



1 of Fact and Conclusions of Law on March 29, 2004.<sup>1</sup>

2 **II. FINDINGS OF FACT**

3 8. At all times relevant to the complaint, Respondent was an attorney  
4 licensed to practice law in the State of Arizona, having been admitted to practice in  
5 Arizona on October 5, 1974. Joint Pre-Trial Statement dated January 14, 2004  
6 (“JPTS”) ¶ I(A).

7 9. Precision Power, Inc., whose shareholders were Christine and Edward  
8 (“Ted”) Guenther, leased premises to Phaze Audio, LLC for five years commencing on  
9 January 1, 1998. Ted Guenther was the President of Precision Power. Wayne Shive  
10 guaranteed the lease for Phaze Audio. JPTS ¶ I(B).

11 10. Respondent had a twenty-year professional relationship with Ted and  
12 Christine Guenther, during which he performed services for the Guenthers and entities  
13 controlled by the Guenthers. Transcript dated January 30, 2004 (“TR”) pp. 57, 117.

14 11. Guenther Properties, LLC, which was managed by Ted Guenther,  
15 became the successor property owner and lessor on the Phaze Audio lease in October  
16 1998. JPTS ¶ I(P).

17 12. Ted Guenther requested that Pulito sue Phaze Audio and Wayne Shive,  
18 (the “Phaze/Shive matter”) for breach of the lease in the year 2000. JPTS ¶ I(C).

19 13. Ted Guenther requested that Pulito move quickly in the Phaze/Shive  
20 matter because Ted Guenther believed that delay would adversely impact plaintiff’s  
21 ability to collect. TR. pp. 59, 60.

22 14. Respondent commissioned an asset search on Wayne Shive to determine  
23 whether any judgment would likely be collectible. The asset search was conducted in  
24 September, 2000 and revealed some potential assets to pay a judgment. TR. p. 60; TR. P.  
25 116.

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27 <sup>1</sup> The Hearing Officer had ordered any response to be filed on March 26, 2004. Pulito having  
28 requested additional time to file his response; no objection having been received; and finding  
no prejudice resulting from the delay, the Hearing Officer has considered Pulito’s response.

1           15. Respondent concedes that he should have filed suit in the Phaze/Shive  
2 matter no later than September, 2000. TR. p. 124.

3           16. During the next two years, Ted Guenther and Christine Guenther made  
4 numerous inquiries of the status of the Phaze/Shive matter. TR. p. 61.

5           17. From October, 2000 until March 21, 2002, the Respondent deceived the  
6 Guenthers about the status of the Phaze/Shive matter by assuring them that the matter  
7 or lawsuit was proceeding. JPTS ¶ I(H); TR. p. 116; TR. P. 125. Every time the  
8 Guenthers asked, Pulito assured them that the matter was progressing. TR. p. 62.

9           18. On or shortly after December 21, 2001, Ted Guenther and Christine  
10 Guenther received a billing for work being done by Pulito on the Phaze/Shive matter that  
11 indicated that they owed Mr. Pulito \$14,364.00 for work done on the Phaze/Shive matter.  
12 TR. p. 63; Ex. 16(f); JPTS ¶ I(E).

13           19. The billing described services performed since the inception of the  
14 Phaze/Shive matter. TR. p. 63, Ex. 16(f).

15           20. The billing provided detail as to services performed, including costs, a  
16 filing fee, conferences with the court, summary judgment motions and responses, and  
17 service and re-service of process. These events had never occurred. TR. pp. 144-145;  
18 JPTS ¶ I(F).

19           21. The Respondent admits that he utilized the false billing to “perpetuate the  
20 deception that I had expressed prior to the date of that billing.” TR. p. 146.

21           22. The December 21, 2001, bill was for a total of \$18,624 and included  
22 matters other than the Phaze/Shive matter. Ex. 16(f). Ted Guenther paid \$14,000  
23 towards the December 21, 2001, bill. Ex. 16(a), ¶¶ 6, 7; TR. pp. 76, 82, 155, 35.

24           23. The amount of legitimate billings on other matters being \$4,260, Ted  
25 Guenther overpaid Pulito in the amount of \$9,740.

