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DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

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3 IN THE MATTER OF A MEMBER) No. 03-1278
4 OF THE STATE BAR OF ARIZONA,)
5 **HOLLY R. GIESZL,**)
6 **Bar No. 013845**) **DISCIPLINARY COMMISSION**
7) **REPORT**
8)
9) **RESPONDENT.**)
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This matter came before the Disciplinary Commission of the Supreme Court of Arizona on September 10, 2005, pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed May 19, 2005 recommending that the Complaint be dismissed, the matter be remanded to the Probable Cause Panelist with instructions to vacate the Probable Cause Order and refer the matter for Diversion with the State Bar's Member Assistance Program (MAP). The State Bar filed an objection and the matter was set for oral argument. Respondent, Respondent's Counsel and Counsel for the State Bar were present.

The State Bar argues that the Hearing Officer erred in finding that Respondent's mental health lessened her obligations under the ethical rules by serving as a defense to the misconduct; erred by finding Respondent did not violate Ethical Rule (ER) 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation); erred by considering the effect of possible sanctions on the Respondent; and, that a suspension no less than one year is appropriate.

Respondent argues the Hearing Officer properly found that the State Bar failed to prove by clear and convincing evidence all of the essential elements (*mens rea*) required to

1 prove a violation of the rules charged in the Complaint.¹ She contends that her mental
2 illness negated the state of mind element of the Professional Rules of Conduct that requires
3 proof of knowing or intentional behavior.

4 Respondent further argues the Hearing Officer correctly applied the *Standards*
5 corresponding to ER 8.4(c), which, by its terms, requires intent to deceive. Respondent
6 contends the Hearing Officer properly considered the purposes of attorney discipline and the
7 system's duty to show fairness to Respondent. Finally, Respondent asserts that because her
8 conduct was the product of mental illness and therefore negligent, the Hearing Officer
9 properly recommended diversion.

10 Decision

11 The eight² members of the Disciplinary Commission by a majority of six,³ adopt the
12 majority of the Hearing Officer's findings of fact and conclusions of law with some
13 exceptions, and modifies *de novo* the recommended sanction based upon the Commission's
14 proportionality review.

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16 The Disciplinary Commission applies a clearly erroneous standard to the Hearing
17 Officer's findings and conclusions regarding Respondent's mental state, whether ER 8.4(c)
18 (conduct involving dishonesty, fraud, deceit or misrepresentation) was violated, and whether
19 it is appropriate to consider the effect on Respondent in determining the appropriate
20 sanction.

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22 The Commission recommends *de novo* a one year suspension, two years of probation
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24 ¹ The Complaint alleged violations of ERs 1.1, 1.2, 1.3, 1.4(a), 1.7(b), 1.8, 4.1(a), 4.4, 8.4(c) and (d).
25 ² Commissioners Gutierrez and Nelson did not participate in these proceedings. Former
26 Commissioner Maria Hoffman participated as a public ad hoc member. Former Commissioner and
ad hoc member Jack L. Potts, M.D., recused.
³ Commissioners Atwood and Baran were opposed and determined that a shorter suspension was
appropriate based on the strength of the mitigating factors.

upon reinstatement (MAP), and costs of these disciplinary proceedings.

Discussion

The Disciplinary Commission's standard of review is set forth in Rule 58(b), which states that it applies a clearly erroneous standard to findings and reviews questions of law *de novo*. The Commission historically gives great deference to the Hearing Officer's Report and recommendation. *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989).

The Commission, as well as the Hearing Officer, found clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically ERs 1.3, 1.4(a) and 1.7(b). Respondent failed to act with reasonable diligence and promptness in representing her client, failed to keep her client reasonably informed about the status of the matter and to promptly comply with reasonable requests for information, and failed to recognize a conflict of interest and advise the client to seek independent legal advice.

The Hearing Officer, however, did not find clear and convincing evidence of ERs 1.1, 1.2, 1.8, 4.1(a), 4.4, 8.4(c) or 8.4(d). The State Bar has appealed the Hearing Officer's finding and conclusion that there was no violation of ER 8.4(c).

