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BEFORE A HEARING OFFICER OF

THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **ALAN N ARIAV,** **Bar No. 013740** Respondent.	File No. 06-1741 **HEARING OFFICERS REPORT** (Assigned to Hearing Officer 7V Stanley R. Lerner)

The Hearing Officer hereby submits its proposed findings of fact and conclusions of law, a discussion of the American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*" or "*Standards*") as they apply to the misconduct including any applicable aggravating and mitigating factors, a proportionality analysis and a recommended sanction.

The State Bar recommends that Respondent be suspended for six months and one day, be placed on probation for two years, with conditions to be determined at reinstatement, and ordered to pay all costs and expenses incurred in these disciplinary proceedings.

The Respondent recommends a censure.

The Hearing Officer determines that the appropriate sanction is a 6-month suspension, 2 years probation, payment of costs and expenses of these proceedings.

I. FINDING OF FACTS[1]

1. Respondent is a lawyer licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 19, 1992.

2. Respondent was an attorney at the firm of DeConcini, McDonald, Yetwin & Lacy P.C., ("the firm") from May 19, 2003, to October 10, 2006.

3. While working at the firm, Respondent represented a client in an employment matter and during litigation was able to negotiate the client's reinstatement to his Arizona Department of Corrections ("the State") job, with the client receiving a higher paying position as a warehouse supervisor than he previously held as a correctional officer prior to his wrongful termination by the State.

4. On September 14, 2006, a private mediation took place to discuss the amount of costs and fees to be awarded to the firm.

5. Prior to the mediation, Respondent informed the Attorney General's, office ("the AGs office"), who was representing the State that the firm had incurred over $200,000.00 in attorney's fees.

6. Respondent told the AG's office and the mediator that the firm had incurred over $200,000.00 in fees, when Respondent knew that the firm had not incurred $200,000.00 in fees.

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[1] Some of the facts in this section are from the parties' Joint Prehearing Statement, filed on June 3, 2008, and were discussed at the hearing. Reporters Transcript of the Proceedings ("RTP") 342:16 – 346:4. Page numbers are to the left of the colon; line numbers are to the right of the colon.).

7. The State, through the AG's office, agreed to pay the firm $82,596.87 in fees and costs and the firm received a check for that amount on September 27, 2006.

8. In a September 7, 2006, "Plaintiff's Confidential Mediation Position Statement," provided to the AG's office and the mediator, Respondent made false statements.

9. Respondent's mediation statement included the statement: "How much will the State pay [client] in attorney's fees and costs, considering that he has incurred approximately $200,000 in fees (at $300-per-hour) and $8000 in costs to date? The State is aware of these figures as I provided them to the State recently. ... [client] would like a full recovery of his attorney's fees and costs of $208,000."

10. Respondent added that if the matter went to hearing the attorney's fees would be higher, and could "easily exceed $275,000 ...."

11. On October 4, 2006, Linda Davis, a firm paralegal, discovered a September 7, 2006, "Plaintiff's Confidential Mediation Position Statement" that had been provided to the mediator and the AG's office prior to the mediation. [RTP 199:7 – 200:15; 463:1 – 465:19]

12. Ms. Davis also found a fabricated bill that Respondent had requested Connie DeLarge, an employee in the firm's accounting department, to create. [RTP 199:7 – 200:15; 269:11 – 270:21; 271:10 – 272:21; 283:12 – 286:14; Exhibit 4]

13. After confirming that Respondent had made misrepresentations to the mediator and to the AG's office prior to and during the September 14, 2006,

mediation, the firm allowed Respondent to resign in lieu of termination. [RTP 330:2 – 7; 377:15 – 25]

14. Respondent misled the State about the amount of attorneys fees incurred, which the State claims that had it known of the truth of hours and fees tracked by the firm would not have paid the full amount of the fees. Specifically, the total amount of fees that Respondent incurred on behalf of the firm included amounts attributable to claims against the State, U.S. Healthworks and Pinnacle Healthcare. The State claims it was not liable for any acts or omissions of these entities and would not have agreed to pay fees associated with claims against them. [161:20 – 162:5; 165:21 – 166:16; 174:22 – 176:2]

15. Respondent's conduct harmed the State by inducing it to pay fees in an amount greater than the fees it would have paid but for the Respondent's misrepresentation.

