BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA,	)	File No. 07-0169
GEORGE VICE, Bar No. 011753	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

1. Respondent is a lawyer who was licensed to practice law in the State of Arizona, having first been admitted to practice in Arizona October 24, 1987. Pursuant to an order of the Supreme Court of Arizona, Respondent was suspended from the practice of law on June 18, 1998. Pursuant to an order of the Supreme Court of Arizona, Respondent was reinstated on March 17, 1999.

2. Pursuant to an order of the Supreme Court of Arizona, Respondent was again suspended from the practice of law on October 11, 2001. Pursuant to orders of the Supreme Court of Arizona, Respondent's suspension was extended on December 23, 2003, and again on April 26, 2004.

3. Since April 26, 2004, Respondent has not applied for reinstatement and Respondent remains suspended from the practice of law as of the date of these proceedings.

4. Probable cause was found in this matter on September 4, 2007, and a Complaint was filed on December 28, 2007. The Complaint was served on the Respondent by certified mail on January 2, 2008. Respondent filed his answer on January 22, 2008.

5. The matter was originally assigned to Hearing Officer 7W on January 24, 2008, and a notice of transfer was filed on January 29, 2008. This matter was reassigned to the undersigned Hearing Officer on February 7, 2008. An Initial Case Management Conference was held on February 15, 2008, and the matter set for final hearing on March 24, 2008. A contested final hearing started and concluded on March 24, 2008.

FINDINGS OF FACT

Summary of Facts:

6. In this one count Complaint, the State Bar claims that the Respondent used and revealed information relating to his representation of Kim Nichols against her. It is also alleged that Respondent practiced law in the State of Arizona in violation of his suspension, made false representations to a tribunal, made false statements of material fact to the State Bar, engaged in conduct that was prejudicial to the administration of justice, and Respondent failed to abstain from offensive personality, all in violation of the Rules of the Supreme Court.

COUNT ONE

7. In July of 2005, attorney Steven L. Tunney represented plaintiff Kim Nichols against defendant ILX Resorts Inc. The matter went to arbitration and Ms.

Nichols was awarded $12,356.27 on December 1, 2006 (Joint Prehearing Statement "JPS" p. 2:9).[1]

8. Ms. Nichols and Respondent had previously been friends and Ms. Nichols complained to Respondent about Mr. Tunney's representation in November 2006 (JPS p. 2:23). Ms. Nichols asked Respondent to assist her if he could (JPS p. 3:3).

9. Respondent was clear to Ms. Nichols from the start that he was suspended from the practice of law and that regardless of what Respondent might tell her, Ms. Nichols should rely on what her attorney told her (T/R p. 50:24 – 51:5).

10. Mr. Tunney sent Ms. Nichols his evaluation of the case and the prospect of a successful appeal on December 6, 2006. On December 7, 2006, Ms. Nichols retained Respondent's services at the rate of $100.00 per hour and one 10 pack carton of Marlboro cigarettes (JPS p. 3: 1-6).

11. Respondent indicated to Ms. Nichols that he felt that his services were going to total at least $1,500.00 and repeatedly sought Ms. Nichols assurances during the early weeks of December that she would be able to afford to pay him. Ultimately, Ms. Nichols asked Respondent if she could pay for his services as they were rendered instead of paying a retainer, to which Respondent agreed (JPS p. 3:15-20).

12. On December 22, 2006, Ms. Nichols and Respondent met with Mr. Tunney at his law offices to discuss her case. Respondent was clear with both Ms. Nichols and Mr. Tunney that he was a suspended member of the State Bar of Arizona (JPS p. 3:20- 4:2 and T/R p. 25:1 – 11, T/R p. 54:19 – 23 & T/R p. 103:13 - 14).

[1] Citations to the Joint Prehearing Statement cite to the facts that are stipulated to by both the State Bar and Respondent.

Respondent left the meeting with Mr. Tunney with the impression that he could to work for Ms. Nichols as Mr. Tunney's law clerk.

13. After the meeting on December 22, 2006, Respondent conducted legal research, and e-mailed Mr. Tunney information and authorities concerning legal issues in the case. (JPS p 4:5-18, Hearing Ex. 6). In this e-mail Respondent stated the following: "As we agreed, my communications with you relating to your representation of Ms. Nichols and/or Infinite Impressions, LLC are done as your law clerk."

