Stanley R. Lerner
Hearing Officer

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **BRIAN E. FINANDER,** **Bar No. 007739** Respondent.	Nos. 06-1953 and 07-0993 **HEARING OFFICER'S REPORT** (Assigned to Hearing Officer 7V, Stanley Lerner)

I. PROCEDURAL HISTORY

The Complaint in this matter was filed on September 29, 2008. A Case Management Order was issued on October 22, 2008. Respondent filed his Answer on October 27, 2008. Respondent filed an "Omnibus Dispositive Motion under Rule 57(g)" on January 20, 2009. The State Bar filed its response on January 27, 2009. By Order issued January 28, 2009, the Hearing Officer denied Respondent's Motion. The State Bar filed a Unilateral Prehearing Statement on February 3, 2009. Respondent filed a Unilateral Prehearing Statement on February 4, 2009. By Order filed February 10, 2009, the Hearing Officer ordered the parties to file proposed Findings of Fact and Conclusions of Law 14 days after the filing of the transcript of the hearing on the merits. The State Bar filed its Findings of Facts and Conclusions of Law according to the Order of the Hearing Officer. Respondent did not comply with the Hearing Officer's Order regarding the form and content of the Findings of Facts and Conclusions of Law.

The hearing on the merits commenced on February 12, 2009, and continued for a second day of hearing on February 25, 2009. At the commencement of the second day of hearing,

Respondent sought to have admitted evidence not previously disclosed as exhibits; admission of those exhibits was denied. At the conclusion of the second day of hearing, Respondent made an offer of proof relating to evidence previously not disclosed as exhibits. On or about March 2, 2009, Respondent sought to make an additional offer of proof of additional evidence. The State Bar objected; by order of the Hearing Officer filed March 9, 2009, Respondent's motion to make an additional offer of proof was denied.

II. FINDINGS OF FACT[1]

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on May 14, 1983.[2] [Transcript of hearing[3], p. 17, lines 15 – 16]

COUNT ONE (File No. 06-1953/Nutini/Sikora)

2. Respondent was hired by Sikora Trucking Co., Inc. ("Sikora Trucking") in March 2004, to represent Sikora Trucking in a contract dispute with Watkins Motor Lines. [R Ex L]

3. Jeremy and Carol Sikora, the owners of Sikora Trucking found Respondent by using a website, Legal Match. [Tr. 111:22 – 112:4]

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[1] The Hearing Officer incorporates by reference the State Bar's Supplemental Findings of Facts dated April 27, 2009.

[2] Notwithstanding Respondent's general denial of all allegations in the State Bar's complaint, Respondent's admission date, as reflected in the State Bar Membership Database, is May 14, 1983.

[3] References to the Transcript of the hearing on the merits will hereinafter be noted as "Tr.," followed by a reference to the pertinent page and line, "page:line". References to State Bar exhibits will be noted as "SB Ex." followed by the exhibit number and Bates Stamp numbers, "SBA ##"; references to Respondent's exhibits will be noted as "R Ex." followed by the exhibit number and, when possible, additional identifying information.

4. Respondent's first meeting with the Sikoras occurred at their home. [Tr. 112:22 – 24] During the representation Respondent met with the Sikoras at his office and their home. [Tr. 18:22 – 19:1]

5. Respondent knew that Jeremy Sikora was ill from the outset and later learned that he was terminally ill. [Tr. 19:2 – 4] Respondent was continually made aware of Mr. Sikora's failing health. [Tr. 173:3 – 15]

6. Mr. Sikora's illness made it difficult for him to breath and he used oxygen regularly. [Tr. 107:22 – 109:5] His medical condition was obvious. [Tr. 232:23 – 233:5]

7. The Sikoras explained to Respondent that they wanted to pursue a breach of contract action against Watkins Motor Lines for $322,000, through an arbitration clause in their contract with Watkins. [Tr. 114:15 – 19; 114:22 – 115:13]

8. Respondent recommended that the Sikoras not arbitrate their case against Watkins, and that they would get a larger recovery if they pursued the case in state court. [Tr. 115:14 – 17]

9. Respondent did not discuss with the Sikoras the difference in costs and his fees between pursuing their case through arbitration as opposed to filing in state court. [Tr. 115:18 – 21; 117:6 - 15]

10. The Sikoras had no prior experience in filing lawsuits in state court. [Tr. 115:22 – 24]

11. Mrs. Sikora was not experienced in business matters as Mr. Sikora handled all financial matters relating to their business. [Tr. 216:17 – 24]

12. Respondent informed the Sikoras that he would charge an hourly fee. [Tr. 116:4 – 7]

13. At a subsequent meeting, Respondent entered into a written representation contract and fee agreement with the Sikoras. [Tr. 19:17 – 22; 20:12 – 17; 116:25 – 117:4; *see also*, SB Ex. 3, R Ex L, SBA 24 – 31]

14. The financial terms of Respondent's written fee agreement called for Respondent to be paid an hourly fee. [Tr. 20:25 – 21:7] The Sikora Trucking were required to, and did, pay a one-time retainer of $3,500, and then an advance fee of $2,500, against which Respondent was to bill. [Tr. 21:13 – 22:12; SB Ex. 3, SBA32]

15. Respondent's hourly rate was set at $190 per hour. [Tr. 22:20 – 22; *see also* SB Ex. 3, SBA 25]

16. Respondent's fee agreement in the Sikora Trucking matter contained no provision setting forth a contingency fee, [Tr. 24:8 – 13] nor did he discuss collecting or charging a contingency fee with the Sikoras. [Tr. 118:12 – 14; 119:4 – 6]

17. Respondent's fee agreement did provide that he could hire individuals on contract to assist with the Sikoras case. [Tr. 25:7 – 10; SB Ex. 3, SBA 28]

18. The fee agreement also stated that Respondent was responsible for the work contracted for . . . "even if Attorneys shall elect, *out of its fee from Client*, to the retention of another attorney . . . as co-counsel hereunder." (emphasis added) [SB Ex. 3, SBA 28, paragraph[5]]

19. In May 2004, Respondent hired attorney Dona Nutini ("Ms. Nutini") to work on the Sikoras case. [Tr. 27:12 – 25] Ms. Nutini is an Arizona attorney, admitted in Arizona in 1997. [Tr. 227:7 – 8]

20. Ms. Nutini, a graduate of Georgetown University Law Center, worked for the National Labor Relations Board from 1983 until 1997. [Tr. 227:12 – 20] Her practice has, for

the most part, been focused on labor, and labor and relation law, during the span of her career. [Tr. 228:6 – 9]

21. By letter dated Wednesday 5 May 2004, Respondent notified the Sikoras that Ms. Nutini had been hired to work on their case *"at no charge"* to them. [SB Ex. 14; Tr. 140:12 - 16] (emphasis added)

22. The copy of the letter provided to the State Bar contained a blacked-out word; the blacked-out word is "charge." [Tr. 28:4 – 11; 140:17 - 5]

23. Respondent billed the Sikora Trucking for the hours worked by Ms. Nutini. [Tr. 31:23 – 32:1; 32:23 – 333:14]

24. Respondent billed Ms. Nutini's work at $190 per hour. [4] [SB Ex. 3, SBA 35 – 80]

25. Respondent initially paid Ms. Nutini $75 or $80 per hour, although her compensation was later raised to $125 per hour. [Tr. 29:4 – 15; 229:13 – 14]

26. Ms. Nutini provided her monthly hours to Respondent, who then paid her directly. [Tr. 229:15 – 230:14] Ms. Nutini did not see any of the bills sent to the Sikoras by Respondent until September 2006, and was not aware of the amounts Respondent was billing to the Sikoras. [Tr. 243:2 – 15; 258:6 - 9]

27. After Ms. Nutini was hired, she suggested filing suit in federal court as well, on an age-discrimination EEOC claim related to Jeremy Sikora. [Tr. 127:18 – 128:6]

28. Respondent encouraged the Sikoras to follow this suggestion and informed the Sikoras that the filing of a federal claim would intimidate Watkins and would cause a quicker settlement. [Tr. 129:10 – 16] Respondent stated that the idea was brilliant. [Tr. 186:17 – 18]

[4] When Respondent later raised his hourly fee to $200, Ms. Nutini's work was also billed to the Sikoras at that rate.

