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MAY 19 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Williams*

BEFORE A HEARING OFFICER

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

HOLLY R. GIESZL
Bar No. 013845

RESPONDENT.

No. 03-1278

HEARING OFFICER'S REPORT

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

PROCEDURAL HISTORY

A Probable Cause Order was filed on March 5, 2004. A one-count Complaint was filed October 28, 2004. The Complaint alleged violations of ERs 1.1, 1.2, 1.3, 1.4, 1.7, 1.8, 4.1, 4.4, and 8.4(c) and (d). Respondent, through her counsel, accepted service of the Complaint. An Answer to the Complaint was filed December 3, 2004. A Case Management Order was entered December 17, 2004, setting an evidentiary hearing for March 1, 2005, which hearing subsequently was continued to March 7, 2005. On the motion of the State Bar, the evidentiary hearing again was continued until March 14, 2005.

Respondent filed a Motion for Partial Summary Judgment, arguing that the record precluded the existence of the mental states required by E.R. 1.7, 4.1, 4.4 and 8.4(c). After submission of memoranda, the Motion for Partial Summary Judgment was denied. Respondent filed a Motion for Reconsideration on which oral argument was held. Although the medical evidence submitted on Respondent's summary judgment motion

was uncontroverted, this Hearing Officer denied the Motion for Reconsideration,
1 believing that, as all reasonable inferences were drawn in favor of the State Bar, there
2 were disputed questions of material fact. See *Doe v. Roe*, 191 Ariz. 313, 328, 955 P.2d
3 951, 966 (1998).¹
4

5 The Settlement Officer conducted a settlement conference on February 1, 2005.
6 The parties did not reach an agreement.

7 The State Bar and the Respondent, on February 18, 2005, submitted a Joint Pre-
8 hearing Statement, which included certain stipulated facts. A telephonic pre-hearing
9 conference was held in this matter on February 22, 2005.
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11 A motion *in limine* was filed by the State Bar regarding testimony of Respondent's
12 medical witnesses. That motion was granted in part and denied in part. Testimony of
13 what the doctors believed was an appropriate sanction was ordered excluded. However, it
14 also was ordered that the doctors, assuming sufficient foundation, could express an
15 opinion as to the effect that different sanctions would have on Respondent or similarly
16 situated attorneys.
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19 ¹ This conclusion also was based on case authority holding that a trier of fact may
20 reach a different conclusion than an expert witness. *Leslie C. v. Maricopa County*
21 *Juvenile Court*, 193 Ariz. 134, 136, 971 P.2d 181, 183 (App. 1997). That authority,
22 however, is not without contradiction. *Buzzard v. Griffin*, 89 Ariz. 42, 358 P.2d 155, 159
23 (1960); *Reliable Electric Co. v. Clinton Campbell Contractor, Inc.*, 10 Ariz. App. 371,
24 459 P.2d 98, 102 (1969); see *Schwartz v. Superior Court*, 186 Ariz. 617, 925 P.2d 1068,
25 1071 (App. 1996) (court should not make findings contrary to undisputed evidence); *In re*
26 *Estate of Harber*, 102 Ariz. 285, 428 P.2d 662, 671 (1967) ("mere suspicion, innuendo,
insinuation and speculation are no substitute for evidence.")

1 A motion *in limine* was filed by Respondent regarding the testimony of Philip
2 May. To the extent the motion sought the complete exclusion of Mr. May's testimony,
3 the motion was denied. However, it further was ordered that Mr. May would be allowed
4 to testify only as to matters which were based upon his personal knowledge.

5 The duly noticed evidentiary hearing in this matter was held beginning March 14,
6 2005 and continuing March 16, 2005. Respondent was present in person and through
7 counsel, Mark I. Harrison and Diane M. Meyers. The State Bar was represented by
8 Robert VanWyck and Roberta L. Tepper.

9 The transcript of the March 14, 2005 and March 16, 2005 evidentiary hearing will
10 be cited hereafter with the abbreviation "Tr.", followed by page and line. The hearing
11 exhibits will be cited as either "SB Ex." for a State Bar exhibit or "Resp. Ex." for an
12 exhibit introduced by Respondent.
13

14 **BACKGROUND TO HEARING OFFICER'S REPORT**

15 **THE ERS ALLEGEDLY VIOLATED**

16 The formal Complaint charged Respondent with violating ERs 1.1, 1.2, 1.3, 1.4,
17 1.7, 1.8, 4.1, 4.4, and 8.4(c) and (d). The versions of these ethical rules in effect at the
18 time of Respondent's conduct are as follows:
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20 "A lawyer shall provide competent representation to a client. Competent
21 representation requires the legal knowledge, skill, thoroughness and preparation
22 reasonably necessary for the representation." *ER 1.1, Rule 42, Ariz.R.S.Ct.*
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1 "A lawyer shall abide by a client's decisions concerning the objectives of
2 representation . . . and shall consult with the client as to the means by which they are to be
3 pursued . . ." *ER 1.2, Rule 42, Ariz.R.S.Ct.*

4 " A lawyer shall act with reasonable diligence and promptness in representing a
5 client." *ER 1.3, Rule 42, Ariz.R.S.Ct.*

6 "A lawyer shall keep the client reasonably informed about the status of the matter
7 and promptly comply with reasonable requests for information." *ER 1.4(a), Rule 42,*
8 *Ariz.R.S.Ct.*

9 "A lawyer shall not represent a client if the representation of that client may be
10 materially limited . . .by the lawyer's own interests, unless (1) the lawyer reasonably
11 believes the representation will not be adversely affected; and (2) the client consents after
12 consultation." *ER 1.7(b), Rule 42, Ariz.R.S.Ct.*

13 "A lawyer shall not enter into a business transaction with a client or knowingly
14 acquire an ownership, possessory, security or other pecuniary interest adverse to a client. .
15 .." *ER 1.8, Rule 42, Ariz.R.S.Ct.*

16 "In the course of representing a client a lawyer shall not knowingly: (a) make a
17 false statement of material fact or law to a third person;..." *ER 4.1(a), Rule 42,*
18 *Ariz.R.S.Ct.*

19 "In representing a client, a lawyer shall not use means that have no substantial
20 purpose other than to embarrass, delay, or burden a third person, or use methods of
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obtaining evidence that violate the legal rights of such a person.” *ER 4.4, Rule 42,*

1 *Ariz.R.S.Ct.*

2 “It is professional misconduct for a lawyer...to engage in conduct involving
3 dishonesty, fraud, deceit or misrepresentation.” *ER 8.4(c), Rule 42, Ariz.R.S.Ct.*

4 “It is professional misconduct for a lawyer...to engage in conduct that is
5 prejudicial to the administration of justice.” *ER 8.4(d), Rule 42, Ariz.R.S.Ct.*

7 **THE MENTAL STATE REQUIRED BY THE RELEVANT ERS**

8 Some of these Rules of Professional Conduct require that the attorney’s actions be
9 done “knowingly” or “intentionally.” “Knowingly” denotes “actual knowledge of the fact
10 in question.” *ER 1.0(f)*. For example, ER 4.1 requires *knowing* misconduct, thus a
11 showing of mere negligence or that the attorney reasonably should have known her
12 conduct was in violation of the rules, without more, is insufficient. *Matter of Tocco*, 194
13 Ariz. 453, 456 - 457, 984 P.2d 539, 542 - 543 (1999). An attorney’s “knowledge” may be
14 inferred from circumstances suggesting that the lawyer must have had actual knowledge
15 of a fact. *Matter of Curtis*, 184 Ariz. 256, 908 P.2d 472 (1995); *Matter of Galbasini*, 163
16 Ariz. 120, 786 P.2d 971 (1990).

17 “Intentionally” refers to “the conscious objective or purpose to accomplish a
18 particular result.” *Matter of Arrick*, 180 Ariz. 136, 139, 882 P.2d 943, 946 (1994),
19 quoting *ABA Standard for Imposing Lawyer Sanctions*, 17 (1991). The question is
20 whether there is a conscious objective or purpose to accomplish a particular result, or
21 evidence of acting with conscious awareness of the wrongful nature of the conduct. *Pool*

1 v. *Superior Court*, 139 Ariz. 98, 107, 677 P.2d 261, 270 (1984). For example, a violation
2 of ER 8.4(c) requires knowing or intentional behavior which purposely deceives or
3 involves dishonesty or fraud. *In re Clark*, 207 Ariz. 414, 417, 87 P.3d 827, ¶ 15 (2004);
4 *Matter of Arrick*, supra, 180 Ariz. at 139, 882 P.2d at 946.