14. On December 26, 2006, Ms. Nichols sent Respondent an e-mail asking him to stop his work on her behalf. On December 27, 2006, Respondent responded to the e-mail explaining the time that he had spent on her behalf, and thereafter Ms. Nichols continued to send information about the case to the Respondent (JPS p. 4:25- 5:3, Hearing Ex. 5, T/R p. 58:17 –p.60:20).

15. On December 28, 2006, Respondent sent Ms. Nichols an e-mail with a copy to her attorney discussing some of the timelines regarding an appeal (Hearing Ex. 4).

16. On January 1, 2007, Respondent e-mailed to Mr. Tunney, with a copy to Ms. Nichols, a template outline of a draft first amended complaint with cause of action headings sounding in promissory fraud; civil racketeering; negligent misrepresentation; breach of contract/breach of the implied covenant of good faith and fair dealing; and punitive damages.

17. On January 1, 2007, Mr. Tunney e-mailed Ms. Nichols a memorandum dated December 28, 2006, which summarized his negative perspectives regarding a possible appeal and trial de novo, announcing that he would be withdrawing in 30

days, and offering a compromise on his outstanding fees. Significantly, Respondent was not copied on this e-mail (JPS p. 5:16, Hearing Ex. 44). Ms. Nichols sent Respondent a copy of Mr. Tunney's email.

18. Respondent sent Mr. Tunney, with a copy to Ms. Nichols, two e-mail communications on January 2, 2007. In addition to attacking Mr. Tunney's competence, analysis and morals, Respondent included the following in his e-mails:

"Unless you have some solid reason to conclude otherwise, I believe the information that you, Kim and I share while I was preparing for and acting as your de facto law clerk is covered by the attorney-client privilege. You have not claimed that I can no longer act as your law clerk in assisting you in cleaning up the mess you made of Kim's case, but I will assume immediately following my sending of this e-mail that such will be your direction and therefore will not communicate with you further after this e-mail.

I read your analysis... Quite frankly, I am surprised that you would write such a "CYA" document after our frank discussion in your offices on December 22, 2006. In any event, while I naturally will defer to whatever decision Kim makes regarding whether to appeal, I think you know that your analysis is substantially flawed and result oriented against an appeal. I blame you legally and morally for adopting such a course of action." (Hearing Ex. 1 Bates Stamp # 0009)

19. Mr. Tunney did not respond to any of Respondent's e-mails, and it is clear from the language of Respondent's January 2, 2007, e-mail to Mr. Tunney that Respondent no longer considered himself working under the supervision of Mr. Tunney.

20. Respondent advised Ms. Nichols to seek a full refund of Mr. Tunney's fees. On January 3, 2007, Respondent drafted a response for Ms. Nichols to Mr. Tunney's January 1, 2007, e-mail which, after some prompting by Respondent, she then

sent on to Mr. Tunney as her own on January 4, 2007, (JPS p.8:1-5, Hearing Ex. 8, T/R p. 34:1 – 37:20).

21. Respondent thereafter told Ms. Nichols that he would charge her $100.00 for using the letter and sent her a bill on January 4, 2007, (Hearing Ex. 11, BSN 00145-00146). Upon hearing of and receiving the bill for his services, Ms. Nichols felt "tricked", questioned Respondent's motives and decided that she did not want him to represent her any further. Ms. Nichols told Respondent that she wanted him to stop working on her case (JPS p 10:10-13, T/R p. 38:21 – 39:15).

22. Within a week, on January 10, 2007, Respondent filed suit in the Phoenix Justice Court against Ms. Nichols (amending it the next day) claiming in a seven page complaint the amounts of $1,000.00 for compensatory damages; punitive damages in the amount of $5,000.00; attorney's fees and costs; and post-judgment interest. The complaint against Ms. Nichols was based upon claims of Promissory Fraud/Punitive Damages; Negligent Misrepresentation; Breach of Contracts; Promissory Estoppel; Unjust Enrichment (Hearing Ex. 10).

23. After filing suit against Ms. Nichols, Respondent sent, on January 16, 2007, and again on January 18, 2007, e-mails (copies going to mutual friends) with attached pictures of a courtroom setting with Ms. Nichol's picture superimposed on a witness and text below (Hearing Ex. 59 & 60, T/R 162:1 – 163:25).

24. On or about February 4, 2007, the case filed by the Respondent against Ms. Nichols was settled by Ms. Nichols paying Respondent $1,350 for his work (JPS p. 10:19).