29. Although Mrs. Sikora was concerned about the additional expense, Respondent assured her that she would get her attorney's fees back. [Tr. 129:17 – 24; 174:5 - 8] As the federal case progressed, Mrs. Sikora again raised her concerns about the cost of both lawsuits to Respondent, who urged her to continue with the cases. [130:8 – 13; *see also* SB Ex. 17, SBA393 - 395]

30. The Sikoras agreed to proceed with both cases based on Respondent's word, advice and legal experience. [Tr. 186:21 – 22]

31. Respondent represented to the Sikoras that they might also have a defamation case that would yield a high verdict, supporting that representation with a publication showing a $3 million verdict in a defamation case. [Tr. 170:16 – 8; SB Ex. 17, SBA374 – 378]

32. Ms. Nutini performed most of the substantive work on the during the representation including preparing motions, interviewing witnesses, drafting a motion for summary judgment, and conducting depositions of Mr. and Mrs. Sikora and primary witnesses from Watkins. [Tr. 29:20 – 21; 30:11 – 17; 31:14 – 18; 141:16 – 23; 233:21 – 235:23; 236:9 - 22]

33. Based on the work done on the case, and Ms. Nutini's familiarity with the case, she estimated that she performed 90% or more of the work on the case. She conducted all depositions, did legal research, interviewed witnesses, appeared at every hearing, etc. [Tr. 237:7 – 13; 255:23 – 256:11] *See also*, SB Ex. 25, SBA433 (Respondent recited to the Court that Ms. Nutini had appeared at all hearings and was thoroughly familiar with the case in its entirety); [Tr. 388:18 – 389:5]

34. As far as Mrs. Sikora could tell, Ms. Nutini was doing the work on the case and she could never figure out what Respondent was doing. [Tr. 141:20 – 23]

35. Mrs. Sikora repeatedly raised her concern over mounting fees and costs to Respondent. [Tr. 201:4 – 7]

36. During the course of his representation, Respondent raised his billing rate from $190 per hour to $200 per hour. [Tr. 34:17 – 22; 76:9 - 10] This increased rate was billed for all work Respondent claimed to have done, as well as all work performed by Ms. Nutini. [*See* SB Ex. 3, SBA 34 et. seq]

37. Although Respondent billed monthly, he did not provide detailed time records or explanation about what he was doing on their case. [Tr. 141:24 – 142: 1; 141:24 – 1; 162:18 – 163:8]

38. Respondent requested consent from the Sikoras to raise his fee, and to take a contingency fee, but did not receive consent from the Sikoras or Sikora Trucking to do so. [Tr. 35:15 – 19; 37:15 – 38:1; 38:15 – 21; 82:12 - 15]

39. Neither the Sikoras nor Sikora Trucking agreed to pay Respondent a contingency fee. [Tr. 123:3 – 5; 123:24 – 124:2]

40. Respondent did not advise the Sikoras or Sikora Trucking, in writing, that he changed his fee from billing hourly to hourly plus a contingent fee. [Tr. 81:4 – 11] There was no offer of a separate fee arrangement for the federal case related to age discrimination. The contract signed by Respondent and Sikora Trucking was limited in scope to breach of contract and other related claims.

41. During the representation Respondent did not advise the Sikoras to obtain independent counsel with regard to a contingency fee in the federal case [Tr. 81:18 – 23] It appears that the Respondent continued to bill the Sikoras personally under the fee arrangement predicated on the Sikora Trucking fee agreement and then Respondent added a contingent fee

to his billing statement without written agreement from the Sikoras or referring the Sikoras to independent counsel on the issue of changing the fee agreement.

42. In December 2005, the Sikora's federal case settled for $47,500. [Tr. 164:9 – 11]

43. Although the settlement checks were made jointly payable to Respondent and each of the Sikoras, neither Mr. nor Mrs. Sikora ever saw either check. [Tr. 164:12 – 20]

44. Respondent, without obtaining the endorsement of either Sikora, deposited the funds into his client trust account. [Tr. 164:21 – 25; 165:8 - 15]

45. Without first obtaining the consent of the Sikoras, Respondent took those funds to pay his on-going legal fees and merely informed the Sikoras that he was doing so. [Tr. 164:23 – 165:7]

46. Although Respondent did not receive the consent, in writing or otherwise, of the Sikoras to pay himself a contingency fee, he paid himself a 10% contingency fee from the settlement of the Sikoras' federal case. [Tr. 39:9 – 11; 49:9 – 11; 89:6 – 15; 165:16 - 19]

47. Only after Respondent had paid himself a contingency fee and taken the balance of the funds from the settlement of the federal case did he notify the Sikoras that he had done so without their express consent. [Tr. 165:16 – 166:4]

48. At the time the Sikoras' federal case settled for $47,500, Respondent received $55,968 in legal fees in 2004, $45,651.55 specifically for the federal case in 2005, and an additional amount in 2006. [Tr. 168:1 – 21, *see* SB Ex. 17, SBA372]. The Respondent did not undertake a look back on the issue of whether his fees for the Federal case were reasonable.

49. Once she was hired Ms. Nutini had more contact with the Sikoras than did Respondent.[5] [Tr. 40:16 – 20; 141:12 - 16]

50. During the course of the representation Mrs. Sikora continued to express to Respondent concern over the amount of the legal fees. [Tr. 41:25 – 42:11]

51. Mr. Sikora shared Mrs. Sikora's concern over legal fees as he was receiving income only from social security, $761 per month. [Tr. 125:13 – 24; 126:25 – 127:3]

52. Respondent, on many occasions, told the Sikoras that they would recover all of their attorney's fees. [Tr. 119:15 – 24]

53. Notwithstanding their concern over the legal fees charged by Respondent, and despite their dwindling personal finances, the Sikoras paid Respondent's bills in full each month until the last two months of the representation. [Tr. 120:4 – 10; *see also* SB Ex. 3, SBA 24 et seq.]

54. When a notation referring to a contingency fee began appearing on the Sikoras monthly statements, Mrs. Sikora did not understand it, having had little experience with attorneys before this matter arose. [Tr. 122:5 – 22; 123:17 - 18]

55. During the representation, whenever Mrs. Sikora asked questions of Respondent, she received "long, rambling explanations" that she did not understand. [Tr. 130:14 – 131:2]

56. Respondent's verbal statements about the fees and the fee agreement were different from the terms the written contract recited. [Tr. 185:19 – 21]

[5] This is supported, as well, by Respondent's e-mail of August 31, 2006, (SB. Ex. 20, SBA420) in which Respondent stated to Ms. Nutini that the Sikoras were "technically" his clients.