5 In regards to the term “intentionally,” a useful analogy may be made to the
6 “intentional acts” exclusion commonly appearing in insurance policies. To trigger this
7 exclusion, there must be some subjective desire to cause harm or a substantial certainty
8 that harm will occur. *Republic Ins. Co. v. Feidler*, 178 Ariz. 528, 531, 875 P.2d 187, 190
9 (App.1994).² If the insured is so impaired, mentally or otherwise, that she lacks the
10 capacity to govern her conduct in accordance with reason and, instead, acts on an
11 impulse, the act cannot be “intentional.” *Globe Am. Cas. Co. v. Lyons*, 131 Ariz. 337,
12 339 - 340, 641 P.2d 251, 253 - 254 (App.1981); *Republic Ins. Co. v. Feidler*, supra., 178
13 Ariz. at 532, 875 P.2d at 191.

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15 In the numerous disciplinary matters I have handled in more than ten years of
16 service as a hearing officer, these “state of mind” definitions have been extremely easy to
17 apply. Their application, however, becomes less obvious where the proceeding involves
18 an emotionally troubled respondent. What effect a proven mental or emotional illness has
19 in attorney discipline proceedings appears on the surface not to be consistently
20 articulated. See generally, *Annotation, “Mental or Emotional Disturbance as Defense to*
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23 ² *In re Clark*, 207 Ariz. 414, 417, 87 P.3d 827, 830 (2004) cited *Feidler* for the
24 proposition that the existence of “intent” is a question of fact.

or Mitigation of Charges Against Attorney in Disciplinary Proceeding," 26 A.L.R. 4th 995

1 (1983). There are decisions holding that a mental or emotional disturbance is not a
2 defense to a charge of misconduct, but may be considered in mitigation. *Matter of*
3 *Hoover*, 155 Ariz. 192, 198 - 199; 745 P.2d 939, 945 - 946 (1987); *In re Stout*, 122 Ariz
4 503, 596 P.2d 29 (1979); *State of Oklahoma ex rel. Oklahoma Bar Association v.*
5 *Southern*, 2000 Okla. 88, 15 P.3d 1,8 (2000);³ see *In re Jett*, 180 Ariz. 103, 106, 882 P.2d
6 414, 417 (1994); *ABA Formal Opinion 03-429*.⁴ Other decisions, however, state that a
7 mental or emotional disturbance may negate a required mental state; thus, under the
8 proper circumstances, mental impairment may be a complete defense to a particular
9 charge. *In re Clark*, supra;⁵ *Matter of Arrick*, supra, 180 Ariz. at 139, 882 P.2d at 946;
10 see "*Professional Misconduct by Mentally Impaired Attorneys: Is there a Better Way to*
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14 ³ "It is important that all members of the Bar understand that while a disabling
15 mental condition may in some instances mitigate misconduct, the illness may not excuse
16 the attorney's failure to terminate his services or to seek assistance when his legal
17 performance falls below the required standard of competent representation."

18 ⁴ "Impaired lawyers have the same obligations under the Model Rules as other
19 lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to
20 provide clients with competent representation."

21 ⁵ "Because a violation of ER 8.4(c) requires knowing or intentional misconduct,
22 the factual finding that Clark's conduct was merely negligent necessarily establishes that
23 both the hearing officer and the Disciplinary Commission erred in concluding that Clark
24 violated that ethical rule. The Disciplinary Commission erroneously reasoned that,
25 because ER 8.4(c) requires knowing or intentional conduct, the hearing officer's
26 conclusion that Clark violated ER 8.4(c) permitted the Disciplinary Commission to ignore
the factual finding that Clark acted negligently. The factual finding must precede and
support the legal conclusion." *In re Clark*, supra, 207 Ariz. at 417 - 418, 87 P.3d at 830 -
831.

Treat an Old Problem?" 17 Georgetown Journal of Legal Ethics 619, 623 - 624 (2004)

(hereafter "Professional Misconduct by Mentally Impaired Attorneys").

I have found no Arizona attorney disciplinary decision which definitively reconciles these two strands of authority. However, the Arizona Supreme Court provides some guidance in a criminal appeal where the Court drew a distinction between a mental condition negating a required mental state and a mental condition offered as an excuse for a crime. *State v. Mott*, 187 Ariz. 536, 540, 931 P.2d 1046, 1050 (1997).⁶ The evidence presented to this Hearing Officer has been reviewed with this general background in mind.

FINDINGS OF FACT

Based on the stipulated facts contained in the Joint Pre-hearing Statement and the evidence presented at the evidentiary hearing, the following facts are found to exist:

LINDA STANGL'S PERSONAL INJURY

1. In July 1999, Linda Stangl ("Ms. Stangl") slipped and fell at a Fry's Food and Drug Store ("Fry's"), breaking her patella. *Tr. 16/22 - 17/25*.

⁶ *Mott* is of limited utility in disciplinary proceedings since, in criminal law, *mens rea* generally is satisfied by any conscious awareness. *State v. Mott*, supra, 187 Ariz. at 542 - 543, 931 P.2d at 1052 - 1053; but see *State v. Christensen*, 129 Ariz. 32, 35, 628 P.2d 580, 583 (1981). Some ethical rules, on the other hand, demand more than simple conscious awareness to establish a violation, requiring instead a conscious objective of a particular result. *Matter of Arrick*, supra, 180 Ariz. at 139, 882 P.2d at 946; *In re Clark*, supra.

1 2. There was little question that Fry's was liable for Ms. Stangl's injury. *Tr.*
2 223/10 - 23; *SB Ex. 8 at 78, 82 - 83.*

3 3. Within days of the incident, Ms. Stangl had surgery on her knee. *Tr. 18/1 -*
4 12.

5 4. Ms. Stangl wore a cast from her ankle to her thigh for six weeks, was
6 precluded from work for two weeks, and had to undergo months of extensive therapy. *Tr.*
7 22/1 - 6; 66/7 - 25.

8 5. Even now, Ms. Stangl suffers from pain and swelling of her knee. *Tr. 66/23*
9 - 67/20.

10 6. Shortly after her surgery in July 1999, Ms. Stangl began receiving phone
11 calls from claim adjusters from Fry's. She decided to retain an attorney to assist her. *Tr.*
12 18/13 - 20/21.

13 7. In late September 1999, Ms. Stangl retained attorney Teri McCall of the law
14 firm Kimerer and LaVelle to represent her in the claim against Fry's. See "Uncontested
15 Facts Deemed Material" in *Joint Pre-hearing Statement*, filed April 27, 2004 (hereafter
16 "*Stipulated Fact*"), *Stipulated Fact 2; Tr. 20/16 - 21/20*. A relative of Ms. Stangl
17 previously had worked for Kimerer and LaVelle. *Tr. 46/8 - 18.*

18 8. Ms. McCall handled Ms. Stangl's matter until February 2001. *Stipulated*
19 *Fact 3*. During this time, Ms. McCall performed work on the claim, including viewing
20 and photographing the accident site, retrieving ownership, entity status and statutory
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26 and photographing the accident site, retrieving ownership, entity status and statutory

agent information for Fry's; and obtaining medical releases and records. *Tr. 405/21 - 407/2.*

9. As Ms. Stangl's condition would take time to stabilize, Ms. McCall advised Ms. Stangl that a formal claim or lawsuit should not be filed until the extent of Ms. Stangl's injuries were clear and she had completed medical treatment and rehabilitation, which might not occur until late in the statute of limitations period. *Tr. 22/8 - 23/8.*

10. During the year and a half that Ms. McCall handled Ms. Stangl's file, Ms. McCall had little contact with Ms. Stangl regarding her case. *Tr. 90/19 - 91/3.* There is no suggestion that there was anything improper with Ms. McCall's competency, diligence or client communication regarding Ms. Stangl's matter.

11. Ms. Stangl is well-educated, articulate and organized. *Tr. 75/7 - 24.* She was capable of actively participating in establishing and documenting her claim against Fry's, and did so.

RESPONDENT'S BACKGROUND

12. Respondent received a bachelor's degree and a master's degree from Vanderbilt University. *Tr. 389/14 - 390/12; Resp. Ex. A.*

13. Prior to becoming an attorney, Respondent held various executive jobs in the health care field. *Tr. 389/14 - 391/22; Resp. Ex. A.*

14. Respondent attended law school at Arizona State University, and was licensed to practice law in this State in October, 1991. *Tr. 289/5 - 11; Stipulated Fact 1.*

15. Respondent served as a judicial law clerk, including a term as clerk to
1 Federal District Court Judge Roger Strand. *Tr.* 289/12 - 25; 391/23 - 25.

