BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	Nos. 07-1474, 07-1570, 07-1606, 07-1684, 08-0006, 08-0219
JASON J. KELLER, Bar No. 02205	**HEARING OFFICER'S REPORT**
RESPONDENT.	

PROCEDURAL HISTORY

1. Probable Cause was found in case number 07-1606 on January 31, 2008. Probable Cause was found in case numbers 07-1474, 07-1570, and 07-1684 on March 3, 2008. Probable Cause was found in case number 08-0219 on March 21, 2008, and in cause number 08-0006 on April 18, 2008. A Complaint in all case numbers was filed on June 30, 2008, and service was thereafter accomplished by mail on July 1, 2008. The case was assigned to the undersigned Hearing Officer, on July 2, 2008, and an Initial Case Management Conference was held on July 21, 2008. The Final Hearing was set in this matter on September 29, October 2, and October 3, 2008. As a result of an emergency motion for continuance, granted by the Disciplinary Commission, the matter was thereafter reset on November 12, 2008, for hearing on an agreement which had been reached by the parties in the interim. The Tender of Admissions and Agreement for Discipline by Consent was considered by the undersigned Hearing Officer on November 12, 2008.

2. As a result of facts and incidences not a part of these proceedings and not considered by the undersigned Hearing Officer, Respondent was placed on

Interim Suspension by the Supreme Court of the State of Arizona on October 24, 2008, and remains on Interim Suspension at this time.

FINDINGS OF FACT

3. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice in Arizona on July 22, 2003.

COUNT ONE (File No. 07-1474 Escobedo)

4. On May 8, 2007, Respondent filed a Notice of Appearance in State v. Escobedo, CR 2007-121767-001. Respondent was the court appointed counsel for Xavier Escobedo ("Mr. Escobedo").[1]

5. While in custody, Mr. Escobedo placed frequent phone calls to Respondent's firm, Keller and Associates, to speak with Respondent regarding his case. Although representatives from Respondent's firm spoke with Mr. Escobedo, Respondent failed to return any of Mr. Escobedo's calls. Mr. Escobedo was in custody, housed at the Lower Buckeye Jail, from April 4, 2007, through June 18, 2007.

6. On May 29, 2007, Julia Parker, an associate attorney at Keller and Associates, appeared at the initial pretrial conference on behalf of Respondent.

7. On June 27, 2007, Julia Parker appeared at a settlement conference on behalf of Respondent. The settlement conference was vacated and reset for June 28, 2007.

8. On June 28, 2007, Julia Parker again appeared at the settlement conference on behalf of Respondent. Mr. Escobedo addressed the Court and requested the

[1] All facts not otherwise cited are taken from the Tender of Admissions and, therefore, deemed as admitted by the parties.

appointment of new counsel because Respondent had not met with him or returned any of his calls. The Court denied his request.

9. At the same settlement conference, the Court ordered Respondent to "personally meet with the defendant within five days."

10. On July 12, 2007, Respondent appeared at the status conference regarding a plea agreement. Mr. Escobedo did not wish to accept the plea agreement at that time. A trial management conference ("TMC") was set for August 15, 2007.

11. Mr. Escobedo was subsequently charged with a new offense and Respondent believed it to be in Mr. Escobedo's interest to consolidate the two matters.

12. On August 15, 2007, Respondent appeared at the TMC and Cause number CR 2007-147107-001 was heard with CR 2007-121767-001. A discussion was held regarding a possible continuance due to the combining of the two cases. Respondent was ordered to file a Motion to Continue with the Court. The TMC was continued to August 17, 2007, at 8:30 a.m.

13. On August 17, 2007, Respondent appeared at the TMC and requested that the trial be continued due to the addition of the new case. The continuance was granted and a new trial date was set for August 27, 2007. On August 27, 2007, Jeff Swiersky appeared on behalf of Respondent at the continuance panel on the Motion for Continuance. The continuance was granted and a status conference was set for September 14, 2007.

14. On September 14, 2007, Respondent failed to appear for the status conference. By minute entry, the Court indicated it had received a letter from Respondent," indicating his current medical condition."

15. Also, at the September 14, 2007, status conference, Mr. Escobedo addressed the Court and renewed his previous request for change of counsel and advised the Court that he had filed a complaint with the State Bar. The Court ordered that Respondent be withdrawn as attorney of record for Mr. Escobedo.

16. On September 4, 2007, the State Bar received Mr. Escobedo's complaint regarding Respondent.

COUNT TWO (File No. 07-1570 Shumway)

17. Matthew Probst ("Mr. Probst"), ultimately Respondent's client, had been charged with assaulting an officer during his arrest for DUI. Also present at the scene were Mr. Probst's sister and brother-in-law.

18. On or about July 16, 2007, outside the Maricopa County Superior Court, Rebecca Probst ("Ms. Probst"), and Matthew Probst approached Respondent. After giving Respondent a brief accounting of the facts of Mr. Probst's case, a discussion ensued regarding whether the public defender representing Mr. Probst had adequately prepared the case for trial. The trial in State v. Probst, CR 2006-143778-001 was set to begin in two days on July 18, 2007.