25. The primary issues of fact in this case are:

1) Whether Respondent engaged in the unauthorized practice of law;

2) Whether Respondent failed to follow the decisions of his client;

3) Whether Respondent revealed confidential client information;

4) Whether Respondent lied to the Disciplinary Authority and the Bar;

5) Whether Respondent engaged in Offensive personality.

The remaining allegations flow from these basic questions.

Unauthorized Practice of Law

26. As to the first issue, whether Respondent engaged in the unauthorized practice of law, much hinges on what Respondent believed and what Ms. Nichols and her lawyer, Mr. Tunney, said and believed.

27. There is no question that Respondent made it very clear to both Ms. Nichols and Mr. Tunney that he was suspended and if he was to perform any work it must be under the supervision of an attorney, and to Ms. Nichols particularly, that she should not rely on Respondent's comments, opinions or advice but rather rely on her attorney. Therefore, everyone knew the ground rules and Respondent's status.

28. The State Bar alleges that there was never a meeting of the minds between Mr. Tunney and Respondent about Mr. Tunney's willingness to supervise Respondent so, therefore, anything Respondent did that involved giving legal advice was improper.

29. Respondent is adamant that Mr. Tunney agreed to let Respondent work on Ms. Nichols' case under Mr. Tunney's supervision. Ms. Nichols at first says that Mr.

Tunney agreed to let Respondent work under him, then later equivocates. Mr. Tunney's testimony leaves some question.

30. The Hearing Officer finds that Ms. Nichols' testimony is simply not reliable on this point. There was so much that she could not remember, and her misstatements to others leads this Hearing Officer to conclude that her testimony is not very reliable.

31. A review of Mr. Tunney's testimony shows that while he is firm that he never specifically authorized Respondent to act as his "clerk", there was a question. During the one and only meeting between the two on December 22, 2006, Mr. Tunney testified: that Respondent did most of the talking (T/R p. 103:7); that he, Mr. Tunney, "...made no decision there...[at the meeting]" (T/R p. 105:4); and after the meeting decided that Respondent was not someone he "...would socialize with, particularly like, and probably wouldn't work with particularly well" (T/R p. 107:1 – 4). Mr. Tunney had no further communication with Respondent and did not respond to Respondent's e-mails.

32. From Respondent's e-mails to Mr. Tunney after the meeting, it was clear that Respondent felt that there was a meeting of the minds, and to Respondent Mr. Tunney's silence was acquiescence. However, at the time that Respondent sent Mr. Tunney the two January 2, 2007, e-mails wherein he derided Mr. Tunney and concluded that Mr. Tunney no longer wished to have the association, it was clear to everyone, including Respondent, that Mr. Tunney was no longer "supervising" him (Hearing Ex.45 & 46).

33. The focus then shifts to what Respondent did after January 2, 2007, that could be considered practicing law. On January 3, 2007, Respondent sent to Ms. Nichols a detailed memo on legal issues that he proposed that she send to Mr. Tunney to get Mr. Tunney to change his mind regarding the merit of appealing her arbitration award (Hearing Ex. 47). There is no question but that this memo contains legal arguments and information that are legal arguments on behalf of Ms. Nichols. After multiple urgings by Respondent, Ms. Nichols sent the memo to Mr. Tunney on January 4, 2007, as "her own" (Hearing Ex. 48). A January 4, 2007, e-mail (Hearing Ex. 49), and another e-mail that same date (Hearing Ex. 50) from Respondent to Ms. Nichols making further suggestions also was clearly legal advice.

34. It was after the Respondent gave Ms. Nichols a bill for $100 for the preparation of the January 4, 2007, memorandum that their relationship fell apart and he then sued her for his fees a week later on January 10, 2007.

35. Given this factual setting, this Hearing Officer finds that the State Bar has not proven by clear and convincing evidence that up to January 2, 2007, Respondent engaged in the unauthorized practice of law. Respondent was very up front and honest about his suspension, that Ms Nichols should not rely on his advice, and the need for him to act under the supervision of a licensed attorney. Perhaps Respondent was overly optimistic to think that Mr. Tunney simply could not resist Respondent's assistance, and certainly should have had a clearer understanding. On the other hand Mr. Tunney should have responded when he

had decided **after** the meeting not to use Respondent's services and that Respondent was in error to assume that there was a professional relationship.

