

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

**IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,**

DANIEL THOMAS MCCARTHY,
Bar No. 006396

Respondent.

PDJ-2013-9058

**REPORT AND ORDER IMPOSING
SANCTIONS**

[State Bar Nos. 12-1585 and 12-
3209]

FILED SEPTEMBER 18, 2013

PROCEDURAL HISTORY

The State Bar of Arizona ("SBA") filed its complaint on July 2, 2013. On July 3, 2013, the complaint was served on Mr. McCarthy by certified, delivery restricted mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a)(2), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge ("PDJ") was assigned to the matter. A notice of default was properly issued on July 30, 2013, given Mr. McCarthy's failure to file an answer or otherwise defend. Default was effective on August 20, 2013. A notice of aggravation and mitigation hearing was sent to all parties notifying them the aggravation/mitigation hearing was scheduled for September 11, 2013, at 9:00 a.m. at 1501 West Washington, Room 109, Phoenix, Arizona 85007-3231.

A respondent against whom a default has been entered no longer has the right to litigate the merits of the factual allegations, but retains the right to appear and participate in the hearing that will determine his sanctions. Included with that

right to appear is the right to testify and the right to cross-examine witnesses, in each instance only to establish facts related to aggravation and mitigation. However, Mr. McCarthy did not appear.

On September 11, 2013, the Hearing Panel, comprised of attorney member, James M. Marovich, and volunteer public member, Nance A. Daley, considered the evidence and heard argument. The State Bar requested disbarment. Notwithstanding that the allegations are deemed admitted by default, the hearing panel has made an independent determination that the State Bar has proven by clear and convincing evidence that Mr. McCarthy violated the ethical rules.

FINDINGS OF FACT

GENERAL ALLEGATIONS

1. At all times relevant, Mr. McCarthy was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 4, 1980. Mr. McCarthy previously was admitted to practice law in Montana in 1972.

2. Mr. McCarthy currently is suspended from practicing law in Arizona by virtue of an Order of Interim Suspension entered by the Presiding Disciplinary Judge of the Supreme Court of Arizona on April 22, 2013.

COUNT ONE of TWO (File no. 12-1585/Nixon)

3. On June 12, 2010, Complainants Denise Nixon, James Nixon (Denise's husband) and Julia Holland (Denise's mother) hired Mr. McCarthy to represent them in connection with a motor vehicle, bodily injury claim.

4. The agreed fee was one-third of all sums recovered prior to demanding arbitration or filing suit, and 40% thereafter, plus costs.

5. The liable driver's Sentry Ins. Co. motor vehicle liability insurance policy had limits of \$15,000 per person injured subject to \$30,000 total for all persons injured in one accident.

6. Complainants had underinsured ("UIM") coverage with GEICO, also with 15/30 limits.

7. Julia Holland was the most seriously injured with damages that implicated the UIM policy.

8. A fourth person, Xen, unrelated to Complainants, was injured in the accident which delayed a settlement for all parties.

9. It was clear, however, that Julia's UIM claim warranted payment of GEICO's \$15,000 limit.

10. Mr. McCarthy settled Julia's claim with a GEICO representative for \$15,000 without requesting arbitration or filing suit.

11. On April 11, 2011, Mr. McCarthy asked GEICO to send two settlement checks—one, for \$797.04 payable to the Mercy Care Plan (AHCCCS) and the other for the balance of \$14,202.96, payable to Julia and Mr. McCarthy.

12. Mr. McCarthy asked GEICO to send to him the Mercy Care check so he could copy it following which he would send it to Mercy Care.

13. Following receipt of the checks, Mr. McCarthy had Julia endorse both her check and the Mercy Care check.

14. Mr. McCarthy endorsed both checks, too, and deposited them into his trust account.

15. Mr. McCarthy did not copy the Mercy Care check for his file nor send the original to Mercy Care; rather, he kept the money in anticipation of negotiating down the amount of that lien and another Mercy Care lien against Julia's case.

16. The parties were unable to agree on how to divide Sentry's \$30,000 limit so they hired arbitrator Alan Goldman to break the impasse.

17. On June 22, 2011, Mr. Goldman issued an order awarding Julia \$15,000, Denise \$12,500, James \$416.67, and Xen \$2,083.33.