57. Because Respondent was frequently "very busy" and she didn't understand what he was saying, Mrs. Sikora routinely spoke to Ms. Nutini, who took the time to explain to Mrs. Sikora what was happening. [Tr. 131:1 – 10]

58. Near the end of the litigation of the state case, in or about the spring of 2006, Watkins made a settlement offer of $25,000 to settle the Sikoras case. Respondent rejected the offer without first discussing it with the Sikoras. [Tr. 176:25 – 177:10; 218:14 – 21]

59. Ms. Nutini had no knowledge of the fees being paid by the Sikoras to Respondent. [Tr. 241:15 - 24]

60. Mrs. Sikora had been instructed by Respondent to never discuss the financial arrangements with Ms. Nutini, because it was a violation of ethics. [Tr. 180:5 – 9]

61. Ms. Nutini did not learn of the amounts the Sikoras had paid Respondent until September 2006, the last month of Respondent's representation, [Tr. 241:15 - 17] when Mrs. Sikora revealed the financial arrangements to Ms. Nutini. [Tr. 180:8 – 9]

62. During the course of the representation, the Sikoras paid Respondent $351,551.02. [Tr. 131:16 – 22] The Sikoras state case ultimately settled, after Respondent's services were terminated, for an amount subject to a confidentiality agreement. [Tr. 174:12 – 14] According to the record the fees charged by Respondent, excluding costs, were $317,214.

63. Although during the course of the litigation Mrs. Sikora made statements to Respondent indicating that she was satisfied with the course of her case and his representation, she did so only to protect her dying husband from her concerns about Respondent and the representation. [Tr. 136:11 – 137:11]

64. When Mrs. Sikora needed to pay by credit card, Respondent directed Mrs. Sikora to make credit card payments for legal fees to North American Drel Co., a California

corporation that provides financial services and counseling, which is owned by Respondent, his wife and other family members. [Tr. 43:18 – 44:12; 44:18 – 45:17]

65. Respondent instructed Mrs. Sikora that if questioned about the charges by the credit card company, she should inform them that the charges were for "government consultation." [Tr. 138:11-15; 203:17 - 24]

66. Respondent had informed Mrs. Sikora that he was considering criminal charges against Watkins and that to do so he had to consult an expert in the government, and that was very expensive. [Tr. 138:16 – 19; 139:5 – 9]

67. Although there was no such consultation, Respondent retained the fees charged for "government consultation." [Tr. 139:10 –12]

68. Mrs. Sikora believes that those fees/costs charged by Respondent were fraudulent fees, as she was paying for a service that she never received. [Tr. 203:1 – 10] During the month or months that she was to have paid for government consultation, Mrs. Sikora also paid an additional sum for Respondent's legal services. [Tr. 205:2 – 6; 206:16 – 207:14]

69. Respondent suggested that Mrs. Sikora tap into a trust fund her father had, take out a second loan or equity loan on her house or use credit cards to pay his fees, and asked about the financial terms of her father's will. [Tr. 137:23 – 138:7; 211:16 – 22; 212:7 - 10] It appears that some of the credit card payment were withdrawn from the Trust [SB Ex. 17,SBA 370; SB Ex 1, ABA6,7,10; FF Ex B]

70. When, as Mr. Sikora got sicker, Mrs. Sikora verbally raised her concerns about the legal fees to Respondent, Respondent urged her to continue on because they "couldn't let

Jerry down, (they) couldn't disrespect Jerry, (they) had to go forward with it. (They) would have to find other options to get this money." [Tr. 137:12 – 20]

71. Mrs. Sikora felt that she could not let her husband know that they had spent so much money and 28 months and had achieved nothing. [Tr. 172:20 – 24] Mrs. Sikora felt that she couldn't tell her dying husband that she believed Respondent was cheating them. [Tr. 214:21 – 22]

72. Respondent also requested Mrs. Sikora write an article for a trade publication for the purposes of soliciting clients for him. [Tr. 209:23 – 210:1; *see also* SB Ex. 17, SBA 380]

73. Mr. Sikora died on August 29, 2006. [Tr. 172:6]

74. Mrs. Sikora notified Respondent of Mr. Sikora's death on the same day. [Tr. 172:18 – 20]

75. During that conversation, on the day of her husband's death, Respondent informed Mrs. Sikora that she needed to pay her bill for July 2006 of $27,000. He also informed Mrs. Sikora that it would be disrespectful and damaging to Mr. Sikora's memory not to continue with the case and that to do so, his bill would have to be paid. [Tr. 171:21 – 172:11]

76. A hearing in the Sikoras matter was held on September 5, 2006, on a motion for summary judgment. Respondent again urged Mrs. Sikora to continue with the case, saying that they would make Watkins pay through the nose for what they did to the Sikoras' business [Tr. 173:14 – 174:1]

77. Respondent informed Mrs. Sikora that if she fired him, no judge would let her switch attorneys at that late date and to do so would hurt her case. [Tr. 183:10 – 13]

78. Mrs. Sikora fired Respondent in September 2006. [SB Ex. 17, SBA386]

79. After Mrs. Sikora fired Respondent, she asked for an accounting of the fees paid, but did not get complete or understandable records in response to her request. [Tr. 163:5 – 20]

80. After Mrs. Sikora fired Respondent, she received two telephone calls in which threats were made to freeze her business accounts and place a lien on her house if she did not settle the state case and settle with Respondent. [Tr. 179:1 – 7]

81. Specifically, Mrs. Sikora was informed by the unknown caller that if she did not pay Respondent's August 2006 bill of $28,140, Respondent would sue her. [Tr. 179:8 – 11]

82. Mrs. Sikora was frightened by the telephone calls. [Tr. 179:5 – 6]

83. After Mrs. Sikora fired Respondent, she received, for the first time, a detailed accounting of the time Ms. Nutini had spent working on her case; the records were provided by Ms. Nutini. [Tr. 163:25 – 164:4]

84. After Mrs. Sikora fired Respondent, she paid an additional $17,335 to Ms. Nutini to complete the litigation. [Tr. 135:5 – 9] This amount included $8,385 owed to Ms. Nutini by Respondent, which Respondent did not pay Ms. Nutini. [Tr. 134:21 – 135:4]

85. Mrs. Sikora, to date, is still paying off credit cards on which she charged a portion of Respondent's fees. [Tr. 175:7 – 13]

86. Mrs. Sikora attempted to utilize the State Bar's Fee Arbitration program to address her concerns about Respondent's fees, but Respondent declined to participate. [Tr. 43:1 – 17; 135:22 – 136:10; SB Ex. 17, SBA308 et seq.]