26           24. Respondent had also had a previous intimate relationship with Christine  
27 Guenther that produced a son in 1989. Thereafter, Pulito had parenting disagreements  
28 with Christine Guenther. JPTS ¶ I(L); TR. pp. 125-126.

1           25. During the events underlying this complaint, Ted Guenther was acting as  
2 an agreed-upon non-judicial arbitrator of disputes between Christine Guenther and  
3 Pulito concerning their son. JPTS ¶ I(L); TR. p. 119; TR. p. 70.

4 . . . .

5           26. Respondent never advised the Guenthers to seek separate counsel as to the  
6 advisability of having Pulito represent them while Ted Guenther was acting as a mediator  
7 between Pulito and Christine Guenther, nor did Pulito discuss with Ted Guenther the  
8 actual or potential conflict inherent in continuing to represent the Guenthers and their  
9 entities while Ted Guenther was acting as a mediator between Pulito and Christine  
10 Guenther. TR. pp. 79-80.

11           27. In the fall of 2001, while purportedly representing Guenther Properties in  
12 the Phaze/Shive matter, Respondent had a disagreement with Christine Guenther over  
13 parenting and visitation issues. TR. p. 127.

14           28. By February of 2002 the dispute had deteriorated to the point that Pulito  
15 threatened to sue Christine Guenther. TR. p. 128.

16           29. After Pulito threatened to sue Christine Guenther, Ted Guenther felt that  
17 the conflict of interest had become “a little sticky at that point.” TR p. 70.

18           30. Therefore, Ted Guenther sent a letter dated March 5, 2002, to the  
19 Respondent indicating that the Guenthers felt they “were facing a real conflict of interest  
20 and a most uncomfortable situation.” TR. p. 70; Ex. 13.

21           31. Despite the clients’ concerns regarding the conflict, the Respondent never  
22 responded to the March 5, 2002 letter. TR. p. 71.

23           32. The March 5, 2002 letter also asked Pulito precise questions about the  
24 status of the Phaze/Shive matter, and suggested that the Guenthers were hiring another  
25 attorney. Ex. 13.

26           33. In fact, the Guenthers hired Belknap to take over the representation from  
27 Pulito. TR. p. 19.

28           34. Upon realizing that his deception was about to be uncovered, Pulito

1 prepared a written letter disclosing the true state of affairs to Ted Guenther. TR. pp.  
2 65-68; Ex. 16(g).

3 35. In late March, 2002, Respondent gave the Guenthers the typed signed  
4 letter, prepared on March 21<sup>st</sup>, and provided to the Guenthers one or two days thereafter.  
5 In the letter, Pulito admitted he “knowingly deceived both members of Guenther  
6 Properties, LLC by falsely representing that an appropriate civil action was pending  
7 and on-going. This deception was perpetrated by oral statements as well as fax and  
8 email transmissions and had continued for a period of approximately sixteen (16)  
9 months.” JPTS ¶ I(J); Ex. 16(g).

10 36. When Respondent admitted the true status of the matter to his clients, he  
11 still had not advised either Ted Guenther or Christine Guenther to seek separate  
12 representation. During the following week Pulito continued to represent Guenther  
13 Properties while simultaneously attempting to negotiate his own liability to Guenther  
14 Properties. TR. p. 80; Exs. 5(e), 5(f), 5(g), 5(h), 5(i), 5(j), 5(k), 5(m), 5(n), 8, 12(c).

15 37. Upon disclosing his misfeasance, Respondent told the Guenthers that the  
16 delays he caused might have caused damages. JPTS ¶ I(K), Ex. 16(g).

17 38. Respondent admits that on a spreadsheet he prepared, that was based on  
18 information supplied by the Guenthers and a method of interpreting the lease, the  
19 damages sustained by the Guenthers from the breach of lease totaled \$818,157.00 by  
20 March of 2002. JPTS ¶ I(G).

21 39. After Belknap assumed the representation, he concluded that Wayne Shive  
22 was not going to be able to pay much in a settlement. Belknap sued both Pulito and  
23 Wayne Shive in separate lawsuits. TR. p. 24-25.

24 40. In the lawsuit in which he was a defendant, Pulito did not participate in  
25 discovery or the Rule 16 conference. Pulito filed a Motion to Dismiss, which was denied  
26 by the Superior Court. TR. p. 25.

