BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **MICHAEL T. TELEP, JR.,** **Bar No. 011995** RESPONDENT.	No. 08-2230 **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 December 10, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for a 60 day suspension, one year of probation upon reinstatement (continuing legal education ("CLE") relating to Victims' Rights) and costs.

Decision

Having found no facts clearly erroneous, the nine members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 60 day suspension, one year of probation upon reinstatement (CLE relating to Victims' Rights), and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[1] The terms of probation are as follows:

[1] The Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total $1, 541.75.

Terms of Probation

1. Respondent shall within one year following reinstatement attend a CLE program relating to Victims' Rights.

2. Respondent's probation will conclude upon proof of compliance with term one above.

3. Respondent shall refrain from engaging in any other conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

4. In the event that Respondent fails to comply with any of the foregoing probation terms, and the State Bar receives information thereof, Bar Counsel shall file a Notice of Non-Compliance with the imposing entity pursuant to Rule (60)(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days following receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

RESPECTFULLY SUBMITTED this 12th day of January, 2010.

Jeffrey Messing /mps
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 12th day of January, 2010.

Copy of the foregoing hand delivered
this 13 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 13 day of January, 2010, to:

Michael T. Telep, Jr.
Respondent
225 W. Second Street
Yuma, AZ 85364-2267

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

by: Deann Bar

/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,

MICHAEL T. TELEP, JR.,
Bar No. 011995

Respondent.

No. 08-2230

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on September 23, 2009. No Complaint was filed. A hearing was held on November 3, 2009.

FACTS[1]

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 21, 1988. (Transcript of the Hearing page 4, line 3, TR 4:3)

2. In *State v. Santa Cruz*, Yuma County Superior Court Case No. S1400CR200701317, Respondent's client was charged with several counts of indecent conduct with a minor. (TR 4:6)

3. Respondent subpoenaed the minor's high school records. [2]

[1] The facts are found in the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent and in the transcript of the hearing.

[2] The testimony is that the high school records were subpoenaed. (TR 4:15) Later, Respondent testified that the minor was 10 years old when the alleged conduct occurred and was 12 years old when the request for school records was made by subpoena. (TR 6:4 through 7:9) It is undisputed however that Respondent by subpoena acquired the school records of the minor.

4. The subpoenas were issued and served without notice to the minor victim or state. The minor's parents learned of them when the school called them to say they had received the subpoenas. (TR 4:22 through 5:1)

5. The prosecutor filed a motion to quash, arguing among other things that at a hearing 5 months earlier she reminded Respondent and the court that the Victims' Rights and criminal subpoena laws forbade such subpoenas. [3]

6. At a September hearing, Respondent told the court that he later would file a motion to obtain the minor's medical records. (TR 7:15-20)

7. On October 9, 2008, the Hon. Mark Wayne Reeves conducted a hearing in the case. Near the time of that hearing, Respondent subpoenaed the minor's physician's records.

8. At the October hearing, Respondent told the judge that the subpoena *was* the motion: "I did file a motion. My subpoena – the subpoena is a motion. . . That is my subpoena, and you granted that subpoena vicariously through the subpoena power. We have that. I filed that motion." (TR 7:24 through 8:7)

9. The subpoena directed the doctor to deliver the records to the judge's courtroom on and at the date and time of the next hearing in the case, November 12, 2008.

10. The subpoena also contained bold print instructing the doctor that if the records were delivered to Respondent's office before the hearing date the doctor would not have to appear personally in court. (TR 8:11 through 9:10)

11. Judge Reeves determined that the subpoena was misleading because it appeared as though the court was requesting the medical records when in fact it was Respondent who sought the records.

[3] Respondent testified that the attorney for the victim filed a motion to quash, not the prosecutor. (TR 5:8 through 6:6)

12. Judge Reeves concluded that Respondent's attempt to directly subpoena the minor's medical records violated the Victims' Rights laws and related Criminal Rules of Procedure. (TR 11:21-25)

13. At the October hearing, Judge Reeves also determined that Respondent's attempt to subpoena the school records without a court order violated Arizona's Victims' Rights laws. (TR 12:1-9)

14. At the November 12 hearing Judge Reeves asked Respondent why he had not filed a motion for a court order to obtain the school and medical records.

