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

IN THE MATTER OF A SUSPENDED MEMBER)	Nos 07-0588, 07-0683, 07-1096,
OF THE STATE BAR OF ARIZONA,)	07-1101, 07-1207, 07-1258,
)	07-1367, 07-1811
ANDREW TODD WIRTH,)	
Bar No. 022317)	DISCIPLINARY COMMISSION
)	REPORT
RESPONDENT)	
_____)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 14, 2008, pursuant to Rule 58, Ariz R Sup Ct , for consideration of the Hearing Officer's Report filed April 21, 2008, recommending disbarment, restitution, and costs

Decision

Having found no facts clearly erroneous, the eight members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for disbarment, restitution, and costs of these disciplinary proceedings² The amounts of restitution are as follows

¹ One lawyer member seat remains vacant Commissioner Horsley did not participate in these proceedings Sylvia Vega, a public member from Phoenix, participated as an ad hoc member
² A copy of the Hearing Officer's Report is attached as Exhibit A

Restitution

Timothy R Milo \$1,195 00
Ronald Kowalski \$4,500 00
TOTAL \$5,695.00

RESPECTFULLY SUBMITTED this 8th day of July, 2008

Daisy Flores

Daisy Flores, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 8th day of July, 2008

Copy of the foregoing mailed
this 9th day of July, 2008, to

H Jeffrey Coker
Hearing Officer 6R
P O Box 23578
Flagstaff, AZ 86002

Robert J Lauanders
Respondent's Counsel
6719 East Second Street, Suite B
Prescott Valley, AZ 86314

Stephen P Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by *C. Auto*

/mps

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

IN THE MATTER OF AN ATTORNEY) File Nos 07-0588, 07-0683, 07-1096,
UNDER INTERIM SUSPENSION,) 07-1101, 07-1207, 07-1258,
) 07-1367, 07-1811
)

ANDREW TODD WIRTH,
Bar No. 022317

HEARING OFFICER'S REPORT

RESPONDENT

FILED

APR 21 2008

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY A. M. ...

PROCEDURAL HISTORY

- 1 On the September 25, 2007, Probable Cause was found in the following cases. 07-1207 (Page), 07-1101 (McClan), 07-1096 (Stultz), 07-683 (Milo); and 07-588 (Kille) Probable Cause was found in case number 07-1258 (Kowalski) on October 23, 2007, in case number 07-1367 (Stewart) on October 3, 2007, and in case number 07-1811 (Trust Account) on December 20, 2007 An eight count Complaint encompassing all of these cases was filed on December 30, 2007 Respondent was served by mailing a copy of the Complaint to his address of record on December 31, 2007
- 2 A notice of default was filed on January 22, 2008, and the Respondent's default was entered on February 20, 2008
- 3 The matter was originally assigned to Hearing Officer 7K, and thereafter reassigned to the undersigned Hearing Officer on February 7, 2008 An Initial Case Management Conference was held on February 15, 2008 Respondent made an appearance telephonically at the initial case management conference and stated

that he had filed an Answer in the case at least one week earlier. The undersigned Hearing Officer directed the Respondent to determine where his Answer was and provide Bar Counsel and the undersigned with a copy. Respondent was not heard from again, no Answer was found, and so his default was entered on February 20, 2008.

4 The date originally set for the final hearing was maintained as an aggravation mitigation hearing and held on March 7, 2008, at 9 a.m. in the Yavapai County Courthouse, Prescott, Arizona for the convenience of witnesses.

5 Respondent did not appear at the Aggravation Mitigation Hearing, and instead, on the morning of March 7, 2008, had his representative call and seek to get a continuance of the hearing for the reasons set forth in more detail in the undersigned Hearing Officer's order denying the request for a continuance (a copy is attached hereto).

6 Subsequent to the Aggravation Mitigation Hearing, the State Bar and the Respondent were given the opportunity to submit a post hearing memorandum. The State Bar was the only party that submitted a post hearing memorandum.

FINDINGS OF FACT

7. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to the practice in Arizona on November 1, 2005.

COUNT ONE (File No. 07-0588 KILLE)

8 Complainant Mark Kille is an attorney who took over the representation of Laura
Freibott from Respondent following the conduct complained of herein

9 Laura Freibott retained Respondent on September 22, 2006, to file a protective
proceeding for her two minor children so that a pending probate matter in Los
Angeles Superior Court could be resolved

10 Ms Freibott paid Respondent a retainer of \$2,000 00 to cover attorney's fees at
\$195 00 per hour, which doubled to \$390 00 per hour for time spent in court

11 Between September and December 2006, Respondent failed to respond to
numerous calls from Ms Freibott about the matter, and failed to provide Ms
Freibott with any updated status of the subject matter of the representation

12 On December 19, 2006, Respondent transmitted via telefax a document entitled
"Petition for Appointment of Conservator" to the probate lawyer in California.

