BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

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

ALAN N. ARIAV,
Bar No. 013740

Respondent.

File Nos. 08-2141 and 08-2174

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The parties filed the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of the Tender of Admissions on August 20, 2009. No Complaint has been filed. The Complainant has been notified of this consent agreement in compliance with Rule 52(b)(3), Ariz.R.Sup.Ct. The Hearing Officer was assigned on August 24, 2009. The hearing was held on September 9, 2009.

FACTS[1]

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 19, 1992.

2. Respondent represented M.H. Holdings, Inc, and Arthur and Jane Doe Kinberg, who were defendants and counterclaimants in CV 2007-008373, Maricopa County Superior Court. (TR 5:17 through 6:24)

3. Plaintiffs and counter-defendants in CV 2007-008373 were Rick Carpenter and Tammy D'Antonio, business partners of Mr. Kinberg. (TR 7:5-18)

[1] The facts are found in the Tender of Admissions and Agreement for Discipline by Consent, the Joint Memorandum in Support of the Tender of Admissions and the transcript of the hearing.

4. Respondent filed motions for summary judgment in the case on August 13, 2008, and August 21, 2008. The hearing on the motions was held on November 14, 2008.

5. At the hearing, the Respondent inaccurately stated the following concerning another lawsuit where Mr. Kinberg, Mr. Carpenter and Ms. D'Antonio were defendants:

> Mr. Kinberg recently, through me, made an $80,000 offer to Gilbert Fiesta, LLC to resolve [that] litigation. And he made it not only on his behalf, but he asked Gilbert Fiesta, if I pay you $80,000, will you release me and Carpenter and D'Antonio, release everyone from the back rent? And he reached that agreement, and he is now paying Gilbert Fiesta $10,000 a month for eight months with interest to Gilbert Fiesta on behalf of Carpenter and D'Antonio, who are not paying a dime. So to say that he is breaching his fiduciary to his partners [in this matter] is ludicrous, when he is now paying to release them from back rent that they owe to one of the new landlords.

6. Following the hearing on November 14, 2008, Plaintiffs' counsel, Fredrick R. Petti ("Mr. Petti"), contacted the lawyer for Gilbert Fiesta and inquired whether a settlement had been reached.

7. Mr. Petti was informed that there had been no settlement reached between Gilbert Fiesta and Mr. Kinberg.

8. Respondent had in fact sent a letter dated October 16, 2008, to Gilbert Fiesta's attorney which stated: "My client's offer to settle this matter with Gilbert Fiesta LLC is hereby immediately withdrawn. It is immediately null and void and will not be renewed."

9. Mr. Petti called one of the partners at Respondent's law firm to complain that Respondent had falsely represented to the court that a settlement had been reached in the Gilbert Fiesta matter.

10. Respondent then filed a Notice of Correction in the Superior Court on December 9, 2008. Respondent contended the misrepresentation was not made intentionally. Respondent

further contended that Mr. Kinberg had been involved in at least three lawsuits in California and five in Maricopa County.

11. Respondent reported his possible ethical violation to the State Bar on December 9, 2008.

12. Respondent made a false statement to a tribunal; made a false statement of fact to a third person; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct prejudicial to the administration of justice.

CONDITIONAL ADMISSIONS

Respondent conditionally admits his conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 3.3, 4.1, 8.4 (c) and 8.4(d). In File Number 08-2174 Respondent conditionally admits that on November 14, 2008, during oral argument, he misrepresented to the court that his client, Mr. Arthur Kinberg ("Mr. Kinberg"), had settled a lawsuit for $80,000, and was making $10,000 payments per month for eight months. After opposing counsel learned that there had been no settlement as Respondent had avowed to the court, he called Respondent's law partner. Respondent then corrected the misstatement to the court and self reported the matter to the State Bar of Arizona. Opposing counsel also, subsequently, submitted a charge to the State Bar. There is no issue of restitution in this matter.

