

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA

CRAIG A. DECKER,
Bar No. 014391

Respondent.

File Nos. 99-1778, 00-1281

**HEARING OFFICER'S
AMENDED REPORT AND
RECOMMENDATION**

(Assigned to Hearing Officer 9J
Mark S. Sifferman)

This matter having come on for hearing on a Stipulation dated October 25, 2002 and an Evidentiary Hearing held November 12, 2002 (the transcript of which was filed November 27, 2002), the Hearing Officer makes the following findings, conclusions and recommendations:

PROCEDURAL HISTORY

In File No. 99-1778, a Probable Cause Order was filed on March 28, 2000. The State Bar filed a three-count Complaint on April 28, 2000 which was served by mail on May 24, 2000. Respondent filed an Answer on July 21, 2000. Settlement conferences were held on November 14, 2000, January 3, 2001 and February 7, 2001. A hearing was set for March 16, 2001.

In File No. 00-1281, a Probable Cause Order was filed on December 26, 2000. The State Bar filed a three-count Complaint on January 10, 2001 which was served by mail on January 12, 2001. Respondent filed an Answer on February 13, 2001. A settlement conference was set for April 9, 2001.

On March 8, 2001, the State Bar filed a motion to consolidate the matters. On March 14, 2001, the then-assigned Hearing Officer granted the motion and set a hearing for April 25, 2001. A Notice of Appearance for Respondent was filed by Stephen G. Montoya on March 14, 2001. On April 25, 2001, the Hearing Officer was notified that the parties had reached an agreement. The Hearing Officer then filed an Order vacating the April 25th hearing, giving the parties ten days to file their agreement with the Disciplinary Commission.

The parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support for Discipline by Consent ("Joint Memorandum") on June 5, 2001. The Disciplinary Commission heard oral argument on the Agreement and Joint Memorandum on October 13, 2001. On December 12, 2001, the Disciplinary Commission filed its report recommending rejection of the Agreement and Joint Memorandum. On December 12, 2001, the Disciplinary Commission filed an Order Upon Recommendation of Rejection of Agreement for Discipline by Consent.

On April 9, 2002, the Supreme Court filed an order remanding the matter to the hearing officer for further proceedings. The matter was then reassigned to this Hearing Officer on April 15, 2002. On May 13, 2002, Stephen G. Montoya filed a motion to withdraw as counsel for Respondent. After notice to Respondent and after an opportunity for objection by Respondent was provided, the motion was granted on July 5, 2002 without objection.

A hearing by this Hearing Officer was then set for August 1, 2002. The State Bar file a motion to continue the hearing, which was granted and the hearing was reset for October 15, 2002. This Hearing Officer then reset the hearing for October 29, 2002 due to a scheduling conflict of the Hearing Officer. Respondent filed a motion to continue and the hearing was reset a final time to November 12, 2002. Respondent and the State Bar submitted a Stipulation dated October 25, 2002, agreeing that certain facts exist. Based upon the evidence and stipulations presented, the following findings are made:

FINDINGS

1. At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on January 12, 1993. *Stipulation dated October 25, 2002, Stipulated Fact [hereafter "Stipulated Fact"] 1.* Respondent was admitted to practice in the State of California more than twenty years ago. *Transcript of November 12, 2002 Hearing (hereafter "Transcript"), page 58, lines 9 - 19.*

2. Respondent was summarily suspended in Arizona for non-payment of dues on April 28, 2000 and was reinstated on June 5, 2000. Respondent was summarily suspended for noncompliance with Mandatory Continuing Legal Education requirements on June 14, 2000 and was reinstated on August 2, 2000. Respondent was summarily suspended for noncompliance with Mandatory Continuing Legal Education requirements on March 22, 2002 and was reinstated on April 5, 2002.¹

¹ In making this finding, the Hearing Officer takes judicial notice of the records of the Disciplinary Clerk of the Arizona Supreme Court.

