BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **GIL SHAW,** **Bar No. 009290** RESPONDENT.	)	No. 08-1566, 08-1942, 09-0301 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The Complaint was filed on May 29, 2009. The Hearing Officer was assigned on June 2, 2009. An Initial Case Management Conference was held on June 22, 2009. An Answer was filed on June 24, 2009. A Settlement Officer was assigned on June 25, 2009. A Settlement Conference was scheduled for August 18, 2009. The Hearing was held on September 29, 2009.

FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 15, 1983. (Joint Pre-Hearing Statement "JPS", Stipulated Facts, #1)

COUNT ONE (File no. 08-1566/Hilliker)

2. In 2004, Respondent was hired by William and Vicki Hilliker ("the Hillikers") to assist them in collecting a $21,149.00 balance owed to their trucking company by a company called Earthscape. (JPS #2)
3. Early in the representation Earthscape wanted to settle for $10,000. The Hillikers rejected this offer. They wanted to collect the entire amount owed. Vicki Hilliker

testified that Respondent told her and her husband that they had a good claim for $21,149. (Transcript of Hearing, TR 113:20 through 114:8)

4. Respondent filed a complaint on behalf of the Hillikers on July 8, 2004. More than a year and a half later on March 2, 2006 the Superior Court placed the lawsuit on the inactive calendar to be dismissed by May 3, 2006 unless the Hillikers filed a Motion to Set the matter for trial. (Hearing Exhibit 17) On June 1, 2006 Earthscape the defendant in the lawsuit filed a Disclosure Statement pursuant to Rule 26.1 of the Arizona Rules of Civil Procedure (ARCP). (Exhibit 11) Respondent did not file a Disclosure Statement for Plaintiffs. (TR 17:4-6) Respondent sent Defendant's Disclosure Statement to the Hillikers and asked them to give him information to respond to the items in the Disclosure Statement. (TR 16:13-23) Vicki Hilliker testified that she did not get Defendant's Disclosure Statement from Respondent until July 23, 2006. (TR 111:15-25)

5. Mrs. Hilliker answered the Disclosure Statement and took her answers to Respondent's Office on August 11, 2006. (TR 112:8-25, Exhibit 9) The Hillikers also provided Respondent with a list of people who could testify for the Hillikers. (Exhibit 10) The record does not support a conclusion that Respondent ever disclosed his clients' answers to the Defendant's Disclosure Statement or the clients' list of witnesses to counsel for defendant.

6. Respondent had received Defendant's Interrogatories and Requests for Admissions but he did not respond to them. (TR 17:14-18) Respondent testified that he knew John Churchill counsel for the Defendants and he did not think Mr. Churchill would need

formal responses to the discovery or a disclosure statement because Respondent had sent Mr. Churchill the invoices with the Complaint. (TR 190:11-15)

7. On December 6, 2006 Mr. Churchill on behalf of Defendants filed a Motion to Exclude, Motion for Sanctions and Motion to Dismiss because Respondent had ignored the discovery requests. (Exhibit 20) Respondent filed an untimely response to this motion on January 8, 2007. (Exhibit 21) Respondent admitted that he mishandled this case. Respondent did not inform his clients of the Defendant's Motion to Exclude, Motion for Sanctions and Motion to Dismiss. (TR 200:6-10)
8. Respondent requested a continuance of the hearing on the above referenced motions. (Exhibit 21) The Court denied the request for continuance. (Exhibit 23) Respondent was not present for the oral argument on the motions before Judge Hinson on January 12, 2007. (Exhibit 23) The Court granted the Motion to Exclude, and sanctioned the Plaintiffs with a dismissal without prejudice. The Court stated, "Counsel, Gil Shaw has failed to comply with the rules of civil procedure and has failed to respond to legitimate requests for discovery. The relief requested by defendants' counsel is extreme, as is plaintiff counsel, Gil Shaw's blatant disregard for his obligations under the rules of discovery and the rules of civil procedure that are the law of this state and control the ability of litigants to seek relief." (Exhibit 23) In addition the Court sanctioned Respondent personally for attorney fees associated with defendant's motion to exclude, preparation of the disclosure statement and preparation of discovery requests upon plaintiff. In the Judgment (Order of Dismissal, Exhibit 25) two sections addressed attorney fees. In one section a fee of $994.50 was awarded against Gil Shaw personally, while in another section a judgment of $3000 in attorney

fees and $91 in costs was awarded against the Hillikers. Respondent admitted at the Hearing that the Hillikers should not have to pay either award of attorney fees. (TR 22:16 through 23:23) Mr. Churchill has made no effort to collect either the $994.50 or the $3091 in two and a half years. (TR 24:1-7). However, Respondent conceded the unpaid judgment for $3091 could affect the Hillkers' credit rating if at some time it were recorded. (TR 24:15-21)

9. Vicki Hilliker testified that she and her husband first saw the Motion to Exclude, Motion for Sanctions, and Motion to Dismiss on September 25, 2009. (TR 116:6-11) Respondent informed her of the dismissal on February 2, 2007. (TR 116:19 through 117:10) She first saw the Order of Dismissal that was dated February 22, 2007 and the Judgment ordering the Hillikers to pay defendants $3091 on September 29, 2009. (TR 117:19-22)

10. Respondent met with Mr. Hilliker on February 2, 2007, after their lawsuit had been dismissed. According to William Hilliker Respondent said that he blew the case, then he blew it off, and that he was sorry. (TR 121:11 through 122:1) Respondent offered to either pay William Hilliker or to redo the lawsuit. (TR 122:2-6) William Hilliker told Respondent that he would rather have defendant's money than Respondent's money and Respondent said he would reopen the case. (TR 122:6-12) In a letter of February 3, 2007 the Hillikers reminded Respondent that they had given Respondent documents that refuted the defendant's position in the case and that Respondent had failed to provide the court and opposing counsel with those documents. (Exhibit 2) The letter concluded with the Hillikers postponing a decision to accept Respondent's offer to pay them $10,000 because of Respondent's errors in handling their case. The

Hillikers told Respondent that they wanted the defendant's money not Respondent's money. They directed Respondent to attempt to re-file a lawsuit. If Respondent was not successful in re-filing the lawsuit then the Hillikers stated that the Respondent should pay them $8000-$10,000.

11. The Hillikers heard nothing from Respondent by April 2007. (TR 122:11) On April 13, 2007 in a letter the Hillikers demanded that Respondent return their entire file and give to them the phone number and address of the Respondent's errors and omissions carrier. (Exhibit 3)

12. The State Bar received a charge from the Hillikers on September 9, 2008. (Exhibit 1) On September 23, 2008 the Bar sent Respondent a copy of the charge and requested his response within 20 days. (Exhibit 4) The Bar received no response to that letter. On October 24 2008 the Bar sent a second letter to Respondent requesting a response within 20 days. (Exhibit 5) On November 4, 2008 Respondent requested an extension until November 25, 2008 to respond to the charge. (Exhibit 6) Respondent informed the Bar that he had a different recollection of the events then the Hillikers. He stated "During that same time period, my mother was suffering through her final illness and it is quite likely I was not timely in returning some of the calls the Hillikers might have made to me." (Exhibit 6)

13. On November 24, 2008 Respondent submitted a letter in which he fully addressed the Hilliker's charges. He said that the defendant in the lawsuit had all the invoices that the Hillikers were contending proved their debt. Respondent indicated that in conversations and correspondence with defendant's counsel Respondent informed Mr. Churchill that Respondent had disclosed all the documents that the Hillikers had.

Respondent said he told the Hillikers that he felt bad that "... we appeared to have been ousted on a technicality. I do recall saying that I would like to make the debt good to them but I have been financially unable to. I also believe that I informed them I had no malpractice coverage that would cover any loss". (Exhibit 7)

14. In the November 24, 2008 letter and at the Hearing Respondent offered explanations of why he may not have been communicating well with the Hillikers. In September 2006 Respondent began working full-time at Yavapai College. He stated that in February 2007 his mother's health declined rapidly and she died two months later. Respondent was gone from his office to help care for his father who lived in Pinetop. His father suffered a heart attack in August 2007. Respondent was thrown from a horse severely injuring his back in September 2007. Respondent concluded "The cascade of these events, and my teaching job at YCC, without dispute, caused me to neglect my law practice and impacted clients such as the Hillikers". (Exhibit 7) The work that Respondent failed to perform in answering defendant's discovery requests would have been in 2006, before most of the events described above by Respondent occurred. The defendant's Request for Production of Documents was mailed to Respondent on May 23, 2006. (Exhibit 22) This was at least three months before Respondent began teaching full-time at Yavapai College. His mother's sudden decline in health, her death, his father's heart attack and Respondent's fall from the horse occurred in February, April, August and September 2007 respectively. The oral argument on defendant's Motion to Exclude, Motion for Sanctions and Motion to Dismiss was on January 12, 2007 and the Order of Dismissal was signed on February 22, 2007. (Exhibit 25) Yet one aspect of Respondent's problems was manifested in

the 2006 – early 2007 time frame. Respondent has presented evidence that he was being treated for depression from 2005 through 2007. (Exhibits B and C)

15. Finally in the November 24, 2008 letter Respondent clarified that he researched whether he could re-file the Hilliker lawsuit. He concluded that he could not re-institute the lawsuit due to a statute of limitations issue. (TR 32:24 through 33:10) Respondent stated that he failed to inform the Hillikers of his conclusion. (TR 33:11) Respondent also confirmed that during 2007 he was suffering from depression. Respondent stated that in 2008 he was under "... regular treatment with mental health professionals and taking appropriate medication". (Exhibit 7)
16. Respondent summarized his position as follows: "I regret the Hilliker case did not turn out the way we had all hoped. I do not believe I was engaged in malpractice, only perhaps poor lawyering. The dismissal was a result of my mistaken belief and argument that no further disclosure was needed on our part as we had provided everything we had. My ethical misconduct would be more appropriately focused on the issue of communication with my clients. I fully admit that I fell well short of my ethical responsibilities in that regard".(Exhibit 7)
17. Respondent testified that after he told the Hillikers he would try to reimburse them $10,000, he received a letter from attorney John Ryan on behalf of the Hillikers. (TR 34:6) Mr Ryan asked Respondent to sign a Promissory Note for $10,000 for the Hillikers. Respondent declined because he could not meet the proposed pay back schedule. (TR 34:9-19)

18. The Hillikers never received their case file. Respondent believes he turned over their file, but he has no record of transmitting the file to the Hillikers. (Joint Pre-Hearing Statement, paragraph 12)

CONCLUSIONS OF LAW – COUNT ONE (Hilliker)

19. The Hearing Officer concludes that the Bar has proven by clear and convincing evidence that Respondent violated ER 1.1 (failing to provide competent representation), and ER 1.3 (failing to provide prompt and diligent representation to a client) when he failed to comply with disclosure requirements and failed to appear at the hearing, resulting in a dismissal of the Hilliker lawsuit and a judgment against the Hillikers for $3091. His failure to appear at the hearing on the Motion to Exclude, the Motion for Sanctions and the Motion to Dismiss (even if by telephone) is, as defendant's counsel described it in defendant's Reply, "incomprehensible". (Exhibit 22, paragraph 2) Defendant's counsel was referring to the following statement by Respondent in his untimely Response to Motion to Exclude, "In the first instance, counsel would request a brief continuance of the hearing on the motion or in the alternative, he has no choice but to waive his appearance". (Exhibit 21) Respondent was announcing in advance his decision not to appear in a case dispositive motion if his continuance was not granted. This conduct is not competent, prompt and diligent representation of clients. Respondent has not explained why, if he could not arrange to appear by telephone at the hearing, he could not have arranged for another lawyer to appear in court for him.

