BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	)	File No. 05-1451, 06-1326, 07-0073
ARNOLD M. SODIKOFF, Bar No. 001821	)	**HEARING OFFICER'S REPORT**
RESPONDENT	)	

Procedural History

On December 28, 2006, the State Bar of Arizona filed a two-count complaint in this matter pertaining to files 05-1451 and 06-1326. Respondent Arnold M Sodikoff, representing himself, filed an answer to these two counts On March 13, 2007 the State Bar filed a Notice of Intent to Use Prior Discipline.

On March 29, 2007, Attorney Nancy A. Greenlee appeared on behalf of the Respondent On July 16, 2007, the parties came to an agreement That tender of admissions and agreement for discipline by consent (tender) provided for a six month and one day suspension beginning on May 15, 2008 with various other terms applying.

On August 6, 2007, the State Bar filed an additional complaint in file no 07-0073[1] On August 14, 2007, Hearing Officer 6R recommended that the tender be accepted

[1] This new complaint is hereafter identified as Count Three

On August 22, 2007, the Disciplinary Commission rejected the tender and remanded the matter to Hearing Officer 6R for further proceedings

On December 4, 2007, this matter was reassigned to undersigned Hearing Officer

On January 28, 2008, all three counts were set for hearing on the merits. The hearing was set for March 3, 2008 and March 4, 2008 in Prescott, Arizona.

On January 22, 2008, Respondent, through counsel[2], filed a motion for partial summary judgment regarding Count Three. The State Bar opposed the motion. On March 3, 2008, the motion was denied and the case proceeded to hearing.

At the conclusion of the second day of testimony, that matter was adjourned The hearing was reconvened on March 13, 2008 and finished on March 14, 2008.

At the conclusion of the fourth day of evidence, the Hearing Officer requested that the parties prepare proposed findings of fact and conclusions of law to be submitted after the record had been prepared In addition, counsel agreed to coordinate a renumbering of the multiple volumes of exhibits in order to reduce duplicate numbers and confusion Pursuant to the parties' stipulation, exhibits shall be referred to by Book No. (I-IV), Exhibit No. (tab no.), and Bates Stamp Nos [3], where applicable

[2] Attorney Nancy Greenlee

[3] Book I is the notebook previously designated as "Book I" on the cover containing the Yavapai Superior Court filing in Robishaw v Sunar Tabs I-115 Book II is the notebook previously designated as "Book II" on the cover containing the Yavapai Superior Court filings in Robishaw v Sunar, Tabs 116-186 Book III is the notebook previously designated File Nos 05-145, 06-1326" on the cover, "Book IV" is the notebook previously designated "File No 07-0073" on the cover

Citation to the exhibits will be designated by the applicable Book #, Exhibit #, and Bates Stamp # using the abbreviations noted herein For example, a citation to Book I, Exhibit 2, Bates Stamp 3, would be cited as, *Book I, Ex 2, Bates 3*

Findings of Fact
(Applicable to All Counts)

1. At all times relevant herein, except for the periods of time when Respondent was suspended, Respondent was an attorney licensed to practice law in the State of Arizona having been admitted to practice on September 25, 1965. *Joint Pre-Hearing Statement (hereafter JPS),* ¶ 1

2 The Respondent offered character and reputation testimony from four witnesses, i e , Monte Rich, William Fortner, David Lange, and Joseph Waesche.

3 The Respondent has a reputation in the local legal community for being a "brilliant lawyer" *RTP, Day 3, 282 5-10* He's considered to be a "remarkably skilled and passionate advocate" *RTP, Day 4, 481 13-14* He is also considered to be aggressive or very difficult and, at times, overly aggressive in his legal practice *RTP, Day 3, 339.1-341 2, 382 13-14, 385 12-18*

Count 1 (05-1451)
(Robishaw v Sunar litigation)

4 Troy and Karlyn Robishaw ("The Robishaws") purchased a property from Dawn Sunar located at 7595 East Addis Avenue, Prescott Valley, Arizona *Book I, Ex 1, Bates 203*

5 The property at issue was owned by Dawn Sunar, as her sole and separate property. *Reporter's Transcript of Proceedings for March 3, 2008 (hereafter, RTP, Day 1)*[4], *RTP, Day 3, 291 20-292·1*

6. The Robishaws purchased the property for $129,000.00 The Robishaws paid $10,000 00 down and financed the remaining balance. *Book I, Ex 1, Bates 203-204*

7. The property at issue served a dual purpose in that it had residential and commercial functions. *JPS,* ¶ 13.

8 Dawn Sunar was married to Ram Sunar The Sunars and their two small children lived in the property at issue *RTP, Day 3, 291 9-19, Book I, Ex 18, Bates 278.*

9. The sale closed escrow on or about April 29, 2002 Through the sale, Dawn Sunar conveyed all rights, title and interest in the property to the Robishaws *Book I, Ex 1.*

10. Mrs. Sunar told Respondent that she had an agreement with the Robishaws (through their agent) to remain in the house for fourteen days while their new home was being finished Mrs. Sunar indicated under the agreement with the Robishaws' agent, she was to pay $350.00 and said payment would allow her family to stay an additional fourteen days. *RTP, Day 3, 291 1-8, Book I, Ex 18, Bates 278*

[4] Reporter's Transcript of Proceedings for March 3, 2008 will be designated as *RTP, Day 1*, Reporter's Transcript of Proceedings for March 4, 2008, will be designated as *RTP, Day 2*, Reporter's Transcript of Proceedings for March 13, 2008, will be designated as *RTP, Day 3*, and Reporter's Transcript of Proceedings for March 14, 2008, will be designated as *RTP, Day 4*

11 Dawn and Ram Sunar retained Respondent to represent them regarding the fourteen-day hold-over that followed the sale to the Robishaws. *RTP, Day 3, 292 2-5, RTP, Day 3, 368 16-24*

12 The Respondent confirmed the Sunar's representations regarding the fourteen-day agreement hold-over agreement by conferring with the Robishaw's agent. *RTP, Day 3, 368 3-15*

13. On April 29, 2002, Respondent mailed the Robishaws a check for $350.00 representing rent for the fourteen-day hold-over *Book I, Ex 18, Bates 278* Said funds were provided by the Sunars for payment to the Robishaws *RTP, Day 3, 294 19-24, RTP, Day 3, 373 24-25, RTP, Day 3, 434 12-17*

14. Attorney Jeffrey Adams was retained by the Robishaws to address the fourteen-day hold-over by the seller, Dawn Sunar. *Book I, Ex 1, Bates 195 -228.*

15 The Respondent's first contact with Attorney Jeffrey Adams (hereafter, "Adams") was a telephone message on May 6, 2002 left by Adams. *RTP, Day 3, 370 13-18* The telephone message left by Adams said, "Mr. Sodikoff, I only have one question of you and it's to know whether or not you will accept service of a lawsuit" *RTP, Day 3, 370 16-18*

16 On May 6, 2002, Adams delivered a five-page letter to the Respondent *Book I, Ex 1, Bates 219-225* With said letter, Adams returned the $350 00 check previously tendered for payment of the fourteen-day hold-over. *Book I, Ex 1, Bates 220.*

17. In the five-page letter dated May 6, 2002, Attorney Adams made a counter-proposal regarding the hold-over. *Book I, Ex 1, Bates 219* The counter-offer was for the Sunars to pay $1,500.00 for fourteen days or in the alternative to pay $750.00 for shared use and occupancy for the property for the fourteen-day period.