**Matter No. 99-1778
(Count One)**

3. Mary C. Watters and Raymond D. Watters ("Watters") filed a *pro se* petition for bankruptcy in July of 1998. *Stipulated Fact 2.*

4. Thereafter, the Watters retained Respondent to provide legal counsel to assist them with respect to the bankruptcy action that they had previously filed *pro se*. *Stipulated Fact 3.*

5. Respondent was initially retained in October 1998, to convert the Chapter 7 bankruptcy case to a Chapter 13 proceeding for the principal purpose of allowing redemption of the Watters' interest in a family owned building which the Chapter 7 Trustee maintained had been omitted from the original Chapter 7 filing, and which had been noticed for sale by the Trustee. *Stipulated Fact 5.*

6. Shortly thereafter, it was determined that conversion to Chapter 13 was not feasible, and the Watters sought to protect their interest through a dismissal of their Chapter 7 case. *Stipulated Fact 6.*

7. The Trustee would not entertain or approve the dismissal of the Chapter 7 case until the Trustee was paid her required fee and the claims of the unsecured creditors were satisfied. *Stipulated Fact 7.*

8. The total of the unsecured creditors' claims and fees exceeded \$13,000.00. To raise these funds, the Watters sought a loan from family members who had an interest in protecting the building from sale by the Trustee. *Stipulated Fact 8.*

9. The payment of the Trustee's fee and the Watters' agreement to satisfy the claims of unsecured creditors were stipulated to by the Watters and the Trustee. These terms were memorialized in an Order of the Bankruptcy Court entered on or about November 27, 1998. *Stipulated Fact 9.*

10. Family members ultimately agreed to provide funding in the amount of \$6,000.00 as a loan secured by an option on the building. *Stipulated Fact 10.*

11. The proceeds of the loan were disbursed directly to Respondent in April, 1999, with the understanding that they would be held in Respondent's trust account and that any unused portion would be returned to the family members who provided the funding. *Stipulated Facts 10 and 11.*

12. There is no evidence that Respondent misused or misappropriated any of the funds entrusted to him. *Stipulated Fact 12.*

13. The fact that the funding made available by family members was less than the amounts being claimed by the creditors required Respondent to contact, negotiate and reach an actual settlement with each of the Watters' unsecured creditors, in order to satisfy the November 27, 1998 Court Order. This factor made the matter much more complicated than originally anticipated. *Stipulated Fact 13.*

14. Respondent was successful in settling with one of the major creditors (Citibank) on or about October of 1999, but the account of the remaining major creditor (First Card) had been sold to a Third Party Creditor which was unable to locate the account upon inquiry by both Respondent and the Watters because they were using an

incorrect account number which appeared on the Watters' bankruptcy forms. *Stipulated Fact 14*. The incorrect account number was the result of the Watters' error, and Respondent had no part in the creation of the error. *Transcript, page 17, line 10 - page 18, line 6*.

15. By October 1999, the Third Party Creditor had been contacted by Respondent and Respondent had made two or three attempts to determine the proper account name and number, all without success. This created a dilemma, preventing the claim from being paid or settled. The clients, the Watters, were made aware of this dilemma. *Stipulated Fact 15*.

16. After the initial contacts in October 1999, Respondent did not contact the Third Party Creditor again until late April 2001 and then again in January 2002, shortly after Bar Counsel suggested to Respondent that the matter needed to be resolved. *Stipulated Fact 16*.

17. Respondent's wife has a history of poor health. In May 1999, she suffered a household injury resulting in extended confinement to bed. Respondent was the primary caregiver to his wife during this time, necessitating Respondent moving his law office into his home. During the balance of 1999, Respondent's attention and time was devoted to the care of his wife and his children, resulting in a lack of attention to his law practice. *Transcript, page 6, line 1 - page 8, line 11; page 30, line 14 - page 32, line 5*.

18. In mid-1999, Respondent did obtain the help of another attorney on a part-time basis to assist Respondent with his legal practice, including follow-up on the

Watters' matter. This assistance, however, proved ineffective at least as to the Watters' matter. There further was no proof that Respondent appropriately monitored the work of the other attorney or ensured that there was follow-up on the matters assigned.

Transcript, page 13, line 11 - page 14, line 17.