CONDITIONAL DISMISSALS

The State Bar conditionally dismisses the allegations in State Bar File No. 08-2141; specifically that Respondent violated ERs 3.4(c), 3.5(b), 4.4(a) and 8.4(d). In C2007292, Pima County Superior Court, Respondent sent a letter to Judge Tang that asserted a substantive matter, and even though a copy was sent to opposing counsel, Judge Tang was concerned about the *ex parte* nature of the letter. Further, Judge Tang viewed the letter sent by Respondent as

chastisement of the court because it complained that the court had ruled on motions prior to Respondent's time to respond having run. There was a further concern about the position taken by Respondent in a letter to opposing counsel with regard to a discovery issue related to the production of document that indicated production would not occur absent an order of the court. When a motion to compel was filed, Respondent then objected to opposing counsel's motion to compel by claiming that the time to produce the documents had not expired.

These conditional dismissals are in exchange for the settlement in File No. 08-2174, and in recognition of the State Bar's high burden in proving the alleged ethical violations by clear and convincing evidence.

CONCLUSIONS OF LAW

Based on the findings of fact and the conditional admissions the Hearing Officer finds that the State Bar has proven by clear and convincing evidence that Respondent violated ERs 3.3(a)(1) (candor toward tribunal), 4.1(a) (making a false statement of material fact to a third person), 8.4(c) (engaging in conduct involving dishonesty, deceit or misrepresentation) and 8.4(d) (engaging in conduct that is prejudicial to the administration of justice) when Respondent on November 14, 2008 misrepresented to the court in CV 2007-008373 that his client Mr. Kinberg agreed to settle another lawsuit for the benefit of himself and Mr. Carpenter and Ms. D'Antonio. As is reflected in the Tender, Respondent made false and misleading statements to the court and to opposing counsel regarding an alleged settlement in a different lawsuit against his client. Respondent knew the statements were not correct and were prejudicial to the administration of justice. Respondent conditionally admitted the facts as set forth in the Tender and that his conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 3.3, 4.1, 8.4(c) and 8.4(d).

SANCTION

The Hearing Officer recommends that a suspension of one year is appropriate. That suspension will begin at the conclusion of the six-month and one-day suspension that Respondent is currently serving in SB-09-0056-D. Respondent shall be suspended for a total of 18 months and one day, retroactive to February 1, 2009, the date that Respondent changed his membership status from active to inactive, and ceased the practice of law.

1. Should Respondent seek reinstatement following his suspension, he will serve two years of probation, with terms to be decided at the time he seeks reinstatement.

2. Respondent shall pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs and expenses incurred by the Disciplinary Commission, the Supreme Court of Arizona and the Disciplinary Clerk's Office in this matter, if any. The State Bar's Itemized Statement of Costs and Expenses is attached as Exhibit "A" and is incorporated herein by reference.

3. In the event that Respondent fails to comply with the terms of probation, and the State Bar is so informed, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5)(C), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine if the terms of probation have been violated and if an additional sanction should be imposed. In a probation violation hearing, a violation must be proven by a preponderance of the evidence.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. See *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P. 3d 764, 770, 772 (2004); *In re Rivkind,* 164 Ariz. 154, 157, 791 P.2d 1037, 1040. (1990).

In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *See Peasely,* 208 Ariz. at 35, 90 P. 3d at 772; *Standard* 3.0.

In the instant case, Respondent admits that he made false statements to the court about the status of another case involving his client. He falsely informed the court his client had settled the case and was making payments, when in fact Respondent had himself written the letter withdrawing all settlement offers. After opposing counsel investigated and called Respondent's law partner to complain, Respondent filed a "Notice of Correction" with the Court, and reported his misconduct to the State Bar. The parties conditionally agree that Respondent acted with a knowing mental state concerning the false allegations.

Given the conduct in this matter, the most applicable *Standard* is *Standard* 6.0, Violations of Duties Owed to the Legal System. Specifically, *Standard* 6.12 provides: "Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and

takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding."

