

Bruce G. Macdonald
State Bar No. 010355
1670 E. River Road #200
Tucson, Arizona 85718
(520) 624-0126

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

IN THE MATTER OF A MEMBER) No. 03-1957
OF THE STATE BAR OF ARIZONA,))
)
PAUL S. BANALES) HEARING OFFICER REPORT
Bar No. 004313))
)
Respondent.))

I. PROCEDURAL HISTORY

On April, 16, 2004, State Bar of Arizona Probable Cause Panelist, Jimmie D. Smith, filed a Probable Cause Order finding that probable cause existed to issue a complaint against Respondent for violations of Rule 42, Ariz. R.S.Ct., including but not limited to ERs 3.4(a) and 8.4(d).

The State Bar of Arizona filed the Complaint against the Respondent on September 30, 2004. Respondent, through his attorney, accepted service of process of the Complaint on October 6, 2004.

The matter was assigned to Hearing Officer 9Q, Steven M. Friedman, on October 7, 2004. On October 15, 2004, the State Bar, pursuant to Rule

1 50(d)(2), Ariz.R.S.Ct., filed a Motion for Transfer as a Matter of Right
2 requesting that the matter be transferred to a different hearing officer.
3

4 On October 19, 2004, the matter was reassigned to Hearing Officer 7X,
5 John Pressley Todd.

6 Respondent filed his Answer to the Complaint on October 19, 2004.

7 On October 21, 2004, this matter was assigned to Settlement Officer 7G,
8 Jerry Bernstein, for the sole purpose of facilitating a settlement of the case.
9

10 This matter was then reassigned to this Hearing Officer on October 28,
11 2004. The Initial Case Management Conference was held on November 3,
12 2004.
13

14 The Settlement Conference took place on November 9, 2004. The parties
15 were unable to reach a settlement.

16 On December 14, 2004, the Respondent filed a Motion for a Bifurcated
17 Hearing, requesting first to have a hearing to determine whether an ethical rule
18 was violated and then have a second hearing to determine the appropriate
19 sanction, if it was determined that an ethical rule was violated. The State Bar
20 did not oppose the Motion to Bifurcate. The motion was denied by an Order
21 filed on January 14, 2005.
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1 Pursuant to Stipulation, an Order was filed on January 20, 2005,
2 substituting Alan D. Bond in the place of Stephen I. Dokken as attorney for
3 Respondent.
4

5 A hearing on the merits took place in front of this hearing officer on
6 January 27 and January 28, 2005.
7

8 II. FINDINGS OF FACT

9 1. At all times relevant hereto, Respondent was an attorney licensed to
10 practice law in the State of Arizona, having been admitted to practice in Arizona
11 on October 11, 1975. (Respondent's Answer ¶ 1)
12

13 2. From 1999 through 2002, Respondent was a full time Superior Court judge
14 presiding over criminal matters as well as juvenile cases. (January 27 Transcript
15 pg. 101-102)
16

17 3. Respondent has considerable knowledge and experience in the area of
18 criminal law. (January 27 Transcript pg. 102, lines 2-4; January 28 Transcript
19 pgs. 93-94)
20

21 4. On June 4, 2003, Steven Doane was indicted in CR20031722 on five
22 counts including fraudulent schemes and artifice, forgery and theft by control
23 and/or misrepresentation and/or by controlling stolen property. (Exhibit 14;
24 January 27 Transcript pg. 103)
25

1 5. The fraudulent scheme and artifice charge involved Wells Fargo Bank.
2 (Exhibit 14; January 27 Transcript pg. 103; lines 14-18)

3
4 6. On or about July 21, 2003, Steve Doane retained Respondent to represent
5 him in a pending indictment CR20031722 for fraudulent schemes or artifice,
6 forgery and theft by control and/or misrepresentation. (Respondent's Answer ¶ 2;
7 January 27 Transcript pg. 102; lines 5-12)

8
9 7. In July 2003, when Respondent commenced representation of Steven
10 Doane, Respondent knew that Doane had previously been convicted of fraud,
11 forgery, theft and fraudulent schemes and artifice. (Exhibit 14; January 27
12 Transcript pg. 104; lines 19-25, pg. 105; lines 1-4)

13
14 8. On July 29, 2003, check no. 95, from the account of David Doane, was
15 made payable to Respondent's firm in the amount of \$1,500.00. (Respondent's
16 Answer ¶ 3; January 27 Transcript pg. 106; lines 10-24)

17
18 9. On July 29, 2003, Respondent came into possession of a check no. 95,
19 made payable to Palmisano, Reinhardt and Associates in the amount of
20 \$1,500.00. (Respondent's Answer ¶ 4; January 27 Transcript pg. 106)

21
22 10. When Respondent came into possession of check no. 95, he could see that
23 the check was from a Wells Fargo account in the name of David Doane, Steven
24 Doane's brother. (January 27 Transcript pg. 106, lines 14-16; pg. 112, lines 20-
25

1 25; pg. 113, lines 1-2; Exhibit 3 bates stamp 000009; Exhibit 13; bates stamp
2 000115)

3
4 11. On the afternoon of August 4, 2003, Detective Riesgo from the Tucson
5 Police Department Fraud Unit contacted Respondent by telephone. (January 28
6 Transcript pg. 110; lines 4-20, Exhibit 13, bates stamped 000065-000068)

7
8 12. Detective Riesgo advised Respondent that while executing a search warrant
9 at the home of Nicole Ramirez, she found a check register on a Wells Fargo bank
10 account. The bank account was for David Doane. (Exhibit 13, bates stamped
11 000066; lines 9-27; January 28 Transcript pgs. 7-11; pg. 111)

12
13 13. Detective Riesgo also confirmed with Respondent that check no. 95 was
14 made payable to Respondent's law firm, Palmisano, Reinhardt and Associates.
15 (January 28 Transcript pg. 12; lines 10-18; Exhibit 13, bates stamped 000066,
16 lines 33-41)

17
18 14. Detective Riesgo advised Respondent that check no. 95 was from "David
19 Doane's account that was opened fraudulently by Steven Doane." (Exhibit 13,
20 bates stamped 000067, lines 1-3; January 28 Transcript pg. 13, lines 4-9; January
21 27 Transcript pg. 112 lines 7-11)

22
23 15. Detective Riesgo then advised Respondent that if he had the check
24 available, she was going to need to it as evidence. (January 28 Transcript pg. 13;
25 lines 4-9; Exhibit 13, bates stamped 000067, lines 12-14)

1 16. In response to Detective Riesgo's request for the check, Respondent,
2 advised several times during his phone call that he did not accept the check in
3 question. (Exhibit 13, bates stamped 000067, lines 17, 21-22, 25, 30; bates
4 stamped 000068, lines 1-5; January 28 Transcript pg. 13; pg. 14 lines 13-15)

6 17. When Respondent told Detective Riesgo that he did not accept the check,
7 she understood him to be telling her that he did not have physical possession of
8 the check. (January 28 Transcript pg. 14, lines 1-9; pg. 20; lines 15-25; pg. 23,
9 lines 9-12)

11 18. Respondent told Detective Riesgo that he believed that the check had
12 already been torn up. (January 28 Transcript pg. 97, lines 5-8.

