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HEARING OFFICER 7M

FILED
JUN 18 2009
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **Gary L. Lassen,** **Bar No. 005259** **Respondent.**	No. 06-1529 **AMENDED HEARING OFFICER'S REPORT** (Assigned to Hearing Officer 7M, Daniel P. Beeks)

Respondent Gary L. Lassen ("Respondent" or "Lassen") was convicted of leaving the scene of an injury accident, extreme DUI and endangerment after he hit a motorcyclist with his car while Respondent was drunk and taking prescription medications. These were serious crimes, and reflected adversely on Respondent's fitness as a lawyer. Respondent's conduct appears to have been the result of an isolated series of extremely bad choices, and not part of an ongoing pattern of substance abuse or dishonesty. Based upon the evidence presented during the two hearings in this matter, the Hearing Officer recommends that Respondent be censured, and placed on probation.

Procedural History

1. The probable cause order in this matter was issued on March 5, 2008.

2. The State Bar filed its original complaint in this matter on April 21, 2008.

3. The State Bar subsequently moved to amend its complaint on May 28, 2008. The motion to amend was granted. The amended complaint alleged one count arising from

Respondent's criminal conviction arising out of his actions in driving while intoxicated, and leaving the scene of an automobile accident in which a motorcyclist was injured. The amended complaint alleged that Respondent had violated E.R. 8.4(b) and (d), and requested that Respondent be punished pursuant to Rule 53(h), Rules of the Supreme Court of Arizona.

4. Respondent filed an answer to the amended complaint on June 19, 2008.

5. A prior hearing officer conducted a hearing in this matter on September 11, 2008. The parties stipulated that the present Hearing Officer could consider all testimony and exhibits presented at this prior hearing.

6. The prior hearing officer issued a report on October 31, 2008 recommending that the charges against Respondent be dismissed because the State Bar had not established by clear and convincing evidence that Respondent had been consciously aware that he had been involved in an accident which injured another person, or that he had been consciously aware of the risk he posed because his intoxication interfered with his comprehension.

7. The prior hearing officer reasoned that A.R.S. § 13-503[1] had precluded Respondent from demonstrating in his criminal proceedings that his voluntary intoxication had prevented him from forming the necessary mental states required for the crimes, but that this statute did not necessarily apply in disciplinary proceedings.

8. On February 9, 2009, the Disciplinary Commission rejected the prior hearing officer's recommendation, and found that pursuant to Rule 53(h)(1),[2] Rules of the Supreme

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[1] A.R.S. § 13-503 provides that "Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind."

[2] Rule 53(h)(1) provides in relevant part that "Proof of conviction shall be conclusive evidence of guilt of the crime for which convicted in any discipline proceeding based on the conviction."

Court of Arizona, Respondent's conviction was conclusive in establishing that Respondent had acted with the knowing mental states required for the crimes of which he was convicted.

9. The Disciplinary Commission remanded this matter for further findings regarding the presumptive sanction for Respondent's conduct, aggravating and mitigating factors, and proportionality.

10. Upon remand, this matter was initially reassigned to Hearing Officer 6S. Respondent exercised his right pursuant to Rule 50(d)(2) to request reassignment to a different hearing officer on February 25, 2009.

11. On March 2, 2009, this matter was reassigned to the present Hearing Officer.

12. The present Hearing Officer conducted a hearing in this matter on May 5, 2009.

Findings of Fact

13. The Disciplinary Commission did not vacate any of the prior hearing officer's findings of fact. It only vacated his legal conclusions.

14. The prior hearing officer's findings of fact are therefore incorporated by reference. These findings include the following:

a. At all material times Respondent was licensed to practice law in Arizona.

b. On May 4, 2005, Respondent consumed alcoholic beverages at a reception that he attended.

c. Respondent was also taking a number of prescription medications in accordance with his physicians' instructions.

d. Respondent did not realize that some of medications that he was taking might interact adversely with the consumption of alcohol.

e. Respondent left the reception and did not, at the time that he retrieved his car, believe that he was unable to properly operate a motor vehicle.

f. As Respondent drove, he began to feel ill.

g. Respondent hit a wall while driving and got a flat tire.

h. Subsequently Respondent also struck a motorcyclist, injuring the motorcyclist.

i. Respondent hit the saddle bag of the motorcycle which pushed the saddlebag into the motorcyclist's leg.

j. Respondent was not consciously aware that he struck the motorcyclist. Respondent continued driving after the injury accident.

k. According to the arresting officer, Respondent was not aware of what he was doing or where he was when the officer contacted Respondent.

l. Respondent subsequently pled no contest to criminal charges of endangerment, extreme DUI, and leaving the scene of an injury accident.

m. Respondent's treating psychiatrist, Dr. Henry J. Schulte, opined that the interaction between Respondent's medications and alcohol was a "major factor" on the day of the accident.

n. Dr. Schulte did not believe that there had been any prior episodes of alcohol abuse interfering with Respondent's functioning.

o. Dr. Schulte does not believe that Respondent presents a current threat to the public.

