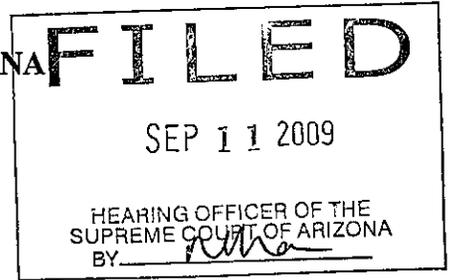


BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
GREGORY L. DROEGER,)
Bar No. 012117)
)
RESPONDENT.)
_____)

No. 08-0462

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

A Complaint was filed on April 20, 2009. The Hearing Officer was assigned on May 6, 2009. Respondent filed an Answer to the Complaint on May 21, 2009. The Initial Case Management Conference was held on May 22, 2009. On May 27, 2009 Settlement Officer Richard Goldsmith was assigned to the case. A Settlement Conference was held on June 18, 2009. A Notice of Settlement was filed on July 31, 2009. The parties filed the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum in Support of the Tender on July 29, 2009. The Hearing was held on August 17, 2009.

FINDINGS OF FACT¹

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 21, 1988. (TR 4:18-23)
2. John Dewar (born 1911) and Benjamin Salinas-Mora (herein "Mr. Salinas") (born about 1929) were longtime companions and lived together in Mr. Dewar's home in Patagonia, Arizona. (TR 5:10)

¹ The facts are found in the Amended Tender of Admissions and Agreement for Discipline by Consent filed August 13, 2009, in the Joint Memorandum in Support of the Tender of Admissions and in the Transcript of the Hearing.

3. Mr. Salinas suffered from various mental and physical incapacities as the result of a brain aneurism when he was in his 40's. (TR 6:19-23)
4. Laura Toby is Mr. Dewar's grand-niece and her father, Joe Toby, was married to Mr. Dewar's niece; these two were the closest family members to Mr. Dewar.
5. On February 14, 2000 John Dewar executed a Will prepared and witnessed by Respondent (herein "February 2000 Will"). (TR 8:15-20)
6. The February 2000 Will contained a testamentary trust for Ms. Toby and Mr. Salinas, with the trust residue devising to the estate of the first trust beneficiary to die.
7. At some point before the February 2000 Will Mr. Salinas had suffered a brain hemorrhage from a fall and was taken to a hospital.
8. On March 9, 2000, the Public Fiduciary was appointed guardian and conservator for Mr. Salinas because of concerns about Mr. Dewar's ability to take care of Mr. Salinas.
9. The Public Fiduciary indicated that Mr. Salinas would not be allowed to stay in Mr. Dewar's home without some supervision. (TR 12:6-11)
10. Mr. Salinas's consumption of alcohol was affecting Mr. Salinas's medication and Mr. Dewar was either unable or unwilling to control the access to alcohol.
11. Additionally, there were concerns about Mr. Dewar's advancing age (he was about 90 at this time) and his ability to care for Mr. Salinas (who was in his 70's) as well as himself.
12. Mr. Dewar was very troubled by the possibility of Mr. Salinas being removed from the home.
13. Because of Mr. Dewar's concern for the in-home companionship with Mr. Salinas, Ms. Toby and Mr. Toby conferred with Respondent about implementing a plan, satisfactory

to the Public Fiduciary, which would permit Mr. Salinas's continued presence in Mr. Dewar's home.

14. With Respondent's help, and after an acceptable supervision plan was provided to the Public Fiduciary, Ms. Toby, Mr. Toby, and Mr. Dewar were made guardians and conservators for Mr. Salinas on February 13, 2001, so that Mr. Salinas could remain in the home. (TR 14:15 through 15:14)
15. During this time Respondent conferred with Ms. Toby on several occasions regarding the services he was providing.
16. Ms. Toby then made arrangements for the in-home care of Mr. Salinas.
17. On January 23, 2003, Dewar executed a codicil to the February 2000 Will, which was also drafted and witnessed by Respondent (herein "January 2003 Codicil"). (TR 16:21 through 17:7)
18. The January 2003 Codicil amended the February 2000 Will by providing that upon the death of Mr. Salinas, the trust residue would devise to Ms. Toby. (TR 18:1-18)
19. In April 2003 Mr. Dewar executed a Will, which Respondent drafted and witnessed (herein "April 2003 Will"). (TR 20: 9-16)
20. The April 2003 Will contained no testamentary trust. (TR 20: 17-19)
21. The April 2003 Will made Mr. Salinas the primary beneficiary (i.e. the estate devised to Mr. Salinas outright). (TR 20:22)
22. The April 2003 Will made Maria Campos, the in-home caretaker for Mr. Salinas at the time, a contingent beneficiary and the personal representative of the estate. (TR 20:22 through 21:4)