14 19. Detective Riesgo told Respondent she was making sure that "we didn't
15 have another victim" (referring to Respondent's law firm). (Exhibit 13, bates
16 stamped 000067, lines 27-30)

18 20. Respondent knew on August 4, 2003, based on his conversation with
19 Detective Riesgo, that David Doane was a potential victim of identity theft.
20 (January 28 Transcript pg. 119, lines 13-25; pg. 120, lines 1-7)

21 21. Immediately following the phone conversation with Detective Riesgo,
22 Respondent phoned his assistant, Karen Rascon, and asked her to tear up check
23 no. 95 and to "just get rid of it" for him. (January 28 Transcript pg. 65, lines 12-
24 25; pg. 66, lines 1-8)

1 22. Upon Respondent's instruction, Ms. Rascon retrieved check no. 95 from
2 Steven Doane's file and tore it into pieces. (January 28 Transcript pg. 54, lines 1-
3 2; pg. 55, lines 1-8)
4

5 23. Ms. Rascon was later advised by Kim Davis, in the Tempe office of
6 Respondent's law firm, that she had spoken with a detective from the Tucson
7 Police department and Ms. Davis advised Ms. Rascon to retrieve the pieces of
8 check no. 95. (Transcript pg. 55, lines 22-25; pg. 56, lines 1-7)
9

10 24. At or about 4:00 pm on August 4, 2003, Detective Butierrez contacted the
11 law office of Palmisano, Reinhardt and Associates. Detective Butierrez spoke
12 with Alan Bond, a lawyer with Palmisano, Reinhardt and Associates. Detective
13 Butierrez advised Mr. Bond that she believed Respondent had contacted Karen
14 Rascon and had her tear up check no. 95. Detective Butierrez advised Mr. Bond
15 that they needed that check, or the remnants of the check if the check had already
16 been torn into pieces. (Exhibit 13, bates stamped 000087, lines 31-33)
17
18

19 25. Respondent was made aware that the Tucson Police detectives wanted
20 check no. 95 or the remnants of that check. (Transcript pg. 86, lines 20-25; pg.
21 87, lines 1-6)
22

23 26. At approximately 5:30 pm on August 4, 2003, Detective Judy Augustine
24 in the Tucson Police Department Fraud Unit was dispatched to the offices of
25 Palmisano, Reinhardt and Associates. She advised Respondent that the Tucson

1 Police Department was attempting to obtain a search warrant. (January 27
2 Transcript pg. 17; Exhibit 13 bates stamp 000054)

3
4 27. While Detective Augustine was present in Respondent's office,
5 Respondent's demeanor was friendly and social. Respondent told Detective
6 Augustine that it was not necessary to obtain a search warrant because he would
7 provide the records the detectives needed. (January 27 Transcript pg. 19, lines
8 21-25; pg. 20, lines 6-12; pg. 37, lines 17-21; Exhibit 13 bates stamp 000054)
9

10 28. On the evening of August 4, 2003, Lieutenant Kelly Lane learned that the
11 Tucson Police Department was attempting to obtain a search warrant for the law
12 offices of Palmisano, Reinhardt and Associates. Lieutenant Lane went to the law
13 office to maintain the security of the location. Detective Augustine was already
14 present when he arrived at Respondent's office. (Exhibit 13, bates stamp 000054;
15 January 27 Transcript pgs. 34-35)
16

17
18 29. When Lieutenant Lane arrived at the law office he advised Respondent that
19 there was a criminal investigation underway regarding Steven Doane and that the
20 Tucson Police were seeking checks that were made payable to Respondent and
21 that those checks were of evidentiary value to the police. (January 27 Transcript
22 pg. 34, lines 12-25; pg. 35, lines 1-4; pg. 36, lines 22-25; pg. 37, lines 1-16)
23
24
25

1 30. While Detective Augustine and Lieutenant Lane were in Respondent's
2 office, Respondent never specifically advised that check no. 95 had already been
3 torn into pieces. (January 27 Transcript, pg. 26, lines 2-5; pg. 41, lines 11-18)
4

5 31. The longer the detectives were in Respondent's office, the more agitated
6 Respondent became. (Exhibit 13, bates stamp 000054, January 27 Transcript pgs.
7 21-22)
8

9 32. Respondent was anxious to leave his office the evening of August 4, 2003,
10 as he had a dinner appointment with his family that included his granddaughter.
11 (Respondent's Answer ¶ 6; January 27 Transcript pg. 21, lines 11-14)
12

13 33. On the evening of August 4, 2003, Respondent informed the detectives that
14 he "would not destroy or do away with the check" until they could obtain a search
15 warrant the following day. (Exhibit 4, bates stamp 000011)
16

17 34. The Tucson detectives detained Respondent in his office for three hours
18 while attempting to obtain the search warrant. Ultimately, the detectives were not
19 able to secure a warrant and Respondent was permitted to leave his office.
20 (Respondent's Answer ¶ 7 and ¶ 8)
21

22 35. On August 8, 2003 Steve Doane was indicted on a 16-count indictment in
23 CR20032563. The indictment included several counts of fraud and theft,
24 including identity theft. The identity theft involved Steve Doane's brother, David
25 Doane, as the victim. (Respondent's Answer ¶ 9; Exhibit 15)

1 36. By letter dated August 8, 2003, Captain Mike Garigan, of the Tucson
2 Police Department, informed Respondent that the police wanted him to turn over
3 check no. 95. (Exhibit 5, bates stamp 000013; Respondent's Answer ¶ 10)
4

5 37. In his letter to Respondent Captain Garigan stated "This agency has reason
6 to believe that you are in possession of a check which is evidence in an ongoing
7 criminal investigation". (Exhibit 5, bates stamp 000013; Respondent's Answer
8 ¶ 11)
9