87. After firing Respondent, Mrs. Sikora hired Ms. Nutini to represent her. [Tr. 178:10 – 14]

88. After Ms. Nutini became Mrs. Sikora's attorney, Respondent directly contacted Mrs. Sikora to attempt to meet with her. [SB Ex. 17, SBA371]

89. Ms. Nutini settled the state case; only after the case was settled did Mrs. Sikora reveal to Ms. Nutini the amount of the fees she had paid to Respondent. [Tr. 179:21 – 180:5]

90. Mrs. Sikora had never discussed the legal fees with Ms. Nutini at any time prior because Respondent had told her from the beginning of the representation that she (Mrs. Sikora) was not to discuss her financial arrangements with Ms. Nutini. [Tr. 180:5 – 9]

91. After she was retained by Mrs. Sikora, Ms. Nutini saw, for the first time, the billing statements Respondent had sent to the Sikoras. They contained no detail of the work done by either Respondent or Ms. Nutini. [Tr. 246:5 – 21]

92. Ms. Nutini was not aware that Respondent had informed the Sikoras that her work would be done at no cost to them. [Tr. 258:10 – 13]

93. Ms. Nutini subsequently prepared a handwritten comparison of the hours she had billed to Respondent for work on the Sikoras cases with the hours billed by Respondent. [SB Ex. 2; Tr. 247:10 – 22]

94. In reviewing hours billed by Respondent to Mrs. Sikora in August 2006, Ms. Nutini had performed 55.9 hours of work on the Sikora case; Respondent, who prepared only three motions *in Limine* during that time billed a little over 85 hours to Mrs. Sikora. [Tr. 253:16 – 254:9]

95. Ms. Nutini does not believe that there is any way Respondent worked the hours in August 2006, he billed to Mrs. Sikora. [Tr. 254:10 – 13]

96. In July 2006, Respondent billed Mrs. Sikora for approximately 86 hours in addition to Ms. Nutini's work, when she is certain she performed all of the work done on the Sikoras case. [SB Ex. 2; Tr. 255:12 – 257:6]

97. In June 2005, when Ms. Nutini performed 37.2 hours of work on the Sikoras cases, Respondent billed the Sikoras for 93.4 hours. [SB Ex. 2; Tr. 257:15 – 18]

98. Ms. Nutini was shocked when she saw that entry because there wasn't that much work to be done on the case at that time. [Tr. 257:19 – 258:5]

99. After Ms. Nutini received the Sikoras files from Respondent she saw no work product or documents produced by Respondent of which she was unaware. [Tr. 259:18 – 260:4]

100. Ms. Nutini found it hard to believe that Respondent had billed 6.1 hours for work that took her .4 hours to complete. [Tr. 302:17 – 303:2]

101. Ms. Nutini also, based on her work in the case and her billings to Respondent, prepared an estimate of the amount of attorney fees she believed would have been reasonable. [Tr. 251:3 – 25] Ms. Nutini believed that the reasonable amount of fees for the services rendered to the Sikoras was $200,000. [Tr. 353:23 – 25]

102. Ms. Nutini, based on her time records, spent 920.2 hours on the Sikoras matters. [SB Ex. 3, SBA82 – 110]

103. At the end of his representation in the State case, Respondent did not review his fees and make any adjustment to them. [Tr. 331:24 – 332:6]

COUNT TWO (File No. 07-0993/Derczo)

104. Respondent represented Nicholas Derczo ("Mr. Derczo") beginning in 2006. [Tr. 45:20 – 25]

105. Mr. Derczo was, at the time, in his early 80's, had physical disabilities, including being hard of hearing and blind in one eye, was bipolar and was taking several medications. [Tr. 48:15 – 49:3; SB Ex. 39, SBA456; SB Ex. 39, SBA488]

106. Respondent provided to Mr. Derczo a written "attorney client retainer contract" which contains multiple parts and is confusingly worded. [SB Ex. 39, SBA480 – 497]

107. Respondent was aware of Mr. Derczo's physical and mental condition [R Ex. R, Letter of September 4, 2007; SB Ex. 39, SBA 488] including the fact that in December 2006, the Veteran's Administration was proposing to rate him as incompetent to handle his own affairs. [Tr. 53:22 – 54:1; 54:8 – 55:10; SB Ex. 41, SBA578; and SB Ex. 44: R Ex. R, Letter from Department of Veterans Affairs dated December 7, 2006]

108. Respondent was not related to Mr. Derczo by blood or marriage. [Tr. 48:10 – 14]

109. During Respondent's representation of Mr. Derczo, Respondent had Mr. Derczo sign multiple powers of attorney in Respondent's favor. [Tr. 46:1 – 22; *see also* R Ex. S, letter of May 26, 2008, p. 3, 2nd full paragraph; SB Ex. 39, SBA477]

110. One of the powers of attorney gave Respondent an ownership interest in a storage space owned by Mr. Derczo. [Tr. 47:20 – 25; *see also,* R. Ex. S, referenced above.]

111. Mr. Derczo provided Respondent unsigned checks on Mr. Derczo's checking account; the agreement between Mr. Derczo and Respondent was that Respondent would issue checks to himself from the account for payment of Mr. Derczo's legal fees and then notify Mr. Derczo of the amount. [Tr. 65:3 – 17]

112. Respondent failed to provide a detailed accounting to Mr. Derczo. [SB Ex. 41, SBA563]

113. During the course of his representation of Mr. Derczo, Respondent issued checks to himself on Mr. Derczo's account totaling $8,427.00. [Tr. 65:18 – 23] Respondent's hourly rate was $270 per hour. [Tr. 382:7 – 8]

114. In August 2006, Mr. Derczo designated Respondent as the beneficiary of a Chase Bank account. [Tr. 62:25 – 63:20; *see also* SB Ex. 45: R Ex. R, Transfer on Death Agreement, Chase Investment Services, dated August 24, 2006]

115. Respondent learned of the beneficiary designation on or about December 12, 2006. [Tr. 91:9 – 13]

116. Respondent acknowledged that designation and thanked Mr. Derczo for it by letter to Mr. Derczo dated January 3, 2007. [Tr. 64:15 – 25] *See,* SB Ex. 46.

117. Other than asking Mr. Derczo how much money was involved [Tr. 91: 25 – 92:6], Respondent said nothing else to Mr. Derczo about that beneficiary designation. [Tr. 64:23 – 25]

118. Respondent did not give Mr. Derczo any written advice regarding Respondent taking an interest in Mr. Derczo's property (the Chase bank account and/or storage space), or make a recommendation to Mr. Derczo about the advisability of seeking independent counsel. [Tr. 92:7 – 93:11; 99:9 - 13]

119. Respondent did not inform Mr. Derczo that he (Respondent) could not take an interest in Mr. Derczo's property unless Mr. Derczo had independent counsel. [Tr. 93:12 – 16]

120. In late 2006 or early 2007, Mr. Derczo asked that Respondent prepare a will for him. [Tr. 54:2 – 4]

121. Mr. Derczo gave Respondent instructions about the terms of the will. [Tr. 59:9 – 13]

122. Mr. Derczo gave Respondent specific instructions relating to the will and the bequest of clock, tools, and to shares of stock. [Tr. 59:14 - 60:9; SB Ex. 41, SBA566; *see also* R. Ex. W]

123. Respondent prepared a will for Mr. Derczo; Mr. Derczo signed it on January 18, 2007. [Tr. 61:5 – 17; SB Ex. 39, SBA 513 - 518]

124. On January 18, 2007, Respondent presented the will he had prepared to Mr. Derczo and instructed him to sign the will and then read it later when he (Mr. Derczo) returned home. [SB Ex. 39, SBA457]

125. One of the witnesses to the signing of the will was Jennifer Boughey. [Tr. 148:4 – 9; *see* SB Ex. 39, pp.513 – 518]

126. Although Ms. Boughey testified at the hearing that she recalled Mr. Derczo, she had previously informed the State Bar that she did not. [Tr. 156:6 – 20]

127. Ms. Boughey was unaware of Mr. Derczo's mental or medical condition at the time he signed the will prepared for him by Respondent, and was not present during any conversation Respondent may have had with Mr. Derczo before the will was signed. [Tr. 158:17 – 159:11]

128. Ms. Boughey testified positively as to Respondent's reputation, but she had not spoken to any other of Respondent's clients [Tr. 159:12 – 15]

129. The terms of the will made Respondent Mr. Derczo's sole beneficiary, although that had not been Mr. Derczo's intent and was contrary to Mr. Derczo's instructions to Respondent. [SB Ex. 39, SBA 513 – 518; SB Ex. 39, SBA 457; SB Ex. 39, SBA500]