23. When Ms. Toby discovered that Mr. Dewar had executed the April 2003 Will, she attempted to contact Respondent to express her concerns over the Will.
24. Respondent destroyed the original executed copy of the April 2003 Will. (TR 22:7-16)
25. In mid-November 2003 Mr. Dewar met with attorney Kay Richter to prepare a new Will (herein "December 2003 Will").
26. In November 2003 Carlos Medina was the in-house caretaker for Mr. Salinas.
27. On November 26, 2003 Mr. Dewar was taken to a Nogales hospital because of excessive bleeding.
28. Mr. Dewar was diagnosed with dementia at the time. (TR 24:12 through 25:11)
29. Soon afterwards Mr. Dewar and Mr. Salinas were moved to a care facility.
30. Due to concerns about Mr. Dewar's deteriorating health, Ms. Toby contacted Respondent in an attempt to secure copies of the January 2000 Will and the February 2003 Codicil.
31. According to Ms. Toby, on December 1, 2003, Respondent advised her that Mr. Dewar was not competent to execute any will.
32. On December 10, 2003, Mr. Dewar executed the December 2003 Will at Ms. Richter's office.
33. Ms. Richter has testified that she determined that Mr. Dewar was competent to execute the December 2003 Will.
34. The December 2003 Will made Mr. Salinas the primary beneficiary with no testamentary trust and made Mr. Medina the personal representative of the estate.
35. At the same time Mr. Dewar executed financial and medical powers of attorney with Mr. Medina charged as the decision maker. (TR 28:8-15)

36. On December 12, 2003, Respondent drafted a Petition for Appointment of Guardian and Surrogate Health Care Decision Maker for Mr. Dewar.
37. The Petition asserted that Mr. Dewar was incapacitated and lacked sufficient understanding and capacity to make responsible decisions concerning his person. (TR 30:15-20)
38. Respondent would testify that he met with Mr. Dewar on or about December 15, 2003, to discuss the Petition and that in his opinion Mr. Dewar was competent to execute a will. (TR 36:16-23)
39. Mr. Dewar died in early February 2004. (TR 35:2-5)
40. On the day Mr. Dewar died, Mr. Medina went to Respondent and asked Respondent to represent him as personal representative for the estate under the December 2003 Will. Respondent agreed. (TR 36:24 through 37:7)
41. Ms. Toby immediately contested the December 2003 Will by alleging Mr. Dewar's lack of competency and undue influence by Mr. Medina. (TR 37:8-14)
42. Ms. Toby filed and received a Temporary Restraining Order which prohibited any dispersal of Mr. Dewar's estate.
43. Ms. Toby filed a motion to remove Mr. Medina as personal representative.
44. Ms. Toby filed a Motion to Disqualify Respondent from his representation of Mr. Medina, primarily arguing that Respondent would be a witness in the Will contest.
45. Respondent fought the disqualification.
46. The probate court disqualified Respondent.

CONCLUSIONS OF LAW

47. Based on the evidence received at the Hearing, the Findings of Fact set forth above and the Conditional Admissions of Respondent set forth below the Hearing Officer finds that the State Bar has proven by clear and convincing evidence that 1) Respondent violated ER 1.7, Rule 42, Ariz.R.Sup.Ct. by representing Mr. Medina while the February 2000 Will and January 2003 Codicil, drafted by the Respondent, were at issue, 2) Respondent violated ER 3.7 by representing Mr. Medina while it was likely that he would be a necessary witness, and 3) Respondent violated ER 8.4(d) by agreeing to represent Mr. Medina when conflicts of interest existed causing Respondent to delay the probate process and cause additional costs to be incurred by Ms. Toby and against the estate.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth in this count, violated Rule 42, Ariz.R.Sup.Ct., specifically, ER's 1.7, 3.7, and 8.4(d).

Respondent's admissions are being tendered in exchange for the form of discipline stated below.

DISMISSED ALLEGATIONS

The State Bar has agreed to dismiss allegations that Respondent violated ERs 1.5 and 1.9 in exchange for the settlement in this matter and in light of evidentiary concerns. ER 1.5(a) involved fees charged for driving to California to examine Mr. Dewar's property. Respondent would testify that Mr. Medina approved the trip. The State Bar would argue that Mr. Dewar's estate would ultimately pay for the trip and therefore it was unreasonable. ER 1.5(b) involved the delay of almost two months in getting a signed fee agreement and whether the delay was reasonable. Respondent would testify that he advised Mr. Medina about the representation and

that there was a reasonable delay in getting the fee agreement signed. Client conflicts are addressed in both ER 1.7 and ER 1.9. Therefore the allegation of ER 1.9 is somewhat redundant and is captured in Respondent's agreement to be sanctioned for a violation of ER 1.7.

