allegations in an initial screening letter mailed to Respondent at his address of record with the State Bar Membership Records. The letter instructed Respondent to provide a written response to the Bar charge within 20 days, by October 22, 2007. Respondent failed to respond.
23. In a second letter sent to Respondent at his address of record and dated October 31, 2007, Respondent was reminded as of his ethical duty to respond, and was advised that failure to respond to the State Bar could be, in itself, grounds for discipline, and was given until November 12, 2007, to respond. Respondent failed to respond.
24. In a third letter sent to Respondent at his address of record and dated November 20, 2007, Respondent was again reminded of his ethical duty to respond and was advised that failure to respond to the State Bar could be, in itself, grounds for discipline, and was given until November 30, 2007, to respond. Respondent failed to respond.
25. On December 13, 2007, Respondent sent an e-mail to the State Bar of Arizona, specifically directed to Staff Bar Counsel Matthew McGregor's legal secretary, Lisa Casablanca. Respondent's e-mail stated the following:

- a. Respondent indicated that he suffered a life-threatening stroke two years prior;
 - b. Respondent indicated that he closed his solo practice and moved to Northern Idaho to focus on recovery;
 - c. Respondent acknowledged that the screening letters had been forwarded from his address of record to his mother's home in Phoenix. Respondent acknowledged that he had received the screening letters from his mother.
 - d. Respondent did not provide a current and effective mailing address for himself, but indicated he would provide one within a few days. Respondent never provided a new mailing address.
 - e. Respondent provided an e-mail address at which he could be contacted.
26. In his December 13, 2007, e-mail, Respondent requested an extension until the end of the year. Staff Bar Counsel Matthew McGregor granted Respondent an extension to respond to the Bar charge until January 31, 2008.
27. On December 18, 2007, Respondent acknowledged the extension to respond to the Bar charge via e-mail. Respondent failed to respond within the extension which was granted to him.
28. On March 10, 2008, Staff Bar Counsel Matthew McGregor sent an e-mail to Respondent at the e-mail address provided by Respondent in Respondent's December 13, 2007, e-mail. In the e-mail, Respondent was given until March 17, 2008, to contact Staff Bar Counsel. Respondent failed to respond.
29. On March 28, 2008, Staff Bar Investigator Mike Fusselman located and contacted Respondent at Respondent's mother's home in Phoenix, Arizona. Respondent indicated that correspondence from the State Bar could be sent to that address.

30. On March 28, 2008, the State Bar sent a new initial screening letter to Respondent at his mother's address in Phoenix, Arizona, instructing Respondent to provide a written response to the Bar charge. Respondent was given 20 days, until April 17, 2008, to respond. Respondent failed to respond.
31. On April 30, 2008, the State Bar sent a second letter to both Respondent's address of record and to Respondent's mother's address in Phoenix, Arizona. Respondent was reminded of his ethical duty to respond and was advised that failure to respond to the State Bar could be, in itself, grounds for discipline, and was given until May 12, 2008, to respond. On May 5, 2008, the April 30, 2008, mailing to Respondent's address of record was returned to the State Bar. The envelope was labeled "Return to Sender; Attempted -- Not Known; Unable to Forward." Respondent failed to respond.
32. On May 23, 2008, in an effort to determine what happened to the estate sale proceeds, the State Bar issued a Subpoena Duces Tecum to Wells Fargo Bank in Phoenix, Arizona, for Respondent's client trust account bank records.
33. On June 30, 2008, the State Bar received Respondent's client trust account bank records from Wells Fargo Bank pursuant to the May 23, 2008, Subpoena Duces Tecum.
34. On July 9, 2008, State Bar Staff Examiner Gloria Barr concluded her examination of Respondent's client trust account bank records, which included a reconstruction of Respondent's General Client Trust Account Ledger from December 31, 2004, through June 1, 2007.