16. The State, through the AG's office, joined in the firm's complaint to the State Bar.

17. In response to the State Bar's inquiry, Respondent told the State Bar that he had a supervisor, Michael Urman ("Mr. Urman") with whom he discussed the issue of fees. Respondent says that Mr. Urman "was not only aware of [Respondent] 'padding' the attorneys fees, the two discussed this matter in some detail before [Respondent] requested the staff member to create the billing that was submitted to the mediator." Mr. Urman denies the conversation.

II. BACKGROUND OF SCHNYER CASE

18. While working at the firm, on or about June 22, 2005, Respondent represented a client [Scott Schnyer] in an employment matter and during litigation was able to negotiate the client's reinstatement to his Arizona

Department of Corrections ("the State") job, with the client receiving a higher paying position as a warehouse supervisor (a $14,000.00 salary difference), than he previously held as a correctional officer prior to his wrongful termination by the State. Joint Prehearing Statement Stipulated Facts; Transcript, Day 1, p. 205, ln. 12 –13; Day 2, p. 328, ln. 6 - 8.

19. According to Ms. DeLarge, Respondent instructed her to create a fee compilation that removed the time associated with each task and to make it appear "as a flat fee." Transcript, Day 2, p. 272, ln. 20 – 23. This fee compilation was submitted as part of the mediation.

20. The parties each prepared and provided to the mediator a confidential mediation position paper. Transcript, Day 1, p. 176, ln. 10 – 15.

21. On September 14, 2006, a private mediation took place to discuss the amount of costs and fees to be awarded to the firm. Joint Prehearing Statement Stipulated Facts.

22. The costs expended by DeConcini were $7,596.87 and that amount was accurately stated in the billing. Transcript, Day 2, p. 273, ln. 19 – 23.

23. At the mediation, the issue of Mr. Schnyer's reinstatement and what job he would be taking was resolved at the beginning of the mediation. The remainder of the mediation was spent negotiating the amount of attorney's fees that the State of Arizona would pay to Mr. Schnyer. Transcript, Day 1, p. 175, ln. 7 – 13.

24. The fees as calculated by the hourly rate of the firm's timekeepers for the representation of Mr. Schnyer were $84,780.00. Exhibit 2.

25. The State, through the AG's office, agreed to pay the firm $82,596.87 in fees and costs, and the firm received a check for that amount on September 27,

2006. Joint Prehearing Statement Stipulated Facts. That amount included all cost incurred by DeConcini, in the amount of $7,596.87. Exhibit 5.

26. In or around October 4, 2006, Linda Davis, a paralegal at DeConcini discovered the mediation billing statement in the Schnyer file and eventually, Wayne Yehling, managing partner of DeConcini was alerted. Transcript, Day 1, p. 200, ln. 1 – 15; p.15, ln. 2 – 4.

27. After the discovery of the mediation billing statement in October, 2006, Respondent was called into a meeting with three shareholders from DeConcini, asked to explain what happened with regard to the fabricated billing in the Schnyer case, which Respondent did, and then Respondent resigned from the firm. Transcript, Day 2, p. 330, ln. 2 – 7.

28. Mr. Urman testified that while he discussed the facts of the Schnyer case with Respondent, they never had a conversation about the fees or that Respondent was inflating the fees. Transcript, Day 1, p. 77, ln. 15 – 25, p. 78, ln. 1 – 6.

III. RESPONDENT'S MENTAL DISABILITY CLAIM IN MITIGATION

29. Mr. Urman testified that he was Respondent's "mentor" for the first year of Respondent's employment with DeConcini, and that he was the assigned "QA" attorney during Respondent's entire employment at DeConcini. Transcript, Day 1, p. 93, ln. 18 – 23; p. 94, ln. 23 –25; p. 95, ln.1.

30. Mr. Urman testified that he noted a marked change in Respondent's behavior during the last year that he was at the DeConcini firm. Mr. Urman described it as "Respondent closed the door and was in a bunker." Transcript, Day 1, p. 109, ln. 5 – 18.

31. In mitigation, Respondent offered the testimony of Dr. Mavis Donnelly, M.D., the psychiatrist who began treating Respondent in February 2002. Transcript, Day 1, p. 119, ln. 8 – 9.