10 38. On August 11, 2003, Respondent spoke with Joe Buescher and Mr.
11 Buescher told Respondent that "new charges were coming down on Steven
12 Doane, some of which consisted of identity theft." (January 28 Transcript pg. 76,
13 lines 7-11)
14

15 39. Mr. Buescher was the assigned Deputy County Attorney responsible for
16 prosecuting all of the various indictments pending against Steve Doane.
17

18 40. On August 18, 2003, Respondent appeared on behalf of Steve Doane at the
19 arraignment in the case involving the identity theft of David Doane.
20 (Respondent's Answer ¶ 15)
21

22 41. On August 18, 2003, Respondent knew that Steven Doane was indicted, in
23 part, for the identity theft of his brother, David Doane. (January 28 Transcript pg.
24 76, lines 12-14)
25

1 42. On August 18, 2003, Respondent was still in possession of check no. 95
2 written on the account of David Doane. (January 28 Transcript pg. 76, lines 12-
3 19; pg. 123, lines 14-18)
4

5 43. At all relevant times hereto, Respondent did not know the exact condition
6 of check no. 95. (January 28 Transcript pg. 70, lines 9-14)
7

8 44. On or about August 19, 2003, Respondent gave Monica Valenzuela an
9 envelope that contained check no. 95. Respondent asked Ms. Valenzuela to “put
10 it in safekeeping” for him. (January 27 Transcript pg. 61 lines 1-3; January 28
11 Transcript pg. 70, lines 24-25; pg. 71, lines 1-2; pg. 74, lines 17-19)
12

13 45. Ms. Valenzuela took the envelope to her residence and placed it in a locked
14 drawer. (January 27 Transcript pg. 63, lines 15-19)
15

16 46. By letter dated August 27, 2003, Respondent informed Captain Garigan
17 that he would not give the check to the police. In his letter Respondent stated
18 that,

19 “Notwithstanding my avowal that I would not destroy or
20 do away with the check, personnel from the Tucson Police
21 Department detained me in my office one evening after
22 work several weeks ago, causing me to miss a dinner
23 appointment with my family and granddaughter. After
24 unsuccessfully attempting to obtain a search warrant for 3
25 hours, the Detectives finally gave up and allowed me to go
home. Since my avowal was not accepted at the time, it is
withdrawn and I will dispose of the check in the manner I
deem appropriate.”

(Respondent’s Answer ¶ 16; Exhibit 4 bates stamp 000011)

1 47. Respondent knew that on August 27, 2003, check no. 95 was still in
2 existence. (January 28 Transcript pg. 84, lines 13-17; Exhibit 4, Bates stamp
3 000011)

4
5 48. On or after August 27, 2003, Respondent directed Ms. Valenzuela to
6 dispose of the envelope he had earlier given her. (January 28 Transcript pg. 85,
7 lines 18-20)

8
9 49. On September 8, 2003 the Pima County Prosecutor's Office filed a Motion
10 to Compel Respondent to turn over check no. 95 to the State. (Exhibit 2, bates
11 stamp 000002-000007)

12
13 50. Despite still being counsel of record for Mr. Doane, Respondent failed to
14 file a written response to the State's Motion to Compel Production of check
15 no. 95. (January 28 Transcript pg. 35, lines 1-2; pg. 77, lines 24-25; pg. 78, line
16 1; pg. 79 lines 23-25; pg. 80 line 1)

17
18 51. On September 29, 2003, during the hearing on the Motion to Compel,
19 Respondent advised the judge that he had destroyed the check on or about
20 August 27, 2003. (Respondent's Answer ¶ 19; Exhibit 6 bates stamp 000028)

21
22 52. At the Motion to Compel Hearing Respondent testified:

23 *They kept me in my office from six in the evening till nine at night. I*
24 *had a dinner appointment with my family. My family includes my*
25 *granddaughter. I made my avowal that I would keep the check, they*
did not accept that. They were not able to get a warrant for three
hours, Judge. They finally let me go home. The next day, they called,
asked me if I would save the check. I said, well, you had your

1 *chance...I don't have to keep the check. It was not evidence in any*
2 *existing case, Judge. It would be one thing if they were looking for*
3 *evidence in a pending prosecution. This check was not a part of any*
4 *pending prosecution. I was free to do whatever I wanted to do with*
5 *it. It's gone. It's not in existence anymore.*

(Respondent's Answer ¶ 20; Exhibit 6 bates stamp 000022)

6 53. In response to the judge's inquiry regarding whether the check was a
7 particularly cumbersome item to hang on to, Respondent replied:

8 *It was quite cumbersome to me Judge, because like I said, I would*
9 *have gladly held onto the check. For some reason they didn't want,*
10 *they didn't accept my avowal. Life's too short, Judge.*

(Respondent's Answer ¶ 21; Exhibit 6 bates stamp 000024)

11 54. During the hearing, Respondent never advised Judge Kelly that the check
12 had been torn into pieces on August 4, 2003. (January 27 Transcript pg. 81, lines
13 11-13)

14 55. During the hearing, Respondent was not candid with the Court concerning
15 the exact circumstances surrounding how the check came to be destroyed and
16 what occurred subsequent to its destruction. (January 27 Transcript pg. 80-84;
17 Exhibit 6)

18 56. Respondent destroyed a piece of evidence that he knew was wanted and
19 requested by the Tucson Police Department. (January 27 Transcript pg. 86 lines
20 21-24)

1 57. Respondent had a duty to preserve check no. 95 until the court ruled on the
2 issue of whether Respondent had to turn it over to the State. (January 27
3 Transcript pg. 85, lines 8-9; pg. 95, lines 23-25; pg. 96, lines 18-25)
4

5 58. Ultimately the court ruled that it would have ordered Respondent to turn
6 over check no. 95. (January 27 Transcript pg. 85, lines 4-6; Exhibit 6 bates stamp
7 000030)
8

9 59. Respondent directed Ms. Valenzuela to dispose of check no. 95 because he
10 was angry with the police for having detained him on the evening of August 4,
11 2003. (January 27 Transcript pg. 85, lines 10-25; pg. 97, lines 9-24; Exhibit 6)
12

13 60. Check no. 95 had evidentiary value in two separate ways. Check no. 95
14 could have been used as evidence of other bad acts pursuant to Rule 404(b),
15 Rules of Evidence in CR20032563 and/or the basis for an additional charge
16 against Steven Doane. (January 28 Transcript pg. 31, lines 20-25; pg. 32, lines 1-
17 6)
18

19 61. Respondent did not provide a candid response to the State Bar in that he
20 did not advise the State Bar of the true circumstances surrounding how the check
21 came to be destroyed and what occurred subsequent to its destruction.
22 (January 28 Transcript pg. 86, lines 6-12; Exhibit 8 bates stamp 000034-000035)
23

24 62. In March of 2004, Steve Doane entered a guilty plea to the following
25 charges in the following cases:

1 (1) CR20031722: Count One, Fraudulent Scheme or Artifice, a class 2
felony (with 2 prior felony convictions)

2 (2) CR20032563: Count Three, Theft of a Means of Transportation, a
3 class 3 felony;

4 (3) CR20032910: Count Two, Theft by Control of Stolen Property, a
class 2 felony;

5 (4) CR20032911: Count One, Fraudulent Scheme or Artifice, a class 2
6 felony (with 2 prior felony convictions); and

7 (5) CR20032912: Count Three, Taking the Identity of Another, a class
4 felony. (Exhibit 19, Steve Doane plea offer).