18. As agreed, Mr. Goldman billed Mr. McCarthy \$612.50 for half of the total bill of \$1,225.00.

19. Sentry issued settlement checks in the proper amounts payable to the respective parties.

20. On July 15, 2011, Mr. McCarthy wrote trust account check no. 1066 to Julia for \$1,500 out of the GEICO UIM funds; he did not actually collect the Sentry money until August 2011, after appropriate paperwork was completed.

21. However, Mr. McCarthy did not send the check to Julia until August 15, 2011, and his cover letter stated that the check was for \$15,000.00, not \$1,500.00.

22. On August 6, 2011, Mr. McCarthy wrote to Complainants and explained that he would divide Mr. Goldman's fee, which he paid, proportionately to the size of their claims.

23. Thus, Julia was responsible for \$312.00, Denise \$250.00, and James \$50.50.

24. On September 16, 2011, Mr. McCarthy sent to Julia trust account check no. 1065 for \$1,000, and explained in a cover letter that this would be the last partial distribution to her until lien claims were resolved.

25. This check was out of sequence compared to check no. 1066, a later number that was issued and sent earlier.

26. In October 2011, Mr. McCarthy and Mercy Care settled the two lien claims against Julia's settlement proceeds for \$8,756.77, and Mr. McCarthy paid them out of his trust account.

27. Mercy Care claimed a lien against Denise's case for \$4,153.10.

28. On February 24, 2012, Mr. McCarthy wrote to the Mercy Care representative and told him that Denise's case settled for \$2,500.00, James received \$1,500, and Xen got \$11,000.

29. All of those representations were false.

30. Mr. McCarthy wanted the representative to think that Denise received such a small sum that it would be inequitable for Mercy Care to insist on payment of that lien.

31. By May 1, 2012, Complainants had not received the funds to which they were entitled even after deducting a reserve for payment of liens.

32. Denise called Mr. McCarthy who wrote a note to her dated May 1 that said: "I'm very sorry for this. I did not know that the checks did not get to you. I will have the full payment later this week."

33. Enclosed with Mr. McCarthy's note were trust account check no. 1109 for \$1,000 payable to Julia for "partial settlement" and check no. 1110 for \$1,000 payable to James and Denise for "partial settlement."

34. On May 23, 2012, Mr. McCarthy sent Complainants a letter and disbursement sheet.

35. Mr. McCarthy explained in the letter that Denise previously received her settlement money in two disbursements of \$500.00 each, her costs were \$912.00, her balance remaining after attorney fees was \$5,588.00, and after paying liens of \$2,342.42 (which he did not do) her balance remaining was zero.

36. All of those statements were false.

37. Mr. McCarthy explained in the letter and disbursement statement that out of Julia's \$30,000 settlement he already had paid her \$3,700, collected a 40% fee on the entire amount (when he was allowed to charge only 33 1/3% on GEICO's \$15,000), assessed \$912.00 in costs (illegitimately), and issued her a check for a "total due to client" of \$4,643.23.

38. The "total due" of \$4,643.23 was incorrect.

39. Mr. McCarthy paid the \$4,643.23 to Julia it with a business account check because his trust account was empty.

40. The check bore the handwritten legend "Remaining Balance Due."

41. Mr. McCarthy explained that although James was entitled to \$116.67 (an incorrectly calculated number—James was entitled to \$199.50), he already paid James \$500 by mistake but agreed to forego repayment (thereby converting other client trust funds).

42. Complainants told Mr. McCarthy that the amount he claimed as the "remaining balance due" to Julia was wrong.

43. Julia went to deposit the check but the bank rejected it because it overdrew Mr. McCarthy's business account.

44. Until informed in this case that he must keep client trust account ledgers, Mr. McCarthy has never kept such ledgers.

45. Many of Mr. McCarthy's trust account checks payable to himself have the term "draw" contained in the memo line.

46. Mr. McCarthy cannot determine the identity of the client to whom his "draw" pertains nor how he determined the amount.

47. Mr. McCarthy claimed during the SBA's screening investigation that he was unable to produce complete bank records or client files due to flooding in his home that destroyed files and records.