32. Dr. Donnelly diagnosed Respondent as suffering from bipolar disorder in 2004, having previously treated him for depression and anxiety. Transcript, Day 1, p. 120, ln. 7 – 15.

33. Dr. Donnelly started Respondent on a different course of medication once she determined that he suffered from bipolar disorder. Transcript, Day 1, p. 121, ln. 15 – 25; p. 121, ln. 1 – 22.

34. Dr. Donnelly testified that in her opinion, Respondent would not have inflated the fees if he had not discontinued his medication and counseling. Transcript, Day 1, p. 130, ln. 21 –25; p. 131, ln. 1. Dr. Donnelly opined that as a result of Respondent discontinuing his medication and counseling in or around March or April 2006, Respondent's bipolar disorder caused him to exercise very bad judgment with regard to the inflating of the attorney's fees at issue in the Schnyer case. Transcript, Day 1, p. 126, ln. 4 – 11; p. 129, ln. 1 – 18. Dr. Donnelly testified that "it's not so much that the episode made him [inflate his fees and lie about it], but rather the compromised judgment in perception was unable to dissuade him from doing it." She also testified that Respondent "was not psychotic. He knew right from wrong …." And during the time he was "cycling" in and out of his bipolar disorder, he would have realized, sometime between July 2006 when he told the AGs office he had already accrued $207,000.00 in fees, and September 2006 when he told the mediator the same thing, that he had lied to the AGs office in the July 2006 email. [RTP; 151:7 – 18; 119:20 – 23; 156:12 – 157:24; Exhibit 1]

35. Dr. Donnelly testified that in her medical opinion, Respondent suffered from a mental disability within the meaning of ABA *Standards* 9.3(i) at the time that he inflated the attorney's fees at issue in Schnyer. Transcript, Day 1, p. 130, ln. 5 – 25, p. 131, ln. 1 – 10, p. 134, ln. 5 – 11.

36. Dr. Donnelly testified that patients stopping medication in bipolar disorder is "more routine than not" and further testified that "all psychiatrists encounter that all the time, because when people are feeling better, and it's true of depression as well, they'll often say, well, gosh, I'm feeling better. I guess I don't need this medication . . . in bipolar disorder, however, it can be quite catastrophic. . . ." Transcript, Day 1, p. 124, ln. 9 – 18.

37. Dr. Donnelly testified that in her medical opinion, Respondent understands the importance of staying compliant with his medication and with counseling and that he has demonstrated a sustained period of meaningful rehabilitation. Transcript, Day 1, p. 131, ln. 2 – 10.

38. Dr. Donnelly testified that one, such as Respondent, in a compromised state due to discontinuing medication and treatment, would likely have a "skewed" recollection, and that Respondent in such a condition may have "very genuinely interpreted the other person's opinion." Transcript, Day 1, p. 154, ln. 15 – 22. The inference is that once Respondent re-established his therapy and medication that he would understand his recollection was "skewed."

IV. RESPONDENT'S CHARACTER WITNESSES

39. William Drury, senior partner at Renaud Cook Drury & Mesaros where Respondent is currently employed, testified that Respondent does a very good job, and seems to be a hard worker. Transcript, Day 1, p. 218, ln. 16 – 21.

40. Mr. Drury further testified that Respondent has a very good character and he testified that he was "really quite surprised we're here", and that during Respondent's employment with Mr. Drury's firm there have been no issues regarding Respondent's honesty or trustworthiness. Transcript, Day 1, p. 219, ln. 7 – 10; ln. 11- 14.

41. Scott Schnyer, Respondent's former client, testified that he thought Respondent was a "very good attorney," and further testified that "if I had to go through another situation like I went through, he would be the person that I'd call." Transcript, Day 1, p. 229, ln. 1 – 4. Mr. Schnyer testified that he did not notice any change in Respondent's behavior during the mediation.

42. Kraig Marton testified that he has been serving as Respondent's Member Assistance Program (MAP) Peer Monitor since January 2008. Transcript, Day 1, p. 236, ln. 19.