15. As a result of Respondent's conduct, the motorcyclist suffered injuries to his ankle, calf, foot and leg, including lacerations and muscle contusions. *Joint Prehearing Statement ("**JPS**")¶ I-6.*

16. The investigating police officer testified that Respondent's blood alcohol content after he was arrested was 0.17. *9/11/08 Transcript at 109:4 – 109:6.*

17. As a result of his no contest plea, Respondent was convicted of three counts: (1) Endangerment (a class 6 undesignated felony[3]); (2) Extreme DUI (a class 1 misdemeanor); and (3) Leaving the Scene of an Injury Accident (a class 6 undesignated felony). *11/07/06 minute entry in CR2005-014584-00; Exhibit 3 at prior hearing.*

18. As a result of his plea in the criminal proceedings, the court suspended the imposition of sentence, and placed Respondent on supervised probation for three years for each count, to run concurrently, beginning November 7, 2006, and required Respondent to serve ten days in the Arizona Department of Corrections. *JPS ¶ I-8.*

19. The State Bar did not seek interim suspension of Respondent pursuant to Rule 53(h)(2)(B), which allows for interim suspension based upon conviction of a "serious crime other than a felony."

20. Other findings of fact will be made below in connection with considering various aggravating and mitigating factors pursuant to Standards 9.2 and 9.3 of the American Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards").

Conclusions of Law

21. Pursuant to Rule 53(h)(1), Respondent's conviction established the enumerated elements that were necessary elements of the offenses for which he was convicted.

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[3] Pursuant to Arizona law, the sentencing court may place a criminal defendant who is guilty of a class 6 undesignated felony on probation and designate the offense as a Class 1 misdemeanor upon the defendant's successful completion of the terms of his or her probation. For purposes of bar discipline, conviction of a class 6 undesignated felony is not considered a felony for discipline purposes unless and until it is actually designated as such by the sentencing court. *In re Beren*, 178 Ariz. 400, 402-03, 874 P.2d 320, 322-23 (1994).

22. Rule 53(h) provides that a "lawyer shall be disciplined as the facts warrant upon conviction of a misdemeanor involving a serious crime or any felony."

23. Respondent violated ER 8.4(b) which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Sanctions

24. The theoretical framework analysis contained in the ABA Standards states that where there are multiple acts of misconduct, the sanction should be based upon the most serious misconduct, with the other acts being considered as aggravating factors. *See also In re Moak*, 205 Ariz. 351, 353, ¶ 9, 71 P.3d 343, 345 (2003).

25. The Hearing Officer finds that Respondent's most serious act of misconduct was his conviction of leaving the scene of an injury accident because this charge most directly relates to his honesty, trustworthiness and fitness as a lawyer.

26. The appropriate sanctions for Respondent's violations of Rule 53(h)(1) and ER 8.4(b) are found in Standard 5.1 of the ABA Standards, which deal with "Failure to Maintain Personal Integrity."

27. As with all of the ABA Standards, the appropriate level of punishment depends on the lawyer's mental state, and varies depending on whether the lawyer's actions were "intentional," "knowing," or "negligent."

28. Respondent's convictions do not necessarily establish that his actions were intentional. A "knowing" mental state is sufficient.

29. In order to be guilty of leaving the scene of an injury accident, a defendant must actually know of the injury or possess knowledge that would lead to a reasonable suspicion that such injury occurred. *State v. Porras*, 125 Ariz. 490, 610 P.2d 1051 (App. 1980).

30. Standards 5.12 and 5.13 both deal with "knowing" failures to maintain personal integrity.

31. Standard 5.12 provides that "Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that **seriously** adversely reflects on the lawyer's fitness to practice law." [emphasis added].

32. Standard 5.13 provides that "Reprimand[4] is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law."

33. Thus, it becomes important to determine whether Respondent's conduct "seriously adversely reflects on the lawyer's fitness to practice law" or only "adversely reflects on the lawyer's fitness to practice law."

34. There is no doubt that driving while intoxicated, especially with a blood alcohol level of 0.17 is a serious crime. There is also no doubt that leaving the scene of an injury accident is also a serious crime.