48. Mr. McCarthy did produce a bill for flood cleanup and repairs at his home, where he kept his records.

49. The State Bar reconstructed the IOLTA ledgers of Mr. McCarthy based on records obtained by subpoena from Wells Fargo Bank, where Mr. McCarthy maintained his IOLTA and business accounts, together with other available documents. Those records and Mr. McCarthy's statements proved the following:

a. Mr. McCarthy should have held at least \$8,231.23 on deposit in his Wells Fargo IOLTA for Julia Holland as of May 3, 2012; however, the balance held in the IOLTA as of May 2, 2012, was only \$2,833.05;

b. Since Mr. McCarthy held insufficient funds in the IOLTA that should have been held on deposit for Julia Holland to pay her the remainder of the settlement funds due, Mr. McCarthy issued check number 5739 to client Holland on May 23, 2012, in the amount of \$4,643.23, for payment of the "remaining balance due" from his Wells Fargo operating account 1029;

c. On May 23, 2012, the balance in the operating account was only \$3,783.00 and insufficient to cover check number 5739. Mr. McCarthy deposited \$1,000 into his operating account on May 24, 2012, bringing the account balance to \$4,783.00, which would have been sufficient to cover check number 5739 had the check been presented for payment that day. However, as of May 25, 2012, and thereafter through September 5, 2012, there were insufficient funds held on deposit in the operating account to cover check number 5739. On July 6, 2012, Mr. McCarthy's operating account became overdrawn and remained overdrawn through September 5, 2012 when Wells Fargo Bank closed the account and wrote off the negative balance of \$158.78 as a loss;

d. In his screening response dated July 27, 2012, Mr. McCarthy acknowledged that, "Based upon my telephone conversation with Denise Nixon, it was my belief that Julia Holland was not going to deposit my business account check no. 5739 in the sum of \$4,643.23. Therefore, I utilized these funds for use on behalf of other clients." Mr. McCarthy converted client funds;

e. Mr. McCarthy provided a settlement statement indicating that the remaining total due to Julia Holland was \$4,643.23; however, due to a mathematical error of \$12 in his calculations, the total due to Ms. Holland based on Mr. McCarthy's figures contained on the settlement statement should have been \$4,631.23;

f. Mr. McCarthy submitted a settlement statement that does not include a deduction for the payment of \$312, which was Julia Holland's share of the \$612.50 total owed to Alan Goldman for arbitration services;

g. Mr. McCarthy submitted a settlement statement that indicates Mr. McCarthy was owed \$12,000.00 (40% of settlement) for earned fees and \$912.00 for costs. Mr. McCarthy made no additional specifically identifiable corresponding disbursements from his IOLTA reflecting payment to himself of the fees and costs;

h. Mr. McCarthy deposited a GEICO check in the amount of \$797.04 into his IOLTA on May 12, 2011. The check was made payable to Mercy Care Plan; however, the check was endorsed by Mr. McCarthy and Julia Holland;

i. Mr. McCarthy submitted settlement statements for all three Complainants that indicate charges for costs in the amounts of \$912, \$912, and \$50 respectively; however, Mr. McCarthy acknowledged that the total costs for all three clients should have been \$912. Mr. McCarthy overcharged all three clients and to date has not provided revised charges for costs. Julia Holland and Denise Nixon are owed refunds for costs;

j. Mr. McCarthy submitted a settlement statement for Julia Holland that indicates Mr. McCarthy was owed \$12,000 (40% of settlement) for earned fees and \$912 for costs. The reconstructed client ledger indicates that Mr. McCarthy disbursed \$9,000 as earned fees. Mr. McCarthy made no additional specifically identifiable corresponding disbursements from his IOLTA reflecting payment to himself of the remaining \$3,000 owed for earned fees and \$912 for costs;

k. The reconstructed individual client ledger indicates the difference between the total deposited and the total disbursed on behalf of James Nixon leaves a negative balance of \$133.83 (\$416.67 less \$50.50 less \$500) as of May 3, 2012;

l. Mr. McCarthy acknowledges that Mr. Nixon was overpaid, but he did not remedy the shortage in the IOLTA with his own funds or request that Mr. Nixon return the overpayment. Mr. McCarthy converted client funds;