19. On or about July 17, 2007, Mr. Probst called Respondent and indicated his desire to hire Respondent and indicated that he did not have the funds to retain him at that time for trial the following day. Respondent informed Mr. Probst that, if hired, he would move to have the trial continued to a later date. He further informed that he anticipated that the motion would be granted due to a change in counsel.

20. Later, after conclusion of the telephone call on July 17, 2007, an employee of Respondent went to the Probst's home and picked up a copy of the case file.

21. On the morning of trial, July 18, 2007, Mr. Probst met Respondent outside of the courtroom and paid him $3,500 in cash as a flat fee to represent him at trial.

22. Respondent gave Mr. Probst his business card as a receipt saying, "he would later send a receipt for the money received, including what services would be provided and a contract."

23. Respondent failed to provide Mr. Probst with a written fee agreement.

24. On July 18, 2007, the judge denied Respondent's Motion to Continue and the trial proceeded as scheduled.

25. At trial, Respondent declined to call two defense witnesses to testify and did not adequately inform Mr. Probst regarding why the witnesses were not called to testify.

26. Respondent contends that he did not call the two witnesses to testify because he believed that, if they were to testify truthfully, they would have testified that Mr. Probst placed his hands on the arresting officer and was therefore guilty of the charged offense.

27. On July 18, 2007, Mr. Probst was found guilty in State v. Probst and sentencing was scheduled for August 8, 2007.

28. After the trial, Respondent discussed the post-conviction options available to Mr. Probst, of which one was to file an appeal.

29. On August 1, 2007, the Court suspended imposition of sentence and placed Mr. Probst on unsupervised probation for one year.

30. On or about August 1, 2007, Respondent assured Mr. Probst and his family that he would file the Notice of Appeal, but Mr. Probst would have to, "at least pay the cost of the transcript." Respondent informed Mr. Probst that he was unsure of the cost of the transcript.

31. The filing of the Notice of Appeal was due on or about August 20, 2007.

32. On or about August 6, 2007, Mr. Probst called Respondent regarding the appeal. Respondent confirmed that he would file the Notice of Appeal by August 20, 2007.

33. On or about Friday, August 17, 2007, Mr. Probst was out of town and asked his mother, Annie Shumway ("Ms. Shumway"), to contact Respondent's office on his behalf. Ms. Shumway called Respondent's office about filing the Notice of Appeal and spoke with Eric, an employee of Respondent.

34. Eric informed Ms. Shumway that Respondent had not filed the Notice of Appeal and would not file it until he was paid $2,000 by that afternoon. Ms. Shumway asked to speak with Respondent and was informed that he was out of the office.

35. Ms. Shumway called Respondent's office several more times on or about Friday, August 17, and Monday, August 20, 2007. Respondent did not return Ms. Shumway's calls.

36. Neither Mr. Probst nor Ms. Shumway provided Respondent with the cost of the transcript or the additional funds for the appeal. However, Respondent contends that he believes Ms. Shumway provided new counsel with funds to file the appeal.

37. Respondent did not file the Notice of Appeal.

COUNT THREE (File No. 07-1606, State Bar)

38. On September 20, 2007, Respondent failed to appear at the sentencing in State v. Rivera CR 2007-121362-001 DT. Respondent was the court appointed attorney to represent Adrian Juoquin Rivera ("Mr. Rivera").

39. As a result of Respondent's failure to appear, the sentencing had to be reset and new counsel appointed.

40. The following is recorded in the Court's September 20, 2007 minute entry:

> "LET THE RECORD REFLECT that [the] Court has received a[n] [undated] letter from Mr. Keller indicated he is suffering from an illness; however, specifics, such as estimated length of absence, approximate date of return or available coverage counsel were not indicated.
>
> Due to defense counsel's lack of obligation to his client, IT IS ORDERED that Mr. Keller be withdrawn as attorney of record for the above cause number....IT IS FURTHER ORDERED referring defense counsel, Jason Keller, to the State Bar of Arizona for investigation."

41. In addition to the judge in State v. Rivera, Respondent sent copies of the undated letter[2] to other judges of the Superior Court. In the five-page undated letter, Respondent provided a history of his legal career, made references to suffering with health problems and apologized for his conduct "over the last couple of months."

42. Attached to the undated letter is a letter from the Medical Director of Advanced Urgent Care stating that Respondent has been diagnosed with pancreatitis and hyperthyroidism requiring more testing, and until it is properly treated it will "likely affect his ability to attend work".

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[2] A copy of the letter (Exhibit B) sent by Respondent to the Judge is with the medical records (Exhibit A) that have been sealed.

43. In his response to the State Bar's investigation regarding his failure to appear or to find available counsel coverage for the sentencing hearing, Respondent states that he did "not anticipate being unable to appear in court" and "coverage was not available."