36. Respondent's actions after January 2, 2007, constitute the unauthorized practice of law. Not only was the January 4, 2007, e-mail (and subsequent memos) that he prepared a memorandum containing legal citations and arguments that urged a certain course of action in a legal matter, Respondent was very persistent in urging Ms. Nichols to send it to Mr. Tunney and then charged her for it. It was Ms. Nichols' refusal to pay Respondent for the memo and his previous work that precipitated his suit against her.

37. While Respondent could arguably claim that his work before the January 2, 2007, e-mail was done under the aegis of Mr. Tunney, that tie was clearly over after January 2, 2007, and the January 4, 2007, memo and follow-on memos constitute the unauthorized practice of law.

38. In that the unauthorized practice of law allegation has been proven, our attention then turns to the allegations that Respondent lied to the Bar and the Discipline Authority regarding his working under Mr. Tunney. This Hearing Officer must conclude that Respondent understands the limits of what he can and cannot do while under suspension as he was so thorough in telling all parties of the limitations his suspension caused. By Respondent's own words, his January 2, 2007, e-mail acknowledged that there was no longer any relationship with Mr. Tunney and yet he thereafter performed legal work for Ms. Nichols. While Respondent may have gotten caught up in the moment of his intense criticism and judgment of Mr. Tunney, that is not an excuse allowing him free reign to give

legal advice and then try and cover it by insisting that Ms. Nichols put her name on the January 4, 2007, e-mail and send it on.

39. Respondent knew that after January 2, 2007, he had no relationship with Mr. Tunney, that he gave Ms. Nichols legal advice after that date, and yet told the Bar and this Hearing Officer that he was supervised by Mr. Tunney. This is no mistake or negligent error. Respondent tried to mislead and was not honest with the Bar and this Hearing Officer about his misconduct.

Failing to Follow Client Decisions

40. This allegation is somewhat ambiguous. The Hearing Officer assumes that this allegation refers to Ms. Nichols' requests to have Respondent stop working on her case. The evidence was that although Ms. Nichols did ask Respondent to stop working on her case, after they talked about her concerns, she kept sending material to Respondent to review and respond to. It is also clear that Ms. Nichols expected Respondent to essentially work free of charge and whenever he raised the issue of being paid, she wanted him to stop. Once Respondent backed off of his demand to be paid, Ms. Nichols started sending him material to read. This allegation was not proven by clear and convincing evidence.

Revealing Confidential Client Information

41. This allegation is that Respondent revealed information about the case to their mutual friends, Scott Lang and Sandy Dolan, and Respondent's Sister Staci Vice (Respondent refers to her as his proofreader).

42. From the testimony of Ms. Nichols, she spoke to their mutual friends Sandy Dolan and Scott Lang (before the Respondent) about the case and her problems with Respondent (T/R p. 82:19 – 83:3 & 195:1 – 6 & 47:3). Later, after the billing dispute fully blossomed, Mr. Lang tried to mediate the dispute between Ms. Nichols and Respondent (T/R p. 197:5 – 199:7). According to Ms. Nichols' testimony, talking to Scott Lang is like talking to Sandy Dolan, that they are "one entity" (T/R p. 46:13 – 47:4). Therefore Ms. Nichols initiated the conversation with the mutual friends and essentially dragged them into the dispute. Once involved, Mr. Lang tried to mediate the dispute and had to be told of the details. There was also no evidence that Respondent's sister, Staci Vice, is not his proof reader.

43. The State Bar has not proven this allegation by clear and convincing evidence.

Offensive Personality

44. Rule 41(g) states that a lawyer should abstain from all offensive personality. The Hearing Officer noted the Respondent to be a very intense person who had to be admonished at least once during the hearing to stop acting aggressively toward a witness (T/R p.93:4 – 14). Respondent also thinks very highly of himself and his legal skills, touting them and his accomplishments many, many times in pleadings and e-mails. While such conduct is not very impressive, professional or endearing, it is not particularly noteworthy or offensive. However, the way Respondent refers to his client pushes the boundaries of acceptable conduct. Below are some of Respondent's comments made mostly in e-mails to Ms. Nichols.