19. Respondent contacted the Bankruptcy Trustee in April 2001, explained the inability to resolve the account of the Third Party Creditor and requested that the Trustee stipulate to a court order returning the funds to the Watters' family. The Trustee refused, stating, however, that she would not oppose a Motion to the court provided only that Respondent could demonstrate payment of, or adequate and continuing efforts to pay all creditors. *Stipulated Fact 16.*

20. Respondent's contact with the Third Party Creditor in January 2002 was productive. This time the Third Party Creditor found the account and a settlement was negotiated. *Stipulated Fact 16.*

21. In late January 2002, Respondent wrote the Watters for approval to settle the account as negotiated. The Watters did not respond directly to Respondent to Respondent's letter but let it be known Mrs. Watters did not wish to pay a fee for the work outlined therein. Accordingly, Respondent did not take immediate action to complete the settlement negotiated with the Third Party Creditor. *Stipulated Fact 17.*

22. Shortly thereafter, Respondent's wife became ill again, undergoing heart surgery, which diverted Respondent's attention from the matter for a time. Respondent, by the time of the final hearing in this matter, had resumed his efforts to accomplish the

earlier (January 2002) negotiations. *Stipulated Fact 17; Transcript, page 16, line 18 - page 17, line 9; page 20, line 24 - page 21, line 10.*

23. The matters about which the Watters initially complained occurred between June and September of 1999. The Watters were concerned about the status of the payment to their creditors. The Watters made repeated attempts to obtain a status report from Respondent. Respondent repeatedly failed to respond to their numerous phone calls and written inquiries. *Stipulated Fact 18.*

24. In June of 1999, the Watters specifically requested that Respondent provide them with a billing statement or an accounting with respect to the monies they had advanced. Respondent did not provide the Watters with the accounting or billing statements when requested in June of 1999. *Stipulated Facts 19 and 20.*

25. Respondent continued to have poor communications with the Watters. Respondent refused to return phone calls or returned phone calls only after considerable delay. *Stipulated Fact 20.*

26. Thereafter, Mrs. Watters continued to request that Respondent pay the remaining creditors and provide her an accounting through September of 1999. On September 2, 1999, the Watters went to Respondent's office and learned for the first time that he had moved. No forwarding address was given to the Watters. On or about September 6, 1999, Mrs. Watters filed a complaint with the State Bar of Arizona. *Stipulated Fact 21.*

27. On or about April 13, 2000, Mrs. Watters faxed Respondent a memorandum making yet another request for an accounting or billing statement. At that time, Mrs. Watters also attempted to discharge Respondent and made a request that he return the balance of the money that was being held in trust. *Stipulated Fact 22.*

28. Respondent's failures in 1999 to communicate with the Watters, to provide them with requested documentation and to solve their legal problem are explained by the distractions created by the health problems of Respondent's wife. See *Finding 17 infra.* Respondent's similar failures in 2000 and 2001 are not explained by the health condition of Respondent's wife.

29. Respondent believed he could not return the balance because he had a continuing obligation to hold the funds and use them to pay the remaining creditor pursuant to the November 27, 1998 Court Order. *Stipulated Fact 23.* Yet, Respondent did not petition the Court for instructions or ask the Court to release him from requirements of the Order.

30. Respondent did not return the funds and took few meaningful steps toward resolving the obligation to pay the remaining creditor. Bar Counsel mediated a resolution between Mrs. Watters and Respondent on October 8, 2002. *Stipulated Fact 24.*

31. Just prior to the final hearing in this matter, Respondent disbursed the remaining funds. Respondent reestablished contact with the Third Party Creditor and wrote a letter on October 23, 2002 to that creditor to resolve that claim. *Stipulated Fact 25.*

32. Respondent also provided an accounting to the Watters on or about April 24, 2001. *Stipulated Fact 25.*

33. Respondent failed to act with reasonable diligence and promptness in representing his clients. *Stipulated Fact 26.*

34. This failure to act with reasonable diligence and promptness, however, did not cause tangible economic damage to the Watters. Instead, Respondent's delay resulted in an unintentional benefit to the Watters as the Third Party Creditor was willing to accept a smaller amount in satisfaction of its claim than it would have accepted in the past.

Transcript, page 62, lines 2 - 19.