The presumptive sanction in this case is a suspension. The plaintiffs Mr. Carpenter and Ms. D'Antonio who were suing Respondent's client, Mr. Kinberg, were his former partners. (TR 5:17 through 6:24) During oral argument on a motion for summary judgment, Respondent claimed that Mr. Kinberg had settled a lawsuit against him and that the former partners were benefiting from the settlement and from the payments Mr. Kinberg was making. The statements regarding the settlement were false and Respondent took no remedial action until opposing counsel complained to a partner in Respondent's law firm. While there was no actual injury, Respondent's statements to the court were intended to benefit Respondent's client and were an attempt to cast Mr. Kinberg in a more favorable light before the court.

The Hearing Officer considered whether Respondent's conduct also fit under *Standard* 6.11 which states, "Disbarment is generally appropriate when a lawyer, with intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding". At the disciplinary hearing Respondent stated that the people suing his client ("Carpenter suit"), Mr. Kinberg ("Kinberg"), were Kinberg's partners. Kinberg owned and leased health club equipment using the names World Gym and later Xeptor. Kinberg contributed the money to set up and operate World Gym establishments. Mr. Carpenter ("Carpenter") and Ms. D'Antonio ("D'Antonio") were to run the establishments. (TR 7:5-18) They sued Kinberg because they alleged that he was breaching his fiduciary duties to them as business partners by conspiring with the landlord of the properties where the World Gyms were operated (Green Street Properties) to deprive Carpenter and D'Antonio of their benefits. (TR 8:6

through 9:10) Kinberg counterclaimed alleging that Carpenter and D'Antonio owed him money. (TR 7:19) Kinberg was expecting to receive profits from the health clubs and a return on his investment with interest. (TR 10:4-25) Carpenter and D'Antonio claimed that Kinberg promised he would timely pay the rent to the landlord Green Street Properties, but Kinberg had failed to pay the rent resulting in World Gym being evicted from four locations. (TR 14:2-14)

On November 14, 2008, when he lied to the court Respondent was arguing two Motions for Summary Judgment on behalf of Kinberg in the Carpenter/D'Antonio lawsuit.

In a separate lawsuit ("Gilbert Fiesta suit"), pending at the same time as the Carpenter suit, a landlord of one of the World Gym establishments, Gilbert Fiesta LLC (a successor to Green Street Properties) was suing Kinberg, Carpenter and D'Antonio for rent for the World Gym in the Gilbert Fiesta strip mall. (TR 19:11 through 20:15) When Respondent told the judge in the Carpenter lawsuit that Kinberg had settled another suit Respondent was referring to the Gilbert Fiesta suit. Respondent was showing the judge that instead of violating his fiduciary duties to Carpenter and D'Antonio, Kinberg was protecting them from the Gilbert Fiesta suit by paying a settlement for himself and for them. (TR 36:5-13) It appears that this false information was used by Respondent to cause the judge in the Carpenter suit to view Kinberg in a favorable light. Since Respondent made the reference to Kinberg settling the Gilbert Fiesta suit in oral argument on Kinberg's Motions for Summary Judgment in the Carpenter suit, it is reasonable to conclude that Respondent intended the information to help influence the judge to rule in favor of Kinberg's summary judgment motions.

At the disciplinary hearing Bar Counsel stated her opinion that she did not think Respondent lied with malice. "I don't think he does this with malice. But he obviously doesn't appear to be able to control himself at times when confronted with stressful situations to speak

without thinking." (TR 62:14-18) Bar Counsel was referring to the significant mental health history for Respondent. This history may be found in the Hearing Officer's Report in the prior matter, File No. 06-1741 filed in October, 2008. However, the context in which Respondent told the falsehood in the instant case leads to the conclusion that he was lying to obtain an advantage for his client.