35. Ms. Barr's examination revealed that:
- a. Not all transactions corresponded to an identifiable client;
 - b. There were no clearly identified client trust account transactions that corresponded to Mr. Monnig, Decedent, or Mr. Bliss;
 - c. On June 30, 2005, check number 155, which was made payable to Terry Brooken in the amount of \$300,000.00, was disbursed when the balance in the client trust account was only \$16,916.41. This left the client trust account with a negative balance of -\$283,084.00. This overdraft was not reported to the State Bar of Arizona.
 - d. On February 7, 2006, there was a Branch Withdrawal made by Respondent in the amount of \$199.48 when the balance in the client trust account was only \$69.20. This left the client trust account with a negative balance of -\$130.28. This overdraft was not reported to the State Bar of Arizona.
 - e. On August 3, 2006, Respondent made a disbursement from the client trust account to Vertical Earth in the amount of \$174.31 when the balance in the trust account was only \$143.94. This left the client trust account with a negative balance of -\$30.37. This overdraft was not reported to the State Bar of Arizona.
 - f. Client trust account pre-numbered checks 111, 112, 154, and 191 were dispersed and made payable to the order of "cash."
 - g. There were 30 occasions where Respondent dispersed money from the client trust account through Automated Teller Machine withdrawals, and not by pre-numbered checks.

- h. There were 108 occasions where Respondent dispersed money from the client trust account through Point of Service or Check Card purchases, and not by pre-numbered checks.
 - i. There were 23 occasions where Respondent dispersed money from the client trust account through online transfers to an account ending in 6233, and not by pre-numbered checks. The Wells Fargo personnel verified that the account ending in 6233 is an individual account registered to Respondent.
 - j. There were six occasions where Respondent dispersed money from the client trust account through Branch Withdrawals, and not by pre-numbered check.
36. A review of exhibit 'A' to the State Bar's Aggravation and Mitigation Brief, (A summary of the Respondent's trust account records) shows that Respondent used the client trust account as his own personal piggy bank, making questionable purchases at various retail stores, restaurants, gas stations, haircuts and golf courses presumably for his own gain (Ex. A to State Bar's Aggravation and Mitigation Brief).

CONCLUSIONS OF LAW

37. The Hearing Officer finds that there is clear and convincing evidence that Respondent violated the Rules of Professional Conduct as hereinafter set forth:
- a. Respondent failed to act with reasonable diligence and promptness in representing his client;
 - b. Respondent failed to keep his client reasonably informed about the status of the probate matter;

- c. Respondent failed to consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knew that the client expected assistance not permitted by the Rules of Professional Conduct;
- d. Respondent failed to identify client property and appropriately safeguard client property.
- e. Respondent knowingly disobeyed an obligation under the rules of a tribunal;
- f. Respondent used means and methods that had no substantial purpose other than to delay or burden any other person;
- g. While summarily suspended and not admitted to practice law in the State of Arizona, Respondent held out to the public or otherwise represented that he was a lawyer admitted to practice law in the state of Arizona;
- h. Respondent knowingly failed to respond to a lawful demand for information from the State Bar of Arizona;
- i. Respondent knowingly engaged in conduct involving dishonesty, fraud, deceit or misrepresentation;
- j. Respondent engaged in conduct that was prejudicial to the administration of justice;
- k. Respondent failed to exercise due professional care in the handling of his client trust account;
- l. Respondent used, endangered, or encumbered money held in trust for a client or third person without the permission of the owner;

- m. Respondent dispersed funds from the client trust account without using a pre-numbered check or by electronic transfer that did not maintain a record of such disbursements;
 - n. Respondent refused to cooperate with the staff of the State Bar acting within the course of that person's duties;
 - o. Respondent failed to furnish information or respond promptly to the inquiries and requests made from Staff Bar Counsel made pursuant to these Rules;
 - p. Respondent failed to notify his client, opposing counsel, substitute counsel, and the Court that he had been suspended within ten (10) days of the effective date of suspension;
 - q. Respondent failed to file a Motion for Withdrawal from the representation of his client before the effective date of suspension when no substitute counsel had been obtained.
38. Respondent's conduct, as found by the Hearing Officer by clear and convincing evidence, violated Rule 42, Ariz.R.Sup.Ct., specifically ER's 1.3, 1.4(a)(3), 1.4(a)(5), 1.5, 3.4(c), 4.4(a), 5.5(b)(2), 8.1(b), 8.4(c), 8.4(d); and Rule 43(d)(1)(a), Rule 43(d)(3), Rule 43(4)(4), Rule 53(d), Rule 53(f), Rule 72(a)(1), Rule 72(a)(3), Rule 72(a)(4) and Rule 72(b), Ariz.R.Sup.Ct..

