BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JEFFREY PHILLIPS, Bar No. 013362,** **ROBERT ARENTZ, Bar No. 005376** **DAVID DE COSTA, Bar No. 020139** RESPONDENTS.	)	Nos. 05-1161, 05-1888, 06-1137, 06-1138, 06-1212, 06-1582, 07-0085, 07-0176, 07-0177, 07-0178, 07-0231, 07-0232, 07-0239, 07-0275, 07-0278 07-0289, 07-0412, 07-0512, 07-0569, 07-0628, 07-0639, 07-0697, 07-0887, 07-0889, 07-0890, 07-0891, 07-0892. 07-0894, 07-0895, 07-1326, 07-1342, 07-1461, 07-1561 07-1601, 07-1885, 08-0397 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on October 17, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for review of the Hearing Officer's Report filed March 31, 2009, recommending dismissal for Respondent DeCosta, a 60 day suspension and two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP") with the same terms and conditions as set forth in the prior Judgment and Order ("Order") filed September 13, 2002, in File No. SB-02-0127-D (2002)[1] for Respondent Arentz, and a six month and one day suspension and two years of probation (LOMAP) with the same terms as set forth in the prior Order for Respondent Phillips, restitution and costs.

[1] The Hearing Officer included three additional terms of probation to the terms in the prior Order.

The State Bar and Respondents Phillips and Arentz filed objections and requested oral argument. Respondents filed two separate requests to continue oral argument, which the Commission granted. Respondents Phillips and Arentz, their counsel and counsel for the State Bar were present at oral argument.

Respondents argue the Hearing Officer committed two dispositive errors of law in his recommendation of suspension. First, they argue the Hearing Officer erred in holding that Respondents acted with a knowing mental state because, Respondents argue, that finding is inconsistent with his finding that their conduct complied with the "letter" of the 2002 consent decree. Respondents assert that if the firm complied with the letter of the consent decree, they cannot now be held to have committed knowing misconduct even if, as the Hearing Officer found, that Order did not sufficiently address the ethical issues at the firm. *See Matter of Van Dox*, 214 Ariz. 300, 152 P.3d 1183 (2007); *Matter of White-Steiner*, 219 Ariz. 323, 198 P.3d 1195 (2009).

Second, Respondents argue the Hearing Officer improperly applied a strict liability standard and ignored the "reasonable efforts" standard of Ethical Rules 5.1 and 5.3, by finding that the conduct of staff, which deviated from established firm policies, established a violation of ERs 5.1 and 5.3. Respondents assert that the Rule does not require perfection, does not impose the rule of strict liability and does not make managers and supervisors guarantors. *Matter of Miller*, 178 Ariz. 257, 259, 872 P.2d 661, 663 (1994).

Respondents argue the Commission should reverse the Hearing Officer's findings and conclusions they violated ERs 5.1 and 5.3 and that Respondent Arentz violated ER 1.5. Respondents contend their violations, if any, were negligent and if any sanction is warranted, at most it should be a censure.

The State Bar argues that this matter is not a probation violation and, therefore, the issue is not whether Respondents complied with the terms of the prior consent order. The State Bar notes regardless of that Order, Respondents had an ongoing obligation to supervise their employees to ensure compliance with the Rules of Professional Conduct. The State Bar asserts that Respondents circumvented the purpose of the 2002 consent order through various practices such as: maintaining a bonus system that in practice, unduly rewarded non-lawyer administrators based on clients retained; failing to require that the lawyer, which the consent order required, speak with every potential client at the retention stage, know enough about the practice area/legal issues involved to provide a meaningful consultation; and failing to ensure that firm administrators promptly honored clients' request to terminate the firm's representation and obtain a refund of unearned fees. The State Bar asserts that Respondents are arguing their compliance with the letter of the terms of the prior consent order immunized them from discipline. The Bar notes the violations at issue in this case occurred after the prior consent order was imposed and after the firm's participation in LOMAP had ended.

On its affirmative appeal, the State Bar argues the Hearing Officer erred in finding that Respondents' conduct did not cause serious or potentially serious injury. The State Bar maintains the applicable American Bar Association *Standards for Imposing Lawyer Sanctions* ("*Standards*") is *Standard* 7.1 and disbarment is the presumptive sanction, because Respondents' misconduct did cause actual injury and potentially serious injury to clients, the court and the legal system. The State Bar asserts Respondents knowingly and repeatedly allowed the ethical violations that the prior consent order intended to eliminate to occur without taking effective remedial measures. In addition, the State Bar argues the

Hearing Officer erred by not finding aggravating factor 9.22(c), pattern of misconduct, and by finding mitigating factors 9.32(g), character or reputation, and 9.32(j), delay in disciplinary process.

The State Bar asserts that Respondents Phillips and Arentz should receive suspensions of no less than two years; if not disbarment.

Decision

Having found no facts clearly erroneous, the eight members[2] of the Commission by a majority of six,[3] recommend adopting and incorporating by reference the Hearing Officer's findings of fact, conclusions of law, and recommendations.[4] The amounts of restitution and terms of probation which include the Hearing Officer's additional recommended terms are as follows:

Restitution

Thomas Gowin	$ 2,990.00
R. Uran	$ 6,000.00
Orlando Corral	$ 5,000.00
TOTAL:	**$13,990.00**

[2] Commissioner Horsley did not participate in these proceedings. Commissioners Belleau and Todd recused themselves. Former Commissioner Barbara Atwood participated as an ad hoc member. Ms. Elaine Sweet from Phoenix also participated as an ad hoc member.

[3] Commissioners Flores and Katzenberg agreed that the Hearing Officer's findings of fact are not clearly erroneous and should be adopted but concluded that a shorter term suspension for Respondent Phillips and Arentz would satisfy the goals of discipline. *See* dissenting opinion below.

[4] A copy of the Hearing Officer's Report is attached as Exhibit A.

Terms of Probation[5]

1. Probation is effective upon reinstatement and will be for a period of two (2) years. After a period of eighteen (18) months, the director of LOMAP may terminate the probation if the terms have been satisfied and additional probation is not necessary.

2. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

3. Respondents shall contact the director of LOMAP within 30 days from the date of the Order of Reinstatement[6] and shall schedule and submit to a LOMAP audit within 45 days thereafter. Following the audit, the director of LOMAP shall formulate and include recommendations based on the audit in a Probation Contract to be executed and implemented by the Respondents. The director of LOMAP shall also monitor the terms of probation.

4. Prior to entering into any written attorney/client fee agreement for the firm, an Arizona licensed attorney must speak with the client and approve the legal fees to be charged and retention of the firm by the client. The attorney meeting with a potential client must be knowledgeable in the practice area, and issues which relate to the retention and the retention decision must be discussed prior to a decision being made on the retention. Retention attorneys should review all paperwork and ensure that all appropriate information is given to the client even if the client lacks the sophistication or knowledge to ask the right questions.

---

[5] In addition to the terms and conditions set forth in the prior Order, the Hearing Officer included three additional terms of probation. *See* terms 4, 21 and 22. The Commission modified the terms slightly to make them simpler and easier to understand and omitted term 11 as set forth in the prior Order.

[6] The prior Judgment and Order provided that probation is effective the date of the final Judgment and Order.

5. Any non-attorney personnel conducting initial consultations with clients must clearly and affirmatively identify themselves as non-attorneys to prospective clients.

6. Respondents shall ensure that non-attorney staff shall not give legal advice to clients and shall not make predictions or guarantees as to the outcome of a case.

7. Standard intake forms including a standard fee agreement shall be utilized. The firm will participate in fee arbitration whenever it is requested by the client and the firm has been unable to resolve the fee dispute directly with the client.

8. A standardized training manual for intake procedures shall be provided to each intake employee.

9. Pursuant to ER 5.3, Respondent or other attorneys with supervisory authority in the firm (over whom the Respondents have direct control) will be responsible for compliance by all intake personnel and non-lawyer staff with the applicable ethical rules.

10. When accepting payment of a client's fees in a form other than cash, Respondents shall not accept payment without signed, written consent (which may be evidenced by a check, electronic signature, credit card authorization or other writing) from the party making the payment.

11. A one-time ethics training program, not to exceed three (3) hours, shall be given to all administrative staff including intake and collection personnel. The program shall be provided by the director of LOMAP or designee, and shall be given at a time(s) within the first six (6) months of the probationary term and in a manner that does not disrupt the firm's practice. The program may be repeated or additional programs may be given during the probationary period if needed as determined by the director of LOMAP. The

initial program shall be taped and shown to any new personnel hired during the probationary period.

12. A one-time Continuing Legal Education ("CLE") ethics program, not to exceed three (3) hours, shall be given to all attorneys employed by Respondent's firm. The program shall be provided by the director of LOMAP or designee, and shall be given at a time(s) within the first six months of probationary terms and in a manner that does not disrupt the firm's practice. The program may be repeated or additional programs may be given during the probationary period. The initial program shall be taped and shown to any new lawyers hired during the probationary period.

13. During the period of probation, the State Bar has the option of sending unidentified "testers" to the firm to test the firm's compliance with the required intake procedures. The methodology of such random testing will be reviewed and approved in cooperation with Respondents' counsel and shall be conducted no more than quarterly unless such testing indicated non-compliance. A written evaluation of the results of such test shall be promptly provided to Respondents. Respondents agree to pay for the reasonable costs associated with the probationary terms.

14. The firm shall utilize a fee review process, consistent with *In re Schwartz* and ER 1.5, at the conclusion of all cases in order to determine whether a refund is due. All attorneys and other billable staff members who work on criminal cases shall keep contemporaneous time records to enable the firm to conduct a "backward glance" at the conclusion of a case in order to determine whether a refund is due.

15. The firm shall provide a written accounting of time spent and fees incurred within fifteen (15) days of a request by a client. When a client terminates the firm's

representation in a criminal case and the firm has been permitted to withdraw by the court, the firm shall, within fifteen (15) days following receipt of the Order permitting withdrawal, provide to the client a written accounting of time spent, fees incurred and when appropriate, a refund of any unearned fees.

16. If Respondents use client testimonials in advertisements, the client must acknowledge in writing that he or she is not receiving any money benefit (or the equivalent) for the appearance.

17. Respondents shall develop a system in which they are promptly advised of all client complaints against the firm or lawyers employed by the firm, which implicate the provisions of ERs 5.1 and/or 5.3. Respondents shall document, in writing, his or the firm's response to each such complaint, and shall maintain a file of such complaints and responses.

18. Respondents shall make all reasonable and good faith efforts to ensure compliance with these probation terms and shall respond directly or through their counsel to inquiries concerning the implementation of and compliance with these probationary terms.

19. Prior to conducting a screening investigation into any new complaint(s) relating to practices covered by the Agreement, the State Bar, when appropriate and consistent with its normal practice, will first attempt to resolve the complaint(s) through A/CAP and Central Intake or will, when appropriate, consistent with its normal practice and pursuant to Rule 54(b)(1), Ariz.R.Sup.Ct., refer the matter to mediation. Nothing in this paragraph is intended to limit in any way the jurisdiction or power of the State Bar disciplinary agency.

20. Bonuses to legal administrators should not be based, in whole or in part, on the amount of clients retained, the amount of fees generated, the number of clients who cancel, or the amount of fees refunded.

21. The firm shall keep precise and accurate time records for all work done on a case.

22. In the event that Respondents fail to comply with any of the foregoing conditions, and the State Bar receives information thereof, bar counsel shall file with the imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing Officer shall conduct a hearing within thirty (30) days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by a preponderance of the evidence.

Discussion

The Disciplinary Commission reviews a hearing officer's findings of fact under a clearly erroneous standard. *See* Rule 58(b). Ariz.R.Sup.Ct. Its review of conclusions of law and mixed questions of fact and law is *de novo. State v. Altieri*, 191 Ariz. 1, 951 P.2d 866 (1997); *Park Central DevCo. v. Roberts Dry Goods*, 11 Ariz.App. 58, 461 P.2d 702 (1969).

The Hearing Officer found that Respondent Phillips violated ERs 5.1(a), 5.3(a) and 7.1 and Respondent Arentz violated ERs 1.5, 5.1(a), 5.3(a) and 5.3(b).

Rule 5.1(a) (Responsibilities of Partners. Managers, and Supervisory Lawyers) provides that:

> A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial

> authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Rule 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) provides with respect to a nonlawyer employed or retained by or associated with a lawyer that:

> A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

The American Bar Association's *Standards for Imposing Lawyer Discipline* ("*Standards*") define "knowledge" as the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular task. In considering the applicable mental state, the Hearing Officer properly considered the *Standards* and the fact that Phillips & Associates had been the subject of the prior Judgment and Order in File No. SB-02-0127-D (2002). *See* Hearing Officer's Report, p. 117.

The Hearing Officer found that Respondents did not intend to violate the Ethical Rules, but that their conduct was knowing. *Id.*, at 119. The Hearing Officer further found that Phillips and Associates complied with the "letter" of the prior Order, but had circumvented the Order's "spirit." *Id.*, at 118.

Given the prior consent order, the Hearing Officer was not persuaded by Respondents' assertions that they were "merely negligent in establishing their policies and practices . . . ." *Id.*, at 119. After carefully reviewing the lengthy factual record and the

Hearing Officer's detailed findings of fact, the Commission cannot say that factual finding was clearly erroneous.

The Hearing Officer's findings make it clear that his statement that Respondents complied with the "letter" while violating the "spirit" of the prior consent order was intended to summarize what he found was the net effect of the manner in which Respondents allowed the firm's policies to be implemented. The Hearing Officer found that, although Respondents could, in one sense, be said to have "complied" with the Order, in practice, they allowed its protections to be gutted. Thus, for example, he found that although Respondents implemented a system which required a lawyer consultation with every potential client before a retention agreement was signed, they allowed the system to be implemented so that a lawyer with no experience or training in criminal law could and did meet with a potential criminal defense client to deliver a pre-scripted five or ten minute "rap" designed to get the client and his or her money in the door. The Hearing Officer properly concluded that although, as implemented, that policy might, in a limited sense, be said to satisfy the Order, it could not be said to have satisfied Respondents' ethical responsibilities because the lawyer(s) lacked the experience and training needed to make the consultation meaningful.

The Hearing Officer found that the manner in which Respondents allowed the procedures required by the consent order to be implemented, in practice, eliminated any chance that the lawyer consultation would provide the protection it was designed to give the potential client. The lawyer's actual role was reduced to another part of the sales pitch, instead of a bulwark of professional protection. On this record, the Commission cannot conclude that the Hearing Officer's finding that Respondents acted knowingly, i.e., they

either knew that their actions violated the Ethical Rules or consciously disregarded a known risk that they would, was clearly erroneous.

In reaching this conclusion, the Commission carefully considered the Court's precedents on mental state. In *Matter of Van Dox*, 214 Ariz. at 305, ¶ 21, 152 P.3d at 1188 (2007), the Court held that for a Respondent's unauthorized practice of law to be knowing, the lawyer must be consciously aware her conduct constitutes the unauthorized practice of law. Similarly, in *Matter of White-Steiner*, 219 Ariz. 323, ¶ 15, 198 P.3d 1195 (2009), the Court held that for a lawyer's conduct to be knowing with regard to improperly handling client property, she must be consciously aware her conduct does not conform to the requirements of the ethical rules. Significantly, *White-Steiner* also noted that the *Standards* recognize an alternative mental state justifying suspension: under *Standard* 4.12, suspension is recommended when a lawyer "knows or should know" that he is dealing improperly with client property and causes injury or potential injury to a client.

In both *Van Dox* and *White-Steiner*, the Commission rejected the Hearing Officer's finding that the Respondent had acted negligently and concluded the conduct had been knowing. In both cases, the Court overruled the Commission, holding that the Commission had erred by failing to give sufficient deference to the hearing officers' findings that the respondent in each of those cases had acted negligently. In contrast, here the Hearing Officer found that Respondents acted knowingly. As the Supreme Court reminded us in *Van Dox* and *White-Steiner,* that finding is entitled to deference unless it is clearly erroneous. The Hearing Officer's detailed, specific findings amply support his determination that Respondents' conduct was knowing. *See* Hearing Officer's Report, p. 119.

With regard to the ER 5.1 and 5.3 violations, the Hearing Officer considered *Standard* 7.2 Violations of Other Duties Owed as a Professional, which 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.

The Hearing Officer found actual injury to clients and to the profession. *See* Report, p. 120.

Respondents seem to argue that if they complied with the literal terms of the prior consent order then they acted ethically even if their conduct otherwise violated the Rules. Unfortunately, Respondents continue to turn a blind eye to the manner in which they implemented the policies the consent order required. The duty imposed by ERs 5.1(a) and 5.3(a) to make "reasonable efforts" to ensure compliance with the Ethics Rules by one's employees requires ongoing proactive efforts. If, as here, the supervising attorney learns that the existing policies as implemented are not effective, different and/or additional measures must be taken. Respondents, however, continued with a course of conduct that vitiated the goals of the prior consent order.

The Dissent argues that out of 33,000 cases only 1% had "issues" and cite that statistic as evidence that Respondents did in fact comply with their ethical responsibilities. There are two problems with that analysis. First it ignores the Hearing Officer's findings which the Dissent acknowledges are not clearly erroneous and are entitled to substantial deference. The Hearing Officer expressly found that Respondents knowingly failed to satisfy those responsibilities.

Second, it equates a lack of Bar complaints with an absence of "issues." This case involves policies and procedures, not simply the conduct of individual employees in

individual cases. The disciplinary system only deals with specific complaints brought by individuals sufficiently motivated to contact the Bar with enough credible evidence to warrant an investigation. But just as we cannot assume the existence of additional "issues" in client representations not part of the record in this case, we cannot assume the flawed policies and procedures Respondents implemented worked to safeguard their clients in the other 33,000 cases. The record is silent in that regard, other than the evidence of how the system Respondents implemented worked in practice and the very real risks that posed to the firm's clients.

Based on the 2002 consent order, Respondents were on notice of the problems inherent in their firm structure and method of operation. Although Respondents did not intentionally set out to violate the Ethical Rules, they created and maintained a structure and mode of operation they knew was giving rise to continuing violations. The Hearing Officer found that Respondents knew their implementation, enforcement and oversight of the firm's stated policies were not enough to give reasonable assurance that employees would conform with the Rules of Professional Conduct. Those findings were not clearly erroneous and fully support the recommended sanctions.

In that context, the Commission notes that the Hearing Officer found mitigating factor 9.32(g) character or reputation, but the only supporting evidence in the record is Respondents' self-serving testimony. The record does not contain any other evidence, such as reference letters from community leaders, attesting to Respondents' standing in the community and no witnesses testified in support of Respondents' character or reputation. *See Matter of Brown*, 175 Ariz. 134, 845 P.2d 768 (1993). Although the Commission

questions whether Respondents' self-serving testimony is sufficient to support the Hearing Officer's finding on this point, it concludes that its absence would not affect the outcome.