20. Respondent's Response to the Motion to Exclude contains his own statements about his failures, "There is no way to disguise the fact that this case has not been handled

in the most professional way by Plaintiff's counsel"... "Counsel's obligations to Mr. Churchill have not been timely met. Mr. Churchill displayed substantial patience in waiting for some simple discovery that simply was not responded to in a timely fashion. There are many excuses but no good reason for the delay and the inability to get this done by the end of the year. However, these delays, while embarrassing, should not pose an obstacle to having a trial on the merits." (Exhibit 21) In fact Defendant's discovery requests had been pending since May 23, 2006, more than seven months before Respondent's January, 2007 Response to the Motion to Exclude.

21. The Bar has established by clear and convincing evidence that Respondent violated ER 1.2 (failing to consult with the client as to the means to accomplish their objectives) when Respondent did not inform the Hillikers of 1) the pending Motion to Exclude, Motion for Sanctions, and Motion to Dismiss, 2) a hearing date on the Motions and 3) Respondent's intention not to even appear at the hearing. These failures also violate ER 1.4 (failing to communicate with his clients for extended periods of time, failing to communicate with clients about matters in which their informed consent was required, failing to keep his clients reasonably informed of the status of their matter and failing to promptly reply to their reasonable requests for information). Respondent did not respond to the Hilliker letters of February and April 2007. He did not inform them of his decision that he could not re-file their lawsuit. (TR 33:6-12) These failures also violate ER 8.4 (conduct prejudicial to the administration of justice).

22. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.16 (failing to provide the client with all of his documents upon termination of

representation) when he did not return the Hilliker's file to them after his representation was terminated. The Hearing Officer concludes that the Hillikers are more believable on this point than Respondent. Respondent could not be certain that he had returned the file to the Hillikers. He could not find the file in his office. (TR 33:13) He could not provide a letter confirming the return of the file. (TR 33:16-20) The Hillikers clearly recall that they requested the file (Exhibit 3), and that they did not receive it.

23. The Bar has proven by clear and convincing evidence that Respondent collected an unreasonable fee pursuant to ER 1.5. The Hillikers testified that they agreed to trade services with Respondent as a way of paying Respondent's fees. Exhibit 12 is an invoice to Respondent from the Hillikers for roadwork services with a value of $2160. ER 1.5 (a) (1-8) lists factors to be considered when deciding if a fee is unreasonable. First, the time and labor involved in this case would not have been significant if Respondent had appropriately attended to this matter. He did not expend much time or effort on the case. This lawsuit was a fairly simple contract matter. It did not involve any novel or difficult questions. The time involved for Respondent would not have caused Respondent to decline other employment. Certainly the amount involved $21,000 was not a very large claim. The result obtained by Respondent was zero on the Hilliker's claim and a judgment against the Hillikers for $3091. Respondent had sufficient time to handle the case and to appropriately respond to defendant's discovery requests. Respondent had been an attorney since 1983, approximately 23 years when the lawsuit was filed. When considering these

factors the Hearing Officer determines that a fee of $2160 was unreasonable for this matter. Respondent did not give his clients enough legal work to justify that fee.

24. Respondent violated ER 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client) when he failed to provide disclosure to the defendants, and failed to appear at the hearing on the Motion to Exclude which resulted in the Hillikers' lawsuit being dismissed.

FINDINGS OF FACT

COUNT TWO (File No. 08-1942/Lowry)

The following facts in paragraphs 25 through 51 were stipulated in the Joint Pre-Hearing Statement (JPS) in paragraphs 14 through 40.

25. Gary Lowry and Marion Carol, husband and wife (hereinafter the "Lowrys"), hired Respondent on May 18, 2008 to represent them in a suit they had filed against Yavapai County. (JPS #14)
26. By e-mail message dated May 15, 2008, Respondent told the Lowrys "I suspect that a flat fee of $3000 would cover the matter through trial". This e-mail is the only evidence of a fee agreement between Respondent and the Lowrys. (JPS #15)
27. The clients paid Respondent $1000. (JPS #16)
28. Counsel for the County noticed the depositions of Mr. Lowry and Ms. Carol for May 28, 2008, a date that was not acceptable to Mr. Lowry and Ms. Carol due to a prior commitment. (JPS #17)

29. Mr. Lowry and Ms. Carol did not appear at their depositions on May 28, 2008. (JPS #18)

30. The depositions were ultimately taken on July 3, 2008, with Respondent in attendance. (JPS #19)

31. On July 22, 2008, the County filed a Motion for Order re Attorney Fees and Costs for Mr. Lowry's and Ms. Carol's failure to appear at the depositions set for May 28, 2008. (JPS #20)

32. Respondent failed to respond to that Motion. (JPS #21)

33. On August 12, 2008, the Court awarded a sanction of $773 against the Lowrys and further ordered that it be paid by September 5, 2008, "or Defendants may seek further sanctions, including dismissal of the action". (JPS #22)

34. Respondent failed to inform the Lowrys that the sanction had to be paid by September 5, 2008. (JPS #23)

35. Respondent told the Lowrys he believed nothing would come of the sanction as long as the parties proceeded to trial. (JPS #24)

36. The County filed a Motion for Summary Judgment on the merits on August 27, 2008. (JPS #25)

37. The County's filing contained a Motion to Dismiss for failure to pay the sanction order due to the missed depositions. (JPS #26)

38. Respondent admitted that: "[t]here is no excuse for failing to respond or otherwise take action" on the Motion. (JPS #27)

39. Respondent failed to respond to these Motions. (JPS #28)

40. Respondent was out of the office a great deal in September 2008, attending to his father who was in ill health. Respondent was not as timely in returning calls or e-mails as he would have liked. (JPS #29)

41. By Order dated September 30, 2008, the Court granted the Motion for Summary Judgment and additionally dismissed the action with prejudice for failure to pay Court-ordered sanctions. (JPS #30)

42. On October 6, 2008, Respondent replied to an e-mail from Mr. Lowry, suggesting that he would call Mr. Lowry at 4:00 pm that afternoon. Respondent did not do so. (JPS #31)

43. On October 20, 2008 Respondent e-mailed Mr. Lowry and Ms. Carol advising them that their case had been dismissed because he had missed the e-filing of the County's Motion for Summary Judgment. He also advised them that failure to pay the court-ordered sanctions regarding the deposition issue also weighed in the court's decision. (JPS #32)

44. In the e-mail to Mr. Lowry and Ms. Carol dated October 20, 2008 Respondent offered to refund the fees paid to date and to pay their sanction of $700. (JPS #33)

45. Mr. Lowry requested a refund of their fee on October 20, 2008 and October 26, 2008. Mr. Lowry also requested that Respondent return their file to them. (JPS #34)

46. Mr. Lowry and Ms. Carol filed a charge with the State Bar on November 1, 2008. By letter dated January 29, 2009 Respondent was sent a copy of the charge and asked to respond within 10 days. (JPS #35)

47. Respondent was sent a follow-up letter on February 27, 2009 asking for a response. On March 2, 2009 the State Bar received a response from Respondent which was dated February 21, 2009. (JPS #36)

48. In the response, Respondent admitted that he failed to respond to the Motion for Summary Judgment because of "major computer issues". Respondent also admitted that he told Mr. Lowry and Ms. Carol that he believed nothing would come of the deposition sanction imposed as long as they proceeded to trial. (JPS #37)

49. Respondent further contended in the response that because Mr. Lowry and Ms. Carol were violating the cease and desist order imposed by the County, the County could have imposed a sanction against them at any time. (JPS #38)

50. Respondent admits that he violated ER 1.3 (representing a client with reasonable diligence and promptness) by failing to properly respond to the motions filed by the defendant County in the matters of summary judgment and sanctions. (JPS #39)

51. Respondent admits that he violated ER 1.4 by failing to promptly return phone calls or messages that may have been placed by the Lowrys. (JPS #40)

52. The action against Yavapai County filed by Mr. Lowry and Ms. Carol (Hereinafter, the "Lowrys") was an appeal of an administrative decision by Yavapai County to deny the Lowrys a special use permit for the use of their home for a religious retreat. The Lowrys had filed this case pro se asserting their rights to freedom of religion under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in Superior Court and the County had removed the matter to Federal Court where it was pending before Judge Neil Wake. (TR 37:20 through 38:18) Attorney Donald Bayles was representing Yavapai County. (Exhibit 28)

53. On May 15, 2008 the Lowrys told Mr. Bayles that they had received the Notice of Deposition for May 28, 2008, but that they would be unavailable that day for the deposition because their guests from the rafting trip would still be with them. (Exhibit 27) The Lowrys were leading twenty guests on a Colorado River rafting trip through the Grand Canyon from May 20 through May 27, 2008. (Exhibit 28) The Lowrys said that they would be available for deposition on May 29 or 30. Mr. Bayles responded on May 21, but the Lowrys were on the rafting trip at the time and did not read the message until May 27, 2008. (Exhibit 29) Mr. Bayles apparently concluded that the Lowrys were leading these guests on the rafting trip as part of the Lowrys' business. He told the Lowrys that normally the operation of a litigant's business was not a good excuse to fail to be present for their depositions in the litigation, especially when the Lowrys were the party that brought the lawsuit. Mr. Bayles said that if the Lowrys would confirm that that were available on May 29 he would reschedule their depositions for that day. (Exhibit 29)