SANCTIONS

Respondent and the State Bar agree and the Hearing Officer recommends that on the basis of the conditional admissions contained herein the appropriate disciplinary sanctions are as follows:

Respondent will receive a Censure. The State Bar recommended that Respondent view the Ten Deadly Sins of Conflict and the Respondent has done so.² Therefore no probation is necessary.

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The court and commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence

² In a telephone conference between the Hearing Officer, Bar Counsel and Respondent on August 31, 2009, Respondent agreed that he would view the video and inform Bar Counsel and the Hearing Officer of his compliance. The Hearing Officer and Bar Counsel have received the e-mail in which Respondent confirms that he has viewed the video.

of aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.

Given the conduct in this matter, the most applicable *Standard* is *Standard* 4.3, Failure to Avoid Conflicts of Interest, in particular *Standard* 4.33 which states:

“Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.”

The issues of conflict in this matter require some analysis. At the Hearing the Bar stated through counsel that it could not prove that Respondent had established an attorney-client relationship with Ms. Toby, Mr. Dewar’s grand niece. (TR 46:14) However, Respondent agreed with the Bar’s assertion that Ms. Toby was pursuing Mr. Dewar’s intentions as set forth in the February 2000 Will and the January 2003 Codicil (and supported by Mr. Dewar’s instructions to Respondent to destroy the contradictory April 2003 Will). (TR 45:14 through 46:21) When Respondent agreed to represent Mr. Medina in the December 2003 Will Respondent was representing a person whose interests conflicted with Mr. Dewar’s intentions in the earlier documents. (TR 39:7 through 40:6)

The conflict was exacerbated by the fact that Respondent was a witness to (and the drafter of) the February 2000 Will and the January 2003 Codicil. (TR 38:4-13) In addition Respondent knew that Ms. Toby had placed in issue in her contest of the December 2003 Will 1) undue influence on Mr. Dewar and 2) Mr. Dewar’s competence. (TR 37:8-14) In Ms. Toby’s Will Contest action these two issues were still pending and had yet to be decided by the Court,

while Respondent was continuing to represent Mr. Medina under the December 2003 Will (which another attorney Kay Richter drafted and witnessed). Respondent placed himself in the position of advocating for a Will (the December 2003 Will) in which he did not participate against a Will and a Codicil (February 2000 Will and January 2003 Codicil) which he drafted and witnessed.

The three documents drafted and witnessed by Respondent (coupled with Mr. Dewar's instructions about destroying the third of these papers, the April 2003 Will) demonstrated Mr. Dewar's desire to have Ms. Toby benefit from her service on behalf of Mr. Salinas. The apparent intention of Mr. Dewar in the February 2000 Will was for a trust (with two trust beneficiaries, Mr. Salinas and Ms. Toby) with the residue of the trust to go to the estate of Mr. Salinas or Ms. Toby whoever died first. If Mr. Salinas died first (which was expected because of his age and health issues) the trust residue would go to his heirs, not to the surviving trust beneficiary, Ms. Toby. The January 2003 Codicil was more favorable to Ms. Toby. It called for the residue of the trust to go to Ms. Toby if Mr. Salinas died first. (TR 18:1-18) The April 2003 Will eliminated Ms. Toby. This Will called for no testamentary trusts, but made Mr. Salinas the direct beneficiary, with Maria Campos as in-home caretaker for Mr. Salinas. Ms. Campos was also designated as a contingent beneficiary and the personal representative of the estate of Mr. Dewar.

The April 2003 Will contradicted the February 2001 supervision plan that Respondent had drafted at Mr. Dewar's request and that called for Ms. Toby, Mr. Toby and Mr. Dewar to be made guardians and conservators for Mr. Salinas. The plan was approved by the Public Fiduciary in 2001 because Ms. Toby and her father were added to the aging Mr. Dewar

to help take care of Mr. Salinas. Without this plan Mr. Salinas (against the wishes of Mr. Dewar) would have been removed from Mr. Dewar's home.

