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JAN 14 2004
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

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

STEPHEN M. JOHNSON,
Bar No. 015831,

RESPONDENT.

No. 03-0346

**HEARING OFFICER'S
REPORT AND
RECOMMENDATION**

PROCEDURAL HISTORY

1. There was no formal complaint filed with respect to the underlying facts contained in this agreement.
2. The parties have come to an agreement without the filing of a complaint or determination of probable cause.
3. On December 23, 2003, the parties submitted a Tender of Admissions and Agreement For Discipline by Consent and Joint Memorandum in Support of Agreement for Discipline by Consent.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October, 22, 1994.
2. Respondent is currently suspended from the practice of law in Arizona.
3. There was no formal complaint filed with respect to the underlying facts contained in this agreement.

COUNT ONE (03-0346)

4. On or about May 14, 2002, Respondent was appointed by the Maricopa County Superior Court to represent Rosendo Rodriguez in *State of Arizona v. Rosendo Rodriguez, Jr.* Specifically, Respondent was to file a petition for post-conviction relief on behalf of Mr.

1 Rodriguez.

2 5. The Court ordered that Respondent file a petition on or before July 12, 2002.
3 Respondent did not file a petition for Mr. Rodriguez on or before July 12, 2002.

4 6. By order dated July 31, 2002, the Court ordered Respondent to file a petition for
5 post-conviction relief by August 30, 2002. Respondent filed a petition for post-conviction
6 relief on behalf of Mr. Rodriguez on August 29, 2002.

7 7. On or about February 20, 2003, Mr. Rodriguez filed a complaint against
8 Respondent with the State Bar of Arizona. He claimed that Respondent failed to adequately
9 communicate with him during the course of the representation and that Respondent was not
10 diligent in the representation.

11 8. By letter dated March 4, 2003, Respondent was advised that Mr. Rodriguez had
12 made allegations concerning his professional conduct. The State Bar requested a written
13 explanation from Respondent.

14 9. By letter dated March 24, 2003, Respondent provided a response to the State Bar
15 concerning the allegations raised by Mr. Rodriguez.

16 10. Respondent indicated in his response that he did adequately communicate with
17 Mr. Rodriguez during the representation. Respondent included a copy of a letter dated May
18 17, 2002, which was purportedly sent to Mr. Rodriguez upon Respondent's appointment to
19 the case.

20 11. Mr. Rodriguez was provided a copy of Respondent's response to the bar
21 complaint.

22 12. Mr. Rodriguez wrote the State Bar and advised that Respondent's letter of May
23 17, 2002 was fabricated. Mr. Rodriguez indicated that the address on the letter dated May
24 17, 2002 was his current address and not his address on May 17, 2002.

25 13. The Arizona Department of Corrections Central Records Department confirmed
26 that from January 2002 through July 8, 2002, Mr. Rodriguez was housed in Florence,
27 Arizona, not Yuma, Arizona, as indicated on Respondent's May 17, 2002, letter.

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1 14. By letter dated June 3, 2003, the State Bar forwarded Mr. Rodriguez's reply to
2 Respondent. Respondent was asked to explain why the State Bar should not conclude that
3 his letter dated May 17, 2002, was fabricated in an attempt to support his response to Mr.
4 Rodriguez's bar complaint.

5 15. By letter dated June 5, 2003, Respondent advised the State Bar that he fabricated
6 the letter dated May 17, 2002.

7 **COUNT TWO (Prior Discipline)**

8 16. Respondent was previously sanctioned for a violation of the Rules of Professional
9 Conduct. In file number 99-2005, Respondent received an informal reprimand by order
10 dated May 25, 2000, for violations of Rule 42, Ariz. R. S. Ct., specifically, ER 1.15 and ER
11 8.1(b), and Rules 43 and 44, 51(h) and (i), Ariz. R. S. Ct..

12 17. Respondent has recently been sanctioned for violations of the Rules of
13 Professional Conduct. In file numbers 00-1856, et.al., Respondent was suspended from the
14 practice of law for six months and one day by Supreme Court Order dated September 11,
15 2003, for violations of Rule 42, Ariz. R. S. Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER
16 1.15(b), ER 1.16(d), ER 8.1(b), and ER 8.4(c) and (d), and Rule 51(h) and (i).

17 **CONCLUSIONS OF LAW**

18 1. Respondent's conduct violated ER 8.1(a), Ariz. R. S. Ct.