54. While the Lowrys were communicating with Mr. Bayles by e-mail they were talking to Respondent about hiring him as their counsel. By May 15, 2008 Respondent had reviewed extensive materials from the Lowrys and had suggested in his e-mail message that he would represent them for a flat fee of $3000. (Exhibit 28) The same day the Lowrys sent a response to Respondent saying that they were "...seriously considering your offer of $3000 over several months." (Exhibit 29) They asked for an opportunity to meet with Respondent on Monday May 19, 2008. On Tuesday May 27, 2008 at 6:07 pm Gary Lowry sent an e-mail to Donald Bayles saying they had just returned from the Colorado River trip and they received Mr. Bayles' e-mail of May

21, 2008 about rescheduling the depositions for May 29, 2008. Mr. Lowry stated, "Before we departed, we appointed Mr. Gil Shaw of Prescott as our attorney. I am sure he will be in touch with you soon regarding the dates for our deposition. His phone number is (928) 776-2155." (Exhibit 29)

55. The Lowry's forwarded Donald Bayles' e-mail of May 21, 2008 to Respondent on May 27, 2008. The Lowrys asked if Respondent would be with them at the May 29, 2008 depositions and whether Respondent had notified Mr. Bayles about Respondent's appointment as the Lowrys' attorney in this case. In an e-mail of May 27, 2008 at 7:59 pm Respondent informed the Lowrys that he had a "big conflict" on May 29, 2008 and that he would contact Donald Bayles in the morning to see about continuing the depositions for about a week or two. (Exhibit 30) Respondent attempted to reschedule the depositions but opposing counsel Mr. Bayles was unwilling to accommodate Mr. Lowry's and Ms. Carol's previous plans. Respondent testified that Judge Wake had imposed a discovery cut-off of June 13, 2008 and that Mr. Bayles did not want to extend the Lowrys' depositions closer to that deadline. (Exhibit 54, docket entry 21)

56. When the Lowry's returned from their rafting trip they learned that the May 28, 2008 depositions had not been rescheduled and that Respondent had not entered his Notice of Appearance in their case until May 28, 2008. (TR 80:7-18)

57. After sanctions were imposed for the Lowrys' failure to appear at the May 28, 2008 depositions, Respondent advised them not to pay the sanction as he believed the sanction would not be due until the end of trial and he might be able to get the

sanction waived. (TR 83:23 through 84:5, TR 45:14 through 48:3) At that time trial was scheduled for August 15, 2008. (Exhibit 54, docket entry 21)

58. Respondent filed his Notice of Appearance in the Federal Court case on May 28, 2008. (Exhibit 54, docket entry 32)

59. Respondent filed a Memorandum of Discovery Dispute on June 3, 2008 in which he informed the court of Mr. Bayles' insistence on the May 28, 2008 depositions. (Exhibit 48) Respondent asked for an extension of the discovery deadline. On June 4, 2008 in a telephonic conference Judge Wake granted defendants sanctions under Rule 37 of the Rules of Procedure against the Lowrys for the Lowrys' failure to appear at the May 28, 2008 depositions, granted an extension of the discovery deadline until July 3, 2008 and continued the trial from August 15, 2008 until October 30, 2008.

60. At the hearing Respondent testified that he failed to respond to defendant's Motion for Summary Judgment (Exhibit 56) and defendant's Notice of Expiration of Time Limit for Payment (Exhibit 58) because these documents were electronically filed and the computer Respondent was using at Yavapai College at the time would not pick up Respondent's personal computer address. (TR 48:3 through 53:18) Respondent said his computer had been stolen. Respondent did not report the theft of his computer to the police. In his response to the Bar charge Respondent said that in late August and early September, 2008 he was having "major computer issues". (Exhibit 46) His e-mail account was not working properly on his computer. He said he either "...failed to see or inadvertently deleted the electronic version of the motion filed by the defendant. My paralegal recalls she likely received a copy of the motion and

forwarded it on to me but it appears to have been lost in the email issues I have set out. She assumed that I calendared it and forgot about it as time went on".

61. Gary Lowry testified at the Hearing that that he was interested in retaining Respondent because Mr. Lowry did not feel comfortable taking depositions. (TR 79:10-18) Although Respondent told Mr. Lowry of the sanction of $773 issued by the judge Mr. Lowry was not shown a copy of the August 12, 2008 Order until Mr. Lowry in November 2008 ordered the document from the PACER system (used to retrieve documents from the Clerk of Court for the United States District Court). (TR 82:20 through 83:21) Therefore Mr. Lowry did not know that the Order contained the following language "Plaintiffs shall pay the sanctions by September 5, 2008, or Defendants may seek further sanctions, including dismissal of the action." (Exhibit 55)

62. Respondent stated in his February 21, 2009 letter to the Bar, "It is true I told the Lowrys I believed nothing would come of the sanction as long as we proceeded to trial and the defendant did in fact take no action until the late August filing accompanying its motion for summary judgment." (Exhibit 46)

63. Mr. Lowry also testified that he was not seeking restitution. Although Respondent in the October 20, 2008 e-mail stated he would refund the fees paid by the Lowrys and pay the sanction judgment "... as a gesture towards my failing to respond to the motion," Respondent did not make any payment until the Lowrys sued him and announced their intention to garnish his Yavapai College wages. (Exhibit 40) Mr. Lowry filed an action against Respondent in small claims court. He stated that he has been repaid what he was owed by Respondent.

64. Mr. Lowry also stated that the dismissal with prejudice of his case in federal court is now on appeal at the Ninth Circuit Court of Appeals. (TR 94:18)

CONCLUSIONS OF LAW – COUNT TWO (Lowry)

65. The Hearing Officer finds that the State Bar has proven by clear and convincing evidence that Respondent violated ER 1.1 (failing to provide competent representation) when he failed to respond to defendants' Motion for Summary Judgment and Motion to Dismiss, when he failed to advise the client to pay the sanction by September 5, 2008, and when he failed to keep the Lowrys advised of the progress of their case. Respondent's explanation that he thought the sanction would either go away or be waived after trial is not competent advice. This Hearing Officer is aware that parties sometimes in settling matters agree to waive sanctions. In the Lowrys' case Judge Wake was careful to warn the Lowrys of the consequence of not paying the sanction. Although some courts might not set a date for payment of the sanction, in this case Judge Wake was very specific on the time for payment.

66. Respondent knew that counsel for the County, Donald Bayles was not inclined to accommodate the Lowrys. Mr. Bayles had rejected Respondent's request to continue the May 28, 2008 depositions. (TR 40:2-6) Mr. Bayles went to the May 28, 2008 depositions with a court reporter when he knew that the Lowrys would not appear. (TR 203:18-20) At the hearing Respondent was asked if he asked Mr. Bayles why Mr. Bayles would attend the depositions when he knew the Lowrys could not attend and Respondent said that Mr. Bayles explained, "The County was pretty upset with the Lowrys in general. And I think he had been instructed not to give much. And he

basically kept harping about Judge Wake's order cutting off discovery in mid-June and how he had to stick to the discovery order, stick to the schedule, otherwise we wouldn't get the depositions done because he was a very busy guy and he had all kinds of stuff scheduled in June." (TR 203:25 through 204:7) After the Lowrys did not appear Mr. Bayles requested sanctions from the court. In fact, when Respondent was considering representing the Lowrys he made reference to Mr. Bayles in his May 15, 2008 e-mail. Respondent said, "Don Bayles and his firm are extremely competent lawyers and will not cut you any slack." (Exhibit 28) Respondent should not have been predicting that Mr. Bayles on behalf of his client the County would simply agree to waive the sanction upon which he had insisted.

67. Respondent has stipulated in the Joint Pre-hearing Statement that the Lowrys retained him on or about May 18, 2008. The Lowrys informed the Bar that they met in Respondent's office on May 19, 2008 and retained him as of that date. They asked Respondent to notify the court and opposing counsel that he was representing the Lowrys. The Lowrys wrote in their Bar charge, "[W]e informed him we were scheduled for giving opposing counsel's deposition on May 28, but wouldn't be able to attend that date and asked him to reschedule it. He said he would." (Exhibit 26)

68. The Hearing Officer concludes that the Bar has proven by clear and convincing evidence that Respondent violated ER 1.1 when he did not file his Notice of Appearance until May 28, 2008 and when he did not file a timely Motion to Continue Depositions.

69. The Bar has proven by clear and convincing evidence that the Respondent violated ER 1.3 (failing to provide prompt and diligent representation to a client) when he

failed to 1) file a timely Notice of Appearance and Motion to Continue Depositions, 2) respond to the Motions for Summary Judgment and to Dismiss, 3) keep the client advised of the progress of their case, resulting in dismissal of their lawsuit.

70. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.2 (failing to abide by the client's decisions concerning the objectives of the representation and failing to consult with client as to the means by which their objectives were pursued). The objectives of the Lowrys were to vigorously assert their claim in federal court. Respondent failed to pursue their goal. After the dismissal and the Bar charge Respondent informed the Lowrys and the Bar that Respondent thought the Lowrys would have lost the case in any event. Judge Wake's Order can be interpreted to both support and oppose Respondent's position that even if he had responded to the Motion for Summary Judgment and if the sanction had been paid, the Lowrys would not have prevailed in their suit.

71. Judge Wake said, "The order assessing sanctions expressly warned Plaintiffs that further sanctions 'including dismissal of the action' would be awarded if Plaintiff failed to pay the monetary assessment. Plaintiffs' failure to pay the awarded sanctions leaves no choice but to enforce the previous order through dismissal. Defendants' Motion for Summary Judgment will also be granted. The agreed time to respond to the Motion has expired (Doc. #41), and Plaintiffs have filed no opposition to the Motion. This may be taken as Plaintiffs' consent to the granting of the Motion, LRCiv 7.2(i), but the Court grants the Motion on its merits for the reasons argued in the Motion. Indeed, the unopposed Motion shows that this action is wholly groundless. IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment

(Doc. # 43) is granted and additionally this action is dismissed with prejudice for failure to pay ordered sanctions."

