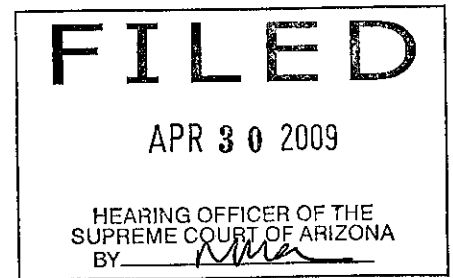


**BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
RICARDO A. BRACAMONTE,)
Bar No. 014303)
)
RESPONDENT.)
_____)

No. 08-1300

HEARING OFFICER'S REPORT



PROCEDURAL HISTORY

A Complaint was filed on December 22, 2008. The Hearing Officer was assigned on January 12, 2009. Respondent filed his Answer to the Complaint on February 4, 2009. An Initial Case Management Conference was held on February 3, 2009. Settlement Officer 6K, Philip M. Haggerty was assigned on February 9, 2009. A settlement conference was held on February 27, 2009. A Notice of Settlement was filed on April 7, 2009. A Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent were filed on April 9, 2009. The hearing was held on April 13, 2009.

FINDINGS OF FACT¹

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted on September 15, 1992.

¹ The facts are found in either the Tender of Admissions and Agreement for Discipline by Consent, the Joint Memorandum in Support of Agreement for Discipline by Consent, the transcript of the hearing, or exhibits to the hearing.

2. Respondent represented the father, Benjamin C. Camberos, in a Pima County Superior Court Family Court case numbered D20064729.
3. The foregoing case involved child custody and parenting issues.
4. A hearing had been set in the case for July 16, 2008, from 9:00 a.m. to 10:00 a.m.
5. At the 9:00 a.m. hearing on July 16, 2008, The Hon. Sarah Simmons announced that her morning calendar had cleared and asked Respondent if he was prepared to go forward with 3 hours of trial that morning.
6. Respondent answered “no”, because he had another hearing scheduled in Juvenile Court at 10:00 a.m. that very morning. Respondent also told the judge that his client had to be back that morning on a construction project. (State Bar’s Exhibit #5 – Transcript of July 16, 2008 proceeding before Judge Sarah Simmons)
7. When the July 16, 2008 hearing concluded for the day at approximately 10:00 a.m., Judge Simmons set the trial resumption for August 4, 2008.
8. Judge Simmons then asked Respondent if he would like to have the judge’s bailiff call the Juvenile Court to advise that judge that he would be late.
9. Respondent declined the offer stating, “No, Judge, I will be heading right out from here, so that’s fine.”
10. Judge Simmons checked the court calendars and discovered that Respondent was not scheduled to appear on July 16 at 10:00 a.m., in Juvenile Court.
11. Judge Simmons set an Order to Show Cause (“OSC”) for August 4, 2008, immediately before the trial was to resume, to give Respondent a chance to explain why he represented to the court that he had a Juvenile Court matter set for July 16, 2008, at 10:00 a.m. when the court’s calendar revealed no such matter.
12. Judge Simmons was concerned not only about Respondent’s candor but, also, because of the delay in a case involving custody and parenting time.

13. After receiving Judge Simmons' OSC minute entry Respondent, on July 29, 2008, self-reported to the State Bar "for making an intentional misstatement of fact to the Honorable Sarah R. Simmons . . ." (Respondent's Exhibit 1- letter to Robert Van Wyck with Judge Simmons minute entry of July 16, 2008 attached)
14. Respondent explained to the State Bar that the July 16 hearing was scheduled initially for only one hour (9:00 a.m.-10:00 a.m.) but the judge informed the parties that her morning calendar was open and that they could go for 3 hours if necessary.
15. Respondent explained further that he lied about having another item on his morning calendar.²
16. Respondent explained further that he had been having marital problems and his briefcase was stolen from his car the night before, "so I was in an emotionally frazzled state during the hearing."
17. Respondent's statement to Judge Simmons about having another matter in another court was false and he knew it was false at the time he made it.
18. Respondent admitted, "In fact, I did not have another hearing, and I stupidly misrepresented this fact to the court."
19. At the August 4, 2008 OSC hearing, Respondent apologized to the court profusely, explaining about his tenuous marriage, a fight with his wife the night of July 15, 2008, the theft of his briefcase, and stated among other things that "it was totally out of character", "it's not me", and "I want to turn my conscience before you and the whole world that I