8 63. In exchange for his guilty plea to the charges outlined above (all of which
9 mandated a prison term – Exhibit 19, p.3), the State agreed to dismiss all other
10 charges, indicting any other indictments pending against Mr. Doane at the time of
11 the plea. The State further agreed not to file any charges relating to check
12 number 95 and one other pending investigation. And finally, the State agreed that
13 all terms of imprisonment imposed on each charge would run concurrently.
14 (Exhibit 19, p.3). On the class 2 felonies alone, Mr. Doane was subject to a
15 prison term of at least 10.5 years with a maximum term of 20 years. (Exhibit 19,
16 p.3).
17
18

19 64. On April 26, 2004, Mr. Doane was sentenced to 15.75 years as a result of
20 his guilty plea. (Exhibit 20, pp.3-7).
21

22 65. Mr. Buescher testified at the hearing herein that he was not hindered or
23 impaired in his ability to prosecute the cases against Steve Doane by his inability
24 to obtain check no. 95. (January 28 Transcript, pg.46, lines 11-14).
25

1 66. Mr. Buescher further testified that he would have entered into the same
2 plea agreement regardless of whether or not he had obtained possession of check
3 number 95. (January 28 Transcript, pg.47, line 1; pg.49, line 4).
4

5 67. Although he was aware of the existence of check number 95 as early as
6 August 5, 2003, Mr. Buescher never requested Respondent to hold onto the check
7 or turn it over to the State until he filed his Motion to Compel on September 8,
8 2003. (January 28 Transcript, pg.45, lines 10-15).
9

10 68. At the time of the hearing on the Motion to Compel on September 29,
11 2003, Respondent, per his instructions to Ms. Valenzuela regarding check number
12 95, was under the impression that the check had already been disposed of.
13 (January 28 Transcript, pg.128, line 24; pg.130, line 12).
14

15 69. No additional hearings were required to handle the State's Motion to
16 Compel disclosure of check number 95 since the matter was set at the same time
17 as other motions and matters concerning Mr. Doane's cases, as well as his co-
18 defendant, Nicole Ramirez. (Exhibit 18, p.1). The actual discussions regarding
19 the Motion to Compel appeared to be brief and did not take that long to resolve.
20 (Exhibit 6, bates stamp 000021-000030).
21

22 70. At no time during the course of events regarding check number 95 was
23 Steve Doane ever charged or indicted for any offenses pertaining to check
24 number 95, including identity theft. Nor did any of the indictments pending
25

1 against Steve Doane encompass check number 95 as a basis for instituting any
2 charge or charges, such as forgery, fraud or identity theft. (Exhibits 14 and 15).

3
4 71. In advising Det. Riesgo on August 4, 2003 that he did not "accept" check
5 number 95, Respondent testified he was not attempting to mislead Detective
6 Riesgo as to the whereabouts of check number 95. Respondent never told Det.
7 Riesgo that his office did not have "possession" of the check; rather, Respondent
8 indicated that his office did not "accept" the check, a term Respondent claims was
9 used to denote that his office never accepted the check as payment. (January 28
10 Transcript pg. 96, lines 12-17).

11
12 72. According to Respondent, check number 95 was actually being held in
13 trust on behalf of a client, there being an understanding that cash or a cashier's
14 check would have to be paid or submitted to Respondent's firm in lieu of the
15 check. (January 28 Transcript, pg.65, line 23; pg.66, line 8).

16
17 73. Check number 95, upon receipt by Respondent's firm, was placed in Mr.
18 Doane's file. The check was never negotiated, tendered for payment or deposited
19 in any checking account whatsoever, there being an agreement that upon payment
20 by cash or a cashier's check, that the check would either be destroyed or returned
21 to the client. (January 28 Transcript, pg.65, line 23; pg.66, line 8).

22
23
24 74. By August 4, 2003, \$1,500.00 cash had in fact been tendered to
25 Respondent's firm in lieu of check number 95. However, Respondent had

1 forgotten to destroy the check or forward it to the client per the agreement.
2 (January 28 Transcript, pg.65, line 19; pg.66, line 8).

3
4 75. According to Respondent, since it appeared to him, after speaking to Det.
5 Riesgo on August 4, 2003, that the police were no longer interested in obtaining
6 check number 95, he requested his office to get rid of the check per his agreement
7 with a client. (January 27 Transcript, pg. 117, lines 5-7).

8
9 76. Notwithstanding his promise to get rid of the check or return it to a client
10 upon payment by cash or cashier's check, and notwithstanding that a Superior
11 Court Judge had denied police efforts to obtain a search warrant for the check,
12 Respondent still held onto the check after August 4, 2003 in order to provide the
13 Tucson Police Department with an additional opportunity to obtain some legal
14 process (i.e., court order or grand jury subpoena) compelling Respondent to
15 product the check based on any additional facts or evidence not otherwise
16 presented to Judge Acuna or Respondent. None were, in fact, provided. (January
17 28 Transcript, pg.127, line 18; pg.128, line 19). (January 28 Transcript, pg.128,
18 lines 20-23; January 28 Transcript, pg.41, lines 8-23; January 27 Transcript,
19 pg.54, lines 7-21).