m. Mr. McCarthy submitted a settlement statement for James Nixon that indicates the proceeds deposited from Sentry Ins. Co. was \$426.67; however, the actual check deposited was for \$416.67, for a difference of \$10;

n. Mr. McCarthy submitted a settlement statement that does not include a deduction for the payment of \$50.50, which was Mr. Nixon's share of the \$612.50 total owed to Alan Goldman for arbitration services;

o. Mr. McCarthy submitted a settlement statement that indicates that in James Nixon's case Mr. McCarthy was owed \$166.67 (40% of settlement) for earned fees and \$50 for costs. Mr. McCarthy made no additional specifically identifiable corresponding disbursements from his IOLTA reflecting payment to himself of the fees and costs;

p. The reconstructed individual client ledger indicates the difference between the total deposited and the total disbursed on behalf of Denise Nixon leaves a balance of \$10,834.69 (\$12,500 less \$250 less \$500 less \$415.31 less \$500) as of May 3, 2012. The disposition of the \$10,834.69 remains unknown at this time; Mr. McCarthy has failed to furnish any further explanation or documentation. In addition, the subpoenaed bank records indicate that the balance held in Mr. McCarthy's IOLTA as of May 3, 2012 was only \$833.05;

q. Mr. McCarthy submitted a settlement statement that indicates \$360.62 was to be paid to Mercy Care (AHCCCS) on Denise Nixon's behalf; however, check number 1097 was issued in the amount \$415.31 and paid to Mercy Care Plan on or about April 13, 2012;

r. The settlement statement also indicates that \$1,981.80 was to be paid to Banner Boswell Hospital on Denise Nixon's behalf; however, the bank account statements did not reflect a corresponding disbursement from Mr. McCarthy's IOLTA during the period of review that could be specifically identified as payment for this lien. This disbursement is not represented on the check stub records Mr. McCarthy provided, and Mr. McCarthy did not provide a copy of the cancelled check. In his deposition, Mr. McCarthy stated that he needed to look into this further; however, he has not reported back to the SBA with his findings. Banner Boswell Hospital waived payment of the lien; Denise Nixon is entitled to receive the \$1,981.80;

s. Mr. McCarthy submitted a settlement statement that does not include a deduction for the payment of \$250, which was Denise Nixon's share of the \$612.50 total owed to Alan Goldman for arbitration services;

t. Mr. McCarthy submitted a settlement statement for Denise Nixon's case that indicates Mr. McCarthy was owed \$5,000 (40% of settlement) for earned fees and \$912 for costs. Mr. McCarthy made no additional specifically identifiable corresponding disbursements from his IOLTA to himself reflecting payment of the earned fees and costs;

u. In his screening response to the SBA dated August 24, 2012, Mr. McCarthy acknowledged that he does not have duplicate deposit records for his IOLTA;

v. Mr. McCarthy acknowledged that he did not maintain individual client ledgers, an administrative funds ledger, or general ledger for IOLTA;

w. Mr. McCarthy submitted settlement statements that do not serve as an appropriate equivalent for proper individual client ledgers in that the statements do not include the date of each transaction, payor of deposited funds, and the unexpended balance after each transaction;

x. Mr. McCarthy submitted checkbook stubs that do not serve as an appropriate equivalent for a proper general ledger in that the checkbook stubs do not include any deposit transactions or an unexpended balance after all transactions;

y. There is a total of \$66,631.84 in many separate transactions disbursed to Mr. McCarthy from his IOLTA during the period of review, which is unidentified since the corresponding client names remain unknown and Mr. McCarthy has yet to provide further information regarding these transactions;

z. When the related mandatory trust account records are not maintained, proper monthly three-way reconciliations cannot be conducted. Mr. McCarthy acknowledged that he does not have copies of the monthly three-way reconciliations for the period of review.

50. At least twice, Mr. McCarthy disbursed from the trust account by withdrawal at a bank branch and not by pre-numbered check or electronic transfer: on September 13, 2011, in the amount of \$1,108.84; and on May 23, 2012, in the amount of \$783. Both withdrawal slips were endorsed by Mr. McCarthy.