45. Of Ms. Nichols, he referred to her as:

"cheap fraudfeasing ingrate" (Ex. 15, T/R p. 158:1

"thoughtless ingrate" (Ex. 56, T/R 159:15)

"poor home training" (Ex. 56, T/R 159:22)

"you numbskull" (Ex. 56, T/R 159:25)

"simply a cheap lying, immature person" (Ex. 56, T/R 160:3)

"missing uncommunicative deadbeat" (Ex. 56, T/R 160:6

"little weasel" (Ex. 59, T/R 162:1)

"a stubborn rogue ant" (Ex. 60, T/R 166:16)

"stubborn lying jerk" (Ex. 65, T/R171:3)

"boneheaded" (Ex. 66, T/R 66)

"the dictionary you used was too small, as are most things about you" (Ex. 62, T/R 169:16)

46. Added to this are Exhibits 59 and 60 which are e-mails that Respondent sent to Ms. Nichols on January 16 and 18, 2007, respectively wherein he puts Ms. Nichol's face on a witness in a picture of a courtroom with added derogatory text to try and intimidate her. When the language of these two e-mails, together with the pictures and the language of e-mails from Respondent to Ms. Nichols on January 15, 2007, [two], (Ex. 56 and 58); again on January 18, 2007, [two more], (Ex. 61); January 21, 2007, (Ex. 63); and January 30, 2007, (Ex. 65) there is no escaping that Respondent evidences language, behavior and conduct that is both

unprofessional and offensive. Respondent was clearly trying to intimidate and bully Ms. Nichols into doing what he wanted.

47. Respondent counters that the Bar let him get away with this kind of conduct previously and therefore is somehow estopped from objecting now. Several times during this process Respondent tried to get into a previous complaint against him for what he termed similar behavior. That complaint was apparently ultimately dismissed. This Hearing Officer refused to let Respondent justify his conduct in this action by what he may have done with other perhaps equally offensive parties in another action. Ms. Nichols may not have paid Respondent the way that he thought she should have, but she was not deserving of Respondent's childish diatribes.

48. Respondent first says that he was justified in speaking of his client this way (T/R p 232:7 – 14). Respondent then cites the First, Fifth and Fourteenth Amendments to the Constitution for the proposition that Rule 41(g) "offensive personality" prohibition is unconstitutionally vague. This Hearing Officer found no case law overturning Arizona's rule on offensive personality, but that is not the real issue here. If "offensive personality" was all Respondent was facing, perhaps it would be more important. However, Respondent has been found guilty of serious violations of the Attorney Discipline Rules. Respondent is on suspension status and has had other disciplinary problems. Given this history, the fact that Respondent acts and talks in an undignified, unprofessional, immature and bullying manner, in spite of his expensive education and claimed professional success, speaks volumes about Respondent's lack of respect for others, and his

general lack of any sense of his responsibility as a professional. This aspect of Respondent's conduct will be considered as an aggravating factor rather than a separate violation.

CONCLUSIONS OF LAW

49. The State Bar alleges, and the Hearing Officer finds by clear and convincing evidence that Respondent violated the following Rules and ER's:

Rule 31 (b) Unauthorized Practice of Law

Rule 31 (c) Restrictions on Suspended Member

Rule 42

ER 3.3 (a) Candor to Tribunal

ER 5.5 (a) Unauthorized Practice of Law

ER 8.1 (a) False Information to the Disciplinary Authority

ER 8.4 (d) Conduct Prejudicial to the Administration of Justice

ABA STANDARDS

50. 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 conduct; (4) the existence of aggravating or mitigating factors.

The Duty Violated

51. The Respondent violated his responsibility to the profession and his duty owed as a professional as set forth above. *Standard* 5.1, Failure to Maintain Personal Integrity, *Standard* 7.0, Duties Owed as Professional, and *Standard* 8.0, Prior

Discipline Orders, are the *Standards* that should be considered in deciding the duty violated and the appropriate sanction.

52. *Standard* 5.11 (b) states:

Disbarment is generally appropriate when: 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.[2]

53. *Standard* 5.13 states:

Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

54. *Standard* 7.1 states:

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

55. *Standard* 7.2 states:

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

[2] *Standard* 5.12 providing for suspension does not apply to these facts.

56. *Standard* 8.1 states:

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.

