BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **STEPHEN J. RENARD,** **Bar No. 021991** RESPONDENT.	Nos. 08-1038, 08-1277, 08-1646, 08-2121, 09-0072, 09-0149 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on January 9, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed November 23, 2009, recommending an 18 month suspension, two years of probation upon reinstatement with the State Bar's Law Office Management Program ("LOMAP") including the use of a practice monitor, and costs.

Decision

Having found no facts clearly erroneous, the eight members[1] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for an 18 month suspension, two years of probation (LOMAP including the use of a practice monitor) upon reinstatement, and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[2] The specific terms of probation shall be determined at the

[1] Commissioner Belleau did not participate in this proceeding.
[2] The Hearing Officer's Report is attached as Exhibit A.

time of reinstatement.

RESPECTFULLY SUBMITTED this 21st day of January, 2010.

Jeffrey Messing /mps

Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 21st day of January, 2010.

Copy of the foregoing hand delivered
this 22 day of January, 2010, to:

Hon. Jonathan H. Schwartz
Hearing Officer 6S
1501 W. Washington, Suite 104
Phoenix, AZ 85007

Copy of the foregoing mailed
this 22 day of January, 2010, to:

Stephen J. Renard
Respondent
Law Offices of Stephen Renard
868 Cove Parkway, Suite 4
Cottonwood, AZ 86326-0001

Jason B. Easterday
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Deann Barker

/mps

EXHIBIT
A

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **STEPHEN J. RENARD,** **Bar No. 021991** Respondent.	No. 08-1038, 08-1277, 08-1646, 08-2121, 09-0072, 09-0149 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on July 31, 2009. The complaint was served on Respondent by certified restricted mail/delivery and regular first class mail pursuant to Rules 47(c) and 57(e), Ariz. R. Sup. Ct. The Hearing Officer was assigned on August 4, 2009. An Initial Case Management Conference was held telephonically on August 24, 2009. Respondent appeared and participated at the conference. An Answer was to be filed by August 28, 2009. Respondent did not file the Answer. A Notice of Default was issued on September 1, 2009, pursuant to Rule 57(d), Ariz. R. Sup. Ct. Respondent failed to file an Answer or otherwise defend against the allegations contained in the State Bar's complaint within the additional time (ten days) provided. A default was entered against Respondent in this matter on September 22, 2009. Pursuant to a Notice of Hearing issued on September 22, 2009, a hearing on mitigation and aggravation was held on October 15, 2009. Respondent did not appear at the hearing.

FINDINGS OF FACT

The facts listed below are those set forth in the State Bar's complaint, and were deemed admitted by Respondent's default.

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 December 16, 2002. (Complaint[1] ¶ 1.)

COUNT ONE (File no. 08-1038 (Barrett))

2. On or about July 11, 2005, Veronika Barrett ("Mrs. Barrett") had a colonoscopy. (Compl. ¶ 2.)

3. On or about May 14, 2007, Mrs. Barrett retained Respondent to pursue a potential medical malpractice case in regards to the perforated bowl that was believed to have been caused by the colonoscopy. (Compl. ¶ 3.)

4. On or about July 13, 2007, Respondent filed a medical malpractice complaint on Mrs. Barrett's behalf in the Yavapai County Superior Court against Doctor Joan Mitrius and the Verde Valley Medical Center. The complaint was served upon the defendants. (Compl. ¶ 4.)

5. On or about April 18, 2008, the Yavapai County Superior Court issued an order dismissing the complaint based upon a violation of the statute of limitations. (Compl. ¶ 5.)

6. On or about May 19, 2008, Respondent filed a notice of appeal in the Yavapai County Superior Court. (Compl. ¶ 6.)

7. By letter dated, June 18, 2008, Mr. Lawrence Barrett ("Mr. Barrett") submitted a bar charge in connection with Respondent's representation of Mr. Barrett in a criminal case. The charge also referenced Respondent's misconduct during Respondent's representation of Mrs. Barrett's medical malpractice case. (Compl. ¶ 7.)

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[1] References to the Complaint in this matter will be hereinafter noted as "Compl." followed by reference to the appropriate paragraph(s) number(s). References to State Bar exhibits will be noted as "SB Ex." followed by the exhibit number and Bates Stamp numbers, "SB Ex. #:SBA ##."

8. On or about October 31, 2008, Respondent filed his opening brief in the Court of Appeals in Mrs. Barrett's matter. (Compl. ¶ 8.)

9. On or about December 2, 2008, counsel for the Verde Valley Medical Center filed a motion in the Court of Appeals requesting their answering brief deadline be vacated because they had not received a copy of Respondent's October 31, 2008, opening brief. (Compl. ¶ 9.)

10. On or about December 5, 2008, counsel for Doctor Joan Mitrius filed a motion joining in Verde Valley Medical Center's December 2, 2008, motion. (Compl. ¶ 10.)

11. On or about December 16, 2008, the Court of Appeals issued an order directing Respondent to serve his October 31 opening brief on defendant/appellees and file written notice of his compliance on or before December 29, 2008. (Compl. ¶ 11.)

12. Respondent failed to serve his October 31 opening brief on defendant/appellees and/or failed to file written notification of his compliance as required by the Court of Appeals December 16, 2008 order. (Compl. ¶ 12.)

13. On or about January 7, 2009, counsel for Verde Valley Medical Center filed a motion to dismiss the appeal on the basis Respondent failed to comply with the Court's December 16, 2008, order. (Compl. ¶ 13.)

14. Also on or about January 7, 2009, counsel for Doctor Joan Mitrius joined Verde Valley Medical Center's motion to dismiss the appeal. (Compl. ¶ 14.)

15. On or about January 27, 2009, Respondent filed a response to the motion to dismiss. (Compl. ¶ 15.)

16. On or about February 23, 2009, the Court of Appeals issued an order granting the defendant/appellees' motion to dismiss. The Court found Respondent violated its December 16, 2008, order. (Compl. ¶ 16.)

17. By letter dated February 26, 2009, the State Bar informed Respondent that the State Bar dismissed Mr. Barrett's bar charge. Respondent was, however, directed to provide an update on, or ruling from, the Court of Appeals action pertaining to Mrs. Barrett's medical malpractice case. Further, the State Bar's letter warned Respondent that Mr. Barrett's matter might be reopened if new information came to light showing Respondent violated an ethical rule. (Compl. ¶ 17.)

18. By letter dated March 3, 2009, Mr. Barrett appealed the dismissal of the bar charge, asking that the State Bar reconsider its decision to dismiss. (Compl. ¶ 18.)

19. On or about March 17, 2009, the Probable Cause Panelist of the State Bar issued an order affirming the dismissal. (Compl. ¶ 19.)

20. By letter dated March 18, 2009, sent to Respondent's address of record, the State Bar requested Respondent provide an update of Mrs. Barrett's appeal on or before March 27, 2009. (Compl. ¶ 20.)

21. Respondent failed to respond or otherwise provide the requested update on or before March 27, 2009. (Compl. ¶ 21.)

22. By letter dated March 31, 2009, sent to Respondent's address of record, bar counsel reminded Respondent of his duty to respond and cooperate with the State Bar, and advised him that his failure to respond was, in itself, grounds for discipline. Respondent was instructed to provide an update on the Barrett appeal on or before April 10, 2009. (Compl. ¶ 22.)