ABA STANDARDS

39. 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; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

40. As set forth above, the Respondent violated not only his duty to his client, but to the profession as well. Given the breadth of the irregularities in Respondent's trust account, his failure to respond to the State Bar's inquiries or attend the hearing in this matter, the Hearing Officer must conclude that Respondent's retention of the \$5,000 from the Monnig estate, as well as the multiple inappropriate disbursements from the client trust account, were all done for Respondent's benefit, as opposed to some other purpose.
41. Respondent's violations implicate *Standard* 4.0 in dealing with the violation of Duties Owed to Clients. *Standard* 4.41 states that: "Disbarment is generally appropriate when (a) a lawyer abandons the practice and causes serious or potential serious injury to a client, or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client."
42. *Standard* 4.11 states that: "Disbarment is generally appropriate when a lawyer knowingly converts client property, and causes injury or potential injury to a client." Disbarment, however, is usually reserved for cases in which the lawyer uses the client funds for the lawyer's own benefit, which, without explanation, is the case in this matter.
43. *Standard* 4.0 and 5.0 deal with Violations of Duties Owed to the Clients and Violations of Duties Owed to the Public, respectively. *Standard* 4.61 states: "Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another and causes serious injury or potentially serious injury to a client."

44. *Standard 5.11* states: "Disbarment is generally appropriate when (a) a lawyer engages in serious criminal conduct, a necessary element of which includes... theft; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."
45. *Standard 6.0* deals with the Violations of Duties Owed to the Legal System. *Standard 6.21* states: "Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding."
46. *Standard 6.11* states: "Disbarment is generally appropriate when a lawyer, with the intent to deceive the Court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes significant or potentially significant adverse effect on the legal proceeding."
47. *Standard 7.0* deals with Violations of Other Duties Owed as a Professional. *Standard 7.1* states: "Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system."

The Lawyer's Mental State

48. This Hearing Officer must conclude that Respondent's mental state was at the very least knowing.

The Actual or Potential Injury

49. As stated previously, Respondent caused financial harm and delay to the Monnig estate. A review of the Respondent's client trust account shows that there is also huge potential for injury as a result of the Respondent treating his trust account as his own personal checking account.

Aggravating and Mitigating Factors

50. *Standard 9.22(b) Dishonest or Selfish Motive.* Respondent's dishonest or selfish motive is clear. Respondent avoided responsibility for his own failures when he failed to advise his client, opposing counsel and the Court of his suspension. Respondent again wanted to avoid a potential sanction when he ignored the Court order to appear. Further, Respondent's disbursements from his client trust account demonstrate that Respondent was solely focused on his own needs to the detriment of his clients.
51. *Standard 9.22(c) Pattern of Misconduct.* Respondent's misconduct includes violations of duties owed to the client, the Court, the public, the legal system and as a professional.
52. *Standard 9.22(d) Multiple Offenses.* Respondent's misconduct involves violations of 19 separate ethical rules and subsections.