Conclusion

Based on the facts in this matter and the relevant *Standards*, the Commission adopts the Hearing Officer's findings of facts, conclusions of law and recommendations.

RESPECTFULLY SUBMITTED this 14th day of December 2009.

Jeffrey Messing, Chair
Disciplinary Commission

Commissioners Flores and Katzenberg dissenting:

The Respondents' conduct warrant a sanction; however, it is difficult to justify the significant sanction recommended by the Hearing Officer and the Commission. Therefore, we respectfully dissent.

We agree with the Commission in that after carefully reviewing the lengthy factual record and the Hearing Officer's detailed findings of fact, we cannot find under a clearly erroneous standard that any of the Hearing Officer's factual findings were clearly erroneous. The Supreme Court has made it clear that the Commission must give "great deference" to a hearing officer's factual findings and may not reject them unless they are clearly erroneous. *In re Van Dox*, 214 Ariz. 300, 304, 152 P.3d 1183, 1187 (2007). We wholly recognize that we, the Commission, may not simply substitute our judgment for the hearing officer's nor independently make new or additional fact findings. Rule 58(b), Ariz.R.Sup.Ct. The Hearing Officer's findings have a reasonable basis in the record before the Commission and therefore, we are compelled to determine the appropriate sanction within those findings.

The Commission is to consider the Hearing Officer's recommendations for sanction and through *de novo* review makes its recommendation to the Supreme Court who is ultimately responsible for imposing such sanction.

The Hearing Officer considered over 10 days of testimony, 7 volumes of exhibits and 22 separate counts consolidated in one complaint. The sheer volume of information and testimony considered in this matter is extensive. However, in determining the appropriate sanction from this voluminous record, the actual violations attributable to the Respondents, as opposed to the firm, may have been lost. It is recognized that the firm of Phillips & Associates {"PA"} was not before the Commission for discipline. However, often it seemed the larger beast of the firm shadowed the actions of the individual Respondents, Arentz and Phillips. Multiple violations were found by the Hearing Officer as applied to the firm of PA.[7] However, as to Respondent Arentz violations were only found in counts 8, 9, 11, 12, 17, 19 and as to Respondent Phillips in counts 3, 4, 9, 11, 12, 19, 20.

Of the 22 separate counts, the Hearing Officer found no proven violation as to Arentz and Phillips on 12 of the 22 counts.[8] As to the remaining violations within various counts there were separate findings as to Arentz and Phillips for violations of E.R.s 1.5, 5.1(a), 5.3(a) and 5.3(b). Notably, there were multiple counts where a violation was found as to portions of the count against only one of the Respondents. The overriding violation, and the focus of the Hearing Officer and the Commission in determining the appropriate sanction, was E.R.5.1(a) and 5.3(a), in that both Arentz and Phillips, as supervising attorneys of a large firm, failed to make reasonable efforts to ensure the firm had in effect measures giving reasonable assurance that all lawyers in the firm conformed their conduct to

[7] Violations as to the firm of PA were found in counts 3, 4, 5, 6, 9, 11, 12, 19, 17, 21.
[8] Count 14 was dismissed.

the Rules of Professional Conduct and that all non-lawyers conduct was compatible with the professional obligations of a lawyer.

With minor exceptions as to matters directly handled by Arentz and Count 20, the Hearing Officer did not find that Phillips or Arentz had direct personal knowledge of any of the specific conduct giving rise to the specific allegations of the Complaint until after the conduct occurred. Phillips and Arentz are not being sanctioned for their personal actions as attorneys, but rather for the offending practice/procedures of the firm, which were implemented by Phillips and Arentz. Clearly, the most offensive practices revolved around retention practices and policies that the Hearing Officer found incentivized unprofessional behavior by legal administrators and impeded clients from obtaining necessary information from a competent attorney in the field of expertise related to the client's case. These practices are outlined in Counts 9, 11, 12, 17, and 19.

The number of cases handled and processed by PA is daunting. The Hearing Officer found that from 2004 – 2006 PA represented 33,000 clients in three areas of practice - criminal, bankruptcy, and personal injury. *See* Hearing Officer's Report, p. 5. PA employs 250 employees, including 38 attorneys. *Id.*, at 5. In the mass of 33,000 clients served over the period of time this complaint covers, there were only five clients where the policies and practices failed to reasonably assure these clients received the level of professional service demanded by our ethical rules. While it is true that every client, whether an attorney has one client or 1000, deserves quality ethical service, and that the numbers alone do not dictate whether or not Phillips and Arentz met their ethical obligations, we cannot ignore these numbers when determining whether the policies were reasonable and what the appropriate sanction should be.

The Hearing Officer found that the business model of PA was such that the firm, thus Phillips and Arentz, was willing to tolerate a few errors for the sake of volume and efficiencies. The Hearing Officer stated, "[a} business model set up to fail in a "very few" matters cannot, in my opinion, defend itself against a violation of E.R. 5.1." *Id.*, at 34. We disagree with the Hearing Officer's conclusion that the business model was established to tolerate errors. We cannot dispute the factual findings upon which it is based, but we interpret the numbers differently. Primarily, we do not believe the policies and procedures as established by Phillips and Arentz were developed to "tolerate a few errors". Rather, the policies and procedures as a whole were designed to reasonably ensure that subordinate's conduct was compatible with (for non-lawyers) or conformed to (for a lawyer) the profession obligations of a lawyer. We do not dispute the Hearing Officer's factual findings, but our interpretation/conclusion, from those findings is different and thus dictates a different sanction.

The policies and procedures instituted at PA were extensive and broad. *Id.*, pp. 9 – 28. During Respondent Phillips' previous probation term an order had been crafted based on the terms of probation set forth in the Agreement for Discipline by Consent which required implementation of various measures at the firm. PA implemented these policies and measures, as required by the Order. Count 19 illustrates the conflict between the requirements of the Order and the interpretation of whether the Order or the implemented procedures were sufficient to address the issue.

The Hearing Officer found specifically in count 19 that the client retention incentives for administrator's bonuses motivated the actions of the subordinate in this count, which included dishonesty, fraud, deceit or misrepresentation. *Id.*, at 106. The prior Order

prohibited bonus determinations to be exclusively based on the number of clients or the amount of fees. The Hearing Officer found that the number of clients retained is one of the factors considered in determining the bonus amount. Other factors include work ethic, work product, value in assisting the client to retain the firm, client complaints, compliance with policy and procedure, attitude, appearance, number of phone appointments set, and nighttime appointments set. *Id.*, at 118. The Hearing Officer found that while PA had complied with the letter of the Order, the Order did not sufficiently address the problem. *Id.*, at 119. The Hearing Officer found that all these other factors are almost irrelevant as one of the few objective factors, client retention, led to the conduct in counts 8 and 19.[9] Yet there was no specific evidence submitted to support the conclusion that the retention bonus factor was the most significant factor in determining the bonus. In addition, the Hearing Officer's conclusion that this was a measure put in place to circumvent the Order, that Respondents complied with the terms of the Order but not the "spirit", is arguably not supported by this record. Especially, when there were substantial safeguards and policies implemented to guard against the kinds of violations that occurred here.

With regard to the Hearing Officer's recommendations for sanctions, he determined that one of the major problems with PA was its way of determining bonuses, in particular, that factors considered when determining bonuses was the number of clients retained, canceled, fees generated or lost, etc. He determined that while there were other factors the firm considered in the determination of bonuses, these were the overriding factors and

[9] We would note that in the evaluation of subordinate attorneys or staff any manager must consider objective numbers to evaluate workloads and productivity. Almost all private law firms or private corporations usually have a financial incentive tied to productivity, but we do not believe any reasonable manager would assume a financial incentive as one factor in determining a bonus will lead to unethical behavior by staff. If it is unreasonable to use such objective numbers, then we may need to examine many larger firm practices in this area.

contributed to the violations and abuses which occurred in this case. *See* Hearing Officer Report pp. 8-9, 13, 17 and 118. While we accept his findings, we do not agree with his recommendation that "bonuses to legal administrators should not be based, in whole or in part, on the amount of clients retained, the amount of fees generated, the number of clients who cancel or the amount of fees refunded." *Id.*, at 126.

It is not unusual in our profession to have an unhappy, disgruntled and, sometimes, abusive client. We think it is fair to say that every attorney in private practice has had such a client, probably more than one. We think most practitioners would agree that a legal assistant who is skillful at dealing with stressed out, angry clients, within the bounds of ethics, such that the client decides not to bolt with their fees, is worth their weight in gold. We think many attorneys would be surprised to know they cannot reward such employees in some manner for this invaluable ability.

So, while the bonus system in place at PA may have contributed to the abuses here, we would not preclude a law firm from developing some ethical way to consider a non-attorney's skill at helping to retain clients in the determination of bonuses or some form of reward.

We are troubled the Hearing Officer and the Commission found that while Phillips and Arentz may have satisfied and "complied" with the prior Order, they allowed its protections to be gutted. While we cannot disturb this finding, we must find that any failure to reasonably comply with their ethical duties is mitigated by the fact the State Bar did not, during the time of Phillips' probation, note any dissatisfaction with Phillips' and Arentz' compliance with the Order as to the two factors that the Hearing Officer found most problematic - the bonus incentives for client retention and attorneys knowledgeable in

practice area assisting at time of retention. Given the Bar's oversight during Phillips' probation, Phillips and Arentz could reasonably believe the policies and procedures they had in place satisfied the earlier issues with the State Bar, and we believe this calls for a more lenient sanction than recommended.

When we are asked to determine the appropriate sanction every hearing officer, this Commission and the Supreme Court is tasked with examining the purposes to be served by the rules.[10] We come to the conclusion that the recommended discipline is too severe when in the case at hand we examine the purpose for the rules. The stated objectives of the disciplinary proceedings are: 1) maintenance of the integrity of the profession in the eyes of the public, 2) protection of the public from unethical or incompetent lawyers, and 3) deterrence of other lawyers from engaging in unprofessional conduct. *In re Murray*, 159 Ariz. 280, 282, 767 P.2d 1, 3 (1988). It goes without saying that sanctioning two prominent attorneys, such as the Respondents, would make clear to the public that no attorney is above the Rules of Professional Conduct. However, as the overriding reason for the recommended sanction as indicated by the Hearing Officer and the Commission is for the ethical violations of Phillips and Arentz as they relate to their duties as supervising attorneys, not their own personal conduct, the purpose of the sanction is not to protect the public from these Respondents personally. They were not found to be incompetent lawyers. It was only limited policies and procedures of the firm that were primarily found to be unethical and the

[10] In this discussion we do not address proportionality as we do not find it overly helpful in most situations and particularly not in the matter at hand.

overriding reason for the recommended sanction.[11] So if the public does not need protection from the Respondents as practicing attorneys, and the offending policies and procedures have or will be changed according to the Terms of Probation, then is the remaining goal of attorney discipline served by the recommended sanction? Simply, does this matter serve to deter other lawyers from similar conduct? We believe it would lead many managing/supervising attorneys to wonder how one can comply with the expectations of the State Bar.

While PA is unique in Arizona's private practice for a variety of reasons, quite often in the government arena managing attorneys or even elected attorney officials must supervise similar numbers of attorneys, staff and caseloads. Most commonly this would fall to large prosecution entities where the client is not 33,000 individual clients, but rather the State is the client represented in each and every case. However, whether private or public, the attorney manager must still adhere to the Rules of Professional Conduct. We would expect that most attorney managers would be pleased to know that out of 33,000 cases less than 1% had issues that indicated the policies and procedures in place failed to ensure conduct compatible with or conforming to the professional obligations of a lawyer. Our rules do not dictate perfection and these kinds of numbers just cannot be ignored. To do

[11] It is our understanding from discussion at Oral Argument before the Commission that these offending policies and procedures have been changed already. It is not clear from the record that this has occurred, though during Phillips' testimony and in his letter responsive to the initial charges (*See* Respondent's Miscellaneous Exhibit 52 admitted on 7/7/08) it was clear he was more than willing to consider all suggested changes to policies and procedures. Phillips' and Arentz' testimony also supported their consistent willingness to modify and change policies as needed. Therefore, while we are unsure if the record supports these offending practices are no longer in place, the record clearly does support Phillips' and Arentz' willingness and consent to modification and correction of policies and procedures with the State Bar's assistance and oversight. Additionally, the Terms of Probation under terms 4 (attorney knowledgeable in practice area) and 21 (bonus to legal administrators) specifically address these issues.

otherwise would leave every attorney manager, public or private, in the untenable hot-seat that it is truly impossible to comply with E.R. 5.1 or E.R. 5.3.

Importantly, the Hearing Officer in the case at hand did find as an aggravator the refusal to acknowledge the wrongful nature of the conduct by Phillips and Arentz as to their policies and practices being responsible for the violations he found. The Hearing Officer did find that Phillips and Arentz did take "corrective measures," though as to what specific mistake or conduct the Hearing Officer is specifically referring to is unclear. *See* Hearing Officer's Report, p. 121. The record does show that Phillips and Arentz did take remedial measures in several areas when faced with policies or procedures that were not effective. [12]

However the Commission does not believe that Phillips and Arentz took such remedial measures. *See* Disciplinary Commission Report, p. 13. Additionally, the Hearing Officer found that Respondents did comply with many terms of the prior Order of discipline. *See* Hearing Officer's Report, p. 117. We were also impressed with their willingness to seek additional assistance from the State Bar through the requests for LOMAP assistance and the compliance with recommended changes.[13]

So again, how are other managerial attorneys deterred from similar conduct through the sanction as recommended in this matter? We are hard-pressed to see how this educates other similarly situated public or private attorney supervisors to do anything but throw their hands up in the air. Simply, if a managing partner is suspended for six months and a day after the managing attorney put in place such detailed and extensive policies and procedures, had State Bar supervision over policies and procedures, took remedial measures when

[12] *See* Transcript of Proceedings pages 1560, 2506-2515, 2525–2527, and Respondent's Miscellaneous Exhibits 2-6, 15, 18-19, 25-26, 40-42 and 45-46.
[13] *See* Transcript of Proceedings pages 1560, 2506-2515, and 2525–2527.

attorneys or staff did not conform their conduct to these policies, took remedial measures when deficiencies were pointed out by the State Bar, requested State Bar assistance and in less than 1% of the cases the policies and procedures he thought were reasonable failed to adequately meet his ethical obligation, then maybe it is not possible to meet the expectations of the State Bar as a managing attorney under E.R. 5.1 or E.R. 5.3.

As attorney discipline serves to protect the public, the legal profession, and the legal system, and to deter other attorneys from engaging in unprofessional conduct, punishing the offender is not the intended purpose, but may be the incidental effect, of such discipline. *In re Scholl*, 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001). Here it appears punishing the offender is not incidental but the primary effect.[14] There must come a point where enough is enough. Our Rules of Professional Conduct place high demands on partners, managers and supervisory lawyers, but these high demands should be attainable. We expect that while they are not vicariously responsible for the actions of those they supervise, be it attorney or non-attorney, they must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance all staff is meeting the lawyer's ethical duties, and we must be fair in determining what is reasonable. So while we cannot disturb the Hearing Officer's factual findings, our conclusions, based on the facts as found, lead us to recommend a lesser sanction of 30 days suspension for Respondent Arentz and 90 days suspension for Respondent Phillips.

Last, though not crucial to the determination of sanction, we believe condition 14 of the Terms of Probation should be reviewed by the Supreme Court and removed. This term allows the State Bar to send in unidentified "testers" to the firm to test the firm's compliance

[14] The sanction of six months and a day as to Respondent Phillips would also require that he show rehabilitation to be reinstated and we must wonder what rehabilitation would be sufficient.

with the required procedures. This term was similarly included in the prior discipline Order and in the prior Disciplinary Commission Report Commissioners Mehrens and Carson posited in the dissent this term was arguably in violation of E.R. 8.4(c) and E.R. 4.1. The Commission imposed reciprocal discipline of censure in the *Matter of Daniel Gatti*, SB-07-0198-D (2008)[15] and censure and probation in *Matter of Cynthia Leyh* SB-07-0198-D (2008)[16] where lawyers engaged in misrepresentations. It seems inappropriate to include this condition of probation and it could subject the State Bar's attorneys and managing attorneys to discipline for the conduct of subordinates implementing this ruse under E.R. 5.1 and E.R. 5.3.

Commissioner Flores /mps
Commissioner Flores

Commissioner Katzenberg /mps
Commissioner Katzenberg

Original filed with the Disciplinary Clerk
this 14th day of December 2009.

Copy of the foregoing e-mailed
this 14th day of December 2009, to:

Martin Lieberman
Hearing Officer 7W
Office of the State Capital Post Conviction Defense
3443 N. Central Avenue, Suite 706
Phoenix, AZ 85012-0001

[15] Daniel Gatti was sanctioned for misrepresenting himself to an insurance company which he claimed was for the purpose of gathering facts against the company which he believed was engaged in fraudulent practices.

[16] Cynthia Leyh was sanctioned for pretending she was a representative of a beer company in order to keep a tribal member occupied long enough so that she could be served with a subpoena for a criminal case that Ms. Leyh was defending.

Mark I. Harrison
Sara S. Greene
Mark P. Hummels
Respondent's Co-Counsel
Osborn Maledon, P.A.
2929 N. Central, Suite 2100
Phoenix, AZ 85012

Stephen P. Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

Copy of the foregoing mailed
this 15 day of December 2009, to:

Martin Lieberman
Hearing Officer 7W
Office of the State Capital Post Conviction Defense
3443 N. Central Avenue, Suite 706
Phoenix, AZ 85012-0001

Mark I. Harrison
Sara S. Greene
Mark P. Hummels
Respondent's Co-Counsel
Osborn Maledon, P.A.
2929 N. Central, Suite 2100
Phoenix, AZ 85012

Stephen P. Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by DeAnn Barker

/mps

BEFORE A HEARING OFFICER

IN THE MATTER OF MEMBERS OF THE STATE BAR OF ARIZONA, JEFFREY PHILLIPS, Bar No. 013362 ROBERT ARENTZ, Bar No. 005376 DAVID DE COSTA, Bar No. 020139, Respondents,	File Nos. 05-1161, 05-1888, 06-1137, 06-1138, 06-1212, 06-1582, 07-0085, 07-0176, 07-0177, 07-0178, 07-0231, 07-0232, 07-0239, 07-0275, 07-0278, 07-0289, 07-0412, 07-0512, 07-0569, 07-0628, 07-0639, 07-0697, 07-0887, 07-0889, 07-0890, 07-0891, 07-0892, 07-0894, 07-0895, 07-1326, 07-1342, 07-1461, 07-1561, 07-1601, 07-1885, 08-0397 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

I. INTRODUCTION

This was a lengthy hearing with numerous witnesses and exhibits. Much of the testimony was conflicting. The findings of fact herein are based upon the evidence presented and my assessment of what evidence was most credible.[1] I have considered all the testimony and have reviewed all of the exhibits referenced in the testimony and/or referenced in the proposed findings, including the electronic exhibits introduced by the Respondents. I have also reviewed and considered the proposed findings and conclusions submitted by counsel

[1]Witness credibility is a critical component of all hearings, and this one is no different. I have considered the testimony adduced about the former Phillips and Associates (hereinafter, "PA") clients (complainants) as to motive, prior acts, criminal history, and the charges PA's criminal clients were being represented for. In determining these facts, even if not specifically mentioned in the findings, I have considered all of the factors to assess the credibility of the testimony. I have also taken into account that most if not all of the complaining former clients are not sophisticated persons and that PA's practice is targeted to unsophisticated persons.

for the parties and have relied on these pleadings to guide me in this report.