23. Respondent failed to provide the requested update. (Compl. ¶ 23.)

COUNT TWO (File no. 08-1277 (Whitley *ex rel.* Talbot))

24. Anne Talbot ("Ms. Talbot") received worker's compensation benefits pursuant to a claim of an industrial injury. (Compl. ¶ 26.)

25. In or around October 2007, the benefits were terminated pursuant to a notice of claim. (Compl. ¶ 27.)

26. Ms. Talbot subsequently retained Respondent to proceed on her behalf before the Industrial Commission. (Compl. ¶ 28.)

27. On or about January 16, 2008, Respondent filed a Request for Hearing in Ms. Talbot's Industrial Claim matter pertaining to the termination of benefits. A hearing was scheduled for May 7, 2008. (Compl. ¶ 29.)

28. As part of the discovery process, opposing counsel propounded interrogatories and served them on Respondent. (Compl. ¶ 30.)

29. Respondent failed to timely answer the interrogatories pursuant to Rule R20-5-821 of the Arizona Industrial Commission. (Compl. ¶ 31.)

30. On or about April 11, 2008, the opposing counsel filed a motion to compel the answers to the interrogatories. (Compl. ¶ 32.)

31. Respondent failed to respond to the motion to compel. (Compl. ¶ 33.)

32. On or about April 14, 2008, Administrative Law Judge Nye issued an order directing Respondent to answer the previously propounded interrogatories by April 25, 2008. (Compl. ¶ 34.)

33. Respondent did not comply with the April 14, 2008 order. (Compl. ¶ 35.)

34. On or about April 14, 2008, Respondent filed a motion to continue the May 7, 2008 hearing. (Compl. ¶ 36.)

35. The hearing was reset to July 1, 2008. Administrative Law Judge Nye issued a Notice of Hearing on or about April 28, 2008, and a Change of Time of Hearing notifying the parties involved of the new July 1, 2008, hearing. (Compl. ¶ 37.)

36. No further Motions to Continue were filed in the matter. (Compl. ¶ 38.)

37. Respondent and Ms. Talbot failed to appear at the July 1, 2008, hearing. (Compl. ¶ 39.)

38. As a result of Respondent and Ms. Talbot's failure to appear at the scheduled July 1, 2008, hearing, the matter was dismissed. (Compl. ¶ 40.)

39. In or around July 2008, Ms. Talbot retained Thomas Whitley ("Mr. Whitley") for representation. (Compl. ¶ 41.)

40. By letter dated July 23, 2008, Mr. Whitely submitted a bar charge on behalf of Ms. Talbot to the State Bar of Arizona in regards to Respondent's actions. By letter dated August 18, 2008, Mr. Whitley supplemented the bar charge. A bar investigation subsequently began and Respondent was instructed to provide information. (Compl. ¶ 42.)

41. By letter dated February 13, 2009, sent to Respondent's address of record, bar counsel requested additional, specific information relating to the pending disciplinary investigation, to be provided no later than February 27, 2009. (Compl. ¶ 43.)

42. Respondent failed to provide the requested information. (Compl. ¶ 44.)

43. By letter dated March 4, 2009, sent to Respondent's address of record, bar counsel reminded Respondent of his duty to respond and cooperate with the State Bar's investigation, and advised him that his failure to respond was, in itself, grounds for discipline. Respondent was instructed to provide the information previously requested in bar counsel's February 13th letter no later than March 18, 2009. (Compl. ¶ 45.)

44. Respondent failed to provide the requested information. (Compl. ¶ 46.)

45. By letter dated March 24, 2009, sent to Respondent's address of record, bar counsel again reminded Respondent of his duty to respond and cooperate with the State Bar, and

advised him that his failure to respond was, in itself, grounds for discipline. Respondent was instructed to provide the requested information on or before April 7, 2009. (Compl. ¶ 47.)

46. Respondent failed to timely provide the requested information. (Compl. ¶ 48.)

COUNT THREE (File no. 08-1646 (Billingsley))

47. On or about February 26, 2008, Respondent was appointed by the Yavapai County Superior Court to represent Daniel Billingsley ("Mr. Billingsley") in a juvenile dependency matter. (Compl. ¶ 52.)

48. During the dependency matter, Child Protective Services ("CPS") filed a motion to sever Mr. Billingsley's rights as a parent to the child subject to the dependency matter. (Compl. ¶ 53.)

49. At all times relevant, Mr. Billingsley was housed at the Federal Corrections Institution in Terre Haute, Indiana. (Compl. ¶ 54.)

50. On or about March 4, 2008, Respondent spoke to Mr. Billingsley by telephone. (Compl. ¶ 55.)

51. Although Respondent may have made attempts to contact Mr. Billingsley by telephone during the intervening months, he did not speak to Mr. Billingsley between March 4, 2008 and September 22, 2008. (Compl. ¶ 56.)

52. On or about September 22, 2008, Mr. Billingsley called Respondent and the two spoke for approximately seventeen (17) minutes. (Compl. ¶ 57.)

53. September 22, 2008 is the last time Respondent spoke to Mr. Billingsley. (Compl. ¶ 58.)

54. On or about November 5, 2008, Respondent, acting for Mr. Billingsley, and other parties in the dependency matter reached an agreement in the dependency matter. (Compl. ¶ 59.)

COUNT FOUR (File no. 08-2121 (Shoup))

55. On or about August 18, 2005, Sandra Shoup ("Ms. Shoup") had surgery for a medical condition regarding her spine. (Compl. ¶ 62.)

56. On or about August 7, 2007, Ms. Shoup retained Respondent for a medical malpractice case in regards to the procedure(s) Ms. Shoup had on or about August 18, 2005. (Compl. ¶ 63.)

57. On or about September 4, 2007, Respondent filed a complaint ("complaint") in the Maricopa County Superior Court in Ms. Shoup's medical malpractice case and named Doctor Jay Standerfer ("Dr. Standerfer"), Doctor Curtis Dickman ("Dr. Dickman"), and Saint Joseph's Hospital and Medical Center ("St. Joseph") as defendants in the case. (Compl. ¶ 64.)

58. Also on or about September 4, 2007, Respondent filed a Certification of Expert Opinion pursuant to Arizona Revised Statute ("A.R.S.") §12-2603 and claimed an expert opinion was not necessary in Ms. Shoup's matter. (Compl. ¶ 65.)

59. On or about October 25, 2007, Respondent, or those acting on his behalf and/or under his supervision or control, served St. Joseph's Hospital and Dr. Dickman with a copy of the complaint. (Compl. ¶ 66.)

60. On or about November 1, 2007, Respondent, or those acting on his behalf and/or under his supervision or control, served Dr. Standerfer with a copy of the complaint. (Compl. ¶ 67.)

61. On or about November 21, 2007, counsel for Dr. Standerfer filed an answer to the complaint. Dr. Standerfer's counsel also filed a pleading pursuant to A.R.S. §12-2603 and asserted expert testimony would be necessary to prove a *prima facie* case of medical malpractice. (Compl. ¶ 68.)