35. For purposes of attorney discipline, however, it is not the seriousness of the crime, but the seriousness of how that crime reflects on the attorney's fitness to practice law, that is important.

36. The prior hearing officer found that Respondent was not consciously aware that he struck the motorcyclist. Because of his conviction, however, Respondent is conclusively deemed to have possessed knowledge that would lead to a reasonable suspicion that such injury occurred.

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[4] What the ABA Standards refer to as a "reprimand" is called a "censure" in Arizona. *In re Mulhall*, 159 Ariz. 528, 532, 768 P.2d 1173, 1177 n.3 (1989).

37. There is no evidence that Respondent ever had alcohol or substance abuse issues previous or subsequent to the night of the incident for which he was convicted.

38. Respondent's behavior on the night of the incident appears to be an isolated series of extremely bad choices, and not part of an ongoing pattern of substance abuse or dishonesty.

39. The Hearing Officer does not believe that an isolated incident of failing to stop for an accident, during an isolated incident of severe intoxication caused in part by unexpected interaction of prescription medicines with alcohol "severely adversely" reflects on Respondent's fitness to practice law. *See, e.g. In re Kearns*, 991 P.2d 824 (Colo. 1999) (vehicular assault arising out of drunk driving incident in which respondent injured a motorcyclist adversely reflects on the respondent's fitness to practice law, but does not "seriously adversely" reflect on his fitness to practice law).

40. As discussed in more detail below, Respondent's "fitness to practice law" is evidenced by his long and successful history of practicing law at the highest levels. Based on Respondent's history, and the steps he has taken to assure that similar incidents do not occur in the future, the Hearing Officer believes there is very little risk of Respondent engaging in similar violations in the future.

41. The Hearing Officer finds that the public will be adequately protected if Respondent is censured.

42. The Hearing Officer therefore finds that the appropriate presumptive sanction is a censure pursuant to Standard 5.13.

43. Even if the Hearing Officer had found that the appropriate presumptive sanction was suspension pursuant to Standard 5.12, the Hearing Officer would have found that based

upon his balancing of the aggravating and mitigating factors discussed below, a censure, rather than a suspension, would have been the appropriate sanction for Respondent's conduct.

Aggravating and Mitigating Factors

Aggravating Factors

44. **9.22(b) Dishonest or Selfish Motive.** The State Bar argues that Respondent failed to stop at the scene of the accident with the motorcyclist in order to conceal his identity. The State Bar argues that Respondent's motive in leaving the accident scene must have been to avoid detection and its attendant consequences.

Based upon the prior hearing officer's findings, the Hearing Officer believes it is equally likely that Respondent was not even aware of what he was doing or where he was after he collided with the motorcyclist. While it is conclusively established that Respondent reasonably should have known that he had been involved in an accident causing injuries, it is not conclusively established that he formed an intent to conceal his identity by driving away from the accident scene. Assuming that Respondent was even mentally able to form such a concealment scheme in light of his cognitive condition, he could not have reasonably believed he would escape given that he had a flat tire at the time of the collision. Escape was also extremely unlikely because an independent witness had been driving behind Respondent for at least five minutes before the collision with the motorcyclist. *9/11/08 Transcript at 76:7 – 78:16.*

The Hearing Officer finds that the State Bar failed to establish this aggravating factor by clear and convincing evidence.

45. **9.22(f) Deceptive Practices During the Disciplinary Process.** The State Bar argues that a motion for post-judgment relief filed by Respondent in his criminal proceedings (Exhibit 14 at first hearing) somehow constitutes a deceptive practice during the disciplinary

process within the scope of Standard 9.22(f). Respondent initially made a claim of prosecutorial misconduct in this motion, based upon the prosecution's alleged last minute change in plea deals offered to Respondent during the criminal proceedings. *Exhibit 14.* Respondent later withdrew this allegation in his reply, and focused on hardship issues instead. *Exhibit 15*; *9/11/08 Transcript at 206:24 – 207:21.* This post-judgment motion was denied by the trial court. *Exhibit 16.* One of the members of the Disciplinary Commission expressed an opinion during oral argument on the State Bar's appeal of the prior hearing officer's report that this motion was "pretty outrageous." *01/10/2009 Transcript at 8:7.*

The Hearing Officer does not find that this motion could qualify as a "deceptive practice during the disciplinary process." First, the motion was filed in February, 2007, before the present disciplinary matter was even filed. The probable cause order in this case was not issued until over a year later, in March, 2008. Second, the motion was not filed in the disciplinary proceedings, but in the criminal proceedings. Although Respondent lost this motion, he should not be punished for vigorously defending himself in the criminal proceedings. If the post-conviction motion was frivolous, the trial court had numerous tools at its disposal to punish Respondent. It chose not to do so, and so does the Hearing Officer. The Hearing Officer finds that the State Bar has not established this aggravating factor.