13 The Court filing information on the document was suspicious in several respects
The signature was not of either of the deputy clerks who accept such filings at the
counter, and there was no file number, Court's date stamp or other insignia to
validate the filing

14 The Yavapai County Superior Court has no record of this document ever having
been filed there

15 There is no record of payment of any filing fee in the Yavapai County Superior
Court for this document

16 Throughout January, February and March 2007, Ms Freibott left many messages
for Respondent that were often not returned, or would be returned by his

paralegal, Elizabeth, who was unable to provide any meaningful information about a date for a Court hearing.

17 On one occasion, Respondent told Ms. Freibott that he had secured a Court date, but he could not tell her what it was because "he didn't have his calendar in front of him "

18 During this time, Respondent moved to new offices and got a new phone number, but he failed to notify Ms Freibott

19 On or about March 20, 2007, with the assistance of a private investigator and a family member, Ms Freibott managed to locate Respondent, at which time she terminated his services and he refunded to her the \$2,000 retainer and gave her what he said was her file

20 Upon their review of the file, Ms Freibott and her new counsel, Mr Kille, discovered that none of the documents required to be filed with the Petition had been drafted, such as the disclosure statement required by A.R S section 14-5106, or Notice of Hearing

21 Respondent's conduct resulted in a delay of approximately six months in the closing of the probate estate in California

22 Pursuant to Ariz R Sup.Ct , Rule 42, ER 8 3, Complainant notified the State Bar of the foregoing conduct by letter dated April 6, 2007 The State Bar sent Respondent a letter of inquiry on May 29, 2007

23 Respondent responded to the letter from the State Bar by letter dated June 14, 2007, indicating among other things, that he had refunded Ms Freibott's fees in total Respondent continued to maintain that the Court Clerk had lost the Petition

he had filed. Respondent admitted "It is accurate, that I moved my office to a new location. It is also correct that my voice mail has been too full to receive a message."

24 As part of Respondent's defense to the claim of delay of three months in filing the Petition, Respondent asked Bar Counsel to "note that the underlying matter had been in process since November of 2003 in California." Respondent maintained further that "There was at times difficulty communicating with the attorney in California (when matters were forwarded to the California attorney by my office via overnight delivery, they were not picked up by her in time for the hearing for which they were requested.)"

COUNT TWO (File No. 07-0683 Milo).

25 Complainant hired Respondent in November 2006 to appeal an adverse decision in a case against the Town of Prescott Valley.

26 Complainant paid Respondent \$1,195.00 for the anticipated services.

27 Respondent has never provided an accounting to Complainant for any services performed.

28 According to Complainant, Respondent "is very difficult to contact, he will not return phone calls marked urgent that are left on his voicemail. He has lied to me more than once about my case. I had deadlines to meet and he never met them. I have no copies of anything he has done for me or record of files."

29 Complainant claims that Respondent "did not appear at my hearing in Prescott Valley when he told me he would be there to represent me."

30 On February 19, 2007, Complainant demanded his files and money back, plus an
accounting

31 On March 26, 2007, Respondent reportedly left a message for Complainant to call
and arrange to meet in his office to review the file. Complainant returned the call
five times that day and the following day but never got through to Respondent,
and never got a call back from him.

32 Finally, on April 18, 2007, Complainant left a message asking again for the return
of his files and retainer. He never heard back from Respondent. Complainant
claimed "To the best of my knowledge, I lost my case."

33 By letter dated July 9, 2007, Bar Counsel notified Respondent of Mr. Milo's
inquiry and requested a response within 20 days, the letter further informed
Respondent that he has a duty pursuant to Ariz.R Sup Ct, Rules 53(d)&(f) to
cooperate with disciplinary investigations

34 Respondent failed to respond to the letter from the Bar

35 By letter to Respondent dated August 14, 2007, Bar Counsel again notified
Respondent of Mr. Milo's inquiry and requested a response within 10 days, the
letter further informed Respondent again of his duty pursuant to Ariz R Sup.Ct,
Rules 53(d)&(f) to cooperate with disciplinary investigations

36 Respondent again failed to respond to the Bar's request for information

COUNT THREE (File No. 07-1096 Stultz)

37 Complainant, Dr. Stultz a chiropractor, retained Respondent in the first part of
2006 to represent him as a plaintiff in a civil action against a former employee

38 When Complainant inquired about the status of the case, Respondent told him it had been "dismissed " When pressed further, Respondent said the Court must have "lost" the claim