18 The counter-offer contained in Attorney Adams' five–page letter was only open until 2:00 pm on May 6, 2002 *Book I, Ex 1, Bates 222* This five-page letter was delivered to Respondent at his home on May 6, 2002 at 5:55 p m. *Book I, Ex 18, Bates 295* Accordingly, the counter-proposal put forth in Adams' letter had already expired at the time it was delivered on May 6, 2002. *Id*

19. On May 6, 2002, Respondent suggested a compromise to the parties' respective position and urged that litigation not be prematurely pursued. *Book I, Ex 18, Bates 289-291*

20. Respondent informed Adams that he could not accept service for the Sunars. *RTP, Day 3, 372 114-17* Respondent was "totally preoccupied" with another case and did not want any new litigation. *RTP, Day 3, 372 114-25*

21. On May 6, 2002 and again on May 7, 2002, Respondent informed Attorney Adams that he was no longer representing the Sunars *Book I, Ex 18, Bates 291, Book I, Ex 18, Bates 298*

22 Respondent counseled Attorney Adams that a forcible detainer action should be filed in justice court rather than superior court. *RTP, Day 3, 371 11*

23 Forcible detainer actions are normally filed in justice court and are less expensive in justice court *RTP, Day 3, 380 7-15, RTP, Day 1, 21 13-18 (Judge Weaver)*

24 On May 7, 2002, Attorney Adams served the Sunars with one letter addressed to them (letter dated May 7, 2002) and copies of two additional letters addressed to Respondent dated May 6, 2002 *Book I, Ex 1, Bates 225*

25 The letter (dated May 7, 2002) addressed to the Sunars extended the Robishaws' counter-offer until May 7, 2002 at 3·00 pm. *Book I, Ex 1, Bates 228* This letter was left at the residence of Sunars at 1 35 pm on May 7, 2008. *Book I, Ex 1, Bates 228* The certificate of service indicates, "Attempted service, no one home, posted on the carport post " *Book I, Ex 1, Bates 225* It is unknown if the Sunars were made aware of Robishaws' offer prior to its 3 00 pm expiration

26. In the letter of May 7, 2002, Robishaws demanded that the Sunars vacate the premise and surrender possession of the property *Book I, Ex 1, Bates 228*

27 On May 8, 2002, Attorney Adams filed a forcible detainer action in Superior Court against Dawn and Ram Sunar. *RTP, 94·9-15, Book I, Ex 1, Bates 195-198*

28 On May 9, 2002, Ram Sunar was served with a copy of the forcible detainer complaint *Book I, Ex 2, Bates 229*

29 On May 13, 2002, Respondent filed an answer only on behalf of Ram Sunar as only he was served *Book I, Ex 7, Bates 244-244*

30. On May 13, 2002, Respondent, on behalf of Ram Sunar, filed a Motion to Strike a Portion[5] of Plaintiffs' Complaint and a document entitled, "Ram Sunar's Offer to surrender Possession of the Subject Real Property/Motion to Continue Hearing if Plaintiffs do not Accept Offer" *Book I, Ex 9, Bates 251; Book I, Ex 10, Bates 253.*

31. On May 14, 2002, the Court reassigned the matter to the Honorable Thomas B. Lindberg *Book I, Ex 12, Bates 259*

32 On May 15, 2002, Respondent filed a Notice of Tender of Possession of the property to the Robishaws Therein, the Sunars acknowledged that they had vacated the premises on May 15, 2002 *Book 1, Ex 17, Bates 266, RTP, Day 1, 38 4-20*

33. On May 15, 2002, a telephonic hearing was held before the Honorable Raymond W Weaver, Jr , to discuss the status of the forcible detainer action. *Book I, Ex 14, Bates 261-262* Therein, the Court noted receipt of the "Defendant's Surrender of Possession, filed this day" *Id*

34 At the telephonic hearing on May 15, 2002, Respondent again reiterated that the Sunars had vacated the premises. Respondent further offered to stipulate that Plaintiffs would take possession. *Id*

[5] The motion to strike sought to prevent plaintiffs from reading to the jury a letter authored by Attorney Adams that was attached to the complaint

35 Attorney Adams would not accept the offered stipulation and insisted that he (Adams) would only stipulate to possession if Respondent stipulated to Defendant(s)' payment of attorney fees *Id*

36 The court ordered the Robishaws would take possession of the property The court also provided that either party could file motions regarding attorney's fees and damages The matter was also reassigned to the Honorable Raymond Weaver for all future proceedings. *Id , Bates 261*

37. The court's order of May 15, 2002, also ordered that if the premises were locked and if Plaintiffs were unable to take possession, that Plaintiffs could hire a locksmith to change the locks and that the expense would be borne by Defendant(s). *Id , Bates 262*

38 On May 24, 2002, Respondent, on behalf of Ram Sunar, filed a motion to dismiss alleging that the summary nature of a forcible detainer action precluded relief for damages not included in the statutory framework *Book I, Ex 19, Bates 314-316*

39 On May 31, 2002, Attorney Adams, on behalf of Plaintiffs, filed a response opposing the motion to dismiss. *Book I, Ex 19, Bates 318-319*

40 On June 11, 2002, Respondent, on behalf of Ram Sunar, filed a "Motion to Correct Error in the Record " *Book I, Ex 24, Bates 346-347* Said motion sought to correct the Court's May 15, 2002 minute entry where it referred to the Respondent as "counsel for Defendant" and also "counsel for Defendants" *Id* Respondent's motion

noted that only Defendant Ram Sunar had been served and that Defendant Dawn Sunar had not been served Respondent had only appeared on behalf of Ram Sunar and not entered a notice of appearance on behalf of Dawn Sunar *Id*

41. On June 22, 2002, Attorney Adams filed a response opposing the "Motion to Correct Error in the Record." Attorney Adams argued that Respondent, during the telephonic status conference, had used the terms of client and clients during the discussion Adams argued that such verbal usage dispensed with the need for service and appearance *Book I, Ex 40, Bates 415-416.*

42 Defendant's "Motion to Correct Error in the Record" was granted on September 18, 2002 *Book I, Ex 44, Bates 429* (Nearly two years later, on June 2, 2004, Judge Weaver reversed his prior ruling.) *Book II, Ex 176, Bates 1429*

43 On June 14, 2002, Respondent, on behalf of Ram Sunar, filed a second motion to dismiss *Book I, Ex 30, Bates 375*

44 Both counsel exchanged numerous allegations of unprofessional and unethical conduct *Book I, Ex 18, Bates 314-316; Book I, Ex 21, Bates 323-326*

45. On June 17, 2002, Attorney Adams, on behalf of Plaintiffs, filed a motion requesting the costs incurred to re-key and change the locks on the property. *Book I, Ex 31, Bates 376-382* Plaintiffs' motion alleged that Defendant refused to surrender the keys and thus was required to re-key all locks. *Id.*

46. On June 27 2002, Respondent, on behalf of Ram Sunar, filed a response opposing Plaintiffs' request for payment of costs incurred to re-key and change the

locks on the premises. *Book I, Ex 381, Bates 409-410* Defendant's response alleged that Defendant offered the keys to Plaintiff but that Plaintiff refused to take the keys and re-keyed the property without there being a need Defendant requested a hearing to determine which version of the facts was accurate *Id*

47. Both counsel filed various other pleadings *Book I and Book 2*

48 The personal animosity between Attorney Adams and Respondent had become a problem *RTP, Day 1, 179 23-180 1, RTP, Day 1, 29.22-25*

49 On July 22, 2002, there was an attempt to de-escalate the animosity between the Respondent and Attorney Adams *Book I, Ex 43, Bates 426* Therein, Respondent drafted a stipulation wherein the parties would withdraw "all their pending accusations of unethical conduct and motions for sanctions against each other filed in this case." *Id.*

50 On September 18, 2002, Judge Weaver ruled on various pending motions *Book I, Ex 50, Bates 427-429* Among other things, the court denied Defendant's Motion to Strike However, the court granted the principle relief sought in Defendant's Motion to Strike, i e , the court ordered that, as to the complained of exhibit, "the Exhibit, in so far as it refers to conduct of Defendant's counsel, shall not be read to the jury." *Id , 427.* The court also, *inter alia*, denied Defendant's two motions to dismiss and denied Defendant's request for placement with Alternative Dispute Resolution. *Id , 428*

51. On the issue of re-keying of the property, despite the competing fact issues set forth in the pleadings, the Court denied the request for an evidentiary hearing. The Court ordered Defendant to pay the sum requested by Plaintiff ($460 74)[6] for re-keying of the property *Id , 429*

52. On September 25, 2002, Defendant Dawn Sunar was served with a copy of the forcible detainer complaint *Book I, Ex 45, Bates 433*

53. On October 24, 2002, Plaintiffs filed an application for entry of default against Defendant Dawn Sunar *Book I, Ex 47, Bates 435-437*

54. On November 4, 2002, Respondent, on behalf of Dawn Sunar, filed a motion to dismiss *Book I, Ex 48, Bates 438-439.* The Defendant's motion was based on, *inter alia*, Plaintiff's failure to serve Defendant within 120 days after filing the complaint *Id , 439*

55. On November 4, 2002, Respondent, on behalf of Dawn Sunar, filed a Notice of Change of Judge. *Book I, Ex 49, Bates 440.*

56 On November 12, 2002, Respondent, on behalf of Ram Sunar, filed a request that the court make findings of fact and conclusions of law when the case was concluded *Book I, Ex 52, Bates445*

57 On November 12, 2002, Respondent, acting as an officer of the court, filed a notice of "Possible Adverse Legal Authority" *Book I, Ex 53, Bates446* This pleading gave the court notice of legal authority which would undercut his earlier