The findings and conclusions in this report are not based on what I may believe is the right and proper manner of practicing law; rather, I am asked to determine if the Bar has proven, by clear and convincing evidence, violations of the Rules of Professional Responsibility. The practice of law may be a profession, but it is also a business. The nature and manner of PA's practice will leave it open to criticism whether or not violations are found. It is not the purpose of this proceeding to judge PA's business practices, but rather to consider, in part, whether or not PA's business practices were in compliance with the Rules of Professional Conduct as codified in E.R. 5.1 and 5.3. Moreover, as Respondent Phillips and Prof. Lynk testified, isolated mistakes or even misconduct on the part of members of the firm do not automatically mean that Respondents are in violation of the Rules of Professional Responsibility.

There are two difficult questions presented in this matter. 1) How to determine whether an excessive fee is charged in a non-outlier case. While there are a number of factors to consider, the calculus is almost entirely subjective and most any conclusion can be justified in some manner. 2) When does a manager or supervisor become responsible for the actions of others in the firm? The evidence showed, for example, that one client was browbeat and accused of defrauding the firm when he tried, the day after retaining the firm, to terminate his agreement. On the other hand, Respondents have a number of written policies which prohibit this kind of conduct. The question under E.R. 5.1(a), and E.R. 5.3(a), is whether the managing lawyers made reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that subordinate's conduct would be compatible with, or conform to, the professional obligations of the lawyer. At what point do instances of misbehavior give rise to a finding of an E.R. 5.1 or 5.3 violation? To try to answer that question, I've considered the testimony, the policies, and the actual practice at PA.

I have included, prior to a consideration of each of the Counts, some general conclusions of law which informed my specific conclusions and recommendations.

To the extent the conclusions of law may be considered factual conclusions, they should be interpreted as such. The explanations for some of the conclusions are based upon the facts as I interpreted them.

References to the transcript (RT) are to page number only; the entirety of the transcript, through all days of the hearing, are sequentially numbered from 1 - 3000. I cite to the transcript to make it easier to reference, although the cited reference may not be the only basis for my finding.

II. PROCEDURAL HISTORY

The probable cause Orders were issued from approximately August 21, 2006 through April 3, 2008, and a formal complaint was filed on or around October 16, 2007. The Fourth Amended Complaint, upon which this case was heard, was filed on April 10, 2008.

Respondents moved for an exemption from the 150-day requirement under Rule 57 on December 4, 2007. The Bar objected. The Disciplinary Commission Chair initially denied the motion, but, after a series of motions, Commission Vice-Chair Messing extended the 150-day deadline by 60 days.[2]

Respondents filed a motion to dismiss counts alleging a violation of ERs 1.1, 1.2, 1.3, 1.4, 5.1(a), (b), and (c), 5.3 (a), (b), and (c), and 8.4, against Respondents Phillips and Arentz, or, in the alternative, for a more definite statement on those counts. On February 19, 2008, I granted the motion in part and directed the Bar to submit a more definite statement as to the alleged violations of ERs 5.1(c), 5.3(c), and 8.4(a). The Bar did not do so and those allegations against Phillips and Arentz were dismissed. I denied the motion to dismiss ERs 1.1 - 1.4 against Phillips and Arentz based on *In re Galbasini*, 163 Ariz. 120, 786 P.2d 971 (1990). The hearing in this matter occurred over eleven days in May, June and July 2008. At the close of evidence, the Bar dismissed the allegations against Phillips and Arentz based on imputed liability for alleged violations of ERs 1.1, 1.2, 1.3, 1.4. RT 2961-63. Although

---

[2]Given the level of preparedness demonstrated by Respondent's counsel, I find that counsel had sufficient time to prepare for the hearing in this matter.

those allegations against Phillips and Arentz were dismissed, it is necessary for me to consider whether PA's conduct, in each of these counts, amounted to a violation of these allegations because, if so, then I need to determine if Phillips and / or Arentz should be held accountable under the managerial / supervisory responsibilities set forth in E.R. 5.1 and/or 5.3. Accordingly, I have considered these allegations although the substantive allegations as to Phillips and Arentz have been dismissed.[3]

III. GENERAL FINDINGS OF FACT

1. At all times relevant, Respondents were attorneys licensed to practice law in Arizona and with the law firm of Phillips and Associates.

A. Respondent Phillips is the founder and leader of PA. He is responsible for setting policy, billing, accounting and intake procedures for all divisions of the firm and has managerial responsibility and authority for the entirety of the law firm.

1) Other than obtaining notice after the fact, no evidence was presented suggesting that Mr. Phillips had personal knowledge of any of the specific conduct giving rise to the specific allegations in the complaint, with the exception of Count 20 (relating to an advertisement).

2) The evidence was insufficient for me to conclude that Mr. Phillips had direct supervisory responsibility over any non-supervisory PA attorney or non-attorney.

B. Respondent Arentz is the supervisor of the criminal division and is responsible for setting policy, billing, accounting and intake procedures for the criminal division. Mr. Arentz is also responsible for setting fees, assigning cases, managing caseloads, and determining refunds in all criminal cases.[4] Respondent Arentz has managerial

---

[3]I do not consider myself constrained in my findings by whether or not the Bar sought disciplinary sanctions against the attorneys who were responsible for the representation. Those decisions are an exercise of the Bar's discretion.

[4]Evidence presented at the hearing also suggested that Mr. Arentz was a supervising attorney in the bankruptcy section. Bar Ex. 16, p. 4.

responsibility and authority in the criminal division of the law firm.

C. Respondent DeCosta was an associate at the firm and had no supervisory or managerial responsibility or authority in the firm. He had been practicing law since May, 2001. He regularly practiced criminal law and was associated with PA from May, 2005, through September, 2007. RT 111-12.

A. Consumer Law Firm

2. PA represents itself as a "consumer law firm," described as

> . . . a law firm that is seeking to address or market itself to a group of clients who might not otherwise have ever used a lawyer. The cases are - are fairly - some can be complex, but - but many are fairly straightforward. And you're looking to get a large volume of clients for a fixed fee in clearly defined areas of practice.

RT 2174. This type of practice was distinguished from "traditional law firms" which were defined as medium to large firms that bill hourly and which target business entities, and from solo practitioners who do not seek a large volume of cases. RT 2175. Consumer law firm clients are relatively unsophisticated. RT 2174.

B. Caseloads

3. PA handles a high volume of cases, having represented 33,000 clients in 2004, 2005, and 2006. RT 2499-2500. Its practice is divided into three areas - criminal, bankruptcy and personal injury. The firm employs two hundred and fifty employees, thirty eight of whom are lawyers. RT 1802. Twenty-two lawyers practice in the criminal section. RT1385. Most of the clients represented in criminal matters are unsophisticated in the court system or criminal justice system. RT 1563. Unless otherwise noted in these findings, I find that each of the individuals represented by PA in this matter, as well as their friends and family who participated in the process, were unsophisticated.

A. Throughout these proceedings, these unsophisticated clients were cross-examined to expose their lack of factual specificity and understanding of the process. PA asks, implicitly, that the testimony and memories of its former clients be judged by the same

exacting standards as a lawyer may be judged. I find, however, that the client's lack of understanding is due to, at least in part, the nature and manner of PA's high volume business, the fact that they are unsophisticated, and because these clients were not always fully informed. An unsophisticated client does not necessarily have the knowledge to know what questions to ask. RT 2130.

4. Applicable to all counts, the client's (or family member's) lack of specificity about certain facts must be tempered by their lack of sophistication; the expectations for record keeping by counsel is greater than the client. A client's inability to remember all of the salient facts, or inability to clearly articulate the problems they perceived does not, *a fortiori*, detract from their credibility. I also cannot find that PA clients understand the import of each and every paragraph of the fee agreements they signed, especially when the lawyers are called in at the end of the retention period for a hurried review of parts of the fee agreement as more fully described below. Rather, all of the facts and circumstances must be considered to determine the facts.

5. PA does not limit the number of criminal cases it accepts. RT 1661 - 62. Respondents testified that, at the time of the hearing, lawyers who handle primarily felonies carry between 11 and 39 cases, RT 1907, and that lawyers who handle primarily misdemeanors carry between 53 - 75 cases. *Id.*

A. During the times relevant to these counts, however, the testimony was different. One attorney who left the firm in March, 2007, and who carried a mix of felonies and misdemeanors, testified that his caseload was approximately 100 cases. RT 464.[5] There was testimony establishing that these limits, at least for misdemeanor cases, have been higher. For example, in 2005, Respondent DeCosta had 130 cases. Magnus Erickson, whose caseload included 20 per cent felonies, typically carried 100 cases and sometimes as many as 140. He left PA, in part, because he could not keep up with the cases.

[5]This may include a mix of active and inactive cases. RT 469.

B. Former PA attorney Braun left PA, in part, because of his caseload. At the time he left PA, he had an active caseload between 80-100 cases and was unable to devote the time necessary to each. He had to delegate tasks such as witness interviews and motion writing to non-attorneys. RT 507-510, 516-17.

C. PA attorney Jose Saldivar testified that he carries a caseload of felonies, misdemeanors and appeals. At the hearing, he testified that he had 64 active cases, which he considered to be a light load. RT 2740. Just prior to the hearing, and before speaking with Respondent's counsel, however, Saldivar told a representative of the Bar that he had over 100 cases. RT 2742. He explained that he didn't fully understand the questions from bar counsel and that he was subsequently provided a list of his cases from PA. RT 2759.[6] The case list showed 64 active cases and 50 inactive. RT 2778.

D. Bankruptcy attorneys were assigned 500 or more cases at a time.

E. There was testimony that PA employs a mechanism that permits lawyers who feel their caseload is too great to seek relief from management. RT 2782-83.

F. Arentz testified that he reviews attorney caseloads weekly. RT 2455. He does not believe the caseloads are too high. He considers the caseload for each attorney and considers whether the case is a misdemeanor or felony, whether it is active, whether its out of county, and how serious the case is. RT 2455-56.

G. Misdemeanor cases are assigned, generally, by geography so that particular attorneys are assigned to particular courts (*e.g.* Phoenix Municipal Court), or regions (*e.g.* East Valley Justice Courts), in order to cut down on travel time, and to ease calendaring conflicts. Exceptions occur such as when a Spanish speaking attorney is needed. PA attorney Saldivar is assigned to Pinal County but also covers the Phoenix Municipal Court for Spanish speaking clients. Other attorneys travel as well to outlying counties.

---

[6]He also testified that 10% of his caseload were felonies - about 15 or 18 cases.

6. Based on all of the testimony presented, I find that the caseloads at the relevant times were greater than the testimony provided by Respondents and that the testimony of Erickson, DeCosta, Erickson, and, in part, Saldivar more accurately describes PA's caseload levels during the times referenced in the complaint.

C. Intake

7. Potential clients who come to PA do not meet initially meet with an attorney. Rather, they are given some information to read in the lobby while waiting, including a blank fee agreement and a questionnaire, and, thereafter, meet with a "legal administrator." RT 1529.[7] The questionnaire seeks information about the potential client's legal problem, goals to resolve the problem, and financial questions.

A. A "legal administrator" is a non-lawyer intake employee whose function is to retain clients. RT 1694. The backgrounds of these employees may vary, but they have outgoing personalities and had previously been employed in positions where they had dealt with the public. *Id.* Some had been in sales positions. *Id.*

1. With a couple of exceptions where complainants testified that they were unsure whether or not a person identified themselves as a legal administrator, virtually all of the evidence revealed that legal administrators properly identified themselves as non-lawyers; there was no credible evidence that a legal administrator misrepresented himself as a lawyer in any of the counts.

B. Legal administrators are used in this fashion to save PA money. They earn, generally, less than half of what the average lawyers are paid. RT 2535. They can be paid as much as $125,000 per year. RT 1828. PA has twelve or thirteen intake employees, about one to every three lawyers. RT 1828.

C. Legal administrators are paid a base monthly salary and monthly bonuses. PA's policy manual states that the bonus amount is based on "how well the firm is doing,

---

[7]These employees were also referred to as "intake coordinators," RT 1047, and, by one former attorney, as "salespeople.' RT 1295.

how well [the] division is doing and how hard [the administrator] is working." Resp. Misc. 18, p. 53. Bonus factors include PA's determination of the administrator's work ethic, work product, the number of phone appointments set, value in assisting the client to retain the firm, client complaints, compliance with policy and procedure, attitude, appearance, and nighttime appointments set. The policy manual specifically states that the bonus is not a commission and is not "based solely on the number of clients retained or the amount of fees associated with those clients. However, hard work and great client assistance lead to good bonus checks for everyone." *Id*, p. 54. Arentz testified that performance is judged, in part, on the number of cases retained.

> Q: And their [legal administrator's] performance is based upon the number of cases they bring in. Correct?
> A: No.
> Q: And - - it's not any consideration?
> A: It's not solely based on that.
>
> . . .
>
> Q: My question is, is their performance based in part –
> A; In part, yes.
> Q: – on the number of cases they bring in?
> A; In part, yes.

RT 1417-18.

D. Phillips keeps track of each administrator's retention numbers. RT 1830.

8. Potential clients are advised in the forms they are given that they are not clients of the firm at that time, and that they cannot give the firm confidential information during this initial meeting. RT 1530.

A. The firm policy is that the potential clients are not PA clients prior to signing a fee agreement, and, therefore, their statements are not protected by privilege. RT 1530.[8] They are also given a document which states that PA can make no predictions of a result and that they are meeting with a non-attorney who cannot provide legal advice. *Id.*

---

[8] *Cf.* ER 1.18.

9. The legal administrators obtain information from the client by reviewing the completed forms and speaking to the client. The legal administrators then speak with Respondent Arentz (or another supervisory attorney) who sets the fee based upon information provided by the legal administrator. RT 1534.[9] After the fee is set, the legal administrator will prepare a fee contract for the client to sign. The legal administrator will also work out the financing. RT 1535. After signing, the legal administrator provides the paperwork to an attorney to review and to meet with the client. RT 1536, 1577.

10. In bankruptcy cases, a determination is made whether the prospective client should seek relief under Chapter 7 or Chapter 13 by a bankruptcy attorney, based on information provided to him/her by the legal administrator, who had obtained the information from the potential client. RT 2027.

A. After the client has agreed to retain the firm in a bankruptcy case, an attorney is brought in to close the fee agreement and to go "into the rap, the rights and obligations of the client.' RT 2028. The "rap" is described in the "Bankruptcy Close/Wrap" and is essentially a checklist describing the fee agreement, certain aspects of the bankruptcy law, the client's responsibilities, and how the case will proceed. The form also directs the attorney to ask certain questions. Resp. Misc. Ex. 20.

1. Attorneys are trained in the "rap"[10] by watching experienced lawyers and through a training DVD which includes a "model rap." RT 1949 - 1950, 1985.

2. There was contradictory testimony however sugeeting that the attorney meeting in a bankruptcy case, at least between 2003 and the beginning of 2005, was very brief and only for the purpose of reviewing the fee agreement. RT 1048.

---

[9]There might be some negotiation of the fee. RT 1534. Although unclear, it appears that this negotiation takes place between the attorney and the potential client through the legal administrator.

[10]The supervisor of PA's bankruptcy section testified that this discussion is referred to as a "rap" at PA. RT 1947. Resp. Misc. Ex. 20 is entitled "Bankruptcy Close/Wrap."

B. Bankruptcy cases are assigned to attorneys based on the first letter of the client's last name. RT 1048.

11. Whether it's a criminal case or a bankruptcy case, the lawyer has a checklist[11] to ensure that the client understands the fee agreement, who their lawyer will be, the scope of the representation, and the 'flat fee' mechanics. RT 1537. Other discussions may include the payment plan, how the court system works, and how the PA office works. RT 1538.[12]

A. The attorney selected to close the retention need not be knowledgeable in the practice area; for example, a bankruptcy attorney may be used to complete the retention in a criminal case.[13] *E.g.* RT 1987. No legal advice is offered. *E.g.* RT 2026, 2072 (meeting is to discuss fee agreement and scope of representation), 2260 (advising client to call the assigned attorney within 48 hours if they had a question related to their case). If a new client asks a question which requires an answer from a knowledgeable attorney, such a lawyer would have to be located for the answer. *E.g.* RT 1989.[14] There was no testimony about whether a non-bankruptcy attorney is used to conduct the bankruptcy "rap." However, although PA had bankruptcy attorneys assigned to either the chapter 7 department or the chapter 13 department, it did not matter which attorney was available to conduct the "rap." The meeting was described as a brief five minute encounter and the legal administrator would locate any available attorney. RT 1297. One attorney testified that the purpose of the rap was to maintain compliance with the ethical rules by ensuring that the client had an

---

[11]An example of such a checklist was admitted as Exhibit 15-43. The checklist sets forth boilerplate relating to the retention of the firm.

[12]The attorney portion of the intake process is now video recorded, but was not during the events at issue in this case. RT 1540. It does not appear that the discussions with the legal administrator are recorded.

[13]This happened in five cases covered by the complaint. Bar Misc Ex 3, 4, 5, 6, 7.

[14]Although there was testimony that PA has more criminal attorneys in the office now who solely assist in the retention of criminal cases, RT 2439-2240, the facts found above reflect the practice during the relevant time periods defined by the complaint.

opportunity to speak with an attorney. RT 1323.[15] This meeting between attorney and client is also referred to as the "close." RT 2073.

B. The criminal closing is much less involved than the bankruptcy rap/wrap as it does not involve any discussion about the case. RT 2072. In at least one instance, this process in the criminal context was referred to as a "close." Resp. Ex. 15-43. The legal administrator's manual refers to this process as a "close." Resp. Misc. 18, p. 16.

