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OCT 08 2009

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA

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

IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
GARY L. LASSEN,)
Bar No. 005259)
)
RESPONDENT.)
_____)

No. 06-1529

**DISCIPLINARY COMMISSION
REPORT**

This matter first came before the Disciplinary Commission of the Supreme Court of Arizona on January 10, 2009, for consideration of the Hearing Officer's Report recommending dismissal. The Commission determined *de novo* that Respondent's criminal convictions gave conclusive effect to his violation of ER 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and his mental state case was foreclosed by Supreme Court Rule 53(h)(1). The Commission remanded the matter for further proceedings. See Commission Report filed February 9, 2009.

A hearing was held on May 5, 2009. The matter again came before the Disciplinary Commission for consideration of the Amended Hearing Officer's Report filed June 18, 2009, recommending censure, one year of probation with the State Bar's Member Assistance Program ("MAP") and costs. The State Bar and Respondent filed an objection and requested oral argument.

The State Bar argues that this matter is not an isolated criminal DUI but a matter of knowing and reckless conduct involving serious criminal violations and moral turpitude.

1 Respondent avoided the most serious offense of aggravated assault, pled no contest and
2 was found guilty of reckless endangerment and leaving the scene of an accident, both Class
3 6 undesignated felonies, and extreme DUI, a Class 1 misdemeanor. Respondent then filed
4 a motion for post-judgment relief claiming the record was insufficient to support his
5 conviction, a denial of his rights, prosecutorial misconduct, and undue hardship. The
6 motion was denied.

7 The State Bar asserts that Respondent's actions seriously adversely reflects his
8 fitness to practice and pursuant to ABA *Standard* 5.12, suspension is the presumptive
9 sanction. The State Bar further asserts that the Hearing Officer's reliance on *In re Kearns*,
10 991 P.2d 824 (Colo. 1999), is misplaced because it is clearly distinguishable. The State Bar
11 argues that unlike this case, the attorney in *Kearns* stopped to render aid, and *Kearns* has
12 not been followed by Colorado or any other jurisdiction.

13 The State Bar argues that Respondent's conduct reflects badly on the profession
14 and censure is not sufficient to deter others from engaging in similar misconduct. The
15 State Bar further argues that even if a downward departure from the presumptive sanction
16 is justified based on the aggravating and mitigating factors, a short term suspension would
17 still be appropriate in this case. The State Bar requests a suspension of not less than 90
18 days and a term of probation be imposed consistent with *In re Proper*, SB-07-0183-D
19 (2008).
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21 Respondent argues that his misconduct occurred over four years ago, was an
22 isolated instance in over 27 years of practicing law without alcohol problems which has
23 not and will not be repeated and the public will be adequately protected by censure.
24 Respondent advises that he has voluntarily participated in MAP for two years and is
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1 currently being monitored by a physician. While voluntarily participating in MAP
2 Respondent asserts that although he did not meet with his monitor because he could not
3 drive, they did speak by telephone. Respondent states that he has voluntarily abstained
4 from alcohol since the accident and his arrest in 2005 and continues to abstain. In closing,
5 Respondent maintains that a term of probation is not necessary and censure will adequately
6 serve the purposes of discipline.

7 Decision

8 Having found no facts clearly erroneous, the five members¹ of the Disciplinary
9 Commission unanimously recommend accepting and incorporating the Hearing Officer's
10 findings of fact, conclusions of law, and recommendation for censure, one year of
11 probation (MAP) and costs of these disciplinary proceedings including any costs incurred
12 by the Disciplinary Clerk's office.² The terms of probation are as follows:

13 Terms of Probation

14
15 1. Respondent shall contact the director of the State Bar's Member Assistance
16 Program (MAP) within 30 days of the date of the order imposing probation and submit to a
17 MAP assessment.

18 2. The director of MAP shall develop "Terms and Conditions of Probation" based
19 upon the assessment and the terms should be incorporated into the order of probation;

20 3. Respondent shall comply with any other terms and conditions incorporated into
21 the order of probation;

22 4. Respondent shall refrain from engaging in any conduct that would violate the
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25 ¹ Commissioners Gooding, Horsley and Todd did not participate in these proceedings.
26 Commissioner Flores recused.

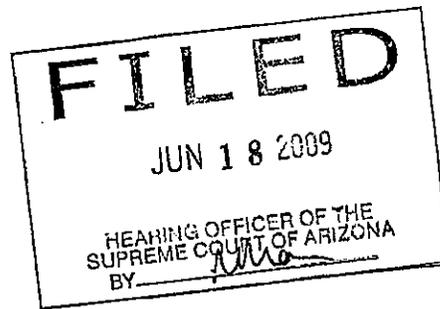
² A copy of the Hearing Officer's Report is attached as Exhibit A.

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EXHIBIT

A

1 DANIEL P. BEEKS
2 2800 NORTH CENTRAL AVENUE, SUITE 1100
3 PHOENIX, ARIZONA 85004-1043
4 TELEPHONE (602) 240-3000
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7 HEARING OFFICER 7M



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

10 **IN THE MATTER OF A MEMBER OF THE**
11 **STATE BAR OF ARIZONA,**

12 **Gary L. Lassen,**
13 **Bar No. 005259**

14 **Respondent.**

No. 06-1529

15 **AMENDED**
16 **HEARING OFFICER'S REPORT**

17 (Assigned to Hearing Officer 7M, Daniel P.
18 Beeks)

19 Respondent Gary L. Lassen ("Respondent" or "Lassen") was convicted of leaving the
20 scene of an injury accident, extreme DUI and endangerment after he hit a motorcyclist with his
21 car while Respondent was drunk and taking prescription medications. These were serious
22 crimes, and reflected adversely on Respondent's fitness as a lawyer. Respondent's conduct
23 appears to have been the result of an isolated series of extremely bad choices, and not part of
24 an ongoing pattern of substance abuse or dishonesty. Based upon the evidence presented
25 during the two hearings in this matter, the Hearing Officer recommends that Respondent be
censured, and placed on probation.