51. Had Mr. McCarthy correctly accounted for Complainant Denise Nixon's settlement funds, the net distribution to her would have been calculated as follows: \$12,500 gross recovery, less \$5,000 attorney fee, less \$250 paid to the arbitrator,

less \$415.31 paid to a medical lienholder, for a net remaining for Ms. Nixon of \$6,834.69. Mr. McCarthy actually distributed to Ms. Nixon \$750, leaving a balance due to her from him of \$6,084.69.

52. Had Mr. McCarthy correctly accounted for Complainant Julia Holland's settlement funds, the net distribution to her would have been calculated as follows: \$30,000 gross recovery, less \$11,000 attorney fee, less \$312 paid to the arbitrator, less \$8,756.77 paid to medical lienholders, for a net remaining for Ms. Holland of \$9,931.23. Mr. McCarthy actually distributed to Ms. Holland \$3,700, leaving a balance due to her from him of \$6,231.23.

53. Ms. Holland currently is 82 years old. She suffered a severe arm fracture in the motor vehicle collision that eventuated in her retaining Mr. McCarthy, is disabled, confined to a wheelchair, and lives in an assisted living facility a considerable distance from her daughter and primary caregiver, Denise Nixon. Ms. Holland cannot afford to reside in a facility closer to Ms. Nixon without the funds Mr. McCarthy owes to her and Ms. Nixon.

COUNT TWO of TWO (File no. 12-3209/Gurney)

54. Complainant, Jim Gurney, is a handyman but is not a licensed contractor.

55. Sometime between 2009 and 2010, Complainant performed some work for Mr. McCarthy valued at \$5,000.00.

56. When Complainant completed the work, Mr. McCarthy informed him that he had no money. Complainant told Mr. McCarthy he could make payments.

57. Mr. McCarthy made some payments but continued to owe Complainant about \$3,500.00.

58. When Complainant needed legal help in two separate cases, a credit card debt issue and a former client collection matter, he contacted Mr. McCarthy who agreed to work off his debt to Complainant by representing him.

59. Mr. McCarthy did not provide to Complainant an ER 1.5(b)-compliant written communication of fees regarding either matter or an ER 1.8(a)-compliant disclosure regarding the barter of services.

60. In the first matter, *Midland Funding LLC v. Gurney*, Dreamy Draw Justice Court cause no. CC2011-080638, Home Depot's credit card bank (or the assignee thereof) sued Complainant for unpaid credit card debt.

61. The day before a scheduled hearing, Complainant and Mr. McCarthy met to prepare for the hearing but Mr. McCarthy could not find Complainant's file.

62. Mr. McCarthy asked Complainant to pick him up the next morning so they could prepare on the way to court.

63. On the morning of the hearing, Mr. McCarthy informed Complainant that he would be unable to attend the hearing because he did not feel well.

64. Mr. McCarthy left a message with the court that he would not attend and that he was going to bed and turning off his phone.

65. Complainant called the court and was told to appear.

66. Complainant faxed a request for continuance that was denied.

67. A few days later, Mr. McCarthy's paralegal informed Complainant that the court had ruled in the Plaintiff's favor and that he would file a motion for reconsideration.

68. Complainant fired Mr. McCarthy and hired new counsel.

69. Mr. McCarthy was to file a motion to withdraw, which he failed to do.

70. New counsel negotiated a settlement with the bank by which Complainant was to pay the principal sum of the credit card debt in installments over time, without interest or late fees.

71. In the second matter, Complainant did a home improvement project for Dana Allen. Complainant had done work for some of Ms. Allen's friends and came highly recommended.

72. At the conclusion of the work, in May 2012, Ms. Allen fired Complainant unexpectedly and refused to pay for the work performed so Complainant asked Mr. McCarthy for legal representation.

73. Mr. McCarthy recommended to Complainant that they file suit, and they did so, in Dreamy Draw Justice Court cause no. CC2012-118739, *Gurney v. Allen*.

74. By Arizona statute, A.R.S. §32-1153, one without a contractor's license who does a licensed contractor's work may not collect damages from the recipient of the services.