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3 16. Respondent has over twelve years of experience in criminal and civil
4 matters, including personal injury, commercial litigation, appellate work, professional
5 liability defense, third party reimbursement, fraud and abuse, bio-ethics and compliance
6 matters. *Resp. Ex. A.*

7 17. In Spring 2000, Respondent's personal life entered what can be only
8 described as a "living hell." Because the events impacting Respondent's personal life
9 involve a third party whose privacy should be protected, some events are set forth in
10 footnotes, which may be redacted in case of future publication.⁷
11

12 18. The situation tormenting Respondent's personal life grew more stressful
13 and tragic over time, frequently disrupting Respondent's professional obligations.
14 Respondent had to interrupt or leave work and other professional functions unexpectedly
15 on numerous occasions to deal with her personal situation. As a result, Respondent
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sometimes had to cancel or miss scheduled meetings and phone calls. *Tr. 274/7 - 275/8, 296/15 - 22, 366/1 - 20, 368/4 - 14, 399/25 - 401/18.*

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3 19. In an effort to deal with her personal situation, Respondent joined Kimerer
4 and LaVelle in mid - 2000. Respondent hoped that she would be able to work fewer
5 hours and have greater control over her cases. *Tr. 256/24 - 257/15; 396/15 - 397/4.⁸*

6 20. Respondent has continued to practice with Kimerer and LaVelle or a
7 successor firm, Kimerer and Derrick, since 2000, and has been a partner since 2001. *Tr.*
8 *256/24 - 257/15.*

9 21. All the evidence shows, including the uncontradicted testimony of three
10 medical doctors, that Respondent suffered from two disorders, major depression and
11 generalized anxiety, starting in early to mid-2001. *Respondent's Exs. H, I and J; Tr.*
12 *158/12 - 160/22, 162/19 - 24, 305/15 - 306/4, 417/11 - 419/19, 420/9 - 25.*

14 **THE SYMPTOMS AND EFFECTS OF MAJOR DEPRESSION**

15 22. Depression can be brought on by a number of factors working separately or
16 in combination. Some of the more common triggers of depression are:
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mind to function poorly, skewing judgment, and leaving the person exhausted,
1 unmotivated and uncoordinated. The disorder's misery originates primarily in two areas
2 of the brain. *Tr. 162/25 - 167/11; 185/20- 186/3; 215/7 - 217/8; Resp. Ex. J.*

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4 25. The prefrontal cortex, located just behind the forehead, is the most
5 developed and sophisticated area of the brain. It performs "executive functions" -
6 reasoning, planning, evaluating, setting limits, and warning of consequences. The
7 prefrontal cortex is a person's conscience. *Tr. 164/16 - 165/23; 166/19 - 25.*

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9 26. The amygdala, an almond-sized and shaped structure, sits in the brain's
10 medial temporal lobe, a few inches from either ear. The amygdala, in comparison to the
11 prefrontal cortex, is primitive. It generates impulsive or reactive behavior, especially
12 actions taken to protect the body and mind from severe physical and mental injury. It is
13 the source of the "fight or flight" reaction experienced with fear. *Tr. 166/5 - 167/11;*
14 *185/20 - 186/3; 215/17 - 217/8.*

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16 27. Ordinarily, when a person is presented with a problem, the prefrontal cortex
17 activates, simultaneously disengaging the amygdala. Depression, however, impairs the
18 prefrontal cortex, giving the amygdala much more of significant role in behavior. As the
19 the prefrontal cortex slows or shuts down, the amygdala becomes hyperactive. *Tr. 166/5*
20 *- 167/11, 185/20 - 186/3, 213/11 - 19.* New technologies have revealed that objective
21 physical changes occur in the prefrontal cortex and amygdala during depression,
22 including increased blood flow to the amygdala. E.g. *Sheline, "3D MRI Studies of*
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Neuroanatomic Changes in Unipolar Major Depression: the Role of Stress and Medical

1 *Comorbidity," Biol. Psychiatry, October 15, 2000, 791 - 800.*

2 28. The more depression prevents the full activation of the prefrontal cortex,
3 the more the amygdala runs unchecked, exposing the person to impulsive, reactive and
4 negative feelings. When threatened, someone who is severely depressed, reacts
5 impulsively, automatically and in a "protective" manner, without thinking in terms of
6 "right" and "wrong." Judgment, which occurs in the prefrontal cortex, can become
7 suspended. *Tr. 165/10 - 16; 166/19 - 167/11; 185/20 - 186/3; 213/11 - 19.*

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9 29. How the function of the prefrontal cortex is impaired during a depressive
10 episode is fairly well understood. The prefrontal cortex contains millions of neural
11 pathways, which provide the means to process and evaluate information, i.e. thought,
12 reasoning, etc. An essential part of this neural communication is the transfer of electrical
13 signals between nerve cells. The transfer of these electrical signals between nerve cells
14 requires chemicals called neurotransmitters, one of which is serotonin. If not enough
15 serotonin is released by the sending nerve cell, the receiving nerve cell may fail to "fire,"
16 meaning the transmission of the message is not completed. In a depressive state, not
17 enough serotonin is available for use by the receiving nerve cell. The serotonin is taken
18 back up into the sending nerve cells. This is why depression can be treated with
19 medicines termed Selective Serotonin Re-Uptake Inhibitors ("SSRIs"), which inhibit the
20 re-uptake of serotonin by the sending nerve cell. *Tr. 163/5 - 25, 164/1 - 15, 199/3 - 16;*
21 *200/4 - 201/2.*

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30. Depression holds the very soul hostage, with lack of energy, disturbed sleep, loss of interest in food and sex, inability to experience pleasure, difficulty concentrating and thinking clearly, impaired short-term memory, self-blame, and inability to see alternatives. *Tr. 164/3 - 15; 215/17 - 217/8.*

31. An impaired person, particularly an impaired professional, may be able to work without incident in some areas, while experiencing problems or committing serious errors in other areas. On the whole, though, a depressed person does not function as well as she normally would function. *Tr. 171/22 - 172/21, 192/6 - 15, 207/16 - 19, 310/14 - 22.*

32. It is not unusual for someone suffering from a mental illness to fail to recognize her illness or lack the energy or focus to sustain a regular course of treatment. *Tr. 209/23 - 210/ 2, 211/15 - 18, 319/22 - 321/16, 429/16 - 20.*

33. Depression is a treatable mental illness. Treatment reduces the risk that inappropriate or unhealthy behavior will occur.

MS. STANGL'S FILE IS TRANSFERRED TO RESPONDENT

34. In the first quarter of 2001, Ms. Stangl e-mailed Ms. McCall requesting a status report on her matter. Ms. McCall, in response, informed Ms. Stangl that her matter had been reassigned to Respondent, another lawyer at Kimerer and LaVelle. *Tr. 23/15 - 24/2; 26/22 - 27/10; 91/4 - 5; 293/16 - 25; Stipulated Facts 3 and 4.*

35. At the time of the case transfer, Teri McCall informed Respondent that the Statute of Limitations ("SOL") on the case would expire on July 17, 2001. *Stipulated Fact 5.*

36. In mid-2001, Dr. Jack L. Potts, a psychiatrist, observed that the personal crisis confronting Respondent was having a devastating effect on Respondent, causing, among other things, an overload of guilt. *Tr. 417/18 - 25; 420/13 - 20; Resp. Ex. H.*⁹

37. In June 2001,¹⁰ Respondent, through her legal assistant Tracy McRae, gathered Ms. Stangl's medical records, including the records at Arizona Bone & Joint Specialists, Ltd., and Rehabilitation Services. *Resp. Ex. V, W.*

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38. In July 2001, Respondent obtained from Fry's Risk Management Department an extension of the statute of limitations until September 1, 2001.

Respondent confirmed the extension with a letter to Thomas Slack, Fry's attorney.