The Hearing Officer's findings of fact are briefly summarized as follows:

Respondent represented a client in a personal injury matter and allowed the statute of limitations to run on the claim. Respondent repeatedly misrepresented the status of the matter to the client. Respondent further misrepresented to the client that the matter was successfully settled. Respondent then compounded her misconduct by preparing fraudulent settlement documents.

The record supports that Respondent engaged in a series of dishonest actions that led to the Complaint, including:

1 Respondent told the client that she had spoken with opposing counsel about
2 mediation, that the underlying defendant (the party alleged to be liable for the client's
3 injuries) did not dispute the client's story or injuries, and the underlying defendant wanted to
4 settle the client's case. The Hearing Officer found that these responses were misleading.
5 *See* Hearing Officer's Report, p. 20 ¶ 50.

6 Respondent told the client she had been in touch with opposing counsel and had
7 passed on information about the client's medical bills. This was "not correct" because she
8 had not been in recent contact with counsel and had not delivered the medical bills as
9 represented. *Id.* at 25 ¶ 64.

10 After learning that the underlying defendant would assert the statute of limitations,
11 Respondent mentioned to the client that there was a problem with the statute of limitations,
12 but that there was a misunderstanding and something could be worked out. *Id.* at 26 ¶ 69.

13 After learning that the underlying defendant would not negotiate or settle the case,
14 Respondent continued to tell the client that she was still communicating with the opposing
15 party in order to settle the claim. The statements, according to the findings of the Hearing
16 Officer, were "misleading and outright untruths. Respondent was consciously aware that
17 what she was saying was not accurate." *Id.* at 27 ¶ 73.

18 On October 25, 2003, Respondent informed the client that there was a settlement
19 offer of \$30,000 when there was no such offer. *Id.* at 27 ¶ 74.

20 On November 7, 2002, Respondent told the client that she believed the underlying
21 defendant would settle for \$40,000, and, after the contingency fee was deducted, the client
22 would receive \$27,000. *Id.* at 27 ¶ 75.

23 On November 12, 2002, Respondent told the client that her case had settled for
24 \$46,000, when there was no settlement. *Id.* at 27 ¶ 76.

1 Even knowing there had not actually been a settlement, Respondent prepared a
2 release document which she e-mailed to the client reflecting the non-existent settlement.⁴

3 *Id.* at 28 ¶ 77.

4 Respondent created a letter dated November 14, 2002, to Timothy Pieters at Legends
5 Claim Service confirming settlement of the case for \$46,000. She did not send it to anyone.

6 *Id.* at 28 ¶ 79-80.

7 Respondent called the client a number of times to attempt to convince her to sign the
8 fictitious settlement agreement. *Id.* at 28 ¶ 82.

9 The client asked for a copy of her file, and while Respondent provided part of the
10 file, she did not provide a copy of the complete file. *Id.* at 30 ¶ 89.

11 Respondent does not dispute that she misled the client into believing that she had
12 successfully settled the matter when she knew or should have known that the claim was no
13 longer viable and that no settlement with the underlying defendant had been or would be
14 achieved. *Id.* at 30 ¶ 94.

15 Based on these findings of fact, the Disciplinary Commission determined that the
16 Hearing Officer erroneously concluded that Respondent did not violate ER 8.4(c) (conduct
17 involving dishonesty, deceit, fraud and misrepresentations).

18 In determining the appropriate sanction, our Supreme Court considers the ABA
19 *Standards for Imposing Lawyer Sanctions* (“*Standards*”) a suitable guideline. *In re Kaplan*,
20 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Disciplinary Commission
21 are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney
22 discipline. In imposing a sanction after a finding of misconduct, consideration is given to
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26 ⁴ The release document not only released the underlying defendant, but also the Respondent and her
law firm from any liability.