62. On or about December 12, 2007, counsel for Dr. Dickman filed an answer to the complaint. (Compl. ¶ 69.)

63. Pursuant to Rules 16(c) and 26.2, Ariz.R.Civ.P., Respondent was to provide Ms. Shoup's medical records relevant to Ms. Shoup's claim to the opposing parties. (Compl. ¶ 70.)

64. Respondent failed to provide Ms. Shoup's pertinent medical records to defendants' counsel as required. (Compl. ¶ 71.)

65. By letter dated January 9, 2008, counsel for Dr. Standerfer requested Respondent provide Ms. Shoup's pertinent medical records. (Compl. ¶ 72.)

66. By letter dated January 17, 2008, counsel for Dr. Standerfer requested Respondent provide a copy of his expert witness affidavit. (Compl. ¶ 73.)

67. On or about February 11, 2008, Respondent provided Ms. Shoup's initial disclosure statement to defendants' counsel. In the initial disclosure statement, Respondent recited that no expert witness had been retained. Respondent failed to include a copy of Ms. Shoup's medical records with the initial disclosure statement. (Compl. ¶ 74.)

68. By letter dated February 27, 2008, sent to Respondent's address of record, counsel for Dr. Dickman requested Respondent provide an expert opinion affidavit, contending that Respondent must have obtained an expert opinion in the matter before bringing the claim. (Compl. ¶ 75.)

69. By letter dated March 4, 2008, sent to Respondent's address of record, counsel for Dr. Standerfer requested Respondent provide a copy of Ms. Shoup's medical records and further requested Respondent's expert witness affidavit. (Compl. ¶ 76.)

70. On or about March 26, 2008, counsel for Dr. Standerfer filed a motion to dismiss with prejudice all claims against Dr. Standerfer based on Respondent's failure to provide Ms.

Shoup's medical records pursuant to the rules of civil procedure and Respondent's failure to provide an expert opinion affidavit pursuant to A.R.S. § 12-2603(B). (Compl. ¶ 77.)

71. On or about March 31, 2008, counsel for Dr. Dickman filed a motion joining in the Dr. Standerfer's March 25, 2008 motion to dismiss. (Compl. ¶ 78.)

72. In or around April 2008, Ms. Shoup requested Respondent provide a copy of her medical records to her. (Compl. ¶ 79.)

73. On or about April 22, 2008, Respondent, on Ms. Shoup's behalf, filed a response to the motion to dismiss. In his response, Respondent argued he inadvertently failed to enclose the pertinent medical records referenced in his initial disclosure statement when he provided them to defense counsel. Also, Respondent argued he complied with A.R.S. §12-2603. (Compl. ¶ 80.)

74. On or about April 28, 2008, counsel for Dr. Standerfer filed his reply to Respondent's response to the motion to dismiss. In the reply, counsel argued that the medical records were not timely provided and that an expert opinion was necessary in the matter. (Compl. ¶ 81.)

75. On or about May 2, 2008, counsel for Dr. Dickman filed a motion joining in Dr. Standerfer's April 28, 2008 reply. (Compl. ¶ 82.)

76. By minute entry dated May 29, 2008, the Honorable Glenn Davis ("Judge Davis") scheduled oral argument on July 11, 2008, on the motion to dismiss. (Compl. ¶ 83.)

77. In or around June 2008, Ms. Shoup and Respondent met. Respondent still had not provided a copy of Ms. Shoup's medical records to Ms. Shoup. (Compl. ¶ 84.)

78. Ms. Shoup never received a copy of her medical records that she requested from Respondent. (Compl. ¶ 85.)

79. On or about July 11, 2008, Judge Davis presided over oral argument concerning the motion to dismiss. Judge Davis denied the motion to dismiss and further ordered counsel for the defendants to file a motion on the issue of the expert opinion. (Compl. ¶ 86.)

80. On or about July 28, 2008, counsel for Dr. Standerfer filed a motion pursuant to Judge Davis's July 11th order. The motion argued that an expert opinion affidavit is required in the matter pursuant to A.R.S. §12-2603. (Compl. ¶ 87.)

81. On or about July 31, 2008, counsel for Dr. Dickman filed a motion joining in Dr. Standerfer's July 28, 2008 motion. (Compl. ¶ 88.)

82. Respondent failed to file a response to the July 28, 2008 motion. (Compl. ¶ 89.)

83. By minute entry dated September 17, 2008, Judge Davis ordered Respondent to file a preliminary expert opinion affidavit no later than September 30, 2008. (Compl. ¶ 90.)

84. Respondent failed to file a preliminary expert opinion affidavit pursuant to Judge Davis's September 17, 2008, order. (Compl. ¶ 91.)

85. On or about October 17, 2008, counsel for Dr. Standerfer lodged an order of dismissal with prejudice due to Respondent's failure to file the court ordered preliminary expert opinion affidavit. (Compl. ¶ 92.)

86. On or about October 22, 2008, Ms. Shoup's entire matter was dismissed without prejudice due to lack of prosecution. (Compl. ¶ 93.)

87. Respondent did not communicate with Ms. Shoup between September to November 2008. (Compl. ¶ 94.)

88. In or around November 2008, Ms. Shoup learned, by computer research and not by Respondent, her case had been dismissed. (Compl. ¶ 95.)

89. Upon learning her case had been dismissed, Ms. Shoup attempted to contact Respondent for three weeks, leaving six voicemails. Respondent failed to return any of Ms. Shoup's phone calls. (Compl. ¶ 96.)

90. By email dated November 13, 2008, sent to Respondent's email account, Ms. Shoup requested her case file from Respondent. (Compl. ¶ 97.)

91. In or around late November 2008, Ms. Shoup called and spoke to Respondent. Ms. Shoup informed Respondent that her case had been dismissed. Respondent was unaware until that time that Ms. Shoup's matter had been dismissed. (Compl. ¶ 98.)

92. On or about December 3, 2008, Ms. Shoup submitted a bar charge concerning Respondent's conduct in the representation. A disciplinary investigation commenced; Respondent was notified of the charge and the commencement of the disciplinary investigation. (Compl. ¶ 99.)

93. On or about December 8, 2008, Judge Davis ordered Ms. Shoup's matter dismissed with prejudice due to Respondent's failure to file the court ordered preliminary expert opinion affidavit. (Compl. ¶ 100.)

94. By letter dated March 19, 2009, sent to Respondent's address of record, bar counsel requested additional, specific information to be provided no later than April 3, 2009. (Compl. ¶ 101.)

95. Respondent failed to provide the information requested in bar counsel's March 19th letter. (Comp. ¶ 102.)

96. By letter dated April 7, 2009, sent to Respondent's address of record, bar counsel reminded Respondent of his duty to respond and cooperate with the State Bar's investigation, and advised him that his failure to respond was, in itself, grounds for discipline. Respondent was

instructed to provide the requested information within ten days of the date of the letter. (Compl. ¶ 103.)

