BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JOSEPH W. CHARLES,** **Bar No. 003038** RESPONDENT.	)	No. 07-0302, 07-1663, 08-0478 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A Complaint was filed on December 30, 2008. The Hearing Officer was assigned on January 13, 2009. An Initial Case Management Conference was held on January 26, 2009. Respondent filed an Answer on January 28, 2009. A Settlement Officer, Richard Goldsmith, was assigned on February 3, 2009. A settlement conference was held on March 6, 2009. The matter did not settle. Respondent filed a Motion to Compel on January 28, 2009. The State Bar responded on February 3, 2009. Respondent replied on February 9, 2009. The Hearing Officer denied the Motion to Compel on February 11, 2009. Respondent filed a Motion to Dismiss on February 4, 2009. The State Bar responded on February 25, 2009. The Respondent replied on March 5, 2009. The Hearing Officer denied the Motion to Dismiss on March 9, 2009. The hearing was held on April 14 and 15, 2009.

FINDINGS OF FACT

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 September 23, 1972.

COUNT ONE (File no. 07-0302/Moore)
Ray Grim and Kelly Moore, DR 1999-070002

2. On or about September 2002, Ray Grim retained Respondent to represent him in a marriage dissolution action.

3. The Court ordered a status conference to be held on Tuesday, October 31, 2006, in front of the Honorable Jose Padilla, Superior Court Judge in the Northwest Judicial District in Surprise.

4. Kelly Moore and her attorney, Charles Kellers ("Mr. Kellers"), appeared at the hearing. Respondent and his client, Raymond Grim did not.

5. The Court directed Mr. Kellers to file a *China Doll* affidavit for attorney's fees and costs with regard to his preparation and appearance at the October 31 hearing.[1]

6. Mr. Kellers filed his Affidavit with the Court on or about November 6, 2006.

7. Respondent filed a Motion for Reconsideration (First Motion for Reconsideration) on November 13, 2006. In that motion, Respondent claimed he contacted Mr. Kellers' office on Friday, October 27, 2006 and faxed a copy of a Motion to Continue the October 31, 2006 status conference to Kellers' office.

8. At the status conference the Court heard argument concerning the issue and on November 17, 2006, issued a judgment against Respondent in the amount of $720.00 for Mr. Kellers' attorney's fees, denying Respondent's First Motion for Reconsideration.

9. On March 31, 2007 Mr. Kellers sent a final demand letter to Respondent, as the judgment had not been paid.

10. Respondent filed another Motion for Reconsideration (Second Motion for Reconsideration) concerning the judgment, on November 30, 2006. On April 10, 2007, the Court affirmed the November 17, 2006 judgment.

11. Respondent paid the judgment on April 19, 2007.

---

[1] *Schweiger v. China Doll Restaurant Inc.*,138 Ariz.183, 673 P2d. 927 (App. 1983). The opinion required any party seeking an attorney fee award to file a detailed affidavit setting forth the agreed hourly billing rate for each attorney working on the case and a description of each task performed along with the time spent on each specific task.

12. Respondent testified that he learned on Friday October 27, 2006 that a criminal case in which he was counsel for the defendant had been assigned through the Superior Court's (Maricopa County) criminal case transfer system to a judge for trial to begin Monday October 30, 2006. (TR 459:23 through 460:6) Therefore, Respondent would not be able to attend the status conference before Judge Padilla on Tuesday October 31, 2006. Respondent had his office staff contact Judge Padilla's staff and notify the Court that Respondent would be filing a Motion to Continue the October 31, 2006 status conference. (TR 460:7-13) Judge Padilla's assistant told Respondent's staff that Respondent (or his staff) was to contact the opposing counsel Mr. Kellers to alert Mr. Kellers and his client Ms. Kelly Moore that they need not drive to Surprise for the October 31 conference due to the continuance. (Exhibit 1, Bates stamp SBA000001)

13. **ISSUES: After Respondent was sanctioned by Judge Padilla for not notifying the opposing counsel that the status conference would be continued were Respondent's two Motions for Reconsideration non-meritorious, or were they filed for the sole purpose of delay, or did the motions prejudice the administration of justice? Did Respondent fail to cooperate with the State Bar's requests for information?**

14. The answer to these questions depends somewhat on the facts of Respondent's efforts to notify opposing counsel of Respondent's need to continue the October 31, 2006 conference. Respondent testified that he personally called Mr. Kellers' office on Friday October 27, 2006. (461:10 through 462:7) The Hearing Officer finds that this did not occur. Mr. Kellers testified that he received no notice that Respondent would not be able to attend the status conference. (TR 64:15-24) In the evening of Monday October 30, 2006 Mr. Kellers left his office before 5:19 pm. In the morning of Tuesday October 31, 2006 Mr. Kellers drove straight

from his home in Scottsdale to the Northwest Judicial District in Surprise without going to his office. (TR 56:18-22) If he had gone to his office that morning he would have heard a message on his voicemail from Respondent's staff (placed there on Monday evening at about 5:19 pm) informing him of the continuance of the status conference. (TR 57:25 through 58:8)

15. Respondent insisted in his testimony before Judge Padilla that he personally called Mr. Kellers. Respondent persisted in this recollection even after Judge Padilla had rather generously told Respondent that the judge was not blaming him personally for the failure of notification, but was allowing that sometimes office staff members don't do what they are told to do. (Exhibit 5, Bates stamp SBA000017) The reason the Hearing Officer does not find that Respondent personally left a message about the continuance on Friday October 27, 2006 for Mr. Kellers is that Mr. Kellers and his client would not have travelled the long distance to Surprise on Tuesday October 31, 2006 if they had known the Friday before that the conference would have to be continued. (TR 73:19) If Respondent was not sure that he had personally called Mr. Kellers he should not have stated that as a fact before Judge Padilla and he should not have specifically referred to himself as the source of the phone call in his First Motion for Reconsideration. (Exhibit 3, Bates stamp, SBA000009)

16. The Hearing Officer concludes that Respondent has far too many cases in litigation. He has overworked himself to the point that it is difficult for his staff to coordinate all his Court appearances. When he gets in trouble for not communicating about his calendar conflicts he is too quick to avow that he personally called an opposing counsel with notice. If Respondent had taken the time to sit at a computer and create an email message to Mr. Kellers, then he would have had a record to confirm that he gave notice. He did not use the email in this incident because he was simply too busy.

17. He testified that he left instructions for his staff on Friday, October 27, 2006 to begin notifying Courts and opposing counsel of the conflicts created in a number of his cases during the week of October 30, 2006 by the quick scheduling of the criminal trial. To his credit his staff did notify Mr. Kellers. But the telephone message from Respondent's staff to Mr. Kellers was dangerously late, at 5:19 pm on the evening before the morning hearing in Surprise. (TR 73:10) Because Mr. Kellers lives and works so far from Surprise he had a long drive on Tuesday morning to the Court. It was reasonable for him to leave his office before 5:19 pm on Monday evening and not to go into the office Tuesday morning before such a long trip to Court.

18. Respondent has so overloaded himself and his office staff with work that the staff's attempt to notify Mr. Kellers was at the eleventh hour. It was made so late that there was no margin for error. If Respondent continues to practice this way he will probably encounter problems such as in this case. He will be in trouble with judges and opposing counsel. He and his staff will be under unnecessary stress.

19. On cross-examination by Bar Counsel Respondent stated that he had as of November, 2008, 365 Family Court matters. Of these, 50 to 75 were active cases. He had 30 personal injury cases, 12 criminal cases, 25 to 30 bankruptcy cases and 12 probate cases. He has only one other lawyer working with him as an associate, John Orile. Mr. Orile works on the personal injury cases, but if one of the cases goes to jury trial only Respondent will handle the trials. (TR 542:7 through 547:4) During the hearing Respondent testified that in 2006 he was in jury trial in 12 cases. (TR 458:22) This is a very high number of trials in a calendar year for one lawyer.

20. A closer look at the information provided by Respondent about his practice reveals that his work is very much in Court. Criminal, Family and Personal Injury cases involve more Court appearances than commercial matters, drafting leases and documenting and negotiating commercial transactions. Respondent is free to select the areas of practice he will conduct, but he must be able to support the work. He stated he has two assistants in family law matters, two in bankruptcy and one in litigation. His assistant handling criminal matters, Gabby, worked only part-time in 2006 with hours from 2:00 pm to 6:00 pm. (TR 59:23 through 460:3) Respondent testified that when he asked his staff to notify other Courts and counsel in the week of October 30, 2006 that he would be in trial in the criminal case, the staff would be contacting Courts in six to twelve other cases for just four days of the week. (TR 460:7-24) Another assistant (an accounting clerk) had left the firm in late 2007. Her position was unfilled for four months. (Exhibit 22) Respondent provided the Hearing Officer with Exhibit AA, AG which is a listing of Family Court filings in Superior Court Maricopa County from 2000 through six months of 2004, sorted by the attorney who filed the matter. Respondent is at the top of the list (of 650 lawyers) with 384 total filings.

21. On October 31, 2006, when Judge Padilla learned that Mr. Kellers and his client Kelly Moore had not been notified of Respondent's Motion for Continuance, Mr. Kellers told the judge of Mr. Kellers' intention to file a motion for attorney fees. Judge Padilla told Mr. Kellers to skip the filing of a motion for attorney fees and directed Mr. Kellers to merely file a China Doll affidavit. (TR 58:9-15) Therefore Judge Padilla eliminated the Respondent's opportunity to respond in writing to a request for attorney fees as a sanction. (TR 59:23 through 60:4) Respondent's First Motion for Reconsideration was filed on November 13, 2006. (Exhibit 3) Respondent filed the motion in response to Judge Padilla's minute entry of October 31, 2006

in which the judge basically stated his conclusion that an attorney fee sanction was warranted. (State Bar's Exhibit 2)

22. Mr. Kellers filed the attorney's fees affidavit on November 6, 2006. (Exhibit 6, Bates stamp SBA000020) Respondent in the First Motion for Reconsideration argued that he should not have been sanctioned with attorney's fees when Respondent and Respondent's office attempted to advise the Court and opposing counsel of the need to continue the October 31, 2006 status conference. (Exhibit 3)

23. Respondent's First Motion for Reconsideration of November 13, 2006 was therefore in the nature of a response to Mr. Kellers' request for attorney's fees. The First Motion for Reconsideration was not filed for delay or to prejudice the administration of justice. If Judge Padilla had required the filing of a motion for attorney's fees Respondent would have had the opportunity to argue his position that the judge should not sanction him.

24. The Hearing Officer finds that Respondent believed that his office staff attempted to advise the Court and opposing counsel late on Friday, October 27, 2006. Respondent may have also believed that he left a message for Mr. Kellers' office on Friday, October 27, 2006. Even though it appears Respondent did not personally make that phone call the evidence shows that he instructed his staff to notify Mr. Kellers. Therefore the Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that the First Motion for Reconsideration had no merit, was filed for the purpose of delay and prejudiced the administration of justice.

25. On November 17, 2006 Judge Padilla conducted a telephonic conference relating to Mr. Kellers' request for sanctions. (Exhibit 5) After listening to the arguments of both Respondent and Mr. Kellers the judge sustained the attorney fee sanction and decided that

the amount of $720 requested by Mr. Kellers was appropriate. In the First Motion for Reconsideration Respondent had not addressed the amount of the sanction. Instead Respondent was attempting to convince Judge Padilla not to sanction him.

26. On November 17, 2006 Judge Padilla signed a judgment for $720 to be paid by Respondent to Mr. Kellers and his client Kelly Moore. (Exhibit 7) On November 26, 2006 Mr. Kellers sent a letter to Respondent demanding payment of $720 plus interest of $2.96 for a total of $722.96. (Exhibit 8) Respondent filed the Second Motion for Reconsideration on November 30, 2006. (Exhibit E) Respondent attached to the motion a Motion to Accelerate. The Second Motion for Reconsideration stated, "This Motion for Reconsideration is not in regard to the finding of sanctions but, rather the amount imposed." Respondent merely argued that he should not be sanctioned for a portion of the $720. Respondent thought that he should not be charged with time Mr. Kellers spent preparing for the Status Conference because issues that were to be addressed at the October 31, 2006 conference were handled in the November 17, 2006 conference. The Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that the Second Motion for Reconsideration lacked merit, was filed for the purpose of delay and prejudiced the administration of justice.

27. Respondent wanted a ruling on the amount of sanctions quickly because Mr. Kellers had told Respondent that interest was accruing for each day that the judgment was not paid in full. (Exhibit 8, November 26, 2006 letter from Charles Kellers to Respondent) For this reason Respondent filed the Motion to Accelerate the judge's ruling on the Second Motion for Reconsideration. (TR 467:9 through 468:5) The record before this Hearing Officer reflects that the delay in the judge's ruling on the Second Motion for Reconsideration (April 10, 2007 – Exhibit G) was not caused by Respondent. Apparently the judge's staff or the judge had lost

track of the Second Motion for Reconsideration. (TR 70:9-18) Neither Respondent nor Mr. Kellers contacted Judge Padilla's staff to inquire about a ruling on the Second Motion for Reconsideration. (TR 71:18 through 72:6; 469:11through 470:24)

28. When the judge issued the minute entry of April 10, 2007 denying the Second Motion for Reconsideration he did not refer to that motion. He indicated that he had reviewed, "Petitioner's Motion for Expedited Ruling, filed on or about April 5, 2007." (Exhibit G) Both Respondent and Mr. Kellers agree that Respondent's Motion for Expedited Ruling was filed on November 30, 2006. Neither Respondent nor the State Bar was able to present to the Hearing Officer any Motion for Accelerated Hearing filed on April 5, 2007. The judge simply denied "Petitioner's motion". The parties treated this ruling as denying the Second Motion for Reconsideration.

29. On March 31, 2007 Mr. Kellers sent Respondent another letter demanding payment on the attorney fees judgment of $720 plus interest of $29.40 for a total of $749.40. (Exhibit 16) After the judge denied the Second Motion for Reconsideration, Respondent paid the judgment on April 19, 2007. The Hearing Officer finds that the record does not contain proof by clear and convincing evidence that Respondent filed the Second Motion for Reconsideration for purposes of delay and to burden the opposing party or to prejudice the administration of justice. The Respondent had an economic interest in a quick ruling on the motion (not paying interest on the judgment).