1 the duty violated, the lawyer's mental state, the actual or potential injury caused by the
2 misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0.*

3 Absent aggravating or mitigating circumstances, upon application of the factors set
4 forth in *Standard 3.0*, the following is generally appropriate in cases where the lawyer has
5 engaged in fraud, deceit, or misrepresentation directed toward a client, ER 8.4(c):

6 *Standard 4.61* Lack of Candor provides that:

7 Disbarment is generally appropriate when a lawyer **knowingly**
8 **deceives a client with the intent to benefit the lawyer or**
9 **another, and causes serious or potentially serious injury to a**
10 **client.**

11 The Hearing Officer found that Respondent knowingly deceived the client into thinking her
12 claim was viable and that there was a settlement offer. *See* Hearing Officer's Report, p. 27 ¶
13 73 and ¶ 74. The client was fully compensated by the settlement of the malpractice lawsuit.
14 *Id.*, at 37 ¶ 131. The record supports that Respondent's acts were materially limited by her
15 own interests. *Id.*, at 40.

16 The record also supports that Respondent's misconduct involving the fabrication of
17 settlement documents and misrepresentations to the client was to achieve a particular benefit
18 or goal of protecting herself from humiliation and out of fear of losing her job.

19 The Supreme Court of Arizona in *In re Clark* (207 Ariz. 414, 417, 87 P.3d 827, 830
20 (2004) held that a violation of ER 8.4(c) requires behavior that is "knowing or intentional
21 and purposely deceives or involves dishonesty or fraud." The Hearing Officer correctly
22 made findings of fact that the conduct was "knowing" based on the medical experts'
23 testimony.

24 "Knowingly" is defined as "actual knowledge of the fact in question." ER 1.0(f),
25 Rule 42, Ariz. R. S. Ct. *See also Matter of Arrick*, 180 Ariz. 136, 139, 882 P.2d 943, 946
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1 (1994). “Intentionally” means the conscious objective or purpose to accomplish a particular
2 result.” “Thus, while the initial misconduct may not have been intentional, [due to
3 alcoholism] the subsequent attempt to deceive Mrs. E was clearly *intended* to achieve that
4 result.” *Id.* at 140.

5 In the instant matter, there was knowing dishonesty with the clear purpose to deceive
6 the client into believing there had been a settlement. The treating physician’s testimony
7 makes it clear that Respondent knew she was engaging in the acts in question and that they
8 were lies designed to achieve a goal. Again, any findings that this was merely “negligent”
9 or that intent was negated by depression were clearly erroneous.

10 The Hearing Officer correctly found that the medical evidence establishes that the
11 acts of misconduct committed by Respondent were “knowing” in the sense that Respondent
12 was conscious of her acts. However, he erroneously concluded that they were “acts which
13 were impulsive, and committed without regard as to whether they were right or wrong.” *See*
14 *Hearing Officer’s Report*, p. 33 ¶ 108.

15 The Hearing Officer erroneously concluded that Respondent’s “[a]cts of misconduct,
16 including the misrepresentations were the product of mental disorders. Respondent’s
17 conduct was not intentionally wrongful, to the extent that state of mind requires a conscious
18 objective to accomplish a wrongful result.” *Id.* at ¶ 109.

19 The Hearing Officer erroneously concluded, based on his findings of fact, that
20 “Respondent’s state of mind, however, was negligent. The uncontradicted un rebutted
21 medical evidence compels the conclusion that Respondent’s acts were the product of her
22 mental illness, and, at most, her actions were negligent.” *Id.* at 41:10-12. The Hearing
23 Officer also made the following erroneous conclusion: “To commit a violation of ER 8.4(c),
24 an attorney must have a purpose to deceive. The uncontradicted, un rebutted medical
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evidence compels the conclusion that Respondent's acts were the product of her mental illness, and her mental illness negates the intent necessary to find a violation of ER 8.4(c)."

Id. at 43.