39 Complainant experienced a chronic inability to contact Respondent In the last quarter of 2006 alone, he called several times weekly and did not get a response until eight weeks later In addition, Complainant left four unanswered messages in March, seven in April, four in May, and three in June 2007

40 According to information from Complainant, it appears that a Complaint had been filed in the Yavapai County Superior Court in April 2006, but the defendant had moved for a change of venue to Pima County After Respondent failed to respond to that motion, it was granted When the fee to transfer the case was not paid, it was dismissed on September 29, 2006

41 Complainant signed the verification on a second Complaint on March 15, 2007 Respondent told Complainant he would "personally walk (it) into the Court, so it won't get lost "

42 In April 2007, Respondent told Complainant "the defendant was served while at work and the claim had been filed with the Court "

43 Neither Complainant nor his attorney, Mr Kille, was able to obtain any information, either from the skeletal file retrieved from Respondent's office or from either Pima or Yavapai County Superior Court, such that any filing or service ever took place

44 By letter dated July 25, 2007, Bar Counsel notified Respondent of Dr Stultz inquiry and requested a response within 20 days, the letter further informed

Respondent that he has a duty pursuant to Ariz R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

45 Respondent failed to respond to the letter from the Bar

46 By letter to Respondent dated August 14, 2007, Bar Counsel again notified Respondent of Dr Stoltz inquiry and requested a response within 10 days, the letter further informed Respondent again of his duty pursuant to Ariz.R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

47 Respondent continued to fail to respond to the Bar's inquiries

COUNT FOUR (File No. 07-1101 McClain)

48 In September 2006, Respondent agreed to represent Complainant on a contingency fee basis to recover on a personal injury she had sustained in May 2005.

49 According to Complainant, Respondent confirmed to her doctor that he had written to the defendant's insurance company and had obtained authorization from the insurer for payment for treatments for her injury

50 Complainant made numerous attempts to contact Respondent, but she claims she has had "little or no response from him "

51 On June 27, 2007, Complainant notified Respondent through his employee that she wanted to pick up her files at his office For the following two weeks, she made several unsuccessful trips to Respondent's office, and left numerous unanswered phone messages

52 On July 11, 2007, Respondent's employee told Complainant by phone that her file had been mailed to her the day before, despite Complainant's insistence on picking it up personally

53 According to Complainant's current attorney, the statute of limitations in fact ran on this claim while Respondent was representing Complainant in her matter

54 Complainant has been made aware that "the statute of limitations now prohibits any legal filings on my behalf. I feel his incompetence in handling my case may have cost both me and my doctor "

55 By letter dated July 25, 2007, Bar Counsel notified Respondent of Complainant's inquiry and requested a response within 20 days, the letter further informed Respondent that he has a duty pursuant to Ariz.R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

56 Respondent failed to respond to the letter from the Bar

57 By letter to Respondent dated August 14, 2007, Bar Counsel again notified Respondent of Complainant's inquiry and requested a response within 10 days, the letter further informed Respondent again of his duty pursuant to Ariz R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

58 Respondent continued to fail to respond to the Bar's inquiries

COUNT FIVE (File No. 07-1207 Page)

59 In February 2007, Complainant retained Respondent for legal services, apparently to include filing documents in a civil action in Federal Court

60 Complainant gave some papers to Respondent, including his father's Last Will and Testament and materials concerning two lawsuits in California The financial

arrangements were that Respondent was to receive 25% of the recovery from the sale of a ranch in California that apparently is the subject of one of the suits

61 Since then, Complainant has had "a very difficult time communicating with him " Respondent told Complainant on four occasions that he had mailed Complainant's paperwork to him, but even after many months, it was still not received

62 Complainant claims he informed Respondent "as to the importance of the time line in this action", as recently as July 2007, with no response

63 By letter dated August 3, 2007, Bar Counsel notified Respondent of Complainant's inquiry and requested a response within 20 days, the letter further informed Respondent that he has a duty pursuant to Ariz R Sup Ct., Rules 53(d)&(f) to cooperate with disciplinary investigations

64 Respondent failed to respond to the letter from the Bar.

65 By letter to Respondent dated August 29, 2007, Bar Counsel again notified Respondent of Complainant's inquiry and requested a response within 10 days, the letter further informed Respondent again of his duty pursuant to Ariz R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

66 Respondent continued to fail to respond to the Bar's inquiries

COUNT SIX (File No. 07-1258 Kowalski)

67 Complainant retained Respondent to defend him in a criminal matter Respondent told him " . he would take the whole case for \$4,500 " The Complainant paid Respondent that sum

68 Among other things, Respondent had agreed he would send an investigator out to talk with neighbors and take pictures, and that he would bring it to the Court's attention that the prosecutor had the wrong gun for evidence.