97. Respondent failed to provide the requested information. (Compl. ¶ 104.)

COUNT FIVE (File No. 09-0072 (Palmer *ex rel.* Mickelson))

98. On or about August 31, 2007, Lorri Mickelson, ("Ms. Mickelson") suffered an injury. (Compl. ¶ 107.)

99. On or about September 6, 2007, a Worker's Report of Injury was filed with the Industrial Commission of Arizona regarding Ms. Mickelson's injury, suffered on or about August 31, 2007. (Compl. ¶ 108.)

100. On or about October 5, 2007, Ms. Mikelson's employer, the State of Arizona's Child Protective Services ("CPS"), issued a notice of claim status, which denied Ms. Mickelson's claim for injury benefits. (Compl. ¶ 109.)

101. On or about October 21, 2007, Ms. Mickelson retained Respondent for representation in her worker's compensation matter before the Industrial Commission. (Compl. ¶ 110.)

102. On or about October 21, 2007, Ms. Mickelson and Respondent entered into a fee agreement whereby Respondent's fee would be a one-third (1/3), or 33-1/3%, of any recovery. (Compl. ¶ 111.)

103. Pursuant to A.R.S. §23-1069(B), the maximum attorney's fee matters in a matter such as Ms. Mickelson's is twenty-five (25) percent of any recovery. (Compl. ¶ 112.)

104. Pursuant to A.R.S. §23-947(a), a request for hearing must have been filed within ninety days of the date of the October 5th Notice which denied Ms. Mickelson's claim. (Compl. ¶ 113.)

105. Respondent failed to timely file a request for hearing with the Industrial Commission concerning Ms. Mickelson's matter. (Compl. ¶ 114.)

106. In or around 2007, Respondent electronically submitted his State Bar of Arizona dues statement. In his 2007 statement, Respondent indicated he was covered by professional liability insurance. (Compl. ¶ 115.)

107. By letter dated February 1, 2008, sent to the Industrial Commission, Respondent requested a hearing in Ms. Mickelson's matter. Also enclosed was a copy of a letter dated November 15, 2007, in which Respondent appeared to have requested a hearing on Ms. Mickelson's behalf. (Compl. ¶ 116.)

108. Ms. Mickelson terminated Respondent's representation. (Compl. ¶ 117.)

109. Ms. Mickelson retained Adam Palmer ("Mr. Palmer") for legal representation. (Compl. ¶ 118.)

110. On or about June 13, 2008, Administrative Law Judge Halas issued a subpoena, mailed to Respondent's address of record, to compel Respondent's personal attendance in a hearing before the Industrial Commission on August 27, 2008. The purpose of the August 27, 2008, hearing was to determine if a timely request for hearing was filed in Ms. Mickelson's matter. (Compl. ¶ 119.)

111. Respondent did not file a motion requesting to appear telephonically at the August 27, 2008, hearing. (Compl. ¶ 120.)

112. Respondent failed to appear in person before Administrative Law Judge Halas as ordered by the June 13, 2008, subpoena. Respondent testified by telephone at the August 27, 2008, hearing. (Compl. ¶ 121.)

113. In or around 2008, Respondent electronically submitted his State Bar of Arizona dues statement. In his 2008 statement, Respondent indicated he was covered by professional liability insurance. (Compl. ¶ 122.)

114. Respondent holds his law practice out to the public as a Professional Limited Liability Corporation ("P.L.L.C"). (Compl. ¶ 123.)

115. Upon information and belief, Respondent has not filed the requisite documents with the Arizona Corporation Commission in order to form a P.L.L.C. (Compl. ¶ 124.)

116. In or around 2009, Respondent electronically submitted his State Bar of Arizona dues statement. In his 2009 statement, Respondent indicated he was covered by professional liability insurance. (Compl. ¶ 125.)

117. By letter dated January 15, 2009, Mr. Palmer submitted a bar charge in regards to Respondent's representation and actions concerning Ms. Mikelson. A disciplinary investigation subsequently began; Respondent was informed of the commencement of the disciplinary investigation. (Compl. ¶ 126.)

118. By letter dated May 4, 2009, sent to Respondent's address of record, bar counsel requested Respondent provide additional information concerning the investigation. Respondent was instructed to provide the information no later than May 15, 2009. (Compl. ¶ 127.)

119. Respondent failed to submit the requested information. (Compl. ¶ 128.)

120. By letter dated May 22, 2009, sent to Respondent's address of record, bar counsel again requested the additional information requested in the May 4, 2009 letter. Respondent was instructed to provide the requested information no later than June 1, 2009. (Compl. ¶ 129.)

121. Respondent failed to timely provide the requested information as instructed in the May 4 and May 22 letters. (Compl. ¶ 130.)

122. Upon information and belief, Respondent does not have professional liability insurance. (Comp. ¶ 131.)

COUNT SIX (File No. 09-0149 (Perrot))

123. In or around 2008, Mireille Perrot ("Ms. Perrot") hired Respondent for a tort case. (Compl. ¶ 134.)

124. In or around late 2008, Ms. Perrot terminated Respondent's representation. (Compl. ¶ 135.)

125. By letter dated January 28, 2009, Ms. Perrot submitted a bar charge concerning Respondent's conduct. A disciplinary investigation subsequently was commenced; Respondent was informed of the investigation. (Compl. ¶ 136.)

126. In or around February 2009, Ms. Perrot hired Robert Bohm ("Mr. Bohm") for representation in her tort case. (Compl. ¶ 137.)

127. By letter dated February 27, 2009, sent to Respondent's address of record, Mr. Bohm requested Ms. Perrot's client file. Mr. Bohm requested Respondent to provide the file by March 19, 2009. (Compl. ¶ 138.)

128. Respondent failed to provide Ms. Perrot's file to her new attorney. (Compl. ¶ 139.)

129. By letter dated March 20, 2009, sent to Respondent's address of record, Mr. Bohm again requested Ms. Perrot's client file. Mr. Bohm requested Respondent to provide the file by March 30, 2009. (Compl. ¶ 140.)

130. Respondent failed to provide Ms. Perrot's file to her new attorney. (Compl. ¶ 141.)

131. By letter dated March 31, 2009, sent to Respondent's address of record, Mr. Bohm again requested Ms. Perrot's client file. Mr. Bohm requested Respondent to provide the file by April 6, 2009. (Compl. ¶ 142.)

132. Respondent again failed to provide Ms. Perrot's file to her new attorney; Mr. Bohm never received a copy of the client file from Respondent. (Compl. ¶ 143.)

133. By cover letter dated April 13, 2009, Ms. Perrot provided Mr. Bohm's letters dated February 27, March 20, and March 30, 2009, to the State Bar of Arizona. (Compl. ¶ 144.)

134. By letter dated April 16, 2009, sent to Respondent's address of record, bar counsel forwarded Ms. Perrot's letter dated April 13 as well as Mr. Bohm's letters dated February 27, March 20, and March 30, 2009. Bar counsel's letter requested Respondent voluntarily respond to the additional information within ten days of the April 16th letter. (Compl. ¶ 145.)

135. Respondent did not voluntarily respond to bar counsel's letter dated April 16, 2009. (Compl. ¶ 146.)

136. By letter dated May 5, 2009, sent to Respondent's address of record, bar counsel requested information about whether Respondent forwarded Ms. Perrot's file to Mr. Bohm. Respondent was directed to provide the information no later than May 15, 2009. (Compl. ¶ 147.)