² Paragraph 15 of the Tender of Admissions stated that in his self-reporting letter Respondent also told Mr. Van Wyck that Respondent lied when Respondent told Judge Simmons on July 16, 2008 that Respondent could not continue with the hearing that day for more than one hour because Respondent's client needed to return to work at his construction job. The letter that Respondent wrote on July 29, 2008 does not contain a statement of Respondent about his client and a need to return to a construction job. Instead in the letter Respondent only stated, "At the hearing, I misinformed the court that I could not continue to participate in the hearing because I was scheduled to appear in another matter at 10:00 am. My statement to the court was false. In fact, I did not have another hearing and I stupidly misrepresented this fact to the court." (Respondent's Exhibit #1)

made a very stupid mistake.” (Respondent’s Exhibit 2- Transcript of August 4, 2008 Order to Show Cause Hearing re: Contempt before Judge Simmons)

20. Judge Simmons expressed to Respondent that her “biggest feeling was one of disappointment, and the disappointment is because it wouldn’t be something I would expect from you.”

21. Judge Simmons held Respondent in contempt and sanctioned him \$1,000 representing opposing counsel's fees for the previous hearing and three hours of wasted hearing time on August 4, 2008.

22. Judge Simmons further expressed to Respondent that:
“and this is perhaps the most unfortunate consequence of this whole thing -- is I do not believe I have any choice except to recuse myself from further proceedings in this case. The sad part about that is, to me, and the part that, frankly, is the most difficult aspect of this case, is that it means the hearing this afternoon will be -- have to be continued once again. . . . That, to me, is the most hurtful and the direst consequence of this whole action because a little girl is being affected and a little boy is being affected. And that’s what hurts the most. However, under the circumstances, I do not believe I have an ethical choice, myself.”

CONDITIONAL ADMISSIONS

1. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER3.3(a)(1)** when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he knowingly made a false statement of fact to a tribunal.

2. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER4.1(a)** when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he knowingly made a false statement of material fact to a third person.

3. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER8.4(a)** when, by lying to the court about having a matter scheduled in

Juvenile Court at 10:00 a.m. on July 16, 2008, he committed professional misconduct by violating or attempting to violate the Rules of Professional Conduct.

4. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER8.4(c)** when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he committed professional misconduct by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

5. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER8.4(d)** when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he committed professional misconduct by engaging in conduct that is prejudicial to the administration of justice.

6. Respondent conditionally admits that there is clear and convincing evidence that he violated **ER8.4(d)** when, by causing Judge Simmons to recuse from the case, with the resultant delay in concluding a Family Court case involving child custody and parenting time, Respondent committed professional misconduct by engaging in conduct that is prejudicial to the administration of justice.

7. Respondent conditionally admits that there is clear and convincing evidence that he violated **Rule 41(c)**, Ariz.R.Sup.Ct. when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he violated his duty and obligation as a member of the State Bar of Arizona to maintain the respect due to courts of justice and judicial officers.

8. Respondent conditionally admits that there is clear and convincing evidence that he violated **Rule 41(e)**, Ariz.R.Sup.Ct. when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he violated his duty and obligation as a member of the State Bar of Arizona to employ for the purpose of

maintaining a cause confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact.

9. Respondent conditionally admits that there is clear and convincing evidence that he violated **Rule 41(g)** when, by lying to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008, he violated his duty and obligation as a member of the State Bar of Arizona to avoid engaging in unprofessional conduct.

Respondent's admissions are being tendered in exchange for the form of discipline agreed to by the State Bar, censure and two years of probation with required counseling.