46. **9.22(g) Refusal to Acknowledge Wrongful Nature of Conduct.** The State Bar argues that Respondent has refused to acknowledge the wrongful nature of his conduct. The State Bar's primary argument is that Respondent has not sufficiently acknowledged remorse for the harm he caused to the injured motorcyclist. The Hearing Officer finds that the State Bar's argument is more appropriately considered in connection with the mitigating factor of remorse, discussed below.

The Hearing Officer finds that Respondent has acknowledged the wrongful nature of his conduct. First and foremost, he accepted a no contest plea in the criminal proceedings, even after the more favorable plea deal he expected was withdrawn by the prosecution. Ernest Calderon, an attorney who has worked extensively with Respondent both before and after the incident, has testified that Respondent has continually expressed contrition, to the point that "it was almost as if he went to confession daily over this." *9/11/08 Transcript at 62:5 – 64:6. See also 5/5/09 Transcript at 45:12 – 46:25.*

The State Bar has not established this aggravating factor.

47. **9.22(i) Substantial Experience in the Practice of Law.** It is true that Respondent had been admitted in Arizona for 27 years at the time of the incident. It is not clear that substantial experience should be an aggravating factor in this case because leaving the scene of an injury accident, extreme DUI and endangerment do not seem to be the types of misconduct upon which substantial experience in the practice of law would have any significant effect. *In re Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994). The Hearing Officer cannot say that because of experience, it is more likely that Respondent "would have known better" than to engage in such misconduct. *Id.* To the extent that Respondent's experience can be considered an aggravating factor, it is offset by his complete lack of prior disciplinary complaints. *Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994), *modified in part or other grounds*, 181 Ariz. 307, 890 P.2d 602 (1994).

The State Bar has not established this aggravating factor.

48. **9.22(k) Illegal Conduct**. The State Bar argues that because Respondent engaged in illegal conduct, this aggravating factor should be applied. The Hearing Officer has serious concerns about applying illegal conduct as an aggravating factor in the present case given that it was also an element of the ethical violations for which Respondent is being found

responsible. The Hearing Officer is concerned that considering Respondent's criminal activities as elements of the underlying offenses, and again as an aggravating factor, would result in "double counting" the same conduct. Interpreting the ABA Standards, the Oregon Supreme Court has held that misconduct constituting an ethical violation should not be double counted as an aggravating factor. *In re Conduct of Gallagher*, 26 P.3d 131, 139 (Ore. 2001). *See also In re Cifelli*, No. 06-1428 (Hearing Officer 2007) (illegal conduct is entitled to little weight as an aggravating factor when it already served as the basis of the discipline in the first place).

The Hearing Officer gives no additional weight to this aggravating factor.

Mitigating Factors

49. **9.32(a) Absence of Prior Disciplinary Record.** As discussed in connection with Standard 9.22(i) above, this factor is counter-balanced and offset by Respondent's substantial experience in the practice of law. The two factors cancel each other out, and the Hearing Officer gives no weight to either factor.

50. **9.32(b) Absence of a Dishonest or Selfish Motive.** This factor was already analyzed in connection with aggravating factor 9.22(b).

51. **9.32(c) Personal or Emotional Problems**. Respondent claims that he suffered from various emotional problems at the time of the incident, and that these problems should be considered in mitigation.[5]

The evidence in support of Respondent's emotional problems around the time of the incident was somewhat weak. Respondent called Henry J. Schulte, M.D. as a witness at both the first and second hearings in this matter. Dr. Schulte, however, did not begin treating

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[5] Respondent does not claim that he suffered a mental disability within the scope of mitigating factor 9.32(i). *05/05/2009 Transcript at 125:3 – 125:18.*

