

1 claim lost was clearly erroneous. *See* Report, p.4:4. The client's testimony regarding fees
2 that he paid to Respondent is vague, and the actual value of the client's claim is not clear
3 from the record. *See* hearing transcript dated December 17, 2003, pp. 29-37. The
4 Commission concluded that based on the testimony provided, the value of the claim is
5 speculative, and the Complainant may seek other means of compensation for its value. *See*
6 *Matter of Murphy* 188 Ariz. 375, 936 P.2d 1269 (1997), which held that consequences such
7 as monetary damages and restitution are best left to the civil courts in fact intense disputes.
8 Restitution through the attorney discipline system should not be a substitute for a
9 malpractice action.

10 The Commission determined that the Hearing Officer's finding that in File No. 03-
11 0245,² he recommended a six month and one day suspension for improprieties similar to
12 those in this case was clearly erroneous. *See* Report, Findings of Fact, Count Two (Prior
13 Discipline) p. 5. Although the Hearing Officer's statement of fact is accurate, his
14 consideration of the underlying matter as prior discipline was clearly erroneous because the
15 matter was still pending at the time the Hearing Officer's Report was filed. Additionally, in
16 determining an appropriate sanction, the Hearing Officer erroneously considered
17 Respondent's pending discipline in File No. 03-0245 in aggravation, and also in his
18 proportionality analysis of the discipline imposed in analogous cases. *See* Report, p. 7 and
19 p. 11. A Final Judgment and Order was not issued in File 03-0245 until May 27, 2004. The
20 record reflects that Respondent received a censure in September of 2002 for violating ER
21 5.5. The Commission concluded that the Hearing Officer appropriately considered this
22 previous offense in aggravation as prior discipline.
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² The Hearing Officer inadvertently referenced File No. 01-0245.

1 The Hearing Officer found that by knowingly failing to respond to a lawful demand
2 for information from a disciplinary authority in File No. 03-0245, Respondent violated ER
3 8.1(b). *See Report, Conclusions Of Law p. 5.* As previously stated, it was inappropriate to
4 consider the pending matter as prior discipline. Furthermore, the State Bar conceded at oral
5 argument that this finding was in error, as a violation of ER 8.1(b) was not charged in the
6 formal Complaint. *See Commission transcript, p. 12.*

7 The Hearing Officer found that by engaging in conduct involving dishonesty, fraud
8 and misrepresentation, Respondent violated ER 8.4(c). *See Report, Conclusions of Law, p.*
9 *6.* The State Bar acknowledged at oral argument that although a violation of ER 8.4(c) was
10 charged in the formal Complaint and deemed admitted by default, the violation is not
11 supported by the facts. *See Commission transcript, p. 11.*

12 The Hearing Officer found that by engaging in conduct prejudicial to the
13 administrative of justice in Cause Number CR200200612, Respondent violated ER 8.4(d).
14 Cause Number CR200200612 involves the criminal action in Respondent's pending
15 discipline, File No. 03-0245. *See Report, p. 6.* Again, the pending discipline matter was not
16 final and was erroneously considered by the Hearing Officer. As a result, the Commission
17 determined that a violation of ER 8.4(d) is not supported by the record.
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19 Lastly, the Hearing Officer concluded that by failing to furnish information to an
20 inquiry or request in File No. 03-0245, Respondent violated SCR 51(h). *Id* at p. 6. The
21 Commission however, believes that this reference to File No. 03-0245 is a typographical
22 error and should read File No. 03-0779. *Id* at p. 6. The State Bar acknowledged the
23 typographical error at oral argument. *See Commission transcript, p. 12.* The Commission
24 therefore concluded that the record in this instant matter supports a violation of SCR 51(h).
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1 The Commission agreed with the Hearing Officer that clear and convincing evidence
is present for the remaining violations of ER 1.1, 1.3, 1.4 and SCR 51(h).

2 In applying the *Standards*, the Supreme Court considers the duty violated, the
3 lawyer's mental state, the actual or potential injury caused by the misconduct, and the
4 existence of aggravating and mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d
5 1335, 1345 (1989) and *Standard 3.0*.