130. Although Respondent could have drafted the will to provide a testamentary trust, rather than a gift to himself, he did not do so. [Tr. 98:8 – 12]

131. Upon returning home on January 18, 2007, Mr. Derczo read the will he had signed and found that it had not been prepared according to his instructions to Respondent. [SB Ex. 39, SBA 457]

132. On January 23, 2007, Mr. Derczo fired Respondent. [Tr. 62:15 – 16]

133. Mr. Derczo, through Jody Patterson ("Ms. Patterson"), a person assisting him, requested that Respondent return his file. [SB Ex. 29, SBA457]

134. The file returned to Mr. Derczo by Respondent on or about January 26, 2007, did not include the will Mr. Derczo had signed on January 18, 2007, in which Respondent was made Mr. Derczo's sole beneficiary, or two original powers of attorney, executed January 10, 2007. [SB Ex. 39, SBA457; SB Ex. 41, SBA 560, ¶9]

135. The will Mr. Derczo had signed on January 18, 2007 and two signed powers of attorney were not returned to Mr. Derczo until or after February 15, 2007. [SB Ex. 39, SBA512 – 520]

136. Had Mr. Derczo died before Respondent returned the signed Will, Respondent would have inherited Mr. Derczo's entire estate. [Tr. 98:13 – 17]

137. After reviewing, with the assistance of Ms. Patterson, a copy of the Power of Attorney he had signed January 10, 2007, Mr. Derczo realized that he had been unaware that the terms of the Power of Attorney granted Respondent rights over his (Mr. Derczo's) property. [SB Ex. 29, SBA 458]

138. During the course of Respondent's representation, Mr. Derczo was not presented with any detailed accounting of the funds Respondent had billed to him and for which Respondent had paid himself using Mr. Derczo's checks. [SB Ex. 39, SBA 458]

139. After his services were terminated, Respondent did not review the fees charged to Mr. Derczo to make sure Mr. Derczo had been appropriately charged. [Tr. 387:18 – 21]

140. In May 2007, Mr. Derczo asked Respondent for a detailed accounting of Respondent's fees. [Tr. 66:11 – 13; SB Ex. 39]

141. Respondent thereafter billed Mr. Derczo for an additional $3,325 in fees. [Tr. 66:14 – 18; SB Ex. 39, SBA 545]

142. Respondent characterized Mr. Derczo's request for an accounting as harassment. [Tr. 67:10 – 18; SB Ex. 39, SBA 546]

III. CONCLUSIONS OF LAW

COUNT ONE

1. Respondent violated ER 1.4.

Respondent, during the course of his representation of the Sikoras provided them with no information or provided confusing and incomplete information regarding fees and the time undertaken by the attorneys.

2. Respondent violated ER 1.5 by charging and collecting an unreasonable fee.

Respondent, in his written fee agreement, and then subsequently his May 5, 2004, letter [SB Ex. 14] to the Sikoras, provided that he might hire additional attorney(s) to perform work in their matter out of the legal fees paid to him for the representation and "at no charge" to them. The billing statements to the Sikoras, and the time records presented clearly demonstrate that not only did Respondent benefit by billing the Sikoras for Ms. Nutini's work at a rate at least 50% above what he paid Ms. Nutini, he also charged for an excessive number of hours he claimed he had worked thereby, at a minimum, doubling the fees the Sikoras paid.

Not only did Ms. Nutini, who has significant experience and expertise in this area of the law, estimate that the Sikoras should have paid no more than $200,000 for the representation in their matters, the fact that the fees paid to Respondent, approximately $360,000, constituted 69% of the eventual settlement supports this conclusion that Respondent's fees were excessive.

Further, the fees Respondent charged for his own work was not reasonable. Ms. Nutini's performed essentially most, if not all, of the substantive work in the Sikoras' matters. Ms. Nutini drafted all but three motions filed in the case, including a motion for summary judgments, attended and conducted all depositions, and attended all hearings and argued the motion for summary judgment.

Additionally, Respondent assessed and collected a contingent fee without the consent of the Sikoras, written or verbal. No portion of the written fee agreement signed by the Sikoras established a contingent fee – the fee agreement specifically set forth an hourly fee for Respondent's representation. Although Respondent raised the issue of a contingent fee, through a notation on the billing statements, that was insufficient to amend the fee agreement. The fact that the Sikoras did not object to the billing statement which refers to a contingent fee does not establish the entitlement of Respondent to the contingent fee. The Sikoras did not consent to a contingent fee and that the only written fee agreement in these matters did not authorize Respondent to take one. Further, Respondent changed his hourly billing fee without advance notice to and the agreement of the Sikoras.

Finally, Respondent failed, at the conclusion of the representation or thereafter, to perform the "look back" to assess whether the fees charged and collected were reasonable.

3. Respondent violated ER 1.15, by failing to exercise appropriate professional fiduciary duty over funds belonging to the Sikoras in his possession. When Respondent received the settlement checks in the Sikoras' federal case he, without the consent of the Sikoras, not only paid himself an unauthorized contingent fee, he took the remaining funds to pay himself additional fees without the informed consent of the Sikoras. Although it may not have been inappropriate for Respondent to deposit the settlement checks into his client trust

account, it was impermissible to take a contingent fee from it, and to take the balance of the funds to pay his fees without the express informed consent of Mr. and Mrs. Sikora.

4. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of ER 8.4(c).

Much of Respondent's conduct with regard to the Sikoras involves dishonesty and deceit in connection with the fees charged and collected. Most egregious is the supposed expenditure of his time.

Moreover, Respondent's conduct with regard to the payments he instructed the Sikoras to make to North American Drel Company reveals a dishonest mindset. Mrs. Sikora was instructed, should anyone inquire about those payments, to state that the funds were for "government consultation." It is uncontroverted that no such consultation occurred. In the alternative, if Respondent had actually intended to conduct some such consultation, and the payments were made for that purpose, he was not then entitled to take those funds in payment of his own fees. Either way, Respondent's instructions to his client were in furtherance of his efforts to collect an unreasonable fee.

The acts of Respondent constitute breach of fiduciary duty.

An attorney owes a duty of utmost good faith to his client and must inform his/her client of matters that might adversely affect his/her client's interests. *Sarti v. Udall*, 369 P.2d 92, 91 Ariz. 24 (1962).

The attorney is liable for the failure to inform his/her client of matters having an important bearing on the client's financial interest where the attorney knew or ought to have known of such matters. *Mageary v. Hoyt*, 369 P.2d 662, 91 Ariz. 41 (1962).

A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to

which his testimony relates. Duly qualified experts may give their opinions on the fact questions at trial. Rule 702, Arizona Rules of Evidence; M. Udall, J. Livermore, P. Escher & G. McIlvain, Law of Evidence, §25 (3d.Ed. 1991). Ms Nutini, based on her training, education, and experience, qualifies as an expert qualified to give opinion on the issue of the reasonableness of the Respondent's fees.

An attorney has a duty to inform his client, to the extent reasonably necessary, of all matters that materially affect a client's affairs or decisions to permit the client to make informed decisions. A failure to perform this duty is evidence of a violation of E.R. 1.4; E.R. 1.2; *Matter of Mulhall,* 159 Ariz. 529, 768 P.2d 1173; *Phillips v. Clancy*, 152 Ariz. 415 (App. 1987), 733 P.2d 300; *Elliott v. Videan*, 164 Ariz. 113 (App. 1989), 791 P.2d 639; petition for review denied, 166 Ariz. 191.