Procedural History

- 1: The probable cause order in this matter was issued on March 5, 2008.
- 2: The State Bar filed its original complaint in this matter on April 21, 2008.
- 3: The State Bar subsequently moved to amend its complaint on May 28, 2008.

The motion to amend was granted. The amended complaint alleged one count arising from

1 Respondent's criminal conviction arising out of his actions in driving while intoxicated, and
2 leaving the scene of an automobile accident in which a motorcyclist was injured. The
3 amended complaint alleged that Respondent had violated E.R. 8.4(b) and (d), and requested
4 that Respondent be punished pursuant to Rule 53(h), Rules of the Supreme Court of Arizona.

5 4. Respondent filed an answer to the amended complaint on June 19, 2008.

6 5. A prior hearing officer conducted a hearing in this matter on September 11,
7 2008. The parties stipulated that the present Hearing Officer could consider all testimony and
8 exhibits presented at this prior hearing.

9 6. The prior hearing officer issued a report on October 31, 2008 recommending
10 that the charges against Respondent be dismissed because the State Bar had not established by
11 clear and convincing evidence that Respondent had been consciously aware that he had been
12 involved in an accident which injured another person, or that he had been consciously aware of
13 the risk he posed because his intoxication interfered with his comprehension.

14 7. The prior hearing officer reasoned that A.R.S. § 13-503¹ had precluded
15 Respondent from demonstrating in his criminal proceedings that his voluntary intoxication had
16 prevented him from forming the necessary mental states required for the crimes, but that this
17 statute did not necessarily apply in disciplinary proceedings.

18 8. On February 9, 2009, the Disciplinary Commission rejected the prior hearing
19 officer's recommendation, and found that pursuant to Rule 53(h)(1),² Rules of the Supreme
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21 ¹ A.R.S. § 13-503 provides that "Temporary intoxication resulting from the voluntary
22 ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter
23 34 of this title or other psychoactive substances or the abuse of prescribed medications does
not constitute insanity and is not a defense for any criminal act or requisite state of mind."

24 ² Rule 53(h)(1) provides in relevant part that "Proof of conviction shall be conclusive
25 evidence of guilt of the crime for which convicted in any discipline proceeding based on the
conviction."

1 Court of Arizona, Respondent's conviction was conclusive in establishing that Respondent had
2 acted with the knowing mental states required for the crimes of which he was convicted.

3 9. The Disciplinary Commission remanded this matter for further findings
4 regarding the presumptive sanction for Respondent's conduct, aggravating and mitigating
5 factors, and proportionality.

6 10. Upon remand, this matter was initially reassigned to Hearing Officer 6S.
7 Respondent exercised his right pursuant to Rule 50(d)(2) to request reassignment to a different
8 hearing officer on February 25, 2009.

9 11. On March 2, 2009, this matter was reassigned to the present Hearing Officer.

10 12. The present Hearing Officer conducted a hearing in this matter on May 5, 2009.

11 **Findings of Fact**

12 13. The Disciplinary Commission did not vacate any of the prior hearing officer's
13 findings of fact. It only vacated his legal conclusions.

14 14. The prior hearing officer's findings of fact are therefore incorporated by
15 reference. These findings include the following:

16 a. At all material times Respondent was licensed to practice law in Arizona.

17 b. On May 4, 2005, Respondent consumed alcoholic beverages at a
18 reception that he attended.

19 c. Respondent was also taking a number of prescription medications in
20 accordance with his physicians' instructions.

21 d. Respondent did not realize that some of medications that he was taking
22 might interact adversely with the consumption of alcohol.

23 e. Respondent left the reception and did not, at the time that he retrieved his
24 car, believe that he was unable to properly operate a motor vehicle.
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f. As Respondent drove, he began to feel ill.

g. Respondent hit a wall while driving and got a flat tire.

h. Subsequently Respondent also struck a motorcyclist, injuring the motorcyclist.

i. Respondent hit the saddle bag of the motorcycle which pushed the saddlebag into the motorcyclist's leg.

j. Respondent was not consciously aware that he struck the motorcyclist. Respondent continued driving after the injury accident.

k. According to the arresting officer, Respondent was not aware of what he was doing or where he was when the officer contacted Respondent.

l. Respondent subsequently pled no contest to criminal charges of endangerment, extreme DUI, and leaving the scene of an injury accident.

m. Respondent's treating psychiatrist, Dr. Henry J. Schulte, opined that the interaction between Respondent's medications and alcohol was a "major factor" on the day of the accident.

n. Dr. Schulte did not believe that there had been any prior episodes of alcohol abuse interfering with Respondent's functioning.

o. Dr. Schulte does not believe that Respondent presents a current threat to the public.

15. As a result of Respondent's conduct, the motorcyclist suffered injuries to his ankle, calf, foot and leg, including lacerations and muscle contusions. *Joint Prehearing Statement ("JPS")* ¶ I-6.

1 16. The investigating police officer testified that Respondent's blood alcohol
2 content after he was arrested was 0.17. *9/11/08 Transcript at 109:4 – 109:6.*

3 17. As a result of his no contest plea, Respondent was convicted of three counts:
4 (1) Endangerment (a class 6 undesignated felony³); (2) Extreme DUI (a class 1 misdemeanor);
5 and (3) Leaving the Scene of an Injury Accident (a class 6 undesignated felony). *11/07/06*
6 *minute entry in CR2005-014584-00; Exhibit 3 at prior hearing.*

7 18. As a result of his plea in the criminal proceedings, the court suspended the
8 imposition of sentence, and placed Respondent on supervised probation for three years for
9 each count, to run concurrently, beginning November 7, 2006, and required Respondent to
10 serve ten days in the Arizona Department of Corrections. *JPS ¶ I-8.*

11 19. The State Bar did not seek interim suspension of Respondent pursuant to Rule
12 53(h)(2)(B), which allows for interim suspension based upon conviction of a "serious crime
13 other than a felony."