35. Respondent failed to promptly reply to requests for information and failed to keep his clients reasonably informed about the status of the matter. *Stipulated Fact 27.*

36. Respondent failed to provide a prompt or timely accounting to the clients upon their requests. *Stipulated Fact 28.*

37. Respondent failed to abide by his clients' decisions concerning the objectives of the scope of the representation. *Stipulated Fact 29.*

(Count Two)

38. The Watters filed their bar complaint with the State Bar on or about September 6, 1999. *Stipulated Fact 30.*

39. On or about September 27, 1999, Bar Counsel requested that Respondent respond to the charges in the complaint within twenty (20) days. Respondent did not respond within twenty (20) days. *Stipulated Fact 31.*

40. Bar Counsel then sent another letter to Respondent on or about November 3, 1999, reminding him of the deadline and that his response was overdue and providing him with an additional ten (10) days to respond. Respondent did not respond during that period of extension. *Stipulated Fact 32.*

41. On or about November 30, 1999, Respondent forwarded a letter to Bar Counsel requesting an additional ten (10) days to respond. Bar Counsel granted that request and sent a letter advising Respondent that his response would now be due on or about December 10, 1999. Respondent did not respond by the extended December 10, 1999 deadline. *Stipulated Fact 33.*

42. On or about March 22, 2000, the Probable Cause Panelist signed an order of probable cause. *Stipulated Fact 34.*

43. On or about March 27, 2000, Respondent hand-delivered his response. Thereafter, Bar Counsel sent an additional letter to Respondent, requesting that he provide relevant documents; however, Respondent did not provide those relevant documents promptly or within the timeline requested by the State Bar. *Stipulated Fact 35.*

44. Respondent failed to furnish information or to respond promptly to an inquiry and request from Bar Counsel. *Stipulated Fact 36.*

45. Respondent initially failed to cooperate with the State Bar and comply with the Rules of the Supreme Court regarding lawyer misconduct. *Stipulated Fact 37.*

46. Respondent engaged in conduct which was prejudicial to the administration of justice. *Stipulated Fact 38.*

**Matter No. 00-1281
(Count One)**

47. This count was originally pled after Respondent failed to respond to the allegations made by the Complainant in his initial complaint with the Bar. *Stipulated Fact 40.*

48. Since the filing of the formal Complaint in this matter, the Complainant has withdrawn his Bar complaint and has informed Bar Counsel that he has been paid in full with respect to a contractual obligation he entered into with Respondent. *Stipulated Fact 41.*

49. The State Bar has determined that it would not be able to meet its burden of proving the allegations of this Count by clear and convincing evidence. *Stipulated Fact 42.*

50. That determination, however, it was not made until after the filing of the formal Complaint when the State Bar obtained the further explanation from Respondent and the Complainant. *Stipulated Fact 43.*

(Count Two)

51. On or about June 12, 2000, the Complainant filed a charge with the Bar against Respondent for Respondent's alleged misconduct. *Stipulated Fact 44.*

52. After the filing of the charge, the matter was assigned to staff Bar Counsel who sent correspondence to Respondent on July 10, 2000, advising Respondent of the complaint and directing Respondent to address the allegations in writing. *Stipulated Fact 45.*

53. Respondent did not respond to that letter or the allegations set forth in the initial complaint. *Stipulated Fact 46.*

54. On or about September 6, 2000, Bar Counsel drafted another letter to Respondent referring to his prior letter of July 10, 2000 and again requested a response in ten (10) days. *Stipulated Fact 47.*

55. Respondent did not respond to the September 6, 2000 correspondence from Bar Counsel. *Stipulated Fact 48.*

56. On or about December 26, 2000, the Probable Cause Panelist found probable cause to exist to issue a formal Complaint against Respondent for violation of Rule 42, Ariz.R.S.Ct. Specifically ER 1.8, ER 8.4, and Rules 51(h) and (i). *Stipulated Fact 49.*

57. Respondent engaged in conduct prejudicial to the administration of justice. *Stipulated Fact 50.* While Count One of this Complaint is to be dismissed at the request of the State Bar, that dismissal was based on information and documents provided by Respondent *only after* Respondent neglected to respond to two requests for information from the State Bar and *only after* the filing of a formal Complaint. See *Findings 49, 50*

and 51. Respondent's neglect resulted in the unnecessary use of disciplinary resources and undue delay in resolution of a complaint filed against an attorney.

