

1 military retirement and pension benefits), she did not insert the appropriate language
2 provided by Mr. McCarthy.

3 Respondent states that she did not understand the language provided by Mr.
4 McCarthy and knew that she would not be shielded from liability if Mr. McCarthy should
5 make an error, so the language was not inserted.

6 Respondent argues that the Hearing Officer erred in finding she violated ER 1.3
7 (diligence), for not pursuing due diligence in attempting to correct the faulty Decrees filed
8 for Ms. Gallagher. Respondent asserts that the decree was faulty in only one respect, the
9 error in the title of the document and states she corrected the error promptly. Respondent
10 also indicates that the Hearing Officer erroneously found that she violated ER 1.4
11 (communication) by not timely communicating or informing her clients about the status of
12 their cases and states that the Hearing Officer failed to consider that the Court used an
13 outdated address list, which resulted in Respondent not receiving minute entries.

14 Respondent argues that the conclusions of law fail to consider exculpatory evidence
15 and that the Hearing Officer erred in finding that Respondent violated ER 1.5 (fees).
16 Respondent states that the Hearing Officer refused to consider that the witnesses
17 admittedly signed and understood relevant portions of the fee agreement and also that
18 Respondent provided services without charge for Ms. Gallagher and Ms. Eisenchenk.

19 Respondent argues that conclusions of law were based on matters not plead and
20 that the Hearing Officer improperly considered testimony from Chad Likens regarding the
21 quality of Respondent's services and concluded that Respondent's first flat fee agreement
22 violated ER 1.5 by designating fees "earned on receipt". Respondent argues that the
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1 language of the agreement was not noticed as an issue until the Hearing Officer's report
2 was issued.

3 Respondent further argues that the Hearing Officer's recommendation for a 10-
4 month suspension and two years of probation is excessive based on the evidence and cites
5 *Matter of Lenkowsky*, SB-08-0172-D (2009).¹ In *Lenkowsky*, the lawyer charged
6 unreasonable fees, engaged in conflict of interest, failed to safe keep client property and
7 engaged in conduct prejudicial to the administration of justice and received a 90-day
8 retroactive suspension and two years of probation. Respondent states that in *Lenkowsky*,
9 the suspension was short and retroactive, and maintains that the Bar Counsel refused to
10 consider such an agreement. Respondent asserts that any suspension imposed in this
11 matter should commence on October 2, 2008, the date she voluntarily withdrew from the
12 practice of law pending "appeal of sanctions". See Respondent's Notice of Suspension
13 filed October 2, 2008.

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15 The State Bar argues that the Hearing Officer's conclusions of law were supported
16 by the evidence and that the lack of diligence in Respondent's representation of Ms.
17 Einsenchenk and Ms. Gallagher were supported by the evidence presented at the hearing
18 and through Ms. Gallagher's testimony as well as the testimony of Mr. McCarthy.

19 The State Bar states that there is no basis for Respondent's assertion that the
20 Hearing Officer failed to consider exculpatory evidence and Respondent cannot
21 demonstrate or offer any grounds that the hearing Officer did not consider that evidence.
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23 The State Bar also states that the Hearing Officer's conclusions of law that
24 Respondent did not have the competence to draft the decree in the Gallagher matter were
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¹ Respondent's refers to *Matter of Lenkowsky as File No. 05-1347* in her Opening Brief because at that time a final Judgment and Order was pending.

1 based on appropriate and correct findings of fact and is supported by the testimony at the
2 hearing.

3 The State Bar further states that the Hearing Officer's conclusions of law were not
4 based on matters not plead and refers to the Hearing Transcript P. 182, lines 1-13, in which
5 Mr. Likens recites his personal decision to terminate Respondent's services without
6 addressing the quality of the work done.

7 The State Bar supports the recommendation of the Hearing Officer and states that it
8 is an appropriate sanction under the facts of the instant matter and cites *In re Bjorgaard*,
9 SB-07-0081-D (2007), in which the lawyer engaged in a pattern of neglect with clients
10 including failure to timely respond to motions, failure to communicate and properly
11 withdraw from representation and cooperate with the State Bar and received a two year
12 suspension, *In re Dooley*, SB-07-0051-D (2007); in which the lawyer engaged in a pattern
13 of neglect of clients, including failure to adequately communicate with them, failing to
14 timely comply with deadlines and failing to provide client's file to new counsel and
15 received a six-month suspension (consent); *In re Schlievert*, SB-07-0034-D (2007), in
16 which the lawyer engaged in a pattern of neglect with clients including failure to perform
17 services requested by the client and failure to comply with court orders and received a six
18 month and one day suspension; *In re Beskind*, SB-07-0155-D (2007), in which the lawyer
19 failed to adequately or fully perform legal services promised, failed to attend hearings,
20 failed to communicate with clients, failed to cooperate with the State Bar and was
21 disbarred; *In re Masters*, SB-05-0163-D, (2006), in which the lawyer failed to competently
22 and diligently represent client, failed to communicate, failed to return client property and
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1 failed to properly terminate representation and received a six-month and one-day
2 suspension.