44. In his undated letter sent to several of the Superior Court judges, Respondent states the following regarding his illness and counsel coverage for his missed court appearances:

> "In the beginning of 2007, I started to notice physical symptoms of my current illness.... I ignored the possibility that my health was declining.... Still my symptoms continued, and still, I ignored them. I began to run late for every court appearance... My associate was covering more and more for me... [T]he relationship with my associate [ended] before I had a replacement. My caseload became unmanageable.... I felt overwhelmed. ... [M]y illness began to affect my reputation. My behavior was questioned by the Court... Deputy County Attorneys... [and] other Defense Attorneys."

45. In Respondent's undated letter to the judges he states the following about one of his clients:

> "There are Defendants such as Tracy Kovach, that simply do not tell the truth and want to blame everyone except the one that is truly at fault. I can handle difficult clients and have in the past. My current situation, however, makes it hard to show the client that I am acting with their best interests in mind."

COUNT FOUR (File No. 07-1684 Pavese)

46. On or about September 8, 2007, Lisa Pavese ("Ms. Pavese") hired Respondent to represent her boyfriend, Christian Crank ("Mr. Crank") on a charge of aggravated assault - dangerous.

47. On the same day, Ms. Pavese paid Respondent $3,500 "as a down payment on a retainer." Respondent failed to provide Ms. Pavese with a written receipt for the payment and further failed to provide her with a written fee agreement.

48. Ms. Pavese made numerous attempts to contact Respondent at his office regarding his failure to visit Mr. Crank in jail or provide a fee agreement.

49. On or about September 20, 2007, Respondent faxed Ms. Pavese a copy of the fee agreement.

50. On or about September 20, 2007, Ms. Pavese contacted Respondent's office and spoke with a legal assistant regarding why Respondent had not visited Mr. Crank in jail and why it was taking so long. The legal assistant rudely informed Ms. Pavesey that Respondent's health issues were the reason for no work having been done on the case.

51. On or about September 21, 2007, Ms. Pavesey informed Respondent that his services were no longer needed and requested a refund of the $3,500.

52. On or about October 8, 2007, Ms. Pavese received a $3,000 refund and a letter explaining why Respondent retained $500.

53. On or about October 10, 2007, Ms. Pavese faxed a complaint to the State Bar regarding Respondent's conduct and requested a refund of the $500 because "there is no evidence of any actual work having been performed."

54. In a letter dated October 29, 2007, Ms. Pavese informed the State Bar that Respondent had refunded an additional $250.

55. Respondent asserts the following in his November 15, 2007, response to the Bar regarding the work performed for Mr. Crank, the rude response of his legal assistant and the delay in issuing a refund to Ms. Pavese:

a. Respondent did not visit Mr. Crank in jail because he did have two telephone conversations with him. Respondent drafted motions for substitution of counsel,

to modify release conditions, and for a reduction of bond. Respondent's services were terminated before he had a chance to file the motions.

b. Respondent has instructed his staff to: "be aware of the sensitivities of the clients and the public and to be careful not to offend."

c. Respondent feels that a refund within two weeks of termination is reasonable. Respondent's father is the firm's accountant and drafts checks. During this period of time, Respondent and his father were in Pennsylvania for seven days attending the funeral of a friend. Respondent's office staff made arrangements to have a check delivered by courier to Ms. Pavese while he was in Pennsylvania.

COUNT FIVE (File No. 08-0006 Kovach)

56. Respondent was appointed counsel for Tracy Stephen Kovach ("Mr. Kovach") in State v. Kovach, CR 2006-174686-001 DT, filing his Notice of Appearance on February 12, 2007.

57. On June 28, 2007, at the time set for trial, Respondent moved orally for a continuance so that CR2006-174686-001 DT and CR 2007-132914-001 DT could be consolidated. The Court granted the motion and set a new trial date of July 6, 2007, at 1:00 p.m. and a pretrial conference and Rule 69 hearing for 8:15 a.m. The Court further ordered that a joint pretrial statement and proposed jury instructions be submitted prior to the trial.

58. On or around June 29, 2008, Respondent filed a written Motion to Continue the trial. Respondent's motion was submitted to the continuance panel.

59. On July 6, 2007, Respondent failed to appear at the pretrial conference. The Court continued the status conference and trial, setting it for July 17, 2007. The Court further ordered both counsel to appear on July 17, 2007.

60. On July 9, 2007, Respondent failed to appear for the hearing on his motion to continue the status conference and/or trial.

61. The Court ordered the following on July 9, 2007:

a. Respondent was directed to visit Mr. Kovach in jail for no less than one hour, no later than July 13, 2007.

b. The trial management conference set for July 17, 2007, was converted into a status conference, at which time Mr. Kovach's motion for change of counsel would be addressed.

c. Respondent and Mr. Kovach were directed to personally appear at the trial management conference.

62. In its July 9, 2007, minute entry the Court noted that the plea offer in CR2006-174686-001 DT was set to expire on July 20, 2007, and that Mr. Kovach advised the Court that he had not yet met with Respondent, and that he had filed a motion for change of counsel. Later, the Court noted that the division's clerk had notified Respondent via e-mail regarding the Court's order directing Respondent to visit Mr. Kovach in jail by July 13, 2007.