Respondent testified that Mr. Dewar instructed him to destroy the April 2003 Will. Respondent described Mr. Dewar as being in tears when Mr. Dewar begged Respondent to destroy the April 2003 Will shortly after Mr. Dewar had been in Respondent's office signing the April 2003 Will. (TR 22:7-22) Respondent stated that the legal effect of destroying that document was to make it null and void, and to have the February 2000 Will modified by the January 2003 Codicil be the controlling documents. These circumstances led to a strong inference that Mr. Dewar intended to keep his grand niece Ms. Toby as a trust beneficiary. (TR 23:3-21)

Respondent testified that he was not in agreement with Ms. Toby's contention that Mr. Dewar was not competent to execute the December, 2003 Will. Respondent did not challenge the facts that 1) in November 2003, Mr. Dewar was taken to a Nogales Hospital because of excessive bleeding, 2) at that time Mr. Dewar was diagnosed with dementia and 3) soon thereafter Mr. Dewar and Mr. Salinas were moved to Waverly House, a Tucson care facility. (24:22 through 25:11)

Respondent testified that when he drafted the December 12, 2003 Petition for Appointment of Guardian and Surrogate Health Care Decision Maker for Mr. Dewar he did not conclude that Mr. Dewar was incompetent. Yet, in the Petition, Respondent asserted that Mr. Dewar was incapacitated and lacked sufficient understanding and capacity to make reasonable decisions concerning his person. (TR 30:15-20) Respondent distinguished the need for a guardian from a lack of competence. (TR 30:25 through 31:8) Respondent at the Hearing recognized that the language he used in the Petition about Mr. Dewar's lack of understanding

coupled with the diagnosis of dementia for Mr. Dewar could have raised an issue in Respondent's mind about Mr. Dewar's competence to sign the December 2003 Will. (TR 33:7 through 34:14) The point is that with this much evidence on the question of Mr. Dewar's competence Respondent should have been able to discern a conflict in representing Mr. Medina and should have recognized his role as a witness in the proceedings. The Hearing Officer concludes that Respondent was negligent in not perceiving the conflict.

THE DUTY INVOLVED

Respondent violated a duty to a client when he placed himself in a position to advocate against Wills that he had drafted and witnessed which were contradictory to a Will Respondent had not drafted.

THE LAWYER'S MENTAL STATE

Respondent negligently failed to appreciate the conflicts in advocating for the December 2003 Will against the earlier Wills that he himself drafted and witnessed.

THE INJURY CAUSED

Ms. Toby's Will Contest action was unnecessarily delayed when Respondent did not withdraw from representing Mr. Medina. When Ms. Toby moved for Respondent's disqualification Respondent fought the motion. The Court ruled in Ms. Toby's favor on this point and ordered Respondent disqualified as Mr. Medina's lawyer.

AGGRAVATING AND MITIGATING FACTORS

In deciding what sanction to impose the following aggravating and mitigating circumstances should be considered:

Aggravating Factor:

Standard 9.22(i) (substantial experience in the practice of law):

Respondent has been an Arizona attorney for 19 years.

Mitigating Factors include:

Standard 9.32(a) (absence of prior disciplinary record):

Respondent has been an Arizona attorney for 19 years without a disciplinary record.

Standard 9.32(l) (remorse)

Respondent appeared sincerely remorseful as evidenced by several portions of his testimony. He stated that because of this disciplinary matter he now uses the services of a licensed fiduciary to investigate matters of alleged incompetency. (TR 53:9 through 54:9) Respondent testified that he does about 12 cases a year of pro bono work for poorer people in the community of Nogales. He was a board member of the Southern Arizona Legal Aid Foundation for three years. (TR 49:1 through 52:4)

In evaluating the aggravating and mitigating factors, the parties and the Hearing Officer agree that they do not justify varying from the presumptive sanction of Censure.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695 (1984).

Proportional cases

In *In re Gorey*, 07-0264 (2008), Respondent received a Censure and one year of Probation (CLE). Respondent engaged in a conflict of interest by providing financial assistance

to a client in connection with pending litigation. Respondent paid more than \$9000 for his client's rental car. Respondent further failed to obtain his client's informed written consent to the conflict. ERs 1.7 and 1.8(e). An aggravating factor was Respondent's substantial experience in the practice of law. In mitigation the Commission found an absence of discipline, full disclosure, and remorse. Respondent's mental state was negligent. No injury was proven.

In *In re Heldenbrand*, 04-0495, (2008), Respondent received a Censure. Respondent engaged in a conflict of interest by representing two clients with divergent interests in the same dispute. Respondent's decision to add one of his two clients as a party benefitted that client but could have harmed his other client. Respondent further failed to adequately communicate with the clients before making decisions about the dispute in question. ERs 1.7(a), 1.4(a) and 1.4(b). In aggravation in this matter Respondent had both prior discipline and substantial experience in the practice of law. Mitigating factors included no selfish motive and full disclosure. The mental state was found to be negligent. A potential for injury was found instead of actual injury.