CONCLUSIONS OF LAW

Respondent's admissions and the record at the Hearing support the Hearing Officer's conclusion that there is clear and convincing evidence that Respondent violated ER 3.3(a)(1) knowingly making a false statement of fact to a court, ER 4.1(a) knowingly making a false statement of material fact to a third person, ER 8.4(a) violating the rules of Professional Conduct, ER 8.4(c) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, ER 8.4(d) engaging in conduct that is prejudicial to the administration of justice (both in lying to the court and in causing Judge Simmons to recuse herself thereby delaying the case), Rule 41(c) violating his duty and obligation as a member of the State Bar of Arizona to maintain the respect due to courts, Rule 41(e) violating his duty and obligation to employ for the purpose of maintaining a cause confided to him such means only as are consistent with truth and never seeking to mislead a judge by any artifice or false statement of fact, and Rule 41(g) violating his duty and obligation as a member of the State Bar of Arizona to avoid engaging in unprofessional conduct.

RESTITUTION

There is no restitution in this matter. The record does not indicate that Respondent's client is owed any money from Respondent for attorney fees. The court sanctioned Respondent for contempt. Respondent was ordered to pay \$1000 of the attorney fees incurred by the opposing party. Respondent has paid the sanction.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and Arizona case law. 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.2d 764,770,772 (2002); *In re Rivkind*, 164 Ariz. 154,157, 791 P.2d 1037,1040 (1990). They are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those factors to situations where lawyers have engaged in various types of misconduct. *Standards 1.3, Commentary*.

In determining the 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 *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard 3.0*.

The Applicable Standard

The misconduct in this case was Respondent's lie to the court about having a matter scheduled in Juvenile Court at 10:00 a.m. on July 16, 2008. The following ethical rules are the most applicable and appropriate:

ERs 3.3(a)(1) (Candor Toward the Tribunal), 4.1(a) (Truthfulness in Statements to Others), 8.4(a) (Misconduct - violation of the Rules of Professional Conduct), 8.4(c) (Misconduct - dishonesty) and 8.4(d) (Misconduct - prejudicial to the administration of justice). These matters fit under *Standard* 6.1 False Statements, Fraud and Misrepresentation and *Standard* 5.1 Failure to Maintain Personal Integrity. The Bar and Respondent urge that the most appropriate *Standards* are

Standard 6.12:

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.

Standard 5.13

Reprimand [Censure in Arizona] is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Based upon the conditional admissions in this matter, the Bar and Respondent urge that the presumptive sanction with regard to Respondent's misconduct under *Standards* 6.12 and 5.13 is suspension or censure.

Hearing Officer's Analysis

Standard 6.11 must be addressed. It reads:

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 a significant or potentially significant adverse effect on the legal proceeding.

The Hearing Officer is concerned that Respondent intended to deceive the court into thinking he could not proceed with the three hour hearing on July 16, 2008 because he had a 10:00 am hearing in another court.

Respondent testified that the case involved mother's desire to see her daughter. The case was complicated by the fact that father was a U.S. citizen living in Tucson with the daughter and mother was not a U.S. citizen living in Mexico. At the hearing in the disciplinary matter Respondent testified that he was surprised on the morning of July 16, 2008 by the fact that mother had ten witnesses ready to testify at the hearing before Judge Simmons. (Transcript of Hearing, hereinafter "TR", page 7, line 14 through page 8, line 18, hereinafter "7:14 through 8:18", 22:13 through 23:10)

Respondent was particularly concerned that the lawyer from Mexico who would testify for mother at the hearing would convince Judge Simmons to order father to take the daughter to Mexico (Nogales, Sonora) at least for visitation. Respondent feared that because of his frazzled emotional state and the loss of his file he was not prepared to counter the testimony of a lawyer from Mexico that there would be no problem in returning the child to the United States after the visitation. Father and Respondent were worried that once the child was in Mexico they would be powerless to effect a return of daughter if for some reason mother decided not to cooperate in that return. Respondent had suggested to mother's counsel visitation for mother in Tucson, but this was not possible due to mother's status as a citizen of Mexico. (TR 7:14-22, 9:1-5, 14:14-22, 15:22 through 16:2, 18:6 through 19:12, 22:15 through 24:14, 25:18 through 26:23)