Did Respondent with intent to deceive the court make a false statement and cause serious or potentially serious injury to a party, or cause a significant or potentially significant adverse effect on a legal proceeding? Respondent did intend for the court to rely on his statement and Respondent knew the statement was false when made. Respondent did not cause a serious injury to a party. The court did not grant the Motions for Summary Judgment on behalf of Kinberg. (TR 45:8-16) Therefore, Carpenter and D'Antonio were not harmed by the lie. The record is not clear if the court had already denied the Motions before Respondent filed his "Notice of Correction" on December 9, 2008. However, if the court had not ruled by December 9, 2008, then much of the credit for no harm coming to the opposing parties was due to the quick action of their attorney, Fredrick R. Petti ("Petti"). He contacted the lawyer for Gilbert Fiesta right after the November 14, 2008 argument and learned that Kinberg had not settled the case and that Respondent had written a letter to Gilbert Fiesta's counsel on October 16, 2008 withdrawing the settlement offer and stating that the offer would not be renewed.

The cases in the comment to *Standard* 6.11 provide some guidance on how to treat Respondent's ethical violation. In *Board of Overseers of the Bar v. James Dineen*, 481 A.2d 499 (Maine, 1984) a criminal defense lawyer was disbarred for putting a client on the stand to testify falsely. In *Office of Disciplinary Counsel v. Grigsby*, 493 Pa. 194, 425 A.2d 730 (1981) a lawyer filed a false affidavit about his own property to avoid a garnishment. In disbarring the

lawyer the court found that his actions were damaging to his creditors. Finally, in *Matter of Discipline of Agnew*, 311 N.W.2d 869 (Minn. 1981) the lawyer refused to return a client's documents to the client and then filed a suit on the client's behalf without the client's knowledge. In the suit the lawyer made false allegations that the defendant in that matter had harmed the client. The lawyer's actions caused the client to incur $8000 in attorney fees and to spend time in court trying to obtain his documents.

The result of Respondent's actions in the instant matter did not lead to the harm described in *Grigsby* or *Agnew*. When caught Respondent corrected the misinformation with the court and reported himself to the Bar. Although the Hearing Officer will address the issue of Respondent's ability to tell the truth later in this report, the Hearing Officer concludes that disbarment is not the appropriate sanction at this time.

A core value of the court system is telling the truth. Attorneys as officers of the court must be able to be truthful. Attorneys are more familiar with the facts of their cases than the judge. Therefore the court must rely on the accuracy of counsel's representations. Of course opposing counsel is usually prepared to correct any misstatements. In addition the court can take the time to review the entire record to check the representations of a lawyer. But both of these methods of checking for truthfulness are time-consuming and should be unnecessary. A lawyer's word should be his bond. A lawyer's reputation for truthfulness with clients, witnesses, opposing counsel and the court is worth more than anything in the legal profession. The ultimate question about Respondent is whether he will ever be able to be trusted? The concern of the Hearing Officer is heightened by two matters concerning Respondent, 1) Respondent's initial testimony at the hearing that he did not knowingly present false information to the court on November 14, 2008 and 2) a review of Respondent's prior discipline.

Respondent testified in the hearing that he signed the Tender of Admissions for "personal reasons" even though he disagreed with some of the items in the Tender. (TR 5:8-16) The Hearing Officer asked Respondent if he knew that his client had not settled with Gilbert Fiesta when Respondent told the judge on November 14, 2008 that his client had settled. Respondent testified that his client had told Respondent that the client had settled. Therefore, Respondent testified that he did not know that his client had not settled when he stated in court that Kinberg had settled. (TR 20:17 through 21:10) Respondent further testified that he did not agree with the portion of the Tender of Admissions which stated that Respondent knew that his statements on November 14, 2008 were not correct. (TR 21:23 through 22:8) Bar Counsel considered this testimony of Respondent to be a repudiation of the agreement reached in the Tender. (TR 28:3-15) Respondent's Counsel thought that her client was mistaken in this testimony. (TR 28:22) Respondent's Counsel referred to the October 16, 2008 letter in which Respondent had informed Gilbert Fiesta's lawyer that Kinberg's settlement offer was withdrawn. Respondent's Counsel thought that this letter showed that Respondent would have known on November 14, 2008 that his client Kinberg had not settled with Gilbert Fiesta. (TR 32:9-21) The Hearing Officer offered the parties a recess. (TR 28:19)