The testimony of the mental health experts does not say that Respondent's mental state was "negligent", as stated by the Hearing Officer. The word "negligent" does not appear even once in the entire transcript of the hearing. Three medical professionals all testified that Respondent was aware of her deception, and if she told a lie, she knew it was a lie. The Hearing Officer recognized that dishonesty, deceit and avoidance are not clinical symptoms of depression, although these behaviors can be expected from depressed attorneys. *Id.* at 33 ¶ 111, and 47, n.23.

Dr. Mark Wellek, Respondent's treating physician, testified that Respondent was not *M'Naghten* insane and knew the difference between right and wrong. If Respondent told a lie, she knew it was a lie. If Respondent fabricated a document, she knew she was fabricating a document. If Respondent told her client a case had settled, she understood that was a lie. *See* Hearing Transcript, Volume I, dated March 14, 2005 at 183-184. Respondent was conscious of her effort. Her efforts had a particular goal to protect herself from humiliation. *Id.* at 188.

Dr. Wellek further testified that Respondent's acts were irrational, but not accidental; they were deliberate acts to serve a goal. *Id.* at 190. "With limited energy and judgment, and in an attempt to hide her shameful behavior (missing a time deadline) and avoid public humiliation, she impulsively lied to protect her then fragile sense of self, trying to maintain some vestige of pride which she could sense was ebbing away." *See* Respondent's Exhibit J, Dr. Wellek's Report, p. 2.

1 Dr. Michael Sucher testified that Respondent was not delusional. At the time the
2 event occurred, she was severely depressed and probably did not appreciate the
3 wrongfulness of the act. The acts were voluntary, although she was in an impaired state.
4 *See* Hearing Transcript Volume II, dated March 16, 2005 at 314.

5 Dr. Jack Potts testified that Respondent's behavior was the product of her mental
6 disorder; but for her mental illness, this would not have occurred. *Id.* at 425. However,
7 Respondent knew she was performing the acts she did. When she wrote a letter that
8 documented a settlement that did not exist, Respondent knew what she was doing. Whether
9 she knew the wrongfulness is debatable, according to Dr. Potts. *Id.* at 434. Respondent
10 knew what she was doing. *Id.* at 435.

11 The Disciplinary Commission, having concluded that disbarment is the presumptive
12 sanction, reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors respectively,
13 to determine if a reduction of the presumptive sanction is justified.

14 The Hearing Officer found no aggravating factors in the record. The Commission
15 disagrees and finds *de novo* aggravating factor 9.22(i) substantial experience in the practice
16 of law. The Hearing Officer erroneously rejected this stipulated fact. *See* Hearing Officer's
17 Report, p. 37:24. Respondent was admitted to practice law in Arizona on October 26, 1991.
18 An experienced attorney knows that it is improper to draft an agreement asking a client to
19 waive any liability claims in an effort to insulate themselves and their lawfirm.
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21 In addition, the Hearing Officer erroneously concluded that aggravating factor
22 9.22(b) dishonest or selfish motive, did not apply and, respectively, found that mitigating
23 factor 9.32(b) absence of a dishonest motive is present. *See* Hearing Officer's Report, p. 36
24 at ¶ 124 and pp. 37-38. The Commission disagrees and determines that aggravating factor
25 9.22(b) dishonest or selfish motive is supported by the record. The evidence shows that
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1 Respondent lied and fabricated settlement documents to protect herself and to achieve a
2 particular goal. Respondent wanted to avoid public humiliation. See Hearing Transcript
3 Volume I, dated March 14, 2004, pp. 169, 183, and 188, and Respondent's Exhibit J, Dr.
4 Wellek's Report, p. 2. She also acted out of fear of losing her job. Respondent's supervisor,
5 attorney Michael Kimerer, testified that once she could no longer carry on with deceiving
6 her client, her immediate concern was whether she would be fired:

7 "She indicated that there was a very serious problem with the
8 Stangle case. She was very concerned, she was very contrite,
9 talked about you know, are you going to fire me right now, or
10 let me go and she wanted to see me." See Hearing Transcript,
11 Volume II, dated March 16, 2005, pp. 262-263.

12 Therefore, the aggravating factor of dishonest or selfish motive is present and the mitigating
13 factor of absence of dishonest or selfish motive is not.