30. The Second Motion for Reconsideration was not without merit. It simply challenged the amount of the sanction and did not repeat the more extensive argument of the First Motion for Reconsideration that no sanction was warranted. These are two distinct arguments; one about the merits of the sanction itself and the other about the amount of the

sanction. Although the two issues can be raised in the same motion they do not necessarily have to be in one motion. Respondent was not seeking to delay the proceedings with the Second Motion for Reconsideration because he filed it quickly after the First Motion (First Motion filed November 13, 2006, Second Motion filed November 30, 2006) and filed a Motion to Accelerate Ruling on the Second Motion contemporaneously with the Second Motion.

31. Since in Count One the Bar has included two matters under File number 07-0302/Moore, 1) Ray Grim and Kelly Moore, DR 1999-070002, and 2) Kim McIntosh and Don Moore DR 1995-007273, the Hearing Officer will address the allegations of Respondent failing to cooperate in both matters of Count One with the Bar's requests for information at the end of the next section on Kim McIntosh and Don Moore DR 1995-007273.

Kim McIntosh and Don Moore, DR 1995-007273

32. In or around November 2005, Respondent was retained by Kim McIntosh ("mother") to represent her in post decree matters involving her former husband, Don Moore ("Mr. Moore" and "father").

33. On January 13, 2006 Respondent on behalf of Mother filed a Petition for Order to Show Cause re: Modification of Access Time and Child Support. (Exhibit 12, Father's Response to Motion for Contribution toward Attorney's Fees) Rule 91(D) of the Arizona Rules of Family Law Procedure required that within 120 days the party filing such a motion must file a Request for Ruling. If no such request is filed in 120 days the Petition will be deemed abandoned.

34. In a minute entry of May 18, 2006 the Court found that Mother's Petition to Modify Custody was not at issue because of Mother's failure to timely request a ruling. At an

evidentiary hearing on August 17, 2006, Respondent on behalf of Mother made an oral request for a modification of child support. The Court denied the request and told Mother to file another Petition to Modify Child Support if she wished to have her request heard. The Court determined that Mother's other motions about whether the couple's 15 year old son wanted to visit his Father anymore were motions related to the January, 2006 Petition and therefore were not at issue for the failure of Mother to comply with Rule 91(D). (Exhibit 12, Bates stamp SBA000049)

35. However the Court realized that the parents needed help. The Court appointed Muriel McClellan as the Parenting Coordinator. Mother filed a Motion to Modify Parenting Time on July 17, 2006. (Exhibit 12) It was at the August 16, 2006 evidentiary hearing on Mother's Motion to Modify Parenting Time that Respondent made the oral motion referred to in Paragraph 34 above. (Exhibit 12)

36. Mr. Kellers represented Mr. Moore in the post decree matters, including child support and parenting time issues.

37. On or about August 18, 2006, Respondent filed a Motion to Modify Child Support on behalf of Mother. Mother sought $912 per month for child support. Father opposed this motion. (Exhibit 12)

38. The parties appeared for a Support Conference with Expedited Services on November 16, 2006. At that time the parties reached agreement on all issues except for the effective date of the modification of child support. (Exhibit 12)

39. It was agreed at the meeting with Expedited Services that Father would pay Mother child support in the amount of $535.27 per month based upon a gross monthly income

of $4,558.00 for the Father, and a gross monthly income of $3,551.00 for the Mother. (Exhibit 12)

40. Following this conference the parties appeared before Commissioner Hugh Hegyi who, after oral argument, agreed with Father's position as to the effective date of the modification. The modification was set to begin in September 2006. (Exhibit 12)

41. Respondent then filed a Motion for Contribution of Attorney's Fees on behalf of Mother on or about November 29, 2006. Respondent was seeking the amount of $14,588.50 from January 2006 through November 2006. In this document, Respondent attached a copy of the front page of Father's 2005 income tax statement and alleged that Father had a yearly income of $210,081.00. (Exhibit 9)

42. **Issues: Did Respondent in the Motion for Contribution of Attorney Fees a) make claims that were not meritorious (ER 3.1), b) make false statements to the Court (ER 3.3), c) engage in conduct with no other purpose than to delay or burden another person (ER 4.4), d) engage in conduct that involved dishonesty, fraud, deceit or misrepresentation (ER 8.4(c), and e) engage in conduct that was prejudicial to the administration of justice (ER 8.4 (d))?**

43. In the Motion for Contribution Respondent made two statements that the Bar asserts are arguably false. (TR 429:11 through 440:4) In the Joint Pre-Trial Statement the State Bar alleged only that the second statement (using Father's 2005 joint tax return and characterizing it as "yearly income") was the basis for the above-referenced misconduct. First, Respondent stated, "Additionally the Father objected to Mother's request for child support and at the child support hearing it was found that the Mother's income was as originally submitted

by the Mother in addition to Father's access time with the parties (sic) son in accordance with the Petition filed by the Mother". (Exhibit 9 page 1 line 27 through page 2, line 2)

44. The second statement was, "Father additionally has a family business inheritance from which he receives monies as evidenced by the attached 2005 tax return wherein it is report (sic) he has a yearly income was (sic) $210,081". (Exhibit 9, page 3, lines 11-13)

45. In the first statement the words "it was found" are misleading. These words infer that after a hearing mother (Respondent's client) won the issue (of her income for child support purposes) when the judicial officer "found" for her. There was no real "hearing" on the issue of the amount of child support. The parties attended a conference with Expedited Services with a conference officer (not a judicial officer) where they were encouraged to agree on child support. If they could not have agreed on the amount of child support they would have seen a Commissioner immediately who would have made a finding on that contested issue. Mother originally requested $912 per month for child support. However, at the conference Father agreed to a figure for mother's income ($3551/month) and Mother agreed to a figure for Father's income ($4558/month) and agreement was reached on Father paying child support of $535.27 per month.[2] The parties presented that agreement to Commissioner Hugh Hegyi on the same day November 16, 2006. (TR 74:12 through 76:12)

46. The only contested issue that the Commissioner heard was the effective date for the modified amount of child support. The parties were not able to agree on that issue at the conference. Mother argued for an effective date of February 1, 2006. Father argued for an effective date of September 1, 2006. The Commissioner "found" for Father. (TR 74:21 through

[2] Mother listed her monthly income on her child support worksheet (filed August 18, 2006) as $3750. Her affidavit of financial information filed with her August 18, 2006 Petition to Modify Child Support listed her gross wages as $2070/month and her total income as $5731/month.

75:3; Exhibit 12, Bates stamp SBA000051) There was no "finding" in this matter on the amount of the child support. The Commissioner merely affirmed the parties' agreement on the amount of child support.

47. In the second statement Respondent characterized the adjusted gross income figure on Father's 2005 Tax Return as "yearly income". Yet at the November 2006 conference Respondent on behalf of Mother agreed that Father's monthly income for child support purposes was $4558. This figure would yield an annual income for Father of about $54,696.

48. Respondent argued that at the November 16, 2006 conference he and Mother did not have Father's 2005 tax return. Kim McIntosh (Mother) supported Respondent's argument in part when she testified at the disciplinary hearing that the day of the Expedited Services conference was the first time she saw numbers on Don Moore's (Father's) 2005 tax return. Kim stated that she had seen the 2005 tax return before November 16, 2006 but that the numbers reflecting the income had been redacted. (TR 446:21 through 448:4) Father's counsel Mr. Kellers and Father Don Moore contradicted this testimony. Mr. Kellers stated that before the November 16, 2006 conference he sent a Response to Mothers' Request for Production and he attached Father's 2003, 2004 and 2005 tax returns. Mr. Kellers said that he had discussed the 2005 return with his client Don Moore so that Don would be prepared to address the issues at the November 2006 conference. (TR 76:18 through 77:16 and 84:3-22) Mr. Kellers testified that he thought Respondent on behalf of Mother was misleading the Court by using Father's 2005 tax return without informing the Court of the much lower income for Father in the 2003 and 2004 tax years or of the agreement by Mother at the Expedited Services conference that Father's yearly income was about $54,696. (TR 87:7-18) Don Moore testified that the 2005 tax return was discussed in the Expedited Services Conference. Mr. Moore said the $37,587 on line

17 of the return was a profit from his deceased father's business, but that in some years losses could be incurred. Therefore at the Conference it was decided that this figure would not be considered included in his income for child support. (TR 166:14 through 167:1)

49. Respondent asserts that for several reasons his use of the 2005 tax return was not misleading. First, he argues that the return is self-explanatory. On line 7 of the return the income from wages and salaries is listed as $99,061. On line 13 the income from capital gain is listed as $67,613. On line 17 the income from rental real estate or partnerships is listed as $37,587. Therefore Respondent states that if Judge Mroz thought that the capital gain and income from partnerships was not income that Father would have on a regular yearly basis, the judge could discern that fact from the face of the tax return itself.

50. Mr. Kellers' for Father argues that $99,061 in wages and salaries includes the income of both Father and his new wife Kelly Moore and that Ms. Moore is not a "party" to the dispute between Father and Mother, Kim McIntosh. It is clear from the return itself that it is a joint return. But Respondent counters this argument with the fact that Kelly Moore testified that she was not working in the year 2005 but was a full-time student. (TR 156:4-7)

51. Secondly, Respondent argues that ARS section 25-324 allows the Court when ruling on a motion for contribution for attorney's fees to consider more sources of income than the Court would consider for an award of child support. Respondent cites to the following language in subsection A of ARS section 25-324: "The Court from time to time, after considering the financial resources of both parties…"

52. In his testimony Mr. Kellers agreed with Respondent's interpretation that the words "financial resources" convey a broader meaning than the word "income" as used for

child-support calculation. The parties have not been able to cite any case law adopting this interpretation.

53. The Hearing Officer concludes that the term "financial resources of the parties" in ARS section 25 -324 limits the Court's consideration to resources of a "party". A new spouse is not a "party" to either a dissolution case or a post-decree proceeding. However income from capital gains or partnerships for Don Moore (Father) could be considered by the Court in the Motion for Contribution of Attorney's Fees. Mr. Kellers argued that the capital gain might not reflect the acquisition of money but could instead be an accounting procedure with a tax effect. However there was no evidence that this was the case with Don Moore in tax year 2005. Don Moore testified that he and his three brothers had sold some property and the $67,000 was his share of the money received. (TR 160:10 through 161:20) Don's father had passed away before 2005. One of Don's brothers was managing their father's business after their father's death. The $37,587 was a distribution to Don Moore of his share of profit from his deceased father's business. (TR 166:11-23)

54. The Hearing Officer finds that Respondent was not misleading the Court by using the 2005 tax return as evidence of the "financial resources" of Don Moore for the purpose of contributing to Kim McIntosh's attorney fees. When Respondent used the phrase "yearly income" Respondent was being cavalier with the facts. However because Respondent clarified that Father had received a "family business inheritance" reflected in the 2005 tax return, Respondent was not misleading the Court. Respondent was saying enough to alert the Court that a part of the 2005 income was a one-time occurrence.

55. Respondent's expert witness Stephen Keist also testified that in his opinion ARS section 25-324 permitted the Court to consider all resources of a party including whether that party was receiving money as a beneficiary of a trust or from a division of assets.

56. The Hearing Officer concludes that the State Bar has proven by clear and convincing evidence that it was misleading for Respondent to assert in the Motion for Contribution that a child support hearing resulted in a "finding" in favor of Mother on her income. Respondent's false statement in this regard is in violation of ER 3.3. Judge Mroz denied Respondent's Motion for Contribution of Attorneys Fees. In her minute entry of January 5, 2007 the judge stated, "The Court is particularly troubled by the misleading statements in Mother's Motion about what occurred at the Child Support Hearing held on November 16, 2006, and about Father's income."

57. However the Joint Prehearing Statement at pages 23 through 27 reflects that the State Bar listed as contested issues of law for this section of Count One only the alleged misrepresentation by Respondent of Father's income and not misrepresenting that at the child support hearing it was "found" that Mother's income was as Mother had originally asserted. The Complaint at paragraphs 20 through 34 alleges that Respondent's use of Father's 2005 tax return was intentionally misleading to the Court.

58. Paragraph 28 of the Complaint quotes the Court's January 5, 2007 minute entry including the judge's opinion that Respondent had made a misleading statement about what occurred at the child-support hearing on November 16, 2006. Paragraph 30 of the Complaint stated "Respondent made a false statement of fact to the Court in the Motion for Contribution of Attorney's Fees." Paragraph 32 alleged that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation when filing the Motion for Contribution.

59. The question is whether Respondent was put on sufficient notice that the State Bar was alleging in Paragraphs 30 and 32 that Respondent's statements to the Court in the Motion for Contribution (whether mother had prevailed in the child support hearing with a "finding" that her income was as she had originally claimed) were alleged to be false. Mr. Kellers filed Father's Response to Motion for Contribution toward Attorney's Fees. (Exhibit 12) Mr. Kellers drew the Court's and Respondent's attention to the fact that the issue of child support was settled by agreement: "At the time, the parties were able to reach an agreement upon all issues EXCEPT for the effective date of the modification." (Underlining and emphasis supplied) (Exhibit 12, page 4, lines 2-3).

60. The Hearing Officer concludes that the State Bar considered the Respondent's alleged misrepresentation of Father's income to be the main reason for its Complaint in this part of Count One, but that the State Bar also considered Respondent's statement about the child support hearing in the Motion for Contribution to be misleading. . The State Bar in the Complaint, in paragraph 28, quoted Judge Mroz that she was "...troubled by the misleading statements in Mother's motion about what occurred at the Child Support Hearing held on November 16, 2006, and about Father's 2005 income."