14 20. Other findings of fact will be made below in connection with considering
15 various aggravating and mitigating factors pursuant to Standards 9.2 and 9.3 of the American
16 Bar Association's Standards for Imposing Lawyer Sanctions ("ABA Standards").

17 **Conclusions of Law**

18 21. Pursuant to Rule 53(h)(1), Respondent's conviction established the enumerated
19 elements that were necessary elements of the offenses for which he was convicted.

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22 ³ Pursuant to Arizona law, the sentencing court may place a criminal defendant who is
23 guilty of a class 6 undesignated felony on probation and designate the offense as a Class 1
24 misdemeanor upon the defendant's successful completion of the terms of his or her
25 probation. For purposes of bar discipline, conviction of a class 6 undesignated felony is not
considered a felony for discipline purposes unless and until it is actually designated as such
by the sentencing court. *In re Beren*, 178 Ariz. 400, 402-03, 874 P.2d 320, 322-23 (1994).

1 22. Rule 53(h) provides that a "lawyer shall be disciplined as the facts warrant upon
2 conviction of a misdemeanor involving a serious crime or any felony."

3 23. Respondent violated ER 8.4(b) which provides that it is professional
4 misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's
5 honesty, trustworthiness or fitness as a lawyer in other respects."

6 **Sanctions**

7 24. The theoretical framework analysis contained in the ABA Standards states that
8 where there are multiple acts of misconduct, the sanction should be based upon the most
9 serious misconduct, with the other acts being considered as aggravating factors. *See also In re*
10 *Moak*, 205 Ariz. 351, 353, ¶ 9, 71 P.3d 343, 345 (2003).

11 25. The Hearing Officer finds that Respondent's most serious act of misconduct
12 was his conviction of leaving the scene of an injury accident because this charge most directly
13 relates to his honesty, trustworthiness and fitness as a lawyer.

14 26. The appropriate sanctions for Respondent's violations of Rule 53(h)(1) and ER
15 8.4(b) are found in Standard 5.1 of the ABA Standards, which deal with "Failure to Maintain
16 Personal Integrity."

17 27. As with all of the ABA Standards, the appropriate level of punishment depends
18 on the lawyer's mental state, and varies depending on whether the lawyer's actions were
19 "intentional," "knowing," or "negligent."

20 28. Respondent's convictions do not necessarily establish that his actions were
21 intentional. A "knowing" mental state is sufficient.

22 29. In order to be guilty of leaving the scene of an injury accident, a defendant must
23 actually know of the injury or possess knowledge that would lead to a reasonable suspicion
24 that such injury occurred. *State v. Porras*, 125 Ariz. 490, 610 P.2d 1051 (App. 1980).

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1 30. Standards 5.12 and 5.13 both deal with “knowing” failures to maintain personal
2 integrity.

3 31. Standard 5.12 provides that “Suspension is appropriate when a lawyer
4 knowingly engages in criminal conduct which is not included within Standard 5.11 and that
5 seriously adversely reflects on the lawyer’s fitness to practice law.” [emphasis added].

6 32. Standard 5.13 provides that “Reprimand⁴ is appropriate when a lawyer
7 knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or
8 misrepresentation and that adversely reflects on the lawyer’s fitness to practice law.”

9 33. Thus, it becomes important to determine whether Respondent’s conduct
10 “seriously adversely reflects on the lawyer’s fitness to practice law” or only “adversely reflects
11 on the lawyer’s fitness to practice law.”

12 34. There is no doubt that driving while intoxicated, especially with a blood alcohol
13 level of 0.17 is a serious crime. There is also no doubt that leaving the scene of an injury
14 accident is also a serious crime.

15 35. For purposes of attorney discipline, however, it is not the seriousness of the
16 crime, but the seriousness of how that crime reflects on the attorney’s fitness to practice law,
17 that is important.

18 36. The prior hearing officer found that Respondent was not consciously aware that
19 he struck the motorcyclist. Because of his conviction, however, Respondent is conclusively
20 deemed to have possessed knowledge that would lead to a reasonable suspicion that such
21 injury occurred.

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24 ⁴ What the ABA Standards refer to as a “reprimand” is called a “censure” in Arizona.
25 *In re Mulhall*, 159 Ariz. 528, 532, 768 P.2d 1173, 1177 n.3 (1989).

1 37. There is no evidence that Respondent ever had alcohol or substance abuse
2 issues previous or subsequent to the night of the incident for which he was convicted.

3 38. Respondent's behavior on the night of the incident appears to be an isolated
4 series of extremely bad choices, and not part of an ongoing pattern of substance abuse or
5 dishonesty.

6 39. The Hearing Officer does not believe that an isolated incident of failing to stop
7 for an accident, during an isolated incident of severe intoxication caused in part by unexpected
8 interaction of prescription medicines with alcohol "severely adversely" reflects on
9 Respondent's fitness to practice law. *See, e.g. In re Kearns*, 991 P.2d 824 (Colo. 1999)
10 (vehicular assault arising out of drunk driving incident in which respondent injured a
11 motorcyclist adversely reflects on the respondent's fitness to practice law, but does not
12 "seriously adversely" reflect on his fitness to practice law).

13 40. As discussed in more detail below, Respondent's "fitness to practice law" is
14 evidenced by his long and successful history of practicing law at the highest levels. Based on
15 Respondent's history, and the steps he has taken to assure that similar incidents do not occur in
16 the future, the Hearing Officer believes there is very little risk of Respondent engaging in
17 similar violations in the future.