20
21
22
23 77. Since no additional facts or evidence were provided to Respondent, Judge
24 Acuna, or a Grand Jury after August 4, 2003 as to the basis for the police's need
25 or request for check number 95, other than his firm was the potential victim of a

1 crime, and since no indications or representations were made to Respondent (by
2 the police or County Attorney) that further attempts were being instituted to
3 obtain legal process for production of check number 95, Respondent determined
4 that he needed to follow through on this commitment to his client and asked Ms.
5 Valenzuela to dispose of the check on or about August 27, 2003. (January 28
6 Transcript, pg.110, line 4; pg. 111, line 9).
7
8

9 III. CONCLUSIONS OF LAW

10 1. Respondent, knowingly, unlawfully obstructed the State's access to
11 evidence when he directed Karen Rascon to destroy check no. 95, a potential
12 piece of evidence, that Respondent knew was being sought by the Tucson Police
13 Department. Respondent's conduct was in violation of Rule 42, Ariz.R.S.Ct.,
14 specifically, ER 3.4(a).
15

16 2. Respondent, knowingly, unlawfully obstructed the State's access to
17 evidence when he directed Monica Valenzuela to get rid of the envelope
18 containing the pieces of check no. 95, a potential piece of evidence, that
19 Respondent knew was being sought by the Tucson Police Department.
20 Respondent's conduct was in violation of Rule 42, Ariz.R.S.Ct., specifically,
21 ER 3.4(a).
22
23

24 3. Respondent, knowingly, unlawfully altered or destroyed material having
25 potential evidentiary value when he directed Karen Rascon to destroy check

1 no. 95, which he knew was being sought by the Tucson Police Department.
2 Respondent's conduct was in violation of Rule 42, Ariz.R.S.Ct., specifically,
3 ER 3.4(a).
4

5 4. Respondent's failure to preserve check no. 95 until the court had
6 determined whether Respondent had an obligation to turn over the evidence was
7 prejudicial to the administration of justice in violation of Rule 42, Ariz.R.S.Ct.,
8 specifically, ER 8.4(d).
9

10 5. Respondent's failure to advise the Tucson Police Department of the
11 condition of check no. 95 on August 4, 2003 was prejudicial to the administration
12 of justice in violation of Rule 42, Ariz.R.S.Ct., specifically, ER 8.4(d).
13

14 IV. DISCUSSION

15 During the disciplinary proceeding, an issue was raised as to the
16 interpretation of the words "unlawful" and "potential evidentiary value."
17 ER 3.4(a) states: "A lawyer shall not unlawfully obstruct another party's access to
18 evidence or unlawfully alter, destroy or conceal a document or other material
19 having potential evidentiary value. A lawyer shall not counsel or assist another
20 person to do any such act." The Comment to the amendment (effective
21 December 1, 2003) states:
22
23

24 [1] The procedure of the adversary system contemplates
25 that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by

1 prohibitions against destruction or concealment of
2 evidence, improperly influencing witnesses, obstructive
3 tactics in discovery procedure, and the like.

4 [2] Documents and other items of evidence are often
5 essential to establish a claim or defense. Subject to
6 evidentiary privileges, the right of an opposing party,
7 including the government, to obtain evidence through
8 discovery or subpoena is an important procedural right.
9 The exercise of that right can be frustrated if relevant
10 material is altered, concealed or destroyed. Applicable
11 law in many jurisdictions makes it an offense to destroy
12 material for purpose of impairing its availability in a
pending proceeding or one whose commencement can
be foreseen...applicable law may require the lawyer to
turn the evidence over to the police or other prosecuting
authority, depending on the circumstances.

13 The choice of the word "illegal," rather than "criminal" is of significance.

14 Non-criminal activity may be illegal in at least two situations: the condition may
15 not have resulted in a criminal conviction, or the conduct may carry only civil
16 consequences. Michael K. McChrystal, *A Structural Analysis Of The Good Moral*
17 *Character Requirement For Bar Admission*, 60 Notre Dame L.Rev. 67, 86-87
18 (1984). The term "unlawful" has a broader meaning than "criminal." Black's
19 Law Dictionary 1536 (6th ed. 1990) defines unlawful in part as:

22
23 That which is contrary to, prohibited, or unauthorized
24 by law. That which is not lawful. The acting contrary
25 to, or in defiance of the law; disobeying or disregarding
the law. Term is equivalent to 'without excuse or

1 justification.’ While necessarily not implying the
2 element of criminality, it is broad enough to include it.

3 Rule 3.4(a) has application beyond the limits of criminal behavior. It
4 extends to non-criminal conduct that constitutes fraud, and to the violation of
5 non-criminal legal obligations to produce a document or other material, as in civil
6 discovery. *The Law of Lawyering*, §30.4, (3rd ed. Supp. 2005); *See also, Briggs*
7 *v. McWeeney*, 796 A.2d 516 (Conn. 2002), (Finding that attorney violated
8 Rule 3.4(1)¹ when she attempted to have an engineering report suppressed and
9 failing to promptly disclose the report pursuant to her continuing duty to disclose)
10 and *Amity v. Atlas Construction Company*, 2001 WL 273145 (Conn. Super. Ct.),
11 the Unpublished Opinion of the underlying Superior Court case. *See also, In Re*
12 *Walker*, SB-99-0074-D, Disciplinary Commission No. 95-1869, 95-1990 et. al.
13 (1999), (finding that Walker violated ER 3.4(a) by failing to respond to opposing
14 counsel’s Request for Production of Documents, Walker “unlawfully obstructed
15 the opposing party’s access to evidence.”)
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¹ ER 3.4(a), Rule 42, Arizona Rules of Supreme Court

1 The comment to Model Rule 3.4 does not provide information on the
2 broadness of the term; however, it does mention the opposing party's right to
3 discovery as part of the justification for the prohibition against destroying
4 evidence.
5

6 Like the term "unlawful," "potential evidentiary value" appears to protect
7 an opposing party against a lawyer's tampering with a class of evidence
8 somewhat broader than that covered by the typical criminal statute. Once a
9 lawsuit is pending, documents or other material relevant to a client's claim or
10 defense obviously carry "potential evidentiary value." Comment [2] of ER 3.4(a)
11 states:
12

13 Documents and other items of evidence are often
14 essential to establish a claim or defense. Subject to
15 evidentiary privileges, the right of an opposing party,
16 including the government, to obtain evidence through
17 discovery or subpoena is an important procedural right.
18 The exercise of that right can be frustrated if relevant
19 material is altered, concealed or destroyed. Applicable
20 law in many jurisdictions makes it an offense to destroy
21 material for purpose of impairing its availability in a
22 pending proceeding or one whose commencement can
23 be foreseen...applicable law may require the lawyer to
24 turn the evidence over to the police or other prosecuting
25 authority, depending on the circumstances.