43. Mr. Marton also testified that he has known Respondent for around 20 years, first while Respondent was a reporter prior to becoming an attorney, and that he represented Respondent as a client from March 2003 to January 2006. Transcript, Day 1, p. 232, ln. 23 – 24; p. 233, ln. 10 – 18.

44. Mr. Marton testified that he has always found Respondent to be "an honest and ethical fellow." Transcript, Day 1, p. 233, ln. 23- 24.

45. Mr. Marton testified that he noticed a marked change in Respondent's behavior and demeanor in 2006 after the lawsuit in which he was representing Respondent settled. Transcript, Day 1, p. 235, ln. 24- 25; p. 236, ln. 2 – 16.

46. Mr. Marton testified that Respondent has been fully in compliance in every way with the terms of his voluntary MAP therapeutic contract. Transcript, Day 1, p. 237, ln. 14 – 18.

47. Mr. Marton testified that Respondent is "embarrassed," "ashamed," and "acknowledges his wrongdoing." Transcript, Day 1, p. 238, ln. 20 – 21.

48. Hal Nevitt, Director of MAP, testified that Respondent voluntarily contacted him, and that Mr. Nevitt did a formal assessment on November 24, 2007. Transcript, Day 1, p. 245, ln. 18 – 19; p. 246, ln. 23 – 24.

49. Mr. Nevitt testified that the terms of Respondent voluntary contract require him to attend continuing legal education on stress management; to see his psychiatrist; to participate with a peer monitor; and to meet with Mr. Nevitt on a quarterly basis. Transcript, Day 1, p. 250, ln. 22- 25, p. 251, ln. 1.

50. Mr. Nevitt testified that he believes Respondent to be a "principled man." Transcript, Day 1, p. 252, ln. 4 – 9.

51. Mr. Nevitt testified that he believes Respondent to be remorseful for his conduct. Transcript, Day 1, p. 252, ln. 10 – 21.

52. Respondent testified that he has never previously been disciplined by the State Bar. Transcript, Day 2, p. 337, ln. 18 – 19.

53. Respondent testified that he has been cooperative throughout the Bar proceedings. Transcript, Day 2, p. 337, ln. 20 – 25, p. 338. ln.1.

54. Respondent testified that the reason that he inflated the attorneys fees was because his firm had been very good to him and he wanted to be a "good partner" and recover for the firm fees for the time that Respondent had spent on the case, and that it had nothing to do with his personal gain. Transcript, Day 2, p. 326, ln. 7 – 14.

55. Respondent testified that under the ADA (which was the claim brought on Mr. Schnyer's behalf), only an employer can be liable for violating the ADA,

and thus, only an employer can be made to pay attorneys fees to the injured employee. Transcript, Day 2, p. 298, ln. 3 – 10; p. 301, ln. 1 – 2.

56. Respondent testified that he had one file and one file number for Mr. Schnyer's case and that his attorney time could not be apportioned between, or attributed, to only one defendant. Further because only the DOC/State of Arizona could ultimately be liable, the other defendants were sued under the theory that they were "actors" or agents of the DOC/State of Arizona. Transcript, Day 2, p. 301, ln. 18 –25; p. 302, ln. 1 – 7.

57. Respondent testified about the his *pro bono* work that he does currently through the Maricopa County Bar Association Lawyer Referral Service, and previously with Pima County Bar Association Lawyer Referral Services.

V. VIOLATIONS PROVEN/UNPROVEN

58. Violations were stipulated to by the parties and accepted as violations by the Hearing Officer.

59. Respondent violated ER 3.3(a)(1), Rule 42, Ariz.R.Sup.Ct., when he knowingly made a false statement of fact to the mediator concerning the firm's and/or his attorney's fee. (Stipulated)

60. Respondent violated ER 4.1(a) when he knowingly made a false statement of material fact to the AG's office concerning the firm's and/or his attorney's fee. (Stipulated)

61. Respondent violated ER 8.4(c), Rule 42, Ariz.R.Sup.Ct., when he made knowing false statements concerning the firm's attorney's fees. (Stipulated)

62. Respondent violated ER 8.4(d), Rule 42, Ariz.R.Sup.Ct., by engaging in conduct that was prejudicial to the administration of justice. (Stipulated)