58. Respondent knowingly failed to respond to a lawful demand for information from a disciplinary authority. *Stipulated Fact 51.*

59. Respondent also failed to furnish information and failed to respond promptly to an inquiry and a request from Bar Counsel. *Stipulated Fact 52.*

60. During the discipline process, Respondent initially refused to cooperate with the staff at the State Bar. *Stipulated Fact 53.*

Prior Discipline
(Count Three of both 99-1778 and 00-1281)

61. Respondent has been previously sanctioned for violation of the Rules of Professional Conduct. Specifically, in File Number 99-1013, Respondent received an Informal Reprimand by Order for violation of Rule 42, Ariz.R.S.Ct., specifically ER 8.1, and of Rules 51(h) and (i), Ariz.R.S.Ct., for failure to respond to Bar Counsel's request for relevant documents. *Stipulated Facts 39 and 54.*

62. In addition, although the following prior discipline was not alleged in the Complaint, Respondent admitted, without objection, that an Order of Censure, Probation and Costs was entered May 16, 2001 in Supreme Court No. SB-01-0099 (D.C. 95-0361, et seq.). *Hearing Exhibit 1.* In that matter, Respondent was found to have violated ER 1.1, 1.2, 1.3, 1.5, 1.15, 4.1(a), 8.1(b), 8.4(d), Supreme Court Rules 43, 44, 51(h), 51(i) and 51(k).

CONCLUSIONS OF LAW

This Hearing Officer finds that there is not clear and convincing evidence to establish a violation of ER 1.1 and ER 1.5, Rule 42, Rules of the Arizona Supreme Court, or of Rule 43(a), Rules of the Arizona Supreme Court, as alleged in Count One in Cause No. 99-1778. The Hearing Officer further finds there is no basis in this record to order restitution other than payment of the costs of the disciplinary process.

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated the following rules:

Count One (99-1778)

1. ER 1.2, Rule 42, Rules of the Arizona Supreme Court, by not consulting sufficiently with the Watters regarding the negotiation and settlement of the outstanding Third Party Creditor's account, and the delays involved in that negotiation and settlement, and in not withdrawing from representation when requested. See *Findings 16, 19 - 21, 23 - 27 and 37 infra*.

2. ER 1.3, Rule 42, Rules of the Arizona Supreme Court, by not diligently and promptly resolving the Watters' account with the outstanding Third Party Creditor or, absent such a resolution, seeking a modification of the conditions attached to dismissal of the Watters' bankruptcy. See *Findings 15, 16, 19, 21, 23 - 27, 30 and 33 infra*.

3. ER 1.4, Rule 42, Rules of the Arizona Supreme Court, by (a) not consulting sufficiently with the Watters regarding the negotiation and settlement of the outstanding Third Party Creditor's account, the delays involved in that negotiation and settlement, and

the Watters' options regarding dismissal of their bankruptcy, and (b) not responding to numerous phone calls and written inquiries from the Watters for status reports, other information, and financial reports. See *Findings 16, 21, 23 - 27, and 35 infra*.

4. ER 1.15(b), Rule 42, Rules of the Arizona Supreme Court, by not promptly resolving the account held by the Third Party Creditor, by not keeping the Watters informed sufficiently regarding the resolution of that creditor's claim, and in not providing a written accounting of the funds held in trust when requested by the Watters. See *Findings 23, 24, 26, 27, 30, and 36 infra*.

5. ER 1.16(a)(3), Rule 42, Rules of the Arizona Supreme Court, by not withdrawing from representation when requested by the Watters. See *Finding 27 infra*.

6. Rule 44(b)(3), Rules of the Arizona Supreme Court, by not providing a written accounting of the funds held in trust when requested by the Watters. See *Findings 24, 25, 26, 27, 32 and 36 infra*.

Count Two (99-1778)

7. ER 8.4(d), Rule 42, Rules of the Arizona Supreme Court, by failing to respond to the State Bar's multiple requests for information and response after the Watters filed their informal complaint. See *Findings 38 - 46 infra*.

8. Rule 51(h), Rules of the Arizona Supreme Court, by failing to respond to the multiple requests for information and response made by Bar Counsel. See *Findings 38 - 46 infra*.

9. Rule 51(i), Rules of the Arizona Supreme Court, by failing to cooperate with Bar Counsel during the initial stages of the Watters' complaint. See *Finding 45 infra*.

Count Two (00-1281)²

10. ER 8.1(b), Rule 42, Rules of the Arizona Supreme Court, by failing to respond to requests for information from disciplinary authorities. See *Findings 51 - 55, 58 - 59 infra*.³

11. ER 8.4(d), Rule 42, Rules of the Arizona Supreme Court, by knowingly failing to respond to requests for information from disciplinary authorities, resulting in the unnecessary use of disciplinary resources and undue delay in resolution of a complaint filed against an attorney. See *Findings 51 - 60 infra*.