137. By letter dated May 7, 2009, Respondent responded to bar counsel's April 16, 2009 letter, by mail and by fax. In this letter, Respondent referred to an enclosed letter. However, no letter was enclosed with Respondent's May 7th letter or fax. (Compl. ¶ 148.)

138. On or about May 20, 2009, Lisa Casablanca, legal assistant to assigned bar counsel, called Respondent's phone number of record and left a message stating there was no attachment or enclosure to Respondent's May 7th letter of fax. (Compl. ¶ 149.)

139. By letter dated May 21, 2009, sent to Respondent's address of record, bar counsel requested the referenced letter that Respondent had previously failed to enclose in his May 7th letter and fax. Respondent was instructed to provide the requested letter no later than May 28, 2009. (Compl. ¶ 150.)

140. Respondent failed to provide the requested letter or to otherwise respond. (Compl. ¶ 151.)

141. By letter dated June 1, 2009, sent to Respondent's address of record, bar counsel reminded Respondent of his duty to respond and cooperate with the State Bar's investigation, and advised him that his failure to respond was, in itself, grounds for discipline. Respondent was instructed to provide the requested letter no later than June 5, 2009. (Compl. ¶ 152.)

142. Respondent failed to provide the letter or to otherwise respond. (Compl. ¶ 153.)

CONCLUSIONS OF LAW

Respondent failed to file an answer or otherwise defend against the allegations in the State Bar's complaint, therefore a default was properly entered. Consequently, the allegations in the complaint are deemed admitted pursuant to Rule 57(d), Ariz. R. Sup. Ct. The Hearing Officer heard argument at the hearing on mitigation and aggravation in which the Respondent failed to appear. Therefore, Respondent violated the following by clear and convincing evidence:

COUNT ONE (File no. 08-1038 (Barrett))

Respondent's conduct violated Rule 42, Ariz. R. Sup. Ct., ER. 3.4 and Rule 53(c) Ariz. R. Sup. Ct. (knowingly disobeying an obligation under the rules of the tribunal and knowingly violating any rule or any order of the court of a state) when he disobeyed the Court of Appeals order to serve his Opening Brief on opposing counsel. He violated ER 8.1

and Rules 53(d) and 53(f) (knowingly failing to respond to a lawful demand for information from a disciplinary authority, refusing to cooperate with staff of the State Bar and failing to furnish information or to respond promptly to any inquiry from bar counsel for information relevant to complaints, grievances or matters under investigation) when he failed to provide the Bar with an update on Mrs. Barrett's appeal. Respondent's actions in Count One violated ER 8.4(d) (conduct prejudicial to the administration of justice) in that the Court of Appeals would not hear the appeal of Respondent's client because Respondent would not serve his Opening Brief on the opposing party.

COUNT TWO (File no. 08-1277 (Whitley *ex rel.* Talbot))

Respondent's conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs. 1.3 (failing to act with reasonable diligence and promptness in representing a client) and ER 3.2 (failing to make reasonable efforts to expedite litigation consistent with the interests of the client) when he failed to timely answer interrogatories, failed to respond to a Motion to Compel answers to the interrogatories and failed to appear at the July 1, 2008 hearing before the Administrative Law Judge (ALJ). Respondent violated ER 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) when he failed to comply with ALJ Nye's order of April 14, 2008 to answer the interrogatories by April 25, 2008. Respondent's conduct violated ER 8.1(b) and Rules 53(d) and 53(f), Ariz. R. Sup. Ct., when he failed to provide information relevant to the matters under investigation in Count Two requested by the Bar on three separate occasions in February and March, 2009.

COUNT THREE (File no. 08-1646 (Billingsley))

Respondent's conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.2 (failing to consult with the client as to the means by which the objectives of the

representation were to be pursued and 1.4 (failing to keep the client reasonably informed about the status of the matter), when Respondent reached an agreement with other parties in the dependency matter without sufficient consultation with his client.

COUNT FOUR (File no. 08-2121 (Shoup))

Respondent's conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), 3.2 (Expediting Litigation), 3.4(c) (Disobeying an Obligation of a Tribunal), 8.1(b) (Failure to Respond to Request for Information), 8.4(d) (Conduct Prejudicial to the Administration of Justice, and Rules 53(c) (Violation of a Court Order), 53(d) (Refusal to Cooperate with Bar Staff), and 53(f) (Failure to Respond to the Bar's Request for Information), Ariz. R. Sup. Ct. Respondent failed to timely provide Ms Shoup's pertinent medical records to the opposing parties and to Ms. Shoup and failed to provide an expert opinion affidavit as required by ARS section 12-2603(B). Respondent failed to respond to opposing counsels' motions about the need for an expert opinion affidavit and then failed to obey Judge Davis' order to file the affidavit by September 30, 2008. Respondent failed to respond to six e-mails from Ms. Shoup and failed to return her file after her case was dismissed. Respondent failed to communicate the fact of the October 22, 2008 dismissal without prejudice for lack of prosecution to Ms. Shoup. Ms. Shoup informed Respondent of the dismissal which she learned through her own computer research. Respondent's failure to file the expert witness affidavit led to Judge Davis' order of December 8, 2008 dismissing the case with prejudice. Respondent failed to respond to several requests from the Bar for information concerning this matter.

COUNT FIVE (File no. 09-0072 (Palmer *ex rel.* Mickelson)

Respondent's conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.3 (Diligence), 1.5 (Charging an unreasonable fee), 3.4(c) (Disobeying an order of the tribunal), 7.1 (Making a false statement about the lawyer's services), 7.5 (Stating that a lawyer practices in a partnership or other organization when that is not true), 8.1(b) (Failing to respond to a lawful demand for information from a disciplinary authority, 8.4(c) (Engaging in conduct involving dishonesty), 8.4(d) (Conduct prejudicial to the administration of justice) and Rule 53 (Failure to promptly furnish information to the Bar and knowingly violating an order of a tribunal), Ariz. R. Sup. Ct. Respondent charged a fee of 33 and 1/3% of any recovery, when the lawful fee for worker's compensation cases cannot exceed 25% of the recovery. Respondent failed to file a timely request for a hearing with the Industrial Commission. Respondent failed to appear personally at the August 27, 2008 hearing before ALJ Halas as the ALJ had ordered in the subpoena. Without requesting permission to appear telephonically, Respondent appeared by telephone on August 27, 2008. Respondent falsely stated in his bar dues statement that he was covered by professional liability insurance. Respondent held himself out as a Professional Limited Liability Corporation (P.L.L.C.). Yet he has not filed the necessary paperwork with the Arizona Corporation Commission for this corporate designation. Respondent failed to timely respond to several requests by the Bar for information related to this matter.

COUNT SIX (File no. 09-0149 (Perrot))

Respondent violated ER 1.16 (Failing to provide client with all her documents upon termination of representation) and ER 8.1(b), and Rule 53, Ariz. R. Sup. Ct. (Failing to respond promptly to requests for information by the Bar). Respondent failed to give Ms.