23 Based upon the comments to ER 3.4(a), Respondent unlawfully destroyed
24 material having potential evidentiary value. Respondent knew that the police
25 were seeking check no. 95 as the Tucson detective told Respondent that check

1 no. 95 was written on an account opened fraudulently by Steven Doane in his
2 brother's name. Respondent was on notice that the document could have
3 evidentiary value in the current indictment as well as a possible future indictment
4 on additional charges.
5

6 Respondent argues that he was under no legal obligation to disclose check
7 no. 95, even when he was eventually put on notice that the Tucson Police
8 Department desired to retrieve the check as evidence of an alleged crime.
9 Further, Respondent claims that although he had no affirmative duty to disclose
10 or produce the check, he did have a duty to hold onto it once he was put on notice
11 that it was being sought as potential evidence in a police investigation.
12 Respondent claims he did in fact comply with the duty, having instructed Ms.
13 Rascon to hold onto the check when notified that the Tucson Police Department
14 was seeking it. However, this was after Respondent had instructed Ms. Rascon to
15 destroy the check, and after Kim Davis, of Respondent's Tempe office, instructed
16 Ms. Rascon to retrieve the pieces of check no. 95 and retain them.
17
18
19

20 Respondent also argues that after Judge Acuna denied the police a request
21 for a search warrant, Respondent was no longer obligated to "preserve the check"
22 since it was "mere evidence" and not subject to disclosure or production as an
23 instrumentality or evidence of a crime.
24
25

1 This Hearing Officer is not persuaded by Respondent's arguments. It
2 seems clear that Respondent knew that check no. 95 was part of an ongoing
3 criminal investigation being conducted by the Tucson Police Department.
4 Despite this knowledge, Respondent instructed Ms. Rascon to tear the check in to
5 pieces, and dispose of the check. But for the intervention by Kim Davis, it
6 appears that the check would have been thrown out. Additionally, Respondent
7 subsequently instructed Monica Valenzuela to dispose of the pieces of the check.
8
9

10 Despite Respondent's arguments, this Hearing Office finds that
11 Respondent violated E.R. 3.4(a) by unlawfully destroying a document having
12 potential evidentiary value. This Hearing Officer further finds that Respondent
13 violated E.R. 8.4(d) by engaging in conduct that is prejudicial to the
14 administration of justice.
15

16 With regard to the violation of E.R. 8.4(d), the Respondent argues that the
17 only evidence to support a violation of this Rule was that a hearing was required
18 on the State's Motion to Compel production of check no. 95. However, this
19 Hearing Officer finds that the Respondent's instructions to Ms. Rascon to tear up
20 check no. 95, and his subsequent instructions to Ms. Valenzuela to dispose of the
21 check, were prejudicial to the administration of justice, specifically with regard to
22 the Tucson Police Department's criminal investigation.
23
24
25

1 To this Hearing Officer, it is immaterial whether any additional charges
2 were brought against Steve Doane with regard to check no. 95. Respondent
3 knowingly and unlawfully instructed Ms. Rascon to tear up a check that he knew
4 had potential evidentiary value, and these actions involved conduct that was
5 prejudicial to the administration of justice.
6

7 **V. RECOMMENDATION**

8 **A. ABA Standards**

9 In determining the appropriate sanction, both the American Bar
10 Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and
11 Arizona case law are considered. The *Standards* provide guidance with respect to
12 an appropriate sanction in this matter. The Supreme Court and Disciplinary
13 Commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz.
14 27, ¶ 23, ¶ 33, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157,
15 791 P.2d 1037, 1040 (1990).
16
17

18 The analysis should be guided by the principle that the objective of lawyer
19 discipline is not to punish the lawyer, but to protect the public, the profession, and
20 the administration of justice *Peasley, supra*, 208 Ariz. 27 at ¶64, 90 P.3d at 778;
21 *Scholl*, 200 Ariz. at 227, 25 P.3d at 715.
22

23 When determining an appropriate sanction, both the Court and the
24 commission consider the duty violated, the lawyer's mental state, the actual or
25

1 potential injury caused by the misconduct and the existence of aggravating and
2 mitigating factors. *Peasley*, 208 Ariz. at ¶ 33, 90 P.3d at 772; *ABA Standard 3.0*.

3
4 The ABA Standards identify four distinct categories where a lawyer has a
5 specific duty. Those duties include a duty to the client, the general public, the
6 legal system or to the profession. Taking the questions in the order in which they
7 are posed, the ethical duties violated by Respondent are his duties to the general
8 public and the legal system.
9

10 Respondent violated his duty to the general public in that his conduct
11 interfered with the administration of justice in the State's case against
12 Respondent's client, Steven Doane. "Members of the public are entitled to be
13 able to trust lawyer to protect their property, liberty, and their lives. The
14 community expects lawyers to exhibit the highest standards of honesty and
15 integrity, and lawyers have a duty not to engage in conduct involving dishonesty,
16 fraud, or interference with the administration of justice. *See, ABA Standards at*
17
18
19 *pg 5.*

20 Further, Respondent violated a duty to the legal system. The Standards
21 indicate that violations of ER 3.4(a) violate the duty the lawyer has to the legal
22 system. "Lawyers are officers of the court, and must abide by the rules of
23 substance and procedure which shape the administration of justice. Lawyers must
24 always operate within the bounds of the law and cannot create or use false
25

1 evidence, or engage in any other illegal or improper conduct.” *ABA Standards* at
2 pg. 5.

3
4 The second prong of the analysis questions the lawyer’s mental state when
5 engaging in misconduct. Respondent’s mental state in reference to all of the
6 underlying allegations is either intentional or knowing. The most culpable mental
7 state is that of intent. *Standards* pg. 6. “When a lawyer acts with the conscious
8 objective or purpose to accomplish a particular result.” *Standards* at pg. 6.
9 Knowing is defined as “the conscious awareness of the nature or attendant
10 circumstances of the conduct without the conscious objective or purpose to
11 accomplish a particular result.” *See, ABA Standards* at page 7.