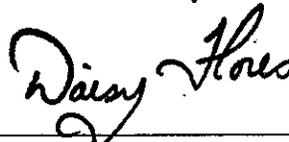
3 **Decision**

4 Having found no facts clearly erroneous, the eight members² of the Disciplinary
5 Commission unanimously recommend accepting and incorporating the Hearing Officer's
6 findings of fact, conclusions of law, and recommendation for a ten-month suspension,
7 restitution in the amount of \$4,676.00,³ two years of probation (six additional CLE hours
8 related to ethics and LOMAP)⁴ and costs.⁵ The amount of restitution ordered is as follows:

9 **Restitution**

10 Edie Eisenchenk	\$2,500.00
11 Deborah L. Gallagher	<u>\$2,176.00</u>
12 Total	\$4,676.00

13 RESPECTFULLY SUBMITTED this 20th day of January, 2009.

14 

15
16 Daisy Flores, Chair
17 Disciplinary Commission

18 Original filed with the Disciplinary Clerk
19 this 20th day of January, 2009.

20 Copy of the foregoing mailed
21 this 21st day of January, 2009, to:

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24
25 ² Commissioner Horsley did not participate in these proceedings.

³ Edie Eisenchenk in the amount of \$2500.00, Deborah L. Gallagher in the amount of \$2176.00.

⁴ Terms and Conditions of Probation are to be determined at the time of reinstatement.

⁵ A copy of the Hearing Officer's Report is attached as Exhibit A

1 T. H. Guerin, Jr.
2 Hearing Officer 7R
3 P.O. Box 15307
4 Scottsdale, AZ 85267-5307

5 Deborah L. Abernathy
6 Respondent
7 9143 W. John Cabot Road
8 Peoria, AZ 85382

9 Roberta L. Tepper
10 Bar Counsel
11 State Bar of Arizona
12 4201 North 24th Street, Suite 200
13 Phoenix, AZ 85016-6288

14 by: *Evelyn Lopez*

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EXHIBIT

A

1 3. On or about May 14, 2007, Mr. Likens obtained the services of Mr. Hubert E
2 Kelly to represent him in a domestic relations matter in Maricopa County Superior Court.
3 (State Bar's pre-hearing statement at p 3, sec.8)

4 4. On or about May 14, 2007, Mr Kelly wrote to the Respondent asking for Mr.
5 Likens' file (Exhibit 16 at Bates 304)

6 5 Mr Likens testified that the Respondent was late to a Court appearance and
7 failed to file documents in Court in a timely manner (Tr p 14, ll 14-18)

8 6. Mr Likens made arrangements to go to the Respondent's office on two
9 occasions to pick up his file The first time he arrived, the office was locked, lights were off
10 and no one answered the phone. The second time he went to the office, the receptionist,
11 Susie, told him the file was at the Respondent's home (Tr. p 15, ll.13-18)

12 7 Both times arrangements to pick up the file were made with Susie (Tr. p.18,
13 ll 12-14)

14 8. On May 14, 2007, Mr Kelly sent a substitution of counsel for her to review
15 and approve He also requested to pick up the file because he was aware that there were
16 hearings in the near future (Tr p 23, ll.11-18)

17 9 Upon receiving the substitution of counsel, Mr Kelly filed it on June 6, 2007.
18 (Tr. p.24, ll.12-14)

19 10 Mr Kelly wrote to the Respondent asking for the file on May 14, 2007, July
20 9, 2007, and again on July 12, 2007 (Exhibit 16, Tr p.25, ll 1-18)

21 11. In June 2007, Mr Kelly had to file a Motion to Continue because he did not
22 have the file. (Tr. p.26, ll 1-8)

1 12. Mr. Kelly believes that a staff member of the Respondent's office informed
2 him by phone that Mr. Likens had a copy of his file and that he did not need a copy of the file
3 that the attorney maintained. (Tr. p 29, ll.10-17)
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5 13 Mr. Kelly testified that he believed he received the file on or about the 18th of
6 July, 2007. (Tr p.32, ll 17-20)
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8 14 The State then called as a witness Edie Eisenschenk, who testified that she
9 obtained the services of the Respondent in September 2006 (Tr p 34, ll.16-23)
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11 15 Ms Eisenschenk paid a retainer of \$2,500.00 to handle her case (Exhibit C,
12 tab 6)
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14 16. The witness then testified that she worked three 12 hour shifts in the
15 emergency department during a week. (Tr. p 37, ll 16-23)
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17 17 She also went to school two days a week Since her school hours varied, her
18 schedule was also varied, making it difficult for her to get off of school or work (Tr p 38,
19 ll.1-9)
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21 18 Ms. Eisenschenk had to call numerous times to get an update on her case (Tr
22 p 39, ll 14-22)
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24 19 Ms. Eisenschenk wanted to settle, and requested that Respondent attempt to
25 settle with her ex-husband. (Tr p.40, ll 13-17)
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 20 She sent an e-mail to the Respondent outlining what she wanted for visitation.
(Tr p 40, ll.18-23)