69 Respondent did not do what he said he would do, never prepared a defense to the charges, and never provided an accounting to Complainant.

70 During the period of the representation, Complainant, his fiancée, and his brother, made numerous attempts to contact Respondent by phone to discuss the case without success

71 Complainant was convicted and, after sentencing, Respondent informed Complainant orally that " an appeal was going to be filed "

72 Respondent failed to file an appeal on behalf of Complainant

73. By letter dated August 10, 2007, Bar Counsel notified Respondent of Complainant's inquiry and requested a response within 20 days, the letter further informed Respondent that he has a duty pursuant to Ariz R Sup Ct , Rules 53(d)&(f) to cooperate with the disciplinary investigations

74 Respondent failed to respond to the letter from the Bar

75 By letter to Respondent dated September 10, 2007, Bar Counsel again notified Respondent of Complainant's inquiry and requested a response within 10 days, the letter further informed Respondent again of his duty pursuant to Ariz R Sup Ct , Rules 53(d)&(f) to cooperate with disciplinary investigations

76 Respondent continued to fail to respond to the Bar's inquiries

COUNT SEVEN (File No. 07-1367 Stewart)

- 77 In October 2006, Complainant retained Respondent to perform legal services for his daughter, paying Respondent \$800
- 78 Respondent sent Complainant a billing statement dated April 2, 2007. The billing statement showed that Respondent had earned \$537.50 leaving a credit balance of \$262.50 at the conclusion of the representation.
- 79 Between April 2 and August 16, 2007, Complainant made four requests by phone and two by letter for the refund of the unused fees, but he received no response from Respondent.
- 80 By letter dated August 23, 2007, Bar Counsel notified Respondent of Complainant's inquiry and requested a response within 20 days, the letter further informed Respondent that he has a duty pursuant to Ariz R.Sup.Ct., Rules 53(d)&(f) to cooperate with disciplinary investigations.
- 81 Because there was an issue of client funds, Bar Counsel specifically requested trust account documentation for Complainant's funds.
- 82 Respondent failed to respond to the letter from Bar Counsel. By letter dated August 28, 2007, Complainant notified the Bar that Respondent "has remitted the rebate due me."
- 83 By copy of Bar Counsel's September 7, 2007, letter to Complainant, the Bar notified Respondent that, pursuant to Supreme Court Rule 48(g), his belated action did not abate the processing of the charge, and reminded Respondent that he had not provided the trust account information.
- 84 Respondent continued to fail to respond to the Bar's inquiries.

COUNT EIGHT (File No. 07-1881 Trust Acct.).

85. At all times material hereto, Respondent maintained an Arizona Bar Foundation client trust account at Wells Fargo Bank
- 86 On October 26, 2007, the State Bar received an insufficient funds notice on Respondent's trust account.
- 87 The notice indicated that, on October 17, 2007, check number 1054 in the amount of \$260 00 attempted to pay against the account. It appears that the bank paid the check and charged a \$34 00 overdraft fee
- 88 On October 30, 2007, the Bar Staff Examiner sent Respondent a copy of the overdraft notice with an initial screening letter, and requested an explanation regarding the apparent overdraft on his client trust account
- 89 Included in the letter was a request for additional information to include copies of the October 2007 trust account bank statements with corresponding canceled checks, duplicate deposit slips, individual client ledgers, and general ledger
- 90 Respondent failed to respond to this letter
- 91 On December 4, 2007, the Staff Examiner sent Respondent a notice of non-response. Respondent was given an additional 10 days to respond. Respondent was informed that his failure to comply with the request may result in a recommendation to the Probable Cause Panelist for an Order of Probable Cause
- 92 Respondent continued to fail to respond to the Bar's letters

CONCLUSIONS OF LAW

93 The Hearing Officer finds that the State Bar has proven by clear and convincing evidence that Respondent violated the following Rules of Professional Conduct

COUNT ONE (File No. 07-0558 Kille)

94 Respondent violated Ariz R.Sup Ct , Rule 42, ER 8 4(c) and 8 4(d) misconduct, when he made a misrepresentation to Ms Freibott and her attorney in California that he had filed a Petition for Appointment of Conservator, when in reality he had not done so

95 Respondent violated Ariz R Sup Ct , Rule 42, ER 1 2 and 1 3 scope of representation, and diligence, when he failed to provide the services for which he contracted and had been paid

96 Respondent violated Ariz R Sup Ct , Rule 42, ER 1 1 competence, when he represented that he was able to file a Petition in Superior Court without supporting documents which were required by law

97 Respondent violated Ariz R Sup Ct , Rule 42, ER 1 2 scope of representation, when he failed to comply with and abide by the client's decisions and directions concerning the representation