Respondent until March 2007, nearly two years after the incident. *05/05/2009 Transcript at 18:11 – 18:12.* Dr. Schulte also had only very limited records from Respondent's prior treating psychiatrist, Mark A. Wellek M.D. *Id.* at 18:13 – 18:20. Dr. Schulte did not receive Dr. Wellek's actual records, but only received a description of the incident and a summary of treatment covering nearly seven years of treatment. *09/11/2008 Transcript at 33:19 – 34:2.* Dr. Wellek had diagnosed Respondent as suffering from a generalized anxiety disorder. *05/05/2009 Transcript at* 20:3 – 20:5. Dr. Schulte disagreed with Dr. Wellek's diagnosis. *05/05/2009 Transcript at* 20:20 – 20:25. Respondent first saw Dr. Wellek in approximately 2000. *05/05/2009 Transcript at 57:29 – 57:22.* In January, 2001, Respondent saw a different psychiatrist who then changed Respondent's psychiatric medication. *05/05/2009 Transcript at 58:4 – 58:18.* Although Respondent's wife is a licensed clinical psychologist, the Hearing Officer finds that it would not have been appropriate for her to treat Respondent, and any opinions she may have rendered regarding his condition were of questionable value, given her obvious self interest in this proceeding. Dr. Schulte's opinions regarding whether Respondent's condition was stable at the time of the incident were based on the limited records from Dr. Wellek, and from Respondent's after the fact reporting. *05/05/2009 Transcript at 25:12 – 25:20.*

Given that Dr. Schulte did not begin to treat Respondent until long after the incident, and his opinions were based upon very incomplete records from Respondent's prior psychiatrists, the Hearing Officer finds that Respondent has failed to carry his burden in establishing this mitigating element.[6]

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[6] Even if it had been sufficiently established that Respondent was suffering from a recognized psychiatric condition at the time of the incident, this would not necessarily excuse his extreme DUI, endangerment, and leaving the scene of an injury accident. *See, e.g., In re Hoover*, 161 Ariz. 529, 532, 779 P.2d 1268, 1271 (1989) ("bar discipline may be

52. **9.32(d) Timely Good Faith Efforts to Make Restitution or to Rectify the Consequences of Misconduct.**

After the incident, Respondent requested that Patrick McGroder, a well known and well respected personal injury litigator, assist in attempting to convince his insurance company to compensate the injured motorcyclist to the fullest extent possible. *11/07/2006 Transcript, State Bar Exhibit 1, at 30:8 – 30:24; 05/05/2009 Transcript at 206:3 – 206:23.* This constitutes evidence supporting this mitigating factor. *See In re Alcorn,* No. SB-02-0097-D (2002) (attempts to convince insurance company to compensate injured victim supports a finding of mitigation under Standard 9.32(d)). Because Respondent was using his insurance company's money, and not his own funds, to make such restitution, the Hearing Officer believes this factor is entitled to little weight.

Respondent also made efforts to make sure that he does not engage in similar misconduct in the future. Although he had no prior history of alcohol or substance abuse, after his plea in the criminal proceeding, Respondent voluntarily began participating in the State Bar's Members Assistance Program ("MAP"). *09/11/2008 Transcript at 131:3 – 133:2.* Respondent did not always follow all of the recommendations provided to him by the MAP program. For example, he did not seek intensive outpatient treatment, as recommended by the MAP Director, Hal Nevitt. *Id. at 132:12 – 133:2.* He also did not meet face to face with MAP Monitor as recommended, although he did have regular telephone contact with the MAP Monitor. *Id. at 123:5 – 126:12.* The Hearing Officer does not find that these variations from MAP's recommendations indicate that Respondent was not making good faith efforts to make

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imposed on lawyers with various degrees of mental illness and disturbance. . . . Mental disease or illness . . . is not a per se bar to imposing sanctions on a lawyer for ethical violations).

sure similar problems did not arise in the future.[7] The Hearing Officer finds that especially given that there was no prior or subsequent history of alcohol or substance abuse, Respondent's participation in the MAP program indicates timely and good faith efforts to insure that similar ethical lapses did not take place in the future.

The Hearing Officer finds that Respondent has established this mitigating factor.

53. **9.32(e) Cooperation in Discipline.** Respondent has made full and free disclosure to the State Bar and has exhibited a cooperative attitude toward the proceedings. The Hearing Officer finds that Respondent has established this mitigating factor. The Hearing Officer, however, gives this factor little weight, as Respondent did nothing more than the rules require, and his failure to cooperate would have been an aggravating factor.

54. **9.32(g) Character and Reputation.** Respondent introduced testimony at both hearings regarding his good character and reputation. Respondent's former partner, and former State Bar President, Ernest Calderon testified regarding Respondent's excellent character and reputation. *05/05/2009 Transcript at 50:6 – 51:4; 09/11/2008 Transcript at 64:23 – 67:3; 11/7/2006 Transcript at 18:19 – 19:3.* Similarly, another of Respondent's long-time partners also testified as to his very good reputation and character. *09/11/2008 Transcript at 158:3 – 161:1; 11/7/2006 Transcript at 10:10 – 11:5.* The State Bar did not present any evidence to contradict this testimony, and in fact, objected to Mr. Calderon's testimony in the most recent hearing as cumulative and redundant. The Hearing Officer finds that Respondent has established this mitigating factor.