18 41. The Hearing Officer finds that the public will be adequately protected if
19 Respondent is censured.

20 42. The Hearing Officer therefore finds that the appropriate presumptive sanction is
21 a censure pursuant to Standard 5.13.

22 43. Even if the Hearing Officer had found that the appropriate presumptive sanction
23 was suspension pursuant to Standard 5.12, the Hearing Officer would have found that based
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1 upon his balancing of the aggravating and mitigating factors discussed below, a censure, rather
2 than a suspension, would have been the appropriate sanction for Respondent's conduct.

3 **Aggravating and Mitigating Factors**

4 **Aggravating Factors**

5 44. **9.22(b) Dishonest or Selfish Motive.** The State Bar argues that Respondent
6 failed to stop at the scene of the accident with the motorcyclist in order to conceal his identity.
7 The State Bar argues that Respondent's motive in leaving the accident scene must have been to
8 avoid detection and its attendant consequences.

9 Based upon the prior hearing officer's findings, the Hearing Officer believes it is
10 equally likely that Respondent was not even aware of what he was doing or where he was after
11 he collided with the motorcyclist. While it is conclusively established that Respondent
12 reasonably should have known that he had been involved in an accident causing injuries, it is
13 not conclusively established that he formed an intent to conceal his identity by driving away
14 from the accident scene. Assuming that Respondent was even mentally able to form such a
15 concealment scheme in light of his cognitive condition, he could not have reasonably believed
16 he would escape given that he had a flat tire at the time of the collision. Escape was also
17 extremely unlikely because an independent witness had been driving behind Respondent for at
18 least five minutes before the collision with the motorcyclist. *9/11/08 Transcript at 76:7 –*
19 *78:16.*

20 The Hearing Officer finds that the State Bar failed to establish this aggravating factor
21 by clear and convincing evidence.

22 45. **9.22(f) Deceptive Practices During the Disciplinary Process.** The State Bar
23 argues that a motion for post-judgment relief filed by Respondent in his criminal proceedings
24 (Exhibit 14 at first hearing) somehow constitutes a deceptive practice during the disciplinary
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1 process within the scope of Standard 9.22(f). Respondent initially made a claim of
2 prosecutorial misconduct in this motion, based upon the prosecution's alleged last minute
3 change in plea deals offered to Respondent during the criminal proceedings. *Exhibit 14*.
4 Respondent later withdrew this allegation in his reply, and focused on hardship issues instead.
5 *Exhibit 15; 9/11/08 Transcript at 206:24 – 207:21*. This post-judgment motion was denied by
6 the trial court. *Exhibit 16*. One of the members of the Disciplinary Commission expressed an
7 opinion during oral argument on the State Bar's appeal of the prior hearing officer's report that
8 this motion was "pretty outrageous." *01/10/2009 Transcript at 8:7*.

9 The Hearing Officer does not find that this motion could qualify as a "deceptive
10 practice during the disciplinary process." First, the motion was filed in February, 2007, before
11 the present disciplinary matter was even filed. The probable cause order in this case was not
12 issued until over a year later, in March, 2008. Second, the motion was not filed in the
13 disciplinary proceedings, but in the criminal proceedings. Although Respondent lost this
14 motion, he should not be punished for vigorously defending himself in the criminal
15 proceedings. If the post-conviction motion was frivolous, the trial court had numerous tools at
16 its disposal to punish Respondent. It chose not to do so, and so does the Hearing Officer. The
17 Hearing Officer finds that the State Bar has not established this aggravating factor.

18 **46. 9.22(g) Refusal to Acknowledge Wrongful Nature of Conduct.** The State
19 Bar argues that Respondent has refused to acknowledge the wrongful nature of his conduct.
20 The State Bar's primary argument is that Respondent has not sufficiently acknowledged
21 remorse for the harm he caused to the injured motorcyclist. The Hearing Officer finds that the
22 State Bar's argument is more appropriately considered in connection with the mitigating factor
23 of remorse, discussed below.
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1 The Hearing Officer finds that Respondent has acknowledged the wrongful nature of
2 his conduct. First and foremost, he accepted a no contest plea in the criminal proceedings,
3 even after the more favorable plea deal he expected was withdrawn by the prosecution. Ernest
4 Calderon, an attorney who has worked extensively with Respondent both before and after the
5 incident, has testified that Respondent has continually expressed contrition, to the point that "it
6 was almost as if he went to confession daily over this." *9/11/08 Transcript at 62:5 – 64:6. See*
7 *also 5/5/09 Transcript at 45:12 – 46:25.*

8 The State Bar has not established this aggravating factor.

9 **47. 9.22(i) Substantial Experience in the Practice of Law.** It is true that
10 Respondent had been admitted in Arizona for 27 years at the time of the incident. It is not
11 clear that substantial experience should be an aggravating factor in this case because leaving
12 the scene of an injury accident, extreme DUI and endangerment do not seem to be the types of
13 misconduct upon which substantial experience in the practice of law would have any
14 significant effect. *In re Augenstein*, 178 Ariz. 133, 138, 871 P.2d 254, 259 (1994). The
15 Hearing Officer cannot say that because of experience, it is more likely that Respondent
16 "would have known better" than to engage in such misconduct. *Id.* To the extent that
17 Respondent's experience can be considered an aggravating factor, it is offset by his complete
18 lack of prior disciplinary complaints. *Matter of Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994),
19 *modified in part or other grounds*, 181 Ariz. 307, 890 P.2d 602 (1994).