 21 Ms. Eisenschenk again asked the Respondent to try to settle the issues with
her ex-husband or his lawyer. (Tr p 41, ll 14-24)

1 22 Prior to March 29, 2007, Ms. Eisenschenk believed that the Respondent did
2 not attempt a settlement with her ex-husband's lawyer (Tr p.42, l.25; p.43, ll.1-3)

3 23. The witness had given copies of medical bills, etc , to the Respondent (Tr
4 p 43, ll 9-13)

5 24. The Respondent's secretary called the client at work the week they were
6 supposed to go to Court and asked her to put something in writing about the settlement (Tr
7 p.43, ll 23-25, p.44, ll.1-4)

8 25 The client had already given her schedule to the Respondent for the previous
9 two weeks. (Tr. p 44, ll 1-7)

10 26 At the Courthouse in December 2006, Ms. Eisenschenk had her sister, Heidi
11 Deutsche, and a friend named Scott Cunningham. (Tr. p.45, ll 1-7)

12 27. The witness introduced Heidi and Scott to the Respondent. (Tr p.45, ll.17-
13 18)

14 28 Within the same conversation, the Respondent asked Ms Eisenschenk's sister
15 how long she had known her client. (Tr p.46, ll.17-19)

16 29 That was odd because maybe two sentences before, the client had introduced
17 her sister to the Respondent (Tr p.46, ll 21-22)

18 30. On March 21, 2007, Ms. Eisenschenk discussed with the Respondent the
19 possibility of a settlement. At that time, she did not ask for anything in writing (Tr p 50,
20 ll 17-20)

21 31 Ms. Eisenschenk did not speak with the Respondent prior to the March 29,
22 2007 hearing (Tr. p.52, ll.6-8)

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32. The Respondent was thirty minutes late for the hearing on March 29, 2007
(Tr p 54, ll 6-16)

33. The witness had requested that Ms. Abernathy present to the Court why her
income and her hours were reduced. (Tr p.55, l.25; p.56, ll.1-16)

34. The witness also gave the names of potential witnesses to the Respondent.
Ms Abernathy did not call any of those witnesses to testify. (Tr. p 56, ll.17-24)

35. Ms Eisenschenk and the Respondent communicated during the hearing on
March 29, 2007, by written notes. None of the matters contained in her notes were addressed
to the Court (Tr. p.57, ll 16-25)

36. The witness called the Respondent and left two voice mails, which the
Respondent did not return. (Tr p.59, ll.11-15)

37. The witness set an appointment for April 9, 2007, between her and the
Respondent (Tr p.59, ll.16-25)

38. The Respondent failed to keep the appointment and had not informed or called
Ms. Eisenschenk to cancel or reschedule (Tr. p 60, ll 1-13)

39. The witness was also unable to obtain her file. (Tr p.60, ll 15-24, p.61, ll 1-3)

40. When she looked in her file, she had discovered that her personal information
was sent to two people, who were unknown to Ms. Eisenschenk. (Tr p.61, ll.9-22)

41. After Ms Eisenschenk looked at her file on April 9, 2007, Susie, her
receptionist, presented a document entitled Motion to Withdraw, however, the motion
indicated that she was satisfied with her services provided by the Respondent, which was
untrue. (Tr. p.62, ll.9-21)

1 42. After April 2007, Ms. Eisenschenk attempted to represent herself. As a result,
2 she ended up withdrawing everything (Petition). (Tr p 63, ll.14-25)

3 43 Ms. Eisenschenk did not receive a bill or an accounting regarding her case.
4 (Tr p 64, ll 18-25)

5 44. On cross examination by the Respondent's attorney, the client acknowledged
6 the fee agreement (Exhibit 6) and that it was a flat fee arrangement (Tr p 65, ll.23-25; p 66,
7 ll.1-5)

8 45. Ms. Eisenschenk then testified that the Respondent made two Court
9 appearances, a telephone appearance in December 2006, and that she did file paperwork on
10 her behalf. (Tr. p.66, ll.14-25, p 67, ll.1-4)

11 46 Ms Eisenschenk then testified on cross that Exhibit 6 also contained an
12 activity log of her billings, which she received from the State Bar, not from Ms. Abernathy.
13 (Exhibit 6; Tr p.68, ll 5-21)

14 47. The witness then testified on cross that she did not inform the Respondent or
15 her staff to serve her ex-husband at a doctor's office. In fact, she has no clue how he was
16 served at a doctor's office. (Tr p.70, ll 20-23)

17 48 On re-direct, the witness affirmed that the Respondent informed her that her
18 case might require more than two Court appearances. (Tr. p 73, ll.1-6)

19 49. The witness testified that she expected to receive a bill indicating what she
20 would have to pay (Tr p 73, ll 10-13)