27 41. Respondent did not participate in a settlement conference. TR. p. 36.

28 42. Respondent did not appear for depositions. TR. p. 28.

1           43. Belknap stated that the Guenthers were not seeking a restitution order in  
2 this matter, because they are pursuing a civil remedy and he was concerned that a  
3 restitution order could have a collateral estoppel effect in the Superior Court action. TR.  
4 p. 47.

5           44. Respondent concedes that he failed to diligently represent his client in  
6 the Phaze/Shive matter in violation of ER 1.3. JPTS ¶ I(M).

7           45. Respondent concedes that he failed to properly communicate with his  
8 client about the true status of the Phaze/Shive matter in violation of ER 1.4. JPTS  
9 ¶ I(N).

10          46. Respondent concedes that his conduct involved dishonesty, fraud, deceit,  
11 or misrepresentation in violation of ER 8.4(c). JPTS ¶ I(O).

12          47. Respondent confirmed that he did not claim any physical or mental  
13 impairment or seek treatment for any physical or mental impairment or infirmity at any  
14 time. TR. p. 90, 46, 147, 140.

15 **III. CONCLUSIONS OF LAW**

16          48. Prior to the hearing, Pulito and the State Bar stipulated to violations of  
17 ER 1.3, 1.4 and 8.4(c).

18          49. In addition, Pulito conceded in both his Proposed Findings of Fact and  
19 Conclusions of Law, and his Response, a violation of ER 1.5. Based on the clear and  
20 convincing evidence of a fee charged for work that was not performed, the Hearing  
21 Officer finds a violation of ER 1.5.

22          50. The State Bar alleges a violation of ER 1.2: “a lawyer shall abide by a  
23 client’s decisions concerning the scope or objectives of the representation.” Because Ted  
24 Guenther directed suit to be filed in the Phaze/Shive matter at least by September 2000,  
25 and Pulito had not filed suit by March 2002, the Hearing Officer finds clear and  
26 convincing evidence that Pulito failed to abide by the client’s decision concerning the  
27 scope and objections of the representation.

28          51. The State Bar alleges a violation of ER 1.7: That Pulito represented a

1 client when there was a significant risk that the representation would be materially  
2 limited by a personal interest of the lawyer. Although it is not clear that Pulito  
3 represented Christine Guenther during the events giving rise to this complaint, Pulito did  
4 represent an entity controlled by Ted Guenther, while Ted Guenther was acting as a  
5 mediator between Christine Guenther and Respondent for parenting disputes.

6 52. In addition, Pulito continued to represent Guenther Properties, LLC, at  
7 least for a time while simultaneously attempting to negotiate a settlement with Guenther  
8 Properties, LLC arising out of his actions in the Phaze/Shive matter.

9 53. Pulito never discussed these conflicts of interest with Ted Guenther, let  
10 alone obtained a written waiver complying with ER 1.7.

11 54. The Hearing Officer finds, based on clear and convincing evidence, a  
12 violation of ER 1.7.

13 55. Finally, the State Bar alleges a violation of ER 8.4(d): conduct prejudicial  
14 to the administration of justice. The State Bar's Proposed Findings of Fact and  
15 Conclusions of Law, however, appears to argue that Pulito violated ER 8.4(b):  
16 commission of a criminal act that reflects adversely on the lawyer's honesty,  
17 trustworthiness or fitness as a lawyer in other respects. Regardless, the Hearing Officer  
18 does not find a violation of either ER 8.4(b) or ER 8.4(d) has been established by clear  
19 and convincing evidence.

20 56. Respondent possessed substantial experience in the practice of law at the  
21 time the above violations occurred.

22 57. At all times, Pulito cooperated fully with the State Bar investigation and  
23 provided full and complete disclosure. Exs. 4, 5, 6, 12.

24 58. The prior discipline alleged by the State Bar is established, but is both  
25 remote in time and unrelated to the events underlying this matter. State Bar File No. 94-  
26 2493.

27 **IV. ABA STANDARDS**

28 59. Although the State Bar has proven multiple violations by Pulito, he should

1 receive one sanction consistent with the most serious instance of his conduct. *See In re*  
2 *Cassalia*, 173 Ariz. 372, 375, 843 P.2d 654, 657 (1992). The parties agree that the most  
3 serious violation is the approximately 18-month long deception by Pulito as to the status  
4 of the Phaze/Shive matter – ER 8.4(c). The State Bar argues that the American Bar  
5 Association Standard for Imposing Lawyer Sanctions (1991) (“Standards”) 4.61 provides  
6 the presumptive sanction; Pulito argues that Standard 4.62 provides the presumptive  
7 sanction.