[6] The $460 74 amount was later reduced to $70 00 after the trial on July 28, 2002 *Book 1, Ex 98, Bates 719*

filed Notice for Change of Judge *Id.*

58 On July 28, 2003, Judge Weaver dismissed the complaint as to Defendant Ram Sunar *Book I, Ex 98, Bates 720*

59. Judge Weaver opined that, "each counsel conducted himself in what may be termed borderline unethical conduct and hardball tactics." *Book I, Ex 60, Bates 495* Later, Judge Weaver again noted that there was still "visible hostility and animosity between counsel." *Book I, Ex 98, Bates 719*

60. Judge Weaver acknowledged that he has been a friend with James Musgrove Mr Musgrove was a senior partner in Mr Adams' firm for more than 20 years *RTP, Day 1, 32 13-18, RTP, Day 1, 15 23-16 8*

61. Respondent requested that Judge Weaver recuse himself on the basis that his long-time friendship with James Musgrove created an appearance of impropriety. *Book II, Ex 141, Bates 1100, RTP, Day 1, 33 6-11* This motion was re-urged on March 9, 2004 *Book II, Ex 159, Bates 1299-1302* This motion was premised upon Canon 3 of the Code of Judicial Conduct. *Id.*

62 Judge Weaver acknowledged there was some incidental communication between himself and Attorney Adams *RTP, Day 3, 325 1-25* Judge Weaver was indignant that an impropriety was suggested by Respondent *Id.*

63. The positions taken by the Respondent in the litigation were taken primarily at the direction of his clients *Book I, Ex 111, Bates 791* The Respondent encouraged his clients to settle the litigation at various times. *Id*

64 On October 8, 2003, Respondent requested an evidentiary hearing regarding Plaintiffs' request for attorney fees based on ARS § 12-349 *Book I, Ex 113, Bates 817*

65. On June 2, 2004, Judge Weaver disqualified himself from the Robishaw/Sunar case The court's ruling concluded that, "it must disqualify itself from further proceedings based upon Cannon [*sic*] 3E, Rule 81, Rules of the Supreme Court" *Book II, Ex 178, Bates 1430.*

66 Nevertheless, in spite of the court's own ruling disqualifying itself, it made rulings on various other pending motions *Book II, Ex 178, Bates 1427-1430* Judge Weaver's order castigated Respondent. Judge Weaver's minute entry reads:

> Throughout litigation, there has been a pattern of conduct by Defendants and defense counsel to abuse legal procedure, take inconsistent positions, refuse to accept reasonable settlement offers and fail to make reasonable efforts to expedite the litigation It is this Court's opinion that Mr Sodikoff was doing everything possible to force the Plaintiffs into taking actions which should not have been required. Mr Sodikoff and Defendants have abused legal procedures by either walking a fine line or going over the line to create as much expense and inconvenience to Plaintiffs as possible Clearly, this Court cannot look into the mind of Mr. Sodikoff. However, this Court has no doubt that this case has been driven by Mr. Sodikoff who has made no good faith effort to resolve the case and sanctions are clearly appropriate as a result of Mr Sodikoff's signing of pleadings and conducting himself in the manner referred to above.
>
> The Court also finds that Mr Sodikoff has defended against Plaintiffs' claims without substantial justification, has unreasonably expanded or delayed the proceedings and has filed motions and defended against Plaintiffs' claims solely or primarily for harassment *Id*

67 For the purposes of this proceeding (bar complaint), this Hearing Officer finds that the pleadings filed by Respondent were reasonably intended to further the objectives of Respondent's clients.[7]

68. Judge Weaver noted that, "every lawyer has an obligation to try to resolve cases, not just try and protract the proceedings and run up fees and costs . . .". *RTP, Day 1, 30·4-7.*

69 Plaintiffs Robishaws' attorneys' fees for this forcible detainer action were $22,251.36 *RTP, Day 1, 112 7-10*

70 Defendant Sunars' attorneys' fees for this action were $3,886.00. *RTP, Day 4, 523 17-18.*

71 Respondent received a total of $1,100 from the Sunars This included all costs and attorney fees paid by the Sunars *RTP, Day 3, 374 1-3.*

72. On July 28, 2003, by minute entry, the court awarded the Robishaws damages against Dawn Sunar in the amount of $475.00 for the two-week holdover, $70 00 for re-keying the door, and $1,430 65 for replacement carpeting. *RTP, Day 1, 36 16-20, Book I, Ex 98, Bates 718 - 720*

73 Respondent retained Attorney David Lange to assist him in representing himself and the Sunars *RTP, Day3, 317 1-320 13.* Respondent retained Attorney Lange due to Respondent's need to be in Canada because of his son's problems

[7] This is explained in more detail in the Discussion below

Respondent also sought assistance in de-escalating the situation with Attorney Adams. *Id , RTP, Day 4, 464 16-465 10*

74 On June 2, 2004, Judge Weaver assessed Respondent to pay $5,000.00 in attorneys' fee pursuant to ARS §12-349. *Book II, Ex 178, Bates 1429*

75 In 2004 Attorney David Lange (for Respondent) and Attorney Thomas Kack (for Plaintiffs) negotiated a stipulated dismissal of the action *RTP, Day 3, 331 5-332 6, RTP, Day 1,170 20-171 4* This resolution was intended to be a global settlement of all issues including a dismissal of the prior order by Judge Weaver ordering payment of $5,000.00 in attorneys' fees. *RTP, Day 3, 331 5-332 6, RTP*

76 On October 26, 2004, the settlement was filed with the court and denominated as the Stipulation for Dismissal *Book III, Ex 4, Bates 28-29*

77. Under the terms of the settlement agreement, Respondent was to pay attorneys' fees that were estimated to be in a range of $3,000 - $3,500 *RTP, Day 1, 171 1-4*

78. The settlement agreement also released the Sunars from any financial obligation to the Robishaws. *RTP, Day 4, 466·22-267.6.*

79 The settlement agreement contained a non-disclosure provision *RTP, Day 3, 327 16-22*

80 Due to Respondent's financial condition, Respondent's payments on the settlement agreement had to be made "in a couple of installments." *RTP, Day 3, 327 23-328 2*

81. On August 19, 2005, Jeffrey Adams sent his 38 page complaint against the Respondent to the State Bar of Arizona

Discussion
(Robishaw/Sunar Litigation)

For this hearing officer, Judge Weaver's minute entry of June 4, 2004 deserves serious consideration. At the same time, such allegations warrant more than a cursory review In addition, there must be an attempt to harmonize the minute entry of June 4, 2004 with Judge Weaver's trial decision of July 28, 2003.

Refusal to Accept Reasonable Settlement Offers. Judge Weaver's minute entry of June 4, 2004, (hereafter, "M E , 6/4/04") criticized Respondent for his "[refusal] to accept reasonable settlement offers" The order specifically referred to Attorney Adams proposals contained in his letter of May 6, 2002.[8]

Judge Weaver's trial decision of July 28, 2003 (hereafter, "trial decision") was that the amount due for the fourteen-day hold-over was **$475.00.** Oddly enough, the trial decision was closer to the **$350** tendered on behalf of the Sunars than was the **$1,500.00**[9] demanded by Plaintiffs in Adams' letter of May 6, 2008 Using a strictly monetary comparison, Sunars' offer was clearly the more reasonable

In addition, there was no evidence presented that the Sunars' could have even accepted Plaintiffs' proposal. The offer was initially delivered after the offer had

[8] The offer was for the Sunars to pay $1,500 00 for fourteen days or in the alternative to pay $750 00 for shared use and occupancy for the property

[9] The $1,500 00 offer would be the comparable offer since the rental income amount was for the exclusive use of the premises—not the shared use option

expired [10] Then, Adams' extension of the offer to May 7, at 3:00 pm was not delivered to the Respondent but was delivered to the Sunars' home[11] less than an hour and a half before it expired

It was the Respondent who counseled Attorney Adams that filing a court action was not necessary. Attorney Adams rejected the previously tendered funds and insisted on filing the action in Superior Court Judge Weaver himself acknowledged that this case belonged in the less expensive forum of the justice court

The trial decision noted that there had been negotiations regarding the Sunars' fourteen-day hold-over but that "no agreement was ever finalized." In addition, it was never suspected or suggested that the Sunars would not be leaving at the end of the fourteen-day period On May 6, 2008, the Respondent assured Adams that the Sunars would not stay beyond the fourteen-day period. Respondent again reiterated that filing an action would be an expensive waste of money and time.