63. On July 17, 2007, Respondent failed to appear for the status conference at the scheduled time. The Court ordered that Respondent appear at the initial pretrial conference on July 23, 2007, and file an explanation regarding why he had not

previously appeared. The Court further ordered affirming its order that Respondent visit Mr. Kovach in jail.

64. At 2:30 p.m. on July 17, 2007, the Court reconvened with Respondent present. After discussion with counsel, the Court ordered that the status conference be set for July 20, 2007.

65. On July 23, 2007, Respondent appeared at the pretrial conference. The Court found that Respondent had not complied with discovery and sanctioned him with a deadline to produce a Rule 15.2 notice by July 30, 2007.

66. On September 4, 2007, Jeffrey Swierski appeared for Respondent at the trial management conference. The Court ordered the withdrawal of Respondent as attorney of record for all further proceedings.

67. In its minute entry dated September 12, 2007, the Court noted:

> "The Court has received a letter from [Respondent], addressing personal medical issues. The Court finds that [Respondent] has satisfied this Court's previous order directing him to show cause why he may have not complied with Court orders in this case. Having been relieved of further duties in this case, no action need be taken."

68. On or about January 2, 2008, the State Bar received Mr. Kovach's complaint regarding Respondent's conduct while representing him in CR 2006-174686-001 DT and CR 2007- 132914-001 DT.

69. In his complaint, Mr. Kovach, informed, inter alia, that Respondent failed to comply with a court order to visit him in jail and failed to provide him with a copy of the police reports.

70. Mr. Kovach also alleged that Respondent tried to coerce him into accepting a plea offer without having interviewed witnesses, gathered all available evidence, shown him the police reports, "or even look[ed] at my case at all."

71. In his February 13, 2008, response to the State Bar's investigation, Respondent asserted:

a) On or about March 3, 2007, Respondent had a lengthy telephone conversation with Mr. Kovach about his case.

b) Respondent interviewed two defense witnesses and filed affidavits from the witnesses with a request for plea modification. The Deputy County Attorney denied this request.

c) Also in March 2007, Respondent delivered one of the witness affidavits to Mr. Kovach's home. While at the home Respondent had a long discussion with him regarding his case.

d) Respondent did not visit Mr. Kovach in jail per court order, because his legal assistant did not give him a copy of the order until the evening of the last day he was to visit Mr. Kovach.

e) Respondent met with Mr. Kovach on or about July 1, 2007, in an empty courtroom with his associate Julia Parker and "discussed at length" both of Mr. Kovach's cases.

f) Respondent failed to appear in court on July 9, 2007, because he was ill and could not secure counsel coverage. Respondent believed his absence would not be an issue, because, "in the past, cases had been continued without the attorney present."

COUNT SIX (File No. 08-0219 State Bar)

72. On June 6, 2007, Respondent filed his notice of appearance in State v. Parra, CR 2007-006274-001 DT. Respondent was court-appointed counsel to Eduardo Luis Parra ("Mr. Parra"), who was a juvenile transferred to adult court from juvenile court.

73. At the June 25, 2007 initial pretrial conference, attorney Vern Dorr appeared for Respondent. The Court noted in its minute entry that Respondent had failed to comply with discovery and ordered him to produce Rule 15.2 discovery by July 9, 2007.

74. At the July 9, 2007, status conference, Julia Parker, an associate of Respondent, appeared on his behalf. Ms. Parker made an oral Motion to Continue which was granted by the Court. The status conference was set for July 17, 2007.

75. At the July 17, 2007, status conference, Humberto Rosales appeared for Respondent. Mr. Parra failed to appear. The Court issued a bench warrant for the arrest of Mr. Parra and set bond at $7,500 cash only.

76. At the August 2, 2007, oral argument on defendant's motion to quash the bench warrant, Julia Parker appeared for Respondent. The Court denied defendant's motion, revoked release for Mr. Parra until the next hearing or until bond was posted, and reduced the bond to $1,000 cash only.

77. On or about July 24, 2007, prior to the time set for a change of plea, Respondent reviewed the plea offer with Mr. Parra in the courtroom while Mr. Parra was chained to other inmates who were seated together in the jury box. Respondent contends that this is common practice in Maricopa County criminal proceedings.

78. The August 24, 2007, communication between Respondent and Mr. Parra occurred in front of the Court and other inmates. This is the only time Respondent communicated with Mr. Parra while he was counsel for Mr. Parra.

79. On August 24, 2007, Respondent had not yet prepared or conducted interviews in the case before advising his juvenile client, Mr. Parra, to accept the plea offer.

80. Respondent contends that the prosecutor had presented Respondent with the offer as Respondent entered the courtroom that day and indicated that it was offered only on that date. Respondent believed it was an acceptable offer, as Mr. Parra would be given credit for time served and would receive only probation.