61. Rule 57 requires that the Complaint "... be sufficiently clear and specific to inform a Respondent of the alleged misconduct." The Hearing Officer finds that the Complaint was sufficiently clear and specific to inform Respondent that both his statements (about a child support hearing "found" for Mother on her income and Father's 2005 tax return reflecting his "yearly income") in Respondent's Motion for Contribution were allegedly false. The Hearing Officer recognizes that the State Bar focused on the 2005 tax return in three areas: 1) in the Joint Pre-Hearing Statement the State Bar did not even list the statement about what occurred at

the Child Support Hearing as a basis for the Respondent's misconduct, 2) paragraphs 26 and 27 of the Complaint alleged the specifics of Respondent intentionally misleading the Court to be Respondent's use of Father's 2005 tax return and 3) in the State Bar's Post-Hearing Memorandum the Bar did not request a finding of fact on anything in the Motion for Contribution other than the use of the 2005 tax return.

62. Rule 47 permits a party to move to amend the Complaint prior to the conclusion of the hearing on the merits to conform to the evidence. The State Bar did not move to amend the Complaint to conform to the evidence on this point. However, the Complaint did not need to be amended because it was both broad enough (in paragraph 30 alleging that Respondent made a false statement of fact to the Court in the Motion for Contribution) and specific enough (in paragraph 28 quoting Judge Mroz referring to misleading statements about the Child Support Hearing) that Respondent was put on notice that both statements in the Motion were allegedly "misleading".

63. In addition a review of the Motion for Contribution reveals that Respondent could not have reasonably been unaware of which statements Judge Mroz (and the State Bar) was alleging were misleading. The Motion consists of only three pages. Respondent made one reference to what occurred in the child support hearing, "Additionally the Father objected to Mother's request for child support and at the child support hearing it was found that the Mother's income was as originally submitted by the Mother in addition to Father's access time with the parties (sic) son in accordance with the Petition filed by Mother." (Exhibit 9, page 1, line 27 through page 2, line 2)

64. The second statement about Father's "yearly income" is a page later, "Father additionally has a family business inheritance from which he receives monies as evidenced by

the attached 2005 tax return wherein it is report (sic) he has a yearly income was (sic) $210,081". (Exhibit 9, page 3, lines 11-13)

65. Although the State Bar's focus in the hearing was on the statement about Father's yearly income the Hearing Officer sought to clarify if the statement about a "finding" at the child support hearing was also alleged to be false. (TR 427:1 through 445:18) The State Bar stated that it was proceeding on both statements.

66. Respondent was aware that Mr. Kellers responded to the Motion for Clarification and emphasized for Judge Mroz that Respondent had misrepresented what occurred at the child support hearing. Mr. Kellers wrote in Father's Response to Motion for Contribution toward Attorney's Fees, "Furthermore, Mother's representation in her Motion that at the Hearing it was found that Mother's income was as originally submitted by Mother and Father's access time with the parties' son in accordance with Mother Petition is simply untrue. Mother's CSW [child support worksheet] listed her income at $3,750; Mother's AFI [affidavit of financial information] filed contemporaneously with her Petition and CSW listed her gross wages at $2070.00 per month and her total income at $5,731 per month. It was the discrepancy in Mother's gross income on her CSW and AFI that triggered Father's Objection and Request for Hearing. Also, the visitation credit on Mother's CSW filed with her Petition (8 days/1.2%) was different than the visitation credit the parties agreed to at Expedited Services (21 days/3.1%), ... The only issue presented to Commissioner Hugh Hegyi at the Hearing was the effective date for the child support modification. All other issues were agreed to by the parties at the Support Conference." (Exhibit 12, Bates stamp SBA000052-000053)

67. Judge Mroz denied the Motion for Contribution in the minute entry of June 5, 2007, stating, "**THE COURT FINDS**, that the procedural history of this case was accurately

described in Father's Response." Therefore the Hearing Officer concludes that Respondent was put on notice by the Complaint (quoting this language in Paragraph 28) as well Respondent's knowledge of Mr. Kellers' Response to his Motion for Contribution that the State Bar was alleging that his statements about what happened at the child support hearing were false.

68. The Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that the Motion for Contribution was non-meritorious or that the Motion was filed for purposes of delay or to burden the opposing party, Father. Respondent's client, Mother, had incurred attorney's fees from January, 2006 through November 2006. Father was disputing Mother's position that their son should not be subjected to visits with Father when Father's new wife Kelly Moore was present. The Motion should have more honestly stated that Father's initial objections to Mother's request to modify child support had been compromised (not surrendered) in the negotiations before the Expedited Services officer.

69. Even if Respondent had not characterized Father's 2005 adjusted gross income as "yearly income", it was income reported by Father on his 2005 tax return. If a portion of the $99,000 wages income was from Father's new wife Kelly Moore that should have been discovered by Respondent before filing the motion. In fact Kelly Moore's testimony at the disciplinary hearing was that she was not working in 2005.

70. Respondent's Motion for Contribution was seeking a one-time contribution toward about $14,000 in attorney's fees incurred by Mother. The hearing testimony revealed that the other major items of income on the 2005 tax return were from Father's sources of income, not Kelly Moore's sources. Even if the capital gain and rental income were one-time payments to Father, Mother was asking the Court to consider the information not to support a continuing obligation such as monthly child support, but as Father's ability to pay a portion of

Mother's attorney fees. Respondent, Charles Kellers (the attorney who opposed Respondent in both family Court cases in Count One) and Stephen Keist (a family practice attorney called as an expert by Respondent) testified in agreement at the hearing that ARS sec. 25-324 permits the Court to consider Father's "financial resources". (TR 106:7-25; 338:10 through 339:6)

71. The Hearing Officer concludes that the Motion for Contribution was not filed for delay or to burden the opposing party, Father. The troubling aspect is that the Motion appears to have been prepared hastily by Respondent. Respondent was not careful to compare the 2003 and 2004 tax returns for Father with the 2005 return. But he was just careful enough to note for Judge Mroz that the 2005 return showed that Father received a family business inheritance. Perhaps Mr. Charles Kellers best described Respondent when Bar Counsel asked him his impression of Respondent:

> "Q. And what is your impression of Mr. Charles, the way he conducts his practice? As far as you know with regard to these people?
>
> A. You know, that's a difficult question. Let me preface it by saying I like Joe Charles. I don't know if what he did was intentional. I would hope that it wasn't. It could be negligent, who knows. Oftentimes sole practitioners take on more than we can handle every once in a while, and sometimes the caseload gets away from us. He practices in a number of areas that I don't, so it seems like he spreads himself thin. And these clients were difficult clients because always something they were fighting about. So if you didn't have the time to go back and review 6 or 8 inches of paper

every time you walked into the courtroom, you're at risk." (TR 89:15 through 90:5)

72. The Hearing Officer concludes that Respondent's conduct in writing that at the child support hearing "it was found" that his client's position about her monthly income was upheld was deceitful in violation of ER 8.4 C and it was prejudicial to the administration of justice in violation of ER 8.4 (D).

Alleged Failure of Respondent to Cooperate with the State Bar's Requests for Information on Both Matters in Count One

73. In a letter dated March 26, 2008, during the investigation of this Complaint, the State Bar asked Respondent to answer four specific questions by April 3, 2008; 1) Did Respondent leave a voice message for Mr. Kellers on October 27, 2006? 2) Did Respondent file a Motion to Continue and if so, send a copy of the motion to State Bar counsel? 3) Explain why Respondent or no one from his office contacted Mr. Kellers to notify him not to go to court on October 31, 2006? 4) Provide Bar Counsel with a copy of the Motion for Contribution of Attorney Fees in McIntosh/Moore and a copy of the transcript of the child support hearing. (Exhibit 23)

74. In his letter of April 10, 2008, Respondent provided a response. (Exhibit 26) Respondent stated in answer to the first question that his staff person informed him that the staff had attempted to contact "... counsel and courts that would be affected by my being unavailable for Monday matters." Respondent worked on Saturday, October 28, 2006 preparing for the criminal jury trial. He left a tape for his staff with instructions to "... send out

appropriate notices and calls on that Monday." Therefore the Hearing Officer concludes that Respondent cooperated with the State Bar on question number one.

75. Respondent did not directly answer question number two. He referred to his staff and said, "I do not believe they had the time to put anything in writing although they may have."This is the only reference that might apply to question number two which was whether Respondent had filed a Motion to Continue the October 31, 2006 status conference. The Hearing Officer concludes that the response is not sufficient. Respondent should have checked the pleading backer for his file or the Court docket to determine if he had filed a Motion to Continue.

76. Respondent sufficiently answered the third question. He explained that he left instructions for his office to contact Mr. Kellers to advise him that the Grim versus Moore status conference would be continued. Respondent stated, "I also believe that at one of the hearings I was advised that the Court did receive the telephonic message on their answering machine and that Mr. Keller stated that he went directly to the Northwest Court from Scottsdale rather than going to his office, and that is why he did not receive the message that was left for him." Respondent could have clarified that not only the Court but Mr. Kellers had been called. Respondent could not provide documentation for his staff's telephone call to Mr. Kellers because apparently there was no such record. Mr. Kellers confirmed that on Tuesday, October 31, 2006 after returning to his office from the Northwest Court he discovered a voice message had been left for him by Respondent's staff at about 5:49 PM on Monday, October 30, 2006. The Hearing Officer concludes that Respondent did not fail to cooperate with the State Bar on question number three.

77. The Hearing Officer finds that Respondent did not cooperate with the State Bar on question number four. Respondent failed to provide the State Bar with a copy of "Mother's Motion" referred to in the minute entries from Judge Mroz of January 5, 2007 and January 9, 2007. Respondent did not fail to cooperate concerning a transcript of the child support hearing. Respondent attempted to obtain a transcript of a proceeding involving child support. Respondent thought that the conference with the Expedited Services officer was recorded. Both parties agree that the conference was not recorded. Respondent also thought that the hearing in front of Commissioner Hegyi was transcribed. Instead a CD was made of the hearing. Since a transcript did not exist for anything related to the child support hearing held on November 16, 2006 the Hearing Officer cannot conclude that Respondent's failure to provide the transcript is a failure to cooperate with the State Bar. Respondent provided the State Bar with a copy of the CD on June 25, 2008.

78. The State Bar was justified in taking the deposition of Respondent because of Respondent's knowing failure to provide the State Bar with a copy of the Motion for Contribution and his failure to determine whether he had filed a Motion to Continue in the Grim vs. Moore matter. On May 12, 2008 in response to the State Bar's subpoena duces tecum Respondent transmitted his file to Bar Counsel.

79. On May 20, 2008, the State Bar deposed Respondent. Respondent admitted that he failed to provide the State Bar with the Motion to Continue in *Grim v. Moore*, as the State Bar had requested in its March 26, 2008 letter.

80. During the May 20, 2008 deposition, Respondent admitted that he failed to provide the State Bar with the documents requested in question four of its March 26, 2008 letter. (Exhibit 57, Transcript of Deposition of Respondent, page 31, line 10)

81. Respondent knowingly failed to respond to a demand for information from the State Bar.

COUNT TWO (File no. 07-1663/Allen-Brissette)

82. Betty Allen-Brissette retained Respondent in November 2006 to probate her husband's estate. Respondent was to substitute for a previous attorney working on the case, Mr. Wooten. At the disciplinary hearing there was a dispute about when Respondent began to represent Ms. Brissette. The timing of the representation is important because the State Bar has alleged that Respondent failed to abide by the client's wishes to probate her estate in a timely manner (ER 1.2) and that Respondent failed to act with reasonable diligence (ER 1.3).

83. Respondent testified that he met the client in his office in November, 2006, but that she did not contact him for several months to confirm his representation. (TR 494:4-21) Respondent stated that he was waiting for the client to contact him. Respondent testified that he did not begin to represent the client until she returned to his office in March, 2007 to sign the Substitution of Counsel form. (TR 495:1 through 496:8) The client testified that she thought Respondent was representing her from the initial meeting in November, 2006 and that she was upset that Respondent was not moving fast enough to probate the estate. (TR 219:11)

84. The Hearing Officer finds that the client's version is more believable on this issue. She had been referred to Respondent by her previous counsel Mr. Wooten. She gave Respondent her files. (TR 219:15) She received from Respondent in the November, 2006 meeting in Respondent's office a brown folder. (TR 219:12) Respondent testified that the folder contained instructions for how Ms. Brissette was to communicate with Respondent. (TR 487:8) Respondent called this information a "mission statement" and a "protocol" for communication.

(TR 490:9) Although no evidence was received that a fee agreement was signed at any time, the conduct of both the client and lawyer warrants the conclusion that Ms. Brissette was justified in her belief that Respondent was representing her from November, 2006.

85. On February 20, 2007 Respondent informed Mr. Wooten that Respondent had written to the client who had not returned to see Respondent in several months. (Exhibit U, bates stamp 140) Respondent first wrote to the client on the same day he wrote to Mr. Wooten, February 20, 2007. (Exhibit U, bates stamp 141)

86. Respondent supplied a copy of the probate Court's computerized docket showing that Respondent filed the Substitution of Counsel on March 12, 2007. (Exhibit L, bates stamp 106). This is the date that Respondent argues he began representing Ms. Brissette. However, attorney Robert Wooten's office wrote to Respondent about the Estate of Roy Brissette (Betty Brissette's husband) on January 3, 2007, "Dear Joe, Per Robert's instructions, enclosed are the pleadings from the above-referenced file. Please do not hesitate to call with any questions." (Exhibit U, bates stamp 136) The Hearing Officer concludes that after the November 2006 meeting it was Respondent's obligation to follow up with the client about the probate of her late husband's estate. In a letter to the State Bar of December 19, 2007, responding to Ms. Brissette's letter of December 4, 2007 Respondent stated, "I initiated my efforts on behalf of this estate in January, 2007." (Exhibit U, bates stamp 133)

87. The Estate of Roy Brissette had been pending in Court since the filing of the Petition for Formal Probate of Will and Appointment of Personal Representative on October 7, 2005. (Exhibit L, bates stamp 109) On November 8, 2005, Mr. Wooten appeared as counsel for Betty Brissette before Commissioner Phemonia L. Miller. By the time Respondent was contacted by the client the case was already over one year old.