72. Respondent failed to inform his clients of the Motion for Summary Judgment and the Notice of Expiration of Time Limit for Payment because Respondent either 1) failed to see these documents, or 2) inadvertently deleted the electronic version of the motion or 3) the e-mails were lost due to Respondent's major computer issues. (Exhibit 46) As Respondent has recognized, none of these reasons are excuses for failing to respond to the motions. When Respondent on May 15, 2008 sent an e-mail message to Mr. Shaw, Respondent spoke of electronic filing in the context of estimating the time needed to represent the Lowrys. Respondent said, "Litigation, even something as truncated as yours, is very time consuming, especially now that you are in federal court. Although the case will be tried here in Prescott, any motions are usually heard in Phoenix and there are other requirements as to filing papers electronically that further magnify the time." (Exhibit 28) His clients were entitled to assume that Respondent would be able to receive notice of case dispositive motions electronically so that he could consult with them as to the means (responding to the motion) to pursue their case objectives.

73. The evidence is clear and convincing (and Respondent has admitted) that Respondent violated ER 1.4 (failing to inform clients of decisions or circumstances with respect to which their informed consent was required, failing to keep clients reasonably informed about the status of the matter and failing to promptly reply to reasonable requests for information). Mr. Lowry wrote in his Bar charge, "Clients met with Mr. Shaw on July 3, 2008 to prepare for the rescheduled depositions on July 3. Mr. Shaw

attended the depositions with clients on July 3 in opposing counsel's office in Sedona, AZ. From that time forward, clients heard nothing from Mr. Shaw concerning our case. Clients repeatedly and continuously telephoned his office and cell phone, leaving messages, sent numerous emails, and even twice visited his office unannounced in a futile hope of catching him there. He, in effect, abandoned us. He did respond to an email message on October 6 saying he would telephone us at 4:00 pm, but he did not call. On October 20, 2008, clients received an email from Mr. Shaw informing them that our case had been dismissed and the defendants' Motion for Summary Judgment granted." (Exhibit 26) Respondent clearly failed to keep his clients informed of the most significant events in their case.

74. The Hearing Officer finds that the fee paid ($1000) was not unreasonable pursuant to Rule 1.5(a). Respondent consulted with the Lowrys in May, 2008, he tried to get opposing counsel to reschedule the depositions, he filed a Memorandum of Discovery Dispute and Motion for Extension of Time on June 3, 2008 (resulting in an extended discovery cutoff and continued trial date), and he prepared the Lowrys for and attended their depositions. The amount of time he would have expended justified the fee, although the result was not what the client expected.

75. The Hearing Officer concludes that the email from Respondent to Gary Lowry of May 15, 2008 was a sufficient communication in writing of the scope of the representation and the basis and rate of the fee pursuant to ER 1.5(b). (Exhibit 28) Respondent explained that he would charge a $3000 flat fee and that he would take the fee over several months. Respondent outlined the type of action the clients had

and the steps needed to maximize the chances for a good result. Respondent explained how he arrived at the "reduced fee".

76. However the evidence is clear and convincing that Respondent was charging a "flat fee", and that Respondent violated ER 1.5(d) by not including in his writing an advisement that if the clients terminated Respondent's services they may be entitled to a refund of all or a part of the fee based on the value of the representation pursuant to paragraph (a). ER 1.5(d) is directed at fees denominated as "earned upon receipt" or "nonrefundable", but also includes the phrase "...or in similar terms". A "flat fee" means that the clients could expect that it was nonrefundable and earned upon receipt.

77. The record does not contain evidence for a finding by clear and convincing evidence that Respondent violated ERs 1.15(a), (b), or (d) by failing to place the fees the Lowrys paid in his trust account or by failing to account to the Lowrys for the advance fees.

78. The record does not contain evidence for a finding by the clear and convincing standard that Respondent violated ER 1.16(d) by failing to promptly return the Lowry's file upon request of the Lowrys.

79. However, Respondent's failure to respond to the Motion for Summary Judgment and the Motion for payment of sanctions was a violation of ER 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client). These failures along with Respondent advising the Lowrys not to pay the sanction and failing to communicate with the Lowrys constitute proof by clear and convincing evidence that Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice).

FINDINGS OF FACT – COUNT THREE (Baugher)

The parties stipulated to the facts in paragraphs 80 through 89 in the Joint Pre-Hearing Statement paragraphs 41 through 50.

80. On or about September 9, 2008 Mark and Marcia Baugher ("The Baughers") hired Respondent to file a lawsuit against several of the Baughers' neighbors for defamation and infliction of emotional distress regarding a special use permit being sought by the Baughers to use their home for a religious Bed & Breakfast. (JPS #41)
81. The lawsuit was filed on October 20, 2008. (JPS #42)
82. Respondent withdrew from the representation of the Baughers on or about January 9, 2009. (JPS #43)
83. During the course of the representation, Respondent discussed the facts alleged in the Lowrys' Complaint with the Baughers. (JPS #44)
84. Mr. and Mrs. Baugher filed a charge with the State Bar on or about February 18, 2009. (JPS #45)
85. Respondent filed a response on or about March 10, 2009. (JPS#46)
86. In his response, Respondent provided copies of all correspondence and the Complaint he prepared and filed in the case. (JPS #47)
87. Respondent contends he was in the process of arranging a meeting between County officials and his clients when it became obvious that he could not work with Mr. Baugher; according to Respondent, Mr. Baugher believed the case demanded more attention than Respondent could give it. (JPS #48)
88. Respondent withdrew from the representation following a voice mail left by Mr. Baugher which Respondent believed was threatening to him. Respondent sent a letter

to Mr. Baugher on January 9, 2009 and filed a stipulation for substitution of counsel on January 30, 2009. (JPS #49)

89. Respondent admits that, during September 2008 in early October 2008, he failed to return phone calls to the Baughers in a timely manner and that his conduct violated ER 1.4(a). (JPS #50)

90. Mr. Baugher testified that he gave Respondent $750 of which $185 was to be used to pay the Court filing fee. (RT 128:9 through 136:1)

91. Mr. Baugher stated that Respondent told him in their initial meeting on September 9, 2008 that Respondent would file a lawsuit in the following week. (RT 130:4) Respondent testified that in September 2008 Respondent was spending a lot of time in Pinetop with his ill father. Respondent was leaving Prescott for Pinetop after his Thursday evening class at Yavapai College (Respondent was teaching at Yavapai College) and returning to Prescott on Monday before his evening class. Respondent stated: "That went on for about three or four weeks. And that impacted me getting this out in a timely manner. And that's why I don't remember professing that I would have it done within a week because at the time Mr. Baugher came into the office, I was aware of these constraints." (RT 67:4-21) The Hearing Officer concludes that Mr. Baugher's testimony is more credible on the fact of when the complaint was to be filed. Respondent was less sure of whether he committed to a one-week deadline for filing the complaint.

92. Respondent stated that he had a misunderstanding with his part-time help about whether the envelopes containing the October 1, 2008 demand letters and the complaints were mailed to the potential defendants. Respondent told his assistant to

send the letters and he thinks the assistant told him she had sent them. However he later learned the assistant had not sent the letters. (TR 69:20 through 70:3) The significance of mailing the demand letters was to get the neighbors (potential defendants) to write retractions of their alleged defamatory statements. Respondent suggested to his clients that he would file the complaint, notify the neighbors of the filing by sending them each a copy of the complaint with the demand letter, but hold off serving the complaint for the 120 days permitted by the Rules of Civil Procedure. In the demand letter Respondent would inform the neighbors that if they did not want to be served with the lawsuit they had 120 days to submit their retractions. (TR 70:16 through 71:11, Exhibit 63)

93. Respondent told Mr.Baugher that he had sent out the demand letter and a copy of the complaint to the defendants. At the time Respondent made this statement the mailing had not occurred. (TR 131:14 through 132:10) When Mr. Baugher learned from Respondent's paralegal that the letters were still on her desk, Mr. Baugher went to Respondent's office, put stamps on the envelopes and mailed them himself. (TR 69:20 through 70:14, 131:14 through 132:1)

94. Mr. Baugher became frustrated because he could not get Respondent to return his phone calls from the time before the complaint was filed (October 20, 2008) until Respondent withdrew from representing him (January 9, 2009). (TR 133:12, 136:18) Mr. Baugher described being under increasing stress because the 120 day period to either serve the complaint or suffer a dismissal (and have to re-file) was running from October 20, 2008, "It was through this 120 days I am going wild because I can't get

Mr. Shaw to return my phone calls. And I'll admit, the more unreturned phone calls that came, the more irritated I became." (TR 133:14)

95. Mr. Baugher testified that Respondent shocked him when Respondent gave Mr. Baugher "a lot of information" about the Lowrys' case including: a) that their lawsuit was very weak, b) that they did not come to Respondent soon enough, c) that they should not have represented themselves, d) that the judge was not sympathetic to them, e) that things were not going well, and f) that Respondent was not optimistic about the Lowrys' case. (TR 142:3-14)

96. The opinions allegedly expressed by Respondent to Mr. Baugher were similar to the position Respondent stated in his testimony at the disciplinary hearing. Respondent testified that in the Lowry matter he was "...somewhat concerned about the position of their case," after taking three depositions. (TR 61:20) In Respondent's October 20, 2008 e-mail to the Lowrys informing them that the Court had dismissed their lawsuit and that Respondent had failed to respond to the defendants' motions for summary judgment, Respondent told the Lowrys that their "... failure to acknowledge that you benefit monetarily from folks staying at your home..." was a consistent problem for their case. Respondent told them, "While we had some arguments to make in that regard, the bottom line is that without folks staying at your home, you would not financially survive. You make no money otherwise on your activities." (Exhibit 40) Respondent also criticized the manner in which the Lowrys pursued their lawsuit before retaining Respondent. In discussing the Lowrys' options after their lawsuit had been dismissed Respondent stated, "You lost an administrative appeal. This means that you could file a subsequent lawsuit on a civil rights and RILUPA basis if the

county tried to shut you down again. Frankly, this would have been the better way to go, though I still think you have significant issues in ultimately establishing your operation as a true religious exercise under the law". (Exhibit 40)

97. Mr. Baugher admitted that he had spoken to the Lowrys before he met Respondent. The Lowrys recommended that Mr. Baugher see Respondent about the Baughers' situation. Gary Lowry had told Mr. Baugher that Respondent had a high opinion of the Lowrys' case. (TR 142:17) Respondent testified that initially he thought the Lowrys had a good RLUIPA issue. (TR 201:14) Apparently the Lowrys may not have known of Respondent's low opinion of their case until Respondent's October 20, 2008 e-mail. This would explain Gary Lowry's statement that Respondent thought he had a good lawsuit, while Respondent developed the opinion after the Lowrys' July 2008 depositions that their case was not strong. Respondent stated, "Initially, after reading the pleadings, I told them I think they had a good RLUIPA issue. There was a number of things I was unaware of until their depositions. (TR 201:14)

98. The Hearing Officer concludes that Respondent discussed more than just the allegations of the Lowry complaint with Mr. Baugher. Respondent discussed the strengths and weaknesses of the Lowrys' case. Respondent confirmed this when he testified about what he had told the Lowrys concerning their case, "That I also told them that I thought at the time that the complaint was rather - - I mean, their appealing the administrative decision was probably not the best way to proceed under this particular federal act. That I thought they should just sue for violations of civil rights under the act." (TR 201:22 through 202:2) Respondent's conversations with the

Lowrys covered similar information to that which Mr. Baugher testified that he learned from Respondent about the Lowrys' case.