12. Rule 51(h), Rules of the Arizona Supreme Court, by knowingly failing to respond to requests for information from disciplinary authorities. See *Findings 51 - 60 infra*.

13. Rule 51(i), Rules of the Arizona Supreme Court, by failing to cooperate with Bar Counsel. See *Finding 60*.

² The State Bar conceded that it could not prove the allegations of Count One of 00-1281 with clear and convincing evidence. See *Finding 49 infra*.

³ The State Bar did not allege a violation of ER 8.1(b), Rule 42, Rules of the Arizona Supreme Court, in Count Two of the Complaint in Cause No. 99-1778. The State Bar did not move to amend that Count of the Complaint in that matter although the evidence clearly established a violation of that rule.

ABA STANDARDS

In imposing a sanction, it is appropriate to consider the facts of the case in light of the American Bar Association's *Standards for Imposing Lawyer Sanctions* (hereafter "Standards" or "Standard"). Matter of Bowen, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). ABA Standard 3.0 provides that four criteria should be considered: (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors.

The predominant mental state of Respondent in committing the violations was negligence. Therefore, the Hearing Officer considered Standards 4.43, 6.23 and 7.3, which call for a censure, in determining the appropriate *presumptive* sanction warranted by Respondent's conduct. Other than the aggravation suffered by the Watters from the unresolved legal issue, they suffered no injury and were exposed to no potential injury from Respondent's conduct (at least the State Bar has not explained what potential injury to the Watters existed). Respondent's failure to provide responses and information to Bar Counsel, however, did cause injury to the legal system by requiring the expenditure of unnecessary disciplinary resources and in delaying the resolution of one of the complaints against Respondent.

The Hearing Officer finds the following aggravating factors: *Standard 9.22(a)*: prior discipline, *Standard 9.22(c)*: pattern of misconduct, *Standard 9.22(d)*: multiple offenses, and *Standard 9.22(i)*: substantial experience in the law.

Of particular importance is Respondent's prior discipline. In the recent past, Respondent has been both informally reprimanded and censured for misconduct similar to the misconduct found in this case. *Standard 8.2* provides that "Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession."

The Hearing Officer finds "substantial experience in the law" as an aggravating circumstance in this case. Respondent has been an attorney for overmore than twenty years, and an Arizona attorney since January, 1993. *Finding 1 infra*. The misconduct in this case is the type of misconduct which is less likely to occur the more experienced the lawyer is, warranting a finding of aggravation. *Matter of Savoy, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995)*.

The Hearing Officer finds four mitigating factors: *Standard 9.32(b)*: absence of a dishonest or selfish motive, *Standard 9.32(c)*: personal or emotional problems, *Standard 9.32(e)*: full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings, and *Standard 9.32(l)*: remorse.

The Hearing Officer notes that while Respondent and the State Bar stipulated to mitigating factors *9.32(e)* and *9.32(l)*, *Transcript, page 54, lines 17 - 24*, little evidence was submitted on these mitigating factors and it is clear Respondent's full disclosure and cooperation came very late, and only after the formal Complaints were filed against him. The Hearing Officer does not believe that Respondent's belated cooperative attitude or

remorse provide much mitigation against the findings of ethical violations in both Count Twos of these consolidated matters. In this regard, the Hearing Officer believes the repeated lack of response to letters and communications from Bar Counsel displays of an extremely serious misapprehension of a Respondent's duty to uphold attorney self-regulation which is vital to the disciplinary system. The Arizona Supreme Court has said that a persistent "failure to cooperate with bar counsel and respond to requests for information from the Bar disciplinary office . . . demonstrates a disregard for the Rules of Professional Conduct and borders on contempt for the legal system." *In re Galusha*, 164 Ariz. 503, 505, 794 P.2d 136, 138 (1990).

The mitigating factor of personal or emotional problems is clear in this record, and weighs, in most cases, would weigh heavily in favor of Respondent a respondent.