81. At the August 24, 2007, change of plea, Mr. Parra entered a plea of guilty to attempted trafficking in the identity of another, a class three designated felony. The Court set sentencing for September 28, 2007.

82. Also, on or about August 24, 2007, Respondent was stopped by Mr. Parra's mother on his way from the courthouse for the change of plea. The mother informed Respondent that Mr. Parra had serious mental conditions and suffered from various mental health problems.

83. At the September 28, 2007, sentencing attorney Matt Schwartzstein appeared for Respondent and argued his motion to continue on the grounds that Respondent would obtain a mental health screening for Mr. Parra prior to sentencing.

84. The Court continued the sentencing to November 5, 2007.

85. At the November 5, 2007, sentencing attorney Jeff Swierski, an associate of Respondent, appeared for Respondent to request another continuance because the medical health screening had not occurred.

86. Also, on November 5, 2007, the Court ordered that Mr. Parra submit to mental health testing and that Respondent notify the Court no later than November 10, 2007, regarding the name of the doctor to complete the evaluation.

87. The Court continued the sentencing to December 10, 2007.

88. At the December 10, 2007, sentencing Jeff Swierski again appeared for Respondent to request another continuance because Dr. Parker had not been able to meet with Mr. Parra to conduct the psychological evaluation.

89. The Court again continued the sentencing to January 15, 2008.

90. On January 15, 2008, Respondent failed to appear at the sentencing and failed to ensure that an associate or a coverage counsel was present on his behalf.

91. On January 15, 2008, the Court relieved Respondent as counsel for Mr. Parra and ordered the Office of Public Defense Services to appoint new counsel.

92. The Court further ordered Respondent to appear and show cause on January 23, 2008, as to why he failed to "perform duties in this matter."

93. In Respondent's Motion to Supplement Order to Show Cause hearing dated January 25, 2008, Respondent asserts that he made several attempts to contact the mother by phone and, "even sent a letter" in an effort to obtain the "needed medical records" for the evaluation of Mr. Parra.

94. A copy of the envelope that allegedly contained a letter to the mother requesting medical records was attached to the January 25, 2008, motion. The postmark date on the envelope is November 16, 2007, six weeks after Respondent's first motion to continue sentencing in order to conduct the mental health examination.

95. According to the minute entry from the January 23, 2008, show-cause hearing, Respondent admitted the following:

a) Respondent had only met once with Mr. Parra, and that was at the August 24, 2007, change of plea.

b) Respondent failed to protect the confidences of his client when he discussed the plea agreement with Mr. Parra in open court while Mr. Parra was chained to other inmates.[3]

c) Respondent failed to review and explain the police reports in the case with Mr. Parra.

d) Respondent failed to conduct witness interviews.

e) Respondent failed to appear at the January 15, 2008, sentencing or to ensure that an associate or coverage counsel was present on his behalf.

96. Also, at the January 23, 2008, hearing the Court asked Mr. Parra if he had met with the doctor for a mental health evaluation. Mr. Parra replied, "No. Never saw one, never talked to one. Nothing."

97. Also, on January 23, 2008, the Court found that Respondent breached his duty as a lawyer and failed to make a court appearance in the matter. The Court sanctioned Respondent in the amount of $2,500.

[3] This Hearing Officer is somewhat concerned by this charge against the Respondent. Having been a judge for 20 years in various courts throughout the state, it has been this Hearing Officer's experience that very often defense council meet with their clients in the courtroom when their clients are in custody and part of the "chain" seated next to other defendants. While I was not privy to everything that was discussed during these conversations, I am certain that plea agreements and terms of the plea agreements were discussed by very many defense attorneys at these meetings. If this then is a violation of the ER's requiring that an attorney protect the confidences of his client, then we have very many attorneys that are violating their duties to their clients, do not know it, and the practice should be addressed. The practice is a matter of necessity because our Public Defenders are so understaffed and carry far too many cases.

CONCLUSIONS OF LAW

98. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, 8 Ariz.R.Sup.Ct., specifically:

Count One (File No. 07-1474 Escobedo)

99. Rule 42 Ariz.R.Sup.Ct., ERs 1.1, 1.2(a), 1.3, 1.4, 3.2, 8.4(d) and Rule 41(c).

Count Two (File No. 07- 1570 Shumway)

100. Rule 42 Ariz.R.Sup.Ct., ERs 1.1, 1.2(a), 1.3 and 1.4.

Count Three (File No. 07-1606 State Bar)

101. Rule 42 Ariz.R.Sup.Ct., ERs 1.3, 1.6, 8.4(d) and Rule 41(c).

Count Four (File No. 07-1684 Pavese)

102. Rule 42, Ariz.R.Sup.Ct., ER 1.4.

Count Five (File No. 08-0006 Kovach)

103. Rule 42 Ariz.R.Sup.Ct., ERs 1.1, 1.3, 1.4, 3.2, 3.4(c) and 8.4(d).

Count Six (File No. 08-0219 State Bar)

104. Rule 42 Ariz.R.Sup.Ct., ERs 1.1, 1.3, 1.4, 1.6, 3.2, 8.4(d), and Rules 41(c) and (f).[4]

ABA STANDARDS

105. ABA *Standard* 3.0 provides that four criteria 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; (4) the existence of aggravating and mitigating factors.