12
13
14 Respondent is an experienced criminal lawyer. He received a check drawn
15 on a Wells Fargo account in the name of David Doane. Respondent knew that his
16 client had already been convicted of fraud and forgery and was currently indicted
17 on charges of fraud and forgery. Respondent stated that he “did not make a habit
18 of accepting checks from clients who are charged with forgery or passing bad
19 checks.” Respondent indicated he would be suspect of a check received from a
20 client who was charged with forgery or passing bad checks. On August 4, 2003,
21 just days after having received check no. 95, Respondent was advised by
22 Detective Riesgo that the Tucson Police wanted to obtain check no. 95 as it had
23 been written off an account fraudulently opened by Steven Doane under the
24
25

1 name, David Doane. Respondent knew his client may have committed another
2 crime, of which he had evidence in his possession. Respondent also knew on
3 August 4, 2003, that David Doane was a potential victim of identity theft of
4 which Respondent had evidence in his possession. Respondent immediately
5 contacted his assistant, Karen Rascon and directed her to destroy check no. 95.
6 Respondent's conduct was either intentional or knowing.
7

8
9 The third component of the model inquiry is directed to the extent of actual
10 or potential injury caused by the lawyer's misconduct. "Injury is harm to a client,
11 the public, the legal system, or the profession which results from a lawyer's
12 misconduct." *ABA Standards* pg. 7 In this instance, Respondent's misconduct
13 harmed the general public and the legal system. Judge Kelly testified as to the
14 harm that occurs to the public when lawyers engage in the types of conduct as in
15 the instant matter. Judge Kelly also testified about the impact on the legal system
16 itself. Additionally, Respondent's misconduct created a situation that allowed for
17 potential harm in that his actions deprived the State of evidence in an ongoing
18 case. That same evidence may also have been the basis for additional charges
19 against Respondent's client.
20
21

22
23 The *ABA Standards* suggest a recommended sanction for various types of
24 conduct. That recommended sanction may increase or decrease depending on the
25 evidence of aggravation or mitigation. Section 9.21 states that "[a]ggravation or

1 aggravating circumstances are any considerations or factors that may justify an
2 increase in the degree of discipline to be imposed.” Section 9.22 sets forth the
3 following factors that may be considered in aggravation:
4

- 5 a. prior disciplinary offenses;
- 6 b. dishonest or selfish motives;
- 7 c. pattern of misconduct;
- 8 d. multiple offenses;
- 9 e. bad faith obstruction of the disciplinary proceedings by
10 intentionally failing to comply with rules or orders of the
11 disciplinary agency;
- 12 f. submission of false evidence, false statements, or other
13 deceptive practices during the disciplinary process;
- 14 g. refusal to acknowledge wrongful nature of conduct;
- 15 h. vulnerability of victim;
- 16 i. substantial experience in the practice of law; and/or,
- 17 j. indifference to making restitution.

18 In this matter, several aggravating factors are present. Respondent’s
19 actions demonstrate a lack of candor. *See, Standard 9.22(b)*. Respondent had an
20 obligation to preserve evidence that he knew the Tucson Police were seeking.
21 Respondent chose however, to immediately contact his assistant once he knew
22 that the police wanted to obtain that evidence, and direct her to destroy it.

23 Respondent’s testimony before the court on September 29, 2003 and his
24 response to the State Bar’s inquiry demonstrate a lack of candor. The evidence
25 shows that Respondent was not candid with the court or the State Bar.
Furthermore, it is evident from the record that Respondent became angry
following his detention at his office on the evening of August 4, 2003. His

1 subsequent actions in directing the disposal of check no. 95 was not the product
2 of a well reasoned, researched, thought out process. Respondent was angry and
3 he decided to dispose of the check. Judge Kelly understood this to be the basis
4 and the transcript of the hearing before Judge Kelly would leave the reader with
5 the same impression.
6

7 Further, Respondent has refused, up to and continuing through the
8 disciplinary proceeding, to acknowledge that he had any obligation to preserve
9 check no. 95 and does not believe that there was anything wrongful about his
10 conduct. *ABA Standard 9.22(g)*
11

12 Respondent also has substantial experience in the practice of law. *ABA*
13 *Standard 9.22(i)* This factor should also be considered in aggravation.
14 Respondent knew that the police were seeking evidence that he knew would be
15 detrimental to his client and he ordered its destruction. Respondent, based on his
16 considerable knowledge and experience in the practice of criminal law, knew
17 exactly what he was doing. Under these circumstances, the presumptive sanction
18 may be aggravated by the substantial experience of the lawyer.
19
20

21 The *ABA Standards* also set forth factors that may be considered in
22 mitigation. *ABA Standard 9.32* lists the following:
23

- 24 a. absence of a prior disciplinary record;
- 25 b. absence of a dishonest or selfish motive;
- c. personal or emotional problems;

- d. timely good faith effort to make restitution or to rectify consequences of misconduct;
- e. full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- f. inexperience in the practice of law;
- g. character or reputation;
- h. physical disability;
- i. mental disability and chemical dependency including alcoholism or drug abuse when:
 - (1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.
- j. delay in disciplinary proceedings;
- k. imposition of other penalties or sanctions;
- l. remorse;
- m. remoteness of prior offenses.

The only mitigating factor that was offered by Respondent at the hearing was the absence of any prior disciplinary record. *ABA Standards* 9.32(a)

The above factors are now considered in conjunction with the standard that addresses the particular conduct. After determining the presumptive sanction, it is appropriate to evaluate factors enumerated in the *Standards* that would justify an increase or decrease in the presumptive sanction. *See, In re Scholl*, 200 Ariz. 222, 225-26, 25 P.3d 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995).

1 ABA Standard 6.0 addresses violations of ER 3.4(a) and ER 8.4(d) and
2 encompasses violations of duties owed to the legal system. Standard 6.1 indicates
3 that, "Absent aggravating or mitigating circumstances, upon the application of the
4 factors set out in Standard 3.0, the following sanctions are generally appropriate
5 in cases involving conduct that is prejudicial to the administration of justice or
6 that involves dishonesty, fraud, deceit, or misrepresentation to a court."
7

8
9 As to the violation of ER 3.4(a), ABA Standard 6.22 states, "Suspension is
10 appropriate when a lawyer knowingly violates a court order or rule, and there is
11 injury or potential injury to a client or a party, or interference or potential
12 interference with a legal proceeding."
13

14 As to the violation of ER 8.4(d), ABA Standard 6.12 cites, "Suspension is
15 generally appropriate when a lawyer knows that false statements or documents
16 are being submitted to the court or that material information is improperly being
17 withheld, and takes no remedial action, and causes injury or potential injury to a
18 party to the legal proceeding, or causes an adverse or potentially adverse effect on
19 the legal proceeding."
20

21 **B. Proportionality**
22

23 To have an effective system of professional sanctions, there must be
24 internal consistency, and it is appropriate to examine sanctions imposed in cases
25 that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772.