63. Respondent violated ER 8.1(a), Rule 42, Ariz.R.Sup.Ct., by engaging in dishonest conduct during the proceedings.

64. The State Bar failed to prove that Respondent violated ER 1.5(a) by charging and collecting an unreasonable fee.

65. The State Bar failed proved that Respondent violated ER 3.4(c).

VI. RESPONDENT'S DISHONESTY IN CONNECTION WITH THESE PROCEEDINGS

66. In Respondent's first response to the State Bar[2], Respondent stated in part:

> While it is certainly no excuse for [Respondent's] actions that he discussed his strategy with Mr. Urman and the two of them came up with the approach that was taken to "inflate" the attorneys' fees in an attempt to get the State to make an acceptable counter-offer, it is relevant that [Respondent] did not make this decision in isolation, and that others in management at DeConcini McDonald either knew or should have known what approach [Respondent] and Mr. Urman had determined to take in Mr. Schnyer's mediation. [Respondent] came up with this strategy in consultation with and with the "blessing" of Mr. Urman.

67. In his second response to the State Bar[3], Respondent clearly indicates he is using the claim that Mr. Urman "blessed" his conduct as mitigation:

> [Respondent] certainly did not act in isolation. The fact that Mr. Urman did not indicate to him that there might be a problem with his approach does not excuse [Respondent] from the consequences of his mistake, but should mitigate his conduct to some extent, particularly since it shows that he did consult with other more seasoned members of his firm before he acted.

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[2] Exhibit 8, Bates stamp 202.

[3] Exhibit 12, Bates stamp 66.

68. At page 320:17 through 321:13 [RTP Volume 2, June 12, 2008], Respondent testified as follows:

> THE HEARING OFFICER: So what you know in your case was, as a general rule, Mr. Urman did not – Mr. Urman QA'd the documents before they were finalized and sent out? Is that what you know?
>
> RESPONDENT: Michael tried to do it the same day.
>
> THE HEARING OFFICER: You got to answer that question.
>
> RESPONDENT: Yes.
>
> THE HEARING OFFICER: And what is the basis for your knowledge that Michael QA'd that letter, Exhibit 3, before it was mailed out?
>
> RESPONDENT: Because it went back to Karen.
>
> THE HEARING OFFICER: Did you see it with Karen?
>
> RESPONDENT: No.
>
> THE HEARING OFFICER: Did Karen tell you she mailed it?
>
> RESPONDENT: Karen told me she mailed it the next day.

69. At the time Respondent gave the foregoing testimony, his then secretary, Karen Tindle ("Ms. Tindle"), was not listed as a witness, and if Respondent had not asked to reopen the hearing to provide additional testimony, this testimony would have gone unchallenged. During the second day of the hearing (re-opened for additional testimony) Ms. Tindle testified that she resigned from the firm on August 15, 2006[4] and had no further contact with any one at the firm until June 14, 2008. It was thus impossible for Ms. Tindle to tell Respondent

[4] Exhibit 40.

that she mailed the Mediation Statement "the next day," at or about September 7, 2006.

70. Respondent also contends that because the firm had a Quality Assurance ("QA") program, that it somehow proves that Mr. Urman did in fact know about and blessed Respondent's actions. This is contradicted by Mr. Urman, who has been with the firm since the inception of the QA program, and Wayne Yehling, who is the managing shareholder of DeConcini McDonald Yetwin & Lacy. They both testified that the QA process is not an assurance that the content and substance of document has been approved by the reader and it is not a ratification of the document by the reader, but is more of a glorified proof reading function. [20:14 – 5; 73:1 – 9; 432:14 –23; 476:1 – 14] In any case, whether Mr. Urman read the mediation letter before it was mailed does not prove that Mr. Urman "blessed" Respondent's misconduct. The only evidence presented at hearing to support Respondent's allegation was his own testimony which is not credible.