Respondent explained that he did not want to tell Judge Simmons the truth that he was not prepared because he thought that reason might not win him a continuance. Respondent feared that Judge Simmons would not have continued the remaining two hours of the hearing because mother's side had so many witnesses present. Some of the witnesses (including the

lawyer from Mexico) had travelled a long distance to testify at the hearing. (TR 8:12-18, 27:25 through 28:23)

A second area of concern is Judge Simmons' conclusion that Respondent's conduct had an effect on the case in issue. After Judge Simmons learned of Respondent's deception she not only found him in contempt and sanctioned him \$1000, but she recused herself. Judge Simmons had to set the resumption of the hearing for August 4, 2008. On that date because she recused, the judge had to reset the hearing again. All of these continuances were caused by Respondent's lie. For these reasons Judge Simmons concluded in the August 4, 2008 minute entry "...that the most hurtful and worst consequences of this action is the effect a continuance will have on the minor children." (State Bar's Exhibit 7)

The question is whether pursuant to *Standard* 6.11 disbarment should be considered if Respondent's actions can be said to have caused "...serious or potentially serious injury to a party or caused a significant adverse effect on the legal proceeding."

Judge Simmons appears to have opined that the minor children would be affected by the continuance of the hearing. A closer reading of the judge's minute entry leads the Hearing Officer to conclude that the judge was saying that there might be an effect on the minor children. The same minute entry contains the following statement: "THE COURT NOTES its concerns regarding this case, and informs counsel that the last report from Little Tree Family Services indicates that parenting time is proceeding better than it has in the past, and is hopeful that it will continue." (State Bar's Exhibit #7)

At the hearing in the disciplinary case Respondent testified that the couples' son was about one year old last summer and the daughter was two years old. There is no other information in this record that these children suffered from the continuance of the hearing in the custody and parenting time case occasioned by Respondent's conduct. (TR 14:3-11, 16:13 through 17:25)

The lie told by Respondent has not been found to have altered the result in the underlying case. First, through no effort of Respondent, Judge Simmons discovered the lie so quickly that only eighteen days elapsed between July 16 and August 4, 2008. Second, the State Bar and Respondent informed the Hearing Officer that Respondent also withdrew from representing father in the underlying case. Except for a delay in assigning another judge, father acquiring new counsel and the setting of another hearing, no other decision in the case was effected by Respondent's lie. (TR 16:4-12)

The examples cited in the commentary to *Standard* 6.11 are of a criminal defense lawyer suborning perjury, *Board of Overseers of the Bar v. James Dineen*, 481 A.2d 499 (Maine 1984) and a lawyer facing personal garnishment lying in a sworn affidavit that the money in his checking account belonged to clients and could not be garnished, *Office of Disciplinary Counsel v. Grigsby*, 493 Pa. 194, 425 A.2d 730 (1981). Respondent's deception in the instant case was not about the merits of the controversy but was a tactic to gain him time to prepare.

Standard 6.12 does not completely fit the facts of Respondent's matter, but it comes closer than any other *Standard*. Respondent knew that false information was being submitted to Judge Simmons and he took no action to remedy the falsehood (before it was discovered by Judge Simmons). Respondent knew that Judge Simmons was so taken in by his lie that after one hour had elapsed in the July 16, 2008 hearing and it was 10:00 am the judge offered to call the Juvenile Court judge (where Respondent was allegedly to appear) to assist Respondent so he would not be blamed for being late to court. The Judge's consideration for Respondent was not reciprocated by Respondent confessing his lie. Instead he deceptively declined the judge's gracious offer of help with a repetition of his lie, "THE COURT: Mr. Bracamonte, because we still have not finished the hearing, do you need Mr. Wagner to call the judge at Juvenile Court in another case? MR. BRACAMONTE: No, Judge. I will be heading right out from here. So that's fine." (State Bar's Exhibit #5)

A. The duty violated

As described above and in the accompanying Tender, Respondent violated rules relating to candor and honesty. For the purposes of this agreement, Respondent admits and the Hearing Officer finds that he violated duties owed to the public and the legal system. As an officer of the court Respondent should uphold the values of truth. He denigrates the court and the system in the eyes of his client and the opposing party when he lies to the judge for his own advantage. His reputation and the reputation of all lawyers for truthfulness suffer when by lying he fosters the impression that lawyers will bend the truth to win.