19 2. Applicable aggravating factors as recognized in the American Bar Association's
20 *Standards for Imposing Lawyer Sanctions* (1991 ed.) [hereinafter, *Standards*], § 9.22, are as
21 follows:

22 a. Respondent has a significant prior disciplinary record. Standard 9.22(a).
23 In May 2000, Respondent received an informal reprimand for violations of Rule 42, Ariz.
24 R. S. Ct., specifically, ER 1.15 and ER 8.1(b), and Rules 43 and 44, 51(h) and (i), Ariz. R.
25 S. Ct.. In September 2003, Respondent was suspended from the practice of law for six
26 months and one day for violations of Rule 42, Ariz. R. S. Ct., specifically, ER 1.2, ER 1.3,
27 ER 1.4, ER 1.15(b), ER 1.16(d), ER 8.1(b), ER 8.4(c) and (d), Rule 51(h) and (i).

28 b. Respondent's conduct was dishonest. Respondent knowingly fabricated a

1 document for submission with his response to a bar complaint in an effort to deceive bar
2 counsel and support the details of his response. Standard 9.22(b) and 9.22(f).

3 c. Respondent has been practicing law for nine years and is aware that there
4 is no greater responsibility of an officer of the court than to be truthful. Standard 9.22(i).

5 3. Applicable mitigating factors as recognized in the *Standards*, § 9.32, are:

6 a. Respondent's candor after being confronted with the discrepancy in his letter
7 of May 17, 2002, was a good faith effort to rectify the consequences of his earlier actions.
8 Standard 9.32(d).

9 b. Respondent also expressed in his letter to bar counsel that he regretted his
10 conduct and further explained the circumstances surrounding his decision to provide the
11 fabricated letter to the State Bar. Standard 9.32(l).

12 Discussion of ABA's Standards

13 Lawyer discipline is imposed not to punish the lawyer but to protect the public and
14 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).
15 It is important to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz.
16 20, 29, 881 P.2d 352, 261 (1994). There is also a concomitant responsibility to show
17 fairness to the Respondent. *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001).

18 To determine the appropriate sanction, the facts of the case, the *Standards*, and the
19 proportionality of discipline imposed in analogous cases should be considered. *Matter of*
20 *Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). The ABA's *Standards* require that
21 the following criteria be considered: (a) the duty violated; (b) the lawyer's mental state; (c)
22 actual or potential injury; and (d) aggravating and mitigating factors. Neither the nature of
23 the lawyer's practice nor the effect on the lawyer's livelihood are considered. *In re Shannon*,
24 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994). Discipline must be tailored to the facts of each
25 case. *In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993).

26 Given the conduct in this matter, it was appropriate to consider Standard 7.0.
27 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a

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1 violation of a duty owed as a professional, and causes injury or potential injury to a client,
2 the public or the legal system. Standard 7.2. Respondent admits that he knowingly
3 fabricated a document to support his response to a bar complaint. Such conduct diminishes
4 the integrity of the profession. Maintaining the integrity of the profession is a duty owed as
5 a professional. See *Standards*, at 5. The Supreme Court expects and demands candor in
6 disciplinary proceedings. *In re Varbel*, 182 Ariz. 451, 454, 897 P.2d 1337, 1340 (1995).
7 Respondent's conduct is addressed by Standard 7.2.

8 A review of all of the applicable standards requires the conclusion that suspension is
9 the appropriate sanction.

10 Proportionality Analysis

11 Discipline in each case must be tailored to the individual case. *Matter of Riley*, 142
12 Ariz. 604, 615 (1984). Review of similar cases reveals the following:

13 In *Matter of Moak*, 205 Ariz. 351, 71 P.3d 343 (2003), the lawyer was suspended for
14 six months and one day. Moak was the subject of a three-count complaint. The most serious
15 misconduct in the complaint involved his representation of a client in a personal injury case.
16 Moak knowingly failed to disclose critical information that misled the defendants, the judge
17 and the jury. Moak's conduct violated ER 3.3, ER 4.1, ER 8.4(c) and ER 8.4(d). The Court
18 considered four aggravating factors - he acted with a selfish and dishonest motive, engaged
19 in a pattern of misconduct, engaged in multiple offenses and had substantial experience in
20 the practice of law. Additionally, the Court considered four mitigating factors as well - he
21 had no prior discipline, he fully cooperated in the disciplinary process, he was the subject
22 of other sanctions and penalties and expressed remorse.

23 Although Moak did not involve a misrepresentation to the State Bar, the Court
24 considered the appropriate sanction for deceptive behavior. In concluding that a sanction of
25 six months and one day was an appropriate sanction, the Court gave great weight to the fact
26 that Moak's conduct demonstrated a pattern and that he engaged in other serious misconduct.
27 "The Court views a continuing pattern of misconduct as calling for a lengthy suspension."

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1 Id., ¶ 30, 71 P.3d at 348 (2003). The Court considered the arguments of both parties, who
2 supported a suspension of less than six months and one day. Both parties argued to the Court
3 that Moak's remorse and repayment to the injured parties sufficiently demonstrated
4 rehabilitation, thereby negating any need for a hearing to determine rehabilitation. The Court
5 rejected those arguments and found that Moak had serious ethical deficiencies and proof of
6 rehabilitation was required.