Expansion of Litigation. In Attorney Adams' five-page letter of May 6, 2002, he acknowledges that the forcible detainer statute is a summary statutory remedy for obtaining possession. *Book I, Ex 1, Bates 221* There he writes, " our clients have the right to have your clients forcibly removed therefrom [*sic*] pursuant to A R.S §§

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[10] This five-page letter was delivered to Respondent at his home on May 6, 2002 at 5 55 p m *Book I, Ex 18, Bates 295* Accordingly, the counter-proposal put forth in Adams' letter had already expired at the time it was delivered on May 6, 2002 *Id*

[11] It is unknown if the Sunars were made aware of Robishaws' offer prior to its 3 00 pm expiration since the letter was left at the residence of Sunars at 1 35 pm on May 7, 2008 *Book I, Ex I, Bates 228* The certificate of service indicates, "Attempted service, no one home, posted on the carport post " *Book 1, Ex 1, Bates 225*

12-1171 *et seq* ***Those statutes deal merely with a party's right to possession*** and merely require notice and demand . . ." *Id (Emphasis added)*

The property was voluntarily surrendered on May 15, 2002. Nevertheless, Adams persisted in expanding the litigation seeking civil damages arguably beyond scope of the forcible detainer statute *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101 P 3d 641 (App 2004) There, the Court of Appeals wrote:

> [T]he action (forcible detainer) is intended to "afford a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant in violation of the covenants of his tenancy or lease." *Phoenix-Sunflower,* 105 Ariz. at 336, 464 P 2d at 619. *See Olds Bros Lumber Co v Rushing,* 64 Ariz. 199, 204-05, 167 P 2d 394, 397 (1946). As such, no counterclaims, offsets or cross complaints are "available either as a defense or for affirmative relief in such action " *Olds Bros Lumber,* 64 Ariz. at 205, 167 P.2d at 400 [FN3] Although the fact of title may be admitted if incidental to proving a right to possession, the merits of title cannot be litigated A.R.S. § 12-1177 (2003), *Phoenix-Sunflower Indus ,* 105 Ariz. at 337, 464 P 2d at 620; *Andreola,* 26 Ariz App at 557, 550 P.2d at 111. The only issue to be decided in the action is the right of actual possession. *Id , 645.*

The Respondent, on behalf of his clients, resisted Plaintiffs' continued attempts to use the forcible detainer statute to collect other alleged damages Respondent's resistance appears well founded. The Court of Appeals comment on the summary nature of the forcible detainer statute is insightful "The reason for denying counterclaims and the like and limiting judgment only to possession, costs, and

recovery for unpaid rent is to preserve the proceeding as a summary remedy. Allowing other claims would increase the issues and protract the action. For a discussion of the Arizona forcible entry and detainer statute see. Baird, 'A Study of Arizona Lease Termination'. 9 Ariz.L Rev. 199-204 (1967)." *Gangadean v. Erickson*, 17 Ariz App 131, 134, 495 P 2d 1338 (1972)

It is the view of this Hearing Officer that attorney Adams was equally, if not more, at fault for the protracted litigation. Adams rushed this matter into court without ever giving the parties a chance to reflect or have meaningful negotiations. Attorney Adams chose the more expensive venue (superior court) Attorney Adams took hard line positions and would not consider compromise

Jeffrey Adams testified at the Respondent's hearing on March 3, 2008. Mr. Adams testified there that, "I don't have any affection for Mr Sodikoff I don't like him. And you want to consider that to be a bias, then you may." *RTP, Day 1, 119 17-20.* His demeanor at the hearing was more telling. In addition, Mr. Adams' answers were evasive and not forthcoming. *RTP, Day 1, 125:3 – 130 19*

Some of Mr Adams answers were plainly incredible. For example, in referring to his first conversation with the Respondent he states: "I was really attempting in my very first discussion with Mr. Sodikoff to avoid having to file suit *RTP, Day 1, 121 5-7* This contrasts to his message left on the Respondent's telephone earlier that day. There, he stated, "Mr Sodikoff, I only have one question of you and it's to know whether or not you will accept service of a lawsuit " *RTP, Day 3, 370 16-18.*

Mr Adams' approach at the hearing on Respondent's bar complaint was also not helpful. As noted above, Mr. Adams instigated the instant matter with his 38 page complaint. Nevertheless, when examined by Ms Greenlee, Mr. Adams knowledge and recall were conspicuously vague *RTP, Day 1, 125 24 – 126 8, 135.8 – 138 9* These were serious allegations being tried. Mr. Adams, as an officer of the court, has an obligation to respect the gravity of the charges against the Respondent. This Hearing Officer found Mr Adams' approach to be cavalier and unhelpful to the truth finding process

Inconsistent Positions. The M.E of 6/4/04 also takes issues with the Respondent for taking "inconsistent positions". However, the Arizona Supreme Court has noted that taking an inconsistent position is only forbidden when one has gained an advantage through judicial relief *Standage Ventures, Inc v State,* 114 Ariz. 480, 562 P 2d 360 (1977) Ariz. 1977 There the Court held.

> '(T)he essence of the doctrine of judicial estoppel is not merely that a party has taken inconsistent positions in judicial proceedings. If such were the case, our rules would not expressly allow a party to state in his pleadings 'as many separate claims or defenses as he has regardless of consistency,' Rule 8(f)(2), Rules of Civil Procedure, 16 A.R S , nor would a party who has given sworn testimony in a deposition be allowed to later take a contrary position in testifying at the trial The essence of judicial estoppel is that a party has gained an advantage-obtained judicial relief-in one action by asserting one position, and that in view of his having gained that advantage, he must accept the burdens of that

position in any subsequent litigation between the same parties involving the same issues. Under such circumstances the law will not allow a party 'to have his cake and eat it too ' Id , 483-484.

Conclusions of Law

(Robishaw/Sunar Litigation)

1 The Robishaw-Sunar litigation was continued and unreasonably protracted as much by the attitude and practice of Attorney Adams as it was by Respondent's desire to protect his clients

2. After reviewing the voluminous record of the Robishaw/Sunar litigation, This Hearing Officer finds that the Respondent's motions and other pleadings were not brought in bad faith or for the purposes of delay or harassment

3 The State Bar has the burden of proving, by clear and convincing evidence, that Respondent violated the Ethical Rules and Rules of the Supreme Court alleged in the complaint.

4 The State Bar has failed to prove by clear and convincing evidence that the Respondent violated ERs 1.3, 3.1, 3 2, 3 3, 4.4 or 8 4(d) Rule 42, Ariz.R S Ct , while representing the Sunars in the Robishaw/Sunar litigation

Findings of Fact
Count 1 (05-1451)
(Trespass Allegation)

82. The Respondent and Attorney John Mull were involved in a domestic litigation *RTP*, Day 1, 49.3-11

83. In the course of the litigation, Respondent had made arrangements to retrieve certain documents from Mr. Mull's office (Musgrove, Drutz & Kack, P C, hereafter "the Musgrove firm") on March 19, 2003 *Id.*

84. Respondent discussed, with the receptionist at the Musgrove law firm, that he would be picking up an envelope from John Mull related to a case that Respondent was handling with Mr. Mull *RTP, Day 4, 469 21-25.*

85 Because Respondent was running late on that particular date, he called the receptionist and told her that he would not be there until after 5 00 p.m It was agreed that she would leave the envelope outside *RTP, Day 4, 471 15-24.*

86 When Mr Mull returned to his office at shortly after 5 00 pm, he saw the envelope addressed to the Respondent was outside the front door of the office *RTP, Day 1, 49 13-15.* Mr. Mull retrieved the envelope and placed it on the receptionist's desk in a basket or on a shelf *RTP, Day 1, 49 18-19*

87 Mr Mull was at the office for approximately five minutes and left at about 5:15 pm *RTP, Day 1, 49 24-50 1*

88. Mr Mull had no first hand knowledge of what transpired between the Respondent and Mr. Adams *RTP, Day 1, 54 13-15*

89. When Respondent arrived and did not find the envelope outside, he opened the unlocked door and looked for the envelope on the receptionist's desk, where he had previously found items that he was to retrieve *RTP, Day 4, 472:1-10.*

90 When Respondent did not see the envelope, he heard a voice and called out for John Mull. *RTP, Day 4, 472 12-17*

91 Attorney Adams was present at the Musgrove firm when Respondent arrived When he saw Respondent he told him. "You're late." *RTP, Day 4, 472 20-21*

92 Respondent attempted to call for John Mull from the telephone in the reception area. Respondent didn't walk through the office. *RTP, Day 4, 473 8-21*

93. Attorney Adams was aware that Respondent was seeking to retrieve an envelope relating to another case *RTP, Day 1,140 12-141 12*

94 Attorney Adams offered no assistance to Respondent to retrieve the envelope left by Attorney John Mull. *RTP, Day 1, 137 15-140 24; 143:13-24 149 8-24.*

95 When Jeff Adams told Respondent that he was going to call the police if Respondent did not leave, Respondent left. *RTP, Day 4, 473:23-25*

96 Respondent left the Musgrove office and drove to the police department in an attempt to get their assistance in retrieving the envelope left by John Mull *RTP, Day 4, 474:5-12; RTP, Day 1, 155 14-25*

97. The Musgrove law firm decided to press charges against Respondent for trespassing *RTP, Day 1, 161 7-10*

98. Respondent was found not guilty at trial *RTP, Day 4, 470 11-12.*

Discussion
Count 1 (05-1451)
(Trespass Allegation)

This allegation pits the testimony of the Respondent against the testimony of Mr. Adams The allegation of the complaint must, by necessity, stand or fall on the credibility of Mr. Adams. The State Bar must prove the allegation by clear and convincing evidence.