1 However, the discipline in each case must be tailored to the individual case, as
2 neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at
3 ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614
4 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
5

6 The instant case presents a very specific set of facts. There are no Arizona
7 cases directly on point given the facts. However, the following cases are
8 instructive.
9

10 *In re Hoyt*, 2001 Ariz. LEXIS 51 (2001), Respondent, Robert Q. Hoyt, was
11 censured for violation of ERs 3.4, 4.1, 8.4(c) and Rule 51(b). Hoyt admitted that
12 he instructed his liability expert to “purge” his file of various items, including
13 letters of correspondence, payment schedules and messages, negligently believing
14 that those items were not discoverable. Hoyt admitted that his conduct resulted in
15 obstructing and concealing items that had potential evidentiary value and gave the
16 appearance of purposeful intent to obstruct access to and conceal relevant
17 documents from the opposing party. In arriving at the sanction two factors were
18 considered in aggravation and four factors considered in mitigation.²
19
20

21 In *In re Davidon*, SB-02-0015-D, Disciplinary Commission No. 99-1324
22 (2001), the lawyer, a prosecutor for the Maricopa County Attorney’s Office, was
23

24 ² In aggravation the hearing officer found that the lawyer had a prior disciplinary offense (a
25 private informal reprimand) and that he had substantial experience in the practice of law. The
hearing officer also found in mitigation that there was no selfish or dishonest motive, full and
free disclosure to the disciplinary authority, remorse and remoteness of prior offense.

1 found to have violated ERs 3.4(a) and (c), 3.8(d) and 8.4(d), when he negligently
2 failed to disclose all prior felony convictions of witnesses he intended to call at
3 trial. Substantial experience in the practice of law was considered in aggravation
4 and no prior disciplinary record was considered in mitigation.
5

6 In *In re Manning*, 177 Ariz. 496 (1994), the Disciplinary Commission
7 censured Manning finding that his negligent failure to respond to discovery
8 requests, resulting in his client's answer being stricken, caused injury to the
9 opposing party and interfered with a legal proceeding. The Court found a
10 violation of ER 3.4 as well as ER 8.4(d) for Manning's failure to notify the court
11 and the opposing counsel that the client had filed a bankruptcy causing the court
12 and counsel to spend unnecessary time on a matter that had been previously
13 stayed. In aggravation, Manning had substantial experience in the practice of law
14 and failed to make restitution. In mitigation, Manning had no prior disciplinary
15 record.
16
17
18

19 In *In Re Clark*, 207 Ariz. 414, 87 P. 3d 827 (2004), Clark was censured for
20 one single violation of ER 8.4(d) where the hearing officer found that Mr. Clark
21 negligently engaged in conduct prejudicial to the administration of justice by
22 transferring assets to his professional corporation where notifying another
23 creditor of the transfer may have deprived his former client of partial recovery on
24 his judgment. The hearing officer found no factors in aggravation and found in
25

1 mitigation that Clark had had no prior disciplinary record and had no selfish or
2 dishonest motive. The conclusion was that Clark “negligently violated a duty to
3 the courts and to his former client”. *Id.* at 417.
4

5 In *Idaho State Bar v. Gantenbein*, 986 P.2d 339 (Idaho 1999), a 24 month
6 suspension (18 months withheld upon meeting specific conditions) was
7 appropriate for the attorney who, in an irrational and angry act redacted
8 information from a medical report in violation of ER 3.4(a), (b) and (d).³ The
9 Disciplinary Hearing Committee concluded that Gantenbein redacted the medical
10 report because he was angry that the plaintiff’s attorney did not withdraw from
11 the representation. The Committee also found that although Gantenbein
12 disclosed his improper redaction of the document to his employer, no steps were
13 taken to bring the matter to the attention of the plaintiff’s attorney “or to
14 otherwise remedy the situation, on the assumption that the redacted document
15 was insignificant and meaningless.” *Id.* at 341 Gantenbein provided evidence of
16 physical, medical and personal impairments he suffered. This was considered in
17 mitigation.
18
19
20

21 In *In re Zeiger*, 692 A.2d 1351, (D.C. 1997), Respondent, David Zeiger,
22 admitted to altering his client’s hospital medical records and not notifying the
23
24

25 ³ Gantenbein was also found to have violated ER 4.1(a) and 8.4(c) for his redaction of the
medical report.

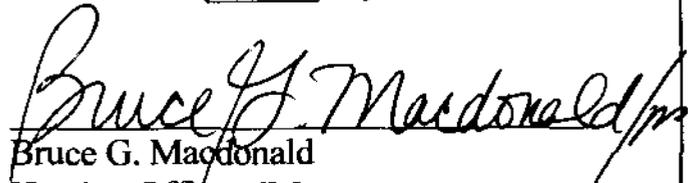
3
4 his actions were solely for the benefit of his client since he believed that the
5 altered information was “immaterial and extremely prejudicial to his client.” *Id.*
6 at 1355. In appealing his 60-day suspension, Zeiger argued that the redaction did
7 not harm his client and was not done for personal gain or advancement. Zeiger
8 claimed that his motive was to assist his client and that this was a single violation
9 of misconduct, which did not occur during the course of legal proceedings.
10 Zeiger also attempted to argue that his actions did not affect the outcome of the
11 case and that he did not believe that the insurance company would rely on the
12 altered records. The Court of Appeals agreed with the appropriateness of a 60-
13 day suspension finding that the potential for significant harm existed and that
14 “[a]ltering records in a legal matter, even in trivial ways, is not a trivial act.” *Id.* at
15 1357.
16
17
18

19 **C. Conclusion**

20 This hearing officer finds there is clear and convincing evidence that
21 Respondent violated Rule 42, Ariz.R.S.Ct., specifically ER 3.4(a) and ER 8.4(d)
22 as alleged by the State Bar. The *ABA Standards* and case law indicate that the
23 appropriate sanction is a suspension of 60 days with the imposition of costs for
24 this disciplinary proceeding for the violations committed by Respondent.
25

1 The recommended sanction is not disproportionate to sanctions in cases
2 involving similar conduct under the cited circumstances. This sanction is not
3 recommended in order to punish Respondent. This sanction is recommended in
4 order to set a standard by which other lawyers may be deterred from similar
5 conduct, while protecting the interest of the public and the profession.
6

7 DATED this 29th day of March, 2005.

8 
9 Bruce G. Macdonald
10 Hearing Officer 6M
11

12 Original filed with the Disciplinary Clerk
13 this 29th day of March, 2005.

14 Copy of the foregoing mailed
15 this 29th day of March, 2005, to:

16 Maret Vessella
17 Deputy Chief Bar Counsel
18 State Bar of Arizona
19 4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

20 Alan D. Bond
21 Respondent's Counsel
22 *Palmisano & Associates, P.C.*
23 110 South Church Avenue, Suite 6426
Tucson, AZ 85701-7605

24 by: *Williams*
25