Respondent is the primary care giver for his wife who suffers from serious health problems. Those health problems of Respondent's wife clearly have diverted Respondent's attention from the practice of law. *Transcript, page 6, line 1 - page 8, line 11; page 21, line 11 - page 24, line 13; page 30, line 14 - page 32, line 5*. There is no question that Respondent is a devoted husband and father. *Transcript, page 12, line 24 - page 13, line 3*. In addition, Respondent suffers from depression, and is under the care of a psychiatrist and on anti-depressant medication. *Transcript, page 24, line 14 - page 25, line 6; page 26, line 13 - page 30, line 13; page 42, line 22 - page 44, line 23*.

Respondent concedes suffering anxiety when confronted with communications from bar counsel regarding the complaints. *Transcript, page 29, line 3 - page 30, line 13*.

This anxiety results in Respondent freezing, and taking no action. *Id.* While Respondent believes that he does not suffer similar anxiety, with resulting inability to act, in dealing with client issues, this record shows that Respondent is incorrect in his impression.

Transcript, page 29, line 3 - page 30, line 13; page 45, line 22 - page 46, line 11.

Although Respondent believes that he suffers anxiety only when dealing with disciplinary proceedings, it is the Hearing Officer's conclusion that Respondent's depression and anxiety have more wide-ranging effects and pose a danger to clients in future matters.

Respondent has taken some recent steps to prevent future misconduct in the future. Respondent reports that he has decreased his practice by limiting the nature of matters in which he is engaged and decreasing the amount of active cases handled. *Transcript, page 25, lines 13 - 24; page 32, page 6 - page 36, line 4; page 37, line 23 - page 41, line 25.*

Respondent reports to be an active participant in the State Bar's Member Assistance program (MAP) and to have engaged other counsel to substitute in Respondent's place in a number of pending matters. *Transcript, page 24, line 14 - page 25, line 24; page 32, line 20 - page 36, line 4; page 37, line 23 - page 41, line 25.*

Based upon the complete record, including the quality of Respondent's representation of himself in these proceedings, however, this Hearing Officer is not convinced Respondent has taken sufficient remedial measures to protect clients and the public from future misconduct. Although Respondent relied heavily on his wife's medical condition as a mitigating circumstance, Respondent provided only sketchy testimony and documentation regarding his wife's health condition and the effect of her

health condition on Respondent's legal practice. Moreover, although Respondent relied upon his own depression as a mitigating factor, Respondent confessed that he was not familiar with the evidentiary distinctions between the relevant mitigating factors.

Transcript, page 28, lines 7 - 23; page 45, line 6 - page 46, line 13. Respondent moreover provided no acceptable explanation for his failure to obtain any statement or other evidence from his treating psychiatrist. *Transcript, page 45, line 6 - page 46, line 19.*

When the Disciplinary Commission rejected the Agreement for Discipline by Consent filed earlier in this case, the Commission noted that the record then did "not provide proof that Respondent is currently undergoing adequate treatment for depression, and therefore does not provide proof that the public would be protected from future misconduct." *Disciplinary Commission Report, filed December 12, 2001, page 5, lines 13 - 17 (emphasis added).* The Disciplinary Commission noted that any future consent agreement or report should address this issue. *Id., page 5, lines 17 - 18.* Considering the Commission's announced interest in Respondent's current treatment and its effect on Respondent's practice of law, it is extremely troubling to see Respondent's lack of evidence on the point. Based substantially on Respondent's admitted unfamiliarity with the standards for mitigation in this proceeding and Respondent's insufficient presentation of evidence to establish mitigation, the Hearing Officer concludes that Respondent, in representing a client, may fail to determine the applicable legal standards for the client's matter and fail to marshal sufficient evidence to support the client's position. Therefore,

~~it is appropriate that, under these circumstances and under the present conditions, the mitigating factor in Standard 9.32(c) be~~ is given little weight, and ~~that therefore~~ this Hearing Officer believes that a suspension is warranted.

The ABA Standards strongly counsel against suspensions of less than six months. ABA Standards, § 2.3. Considering the aggravating factors, primarily the prior discipline, and faced with evidence that Respondent's personal and emotional problems are not sufficiently under control, this Hearing Officer believes that a six (6) month suspension is warranted. During this time, Respondent, with assistance from MAP, and with assistance from Respondent's psychiatrist, should be in the position to ensure the continued practice of law does not pose a danger of harm to clients.