15. The judge also asked Respondent where the medical records were and told Respondent that if he received the medical records they should be delivered to the court where they would remain sealed pending another hearing regarding their disclosure.

16. Specifically, Judge Reeves asked: "And you are not aware of anything about it further, Mr. Telep?" Respondent answered: "Not at this point, your honor." (TR 12:10)

17. Two days later, Respondent delivered the medical records to the court in a sealed envelope.

18. The court's Judicial Assistant called the doctor's office and learned that the records had been delivered to Respondent's office on October 23, 20 days before the hearing at which Respondent denied any knowledge of the whereabouts of the records. (TR 13:23 through 14:3)

19. The court held a hearing on December 9, 2008, to address Respondent's motions to obtain the school and medical records and an OSC regarding Respondent's candor relating to the medical records.

20. Respondent told Judge Reeves that at the time of the November 12 hearing he did not know that the medical records had been delivered to his office.

21. Respondent also told the judge that he had already subpoenaed and received the minor's middle school records and the minor's mother's school records approximately a year earlier.

22. Respondent told Judge Reeves that he had not looked at the school records because he had simply put them away and had not gotten around to examining them. He denied having looked at the medical records, too.

23. Judge Reeves determined that Respondent violated the Victims' Rights laws and rules (Ariz.Const., Art. III, Sec. 2.1; A.R.S. §13-4401, *et. seq.*; Rule 39, Ariz.R.Crim.P), and the criminal law subpoena statute (A.R.S. §13-4071(D)), by issuing subpoenas for the records without a motion and court order and, in so doing, also violated ERs 3.4(c), 4.4(a) and 8.4(d). (TR 15:4-14)

24. Judge Reeves disqualified Respondent from the case and added that his unethical and improper actions severely prejudiced the defendant. He added that Respondent's actions jeopardized legitimate efforts to obtain the records and may necessitate their preclusion from evidence. Judge Reeves observed that the defendant may be entitled to disclosure of the records and they may also contain exculpatory evidence. Only by the appointment of new counsel could the defendant properly request the records sought without the taint and prejudice that Respondent caused. (TR 18:15-19:4)

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct as set forth above violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.3, 3.1, 3.2, 3.3, 3.4(c), 4.1, 4.4(a), 8.4(c) and 8.4(d). Respondent's

admissions are being tendered in exchange for the form of discipline contained in this agreement. Respondent violated ER 1.3 (diligence and promptness) by failing to file a motion for the victim's school and medical records. Respondent also failed to realize that the victim's medical records had been in Respondent's office for almost 3 weeks before the November 12, 2008 appearance in Judge Reeves' court. (TR 19:7 through 20:16)

Respondent violated ER 3.1 (meritorious claims and contentions) by arguing to Judge Reeves that a subpoena was the same as a motion. (TR 22:12-23)

Respondent violated ER 3.2 (expediting litigation) by not using a motion instead of a subpoena to acquire the victim's school and medical records. Respondent's failure to use the appropriate method led to his disqualification as counsel by Judge Reeves. Respondent's client remained in custody while the client's criminal case was delayed. (TR 23:3 through 24:1)

Respondent violated ER 3.3 (candor toward tribunal) by telling the court that he would file a motion, when in fact he knew that he had simply served a subpoena for the records. At the hearing Respondent stated that when he told the court on November 12, 2008 that he knew nothing about the medical records, Respondent was not lying. However, two days after the hearing Respondent delivered the medical records to the court in a sealed envelope. The records had been delivered to Respondent's office pursuant to the subpoena three weeks before November 12, 2008. Respondent admitted at the hearing that he further violated ER 3.3 by not correcting his November 12, 2008 statement that he knew nothing about the records when two days later he found the records in his office and delivered them to court. (TR 15:21 through 18:14)

Respondent violated ER 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) when he knew that he had issued a subpoena for the records but that the judge was requiring a motion pursuant to the relevant statutes. (TR 24:4-14)

Respondent violated ER 4.1 (truthfulness in statements to others) when in front of others in the court room Respondent told the judge that he had filed a motion for the victim's records and that the motion was the subpoena. The others present would have been the prosecutor and counsel for the victim. (TR 24:15 through 25:6)