In *In re Shell*, 08-0358, Respondent was sanctioned with a Censure and one year probation (LOMAP/MCLE). Respondent engaged in a conflict of interest by representing both an individual and family members with concurrent interests in a criminal matter. Respondent further failed to advise his client in writing of the scope of representation. ERs 1.5(b), 1.7 and 8.4(d). Aggravating factors included obstruction of the process, refusal to acknowledge wrongfulness of Respondent's conduct, the vulnerability of victim, and Respondent's substantial experience in the practice of law. One mitigating factor was Respondent's lack of prior discipline. Respondent's mental state was found to be negligent. A potential for injury was found.

CONCLUSION AND RECOMMENDATION

Respondent's conduct merits Censure. He should have realized that representing Mr. Medina in the December 2003 Will would cause him to advocate against the contrary intentions of his former client Mr. Dewar, expressed in the February 2000 Will and the January 2003 Codicil, and against Mr. Dewar's conduct when Mr. Dewar begged Respondent to destroy the April 2003 Will. Respondent might have thought that a testator could change his mind about his heirs or trust beneficiaries. However, Mr. Dewar's health and mental problems (the diagnosis of dementia in November 2003) were known to Respondent in December, 2003. Respondent also knew that Laura Toby's claim centered on Mr. Dewar's competence and that Respondent would have significant information on that subject (having drafted and witnessed the February 2000 Will, the January 2003 Codicil and the April, 2003 Will).

Based on the *Standards* and case law, the parties and the Hearing Officer believe that a Censure is within the range of appropriate sanctions in this case and will serve the purposes of lawyer discipline. The sanction will serve to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of the Bar.

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the State Bar and Respondent and the Hearing Officer assert the objectives of discipline will be met by the imposition of the proposed sanction of a Censure, and the costs and expenses of these proceedings.

SANCTION

- 1.) Respondent will receive a Censure;³
- 2.) Respondent will view the Ten Deadly Sins of Conflict video; (this has been done)
- 3.) Respondent will pay the costs associated with these proceedings. A Statement of Costs and Expenses is attached as Exhibit A.

DATED this 11th day of September, 2009.

Jonathan H. Schwartz / JMS
Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 11th day of September, 2009.

Copy of the foregoing mailed
this 14th day of September, 2009, to:

Gregory Droeger
Respondent
Law Offices of Gregory L. Droeger
274 W View Point Drive
Nogales, AZ 85621

Thomas E. McCauley, Jr.
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Evelyn Loza

³ The Joint Memorandum in Support of the Tender of Admissions stated incorrectly that Respondent would also receive probation. In a telephone conference of August 31, 2009, with the Hearing Officer, Bar Counsel and the Respondent, the parties informed the Hearing Officer that the reference to probation was a mistake.

STATEMENT OF COSTS AND
EXPENSES

EXHIBIT A

1 **Statement of Costs and Expenses**

2 In the Matter of a Member of the State Bar of Arizona,
3 Gregory L. Droeger, Bar No. 012117, Respondent

4 File No(s). 08-0462

5 **Administrative Expenses**

6 The Board of Governors of the State Bar of Arizona with the consent of the
7 Supreme Court of Arizona approved a schedule of general administrative
8 expenses to be assessed in disciplinary proceedings. The administrative
9 expenses were determined to be a reasonable amount for those expenses
10 incurred by the State Bar of Arizona in the processing of a disciplinary matter.
11 * An additional fee of 20% of the general administrative expenses will be
12 assessed for each separate file/complainant that exceeds five, where a violation
13 is admitted or proven.

14 General administrative expenses include, but are not limited to, the following
15 types of expenses incurred or payable by the State Bar of Arizona:
16 administrative time expended by staff bar counsel, paralegals, legal assistants,
17 secretaries, typists, file clerks and messengers; postage charges, telephone
18 costs, normal office supplies, and other expenses normally attributed to office
19 overhead. General administrative expenses do not include such things as travel
20 expenses of State Bar employees, investigator's time, deposition or hearing
21 transcripts, or supplies or items purchased specifically for a particular case.

22 *General Administrative Expenses for above-numbered proceedings* = \$1200.00

23 Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary
24 matter, and not included in administrative expenses, are itemized below.

25 **Staff Investigator/Miscellaneous Charges**

07/15/09 Atwood Reporting Service, Deposition of Respondent \$876.75

Total for staff investigator charges \$876.75

TOTAL COSTS AND EXPENSES INCURRED **\$2,076.75**

26 *Sandra E. Montoya*
27 Sandra E. Montoya
28 Lawyer Regulation Records Manager

8-10-09
Date