A recess was taken between 10:02 am and 10:18 am. (TR 33:6-13) Respondent then testified, "...I guess I did make a misrepresentation to the Court." (TR 33:21) This exchange is troubling to the Hearing Officer because it seemed that Respondent could not even remember the truth during the hearing. He had to have his memory refreshed during a recess to be able to admit that he had knowingly misled the court. (TR 34:4-11) The Hearing Officer could not determine whether Respondent's mental health condition (bipolar) was the cause of Respondent's initial attempt to cast himself as an unknowing purveyor of false information to the court. Perhaps

Respondent was simply having trouble admitting that he lied. In either case Respondent's need to justify his misrepresentation after he had conditionally admitted knowingly presenting false information is not a good sign. He should not have had to have his memory refreshed about his knowing falsehood to the court.

Duty Violated

Respondent violated his duty to the court system and the profession by lying about the settlement.

Mental State

Respondent knowingly lied to the court about the settlement.

Injury

No actual injury was caused by Respondent's lie. The State Bar has indicated that restitution is not appropriate in this case. The record does not contain proof that Mr. Petti, counsel for Carpenter and D'Antonio, charged his clients for the time he spent uncovering Respondent's lie. The potential for injury was slight. In considering a Motion for Summary Judgment the court is to rely on the record. Statements made by counsel in oral argument on the motion are not a part of the record. See Rule 56 of the Arizona Rules of Civil Procedure. Therefore, the court should not have placed any weight on Respondent's false statement.

AGGRAVATION/MITIGATION

Aggravating Factors:

Standard 9.22(a) Prior Disciplinary Offenses: Respondent is currently serving a suspension of six-months and one day in SB-09-0056-D (07/23/09). Significantly, the charges are similar to those in this case, making a false statement to opposing counsel, but in that case,

the false statement was the amount of fees incurred by his firm in pursuing the client's claim. Respondent was found to have violated ERs 3.3, 4.1, 8.4(c) and 8.4(d).

Standard 9.22(c) Pattern of Misconduct : The State Bar believes that because this is the same type of misconduct as in File No. 06-1741 that Respondent has engaged in a pattern of misconduct. Respondent does not agree that this aggravating factor should be considered because the prior case occurred well before this conduct at issue, and involved entirely different facts and circumstances. Furthermore, Respondent asserts that this aggravating factor is appropriate when there is more than one count of the same type of behavior at issue in the same complaint, or the Respondent's conduct in one matter continued over a significant period of time. Neither situation is presented herein.

The Hearing Officer finds that this factor has been established. The pattern of misconduct may occur when there are multiple counts in a complaint or when prior conduct demonstrates that Respondent has engaged on more than one occasion in the same or similar misconduct.
In the prior matter Respondent represented a client in a wrongful termination claim against a State agency. (Hearing Officer's Report File No. 06-1741, "Report", page 2, SB-09-0056-D) The client had been an employee of the Arizona Department of Corrections (ADOC). In the settlement of the claim ADOC agreed to reinstate the employee. Prior to a private mediation Respondent had informed the Attorney General's Office that his client had incurred over $200,000 in attorney's fees. At the mediation on September 14, 2006 Respondent told the mediator that his law firm had charged over $200,000 in fees. The Attorney General's Office relied upon Respondent's misrepresentation of the $200,000 in fees and agreed to pay the law firm for which client worked $82,596.87 for fees and costs. The law firm received the check for that amount on September 27, 2006. A firm paralegal Linda Davis found a fabricated bill that

Respondent had requested Connie DeLarge, an employee of the firm's accounting department, to create. (Report page 3, lines 15-22)

In his response to the Bar charges and at the hearing (for mitigation) Respondent stated that a supervisor in the law firm (Mr. Urman) was aware of Respondent padding the fees. The supervisor testified at the hearing that he never discussed the matter of Respondent padding the bill. The Hearing Officer concluded that Respondent's testimony that his law firm also participated in his unethical conduct was not credible. (Report page 14, line 14) The Hearing Officer wrote: "While the Mr. Urman/Respondent version of the conversation about inflating the fees may amount to no more than a "swearing match," the cumulative effect of Respondent's mental disability; the creation of the false documents; the issue of Davis's hours and the conversation about what Karen Tindle told Respondent of the QA, leads the Hearing Officer to conclude that Respondent (sic) memory is not credible and he recreated and testified to a false history to rationalize his conduct." (Report page 16, lines 16-22)