C. Expert Witness, Professor Myles Lynk, testified that after initial screening by the legal administrator, the client should be passed on to the lawyer in order for the lawyer, who is dealing with an unsophisticated client, to ensure that the right questions were asked, and to provide the answers.[16] The evidence adduced at the hearing revealed that this did not occur and that there were deficiencies in the process.

D. At least one client, RW, testified that she was told that, despite other language in the fee agreement, if the case does not go to trial, she would be entitled to a refund. RT 820. This caused her to seek a fee adjustment after her case ended in a plea agreement. *Id.*

E. Former PA attorney Braun testified that he had to deal with clients who were promised "impossible things" by intake people, making his job more difficult. RT 508. No specific examples were provided.

12. If PA is retained, the office sends out introductory letters describing the office and other information. RT 1541-42. These letters are form letters generated by non-attorney staff. *E.g.* RT 1048.

---

[15]This condition had also been imposed in a prior consent Order entered against Phillips.

[16]Because the client is unsophisticated, she does not necessarily know what questions she should be asking and will not know what facts are legally significant. The lawyer is responsible for ensuring that these issues are addressed.

D. Policies, Procedures and Supervision

13. PA maintains written policies and procedures on many aspects related to the work of the firm, and continually updates the materials. Policies and procedures manuals are maintained for attorneys and support staff. Among the written manuals are:

A. Outline of Office Procedures - Attorney Policy Manual for the accident and injury division.

B. Case Procedures for 2006-2007, for paralegals in the accident and injury division.

C. Bankruptcy Department - Cancellation Policy and Procedures

D. "Bankruptcy Law Center" - Outline of Office Procedures

Among other things, this policy directs attorneys who feel they are approaching a large caseload to notify the supervising attorney. It also provides that new files are to immediately reviewed to determine the scope of work and issues presented, that attorneys will keep their clients reasonably informed about the status of the case, and provide sufficient information for the client to make informed decisions. The procedures also require the attorney, during their first client meeting, to determine the client's expectations and to check for conflicts of interest, to return phone calls within twenty-four hours, to notate the file with significant events, to provide competent representation, to be diligent, and to aggressively and professionally represent their clients.[17] There is also a description of the factors considered when PA determines its monthly bonus checks (compliance with office policy, client complaints, refund or termination requests, attitude, "bringing in new clients," results, etc.).

[17]The policy requires each attorney to review each file once a week and to meet with his or her assistant each week to determine whether action is necessary on the file. Other testimony in this hearing revealed that attorneys were assigned 500 cases at a time suggesting the impossibility of meeting this policy.

E. Bankruptcy Training DVD

This video describes the bankruptcy "rap" and demonstrates the "rap" with counsel playing the part of a client.

F. Criminal Training DVD

G. Legal Administrator Information and Training Manual

1) Legal Administrators are required to "read and memorize" the information in the 129 page manual. Resp. Misc. 18, p. 17.[18] Among other things, this manual states that the firm seeks to ensure that "each visitor meets the correct attorney and that the attorney they meet is prepared for the office visit." *Id*, p. 3. I find that the actual practice is different as stated in the manual. Testimony revealed that bankruptcy attorneys would meet criminal clients after a fee agreement was signed and that any available attorney would be tasked to close a retention. The policy also requires "complete candor and truthfulness with clients and all other people at all times." *Id.*, p. 4. The tape-recorded telephone call between former client LM and legal administrator Davila (described in Count 19, *infra.*) was contrary.[19]

2) The manual encourages legal administrators to ask questions, attend twice-weekly trainings, listen to DVD legal seminars, and review PA practice area information on the firm's website. They are told to ensure that they announce themselves as non-attorneys and not to provide legal advice.

3) Administrators are directed to find out if the potential client is interested in retaining PA, and to learn the rules for PA's "no money down" and discount offers. Administrators are instructed to ask the client how much they want to pay to start the

---

[18]The text of the manual is 64 pages. The remainder are appendices: the Rules of Professional Conduct for Lawyers, biographies of the attorneys, and office locations.

[19]The manual also prohibits coercion, duress, intimidation, threats and harassing conduct. Resp. Misc. 18, p. 4. This describes Davila's conduct. PA recognizes that this conduct was wrong and in violation of policy. RT 1881.

case. That offer is then taken to a supervisor who approves the offer or provides a counter-offer. Once the initial payment is agreed upon, the administrator is directed to work out the monthly payment in a similar fashion. Once the agreement is made, the administrator is directed to complete the forms and have the attorney meet the new client. Administrators are advised not to pressure retention but that is acceptable to ask the client what it will take to "earn your business." If the retention process is not working, administrators are advised to notify a supervisor so that a different administrator can be brought in.

4) Once a client has agreed to retain the firm, the administrator is trained to complete the paperwork and take it to the accounting department to review. Should the client forget his checkbook, PA will print bank quality checks for the client. Administrators are told that any client who wishes to speak to an attorney shall be permitted to do so. The manual also instructs on Home and Hospital visits for accident cases, and telephone consultations.

5) The manual includes a section entitled "Ethical Guidelines for Legal Administrators" which states, among other things, that the one of the goals of the office is to "provide high quality legal representation in the specific areas of law in which we practice." The manual includes a synopsis of each area of the Rules of Professional Responsibility for lawyers. The manual also includes basic office policies such as vacation, sick leave, dress code, harassment policies, and the like.

6) Mr. Arentz testified that new legal administrators shadow an experienced administrator for two weeks and watch the attorneys speak with newly retained clients.

H. Criminal Department Cancellation Procedures

The policy requires clients to visit the office and sign a cancellation agreement. The manual instructs employees to try to "save" the case, and, if they cannot, to cause the filing of a Motion to Withdraw, if necessary, in which case the client is advised that the file cannot be closed until the Motion is granted, to process the case to the criminal supervisor for a fee

review, and how to process a refund if one is due.

I. Outline of Office Procedures, Criminal Section

1) This policy is described as a mandatory policy and addresses various concerns relating to the conduct of attorneys in the criminal section. It states that new files are assigned to an attorney within twenty-four hours of retention. This is contrary to other testimony which suggested that the attorney is assigned at the time of retention. The policy also requires attorneys to notify their supervisor if they feel that their caseload is becoming too large so that the problem can be "fixed."

2) The policy directs the assigned attorney to communicate with the client within ten days and have an office visit within forty-five days. The first communication is to ensure that the scope of representation is understood. The attorney is not to discuss likely results on plea agreements over the telephone. If an office visit cannot be set within forty-five days, the supervising attorney "may grant an extension of 15 days."

3) The policy states that the client must remain reasonably informed about the status of the case, that the attorney shall promptly respond to inquiries and sufficiently explain matters to the client so that informed decisions can be made. Frequent contacts are encouraged because "if clients are not well informed and represented, they are more likely to default in the payment of attorneys fees."

4) Mr. Arentz testified that the policy which requires monthly status reviews for each case is part of the diligence component of the representation - to ensure that the file is not being ignored, that deadlines are not missed, and that things are not done at the last minute - so that the client receives a benefit from the activity. Mr. Picarretta, Respondent's expert witness, testified that monthly status reviews are a "good business practice."

5) The policy states that the attorney "should not advise the client to make a decision that would affect the outcome of the case until a subsequent [*i.e.*, after initial office visit] in-office meeting after discovery and/or interviews are complete." The policy

describes various forms to be used to document return telephone calls (which, according to policy, must be within twenty-four hours) and client contacts. The purpose of these forms is to document client contact. Jail clients must have an attorney visit as soon as possible after retention.

6) Policy requires that the client be sent a minimum of two letters per month to explain the case status using standard letters on file with the legal assistants. The policy also covers communication with the office, mandatory attorney meetings on Fridays at 4:30 p.m., and the need to be competent and diligent (requiring weekly file reviews and the completion of a file review form each month). Attorneys are required to conduct interviews or "review the tape" prior to a trial. Attorneys are instructed that files must include logs of meetings with clients, settlement offers, when the offer was communicated, and the client's response to the offer.

7) The policy also describes the factors considered in monthly bonus checks to attorneys, including compliance with office procedures, whether or not the clients are happy, refunds, and cancellation requests. Mr. Arentz testified that the bonuses are tied very closely to the attorney's performance and the client's satisfaction. RT 2450. Performance is judged on the number of complaints against the attorney. RT 2451.

a) Attorneys are required to complete a bonus information form each month to assist Arentz and Phillips in determining the amount of the monthly bonus. RT 2453. The attorney is required to sign a certification that they are diligently keeping up with their caseloads and, if they are having problems, that they will discuss them with their supervising attorney. RT 2454.

8) The criminal department also uses a checklist to ensure that all steps were completed prior to opening a new case. It uses a criminal file approval form, another checklist, which is completed by the attorney after "closing" a case. The approval form contains a description of the matters the attorney is supposed to discuss with the new client prior to retention, *e.g.* that there were no promises or guarantees, that the fee agreement was

understood, that their attorney's name was provided, and that legal administrators are not lawyers.

9) PA pays for CLE training for its criminal attorneys.

14. There are a number of instances where the evidence at the hearing conflicted with the practices established by the these manuals. The fact that proper procedure may be described in a manual does not necessarily determine the findings of fact relative to E.R. 5.1. Rather, the fact of the manual, and its contents, is a factor to consider in determining whether there was a violation of the Rule.

15. PA has a mechanism to train and supervise legal assistants.[20] It developed a policy memorandum, employs a supervisory legal assistant, utilizes a training process, and conducts weekly meetings.

16. PA has a mechanism in place to train and supervise legal administrators. In additon to the policy manual, administrators view a training DVD describing the duties and obligations of the administrator, undergo training by another administrator, and shadow the intake process for a period of time when they are newly hired. They also have weekly meetings with the supervisory attorneys.

A) There are a number of instances where the evidence at the hearing conflicted with the procedures described the these manuals. The fact that proper procedure may be described in a manual does not necessarily determine the findings of fact relative to E.R. 5.3. Rather, the fact of the manual, and its contents, is a factor to consider in determining whether there was a violation of the Rule.

17. Robert Teague is the bankruptcy section supervisor. He testified that he has a weekly meeting with his attorneys to review new cases, caseloads, department goals, legal assistants, staffing, and other matters. Mr. Teague testified that he reviews all files of newly

---

[20]The term "legal assistant" is a catch-all term meaning, here, legal secretaries, assistants, and paralegals. The term is distinguished, however, from "legal administrators" which is elsewhere defined.

retained clients to ensure that immediate needs are addressed, that he reviews the list of clients who have fully paid their fees so that their cases may be filed in court, and that the firm utilizes written policies as described above. In addition, there is a written document entitled "Bankruptcy Close/Wrap, Individual Debtor" which is used as a checklist of information and questions for the attorney closing the retention in a bankruptcy case.

A. New attorneys are provided a copy of Williamson, The Attorney's Handbook on Consumer Bankruptcy and Chapter 31 (Argyle Publishing). If the attorney is new to bankruptcy work, she will be personally trained by Mr. Teague, will observe the process by shadowing Mr. Teague, and will have her work product reviewed for several months. New attorneys will not be given a caseload at first; they will then be slowly introduced to one. Testimony at the hearing revealed that these policies were not always followed in practice.

B. After the events unfolded as described in the Count 3,[21] PA instituted a policy notifying the client, in writing, of any change in personnel working on their case. PA also altered their bankruptcy cancellation policy as a result of complaints about the timeliness of the refunds by dedicating one person to that process.

C. PA pays for required CLE for bankruptcy training.

D. Mr. Teague consults with Respondent Phillips on a monthly basis and, as well, in connection with the hiring or firing of an attorney, the acquisition of expensive equipment, issues about the direction or growth of the department, and ethical issues, as when complaints are lodged against a bankruptcy attorney.

E. Monthly reviews are held with the attorneys in connection with a determination of the amount of the monthly bonus. Attorneys complete a bonus review form as part of that process. Attorneys are permitted to make recommendations to improve the firm or the department on these forms, and to discuss their caseload. Annual reviews are also

[21]Count 3 concerns, among other things, multiple re-assignment of counsel to a case.

conducted.

F. Non-lawyer assistants are trained in connection with the unauthorized practice of law. New assistants are trained by a supervisor in PA practices. They shadow the supervisor for "a couple of weeks" when they are then assigned to a working attorney. The attorney then supervises the assistant.

18. PA has a mechanism in place to supervise lawyers. PA uses a system of progressive discipline in an effort to assure ethical compliance by their attorneys. RT 2459. This can range from a discussion with a supervisor, a cut on the monthly bonus, counseling, peer mentoring, and termination. RT 2459. There are weekly meetings to discuss office policies, legal issues, court policies, and the like. The firm offers in house CLE.

A. Phillips testified that, as a high profile law firm "under the microscope," PA stresses ethical responsibility training.

19. Phillips testified that he has had extended consultations with his counsel in an effort to ensure compliance with ER 5.1. RT 2527.

20. Respondents presented Professor Myles Lynk who opined that there were no violations of E.R. 5.1(a) or 5.3(a). His opinion is based upon the following factors:

A. The "depth and breadth of the efforts ... taken to ... train its legal and nonlegal personnel to comply with the ethical rules of responsibility." RT 2095.

B. The policies in place designed to assure ethical compliance.

C. The procedures in place to implement the policies, including the involvement of lawyers meeting and consulting with clients who retain the firm.

D. Phillips keeps records describing the complaints filed with the firm.

E. The use of complaint forms.

F. Changing of policies to address previously unforseen circumstances.

1. One example was the change of policy to advise a client when their lawyer has been changed, in response to Judge Curley's complaint as more particularly described in Count 3. Another was the direct involvement of lawyers in refund requests.

G. PA practice groups hold weekly meetings with attorneys and with non-attorney employees.

H. The firm policy which requires a newly assigned attorney to make contact with his or her client.

I. PA regularly consults with outside ethics counsel.

21. I find that Professor Lynk's testimony is not entitled to conclusive weight. He spent very little time at the firm[22] and did not observe meetings between legal administrators and potential clients. The retention meetings form the basis for some of the counts. Additionally, Professor Lynk appears to believe that clients who are retaining PA in a criminal case are afforded a more meaningful meeting with a criminal attorney at the time of retention than the evidence showed. He did not observe lawyers meeting with clients who had just retained PA. Moreover, as noted, the evidence at the hearing showed that the actual practices and policies were not necessarily as described in the manuals.

E. Time Keeping System

Although I may not mention it in each of the counts, I have reviewed PA's time keeping documentation in connection with each count in which it is relevant.

22. PA maintains a computer program called "Time Matters." PA employees input time attributed to PA employees working on a case. PA does not bill hourly; its fees are flat and earned upon receipt.

A. Respondent Arentz testified that the time recording is not meant to provide an accurate time record. Rather, the time entries are intended to provide "rough estimates of work done to determine what a quantum meruit would have been done in a case. And they're

---

[22]Prof. Lynk spent about five hours at the firm, mostly speaking with supervisory personnel and, for a limited time, in the waiting room and watching people talk with the client intake people. He did not observe any discussion related to fees, but, rather, clients being asked what documentation they had, and what kind of case they had. RT 2126. He also spent, in total, about thirty hours reviewing documents pertinent to his review and conducting interviews of Phillips and supervisory attorney Clark outside of the firm. He reviewed PA's written policies and procedures.

done in lieu of recreating a file and what the attorneys do." RT 1433. It is not meant to be precise.

B. "Time Matters" is also used a supervisory tool. Supervisory or Managing attorneys may review file activity to determine what has or has not been done. RT 1888. It is also used to assist the firm in complying with E.R. 1.5 and 1.15. RT 1888.

C. PA sends these time records to clients who request a fee review.

23. The Time Matters record keeping system is not a reliable indicator of the amount of work done on the case for a number of reasons including, but not limited to:

A. Routine tasks that should be accounted for in general overhead is included.

B. Tasks are automatically generated on a monthly basis whether the work is performed or not.

1) Testimony established that the time records self-generate time for file reviews[23] which may or may not be done, either by an attorney or an assistant, *E.g.* RT 133, and that time is charged for 'closing files'. *E.g.* RT 129. PA time records reflect .3 attorney hours for a monthly status review for each case. PA attorney Hock testified that he has 20 active cases and was asked if he spent 300 minutes each month reviewing his cases [actually, it should be 18 minutes and 20 cases for a total of 360 minutes]:

> A: I don't know whether it comes out to 300 minutes or not.
> Q: Well, you said 20 active cases. You do it for each case, monthly status reviews. You do – would I be correct in saying that's 300 minutes, 20 times 15?
> A: Twenty times – yes, that's correct. That's a – arithmetically correct.
> Q: You do that every month?
> A: Well, you've got to understand ....that we do a flat fee.
> Q: That's not what I'm asking you. What I'm asking you –
> A: Well, that's the answer, sir.
> Q: My question is, do you spend 300 minutes every single month doing status reviews?
> A: And my answer to you is, I don't know how many minutes I spend each month.

---

[23]PA's manual emphasizes the need to complete the file review forms "including whether the client had ever mentioned the fee agreement, was upset with anyone in the office, or made any unusual comments or requests." Resp. Misc. 46, p. 6.

RT 365-76. For attorneys who carry 100 cases, the time spent on monthly status reviews would be thirty hours per month if the attorney actually spent .3 hours on each case for that purpose.

2) When attorney Erickson was asked if he spent 18 minutes for each of his 100 cases each month participating in a monthly status review, he stated "probably not." RT 1078. Attorney Creaven testified that he had no need to conduct a monthly status review on at least one of his cases (Count 8) because he was well familiar with it due to the contacts with the client. RT 610. Attorney Yucevicius stated that the time accounted for on monthly status reviews is computer generated and not a result of an entry he generates. RT 271.[24]

3) Time is recorded for 'monthly status reviews' even when the attorney had appeared with the client in court a few days earlier. Presumably, therefore, counsel would have been acquainted with the case without the need for a status review, and had reviewed the file prior to the Court appearance. Bar Ex. 42 (showing attorney time spent in court on August 22, 2005, an accounting of .5 for file review on August 26, 2005, and an attorney monthly status review (.5) on August 30, 2005).

C. Some tasks are not reflected in the system. *See, e.g.*, RT 456 (phone calls made by attorney not reflected in accounting). PA asserts that its attorneys do not always enter time into the system and, therefore, they do more work than reflected. *E.g.* RT 121.

D. Rather than maintain independent time records for court appearances, the system automatically attributes 2.5 hours for each court appearance. Respondent Arentz advised at least one attorney to account for more than 2.5 hours if the hearing took more than 2.5 hours, but otherwise, to use 2.5 hours for each hearing to accommodate wait and travel time. RT 506. The time attributed is not dependent on the actual amount of time spent in

---

[24]The Outline of Office Procedures for the Criminal Department states that "[e]ach attorney is required to set aside time **once per week** to review all the files that are assigned to them." Resp. Misc. 46, p. 6 (emphasis added).

court. *E.g.* RT 127-28 (attributing 2.5 hours for court hearings in Gilbert).