20 The State Bar has not established this aggravating factor.

21 **48. 9.22(k) Illegal Conduct.** The State Bar argues that because Respondent
22 engaged in illegal conduct, this aggravating factor should be applied. The Hearing Officer has
23 serious concerns about applying illegal conduct as an aggravating factor in the present case
24 given that it was also an element of the ethical violations for which Respondent is being found
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1 responsible. The Hearing Officer is concerned that considering Respondent's criminal
2 activities as elements of the underlying offenses, and again as an aggravating factor, would
3 result in "double counting" the same conduct. Interpreting the ABA Standards, the Oregon
4 Supreme Court has held that misconduct constituting an ethical violation should not be double
5 counted as an aggravating factor. *In re Conduct of Gallagher*, 26 P.3d 131, 139 (Ore. 2001).
6 *See also In re Cifelli*, No. 06-1428 (Hearing Officer 2007) (illegal conduct is entitled to little
7 weight as an aggravating factor when it already served as the basis of the discipline in the first
8 place).

9 The Hearing Officer gives no additional weight to this aggravating factor.

10 **Mitigating Factors**

11 49. **9.32(a) Absence of Prior Disciplinary Record.** As discussed in connection
12 with Standard 9.22(i) above, this factor is counter-balanced and offset by Respondent's
13 substantial experience in the practice of law. The two factors cancel each other out, and the
14 Hearing Officer gives no weight to either factor.

15 50. **9.32(b) Absence of a Dishonest or Selfish Motive.** This factor was already
16 analyzed in connection with aggravating factor 9.22(b).

17 51. **9.32(c) Personal or Emotional Problems.** Respondent claims that he suffered
18 from various emotional problems at the time of the incident, and that these problems should be
19 considered in mitigation.⁵

20 The evidence in support of Respondent's emotional problems around the time of the
21 incident was somewhat weak. Respondent called Henry J. Schulte, M.D. as a witness at both
22 the first and second hearings in this matter. Dr. Schulte, however, did not begin treating
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24 ⁵ Respondent does not claim that he suffered a mental disability within the scope of
25 mitigating factor 9.32(i). *05/05/2009 Transcript at 125:3 – 125:18.*

1 Respondent until March 2007, nearly two years after the incident. *05/05/2009 Transcript at*
2 *18:11 – 18:12.* Dr. Schulte also had only very limited records from Respondent's prior treating
3 psychiatrist, Mark A. Wellek M.D. *Id.* at 18:13 – 18:20. Dr. Schulte did not receive Dr.
4 Wellek's actual records, but only received a description of the incident and a summary of
5 treatment covering nearly seven years of treatment. *09/11/2008 Transcript at 33:19 – 34:2.*
6 Dr. Wellek had diagnosed Respondent as suffering from a generalized anxiety disorder.
7 *05/05/2009 Transcript at 20:3 – 20:5.* Dr. Schulte disagreed with Dr. Wellek's diagnosis.
8 *05/05/2009 Transcript at 20:20 – 20:25.* Respondent first saw Dr. Wellek in approximately
9 2000. *05/05/2009 Transcript at 57:29 – 57:22.* In January, 2001, Respondent saw a different
10 psychiatrist who then changed Respondent's psychiatric medication. *05/05/2009 Transcript at*
11 *58:4 – 58:18.* Although Respondent's wife is a licensed clinical psychologist, the Hearing
12 Officer finds that it would not have been appropriate for her to treat Respondent, and any
13 opinions she may have rendered regarding his condition were of questionable value, given her
14 obvious self interest in this proceeding. Dr. Schulte's opinions regarding whether
15 Respondent's condition was stable at the time of the incident were based on the limited records
16 from Dr. Wellek, and from Respondent's after the fact reporting. *05/05/2009 Transcript at*
17 *25:12 – 25:20.*

18 Given that Dr. Schulte did not begin to treat Respondent until long after the incident,
19 and his opinions were based upon very incomplete records from Respondent's prior
20 psychiatrists, the Hearing Officer finds that Respondent has failed to carry his burden in
21 establishing this mitigating element.⁶

23 ⁶ Even if it had been sufficiently established that Respondent was suffering from a
24 recognized psychiatric condition at the time of the incident, this would not necessarily
25 excuse his extreme DUI, endangerment, and leaving the scene of an injury accident. *See,*
e.g., In re Hoover, 161 Ariz. 529, 532, 779 P.2d 1268, 1271 (1989) ("bar discipline may be

1 52. 9.32(d) Timely Good Faith Efforts to Make Restitution or to Rectify the
2 Consequences of Misconduct.

3 After the incident, Respondent requested that Patrick McGroder, a well known and
4 well respected personal injury litigator, assist in attempting to convince his insurance company
5 to compensate the injured motorcyclist to the fullest extent possible. *11/07/2006 Transcript,*
6 *State Bar Exhibit 1, at 30:8 – 30:24; 05/05/2009 Transcript at 206:3 – 206:23.* This
7 constitutes evidence supporting this mitigating factor. *See In re Alcorn*, No. SB-02-0097-D
8 (2002) (attempts to convince insurance company to compensate injured victim supports a
9 finding of mitigation under Standard 9.32(d)). Because Respondent was using his insurance
10 company's money, and not his own funds, to make such restitution, the Hearing Officer
11 believes this factor is entitled to little weight.

12 Respondent also made efforts to make sure that he does not engage in similar
13 misconduct in the future. Although he had no prior history of alcohol or substance abuse, after
14 his plea in the criminal proceeding, Respondent voluntarily began participating in the State
15 Bar's Members Assistance Program ("MAP"). *09/11/2008 Transcript at 131:3 – 133:2.*
16 Respondent did not always follow all of the recommendations provided to him by the MAP
17 program. For example, he did not seek intensive outpatient treatment, as recommended by the
18 MAP Director, Hal Nevitt. *Id. at 132:12 – 133:2.* He also did not meet face to face with MAP
19 Monitor as recommended, although he did have regular telephone contact with the MAP
20 Monitor. *Id. at 123:5 – 126:12.* The Hearing Officer does not find that these variations from
21 MAP's recommendations indicate that Respondent was not making good faith efforts to make

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24 imposed on lawyers with various degrees of mental illness and disturbance. . . . Mental
25 disease or illness . . . is not a per se bar to imposing sanctions on a lawyer for ethical
violations).