21 50. The State called Heidi Deutsche, the sister of Ms Eisenschenk. This witness
22 testified that she was in Court with Ms. Eisenschenk in December 2006 (Tr p 79, ll 18-23)

1 51. Her observations of the Respondent during the hearing was that she didn't
2 seem to be prepared, as she was telling the judge she wasn't prepared. (Tr. p 80, ll 10-17)

3 52 She also observed her sister, Ms Eisenschenk, writing things on a pad of
4 paper and showing it to the Respondent. (Tr. p.80, ll.17-19)

5 53. None of those issues were brought up, especially the one regarding medical
6 reimbursement (Tr p.80, ll.23-25; p.81, l.1)

7 54 The next witness, Scott Cunningham, is a friend of Ms Eisenschenk, who was
8 also at the hearing in December 2006. (Tr p.82, ll 2-13)

9 55. He was also present when the Respondent came to Court on that date (Tr.
10 p.82, ll 21-23)

11 56. He also observed the Respondent during the Court hearing, and got the
12 impression that the Respondent was totally unprepared. (Tr. p 83, ll 14-19)

13 57. The witness described the Respondent's conduct as being disheveled and not
14 prepared. She kept answering the judge that she wasn't prepared today to address that issue
15 (Tr p.84, ll 1-3)

16 58. The State called the next witness, Deborah L. Gallagher

17 59 In May 2005, Ms. Gallagher was seeking a legal separation from her husband
18 (Tr p 85, ll 8-9, 23-25)

19 60 The witness paid \$1,800 00, plus costs of \$376 00 for filing fees and
20 something else. (Exhibit 20, Tr. p.86, ll.15-21)

21 61. In a conversation with the Respondent, Ms Gallagher was informed that the
22 Respondent did not do military retirement orders. (Tr p.91, ll.22-25; p 92, ll 1-2)

1 62 Ms Gallagher then retained the services of Michael McCarthy to prepare the
2 military retirement order for \$900.00 Mr McCarthy said there was a possibility that if there
3 were problems, more money may be required (Tr. p.92, ll.5-10, l 20-23)

4 63 The witness understood that Respondent would be working with Mr
5 McCarthy (Tr p.93, ll.21-24)

6 64. In January 2006, Ms. Gallagher received a letter from the Respondent saying
7 that her divorce was final (Tr p.94, ll 13-14)

8 65 During the various meetings, the Respondent would use the term divorce
9 rather than a legal separation (Tr p.95, ll.5-13)

10 66 The Respondent constantly using the term divorce rather than legal separation
11 caused concern for the witness. (Tr p.96, ll.2-7)

12 67 However, the witness knew that it was a legal separation and not a divorce, so
13 she just assumed that the Respondent was meaning legal separation. (Tr. p.97, ll 13-20)

14 68. Ms. Gallagher received a document entitled "Consent Decree of Dissolution
15 of Non-Covenant Marriage" from the Respondent. (Exhibit 20 at Bates 211, Tr p 98, ll 4-6)

16 69 On May 11, 2006, the Respondent sent Ms Gallagher a document for her
17 signature regarding a consent decree of legal separation No explanation was given (Tr.
18 p 100, ll.1-9)

19 70. After the Decree of Dissolution was entered, Mr McCarthy contacted Ms.
20 Gallagher and stated that a divorce, rather than a legal separation, changed the military
21 retirement order (Tr. p.101, ll.18-25, p 102, ll.3-5)

22 71 Mr. McCarthy informed Ms Gallagher that he would contact the Respondent,
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1 which he did numerous times. (Tr. p.102, ll 6-10)

2 72 Mr McCarthy was the first person in June 2006 to explain the type of
3 problem that needed to be fixed. (Tr p 102, ll.15-25)

4 73. Mr McCarthy contacted the Respondent to try to get her to correct the
5 paperwork (Tr p.103, ll 12-15)

6 74 Mr. McCarthy kept Ms. Gallagher up to date about what he was attempting to
7 do to help her (Tr. p.103, ll 18-20)

8 75. Mr. McCarthy started helping the Respondent in January 2006, and she
9 believes it was accomplished in September 2006. (Tr. p.104, ll.1-7)

10 76 Ms. Gallagher had to pay an additional \$955 00 to Mr McCarthy to correct
11 the errors regarding the different between a divorce and legal separation (Tr p 104, ll 12-
12 19)

13 77. The Consent Decree of Dissolution was mistitled, but the rest of the body of
14 the Decree referred to a legal separation. (Tr. p.106, ll.20-25; p.107, l.1)

15 78 Ms Gallagher got the impression from McCarthy that she was divorced, not
16 separated (Tr p 108, ll.14-25; p 109, l 1)

17 79 Ms Gallagher understood that Mr McCarthy and the Respondent would be
18 working together on the military retirement order and the Decree so that the military
19 retirement order would be inserted in the Decree. (Tr p.109, ll.16-19)