99. Mr. Baugher stated that Respondent did not tell him anything that the Lowrys had said to Respondent about their case. (TR 144:13-22) However, ER 1.6 and the Comment clarify that the lawyer's obligation of confidentiality extends to more than statements made by the client to the lawyer. ER 1.6(a) begins, "A lawyer shall not reveal information relating to the representation of a client unless..." Comment [3] states, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

100. Respondent's billing invoice of October 10, 2008 does not qualify as a written fee agreement with the Baughers because the document does not clarify the scope of the representation, but merely bills for work accomplished; drafting and revising the complaint, drafting and revising the demand letter, and the filing fee for the complaint. (Exhibit 64) What was to happen if the neighbors (defendants) did not submit retraction letters and the complaint had to be served? When asked what he expected Respondent to do for the $750 he paid, Mr. Baugher testified, "He was going to, of course, create the lawsuit, file the lawsuit, send letters. And I guess we just weren't very clear past that point what - - where the money was going to stop and end. I don't know. All I know is I wrote him a check for 750 and that was - - I guess I was just really darned unclear about where it was - - I guess I was waiting for him to tell me I owed him more money." (TR 128:12-19) The billing invoice did not contain

a statement under ER 1.5(d)(3) that if the client terminated Respondent's services, the client might be entitled to a refund of the unearned portion of the fee. However, because Respondent apparently did not ask for money from the client before he did the work, the Hearing Officer finds this omission is not significant.

101. Respondent might assert that the $565 fee described as a "Flat Fee" was not denominated as "earned upon receipt" or "nonrefundable". This was because at the time Respondent sent the bill October 10, 2008, the fee had been earned. However, ER 1.5(b) requires that the writing that explains the scope of representation and basis of the fee shall be communicated to the client "... before or within a reasonable time after commencing the representation..." Respondent assumed the representation of the Baughers on September 9, 2008. It was not reasonable to wait 30 days for a written fee agreement. If Respondent wanted a flat fee of $565 for preparing and filing the complaint and preparing the demand letter ER 1.5(b) requires that Respondent state those terms in writing before billing for the work.

CONCLUSIONS OF LAW – Count Three (Baugher)

102. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.2(a) (failing to abide by the client's decisions concerning the objectives of the representation and failing to consult with the client about the means by which the objectives were to be pursued) when Respondent failed to file the lawsuit in the time frame requested by the Baughers and failed to inform the Baughers that he had not sent the letters with the complaint to the defendants.

103. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.4(a) (failing to keep the client reasonably informed about the status of the matter and failing to promptly comply with reasonable requests for information) when Respondent did not inform the clients that he would not file the lawsuit in one week of their initial meeting and Respondent did not inform the clients between October, 2008 and January, 2009 that he had not taken any action on their case. Respondent did not return Mr. Baugher's phone calls between October, 2008 and January, 2009.

104. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) when Respondent did not return Mr. Baugher's phone calls and did not advise Mr. Baugher between October, 2008 and January, 2009 of what, if any, action Respondent had taken in his case. Since Respondent was not communicating with the Baughers, they could not know for sure that they had to make a decision to hire new counsel until they received Respondent's letter of withdrawal.

105. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.5(b) (failing to communicate the scope of the representation and basis or rate of the fee in writing) when Respondent did not present the Baughers with anything in writing until 30 days after he was retained. The writing was an invoice for work performed.

106. The Bar has not proven by clear and convincing evidence that Respondent violated ER 1.5(d) (failing to advise the clients that upon discharge or withdrawal

they may be entitled to a refund of a portion of the fee). Since Respondent did not require the Baughers to pay an upfront fee and only required them to pay after the work was performed, the Hearing Officer will not conclude that in this circumstance ER 1.5(d) applied to Respondent.

107. The Bar has proven by clear and convincing evidence that Respondent violated ER 1.6(a) (revealing information relating to the representation of a client without client consent) when Respondent told the Baughers that the Lowry lawsuit was very weak, the Lowrys did not come to Respondent soon enough, the Lowrys should not have represented themselves, the judge was not sympathetic to the Lowrys and that Respondent was not optimistic about the Lowrys' case.

108. The Bar has not proven by clear and convincing evidence that Respondent violated ER 1.15(a), 1.15(b) or 1.15(d). The record does not contain evidence that Respondent failed to place the Baughers' fees in his trust account, failed to account to the Baughers for these fees, or failed to safely keep property of the Baughers. Respondent sent the Baughers an invoice for the work performed.

ABA STANDARDS

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

1040 (1990), *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Tarlitz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

APPLICABLE STANDARDS

The most serious violations by Respondent involved failing to answer defendant's discovery and failing to attend the hearing on the Motion to Exclude, Motion for Sanctions and Motion for Dismissal in Count One (Hilliker) and telling the client not to pay the sanction and failing to respond to the Motions for Summary Judgment in Count Two (Lowry). The *Standards* that are applicable are *Standards* 4.42, 4.43, 4.53, 4.63, 4.22, 4.23, 8.2 and 8.3 (b).

Standard 4.42 states that **"Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."**

Standard 4.43 states: **"Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client."**

The Hearing Officer concludes that the most egregious conduct of Respondent in this Complaint is a combination of knowing and negligent acts in the Hilliker and Lowry matters that led to actual injury when the clients' lawsuits were dismissed. These two matters constitute at least a pattern of neglect by Respondent that caused injury or potential injury to several clients. Therefore, although some of Respondent's violations were committed negligently (while other

violations were committed knowingly), the *Standard* that most appropriately fits Respondent's conduct is *Standard* 4.42(b). Even if the Hearing Officer were to conclude that the Lowry case would have been dismissed by summary judgment (even if Respondent had filed a response) and therefore the dismissal for failure to pay the sanction was superfluous, *Standard* 4.42(a) would apply to Respondent's knowing conduct in Hilliker, when his knowing decision not to attend the January 12, 2007 hearing on the Motions led in part to a dismissal of the Hilliker lawsuit and the judgment against the Hillikers.

Duty Violated

In all three counts of the Complaint Respondent violated duties owed to his clients. In Count One (Hilliker) Respondent violated duties of competence, diligence, asserting the client's objectives, communication, returning the file upon termination, charging a reasonable fee, and expediting litigation. In Count Two (Lowry) Respondent violated the duties of competence, diligence and expediting litigation. In Count Three (Baugher) Respondent violated the duties of asserting the client's objectives, communication, a written fee agreement, and maintaining client confidences.

Mental State

In Count One Respondent was negligent when he did not answer the defendant's discovery requests. Respondent knowingly did not attend the January 12, 2007 hearing before Judge Hinson where the defendant's Motion to Exclude, Motion for Sanctions and Motion for Dismissal were to be heard. Respondent knowingly did not inform his clients of his decision that he could not re-file the lawsuit.

In Count Two, Respondent negligently failed to respond to defendants' Motions for Summary Judgment. Respondent knowingly told his clients not to pay the sanction for missing their depositions by the September 5, 2008 deadline.

In Count Three, Respondent knowingly disclosed information about the Lowrys'case to the Baughers. Respondent negligently failed to pursue the client's objectives, negligently failed to have a written fee agreement and negligently failed to communicate with his clients.

Injury

In Count One, a combination of Respondent negligently failing to answer defendant's discovery requests and Respondent knowingly failing to attend the September 12, 2007 hearing, led to the dismissal without prejudice of the client's lawsuit. Respondent determined that he could not re-file the lawsuit because of a statute of limitations problem. The effect of Respondent's violations led to a loss of the client's case and a judgment against the client for $3091. The Hearing Officer concludes that the Hillikers suffered actual injury.

In Count Two, a combination of Respondent negligently failing to respond to defendants' Motions for Summary Judgment and Respondent knowingly telling his clients not to pay the sanction by September 5, 2008, led to the dismissal with prejudice of the clients' lawsuit. Respondent has asserted that Judge Wake found that the defendants would prevail on their Motion for Summary Judgment on the merits. However, Judge Wake also found that the failure of the Lowrys to pay the $773 sanction by September 5, 2008 was cause in itself for dismissal. The Lowrys' failure to pay the sanction was a direct result of Respondent's advice. The Lowrys filed a pro per Motion for Prehearing with Judge Wake after the granting of defendants' Motions for Summary Judgment. In his Order of December 22, 2008 Judge Wake discussed the merits of the Lowrys' arguments and the position of the defendants. (Exhibit 50) The court said that the

defendant should prevail by summary judgment on the merits. The court even stated that if the Court of Appeals re-vested jurisdiction in the District Court to hear the Lowrys' Motion for Re-hearing as a Rule 60(b)(1) motion, the District Court would deny the Motion.