Conclusions of Law
Count 1 (05-1451)
(Trespass Allegation)

5. The State Bar has failed to prove by clear and convincing evidence that the Respondent violated Rule 42, Ariz R Sup Ct., ERs 4.4(a), 8.4(b), and 8.4(d), relating to the alleged trespass at the Musgrove law firm.

Findings of Fact

Count 2 (06-1326)

(State Bar/Wal-Mart Shoplift)

99. On August 13, 2006, Prescott police officers were dispatched to a Prescott Wal-Mart regarding a theft in progress. *Book III, Ex 5, Bates 184-186, RTP, Day 2, 209 21-210 1.*

100. The Prescott police were advised that a White male, in his sixties, wearing a white shirt and black pants was seen leaving the Wal-Mart store without paying for certain items *RTP, Day 2, 210.1-4*

101. The Prescott police stopped the Respondent to investigate the shoplifting incident *RTP, Day 2, 210 7-13, 226 24-25.*

102 When questioned by police, Respondent initially denied shoplifting anything and indicated that he had a receipt for the items. *Book III, Ex 5, Bates 186.*

103 The receipt that Respondent produced was for some other items and did not show the items that had been alleged to have been shoplifted from the Wal-Mart. *RTP, Day 2, 227 19-228 2*

104. Respondent eventually admitted that he had shoplifted the items from the Wal-Mart. *Book III, Ex 5, Bates 186, RTP, Day 2, 211·18-212.18.*

105. Respondent was cited for shoplifting from Wal-Mart and issued a trespass warning to not return to the store *JPS, ¶ 24*

106. The total value of the items Respondent shoplifted was $6 88. *JPS, ¶ 24*

107 On or about October 6, 2006, Respondent signed a plea agreement in case no. 2006080442C, pleading guilty to one count of shoplifting in violation of A R.S. § 13-1805, as a class one misdemeanor. The Respondent agreed to have ten sessions with Dr Joseph Steward, MSW, Ed D. *JPS, ¶ 29*

108. Respondent was emotionally distraught and experiencing great stress during this time due to events involving his family *RTP, Day 4, 476 24-25, RTP, Day 3, 400 13-25, and RTP, Day 3, 401 1-5*

Findings of Fact
Count 3 (07-0073)
(Practicing While Suspended)

109. On September 26, 2006, The Arizona Supreme Court ordered that Respondent was suspended from the practice of law for 30 days, effective on **October 26, 2006** *Order of Supreme Court filed September 26, 2006, Book IV, Ex 13, Bates 50-51*

110 Pursuant to Supreme Court Rule 72, "within ten (10) days after the date of the . . .order . . ." the Respondent was required to notify "by registered or certified mail, return receipt requested" the contents of the order and "the fact" that he was suspended. *Rule 72(a)* Ariz.R Sup Ct.

111 Rule 72 (a) required that the above notice was to be transmitted, in the above manner, to.

a. All clients,

b. Any co-counsel in pending matters;

c. Any unrepresented adverse parties in pending matters; and

d. Each court and division where the Respondent has any pending matter

112. The above notices should have been transmitted to all enumerated courts, counsel, and parties on or before **October 6, 2006**

113 Rule 72(f) requires a suspended lawyer to keep and maintain records constituting Proof of Compliance with Rule 72 Proof of Compliance is a condition precedent to any application for reinstatement.

114 Rule 72(d) further requires that, "after entry" of the suspension order, and prior to the effective date of the suspension, Respondent may only complete matters that were already pending

115 In 2006, Attorney Douglas Suits represented Plaintiff Dorothy Tyson in a lawsuit against Nelda DeShane in a case in the Superior Court, Yavapai County *RPT, Day 1, 59 11-60 17, Book IV, Ex 13, Bates 43-46.*

116. On October 11, 2006, Respondent filed a "Stipulation for Substitution of Counsel with Consent" by which he became counsel of record for the defendant.. *Book IV, Ex 15, Bates 41*

117 On October 13, 2006, Respondent notified Attorney Suits that he "was substituting in as counsel of record for Defendants (DeShane)". *Book IV, Ex 13, Bates 43*

118 On October 13, 2006, Respondent entered a notice of association to appear on behalf of Nelda DeShane in the Tyson/DeShane case *Book IV, Ex 15, Bates 410-411*

119 Respondent had discussions with attorney Suits regarding scheduling of Ms. Tyson's deposition for October 25, 2006 *Book IV, Ex 13, Bates 28.*

120. On October 31, 2006, Attorney Suits filed a Motion to Compel disclosure and requested sanctions since Respondent had failed to provide an earlier promised disclosure statement. *Book IV, Ex 13, Bates 27-32.*

121 Respondent provided a verified disclosure statement signed by Respondent that was dated October 19, 2006. The disclosure statement bears Ms DeShane's declaration, signature and date of October 25, 2005 [*sic*]. The disclosure statement includes an unsigned certificate indicating that it was hand-delivered to Mr. Suits on October 25, 2006. *Book IV, Ex 13, Bates 38-42.*

122 On November 6, 2006, Mr. Suits received a call from Respondent who inquired whether Mr. Suits had received the disclosure statement When told that Mr. Suits had not received the disclosure, Respondent assured Mr. Suits that he would have someone put it in the mail to Mr Suits. Mr. Suits finally received the defendant's disclosure statement on or about November 10, 2006 *Book IV, Ex 13, Bates 43-45.*

123. On November 17, 2006, Mr Suits filed his affidavit in support of the motion to compel previously filed in the Tyson/DeShane case. *Book IV, Ex 13, Bates 43-46*

124 Subsequent to filing of the motion to compel (10/31/06) and in November of 2006, Respondent contacted Mr. Suits regarding producing Defendant's disclosure. *RTP, Day 1, 62 7-25; Book IV, Ex 13, Bates 44*

125. Mr. Suits' affidavit in support of his motion to compel filed November 17, 2006, referred to Mr Suits learning that the Respondent had been suspended from the practice of law *Book IV, Ex 13, Bates 45.*

126 On November 2, 2006, Respondent contacted Mr. Suits and acknowledged the receipt of Plaintiff's motion to compel. Respondent informed Mr Suits that he was prepared to produce the requested disclosure *Book IV, Ex 13, Bates 43-48*

127 Attorney Suits agreed to withdraw the motion to compel if the disclosure was timely produced. Mr. Suits confirmed this conversation and agreement in a letter of November 2, 2006, said letter being addressed to the Respondent *Book IV, Ex 13, Bates 43-48*

128. On or about November 10, 2006, Mr Suits received information that Respondent was suspended from the practice of law and that Respondent's status might preclude Mr. Suits from accepting the disclosure sent by Respondent. *Book IV, Ex 13, Bates 43-48*

129. Mr Suits researched the Respondent's status with the State Bar and the Supreme Court of Arizona and verified the Respondent's suspension had been effective on October 26, 2006. *Book IV, Ex 13, Bates 43-48*

130. On November 20, 2006, Respondent contacted attorney Suits to inquire whether Mr. Suits would take his motion to compel in the Tyson/DeShane matter off of the calendar. Mr. Suits informed the Respondent that he would not discuss any further issues regarding this matter until the Respondent's suspension was lifted *Book IV, Ex 13, Bates 8-9*

131. Respondent offered some evidence that he was acting as a "paralegal" during his period of suspension However, said testimony was inconclusive and less than compelling *RTP, Day 1, 193.19 – 22*

132 As to the various exchanges between Mr. Suits and Respondent, this Hearing Officer finds the testimony of Mr. Suits to be reliable and persuasive evidence *RTP, Day 1, 59 2-90 23, Book IV, Ex 13, Bates 43-45, Book IV, Ex 13, Bates 8-9*

133. At no time prior to, during, or subsequent to Mr. Suits' communications and negotiations with Respondent related to the *Tyson* matter, did Respondent inform Mr. Suits, as opposing counsel in an active legal matter, that Respondent was going to be or was suspended from the practice of law effective October 26, 2006 *Book IV, Ex 13, Bates 8-9, 26*