Standards of the legal profession require undeviating fidelity of the lawyer to his clients; no exceptions can be tolerated. *Parsons v. Continental Natl. Am. Grp.*, 550 P.2d 94, 113 Ariz. 223 (1976).

One test for determining the validity of a contract made during the attorney-client relationship might be whether a disinterested attorney, having full knowledge of the surrounding facts and circumstances, would have advised the client to enter into such a contract. In the present case, Respondent and Sikoras had an attorney/client relationship at the time of Respondent unilaterally claiming a contingent fee in the federal case.

In many cases whether the client received independent advice from a disinterested attorney or other competent person, or whether the attorney recommended that the client seek or not seek such advice, has been considered as a factor material to the question of the validity of a fee contract made during the existence of an attorney-client relationship.

ER 1.5 does not state that the fee becomes reasonable and the eight factors irrelevant merely because the client pays the fee. As the Arizona Supreme court has explained:

> ... a fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients, which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client. Thus, in fixing and collecting fees the profession must remember that it is 'a breach of the administration of justice and not a mere money getting trade.'

Matter of Swartz, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984).[6]

The Arizona Supreme Court has recognized that charging an excessive fee reflects adversely on an attorney's fitness to practice law:

> It is proper to say that it is not a part of the province of the State Bar to take note of or to investigate the ordinary disputes and controversies between an attorney and client upon complaint of the client that the fee is to large for the services rendered. ... but, where the fee is so excessive and unconscionable as to indicate that it could not have been charged in good faith, the rule is different.
> ...
> It can make no difference what the actuating cause was for excessive charge, whether want, greed, or an exaggerated idea of the value of his services, for it all goes to show that respondent's sense of balance and proportion disqualifies him for the duties of an attorney.

In re Myrland, 54 Ariz. 284, 291-292, 95 P.2d 56, 59-60 (1939).[7]

As stated in Ethics Opinion 94-09: Defendants' ethical violation that arises from charging an excessive fee does not occur merely when money changes hands. The violation occurs in the overreaching and dishonesty present when an attorney attempts to collect a fee that clearly exceeds a reasonable charge for his services.

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[6] Swartz received a 6 month suspension.

[7] Myrland was disbarred with findings of previous discipline.

Borrowing from Opinion 94-09: The former Code of Professional Responsibility (as in effect in Arizona) was more explicit on this point: "A lawyer shall not [1] enter into an agreement, for, [2] charge, or [3] collect an illegal or clearly excessive fee." DR 2-103(a) (numbers added for emphasis). Although this language was not carried forward into the Model Rules, each of the factors used to determine the reasonableness of a fee was carried forward. Compare DR 2-106(B) with ER 1.5(a). There is nothing to suggest that the drafters of the Model Rules intended by this change to limit these ethical requirements to situations where fees actually are collected. Indeed, in proscribing certain fee arrangements in domestic relations and criminal cases, the Model Rules continue to state that lawyers shall not "enter into an arrangement for charge, or collect" the improper fees. ER 1.5(d). The Model Rules, like the holdings of the Arizona Supreme Court, find the ethical violation in the act of seeking to charge an excessive fee, not solely in the act of collecting such a fee.

To determine the reasonableness of the fee charged by Defendants one examines each of the eight factors identified in ER 1.5(a). An attorney may commit an ethical violation when the fee charged for his or her work clearly exceeds the value of the legal work performed. *Matter of Douglas,* 158 Ariz. 516, 519-520, 764 P.2d 1, 4-5 (1988).[8] Such a determination requires a fact-intensive examination of the services rendered by the attorney and each of the factors set forth in ER 1.5(a).

In this case the factors enumerated in ER 1.5(a) do not justify the fee charged and collected by Respondent.

To be reasonable under ER 1.5, a fee must bear a reasonable relationship to the work actually performed by the attorney as enumerated in the eight factors of ER 1.5(a). A fee

[8] Douglas received a suspension.

cannot be calculated by taking a sum of money unrelated to the attorney's work. *Matter of Mercer*, 126 Ariz. 274, 614 P.2d 816 (1980).[9]

The Arizona Supreme Court has held that the charging of "clearly excessive fees' will constitute ground for disciplinary action, whether the fee is fixed or contingent." *Matter of Swartz*, supra; *Matter of Douglas*, 158 Ariz. 516, 764 P.2d 1 (1988), *Matter of Zang*, 154 Ariz. 134, 741 P.2d 267 (1987); *Matter of Mercer*, supra.

Charging of an excessive fee raises substantial questions about a lawyer's honesty, trustworthiness, or fitness to practice law. When Respondent charged a fee so excessive that it could not have been charged in good faith, the act suggests Respondent was willing to take advantage of his position of trust for his own personal gain.

Fees charged by attorney must be reasonably proportional to services rendered and to situation presented. *Matter of Struthers*, 179 Ariz. 216, 877 P.2d 789 (1994).[10]

If at conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, attorney may not stand upon the contract; he must reduce the fee. *Matter of Swartz,* supra.

Propriety of initial fee arrangement does not give a lawyer carte blanche to charge agreed percentage regardless of circumstances which eventually develop, since either a fixed or contingent fee, proper when contracted for, may later turn out to be excessive. *Matter of Swartz*, Id.

The conduct of Respondent in breach of his fiduciary duty makes his fees subject to forfeiture or reduction. *In re Estate of Shano,* 177 Ariz. 550, 869 P.2d 1203 (App. 1993)

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[9] Mercer received a suspension.

[10] Struthers received disbarment.

Based on the forgoing the Hearing Officer finds that the fee charged and collected was unreasonable and excessive. The Hearing Officer finds that the reasonable fee for the services provided and the results obtained in the federal and state cases was $200,000.

COUNT TWO

5. Respondent's conduct violated ER 1.2. Respondent failed to honor Mr. Derczo's directions relating to the preparation of his will. Mr. Derczo provided specific instructions to Respondent about bequests to be made in his will. Respondent failed to honor those instructions and instead prepared a will making himself Mr. Derczo's sole beneficiary. Further, Respondent, either without the consent of Mr. Derczo and/or contrary to his directions, prepared a power of attorney giving him a proprietary interest in a storage space rented by Mr. Derczo in violation of ER 1.8

6. Respondent engaged in a conflict of interest in violation of ER 1.7, by continuing to represent Mr. Derczo notwithstanding the significant risk that the representation would be materially limited by Respondent's own personal interests.

Respondent, during the course of his representation of Mr. Derczo, obtained ownership and/or testamentary interests in Mr. Derczo's property. The first such occurrence was when Respondent had Mr. Derczo sign a power of attorney giving Respondent an ownership interest in a storage space owned or leased by Mr. Derczo. Thereafter, Respondent failed to advise Mr. Derczo about the conflict of interest or obtain a waiver of it from Mr. Derczo. Respondent's personal interest thereafter created a conflict with future representation. Respondent's conflict

deepened when he learned that he was named the beneficiary of a Chase Bank account owned by Mr. Derczo. Yet again, Respondent failed to take appropriate actions.[11]

Respondent then represented Mr. Derczo in creating another dispositive document, Mr. Derczo's will. At the time Respondent created the will, in which he was the sole beneficiary; his personal interest clearly compromised his representation of Mr. Derczo. Even if, *arguendo*, Mr. Derczo wished for Respondent's assistance in distributing his estate, there were other options open to Mr. Derczo about which he should have been informed and was not.