14 The Commission agrees with the Hearing Officer that mitigating factors 9.32(a)
15 absence of a prior disciplinary record, 9.32(c) personal or emotional problems, 9.32 (d)
16 timely good faith effort to make restitution or to rectify consequences of misconduct, 9.32(e)
17 full and free disclosure to disciplinary board or cooperative attitude toward proceedings,
18 9.32(g) character or reputation, and 9.32(i) mental disability are present.

19 However, the Hearing Officer erroneously concluded that Respondent's mental
20 health lessened her obligations under the Ethical Rules by serving as a defense to the
21 misconduct.

22 Legal precedent has established that a mental illness is not a complete defense to
23 misconduct in disciplinary proceedings. It does not bar the imposition of significant
24 discipline⁵ but is more appropriately considered in mitigation. If causation is established, it

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26 ⁵ *In re Hoover I*, 155 Ariz. 192, 198-199, 745 P.2d 939, 945-946 (1987) and *In re Hoover II*, 161
Ariz. 529, 779 P.2d 1268 (1989).

1 should be given great weight. See 1992 Amendments to the ABA Standards, 9.3 Mitigation,
2 Commentary to 9.32. Given the significant mitigating factors present, the Commission
3 determined that a reduction in the presumptive sanction of disbarment to suspension is
4 justified.

5 To have an effective system of professional sanctions, there must be internal
6 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
7 similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*,
8 135, Ariz. 203, 207 (1983)). Sanctions have been imposed in the past on attorneys who
9 were *M'Naghten* insane in order to instill confidence in the disciplinary system and deter
10 other lawyers. See *In re Hoover II*, 161 Ariz. 529, 779 P.2d 1268 (1989).

11 The Commission found the precedents of *Hoover II*, *Id.* and *In re Riches*, 179 Ariz.
12 212, 877 P.2d 785 (1989), most instructive in determining the appropriate length of
13 suspension to be imposed.

14 In *Riches*, the respondent regularly misappropriated funds belonging to his law firm
15 over a five year period in violation of ERs 8.4(b) and (c). An Agreement for a three year
16 retroactive suspension was imposed. What was most instructive was that Riches was
17 diagnosed as *M'Naghten* insane due to bipolar disorder. It was determined that Riches did
18 not know the nature and quality of many of his acts and was unable to differentiate between
19 right and wrong. Riches' mental state was considered a mitigating factor – not a defense to
20 the misconduct – and the presumptive sanction of disbarment was reduced to a three year
21 suspension.

22 In *Hoover II*, *supra*, the respondent misappropriated substantial sums from his client
23 and fraudulently billed for personal expenses. A six month suspension and six months of
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1 probation was imposed for violating DR 1-102(A) (1), (4) and (6). Hoover's bipolar
2 condition, like Riches, was treated as a mitigating factor and not as a defense. The Supreme
3 Court of Arizona held that "when an attorney suffers from a mental disturbance such that he
4 cannot perceive reality at all or lives in a fantasy world totally divorced from reality, the
5 mental condition *may* be a complete defense to bar discipline." It was determined that
6 Hoover should be sanctioned because he "knew he was taking trust monies and showed
7 some creativity in concealing his actions from easy discovery." *Supra* at 532, note 5. This
8 is an apt description of Respondent's deception in this case.

9 Respondent's dishonest conduct is as serious as the acts committed by Riches and
10 Hoover. Her mental impairment is less than theirs. The record establishes knowing
11 violations. The sanction for her misconduct should fall within the range between the six
12 month suspension Hoover received and the three years Riches received.

13 The Commission finds that the Hearing Officer erroneously considered the effect a
14 sanction could have on Respondent.⁶ See Hearing Officer's Report, p. 35 ¶ 116 and p. 49:2.