1 sure similar problems did not arise in the future.⁷ The Hearing Officer finds that especially
2 given that there was no prior or subsequent history of alcohol or substance abuse,
3 Respondent's participation in the MAP program indicates timely and good faith efforts to
4 insure that similar ethical lapses did not take place in the future.

5 The Hearing Officer finds that Respondent has established this mitigating factor.

6 53. **9.32(e) Cooperation in Discipline.** Respondent has made full and free
7 disclosure to the State Bar and has exhibited a cooperative attitude toward the proceedings.
8 The Hearing Officer finds that Respondent has established this mitigating factor. The Hearing
9 Officer, however, gives this factor little weight, as Respondent did nothing more than the rules
10 require, and his failure to cooperate would have been an aggravating factor.

11 54. **9.32(g) Character and Reputation.** Respondent introduced testimony at both
12 hearings regarding his good character and reputation. Respondent's former partner, and
13 former State Bar President, Ernest Calderon testified regarding Respondent's excellent
14 character and reputation. *05/05/2009 Transcript at 50:6 – 51:4; 09/11/2008 Transcript at*
15 *64:23 – 67:3; 11/7/2006 Transcript at 18:19 – 19:3.* Similarly, another of Respondent's long-
16 time partners also testified as to his very good reputation and character. *09/11/2008 Transcript*
17 *at 158:3 – 161:1; 11/7/2006 Transcript at 10:10 – 11:5.* The State Bar did not present any
18 evidence to contradict this testimony, and in fact, objected to Mr. Calderon's testimony in the
19 most recent hearing as cumulative and redundant. The Hearing Officer finds that Respondent
20 has established this mitigating factor.

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22 ⁷ The Hearing Officer also finds that Respondent's choice to pursue a Smart
23 Recovery© program, rather than a more traditional Alcoholics Anonymous program does
24 not demonstrate any lack of devotion to maintaining sobriety and avoiding potential future
25 ethical issues. *See In re Sorenson (Reinstatement)*, No. 05-6000 at ¶ 100 (2007) (preference
for treatment programs other than traditional 12 step programs does not demonstrate lack of
commitment to maintaining sobriety).

1 55. 9.32(i) Delay in Disciplinary Proceedings. Respondent argues that although
2 he was sentenced in the criminal proceeding in November, 2006, formal proceedings were not
3 filed against him until March, 2008. The State Bar claims that part of this delay resulted from
4 a decision to await a ruling on Respondent's post-conviction motion before proceeding with
5 formal disciplinary actions. Although this may be true, the post-conviction motion was denied
6 in a minute entry dated May 9, 2007. The probable cause determination was not issued until
7 nearly 10 months later, on March 5, 2008. Even though not all of the delay was the fault of the
8 State Bar, this delay qualifies as a mitigating factor. *See, e.g., In re Peasley*, 208 Ariz. 27, 40-
9 41, ¶ 59, 90 P.3d 764, 777-78 (2004) (delay of several years between initial complaint and
10 resolution of case constitutes a mitigating factor under Standard 9.32(i) even if some of the
11 delay is caused by respondent or by complexity of the case). The Hearing Officer finds that
12 Respondent has established this mitigating factor.

13 56. 9.32(k) Imposition of Other Penalties or Sanctions.

14 Respondent was sentenced to ten days in prison for his conduct. This constitutes
15 imposition of other penalties within this Standard.

16 In addition, Respondent has suffered significant humiliation as a result o the incident.
17 The parties disagree regarding whether Respondent's public and personal humiliation,
18 resulting from being arrested, and having the charges reported multiple times in the local press
19 can be considered as mitigating factors. The Arizona Supreme Court considered exactly this
20 type of evidence as a mitigating factor in *In re Walker*, 200 Ariz. 155, 161, ¶ 25, 24 P.3d 602,
21 608 (2001) (such public humiliation should be sufficient to deter other attorneys). The
22 Supreme Court later clarified that in order to be considered in mitigation, such humiliation
23 must arise from actions that occurred before the inception of disciplinary charges, and not
24 those resulting from the disciplinary process itself. *In re Peasley*, 208 Ariz. 27, 40, ¶ 58, 90
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1 P.3d 764, 777 (2004). See also *In re Nalabandian*, No. 01-1792 (2004) (significant amount of
2 negative publicity, and being forced to resign employment with law firm constitute mitigating
3 factors of other penalties and humiliation).

4 Respondent testified that at least three newspaper articles were published about the
5 incident. *05/05/2009 Transcript at 104:13 – 106:2*. He also testified that as a result of these
6 articles, he was asked to leave the firm with which he was working at the time. *Id.* at 69:6 –
7 69:11. According to the parties joint prehearing statement filed before the hearing in front of
8 the prior hearing officer, at least one of these articles was published in 2006. The Hearing
9 Officer takes judicial notice that one of the other articles was published in the Arizona
10 Republic in January, 2007. Because these articles were published prior to formal disciplinary
11 proceedings being instituted against Respondent, the Hearing Officer finds that the public
12 humiliation caused by such newspaper articles can be considered as a mitigating factor. Given
13 the high-profile public entity clients which Respondent typically represented, and the difficulty
14 it caused him in retaining such clients, the Hearing Officer finds that Respondent has
15 established this mitigating factor, and that it is entitled to significant weight.