75. Working as a contractor without a license is a criminal misdemeanor.

76. Ms. Allen's attorney reminded Mr. McCarthy of the statute but Mr. McCarthy did not voluntarily withdraw the suit.

77. Opposing counsel filed a Motion to Dismiss and for Sanctions, and Mr. McCarthy refused to dismiss the suit, filing a response to the motion instead.

78. Mr. McCarthy continued to litigate the motion despite being informed by opposing counsel of *Crowe v. Hickman's Egg Ranch, Inc.*, 41 P.3d 651 (App. 2002), which was directly on point and contrary to Mr. McCarthy's legal position.

79. In his response, Mr. McCarthy asserted that Complainant was not a licensed contractor but had over 40 years of experience in home repair, and had done similar work for over 300 individuals and companies in Arizona.

80. The court granted the Motion to Dismiss and for Sanctions.

81. Opposing counsel demanded \$1,500 in attorney fees against Complainant and Mr. McCarthy for filing a frivolous lawsuit.

82. Mr. McCarthy did not respond or try to negotiate.

83. Opposing counsel filed an Affidavit of Attorney Fees for \$3,923.50, and the court awarded that sum against Complainant and Mr. McCarthy.

84. Mr. McCarthy was obnoxious, threatening and aggressive toward opposing counsel and his office staff.

85. Ms. Allen reported Complainant to the Registrar of Contractors and the police.

86. The Registrar took administrative action against Complainant and the Scottsdale City Attorney's Office prosecuted him. Complainant pled guilty to two misdemeanors.

87. Mr. McCarthy filed a Motion to Withdraw; the same attorney who negotiated a resolution of Complainant's credit card debt case also represented him in the Registrar and city court cases.

88. Although requested to do so, Mr. McCarthy did not promptly give Complainant's case files to Complainant's new attorney.

89. With the assistance of new counsel, Complainant was able to set aside his guilty pleas and resolve all financial issues with Ms. Allen for payment to her of \$5,500. In connection with both the Midland Bank matter and the Dana Allen

matter for which new counsel represented him, Complainant paid new counsel \$7,550.

90. Mr. McCarthy failed to respond substantively to the SBA's request for information during its screening investigation.

CONCLUSIONS OF LAW

Mr. McCarthy failed to file an answer or otherwise defend against the allegations in the SBA's complaint. Default was properly entered and the allegations are therefore deemed admitted pursuant to Rule 58(d), Ariz. R. Sup. Ct. Based upon the facts deemed admitted, the Hearing Panel finds by clear and convincing evidence that Mr. McCarthy violated the following: Rule 42, Ariz. R. Sup. Ct., ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.8, 1.15, 1.16, 3.1, 8.4(b), 8.4(c), 5.5, 8.1, 8.4(c), and 8.4(d), and Rule 43.

ABA STANDARDS ANALYSIS

"Sanctions imposed shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions* ["Standards"] and, if appropriate, a proportionality analysis." Rule 58(k).

According to the *Standards*, in imposing a sanction the following factors should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

(1) Duties violated

Mr. McCarthy violated his duties to his clients (ERs 1.1, 1.2 1.3, 1.4, 1.5(b), 1.6, 1.8, 1.15, and 8.4(c)), the legal system (ER 3.1), the public (ERs 8.4(b) and 8.4(d)), and the legal profession (ER 1.16). The *Standards* assume that the most

important ethical duties are those obligations which a lawyer owes to clients.
Standards, II. Theoretical Framework.

(2) Mental State

Mr. McCarthy acted with all three mental states that the *Standards* recognize—intentionally, knowingly, and negligently—in connection with the foregoing violations.

(3) Actual or Potential Injury

Mr. McCarthy caused actual and potential serious injury to his clients, most egregiously by stealing more than \$12,000 from Ms. Nixon and Ms. Holland and exposing Mr. Gurney to civil liability and criminal culpability.

The *Standards* applicable to Mr. McCarthy's most egregious violations are:

ER 1.6-Confidentiality of Information

4.2 Failure to Preserve the Client's Confidences

Standard 4.22—Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

ERs 8.4(b) and 8.4(c)-Misconduct

4.6 Lack of Candor

Standard 4.61—Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

5.1 Failure to Maintain Personal Integrity

Standard 5.11—Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; . . . or an attempt . . . to commit any of these offenses; or
- (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

"The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations" *Standards*, "II. Theoretical Framework". Thus, the presumptive sanction herein is disbarment.