71. Mr. Urman testified that the only discussion he had with Respondent about the Schnyer matter was "late in the case … the State had just offered … his client another job with DOC …." As pointed out in cross-examination, this conversation had to have taken place after the September 14, 2006 mediation. [RTP 71:21 – 72:10; 105:18 – 107:2]

72. Respondent testified that he drafted the mediation letter and that all Ms. Davis did was "put [in] the Jeffrey Minker name. She put the number at the bottom of the documents …. She put the roman numeral, and I sent her an email telling her to put as the roman numerals, and I wrote the entire mediation report myself." [Emphasis added, RTP 310:21 – 311:4] Respondent further testified

that "Linda Davis did not summarize a single deposition in the Schnyer case ...." [RTP 315:11 – 18]

73. Ms. Davis testified that she created the initial version of the mediation statement and put in the introduction and the facts and then gave it to Respondent. [RTP 194:1 – 14]

74. She provided emails that corroborate her testimony. [Exhibits 19 through 39]

75. Respondent testified that Exhibit 4, which contained the inflated attorney's fee's number, was correct as far as the entries were concerned. [RTP 351:21 – 354:1] Exhibit 4 shows that not only did Ms. Davis work on the mediation letter as she testified, but that she also summarized numerous depositions in the matter. [*See* also Exhibits 5 and 7]

VII. DISCUSSION OF SANCTION

The ABA *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors the court should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. ABA *Standard* 1.3, Commentary. The ABA *Standards* indicate that the "ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious." *Matter of Taylor*, 180 Ariz. 290, 292, 883 P.2d 1046 (1994).

It is necessary in determining a sanction that the Hearing Officer consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley,* 208 Ariz. 27 at 35, 90 P.3d at 772; *Standard* 3.0.

The most serious violation is Respondent's violation of ERs 3.3, 4.1, and 8.1 so consideration was given to ABA *Standard* 6.12. Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Respondent knowingly violated his duty to the legal system by submitting false information to the mediator and the AG's office and there was actual injury to the AG's office, which paid more than it would have to settle the lawsuit had its lawyer's been aware of the actual amount of Respondent's attorney's fees. In addition, the settlement negotiations had to be resumed which caused the AG's office and the Deconcini firm to incur additional attorneys' time.

The State Bar proved by clear and convincing evidence that Respondent knowingly made a false statement of material fact in connection with these proceedings in violation of ER 8.1(a). While the Mr. Urman/Respondent version of the conversation about inflating the fees may amount to no more than a "swearing match," the cumulative effect of Respondent's mental disability; the creation of the false documents; the issue of Davis's hours and the conversation about what Karen Tindle told Respondent of the QA, leads the Hearing Officer to conclude that Respondent memory is not credible and he recreated and testified to a false history to rationalize his conduct.

Aggravating factors to be considered include:

Standard 9.22(b) dishonest or selfish motive. Respondent's conduct was selfish because Respondent would have received a percentage of the falsified fees.

Standard 9.22(e) bad faith obstruction of the disciplinary proceeding. Being untruthful during a disciplinary proceeding or failing to cooperate with disciplinary authorities is a significant aggravating factor. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988); *In re Varbel*, 182 Ariz. 451, 897 P.2d 1337, (1995); *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993); *In re Fresquez*, 162 Ariz. 328, 783 P.2d774 (1989).

Standard 9.22(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process. Respondent falsely testified that he spoke to Karen Tindle and his version of the QA process and Mr. Urman's participation was false.

Standard 9.22(i) substantial experience in the practice of law. Respondent has been an Arizona attorney for 15 years, and had knowledge of the firm's processes. This is the type of conduct a lawyer with his years of experience and knowledge should have known was unethical. This is confirmed by Dr. Donnelly's testimony that Respondent knew right from wrong.

Mitigating factors to consider include:

Standard 9.32(a) absence of prior disciplinary record. This factor should be of some weight.

Standard 9.32(i) mental disability. Respondent has proven that he qualifies for mitigation under this *Standard* and the hearing officer gives this criteria great weight. Dr. Donnelly testified that "it's not so much that the episode made him

[inflate his fees and lie about it], but rather the compromised judgment in perception was unable to dissuade him from doing it."

The saving circumstance for Respondent is that his mental disability at the time impacted his memory and his doctor confirmed his judgment was impaired due to a mental disability.

That Respondent suffered from a mental disability that was a cause of the misconduct, does not excuse the conduct. The disability only militates against a harsher sanction.

Additionally, Dr. Donnelly testified that she believed that the misconduct is unlikely to recur [RTP 134:5 – 11] she also testified that Respondent's reasons for going off his medication in the past had to do with money and a "great discomfort with the diagnosis itself." [RTP 141:22 – 142:17]

Respondent's ongoing recovery was demonstrated by a meaningful and sustained period of ongoing rehabilitation. However, the recurrence of the misconduct is only unlikely if Respondent continues with medication and therapy.