134. At no time prior to, during, or subsequent to substituting in as counsel of record for the defendant Ms DeShane, did Respondent inform the Court that Respondent was going to be or was suspended from the practice of law effective October 26, 2006 *Book IV, Ex 15*

135 From September 26, 2006 to October 26, 2006, when Respondent was not allowed to engage in the practice of law other than to complete client matters that were pending on September 26,2006, Respondent did the following acts that were beyond the provision of Rule 72(d) Ariz.R.Sup.Ct·

a Respondent entered his notice of association on behalf of Nelda DeShane *Book IV, Ex 15, Bates 410-411*

b Respondent called and spoke to Attorney Doug Suits, attorney for plaintiff, on behalf of Respondent's defendant client Nelda Fay De Shane *RTP, Day 4, 535 2-536 1*;

c Respondent filed a document entitled, "Declaration of Arnold M Sodikoff" acknowledging his activities on behalf of his client Nelda Fay De Shane from October 13, 2006-October 25, 2006. *RTP, Day 4, 536 2-15*,

d Respondent entered into a "Stipulation for Substitution of Counsel with Consent" (October 11, 2006) by which he became counsel of record for the defendant . *Book IV, Ex 15, Bates 411, RTP, Day 4, 536 16-539 17.*

136 During the 30-day period of time after October 26, 2006, during which time Respondent was suspended

a. Respondent negotiated and dealt with legal matters on the Tyson/DeShane case with Attorney Suits, regarding the failure of Ms DeShane to

provide disclosure and Plaintiff's Motion to Compel that was filed on October 31, 2006 *RTP, Day 1,61 18-63 5*

b Respondent, on or about November 9, 2006, provided to Attorney Suits a Disclosure Statement[12] prepared by Respondent and signed by his client, Nelda Fay De Shane in his capacity as "Attorney for Defendant, Nelda Fay De Shane. *RTP, Day 1, 61 18-63 5, RTP, Day 4, 533 4-535 1.*

137 On behalf of Respondent, attorney Robert Blakey, Jr submitted the affidavit required by Rule 72, and indicated to the Supreme Court that Respondent had orally notified his clients of his suspension. The affidavit made no mention of notifying opposing counsel or the courts *RTP, Day 1, 188 24, 192·14-21*

138. On November 7, 2006, Respondent filed a Rule 72(e) Affidavit with the Supreme Court avowing that he had contacted all clients through oral contact to advise them that he could no longer represent them *Respondent's Statement of Facts in Support of Motion for Summary Judgment, Ex 1.*

139 Respondent avowed that he filed motions to withdraw on all his cases or that he stipulated to have other counsel substitute in his place. *Id*

140 Respondent swore that he "fully complied" with Rule 72(e) of the Rules of Supreme Court. *Id.*

[12] The Disclosure Statement is dated, October 19, 2006 and verified by Ms DeShane on October 25, 2005 [*sic*] However, the testimony of Attorney Suits clearly established that the dates were not accurate and that the documents were prepared and transmitted subsequent to October 26, 2006 *RTP, Day 1,61 18-63 5 , Book IV, Ex 13, Bates 43-45, Book IV, Ex 13, Bates 8-9*

141 On November 27, 2006, Respondent swore an affidavit "upon my oath that I have fully complied with the requirements of the suspension order of this court " *Book IV, Ex 16, Bates 453*

142. At no time prior to, during, or subsequent to Mr Suit's communications and negotiations with Respondent related to the Tyson/DeShane case, did Respondent inform Mr. Suit, as opposing counsel, that Respondent was going to be or was suspended from the practice of law effective October 26, 2006. *Book IV, Ex 13, Bates 8-9, 26.*

143. At not time prior to, during, or subsequent to substituting as counsel for Ms. DeShane, did Respondent inform the court that he was going to be or was suspended from the practice of law effective October 26, 2006. *Book IV, Ex 15.*

Count 3 (07-0073)

Failure to Respond to State Bar

144. On January 31, 2007, the State Bar notified Respondent of Mr Suits' inquiry and allegations and requested a response within 20 days *Book IV, Ex 13, Bates 20-21.*

145 Respondent failed to respond within 20 days. *Book IV, Ex 13, Bates 18-19.*

146 On February 27, 2007 the State Bar reminded Respondent of the obligation to respond and cooperate with the Star Bar's investigation into the

allegations made by Mr Suits. Bar counsel requested a response from Respondent within 10 days. *Book IV, Ex 13, Bates 18.*

147 Respondent requested an extension to respond and eventually submitted a response to the charges in this matter *Book IV, Ex 13, Bates 13-16.*

148. Respondent's response was dated March 16, 2007. However, the State Bar did not receive the response until April 12, 2007. *Book IV, Ex 13, Bates 12*

149. Bar counsel requested the Respondent produce copies of all documents that would demonstrate his compliance with Rule 72(a) requirements. *Book IV, Ex 13, Bates 12.*

150. Respondent failed to respond to Bar counsel's request to produce copies of documents that would demonstrate compliance with Rule 72(a). *Book IV, Ex 12, 13*

Conclusions of Law
Count 2 (06-1326)
(State Bar/Wal-Mart Shoplift)

6 There is clear and convincing evidence that the Respondent violated Rule 42, Ariz.R.Sup.Ct when he shoplifted goods from Wal-Mart Specifically Respondent violated:

a ER 8.4(b) by committing a criminal act which reflects adversely on his honesty, trustworthiness or fitness as a lawyer,

b. ER 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and

c ER 8 4(d) by engaging in conduct that is prejudicial to the administration of justice.

Conclusions of Law
Count 3 (07-0073)
(Practicing While Suspended)

7. By engaging in the practice of law while suspended other than to complete client matters that were pending on the entry date of the Supreme Court's Judgment and Order of suspension, Respondent:

a. practiced law in violation of Rules 31(a)2 A and 31(c), Ariz.R Sup.Ct.;

b. engaged in the unauthorized practice of law in violation of Rule 31(a)2.B , Ariz.R Sup Ct.,

c. engaged in the unauthorized practice of law in violation of Rule 42, Ariz.R Sup.Ct., ER 5.5(a), and

d violated Rule 72(b), Ariz R Sup Ct.

8 By failing to comply with the known notification and affidavit requirements of Rule 72, Ariz R Sup Ct., Respondent violated:

a Rule 72(a)1 , Ariz R.Sup Ct.;

b. Rule 72(a)3., Ariz.R Sup.Ct ,

c Rule 72(a)4., Ariz R.Sup.Ct.;

d Rule 72(e)1., Ariz.R Sup Ct., and

e Rule 42, Ariz R.Sup.Ct., ER 3.4(c)

9. By falsely swearing in the affidavit of November 27, 2006 that he "fully complied" with the provisions of the Supreme Court's Judgment and Order of Suspension, and with the Rules of the Supreme Court, when in fact he had not so complied, Respondent

a. engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and violated Rule 42, Ariz R Sup.Ct., ER 8.4(c); and

b engaged in conduct that is prejudicial to the administration of justice in violation of Rule 42, Ariz.R.Sup.Ct., ER 8 4(d).

10 By failing to respond timely to the SBA's investigation of his conduct, and by failing to produce items requested of him in the State Bar's investigation of this matter, Respondent violated Rule 53 (c), (d) and (f), Ariz.R.Sup.Ct.

General Discussion Regarding Sanctions

ABA Standards In determining the appropriate sanctions, Respondent and the State Bar considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards"* or *"Standard* _____") and applicable case law The ABA *Standards for Imposing Lawyer Sanctions* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider

and then applying these factors to situations where lawyers have engaged in various types of misconduct *Standard* 1.3, Commentary. The court and commission consider the *Standards* a suitable guideline *In re Peasley*, 427 Ariz Adv. Rep. 23, 90 P.3d 764, §§ 23, 33 (2004); *In re Rivkind*, 164 Ariz 154, 157, 791 P.2d 1037, 1040 (1990).

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (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 circumstances ABA *Standard* 3 0

The Duty Violated

Respondent engaged in professional misconduct that violated the duties owed to 1) The public, 2) The profession, and 3) The legal system. *Standards*. The specific duties violated were

1. **Duty to the Public.** Respondent committed a criminal act, which reflects adversely on his honesty, trustworthiness and fitness as a lawyer.

2. **Duty to the Legal system.** Respondent filed a false affidavit with the Supreme Court of Arizona

3. **Duty to the Profession.** Respondent undertook new representation when he was not authorized to do so Respondent engaged in the practice of law while he was suspended from the practice of law.