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7 The Hearing Officer found that Respondent knew or should have known that his
8 failure to comply with the Court order of disclosure would result in Mr. Klingsat's case
9 being dismissed and that disbarment was the presumptive sanction for a lack of diligence
10 and applied ABA *Standard 4.41*. See Report, p.7. The Commission determined that
11 *Standard 4.42* Violation of Duties Owed to Clients involving a lack of diligence is more
12 applicable to the misconduct at hand. *Standard 4.42(a)* provides that:

13
14 (a) Suspension is generally appropriate when a lawyer
15 knowing fails to perform services for a client and causes
injury or potential injury.

16 The Commission determined that suspension is the presumptive sanction for a knowing
17 failure to perform services and causing injury to clients.

18 The Commission then reviewed the aggravating and mitigating factors to assist in
19 determining the appropriate sanction. The Commission determined that the Hearing
20 Officer's finding that aggravating factors 9.22(b) selfish or dishonest motive is present in the
21 record was clearly erroneous. See Report, p. 8. Case law has established that a dishonest or
22 selfish motive reflects intent and not conduct. See *In re Shannon*, 179 Ariz. At 69, 876 P.2d
23 at 565; and involves deliberate misrepresentations and financial gain. See *In re Arrick*, 180
24 Ariz. At 143, 882 P.2d at 950. The Commission determined that the facts as stated do not
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1 support the presence of aggravating factor 9.22(b) selfish or dishonest motive and therefore,
2 rejects that factor.

3 The Hearing Officer found that Respondent failed to acknowledge the wrongful
4 nature of his conduct, aggravating factor 9.22(g). See Report, p. 8. The Commission
5 determined that a failure to participate in the disciplinary process does not establish that
6 Respondent failed to admit or acknowledge his transgressions.

7 The Hearing Officer conversely found that Respondent expressed remorse at having
8 caused his client's case to be dismissed with prejudice, mitigation factor 9.32(l). See Report,
9 p 4 and p. 8. The Commission determined that these findings are inconsistent, which further
10 supports rejection of aggravating factor 9.22(g). The Commission determined however that
11 mitigating factor 9.32(l) remorse is supported by the record.

12 Lastly, the Supreme Court has held that sanctions against lawyers must have internal
13 consistency to maintain an effective and enforceable system; therefore, the court looks to
14 cases that are factually similar to the case before it. *Matter of Pappas*, 159 Ariz. 516, 526,
15 768 P. 2d 1161, 1171 (1988). A proportionality analysis of previous cases offered by the
16 State Bar involving client neglect and a failure to cooperate supports a two-year suspension.
17 The Commission concluded that the prior imposition of a censure for unrelated conduct does
18 not warrant a longer suspension.
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20 Therefore, having found that none of the remaining findings of fact are clearly
21 erroneous, the Commission recommends adopting and incorporating by reference the
22 Hearing Officer's remaining findings of fact and conclusions of law.
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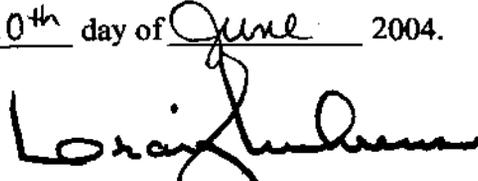
24 Conclusion

25 As the Court has indicated, the purpose of lawyer discipline is to protect the public,
26 the profession, and the administration of justice, not to punish the offender. *In re Neville*,

147 Ariz. 106, 708 P.2d 1297 (1985). After consideration of the facts, *Standards*,
1 aggravating factors and mitigating factors, a proportionality analysis, the Commission
2 recommends modifying the Hearing Officer's recommended sanction to reflect a two-year
3 suspension and restitution to client Wilfred Klingsat in the amount of \$1,000.00.

4 by the absence of these factors.

5 RESPECTFULLY SUBMITTED this 10th day of June 2004.

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9 Craig B. Mehrens, Chair
Disciplinary Commission

10 Original filed with the Disciplinary Clerk
11 this 10th day of June, 2004.

12 Copy of the foregoing mailed
13 this 10th day of June, 2004, to:

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