57. *Standard* 8.2 states:

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

The Lawyer's State of Mind

58. The evidence was clear and convincing that Respondent acted knowingly and intentionally as to all violations.

The Injury

59. The injury in this matter was real and potential. Although only the conduct by Respondent after January 2, 2007, is considered as actual unauthorized practice of law, the contents of the e-mails thereafter are similar to those that preceeded. By interjecting himself between Ms. Nichols and her attorney and giving Ms. Nichols legal advice, Respondent dragged the case out and prolonged not only the resolution of the case, he caused Ms. Nichols to incur more costs ($1,350 that she paid Respondent). Ms. Nichols was no better off from Respondent's efforts on her behalf. Respondent argues that Mr. Tunney reduced his fees because of Respondent's work. In his December 28, 2006, e-mail Mr. Tunney indicated that he would "compromise the amount" of his fees, but was adamant in his testimony

at the hearing in this matter that the reduction in his fees was due to his concern that it would be "wrong" for the attorney to get more than the client, and not as a result of Respondent's threats against him (T/R 114:17 – 117:3).

60. Respondent, in his testimony and in many e-mails, derided Mr. Tunney's work and feels very strongly that Mr. Tunney "blew" Ms. Nichol's case. While Respondent may or may not be correct about Mr. Tunney's work, the fact remains that Mr. Tunney is not suspended from the practice of law and Respondent is. Regardless of Respondent's evaluation of Mr. Tunney's legal performance, Respondent is not allowed to give legal advice and then charge for it.

61. Because the record is not clear on how much Mr. Tunney compromised his bill to Ms. Nichols, it cannot be determined how much Ms. Nichols is out of pocket after receiving the reduction, so calculating restitution is difficult.

62. There was also injury to the profession in that Respondent's conduct in interjecting himself between Ms. Nichols and her attorney, claiming to be superior in every way to Mr. Tunney, undermined Ms. Nichol's confidence in her attorney and interfered in the attorney client relationship.

63. There also was injury to the administration of justice (these proceedings) by Respondent being dishonest with the Bar and this Hearing Officer about his unauthorized practice of law.

Aggravating and Mitigating Factors

Aggravating Factors

64. *Standard* 9.22 sets forth aggravating factors to be considered and the Hearing Officer concludes that the following factors apply to this case:

65. 9.22 (a) Prior Disciplinary Offenses:

A) In SB-01-0128-D on September 11, 2001, Respondent was suspended from the practice of law for 6 months and a day for violating Rule 42, ER's 1.2 (scope of representation); 1.3 (diligence); 8.1(b) (failure to respond to disciplinary authority); 8.4 (criminal act reflecting on honesty, trustworthiness and fitness); 8.4(d) (conduct prejudicial to the administration of justice); Rule 51(a) (misdemeanor conviction); 51(h) (failure to respond to Bar inquiry); 51(i) (refusal to cooperate with the State Bar); 51(k) (willful violation of a court order).

B) In SB-01-2329 on December 23, 2003, Respondent (while suspended) was censured for violating Rule 42, ER's 5.5(a) (unauthorized practice of law); 7.1(a) (false or misleading communication about the lawyer's services); 7.5(a) (firm name or letterhead); 8.4(c) (misconduct: dishonesty, fraud, deceit or misrepresentation).

C) In SB-02-0007-D on April 26, 2004, Respondent had his suspension extended from six months to one year for violating Rule 51(f) and 51(j) for failure to comply with his MAP contract in another matter.

D) In SB-07-0145-D on August 23, 2007, Respondent was suspended for three months for violating Rule 42, ER's 3.5(d) (engaging in conduct likely to disrupt a tribunal); and 8.4(d) (engaging in conduct that is prejudicial to the administration of justice).

66. 9.22(b) Dishonest or Selfish Motive:

Respondent was not honest when he represented to the Bar and this Hearing Officer when he claimed that he was supervised by Mr. Tunney after January 2, 2007.[3]

67. 9.22(f) Submission of False Statements During the Disciplinary Process:

Respondent was not honest when he represented to the Hearing Officer that he was supervised by Mr. Tunney after January 2, 2007.

68. 9.22(g) Refusal to Acknowledge the Wrongful Nature of Conduct:

Respondent is adamant that what he did was proper.

69. 9.22(i) Substantial Experience in the Practice of Law.

Respondent was admitted to the practice of law in 1987.

Mitigating Factors

70. Respondent submits that there are four mitigating factors. However, after reviewing the evidence, the Hearing Officer cannot agree. Respondent cites *Standard* 9.32(b) (absence of dishonest or selfish motive) because he did substantial work and charged her "a mere total of 2.7 hours on 8.1 hours work..." (Respondent's Closing Memorandum p. 13:10). While this Hearing Officer did not find that there was clear and convincing evidence that Respondent was not acting under the supervision of Mr. Tunney prior to January 2, 2007, that is not to say that there was any evidence that Respondent's work on behalf of Ms. Nichols directly helped her. When it is also considered that Respondent knew that Ms.