The Lawyer's Mental State

The Respondent is an exceptionally intelligent attorney. Additionally, Respondent has substantial experience in the law and discipline matters in particular. Respondent's violations herein were not accidental or the result of negligence. As to Count 2, this Hearing Officer finds that the Respondent's conduct was done knowingly. As to count 3, this Hearing Officer finds that the Respondent's conduct pertaining to the affidavit filed November 27, 2006 was intentional. The remaining violations of Court 3 were, at the least, knowing violations

Actual or Potential Injury caused by the Misconduct

Wal-Mart suffered actual, although modest, injury as a result of Respondent's theft of merchandise. Litigants, such as Nelda De Shane, were exposed to potential injury as a result of Respondent's unauthorized practice of law and potential invalidation of actions Respondent took on behalf of his "clients" during his suspension

The Standards applicable to this matter that were considered are noted below

Standard 5 11 provides

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 ,

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice

Standard 5 12 provides

Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5 11 and that seriously adversely reflects on the lawyer's fitness to practice

Standard 6 11 provides

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceedings

Standard 6 12 provides

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted in 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 cause an adverse or potentially adverse effect on the legal proceeding.

Standard 7 1 provides

Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Standard 7 2 provides·

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Standard 8 1 provides

Disbarment is generally appropriate when a lawyer

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession, or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that

cause injury or potential injury to a client, the public, the legal system, or the profession

Standard 8 2 provides

Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession

Aggravating and Mitigating Factors

In deciding an appropriate sanction, the aggravating and mitigating circumstances noted in *Standards* 9 22 and 9.32 were considered. This officer finds the following aggravating factors are present:

Standard 9 22(a) – prior disciplinary offenses. Respondent has a substantial history of discipline, to wit·

1) By Judgment and Order of the Supreme Court of Arizona, No. SB-96-0016-D, Disciplinary Clerk File Nos. 90-1967, 92-0178, dated March 15, 1996, Respondent received a censure and was placed on probation for one (1) year. *See Notice of Intent to Use Prior Discipline filed March 13, 2007, Ex A* Respondent was found to have violated ER 1 1 (competence), ER 3.1 (non-meritorious claim, /contention), ER 8 4 (c)(conduct involving dishonesty), ER 8.4(d)(conduct prejudicial to administration of justice)

2) By Judgment and Order of the Supreme Court of Arizona, No. SB-99-0057-D, Disciplinary Clerk File Nos 94-0489, 94-2233, 96-0022, 96-1601, 96-1602, 96-1603, dated June 23, 1999, Respondent was suspended for one (1) year *See Notice*

of Intent to Use Prior Discipline filed March 13, 2007, Ex B This matter Respondent was found to have violated the following ethical rules: ER 1 3 (diligence), ER 1.4 (communication), ER 1.15 (safe keeping of property), ER 8 1(b) (failure to respond to disciplinary authority), ER 8 4(b)(commission of a criminal act, shoplifting), ER 8 4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation), ER 8.4(d)(conduct prejudicial to the administration to justice), Rule 43, Ariz.R Sup.Ct. (trust account verifications), Rule 44, Ariz R.Sup.Ct (trust account interest), Rule 51(h), Ariz R.Sup Ct (failure to respond to State Bar), and Rule 51(i), Ariz R Sup.Ct (refusal to cooperate with State Bar)

3) By Judgment and Order of the Supreme Court of Arizona, No. SB-01-0109-D, Disciplinary Clerk File Nos 97-1523, 98-1874, dated June 21, 2001, Respondent received a censure and probation *See Notice of Intent to Use Prior Discipline filed March 13, 2007, Ex C* Respondent was found to have violated the following ethical rules ER 1 2 (scope of representation), ER 1.3 (diligence), ER 1.4 (communication), ER 1.15(b)(safe keeping of property), ER 3 2 (expediting litigation), 4 violations of ER 8.1(b)(not cooperating with disciplinary authority), and 4 violations of Rule 51(h) Ariz.R.Sup Ct (failure to responded to Bar inquiry).

4) By Order of Reinstatement of the Supreme Court of Arizona, No. SB-01-0133-R, Disciplinary Clerk File No 00-2558, dated July 25, 2001, Respondent was placed on probation for two (2) years. *See Notice of Intent to Use Prior Discipline filed March 13, 2007, Ex D*

5) By Judgment and Order of the Supreme Court of Arizona, No SB-06-0125-D, Disciplinary Clerk File No 04-1979, dated September 26, 2006, Respondent was suspended for thirty (30) days and placed on probation for two (2) years Respondent was suspended for being held in direct and indirect criminal contempt. *See Notice of Intent to Use Prior Discipline filed March 13, 2007, Ex E.* Respondent was found to have violated the following ethical rules: ER 8 4(d)(conduct prejudicial to administration of justice), ER 3.5 (decorum of the tribunal), and ER 8 4(b)(commission of a criminal act that reflects adversely on fitness of a lawyer).

Standard 9 22(b) – Dishonest or selfish motive (shoplifting, false swearing; unauthorized practice of law, practicing law while suspended),

Standard 9 22(c) – Pattern of misconduct (several criminal and dishonest acts, including shoplifting and false swearing;

Standard 9 22(d) – Multiple offenses (2 counts in this complaint);

Standard 9 22(i) – Substantial experience in the practice of law. Respondent was admitted to the Arizona Bar in 1965, he has been practicing law for approximately 42 years; and

Standard 9 22(k) – Illegal conduct (shoplifting, trespass, false swearing).

/ / /

/ / /

The following factors are considered in mitigation

Standard 9 32(c) – Personal or emotional problems (character disorder, bipolar disorder, somatization disorder—*see*, testimony of Dr Joseph D Stewart, *RTP, Day 3, 398.19-399 20*

Standard 9.32(g) – Character or reputation. Testimony was offered that a Respondent was of good character and had a brilliant legal mind. There was also testimony that Respondent contributed to the legal community. However, the testimony also concluded that Respondent had a tendency to be overly aggressive in his representation

Recommended Sanction

Violations Calling for Disbarment Under the *Standards*, disbarment is considered as the appropriate sanction in at least two of Respondent's violations. The Supreme Court's order of September 26, 2006 suspending the Respondent for thirty (30) days, as a disciplinary order, was both clear and concise. Respondent knowingly violated the order when he practiced law during the period of suspension Similarly, Respondent violated the order when he undertook new representation after issuance of the order *Standard 8 1* is directly on point. *Standard 8 1* provides that disbarment is generally appropriate when a person "intentionally or knowingly violates the terms of a prior disciplinary order and such order causes injury or potential injury."

The Respondent's actions certainly imperiled Nelda DeShane. His actions also created potential injuries for Mr Suits' clients as Respondent's actions could prolong litigation and cast a cloud over the proceeding.

Respondent's submission of the false affidavit to the Supreme Court on November 28, 2006, implicates *Standard 6 11* *Standard 6 11* provides that disbarment is "generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false statement, and causes potentially serious injury to a party, or adverse effect on the legal proceedings." *See, In re Fresquez*, 162 Ariz 328, 783 P.2d 774 (1989).

Respondent's submission of the false affidavit to the Supreme Court on November 28, 2006, also implicates *Standard 5 11*. *Standard 5 11* provides that disbarment is generally appropriate when a lawyer engages in intentional conduct "involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice "

Violations Calling for Suspension All of the Respondent's remaining violations would, at a minimum, call for suspension. Respondent's theft from the Wal-Mart could arguably implicate *Standard 5 11(b)* (disbarment). However, there was not clear and convincing evidence that Respondent's actions were done with the higher mental state of an intentional act. *Standard 5 12* would generally call for suspension

as the appropriate sanction. Nevertheless, it must be acknowledged that this is Respondent's third criminal act.[13]

Arguably, Respondent's failure to respond and cooperate with the State Bar regarding the allegations in Count Three could implicate *Standard 7 1* (disbarment) Respondent's foot-dragging as to Count Three is suspicious in that Count Three likely contained the most dangerous allegation to Respondent Nevertheless, there was not clear and convincing evidence that the Respondent's dilatory actions were done with the "intent to obtain a benefit" There was evidence that Respondent knowingly engaged improper conduct when he failed to respond and cooperate with the State Bar. Accordingly, *Standard 7 2* would apply *Standard 7 2* provides that a suspension would be the appropriate sanction

Respondent's other violations of the Ethical Rules and Rules of the Supreme Court noted above would also call for suspension under *Standard 7 2.*

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).