*Stipulated Fact 6; SB EX 8 at 70; Tr. 241/4 - 243/3.*¹¹

39. Respondent had a telephone conversation with Mr. Slack later in July 2001 during which Mr. Slack asked to be provided with Ms. Stangl's medical records. Mr. Slack and Respondent also discussed resolving the case through mediation. Mr. Slack testified that Fry's desired to settle the matter. *Tr. 224/19 - 266/2, SB Ex. 8 at 82 - 83.*

40. In July 2001 Fry's sought a recorded statement from Ms. Stangl about her accident and injury. Ms. Stangl was advised by Respondent's staff to come to Respondent's office one half hour prior to the time set for the taking of the recorded statement so that she could consult with Respondent in preparation. Ms. Stangl arrived as instructed. Respondent told Ms. Stangl to "tell the truth" but did not prepare her further in any way for giving the statement. *Tr. 30/5 - 24.*

41. After the recorded statement was taken, Respondent talked with Ms. Stangl about her condition. Respondent stated that she was going to ask for an extension of time to file suit. *Tr. 30/25 - 31/21, 65/2 - 18.*

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1 48. Respondent could have and should have followed up on her request for an
2 additional extension of the statute of limitations when no response came from Mr. Slack.

3 49. Had Mr. Slack received any communication from Respondent within
4 approximately 30 days from the expiration of the September 1, 2001 extension, he would
5 have recommended to Fry's that it settle the matter notwithstanding the expiration of the
6 statute of limitations. Mr. Slack would have done this because of the prior agreement to
7 mediate the case and for altruistic reasons. *Tr. 243/4 - 14, 246/19 - 247/10.*

8 **EVENTS BETWEEN SEPTEMBER 2001 AND AUGUST 2002**

9 50. From the end of Summer 2001 through Spring 2002, Ms. Stangl
10 periodically requested updates from Respondent regarding the status of her case.
11 Respondent indicated that she had spoken with Fry's counsel about mediation and Fry's
12 did not dispute her story or injuries and wanted to settle the case. *SB Ex. 8 at 83, 92; Tr.*
13 *32/20 - 35/17, 328/1 - 25; 377/17 - 22; 380/1 - 15.* These responses were misleading as
14 they implied that Respondent had had recent communications with Fry's counsel and that
15 progress was being made on mediation of Ms. Stangl's case.
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1 the delay in the call, Ms. Stangl was informed that Respondent was unavailable since she
2 was out of the office.¹⁶

3 55. On January 28, 2002,¹⁷ Dr. Mark A. Wellek, a psychiatrist, had the
4 opportunity to observe and evaluate Respondent, noting that she appeared tired, worried,
5 and frazzled. He concluded that Respondent suffered from depression. *Tr. 158/12 -*
6 *159/2; 160/8 - 22.*

7 56. After having no communication with Respondent for several weeks, Ms.
8 Stangl contacted Respondent by e-mail on March 12, 2002. Hearing nothing, Ms. Stangl
9 e-mailed Respondent on April 15, 2002. Following no response, Ms. Stangl e-mailed
10 Respondent on May 17, 2002, again asking for an update on the status of her matter and a
11 time frame for the resolution of it. *Tr. 34/2 - 35/23; SB Ex. 8 at 90 - 94.*
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Conclusions of Law, page 10, lines 12 - 15. This assertion is contrary to the evidence.

1 *E.g., Tr. 162/3 - 24.* Indeed, the intense mental pain suffered by Respondent from her
2 personal predicament increased in and after May 2002.¹⁹ This debilitating environment
3 was exacerbated by the massive financial pressure created by Respondent's personal
4 situation.²⁰

6 61. On June 19, 2002, Ms. Stangl again asked Respondent to move her case
7 forward. This precipitated a telephone conference during which Respondent and Ms.
8 Stangl discussed needed information and the progress of the matter. *Tr. 36/14 - 37/2.*
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10 62. On July 19, 2002, Respondent e-mailed Ms. Stangl, indicating that she
11 would get the needed medical records and would put together a settlement demand. *Tr.*
12 *37/15 - 38/19.* Respondent did not complete that task. *Tr. 379/23 - 380/9.*

13 63. On August 12, 2002, Ms. Stangl e-mailed Respondent again asking for an
14 update on the status of her case, including whether Respondent had contacted Fry's. Not
15 receiving a response, Ms. Stangl again e-mailed Respondent on August 20, 2002. *SB Ex.*
16 *8, at 112 - 113.*
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64. By e-mail dated August 21, 2002, Respondent replied to Ms. Stangl, stating that she had been out of town, but that she had been in touch with Fry's attorneys and had passed on Ms. Stangl's information regarding her medical bills. *SB Ex. 8, at 000112.* This response was not correct, as Respondent had not been in recent contact with Fry's attorney and had not delivered Ms. Stangl's medical bills.

ASSERTION OF A LIMITATIONS DEFENSE AND RESPONDENT'S REACTION

65. On September 19, 2002, Respondent spoke with Tom Slack and indicated that she would provide him with Ms. Stangl's medical records and bills. The conversation was cordial but superficial, primarily because Mr. Slack did not remember the case. *Stipulated Fact 7; Tr. 288/15 - 299/7.*

66. Later that day, after reviewing his file, Mr. Slack dictated a letter informing Respondent that Fry's had directed the case be closed due to the expiration of the Statute of Limitation. *Tr 229/4 - 11; SB Ex. 8 at 118 - 199.*

67. By return letter dated September 23, 2002, Respondent explained that she thought they had agreed to an extension of the statute of limitations until November 2002. With her letter, she enclosed a copy of the August 10, 2001 letter requesting a second extension. *Tr. 229/11 - 230/6; SB Ex. 8 at 123; Stipulated Fact 8.*

68. In September 2002, Ms. Stangl contacted Mr. Kimerer twice to express concerns about the way her case was being handled and the responses she was receiving from Respondent. In the second conversation, Ms. Stangl told Mr. Kimerer that based on her communications with Respondent, she was concerned that the statute of limitations was missed. After this conversation with Ms. Stangl, Mr. Kimerer reviewed the file and

asked Respondent about the case. Respondent explained that she had received an
1 extension from opposing counsel. *Tr.* 258/9 - 16, 259/18 - 22; 260/11 - 17; 261/1 - 5.

2
3 69. After receiving Mr. Slack's letter, Respondent met Ms. Stangl. During this
4 conference, Respondent mentioned there was a problem with the statute of limitations,
5 but assured Ms. Stangl that there had been a misunderstanding and something could be
6 worked out. The explanation was vague, not constituting full disclosure. *Tr.* 42/9 -
7 43/22.

8
9 70. At this time, Respondent believed that there was a misunderstanding
10 regarding an extension of the statute of limitations and that the prior agreement to
11 arbitrate Ms. Stangl's matter was still an option.

12 71. Because of developments in Respondent's personal life, October 2002 was
13 unbearably painful and stressful.²¹ All the evidence, including the uncontradicted
14 testimony of three physicians, establishes that Respondent, by this time, was in the midst
15 of a full-blown Major Depressive Episode.

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17 72. As Mr. Slack was a potential witness on the extension issue, Fry's retained
18 another attorney, Kevin Dykstra. In a letter dated October 16, 2002, Mr. Dykstra

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1 expressly and unequivocally stated that there was no extension and Fry's would assert a
2 limitations defense. *Stipulated Fact 9; SB Ex. 8 at 137.*

3 73. Despite the letter from Mr. Dykstra, and her knowledge that Fry's would
4 not negotiate or settle the case, Respondent continued to tell Ms. Stangl that she was still
5 communicating with Fry's to settle Ms. Stangl's claim. In the communications between
6 Respondent and Ms. Stangl during this period, Respondent provided confusing and
7 conflicting information to Ms. Stangl. Respondent did not reveal to Ms. Stangl the
8 existence of Mr. Dykstra's letter, or tell Ms. Stangl that Fry's would assert a statute of
9 limitations as a defense. Respondent's statements to Ms. Stangl were misleading and
10 outright untruths. Respondent was consciously aware that what she was saying was not
11 accurate. *Tr. 42/7 - 53/9.*

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13 74. On October 25, 2002, Respondent informed Ms. Stangl that Fry's had made
14 a settlement offer of \$30,000. No such offer had been made. *Tr. 53/10 - 54/2.*

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16 75. In a November 7, 2002 telephone call, Respondent indicated to Ms. Stangl
17 her belief that Fry's would settle for \$40,000, and explained that after the contingency fee
18 was deducted, Ms. Stangl would receive a net settlement of \$27,000.00. *Tr. 55/2 - 56/21.*

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20 76. On November 12, 2002, Respondent informed Ms. Stangl that her case had
21 settled for \$46,000, and indicated that the check would be made payable to Ms. Stangl.
22 No such settlement existed. *Stipulated Fact 10; Tr. 56/22 - 57/13.*

that Ms. Stangl was properly compensated and her interests otherwise protected. *Tr.*

1 85/11 - 16; 264/17 - 23; 268/13 - 18; 459/8 - 13.