88. **The Issues: Did Respondent fail to abide by the client's wishes to probate the estate in a timely manner (ER 1.2)? Did Respondent fail to act with reasonable diligence ER 1.3)? Did Respondent keep the client informed of the status of the case (ER 1.4)? Did Respondent charge the client an unreasonable fee or double bill the client (ER 1.5)? Did Respondent fail to respond to the State Bar's request for information (ER 8.1 (b) and Rule 53 (f))?**

89. The State Bar did not present evidence from anyone other than Ms. Brissette that Respondent's conduct in the case was dilatory. An attorney who specializes in probate Court was not called to give an opinion that Respondent's actions were too slow for seeking the probate of the estate. The client testified that she did not think that Respondent handled the probate matter timely. (TR 238:6) Respondent wrote to Ms. Brissette in February, 2007 to acquire her signature for the Substitution of Counsel. He prepared the Substitution on March 9, 2007. (Exhibit U, bates stamp 145) He filed a Motion to Unrestrict Real Property on April 11, 2007 along with an Order to Unrestrict the Real Property at 2444 E. Broadway Road in Phoenix, which was signed by Commissioner Miller on May 9, 2007. (Exhibit U, bates stamp 149-154) Respondent testified that this motion was necessary to open "...up the door so we could make distributions, and that was filed I think in April, early May, and the commissioner signed off at the end of May and early June. So we were ready to go forward with the closing of it." (TR 496:15-18)

90. The billings to the client for work performed demonstrate a gap in activity by Respondent from June 4, 2007 to September 7, 2007. (Exhibit T, bates stamp 130) Respondent explained as follows: "Q. And in order to close it, she had to provide you information and documentation because she had personal representative expenses she had incurred and wanted

to be reimbursed? A. Correct. Q. She got that stuff together to you? A. She got that stuff in August to us so I could start working in September, essentially, September to get it closed out. That's my recollection when Nancy told me she finally brought in everything. She wanted to make sure she had everything to us, so it took a little time to get everything together." (TR 496:19 through 497:5)

91. The Court docket reflects no activity between the signing of the Order to Unrestrict Property on May 11, 2007 and the filing by Respondent of the Petition for Decree of Settlement and for Distribution of Estate/Petition for Discharge of Personal Representative on October 24, 2007. (Exhibit L, bates stamp 106) Ms. Brissette signed the Petition on October 22, 2007. (Exhibit U, bates stamp 163) After the petition was filed a Notice of Hearing was issued on November 1, 2007. An Order for Discharge of Personal Representative was signed on December 4, 2007. A Motion to Amend Order was filed on December 6, 2007, and the Amended Order was signed on that same day.

92. Checks were written from the proceeds of the estate to Betty Brissette dated December 5, 2007 for $5750 (to reimburse the client for her out-of-pocket expenses incurred to preserve the real property of the estate) and for $46,104.88 (as Ms. Brissette's share of the balance of $102,259 from the sale of the property after a deduction of $3074 for attorney fees and costs). (Exhibit XYZ, bates stamp 173-174, Exhibit U, bates stamp 164-165)

93. Betty Brissette's recollection of what was happening with her case in the summer of 2007 was different than Respondent's recall. On July 20, 2007 Ms. Brissette wrote to Respondent informing him of her frustration in not receiving a return call to her numerous messages. She told Respondent that she had left messages with Gabby after Clem Leslie left Respondent's practice. She said that Gabby (one of Respondent's staff assistants) told Betty

that Gabby had left papers with Respondent and was waiting to hear from Respondent. She complained that her out-of-pocket expenses for the probate matter were unaffordable. She begged to be informed of the status of the case since her last phone message for Respondent of June 14, 2007 was still unreturned. (Exhibit 34, bates stamp SBA000121)

94. Exhibit 43 contains documentation of some of the out-of-pocket expenses Betty incurred. It was this documentation that Respondent said he was waiting for and that he did not get from Betty until August, 2007. The records do not reveal when Betty gave this information to Respondent except in one instance. On April 27, 2007 Betty faxed to Respondent a document that she entitled "Continuation of Expense Report" showing a list of time she spent on the estate on April 5, 6 and 7, 2007. (Exhibit 43, bates stamp SBA 000191-192). These items were included by Respondent as the last three items (and the only expenses incurred in 2007) on the list of "Disbursements" to be paid to Betty from the proceeds of the estate for her out-of-pocket expenses.

95. If documentation for the other 9 items of Betty's expenses from April, 2005 through November, 2006 were given to Respondent before April 27, 2007, then Respondent would not have been delayed in the summer of 2007 in filing the Petition for Distribution by waiting for his client to provide him with information. Therefore these circumstances lead the Hearing Officer to conclude that Betty Brissette had given Respondent all of her expense information before the summer of 2007.

96. Betty Brissette and the State Bar also allege that Respondent did not communicate with his client about the status of her case (ER 1.4). Betty kept contemporaneous notes on a calendar and on grocery lists of when she called Respondent and he did not return her calls. (Exhibit 44, bates stamp SBA000196) Her notes show that she called Respondent on

June 12, 2007 and received no response. She called again on June 14, 2007 and she recorded that Gabby told her Respondent was in Court. On two grocery lists she recorded that she called Respondent eight additional times on seven days in August and September, 2007; August 28, 2007 ("twice"), August 29, 2007 ("1:15/3:30"), August 30, 2007 ("12:10"), August 31, 2007 ("2:30/closed at 1:00"), September 4, 2007 ("ATTY NOT IN"), September 5, 2007 ("11:00 NOT IN left Message That I will call To Find out hold up"), September 5, 2007 ("ATTy Charles Retured (sic) call around Noon after getting my message about contacting the Bar Assoc: Atty Charles said he would call me at 7:00 am on 9-6-07, as of 10:25 I have yet to get a call from Him.") (Exhibit 44, bates stamp SBA000197)

97. On the next page of her notes Betty wrote "after vac on 9/5 – 9/5 9/10 – here 9/6 he called PM apol – what am I suppose to do." (Exhibit 44, bates stamp SBA000198) Ms. Brissette testified that Respondent had called her in September. She was on vacation out of state. Respondent asked her to contact him when she returned from vacation. (TR 229:12) In the telephone conversation of September 6, 2007 Respondent asked Betty Brissette, "What exactly am I supposed to be doing." (TR 230:12) Ms. Brissette stated that when she heard this, "... my mouth kind of flew open." (TR 230:14)

98. In his testimony at the disciplinary hearing Respondent blamed Betty Brissette for not following the "protocol" for communicating with him that he had given to her at their first meeting. (TR 487:8-19, 489:1 through 490:9) According to Respondent Betty was to call his staff to set up a telephonic conference or an office appointment with him. If she had to speak to him directly she was to call on his cell phone. If her calls to him were not returned in the same morning or afternoon she was to call Respondent's receptionist. Respondent circled the name of his assistant in charge of probate matters "Nancy" for Betty.

99. Respondent testified that he recalled calling Betty in July, 2007 after he got what he called her "bell-ringing" letter. (TR 491:1) Betty was back east at a family reunion at the time of this call and could not talk to him. Respondent told her to call him as soon as she got back to Phoenix so she could bring in her receipts and they could start closing out the estate. (TR 491:5-12) When Respondent was asked about Betty's numerous telephone calls in late August 2007 he said his birthday was on August 28 so he was out of the office. "Usually take a week and maybe a little more out. That period of time that she had all those calls, I don't know what happened. Because no one told me when we got back she called." (TR 491:22-25)

100. The Hearing Officer concludes that Respondent's testimony (on the point of no one in his office telling him that Betty called so many times in such a short period of time) is simply not believable. The Hearing Officer concludes that the State Bar has proven by clear and convincing evidence that Respondent failed to keep Ms. Brissette informed about the status of her case and failed to comply with her reasonable requests for information (ER 1.4) The issue of whether the Bar has proven by clear and convincing evidence that Respondent failed to promptly probate the estate is more difficult. Certainly there is circumstantial evidence that Respondent was not waiting on Betty as late as August 2007 to get her documentation for out-of-pocket expenses, since she faxed him a list of the last three expenses incurred in April 2007 on April 27, 2007.

101. The Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.2 by not complying with the client's objectives for the representation. This rule and the comments do not address the specific situation of a client wanting a result promptly. Instead promptness is specifically handled in ER 1.3.

102. The Hearing Officer concludes that the Bar has proven by clear and convincing evidence that Respondent did not act with reasonable promptness. Respondent is not to be charged with the more than one year the probate matter was pending before he took Betty as his client. The circumstantial evidence points to the conclusion that Betty gave Respondent her documentation for out-of-pocket expenses well before August 2007. Certainly Betty's actions confirm her testimony that she was trying to get the estate concluded as soon as possible. If Respondent had asked Betty for her documentation before August 2007 he would have received it. Respondent's comment to Betty in September, 2007 that he did not know what he was supposed to be doing on her case, is evidence that he was not moving forward on her case in June, July, and August, 2007.

103. The comment to ER 1.3 says in part: "A lawyer's work load must be controlled so that each matter can be handled competently. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

104. Respondent's work on Betty's case was competent. His fee was reasonable; $3074 on an estate distribution of $102,259. Betty was satisfied with the result of Respondent's work. (TR 243:6 through 244:12) But Betty was made to suffer needlessly by Respondent's lack of communication with her. As his client she deserved better treatment from her attorney. The fact that she was not calling him on his cell phone but was Courteously trying to communicate with him through his staff should not be held against her.

105. The State Bar has not proven by clear and convincing evidence that Respondent double-billed Betty Brissette. Paragraph 52 of the Complaint alleges that on one occasion Respondent billed the client for work that had previously been billed by him. In paragraph 59 of the Complaint and in paragraph 37 of the Joint Pre-Hearing Statement the State Bar alleged that Respondent charged an unreasonable fee and/or billed Ms. Brissette twice for the same work. The testimony at the disciplinary hearing did not support either allegation. Exhibit 34 contains a bill from Respondent dated September 21, 2007 with an invoice number 25043. One entry on the bill is for work on September 7, 2007 entitled "work on file; closing statement." Another entry is for work on September 12, 2007 entitled "work on probate; staffing". (Exhibit 34, bates stamp SBA000123) Ms. Brissette wrote on this invoice "Double Billed for 9/7 + 9/12".

106. The client testified that her note about double billing was, "Because, you know, I was thinking, if I was billed for these things, what - - you know, Shauna, I wanted to know really what I was billed for because I was getting the bills he was sending me in the mail in an envelope. Every bill he had sent me, I saved it. And then when I got the printout from the billing from his department, I called there because I wasn't sure if what I owe him." (TR 232:19 through 233:1) Bar Counsel clarified that Ms. Brissette was questioning whether "working on the file" on September 7, 2007 was the same as "working on the probate" on September 12, 2007. (TR 233:10-13)

107. Counsel for the State Bar then asked Ms. Brissette to review Exhibit 42, the billing statements Respondent sent to Ms. Brissette. The client responded that Exhibit 42 did not contain a billing statement from Respondent for the month of September 2007. Exhibit 42 begins with a billing statement of February 21, 2007 and ends with a statement of April 21,

2008. The Exhibit does not contain any billing statements for the months of April, September, October, November, December 2007, and January 2008. The Hearing Officer concludes that the fact that there is no billing statement for the month of September 2007 in Exhibit 42 is irrelevant to the State Bar's allegation that Respondent double billed Ms. Brissette.

108. Bar Counsel asked Ms. Brissette the following questions: "Q. Okay. So when you called to ask about the fees and they faxed you Exhibit 34, Bates stamps 123, which is the one you wrote double billed on, did you question them about that about what it was? A. No. Q. Okay. Why didn't you? A. I don't have a clue why I didn't question them. I just took it like it seemed to me it was double billed and I wrote that on there. Q. Did you ever ask Mr. Charles about the fees that he was charging you and these billings that he sent you? A. No, I didn't, because I felt as though Mr. Charles knew what he was doing more so than I did. And I trusted that he, you know, was doing the right thing." (TR 234:18 through 235:7)

109. The record does not contain additional evidence on the allegation of double billing. The Hearing Officer cannot conclude that the evidence is clear and convincing that the work done by Respondent on September 7, 2007 and September 12, 2007 was duplicative. Respondent charged $200 per hour to the client. On September 7, 2007 he spent 1.3 hours working on the file and the closing statement for a total of $260. On September 12, 2007 he spent 1.2 hours working on probate and staffing for a total of $240. Without speculating the Hearing Officer cannot conclude that the client was being overcharged.

110. The record does not support a conclusion that Respondent charged Ms. Brissette an unreasonable fee. The distribution of funds occurred in December 2007. However Respondent continued to work on the final closing of the estate until May, 2008. Respondent's work was complicated by the fact that the proceeds from the sale of the real property was to be

divided between Ms. Brissette and the five children of her deceased husband Roy Brissette Sr. and his former wife Alberta Brissette. (Exhibit L, Bates stamp 105) One of the children, Roy Brissette Jr., was in prison and as late as April, 2008 he was still not returning to Respondent the receipt of estate assets (for the distribution of funds) and the release of personal representative. (Exhibit AA) For this reason Respondent could not file the Closing Statement until May 7, 2008.

111. **Failure to cooperate with the State Bar's request for information on Count Two.** On October 22, 2007 the State Bar sent Respondent a letter requesting a written response to the complaint of Betty Brissette. Respondent was told to reply within 20 days. Therefore his response would have been due by November 11, 2007. (Exhibit 35) The Bar did not receive a response. On November 15, 2007 Bar Counsel sent another letter to Respondent requesting his response within 10 days (November 25, 2007). (Exhibit 36) Respondent sent a letter of November 20, 2007 responding in five paragraphs to the complaint of his client. (Exhibit 37)

112. Bar Counsel sent Respondent's letter of November 20, 2007 to Ms. Brissette. On December 4, 2007 Ms. Brissette in a letter responded to Respondent's letter of November 20, 2007. (Exhibit 38) On December 19, 2007 Respondent in a letter to Bar Counsel responded to Ms. Brissette's December 4, 2007 letter. Respondent attached to the letter ten exhibits which contained correspondence, and motions from the case. (Exhibit 39) Seven months later on July 16, 2008 Bar Counsel asked Respondent for five items; 1) a complete copy of Ms. Brissette's file, 2) all e-mails that relate to Ms. Brissette, 3) copies of all telephone message records, 4) all billing statements relating to Ms. Brissette, and 5) documentation of all payments made to you with regard to this matter. (Exhibit 40) Respondent was told to submit this information in eleven days by July 25, 2008.