Perrot her file after she terminated Respondent's representation. Respondent failed to promptly respond to the Bar's requests for information. When Respondent finally wrote to the Bar on May 7, 2009, he referred to an "enclosed letter", but no letter was enclosed. Respondent never sent the Bar the "enclosed letter".

ABA STANDARDS

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

Duty Violated

In Count One, Respondent violated his duty owed to the court by violating the Court of Appeal's December 16, 2008, court order. Further, Respondent violated his duty as a professional. Respondent failed to cooperate and respond to the State Bar's investigatory letters.

Respondent violated his duties to his client, the legal system, and profession in Count Two. Respondent failed to act diligently in Ms. Talbot's matter. Respondent violated the court's order to compel discovery thereby violating his duty to the legal system. Lastly, Respondent failed to cooperate and respond to the State Bar's investigatory letters thereby violating his duty as a professional.

In Count Three Respondent failed to adequately consult and communicate with Mr. Billingsley. Therefore, Respondent violated his duty to his client.

In Count Four, Respondent failed to provide competent representation, failed to abide by the client's objectives in the representation, failed to act with reasonable diligence, failed to adequately communicate with Ms. Shoup, and failed to safeguard Ms. Shoup's medical records by failing to provide a copy upon request. Therefore, Respondent violated his duty to his client. Respondent also violated his duty to the legal system by failing to expedite the litigation and violated the court's order to provide the preliminary expert opinion affidavit. Lastly, Respondent violated his duty as a professional by failing to cooperate with the State Bar's investigation.

In Count Five, Respondent failed to act with reasonable diligence and made an agreement for an unreasonable legal fee with Ms. Mickelson. Therefore, Respondent violated his duty to his client. Respondent also failed to abide by the court's subpoena to testify in person, thereby violating his duty to the legal system. Next, Respondent violated his duty owed to the public by lying about his professional liability insurance. Lastly, Respondent violated his duty owed to the profession by failing to cooperate and respond to the State Bar's investigatory letters.

Lastly, in Count Six, Respondent violated his duty as a professional. Respondent failed to provide the client's file to subsequent counsel. Respondent also failed to respond and cooperate with the State Bar in its investigation into the matter.

Injury and Mental State

There are multiple *Standards* implicated in the instant matter. In Count 4, Respondent violated ER 1.1, therefore implicating *Standard* 4.5. Respondent demonstrated a failure to

understand relevant legal doctrines and procedures in Count Four. Respondent failed to understand that his client's medical malpractice case did not qualify for the exception to the rule that an expert witness affidavit must be filed supporting plaintiff's claim. Respondent stubbornly failed to recognize the need for an expert to prove a *prime facie* case, even after the opposing counsel requested, and the court ordered, an expert-opinion affidavit. Further, Respondent failed to demonstrate an understanding that he needed to respond to the Court's order for an expert-opinion affidavit and the lodged dismissal order to preserve his client's claim. Respondent's actions also caused Ms. Shoup's matter to be barred by allowing the matter to be dismissed with prejudice. Therefore, Respondent caused actual injury. *Standard* 4.53 is the most appropriate *Standard. Standard* 4.53 states, "[r]eprimand [censure in Arizona] is generally appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client." Therefore, *Standard* 4.53 is appropriate to this issue.

Respondent violated ERs 1.2, 1.3, 1.4, and 3.2 in Counts Two, Three, Four, and Five, which implicates *Standard* 4.4. Respondent engaged in a pattern of neglect by failing to perform tasks in which he was hired, failing to communicate with clients, and failing to expedite litigation. The client in Count Two, Ms. Talbot, had her worker's compensation matter dismissed because Respondent failed to file a timely motion to continue or appear at the hearing. Therefore, Respondent caused actual injury. Respondent caused potential injury by failing to adequately communicate with his client in Count Three. Respondent caused actual injury to Ms. Shoup in Count Four by failing to timely file the court ordered expert opinion affidavit and by

failing to respond to the lodged motion to dismiss with prejudice, thereby causing the matter to be dismissed with prejudice.

Further, Respondent caused actual injury to Ms. Mickelson, the client in Count Five, by failing to timely request a hearing. The Bar asserts in the Post Hearing Memorandum (page 30, lines 2-5) that Respondent's failure to timely file the request for hearing led to Ms. Mickelson's claim being barred. The complaint does not allege that the worker's compensation claim was barred. However, ARS section 23-947 states that a hearing shall not be granted unless the request for hearing is filed within ninety days after the October 5, 2007 notice was sent. The complaint (paragraphs 119 through 121) alleged that the Administrative Law Judge Halas set August 27, 2008 as a hearing to determine if a timely request for hearing was filed. (Respondent had sent a letter to the Industrial Commission on February 1, 2008 in which he enclosed a copy of a letter dated November 15, 2007, which appeared to request a hearing – complaint paragraph 116). Respondent testified telephonically at the hearing before ALJ Halas. The complaint does not allege what ALJ Halas ruled about whether a request for hearing was timely filed. ARS section 23-947 provides for the Industrial Commission to excuse the late filing of a request for hearing in only very limited circumstances. If the untimely request for hearing is not excused the statute states that the determination made by the commission, insurance carrier or self-insuring employer is final. In Ms. Mickelson's case her employer had denied her claim for injury benefits. Therefore the combination of Respondent not filing a timely request for hearing (deemed admitted by Respondent's failure to answer the Complaint, paragraph 114 which alleged his failure to file a timely request) and the operation of the statute and the absence of any evidence of a satisfactory excuse for the failure to file a timely request for the hearing, leads to the conclusion that Ms. Mickelson's worker's compensation claim was barred. *Standard* 4.42

states, "[s]uspension 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." Therefore, *Standard* 4.42 is appropriate.

Respondent violated ER 1.5 in Count Five by attempting to charge an unreasonably high fee pursuant to statute. *Standard* 4.6 is implicated whenever ER 1.5 is violated. *Standard* 4.63 states, "[r]eprimand [censure] is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client." Respondent's fee agreement in Count Five stated Respondent's fee would be thirty-three (33) percent when the statutory maximum is twenty-five (25) percent. There is no evidence that would indicate Respondent intentionally or knowingly attempted to have an inappropriate fee. Further, the client never recovered any benefits. Therefore Respondent did not attempt to take a fee. Therefore, there is no actual injury, but the potential for injury was present.

Respondent violated ER 1.15 in Count Four by failing to provide a copy of Ms. Shoup's medical records as she requested. Therefore, *Standard* 4.1 is implicated. *Standard* 4.12 states, "[s]uspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Ms. Shoup requested a copy of her medical records. Respondent failed to provide the records as directed. Therefore, Respondent acted knowingly when he failed to turn over the records. Further, Respondent was previously censured in *In re Renard*, SB-09-0042-D (June 1, 2009) for failing to timely return medical records to a client. (Exhibit 4, SBA000017-25, Exhibit 6, SBA000031-32) In that case Respondent was representing Mr. McEwan in a medical malpractice case. The client wanted to terminate Respondent's representation. On numerous occasions the client informed

Respondent that he wished to terminate the representation and that the client wanted Respondent to return his medical records. Even after assuring his client that he would return the client's medical records Respondent had not returned the records from April 2008 until July 2008. The Hearing Officer concluded that the client finally received all of his medical records "...although not as timely as he should have." (Exhibit 4, SBA 000020) Thus, in the instant case, Respondent at least should have known that he was dealing improperly with client property. Ms. Shoup never received a copy of her medical records from Respondent. Respondent caused actual injury. Therefore, *Standard* 4.12 is appropriate as to this issue.