The Duty Violated

106. The Respondent violated his duty to his clients and the legal system by violating the Rules and ERs set forth above by: failing to communicate with his clients and

[4] The State Bar dismissed certain ER violations for the reasons set forth in the Tender of Admissions p. 23.

discuss the clients objectives and the means by which they were to be obtained; failing to meet with clients even when ordered by the Court to do so; not acting with diligence or competence in representing his clients; failing to properly reveal information related to the representation of a client; failed to communicate the scope of representation in writing and the basis for a fee in writing; and failing to withdraw from the representation of his client when physical or mental conditions impaired his ability to represent his client. This represents conduct that is prejudicial to the administration of justice.

107. In that the *Standards* do not account for multiple charges of misconduct, the sanction imposed must be consistent with the sanction for the most serious instance of misconduct among a number of violations. The parties submit, and this Hearing Officer concurs, that Respondent's most serious conduct in this case was a violation of the duty he owed to his clients under *Standard* 4.0. Respondent repeatedly failed to communicate with his clients, including Mr. Escobedo (count one); Mr. Rivera (count three); Mr. Crank (count four); Mr. Kovach (count five); and Mr. Parra (count six). Respondent further failed to schedule or attend court hearings for many of these clients, failed to interview witnesses and failed to diligently represent them. *Standard* 4.4, Lack of Diligence, is applicable in this case in that Respondent did not file a Notice of Appeal for Mr. Probst after previously assuring him and his family that Respondent would file it, but that Mr. Probst would have to pay at least the cost of the transcript.

108. Under *Standard* 4.42, "Suspension is generally appropriate when a lawyer (a) knowingly fails to perform services for a client, and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."

109. Regarding Respondent's obligation to the Court and the profession, *Standard* 6.2, Abuse of the Legal Process is implicated. On at least two occasions, Respondent was ordered by the Court to personally visit his clients in jail within a certain number of days. Respondent failed to do so on both occasions (Mr. Escobedo and Mr. Kovach). In addition, Respondent was removed as attorney of record for two of his clients and their respective courts referred the matter to the State Bar because of Respondent's repeated failure to attend court hearings (Mr. Rivera, and Mr. Parra).

110. *Standard* 6.22 states that "Suspension is appropriate when a lawyer knowingly violates a court order, or rule, and there is injury or potential injury to a client or party, or potential interference with a legal proceeding."

111. The presumptive sanction in this matter therefore is suspension.

The Lawyer's Mental State

112. The Hearing Officer finds that there is clear and convincing evidence that Respondent acted with a knowing state of mind.

The Injury Caused

113. The parties submit that there are no restitution issues in this matter. Absent further evidence, the Hearing Officer must so find. The injury caused by the Respondent's conduct was not only the delay for his clients, but also a delay to

the effective administration of justice by the courts. When asked about the harm of delay in the client's cases, Bar Counsel explained that the three in custody cases actually had no adverse effect: Mr. Parra was sentenced to time served, and Mr. Escobedo and Mr. Kovach received long prison sentences so the Bar could not prove that the delay caused them injury (Hearing Transcript p. 13:16 – 14:25). No other evidence was offered, so the Hearing Officer must find that there was no injury to the clients.

Aggravating and Mitigating Factors

114. This Hearing Officer considered aggravating and mitigating factors in this case pursuant to *Standards* 9.22 and 9.32, respectively.

Aggravating Factors

115. 9.22(c) Pattern of Misconduct:

The Complaint in this matter included six separate counts. Most involved Respondent's lack of diligence and failure to communicate with clients and failure to comply with court orders. The Misconduct in this case is established as a clear pattern.

116. 9.22(d) Multiple Offenses:

As stated above, the Complaint involved six different counts, two of which were referrals by judges.

Mitigating Factors

117. 9.32(c) Personal or Emotional Problems:

As was set forth in a letter submitted to many of the judges before whom Respondent appeared, Respondent claimed to suffer from physical problems and

illness which impaired his ability to handle his workload. Although the letter itself is undated, it was sent to several Superior Court judges around September of 2007. In this letter, Respondent offers apologies to the courts and other court personnel whom he has inconvenienced "over the past few months." Respondent attributed much of his misconduct to opening his own practice in April 2007, ending a relationship with an associate he hired before he had another in place, and feeling overwhelmed. This was occurring at the time when he was experiencing physical symptoms such as losing weight, feeling tired all the time and having burning in his stomach. Attached to his letter, was a September 11, 2000, letter from Dr. Nasser Hajaig, which diagnosed Respondent with pancreatitis.