2 89. Respondent had not provided Ms. Stangl with her complete file. Mr.
3 Kimerer subsequently provided Mr. May with the missing documents, the September
4 letters from Mr. Slack, and the October 16, 2002 letter from Mr. Dykstra. *Tr.* 106/20 -
5 106/22, 265/3 - 267/5.
6

7 90. After the discussion with Mr. Kimerer, Mr. May was left with the
8 impression that either Respondent's firm or Respondent would report her conduct to the
9 State Bar. *Tr.* 108/9 - 24.
10

11 91. No report was made to the State Bar by either Respondent, her partner or
12 anyone else involved with Respondent's firm. *Stipulated Fact 12.*

13 THE STATE BAR COMPLAINT

14 92. Ms. Stangl and Mr. May filed charges against Respondent with the State
15 Bar by letters dated June 30, 2003 and July 8, 2003 respectively. *Stipulated Fact 13.*
16

17 93. By letter dated October 31, 2003, Respondent acknowledged her
18 misconduct relating to Ms. Stangl's case and the purported settlement. *Stipulated Fact*
19 *14.*

20 94. Respondent does not dispute that she misled Ms. Stangl into believing that
21 Respondent had successfully settled the matter when she knew or should have known that
22 the claim was no longer viable and that no settlement with Fry's had been or would be
23 achieved. *Stipulated Fact 15; Tr.* 332/12 - 13; 454/7 - 11.
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THE MALPRACTICE LAWSUIT

1 95. In August 2003, Mr. May, on behalf of Ms. Stangl, filed a malpractice case
2 against Respondent and her firm. *Tr. 137/13 - 14; 139/17 - 21; 233/9 - 23; 411/21 -*
3 *412/6.*

4
5 96. Prosecution of the malpractice action was greatly enhanced by the work and
6 investigation performed by Ms. McCall and Respondent. *Tr. 137/13 - 14; 139/17 - 21;*
7 *233/9 - 23; 411/21 - 412/6.*

8 97. Respondent admitted liability in the malpractice case. *Tr. 463/1 - 465/7*

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10 98. Respondent put pressure on her insurance company to compensate Ms.
11 Stangl. *Tr. 463/1 - 465/7.*

12 99. Respondent agreed to reinstate the malpractice case after it had been
13 dismissed for lack of prosecution. *Tr. 463/1 - 465/7*

14 100. Ms. Stangl's case against Respondent and others settled for over \$200,000,
15 an award much larger than the reasonable value of her claim against Fry's.

16
17 101. Respondent contributed substantial sums of her personal funds to facilitate
18 the \$200,000 settlement. In fact, Respondent paid more money than originally pledged
19 when a co-defendant was unable to fund its portion of the settlement. *Tr. 463/1 - 465/7.*

20 **ADDITIONAL FINDINGS AS TO RESPONDENT'S MENTAL CONDITION**

21 102. Respondent has been evaluated by three medical professionals in
22 connection with her emotional disorders, Dr. Mark A. Wellek, Dr. Jack L. Potts, and Dr.
23 Michel A. Sucher. *Respondent's Exs. H, I and J.*

103. Mark Wellek, M.D., a psychiatrist, observed Respondent's condition beginning in January 2002. *Resp. Ex. J*. Respondent formally sought treatment from Dr. Wellek in November 2002, shortly after her representation of Ms. Stangl terminated. Dr. Wellek reported that Respondent, by that time, was mortified and suicidal because of her conduct in the Stangl case. *Tr. 161/13 - 24, 162/17 - 18, 162/23 - 24; Respondent's Exs. J and U*.

104. Dr. Sucher is a licensed physician, who, among his many professional responsibilities, acts as a consultant on professional health issues to various regulatory boards and agencies, including the State Bar. Currently, Dr. Sucher is medical director for the State Bar's Member Assistance Program ("MAP"). Dr. Sucher has worked with a number of enrollees in MAP who suffer from an impairment and were found to have committed acts of dishonesty. *Tr. 303/13 - 25; 322/7 - 10; Resp. Ex. I*.

105. Dr. Potts currently practices as a forensic psychiatrist and has served as an expert witness for the State Bar in numerous cases involving attorneys' mental health status in disability, MAP and discipline matters. He also served for six years, and continues to serve on an *ad hoc* basis, as a member of the Disciplinary Commission of the Supreme Court of the State of Arizona. *Resp. Ex. H; Tr. 413/21 - 415/15*.

106. Drs. Sucher, Potts and Wellek agree that Respondent suffered from major depression and generalized anxiety disorder during the relevant time period. *Respondent's Exs. H and J; Tr. 160/20 - 22; 162/19 - 24; 423/9; 429/16 - 20*.

107. These opinions are corroborated by evidence that Respondent often was
1 distracted, frazzled, and depressed, frequently out of the office, and missing phone calls
2 and meetings. *Tr. 274/7 - 25; 275/1 - 8; 296/15 - 22; 366/1 - 6, 15 - 20; 368/4 - 14.*

108. The medical evidence establishes that the acts of misconduct committed by
3 Respondent were "knowing" in the sense that Respondent was conscious of her acts.
4
5 However, they were acts which were impulsive, and were committed without regard to
6 whether they were right or wrong. *Tr. 217/1 - 5; 433/4 - 12; 434/21 - 22.*

109. Respondent's acts of misconduct, including the misrepresentations and the
7 fabricated settlement, were the product of mental disorders. *Tr. 168/19 - 172/21, 425/16 -*
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19; Resp. Ex. H, I and J. Respondent's conduct was not intentionally wrongful, to the
extent that state of mind requires a conscious objective to accomplish a wrongful result.

110. Respondent's conduct in the Stangl case was the result of a worsening
14 mental illness during a time of significant personal stress. The three medical
15 professionals agree that Respondent's conduct was aberrant, completely out of character
16 with her strong sense of ethics, dedication to her family, colleagues and clients, and
17 inconsistent with her reputation as an ethical, competent and professional attorney. *Resp.*
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Exs. H, I, and J; Tr. 312/1 - 6.

111. The State Bar presented no expert witness and never requested an
20 independent medical examination (IME) of Respondent. In its cross-examination of
21 Respondent's medical experts, the State Bar did not elicit any evidence which
22 contradicted or discredited the opinions of those experts. It is true that Respondent
23 exhibited dishonesty and avoidance, and those behaviors are not clinical *symptoms* of

1 depression. However, dishonesty and avoidance are behaviors which can be expected
2 from depressed attorneys, as is delay in obtaining treatment. *Tr. 206/17 - 207/2, 319/22 -*
3 *321/16, 321/23 - 322/10.*

4 **RESPONDENT'S ONGOING TREATMENT AND RECOVERY**

5 112. Respondent has been undergoing treatment since November 2002, and has
6 been in continuous treatment since October 2003. Her treatment includes therapy (both
7 individual and group) plus medication. *Tr. 172/22 - 174/18; 473/9 - 22; Resp. Ex. H, I*
8 *and J.*

9 113. The medical professionals agree that Respondent's current mental condition
10 is significantly improved. *Tr. 173/9 - 19; 312/1 - 6; 426/8 - 18; Resp. Ex. H, I and J.*

11 114. The emotionally distressing situation which caused Respondent's
12 depression has greatly subsided.²²

13 115. All three medical professionals agree that there is little appreciable risk of
14 comparable misconduct in the future. *Tr. 173/23 - 25; 311/24 - 25; 312/1 - 6; 427/4 - 10;*
15 *Resp. Ex. H, I and J.* There is no evidence contrary to the doctors' conclusion.
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116. The medical professionals uniformly agree that a sanction of Respondent would have a negative effect on her and could produce a relapse in her depression. *Tr.* 176/20 - 177/5, 312/19 - 23, 430/17 - 22; *Resp. Ex. H, I and J.*

ADDITIONAL FINDINGS OF MITIGATING CIRCUMSTANCES

117. Respondent, when not impaired by depression, is highly moral and ethical, and an excellent attorney. *Tr.* 304/20 - 305/14, 416/6 - 417/10.

118. As an attorney, Respondent has demonstrated a commitment to *pro bono* work, and has accepted state and federal court appointments in several difficult cases, including capital cases and constitutional challenges to prison conditions. *Tr.* 452/3 - 25, 453/1 - 23.