113. In paragraph 54 of the Complaint the State alleged that Ms. Brissette had complained in her letters of October 2, 2007 and December 4, 2007 about Respondent's billings, but that Respondent had never addressed the over billing or double billing issues. In her October 2, 2007 letter to the Bar Ms. Brissette included the September 21, 2007 invoice #25043 discussed above in Paragraph 107 (Exhibit 34, Bates stamp SBA000123). In the body of her letter she did not specifically allege that Respondent double billed her, but she complained about "...additional charges, for what I am not sure", she asked the Bar to review the charges billed to her by Respondent, and she had written on the September invoice "Double Billed for 9/7 + 9/12". In her December 4, 2007 letter she specifically complained about Respondent's charges for his services "(there appears to be double billing)". (Exhibit 38, Bates stamp SBA000132)

114. Respondent addressed the billing issue in his November 20, 2007 letter by first explaining that in spite of his efforts to minimize costs to the estate he had to change his strategy to a more formal procedure to protect Betty because he had received some correspondence from one of the heirs. (Exhibit 37, Bates stamp SBA000130). On the second page of his letter Respondent made only one comment about the double billing issue, "Quite frankly it appears that there is a billing issue which may be one of the main reasons for her correspondence to the State Bar of Arizona. I am further puzzled by this issue since our office has not been paid any monies by Ms. Brissette and therefore it appears that she is referring to her previous attorney in regard to that issue." (Exhibit 37, Bates stamp SBA000131)

115. Respondent failed to appreciate the specific nature of Ms. Brissette's complaint about billing. Her cryptic note about "Double Billing 9/7 +9/12" on the September invoice should have caused Respondent to better focus his attention on this allegation. However the

Hearing Officer notes that in paragraph 52 of the Complaint the allegation is that Respondent billed the client "for work that had been previously billed by him", yet in paragraph 59 of the Complaint the allegation is somewhat different, "...or billed Ms. Allen-Brissette twice for the same work." This situation is further complicated by the fact that Ms. Brissette testified at the disciplinary hearing that she did not discuss her complaint about the September 2007 invoice with Respondent or his staff. After Ms. Brissette referred to "double billing" again in her December 4, 2007 letter, Respondent continued not to connect her complaint with the words she wrote on the September 2007 invoice about double billing. Instead in his December 19, 2007 letter he stated, "This is in response to Ms. Brissette's letter dated December 4, 2007. I apologize in that at first reading, I thought she was complaining about paying monies for lawyers. I did not mean any negativity reference to her previous counsel, only that I had not been paid any monies. Apparently her reference was paying other related costs in the administration of the estate." (Exhibit 30, Bates stamp SBA000133)

116. There are two ways to view the allegation that Respondent did not cooperate with the Bar's request that Respondent address the billing issue. First, it can be argued that it was not easy for Respondent to understand Ms. Brissette's complaint. At the disciplinary hearing it did not become clear until Ms. Brissette testified that she was complaining that the work done on September 7, 2007 appears to be the same work that was done on September 12, 2007. Before Ms. Brissette gave that testimony the Hearing Officer thought that her complaint was that she had previously been billed for both the September 7 and September 12 work and that she was upset that she was being billed for the same work again. Second, the State Bar could argue that because Respondent did not cooperate and address the double billing

allegation, the Bar did not have enough specific information to decide that only one theory of double billing was necessary to allege.

117. The Hearing Officer concludes that it was reasonable for the Respondent not to be able to discern the specific nature of Ms. Brissette's double billing complaint. Therefore the Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that Respondent failed to cooperate with the Bar's request for information specifically concerning the double billing allegation.

118. The Hearing Officer concludes that Respondent failed to respond promptly to the State Bar's request for information in the letter of October 22, 2007. Respondent should have responded by November 11, 2007. By November 15, 2007 he had still not responded. (Exhibits 35 and 36) Respondent did not file a response until November 20, 2007 after the State Bar had to send a second letter on November 15, 2007. Respondent's explanation for his dilatory response was that perhaps the State Bar had not sent the letters to his Post Office Box. (TR 538:16 through 541:12) However the letters included his street address and the Post Office Box.

119. The Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that Respondent failed to provide the information sought in the letter of July 16, 2008 (see paragraph 115 above). The Bar did not introduce evidence on this specific point at the hearing. Counsel did not question Respondent on this topic. (TR 538:16 through 541:12) Exhibit 57 is the transcript of the deposition of Respondent. Although counsel for the Bar examined Respondent about his failure to cooperate with the Bar's requests for information the topics were confined to allegations in Count One of the Complaint.

COUNT THREE (08-0478/Horne)

120. Respondent represented Josefina Horne ("Wife") in her dissolution of marriage action against her husband Michael W. Horne ("Mr. Horne"). Respondent's representation began sometime before December 7, 2006 because by that date Respondent had filed a Charging Lien against the marital residence for his attorney fees of $3825. (Exhibit AQ) A trial in this case occurred in either late December, 2006 or early January, 2007. (TR 173:2) The Decree of Dissolution of Marriage was filed on January 19, 2007. The sale of the marital residence closed escrow on March 2, 2007. Respondent notified the escrow company on March 2, 2007 that his client owed him $14, 549.20 for attorney fees. (Exhibit AW) Therefore the escrow company relied on Respondent that in order to clear the lien they would pay Respondent $14,549.20 from the proceeds of the sale of the home. (Exhibit 47, Bates stamp SBA000214)

121. Respondent placed the lien because Wife could not afford to pay Respondent's fees. On January 17, 2007 Judge Peter Reinstein issued a minute entry entitled "Judgment/Decree - **Decree of Dissolution of Marriage**". Three sections of the Court's rulings are relevant. Under "Disposition of Community Debt" the Court stated that the parties agreed that some of the community debts be paid from the sale of the marital residence. In the section on "Community Waste" the Court ordered wife to pay her husband $10,650 from the proceeds received by wife from the sale of the marital residence. Finally under the topic "Attorneys' Fees" the Court found that after considering the factors in ARS section 25 -- 324, each party should be responsible for their own fees and costs. (Exhibit 45, Bates stamp SBA000204)

122. Robert Hunter was appointed by the Court as the Special Real Estate Commissioner in this case to handle the sale of the marital residence. Exhibit AT) The sale of

the home could not be completed without Respondent's Charging Lien being paid. A policy of title insurance could not be issued to the purchasers of the home unless the Lien was satisfied.

123. Wendy Lancaster represented Mr. Horne in this matter. (TR 172:12) She testified at the disciplinary hearing that she was not aware at the time of the trial in this case that Respondent had filed a charging lien on the property. (TR 175:18) She became aware of the lien's existence after the trial and before the close of escrow on March 2, 2007. She first recollected that she sent a letter to the title company (US Title Agency Inc) and to Respondent asking that the lien be removed. (TR 175:24) The evidence received at the hearing does not support this recollection. Instead the record shows that Ms. Lancaster only asked the escrow company to pay the lien from wife's share of the proceeds. She later testified that in a meeting with Respondent and Mr. Hunter she recalled suggesting that Respondent remove the lien, but that, "I do not recall ever putting that in writing." (TR 196:6-12) She also stated that at the end of the same meeting it was resolved to only pay about $6000 on the wife's car loan instead of removing the lien. If she was referring to the September 5, 2007 meeting it would have been too late to remove the lien if Respondent had already been paid.

124. Exhibit AL is a letter from Ms. Lancaster of February 28, 2007 to the Special Real Estate Commissioner Robert Hunter asking him to instruct the escrow company to make sure that the lien be paid out of the Wife's share of the equity. However the escrow company had to pay the lien first from the total proceeds of the sale. The record before this Hearing Officer does not include any letter from anyone to Respondent asking him to remove the lien. Instead Ms. Lancaster, Mr. Hunter, Respondent's office and Mr. Horne sent separate letters to the escrow company before the close of escrow directing the escrow company to pay the lien from the wife's portion of the proceeds. (Exhibits AN, AS, AW)

125. The sale of the residence yielded approximately $99,000. The amount of the community debts at the time of the Decree on January 17, 2007 was about $101,952. (Exhibit 47, Bates stamp SBA000204) [3] The escrow company paid Respondent $14,549.20 first because the lien had to be cleared **before** the sale could take place. All the creditors of the Horne community had to wait until September, 2007 to be paid. The amount remaining to pay the community debts was $84,490.92. (Exhibit 47, Bates stamp SBA000214 and Exhibit AY) Because the community had been deprived of the $14,549.20 all of the debts could not be paid in full. If the lien had not been placed almost all of the debts of the community would have been paid in full from the proceeds.

126. Judge Reinstein had listed the debts in the decree by the husband's and wife's names. (Exhibit 45)The Chase Financial debt for the Nissan vehicle (wife drove this car and paid the monthly payments, but it was registered in only husband's name) was $20,922. (TR 371:4 through 372:9)

127. After Ms. Lancaster and Mr. Hunter learned that the lien had been paid they began to negotiate with Respondent on how to resolve the situation. They decided on or about September 5, 2007 to instruct the escrow company to pay 100% of all the debts except for the Chase Financial $20, 922 on the Nissan. After these payments the balance from the proceeds was $6372.80. Since wife would be keeping the Nissan, and husband was faced with the fait accompli that wife had already received a $14,549.20 payment of her attorney fees from the proceeds of the marital residence, they agreed to instruct the escrow company to pay all the remaining $6372.80 to Chase Financial for the Nissan. (Exhibit AY and TR 373:3) Although it would seem equitable to allow the wife to retain the Nissan and to subtract the $14,549.20 she

[3] Chrysler Financial $21,948 (Husband), Chase Financial $20,922 (Wife), American Express $18,867 (Husband), Capitol One-credit card (Husband), Citi Card – credit card $5000(Transfer to Amer. Express) and Chase credit card $23, 269 (Wife)

received for attorney fees from the payment on that debt, the creditor could still hold both husband and wife liable for the debt.

128. Husband's counsel Wendy Lancaster did not know until the lien had already been paid that it was as high as $14,549.20. She and Robert Hunter thought it was $3825. The record does not contain any Amended Lien. Instead Respondent's assistant Autumn sent the escrow company a hand-written instruction on a copy of Respondent's March 2, 2007 invoice for wife's attorney fees, "Trisha – please note the balance as of 3/2/07 is $14549.20. This amount is to be taken from Josefina's portion of proceeds only. If you have any questions please call me. Thanks Autumn" (Exhibit AW) Mr. Horne testified at the disciplinary hearing that he objected to the September 5, 2007 agreement between his counsel Wendy Lancaster, Respondent and Mr. Hunter but that he was told that because Respondent would not remove the lien there was nothing that could be done. (TR 268:14-22)

129. **The issues are whether Respondent: 1) engaged in conduct constituting a conflict of interest when he placed the lien allegedly without his client's consent (Complaint, paragraph 78) [ER 1.8], 2) failed to safeguard third party funds (Complaint, paragraph 79) [ER 1.15], 3) knowingly disobeyed the orders of the Court by paying himself from the proceeds of the sale before payments to creditors (Complaint, paragraph 80), [ER 3.4 (c)] and, 4) knowingly failed to respond to a demand for information from the State Bar or failed to furnish information or respond promptly to a request from Bar Counsel (Complaint, Paragraphs 81 and 82) [ER 8.1 (b) and Rule 53 (f)].**

130. On direct examination by Respondent's counsel, wife testified that she did know about the lien. (TR 367:9 through 368:6) Then on cross examination she clarified that she first learned about the lien when, on December 20, 2006, she got a bill from Respondent and he

included a copy of the lien. (TR 380:13 through 381:15) The lien for $3825 was dated December 7, 2006. Therefore it is clear that she did not consent to the lien before it was filed. However, it is equally clear that she was in favor of the lien, that she did not object to the lien increasing as her bill for attorney fees became larger and that she had no other way to pay her attorney. The Bar asserts that ER 1.8 (a) required Respondent to 1) fully disclose the nature of the security interest (the lien) in writing to the client, and 2) advise the client of the need to seek the advice of independent counsel before agreeing to the lien and 3) acquire the client's informed consent in writing to the lien.

131. The opposing argument is that ER 1.8 (i) and ARS section 25-315 control the placing of liens for attorneys' fees. The Rule and the statute clearly authorize the liens. The Hearing Officer concludes that ER 1.8 (a) does not apply to the charging lien in this case.

132. ARS section 25-315 (A) (1) (a) states that the Preliminary Injunction that is issued with the Petition for Dissolution of Marriage enjoins each party (without the consent of the other party or the Court) from encumbering community property "...except if related to the usual course of business, the necessities of life or Court fees and reasonable attorney fees associated with an action filed under this article..." Therefore, Respondent was authorized to file the lien against the residence of the community if he had the consent of his client. After wife learned of the lien she certainly consented to it. Although the lien is a security interest adverse to a client as is stated in the language of ER 1.8 (a), a review of the comments to ER 1.8 (a) and ER 1.8 (i) reveals that ER 1.8 (i) controls this situation.

133. Comments [1], [2], and [3] to ER 1.8 (a) describe a series of transactions between lawyer and client where there are risks that the lawyer's pursuit of his own interests will limit his representation of the client. That is not the case in a charging lien. Wife benefitted

from the lien, even if after it was paid she owed Chase Financial about $14,000 on her Nissan. Another of her financial obligations ($14,529.20 in attorney fees) had been paid from the proceeds of the marital residence when she had no other source of funds from which to pay Respondent. Without the ability to use a charging lien in these circumstances, wife may not have had representation.

134. More on point, Comment [1] states in part, "It [ER 1.8(a)] does not apply to ordinary fee arrangements between client and lawyer, which are governed by ER 1.5. although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." There is no definition of "nonmonetary property" in the ERs. However ER 1.8(i) is the more specific rule on this topic. It states in part, "(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses;" Comment [16] states in part, "In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees."

135. The marital residence was a part of the subject matter of Respondent's representation of wife in the dissolution action. ARS section 25-315 (A) (1) (a) is a specific authorization by the legislature for an attorney to encumber (a lien) community property after the filing of the Petition for Dissolution and the Preliminary Injunction for the purpose of collecting attorney fees. Therefore the charging lien in this case was authorized by statute and it was placed on property that was the subject matter of the representation. The Hearing Officer concludes that the more specific rule ER 1.8 (i) applies, not ER 1.8 (a) and that the lien could be placed without Respondent complying with the requirements of ER 1.8 (a).