Respondent has engaged in similar conduct in the instant case. He has lied to assist his client in a claim. In the hearing he initially testified that he did not knowingly lie. After a break in the hearing Respondent had his memory refreshed and testified that he knowingly misled the court. The pattern of misconduct is that Respondent did not tell the truth in both matters. His intentions in both matters were to mislead opposing counsel and to acquire a "win" for his respective clients.

In the prior matter Respondent presented the testimony of his treating psychiatrist Dr. Mavis Donnelly. Dr. Donnelly diagnosed Respondent with bipolar disorder in 2004. In her opinion Dr. Donnelly testified that Respondent would not have lied about the fees if Respondent had not discontinued his medication and counseling. She stated that Respondent knew right from

wrong but his bipolar disorder caused him to exercise very bad judgment. (Report page 7) The Hearing Officer concluded that "... the recurrence of the misconduct is only unlikely if Respondent continues with medication and therapy." (Report page 18, line 14)

In the instant case Respondent did not present the testimony of a psychiatrist. He testified that he is currently receiving treatment and taking medication. He sees a psychiatrist Dr. Mari Alvig every two weeks. He takes Lamestal, Wellbutrin, Pristiq, Effexor and Geodon. (TR 51:3-6, 52:5-20, 56:14-16) Respondent also testified that he has been taking the medications from October 2008 until the present time. (TR 55:20 through 56:3) The troubling question is if Respondent was on his medication and receiving treatment through counseling in November 2008 why did he lie to the court in this matter? Respondent knew he was pending disciplinary proceedings in the prior case. The Hearing Officer's Report in the prior matter was filed in October 2008. The Disciplinary Commission filed its decision on January 16, 2009 in which the Commission decided that a suspension of six months and one day should be imposed. Therefore when Respondent lied to the court in the instant matter on November 14, 2008 he knew that he was pending discipline before the Commission and eventually before the Supreme Court of Arizona. Yet he still misrepresented the settlement to the court.

The Judgment and Order from the Supreme Court in the prior matter was issued in July 2009. The Court imposed the suspension of six months and a day but directed that the suspension would begin retroactively on February 1, 2009. Respondent had decided to notify the State Bar that effective February 1, 2009 Respondent was adopting the status of an inactive member of the Bar. The Tender of Admissions in the instant case reflects an agreement that an additional one year of suspension follow the previously ordered six months and one day suspension. The apparent purpose of the additional suspension is to protect the public from Respondent for an

extended period of time. Bar counsel stated that the sanction for the instant case is designed to give Respondent a light at the end of the tunnel and for Respondent to work on his medical condition. (RT 61:10 through 62:14)

The key question remains whether Respondent can ever be trusted with the truth in our legal system. The Hearing Officer thinks that these two instances of lying should lead to an eighteen month separation from the practice of law. The reinstatement process (if Respondent chooses to attempt to practice law again) will put the burden on Respondent to establish that he has his mental health condition under control. If the Court is inclined to reinstate Respondent, his treating physician may play a key role in helping the Court design terms of probation. Those terms might include the requirements of taking his medication, continuing with counseling and verifying for the Bar that he is in compliance. A practice monitor may also be necessary.

Standard 9.22(i) Substantial Experience in the Practice of Law: Respondent has been a practicing attorney for over 15 years.

Mitigating Factors:

Standard 9.32(d) Timely good faith effort to make restitution or to rectify consequences of misconduct. While Respondent's Notice of Correction to the court and self-report to the State Bar came on the heels of the complainant calling Respondent's former law partner, nonetheless, Respondent did take action to attempt to rectify his misstatements. Of more importance, Respondent placed himself on inactive status beginning on February 1, 2009, and ceased any involvement with the practice of law in recognition of his difficulties and to attempt to focus on his personal issues. Respondent testified that the prior disciplinary proceeding was pending when he lied to the court on November 14, 2008 in the current matter. He does not know if the stress of the prior proceeding contributed to his misrepresentation to the court in November 2008. But

Respondent decided to go inactive due to his inability to deal appropriately with the fear of making mistakes in law practice through the exercise of bad judgment. (TR 50:24 through 52:4) This decision in itself seems to this Hearing Officer to be an exercise in good judgment.