16 57. **9.32(l) Remorse.** Respondent claims that he is remorseful and that this should
17 be considered as a mitigating factor. Numerous witnesses testified that Respondent had
18 expressed true remorse about the incident to them. As the Arizona Supreme Court has
19 recognized, “those seeking mitigation relief based upon remorse must present a showing of
20 more than having said they are sorry.” *In re Augenstein*, 178 Ariz. 133, 137, 871 P.2d 254,
21 258 (1994). “The best evidence of genuine remorse is affirmative and, if necessary, creative
22 efforts to make the injured client whole.” *Id.* A “late apology, standing alone, is insufficient
23 to support a finding of remorse.” *Id.*

1 The State Bar expresses concern that Respondent has exhibited little true remorse, and
2 that he seems to be more sorry about how his conviction and loss of his drivers license has
3 affected him and his family. Although the Hearing Officer shares some of the State Bar's
4 concerns, and questions whether Respondent has, at times, focused more on the impact of the
5 incident on his own life as opposed to the motorcyclist's life, the Hearing Officer finds that
6 Respondent has carried his burden of establishing this mitigating factor. Given the difficulty in
7 separating the remorse relating to his own situation from the remorse relating to the harm he
8 caused to the motorcyclist, however, the Hearing Officer gives this mitigating factor little
9 weight.

10 **Balancing of Aggravating and Mitigating Factors**

11 58. Overall, the Hearing Officer finds that the mitigating factors significantly
12 outweigh the aggravating factors.

13 59. To the extent that Respondent's conduct could be considered to "seriously
14 adversely reflects on the lawyer's fitness to practice law," such that a suspension would be the
15 presumptive sanction under Standard 5.12, the Hearing Officer finds that the balance of the
16 mitigating factors would support a downward departure, justifying the imposition of a censure.

17 60. The Hearing Officer does not believe, however, that the balance of the
18 mitigating factors would justify a departure from the presumptive sanction of a censure if
19 Standard 5.13 applies, because Respondent's misconduct only "adversely reflects" on his
20 fitness to practice law. The Hearing Officer does not believe that the balance of the mitigating
21 and aggravating factors would justify a mere informal reprimand or diversion, as requested by
22 Respondent's counsel.

1 **Recommended Sanction**

2 61. Based upon the conclusion that Standard 5.13 applies, and the above balancing
3 of aggravating and mitigating factors, the Hearing Officer recommends that Respondent
4 receive a censure.

5 62. The Hearing Officer also recommends that Respondent be placed on probation,
6 on terms discussed in more detail below.

7 **Proportionality**

8 63. The last step in determining if a particular sanction is appropriate is to
9 assess whether the discipline is proportional to the discipline imposed in similar cases. *In*
10 *re Peasley*, 208 Ariz. 27, 41, ¶ 62, 90 P.3d 764, 778 (2004). "This is an imperfect process
11 because no two cases are ever alike." *In re Owens*, 182 Ariz. 121, 127, 893 P.2d 1284,
12 1290 (1995). As the Arizona Supreme Court has observed:

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14 Consideration of the sanctions imposed in similar cases is necessary to
15 preserve some degree of proportionality, ensure that the sanction fits the
16 offense, and avoid discipline by whim or caprice. . . . Proportionality
17 review however, is an imperfect process. . . . Normally the fact that one
18 person is punished more severely than another involved in the same
misconduct would not necessarily lead to a modification of a disciplinary
sanction. Both the State Bar in its capacity as prosecutor and the
Disciplinary Commission in its quasi-judicial capacity have broad
discretion in seeking discipline and in recommending sanctions.

19 *In re Dean*, 212 Ariz. 221, 225, ¶ 24, 129 P.3d 943, 947 (2006).

20 64. Because perfect uniformity cannot be achieved, the Arizona Supreme Court
21 has long recognized that the discipline in each situation must be tailored for the individual
22 case. *In re Piatt*, 191 Ariz. 24, 31, 951 P.2d 889, 896 n.5 (1997). The Hearing Officer has
23 carefully considered all of the evidence, the aggravating and mitigating factors, and prior
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1 disciplinary cases in attempting to adequately tailor Respondent's discipline to the facts of
2 his individual case.

3 65. The Hearing Officer has considered the cases cited by the parties in their
4 respective proportionality briefs, and has performed independent research regarding similar
5 cases.

6 66. There are no prior Arizona cases with precisely analogous facts.

7 67. Arizona cases involving injuries resulting from intoxicated drivers have
8 resulted in a wide range of sanctions. The Hearing Officer has considered the following
9 cases as providing some guidance.
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11 a. *In re Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994) (respondent with
12 long history of drug abuse and drug related arrests who was
13 convicted of negligent homicide after he was involved in an accident
14 with cocaine and prescription drugs in his blood was disbarred);

15 b. *In re Torre*, No. SB-04-0057-D (2004) (respondent convicted of
16 negligent homicide and leaving the scene of a fatal accident
17 stipulated to disbarment);

18 c. *In re Nalabandian*, No. 01-1792 (2004) (passenger in Torre's
19 vehicle at the time of fatal accident, who assisted Torre in leaving
20 the scene thereby preventing state from determining whether Torre
21 was intoxicated at the time of the accident, and who did not report
22 the accident himself, stipulated to receive a censure);

23 d. *In re Saidel*, No. 01-2324 (2003) (Respondent received six month
24 retroactive suspension after he pled guilty to two counts of
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1 endangerment arising out of accident while he was under the
2 influence of alcohol and traveling at least 30 miles an hour in excess
3 of the speed limit, when he lost control of his vehicle, causing
4 significant and serious injuries to both passengers in his car).⁸

5 e. *In re Proper*, No. SB-07-0183-D (2008) (90 day suspension after
6 Respondent pled guilty to aggravated DUI with Child Present, with
7 two prior DUI convictions).