118. Additionally, Respondent submitted medical records that are covered by a protective order that support this factor. These records are sealed and placed in the Clerk's file. The information set forth in these records show that the physical problems suffered by Respondent caused him to not be able to keep up with his work, which in turn caused him to lose work, all of which caused anxiety and depression which exacerbated his poor work performance. (See sealed medical records, Exhibit A.)

119. The majority of the complaints received by the State Bar occurred within a fairly short period of time from approximately May 2007 until January 2008, with the bulk of the misconduct engaged in by Respondent occurring in May -- September 2007, the period of Respondent's medical issues. The parties submit that personal or emotional problems exacerbated by physical illness, should be a mitigating

factor in this case. A review of the Complaint and the medical records referred to above, causes this Hearing Officer to find that the physical, personal and emotional problems are, in fact, a mitigating factor.

120. 9.32(e) Full and free disclosure to the disciplinary board or cooperative attitude toward proceedings:

Respondent has cooperated with the State Bar in these proceedings and, in fact, has sought out the services of the State Bar to assist him with his practice. (See the sealed medical records.)

121. 9.32(f) Inexperience in the practice of law:

Respondent is relatively inexperienced in the practice of law, having been admitted in 2003.

122. 9.32(k) Imposition of other penalties or sanctions:

With respect to Count Two of the Complaint (Shumway), Respondent was hired to represent Matthew Probst in a criminal matter. Mr. Probst' mother, Ms. Shumway, actually paid the fee. Respondent and Ms. Shumway entered into a fee arbitration and the arbitrator issued an award of $500 to Ms. Shumway to address Respondent's failure to file a notice of appeal in the case.

123. Also, in Count Six (Parra) the judge ordered an Order to Show Cause, held the hearing and sanctioned Respondent in the amount of $2,500 for his conduct in the case.

124. The parties submit that, considering that the mitigating factors outweigh the aggravating factors, a short-term (three month) suspension is called for.

PROPORTIONALITY REVIEW

125. The Supreme Court has held that one of the goals of the disciplinary system should be proportionality when imposing discipline in cases with similar facts, *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983).

126. The parties submitted two cases for the Hearing Officer's consideration, both of which resulted in long-term suspensions (six month and a day). The parties further submit that, given the mitigating factors in this case, a shorter period of suspension is appropriate.

127. In the *Matter of Heath Dooley* SB 07-0051, Respondent was originally charged with five counts. One of the counts was dismissed by the State Bar. The conduct charged was similar in that case to this: failure to communicate with clients; failure to protect their interests upon termination; failure to respond to discovery requests; and failure to refund unearned fees. Respondent conditionally admitted to violation of ER's: 1.2, 1.3, 1.4, 1.16(d), 3.2, 8.1(b) and 8.4(d). An agreement was entered into for a six month and one day suspension, with two years probation following reinstatement. Restitution was ordered in two of the counts. The Hearing Officer found four aggravating factors: pattern of misconduct; multiple offenses; obstruction of the disciplinary proceeding; and substantial experience in the law. There were three mitigating factors: absence of a prior disciplinary record; personal or emotional problems; and a lack of dishonest or selfish motive.

128. The parties submit that Respondent's lack of experience in the law and his cooperation with the disciplinary process, taken together with his efforts to apologize and explain to the courts his behavior through the letter sent to the judges, distinguish this case from Dooley and justifies a lesser suspension of three months.

129. In the *Matter of Andrew Mankowski*, SB05-002, Respondent repeatedly failed to communicate with his clients, failed to schedule and/or attend court hearings, failed to diligently represent his clients, and consistently failed to respond to repeated requests from the State Bar during its investigation. Originally there were 10 counts in the Complaint against Mr. Mankowski, and the State Bar ultimately dismissed three counts. The matter involved ER's 1.2, 1.3, 1.4, 1.5(a), 1.16(d), 3.2, 3.3(a)(1), 8.1(b), 8.4(c), and (d) and Rule 53(b), (c), (d) and (f). There were four aggravating factors considered: pattern of misconduct; multiple offenses; bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency; and substantial experience in the practice of law. Mitigating factors included: absence of a prior disciplinary record; absence of a dishonest or selfish motive; and personal or emotional problems. Respondent's wife had been diagnosed with cancer and could no longer assist him in his practice, he was a solo practitioner, had too many clients, and could not maintain support staff to assist him. An agreement was reached with the State Bar wherein Mr. Mankowski served a six-month and one day suspension and a two-year probationary period upon

reinstatement. The Hearing Officer, Disciplinary Commission and the Supreme Court upheld the agreement reached.

130. Like the Dooley matter, in Mankowski the parties submit that there were additional aggravating factors (substantial experience in the practice of law and failure to cooperate with the disciplinary process), which warranted a longer suspension than is felt required in this matter. The parties submit that although the misconduct in the case at hand is similar to that in Mankowski and Dooley, a shorter period of suspension is warranted here because of Respondent's lack of experience and his cooperation in this disciplinary process. The parties also submit, and this Hearing Officer must find, that there is no evidence that any client suffered actual harm from Respondent's conduct.