E. Routine tasks such as the preparation of form pleadings (*e.g.* Notice of Appearance) account for .5 hours. *E.g.* RT 135, 462. Form letters such as requests for discovery account for .3 hours. *Id.* PA assigns time for administrative review and for fee reviews. RT 505-06. In at least one case, .2 hours were entered for legal assistants who take messages for an attorney to call a client back. RT 1074-75, and time was accounted for to take a call from a client who wished to cancel services. RT 1075.

1. PA values its assistants at $80 per hour. Therefore the value attributed by PA for the preparation of a Notice of Appearance is $40. PA asserts that this value is appropriately attributed due to the time it takes for the legal assistant to create the form, for the attorney to sign it, and to have it delivered to the Court.

F. The times are input by legal assistants with or without an accounting by the attorney. *E.g.* RT 142. Evidence also revealed that attorney time (of .3) is attributed for the 'closing' of a file even though the attorney is not involved in the 'closing' of a file. RT 725. (PA attorney Hock testified differently. He stated that he looks through the file and fills out a form to 'close' a file. RT 376).

G. The system is not designed to keep accurate time but is used to assist PA when it conducts reasonableness reviews of fees, and provide clients with a document that purports to be an accurate reflection of the work done. In fact, in most cases, the document is not an accurate reflection of the work performed.

H. The fee reviews conducted at the conclusion of the representation are accounted for in the time keeping system. *E.g.* Bar Ex. 86 (one-half hour for administrative fee review preparation and one-half hour for attorney fee review).[25]

---

[25]It also appears that the entry of these times is a routine matter accomplished whether or not the task is performed. *E.g.* RT 1444-45 (estimate of the time to be allotted for a fee review entered into the system).

I. Count 18 exemplifies one of the problems with Time Matters. The Bar asserts that the documentation reflects 17.7 hours of substantive attorney time. Bar's Proposed Findings, p. 76. Respondent, on the other hand, asserts that a significant amount of work was performed that was not entered into the accounting system yielding 19.7 attorney hours. Respondent's Proposed Findings, pp. 195-199.

J. This inaccurate time record system is then used to help determine whether or not a fee was reasonable and later used to justify the fees under PA's retrospective review and *quantum meruit* analysis.[26]

24. Having heard the evidence and weighed the relevant testimony, I cannot rely on the time records to justify any of the findings of fact in this case and, instead, must weigh those records against the rest of the testimony to determine what is reasonable and credible. The time keeping system is not a reliable indicator of the amount of time spent on a case. To the extent that these time records are used to a) facilitate and inform the hindsight ("Swartz") review or b) used to advise a client of the actual work done on the case, I find that these records are misleading and should not be relied upon for this purpose, nor should they be used to support any agreement made with the client.[27] While I have considered the accounting records in connection with my findings and conclusions regarding E.R. 1.5 allegations (fees), they were neither dispositive nor necessarily controlling.

25. PA asserts that non-attorney time is properly valued at $80 per hour when assessing the reasonableness of the fee. That figure is consistent with a 2007 State Bar survey of the legal community.

26. PA values its attorneys from $275 to $425 per hour, depending on the attorney's experience. These rates are comparable to rates charged by the more experienced and reputable attorneys in the community including the experts who testified in this proceeding.

---

[26]Respondents testified that, as a result of these proceedings, PA now requires precise time recording by attorneys and assistants.

[27]The experts who testified as to reasonableness of fees relied, in part, on these records.

A. The lower figure is used for attorneys will little experience while the figures increase as a lawyer gains, or has had, experience.

F. General Findings re Fees

27. Arentz was responsible for determining the amount of any refunds issued in criminal cases and, therefore, the ultimate fee charged.[28] There was no evidence that Phillips was directly involved in either fee-setting or refunds as to any count.

28. One criminal law expert testified on behalf of the Bar in connection with fees, two experts testified for the Respondents. None of the experts were familiar with "consumer law firms." They offered their opinions on the reasonableness of the fees based upon their own practice experiences.[29]

29. The Bar and Respondents submitted separate analyses of the effective hourly rate in each of the counts involving an allegation of an unreasonable fee based on the ultimate (as opposed to the initial) fee charged. Both rely on the inaccurate time keeping system; Respondents make adjustments for any specific testimony reflecting that additional work was done which was not recorded and, in one instance, deducts time because one attorney testified he did not conduct monthly status reviews. The Bar deducted an amount equivalent to $80 per hour for non-attorney time spent on the case and deducted that from its calculation of the attorney rate. The Bar made adjustments by deducting time recorded for staff file reviews, file closing, administrative fee review preparation, and supervisor attorney fee reviews. It attributes no value to non-attorney assistance.

---

[28]I have found no violation proven in connection with Count 2. Accordingly, the only fee issues relate to criminal cases.

[29]David Derickson testified on behalf of the Bar. He has practiced in a small sized firm for the bulk of his private practice career. He was not compensated for his review of the cases or his testimony. James Belanger and Michael Picarretta testified for Respondents. Each was compensated. Mr. Belanger is former member of Lewis and Roca and currently practices with a small / medium sized firm. Mr. Picarretta has practiced in a small sized firm for the bulk of his career. I am familiar with each of them and all three qualify as "experts" as contemplated by Rule 702, Arizona Rules of Evidence.

A) With these adjustments, the parties have submitted the following figures which I find are accurate only to the extent that the figures reflect what was entered into the time keeping system and adjusted as each party thought appropriate:

Count	Name	Attorney Time PA	Attorney Time Bar	Attorney Rate - PA	Attorney Rate Bar
8	TG	4.75	3.75	549	797
9	RU	18.8	16.8	255	357
10	EE	13.1	8.7	68	230
11	CB	13.7	n/a	92	n/a
12	OC	10.3	9.7	435	515
15	MC	6.8	6	49	417
16	RB	8	4.4	145	330
17	JH	4.8	1.3	193	1608
18	RW	23.7	17.7	621	904
21	PF	24.7	22.2	177	225
22	MS	6.8	5.7	359	490

B) It is appropriate to place a value on non-attorney work on a case when assessing the reasonableness of the fee.

C) It is not appropriate to considers matters appropriately considered as overhead when assessing the reasonableness of the fee.

G. Fee Setting

30. Among the factors considered in setting the fee, Arentz considers the seriousness of the case and whether or not it is within Maricopa County. RT 2467.

31. Arentz testified that approximately 75 per cent of their clients finance their fees, RT 2467, so that there is a risk that the client will default and not complete the payment after the case is concluded.

32. Bar expert David Derickson believed some of the fees were unreasonable and others reasonable. Respondent's expert James Belanger and Michael Picarretta believed all fees, when initially set and ultimately after refund, were reasonable.

33. The testifying experts charge between $300 - $450 per hour, about the same as PA attributes to their attorneys, depending on their level of experience. PA values its

attorneys at essentially the same rates, or more, than other criminal attorneys in the locale. Given the caseloads, the rate seems high.

H. Fee Reviews and Refunds

34. Although E.R. 1.5 requires consideration of the results received, Arentz looks more, in connection with a criminal case, with whether there was any problems with the representation, because, in a criminal case, a conviction is not necessarily a bad result. RT 1640.

35. Arentz conducts a review of the fee after each case is terminated whether or not the client has requested a refund. If the client requests a refund, the review is conducted as a priority review. Otherwise, it may take six to eight weeks before he is able to review the file.

36. If a client has requested a refund, Arentz will call the client to discuss the request. Whether or not the client requests a refund, Arentz will review and "read the file in detail," RT 2469, to consider the work done and the result achieved.

37. Arentz testified that over the past year, PA had refunded an average of $80,000 per month to 25 clients per month. RT 2470.

38. PA fee agreements advise the client of the Bar's fee arbitration program. If Arentz is unable to resolve the disagreement directly with the client, he suggests the fee arbitration program. PA is involved in two to three arbitrations per month.

39. If the scope of representation has been completed, Arentz will review the file to see if there's anything unusual about the case. If not, based on his understanding of Arizona Supreme Court's decision in *Connelly,* considered below, the fee has been earned. If there's a problem with the case or it is unusual, then Arentz will convert the fixed fee to a reasonable value based on an hourly rate. One example would be a refund due when a criminal case was dismissed unilaterally at the preliminary hearing and never re-filed.

40. If the scope of representation has not been completed, Arentz will review the time recording in the Time Matters program to calculate a rough estimate of the time spent and

then determine what a reasonable hourly rate would be.

IV. GENERAL CONCLUSIONS OF LAW

A. GENERAL CONCLUSIONS OF LAW REGARDING FEES

1. Some of the counts allege a violation of E.R. 1.5, unreasonable fees, mainly in criminal cases. Some general considerations are noted below. They have informed my conclusions.

2. Respondents assert that *In Re Connelly*, 203 Ariz. 413, 55 P.3d 756 (2002), precludes a review of the reasonableness of the fee in each of these counts (and, therefore, a determination whether or not Respondents violated E.R. 1.5(a)), because *Connelly* requires that the cases first be submitted to arbitration if the parties had previously contracted to arbitration. *Connelly* does not support Respondents's contention:

> We hold that when a lawyer and client have agreed to binding fee arbitration *and the disciplinary complaint involves no allegations of other misconduct*, the State Bar should await the conclusion of fee arbitration proceedings before initiating formal disciplinary proceedings.

Id. at 414 ¶1, at 757 (emphasis added). The Court further stated that the Bar should retain discretion to bring complaints involving more than just fee disputes in order to protect the public. The Bar had not asserted that Connelly violated another professional responsibility.

Here, however, each count alleging an unreasonable fee alleges other disciplinary violations. In general terms, the Bar contends that PA's policies and practices are responsible, at least in part, for the alleged unreasonable fee and have coupled an allegation of supervisory or managerial responsibility pursuant to E.R. 5.1 and/or 5.3 to those counts. Because, as to each count, and because, generally, the Bar complains of PA's practices and policies, *Connelly* does not prelude consideration of the E.R. 1.5 allegations. Given the other allegations, it is appropriate to consider these allegations.

3. E.R. 1.5 lists a number of factors to consider when assessing the reasonableness of the fee:

1) time and labor involved; novelty and difficulty of the questions involved; and skill required to perform the service

2) likelihood that acceptance of the case will preclude other employment by the lawyer

3) fee customarily charged in the locality

4) amount involved and results obtained

5) time limitations imposed by client or the circumstances

6) nature and length of professional relationship with the client

7) experience, reputation and ability of the lawyer(s) performing the service

8) whether fee is fixed or contingent

Additionally, assessing the reasonableness of a flat fee requires the decision maker to consider the circumstances under which the parties agreed to the fee, whether the parties negotiated for and recognized the risks involved with this type of fee, and the specificity with which the legal services are described. *Connelly*, at 762, ¶30, at 419.

4. Flat fees reflect a balancing of risk to each party. Accordingly, a flat fee can be larger than the fee which would have been earned if generated on an hourly basis. Flat fees, of course, are subject to a retrospective analysis referred to in this proceeding as a Swartz review based on *In the Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984).

5. In assessing the reasonableness of the fee, I have considered all of these factors. While these factors vary in each case, some of the factors are constant: In each instance, the acceptance of the case did not preclude PA from accepting other cases, there was no prior professional relationship with the client and the fee was a fixed, earned upon receipt, flat fee. Additionally, there was no testimony presented that any fee was negotiated; rather, it was set by PA and accepted by the client. For the most part, the cases presented did not involve novel or difficult issues and were, generally, routine criminal matters. There was no testimony that the potential clients recognized the risks involved with this type of fee.

6. PA has a high volume practice. Its business model is designed to create financial efficiency. It charges rates, however, consistent with the low volume, high quality representation provided by the State's most renown attorneys. Comparing PA rates with the low volume small firm practitioners is not necessarily a proper comparison because PA does not limit its acceptance of cases based on caseload. Evidence at this lengthy hearing revealed numerous problems caused by the firm's practices in retention, advisement, and volume. I therefore do not completely accept the comparisons made by the various parties and experts.

7. Reference was made during this hearing to caseload limits established by *State v. (Joe U.) Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984), which adopted a caseload maximum of 150 felonies or 300 misdemeanors per year. PA refers to *Smith* as some sort of standard to judge PA's caseloads. PA asserts its caseloads are about one half the *Smith* limits.

Smith was concerned with the constitutionally effective representation of indigent defendants and, as part of its consideration of the proper guidelines, considered national standards established by various non-governmental organizations as well as the disciplinary rules then in effect. *Smith* concluded that Mohave County's then method of selection of counsel for indigent defendants violated the right to due process and the right to counsel guaranteed under the United States and Arizona constitutions. *Id.*, at 362, 1381.

Smith sets a caseload limit in an effort to ensure, to the extent possible, the effective assistance of counsel for indigent defendants. The Court did not review the practice of a private law firm charging fees comparable to the most expensive lawyers in the locale. I do not believe that a comparison to the *Smith* standards is appropriate in assessing the ethical allegations in the instant case. The question is not whether PA attorneys are providing constitutionally effective assistance of counsel or depriving its clients of due process as a result of its caseload. Rather, the question is whether or not PA charged unreasonable fees or otherwise acted outside the Rules of Professional Conduct.

8. It is appropriate for me to consider PA's caseload, far greater than the experts who testified during these proceedings, when assessing the ethical violations alleged including the

reasonableness of the fees. The more difficult question is how to quantify that factor in the fee review calculus.

B. GENERAL CONCLUSIONS OF LAW REGARDING E.R. 1.15 AND E.R. 1.16

9. In many counts, the Bar asserts that ER 1.15(d) and ER 1.16(d) is violated when a fee, determined ultimately to be unreasonable in violation of E.R. 1.5, is collected or not refunded upon a retrospective review.

10. I do not believe that E.R. 1.15(d) applies to an ER 1.5 violation when, as here, the fees are all non-refundable. E.R. 1.15(d) applies to client property. The fees at issue in this matter are earned upon receipt and, therefore, belong to the lawyer, not the client. Accordingly, I conclude that an E.R. 1.15(d) violation cannot be found based solely on the failure to refund the amount of the fee determined to be unreasonable so long as there is a good faith dispute about the reasonableness of the fee. Given the amount of the fees in this case, and the uncontroverted testimony that post representation fee reviews were conducted, I conclude that there were good faith disputes about the reasonableness of the fees - even those fees I have concluded, ultimately, were unreasonable. Accordingly, I do not find an ER 1.15(d) violation based on the failure to 'promptly deliver' a refund of a non-refundable fee.

11. *In re Curtis*, 184 Ariz. 256, 908 P.3d 472 (1995), suggests that E.R. 1.16(d) is not applicable to non-refundable, earned upon receipt fee disputes either. A lawyer cannot be found to violate E.R. 1.16(d) in the absence of evidence that the lawyer "kept the fee in bad faith or with knowledge that it had not been earned." *Id.*, at 263, 479. The Bar has not proven, by clear and convincing evidence, either bad faith or knowledge that a fee had not been earned and, accordingly, I do not find an E.R. 1.16(d) violation based solely on the failure to deliver a refund of a non-refundable, earned upon receipt fee, even in those cases where I find the fee to be unreasonable.

12. Some counts allege that PA did not promptly process refunds. In those counts, the issue is not the failure to refund a portion of the fee which was disputed, but, rather, the

time it took for PA to process the refund request, or deliver the refunds. Those counts are not based solely on a E.R. 1.5 allegation. Therefore, those E.R. 1.16 allegations will be separately considered.

C. GENERAL CONCLUSIONS OF LAW REGARDING E.R. 5.1 AND 5.3

13. There is no vicarious liability in disciplinary proceedings under the Rules of Professional Conduct. Although the Bar has proposed that I find Respondents Phillips and Arentz in violation of a host of ethical rules, virtually all of the complained conduct was committed by others. Phillips and Arentz, without more, cannot be subject to disciplinary sanctions for the conduct of others in their firm. *See Galbasini, supra.*

14. Rather, the Rules require that managers and supervisors of law firms make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that the subordinate's conduct is compatible with (for a non-lawyer) or conform to (for a lawyer) the professional obligations of a lawyer. E.R. 5.1(a), E.R. 5.3(a). Under the facts presented in this case, absent a finding that these requirements have not been met, an ethical lapse cannot be found for the conduct of others.[30]

15. Whether a "consumer law firm" or not, the practice of law places demands on the professionals, which include the duty to communicate with (and spend as much time as necessary with) clients to ensure they have a full understanding of the legal process and their rights. There is no prohibition against streamlining the process to decrease costs and improve efficiency; it just cannot be done in a manner that transgresses the Rules of Professional Responsibility.

16. One of the duties of a lawyer is to communicate with his client. E.R. 1.4. Meeting this obligation may differ depending on the type of client. RT 2177. Although Prof. Lynk thought that the firm had policies in place to ensure compliance with E.R. 1.4, the evidence revealed that the initial retention process discourages effective communication by placing

---

[30]There are other instances where imputed liability may be found, but they do not apply to this matter. *E.g.* ER 8.4(a) (assisting or inducing a violation of the Rules of Professional Conduct).

virtually of the client contact responsibility on non-lawyer personnel and because a knowledgeable attorney is not required to be available to discuss the case prior to retention.

17. Especially troubling throughout the hearing in this case is PA's assertion that, given the volume of work, problems only occur in a small percentage of the cases. This is stated, for example, in a PA supervising attorney's remarks that PA misses "very few" meetings. A business model set up to fail in a "very few" matters cannot, in my opinion, defend itself against a violation of E.R. 5.1. The Rules of Professional conduct apply to the lawyers for every client in every case. As Professor Lynk testified, and while acknowledging that mistakes will always be made as a part of the human condition, "... the goal of the profession is to provide quality service, competent service, professional service, ethical service to every client." RT 2138. The evidence in this case revealed a business model willing to tolerate a few errors for the sake of volume and efficiencies. I do not believe that this model should be shielded from ethical complaint based on substantial compliance with the ethical rules. Each individual client is entitled to have his or her lawyer comply with the Rules of Professional Responsibility.

V. FINDINGS AND CONCLUSIONS AS TO THE SPECIFIC COUNTS

Count 1

1. In June, 2004, BB sought legal advice from PA because she entered into a contract for the purchase of a car which she felt was coerced. RT 1020.

2. BB was advised to seek Chapter 7 bankruptcy protection to avoid the contract. RT 1021, 1022; Ex. 3. She could not be sure if the advice came from an attorney or not. *Cf.* RT 1021, 1030. BB disclosed her income at this initial meeting. RT 1025.

3. BB had been advised that a bankruptcy petition would not be filed until she paid all of her fees. RT 1030. She retained the firm and, by December, 2004, paid all of her fees. RT 1030. She provided her pay stubs to PA. RT 1031.