20 80. The Respondent informed Ms Gallagher that she had worked on the military
21 retirement order all night (Tr. p.110, ll 1-4)

22 81 Ms. Gallagher didn't know why she worked on the military retirement order
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1 all might because she was supposed to do so. (Tr. p.110, ll.4-6)

2 82. The Respondent couldn't understand what Mr. McCarthy wanted and was just
3 going to file the military retirement order with what she thought was correct. (Tr p 110, ll 6-
4 11)

5 83. The State Bar called Michael W. McCarthy as their next witness Exhibit 21
6 SBA340-342 is the letter that Mr McCarthy sent to the Gallaghers and a copy to the
7 Respondent.
8

9 84 Enclosed in the letter was a draft of the language to be used for the parties and
10 Ms Abernathy to review. (Tr. p.114, ll 21-25)

11 85 At first, Mr McCarthy thought he was dealing with a divorce, there is
12 different languages if it's a legal separation, until September 2005 (Tr. p.115, ll.18-25)

13 86. After Mr. McCarthy learned on January 12, 2006, that it was going to be a
14 legal separation, he then prepared a new finding to be included into the Decree (Tr p.116,
15 ll 1-12)

16 87 It was Mr McCarthy's expectation that the Respondent would incorporate the
17 language provided into the Order that she was drafting. (Tr. p 116, ll 13-16)

18 88. If the correct language is included in the original Decree, it is less expensive
19 for the parties and there are no issues with the military (Tr p 117, ll 1-13)

20 89 The difficulty with the military is that you have a jurisdictional requirement
21 that exists nowhere else. You have time requirements that are critical. If you have a gap
22 between when the Decree is entered and an Order regarding retirement, then something may
23 happen during the gap which would nullified the Order. (Tr. p 117, ll.18-25; p 118, ll.1-6)

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90. Mr. McCarthy prepared a new finding based upon a legal separation and e-mailed it to the Respondent on January 16, 2006. (Exhibit 21 SBA345, Tr p 119, ll.8-19)

91 Mr. McCarthy sent an e-mail to the Respondent in which it was his understanding that the Respondent was going to incorporate his language She did not (Exhibit 21 SBA349; Tr p 124, ll 3-8)

92. If a document says Decree of Dissolution rather than Legal Separation, it would cause a problem because the military would reject it because the body and the title don't confirm. (Tr p 126, ll 1-8)

93 Mr. McCarthy filed the appropriate documents to correct the Decree in that the Decree prepared and entered by the Respondent did not include the necessary language (Tr. p 130, ll 6-22)

94. Over the lunch hour, Mr. McCarthy called and corrected his earlier testimony stating that he had received an e-mail from the Respondent dated March 15, and that his March 19 e-mail was in response. In his March 19 e-mail, he wanted to talk to the Respondent regarding costs for him to correct the pleadings He never had a subsequent conversation with the Respondent regarding costs, but instead received an e-mail stating that she was going to do the corrections. (Tr. p.144, ll 12-25)

95. The Respondent testified that she is not knowledgeable enough to prepare military retirement orders. (Tr p.151, ll 1-11)

96 The Respondent testified that Mr. McCarthy provided specific language to include in the Gallaghers' Decree, but that she had lost that language and asked him to send it

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again, which he did. (Tr p.152, ll.9-15)

97. The Respondent then testified that her memory is fuzzy, and that she wasn't going to answer yes because she does not recall because there were letters back and forth (Tr. p.152, ll.17-21)

98. The Respondent then testified that she doesn't know the definition of expertise. (Tr. p.153, ll 2-5)

99 The Respondent acknowledged that the title of the Decree she had submitted was incorrect and that she corrected it (Tr. p 153, ll.18-20)

100 The Respondent was ambiguous in answering questions regarding receiving e-mails, attachments, and issues with pleadings. (Tr p.155, ll 1-22)

101 The Respondent then acknowledged that Mr. McCarthy sent the correct language in January 2006 a second time (Tr. p 156, ll.5-9), and that she did not file a corrected pleading until February 2006. (Tr. p.156, ll 13-18)

102 The Respondent also acknowledged that on March 19, 2006, Mr. McCarthy sent her an e-mail with specific instructions and recommendations on how to correct the language (Tr p 156, ll 24-25, p.157, ll.1-3)

103 On March 22, 2006, the Respondent confirmed that she would incorporate Mr McCarthy's language into the Decree. (Tr. p.157, ll.8-15)

104 The Respondent was again ambiguous regarding her correspondence regarding Mr Likens' attorney, Hugh Kelly, asking for the file. (Tr p 158, ll.12-25)

105. The Respondent acknowledged that Mr Kelly asked for Mr. Likens' file three times. (Tr p 159, ll 1-6)

1 106. The Respondent delivered the file to Mr. Likens' work place rather than to his
2 attorney, Mr. Kelly. (Tr. p 159, ll 7-14)

3 107. The Respondent did finally admit that she understood it was her ethical duty
4 and responsibility to safeguard a client's property. (Tr. p.160, ll.1-24)