119. Respondent performs significant professional and social service, evidencing an extremely giving and altruistic nature. Respondent regularly provides *pro bono* representation to nurses and behavioral health professionals, supervises law students in the Arizona State University College of Law Justice Project, and has served on the State Bar's Ethics Committee.

120. Respondent's service extends beyond the legal profession to many civic and charitable organizations. Respondent has held a leadership position in many of those organizations. *Tr.* 394/1 - 19.

121. Respondent enjoys a reputation as a skilled and competent lawyer. *Tr.* 273/16 - 22; 305/7 - 14; 370/1 - 17; 416/15 - 417/10; *see also Comer v. Stewart*, 230 F. Supp.2d 1016, 1019, n. 6 (D. Ariz. 2002).

122. Respondent has never been the subject of a bar complaint in her fourteen
1 years of practice. *Tr. 392/20 - 25; 393/1 - 19; 394/1 - 19; Resp. Ex. A.*

123. Respondent cooperated with the State Bar during the pre-Complaint
2 investigation and during these disciplinary proceedings. *State Bar's Post-Hearing*
3 *Memorandum, page 58, lines 19 - 20.*

124. While Respondent, in lying to Ms. Stengl and in creating the fictitious
4 settlement agreement, was trying to conceal the fact that the statute of limitations had run
5 on Ms. Stengl's claim, her primary motive was not dishonest or selfish in the sense that
6 she intended to benefit herself at the expense of Ms. Stengl. In her confused mind,
7 Respondent was motivated, in part, by a desire to see Ms. Stengl compensated.
8 Considering that Respondent was going to accomplish the fictitious settlement by paying
9 her own funds to Ms. Stengl, Respondent's motives can not be considered selfish.
10

125. Respondent feels genuine remorse and shame for her conduct in this case.
11

126. In light of her depression, Respondent has curtailed her professional
12 activities. *Tr. 394/1 - 19.*

127. Respondent was actively involved in making sure that Ms. Stengl was
13 compensated for her loss as soon as possible. She admitted liability, put pressure on her
14 insurance company to compensate Ms. Stengl, agreed to reinstate the case after it had
15 been dismissed for lack of prosecution, and ultimately, contributed substantial sums of
16 her personal funds to facilitate the settlement. Respondent took personal responsibility
17 for ensuring that more than full restitution was made for Ms. Stengl's loss. *Tr. 463/1 -*
18 *465/7.*

1 128. To the extent Respondent failed to act with reasonable diligence and
2 promptness in representing her client, Respondent's failure was the result of a mental
3 disorder.

4 129. To the extent that Respondent failed to keep her client reasonably informed
5 about the status of the matter and to promptly comply with reasonable requests for
6 information, Respondent's failure was the result of a mental disorder.

7 130. To the extent that Respondent failed to recognize that she had a conflict of
8 interest, Respondent's failure was the result of a mental disorder.

9
10 **FINDING RELEVANT TO RESTITUTION**

11 131. Ms. Stangl was fully compensated by the settlement of the malpractice
12 lawsuit. There is no basis in this record to order restitution.

13 **CONCLUSIONS OF LAW**

14 Based on the foregoing facts and as explained hereafter, this Hearing Officer
15 concludes:

16
17 1. There is clear and convincing evidence that Respondent violated Rule 43,
18 Ariz. R. S. Ct., ER 1.3, 1.4(a), and 1.7(b).

19 2. There is not clear and convincing evidence that Respondent violated Rule
20 43, Ariz. R. S. Ct., ER 1.1, 1.2, 1.8, 4.1(a), 4.4, 8.4(c) or 8.4(d).

21 3. There are no aggravating circumstances.

22 No Dishonest or Selfish Motive. Finding of Fact 125 precludes this conclusion.

23
24 No Substantial Experience in the Law. In their post-hearing memoranda, the State
25 Bar and Respondent both state that the aggravating factor of "substantial experience" in
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1 the law is present. I respectfully disagree. The misconduct in this case is not the type of
2 misconduct which is less likely to occur the more experienced the lawyer is. All lawyers,
3 regardless of experience, know that it is unethical to lie and fabricate documents. Thus,
4 substantial experience in the practice of law is not an aggravating factor. *In re Peasley*,
5 208 Ariz. 27, 90 P.3d 764 (2004); *Matter of Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239
6 (1995); *ABA Standard 9.22(i)*.

7 No Pattern of Misconduct. The State Bar contends this aggravating circumstance
8 because Respondent's conduct involved different and multiple improper acts over a
9 period of time. This aggravating circumstance is not present when only one client and
10 one matter is involved, even if multiple unethical acts are involved and multiple ERs are
11 violated. *In re Levine*, 174 Ariz.146, 171 - 172, 847 P.2d 1093, 1118 - 1119 (1993); *In re*
12 *Disciplinary Proceeding Against Brothers*, 149 Wash.2d 575, 586 - 587, 70 P.3d 940, 945
13 - 946 (2003); *In re Complaint as to Conduct of Davenport*, 334 Or. 298, 321, 49 P.3d 91,
14 104 (2002); *In re Reardon*, 759 A.2d 568, 576 - 577 (Del. 2000).

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16
17 4. There are numerous mitigating factors. They are:

- 18 • absence of prior discipline. *Standard 9.32(a)*.
- 19 • absence of a dishonest or selfish motive. *Standard 9.32(b)*.
- 20 • personal or emotional problems. *Standard 9.32(c)*.
- 21 • timely good faith effort to make restitution or to rectify the consequences of
22 the misconduct. *Standard 9.32(d)*.
- 23 • full and free disclosure to Disciplinary Board or cooperative attitude toward
24 proceedings. *Standard 9.32(e)*.
- 25

- good character and reputation. *Standard 9.32(g)*.
- mental disability or impairment. *Standard 9.32(h)*.
- remorse. *Standard 9.32(j)*.

EXPLANATION OF CONCLUSIONS

Why a violation of ER 1.1 does not exist. ER 1.1 requires that, at a minimum, a lawyer who accepts an engagement by a client must have “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” *Toy v. Katz*, 192 Ariz. 73, 85, 961 P.2d 1021, 1033 (App. 1997). Respondent had the requisite legal knowledge and skill. Neither failure to achieve a successful result nor negligence in the handling of a case will necessarily constitute an ER 1.1 violation. *Matter of Curtis*, supra.

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. *Comment 5 to Model Rule 1.1*.

Respondent was competent within the meaning of ER 1.1. There is the suggestion that Respondent did not act competently in how she approached the second extension request. While how Respondent handled the second extension request may not constitute the “best practice,” the evidence is not clear and convincing that she was incompetent, especially considering the lack of expert testimony on the issue and the first extension was memorialized by only a letter.

How Respondent failed was by not being "diligent" as required by ER 1.3.

1 Finding a ER 1.1 violation for Respondent's lack of diligence, however, would
2 improperly overlap ER 1.3.
3

4 Why a violation of ER 1.2 does not exist. There is a distinction between the
5 objectives of the representation, which is the prerogative of the client, and the means used
6 to achieve those objectives, which is the prerogative of the attorney. The attorney has the
7 authority to make day-to-day tactical decisions regarding the litigation process. See
8 *Wyatt v. Wehmuller*, 167 Ariz. 281, 806 P.2d 870 (1991); *Garn v. Garn*, 155 Ariz. 156,
9 745 P.2d 604 (App. 1987). The attorney may assume responsibility for technical and
10 legal tactical issues, but should defer to the client regarding such questions as the expense
11 to be incurred. *Comment to former ER 1.2.* The State Bar failed to prove with clear and
12 convincing evidence where Respondent failed to abide by Ms. Stangl's decision
13 concerning *the objectives* of the representation.
14

15 Why a violation of ER 1.7 exists. The State Bar contends that Respondent violated
16 ER 1.7 by "continuing to represent Ms. Stangl knowing that her representation of Ms.
17 Stangl might be materially limited by Respondent's own interest in concealing the true
18 status of Ms. Stangl's case to avoid the negative consequences of her actions and
19 inaction." Once it was clear that Fry's was going to assert a limitations defense,
20 Respondent's representation of Ms. Stangl was "materially limited" by Respondent's own
21 interests. *Matter of Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995); *In re*
22 *Shannon*, 179 Ariz. 52, 876 P.2d 548, 556-558 (1994). This issue was addressed in
23 Arizona Ethics Opinion No. 90-15, where the Committee opined that an attorney who
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1 represents a client in a personal injury action proceeding on both strict liability and
2 negligence theories, and who fails to file the strict liability claim within the applicable
3 statute of limitations, may not continue with the representation of the client unless the
4 client consents after disclosure and consultation.