Although Judge Wake is clearly granting summary judgment against the Lowrys on the merits it is not possible for this Hearing Officer on this record to conclude with certainty, that Judge Wake would have made the same decision if Respondent had filed a response to the motion for summary judgment. The Hearing Officer cannot know enough about the quality of the pro per Motion for Rehearing to know if a response to the motion for summary judgment prepared by an attorney (Respondent) allegedly skilled in this area of practice would have changed the result. Unfortunately, even if Judge Wake could have been convinced to deny the motion for summary judgment, the failure to pay the sanction would have led to dismissal. In an abundance of caution, the Hearing Officer will conclude that Respondent's violations in the Lowry case, if not the proximate cause of the actual injury of dismissal, caused a potential for injury. Judge Wake's decisions are on appeal by the Lowrys to the Ninth Circuit.

In Count Three, Respondents failure to communicate with the Baughers did not cause the client to lose the lawsuit. However, Mr. Baugher intended for Respondent to continue with the lawsuit. Instead, Mr. Baugher's frustration at Respondent ignoring him, led Mr. Baugher to leave a harsh message on Respondent's answering machine to the effect that Mr. Baugher threatened to tell other people that Respondent had disappointed Mr. Baugher. In January, 2009 Respondent notified Mr. Baugher that Respondent was withdrawing from representation because of this "threat". (Exhibit 65) Respondent wrote to Mr. Baugher, stating in part, "First, I detected a threat that if I did not continue to represent you in a meeting with the County Attorney there

would be "repercussions" and "bad mouthing". I don't represent anyone under a condition that if I don't, bad things will happen. Simple as that. " (Exhibit 65)

Respondent failed to let Mr. Baugher know what was happening in his case from October, 2008 until January 9, 2009 while 81 days of the 120-day period to serve the lawsuit had expired. When the client became upset, the lawyer fired him. The Hearing Officer is not condoning what was apparently a strident complaint by Mr. Baugher to Respondent. But, for Respondent to dictate to a client his "simple" rule that he does not represent clients who are so upset they threaten to "bad-mouth" him, after Respondent caused the client's frustration by ignoring him, is wrong. Respondent can represent whomever he wants to represent. No one forced Respondent to take Mr. Baugher's case on September 9, 2008, at a time when Respondent knew he was travelling to Pinetop to care for his father. But once he made the decision to represent Mr. Baugher, Respondent had the obligation to communicate with his client. Respondent caused actual injury to Mr. Baugher because his withdrawal caused Mr. Baugher to expend some resources to bring new counsel up to speed on the case. (TR 139:24 through 140:8)

OTHER APPLICABLE STANDARDS

Standards 4.22 and 4.23 are not appropriate for Respondent either knowingly or negligently revealing confidential information about the Lowrys to the Baughers, because these standards apply only when the client was caused injury or potential injury. The record does not support a conclusion that the Lowrys were harmed by the matters that Respondent revealed to the Baughers. Even if Respondent's revelation of the confidences could be characterized as "negligent", *Standard* 4.24 would call for an admonition. It states: **"Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a**

client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client."

Standard 4.63 states: **"Reprimand [Censure in Arizona] is generally appropriate when a lawyer negligently fails to provide a client accurate or complete information, and causes injury or potential injury to the client."** Respondent knowingly told the Lowrys not to pay the $773 sanction by September 5, 2008. If Respondent's mental state were characterized as negligent, a censure would be appropriate under this *Standard* before considering aggravating and mitigating circumstances. The admonition in *Standard* 4.24 and the censure in *Standard* 4.63 are superseded by the suspension called for in *Standard* 4.42(b).

Standard 8.2 is also applicable. It states: **"Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."**

Respondent received a censure in file #07-1069, the Anglin matter. In that case Respondent failed to diligently represent and adequately communicate with clients and failed to abide by the client's decision concerning the objective of this representation. Respondent further allowed a cause of action to be dismissed and then failed to act on the dismissal until after notification from the client. Respondent was found to have violated ERs 1.2, 1.3, 1.4, 3.2, and 8.4(d). (TR 185:8 through 188:8, Exhibits 71, 72) The Hearing Officer finds that Respondent's violations in the Anglin matter are the same or similar misconduct established by the Bar in the instant case.

Respondent was also placed on diversion before the case in which he was censured. Rule 55 of the Rules of the Arizona Supreme Court was amended effective January 1, 2009 in

subsection C. The following language was added by the amendment to clarify whether a dismissal of a charge after successful completion of diversion would prevent further reference to the diversion case: "Dismissal under this rule shall not preclude the state bar from using the fact of an order of diversion and the facts of the underlying matter in other discipline proceedings." However, the diversion cases may not fit *Standard* 8.2 because it applies when a lawyer has been "reprimanded" for the same or similar conduct. A diversion is not a reprimand. The underlying facts of the diversion cases may be considered under the topics of pattern of misconduct and multiple offenses as aggravating factors.

Aggravating Factors

Standard 9.22(a) - prior disciplinary offenses. Respondent received a censure in file # 07 – 1069, the Anglin matter.

Standard 9.22(c) - pattern of misconduct. Respondent's misconduct in the instant case, in the Anglin case and in the diversion matters establish a pattern of similar violations of the ethical rules. In the Walker diversion matter Respondent violated ER 1.15 and 1.16. Respondent admitted that he had lost the client's file and later found it stuck inside another file. Respondent admitted that he did not do a good job for Jack Walker. Respondent stated, "And he had hired me to do a tax lien foreclosure. I think he didn't pay for it at the time, but I think I admitted to the Bar that I just didn't get the case off the ground for Jack." (TR 181:8-11). Respondent also stated in his response to the Bar in the Walker matter, "It is my ultimate responsibility to move Jack's case forward. For a variety of reasons it didn't happen. I take full responsibility for not doing what Jack hired me to do. While I have several excuses, they are not good reasons for letting Jack down." (TR 181:18 through 182:2) In the Marie Roller matter, the order of diversion stated violations of ERs 1.3, 1.15 and 3.2. (TR 182:14-20) Among other violations the Roller matter

involved file retention issues. (TR 183:19-21) In the Gravina diversion (a dispute over a lien Mr. Gravina claimed Respondent did not protect) the order stated a violation of ER 1.15. (TR 182:22, 183:16-18).

Standard 9.22(d) - multiple offenses. In the instant Complaint Respondent has violated ethical rules in relation to three separate clients, the Hillikers, the Lowrys, and the Baughers. When the Anglin censure and the Walker, Roller, and Gravina diversions are added, Respondent has been involved in at least seven sets of offenses.

Standard 9.22(i) - substantial experience in the practice of law. Respondent has been an Arizona attorney since 1983, 26 years.

Standard 9.22(j) - indifference to making restitution. Respondent did not agree to sign a promissory note for $10,000 to repay the Hillikers what they lost because Respondent's conduct caused their lawsuit to be dismissed. Respondent refused to sign the promissory note even after he promised to repay the Hillikers. (TR 33:21 through 34:15) Respondent's explanation that he could not afford the payment plan set forth in the promissory note does not explain why he has not attempted to repay any amount of money to the Hillikers in two and a half years. Instead Respondent testified that he did not try to negotiate some other payment schedule with the new attorney for the Hillikers because, "I couldn't meet any payment schedule so I didn't." When asked at the hearing if he could meet any payment schedule now, Respondent replied, "Probably". (TR 34:16-21) Respondent testified that he made a decision in 2006 to teach at Yavapai College. This decision caused his income which had been approximately $130,000 in 2005 to be reduced to $51,000 as his salary for full-time teaching. (TR 235:18-24)

Mitigating Factors

Standard 9.32(b) - absence of a dishonest or selfish motive. The record demonstrates that Respondent was not going to make large sums of money in attorney fees in the Hillikers, Lowrys, or Baughers matters. Respondent's acts of misconduct were not motivated by a dishonest or selfish intention.

Standard 9.32(c) - personal or emotional problems. Respondent did not present evidence from a psychologist or psychiatrist that he had been diagnosed pursuant to the DSM-IV with clinical depression. However Exhibit B is a record from Respondent's family practice physician Dr. Stonecipher, a doctor of osteopathy. In a note from October 3, 2005 the doctor stated "Also patient here for depression, says his mom and sister are on anti-depression meds. Zoloft sample was given." Another note dated March 28, 2008 stated that the purpose of Respondent's visit that day was to verify that his physical and mental conditions were satisfactory for foster care and adoption. In summary the doctor concluded that Respondent's mental and physical condition was satisfactory for foster care and adoption. In a note of May 8, 2009 the doctor noted that Respondent needed his Zoloft 100 mg increased. Exhibit C is a letter from David Schmuckler of September 18, 2009. Mr. Schmuckler refers to himself as a "psychotherapist". Yet the initials after his name are L. C. S. W. The Hearing Officer is not certain that the initials stand for a licensed social worker. However, the Hearing Officer concludes that Respondent was in therapy for depression from October 3, 2005 through December 7, 2007 with Mr. Schmuckler. Therefore, this factor will be given some weight.

Standard 9.32(g) - character or reputation. Kathy McCormick is the ADR coordinator for the Yavapai County Superior Court. She testified that Respondent was one of the best mediators for the court. She received no complaints from litigants or co-mediators about Respondent. In her

opinion Respondent was highly respected as a mediator in the court system. (TR 96:6 through 99:2) On cross examination she admitted that she was not aware of the fact that Respondent had been censured by the Supreme Court in 2008 for a number of failures. She also stated that the censure and the reasons stated for it would not change her opinion about Respondent. (TR 101:4 through 103:19) Ms. McCormick thought that Respondent's ethical violations did not affect his standing as a mediator. In fact she stated that mediators do not have to be lawyers.

Lisa Counters, an attorney, has worked with Respondent. Since 2001 she and Respondent have handled approximately 13 cases to completion together. (TR 148:19) The cases included issues in insurance bad faith, products liability, medical malpractice, referendum and initiative, and employment. (TR 149:18) Respondent had a reputation for doing an excellent job of explaining things to clients. (TR 150:12) Respondent served as a mentor for Ms. Counters. (TR 151:14) She testified that she learned a great deal about trial practice, trial strategy and discovery practice from Respondent. (TR 151:24 through 152:1) Ms. Counters stated that attorneys in Prescott have positive opinions about Respondent's skills. (TR 154:7) She noticed that in 2006, 2007 Respondent seemed to change in that his face had a flat affect. (TR 156:23) Respondent was very close to his mother and her death was very difficult for him. His father took it very hard when his wife died. Yet Respondent was the sibling who had to care for his ailing mother and his ailing father. (TR 158:7 through 159:12) Ms. Counters described Respondent doing pro bono work on a number of referendum and initiative cases, and Respondent charged a $20 consultation fee in Yarnell when Ms. Counters was charging a $200 fee. (TR 160:17 through 161:21) The witnesses have established that as a mediator, a mentor, and a trial lawyer, Respondent has a good reputation except for the seven sets of clients discussed in the Aggravating Factors section above.