As noted above, six (6) aggravating factors were found:

1. *Standard 9.22(a)* – prior disciplinary offenses;

2 *Standard 9 22(b)* – Dishonest or selfish motive,

[13] Respondent had a prior shoplifting offense as noted in SB-99-0057-D and the criminal contempt that arose

3 *Standard 9 22(c)* – Pattern of misconduct,

4. *Standard 9 22(d)* – Multiple offenses,

5. *Standard 9 22(i)* – Substantial experience in the practice of law,

6. *Standard 9 22(k)* – Illegal conduct

Two Mitigating factors were found

1 *Standard 9 32(g)* – Character or reputation, and

2 *Standard 9 32(c)* – Personal or emotional problems

Both mitigating factors are somewhat tarnished The reputation evidence, although largely positive, also indicated that Respondent would occasionally lose control of his powerful personality He was widely held to be difficult for many attorneys to work with In addition, his highly developed legal skills could suggest that some of his omissions were calculated actions rather than mere negligent actions The Respondent's personal problems were compelling. However, his failure to follow the suggestions of his doctor and mental health professionals was troubling *RTP, Day 3, 421.11-422 25*

The six aggravating factors far outweigh the two mitigating factors Moreover, Respondent's prior disciplinary history, illegal conduct, and substantial experience in the practice of law must be given great weight in the present situation

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from his striking opposing counsel in SB-0600125-D

Proportionality Review

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) However, the Supreme Court has noted that the concept of proportionality review is an imperfect process because no two cases "are ever alike". *Matter of Owens*, 182 Ariz 121, 127, 893 P 2d 1284, 1290 (1995)

Matter of Tarletz. In the *Matter of Tarletz*, 163 Ariz 548, 789 P.2d 1049 (1990), the Supreme Court reviewed the findings and recommendations on two separate complaints Complaint One contained six counts of misconduct that "centered on Tarletz's failure to properly and competently represent her clients." *Id* , 549, 1050. This matter resulted in a two year suspension

Complaint Two had two counts Count One involved Tarletz's filing of a false and forged document in the bankruptcy court Tarletz also failed to use the filing fee provided by the client and instead sought and obtained a delay in payment of the filing fee. When the court noted an irregularity in the signatures on court documents (forged by Tarletz), the court set a hearing. Tarletz did not appear at that hearing. Tarletz was found in violation ERs 3 3, 3 4, and 8.4.

Count Two involved a personal injury claim where Tarletz failed to diligence pursue her client's personal injury claim and failed to keep the client reasonably informed about the status of the case Tarletz's conduct resulted in a statute of

limitations lapse on her client's case. Tarletz was found in violation ERs 1 3, and 1 4. Tarletz also failed to cooperate with the State Bar in its investigation and proceedings in her case.

The following five aggravating circumstances were noted

Standard 9 22(c) — Pattern of misconduct,

Standard 9 22(d) — Multiple offenses,

Standard 9 22(e) — Bad faith obstruction of the disciplinary process;

Standard 9 22(g) — Refusal to acknowledge wrongful nature of conduct, and

Standard 9 22(h) — Vulnerability of victim.

No mitigating facts were found for Complaint 2. Disbarment was ordered by the Court. *Standard* 6 1 was implicated based on Tarletz's submission of the false/forged document to the court.

Matter of Savoy. In *Matter of Savoy,* 181 Ariz 368, 891 P.2d 236 (1995), Savoy was found to be in violation of ERs 3.3(a), 8.4(b), (c) and (d) and Rule 51(a). Savoy received a two-year suspension Savoy was convicted of one count of perjury, based on a statement he made while testifying before the Arizona State Grand Jury in October 1990 Savoy lied when he indicated to the Court that he didn't have certain records but upon the search of his law offices, pursuant to a search warrant, those records were found. There were no aggravating factors found. Many mitigating factors were found which resulted in the suspension and not disbarment.

Matter of Lourdes Lopez. In the *Matter of Lourdes Lopez*, DC No 04-2051, SB-07-0139-D (2007), Lopez was found in violation of ERs 3.4(c), 8 4(b), 8.4(c), 8 4(d), and Rule 53(c) While employed as a deputy county attorney, Respondent engaged in felony criminal behavior and ultimately pled guilty to interfering with the DEA's investigation of this matter Lopez made misrepresentations to the State Bar, local police, federal investigaters, her supervisors and the court. She also intentionally violated a court order

The following six aggravation circumstances were noted:

Standard 9 22(b) — Dishonest or selfish motive;

Standard 9 22(c) — A pattern of misconduct;

Standard 9 22(d) — Multiple offenses,

Standard 9 22(f) — Submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

Standard 9 22(i) — Substantial experience in the practice of law[14], and

Standard 9 22(k) — Illegal conduct, including that involving the use of controlled substances.

The following five mitigation circumstances were noted:

Standard 9 32(a) — Absence of a prior disciplinary record;

Standard 9 32(c) — Personal or emotional problems,

Standard 9 32(g) — Character or reputation,

Standard 9 32(k) — Imposition of other penalties or sanctions, and

Standard 9 32(l) — Remorse

The mental state for Respondent Lopez' violations was that of "intentional and "knowing". Her actions caused actual or potential injury.

Matter of Wagner. In the *Matter of Wagner,* DC No 04-1678., SB-05-0175-D(2005), the Respondent was found in violation of ERs 1.4, 3.2, 3.4, 5 5, 8.1, 8.4(d) and Rule 53(c), (d) and (f). There, Respondent engaged in the unauthorized practice of law while summarily suspended for failure to comply with Rule 45, Mandatory continuing Legal Education requirements. Respondent appeared in court representing a father in a child-dependency case while suspended, and failed to obey a court order. She also abandoned her law practice and failed to cooperate with the State Bar's investigation

The following six aggravating circumstances were noted.

Standard 9 22(c) — A pattern of misconduct,

Standard 9 22(e) — Bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency;

Standard 9 22(g) — Refusal to acknowledge wrongful nature of conduct;

Standard 9 22(i) — Substantial experience in the practice of law; and

Standard 9 22(j) — Indifference to making restitution

Only one mitigating circumstances was noted, i e ,

Standard 9 32(k) — Imposition of other penalties or sanctions.

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[14] Respondent was admitted to the practice of law on October 18, 1997 The violations began in June of 2001 The latest violation was in 2004

The mental state for Wagner's violations was that of "knowing". Her actions caused actual or potential injury Wagner was disbarred

Matter of Anderson. The *Matter of Anderson*, DC No 99-1378, SB-02-0006-D was also considered. There, Respondent engaged in the unauthorized practice of law while summarily suspended for his failure to comply with Rule 45, Mandatory continuing Legal Education requirements. Anderson represented individuals in negotiations with insurance companies. Anderson also overdrew his client trust account and commingled funds. the Respondent was found in violation of ERs 1.15, 3.4(c), 5 5(a), 8 4(c), Rules 31, 43, 44, and 46 of the Rules of the Supreme Court

Anderson had four aggravating factors, to wit

Standard 9 22(b) — Dishonest or selfish motive;

Standard 9 22(c) — A pattern of misconduct,

Standard 9 22(g) — Refusal to acknowledge wrongful nature of conduct,

Standard 9 22(i) — Substantial experience in the practice of law

There was one mitigating factor noted

Standard 9 32(a) — Absence of a prior disciplinary record

The mental state for Respondent Anderson's violations was that of "knowing" His actions caused potential injury.

Respondent Anderson was disbarred.

RECOMMENDATION

The objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity *Matter of Horwitz,* 180 Ariz 20, 29, 881 P.2d 352, 361 (1994)

Respondent's intentional filing of the false affidavit with the Supreme Court was an egregious and shameless attempt to circumvent the disciplinary oversight of the bar In *Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989), the Supreme Court discussed a similar act of submitting a false affidavit to the State Bar. There, "Count 5 alleged that, in an attempt to justify his failure to respond timely to the complaint, respondent prepared and filed a false affidavit with the State Bar, in violation of ER 8 4(c) " *Id* , 330-331, 776-777. The Court concluded, "The allegations contained in Count 5 were established by clear and convincing evidence and are, standing alone, sufficient to warrant respondent's disbarment " *Id* , 335, 781

Fresquez, like the Respondent's matter, were both attempts to circumvent the oversight authority of the Supreme Court and the discipline process.

By and large, the law is a self-regulated profession *In re Stout*, 122 Ariz. 503, 596 P 2d 29 (1979) That self-regulation applies to each individual member, just as it does the profession as a whole. Unfortunately, Respondent, although a brilliant attorney, seems incapable of regulating his conduct to fit the requirements of this self-regulated profession His conduct is repetitive and not self-correcting The

presumptive sanction calls for disbarment The six aggravating circumstances far outweigh the two mitigating circumstances. Disbarment is appropriate

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this hearing officer makes the following recommendation.

1. That Respondent should be disbarred from the practice of law.

2 Respondent should pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 18th day of September, 2008.

Neal C. Taylor
Hearing Officer 8I

Original filed with the Disciplinary Clerk
this 18th day of September, 2008.

Copy of the foregoing mailed
this 18th day of September, 2008, to

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