5 While Respondent's representation of Ms. Stangl was "materially limited" by
6 Respondent's own interests, Respondent still could have represented Ms. Stangl as long
7 as Ms. Stangl consented after proper disclosure and consultation. *ER 1.7(b); Matter of*
8 *Owens*, supra. A thorough explanation was required, but was not given.

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10 Respondent's state of mind, however, was negligent. The uncontradicted,
11 unrebutted medical evidence compels the conclusion that Respondent's acts were the
12 product of her mental illness, and, at most, her actions were negligent.

13 Why a violation of ER 1.8 does not exist. The State Bar contends that Respondent
14 "engaged in a conflict of interest involving prohibited transactions with clients, in
15 violation of ER 1.8." Although Respondent forwarded the release, Ms. Stangl never
16 signed it. This ER, on its face, requires a consummated transaction between the attorney
17 and client. *An attempt to enter into a prohibited transaction is not enough.*

18
19 Why a violation of ER 4.1 does not exist. ER 4.1 requires that the attorney
20 knowingly make a false statement of material fact or law to a third person. See *Comment*
21 *1 to former Model Rule 4.1* ("A lawyer is required to be truthful when dealing with others
22 on a client's behalf. . ."). Respondent's false statements were made to her client, not to a
23 third party. When Respondent made statements to the attorneys for Fry's that the statute
24 of limitations had been extended, Respondent believed such an extension had been
25

1 obtained. Although Respondent prepared a letter to Mr. Pieters which contained false
2 statements, that letter was not sent to Mr. Pieters.

3 Why a violation of ER 4.4 does not exist. ER 4.4 requires a showing that a
4 respondent "used means that have no substantial purpose other than to embarrass, delay
5 or burden *a third person*, or used methods of obtaining evidence that violate the legal
6 rights of *such a person*." As the Comment to ER 4.4 elaborates: "Responsibility to a
7 client requires a lawyer to subordinate the interests of others to those of the client, but that
8 responsibility does not imply that a lawyer may disregard the rights of third persons. It is
9 impracticable to catalogue such rights, but they include legal restrictions on methods of
10 obtaining evidence from others and unwarranted intrusions into privileged relationships,
11 such as the client-lawyer relationship." A violation of ER 4.4 requires clear and
12 convincing proof of an improper motive or bad faith. *In re Levine*, 174 Ariz.146, 154,
13 847 P.2d 1093, 1101 (1993). The uncontradicted, unrebutted medical evidence compels
14 the conclusion that Respondent's acts were the product of her mental illness, and her
15 mental illness negates the intent necessary to find a violation of ER 4.4. The State Bar
16 did not present proof of an improper or bad - faith motive to embarrass, delay or burden a
17 third person.

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20 Why a violation of ER 8.4(c) does not exist. ER 8.4 requires "conduct that is
21 fraudulent under the substantive or procedural law of the applicable jurisdiction and has a
22 purpose to deceive." *ER 1.0 and 8.4(c)*. A showing of negligence is insufficient to
23 support a determination that a lawyer committed a fraud or engaged in fraudulent
24 conduct. *In re Clark, supra; Matter of Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288
25

1 (1995). Stated another way, to commit a violation of ER 8.4(c), an attorney must have a
2 purpose to deceive. The uncontradicted, unrebutted medical evidence compels the
3 conclusion that Respondent's acts were the product of her mental illness, and her mental
4 illness negates the intent necessary to find a violation of ER 8.4(c).

5 Why a violation of ER 8.4(d) does not exist. ER 8.4(d) proscribes disrespect for
6 the court, abusive or uncivil behavior towards opposing counsel or parties, sexual
7 misconduct, abuse of public office, and deceitful conduct. See ANNOTATED MODEL
8 RULES 615 - 17 (5th Ed. 2003). For example, an attorney who manifests by words or
9 conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age,
10 sexual orientation or socioeconomic status, violates paragraph (d) when such actions are
11 prejudicial to the administration of justice. See comment 2 for former 8.4(d). The State
12 Bar failed to present clear and convincing evidence that Respondent's conduct violated
13 ER 8.4(d).

14 APPROPRIATE SANCTION

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17 The purpose of professional discipline is twofold: (1) to protect the public, the
18 legal profession, and the justice system, and (2) to deter others from engaging in
19 misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985); *In re Swartz*,
20 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984). Disciplinary proceedings are not to
21 punish the attorney. *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004); *In re*
22 *Beren*, 178 Ariz. 400, 874 P.2d 320 (1994). The State Bar suggests that a one year
23 suspension is justified. Respondent suggests that diversion is more appropriate.
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CONSIDERATION OF THE ABA STANDARDS

1 In determining the appropriate sanction, the American Bar Association's
2 *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, supra. Those
3 *Standards* counsel that, in determining the proper sanction, four criteria should be
4 considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential
5 injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or
6 mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA
7 *Standard 3.0*.

9 The applicable ABA *Standards* are Standards 4.3 and 4.4. Based upon all the
10 evidence, the most relevant *Standards* are Standards 4.34 and 4.43. Standard 4.34 (failure
11 to avoid conflicts of interest) provides that an admonition (informal reprimand in
12 Arizona) is appropriate when a lawyer is negligent in determining whether the
13 representation of a client may be materially affected by the lawyer's own interest, but the
14 attorney's failure causes little or no actual or potential injury to the client. Standard 4.43
15 (lack of diligence) provides that a reprimand (censure in Arizona) is appropriate when a
16 lawyer is negligent and does not act with reasonable diligence, causing injury or potential
17 injury to the client.

19 Here, the most serious violation is lack of diligence, making Standard 4.43 the
20 controlling guide. Therefore, the presumptive sanction is censure. Because of the lack of
21 any aggravating circumstances and the presence of numerous, significant mitigating
22 circumstances, a reduction in this presumptive sanction is justified. *ABA Standard 9.31*.
23 A downward reduction from the presumptive sanction leaves available: informal
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reprimand with probation, probation only, and diversion. *Rule 60, Rules of the Supreme Court.*

PROPORTIONALITY ANALYSIS

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar: *In re Shannon*, 179 Ariz. 52 (1994); *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988).

The State Bar refers to the following decisions for proportionality: *In re Pulito*, SB-04-0134-D (2005); *In re Sierra*, SB-04-0074-D (2004), *In re Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989), *In re Laskorski*, 213 A.D.2d 50, 630 N.Y.S.2d 561 (1995), and *In re Want*, Virginia State Bar Docket No. 97-101-2163 (1999). These decisions are of little assistance. None of the Arizona decisions (*Pulito*, *Sierra* and *Fresquez*), involve a respondent with a mental disorder which caused the attorney's improper conduct. Additionally, those decisions involve numerous aggravating circumstances, which overcome insubstantial or non-existent mitigating circumstances.

In re Laskorski, 213 A.D.2d 50, 630 N.Y.S.2d 561 (1995), is somewhat similar in that the client's matter was dismissed due to Laskorski's failure to take action, Laskorski failed to inform the client of the dismissal, and he then falsely represented to the client that the opposing party had tendered a settlement and urged the client to accept. While Laskorski offered as mitigation the recent death of a close relative, the decision's

1 description of the potentially mitigating circumstances is superficial. There appears to be
2 no evidence that the death of the close relative impaired the attorney's mental capabilities.

3 *In re Want*, Virginia State Bar Docket No. 97-101-2163 (1999) is similarly lacking
4 of an impairment causing the inappropriate conduct. There, the attorney merely stated
5 that he underwent some treatment for depression. There was no expert testimony and no
6 evidence the depression impaired the attorney. Other than the fact that the decision
7 mentions diligence and depression, *Want* is not similar to the uncontroverted and
8 uncontradicted evidence of Respondent's impairment and its causal link with improper
9 conduct.

10
11 More helpful are cases cited by Respondent which consider the impact of an
12 attorney's disorder on the improper conduct. *Matter of Mettler*, SB-02-0094; *Matter of*
13 *Bihn*, SB 03 - 2158 (Hearing Officer's Report and Recommendation filed Feb. 8, 2005);
14 *Matter of Arrick*, supra, 180 Ariz. at 139, 882 P.2d at 946.