Respondent violated ERs 1.16, 7.1, 7.5, and 8.1 in Counts One, Two, Four, Five, and Six and therefore, *Standard* 7.0 is implicated. *Standard* 7.2 states, "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Respondent knowingly failed to provide the client file to Ms. Perrot, the client in Count Six, and he failed to provide the file even after her subsequent attorney sent multiple letters. Ms. Perrot's subsequent counsel never received a copy of the file thereby causing actual injury. Respondent knowingly held his law practice out to the public as a professional limited liability corporation despite failing to file the requisite documents. It is unknown if any potential or actual client relied upon Respondent's assertions, so Respondent caused the potential for injury. Lastly, Respondent failed to respond to numerous letters from the State Bar requesting information in the investigation. Respondent's actions hampered and delayed the State Bar's investigation. Further, the State Bar exerted time, money and resources attempting to obtain Respondent's compliance. Respondent caused actual injury. Therefore, Respondent acted knowingly and *Standard* 7.2 is appropriate.

Respondent violated numerous court orders and, in turn, violated ER 3.4(c). *Standard* 6.2 covers the violation of court orders. *Standard* 6.22 states, "[s]uspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding." Respondent was the attorney of record in Counts One, Two, and Four when the court ordered Respondent to act. Respondent caused actual injury in Count One because the Barretts' matter was dismissed due to Respondent's failure to comply with the Court of Appeal's order. Respondent failed to comply with an order to compel in Count Two. The matter was dismissed for reasons other than the court order violation, so there was at least the potential for injury. Respondent caused actual injury in Count Four, as previously discussed above. In Count Five, the administrative law judge ordered Respondent to testify in person pursuant to a subpoena. However Respondent failed to do so and instead, testified telephonically. His conduct caused a potential for interference. Therefore, Respondent acted knowingly and *Standard* 6.22 is appropriate.

Lastly, Respondent lied to the State Bar about having professional liability insurance in Count Five. *Standard* 5.1 is implicated whenever ER 8.4(c) is violated. *Standard* 5.13 states, "[r]eprimand [censure] is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Respondent knowingly stated he had insurance despite the admitted fact that he does not have insurance. Any lie reflects adversely on the lawyer's fitness to practice law since our system of justice relies on attorneys to act honestly and truthfully. Therefore, *Standard* 5.13 is the most applicable to this issue.

"The *Standards* do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of

misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." *Standards* at 7. *Standards* 4.12, 4.42, 6.22 and 7.2 call for suspension. Therefore, the presumptive sanction in this case is suspension. The following are factors that should be considered in aggravation of the presumptive sanction:

Aggravating Factors

Standard 9.22(a) Prior disciplinary offense: On June 1, 2009, in SB09-0042-D (2009) (McEwan), Respondent was censured and placed on probation for a violation of Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.15(d), 1.16(d), and Rule 53(f), Ariz. R. Sup. Ct. (Exhibit 6, SBA000031-32; Exhibit 4, SBA000017-26) This case was summarized in the **Injury and Mental State** section of this report. The Bar has alleged that Respondent violated the June 1, 2009, Judgment and Order. (Exhibit 7, SBA000033) The State Bar filed a Notice of Noncompliance and a hearing was held. *Id.* The probation violation matter is pending before the Disciplinary Commission. As this matter has not been finalized by a Judgment and Order it will not be considered.

On October 15, 2009, in SB-09-0101-D (2009) (Fortsch), Respondent was censured and placed on probation for a violation of Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.1, 1.3, and 1.5(c).[2] (Exhibit 1, SBA000004) *See In re Augenstein*, 178 Ariz. 133, 136-37, 871 P.2d 254, 257-58 (1994) (holding that a subsequently filed disciplinary proceeding may be considered a prior offense if it has been finalized by a Judgment and Order). In this matter Respondent represented Jennifer Fortsch, a plaintiff in a personal injury claim. Respondent failed to serve the first complaint which resulted in a dismissal on June 13, 2007. On July 2,

[2] The Supreme Court of Arizona issued its Judgment and Order in Disciplinary Commission No. 07-1867 (Fortsch) the same day as the hearing on mitigation and aggravation in the instant matter.

2007 Respondent re-filed the complaint. Respondent mistakenly thought that the insurance carrier for the defendant would accept service of the complaint and agree to resolve the case through mediation. When this did not occur, Respondent failed to serve the second complaint resulting in another dismissal. Ms. Fortsch's claim is now barred by the statute of limitations. Respondent violated ER 1.1 (competence) and ER 1.3 (diligence) by failing to serve the two complaints. He violated ER 1.5(c) by failing to receive a signed fee agreement.

Standard 9.22(b) Dishonest or selfish motive: Respondent was dishonest when he stated he had professional liability insurance and held out his firm as a professional limited liability corporation.

Standard 9.22(c) Pattern of misconduct. Respondent has demonstrated a lack of competence, a lack of diligence, and inability to comply with court orders in this case and also in other disciplinary matters. Further, Respondent has demonstrated a pattern of not timely responding to the State Bar or returning client material.

Standard 9.22(d) Multiple offenses: Respondent violated multiple ethical rules, duties, and *Standards*.

Standard 9.22(e) Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency: Respondent failed to comply with his ethical obligation to respond to the State Bar's investigation in five of the six counts. Further, Respondent did not file an answer to the formal complaint and did not participate in the formal proceedings, except for participating in the initial case management conference.

Standard 9.22(g) Refusal to acknowledge wrongful nature of conduct: Respondent has never acknowledged the wrongful nature of his conduct.

Mitigating factors

No evidence was presented that would warrant a finding of a mitigating factor.

RESTITUTION

The Bar has not presented evidence that any person is owed restitution by Respondent.

PROPORTIONALITY REVIEW

In the imposition of lawyer sanctions, the Court is guided by the principle that an effective system of professional sanctions must have internal consistency. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). Therefore, a review of cases that involve conduct of a similar nature is warranted. To achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994). However, the discipline in each situation must be tailored for the individual case as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 691 P.2d 695 (1984).

In *In re Casper*, SB-08-0123-D (2008), Casper was suspended for six months and one day and ordered to pay restitution. In a one-count matter, Casper failed to adequately communicate and diligently represent his client. Casper further failed to actively pursue the client's Chapter 13 bankruptcy and failed to respond to the State Bar's investigation. Casper's conduct was deemed admitted by default. There were five aggravating factors: 9.22(a) prior disciplinary offenses, 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, 9.22(e) bad faith obstruction of disciplinary proceeding by intentionally failing to comply with rules or orders of

disciplinary agency, and 9.22(j) indifference to making restitution. There were three mitigating factors: 9.32(c) personal or emotional problems, 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct, and 9.32(l) remorse. Casper was sanctioned for violation of Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.2, 8.4(d), and Rules 53(d) and 53(f), Ariz. R. Sup. Ct.