Respondent violated ER 4.4(a) (respect for rights of others) when he used methods of obtaining evidence that violated the legal rights of the victim. The proper method for obtaining the school and medical records of the victim was to file a motion with the court. (Arizona Constitution, Article III, Section 2.1; A.R.S. sec. 13-4401, *et seq.*; Rule 39, Arizona Rules of Criminal Procedure and A.R.S. sec. 13-4071 (D)) (TR 25:7-12)

Respondent violated ER 8.4(c) (conduct involving dishonesty) by telling the court that he would file a motion for the records and then using a subpoena. Respondent also violated ER 8.4(c) by telling the judge that he did not know anything about the medical records, then discovering the records two days later and bringing them to court, but failing to correct his statement that he did not have the records. (TR 25:13-19)

Respondent violated ER 8.4(d) (conduct prejudicial to the administration of justice) when he failed to use the correct procedure for obtaining the records. His misconduct led to his disqualification for violating the victim's rights. His client who remained in custody was made to wait a longer time for a resolution of his criminal case.

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. *Standards* 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 Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

In this case there are multiple charges of misconduct. "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. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors." (*Standards, p.7; In re Redekar,* 177 Ariz. 305, 868 P.2d 319 (1994)).

The most serious misconduct is Respondent's lack of candor to the court and other participants in *State v. Santa Cruz*, Yuma County Superior Court Case No. S1400CR200701317. During a court hearing, Respondent falsely told Judge Reeves in open court that he knew nothing about receiving certain medical records that he had subpoenaed when, in fact, he already had received those records in response to a subpoena, in violation of Rule 42, Ariz. R. Sup. Ct., ER 3.3. Respondent also violated the Constitutional and Statutory Victims' Rights of a minor crime victim when he issued and served subpoenas for the medical and school records without first filing a motion for authority to do so and without giving notice of his actions to the minor, her parents or the state, in violation of Rule 42, Ariz. R. Sup. Ct., ER 4.4.

Given the conduct in this matter, the most applicable *Standards* are Standards 6.12 and 6.22 regarding Duties Owed to the Legal System.

6.0 Violations of Duties Owed to the Legal System

Standard 6.12 provides:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Standard 6.22 provides:

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

Based on the conditional admissions, the presumptive sanction for the admitted conduct under the *Standards* is suspension. To determine the applicability of these *Standards* in this case, the factors listed in the theoretical framework must be considered.

The Duty Violated

On the basis of the foregoing, Respondent violated duties owed to the legal system.

Respondent's Mental State

Respondent knowingly told Judge Reeves that he knew nothing about the medical records that in fact he had already subpoenaed and received, and he knowingly violated the minor victim's Victims' Rights. Given the prison time that his client faced, Respondent felt compelled to mount a zealous and aggressive defense. He felt that he had to choose between the Constitutional rights of his client versus those of the victim and he chose his client. He admits that he could have complied with the ethical rules and still mounted an aggressive defense but found himself losing objectivity and his judgment became more subjective for several reasons,

the main one of which owed to the relationship he developed with his client's family and friends. (TR 32:20 through 37:13)

Respondent understood that a subpoena was not a motion. (TR 9:13-19) He was being disingenuous when he argued to the court that the end result of a subpoena was a court order, and the end result of a motion was a court order, and therefore the subpoena could be considered a motion. (TR 8:4-7) Respondent testified, "But I suppose in some strange way I was trying to figure out a way to extricate myself from this situation that I was starting to develop." (TR 9:21-23)

Actual and Potential Injury

As a result of Respondent's conduct, there was actual and potential injury to the client, victim and the court system. Judge Reeves discharged Respondent from representing the client thereby requiring that new counsel represent the client resulting in delay. The victim's rights of privacy were violated. Judge Reeves expressed that the client may have had legitimate grounds to obtain the minor's medical and school records but by obtaining them illegally, Respondent may have tainted the process so much that the records might thereafter not be obtainable.

Aggravation and Mitigation

In deciding what sanction to impose the following aggravating and mitigating circumstances should be considered:

Aggravating Factors:

- *Standard* 9.22(d), multiple offenses (as stated above, Respondent committed several offenses resulting in violations of 9 separate ERs);

- *Standard* 9.22(h), vulnerability of victim (the victims in this matter are a minor crime victim and a criminal defendant);
- *Standard* 9.22(i), substantial experience in the practice of law (Respondent has been an Arizona attorney for 21 years).