136. The American Bar Association Formal Opinion 02-427 of May 31, 2002 states, "Rule 1.8 (a) should not be regarded as a Rule that is inconsistent with Rule 1.8 (i) and we conclude that it does not apply to the acquisition by contract of a security interest in the subject of the litigation for fees." (Exhibit AAU, Bates stamp 553)

137. Respondent therefore did not violate ER 1.8 (a) when filing the charging lien in this matter.

138. The Hearing Officer finds that Respondent did not violate ER 1.15 by failing to safeguard property of a third party. This rule is applicable when property of another comes into an attorney's possession. Respondent was not holding property for Mr. Horne. The escrow company was holding the proceeds from the sale of the residence.

139. Another theory of the Bar might relate to ER 1.15 (e) which requires a lawyer who is holding property in which two or more persons (including the lawyer) claim an interest to keep the property separate and distribute all portions to which there is no dispute. This theory asserts that Respondent refused to pay back the $14.549.20 after he learned that Mr. Horne disputed Respondent's claim to these funds. The evidence is not clear and convincing on this point. Ms. Lancaster testified that she had orally asked Respondent to pay back the funds in a meeting with Robert Hunter that resulted in the September 5, 2007 agreement when Respondent refused to pay back the money. Respondent testified that no one asked him to pay the money back that he had received from the Charging Lien. (TR 503:13-23) Robert Hunter the Special Real Estate Commissioner testified that he and the escrow agent and Ms. Lancaster did not ask Respondent to pay back the money. (TR 403:18-21)

140. Another theory is that Respondent's charging lien caused a third party Mr. Horne to suffer financially. Mr. Horne testified that his credit report showed he still owed

$16,000 in attorney fees which he could have paid if all the community debts from this dissolution action had been paid. (TR 272:22 through 273:11)His testimony was contradicted by his conduct when his wife tried to trade in the Nissan on a new car after the divorce. He was living in the State of Washington. She was living in Arizona. She went to a Lexus dealership in Peoria and purchased a new Lexus using the Nissan as a trade-in. The dealership had to contact Mr. Horne to get him to sign off on the title for the Nissan since he was the only owner on the title. He refused to sign even though the dealership had agreed to pay enough money for the Nissan to pay off the entire remaining debt to Chase Financial. Respondent was angry that his wife had failed to live up to her agreement to change the ownership of the Nissan to her name and to have his name removed from the Chase Financial debt. (TR 271:9 through 272:21)

141. Mr. Horne travelled to Peoria, contacted the Peoria Police and with a policeman went to the dealership to demand possession of the Nissan. He then took the Nissan back to Washington and sold it, retaining the proceeds after the obligation to Chase Financial was paid. (Exhibit AV, Bates stamp 290-296) In addition he had earlier insisted in the settlement with his wife in or about September, 2007 that the escrow company pay the creditors the amount of the debts as they were before the Decree was signed in January, 2007 even though by September, 2007 the debts had been reduced by Mr. and Mrs. Horne paying the monthly payments. (TR 397:5 through 398:9) This resulted in Mr. Horne receiving refund or overpayment checks from the creditors written to both Mr. and Mrs. Horne when the creditors were overpaid by the escrow company. Mr. Horne signed Mrs. Horne's name on the backs of these checks without her permission, kept the proceeds and never informed his own lawyer Wendy Lancaster, Mrs. Horne or his succeeding counsel Mr. Zubriggen. (Exhibit AV, Bates stamp 318) These matters

(and other issues) were brought to the attention of Judge Reinstein in a post-decree hearing on July 31, 2008. (Exhibit AV)

142. On July 31, 2008, Judge Reinstein conducted an evidentiary hearing on a number of issues. Judge Reinstein heard the issue of whether Respondent's charging lien was in violation of the Court's order of January 17, 2007. On August 5, 2008, Judge Reinstein ruled as follows:

> **"ATTORNEY FEES PAID OUT OF PROCEEDS FROM THE SALE OF MARITAL HOME**
>
> A Charging Lien on the marital home was filed by counsel for Wife on December 7, 2006, in the amount of $3,285 (See Exhibit 16). However, upon sale of the marital home on or about March 2, 2007, $14,500 was paid counsel for Wife out of the net proceeds from the sale of the home (See Exhibit 4) prior to these proceeds being divided by the Parties.
>
> The Court finds that Husband is entitled to an equalization payment from Wife of one-half of the above payment or $7,250." (Exhibit 54, Bates stamp SBA000228-000229)

143. It is clear from Judge Reinstein's decision that he thought that the Respondent should not have been paid his attorney fees by a lien on the marital residence. The lien operates on the sale of real property in a dissolution action as a priority over payments from the proceeds of the sale to the parties. Therefore to Judge Reinstein the key word in his decision was that Respondent was paid "prior" to proceeds being divided by the parties.

144. Respondent knew that Judge Reinstein had ordered each party to pay its own attorney fees in his January 17, 2007 order. Respondent knew this well in advance of the close of escrow on the marital residence on March 2, 2007. Respondent knew that his lien was $14,549.20 by the time escrow was to close. He knew that the deduction from the $99,000 in proceeds of the $14,549.20 for his attorney fees would leave the parties unable to pay off all of their debts. He knew that the Nissan vehicle of Wife was titled only in the name of Husband, Mr. Horne. He also knew that unless the Chase Financial loan on the Nissan was paid off that Chase Financial could proceed against both the Husband and the Wife (the Nissan was purchased during their marriage) if the Wife later defaulted on the payments. He also knew that in the "agreement" (necessitated by the payment of his charging lien) Wife had agreed to accomplish the removal of Husband's name from the title on the vehicle and from the loan by refinancing the Nissan. (Exhibit 54, Bates Stamp SBA000227) Wife did not get Husband's name removed from either the title or the loan.

145. Respondent in order to comply with Judge Reinstein's order of January 17, 2007 should have removed his lien before the close of escrow. Respondent did not need to be asked or told by anyone else to remove the lien. Respondent knew enough about the sales of marital residences in dissolution actions, and the use of the proceeds to pay community debts, the amount of proceeds available in this case and the amount of the debts, to know that the effect of his lien would thwart the intention of both parties to pay off their obligations. Respondent knew enough to know that if his lien was not paid it would prevent the sale of the residence. What happened after his lien was paid was very telling about what Respondent knew before the close of escrow.

146. Ms. Lancaster, Husband's lawyer, and Mr. Hunter the Special Real Estate Commissioner and the parties were faced with a shortage of $14,549.20 from which to pay the debts. Respondent argues that he could not have done anything wrong because Mr. Hunter, Ms. Lancaster and Husband all "agreed" (on September 5, 2007) to the resolution of this matter. They "agreed' because they were left with no other choice. The intention of the parties as stated in Judge Reinstein's minute entries of January 17, 2007 and August 5, 2008 was to pay off as much of the debts as possible. If Judge Reinstein had wanted the proceeds from the sale of the residence to first be reduced by $14,549.20 to pay for Wife's attorney fees he would have in the January 17, 2007 Decree stated that the sum of $14,549.20 would be first deducted from the proceeds as Husband's obligation to pay Wife's attorney fees pursuant to ARS section 25-324. Instead Judge Reinstein ruled exactly the opposite.

147. The State Bar has proven by clear and convincing evidence that Respondent knowingly disobeyed the orders of the Court by paying himself from the proceeds of the sale before payment to creditors.

148. On March 20, 2008 the State Bar sent Respondent a letter requesting his response to Michael Horne's complaint. (Exhibit 49) The Bar asked Respondent to reply within 20 days. His reply was due on April 9, 2008. Respondent failed to reply by April 9, 2008.

149. Having received no reply by April 15, 2008 the State Bar sent Respondent another letter requesting a reply by April 25, 2008. (Exhibit 50) Respondent replied in a letter of April 21, 2008. (Exhibit 51) However, instead of addressing the specifics of Mr. Horne's complaint, Respondent noted that Mr. Horne's complaint was filed at the time that Respondent had filed a post-decree motion on behalf of Josefina Horne. Respondent then attached a

document from his client Josefina Horne stating the client's opinion of Mr. Horne's complaint. Then Respondent concluded his letter by suggesting that Bar Counsel contact his client Josefina Horne.

150. The Hearing Officer concludes that Respondent did not promptly respond to the April 15, 2008 request of the Bar for information. The Hearing Officer concludes that Respondent failed to furnish information to the Bar when, in his letter of April 21, 2008, Respondent simply referred Bar Counsel to his client Josefina Horne. The Bar is entitled to information directly from Respondent. Respondent is a member of the Bar. He is required by ER 8.1 (b) and Rule 53 (f) to respond to a demand for information from the Bar and to furnish information in a prompt manner. Respondent cannot meet this obligation by putting the burden on Bar Counsel to learn the facts through direct contact with Respondent's client. The Bar is entitled to receive the information from Respondent.

151. On July 17, 2008 the State Bar sent Respondent a letter requesting seven categories of information. (Exhibit 52) The Bar requested that Respondent provide the information by July 25, 2008. Respondent in a letter of July 22, 2008 informed the Bar that he was out of his office until July 28, 2008 and that he would review the matter in further detail after he returned. The record reflects that the Probable Cause Order in this matter was issued on August 25, 2008. Respondent had not provided the information requested in the July 17, 2008 letter by the time of the Order. Therefore the Hearing Officer concludes the Respondent failed to respond to the demand for information and failed to furnish information.

CONCLUSIONS OF LAW

COUNT ONE – Grim/Moore

152. The State Bar has not proven by clear and convincing evidence that Respondent's two Motions for Reconsideration were 1) non-meritorious [ER 3.1], 2) filed for the sole purpose of delay [ER 4.4 (a)], and 3) prejudiced the administration of justice [ER 8.4 (d)].

153. The State Bar has proven by clear and convincing evidence that Respondent failed to respond to a demand for information and failed to furnish information when Respondent 1) failed to send a copy of the Motion to Continue in Grim v. Moore to the Bar in response to question #2 in the Bar's March 26, 2008 letter and 2) failed to provide Bar Counsel with a copy of the Motion for Contribution of Attorney Fees in McIntosh v. Moore in response to question #4 in the Bar's March 26, 2008 letter. [ER 8.1 (b) and Rule 53 (f)] (Note: Question #4 applies to McIntosh/Moore)

154. The State Bar has not proven by clear and convincing evidence that Respondent failed to respond to a demand for information or failed to furnish information in response to question #1 and question #3 in the State Bar's letter of March 26, 2008.

COUNT ONE – McIntosh/Moore

155. The State Bar has not proven by clear and convincing evidence that Respondent's Motion for Contribution of Attorney Fees was non-meritorious. [ER 3.1]

156. The State Bar has not proven by clear and convincing evidence that Respondent made a false statement of a material fact in the Motion for Contribution. [ER 3.3 (a)]

157. The State Bar has not proven by clear and convincing evidence that Respondent filed the Motion for Contribution for the purpose of delay or to burden the opposing party (Father). [ER 4.4 (a)]

158. The State Bar has proven by clear and convincing evidence that Respondent engaged in conduct in the Motion for Contribution involving dishonesty, deceit and misrepresentation and that this conduct was also prejudicial to the administration of justice. [ER 8.4 (c) and (d)]

COUNT TWO – Betty Allen-Brissette

159. The State Bar has not proven by clear and convincing evidence that Respondent violated ER 1.2. The Bar cast this allegation as not complying with the client's objectives for the representation which were a prompt completion of the probate of her husband's estate. The Hearing Officer finds that Respondent was not prompt in his work for the client, but that the lack of promptness is dealt with by ER 1.3, not ER 1.2.

160. The State Bar has proven by clear and convincing evidence that Respondent did not act with reasonable promptness. [ER 1.3]

161. The State Bar has proven by clear and convincing evidence that Respondent failed to keep the client informed about the status of her matter. [ER 1.4 (a) (3)]

162. The State Bar has not proven by clear and convincing evidence that Respondent charged the client an unreasonable fee or billed the client twice for the same work. [ER 1.5 (a)]

163. The State Bar has proven by clear and convincing evidence that Respondent did not respond promptly to the Bar's October 22, 2007 letter. [Rule 53 (f)]

164. The State Bar has not proven by clear and convincing evidence that Respondent failed to provide information sought in the Bar's letter of July 16, 2008. [ER 8.1 (b)]

COUNT THREE - Horne

165. The State Bar has not proven by clear and convincing evidence that Respondent engaged in a conflict of interest with his client when he filed a Charging Lien on the marital residence. [ER 1.8 (a)]

166. The State Bar has not proven by clear and convincing evidence that Respondent failed to safeguard funds of another when he filed the Charging Lien and did not withdraw the Lien. [ER 1.15]

167. The State Bar has proven by clear and convincing evidence that Respondent knowingly disobeyed an obligation under Court order when he paid himself first with the Lien after Judge Reinstein had ordered that each party pay their own attorney fees. [ER 3.4 (c)]

168. The State Bar has proven by clear and convincing evidence that Respondent failed to promptly respond to a demand for information in the Bar's letter of March 20, 2008 and in the letter of July 17, 2008 and that Respondent failed to furnish information requested in the March 20 and July 17, 2008 letters. [Rule 53 (f)]

RESTITUTION

169. This topic was not addressed at the Hearing. In Counts One and Three Respondent's clients were not complaining against him. Therefore Respondent does not owe them any restitution. In Count Two the client Betty Brissette was complaining about being double billed. The Hearing Officer has concluded that the evidence is not clear and convincing that Respondent either overbilled Ms. Brissette or that he double billed her. Therefore Respondent should not be ordered to pay restitution on this Complaint.

ABA STANDARDS

The American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* are a "... useful tool in determining the proper sanction." *In re Cardenas,* 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). In determining an appropriate sanction matters to be considered include the duty violated, the lawyer's mental state, the presence or absence of actual or potential injury and the existence of aggravating and mitigating factors. *In re Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); *see also Standard* 3.0.