[3] The Hearing Officer reviewed what he could about Respondent's prior discipline history to try and ascertain whether 9.22(c), pattern of misconduct, was applicable. While there was a prior unauthorized practice of law charge, it did not appear to be similar in nature to the facts of this case.

Nichols was of limited means and yet was paid by Ms. Nichols $1,350 as a result of his suit against her, it is hard to consider this as a mitigating factor.

71. Respondent also claims that he made voluntary disclosure and was cooperative. There was simply no evidence of this. Respondent's failure to be honest with the Bar regarding his supervision after January 2, 2007, must be considered as at least failure to cooperate.

72. Finally, Respondent cites character and reputation under *Standard* 9.32(g). Respondent brought no witnesses and no letters from other attorneys or former clients attesting to his claimed good work and contributions. Something more is required than just Respondent's recitation of what he thinks his character and reputation is, and that is independent verification. There simply was no verification of Respondent's claims and it is not the responsibility of the Hearing Officer to go out and verify what Respondent says he has done.

PROPORTIONALITY REVIEW

73. The Supreme Court has held that, while the discipline in each case should be tailored to fit the facts of the case, it is also the aim of discipline that the discipline imposed be consistent in cases with similar facts. *In re Wines,* 135 Ariz. 203, 660 P.2d 454 (1993), and *In re Wolfram*, 174 Ariz. 49, 847 P.2d. 94 (1993).

74. The cases proposed by Bar Counsel in its Post Hearing Memorandum were not particularly helpful because they were not on point for the violations found by this Hearing Officer. What we have in this rather unique case is a suspended lawyer with a long history of not following the rules; who gave legal advice; was very

offensive when his "client" did not pay him; was not honest with the Bar or in these proceedings about his conduct; and refuses to acknowledge any wrongdoing whatsoever.

75. This Hearing Officer reviewed many years worth of Unauthorized Practice of Law (UPL) cases and noted that they fell generally into two categories. Those cases where a lawyer was summarily suspended for dues or MCLE violations and then practiced law almost always resulted in a censure and probation. See: Howell SB-07-0014-D; Fieger SB-07-0048-D; Bayless SB- 04-052-D; Rodgers SB-04-0136; Blake SB-03-0022-D; Brown SB-03-0143-D.

76. Then there were those cases where the lawyer was suspended and then not only practiced law but also committed some other disciplinary violation. In these cases the lawyer received a suspension or disbarment: See Schafer SB-06-0156-D suspended and failed to notify clients, UPL, then failed to respond to the Bar, sanction was 120 day suspension; Wagner SB-05-1075-D suspended for MCLE violation, then UPL and subsequently abandoned her law practice, sanction was disbarment; Turley SB-04-0089-D while suspended UPL, then neglected a case, sanction was 2 year suspension; Musselman SB-02-0148 while suspended UPL, then refused to cooperate, sanction was 90 day suspension.

77. In almost every one of these cases the conduct that was considered to be the unauthorized practice of law was much more extensive than Respondent's conduct herein. So while we have fairly minor "legal" conduct by Respondent, he has been charged with UPL before and has extensive experience with the

disciplinary process. That is a unique set of factors that make proportionality very difficult.

DISCUSSION

78. When we turn to the American Bar Association *Standards* recited above, we note that the difference between disbarment and censure under 5.1 is whether Respondent's conduct in misrepresenting to the Bar and these proceedings that he was supervised by an attorney post January 2, 2007, "seriously adversely reflects on the lawyer's fitness" (5.11(b) disbarment), or merely "adversely reflects on the lawyer's fitness to practice law (5.13 reprimand)."

79. Regarding Respondent's UPL under *Standard* 7.0, we note that the difference between disbarment and suspension is whether the lawyer intended to obtain benefit and the nature of the injury to the client, the public, or the legal system. If the lawyer intended to obtain a benefit (get paid) and the injury is "serious" or potentially "serious" then the sanction is disbarment (7.1). Suspension is warranted if there is actual or potential "injury" (7.2).