Mitigating factors include:

- *Standard* 9.32(a), absence of a prior disciplinary record;
- *Standard* 9.32(b), absence of a dishonest or selfish motive (Respondent's conduct stemmed from his zealousness in protecting his client's rights);
- *Standard* 9.32(d), timely good-faith effort to make restitution or to rectify the consequences of misconduct (within two days of his misrepresentation to the court about the minor victim's subpoenaed medical records, Respondent sealed and delivered the records to the court);
- *Standard* 9.32(e), full and free disclosure to a disciplinary board or cooperative attitude toward proceedings;
- *Standard* 9.32(k), imposition of other penalties or sanctions (Respondent was disqualified from the criminal case);
- *Standard* 9.32(l), remorse. Respondent testified that his conduct has been "embarrassing" and "devastating" and that he will remember this matter for the rest of his life. He felt that this was a "personal defeat" and "a blemish on my record". He stated that he tells young lawyers that their credibility is the most important thing. He realized that his word will now be questioned and that it may take him many years to rebuild his reputation for truthfulness with the court. (TR 40:10 through 42:24) Respondent expressed that he became desperate when the court denied his motion for a reduction in

bond. (TR 43:20 through 44:13) He now realizes that the court would probably have granted Respondent's requests for the victim's records if Respondent had filed a motion for the records. (TR 46:6-10) The Hearing Officer finds that Respondent is genuinely remorseful because Respondent was able to identify specifically the harm he has caused to the victim, to the process, and to his own reputation.

In evaluating the aggravating and mitigating factors, the Hearing Officer agrees with the parties that they do not justify varying from the presumptive sanction of suspension.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

In *In re Freeman*, SB-09-0003-D (2009), a criminal matter, Respondent utilized methods of obtaining evidence that violated the legal rights of the minor victim. Specifically, Respondent served the minor's counselor with a subpoena *duces tecum* to obtain the psychological treatment records without notice to the State, the minor or minor's representative, in violation, ER 4.4(a). There were three factors in aggravation (Standard 9.22(a), prior disciplinary offenses; Standard 9.22(c), pattern of misconduct; and 9.22(i), substantial experience in the practice of law) and two factors in mitigation (Standard 9.32(b), absence of a dishonest or selfish motive; and 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings). The mental

states were knowing and negligent, and there was actual injury. The sanction was censure and two years of Probation (LOMAP/PM/CLE).

In *In re Adelman*, SB-09-0063-D (2009), Respondent filed an unverified disclosure statement and served improper discovery requests and motions, in violation of ERs 1.2, 1.3, 1.4, 3.2, 3.4, 4.4 and 8.4(d). There were two factors in aggravation (Standard 9.22(d), multiple offenses, and Standard 9.22(i), substantial experience in the practice of law) and two factors in mitigation (Standard 9.32(a), absence of a prior disciplinary record and Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings). The mental state was negligent. The sanction was censure and one-year Probation (LOMAP).

In *In re Hentoff*, SB-08-0171-D (2009), Respondent failed to adequately communicate and diligently represent clients. Respondent further failed to comply with court orders in violation of ERs1.2, 1.3, 1.4, 1.16(d), 3.4(c) and 8.4(d). There were three factors in aggravation (Standard 9.22(a), prior disciplinary offenses; Standard 9.22(c), pattern of misconduct; and Standard 9.22(i), substantial experience in the practice of law) and two factors in mitigation (Standard 9.32(b), absence of a dishonest or selfish motive and Standard 9.32(c), personal or emotional problems). The mental state was knowing and there was actual injury. The sanction was a suspension for six months and one day, probation, and restitution.

In *In re Inserra*, SB-08-0166-D (2009), Respondent failed to communicate and diligently represent clients, failed to serve a copy of a Petition for Order to Show Cause, lied to a client about the status of her case, misled the court, and failed to comply with court orders, in violation of ERs1.1, 1.2, 1.2(a), 1.3, 1.4, 1.16(d), 3.2, 3.3, 3.4(c), 4.4(a), 8.4(c), 8.4(d), and Rule 53(c). There were 8 factors in aggravation (Standard 9.22(a), prior disciplinary offenses; Standard 9.22(b), dishonest or selfish motive; Standard 9.22(c), pattern of misconduct; Standard 9.22(d),

multiple offenses; Standard 9.22(g), refusal to acknowledge wrongful nature of conduct; Standard 9.22(h), vulnerability of victim; 9.22(i), substantial experience in the practice of law; and Standard 9.22(j), indifference to making restitution) and one factor in mitigation (Standard 9.32(c), personal or emotional problems). The mental states were knowing and negligent, and there was actual injury. The sanction was a one-year suspension and one year of Probation (LOMAP and MAP).