B. The lawyer's mental state

The parties agree and the Hearing Officer finds that Respondent's conduct was "knowing".

C. The extent of the actual or potential injury

The parties agree and the Hearing Officer finds that Respondent's conduct in this matter caused actual harm to the parties in the underlying litigation in the form of a delay in the proceedings, the judge's recusal and Respondent's withdrawal as counsel of record. However the Hearing Officer finds that the record does not contain information as to how the children were specifically harmed by the delay.

D. The aggravating and mitigating circumstances

Aggravating Factors:

Standard 9.22(a), prior disciplinary offenses (censure and probation in a 3-count Complaint in 2007, File Nos. 06-0484, 06-0722 and 06-1261, for violating ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(d), 3.2, 5.3 and 5.5); Respondent in count one failed to have a contingent fee agreement in writing, failed to act with reasonable diligence and promptness in representing

a client, failed to keep the client reasonably informed of the status of her case, failed to take reasonable steps to expedite the litigation and negligently supervised a non-lawyer who worked in Respondent's office and performed activities in this case that constituted the unauthorized practice of law. In count two (a divorce case) Respondent again failed to have a written fee agreement with a different client, and failed to provide the client with an accounting of how the client's \$5000 was expended. In this count Respondent admitted that he violated ER 1.2 failing to abide by a client's decisions concerning the objectives of representation, ER 1.5 failing to have a fee agreement in writing, ER 1.15 not safekeeping client property, and ER 1.16(d), terminating representation without following the appropriate procedures. In count three (a criminal matter) Respondent had a written fee agreement committing Respondent to reducing the fee by \$2500 if the defendant did not go to trial. After the defendant pled guilty and sought a refund Respondent initially refused to refund the \$2500. Once again Respondent asserted that he failed to memorialize a verbal agreement the defendant made after Respondent visited his client who was in custody. Respondent alleged that the client verbally agreed that Respondent should apply the \$2500 in question toward the trial preparation work that Respondent performed after the defendant initially rejected a plea offer. About **four** months after the defendant filed a complaint with the Bar Respondent refunded the \$2500.

The Hearing Officer has several concerns. The current case is Respondent's second matter with the disciplinary process within two years. In the previous disciplinary matter the Hearing Officer listed three aggravating factors, a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. The four mitigating factors were absence of

a prior disciplinary record, absence of a dishonest or selfish motive, timely good faith effort to make restitution, and full and free disclosure to disciplinary board. In the current disciplinary matter the first two mitigating factors are now aggravating factors. In the prior disciplinary matter Respondent received a censure and was placed on probation for two years. Therefore Respondent was on probation on July 16, 2008 when Respondent lied to the court in the current disciplinary matter. (TR 32:9 through 36:2, 37:32 through 39:12)

Bar counsel in the current matter did not know at the hearing whether he was required to begin a procedure concerning a violation of that probation by Respondent's admitted unethical conduct in the current matter.³ (TR 37:23 through 39:12) Counsel for Respondent asserted that the prior disciplinary matter was not part of a pattern of misconduct with the current disciplinary case. Respondent's counsel argued that the previous discipline case involved basically negligent housekeeping. The current case involves deliberate lying to the court. (TR 44:1 through 45:17) The Hearing Officer agrees with the argument of Bar Counsel that although the two disciplinary matters are factually different they both involve Respondent violating the rules of professional conduct. However the sanctions proposed by the parties in the current matter are appropriate for the circumstances of Respondent. His lie to the court was serious in that it delayed a very important proceeding. Respondent reported himself to the Bar and admitted his falsehood in the contempt hearing before Judge Simmons. Judge Simmons ordered Respondent to pay a \$1000 sanction which he has paid.