THE DUTY VIOLATED

In Count One (MacIntosh/Moore) Respondent violated a duty owed to the legal system when he misrepresented to Judge Mroz in the Motion for Contribution for Attorney Fees that Mother's monthly income for child support purposes had been "found" in the Child Support Hearing to be the figure she had originally requested. Father had agreed to a certain figure for Mother's monthly income for child support purposes in a conference with an Expedited Support Services coordinator **before** the parties saw the Commissioner in the Child Support Hearing. The Commissioner adopted the stipulated figure for Mother's monthly income and then made a "finding" against Mother's position on the only disputed issue presented to him; the effective date of the modified child support.

In Count Two, Respondent violated a duty owed to his client when he failed to promptly probate the estate of Ms. Brissette's husband and when he failed to keep his client informed about the status of her matter.

In Count Three, Respondent violated a duty owed to the legal system when he knowingly disobeyed an obligation under Court order by paying himself first from the proceeds

of the sale of the marital residence after Judge Reinstein had ordered that each party pay their own attorney fees.

THE LAWYER'S MENTAL STATE

In Count One, Respondent knew that in the Child Support Hearing before the Commissioner the amount of the Mother's monthly income was no longer disputed. However, the amount of the income was agreed to by Father and presented to the Commissioner. Therefore, there was only a technical "finding" when the Commissioner simply adopted Mother's monthly income from the agreement of the parties. In considering the sanction for this violation the Hearing Officer will consider that Respondent could technically assert that the Commissioner's adoption of the parties' agreement on Mother's monthly income for child support purposes was a "finding".

In Count Two, Respondent negligently failed to promptly process the estate of his client's husband and negligently failed to keep the client informed about the status of her matter.

In Count Three, Respondent knowingly violated the order of the Court for each party to bear its own attorneys fees when Respondent paid himself first from the proceeds of the marital residence.

THE ACTUAL OR POTENTIAL INJURY

In Count One, Respondent did not cause actual injury with his statement in the Motion for Contribution that Mother's figure for monthly income for child support purposes was found in the Child Support Hearing to be in her favor. Opposing counsel Mr. Kellers showed Judge Mroz in his Response to the Motion that the facts were not as Respondent had asserted in the Motion. Judge Mroz obviously felt that Respondent had tried to mislead her. The

Judge's comments have been previously quoted in this report. The potential for injury was that the Judge may have been either too busy or distracted to have understood the nuances of the case before the Commissioner and that the judge might have ruled on the Motion inappropriately for Respondent's client. This did not happen in this case because the opposing party was represented by counsel who carefully informed the judge about the true nature of the proceedings. However, the Hearing Officer is aware that in many cases in Family Court one party is not represented by counsel. The Court must still be able to rely on Respondent's accurate rendition of the proceedings even if a lawyer is not present on the opposing side of the case.

In Count Two, Respondent caused Ms. Brissette unnecessary anguish over the progress of her matter. The record has established that the client was trying to expedite the probate of the estate. The longer the estate was open the more expenses the client incurred for the upkeep of the real property that was the major asset of the estate. The client's diligence in trying to communicate with Respondent was not reciprocated by him. Although the client was reimbursed for her out of pocket expenses from the distribution of the assets of the estate, she should not have had to first threaten to file a bar complaint and second file the complaint to finally get Respondent to complete her matter.

In Count Three, Respondent caused the parties not to be able to pay the full debt owed to Chase Financial for the Nissan. The Court intended and the parties desired that as much of the community debts that could be paid from the proceeds of the sale of the marital residence should be paid. The Court's order that each party pay its own attorney fees should have resulted in the proceeds of the sale of the marital residence paying all the debts and Respondent's client owing him $14,549.20 in fees. Respondent's violation of the Court's

January 17, 2007 order interfered with the legal proceeding. In a later proceeding on July 31, 2008 and in the order of August 5, 2008 Judge Reinstein had to correct Respondent's violation by awarding the opposing party an offset of $7250. Of course the Hearing Officer will consider that the later hearing and the orders that followed were also caused by the conduct of Husband, the party opposing Respondent's client.

THE APPLICABLE STANDARDS

In Count One – McIntosh/Moore, two standards may be applicable; 1) *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 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.

2) *Standard* 6.13 – Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is withheld, 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.

Respondent's conduct in characterizing the Child Support Hearing as yielding a "finding" in his client's favor was knowingly, but was also careless as to the true details. Technically the Commissioner "found" that the parties' agreement on the modified child support was accepted. But in the real sense of a decision after a dispute before the Commissioner there was no "finding". The Hearing Officer finds that Respondent exhibits a pattern in the matters alleged in this Complaint of being in too much haste. Respondent does not seem to care about the details. He sees a document like Husband's 2005 tax return with a

$210,000 adjusted gross income and he hastily prepares a Motion for Contribution for Attorney Fees and carelessly refers to a "finding" in the Child Support Hearing. As quoted earlier in this Report his opposing counsel Mr. Kellers attributed this conduct to Respondent not wanting to go back and read and review prior documents in this case that may be as much as six inches thick. But as Judge Mroz opined it leaves the Court justifiably feeling misled.

In Count Two – Betty Brissette, *Standards* 4.43 is most applicable: Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

In Count Three – Horne, either *Standards* 6.22 or 6.23 are applicable:

Standard 6.22 – Suspension is appropriate when a lawyer knowingly violates a Court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Standard 6.23 – Reprimand is generally appropriate when a lawyer negligently fails to comply with a Court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

In Count Three, Respondent asserted that his office communicated with Trisha at the escrow company on or about March 2, 2007 before the proceeds from the sale of the residence were distributed. His office informed Trisha that Respondent's Charging Lien was to be paid "from Josefina portion of proceeds only". (Exhibit AW) If this was Respondent's attempt to follow the Court's January 17, 2007 order that each party bear its own attorney fees it was ineffective. Respondent should have known that after the proceeds from the sale of the marital residence paid all the debts, there would have been no money left over to distribute to the parties. Therefore, there was nothing to constitute "Josefina's portion of the proceeds only".

However after the fact that he was paid $14,549.20 in attorney fees from the proceeds, Respondent thought he could ameliorate the situation caused by his Charging Lien by agreeing that since Josefina was going to keep the Nissan the debt payment for that vehicle would be lessened by the $14,549.20. This "solution" would only have worked if Josefina Horne had refinanced the Nissan; thereby paying off the Chase Financial debt and removing Michael Horne's name from the debt. Josefina Horne did not do as she had promised. Therefore, even if the Decree of Dissolution had "assigned" debts to a specific party (Judge Reinstein did not specifically order in the Decree which party was to assume which debt) creditors were free to legally pursue both spouses on a community obligation. [4]

Respondent's failures to furnish the Bar information are also covered by *Standards* 6.22 or 6.23.

AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors

Standard 9.22(a) prior disciplinary offenses. Respondent is currently in Diversion in file no. 05-0145, for violation of ER 1.4 (communication). Respondent received a censure in 1993 for violation of ER 8.4(c)(misconduct involving dishonesty, fraud, deceit or misrepresentation). Respondent received an informal reprimand in 1993 for violation of ERs 1.3(diligence), 1.5(c)(fees), and 1.15(safekeeping property). Respondent received another informal reprimand in 1994 for violation of ERs 1.3, 1.4, 1.16(d)(terminating representation) Rule 51(h)(failure to promptly respond to the State Bar) and (i)(failure to cooperate with the

[4] ARS section 25-318 (H) contains the following Notice to be served on both parties in a dissolution of marriage, "In your property settlement agreement or decree of dissolution or legal separation, the Court may assign responsibility for certain community debts to one spouse or the other. Please be aware that a Court order that does this is binding on the spouses only and does not necessarily relieve either of you from your responsibility for these community debts. These debts are matters of contract between both you and your creditors (such as banks, credit unions, credit card issuers, finance companies, utility companies, medical providers and retailers). ..."

State Bar). Respondent received a third informal reprimand in 1994 for violation of ER 8.1(knowing failure to respond to the State Bar) and Rule 51 (h) and (i). Respondent received a fourth informal reprimand in 1997 for violation of ERs 1.3 and 1.4. Respondent received a fifth informal reprimand in 1997 for violation of ERs 1.5(b) and 1.16(d). [See Exhibit 55] *Standard* 8.2 recommends suspension when "a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

Standard 9.22(c) a pattern of misconduct. A pattern of misconduct has been found in the past under circumstances in which a Respondent has a prior disciplinary record involving the same or similar wrongdoing, or when a Respondent's misconduct involves multiple clients. *Matter of Levine*, 174 Ariz. 146, 171; 847 P.2d 1093, 1118 (1993). Respondent has demonstrated a pattern of misconduct.

In Commission Numbers 89-0254 and 89-0794, Respondent was censured for knowingly engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Although Respondent was well-intentioned, he signed his client's name to a power of attorney and then used a power of attorney that was revoked by his client's death. (Exhibit 55, Bate stamp SBA000235) In the instant case in Count One Respondent did not correctly portray the circumstances of the Child Support Hearing to the Court.

In Number 92-2219, Respondent was reprimanded for failing to promptly conclude the matter, ER 1.3. (Exhibit 55, Bates stamp SBA000240) In the current case in Count Two Respondent failed to promptly conclude the probate matter.

In Number 93-2066, Respondent was reprimanded for violating ER 1.3 by failing to transfer his file to his client's new attorney and for failing to respond to a request for

information from the Bar under former Rules 51 (h) and (i). (Exhibit 55, Bates stamp SBA000242) In the instant case Respondent has violated ER 1.3 by not promptly concluding Ms. Brissette's matter. Respondent has also failed to respond promptly to the Bar's request for information in Count One and Count Two and he has failed to furnish information in Count One and Count Three.

Once again in Number 94-0266, Respondent was reprimanded for failing to respond to requests for information from the State Bar in a timely manner. (Exhibit 55, Bates stamp SBA000244)

In File Number 95-1830, Respondent was reprimanded for failing to diligently represent his client in a dissolution action, ER 1.3 and failing to adequately communicate with the client, ER 1.4. (Exhibit 55, Bates stamp SBA000246) In the current case in Count Two Respondent failed to keep Ms. Brissette informed about the status of her matter.

Therefore the Hearing Officer concludes that Respondent does have a pattern of ethical violations for not promptly concluding matters, not communicating effectively with clients, for not being honest (once before) and for failing to respond to the Bar's requests for information.

Standard 9.22(d) multiple offenses. This matter includes three separate matters and the violation of multiple ethical rules. The other violations that should be considered in aggravation are as follows:

Count One (McIntosh v. Moore) ERs 8.4 (c) and 8.4(d)

Count One (Failure to Cooperate) ERs 8.1(b) and Rule 53(f)

Count Two (Allen-Brissette) ERs 1.3, 1.4, and Rule 53(f)

Count Three (Horne) ERs 3.4(c), 8.1(b) and Rule 53(f)

Standard 9.22(i) substantial experience in the practice of law. Respondent has been an Arizona attorney since September 23, 1972, over 35 years.

Mitigating Factors

Standard 9.32 (g) character or reputation. Stephen Keist testified that Respondent has a reputation for being honest and a straight shooter. (TR 319:16-24) Mr. Keist said that in his opinion Respondent was a zealous advocate for his clients. Mr. Keist thought that most lawyers respected Respondent's abilities as a lawyer and enjoyed practicing against Respondent. As noted earlier in this Report, Charles Kellers who was opposing counsel to Respondent in both Count One – Grim v. Kelly Moore and Count One – McIntosh v. Don Moore, confirmed Mr. Keist's opinion when Mr. Kellers said that in spite of what transpired in the cases he liked Respondent. Mr. Kellers did not know if Respondent's transgressions were intentional or negligent; i.e. the result of having too much on his plate. (Paragraph 71, TR 89:15 through 90:5) The Hearing Officer finds this factor to be in mitigation. Mr. Keist formerly worked for Respondent as an attorney between 1987 and 1994. He has not been associated with Respondent in 15 years. Mr. Keist practices approximately 75 to 80% of his time in family law. He has also opposed Respondent in family law cases. Therefore Mr. Keist is in a good position to know Respondent's reputation in the community of lawyers.

Standard 9.32 (m) remoteness of prior offenses. In Exhibit 55 the Bar has provided the Hearing Officer with six matters in which Respondent was sanctioned. The complaints span the period 1989 to 1995. The Orders of discipline date from 1992 through 1997. Although the Bar in its Post-Hearing Memorandum states that the Respondent is currently in diversion in file Number 05-0145 for a violation of ER 1.4 (communication), no further details have been

provided to the Hearing Officer. Most of Respondent's matters were resolved more than ten years ago and resulted in Informal Reprimands.

PROPORTIONALITY REVIEW

In the imposition of lawyer sanctions, the Court is guided by the principle that an effective system must have internal consistency. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988) Therefore, a review of cases that involve conduct of a similar nature is warranted. To achieve internal consistency, it is appropriate to examine sanctions in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994) However, the discipline in each situation must be tailored for the individual case as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604 (1984).

In re Cayce, SB-06-0177-D (2006). Cheryl Cayce filed a Guardianship Petition on behalf of grandmother and appeared at the hearing without giving prior notice to the mother. Cayce relied on grandmother's assertion of facts for the Petition. Cayce discovered new or additional facts before the hearing on the Petition, but she did not correct the Petition. Judge Munger relied on the inaccurate Petition and awarded grandmother temporary guardianship of the grandchild. The next day the mother of the child filed a Motion to Vacate the Temporary Guardianship. Another judicial officer granted the motion. Cayce called Judge Munger and told him she did not know that her client grandmother had before the first hearing received a letter from an attorney representing mother and that mother had the child.

Judge Munger recorded the conversation with Cayce. The judge instructed Cayce to file a request for criminal contempt against her client. Cayce told her client about the call with Judge Munger, but did not tell the client what she had told the judge about the client's

communication from mother, nor did she advise her client about the contempt action the Court had directed her to start. Instead, citing a conflict she advised the client to retain other counsel. Cayce agreed to a 90 day suspension for knowing that incomplete and misleading documents had been filed with the Court but not correcting the inaccuracies. The case is distinguishable from the instant case because the actions and inactions of Cayce caused actual injury when the Court in an ex parte Emergency Petition for Temporary Guardianship granted a guardianship of the child to grandmother. Judge Munger found that both the child and the mother were actually harmed. Respondent's use of the word "finding" in the Motion for Contribution of Attorney's Fees was not on the fundamental issue as were Cayce's misrepresentations on the guardianship of a child.