15 The Supreme Court of Arizona in *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
16 (1994) held that the effects of sanctions upon a respondent's practice and livelihood shall
17 not be considered. The Court *In re Scholl*, 200 Ariz. 22, 224 ¶ 10, 25 P.3d 710, 712 ¶ 10
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21 ⁶ Dr. Wellek testified that any formal sanction imposed against Respondent would injure what good
22 feelings Respondent has about herself and injure what they have worked hard to build back up. It
23 would be hurtful to her and not useful. See Hearing Transcript, Volume I, dated March 14, 2004, pp.
24 176-177.

25 Dr. Wellek further testified that in May 2002, although Respondent was overtly depressed and
26 anxious, she initially did not indicate a willingness to obtain treatment for her mental illness as
recommended, but that in November 2002, because of a huge error in not meeting a deadline in her
practice, she returned to see Dr. Wellek and an antidepressant was prescribed. Respondent did not
return again until eleven months later in October 2003. See Hearing Transcript, Volume I, pp. 161-
162, 180-182, 192, 195, 211, 214. Dr. Wellek stated that when Respondent returned on October 14,
2003, she was taking the prescribed medication but was still depressed and in need of psychotherapy.
See Respondent's Exhibit J, Dr. Wellek's Report, p. 2.

1 (2001), and most recently in *In re Alcorn and Feola*, 202 Ariz. 62, 74, ¶ 41, 41 P.3d 600,
2 612 ¶ 41(2002) held that “the Court will not be swayed by the character of the offending
3 attorney’s practice, the impact of the sanctions upon the attorney’s livelihood, or the
4 resulting degree of any psychological pain experienced by the attorney.”

5 Additionally, *In re Alcorn and Feola, supra* at ¶ 48 also held that “perhaps more
6 important than rehabilitation of an individual attorney is the value of discipline as a deterrent
7 to other attorneys and as a process that maintains the integrity of the profession.” These are
8 primary purposes of discipline.

9 Lastly, the Hearing Officer erroneously concluded that Diversion was appropriate.
10 *See* Hearing Officer’s Report, pp. 47-51.

11 The Commission believes it is important to impose sanctions proportional to
12 sanctions imposed in analogous cases. Diversion programs have advanced considerably in
13 the last decade, and diversion is often a worthwhile alternative to discipline in matters
14 involving *minor* misconduct and little injury occurring. But given the nature and
15 seriousness of Respondent’s misconduct and the evidence relating to her mental state, the
16 Commission believes it must apply the precedent set forth in *Hoover II* and *Riches, supra*,
17 and, therefore, concludes that a term of suspension requiring formal reinstatement
18 proceedings pursuant to Rule 72, Ariz. R. S. Ct., is proportional and warranted.
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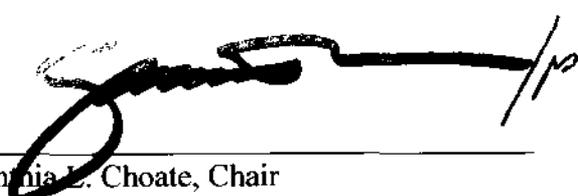
20 Conclusion

21 One purpose of lawyer discipline is to deter the respondent and other attorneys from
22 engaging in similar unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982).
23 Another purpose is to instill public confidence in the bar’s integrity. *Matter of Horwitz*, 180
24 Ariz. 20, 29, 881 P.2d, 352, 362 (1994). In addition, the sanction that we impose must help
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maintain the integrity of the legal system. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).

Therefore, based on the findings and conclusions, application of the *Standards* and a proportionality analysis, the Disciplinary Commission recommends a one year suspension, two years of probation upon reinstatement (MAP), and costs.

RESPECTFULLY SUBMITTED this 21st day of October, 2005.


Cynthia L. Choate, Chair
Disciplinary Commission

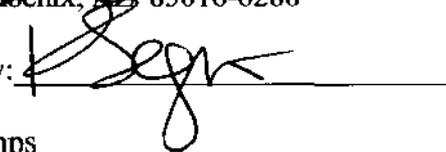
Original filed with the Disciplinary Clerk
this 21st day of October, 2005.

Copy of the foregoing mailed
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