53. *Standard 9.22(e) Bad Faith Obstruction of the Disciplinary Proceeding.* Respondent's refusal to respond to the State Bar was clearly intentional. After negotiating his own extension, Respondent failed to respond to the State Bar's Staff Examiner, a Staff Investigator, and Staff Bar Counsel.
54. *Standard 9.22(f) Submission of False Statements or Other Deceptive Practices During the Disciplinary Process.* Respondent stated that he would provide an effective mailing address, but never did so. Instead, Respondent moved to his mother's residence in Phoenix. Then, when a Staff Investigator located Respondent there, Respondent indicated that the mother's address would be an effective route to communicate with him. However, Respondent ignored all attempts to communicate with him there as well.
55. *Standard 9.22(g) Refusal to Acknowledge Wrongful Nature of Conduct.* Respondent's intentional failure to respond to the client, opposing counsel, the Court, and now the State Bar, shows Respondent's refusal to acknowledge his misconduct.
56. *Standard 9.22(i) Substantial Experience in the Practice of Law.* Respondent has been an attorney since December 2, 1975, almost 33 years.
57. *Standard 9.22(j) Indifference to Making Restitution.* Respondent's intentional refusal to cooperate shows indifference as to whether his former client is ever made whole.
58. *Standard 9.22(k) Illegal Conduct.* The Hearing Officer finds that Respondent's conduct, both in the Monnig estate and in the records of his trust account transactions, evidences nothing less than theft.

Mitigating Factors

59. The undersigned Hearing Officer finds only one potential mitigating factor.
- Standard 9.32(a) Absence of Prior Disciplinary History.* While Respondent was on suspension at the time that these violations took place, that suspension was caused as a result of his failure to keep up with his continuing legal education requirements and not a substantive violation. For approximately 31 years prior to that, Respondent had no prior disciplinary history.
60. Because Respondent failed to appear at the Aggravation Mitigation Hearing, this Hearing Officer has no further evidence of any mitigating factors and therefore can find none.

PROPORTIONALITY REVIEW

61. The Supreme Court has held that in order to have an effective system of professional sanctions, there must be an internal consistency, and therefore it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley*, 208 Ariz. 27, 90 P3d. 764 (2004). It is also recognized that the discipline in each case must be tailored to the individual case, as neither perfection or absolute uniformity can be achieved, *Id* at p.41 and p. 778, and *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983).
62. In *In re Son*, SB-05-0173-D (2006), Mr. Son was disbarred for knowingly abandoning his law practice and knowingly failing to perform services for which his clients had paid. Mr. Son was charged with a six count Complaint, and failed to participate in the disciplinary process. Three aggravating factors outweighed one mitigating factor.

63. In *In re Menkveld*, SB-06-0120-D (2006), Mr. Menkveld was disbarred when he misappropriated funds from his client trust account that were supposed to have been held on behalf of a client's estate. Additionally, Mr. Menkveld abandoned his clients and his law practice. Mr. Menkveld failed to respond to the State Bar and a three count formal Complaint ended up in default proceedings. Mr. Menkveld violated multiple ethical rules and multiple duties to his clients and to the legal profession. There were seven aggravating factors which outweighed only one mitigating factor.
64. In *In re Beskind*, SB-07-0155-D (2007), Mr. Beskind was charged in a three count Complaint. Mr. Beskind violated ER's 1.2, 1.3, 1.4, 1.5, 3.4(c), 8.4(d), and Rule 53(d)(e) and (f). Mr. Beskind failed to perform work for which he had been paid, failed to provide a written fee agreement, failed to communicate with his clients, failed to comply with orders and requests from the State Bar, and essentially abandoned his clients. Eight aggravating factors outweighed only one mitigating factor. Mr. Beskind was disbarred.

RECOMMENDATION

65. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, deter future misconduct, protect the profession and the administration of justice, as well as instill public confidence in the Bar's integrity, *In re Fioramonte*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994)

66. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases.
67. Upon consideration of the facts, application of the *Standards*, including the overwhelming aggravating and only one potential mitigating factor, and a proportionality analysis, this Hearing Officer recommends the following:
1. That Respondent be disbarred;
 2. That Respondent pay restitution to the Monnig estate the sum of \$5,000;
 3. That Respondent pay the entire cost of these proceedings.

DATED this 24th day of November, 2008.

Hon. H. Jeffrey Coker /NM
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 24th day of November, 2008.

Copy of the foregoing mailed
this 24th day of November, 2008, to:

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by: 