4. Angela Kruszynski was assigned as BB's attorney; BB did not meet her when she retained the firm, RT 1023, and never met with her in person. RT 1048.

5. PA's file reflects that on September 22, 2004, BB called PA and spoke to a staff person advising that she had been sued over the car contract. Resp. Ex. 1-32. BB asked PA to file an Answer and was advised by the staff person that PA doesn't do that. The staff person advised BB that a partial payment to PA would not delay the contract lawsuit and to hurry up and pay the entirety of the fees so the suit "could be stopped."

6. In or about December, 2004, Ms. Kruzynski advised BB that she earned too much money to file a Chapter 7 bankruptcy. RT 1024. After hearing this, BB requested a refund. RT 1026.

A. BB received a phone call from a PA employee the night before the bankruptcy petition was supposed to be filed; she was asked what her income was. After answering the question, she was told she made too much money. RT 1032.[31] She requested a refund and was directed to Ted Ramirez.

B. Ted Ramirez, a legal administrator[32] spoke to BB on December 22, 2004., because BB was requesting a refund. Mr. Ramirez discussed her income with her. Bar Ex. 4. Ramirez described the conversation as trying to determine what type of bankruptcy to seek because of fluctuating income. RT 1038.

C. Ramirez testified that he spoke with PA attorney Robert Beucler who advised to wait and see what her future income would be to determine if she qualified for Chapter 7. RT 1039.[33] Neither Ramirez nor Beucler discussed the problem with Kruzynski.

---

[31]Firm policy was to call the client after the entirety of the fees were paid in order to gather the financial information needed for disclosure in the bankruptcy petition. RT 1050. BB's 'financial interview' occurred on December 2, 2004. RT 1050.

[32]At the time, Ramirez worked in the "call center," RT 1042, and reported to supervising attorney Robert Beucler. RT 1039. His duties, at the time, were to field calls from clients wishing to cancel their services. RT 2035. Beucler however asserted that he was not Ramirez's supervisor. RT 2060.

[33]Although there was speculation, there was no credible evidence adduced describing why Mr. Ramirez went to a lawyer other than the client's lawyer for assistance. This, however, does not appear to be an uncommon practice at PA. RT 2076.

RT 1058-60.

D. Ramirez described the problem to Beucler as a client with confusion as to her income and living expenses and, therefore, whether she qualified for chapter 7 or chapter 13. RT 2035. Mr. Beucler, therefore, determined, based on BB's fluctuating hours, that a potential way to help the client would be to see if the income stabilized at a higher or lower level. RT 2036. Accordingly, he advised BB, through administrator Ramirez, to wait. *Id.* BB was holding on the phone when Mr. Ramirez spoke with Mr. Beucler. RT 2060.

E. Rather than accede to BB's request to cancel services, Ramirez engaged BB in conversation in order to try to prevent the cancellation. He succeeded in retaining BB as a client. Bar Ex. 4. His actions are consistent with the firm practice which was for Ramirez to discuss the concerns of clients expressing a desire to cancel and to look for ways "to help that person." RT 2060.

F. Kruzynski, as BB's attorney, stated that she would not have advised BB to wait before filing because she was aware that the lawsuit against BB had been, or was close to being, reduced to judgment and that garnishment would soon follow. RT 1054-55. Waiting to file placed her wages in jeopardy. RT 1055.

1. Kruzynski's knowledge about BB's file was based on conversations with BB and information submitted at the time of the initial retention that was in the firm file. RT 1055.

2. Kruzynski would have advised BB to file the bankruptcy petition immediately to provide the best protection against garnishment. RT 1055.

7. BB spoke to at least two people during "exit interviews" at PA. RT 1026. The second person she spoke with was Ramirez, who advised her to wait until the new year before she fired the firm because, at the start of the new year, she would qualify for bankruptcy. RT 1026.

8. BB decided to continue to seek a refund and, in January or February, 2005, received a partial refund.

9. A judgment on the contract was entered against BB in the amount of $4,000. RT 1029.

10. BB never obtained a bankruptcy discharge. RT 1029.

11. Beucler was not aware of the contract lawsuit pending against BB at the time he provided the advice to BB through administrator Ramirez.

12. The advice given to BB, *to wit*, to wait before filing, was imprudent given the pendency of the contract lawsuit.

Conclusions of Law

1. The Bar does not allege that PA was incompetent or not diligent. Rather, it asserts the unauthorized practice of law by legal administrator Ramirez because he advised BB to wait before filing for bankruptcy. Ramirez testified that he spoke with attorney Beucler before relaying Beucler's advice. Beucler testified consistently. The Bar asserts that the testimony is suspect because time records don't reflect the conversation between Ramirez and Beucler. However, as noted elsewhere, PA time records do not, in any meaningful way, reflect the true day to day activities at the firm and cannot be credibly relied upon. Accordingly, I find that the Bar has failed to prove, by clear and convincing evidence, a violation of E.R. 5.5(a) based on the evidence adduced at the hearing.

2. The Bar alleges a violation of E.R. 5.3, but not 5.1. Because the Bar failed to prove that Ramirez engaged in the unauthorized practice of law, the Bar has also failed to prove that Respondent Phillips violated either 5.3(a) or 5.3(b).[34]

Count 2

The testimony in connection with this count was highly conflicting. Accordingly, all of the relevant testimony will be discussed below. This count is based on general practice allegations made by former PA attorney Jo Ann Joy. Joy's allegations were, not surprisingly,

---

[34]Although the firm's practices led to BB's receipt of bad advice because her inquiry was not answered by the attorney who could answer the question intelligently, the Bar does not allege a violation of E.R. 5.1.

contested by current PA employees.

1. Jo Ann Joy was employed as an attorney in the chapter 13 bankruptcy section at PA from February, 2005, through June, 2005. RT 1294, 1318. She asserts that she received no training at the firm and was not particularly aware of the firm's policies. RT 1294 - 95.

2. Joy asserted that the firm preferred to sign clients for chapter 7 (as opposed to chapter 13) bankruptcies because the firm was paid immediately, prior to filing. In a chapter 13, only a portion of the fees may be paid 'up front.' RT 1298. Chapter 13 fees, in the long run, are higher than chapter 7 fees. RT 1315. Legal administrators determined which bankruptcy chapter to suggest to the potential client without consulting an attorney. RT 1314.

3. Joy asserted that the firm accepted fees in bankruptcy cases for clients who were judgment proof or receiving exempt Social Security Income. RT 1301. There were three or four of these cases during Joy's tenure. *Id.*

A. A supervising bankruptcy attorney at PA testified that there may be circumstances where an individual would benefit from a bankruptcy petition even under such circumstances. RT 2052. The benefit would be to protect 'elderly people" from "merciless" collection agencies. *Id.* Additionally, bankruptcy could be a vehicle to remove judgment liens on homesteaded property. RT 2053. Similar testimony was adduced from another current PA attorney. RT 2218.

B. The Bar did not introduce evidence contradicting PA's assertion that persons who were judgment proof or receiving SSI could benefit from bankruptcy protection.

4. Joy asserted that she was advised by her supervisor not to advise clients of a better alternative to bankruptcy. RT 1301.

A. A supervising attorney asserted that PA advises clients regarding alternatives to bankruptcy "every day." RT 2049. Other attorneys testified that potential clients were regularly advised of alternatives to bankruptcy. RT 2195, 2217. Cases are either rejected for bankruptcy or referred to PA's debt negotiation division. RT 2049-2050.

5. Joy asserted that she saw legal assistants providing legal advice. On one occasion, a legal assistant was overheard advising a client on the meaning of exempt properties and providing advice on foreclosure and repossession. RT 1302.

A. A supervising attorney at PA testified that this allegation is not true. RT 2054.

B. Each of the three legal assistants identified by Joy testified that they did not provide legal advice. RT 2283, 2292, 2357.

6. Joy asserted that attorneys were too busy to be consulted by legal assistants. RT 1303.

A. A supervising attorney at PA testified that legal assistants regularly approach him with legal questions. RT 2054. Joy's replacement testified that legal assistants would approach attorneys with legal questions from clients. RT 2255. Two of the legal assistants testified that they are able to communicate with the attorneys they work for. RT 2285, 2358. Other PA attorneys also disputed this allegation. *E.g.* RT 2195.

7. Joy asserted that legal assistants engaged in settlement negotiations with creditors. RT 1303. The firm started a debt negotiation practice during Joy's tenure. RT 1308.

8. Joy asserted that PA's caseload of 1,500 chapter 13 cases were evenly divided amongst three attorneys. RT 1303. Joy was unable to handle a caseload of 500 cases. RT 1303-04. About half of these cases were inactive. RT 1313. Joy asserted that this caseload was too high. RT 1320.

A. A supervising attorney at PA testified that the case loads are not excessive. RT 2054. Joy's supervisor testified that caseloads were not too high, RT2192, although Joy did complain about her caseload. RT 2193. He relieved her of responsibility for approximately twenty to twenty-five, or up to fifty cases, *id,* and offered her a transfer to the Chapter 7 department. RT 2194.

B. The attorney who took over Joy's caseload upon termination testified that the caseload was not too high. RT 2254.

C. Bankruptcy supervisor Robert Teague testified that bankruptcy attorneys carry a caseload between 600 and 800. Two-thirds of the cases are inactive.

1. While describing the caseload, Mr. Teague testified that PA seeks standardized cases which will not require litigation. If a case may involve litigation where the results would be uncertain, PA refers those cases to other attorneys. Additionally, PA does not accept Chapter 11 cases or business reorganizations.

D. The Bar presented no evidence describing an appropriate caseload for bankruptcy cases.

9. Joy asserted that she was advised by the chapter 13 supervisor to lie to cover up a mistake by the firm. Specifically, she was asked to lie to a client about a deadline that had been missed which resulted in a home foreclosure. RT 1305.

A. Joy's supervisor testified that he did not ask her to lie to a client. RT 2191.

10. On June 27, 2005, Joy complained about the ethical concerns she had to supervising attorney John Schill. Resp. Ex. 2-39. Later that day, she was terminated. RT 1318.

A. On May 27, 2005, Joy's supervisor discussed concerns he had with her work performance. RT 2198; Resp. Ex. 2-40. He testified that a decision was made to terminate her but she was not immediately terminated due to PA's workload. RT 2198-99.

B. Joy's supervisor testified that Joy was terminated because of disruptive behavior some time prior to the termination. RT 2199-2200.

Conclusions of Law

Given the sharply conflicting testimony and the Bar's failure to adduce any evidence corroborating any of Joy's allegations, I find that the Bar has failed to prove, by clear and convincing evidence, a violation of any of the ethical violations alleged in Count 2.

Count 3

1. On August 12, 2004, Mr. and Mrs. T retained PA to file and represent them in a chapter 13 bankruptcy petition. RT 845-46; Bar Ex. 13. PA attorney Colleen Engineer

approved the agreement. RT 904-05; Resp. Ex. 3-54 (PA1876).

2. On August 23, 2004, a form letter, signed by PA attorney Andrew Nemeth, was sent to Mr. and Mrs. T. Resp. Ex. 3-54 (PA002041). The letter advised that three attorneys will be working on their case - Colleen Engineer, Gregory Groh and Andrew Nemeth. The clients were advised to contact the legal assistant assigned to the first letter of their last name and, if they do not receive return calls within 24 hours two times, to call Mr. Nemeth.[35]

3. On February 8, 2005, PA filed a chapter 13 petition on behalf of the clients. Bar Ex. 16 at SBA4389.

4. On February 8, 2005, PA sent a letter to Mr. T advising him that his attorneys were Andrew Nemeth, Jerry Schollian and Jo Ann Joy. Resp. Ex. 3-52, p. 42. Mr. Nemeth testified however that he was not an assigned attorney on the case and did no substantive work on the case. RT 2213. Mr. Nemeth's name appears as the attorney of record on the petition filed in February. Resp. Ex. 3-54 (PA002083). Moreover, a number of apparent form letters were sent to the clients by Nemeth. Resp. Ex. 3-54.

5. Joy was terminated from the firm on June 27, 2005. RT 1313.

6. The clients were not immediately advised that Jo Ann Joy had left the firm and that they were being represented by another attorney. Resp. Ex. 3-52, p. 48. After unsuccessfully trying to reach Joy, Mr. T was advised by a legal assistant that Joy was no longer employed at PA. She scheduled an appointment for him to meet with Schollian. *Id.*

7. No one from PA contacted Mr. and Mrs. T between the date of the retention until February, 2005. Bar Ex. 16, p. 5. Legal assistants, as opposed to attorneys would handle inquiries from them. *Id.*

8. Various counsel for the firm represented Mr. and Mrs. T in the bankruptcy, including Andrew Nemeth, Jo Ann Joy, Tatiana Froes, and James Schollian. The February

---

[35]Judge Curley, in her findings resulting from an OSC hearing she held as a result of PA's failure to appear on behalf of its client, noted that Robert Teague had been identified as the attorney representing the Mr. and Mrs. T, and that Robert Arentz had been represented as a supervising attorney. Bar Ex. 16, pp. 3, 4.

2005 petition was signed by Andrew Nemeth. Resp. Ex. 3-54 (PA002083). As discussed in more detail below, the file was transferred to Jo Ann Joy, then to James Schollian, then to Tatiana Froes, and, after some problems between Froes and Mr. T, back to James Schollian.

A. James Schollian was assigned the file in June, 2005. Resp. Ex. 3-53, p. 21. He discussed the file with new counsel when the file was transferred the following month. *Id.*, p. 22.

B. Tatiana Froes took responsibility for the case on or about July 5, 2005. Resp. Ex. 3-51, p. 85.[36] That was the day she took over Joy's case load. *Id.* When Froes joined the firm, she was given responsibility for 540 files[37], Resp. Ex. 3-53, p. 16, and did not have time to meet with the clients prior to a hearing scheduled for August 16, 2005. *Id.*[38]

9. On Tuesday, August 16, 2005, a hearing designed to facilitate the sale of the client's home was conducted. Resp. Ex. 3-50 (PA5375) The hearing had been scheduled because Mr. and Mrs. T had received an offer to purchase the home for $370,000, and PA had filed a motion to permit the sale. RT 851-52; Bar Ex. 16 (4393). Just prior to the hearing, the contract "fell through" and the sale was canceled. No one at PA advised the clients of the court hearing. RT 852-53.

---

[36]At a later hearing, Froes testified that she received the file on August 1, 2005. Resp. Ex. 3-53, p. 16. During these proceedings, she testified that she received the file in the early days of August. RT 906.

[37]Mr. Schollian testified that he was responsible for approximately 100 cases - but he only handled cases "up to confirmation." Resp. Ex. 3-53, p. 30.

[38]Froes supervisor, Joshua Parilman, when questioned by Judge Curley at a subsequent OSC hearing, asserted that Froes was given responsibility for "a few files a day at most" after she started with the firm. Resp. Ex. 3-53, p. 55. He believed that Froes was carrying a caseload of 100, the same as the other attorneys, *id.*, at 56, and an additional 100-120 cases which had been confirmed. *Id.*, at 57. Froes predecessor, Jo Ann Joy, testified, consistently with Froes, that the firm had 1500 cases distributed evenly amongst three attorneys. RT 1303. I find, from the evidence, and consistent with my findings in Count 2, that the attorneys each carried a caseload of approximately 500 cases, both pre- and post- confirmation, and that Parilman's statements to Judge Curley were inaccurate.

10. Tatiana Froes represented Mr. and Mrs. T at the hearing. RT 2229. She intended to inform the Court that the offer had been withdrawn and that the motion to permit the sale was moot. RT 2230. During the hearing, a representation was made that the home was in foreclosure proceedings, and that there was an offer for $300,000. Froes called Mr. T who became upset because he was unaware that the home was in foreclosure, he thought that $300,000 was too low, and he had never met Froes. RT 853, 862. Mr. T understood the call to mean that he was going to lose his home. RT 854-55.

11. Froes did not believe that there was a foreclosure pending because none of the usual reasons for a foreclosure were evident to her based on her review of the file. RT 2231.

12. Judge Curley determined that it was clear that Froes "did not have a clear understanding of basic points in [Mr. and Mrs. T's] case" at the August 16, 2005, hearing. Bar Ex. 16, p. 7.

13. The hearing was continued to August 24, 2008, at Froes's request, in order to ascertain whether there was a foreclosure proceedings. RT 2233.

14. On Wednesday, August 17, 2005, Froes called the attorney for the mortgage company to ascertain if a foreclosure had actually been scheduled. RT 2234-5.

15. On Friday, August 19, 2005, at 5 p.m., the clients were informed by a legal assistant that the home would not be foreclosed upon. Resp. Ex. 3-47. Mr. T felt that he could not rely on PA for accurate information because he had been provided inaccurate information in the past. RT 857.

16. On Monday, August 22, 2005, Mr. T confirmed through the lender's attorney that the home was not being subjected to foreclosure proceedings. Resp. Ex. 3-51, p. 76. By that time, he had accepted an offer for $320,000. *Id.*, at 77. The offer had been accepted the previous weekend, on Sunday, August 21, 2005. *Id.*, at 87, 98. The offer was accepted after the August 19, 2005, phone call from a PA legal assistant.

17. On Monday, August 22, 2005, Mr. T's real estate agent learned from a title company that there was no foreclosure sale scheduled. Resp. Ex 3-52, pp. 103, 110.

18. On Tuesday, August 23, 2005, Froes asked Schollian to resume representation. Resp. Ex. 3-53, p. 23. Schollian was advised that the continued hearing was scheduled for the next day. *Id.* He failed to appear. He explained to Judge Curley that he had lost track of time while meeting with another client. *Id.* He testified in these proceedings that he failed to calendar the hearing and got busy in a meeting with a client. RT 884.

19. On or about August 24, 2005, Judge Curley of the Bankruptcy Court set an order to show cause hearing for September 6, 2005. Although Schollian and Froes disavowed notice of this hearing, Resp. Ex. 3-53, p. 25; RT 2238, the Court's minute entry indicates that it was mailed/faxed on August 29, 2005, to Andrew Nemeth and Tatiana Froes at PA. Bar Ex. 14, at 4374.[39] PA had notice of the Order.[40]

20. On or about August 25, 2005, Schollian faxed a proposed order approving the home sale to the bankruptcy trustee. Resp. Ex. 3-54 (PA001937). The order was signed on or about August 29, 2005. Resp. Ex. 3-53, p. 24. The Court struck the $500 fee inserted by PA for its preparation of the Order. Bar Ex. 18, p. 9.[41]

21. On September 6, 2005, the Court tried to conduct an order to show cause hearing but no one from PA appeared. The Court reached PA by phone and Froes and Schollian appeared telephonically. Bar Ex. 18, p. 1. Judge Curley directed Schollian to submit a declaration of explanation for his failure to appear but he did not submit one. Bar Ex. 16, p. 9; Resp. Ex. 3-53, p. 25. He stated that he believed his oral explanation was sufficient. Resp. Ex. 3-53, p. 25.