7. Respondent violated ER 1.8(a) and (c). Respondent, on at least three occasions, acquired an ownership interest in property owned by Mr. Derczo, two of which were alleged in the State Bar's complaint. Respondent acquired a possessory and/or ownership interest in Mr. Derczo's storage space by virtue of a power of attorney he prepared and had Mr. Derczo sign; Respondent, by the terms of the will he prepared for Mr. Derczo and instructed him to sign, became Mr. Derczo's sole beneficiary. Respondent did not appropriately advise Mr. Derczo about either circumstance. The prohibition on soliciting and accepting a testamentary gift in ER 1.8(c) does not provide for a waiver. Respondent's actions are a *per se* violation of that section, and would be even if he had attempted to obtain a waiver of the conflict.

8. Respondent did not violate ER 1.16 by failing to surrender to Mr. Derczo all of Mr. Derczo's files and documents at the termination of the representation. A three-week delay in surrendering a client file is not excessive; Mr. Derczo's at any time could have signed a new will and powers of attorney during the three weeks.

[11] Although this conflict was not alleged in the State Bar's complaint, and is therefore not a basis for the finding of Respondent's violation of ER 1.7, it is considered as further evidence of Respondent' on-going conflict of interest in his continuing representation of Mr. Derczo.

9. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of ER 8.4(c). Most egregious are these: Respondent prepared and had Mr. Derczo execute a power of attorney giving Respondent rights and control in Mr. Derczo's storage space; Mr. Derczo did not authorize this; Respondent then drafted a will, not following the express directions of his client, and instructed his 80+ year-old, partially blind, client to sign it and read it later, knowing that he had made himself his client's sole beneficiary; Respondent issued payment checks to himself without providing the accounting requested by his client and agreed upon by both of them. After Mr. Derczo questioned the fees, and demanded an accounting, Respondent attempted to punish his client by billing an additional $3,300 in fees he claimed had been earned and not paid and asserting that Mr. Derczo should have left well enough alone.

IV. RECOMMENDED SANCTION PURSUANT TO *STANDARDS*

APPLICABLE *STANDARDS*

The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, ¶ 23, ¶ 33, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

The Supreme Court and the Disciplinary Commission consistently use the *Standards* to determine appropriate sanctions for attorney discipline. *See In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). The *Standards* are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying these factors to situations in which lawyers have engaged in various types of misconduct. *Standard* 1.3, Commentary.

In determining an appropriate sanction, the Court and the Disciplinary Commission consider 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. *Peasley*, 208 Ariz. at ¶ 33, 90 P.3d at 772; ABA *Standard* 3.0. "The *Standards* do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious conduct." *Standards, p. 6 In re Redeker,* 177 Ariz. 305, 868 P.2d 318 (1994).

The *Standards* identify four distinct categories in which a lawyer has specific duties, to his client, to the general public, to the legal system and to the profession. Respondent's duties to his clients and to the profession are implicated in this matter, as are several *Standards*.

Standard 4.6 is implicated by Respondent's violation of ERs 1.5 and 8.4(c). *Standard* 4.61 states that disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer and causes serious injury or potentially serious injury to a client. *Standard* 4.62 states that suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. *Standard* 4.61 appears to be more applicable to Respondent's deception of Mr. Derczo relating to both the power of attorney and the will, as does Respondent's conduct relating to the fees charged to and collected from the Sikoras.

Standard 7.0 is also implicated in violations of ER 1.5, providing in *Standard* 7.1 that disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of his duty to the profession, with intent to obtain a benefit for him, and that causes serious injury to the client. Suspension is the presumptive sanction, recommended in *Standard*

7.2, for knowingly engaging in conduct that is a violation of a duty to the profession, and causing injury or potential injury to the client. There is no doubt that Respondent's conduct, relating to his excessive fees in the Sikoras matters, was intended to provide a benefit for him.

Respondent's violations of ERs 1.7 and 1.8 implicate *Standard* 4.3. Disbarment is generally appropriate, under *Standard* 4.31, when the lawyer, without the informed consent of the client, engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer, and causes serious or potentially serious injury to the client. Suspension is generally appropriate, according to *Standard* 4.32, when the lawyer knows of a conflict of interest and does not fully disclose to the client the possible effect of that conflict, and causes injury or potential injury to a client. Censure is appropriate if the lawyer is negligent in determining whether their representation of a client might be materially limited by the lawyer's own interests. *Standard* 4.33.

Finally, *Standard* 8.2 provides that suspension is generally appropriate when a lawyer has been reprimanded for the same or similar conduct and engages in further acts of misconduct that cause injury or potential injury to a client. Respondent was previously censured for misconduct that included a violation of ER 8.4(c).

The range of presumptive sanction in this matter appears, therefore, to be between disbarment and suspension.

AGGRAVATING AND MITIGATING FACTORS

To assist in the determination of the appropriate sanction, aggravating and mitigating factors applicable to the facts and circumstances of the conduct must be considered.

Standard 9.22(a) Prior disciplinary offenses. In SB-05-1097-D (2006), by Amended Judgment and Order of the Supreme Court of Arizona, filed February 13, 2006, pursuant to a

two-count complaint, Respondent was censured for violations of ERs 3.1 (meritorious claims and contentions), 3.3 (candor to the tribunal), 4.1 (truthfulness in statements to others), 4.4 (respect for the rights of others), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

Standard 9.22(b) Dishonest or selfish motive. Respondent's motive in his collection of an excessive fee from the Sikoras, and in making himself the beneficiary of Mr. Derczo's property, was certainly both dishonest and selfish.

Standard 9.22(c) Pattern of misconduct. Although the nature of the cases in Counts One and Two differ substantively, Respondent's conduct reveals a pattern of taking advantage of vulnerable clients. The Sikoras were burdened with Mr. Sikora's terminal illness and financial concerns. Mr. Derczo was elderly, infirm and of questionable mental status, all of which was known by the Respondent.

Standard 9.22(d) Multiple offenses. Respondent's misconduct occurred in relation to two completely separate clients with completely separate cases.

Standard 9.22(g) Refusal to acknowledge wrongful nature of conduct. Respondent has continually asserted that these allegations have no merit; that his conduct was ethical relating to both the fee collected from the Sikoras and his acceptance of interests in his client's property, by power of attorney and by will, from Mr. Derczo. Respondent continued to insist that there was no problem with his interest in his client's property. Respondent appears to view himself as the victim of the Sikoras, as Mrs. Sikora finally, after paying approximately $360,000 in fees and costs refused to pay Respondent's final inflated bill. His testimony that the Sikoras and Ms. Nutini, and Mr. Derczo and his helper Ms. Patterson, conspired against him, reveals that Respondent's state of mind lacks acknowledgment of his wrongful conduct.

Standard 9.22(h) Vulnerability of victim. Jerry Sikora and Mr. Derczo were vulnerable, ill, and dependent.

Mr. Sikora was terminally ill from the outset of Respondent's representation. On the day Mr. Sikora died, Respondent shamelessly urged Mrs. Sikora to continue on with a case that she had concerns about, and to continue to pay fees she could not afford, to avoid disrespect to her husband's memory. While she endured extremely trying personal circumstances, Respondent continually urged her to borrow money from relatives and banks, to continue to pay Respondent's fees.

Mr. Derczo, an 83 year-old bipolar man, blind in one eye, with hearing problems, with no local family, was vulnerable as well. Respondent was in possession of documents from the Veterans Administration that questioned Mr. Derczo's mental abilities to handle his property and affairs. Despite Respondent's knowledge of Mr. Derczo's condition and the concerns of those who were providing for Mr. Derczo (The Veterans Administration), Respondent obtained Mr. Derczo's property by the power of attorney and will he prepared for Mr. Derczo and directed him to sign.