In *In re Ariav*, SB-09-0056-D (2009), Respondent represented a client in an employment matter and during a private mediation session, Respondent made misrepresentations to the mediator and to the attorney general's office. Respondent further misled the State about the amount of attorney fees incurred, all in violation of ERs 3.3(a)(1), 4.1(a), 8.1(a), 8.4(c), 8.4(d). There were four factors in aggravation (Standard 9.22(b), dishonest or selfish motive; Standard 9.22(e), bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; Standard 9.22(f), submission of false evidence, false statements, or other deceptive practices during the disciplinary process; Standard 9.22(i), substantial experience in the practice of law) and three factors in mitigation (Standard 9.32(a), absence of a prior disciplinary record; Standard 9.32(i), mental disability; Standard 9.32(g), character or reputation). The mental state was knowing and there was actual injury. The sanction was a suspension for six-months and one-day.

In *In re Bracamonte*, 08-1300 (2009), Respondent lied to a judge in open court when he told her he could not attend a hearing beyond 10:00 a.m. because he had a different matter to attend in a different court, in violation of ERs 3.3(a)1, 4.1(a), 8.4(a), (c) and (d), and Rule 41(c), (e) and (g). There were four aggravating factors (Standard 9.22(a), prior disciplinary offenses; Standard 9.22(b), dishonest or selfish motive; Standard 9.22(h), vulnerability of victim; and

Standard 9.22(i), substantial experience in the practice of law), and five factors in mitigation (Standard 9.32(c), personal or emotional problems; Standard 9.32(d), timely good faith effort to make restitution or to rectify consequences of misconduct; Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings; Standard 9.32(k), imposition of other penalties or sanctions; and Standard 9.32(l), remorse). The Mental state was knowing and there was actual injury. The sanction was for a suspension of 30 days with 2 years of Probation (MAP).

Respondent's conduct seems more egregious than *In re Freeman,* a censure case, because it involved not only circumventing the rights of the victim to protect her privacy, but Respondent was not honest with the court. Respondent did not have the prior discipline present in *In re Henotff, In re Inserra, and In re Bracamonte*, suspension cases. But in the two former cases the suspensions were for six months and a day and one year respectively, and the agreed upon sanction in the instant case is for 60 days. In *Bracamonte* the attorney lied to the court about having another hearing in Juvenile Court to get out of a three-hour proceeding in Family Court. However, the court had scheduled the hearing for only one hour and only told the lawyers on the morning of the hearing that the court's calendar had suddenly cleared and three hours were available. This late notice does not excuse the attorney's conduct of lying to the court, but it serves to explain a sanction of a 30 day suspension.

Respondent's conduct was more deliberate than the lawyer in *Bracamonte*. Respondent knew that he had not filed a motion to acquire the victim's records. And he knew months before the court asked him about a motion that he could not use a subpoena to acquire victim's records. Yet he still asserted to the court that he would file a motion. He knew he had not filed a motion and instead he had used a subpoena. When he was asked by the court whether he knew

anything about the victim's medical records he did not give the more appropriate response that he had subpoenaed the records and they might arrive in his office and ask for a recess so that he would check to see if they had arrived. Instead, he said he did not know anything about the records. (TR 13:11-22) His conduct was prejudicial to the victim, his own client and the court. His conduct must be viewed in the context that he was a 21 year lawyer at the time who described himself as having "... defended some fairly high-profile murder cases, capital cases", as well as representing child molesters. (TR 43:21; 46:1)