³ The Hearing Officer's Report in Respondent's prior matter (File Nos. 06-0484, 06-0722, 06-1261) was filed on June 25, 2007. It contained the recommendation for censure and probation. At page 22 of the report the Hearing Officer stated: "In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the disciplinary clerk."

The consequence for his conduct in the current case will be in addition to the finding of contempt and the \$1000 sanction issued by Judge Simmons.

The previous probation will now be extended by another two years. Respondent has maintained regular counseling on a weekly basis. The extension of probation will require Respondent to continue this counseling. In addition Respondent will be suspended from the practice of law for 30 days. (TR 38:19 through 39:12)

Standard 9.22(b), dishonest or selfish motive; Respondent told the lie to get out of having to put on the evidentiary hearing in a very hotly contested case involving child custody and parenting issues because Respondent was not prepared. (TR 56:23 through 58:14)

Standard 9.22(h), vulnerability of victim; Respondent was representing the father in the family court matter. Father was a United States citizen living with the couple's two year old daughter in Tucson. Mother was not a U.S. citizen and was living in Mexico with the couple's one-year old son. At the hearing of July 16, 2008 mother was seeking visitation in Nogales, Sonora, Mexico with the couple's daughter. A complicating factor was that mother could not come into the United States to exercise her parenting time and father was afraid that if his daughter was sent to Nogales, Sonora he might not be able to get her back. (TR 26:24 through 27:24) When Respondent's lie forced the judge to recuse herself and Respondent to withdraw the resolution of these difficult custody and parenting time issues was delayed. The most vulnerable victim would be the two year old daughter who was not seeing her mother in the summer of 2008.

Standard 9.22(i), substantial experience in the practice of law. Respondent has practiced law since 1992.

Mitigating Factors:

Standard 9.32(c), personal or emotional problems. Respondent experienced marital difficulty for several years which was an ongoing source of stress. (TR 50:16-23) The evening before his misconduct, his briefcase containing valuable and important documents and exhibits was stolen from his car necessitating involvement with the police and a late night at his office to reproduce documents. This triggered another fight with his wife. By the time Respondent appeared in court before Judge Simmons in a case that already was a source of anxiety given its high profile in the local media, he was emotionally “frazzled”. Respondent’s counselor, Amy Shiner, has diagnosed Respondent as suffering from an Adjustment Disorder. (See Respondent’s Exhibit 4 to the Hearing)

Standard 9.32(d), timely good faith effort to make restitution or to rectify consequences of misconduct. Respondent self-reported his misconduct to the State Bar shortly afterward. He apologized to Judge Simmons and all parties, and paid court-imposed sanctions immediately. (Respondent’s Exhibit 1 to the Hearing)

Standard 9.32(e), full and free disclosure to a disciplinary board or cooperative attitude toward proceedings. Respondent has cooperated fully with the Bar investigation. He has candidly admitted his unethical conduct. He has provided the Bar proof of his contact with the police about his stolen briefcase and proof of his counseling (he gave the Bar the counselor’s notes). In the Hearing he made no attempt to minimize or rationalize his conduct.

He impressed the Hearing Officer as a person who has confronted his mistake and is taking practical steps (regular counseling) to make sure that he never commits unprofessional conduct again. (TR 49:11 through 51:23)

Standard 9.32(k), imposition of other penalties or sanctions; The court imposed a \$1,000 sanction which Respondent paid. The court found Respondent in contempt.

Standard 9.32(l), remorse; Respondent's action of acquiring counseling on a regular basis impresses the Hearing Officer that he is sincerely remorseful for his conduct. He did not simply obtain an assessment of his "problem", but he has taken the extra step of meeting with his counselor once each week since September 2008. Respondent reported himself to the Bar. Respondent consistently admitted his lie to Judge Simmons, to the Bar and in the Hearing. (TR 31:3-25)

PROPORTIONALITY

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. *See Peasley*, 208 Ariz. at 35, 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.*, 208 Ariz. at 41, 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 cases set forth below demonstrate that a 30-day suspension with probation and costs is an appropriate sanction in this matter.