8 f. *In re Lopez*, No. SB-07-0139-D (2007) (one year suspension where
9 the respondent pled guilty to obtaining illicit drugs by fraud,
10 interfered with a law enforcement investigation, made
11 misrepresentations to the State Bar, and intentionally violated a
12 court order).

13 g. *In re Cifelli*, No. SB-07-0154-D (2007) (two year retroactive
14 suspension where respondent was found guilty at trial of felony
15 DUI, where respondent's drivers license was suspended, and
16 respondent had a recent prior DUI, and failed to participate in
17 discipline proceedings).

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23 ⁸ The details of the underlying conduct were not included in the Arizona disciplinary
24 matrix, or in the online report issued by the Disciplinary Commission. The details regarding
25 Saidel's intoxication and speed were obtained from the reciprocal discipline report issued by
New Jersey's Office of Attorney Ethics.

See <http://www.judiciary.state.nj.us/oac/DisciplinarySummaries1984-2008.pdf>

1 68. Because of the dearth of Arizona cases with facts and circumstances similar to
2 the present matter, the Hearing Officer also looked to cases from other states considering
3 similar situations. The Hearing Officer finds that the following cases are somewhat instructive.

4 a. *In re Kearns*, 991 P.2d 824 (Colo. 1999). In *Kearns*, the
5 respondent was driving with a BAC of 0.161 when he hit a
6 motorcyclist. The motorcyclist suffered serious head injuries,
7 several broken bones, and was in a coma for two months. The
8 respondent called 911 and reported the accident. The respondent
9 was convicted of vehicular assault (serious bodily injury to
10 another proximately caused by driving under the influence). *Id.*
11 at 825. The Colorado Supreme court found that although the
12 respondent's conduct adversely reflected on his fitness to
13 practice law (Standard 5.13), it did not seriously adversely
14 reflect on that fitness (Standard 5.12). *Id.* at 826. Based upon
15 this finding, and numerous mitigating factors, the Colorado
16 Supreme Court approved a censure.

17 b. *In re Curran*, 801 P.2d 962 (Wash. 1990). In *Curran*, the
18 respondent was suspended for six months following his
19 conviction for vehicular homicide, arising from a single vehicle
20 accident which killed two passengers in the respondent's car.
21 The respondent was found to have a BAC of 0.18.

22 69. As one would expect, the cases discussed above demonstrate that more serious
23 sanctions are generally reserved for cases in which a respondent has a history of substance
24 abuse, or if a fatality results. This is consistent with the commentary to Standards 5.12 and
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1 5.13, which recognize that isolated incidents not involving fraud or dishonesty should rarely
2 subject a lawyer to discipline, unless there is a pattern of repeated offenses.

3 70. In light of the fact that Respondent had no prior or subsequent history of
4 substance abuse, and nobody died as a result of Respondent's drunk driving, it appears that a
5 censure is within the broad range of sanctions imposed in somewhat similar cases.

6 **Conclusion**

7 71. The purpose of disciplinary proceedings is not to punish the offender, but rather
8 is to protect the public, the profession and the administration of justice, and to deter similar
9 conduct by other lawyers. *In re Alcorn*, 202 Ariz. 62, 74 P.3d 41, 41 P.3d 600, 612 (2002); *In re*
10 *Fioramonti*, 176 Ariz. 182, 187 P.2d 859 P.2d 1315, 1320 (1993).

11 72. The Hearing officer believes that the public, the profession and the
12 administration of justice will be adequately protected if Respondent receives a censure.

13 73. The Hearing officer believes that when considered in conjunction with the
14 existing criminal penalties, a censure of respondent will adequately deter similar conduct by
15 other lawyers.

16 74. For the reasons discussed above, the Hearing Officer recommends that the
17 following punishment be imposed on Respondent Gary L. Lassen:

- 18 a. Lassen should receive a **censure**;
- 19 b. Lassen should be placed on **probation for one year**, under the
20 following terms:
- 21 i. Lassen should be required to contact the director of the State Bar's
22 Member Assistance Program (MAP) within 30 days of the date of the
23 order imposing probation;
- 24 ii. Lassen should be required to submit to a MAP assessment;
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- 1 iii. The director of MAP should be required to develop "Terms and
2 Conditions of Probation" based upon the assessment and the terms
3 should be incorporated into the order of probation;
- 4 iv. Lassen should be required to comply with any other terms and conditions
5 incorporated into the order of probation;
- 6 v. Lassen should be required to refrain from engaging in any conduct that
7 would violate the Rules of Professional Conduct or other rules of the
8 Supreme Court of Arizona;
- 9 vi. If Lassen fails to comply with any of the foregoing probation terms, and
10 the State Bar receives information regarding such non-compliance, Bar
11 Counsel should be obligated to file with the Probable Cause Panelist a
12 Notice of Noncompliance, and the Probable Cause Panelist should refer
13 the matter to a hearing officer to conduct a hearing at the earliest
14 applicable date, but in no event later than 30 days after receipt of notice,
15 to determine whether a term of Lassen's probation has been breached
16 and, if so, to recommend an appropriate sanction. If there is an
17 allegation that Lassen has failed to comply with any of the foregoing
18 conditions, the burden of proof should be placed on the State Bar to
19 prove noncompliance by a preponderance of the evidence.
- 20 vii. Lassen should be required to pay all costs incurred by the State Bar in
21 bringing these disciplinary proceedings, including those incurred by the
22 Disciplinary Commission, the Supreme Court and the Disciplinary
23 Clerk's Office in this matter.
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DATED this 18th day of June, 2009.

Daniel P. Beeks INM
Daniel P. Beeks
Hearing Officer 7M

Original filed with the Disciplinary Clerk
this 18th day of June, 2009.

Copy of the foregoing mailed
this 18th day of June, 2009, to:

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