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[7] The Hearing Officer also finds that Respondent's choice to pursue a Smart Recovery© program, rather than a more traditional Alcoholics Anonymous program does not demonstrate any lack of devotion to maintaining sobriety and avoiding potential future ethical issues. *See In re Sorenson (Reinstatement),* No. 05-6000 at ¶ 100 (2007) (preference for treatment programs other than traditional 12 step programs does not demonstrate lack of commitment to maintaining sobriety).

55. **9.32(j) Delay in Disciplinary Proceedings.** Respondent argues that although he was sentenced in the criminal proceeding in November, 2006, formal proceedings were not filed against him until March, 2008. The State Bar claims that part of this delay resulted from a decision to await a ruling on Respondent's post-conviction motion before proceeding with formal disciplinary actions. Although this may be true, the post-conviction motion was denied in a minute entry dated May 9, 2007. The probable cause determination was not issued until nearly 10 months later, on March 5, 2008. Even though not all of the delay was the fault of the State Bar, this delay qualifies as a mitigating factor. *See, e.g., In re Peasley*, 208 Ariz. 27, 40-41, ¶ 59, 90 P.3d 764, 777-78 (2004) (delay of several years between initial complaint and resolution of case constitutes a mitigating factor under Standard 9.32(i) even if some of the delay is caused by respondent or by complexity of the case). The Hearing Officer finds that Respondent has established this mitigating factor.

56. **9.32(k) Imposition of Other Penalties or Sanctions.**

Respondent was sentenced to ten days in prison for his conduct. This constitutes imposition of other penalties within this Standard.

In addition, Respondent has suffered significant humiliation as a result o the incident. The parties disagree regarding whether Respondent's public and personal humiliation, resulting from being arrested, and having the charges reported multiple times in the local press can be considered as mitigating factors. The Arizona Supreme Court considered exactly this type of evidence as a mitigating factor in *In re Walker*, 200 Ariz. 155, 161, ¶ 25, 24 P.3d 602, 608 (2001) (such public humiliation should be sufficient to deter other attorneys). The Supreme Court later clarified that in order to be considered in mitigation, such humiliation must arise from actions that occurred before the inception of disciplinary charges, and not those resulting from the disciplinary process itself. *In re Peasley*, 208 Ariz. 27, 40, ¶ 58, 90

P.3d 764, 777 (2004). *See also In re Nalabandian*, No. 01-1792 (2004) (significant amount of negative publicity, and being forced to resign employment with law firm constitute mitigating factors of other penalties and humiliation).

Respondent testified that at least three newspaper articles were published about the incident. *05/05/2009 Transcript at 104:13 – 106:2.* He also testified that as a result of these articles, he was asked to leave the firm with which he was working at the time. *Id.* at 69:6 – 69:11. According to the parties joint prehearing statement filed before the hearing in front of the prior hearing officer, at least one of these articles was published in 2006. The Hearing Officer takes judicial notice that one of the other articles was published in the Arizona Republic in January, 2007. Because these articles were published prior to formal disciplinary proceedings being instituted against Respondent, the Hearing Officer finds that the public humiliation caused by such newspaper articles can be considered as a mitigating factor. Given the high-profile public entity clients which Respondent typically represented, and the difficulty it caused him in retaining such clients, the Hearing Officer finds that Respondent has established this mitigating factor, and that it is entitled to significant weight.

57. **9.32(l) Remorse.** Respondent claims that he is remorseful and that this should be considered as a mitigating factor. Numerous witnesses testified that Respondent had expressed true remorse about the incident to them. As the Arizona Supreme Court has recognized, "those seeking mitigation relief based upon remorse must present a showing of more than having said they are sorry." *In re Augenstein*, 178 Ariz. 133, 137, 871 P.2d 254, 258 (1994). "The best evidence of genuine remorse is affirmative and, if necessary, creative efforts to make the injured client whole." *Id.* A "late apology, standing alone, is insufficient to support a finding of remorse." *Id.*

The State Bar expresses concern that Respondent has exhibited little true remorse, and that he seems to be more sorry about how his conviction and loss of his drivers license has affected him and his family. Although the Hearing Officer shares some of the State Bar's concerns, and questions whether Respondent has, at times, focused more on the impact of the incident on his own life as opposed to the motorcyclist's life, the Hearing Officer finds that Respondent has carried his burden of establishing this mitigating factor. Given the difficulty in separating the remorse relating to his own situation from the remorse relating to the harm he caused to the motorcyclist, however, the Hearing Officer gives this mitigating factor little weight.