5 108. The Respondent testified to medical problems, including hospitalization and
6 dental bills (Tr. p.159, ll 17, p 162, ll 3-4)

7 109 The fee agreement with Ms Eisenschenk stated that the Respondent agreed to
8 provide reasonable and necessary services for a flat fee (Tr. p 166, ll 9-14)

9 110 The Respondent does not send out billing statements with recorded time with
10 a flat fee agreement. (Tr. p.166, ll.13-18)

11 111 The Respondent did prepare an accounting because Ms Eisenschenk filed the
12 Complaint with the State Bar (Tr. p.166, ll.19-24)

13 112 The accounting did not include itemization of time, but is based on her best
14 recollection (Tr p 167, ll.5-17)

15 113. The Respondent testified that she did not give notice of a December hearing
16 because the Gila County Court confirmed that they had the wrong address. (Tr p.169, ll 22-
17 25, p 170, ll 1-3)

18 114 The Respondent believed that the December 20, 2006 hearing was going to be
19 a return hearing (Tr. p.176, ll.18-25)

20 115 The Gila County Court scheduled a telephone conference for 4 00 p.m on
21 December 19 (Tr. p.177, ll.9-17)

1 116 The judge then vacated the hearing on the December 20, 2006 (Exhibit B,
2 Tr p 178, ll 5-8)

3 117. The Respondent testified that she could not follow the judge's reasoning
4 regarding his orders on December 19, 2006. (Tr. p 182, ll 8-16)

5 118. The Respondent testified that she did not discuss settlement with opposing
6 counsel until she got the terms of settlement in writing from her client (Tr. p.184, ll 14-24)

7 119. The requirement for terms of office in writing from the client is in the contract
8 prepared by the Respondent. (Tr. p.185, ll.8-14)

9 120 The Respondent testified that she asked for the terms of an agreement on
10 March 13. (Tr. p.186, ll 1-7)

11 121 The Respondent testified that the hearing was confusing and more of a
12 surprise to her (Tr. p 187, ll.9-21)

13 122 The Respondent explained that she was not prepared to address certain items
14 at the March hearing because other matters were not noticed for that hearing. (Tr. p.188,
15 ll 13-19)

16 123 The Respondent admitted that she had made a mistake on the Decree
17 pertaining to Ms Gallagher and that she corrected it. (Tr. p 192, ll 1-5)

18 124. The Respondent testified that she did not include the language that Mr.
19 McCarthy wanted because in 1996, she learned that just because another attorney who
20 appears to have expertise tells you how to do something, does not relieve an attorney of
21 ethical and other liability. (Tr p.192, ll 18-25)

22 125 That is why the Respondent was reprimanded in 1996 (Tr. p.193, ll 1-2)

1 126. The Respondent testified that she was surprised when she received the
2 language from McCarty and for a short time, she balked at including the language. (Tr
3 p 193, ll 3-8)

4 127 The Respondent further testified that she was not being paid to work with Mr
5 McCarthy and that she never agreed to work with him. (Tr. p 193, ll 8-9)

6 128. The Respondent testified that she only agreed to put language in the Decree
7 that referred to a military retirement order (Tr p.193, ll.12-13)

8 129. The Respondent again testified that she was not being paid to work with Mr
9 McCarthy, or to do any of these tasks that he eventually came to require or demand that she
10 do for Ms. Gallagher. (Tr p 193, ll.14-17)

11 130. The Respondent, testifying on her behalf, stated she really didn't keep good
12 records regarding military retirement order language, and that she did not think she had to do
13 it as she was not being paid to make changes (Tr p 193, ll 19-24)

14 131. On cross, the Respondent stated that she knew Ms. Eisenschenk only worked
15 for 36 hours a week, and that she used her actual income because she didn't want her client
16 to be charged with four extra hours a week of income (Tr p 197, ll 6-16)

17 132 The Respondent states that she did not tell the judge that her client did not
18 work a 40 hour week because the Respondent would have a higher income (Tr p 197, ll.12-
19 13, ll 20-25)

20 133 The Respondent testified that she could not get an answer from the Court
21 regarding the March 29 hearing. She also testified that she did not file a Motion for
22 Clarification (Tr p.199, ll 20-25)

1 134. The Respondent testified that she did not follow the judge's reasoning after
2 seeing the minute entry for March 29 (Tr. p 201, ll.22-25)

3 135. The Respondent filed a Motion to Withdraw as attorney for Ms Eisenschenk
4 on April 15, 2007 (Exhibit A, Tr. p 202, ll 5-24)

5 136 In the Motion, the Respondent stated that the flat fee retainer agreement had
6 been satisfied, and Ms. Eisenschenk declined to enter into a new agreement for legal
7 services. (Tr. p.203, ll.5-9)

8 137 The Respondent testified earlier that Ms. Eisenschenk fired her, which is not
9 mentioned in the Motion to Withdraw (Tr. p 203, ll 14-21)