98 Respondent violated Ariz R Sup.Ct., Rule 42, ER 1 4 communication, when he failed to respond to his client's attempts to communicate with him on numerous occasions, and to advise her honestly and candidly about the status of her matter

99 Respondent violated Ariz R Sup Ct , Rule 42, ER 3 2 expediting litigation, when he failed to complete the representation for which he had been retained, and therefore delayed the resolution of the California probate

COUNT TWO (File No. 07-0683 Milo)

100 Respondent violated Ariz R Sup Ct , Rule 42, ER's' 1.1 competence, 1.2 scope of representation, 1.3 diligence, 1.4 communication, 1.5 fees, 1.15 safekeeping property, 1.16(d) protecting client's interests upon termination of services, refunding unearned retainer, and returning documents, 3.2 expediting litigation, 8.1 failing to respond to disciplinary authority, 8.4(a) violating the Rules of Professional Conduct, 8.4(c) dishonesty, fraud, deceit or misrepresentation, 8.4(d) conduct prejudicial to the administration of justice, and Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information¹

101 Further, Respondent owes Mr Milo restitution in the amount of \$1,195.00

COUNT THREE (File No. 07-1096 Stultz)

102 Respondent violated Ariz R Sup Ct , Rule 42, ERs 1.1 competence, 1.2 scope of representation, 1.3 diligence; 1.4 communication, 3.2 expediting litigation, 8.1 failing to respond to disciplinary authority, 8.4(a) violating the Rules of Professional Conduct, 8.4(c) dishonesty, fraud, deceit or misrepresentation, 8.4(d) conduct prejudicial to the administration of justice, Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information

COUNT FOUR (File No. 07-1101 McClain)

103 Respondent violated Ariz R Sup Ct , Rule 42, ERs 1.1 competence, 1.2 scope of representation, 1.3 diligence; 1.4 communication, 1.16(d) protecting client's

¹ The State Bar claims in its Post Hearing Memorandum that Complamants Milo, McClain, and Kowalski are all "vulnerable clients" lacking sophistication in legal matters sufficient to understand the negative consequences to them caused by Respondent's conduct. While this is probably true, there was no evidence at the hearing on this issue, nor was it contained in the Complaint. Therefore, the Hearing Officer cannot make this finding by the clear and convincing evidence standard.

interests upon termination of services, refunding unearned retainer and returning documents, 3 2 expediting litigation, 8 1 failing to respond to disciplinary authority, 8 4(a) violating the Rules of Professional Conduct, 8.4(c) dishonesty, fraud, deceit or misrepresentation, 8 4(d) conduct prejudicial to the administration of justice, and Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information.

COUNT FIVE (File No. 07-1207 Page)

104 Respondent violated Ariz.R Sup Ct Rule 42, ERs 1 2(a) abiding by client's decisions, 1 3 diligence, 1.4 communication, 1 15(d) promptly delivering client funds, 1 16(d) protecting client's interests upon termination of services, refunding unearned retainer and returning documents, 8 1 failing to respond to disciplinary authority, 8 4(c) dishonesty, fraud, deceit or misrepresentation, and Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information

COUNT SIX (File No. 07-1258 Kowalski)

105 Respondent violated Ariz R.Sup Ct , Rule 42, ERs' 1 2 abiding by client's decisions, 1 3 diligence, 1 4 communication, 1 5 fees, 1 15 safekeeping client property, 8 1 failing to respond to disciplinary authority, 8 4(a) violating the Rules of Professional Conduct, 8 4(c) dishonesty, fraud, deceit or misrepresentation, 8 4(d) conduct prejudicial to the administration of justice, and Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information Further, Respondent owes Mr Kowalski \$4,500 00 in restitution

COUNT SEVEN (File No. 07-1367 Stewart)

106 Respondent violated Ariz R Sup Ct , Rule 42, ERs 1.4 communication, 1.15 safekeeping client property, 1.16(d) protecting client's interests upon termination of services, refunding unearned retainer and returning documents; 8.1(b) failing to respond to disciplinary authority, and Rule 53(d) refusal to cooperate with the State Bar; (f) failure to furnish information

COUNT EIGHT (File No. 07-1811 Trust Account).