Balancing of Aggravating and Mitigating Factors

58. Overall, the Hearing Officer finds that the mitigating factors significantly outweigh the aggravating factors.

59. To the extent that Respondent's conduct could be considered to "seriously adversely reflects on the lawyer's fitness to practice law," such that a suspension would be the presumptive sanction under Standard 5.12, the Hearing Officer finds that the balance of the mitigating factors would support a downward departure, justifying the imposition of a censure.

60. The Hearing Officer does not believe, however, that the balance of the mitigating factors would justify a departure from the presumptive sanction of a censure if Standard 5.13 applies, because Respondent's misconduct only "adversely reflects" on his fitness to practice law. The Hearing Officer does not believe that the balance of the mitigating and aggravating factors would justify a mere informal reprimand or diversion, as requested by Respondent's counsel.

Recommended Sanction

61. Based upon the conclusion that Standard 5.13 applies, and the above balancing of aggravating and mitigating factors, the Hearing Officer recommends that Respondent receive a censure.

62. The Hearing Officer also recommends that Respondent be placed on probation, on terms discussed in more detail below.

Proportionality

63. The last step in determining if a particular sanction is appropriate is to assess whether the discipline is proportional to the discipline imposed in similar cases. *In re Peasley*, 208 Ariz. 27, 41, ¶ 62, 90 P.3d 764, 778 (2004). "This is an imperfect process because no two cases are ever alike." *In re Owens*, 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). As the Arizona Supreme Court has observed:

> Consideration of the sanctions imposed in similar cases is necessary to preserve some degree of proportionality, ensure that the sanction fits the offense, and avoid discipline by whim or caprice. . . . Proportionality review however, is an imperfect process. . . . Normally the fact that one person is punished more severely than another involved in the same misconduct would not necessarily lead to a modification of a disciplinary sanction. Both the State Bar in its capacity as prosecutor and the Disciplinary Commission in its quasi-judicial capacity have broad discretion in seeking discipline and in recommending sanctions.

In re Dean, 212 Ariz. 221, 225, ¶ 24, 129 P.3d 943, 947 (2006).

64. Because perfect uniformity cannot be achieved, the Arizona Supreme Court has long recognized that the discipline in each situation must be tailored for the individual case. *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997). The Hearing Officer has carefully considered all of the evidence, the aggravating and mitigating factors, and prior

disciplinary cases in attempting to adequately tailor Respondent's discipline to the facts of his individual case.

65. The Hearing Officer has considered the cases cited by the parties in their respective proportionality briefs, and has performed independent research regarding similar cases.

66. There are no prior Arizona cases with precisely analogous facts.

67. Arizona cases involving injuries resulting from intoxicated drivers have resulted in a wide range of sanctions. The Hearing Officer has considered the following cases as providing some guidance.

a. *In re Horwitz,* 180 Ariz. 20, 881 P.2d 352 (1994) (respondent with long history of drug abuse and drug related arrests who was convicted of negligent homicide after he was involved in an accident with cocaine and prescription drugs in his blood was disbarred);

b. *In re Torre*, No. SB-04-0057-D (2004) (respondent convicted of negligent homicide and leaving the scene of a fatal accident stipulated to disbarment);

c. *In re Nalabandian*, No. 01-1792 (2004) (passenger in Torre's vehicle at the time of fatal accident, who assisted Torre in leaving the scene thereby preventing state from determining whether Torre was intoxicated at the time of the accident, and who did not report the accident himself, stipulated to receive a censure);

d. *In re Saidel*, No. 01-2324 (2003) (Respondent received six month retroactive suspension after he pled guilty to two counts of

endangerment arising out of accident while he was under the influence of alcohol and traveling at least 30 miles an hour in excess of the speed limit, when he lost control of his vehicle, causing significant and serious injuries to both passengers in his car).[8]

e. *In re Proper*, No. SB-07-0183-D (2008) (90 day suspension after Respondent pled guilty to aggravated DUI with Child Present, with two prior DUI convictions).

f. *In re Lopez*, No. SB-07-0139-D (2007) (one year suspension where the respondent pled guilty to obtaining illicit drugs by fraud, interfered with a law enforcement investigation, made misrepresentations to the State Bar, and intentionally violated a court order).

g. *In re Cifelli,* No. SB-07-0154-D (2007) (two year retroactive suspension where respondent was found guilty at trial of felony DUI, where respondent's drivers license was suspended, and respondent had a recent prior DUI, and failed to participate in discipline proceedings).