Standard 9.32(e) - full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent filed responses to each of the charges in the instant Complaint. The record does not reflect any instance of the Respondent denying the Bar any information that was requested. Respondent admitted that he violated ER 1.4 in the Hillikers matter and that he violated ER 1.3 and ER 1.4 in the Lowrys matter. (JPS #13, #39, #40)

Standard 9.32(l) - remorse. Respondent testified that he was sorry for the Hillikers and the Lowrys matters, but that he had done nothing wrong in the Baughers case. (TR 234:11) The statement of remorse would have more meaning if Respondent had made more of an effort to pay anything to the Hillikers since February, 2007. When the Lowrys sued Respondent and got a judgment against him in small claims court, and threatened to garnish his wages, Respondent found the money to pay them. (TR 87:8)

RESTITUTION

The Hearing Officer determines that Respondent should pay to the Hillikers $10,000 in restitution for the offer of judgment they could have had from the defendants in their collection action, but for Respondent's misconduct that led to the dismissal of their case. In addition Respondent should be ordered to pay the Hillkers an additional $3091, if defendants in the collection case ever seek to enforce the judgment for that amount against the Hillikers. The $10,000 will be paid within one year from the Judgment and Order in this case.

The Hearing Officer concludes that no restitution is due to the Baughers because the work Respondent performed for them justified the fee.

PROPORTIONALITY REVIEW

1. *In re Deborah Abernathy* – SB 09-0017. Abernathy received a 10-month suspension, restitution and two years of probation. She failed to competently and diligently represent clients; failed to safeguard client property, entered into an improper fee agreement and failed to protect the clients' interests upon termination of representation. In the "Likens" matter, Abernathy missed a court hearing and then delayed turning over the file to a new attorney. In the second matter, the client paid Respondent $2500.00 to represent her in matters involving child visitation. The client stated she wanted to settle, but Abernathy made no efforts to do so. She was unprepared at court hearings and appeared "disheveled". She did not return phone calls, did not handle matters the client wanted handled and the client had difficulty getting her file. The third client was seeking a legal separation from her husband and Abernathy instead obtained a Decree of Dissolution that then needed to be changed back to a legal separation document. The client had to obtain a separate military retirement specialist, and the lawyer's mistake with the decree caused issues with the military retirement orders. She had difficulty understanding what the military retirement specialist wanted. She lost the first language he sent her. The Hearing Officer found violations of 1.1, 1.3, 1.4, 1.5 and 1.16. Abernathy's mental state was knowing and in aggravation the following factors were found 9.22(a); 9.22(b); 9.22(c), 9.22(d), 9,22(e) and 9.22(g). In mitigation, the Hearing Officer found 9.32(l), remorse.

2. *In re David Bjorgaard* – SB- 07-0081. (This case was cited in Abernathy, above). By consent, this lawyer agreed to a two-year suspension and two years of probation. (See case no. 05-0735 to read the consent documents). There were approximately 7 counts in this case. Bjorgaard engaged in a pattern of neglect with clients including failing to respond to motions and conduct discovery, causing several matters to be dismissed. One client was severely sanctioned, along with Bjorgaard. The lawyer paid the sanction in full. Although he did not cooperate with the State Bar

during the screening process, he did during the formal proceedings. He had no prior discipline. There were agreed upon violations of 1.2, 1.3, 1.4, 1.16(d), 3.2, 3.4, 8.1(b), 8.4(c), 8.4(d) and Rules 53(c) and 53(f). He was ordered to pay restitution in one matter and was ordered to fee arbitration in several other matters. The mental state was knowing and the aggravating factors were 9.22(c), 9.22(d) and 9.22(e). Mitigation included 9.32(a), 9.32(c) (He was being treated for depression) and 9.32(k). There was actual injury to the clients, many of whom did not get their matters heard, as they were dismissed. A review of the facts in the Tender of Admissions reveals that Bjorgaard's conduct was more damaging and pervasive than Respondent's conduct in the instant case, because Bjorgaard failed in many more court cases than Respondent to respond to opposing counsels' Motions for Summary Judgment.

3. *In re Scott Schlievert*, SB 07-0034-D. This case also involved several counts. The lawyer agreed to a six-month and one-day suspension and two years of probation. In count one, Schlievert failed to communicate with his client, failed to appear at hearings, and failed to return the file when new counsel was appointed. In count two, he failed to appear at a settlement conference and failed to return the court-ordered affidavit regarding his failure to appear. He then failed to appear at the Order to Show Cause Hearing set by the court. In count three, he failed to communicate with his client regarding various issues and court dates. In count four, he failed to communicate with his client regarding the limitations of his representation; this caused a default to be entered in the client's domestic relations case. The lawyer would have argued he acted with a negligent state of mind if the matter went to hearing, but for purposes of settlement agreed that he acted with a knowing state of mind. Aggravating factors were 9.22(a), 9.22(c), 9.22(d) and 9.22(i). In mitigation the Hearing Officer found only 9.32(b). Schlievert argued his wife had a heart attack during the time period of one of the counts, but the Hearing Officer found he had plenty of opportunity to explain the reason

for his absence to the court and did not do so. This case was also cited in Abernathy and in the 2009 case of Nicholas Hentoff (a 6 month plus one day suspension case with the same kind of issues.)

4. *In re Heath Dooley* – SB- 07-0051-D. This was a consent in which Dooley accepted a six-month suspension. In count one, Dooley filed a complaint for a client (after getting her to sign up for his pre-paid legal insurance plan) but then did nothing, did not communicate with the client and finally withdrew at her request. In the second count, Dooley filed a medical malpractice complaint for his clients, then failed to return his clients' calls, failed to respond to discovery, moved to withdraw without informing his clients, and failed to give the file to new counsel. He also failed to refund over $4,000.00 in unused retainer. The third count was dismissed by agreement. In the fourth count Dooley agreed to represent a client, then failed to communicate. He moved to withdraw without consulting the client. He failed to repay the unused retainer. In the fifth count, Dooley failed to respond to discovery requests in an automobile accident case. He failed to communicate with the client and moved to withdraw without telling the client. The Hearing Officer found the following in aggravation 9.22(c), 9.22(d), 9.22(e) and 9.22(i). In mitigation, the factors were 9.32(a), 9.32(b) and 9.32(c). His mother was suffering from dementia and lived with him, and he had marital problems. Violations of ER's 1.2, 1.3, 1.4, 1.16(d), 3.2, 8.1(b) and 8.4(d) were found. The mental state found was knowing and there was actual injury to clients.

5. In *In re Levenson*, SB-02-0130-D (2002), Levenson was suspended for one year, was placed on probation for two years, and was ordered to pay restitution. Levinson received retainers from clients and then failed to adequately communicate with his clients; failed to act with reasonable diligence on their matters; failed to refund unearned fees to his clients; engaged in conduct that was prejudicial to the administration of justice and failed to promptly respond to the inquiries and requests for information received from the State Bar regarding the matters. Levinson voluntarily

ceased practice and entered into a drug rehabilitation facility. There were three aggravating factors: (d) multiple offenses, (h) vulnerability of victims and (i) substantial experience in the practice of law, and four mitigating factors: (a) absence of prior disciplinary record, (b) absence of dishonest or selfish motive, (i) mental disability or impairment and (l) remorse. Levinson was sanctioned for violation of ERs 1.2, 1.3, 1.4, 1.5, 1.16(d), 3.4, 8.1(b), and 8.4(d), and Rule 51(h) and (i).

In *In re Moffatt*, SB-09-0089-D (2009), the Respondent failed in his duties to a number of clients, the profession, and the legal system by filing deficient pleadings, causing numerous client matters to be dismissed by the court. The Hearing Officer found a pattern of misconduct as his misconduct was repeated in several client matters. However, the Respondent was experiencing personal and family difficulties during that period of time. He was censured and placed on probation. This case is distinguishable from the instant matter because only one aggravating factor was found in *Moffat*, 9.32(c) pattern of misconduct. The Respondent in *Moffat* had no prior discipline. The Hearing Officer has found that Respondent in the instant case has five aggravating factors; 1) prior disciplinary offense, 2) pattern of misconduct, 3) multiple offenses, 4) substantial experience in the practice of law and 5) indifference to making restitution and five mitigating factors; 1) absence of dishonest motive, 2) personal or emotional problems, 3) full and free disclosure to disciplinary board or cooperative attitude toward the proceedings, 4) character or reputation and 5) remorse.

In re Struble, SB-09-0062-D (2009) involved another consent agreement where the Respondent was censured and placed on probation despite failing to consult with his client, engaging in conduct that was prejudicial to the administration of justice, and by failing to supervise an associate in his firm, causing improper discovery requests and motion to be filed, delaying the progress of the case. Respondent had no prior discipline. He did not have the

significant mitigation present in this case. However, the significant differences between *Struble* and the instant case is that Struble's mental state was negligent and he caused no injury to the client. For those reasons, *Standards* 4.43 and 7.3 (calling for reprimand based on negligent conduct) were applied in *Struble*. In the instant case, Respondent's mental state in some violations was knowing and he caused actual harm to the Hillikers and potential (and partially actual) injury to the Lowrys.

Struble was cited in *In re Abernathy*, SB-05-0171-D (2006) in which the respondent engaged in a pattern of neglect in handling client matters. Ms. Abernathy had prior discipline and substantial experience in the practice of law. However, due to evidence in mitigation (which included chemical dependency), she was censured and placed on probation in that matter. In her later matter in 2009, Ms. Abernathy was suspended for ten months.