80. Also regarding Respondent's violation of his order of suspension by UPL, *Standard* 8.1 provides that disbarment is appropriate if a lawyer 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 that suspension is appropriate when a lawyer has been REPRIMANDED for the same or similar conduct and engages in further acts of misconduct, etc.

81. So, does Respondent's misrepresentation conduct "seriously" adversely reflect on his fitness to practice law; was the UPL intended to benefit the attorney and was the injury to the client or the profession "serious" or not; finally was Respondent's misconduct similar to what he had previously been suspended for?

82. This hearing officer must conclude that based on the Respondent's prior disciplinary history he has learned little or nothing about setting boundaries. In spite of his history, one that would make most any thoughtful person with even a modicum of insight and self awareness not go anywhere near the minefield of Ms. Nichol's case, Respondent was so overcome by his own judgment that he could out-lawyer Mr. Tunney, that he barged ahead and then had to try and cover his tracks by misrepresenting the nature of his relationship after January 2, 2007. This lack of judgment "seriously" adversely reflects on Respondent's fitness to practice law.

83. Respondent's action in giving Ms. Nichols legal advice in a memo, as opposed to appearing on her behalf in court is, in relation to other unauthorized practice of law cases, not very egregious. On the other hand this is not the first time Respondent has been before the disciplinary process for the unauthorized practice of law. This Hearing Officer could find nothing in the cases reviewed that would give guidance as to the difference between "serious" and not serious. This Hearing Officer cannot say that Respondent's conduct was "serious". Ms. Nichols did not act on Respondent's memo for whatever reason. Certainly there was the potential for serious consequences, but Respondent took it no further. This

Hearing Officer concludes that these facts more properly fit under *Standard* 7.2, suspension, than under 7.1, disbarment.

84. Regarding Respondent's violation of his order of suspension by engaging in UPL, and being misleading to the Bar and these proceedings, Respondent was previously suspended in SB-01-0128-D for violating 8.4(d), conduct prejudicial to the administration of justice, and in SB-03-121-D censured for violating 8.4(c), conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent has been found to have committed similar violations in the case at hand. Under this history either suspension or disbarment could be justified.

85. What tips the decision against suspension and in favor of disbarment are the aggravating factors and Respondent's consistent reaction to the Bar's efforts to get him to follow the rules. While this Hearing Officer respects Respondent's intellect and the passion that drives him, he lacks the key ingredients of restraint, perspective, propriety and what it means to be a professional. Without those, instead of reasoned debate, Respondent acts with imperious disdain for anyone that disagrees with him and then his aggression kicks in and he not only breaks the rules, he justifies his misconduct by blaming others. (See the last sentence of Respondent's Post Hearing Memorandum.)

86. Reviewing Respondent's conduct in his other disciplinary matters, the language that he uses to assess Mr. Tunney's work and his emails in this matter describing Ms. Nichols, one comes away with the firm belief that Respondent is either a troubled person or an intellectual bully that refuses to acknowledge or learn that

there are boundaries defining what it means to be a professional in general and a lawyer in particular.

87. Were this Respondent's first disciplinary matter, there might be the possibility that counseling and MAP (which Respondent rejected in a previous matter SB-02-0007) could help Respondent. However, as pointed out previously, Respondent has now been suspended for over six years and yet still breaks the rules, acts aggressively when he perceives a challenge and perhaps worst of all uses other's actions as an excuse for his misconduct. Respondent's stunning lack of personal insight is both sad and tragic. At the end of the hearing in this matter this Hearing Officer confronted Respondent with his offensive behavior hoping to get some insight into why Respondent acts the way he does, and also hoping that Respondent might take the opportunity to show awareness that he steps over the boundaries of professional behavior (T/R p. 229:13 – 232:14). Instead Respondent said he was justified in his remarks about both Ms. Nichols and Mr. Tunney. Result: no insight and no awareness.

88. If Respondent has not come to the realization after six years of suspension and multiple violations and sanctions that the problem is his and not everyone else's, he probably never will.

RECOMMENDATION

89. After considering Respondent's misconduct in this matter, his discipline history, other similar cases, the ABA *Standards* and weighing the aggravating factors, this

Hearing Officer concludes that Respondent's misconduct in this matter merits disbarment and recommends to the Commission that Respondent be disbarred.

DATED this 28th day of May, 2008.

H. Jeffrey Coker /M/M
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 28th day of May, 2008.

Copy of the foregoing mailed
this 29th day of May, 2008, to:

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