10 138 The word refund is not contained in the retainer agreement with Ms
11 Eisenschenk (Tr. p.205, ll 3-7)

12 139 The Respondent was ambiguous in her answers regarding whether or not she
13 would include the language from Mr. McCarthy in Ms. Gallagher's Decree. (Tr p 205, ll 9-
14 25)

15 140. Even though the Respondent agreed to include Mr McCarthy's language, she
16 didn't do it, giving computer problems as the reason. (Tr p 207, ll 9-16)

17 141 The witness then testified he wanted other things changed as outlined in his
18 March 19, 2006 e-mail The Respondent didn't agree to do more than include the language.
19 (Tr p 208, ll 5-10)

20 142 The Respondent did not seek a second opinion as to the language Mr.
21 McCarthy sent her. (Tr p.212, ll.1-3)

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CONCLUSTIONS OF LAW

The Respondent admits to violating ER 1.16(d) and ER 1.5. Respondent argues that there was no injury to clients because of her violation of the aforementioned ERs.

The State Bar proved by clear and convincing evidence that the Respondent violated ER 1.1 (competence), ER 1.3 (diligence), ER 1.4 (communication), ER 1.5 (fees), and ER 1.16 (declining or terminating representation). The State did not, by clear and convincing evidence, prove that the Respondent violated ER 1.2 and 8-4(d).

The facts clearly indicate that the Respondent did not have the necessary competence to draft (ER 1.1), review, or otherwise prepare a military retirement order. The Respondent did testify that she referred her client to Michael McCarthy because it was known that he did have the knowledge and experience to prepare such order. However, the Respondent, knowing that she did not have the competency, prepared an Order and submitted it to the Court.

The Respondent also violated ER 1.3 (diligence) in that she did not pursue a matter on behalf of her client. A lawyer must act with commitment and dedication to the interests of the client. In this particular matter, the client did not pursue due diligence in attempting to correct the faulty Decrees for Ms. Gallagher. The lack of communication also deals with being late for Court, returning files to the three clients, and keeping the clients current as to the status of the case. The Respondent also failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished (ER 1.4(2)), and promptly comply with reasonable requests for information (ER 1.4(4)).

The Respondent violated ER 1.5(3) in that the ER specifically states, "A lawyer shall

1 not enter into an arrangement for, charge, or collect a fee labeled as 'earned upon receipt.'
2 The way the retainer agreement is written, the Respondent also violated ER 1.5, ¶5 of the
3 Comment section that may allow the lawyer to improperly curtail services for the client, such
4 as that services are to be provided only up to a stated amount when it is foreseeable that more
5 expensive services probably will be required. This type of fee arrangement is frowned upon
6 because it puts the client in a position that they may have to bargain for further assistance in
7 the midst of a proceeding or transaction. Further, from the testimony of the Respondent, it is
8 clear that she intended to stop services once the retainer has been used by her comments that
9 she wasn't being paid for that, and by putting the clients in a situation where she would have
10 to bargain for further services, even though the matter had not been resolved
11

12 ER 1.6(d) states that upon termination of representation, a lawyer shall take steps to
13 the extent reasonably practical to protect the client's interests. This is to include giving
14 reasonable notice to the client, allowing time for employment of other counsel, and the
15 surrendering of documents and property to which the client is entitled and refunding any
16 advance payment of the fee. More importantly, that specific ER states clearly that upon the
17 client's request, the lawyer shall provide the client with all of the client's documents and all
18 documents reflecting work performed for the client. It is clear from the testimony by clients
19 and the Respondent herself that this was not done. The Arizona Courts have consistently
20 held for many years that the file in the lawyer's office is the property of the client and shall
21 be returned upon request to the client.
22

23
24 The Respondent also did not follow the fee agreement in that it specifically states that
25 if the attorney/client relationship ends prematurely for specific reasons stated or due to the
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1 breakdown of the relationship, the attorney will itemize fees. The Respondent mistakenly
2 assumes and continues to do so even to the closing statement, that since she mailed a copy of
3 everything that went in or out of her office to the client, that it was sufficient to transferring
4 the file/return to the client or another attorney. It is not. The client owns the file. If the
5 lawyer fires the client, the client gets the file. If the lawyer is retiring from the practice of
6 law, the client gets the file. If the client terminates the lawyer's services, the client gets the
7 file. It is the client's property. In Re Woltman, 181 Ariz. 525 (1955), Ethics Opinion 98-
8 07(6/19/98), and 93-03 (3/17/93)

9
10 The Bar proved by clear and convincing evidence that the Respondent did violate ER
11 1.2 (scope of representation). Even though the Respondent referred the parties to Mr
12 McCarthy, she refused to implement the language that he sent her in the Decree because she
13 "did not work for Mr McCarthy." It is clear from testimony and exhibits, that the
14 Respondent did not know, understand, or attempt to follow the ethical rules regarding
15 representation of clients, communications, diligence, and protecting the property of a client.
16 From the testimony of the Respondent and the exhibits, it is clear that the Respondent
17 worked to a certain point and then stopped, using the reason that she was not being paid to do
18 any more. This included errors that she herself caused