---

[39]Mr. Nemeth's name appears on the filed petition and Froes had appeared for the clients before the Court on August 16, 2005.

[40]I have considered the testimony from PA employees that PA has a mail delivery system requiring handling by a mail clerk and review by two supervising attorneys before mail is delivered to the assistants for the attorneys to whom they are directed, RT 2222, 2225, and that each of the supervising attorneys testified that they had not seen the O.S.C. Order at issue. RT 2042 - 46, 2213 - 16.

[41]The Court likened the insertion of the attorneys fees to adding salt to the client's wounds. Bar Ex. 16, p. 9.

22. On September 6, 2005, Judge Curley set another Order to Show Cause hearing, scheduled for September 28, 2005, to discuss whether or not the $2,750 fee should be reduced based on the continued lack of representation. The hearing was further continued for the taking of evidence and scheduled for November 10, 2005. Ex. 3-51, p. 31. Schollian offered to refund the entire amount of the fee at the September 28, 2005, hearing. *Id.*, p. 52. Later, Judge Curley announced that she wanted to consider the potential breach of ethics at the continued hearing and Schollian asked if the hearing would be necessary if the fees were refunded. *Id.*, p. 89.

23. Schollian told Judge Curley that September 27, 2005, was the first time he spoke with his client at length about the case. Resp. Ex. 3-51, p. 4.[42] He had called his client at 8:00 p.m. the night before the hearing on the Order to Show Cause issued against Mr. Schollian for his failure to appear at a hearing on August 24, 2005. *Id.*, p. 10. He did not advise Mrs. T of the O.S.C. hearing until the end of the conversation. *Id.* He later stated that he had spoken with Mrs. T three times. *Id.*, p. 39.

24. When Schollian reviewed the bankruptcy plan that had been filed by another attorney with PA, he noted that there were mistakes. Ex. 3-51, p. 6.

25. Schollian misrepresented the nature of the retention to Judge Curly by stating that Mr. and Mrs. T came in as a 'quick file' and that PA filed a bankruptcy petition immediately when, in fact, Mr. and Mrs. T retained the firm in August, 2004, and a petition was not filed until after they paid $2,000 to the firm, in February, 2005. Ex. 3-51, p. 9.

A. Judge Curley concluded that "during the course of the hearing, it became clear that [Mr. Schollian] was not aware of [Mr. and Mrs. T's] current address or even when

---

[42]Mrs. T related that she had once met Mr. Shollion at PA offices and that she obtained the business card of the attorney who would be representing her. Resp. Exh. 3-51, p. 11. Mrs. T also related that Schollion had told her (incorrectly) that the first time they had met was in Court at the O.S.C. hearing on September 28, 2005. *Id.* Schollian also told Judge Curley that he had "never sat down with both of these clients in my office." Resp. Ex. 3-51, p. 32. In these proceedings, however, Schollian testified that he had met with Mr. and Mrs. T in January, 2005. RT 879.

they had moved, and that there was a lack of communication between Mr. Schollian and [the clients]." Bar Ex. 16, p. 9.

26. Based on the client's oral motion to have PA withdrawn, Judge Curley ordered that PA be withdrawn from representation. Ex. 3-51, p. 23.

27. As a result of the number of attorneys handling the case, there was a breakdown in communication and a lack of attention paid to the problems presented by the case. These facts are well summarized, and incorporated herein, by Judge Curley. Resp. Ex. 3-51, p. 40.[43]

28. On October 4, 2005, the chapter 13 bankruptcy case was dismissed. Resp. Ex. 3-54 (PA 002059). RT 865.

29. On Friday, November 4, 2005, Mr. T was advised that he would receive a $2,000 refund from PA. Resp. Ex. 3-52, p. 49.

30. On or about November 7, 2005, PA refunded $2,000 to Mr. T. Resp. Ex. 3-54.

31. On November 10, 2005, Judge Curley conducted an evidentiary hearing on the issues raised by Mr. and Mrs. T and the failure of PA to appear in prior proceedings. Resp. Ex. 3-52.[44] PA attorney Martin Creaven appeared for PA, PA supervising attorneys Robert Beucler and Joshua Parilman, as well as PA attorneys Tatiana Froes and James Schollian, were present. *Id.*, p. 3. PA announced it had fully refunded the fee at the start of the hearing. *Id*, p. 9.

32. Mr. T asserted, before Judge Curley, that he had accepted a 'fire sale' offer prior to being advised by PA that the home was not in foreclosure proceedings. Resp. Ex. 3-51, p. 59. He also asserted before Judge Curley that he had been advised on Monday, August 22,

---

[43]Judge Curley also noted that six or seven attempts had been made to contact an attorney at PA when no attorney appeared for the scheduled September 6, 2005, hearing. Resp. Exh. 3-51, p. 58. As a result, Judge Curley found truth in Mrs. T's description of her attempts to get through to an attorney at the firm. *Id.*

[44]Specifically, the Court conducted the hearing to consider whether counsel's fees were reasonable, whether fees should be disgorged, and whether there should be a referral to the State Bar for potential violations of ER 1.1, 1.2, 1.3, 1.4, 3.3, 5.1 and 5.2. Bar Exh. 3-45. The transcript of the hearing was entered into evidence in this matter.

2005, that the home was not subject to foreclosure proceedings at that time. Resp. Ex. 3-51, p. 60. By that time, Mr. T was unsure if PA was providing correct information. *Id.*, pp. 74, 81.

33. Judge Curley concluded that Mr. and Mrs. T "should have been provided with the correct factual information by an attorney that they had met and consulted. Although Ms. Froes did the best that she could in a difficult situation, the Firm should not have placed her in that situation." Bar Ex. 16, p. 7.

Conclusions of Law

1. The Bar has established by clear and convincing evidence that firm members who provided representation violated E.R. 1.3 (diligence), 1.4(a)(2) (reasonably consult), 1.4(a)(3) (keep client reasonably informed), 1.4(a)(4) (promptly comply with reasonable requests for information), and 1.4(b) (reasonably explain matters). The Bar has failed to prove, by clear and convincing evidence, a violation of E.R. 1.2 (scope).

2. The Bar has established by clear and convincing evidence that PA's practices were such that the type of problems exhibited in this count were likely to occur and that Respondent Phillips failed to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that subordinate counsel would be able to comply with the professional obligations of the lawyer, and, therefore has proven a violation of E.R. 5.1(a).

3. The Bar has failed to prove, by clear and convincing evidence that Respondent Phillips had direct supervisory authority over any attorney involved in the direct representation and, therefore, has failed to prove a violation of E.R. 5.1(b).

Count 4

1. On February 25, 2005, RS retained PA for a bankruptcy. The fee agreement stated that the fee was $791, and court filing fees were $209. Robert Teague approved the fee agreement for PA. Among other things, the agreement provided for representation at a "341 meeting" of creditors and that if RS failed to appear at the 341 meeting, he would be required

to pay a $100 penalty. It further provided that if RS failed to appear for a scheduled office meeting, he would be assessed an additional $75 fee. Robert Teague was assigned as RS's attorney. PA Ex. 4-61.[45]

2. A 341 meeting was scheduled for August 5, 2005. Evan Romberg appeared as PA counsel for RS. RT 955. The meeting was thereafter continued to August 12, 2005, because RS was not prepared with all of the documentation needed. RT 937.[46]

3. PA, at the time, had one lawyer, Charles Leftwich, to handle 341 meetings for all of its clients. This lawyer was not the attorney assigned to the client. His function at the firm was only to represent clients in 341 meetings. RT 951. His role was "simply to assist the client in attending this hearing." RT 952. He testified that he handled approximately 40 files per day, RT 960, although at times, he would handle each of six or seven 341 meetings held in a half-hour block, because PA would be representing all of the debtors. RT 957.

4. If the calendars were busy, as they were prior to the amendments to the bankruptcy statutes (which caused a significant increase in the number of bankruptcy filings prior to October 17, 2005), other attorneys would appear at 341 meetings because more than one set of meetings were scheduled at the same time. RT 968. PA attorney Romberg filled in for Mr. Leftwich in RS's case. RT 955. RS had been advised that the assigned attorney would not always be present, but that PA would have a representative present, at meetings. RT 945.

5. Leftwich's usual practice was to address all the PA clients in a group prior to the beginning of the 341 meetings. RT 956. Because he appeared in a separate room for a different set of 341 meetings at the time RS's 341 meeting was conducted, Mr. Leftwich was

---

[45]PA fee agreements in bankruptcy cases provide that costs are not included in the fees. Among the "costs" noted as excluded from the quoted fee are Motion for Relief fees, Complaint to Determine Dischargeability, Relief from Automatic Stay, Objections to Exemptions, Amendments, Applications to Reopen Case, Motion to dismiss / for sanctions, Rule 22004 examinations / depositions, Objections to Claims, and any civil cause of action.

[46]PA attorney Leftwich testified that PA bankruptcy contracts require an additional payment for continued 341 meetings. RT 960. That provision, however, is not found in RS's fee agreement. PA Ex. 4-61.

not present on August 12, 2005, for the continued 341 meeting and RS was unrepresented. RT 957. Mr. Leftwich had no independent recollection of meeting with RS. RT 965. It was Mr. Leftwich's practice to request accommodations from the bankruptcy trustee when he was needed in a concurrently scheduled 341 meeting. RT 958-59.

A. The trustee advised RS and other unrepresented PA clients that they could proceed without counsel if they wanted to; RS did not want to wait, so he proceeded on his own. RT 939.

B. A supervising attorney advised Bankruptcy Judge Sarah Curley that the firm, at the time, had 7,000 bankruptcy clients and that it misses "very few" 341 meetings. Bar Ex. 16, p. 14.

6. RS felt that he was not properly represented by PA before the trustee because he believed that PA should have prevented a distribution to a particular creditor. RT 940.

A. The Bar presented no evidence suggesting that this distribution was improper or otherwise the result of incompetent representation.

7. PA refunded RS $200 for missing the 341 meeting. RT 941-42.

8. RS received a chapter 7 discharge. RT 944.

9. Judge Curley considered these same facts and concluded that the firm did not meet the provisional standard necessary to comply fully with ER 1.4(a)(2), 1.4(a)(3), 1.4(a)(4), and 1.4(b), noting that PA recognized the deficiency in the handling of the case and suggesting that PA could use further assistance in "assigning, reviewing and analyzing cases in an appropriate matter so that one supervising and one associate attorney provide appropriate, timely communication and advice to the client, to provide a debtor with competent legal representation in a bankruptcy case from the filing of the petition through the closing of the case." Bar Ex. 16, p. 17.

Conclusions of Law

1. I find that the Bar has proven by clear and convincing evidence that PA attorneys violated E.R. 1.3 because PA attorneys failed to act with reasonable diligence.

2. The Bar has failed to prove a violation of E.R. 1.2 (scope).

3. The Bar has failed to prove, by clear and convincing evidence that Respondent Phillips had direct supervisory authority over any attorney involved in this matter and, therefore, has failed to prove a violation of E.R. 5.1(b).

4. The issue, then, is whether Respondent Phillips violated E.R. 5.1(a) by failing to make reasonable efforts to ensure that PA had in effect measures giving reasonable assurances that all lawyers in the firm conformed to the Rules of Professional Conduct. Had this count been heard in isolation, I might not have found an ethical violation as attorneys often are placed in situations where they can't be in two places at the same time. However, PA established a model where this occurrence was likely to happen. And even if I accept that it only happens in a 'very few' cases, the Rules of Professional Conduct are to be followed in every case - not a percentage of cases. As Judge Curley noted, PA utilizes so many attorneys on any given case, the debtor is left with a lack of information and confusion. Bar Ex. 16, p. 16. Accordingly, I find that Respondent Phillips violated E.R. 5.1(a).

Count 5

1. JE retained PA to file and represent him in a bankruptcy action. RT 1000.[47] PA attorney Shad Blackford was assigned to represent him.

2. During JE's initial meeting at PA, he did not disclose a large debt he owed to the Arizona Department of Economic Security.[48] RT 1003.

3. A petition was filed which did not include the debt owed to DES.

---

[47]Although JE agreed with bar counsel's question suggesting an October 11, 2005, date of retention, that actually appears to be the date the bankruptcy petition was filed. Bar Ex. 21 (001265). The actual date of retention however is not relevant to the conclusions.

[48]JE testified that the debt was $42,000. Respondent's counsel asserted that the debt was over $80,000 and offered exhibit 5-63. That document however is unreadable in pertinent part. Mr. Teague testified that the amount was approximately $81,000. RT 1992. The exact amount of the debt is not determinative.

4. Some time after the initial meeting, JE advised PA of the debt. RT 1003. He discussed the debt with a legal assistant, RT 1992, and brought documentation reflecting the debt to PA. RT 1004.

5. JE expected his bankruptcy petition to be amended to reflect this debt. RT 1005.

A) On February 14, 2006, JE paid $26 to PA for the filing fee for an amendment, and $50 to PA as an amendment fee. Bar Ex. 21 (001266).

B) The debt was not dischargeable. RT 1992.

C) JE was not told that the debt was not dischargeable. RT 1993. Later, one of the attorneys reviewed the debt and asked a paralegal to advise JE that the debt was not dischargeable. *Id.* No evidence was presented suggesting that JE was ever provided this information.

6. JE testified that he had called the firm on numerous occasions and did not receive a return call regarding the amendment. RT 1004 - 06.

7. Hearing nothing from the firm, JE went to the courthouse and obtained a copy of the discharge reflecting a discharge date of January, 2006, which was prior to his payment of the fees and costs for the amendment. RT 1006 - 07; PA Ex. 5-66.

8. JE's address on the discharge petition was incorrect and inconsistent with information JE provided to PA. RT 1007; PA Ex. 5-66.

9. JE sought a refund from PA in March, 2006, but was unable to reach anyone and complained that he "couldn't talk to a human being." RT 1008.

A. PA recognized that a refund should issue after determining that the debt was not dischargeable, but asserted that the refund did not immediately issue because the "information" provided to a paralegal, who then was fired, was "lost." RT 1993 - 94.

10. JE filed a complaint with the Bar in March, 2006, and, in August, 2006, he received a $76 refund from PA. RT 1008-09. The refund was received but was mailed to

an incorrect address. PA Ex. 5-64.[49]

11. PA's supervising attorney blames JE for the problems. *E.g.* RT 1991, 1996. JE was faulted, for example, for not taking note of the incorrect address when he signed the bankruptcy petition.

12. No PA attorney or assistant who directly worked on the JE matter testified at the hearing.

Conclusions of Law

The Bar only asserts a violation of E.R. 1.15(d), and 1.16(d), based on the untimely refund of the improper amendment fee payment, in addition to a 5.3 allegation.

1. I find that the Bar has proven by clear and convincing evidence, a violation of E.R. 1.15(d) and 1.16(d) for not only its failure to timely refund the monies, but for its improper acceptance of the monies after the discharge had been competed. Because its acceptance of the monies was improper, its refund of the monies was untimely. In addition, it took five months for the refund to issue after the filing of the Bar complaint.

2. The Bar has failed to prove, by clear and convincing evidence that Respondent Phillips had direct supervisory authority over any of the PA employees involved in this matter and, therefore, has failed to prove a violation of E.R. 5.3(b).

3. The Bar has failed to prove, by clear and convincing evidence a violation of E.R. 5.3(a). PA blamed the failure to timely refund the monies on a fired paralegal who lost the information. There was no evidence to the contrary. A mistake by an employee does not necessarily imply an ethical violation. While there was no good explanation for the firm's acceptance of the amendment fee subsequent to the discharge of the bankruptcy, there was nothing to suggest that the acceptance of the funds or the untimely distribution of the funds were the result of ineffectual internal measures. The evidence suggests, rather, an isolated

---

[49]At the time, JE's address was P.O. Box 965. PA sent correspondence in November, 2005, to that post office box. PA Ex. 5-69. The discharge petition lists the address as Box 956; the refund was sent to Box 465.

circumstance. Therefore, there is insufficient evidence to establish a violation of 5.3(a).

Count 6

1. On May 30, 2006, KS retained PA to file and represent her in a Chapter 13 bankruptcy. Bar Ex. 22. The fee was $750 for a pre-bankruptcy review, and $2,740 for the bankruptcy petition. $400 of the fees were to be paid out of the bankruptcy plan. Other fees were extra if needed. *Id.* $3,090 was paid to PA on May 30, 2006. RT 1262

2. After meeting with a non-attorney, and signing a fee agreement, KS met with an attorney. RT 1260. KS did not meet with an attorney until after she paid the fee. RT 1268. She recollected meeting with attorney Tatiana Froes for a "couple of minutes." *Id.*, RT 1276. The only subject discussed with Froes concerned the need to fill out a "packet of information" related to her financial condition. *Id.* 1260-61. This included a compilation of financial documents. RT 1271-72.

A. KS was unhappy with what she perceived to be attorney Froes's short and abrupt manner when she met with her after paying the fee. RT 1268-69. It was clear to KS that Froes had not discussed KS's concerns, which had previously been communicated to the non-attorney, with her. RT 1269.

3. KS, dealing with emotional and mental health problems as well as financial problems, found the paperwork to be a monumental task. RT 1263, 1277. At the retention meeting, KS advised both the non-attorney and Froes that she may not be up to the task. *Id.* She was assured that PA would assist in any way possible. RT 1264. She was provided with the phone number of legal assistant Martha for this purpose. *Id.*[50]

A. The then recently amended bankruptcy laws required that attorneys conduct due diligence to help ensure that the financial information provided by the client is accurate. RT 2247. KS was asked to provide financial documentation to corroborate the correctness of the financial information she provided. PA sent what appears to be a form letter

[50]Legal assistant Martha did not testify in these proceedings.

describing, among other things, the need to provide the financial information. Resp. Ex. 6-72.

4. KS did not believe that Martha was of much help in assisting her. RT 1265. KS was falling behind on her day to day living functions, including the compilation of the financial information. KS was told that she needed to complete the paperwork to forestall legal action against her from her creditors. *Id.*

5. KS received a judgment against her from a creditor and advised Martha. KS stated that after that communication, Martha stopped returning her phone calls. RT 1266. However, Froes testified that she spoke with KS on the telephone after receipt of the judgment, and explained that a bankruptcy could eliminate a judgment. RT 2250.