In *In re Nysather*, DC No. 07-0475 Nysather was representing a minor child in the settlement of a personal injury matter. A conservatorship had to be established in probate Court to approve the settlement and distribute the proceeds. Nysather failed to comply with numerous Court orders resulting in an order to show cause hearing and a finding of contempt against him. He was sanctioned with a monetary fine. The Hearing Officer stated, "His apparent disregard of the respect for the authority of the Superior Court potentially damaged the public's trust in the legal system." Nysather and the Bar agreed that Nysather's undue delay in completing the conservatorship resulted in the minor losing interest income from the settlement proceeds. Nysather agreed to a Censure and one year of probation with LOMAP and CLE terms. The case is distinguishable from the instant matter because Nysather's state of mind was found to be negligent. Three aggravating factors were multiple offenses, vulnerable victim and substantial experience in the practice of law. Among eight mitigating factors was no prior discipline, remorse, personal problems (divorce), full and free disclosure to the Bar, and a timely and

good-faith effort to rectify the situation. Although Respondent has a prior disciplinary history the consequences of his action in filing the lien were not as potentially severe as in the Nysather matter.

In *In re Abernathy*, SB-05-0171-D (2006) Ms. Abernathy received a Censure and one year of probation (LOMAP) for violating several ERs including ER 3.4(c). Ms. Abernathy's problems began when she was representing a client in a family Court matter and she did not appear at a return hearing. The judicial assistant for Judge Foster recalled that Ms. Abernathy called her in the afternoon of the hearing to say that Ms. Abernathy would not be appearing because she was not prepared and the client had not provided her with sufficient information. The client appeared telephonically and stated that her lawyer had not told her the hearing was canceled. The judge reported Ms. Abernathy to the Bar for not attending the hearing and not following proper procedures of filing a motion to continue. The Court set a hearing for Ms. Abernathy to show cause why she should not be held in contempt. Ms. Abernathy did not appear for the return hearing on the OSC. The Court found Ms. Abernathy in contempt but ordered that Ms. Abernathy could purge herself by paying $500 and providing proof to the Court that she had not charged her client any attorney's fees for any action involving the Petition for Temporary Orders.

Ms. Abernathy paid the $500 but did not provide proof that she had not charged her client attorney's fees. When Ms. Abernathy first responded to the Bar's request for information she indicated that perhaps someone had originally called the judicial assistant for Judge Foster and said that they were from the office of the client's lawyer. At first Ms. Abernathy was asserting that she had not called the judicial assistant to say that she was not prepared for the

hearing. The Bar later received an amended version of Ms. Abernathy's first letter in which her assertions that another law office had called the judicial assistant were stricken through.

The parties agreed that Ms. Abernathy knowingly failed to comply with a Court order or rule by failing to provide the Court with proof of not charging her client legal fees, by failing to appear at the show cause hearing, by failing to request a continuance of the return hearing and, by failing to appear at the return hearing. The Hearing Officer noted that there was minimal injury to Ms. Abernathy's client. Two aggravating factors were found, 1) prior disciplinary offenses and 2) substantial experience in the practice of law. Six mitigating factors included 1) absence of a dishonest or selfish motive, 2) personal or emotional problems, 3) full and free disclosure to the Bar and cooperative attitude, 4) mental disability or chemical dependency, 5) imposition of other penalties and 6) remorse.

Although Respondent does not have the same number of mitigating factors the Hearing Officer concludes that this case is closer to the Respondent's matter than *In re Cayce.*

RECOMMENDATION

The Hearing Officer recommends that the Respondent receive a Censure with two years of probation with LOMAP terms and that Respondent pay the costs of this proceeding. The State Bar did not prove a violation in Count One – Grim v. Moore. The Hearing Officer found a violation in Count One – McIntosh v. Moore for Respondent being deceitful with the Court in his Motion for Contribution of Attorneys Fees. However, the Hearing Officer's finding was not on the major point stressed by the Bar. Instead, the finding was that Respondent misrepresented that there was a "finding" at the Child Support Hearing in his client's favor. The Bar did not list this misrepresentation in the Complaint. The Bar did not refer to this

misrepresentation in its portion of the Joint Prehearing Statement. The Bar did not request a finding of fact on this misrepresentation in the Bar's Post Hearing Memorandum.

The Bar in Count One - McIntosh v. Moore focused on the allegation that Respondent misrepresented the facts when in the Motion for Contribution he referred to the $210,000 of adjusted gross income on Father's 2005 tax return as reflecting Father's yearly income. The Bar asserted that Respondent omitted to inform the Court in the Motion for Contribution that in the earlier Court proceedings Respondent and his client, Mother, had agreed that for monthly child support purposes Father's yearly income was about $55,000. The Hearing Officer has found that although Respondent's Motion for Contribution should have been clearer about Father's 2003 and 2004 income and about the agreement regarding Father's monthly income for child support, Respondent was not found to have misrepresented facts to the Court because his request for attorney's fees was fundamentally different than a request for monthly child support.

Father's yearly income for child support purposes must be steady to support a monthly ongoing obligation. However, in the Motion for Contribution, Respondent on behalf of Mother was seeking a partial payment for a one time obligation of attorney fees. Therefore, if, in the year 2005 Father had received large one time payments that were reflected in his 2005 joint tax return, and if those payments could be attributable to Father instead of his new wife, then Mother was justified in informing the Court that Father had "financial resources" available to contribute to Mother's attorney fees. ARS section 25-324 (A)

The Hearing Officer notes that the lawyer who opposed Respondent in McIntosh v. Moore, Charles Kellers, and the judge who commented on the misleading quality of Respondent's Motion for Contribution, did not report Respondent to the Bar. Mr. Kellers clearly

stated in the hearing his opinion that the Motion for Contribution was misleading because Respondent did not inform the Court about the stipulation several weeks before the Motion for Contribution of Father's yearly income of $55,000 and of Father's income reported on his 2003 and 2004 tax returns.

However, Mr. Kellers also testified that he had other significant objections to the Motion for Contribution. First, Mr. Kellers was upset that the Motion was seeking so much in attorney's fees when the Petition for Modification of Child Support filed by Respondent in August 2006 requested attorneys fees if the case went to hearing. (TR 80:23 through 81:4) Mr. Kellers noted that the issue of child support did not go to hearing. The only issue before the Commissioner was the effective date of the modification, which was lost by Respondent. Second, Mr. Kellers objected to Respondent's attempt in the Motion for Contribution to be paid attorneys fees for legal work dating back to January 13, 2006. Judge Mroz had essentially thrown out Respondent's January 2006 Petition because Respondent had not complied with the rule that required him to request a hearing. (TR 81:5-25)

In deciding the appropriate sanction the Hearing Officer has weighed the severity of Respondent's violation. In Count One the violation has been found to be misrepresenting that there was a "finding", instead of informing the Court that the amount of child support (and therefore the amount of Mother's monthly income) was settled by agreement. Since the Hearing Officer finds that the use of the word "finding" by Respondent in the Motion for Contribution was not a significant factor the sanction associated with this misconduct should not be as significant as suspension.

The most serious misconduct found by the Hearing Officer has been the use by Respondent of the Charging Lien on the marital residence in Count Three – Horne. However,

certain facts must be considered when recommending either suspension or censure. *Standard* 6.22 recommends suspension when a lawyer knowingly violates a Court order or rule. Since the Hearing Officer has found that Respondent violated ER 3.4 (c) that finding states that Respondent knowingly disobeyed an obligation under the rules of a tribunal. It must be noted that Respondent filed the Charging Lien when his attorney fees for his client Josefina Horne were $3825 on December 7, 2006. Therefore, the Lien was filed **before** Judge Reinstein had issued his decision on January 17, 2007 that each party should bear its own attorneys fees. It is significant that Respondent did not withdraw the lien after he read the Court's order that each party bear its own fees.

But Respondent attempted to react to the Court's order on fees by having his office staff direct the escrow company to pay his Charging Lien out of Josefina Horne's portion of the proceeds only. (Exhibit AW) When Respondent and the Special Real Estate Commissioner Robert Hunter and counsel for Mr. Horne Wendy Lancaster learned that the instruction to pay the Lien out of Mrs. Horne's portion of the proceeds would not work, they agreed to compensate Mr. Horne for the payment of the Lien by reducing the payment on a debt (Chase Financial on the Nissan) they all thought was being assigned to Mrs. Horne by $14,549.20 (the amount of the lien). As stated earlier, this adjustment would have worked if Mrs. Horne had refinanced the Nissan and removed Mr. Horne's name from the lien and the title.

In arriving at a recommendation on a sanction the Hearing Officer has considered the harm done by Respondent's conduct. Even though Mrs. Horne did not refinance the vehicle, Mr. Horne refused to allow her to pay off the balance of the debt on the Nissan, thereby clearing his name from the obligation. He was told by the Peoria car dealership that the dealer was giving Mrs. Horne enough of a trade-in value on the Nissan when she purchased the Lexus,

that the dealer would pay off the entire remaining balance on the Nissan loan to Chase Financial. The dealer asked that to complete the trade-in on the Nissan, Mr. Horne sign over the title to the dealer. Mr. Horne refused. He contacted an attorney. He travelled to Peoria from the State of Washington. He contacted the Peoria police and asked them to accompany him to the Peoria car dealership where he demanded possession of the Nissan.

Mr. Horne was given the Nissan. However, after he returned to Washington and sold the Nissan and paid the Chase Financial debt he kept the proceeds. At the hearing of July 31, 2008, Judge Reinstein took testimony on this issue. (Exhibit AV) In his August 5, 2008 ruling Judge Reinstein found that he had "by inference" awarded the Nissan to Wife in the Decree and that she also was responsible for the debt to Chase Financial (which in the Decree was listed as $20,922). (Exhibit 54, Bates stamp SBA000227)

The judge found that Husband had sold the Nissan for $14,500. The debt at the time of this sale was down to $4977. Mrs. Horne testified that she continued to make payments on the Nissan until the attempted trade-in. (TR 374:3; 375:4-8; 389:8 through 391:5) Judge Reinstein ruled "...that the $9523 realized from the sale of the Nissan is a community asset. Consequently, each Party is entitled to $4761.50." (Exhibit 54)

The Hearing Officer concludes that there was very little if any actual damage caused to the parties by Respondent failing to withdraw the lien, when Respondent's attempt to correct the situation he created was reasonable. Mr. Horne was the complainant in Count Three. His major complaint was that Respondent's selfish motive in paying himself first from the proceeds of the house caused Mr. Horne to have credit problems. There is no evidence that Chase Financial ever took any action against Mr. or Mrs. Horne on the Nissan debt. There is no evidence that Mrs. Horne ever failed to keep up the payments on the Nissan. There is no

evidence that Mr. Horne could not pay his own attorney fees because he was paying on Mrs. Horne's Nissan. The community debts assigned to Mr. Horne at the time of the Decree were paid in full by September, 2007. When Mr. Horne was presented with an opportunity to have his name removed from the Nissan debt (the damage he was claiming by Respondent's use of the Lien) by Mrs. Horne's trade-in, he refused to sign the title over to the car dealership.

Although the Hearing Officer has put the burden squarely on Respondent to have withdrawn the lien after receiving Judge Reinstein's ruling on attorney fees on January 17, 2007, the evidence at the hearing did not support Mr. Horne's and Wendy Lancaster's recollections that Respondent was repeatedly asked to remove the lien, but he refused. (Exhibit 48) If this request had been made the Hearing Officer would expect that Ms. Lancaster would have confirmed the request in writing. No such writing has been presented as evidence. Instead the letters in evidence clearly state instructions to the escrow company to pay the Charging Lien out of Josefina Horne's portion of the proceeds. The later instructions tell the escrow company to pay $14,549.20 less to Chase Financial on the Nissan debt. Finally, Mr. Hunter the Special Real Estate Commissioner stated that he did not request that Respondent remove the Lien and he did not hear Ms. Lancaster make that request of Respondent.

The impact of Respondent's misconduct in Count Three has not been as severe as portrayed by Mr. Horne.

Respondent's record of prior discipline is of concern to this Hearing Officer. Respondent is too quick to blame the Bar for trying to get him. He too often dismisses the complaints against him as merely the sour grapes of people he has litigated against in Family Court. The Hearing Officer has concluded that Respondent operates not as much with evil intention, but with a slapdash type of practice that has him running from pillar to post, with a

somewhat reckless disregard for the consequences of his actions or inactions on clients, opposing counsel and opposing parties.

If Respondent does not "get it" soon he is going to face more severe consequences than Censure. What he does not "get" is that he has too much work, not enough support, an inability to focus, and a lack of attention to detail. His most disturbing testimony in the hearing was the following: "But being overworked, no Judge, I don't believe that. Busy, yes. Busy, yes. But Mr. Horne, I would never have changed him. I would never have changed Ms. Moore and their attitudes on that. And I'm never going to change Ms. Miller. She said in her opening she's going to change the way I practice law." (TR 480:15-20)

SANCTIONS

The Hearing Officer recommends the following disciplinary sanctions shall be imposed:

1. Respondent will receive a Censure;

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 Law Office Management Assistance Program ("LOMAP") within 30 days of the date of the final judgment and order;

b. The LOMAP director shall develop written "Terms and Conditions of Probation" the terms of which shall be incorporated herein by this reference;

c. Payment of the costs and expenses of the disciplinary proceedings;

d. 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."

e. Respondent shall be responsible for any costs associated with LOMAP.

f. 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.

g. 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 evidence.

h. 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. 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 26th day of May, 2009.

Jonathan H. Schwartz

Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 26th day of May, 2009.

Copy of the foregoing mailed
this 26th day of May, 2009, to:

Joseph W. Charles
Respondent
Joseph W Charles, PC
PO Box 1737
5704 W Palmaire
Glendale, AZ 85311

Gerald Alston
Respondent's Counsel
Jennings Strouss & Salmon PLC
201 E Washington Street, 11th Floor
Phoenix, AZ 85004

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

by: _____