19
20 **ABA STANDARDS**

21
22 *ABA Standard 3.0* provides that four criteria should be considered: (1) the duty
23 violated; (2) the lawyer's mental state, (3) the actual or potential injury caused by the
24 lawyer's misconduct; and (4) the existence of aggravating or mitigating factors

1 This Hearing Officer considered *Standard 4 1* failure to preserve the client's property
2 Specifically, *Standards 4 11* and *4 12* were considered. This Hearing Officer also considered
3 *Standard 4 4*, lack of diligence, a failure to act with reasonable diligence and promptness in
4 representing a client, specifically, *Standards 4 41* and *4 42*, *Standard 4 5*, lack of competency
5 as to drafting military retirement language in a decree, and *Standards 4 51* and *4 52* There is
6 testimony regarding the Respondent's lack of communications with the client and a fellow
7 attorney The *ABA Standards*, when read in its entirety, specifically theoretical framework,
8 which states that it assumes the most important ethical duties are those obligations which a
9 lawyer owes to clients

11 This Hearing Officer then considered aggravating and mitigating factors in this case
12 pursuant to *Standards 9 22* and *9 32* *Standard 9 22(a)* prior disciplinary offenses, and
13 *Standard 9 22(b)* dishonest or selfish motive, were specifically considered. Also, Standards
14 9.22(c) a pattern of misconduct, *9 22(d)* multiple offenses, *9 22(e)* failure to comply with
15 rules or orders of the State Bar and Rules of Professional Conduct, and *9 22(g)* refusal to
16 acknowledge wrongful nature of conduct. The only mitigating factor considered pursuant to
17 the *Standards* was *9 32(l)* remorse.

19 PROPORTIONALITY REVIEW

21 The Supreme Court has held in order to achieve proportionality when imposing
22 discipline, the discipline in each situation must be tailored to the individual facts of the case
23 in order to achieve the purpose of discipline *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983)
24 and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993) The Supreme Court has further
25 recognized that the concept of proportionality review is "an imperfect process." *In re Owens*,
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1 182 Ariz. 121, 893 P.3d 1284 (1995). The reasoning is that no two cases are alike. To have
2 an efficient system of professional sanctions, there must be internal consistency, and it is
3 appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*,
4 208 Ariz. 33, 98 P.3d 772. Discipline must be tailored to each individual case because
5 neither perfection nor absolute uniformity can be achieved. *In re Alcorn*, 202 Ariz. 62, 41
6 P.3d 600 (2002). The standards regarding sanctions should be consistent for the most
7 serious instance of misconduct among a number of violations. *In re Redeker*, 177 Ariz.
8 305, 868 P.2d 318 (1994).

10 **RECOMMENDATIONS**

11 The purpose of discipline is to protect the public from further acts by a respondent,
12 to deter others from similar conduct and to provide the public a basis for continued
13 confidence in the State Bar and the judicial system.

14 The Respondent has violated five *Standards*. The Respondent seems to base a
15 portion of her responsibilities to the client on a retainer agreement. Yet, since 1941, in
16 *Schwartz v. Dodd*, 110 P.2d 550, 57 Ariz. 32 (1941), the Court held that a contract to
17 perform services precludes an attorney from collecting the fee when the attorney
18 deliberately or negligently fails to perform services. Furthermore, *Connelly*, 55 P.3d 756,
19 203 Ariz. 413 (2002), held that a non-refundable fee is paid apart from other compensation
20 to insure a lawyer is there if required. Even though this is a fee arbitration, the principal
21 holds true regarding all non-refundable fees.

22 On consideration of testimony, exhibits, facts and application of the *ABA Standards*,
23 including aggravation and mitigating factors and a proportionality analysis, this Hearing
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1 Officer recommends that the Respondent receive as follows.

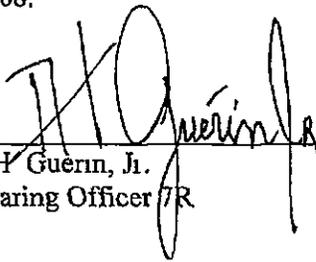
2 1. Respondent shall be suspended for a period of ten months

3 2. Respondent shall be placed on probation for two years upon her
4 reinstatement to practice law. Probation shall include six additional CLE hours related to
5 ethics and participation and successful completion of LOMAP

6 3. Respondent shall pay restitution to each client in the amounts provided for
7 legal services

8 4. Respondent shall pay the costs and expenses incurred in this disciplinary
9 proceeding.

10 DATED this 19th day of September, 2008.

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T.H. Guerin, Jr.
Hearing Officer /R

17 Original filed with Disciplinary Court, and copy
18 delivered this 22nd day of September, 2008.

19 Copy of the foregoing mailed this 23rd day of
20 September, 2008, to.

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