The aggravating and mitigating factors were considered in recommending the one-year suspension.

PROPORTIONALITY REVIEW

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226; 887 P. 2d 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality review is "an imperfect process." *In re Owens,* 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). The State Bar and Respondent conditionally agree that the sanction proposed here is consistent with these principles.

In *In re Moak,* 205 Ariz. 351, 71 P.3d 343 (2003), the Respondent failed to disclose that his client was injured in a second car accident during the trial for the first accident. The Supreme Court suspended him for six months and one day and gave great weight to the fact that his conduct demonstrated a pattern of misconduct as he attempted to deceive the defendants in both accidents for a substantial period of time. There were additional counts in the complaint that were aggravating factors (*Standard* 9.22(b) (c) (d) and (e)), but there were also four mitigating factors (*Standard* 9.32(a) (e) (k) and (l)). Moak violated ERs 1.2, 1.3, 1.4, 1.7(b), 1.8(e) and (j), 1.9, 3.3, 4.1, 8.4(c) and (d), and Rule 51(e), Ariz. R. Sup. Ct. Moak's mental state was knowing and there was the potential for injury.

In *In re Matheny*, SB 08-0033-D (2008), Matheny assisted the client in forging the names of two fictitious/nonexistent witnesses on a will the Court had already rejected for informal probate because it was not witnessed. Matheny then resubmitted it to the Court. Matheny then misled opposing counsel about the circumstances of the witnesses' execution of the will for approximately six months before finally admitting that the signatures were forged. Matheny later self-reported to the State Bar, but misrepresented the nature and extent of his misconduct and well as the level of his involvement in the fraud. The Supreme Court upheld the Disciplinary Commission's recommendation for a one-year suspension. Respondent violated ERs 1.1, 1.2(d), 1.5(b), 1.7, 3.3, 8.4(c) and 8.4(d). There were four aggravating factors (*Standard* 9.22(a) (c) (f) and (k)), and five mitigating factors (*Standard* 9.32(b) (d) (e) (g) and (k). Matheny's mental state was knowing and there was actual injury.

In re Johnson, SB-08-0090-D is a case not mentioned by the parties in the Joint Memorandum. The Respondent agreed to a six month and one day suspension. The Hearing Officer did not reject the Agreement but stated that he preferred a four month suspension. The

Commission approved the six month and one day suspension. Respondent had practiced law for forty years without a disciplinary action.

He agreed to represent the daughter of the deceased in the probate matter. The daughter was living in her father's home (the sole asset of the estate) at the time of his death, but she could not keep up with the mortgage payments. She needed a quick probate action that awarded the home to her because she had found a lender that would provide her with a home equity loan if the home were in her name. She gave the original will of her father to Respondent. Respondent misplaced the original will. He told the daughter that without the will he would have to file formal probate proceedings which would take 90 days and would delay her much needed home equity loan.

Respondent suggested to the daughter that they "re-execute" the will. Respondent used a copy of the will. The daughter signed her father's name and backdated the will to create the appearance that her father had signed it before he died. Respondent notarized the will and backdated the notary date to create the appearance that it had been notarized before the father passed away. Respondent filed the altered will in probate court. The grandchildren of the deceased received copies of the will and noted that their grandfather's signature was not genuine. In the interim Respondent had found the original will that he misplaced, but he did not immediately notify the Court that he had submitted a fake will.

Johnson is different from the instant case in that Respondent there did not have a prior disciplinary matter. Fortunately for Respondent in *Johnson* the grandchildren did not have any legitimate claims to the deceased's estate. In the instant case Respondent's prior disciplinary matter resulted in a six month and one day suspension. His second offense will now add an

additional year to that suspension followed by two years of probation if he is successful in being reinstated.