In re: Macpherson, SB-08-0079-D (2008). Respondent was less than candid with the judge in representing that he had a doctor's appointment and was not available to appear in

court when his client was being called as a witness in a murder-for-hire prosecution. Respondent told the court that he had a doctor's appointment at the time of the witness' testimony a Wednesday at 1:30 pm. The judge remembered that Respondent had a regular golf tee time at the Tucson Country Club every Wednesday afternoon. On the afternoon of the witness' scheduled testimony the judge instructed her assistant to contact the Country Club to see if Respondent was playing golf. The Club reported that Respondent's golf group teed off at 12:30 pm and Respondent was with them. He would be finished at 4:30 pm. The involved ERs were 3.3(a), 8.4(c) and 8.4(d). The result was an agreement for a **30-day Suspension and one year of probation** (LOMAP including four hours of ethics). In the Tender of Admissions the parties cited the following aggravating and mitigating factors; in aggravation: 9.22(b) dishonest or selfish motive, (g) refusal to acknowledge wrongful nature of conduct and (i) substantial experience in the practice of law, in mitigation: 9.32(a) absence of prior disciplinary record(one remote informal reprimand in 1989), (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, (l) remorse and (m) remoteness of prior offenses. The mental state was "knowing" and there was a potential injury.

In re Brinton, SB-03-0154 D (2004). Mr. Brinton received a **30-day suspension** and **two-years of probation** for violating Ariz.R.Sup.Ct., Rule 42, ERs 1.2, 1.3, 1.4, 1.15, 3.3, 4.1, 8.4(c) and 8.4(d), and Rules 41(c) and 43(d), Ariz.R.Sup.Ct. In count one Brinton made a false statement to a tribunal, failed to be truthful in statements made to others, and engaged in conduct involving a misrepresentation. Respondent representing plaintiff filed a stipulation with the court that he altered to make it appear as if defendant's counsel had agreed to an amended complaint adding seven plaintiffs. One aggravating factor was found

to exist: substantial experience in the practice of law. There were five mitigating factors found: no prior disciplinary record, no selfish or dishonest motive, personal or emotional problems, full and free disclosure and cooperation throughout the disciplinary proceedings, and remorse.

In re Coffee, SB-01-0095-D (2001). Mr. Coffee was found to have willfully failed to update his pleadings relating to his spousal maintenance reduction request and supporting financial affidavit when he told the Judge that there were no additional financial assets not listed. In fact, he had \$50,000.00 in an out-of-state bank account. Coffee received a **30-day suspension** for violating Ariz.R.Sup.Ct., Rule 42, ERs 3.3, 4.1 and 8.4(c) and (d). Two aggravating factors were found to exist: dishonest or selfish motive and substantial experience in the practice of law. Two mitigating factors were found: absence of a prior disciplinary record, and a delay in the disciplinary proceedings.

Matter of Linda Hansen, No. 93-0417. Ms. Hansen agreed to a **Censure** prior to issuance of a formal complaint, which was upheld. She was a city prosecutor assigned to a DUI case the day of trial. Shortly before trial, she spoke to the victim of the accident and, believing that the defendant would enter into a plea agreement or that the judge would begin jury selection the following day, told the witness she could leave (which the latter did). The judge, however, then announced that the trial would begin, so Hansen told the judge she was not ready to proceed because the victim witness was not present. She did not tell the court or defense counsel that the witness had been present earlier and that she told the witness she could leave. When asked by the judge if she had heard from the witness that day, Hansen said no. When the judge asked her to look for the witness, Hansen looked for her in the

hallway, then attempted to call her, but received no answer. In her log, Hansen wrote that the witness “had not yet arrived”, “need to call witness”, “not able to locate witness”, “can’t find witness”. On a defense motion, the court dismissed the case without prejudice. Hansen told her supervisor that she dismissed the case because the victim witness failed to appear. That same day, she resigned from the prosecutor’s office. The charges later were refiled. Relevant ERs were 1.3 (reasonable diligence), 3.3(a)(1) and 4.1(a) (knowingly make false statements of material fact or law to a tribunal or third person) and 8.4(a), (c), and (d) (violating rules of professional conduct, engaging in conduct that involves dishonesty, deceit, or misrepresentation and that is prejudicial to the administration of justice). There was one aggravating factor-dishonest or selfish motive (lying to court to cover up her error in prematurely releasing her witness). Numerous mitigating factors included no prior disciplinary record, remorse, full and free disclosure, full cooperation, inexperience, and resignation from her job.