8           60. Standard 4.61 states: “disbarment is appropriate when a lawyer knowingly  
9 deceives a client with the intent to benefit the lawyer or another, and causes serious injury  
10 to a client.”

11           61. Standard 4.62 states, “suspension is generally appropriate when a lawyer  
12 knowingly deceives a client and causes injury or potential injury to a client.” The critical  
13 distinction for this case is the “intent to benefit the lawyer or another” element of  
14 Standard 4.61. *Compare* Standard 7.1 (disbarment appropriate for violation of duty owed  
15 as a professional with the intent to obtain a benefit for the lawyer).

16           62. Except for the false billing for services that were never rendered, the State  
17 Bar produced no evidence from which a finding could be made that Pulito intended to  
18 benefit himself. Indeed, the commentary to Standard 4.62 is instructive: “Suspension is  
19 appropriate when a lawyer knowingly deceives a client, although not necessarily for his  
20 own direct benefit, and the client is injured. *The most common cases are those in which a*  
21 *lawyer misrepresents the nature or extent of services performed.*” (Emphasis added).

22           63. Although the charging of fees (subsequently collected) for the non-existent  
23 work did convey a benefit to Pulito, the evidence does not establish that collection of the  
24 fee was Pulito’s “conscious objective or purpose . . . .” Standards “Definitions.”

25           64. Rather, the evidence taken as a whole compels the conclusion that Pulito’s  
26 actions after the initial deception were for the purpose of supporting that deception.

27           65. Standard 3.0 provides that, in addition to considering the duty violated and  
28 the lawyer’s mental state, the actual or potential injury caused by the misconduct and the

1 existence of aggravating/mitigating factors should be considered in reaching the ultimate  
2 discipline imposed.

3 66. Although the fact of injury may await the outcome of the civil proceeding,  
4 the potential for a serious injury certainly exists, and indeed, is conceded by Pulito.

5 67. Pursuant to Standard 9.22, the following aggravating factors urged by the  
6 State Bar are present: 9.22(b) (dishonest motive); and 9.22 (i) (substantial experience in  
7 the practice of law).

8 68. Pursuant to Standard 9.32, the following mitigating factors urged by Pulito  
9 are present: 9.32(e) (full and free disclosure and cooperative attitude); and 9.32(m)  
10 (remoteness of prior offenses).

11 69. Although the parties argued various other aggravating/mitigating factors,  
12 the Hearing Officer did not find any established by the evidence.

13 70. Specifically, although Pulito did make various efforts to rectify the  
14 consequences of his actions, each appeared to be motivated by the hearing in this matter  
15 and/or court proceedings rather than by a desire to make the prior client(s) whole.  
16 Pursuant to Standard 9.4(a), these attempts are neither aggravating nor mitigating.

17 71. Pulito's actions in late March 2002 are more difficult to analyze.  
18 Commendably, Pulito did fully disclose his prior misfeasance and make some proposal to  
19 rectify the potential harm. However, Pulito did not advise his client of the non-waivable  
20 conflict of interest then existing. Under the circumstances, this Hearing Officer does not  
21 find Pulito's efforts at that time to be a substantial mitigating factor.

22 **V. PROPORTIONALITY REVIEW**

23 72. The purposes of having lawyer discipline are to protect the public, to  
24 maintain confidence in the legal system, to deter future misconduct, and to instill public  
25 confidence in the bar's integrity. *In re Fioramanti*, 176 Ariz. 182, 187, 859 P.2d 1315,  
26 1320 (1993); *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985); *Matter of Horwitz*, 180  
27 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

28 73. To achieve these purposes, the discipline imposed must be tailored to each

1 case, although like sanctions should be imposed for like conduct. *In re Wolfram*, 174  
2 Ariz. 49, 59, 847 P.2d 94, 104 (1993). Particularly troubling in this case is the length of  
3 the deception involved.