Finally, in *In re Brinton*, SB- 07-0153 D, Respondent altered his client's affidavit by removing several paragraphs before presenting it to the court. He did not tell his client that he had done so. There were other counts involved in the case, including a trust account violation, but the Hearing Officer and the Commission determined his misrepresentation to be the most serious. The Hearing Officer, the Disciplinary Commission and the Supreme Court accepted the agreement that Respondent be suspended for six months and one day. Respondent violated ERs 1.15, 1.6, 3.3, 8.4(c), 8.4(d) and Rules 43, 44 and 53(e), Ariz. R. Sup. Ct. There were three aggravating factors (*Standard* 9.22(a) (d) and (i)) and no mitigating factors. Brinton's mental state was knowing for the violation of ERs 1.6, 3.3, and 8.4(c) and (d) and Rule 53(e); it was negligent for the violation of ER 1.15 and Rules 43 and 44. There was the potential for serious injury. The Hearing Officer recommends that a one-year suspension, probation terms to be determined upon reinstatement, if any, and payment of all costs of the disciplinary proceedings will serve to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of our self regulated profession.

CONCLUSION

Recognizing that it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the State Bar and Respondent agree and the Hearing Officer recommends that the objectives of discipline will be met by the discipline as set forth in the Tender of Admissions, the terms of which are incorporated herein by reference, including a one year suspension, probation and payment of all costs and expenses of these proceedings.

SANCTION

The Hearing Officer recommends that a suspension of one year is appropriate. That suspension will begin at the conclusion of the six-month and one-day suspension that Respondent is currently serving in SB-09-0056-D. Respondent shall be suspended for a total of 18 months and one day, retroactive to February 1, 2009, the date that Respondent changed his membership status from active to inactive, and ceased the practice of law.

1. Should Respondent seek reinstatement following his suspension, he will serve two years of probation, with terms to be decided at the time he seeks reinstatement.
2. Respondent shall pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs and expenses incurred by the Disciplinary Commission, the Supreme Court of Arizona and the Disciplinary Clerk's Office in this matter, if any. The State Bar's Itemized Statement of Costs and Expenses is attached as Exhibit "A" and is incorporated herein by reference.
3. In the event that Respondent fails to comply with the terms of probation, and the State Bar is so informed, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5)(C), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable time, but in no event later than thirty days after receipt of notice, to determine if the terms of probation have been violated and if an additional sanction should be imposed. In a probation violation hearing, a violation must be proven by a preponderance of the evidence.

DATED this 8th day of October, 2009.

Hon. Jonathan H. Schwartz

Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 8th day of October, 2009.

Copy of the foregoing mailed
this 9 day of October, 2009, to:

Nancy Greenlee
Respondent's Counsel
821 E Fern Drive North
Phoenix, AZ 85014

Shauna Miller
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Dawn Barker

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Alan N. Ariav, Bar No. 013740, Respondent

File No(s). 08-2141 and 08-2174

Administrative Expenses

The Board of Governors of the State Bar of Arizona with the consent of the Supreme Court of Arizona approved a schedule of general administrative expenses to be assessed in disciplinary proceedings. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. * An additional fee of 20% of the general administrative expenses will be assessed for each separate file/complainant that exceeds five, where a violation is admitted or proven.

General administrative expenses include, but are not limited to, the following types of expenses incurred or payable by the State Bar of Arizona: administrative time expended by staff bar counsel, paralegals, legal assistants, secretaries, typists, file clerks and messengers; postage charges, telephone costs, normal office supplies, and other expenses normally attributed to office overhead. General administrative expenses do not include such things as travel expenses of State Bar employees, investigator's time, deposition or hearing transcripts, or supplies or items purchased specifically for a particular case.

General Administrative Expenses for above-numbered proceedings = **$1200.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges	$0.00
TOTAL COSTS AND EXPENSES INCURRED	***$1,200.00***

Sandra E. Montoya
Lawyer Regulation Records Manager

7-8-09
Date