107 Respondent violated Ariz R Sup Ct , Rule 42, ER 1.15 safekeeping client's property, Rule 43 trust account verification, Rule 44 trust account requirements, and Rule 53(d) refusal to cooperate with the State Bar, (f) failure to furnish information

ABA STANDARDS

108 *ABA Standard 3.0* provides that four criteria should be considered (1) the duty violated, (2) the lawyer's mental state, (3) the actual or potential injury caused by the lawyer's misconduct, and (4) the existence of aggravating and mitigating factors

The Duty Violated:

109 Respondent violated his duty to his clients by failing to act with reasonable competence, diligence and promptness and representing his clients, failing to abide by his client's decisions and intentions concerning the objectives of representation, failing to communicate and promptly comply with the request for information from his clients, charging an unreasonable fee, failing to safeguard client's property, failing to surrender documents and property to which the client is entitled, failing to timely refund an advance payment of a fee that was not

earned, failing to expedite litigation, engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, engaging in conduct prejudicial to the administration of justice; knowingly failing to respond to a lawful demand for information from the disciplinary authority, and failing to provide clients with timely written accountings

110 Respondent violated his duty to the legal system and to the profession by failing to furnish information or respond promptly to an inquiry or request from Bar Counsel for information relevant to the investigation of his conduct or failing to assert the grounds for refusing to do so Respondent also refused to participate in these disciplinary proceedings

111 The violation of these duties must be considered in light of the *Standards* adopted by the American Bar Association An examination of those *Standards* gives guidance to an appropriate sanction in this matter

Standard 4.1 Failure to Preserve the Client's Property

112 *Standard 4 11* Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client

113. *Standard 4 12* Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client

Standard 4.4 Lack of Diligence

114 *Standard 4 41* Disbarment is generally appropriate when: (a) a lawyer abandons the practice and causes serious or potential serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or

potentially serious injury to a client, or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client

- 115 *Standard 4.42* Suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client

Standard 4.5 Lack of Competence

- 116 *Standard 4.51* Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

- 117 *Standard 4.52* Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client

118. *Standard 4.53* Reprimand (Censure in Arizona) is generally appropriate when a lawyer (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client, or (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client

Standard 6.2 Abuse of the Legal Process

- 119 *Standard 6.21* Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or

another, and causes serious injury or potential serious injury to a party or causes serious or potential serious interference with the legal proceeding

- 120 *Standard 6.2.2* Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with the legal proceeding

Standard 7.0 Violation of Other Duties Owed as a Professional

- 121 *Standard 7.1* Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system
122. *Standard 7.2* Suspension is generally appropriate when a lawyer knowingly engages in this conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

The Lawyer's Mental State:

- 123 Determining the lawyer's mental state in a case where the lawyer refuses to cooperate in the disciplinary process can be problematic. While on the one hand, some of Respondent's conduct could have been negligent, the sheer volume of the complaints against the Respondent, the similarities between the complaints, and his consistent and persistent refusal to cooperate with the Bar in the disciplinary process leads this Hearing Officer to conclude that Respondent's mental state was not negligent, but intentional. Respondent's refusal to, once retained, maintain contact with his clients, comply with their wishes on the direction of the case,

failing to safeguard his client's property, failing to surrender documents and property once his representation was terminated in several of these cases, leads this Hearing Officer to no other conclusion but that Respondent was acting intentionally

124 Concerning Respondent's engaging in dishonest, fraudulent and deceitful misrepresentation in Count One, that is clearly intentional conduct. Similarly, Respondent's persistent refusal to cooperate with the Bar in its investigation is also intentional.

The Potential or Actual Injury Caused:

125 In Count One Respondent caused his clients to have to retain the services of a private investigator and a family member to locate the Respondent in order to retrieve her file and retainer. Respondent's conduct caused a six-month delay in the closing of the California probate.

126 In Count Two, Mr. Milo paid Respondent \$1,195.00 for services that he never received, did not get his file or retainer returned to him, and to the best of the client's knowledge, "he lost his case."

127 In Count Three, Respondent repeatedly lied to his client and subsequently forced him to retain another attorney. This caused a delay in the client's case.

128 In Count Four, Respondent lied to his client, refused to return her file to her, and allowed the statute of limitations to run on her claim without filing suit, thus precluding any recovery by her or her doctors.

129 In Count Five, Respondent did not provide the legal services for which he was retained, lied to his client about having mailed his paperwork to him, and he

ignored his client's reminders as to the importance of the timeliness of handling the case

130 In Count Six, Respondent failed to adequately represent his client by failing to do an adequate investigation and preparation for his client's criminal defense, and then failed to file an appeal or provide his client with an accounting

131 In Count Seven, Respondent refused to timely return the unused portion of his client's retainer for several months until after the Bar made an inquiry, and thereafter failed to respond to the Bar's request for trust account documents

132 In Count Eight, Respondent has refused to provide the State Bar with the necessary information to investigate an overdraft of his client trust account

133 In Counts Two through Eight, Respondent frustrated the Bar's investigation process by refusing to respond to the inquiries and thus prolonged the disciplinary process. Similarly, Respondent failed to answer the Complaint against him in these proceedings, and lied to the Hearing Officer that he had filed an Answer

Aggravating and Mitigating Circumstances:

134 *Standard 9 22* and *Standard 9 32* set forth the Aggravating and Mitigating factors to be considered. The Hearing Officer finds the following Aggravating and Mitigating factors applicable in this case

135 *Standard 9 22(b)* Dishonest or Selfish Motive. Respondent collected retainers and then failed to provide the agreed-upon work contracted for, or an accounting, or to provide a timely refund of all or part of the retainers paid by the complainants in three of the counts of this matter. In addition, Respondent lied to

his clients in an effort to preserve his reputation and give the false impression that he was performing adequate legal services

136 *Standard 9 22(c) Pattern of Misconduct* Respondent's misconduct could be characterized as a "pattern of misconduct" in three separate areas repeated false promises and misrepresentations to his clients, repeated refusal to respond to his client's attempts to communicate with him, repeated refusal to respond to inquiries from the Bar concerning his conduct

137. *Standard 9 22(d) Multiple Offenses* Respondent's numerous violations have been set forth previously, both in the findings of facts and conclusions of law

138 *Standard 9 22(e) Bad Faith Obstruction* Save for the first Count, Respondent has intentionally and persistently refused to comply with the State Bar or participate in these disciplinary proceedings, refused to furnish information relevant to the investigations, and refused to offer any explanation whatsoever for his refusal to cooperate *Standard 9.22(j) Indifference to Making Restitution* Respondent has made no effort to refund in whole or in part, the retainers paid to him by either Mr Milo or Mr. Kowalski ²

Mitigating Factors:

140 The Respondent failed to appear at the Aggravation Mitigation Hearing in this matter and did not submit a post hearing memorandum for the Hearing Officer's

² The State Bar submits that 9 22(h) Vulnerability of Victim, and *Standard 9 22(i) Substantial Experience in the Practice of law* should be considered as aggravating factors in this case As stated previously, the vulnerability of the victims was not alleged or proven in this case, and Respondent, although admitted in Iowa in 2001, has only been practicing in Arizona since November of 2005 Therefore, the Hearing Officer does not find Substantial Experience as an aggravating factor in this case

consideration Therefore, the only mitigating factor the Hearing Officer can consider is *Standard 9 32(a) Absence of Prior Disciplinary Record.*

PROPORTIONALITY REVIEW

- 141 The Supreme Court has held that in order to achieve the aims of discipline, each situation must be tailored to the individual facts of the case, but that there should be some consistency with other similar cases *In re Wines*, 135 Ariz 203, 660 P 2d 454 (1983) and *In re Wolfram* 74 Ariz 49, 847 P 2d 94 (1993)
- 142 To recap, Respondent's conduct is summarized as follows Respondent abandoned his clients, failed to diligently represent them and failed to abide by his client's wishes, failed to communicate with his clients, failed to provide his clients with an accounting or information when requested; charged an unreasonable fee; failed to safeguard his client's property, was dishonest in his conduct towards his clients, refused to cooperate with the State Bar and these disciplinary proceedings
- 143 The *Standards* set forth previously indicate that this could be a case involving suspension or disbarment and there are similar cases which support either sanction
- 144 In *In re McCarthy*, SB-01-0121-D (2001), McCarthy was suspended for two years, placed on probation for two years and ordered to pay restitution He failed to communicate or consult with clients, failed to act with reasonable diligence, failed to keep his address current with the Bar's membership office, failed to make reasonable efforts to expedite litigation consistent with his client's interests, failed to return a client's file, failed to attend two court hearings and made

- misrepresentations to opposing counsel and Bar Counsel. He charged an unreasonable fee, failed to properly withdraw from representation as necessary to protect his client's interests, engaged in conduct that was prejudicial to the administration of justice and failed to respond to the State Bar's investigation.
- 145 Three aggravating factors were found in *McCarthy*: a pattern of misconduct, multiple offenses, and bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency. There was one mitigating factor found: absence of a prior disciplinary record.
- 146 In *In re McGuire*, SB-99-0029-D (1999), McGuire was suspended for two years. While representing clients in an estate matter, he failed to adequately communicate with his clients, failed to prepare necessary documents, abandoned clients, failed to return unearned retainers and personal property in the form of stock certificates and deeds to his clients, and failed to cooperate with the State Bar.
- 147 In the McGuire case two aggravating factors were found: multiple offenses and bad-faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency. There was one mitigating factor found: absence of prior disciplinary record.
148. In *In re McFadden*, SB-00-0072-D (2000), McFadden was suspended for two years and ordered to pay restitution. He failed to perform services for which he had been retained, failed to communicate or respond to requests for information from clients, failed to return unearned retainers, failed to return original documents, and engaged in the unauthorized practice of law while suspended for

nonpayment of dues and noncompliance with MCLE requirements. He also failed to respond or cooperate with the State Bar's investigation in the matter.