4 74. The State Bar proffers *Matter of Romney*, SB-01-0035-D (42-month  
5 suspension (retroactive) for violations of ERs 1.2 through 1.5 and 8.4(c) and (d) among  
6 others); *Matter of Silver*, SB-00-0109-D (disbarred for violations of ERs 1.2 through 1.4,  
7 8.4(c) and (d)) and *Matter of Griffith*, SB-01-0041-D (disbarment for violations of ERs  
8 1.2 through 1.5, 8.4(c) and (d)) as proportional cases. However, all involved either  
9 misconduct in judicial proceedings and/or misconduct in State Bar proceedings in  
10 addition to the misrepresentations to the clients.

11 75. Respondent offers *Matter of Vice*, SB-02-0007-D (six months suspension  
12 arising out of drug conviction); and *In re Cain*, 174 Ariz. 592, 852 P.2d 407 (1993) (two  
13 year suspension after respondent had terminated practice three years earlier) as  
14 proportional cases.

15 76. *Cain*, although somewhat analogous, primarily involved ongoing conflicts  
16 of interest wherein the attorney benefited himself, and the charging of unreasonable fees.  
17 In addition, the respondent in *Cain* voluntarily placed himself on inactive status. Pulito's  
18 actions in "voluntarily" ceasing practice and subsequently "allowing" an administrative  
19 suspension for failure to pay dues, does not equate with voluntary inactive status.

20 77. The Hearing Officer has also considered *In re Carrasco*, 176 Ariz. 459,  
21 862 P.2d 219 (1993) (six month suspension) and *In re Iliff*, 175 Ariz. 161, 854 P.2d 1147  
22 (1993) (three month reciprocal suspension with Minnesota).

23 78. Of the cases cited by either party, or located by the Hearing Officer,  
24 *Carrasco* seems the most appropriate comparison. In *Carrasco*, the respondent caused  
25 harm to two clients. The first client was harmed when the respondent delayed for 2 years  
26 before filing suit and another year before attempting service or requesting an extension of  
27 time to effectuate service, resulting in dismissal of the case. The second client was  
28 harmed when respondent delayed in filing a completed visa application resulting in a one

1 semester delay in the client being hired for a teaching job. In both cases, the respondent  
2 failed to advise the clients of the true status of the matters and failed to cooperate with the  
3 State Bar investigation. In the first matter, the respondent also attempted to negotiate a  
4 settlement with the first client without referring her to independent representation.<sup>2</sup>

5 79. Because of the length and intricacy of the deception involved in this matter,  
6 including the false billing, the Hearing Officer recommends a lengthier suspension than  
7 assessed in *Carrasco* – one year.

8 80. The Respondent requests retroactivity to the summer of 2002. TR. p. 16,  
9 138. The Respondent, however, provided no evidence other than his own testimony that  
10 he stopped practicing law sometime in the summer of 2002. No contemporaneous  
11 notifications to clients in the summer of 2002 were presented.

12 **VI. RECOMMENDATION.**

13 81. Upon consideration of the evidence, application of the Standards, and a  
14 proportionality analysis, it is recommended that:

15 1) Respondent James P. Pulito be suspended for one year from the date  
16 of this suspension;

17 2) Respondent pay restitution of \$9,740.00 plus interest at 10% per  
18 annum from December 31, 2001, until paid, plus payment of any civil judgment;

19 3) Respondent pay the costs and expenses incurred in these  
20 proceedings; and

21 4) Prior to, and as a condition of applying for reinstatement,  
22 Respondent complete at least six hours of ethics courses dealing with the recognition of  
23 conflicts of interest.; and

24 5) Prior to, and as a condition of applying for reinstatement, Pulito  
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26 <sup>2</sup> In *Carrasco*, the State Bar alleged a violation of ER 1.8 which has not been charged in this  
27 matter. Nevertheless, the Hearing Officer has found a violation of ER 1.7 and has refused to  
28 consider Pulito's attempts to rectify the potential harm in March, 2002, largely because of  
Pulito's failure to recognize the conflict of interest.

1 confer with a mental health professional to assess his then current health status.

2 **DATED** this \_\_\_\_ day of April 2004.

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\_\_\_\_\_  
Thomas M. Quigley  
Hearing Officer 8W

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10 and

11 James P. Pulito  
12 Respondent  
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