In *In re Bjorgaard*, SB-07-0081-D (2007), Bjorgaard was suspended for two years and placed on probation upon reinstatement. In a seven-count matter, Bjorgaard engaged in a pattern of neglect by failing to respond to motions and conduct discovery, thereby causing several matters to be dismissed. Bjorgaard failed to communicate with clients, failed to properly withdraw from representation, and failed to cooperate with the State Bar's investigation. There were three aggravating factors: 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, and 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. There were three mitigating factors: 9.32(a) absence of a prior disciplinary record, 9.32(c) personal or emotional problems, 9.32(k) imposition of other penalties or sanctions. Bjorgaard was sanctioned for violation of Rule 42, Ariz. R. Sup. Ct., specifically ERs 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), Ariz. R. Sup. Ct.

In *In re Augustine*, SB-04-0114-D (2004), in a three-count matter, Augustine was suspended for two years and ordered to pay restitution. Augustine failed to act with reasonable diligence and promptness in representing his client. He failed to keep his client adequately informed regarding the status of the matter or promptly comply with reasonable requests for information. Upon request of his client, Augustine failed to promptly render a full accounting regarding the client's property held in trust. Augustine failed to take the steps reasonably

practicable to protect his client's interests upon termination of the representation and further failed to respond to lawful demand for information from a disciplinary authority. Augustine engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. Lastly, Augustine engaged in conduct that was prejudicial to the administration of justice. Augustine's conduct was deemed admitted by default. There were five aggravating factors: 9.22(c) pattern of misconduct, 9.22(d) multiple offenses, 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of disciplinary agency, 9.22(i) substantial experience in the practice of law, and 9.22(j) indifference to making restitution. There were four mitigating factors: 9.32(a) absence of a prior record, 9.32(b) absence of a dishonest or selfish motive, 9.32(g) character or reputation, and 9.32(l) remorse. Augustine was sanctioned for violation of Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.3, 1.4, 1.15(b), 1.16(d), 8.1, 8.4(c), 8.4(d), and Rules 53(f) and 53(d), Ariz. R. Sup. Ct.

Casper represents the low-end of an appropriate sanction since only one count was involved. While the ethical rule violations do not exactly match, this matter more closely resembles *Bjorgaard*. In both the instant matter and *Bjorgaard*, the attorneys failed to promptly act on the client's case and as a result the underlying matter was dismissed. Both matters also involve a failure to adequately communicate with the client and failure to respond to the State Bar. However, a review of the facts in the Tender of Admissions in *Bjorgaard* reveals that Bjorgaard's conduct was more pervasive than Respondent's conduct in the instant case, because Bjorgaard failed in many more court cases than Respondent to respond to opposing counsel's motions.

RECOMMENDATION

The Supreme Court "has long held that the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender." *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). It is also the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is also a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the State Bar. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

The Bar has recommended a suspension for two years followed by two years of probation to begin after reinstatement. The terms of the probation would be established after reinstatement but would at the least include LOMAP. The concern of this Hearing Officer is the damage done by Respondent to multiple clients. In count one Mrs. Barrett's malpractice suit appeal was lost when Respondent did not obey the order of the Court of Appeals to serve his opening brief on two appellees. The act of serving a brief on the opposition in an appeal is so basic that the failure to do so is difficult to understand. This failure leads the Hearing Officer to conclude that something fundamental is wrong with the way Respondent was representing his clients.

In count two and count five Respondent was representing clients in workers compensation claims before the Industrial Commission of Arizona (ICA). In count two Respondent not only failed to respond to discovery, but he failed to respond to the motion to compel and failed to obey the order of the administrative law judge directing him to answer the previously propounded interrogatories. After obtaining a continuance of the hearing for

almost two months, Respondent and his client failed to appear at the rescheduled hearing. The client's claim was dismissed.

In count four, Respondent was representing Ms. Shoup as a plaintiff in a medical malpractice case. The rules of civil procedure require the plaintiff to provide the opposing parties with copies of the relevant medical records for plaintiff. However, Respondent failed to provide his client's medical records to counsel for defendants. Respondent even failed to provide Ms. Shoup's medical records to Ms. Shoup. Counsel for the defendants filed motions to dismiss based on Respondent's failure to disclose his client's relevant medical records. Judge Davis denied those motions. The defendants then filed motions to dismiss because Respondent had not filed an expert opinion affidavit. Respondent failed to respond to this motion to dismiss. Judge Davis gave Respondent another opportunity to comply with the law when the judge ordered Respondent to file the preliminary expert opinion affidavit by September 30, 2008. Respondent failed to comply with the judge's order. In fact Ms. Shoup's case had been dismissed without prejudice on October 22, 2008 for a lack of prosecution. When defendants alerted Judge Davis that Respondent had not filed the preliminary expert opinion affidavit by September 30, 2008 Judge Davis dismissed Ms. Shoup's case with prejudice on December 8, 2008.

The Hearing Officer concludes that an eighteen month suspension will be sufficient to protect the public from Respondent's conduct and to deter Respondent and others from similar misconduct. Respondent's previous sanctions have been censures. A suspension of more than six months is significant in one respect because the suspended lawyer must, when applying for reinstatement, bear the burden to establish by clear and convincing evidence his rehabilitation, his compliance with all applicable discipline orders, and his competence and

fitness to practice law. Rule 65(b)(2) Respondent's violations are part of a pattern of harming clients by ignoring his obligations to his clients and the legal system, ignoring court orders, and then ignoring (for the most part) the Bar's legitimate need for information in the disciplinary process. Respondent's misconduct calls for a more significant sanction than a six month and one day suspension. The Hearing Officer thinks that a two year suspension is more time than is necessary to protect the public and rehabilitate Respondent.

Upon consideration of the facts, the ethical rules violated, the applicable *Standards*, the aggravating and mitigating factors, and an analysis of proportional cases, the Hearing Officer recommends the following sanction:

SANCTION

1. Respondent shall be suspended from the practice of law for 18 months.
2. Should Respondent seek, and be granted, reinstatement to the practice of law, Respondent shall be placed on probation for a period of two (2) years beginning on the date he is reinstated. The probation terms are to be determined upon reinstatement but are to include the Law Office Management Assistance Program ("LOMAP") and the use of a practice monitor approved by the State Bar.
3. Respondent shall pay all costs and expenses incurred by the State Bar in bringing this disciplinary proceeding. In addition, Respondent shall pay all costs and expenses incurred in this matter by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's Office.
4. 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 30 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 23 day of November, 2009.

Jonathan H. Schwartz
Hearing Officer 6S

Original filed this 23 day
of November, 2009, with:

Disciplinary Clerk of the Supreme Court of Arizona

Copies of the foregoing ***mailed*** this 23 day
of November, 2009, to:

Stephen J. Renard
Respondent
Law Offices of Stephen Renard
868 Cove Parkway, Suite 4
Cottonwood, Arizona 86326-0001

Jason Easterday
Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016-6288

by: Deann Bailey