AGGRAVATING AND MITIGATING FACTORS

The Hearing Panel finds the following aggravating factors are present in this matter:

Standard 9.22

- (b) dishonest or selfish motive;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution.
- (k) illegal conduct

The Hearing Panel finds that there are no mitigating factors present in this matter.

CONCLUSION

Lawyer discipline has many purposes which are not to punish a lawyer but, rather, to protect the public, the profession, and the administration of justice; deter similar conduct among other lawyers; preserve confidence in the integrity of the bar; foster confidence in the legal profession and the self-regulatory process; maintain the integrity of the profession in the eyes of the public; and assist, if possible, in the rehabilitation of an errant lawyer. *In re Peasley*, 208 Ariz. 27, 90

P.3d 764 (2004); In re Scholl, 200 Ariz. 222, 25 P.3d 710 (2001); In re Walker, 200 Ariz. 155, 24 P.3d 602 (2001); In re Rivkind, 164 Ariz. 154, 791 P.2d 1037 (1990); In re Hoover, 161 Ariz. 529, 779 P.2d 1268 (1989); and In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985). In view of the facts deemed admitted by Mr. McCarthy's default, the above-recited findings of fact and conclusions of law, the applicable *Standards*, the aggravating factors, the absence of mitigating factors, and the purposes of the attorney discipline system, the Hearing Panel orders as follows:

1. Mr. McCarthy shall be disbarred from the practice of law effective immediately.

2. Mr. McCarthy shall pay restitution of \$6,084.69 to Denise Nixon;

3. Mr. McCarthy shall pay restitution of \$6,231.23 to Julia Holland;

4. Mr. McCarthy shall pay restitution of \$13,050.00 to James Gurney;

and

5. Mr. McCarthy shall pay all costs and expenses incurred by the State Bar and the Office of the Presiding Disciplinary Judge in this proceeding.

6. A Final Judgment and Order will follow.

DATED this 18th day of September, 2013.

/s/ William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

CONCURRING:

/s/ Nance A. Daley

Nance Ann Daley
Volunteer Public Member

/s/ James M. Marovich

James M. Marovich
Volunteer Attorney Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 18th day of September, 2013.

Copies of the foregoing mailed and emailed
this 18th day of September, 2013, to:

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Respondent

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Copy of the foregoing hand-delivered
this 18th day of September, 2013, to:

Sandra Montoya
Lawyer Regulation Records Manager
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4201 N. 24th St., Suite 100
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by: MSmith

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

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

DANIEL T. MCCARTHY,
Bar No. 006396

Respondent.

PDJ-2013-9058

JUDGMENT OF DISBARMENT

[State Bar Nos. 12-1585, 12-3209]

FILED OCTOBER 8, 2013

This matter having come before the Hearing Panel of the Supreme Court of Arizona, the Hearing Panel having duly rendered its decision, and no appeal having been filed and the time for appeal having passed, accordingly:

IT IS HEREBY ORDERED that Respondent, **DANIEL T. MCCARTHY**, is hereby disbarred from the State Bar of Arizona and his name is hereby stricken from the roll of lawyers **effective immediately**. Mr. McCarthy is no longer entitled to the rights and privileges of a lawyer but remains subject to the jurisdiction of the Court.

IT IS FURTHER ORDERED that **DANIEL T. MCCARTHY** shall immediately comply with the requirements relating to notification of clients and others, and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED that **DANIEL T. MCCARTHY** shall pay restitution to the following individuals in the following amounts:

Denise Nixon	\$ 6,084.69
Julia Holland	\$ 6,231.23
James Gurney	<u>\$13,050.00</u>
TOTAL	\$25,365.92

IT IS FURTHER ORDERED that **DANIEL T. MCCARTHY** pay those costs and expenses awarded to the State Bar of Arizona in the amount of \$ 2,634.87. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 8th day of October, 2013.

/s/ William J. O'Neil

The Honorable William J. O'Neil
Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 8th day of October, 2013.

Copies of the foregoing mailed/emailed
this 8th day of October, 2013, to:

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by: MSmith