149 In Mr. McFadden's case three aggravating factors were found: multiple offenses, bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, and substantial experience in the practice of law. One mitigating factor was found: absence of a prior disciplinary record.

150 In *In re Son* SB-05-0173-D (2006), Son was disbarred despite the lack of any prior disciplinary record. Mr. Son abandoned his law practice, failed to perform contracted services for clients after accepting fees, failed to return unearned retainers and failed to respond or cooperate with the State Bar's investigation. In *Son*, as in the instant matter, Son's conduct was deemed admitted by default and he did not appear for the aggravation/mitigation hearing.

151 Three aggravating factors were found in *Son*: a pattern of misconduct, multiple offenses, and bad-faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency. One mitigating factor was found: absence of prior disciplinary record.

152 In *In re Bryn*, SB 06-0127- D (2006), a three count complaint, the sanction imposed was disbarment. Respondent failed to diligently represent clients, failed to meet deadlines, failed to accomplish work for which he was retained, continually provided empty promises of action, and when confronted by clients, declined to return unearned fees. He also failed to comply with trust account

rules and to respond to and cooperate with the State Bar's investigation. There were eight aggravating factors and no mitigating factors found.

153 In *In re Coe*, SB 06-0154 (2007), an eight count matter, Respondent was disbarred. Respondent failed to competently and diligently represent or communicate with his clients. He failed to appear at court hearings, engaged in the unauthorized practice of law while summarily suspended, and failed to cooperate with the Bar's investigation. There were six factors in aggravation and none in mitigation.

154 In *In re Rodgers*, SB-07-0128-D (2007), a three count matter, Respondent was disbarred. In addition to his other infractions, Mr. Rodger's refusal to cooperate with the State Bar and the disciplinary process was deemed to be persuasive to the Hearing Officer in making the decision whether the Respondent should be suspended or disbarred.

RECOMMENDATION

155 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and to deter future misconduct. It is also the purpose of lawyer discipline to instill public confidence in the Bar's integrity. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315, (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

156 In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the

proportionality of discipline imposed in analogous cases *Matter of Bowen*, 178 Ariz 283, 872 P 2d 1235 (1994)

157 So should Respondent be suspended or should he be disbarred? Recalling how difficult it is to become a licensed attorney, and how highly most attorneys value their license to practice law, reminds this Hearing Officer of the significance of this decision. Several factors in this case are deemed to be persuasive.

158 First, the number of victims, the similarity of their complaints and the pattern of misconduct, Second, the injury caused to his clients both monetarily and in the disruption of their lives, Third, the dishonesty that Respondent displayed during the course of representing his clients, especially falsifying a purported court document, Fourth, Respondent's refusal to providing any explanation for his conduct (after the initial complaint), or cooperate with the State Bar and these disciplinary proceedings.

159 Like the Hearing Officer in *Rodgers* (supra), the undersigned Hearing Officer is concerned about the commitment that the Respondent in this matter has to his clients and especially to his profession. Respondent's repeated lying to his client's is very troubling. Respondent's refusal to cooperate with the State Bar and not giving the Bar an explanation for his conduct, and then thereafter, ignoring this disciplinary process, except to lie to the Hearing Officer about having filed an answer, and then on the day of the hearing seeking to have his surrogate get a continuance, shows either a supreme arrogance or total lack of competency. Respondent's conduct also betrays dishonesty, a lack of discipline and an unwillingness to do what he is required to do. Being honest and having the ability

to follow rules is the bedrock of our profession, and anyone that cannot do that betrays not just the public, but the profession as well. Respondent's conduct in these cases feeds into the worst criticisms of our profession and so Respondent hurts not only his clients and himself, but also the profession he owes loyalty to.

160 The Hearing Officer concludes that after weighing Respondent's conduct in light of analogous cases, considering the aggravating and mitigating factors, as well as the harm to the victims and the profession, disbarment is the appropriate sanction

161 It is therefore the recommendation of the undersigned Hearing Officer that

- A) Respondent be disbarred,
- B) Respondent pay restitution to Timothy R. Milo in the amount of \$1,195.00, and Ronald Kowalski in the amount of \$4,500.00,
- C) Respondent shall reimburse the State Bar in full for any and all claims paid by the Client Protection Fund, not to exceed the maximum permissible payment of \$100,000,
- D) Respondent shall pay all the costs incurred by the State Bar in connection with these proceedings.

DATED this 21st day of April, 2008

Honorable H. Jeffrey Coker, N.M.
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 21st day of April, 2008

Copy of the foregoing mailed
this 22nd day of April, 2008, to

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