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[8] The details of the underlying conduct were not included in the Arizona disciplinary matrix, or in the online report issued by the Disciplinary Commission. The details regarding Saidel's intoxication and speed were obtained from the reciprocal discipline report issued by New Jersey's Office of Attorney Ethics. *See* http://www.judiciary.state.nj.us/oae/DisciplinarySummaries1984-2008.pdf

68. Because of the dearth of Arizona cases with facts and circumstances similar to the present matter, the Hearing Officer also looked to cases from other states considering similar situations. The Hearing Officer finds that the following cases are somewhat instructive.

a. *In re Kearns*, 991 P.2d 824 (Colo. 1999). In *Kearns*, the respondent was driving with a BAC of 0.161 when he hit a motorcyclist. The motorcyclist suffered serious head injuries, several broken bones, and was in a coma for two months. The respondent called 911 and reported the accident. The respondent was convicted of vehicular assault (serious bodily injury to another proximately caused by driving under the influence). *Id.* at 825. The Colorado Supreme court found that although the respondent's conduct adversely reflected on his fitness to practice law (Standard 5.13), it did not seriously adversely reflect on that fitness (Standard 5.12). *Id.* at 826. Based upon this finding, and numerous mitigating factors, the Colorado Supreme Court approved a censure.

b. *In re Curran*, 801 P.2d 962 (Wash. 1990). In *Curran*, the respondent was suspended for six months following his conviction for vehicular homicide, arising from a single vehicle accident which killed two passengers in the respondent's car. The respondent was found to have a BAC of 0.18.

69. As one would expect, the cases discussed above demonstrate that more serious sanctions are generally reserved for cases in which a respondent has a history of substance abuse, or if a fatality results. This is consistent with the commentary to Standards 5.12 and

5.13, which recognize that isolated incidents not involving fraud or dishonesty should rarely subject a lawyer to discipline, unless there is a pattern of repeated offenses.

70. In light of the fact that Respondent had no prior or subsequent history of substance abuse, and nobody died as a result of Respondent's drunk driving, it appears that a censure is within the broad range of sanctions imposed in somewhat similar cases.

Conclusion

71. The purpose of disciplinary proceedings is not to punish the offender, but rather is to protect the public, the profession and the administration of justice, and to deter similar conduct by other lawyers. *In re Alcorn*, 202 Ariz. 62, 74¶ 41, 41 P.3d 600, 612 (2002); *In re Fioramonti*, 176 Ariz. 182, 187 859 P.2d 1315, 1320 (1993).

72. The Hearing officer believes that the public, the profession and the administration of justice will be adequately protected if Respondent receives a censure.

73. The Hearing officer believes that when considered in conjunction with the existing criminal penalties, a censure of respondent will adequately deter similar conduct by other lawyers.

74. For the reasons discussed above, the Hearing Officer recommends that the following punishment be imposed on Respondent Gary L. Lassen:

a. Lassen should receive a **censure**;

b. Lassen should be placed on **probation for one year**, under the following terms:

i. Lassen should be required to contact the director of the State Bar's Member Assistance Program (MAP) within 30 days of the date of the order imposing probation;

ii. Lassen should be required to submit to a MAP assessment;

iii. The director of MAP should be required to develop "Terms and Conditions of Probation" based upon the assessment and the terms should be incorporated into the order of probation;

iv. Lassen should be required to comply with any other terms and conditions incorporated into the order of probation;

v. Lassen should be required to refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona;

vi. If Lassen fails to comply with any of the foregoing probation terms, and the State Bar receives information regarding such non-compliance, Bar Counsel should be obligated to file with the Probable Cause Panelist a Notice of Noncompliance, and the Probable Cause Panelist should refer the matter to a hearing officer to conduct a hearing at the earliest applicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of Lassen's probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Lassen has failed to comply with any of the foregoing conditions, the burden of proof should be placed on the State Bar to prove noncompliance by a preponderance of the evidence.

vii. Lassen should be required to pay all costs incurred by the State Bar in bringing these disciplinary proceedings, including those incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter.

DATED this 18th day of June, 2009.

Daniel Beeks, INM
Daniel P. Beeks
Hearing Officer 7M

Original filed with the Disciplinary Clerk
this 18th day of June, 2009.

Copy of the foregoing mailed
this 18th day of June, 2009, to:

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