Character or reputation. *Standard* 9.32(g) The character witnesses satisfied this criteria.

Remorse. *Standard* 9.32(l) The Hearing Officer is not impressed with the Respondent's remorse. The Hearing Officer has considered the Respondent's off –the–record statement that if suspended he would commit suicide as manipulative and indicating the need for continued therapy. Respondent fails to recognize that he continues to feel that he did not act in isolation when in fact his treating doctor says that Respondent's recollection is skewed, she testified that his disability impaired his judgment, and Mr Urman testified that Respondent acted as if he were in a bunker mentality.

VIII. CASE LAW/PROPORTIONALITY ANALYSIS

ABA *Standards*

The ABA *Standards* require consideration of (a) the duty violated; (b) the lawyer's mental state; (c) the extent of actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating circumstances. In this case, the most serious misconduct involved violations of duties owed to the legal system, *Standard* 6.0.

Standard 6.12 states that absent aggravating and mitigating circumstances, a suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court (a mediator is considered "the court", *see In re Fee*, 182 Ariz. 597, 898 P.2d 975 (1995)) and causes injury or potential injury to a party to the legal proceeding.

The mitigating factor of mental disability impairing judgment outweighs those in aggravation solely for the purpose of imposing only a six month suspension.

Sanctions against lawyers must have internal consistency to maintain an effective and enforceable system; therefore, the court looks to cases that are factually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171, (1988).

In re Pozgay, SB-03-0097-D (2003); Pozgay filed a false fee affidavit with the arbitrator and the court, causing the court to award significantly higher fees than that billed to the client, failed to timely pay funds owed to his clients even after a judgment was entered in their favor, let his trust account balance fall below the amount owed to the clients, commingled funds, and failed to keep appropriate trust account records. There were six aggravation factors and several mitigating

factors, including Major Chronic Depression, Dysthymic Disorder, R/O Impulse Disorder NOS, and R/O Paranoid Personality Disorder. The hearing officer, however, found that it did not cause the misconduct as Respondent knew right from wrong and was able to apply that knowledge to his actions. The hearing officer also noted that while Pozgay was in therapy for depression, his ability to function was not resolved because he still had the financial and marital stressor that contributed to his misconduct. Pozgay was suspended for 4 years with 2 years probation to follow reinstatement, and was required to pay restitution and the costs of the discipline proceedings.

This case is similar to *Pozgay* in terms of the type of misconduct and the proposed mitigation. Like Pozgay, Respondent falsified the amount of his attorney's fees and lied about it to the tribunal. Also like Pozgay, Respondent seeks to mitigate his misconduct based on his bipolar disorder. What is dissimilar is the extent of the misconduct, which in Pozgay's case included violations of ERs 1.15 and Supreme Court Rules 43, 44, and 51(e), (h), and (k)[5]. Because Respondent's misconduct was less egregious than Pozgay's, a four-year suspension would not be appropriate for this Respondent.

In *In re Jung*, SB-06-0101-D, the respondent was suspended for six months, which suspension did not require him to file an application for reinstatement and prove his rehabilitation in a reinstatement proceeding, [6] for

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[5] Now Rule 53.

[6] Rule 64(e)2, Ariz.R.Sup.Ct., provides that a lawyer suspended for 6 month or less may apply for reinstatement by filing an affidavit with the Supreme Court setting forth his full compliance with the requirements of the suspension order. Rule 64(e)1, Ariz.R.Sup.Ct., by contrast, requires a lawyer suspended for more than 6 moths to apply for reinstatement according to the procedures set forth in

misappropriating for his own personal use, funds received from a client's personal injury claim that should have been paid to the client's medical provider.

In justifying this lesser period of suspension, even though the respondent's conduct amounted to misappropriation of another funds, Respondent's mental disability was considered as mitigation significant enough to reduce the term of suspension and thus, he was not required to go through a reinstatement hearing, pursuant to Rule 64(e)1, Ariz.R.Sup.Ct. The proportionality analysis done in *Jung* showed that, but for the significant mitigating factors present, the term of suspension for similar conduct in other cases ranged between six months and one year. [7] While admittedly, the misconduct at issue in *Jung* is not the same type of conduct, it is the impact of the mental disability on the sanction recommended that is relevant in this instance.