RECOMMENDATION

131. The purpose of lawyer discipline is not to punish the lawyer, but to: protect the public; the profession and the administration of justice; deter future misconduct; and to instill public confidence in the Bar's integrity, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 P.2d 20, 881 P.2d 352 (1994).

132. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).

133. This Hearing Officer found Respondent to be somewhat difficult to read. He is a young attorney that seems to be genuinely remorseful for his conduct and has a sense of self awareness of what he did to get himself into this mess. Certainly his physical ailments and then emotional and mental health issues, combined with the difficulties of recently opening a new solo practice law office, all contributed to many problems in a very short period of time. Of concern to this Hearing Officer is a perception by this Hearing Officer that while Respondent is remorseful for his conduct and generally recognizes that his conduct was wrong, he did not seem to have a good grasp of how his conduct affected his clients, or that he had much empathy for them.

134. While certainly Respondent's conduct was not as egregious as the cases cited in proportionality, the mitigating factors in this case outweighed the aggravating factors both in number and in significance, and the Respondent has offered some explanation for his conduct, this Hearing Officer is concerned that Respondent needs to have a better understanding of how his conduct negatively affected not only the legal system and himself, it negatively impacted his clients as well and it is to them that he most egregiously failed in his duty. Respondent may have just been nervous at the hearing on the Tender and Agreement, but he comes across as being more wrapped up in his own problems than how those problems are affecting others. Perhaps this was just a misreading of the Respondent by this Hearing Officer, but Respondent needs to be aware of how he is being perceived by others.

135. This Hearing Officer does not believe that a long-term (six months or more) suspension is necessary in this case. However, it is hoped that after Respondent's suspension he takes full advantage of the probationary services offered to him through the State Bar to not only have his duty to the profession reaffirmed, but more importantly his duty to his clients.

136. There was some discussion at the hearing on the Tender and Agreement between the attorneys as to when the period of suspension should begin (Hearing Transcript p.25:18-28:5). On page 25, line 1-3 of the Tender of Admissions, there is reference to when the period of probation will begin to run, but only mentions that it will begin to run no later than the date of the order of reinstatement from suspension. Later, on that same page at line 20-21, it states that the period of probation will begin to run "...at the time of the order of reinstatement." At the conclusion of the hearing, the State Bar argued that the period of suspension should begin after the Respondent's present Interim Suspension is completed because to allow it to run concurrent with the Interim Suspension would result in no sanction for his misconduct. Respondent argued that it would be overly punitive to require Respondent to serve his period of suspension at the conclusion of his present Interim Suspension. The Agreement between the parties is fairly clear that the agreed upon three month suspension begins at the conclusion of the Respondent's present Interim Suspension. This Hearing Officer concurs with the State Bar on this point. To allow the Respondent to serve his three months of suspension concurrent with his Interim Suspension would mean that the sanction is not tied to the conduct. Therefore, this Hearing Officer finds that the three-

month suspension recommended herein should commence at the conclusion of Respondent's Interim Suspension.

137. Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a consideration of the proportionality cases, this Hearing Officer recommends the following:

1) Respondent be suspended from the practice of law for a period of three months commencing at the time of the order of reinstatement from his present Interim Suspension;

2) Respondent serve a period of probation for two years[5] which will include the requirement that the Respondent shall contact the director of the State Bar's Membership Assistance Program (MAP) within 20 days after the date of the order of reinstatement from his three-month suspension, or at such earlier time as Respondent and the MAP director agree upon. Respondent shall submit to a new MAP assessment and the director of MAP shall develop "Terms and Conditions of Probation" if he determines that the results of the assessment so indicate, and the terms shall be incorporated herein by reference. The probation period will begin to run no later than the date of the order of reinstatement from suspension, and will conclude two years from the date that Respondent has signed the "Terms and Conditions of Probation." Should the director of MAP conclude that no MAP probation terms are necessary, probation shall conclude two years from the entry of the order of reinstatement. Respondent shall be responsible for any costs associated with MAP.

[5] The Tender contains typographical errors on page 25:3 and 21 wherein it states that "...probation ... will conclude one year from the date that Respondent has signed the "Terms and Conditions of Probation." This Hearing Officer has confirmed with counsel that the agreed upon term of probation is two years.

138. Respondent shall contact the director of the State Bar's Law Offices Management Assistance Program (LOMAP) within 20 days after the date of the order of reinstatement from suspension. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 3.2, 8.4(d) and Rule 41(c) & (f). The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of the order of reinstatement and will conclude two years from the date that Respondent has signed the "Terms and Conditions of Probation." Respondent shall be responsible for any costs associated with LOMAP.

3) In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by clear and convincing evidence, or by whatever standard is then applicable by rule.

4) Respondent shall pay all costs and expenses incurred in these proceedings by the State Bar, the Disciplinary Clerk, the Disciplinary Commission and the Supreme Court.

DATED this 31st day of December, 2008.

Hon. H. Jeffrey Coker/E.J.
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 31st day of December, 2008.

Copy of the foregoing mailed
this 31st day of December, 2008, to:

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