7 The instant case is limited in that it does not readily demonstrate any pattern of
8 misconduct as was found in Moak. However, when Respondent fabricated the letter for
9 submission to the State Bar, he had already recently engaged in the conduct that resulted in
10 a six month and one day suspension order of September 11, 2003. Much like Moak,
11 Respondent's conduct demonstrates serious ethical deficiencies that should require proof of
12 rehabilitation.

13 In *Matter of Vargas*, SB97-0021-D (1997), Vargas was suspended for one year and
14 ordered to a term of probation upon reinstatement. In a stipulated set of facts, Vargas
15 admitted multiple ethical violations, including that he was not truthful in his response to the
16 State Bar during its investigation. Vargas lied about his failure to return government
17 credentials upon his resignation as an assistant United States attorney. Vargas also lied about
18 having created a false memo and persuading an administrative assistant to prepare and
19 backdate a memo stating that Vargas had returned the government credentials.

20 Vargas subsequently admitted that he was not truthful. Vargas ultimately cooperated
21 with the State Bar and provided truthful responses. Vargas offered extensive mitigation,
22 including a good reputation in the community, acknowledgment that his conduct was
23 wrongful, remorse, no prior disciplinary record and the imposition of other sanctions and
24 penalties. The aggravating factors considered were multiple offenses and submission of false
25 evidence.

26 As part of the analysis, the Disciplinary Commission cited Standard 7.2. Vargas's
27 false statements to the State Bar during its investigation of the charges violated his duty to
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1 the legal profession and indicated a disregard and complete lack of respect for the
2 disciplinary system.

3 The Disciplinary Commission considered a range of cases from a censure to a
4 multiple-year suspension. It concluded that in the cases involving multiple-year suspensions,
5 the deception was more substantial and pervasive, generally involving ongoing
6 misrepresentations. Vargas, on the other hand, corrected his untruthful statements prior to
7 the hearing in the disciplinary process. The Disciplinary Commission believed that even
8 after ethical violations were compounded by untruthfulness to the State Bar, there should be
9 incentives to voluntarily correct the errors.

10 The instant case is more similar to Vargas, in that the actual misconduct involved a
11 misrepresentation to the State Bar during its investigation of the bar complaint.
12 Respondent's deception was isolated to the creation of one document and, once confronted,
13 Respondent admitted his conduct. Respondent did not make multiple misrepresentations that
14 were perpetuated for any length of time.

15 Although Respondent's conduct warrants a demonstration of rehabilitation, it does
16 not warrant a longer term suspension based on the specific facts of the case.

17 The cited cases evaluate deceptive conduct and establish that the recommended
18 sanction is appropriate given the facts of this case. This agreement provides for a sanction
19 that meets the goals of the disciplinary system. A suspension of six months and one day
20 requires a reinstatement proceeding, in which Respondent will have to establish
21 rehabilitation and fitness to practice law prior to being reinstated. This agreement would
22 protect the public, instill public confidence in the bar, deter other lawyers from engaging in
23 similar conduct, and maintain the integrity of the legal profession.

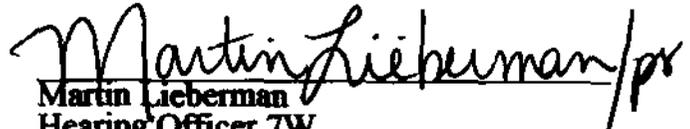
24 Discussion of Appropriate Sanction

25 As noted above, suspension is the appropriate sanction for Respondent's conduct.
26 Suspension is the only sanction consistent with the ABA's *Standards*, the analogous cases,
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1 the protection of the public, the deterrence of future misconduct, and maintaining the
2 public's trust in the integrity of the bar as a profession.

3 Based upon a proportionality review, the ABA's *Standards*, and the weight of the
4 aggravating and mitigating circumstances, it is recommended that Respondent be suspended
5 for a period of six months and one day and that respondent be assessed the costs of these
6 disciplinary proceedings. Accordingly, it is recommended that the agreement be accepted.

7 DATED this 14th day of January, 2004.

8 
9 Martin Lieberman
Hearing Officer 7W

10 Original filed with the Disciplinary Clerk
11 this 14th day of January, 2004.

12 Copy of the foregoing mailed
13 this 14th day of January, 2004, to:

14 **Maret Vessella**
15 **Deputy Chief Bar Counsel**
16 **State Bar of Arizona**
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18 **Phoenix, AZ 85003**

19 **Stephen G. Montoya**
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21 **3200 North Central Avenue, Suite 2550**
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23 by: K. Weigand
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