PROPORTIONALITY REVIEW

The Supreme Court has held that the discipline must be tailored to the individual facts of the particular case. In re Wines, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983); In re Wolfram, 174 Ariz. 49, 58, 847 P.2d 94, 103 (1993). At the same time, the Court has instructed that as sanctions against lawyers must have internal consistency to maintain an effective and enforceable system, cases which are factually similar must be reviewed and compared for proportionality. In re Pappas, 159 Ariz. 516, 526, 768 P.2d 1161, 1171 (1988).

The State Bar suggests as a similar case the decision of In re Pavilack, DC No. 96-0397, SB-98-0075. As noted at the evidentiary hearing in this matter, this Hearing Officer was also the hearing officer in the Pavilack matter. *Transcript, page 46, line 23 -*

page 47, line 6. The Pavilack matter involved lack of diligence on behalf of a client which did not result in injury to the client, coupled with repeated failures to respond to requests for information from bar counsel. Prior discipline was an aggravating circumstance. This Hearing Officer suggested a ninety (90) day suspension with one year of probation. The Commission, over a dissent, imposed a censure with a one (1) year probation.

Considering more recent decisions of the Disciplinary Commission, this Hearing Officer believes that In re Pavilack does not provide the current appropriate measure of proportionality, especially in light of the multiple prior disciplinary sanctions of Respondent and the unresolved anxiety suffered by Respondent when presented with difficult situations. Instead, this Hearing Officer has considered a number of other more recent Disciplinary Commission reports where, under similar circumstances, a suspension ranging from thirty (30) days to six (6) months was imposed. In re Theodore Hansen, DC 98-1918, 98-1921, 98-1989, 98-2159, SB 00-0084; In re Sierra, DC 99-1363, 99-1904, 99-2134, SB 01-0135; In re Wittges, DC 97-0244, 98-1644, SB 00-01075; In re Yates, DC 99-1645, SB 01-0127.

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. In re Fioramonti, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the legal profession and the administration of justice. In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet

another purpose is to instill public confidence in the bar's integrity. Matter of Horwitz, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following:

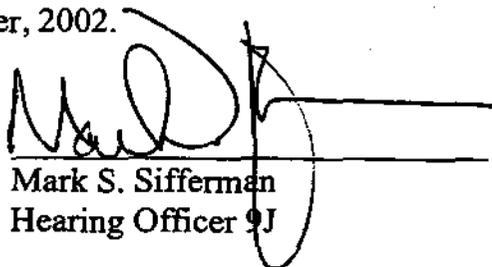
1. That Count One of the Complaint in Matter 00-1281 be dismissed.
2. That, on the Complaint in Matter 99-1778 and on Count Two of the Complaint in Matter 00-1281, Respondent be suspended for six (6) months.
3. That Respondent be ordered to pay the costs and expenses incurred in these disciplinary proceedings.
4. That Respondent be placed on probation, after the service of the suspension, for two (2) years, with the following terms and conditions of probation:
 - a. Respondent shall not commit any ethical violations during the probationary period,
 - b. Respondent shall respond promptly and completely to any bar inquiries or requests for information,
 - c. Respondent shall maintain malpractice insurance,
 - d. Respondent shall continue with psychiatric or psychological treatment as deemed appropriate by his doctor and after consultation with the director of the State Bar Member Assistance Program or his or her designee (hereafter "MAP"),

e. Respondent, at his expenses, shall enter into a contract with MAP for a practice monitor. The practice monitor is to file quarterly reports with the State Bar, setting forth steps which he or she has taken during the reporting period and describing:

1. The status of Respondent's workload; and
2. Any deficiencies observed in Respondent's practice, including but not limited to, any conduct which would be a violation of the Rules of Professional Conduct.

f. If Respondent fails to comply with any of the foregoing conditions of probation, and information thereof is received by the State Bar, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance. The Hearing Officer shall conduct a hearing at the earliest practical date, but in no event less than 30 days following receipt of said notice, to determine whether the conditions of probation have been breached and, if so, to recommend appropriate action and response to such breach. If there is an allegation that Respondent has failed to comply with any of the foregoing conditions, the burden of proof thereof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

DATED this 31st day of December, 2002.


Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this 2nd
day of January, 2003, to:

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A handwritten signature in cursive script, reading "Judy Darling", is written over a horizontal line.