Perhaps Respondent best summarized what he did and why he did it when he testified, "Yes. And that was another – after twenty years – and I've defended some fairly high-profile murder cases, capital cases. But this one, for some reason, I don't know. And I think one of the reasons was because when we were going to have our bond reduction hearing, release hearing, I asked him and his family to get some letters and get some character letters and let me see how the rest of the community feels about you. My God, they came up with like 50 or 60 letters of people that thought this guy – you know, I felt in my mind that the judge would – knowing Judge Reeves like I do, we have been friends for many years, I thought, he's going to let him out on his own recognizance. And when that didn't happen, I don't know, I'm going, how could that not happen? But what happened, it went through – Well, that was just the beginning of it. I thought, man, there's just no way I can let up. I've just got to --"(TR 43:20 through 44:13) Respondent also stated, "... and I've represented child molesters before, and he doesn't fit. He just doesn't fit the profile in my mind. But again, again – and that's what influenced me." (TR 46:1-4)

Based on the *Standards* and case law, the Hearing Officer agrees with the parties that a 60-day suspension and probation are within the range of appropriate sanctions in this case and will serve the purposes of lawyer discipline. The sanction will serve to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of the bar.

RECOMMENDATION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the Hearing Officer asserts that the objectives of discipline will be met by the imposition of the proposed sanction of a 60-day suspension, probation, and the costs and expenses of these proceedings.

SANCTIONS

The Hearing Officer recommends the following sanctions:

1) Respondent will receive a sixty (60)-day suspension;

2) Respondent will be placed on probation for one year to begin upon reinstatement,[4] the terms of which are as follows:

a. Respondent shall within one year following reinstatement attend a Continuing Legal Education program relating to Victims' Rights; [5]

[4] The Tender of Admissions on page 2 and the Joint Memorandum on page 2 clarify that the parties agreed that the probation would begin upon reinstatement.

[5] The parties agreed in a telephonic conference of December 2, 2009 that the obligation to attend the Victim's Rights CLE should begin within one year of reinstatement, not within one year from the Judgment and Order as the Tender had originally stated.

b. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

c. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.[6]

d. Respondent's probation will end upon furnishing satisfactory proof of his compliance with term 2)a. above.

3) Respondent will pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceedings. An Itemized Statement of Costs and Expenses is attached as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred in this matter by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's Office.

[6] The parties agreed in a telephonic conference of December 2, 2009 that the Hearing Officer could amend the Tender of Admissions to reflect the change in Rule 60 of the Rules of the Supreme Court that the Bar's burden of proof on a probation violation was no longer by clear and convincing evidence, but by a preponderance of the evidence.

DATED this 2nd day of December, 2009.

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

Original filed with the Disciplinary Clerk
this 2nd day of December, 2009.

Copy of the foregoing mailed
this 3 day of December, 2009, to:

Michael T. Telep, Jr.
Respondent
225 W Second Street
Yuma, AZ 85364-2267

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

by: Deann Barker

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Michael T. Telep, Bar No. 011995, Respondent

File No(s). 08-2230

Administrative Expenses

The Board of Governors of the State Bar of Arizona with the consent of the Supreme Court of Arizona approved a schedule of general administrative expenses to be assessed in disciplinary proceedings. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. * An additional fee of 20% of the general administrative expenses will be assessed for each separate file/complainant that exceeds five, where a violation is admitted or proven.

General administrative expenses include, but are not limited to, the following types of expenses incurred or payable by the State Bar of Arizona: administrative time expended by staff bar counsel, paralegals, legal assistants, secretaries, typists, file clerks and messengers; postage charges, telephone costs, normal office supplies, and other expenses normally attributed to office overhead. General administrative expenses do not include such things as travel expenses of State Bar employees, investigator's time, deposition or hearing transcripts, or supplies or items purchased specifically for a particular case.

General Administrative Expenses for above-numbered proceedings = **$1200.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

01/13/09	Review file; Attempt to contact Pam Neal; Call from Pam Neal; Call to Adam Gage; Call to Lori Langley; E-mail to Langley	$52.50
01/14/09	E-mail to Adam Gage; E-mail to Lori Langley	$17.50
01/15/09	E-mail to Kate Pitotti & Sandra Riley	$8.75
01/15/09	Copy of transcript, Sandra Riley	$112.50
01/16/09	Copy of Transcript, Katherine Pitotti	$62.50
01/21/09	Memo to Bar Counsel	$17.50

01/21/09	Copy of proceedings, Adam Gage (Court Reporter)	$70.50
Total for staff investigator charges		$341.75
TOTAL COSTS AND EXPENSES INCURRED		***$1,541.75***

Sandra E. Montoya
Lawyer Regulation Records Manager

9-18-09
Date