RECOMMENDATION

The Hearing Officer recommends that the agreement for a 30 day suspension followed by two years of probation be accepted. The probation will include M.A.P. terms and a specific requirement that Respondent continue with his regular counseling. The most disturbing aspect of this matter is that Respondent was on probation for another violation of the Rules of Professional Conduct when he lied to Judge Simmons. Respondent did not present false evidence to the court in an attempt to affect the result in the case. His conduct in lying to buy himself time to prepare is reprehensible. However the recommended sanction is appropriate to deter both the Respondent and other counsel from similar misconduct. The

sanction will serve to protect the public and the legal system because it will alert Respondent to the necessity of conforming his practice to the rules of professional responsibility. Respondent's prior disciplinary matter resulted in censure and probation. His second instance of misconduct will now result in a 30 day suspension from the practice of law and an extended probationary period. Respondent should now understand that he should not be in the disciplinary process again.

SANCTIONS

Respondent and the State Bar agree and the Hearing Officer recommends that the following disciplinary sanctions shall be imposed:

1. Respondent will receive a 30-day suspension;
2. Respondent shall be placed on probation for 2 years under the following terms and conditions:
 - a. Respondent shall contact the director of the SBA's Member Assistance Program ("MAP") within 30 days of the date of the final judgment and order;
 - b. The MAP director shall develop written "Terms and Conditions of Probation" the terms of which shall be incorporated herein by this reference;
 - c. The Terms of Agreement of Probation shall, among other things, require that Respondent continue with regular psychological counseling for the duration of his probation;
 - d. Payment of the costs and expenses of the disciplinary proceedings;
 - e. The probation period will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation."
 - f. Respondent shall be responsible for any costs associated with MAP.

g. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

i. In the event that Respondent fails to comply with any of the foregoing probation terms, and the State Bar receives information thereof, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days following receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence⁴.

3. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding, as provided in the State Bar's statement of costs and expenses, attached hereto as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter.

DATED this 30th day of April, 2009.

Jonathan H. Schwartz / NIM
Jonathan H. Schwartz
Hearing Officer 6S

⁴ The burden of proof in a probation violation hearing has been changed effective January 1, 2009 Rule 60(5)(C) now requires the State Bar to prove a violation of probation by a preponderance of the evidence. In the Tender the parties stated the burden of proof as clear and convincing evidence. After the hearing, the Hearing Officer contacted counsel for the parties. Counsel stipulated that the Hearing Officer could amend the Tender to reflect the changed burden of proof to a preponderance of the evidence.

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

Copy of the foregoing mailed
this 1st day of May, 2009, to:

David L. Sandweiss
Staff Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288

Stephen G. Montoya
Montoya Jimenez PA
3200 North Central Avenue, Suite 2250
Phoenix, Arizona 85012-2490
Counsel for Respondent

by: Evelyn Liza

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
84

File No(s). 08-1300

The Board of Governors of the State Bar of Arizona has adopted a schedule of administrative expenses to be assessed in disciplinary proceedings, depending on at which point in the system the matter concludes. 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 administrative expenses is also assessed for each separate matter over and above five (5) matters due to the extra expense incurred for the investigation of numerous charges.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

General Administrative Expenses for above-numbered proceedings = \$600.00

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.

Total for staff investigator charges	\$0.0
--------------------------------------	-------

TOTAL COSTS AND EXPENSES INCURRED **\$600.00**


Sandra E. Montoya
Lawyer Regulation Records Manager

4-7-09
Date