15
16 In *Mettler*, an attorney committed two violations of ER 1.15 (safekeeping
17 property) and four trust account violations. The presumptive sanction of disbarment was
18 reduced to a thirty day suspension because of the attorney's mental disorder. "A lengthier
19 suspension would be punitive and impose a very severe personal penalty for no
20 rehabilitative purpose.

21
22 In *Bihn*, Respondent admitted that his conduct violated ER 1.2, 1.3, 1.4, 3.2, and
23 8.4(c) and (d), but claimed to be suffering from depression during the time when the
24 underlying facts occurred. Although the State Bar sought disbarment, it eventually
25 agreed that a sixty - day suspension and two years probation were appropriate, due in part

1 to the Respondent's mental illness. I recognize that *Bihn* is not a final decision as the
2 Disciplinary Commission only recently entered its decision.

3 In *Arrick*, an attorney's alcoholism affected his ability to form the intent necessary
4 to violate the disciplinary rules requiring a finding of intent. *180 Ariz. at 139 - 40, 882*
5 *P.2d at 946 - 47*. Despite Arrick's "totally inadequate" representation of a criminal
6 defendant, the Arizona Supreme Court noted that the attorney's condition may have
7 prevented him from having "conscious objective" to engage in misconduct. *Id.* The
8 Court concluded that in the absence of clear and convincing proof that the attorney
9 intentionally failed to represent his client, his actions were negligent and caused in large
10 measure by his addiction to alcohol. *180 Ariz. at 140, 882 P.2d at 947*. The Court
11 dismissed those violations that required specific proof of intent. *Id.*

12 WHAT IS APPROPRIATE FOR THIS CASE

13
14 The State Bar has established diversion programs to address acts of ethical
15 misconduct that typically can be linked to poor law office management, chemical and
16 alcohol dependency, mental illness or behavioral problems.²³ The MAP is intended to
17 serve attorneys who suffer from chemical dependency, stress, depression or similar
18 problems. The MAP compels the attorneys to undergo treatment for mental illness and
19 provides the attorney with the opportunity to cure and control the problem underlying the
20 misconduct. This opportunity for rehabilitation not only protects the public by reducing
21
22

23 ²³ Again, it is true that dishonesty and avoidance are not clinical *symptoms* of
24 depression, but those behaviors can be expected from depressed attorneys. *Tr. 206/17 -*
25 *207/2, 319/22 - 321/16, 321/23 - 322/10.*

the probability of future similar offenses but also provides a real rehabilitative service to the attorney as a person.

To effectuate its purposes, diversion is to be liberally applied at any stage of a disciplinary proceeding. The MAP is an appropriate placement for an attorney suffering from an impairment that was the cause of misconduct. *"A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers,"* 52 *Emory Law Journal* 1221 (2003); *"Professional Misconduct by Mentally Impaired Attorneys"* supra at 633-635; *Attorney Grievance Committee of Maryland v. Olver*, 376 Md. 650, 831 A.2d 66 (2003).

I fail to see how the *expressed* goals of attorney discipline – deterrence and protection of the public and the profession – will be served by imposing discipline on Respondent. When an otherwise competent lawyer commits misconduct attributable to a mental or physical condition or a substance abuse problem, and where, as here, that attorney is successfully treating the problem, neither the public nor the profession gains from the temporary or permanent removal of the attorney from practice. Compare *Rivkind*, 164 Ariz. 154, 791 P.2d 1037 with *Matter of Arrick*, supra.

There is no showing that the public needs to be protected from Respondent. There is little appreciable risk of comparable conduct in the future. The remedial approach of the MAP enhances the likelihood that the public will be protected going forward. And, it is significant Respondent (a) took actions to ensure that more than full restitution was made to Ms. Stangl and (b) there have been no reports of other misconduct or

malpractice, thus demonstrating Respondent's desire and ability to fulfill her professional responsibilities.

The medical professionals agree that because Respondent's misconduct was so aberrant and so much the product of a mental illness, the imposition of a disciplinary sanction would not serve as a deterrence to other attorneys. *Tr. 175/23 – 176/9; 429/15 – 430/24*. More important, those medical experts agree that imposing a formal sanction on Respondent could harm her. The opinions and credible testimony of these three experienced medical professionals, two of whom have familiarity with the attorney disciplinary processes, cannot be overlooked and should be afforded serious consideration.

The State Bar contends that the effect of discipline on Respondent is immaterial. For support, the State Bar cites *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001) and *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994). I believe the State Bar's reading of *Shannon* is too broad and its reading of *Scholl* is incorrect.

The Supreme Court in *Shannon* simply held that the "effects of sanctions upon a Respondent's *practice and livelihood*" were not to be considered. *In re Shannon*, 179 Ariz. at 71, 876 P.2d at 567 (emphasis added). Seven years later in *Scholl*, the Court cited *Shannon* to support its statement that the court does not consider the nature of the lawyer's practice or the effect on the lawyer's livelihood in determining the appropriate sanction. *In re Scholl*, ¶ 10. However, the Court later in *Scholl* noted that the disciplinary system's "duty to assure public confidence is met with concomitant responsibility to show fairness to Scholl." *Scholl*, ¶ 30; citing *In re Savoy*, supra.

1 Stated another way, public confidence in the disciplinary process is important. *In*
2 *re Loftus*, 171 Ariz. 672, 675, 832 P.2d 689, 692 (1992). The duty to ensure public
3 confidence, however, is balanced by a duty to show fairness to a respondent. *In re*
4 *Savoy*, supra, 181 Ariz. at 372, 891 P.2d at 240 (1995); *In re Scholl*, supra, 200 Ariz. at
5 227, 25 P.3d at 715.

6 Of course, it is easy to be suspect about diversion. To those with a cynical view of
7 attorneys, diversion may be seen as attorneys simply protecting colleagues. To others, it
8 may seem that a “noble profession” is being tarnished. The confidentiality of diversion
9 programs does not dispel these beliefs. “*Professional Misconduct by Mentally Impaired*
10 *Attorneys, etc.*”, 17 *Georgetown Journal of Legal Ethics* 619 (2004).

11 And, no matter how much public education and public understanding has
12 improved, many people still do not consider mental disorders, depression in particular, as
13 legitimate as physical disorders. Depression continues to sometimes connote “excuse” or
14 “character flaw.” For some people, understanding and acceptance may only come with
15 the type of pain suffered by this Respondent.
16
17

18 A response to doubts about diversion and depression, I believe, is found in the
19 dissenting words of former Chief Justice Zlaket. Although written in a *judicial*
20 disciplinary proceeding, they reflect the proper balance in attorney discipline.

21 What troubles me most, however, is the majority’s implicit suggestion that a
22 human justice system cannot tolerate human judges. I do not accept the
23 premise that judges who succumb to the emotional stresses of daily living
24 necessarily become unfit to serve. My belief that those who are given the
25 privilege of judging others should be able to recognize and understand,
26 through their own personal experiences, the weakness and folly that go with
being a human. Otherwise we risk having a judiciary composed of

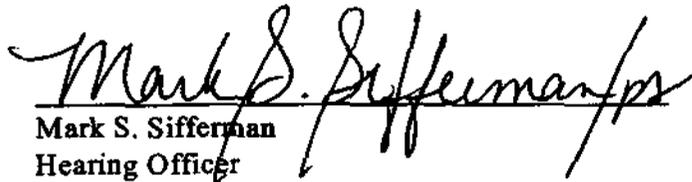
1 arrogant, sanctimonious elitists – people with little humility or compassion,
2 free of emotion in both their personal and professional lives, and well out of
3 touch with the world.

4 *In re Jett*, supra, 180 Ariz. at 112, 882 P.2d at 423 (Zlaket dissenting).

5 **RECOMMENDATION**

6 Upon consideration of the facts, application of the *Standards*, including
7 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer
8 recommends:²⁴ (1) that the Complaint be dismissed and (2) that the matter be remanded to
9 the probable cause panelist with instructions to vacate the probable cause order and refer
10 the matter for diversion with the MAP.

11 DATED this 19th day of May, 2005.

12 
13 Mark S. Sifferman
14 Hearing Officer

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24 ²⁴ Rule 57(j) provides that a Hearing Officer may order dismissal and/or diversion,
25 without further action of the Commission. A party does have the right to appeal such an
26 order. *Rules 57(k) and 58(a), Rules of the Supreme Court.*

1 ORIGINAL filed with the
2 Disciplinary Clerk of the
3 Supreme Court of Arizona and
4 copies mailed this 19th day of
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