CONCLUSION

The Hearing Officer recommends a suspension of six months, restitution of $10,000 to the Hillikers to be paid within one year of the Judgment and Order in this case, probation for one year to begin at the time Respondent is reinstated with specific conditions to be determined at the time of reinstatement, and Respondent to pay the costs of these proceedings. Respondent should be made to pay restitution of an additional $3091 to the Hillikers, if at any time, the defendant in Yavapai County Superior Court case number CV20040563, Hilliker v. Foster, executes the judgment for $3091 against the Hillikers. The probation should include both MAP and LOMAP terms.

The presumptive sanction in this matter is a suspension. Consideration of the aggravating and mitigating factors does not lead to a lesser form of discipline. The aggravating factors are

firmly established. Respondent's conduct was part of a pattern of misconduct when considered in the light of his prior censure and the underlying facts in the diversion matters. Even without the facts of the diversion cases the conduct in the instant case was similar to the misconduct in the matter for which the Respondent was censured. Respondent's pattern is to fail to communicate with clients, fail to actively and efficiently represent them in a prompt and diligent manner, and fail to return files when he knows the representation is over.

The aggravating factor of multiple offenses is clearly stated by the fact that he violated numerous ERs in the instant case, as well as affecting three separate sets of clients, the Hillikers, the Lowrys, and the Baughers. It is also clear that Respondent has substantial experience in the practice of law for 26 years. Finally, although Respondent admitted his mistakes to the Hillikers and the Lowrys and offered to pay restitution, he did not volunteer any payment to either client. Respondent paid the Lowrys $1000 for the attorney fee they paid to him, and Respondent paid the Lowrys $773 they had been ordered to pay because of his incorrect legal advice. But Respondent did not pay these sums until the Lowrys sued him in small claims court. Apparently when Respondent was afraid that his wages would be garnished to pay the Lowrys' judgment Respondent was able to pay the $1773. In the 2 1/2 years since Respondent caused the Hillikers to lose their lawsuit, he has demonstrated indifference to paying them anything toward restitution. Respondent has acknowledged that the Hillikers could have received $10,000 from the defendants in their lawsuit in the nature of an offer of judgment.

The mitigating factors are somewhat less significant than the aggravating factors. Although the record does not establish that the Respondent had any dishonest motive in his actions with the three sets of clients, he could not find the motivation to voluntarily reimburse the Hillikers and the Lowrys even a small sum of money. In a previous section of this report the

Hearing Officer has discussed that except for depression, the other personal problems described by Respondent would not have had a significant effect on the offense in the Hilliker matter. The Respondent chose to become a full-time professor at Yavapai College in September 2006. If he could not do that job and still effectively represent his clients, he should have acquired different counsel for the clients. The deterioration in his mother's condition in February 2007, her death in April 2007, his father's heart attack in August 2007 and his horse accident in September 2007 occurred after the damage had been done to the Hillikers. Their case was dismissed on February 12, 2007. Respondent had failed to answer discovery and failed to file a disclosure statement and failed to attend the hearing on defendant's Motion to Exclude, Motion for Sanctions, and Motion to Dismiss. The Lowry and Baugher matters occurred from May 18, 2008 to January 2009. In Exhibit B David Schmuckler said that Respondent finished his treatment with Mr. Schmuckler on December 7, 2007.

Respondent's explanation for his misconduct in the Hilliker matter is very similar to this explanation for his misconduct in the Lowrys matter. In Hilliker, Respondent said that he was relying on his relationship with Mr. Churchill, the attorney for the defendant Foster who was doing business as Earthscape. Respondent acted as if he was not required to follow the Rules of Procedure because he had attached the invoices to the complaint and because Mr. Churchill knew Respondent. According to Respondent, if Mr. Churchill really needed to know other information, he could just call Respondent. Of course, Respondent's perception of the manner in which the Hilliker case should have proceeded and the manner in which Mr. Churchill should have conducted himself was incorrect. Mr. Churchill explained in the Motion to Exclude and in the Reply to that motion that receiving the invoices was not sufficient disclosure. He argued that it was the defendant's position in the case that all the work allegedly performed by Bill Hilliker

Trucking listed in the invoices was not in fact performed. Respondent ignored Mr. Churchill's request for production of documents that was filed in May 2006. Yet Respondent continued to assert in the hearing that he expected Mr. Churchill to call him and talk about discovery. The Rules of Procedure entitle Mr. Churchill's client to receive answers to written discovery. Respondent has been practicing law long enough to know that. It is of course a shame that the Hillikers suffered the loss of what would have been at least in part a successful lawsuit. The defendants offered to pay between $8000 and $10,000. This offer is a recognition that the Hillikers would have been at least partially successful if their case had not been dismissed through Respondent's actions.

Respondent stated that in the Lowrys matter, he knew Mr. Bayles the lawyer for the defendant Yavapai County. Even though Mr. Bayles had not only rejected Respondent's request on behalf of the Lowrys to reschedule the Lowrys depositions, but had attended the depositions with a court reporter just to create a record that the Lowrys had not attended, Respondent acted surprised that Mr. Bayles on behalf of the County, would seek to enforce a sanction. Once again, Respondent's perception of the situation was totally incorrect. It was also unreasonable for a lawyer of Respondent's experience to tell the Lowrys that the $773 sanction would probably be waived at or after trial. It should not have surprised Respondent that Mr. Bayles was creating a record to seek some sanction against the Lowrys. Respondent knew from the very beginning of his participation in the case that the County felt harshly toward the Lowrys. Respondent told the Lowrys that Mr. Bayles would not cut them any slack. Yet when Mr. Bayles filed a motion for the sanction of not attending their depositions and when he received an order for the Lowrys to pay $773 by September 5, 2008 or suffer a dismissal of their action, Respondent reacted to these events by assuming that the sanction would be waived at some later time by Mr. Bayles and the

County. None of this thinking makes any sense to this Hearing Officer and it calls into question either Respondent's veracity or his competence. It also is contrary to the character and reputation testified to by Lisa Counters and Kathy McCormick.

The mitigating factor of personal and emotional problems in 2007 is recognized by this Hearing Officer. But it must be weighed against the damage done to these innocent victims, especially the Hillikers. The factor of full and free disclosure is somewhat watered down by Respondent's unreasonable explanations for his conduct in Hilliker and Lowry, i.e. that he expected opposing counsel in both cases to act differently than they did. The opposing counsel reasonably represented their clients and informed their respective courts of the abject failures of Respondent (for which unfortunately his clients were made to suffer by the courts' rulings).

Finally, the factor of remorse is lessened by Respondent's failure to take any action to back up his expressions of remorse to both his client and to the Hearing Officer. If he could find the money to pay the Lowrys after they obtained a judgment and threatened garnishment, he could have made some effort to pay the Hillikers. Respondent should be given credit for candor toward his clients after their cases were dismissed. He did not try to lessen his culpability. But the news came as a shock to the Hillikers and Lowrys because Respondent had not kept them informed of developments in their cases.

The Respondent proposed that the sanction should be censure and probation. The Bar proposed six months and one day suspension and restitution to the Hillikers of $13,091 and to the Baughers of $545. The Hearing Officer has explained that the additional $3091 judgment against the Hillikers has not been executed against them in the two and a half years since it was obtained. Respondent gave the Baughers $545 worth of legal services. Even though the Baughers had to hire replacement counsel after Respondent withdrew in January, 2009, that lawyer would

not have had to redraft the complaint or the letters that Respondent had prepared for the Baughers.

The reason the Hearing Officer does not recommend a suspension of six months and a day is that except for the Hillikers, no actual permanent injury may have been suffered by the other clients. Judge Wake's Order (Exhibit 50) makes it clear that the Federal Court was probably going to grant summary judgment against the Lowrys even if a response to the Motion for Summary Judgment had been filed by Respondent. However, the Hearing Officer finds that a potential for significant injury was caused by a combination of acts of misconduct on the part of Respondent including: 1) improperly advising the Lowrys not to pay the $773 sanction by September 5, 2008, 2) failing to respond to the Notice of Nonpayment of the Sanction and 3) failing to respond to the Motions for Summary Judgment. All of these inactions by Respondent played a part in Judge Wake's decision to grant summary judgment. Respondent could not have created a more favorable position for his opponent with the Court, than he did with his inappropriate conduct. It is for these reasons that the Hearing Officer cannot say for certain (even in the face of Judge Wake's Order in Exhibit 50) that Judge Wake would still have granted summary judgment for the defendants. Would Judge Wake have ruled differently if: 1) the sanction had been paid and there was no basis for dismissal for ignoring a court order (and for ignoring the court's setting of a specific date for payment and the court's warning of dismissal as a consequence), and 2) timely, well researched and well argued responses to the Motions for Summary Judgment were filed by Respondent? This question cannot be definitively answered.

The Baughers were made to suffer needlessly by Respondent's failure to communicate with them. But their lawsuit was not harmed. Their next lawyer was able to acquire a satisfactory result for them.

The Bar recommends the six month and one day suspension to trigger the reinstatement provisions of Ariz. R. Sup. Ct. Rule 65. The Respondent has never been suspended. His first suspension will be for a significant period. The six months will give him time to recognize that he must never allow a repetition of this conduct and that he must strictly adhere to the Rules of Professional Responsibility. He should take from this six month suspension, a renewed commitment to protect his clients. This sanction is considered severe enough by the Hearing Officer (coupled with the restitution and costs of the proceeding recommendations) to make the point to Respondent that he cannot commit any more violations of the ethical rules.

SANCTION

The Hearing Officer recommends the following sanction:

1.) Respondent will receive a six month suspension

2.) Respondent will be placed on one year of probation to commence upon reinstatement. Terms of the probation are to be decided at the time of reinstatement, but should include MAP and LOMAP terms.

3.) Respondent will pay restitution to the Hillikers of $10,000 within one year of the signing of the Judgment and Order in this matter. Respondent will pay restitution of an additional $3091 to the Hillikers if at any time the defendant in Yavapai County Superior Court case number CV 20040563 Hilliker v. Foster, executes the judgment for $3091 against the Hillikers.

4.) Respondent will pay the costs of these proceedings.

5.) In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, Bar Counsel will file a

Notice of Non-Compliance with the Disciplinary Clerk. A hearing officer will conduct a hearing at the earliest practical date, but in no event later than thirty days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by a preponderance of the evidence.

DATED this 10th day of November, 2009.

Hon. Jonathan Schwartz/NVM
Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 10th day of November, 2009.

Copy of the foregoing mailed
this 10 day of November, 2009, to:

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