Standard 9.22(i) Substantial experience in the practice of law. Respondent was admitted to practice in Arizona in 1983 and has substantial experience in the practice of law.

Standard 9.22(j) Indifference to making restitution. Mrs. Sikora attempted to address her concerns about Respondent's fees through the State Bar's Fee Arbitration Program. Respondent, even after Mrs. Sikora raised again and again her concerns about the fees, did not perform a "look back" to ensure that the fees he had charged and collected were reasonable.

Mitigating factors: Respondent had the good sense to hire Ms Nutini, a very knowledgeable and experienced employment lawyer, who brought about a settlement for the Sikoras.

PROPORTIONALITY

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

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

As the misconduct in each count of the complaint is so substantively different, proportional cases were reviewed for each. Pertaining to the misconduct in Count One (Sikora), the following cases offer guidance regarding sanction. In *In re Jung*, SB-06-0101-D (2006), the lawyer was suspended for six months by agreement. The lawyer misappropriated settlement funds in a personal injury matter. The lawyer failed to initially deposit the funds into a client trust account and failed to notify the client and a third party of the receipt of the funds. The lawyer also failed to communicate to the client the scope of the representation and the fees for which the client would be responsible. Although not identical to the instant matter,

the misconduct in *Jung* relating to the fee and the taking of settlement funds for his fee without the client's consent has similarities to the misconduct in the Sikora matter.

In *In re Spencer*, SB-06-0123-D (2006), the lawyer engaged in a prolonged pattern of misconduct by making improper transfers and falsely billing clients for costs and fees not associated with their cases. Spencer was suspended for one year for his misconduct, notwithstanding his lack of disciplinary history. Cases in which there has been dishonesty to clients have resulted in suspensions of one year in recent cases. *See, In re Pulito*, SB-04-0134-D (2005) (lawyer failed to discuss conflict of interest and deceived clients about the status of their matter, falsely billing them for services not performed, utilizing false billing to perpetuate the deception); *In re Gieszl*, SB-06-0013-D (2006) (lawyer lied to client after missing statute of limitations deadline for filing case, perpetuated deceit false settlement offer, including fabricated documents).

Regarding the misconduct in Count Two (Derczo), the following cases provide guidance as to the sanction.

In *In re Sinchak*, SB-07-0191-D (2008), the lawyer, who had no prior disciplinary history, was suspended for six months and one day. The lawyer was found to have engaged in a conflict of interest by representing both the client and the heirs to the estate. The lawyer filed a petition to be appointed as the personal representative of the estate to obtain payment of his legal fees and then, when terminated, failed to surrender the client's file. In *In re Davies*, SB-01-0158-D (2001), the lawyer drafted a will for a close personal friend and on multiple occasions made amendments to the will that increased the lawyer's proportionate share. Although it appeared that the changes were made pursuant to the client's wishes and were without undue influence, the lawyer failed to advise his client to seek the advice of independent

counsel. For the violations of ERs 1.7, 1.8 and 8.4(d), the lawyer was suspended for 30 days. Unlike the situation in *Davies*, Respondent drafted a will contrary to the instructions of his client, Mr. Derczo, having previously accepted an interest in his client's bank account without comment, and having obtained an interest in his client's storage space by virtue of a power of attorney.

In *In re Brown*, SB-07-0011-D (2007), the lawyer was suspended for five months after he entered into a business transaction with a client, failed to memorialize the transaction in writing, failed to instruct the client to obtain independent legal advice and failed to obtain the client's consent to the transaction. Additionally, Brown removed money held in trust, contrary to his client's directive regarding the money. Brown had no prior disciplinary history.

V. HEARING OFFICER'S RECOMMENDED SANCTION

In considering the sanction appropriate in this matter, the purpose of discipline must be considered. The purpose of discipline is "to protect the public from further acts by respondent, to deter others from similar conduct, and to provide the public with a basis for continued confidence in the Bar and the judicial system." *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987).

Respondent's conduct violated his duties to his clients, the legal system and the profession. The *Standards,* the proportional case law, and the facts and circumstances of this matter make clear that nothing less than a suspension requiring reinstatement is appropriate in this matter.

SANCTION

Based on the facts and circumstances of this matter, the *Standards* and a review of the proportional case law, the following sanction is recommended:

1. Respondent shall be suspended for six months and 1 day;

2. Should Respondent seek and be granted reinstatement, Respondent shall be placed on probation for a period of two years under terms and conditions to be determined at the time of reinstatement. The terms, however, shall include participation in the State Bar's Member Assistance Program[12] ("MAP") to include evaluation and compliance with any recommended therapeutic course, and participation in the State Bar's Law Office Management Assistance Program ("LOMAP") including the use of a practice monitor.

3. Respondent shall make restitution to Carol Sikora, as set forth below.

4. Respondent shall pay the costs and expenses of this disciplinary proceeding, including the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Disciplinary Commission and the Supreme Court of Arizona.

RESTITUTION

A Hearing Officer is charged with assessing all of the evidence and making recommendations regarding all allegations of ethical violations; no specific ER is included or excluded. In *In re* Connelly, 203 Ariz. 413, 416, 55 P.3d 756, 760 ¶17 (2002), the Court stated:

> A formal disciplinary action brought under ER 1.5 considers whether a lawyer's fee in a specific case falls within the range of reasonable fees for the services performed. If the lawyer's fee is deemed unreasonable under ethical standards, a formal disciplinary proceeding also determines what sanction to impose.

[12] The MAP assessment is recommended based on Respondent's conduct during the formal disciplinary process, as well as his troubling belief that each of his clients, the Sikoras and Mr. Derczo, conspired with others against him. [Tr. 69:1 – 5; 68:23 – 25] There is no basis for this belief that he has been the victim of conspiracies to damage or defraud him, notwithstanding Respondent's allegations in his responses to the Bar, his pleadings and his statements/questions during the hearing on the merits.

The decision in *Connelly* ultimately turned on the mandatory fee arbitration provision in the lawyer's fee agreement, not present in this matter. The Court's statement, however, impliedly accepts the proposition that a finding of an ethical violation for an unreasonable fee is proper.

Given the fact that the Respondent decided to forgo fee arbitration, he tacitly agreed to a determination that the Hearing Officer is entitled to order restitution, when appropriate, pursuant to Rule 60(a)(6). Pursuant to that Rule, "(r)estitution and the amount thereof must be proven by a preponderance of the evidence."

Ms. Nutini opined that the reasonable fees for the Sikoras cases would be $200,000. The fees charged by Respondent in the months of April, 2006; June, 2006; July, 2006; August, 2006; and September, 2006 are not reasonable, nor credible. The attorneys fees charged for the Federal case exceeded the recovery. The contingent fee charged by Respondent of $4,750 is disallowed.

It is ordered that the Respondent is not entitled to collect against the Sikoras, their successors, heirs and assigns for any outstanding bill.

Because the fees charged were not reasonable. Respondent is ordered to make restitution of $117,214 as those attorneys' fees collected in excess of $200,000.

RESPECTFULLY SUBMITTED this 14th day of May, 2009.

Stanley R Lerner-LDA
STANLEY R. LERNER
Hearing Officer

Original filed with the Disciplinary Clerk
this 14th day of May, 2009.

Copy of the foregoing mailed
this 15th day of May, 2009, to:

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