In *In re Everett*, No. 02-1133 (2005), the respondent's most serious conduct was his intentional and knowing use of a false address in order to stay within the Phoenix division of the Bankruptcy Court. In addition, Respondent inserted misleading information on a bankruptcy petition for the purpose of not having to file in the Tucson division of the Bankruptcy Court or having the case transferred to the Tucson division of the Bankruptcy Court. Respondent was found to have violated of ERs 3.3(a), 4.1(a), 8.4(c) and 8.4(d). There were two factors in

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Rule 65. Rule 65 requires a hearing where the respondent has the burden of demonstrating by clear and convincing evidence rehabilitation, compliance with all applicable discipline order and rules, fitness to practice, and competence.

[7] *See*, i.e. *In re Rubi*, 133 Ariz. 491(1982)(one year suspension for misappropriation); *In re Murray*, SB-00-0013-D, 2000 Ariz. LEXIS 21 (2000)(6 month suspension for depositing client funds into business account and later receiving an insufficient funds notice on his trust account when he made payment).

aggravation: 9.22(a)(prior discipline, including two informal reprimands for violations of ERs 3.3, 8.4, and Rule 51(e), Ariz.R.Sup.Ct.), and substantial experience in the practice of law (9.22(i). In mitigation, there was an absence of selfish or dishonest motive, 9.32(b), and full and free disclosure to the disciplinary board and cooperative attitude toward proceedings, 9.32(e).

The Commission noted that previous case law established that prior discipline is an aggravating circumstance that weighs strongly against an attorney in a disciplinary proceeding. Yet, despite two prior informal reprimands for the same type of misconduct, the sanction in *Everett* was a 30-day suspension and one year of probation.

In re Fee and *In re Montijo*, 182 Ariz. 597, 898 P.2d 975 (1995) was considered in the present case. During mediation, respondents made an agreement with the client whereby she agreed to pay an additional amount to them notwithstanding the agreed amount that the defense would pay. This side agreement was not relayed to the defense or the settlement judge, and after a settlement had been reached, and the settlement judge recited the terms of the settlement (which included the amount of attorneys fees that would be paid to the respondents), the respondents did not disclose the existence of the newly-enacted fee agreement reached privately with their client.

The Court found that respondents violated ER 3.3(a)(1), by knowingly failing to disclose the separate agreement to the settlement judge, and that they engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of ER 8.4(c). The Court also noted this respondent used "misguided strategies believed endemic to the bargaining process" and that factor coupled with the unusual circumstances of the case contributed to the misconduct. No

aggravating factors were found, while the mitigation included: absence of prior discipline, lack of dishonest or selfish motives, full and free disclosure to the Bar and cooperation, and that "the respondents demonstrated a high level of competence in their representation" (not an ABA approved mitigating factor). The Court concluded that censure was appropriate.

In re Coffee, SB-01-0095-D (2001): Coffee failed to update pleadings regarding his client's request for a reduction in spousal support. When asked by the judge if any other assets existed that were not listed on the financial affidavit, the respondent said no, even though he knew his client had $50,000.00 in an out-of-state account. He was suspended for 30 days, with two aggravating and two mitigating factors.

Arizona courts have suspended attorneys were they were found to have engaged in deceptive practices and engaged in bad faith obstruction of the disciplinary process. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993); *In re Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989).

Based on the foregoing the Hearing Officer imposes a six-month suspension, 2 year probation costs of the proceedings.

IX. CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, instill public confidence in the profession, and deter similar conduct by other lawyers. A six-month suspension, two-years of probation with terms consistent with MAP and the payment of all costs and expenses incurred by the State Bar in this disciplinary proceeding, are proportional to sanctions imposed in other cases.

The recommended sanction serves the purposes of discipline in that it maintains the integrity of the judicial system, protects the public interest, and demonstrates to the legal profession that such conduct shall not be tolerated.

DATED this 15th day of October, 2008.

HEARING OFFICER

Stanley R. Lerner /NM

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Original filed with the Disciplinary Clerk
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