6. KS did not complete the compilation of financial paperwork and PA did not file a bankruptcy petition.

7. PA did not assist KS in filling out the paperwork. RT 1266.

8. With the help of her husband, KS sought to terminate the representation. RT 1267. PA asked her to come to the office to fill out paperwork but KS did not believe she needed to return to the office where she had previously felt like she was pressured by a car salesman. RT 1267-68.[51]

A. KS's husband, CS, intervened with PA after it appeared to him that KS was just going to let the matter go and lose the money. RT 1283. He made a number of phone calls to Froes and legal administrator Ramirez in September and October, 2006, to try to obtain a refund and terminate PA services. RT 1285 - 87. After receiving no responses after a couple of contacts, he contacted the Bar. *Id.*

B. On November 1, 2006, KS filed a bar complaint. RT 1287, Bar Ex. 23.

C. PA received notice of the complaint shortly after November 29, 2006,

---

[51]KS testified that she met with a non-attorney who quoted a fee of $2,000 and then left the room. After KS wrote the check, he returned and said it would cost an additional $1,000. She likened it to a car salesman's trip to see his manager, "only instead of the price coming down, the price was going up." RT 1268.

which is when the Bar sent a letter to PA regarding KS's complaint. Resp. Misc. 70-6.

9. PA refunded the entire fee after KS filed a complaint with the Bar. RT 1269-70.

10. There was no testimony suggesting that Respondent Phillips had direct involvement in, or knowledge of, the operative facts giving rise to this count.

Conclusions of Law

The Bar asserts a violation of E.R. 1.15(d), 1.16 (a) and 1.16 (d), in addition to a 5.3 allegation.

1. For the reasons stated in the general conclusions, I find no E.R. 1.15(d) violation.

2. I find that the Bar has proven by clear and convincing evidence, that PA violated E.R. 1.16(d) for its failure to timely refund the fees, and failing to do so until it received notice that the Bar had been contacted. The allegation is not proven as to Phillips.

3. I also find that the Bar has proven by clear and convincing evidence a violation of E.R. 1.16(a) for PA's failure to timely withdraw from representation after the client sought termination. The allegation is not proven as to Phillips

4. The Bar has not established, by clear and convincing evidence, that the ethical lapses were a result of the failure to employ measures designed to ensure compliance with the Rules of Professional Responsibility. Therefore, I find that the Bar has not proven a violation of E.R. 5.3(a).

5. The Bar has failed to prove, by clear and convincing evidence that Respondent Phillips had direct supervisory authority over any one involved in this matter, and therefore, has failed to prove a violation of E.R. 5.3(b).

Count 7

1. JM was involved in a car accident in September, 2004; he retained PA to recover damages. RT 1137.[52] In May, 2005, JM was in another car accident. RT 1146.

---

[52]JM testified by telephone, did not have the exhibits which had been sent to him by the Bar, and was unable, many times, to answer questions directly or completely.

2. During its representation, PA obtained the bills and records from the medical provider, learned who the insurance carrier was for the at-fault party, spoke to the client, and prepared and sent a demand letter to the insurance company. RT 2364. PA believed JM to be MMI (medical maximum improvement) at the time the demand letter was sent. RT 2365. However, on June 16, 2005, JM advised PA that he was still treating. Resp. Ex. 7-73 (PA000314).

A. At the time, JM's medical expenses were $9,000. RT 2366. Attorney John Schill, assigned to represent JM[53], testified that JM was anxious to settle because he wanted to move out of state and wanted $10,000 'in his pocket.' RT 2365.

B. Schill was concerned about the effect of the subsequent accident on the settlement value. RT 2367. No specific information about the second accident and the type of injuries suffered, if any, was adduced at the hearing.

C. Schill testified that, in June, 2005, he advised JM of the advantages and disadvantages of litigation, the costs of litigation, the change in fee structure, the merits of the case, and the likelihood of success. RT 2370.

D. Schill testified that JM gave him authority to settle for $20,000. RT 2370. JM testified that he did not. RT 1138-39. A letter prepared by PA on July 7, 2005, Resp. Ex. 7-73 (PA000314), reflects that JM rejected the $20,000 offer on June 16, 2005, when tendered to him by PA, but that on June 23, 2005, after speaking with Mr. Schill, he agreed to accept the offer. *Id.* He then revoked authority on June 24, 2005. *Id.*

E. Schill testified that, in negotiations with the insurer, paralegal Curry acted as a conduit for information and that he, not Curry, negotiated with the adjuster. RT 2373. Curry confirmed this representation. RT 2390. No evidence to the contrary was adduced.

---

[53]Although Schill testified that he was assigned the JM matter, the file reveals that different attorneys were handling the case at different times, including Ward Rasmussen, James Fickling, and Joshua Parilman. Resp. Ex. 7-73.

3. JM retained substitute counsel who settled the case for approximately $51,000. RT 1140-41, 1159.

4. PA sought 1/3 of the $20,000 negotiated amount from the settlement, or in the alternative, recovery under a *quantum meruit* review based on time sheets showing the amount of work performed. RT 1153.

5. The fee dispute was arbitrated by Scott Holcomb[54] on December 18, 2006. RT 1153.

6. PA proffered its time sheets at the arbitration but presented no witness who were familiar with or who worked on the file. PA was awarded no fees. RT 1158, 1161-62, Bar Ex. 26. The arbitrator concluded that the time records revealed that paralegals negotiated the fee settlement with the insurer with little or no oversight and that attorneys had spent very little time on the case. RT 1172; Bar Ex. 26, p. 2. He further concluded, based on JM's testimony and his review of the time records provided by PA, that no attorneys at the firm had met with JM and that JM was not counseled about placing a proper or legitimate value on the claim. *Id.*, RT 1164-65.[55]

A. PA supervising attorney Robert Clark testified that the firm has policies and practices designed, *inter alia*, to ensure that there is no unauthorized practice of law in the personal injury division. RT 2307 *et seq.*; Resp. Ex. Misc. 4. Non attorney staff are provided a manual which specify their duties. Resp. Ex. Misc. 5; RT 2325; Resp. Ex. 7-75.[56] Mr. Clark testified about his practices to keep paralegals from engaging in the unauthorized practice of law. RT 2330-31. A paralegal confirmed Clark's representations. RT 2393.

---

[54]Holcomb is a sole practitioner who sits on the fee arbitration committee and resolves between one and four arbitrations a year. RT 1152. Twenty-five to thirty percent of his practice is personal injury. RT 1158.

[55]Holcomb explained that he credited JM's live testimony over the time records as no one from PA with personal familiarity about the time records was present at the arbitration hearing to explain them. RT 1169.

[56]7-75 is a boiler plate code of ethics for paralegals, but is not descriptive.

Although Mr. Clark was not the attorney assigned to the case, and not a supervising attorney with PA at the time the case was handled by PA, he believed that the case was properly and appropriately handled. RT 2338.

7. Time records provided at the arbitration hearing revealed three and one-half hours of substantive attorney time during the representation. Resp. Ex. 7-80.[57]

Conclusions of Law

1. Mr. Holcomb's conclusions were, as he testified, based on incomplete information. PA was not answering to an ethics complaint and would have no reason to defend against one before the fee arbitrator. While reasonable minds may differ about whether PA, in this instance, given the vagaries of litigation, provided competent representation to JM when it recommended that he accept a $20,000 settlement in light of the ultimate settlement received, the evidence is far from clear and convincing. Based upon the testimony and exhibits presented, the Bar has failed to prove, by clear and convincing evidence, that there was a failure to provide competent representation (ER 1.1) or a failure to act with reasonable promptness (E.R. 1.3)

2. Given the uncontradicted testimony of Clark and the paralegal, the Bar has failed to prove by clear and convincing evidence that a paralegal engaged in the unauthorized practice of law in violation of ER 5.5(a).

3. Having found no violation of the Rules of Professional Responsibility, the Bar has failed to prove, by clear and convincing evidence, that Phillips violated of E.R. 5.1(a), 5.1(b), 5.3(a), 5.3(b), or 5.5(a) as to this count.

[57]The time records include 1 hour review conferences periodically. Based on other testimony reflecting PA's practice of incorporating a fixed figure for file reviews which do not reflect the actual amount of time spent, these time entries cannot be considered reliable.

Count 8

1. On September 12, 2006, TG retained PA for pre-charging representation[58] in connection with an incident in Yavapai County. Bar Ex. 33.

A. TG had been hunting with a friend in Yavapai County. A woman in the area appeared to accuse TG's friend of shooting too close to her, or at her. There was an unfriendly verbal altercation between TG's friend and the woman and, thereafter, when TG tried to speak with her, an unfriendly altercation between TG and the woman. The woman obtained TG's license plate number. Resp. Ex. 8-16, 8-17.

2. TG received a letter from law enforcement in connection with this incident on September 12, 2006, requesting immediate contact. He elected to retain counsel. RT 576.

3. PA charged $6,990 for pre-charging representation; TG was told that if he was arrested, the fee would be increased to $25,000, with credit for the fee paid. RT 577.

A. TG met with legal administrator Thomas Beck to retain PA. Beck was not interested in the facts that TG wanted to provide but, instead, scheduled an appointment with attorney Martin Creaven[59] for later that afternoon in Mesa. RT 577. TG tried to give Beck some paperwork related to the incident but Beck did not accept it. RT 580. Later, TG gave the paperwork to Creaven. RT 581.

4. TG wanted to speak with law enforcement to clear the matter; Creaven counseled against it. RT 580-81, 603. TG did not agree with this advice but thought that he should comply with his attorney's advice. RT 582.

5. TG told Creaven that his hunting friend was the person involved in the incident and asked Creaven to obtain a statement from him. RT 581. Consistent with PA practice, this

---

[58]Pre-charging representation, here, means the retention of counsel in circumstances which do not contemplate any court appearances, but, rather, representation in connection with the possibility of criminal charges being filed and actions that can be taken to obtain information and/or influence the charging decision.

[59]Creaven had been with PA for nine years and worked primarily representing clients in pre-charging matters. RT 617-18.

was not done.

6. TG did not understand what PA was going to do for him after his meeting with Creaven. RT 581.

A) PA unsuccessfully sought to obtain a police report from Yavapai County. RT 604.

B) Creaven spoke to the law enforcement officer assigned to investigate the matter but did not obtain particular information. The officer asked to speak with TG. RT 604-05. The officer would not speak with Creaven after learning that TG declined an interview. RT 607.

C) Creaven wrote a letter to the officer declining an interview on behalf of TG. RT 605; Resp. Ex. 8-35.

7. TG testified that he repeatedly called Creaven and that Creaven returned about half of the phone calls. TG was told that Creaven had received a letter from the law enforcement officer investigating the matter but was not told what the letter said. RT 582.

A) Creaven testified that he spoke with TG seven times during the two month representation and that his assistant spoke with TG on five occasions, based on notes in the file. RT 605. The contacts were to keep TG updated on the status of the case. RT 606.

8. After almost three months, and feeling that he was not being provided with any answers, TG chose to retain another attorney. RT 582-582.

A. The newly retained attorney immediately scheduled a telephone call with TG, counsel, and the law enforcement officer. That call took place on December 1, 2006. RT 583.[60]

9. On or just prior to December 1, 2006, TG contacted Creaven to terminate services and was advised to come to the office to sign an agreement to terminate services. RT 583-86.

---

[60]The nature of the advice provided by PA is not at issue here; there is no allegation of a violation of ER 1.1.

A. TG was advised that he needed to meet with administrator Beck who tried to dissuade him from terminating PA services. RT 585. TG felt intimidated by Beck's high pressure tactics (advising that he was taking a "very risky chance" of "being brought up without legal representation."). RT 585-86.

B. TG was advised that the fee would have to be reviewed before PA could determine if he would receive any money back. RT 586.

C. On December 11, 2006, TG wrote a complaint to be sent to the Bar. RT 586. On that same day, Respondent Arentz wrote a letter to TG that PA had credited $4,000 to TG's credit card, leaving a fee of $2,900 paid. RT 588-89, 594. TG submitted his complaint to the bar after he received the refund. RT 589.

D. TG did not receive an accounting for the fees. RT 599.

10. PA kept time records in the TG matter. Although the time records accounted for time spent performing monthly status reviews, Creaven never performed a monthly status review. RT 610. Time was accounted for closing the file, and for an administrative fee review. RT 611-12. Creaven testified that he spent time on the case that was not documented. RT 613.

A) The time records reflect 3.75 hours of attorney time and 4.75 hours of non-attorney time.

B) Bar expert Derickson opined that the fee, after refund, was unreasonable. RT 1716.

C) Respondent's expert Picarretta testified that it was worth $3,000 to receive the advice to refrain from speaking to the police. RT 2866. Respondent's expert Belanger testified that all fees set at the initial retention were reasonable and that all fees, reviewed after the representation ended were reasonable. RT 2594.

1) Specifically with respect to this count, Belanger believed that about ten hours had been spent on the case and opined that if only a few hours had been spent, about seven, then a retrospective review would be closer to an hourly fee analysis than

otherwise. RT 2677. He believed the fee to be reasonable, although there may be different opinions. RT 2628.

11. Keeping time was not a priority for Mr. Creaven. RT 615-16. He was never told to strictly account for time. RT 616.

12. Respondent Arentz, as the criminal supervisor for PA, set the fees in the case and determined the refund amount. RT 602, 1431.

13. Pre-charge representation at PA does not include the conduct of any interviews or any investigation into the matter.

14. Phillips had no direct involvement in this matter.

Conclusions of Law

1. The Bar alleges that Respondents charged an unreasonable fee in violation of E.R. 1.5. Was $2,990 a reasonable fee for the services provided?[61] Considering the appropriate factors, there was not a significant amount of time or labor involved, the case was not difficult and there was no extraordinary amount of skill necessary to advise TG to refrain from speaking to law enforcement. It is important, I believe, to note that PA does not conduct any investigation into a matter as part of its pre-charging representation and, apart from the initial advice to the client, and a contact with law enforcement, PA does not proactively represent the client. This is not a situation where a retainer is paid to ensure the availability of the lawyer or the firm. Accordingly, I find that the fee, in this instance, was unreasonable for the services rendered, and therefore find a violation of E.R. 1.5 has been proven as to Respondent Arentz. There was no evidence to suggest that Phillips was involved and, therefore, I conclude that the Bar has failed to prove a violation as to him.

2. For the reasons stated in my general conclusions, I find no violation of E.R. 1.15(d) or 1.16(d). Moreover, TG began his efforts to terminate representation in November, 2006,

---

[61]I do not agree with Picarretta's statement that the advice to refrain from speaking to the police was worth $3,000. I do not believe he meant this statement literally, but to make a point that the advice received may well be worth more than the time put into a matter.

and he received a refund on December 11, 2006. There was no unreasonable delay and no violation on the timeliness of the refund that was provided. Accordingly, no E.R. 1.16 violation has been proven.

3. The Bar has not established, in this count, by clear and convincing evidence, that the unreasonable fee was due to the failure to employ measures designed to ensure compliance with the Rules of Professional Responsibility by attorneys at the firm. The Bar has failed to prove, by clear and convincing evidence, that Respondent Phillips or Arentz failed to made reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that attorney conduct conforms to the professional obligations of the lawyer. Therefore, I find that the Bar has not proven a violation of E.R. 5.1(a).

4. Although Phillips is Arentz's supervisor, the Bar has failed to establish by clear and convincing evidence that Phillips did not make reasonable efforts to ensure that Arentz would conform his conduct to the Rules of Professional Conduct as to Arentz's fee reviews. Accordingly, I find that the Bar has not proven a violation of E.R. 5.1(b).

5. Beck's high pressure tactics towards TG were improper. PA's manuals prohibit that conduct. On the other hand, administrator bonuses are tied, in part, to retention. The Bar presented evidence of two instances of this kind of conduct and another, in Count 11, where PA personnel unduly obstructed the processing of a refund. Count 19 is more dramatic because the conversation was captured on tape. Do these instances of misconduct by non-lawyer personnel mean that the Bar has proven by clear and convincing evidence that Phillips and/or Arentz failed to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer? While reasonable minds may differ and the issue is a close one, I conclude that the incentives provided to the administrators, as part of the practice at PA, provide the motive for the misconduct. Based on the evidence presented at the hearing, I conclude that the Bar has proven, by clear and convincing evidence, a violation of E.R. 5.3(a) as to both Phillips and Arentz.

6. Because Arentz is the supervisor in the criminal department, I find that the Bar has proven a violation of E.R. 5.3(b), as to Arentz, but not Phillips.

Count 9

1. RU retained PA in 2006 because his son, Craig, "was having some problems with his plea agreement." RT 215. He wanted to "hire a better lawyer than just a court-appointed lawyer." *Id.*

A. In one cause number, Craig was charged with a count of Theft of Means of Transportation, a class 3 felony, and another, unnamed count. Bar Ex. 36. In another cause number, he was charged with one count of drive by shooting, a class 2 felony. Bar Ex. 40.

2. Craig had already executed plea agreements mandating a sentence of 3.5 years in prison. *Id.*; Bar Ex. 40, 36. The plea agreements were signed by all of the parties on January 24, 2006. Bar Ex. 40, 36. Craig wanted to receive a less severe prison term than required by the plea agreements. RT 216.

A. The plea agreements, in addition to disposing of the two cause numbers, provided that Craig would not be charged with kidnaping, armed robbery, or aggravated assault as described in a Phoenix Police report, theft of means of transportation as described in a different Phoenix Police report, unlawful flight as described in another different Phoenix Police report, nor aggravated assault as described in another Phoenix Police report. Bar Ex. 36.

B. Craig was represented, at the time he entered the plea agreements, by a court appointed attorney. RT 215.

3. RU provided a copy of the plea agreements[62] to the PA representatives he was speaking with at the time he met with them to discuss retention. RT 216.

---

[62]There were two plea agreements in two separate cause numbers. The plea in the drive by shooting case mandated 3.5 years in prison. The plea in the theft case stipulated to probation upon release from the Department of Corrections and was contingent upon entering the plea in the drive by shooting case. Bar Ex. 36, 40.

4. RU paid the firm $6,000. RT 218. The fee agreement defines the scope of services as "mitigation of sentencing." Resp. Ex. 9-39.

A. The fee agreement contains a standard clause that states that no guarantees or promises have been made. It also contains a clause which states: "I understand that I am not yet a client of the Firm. I will not disclose any secrets about my case or information that I regard as confidential until I agree to retain the firm and the Firm agrees to accept my case." Resp. Ex. 9-40.

B. RU was provided with another document which states that PA representatives may not make any guarantees or promises. Resp. Ex. 9-40.

C. Attorney Eric Thieroff signed the fee agreement for PA.

5. RU testified that he was "sold" on the firm because he was told that PA had represented the Hell's angels and several others on murder charges which were dropped or reduced to one or two year terms. He was told that PA should be able to have this sentence reduced as well. RT 218-19.

6. RU hired the firm believing that the time his son would spend in prison would be reduced. RT 219. He also wanted a lawyer to discuss the plea agreement with his son, although this was not his reason for retaining PA, RT 238, 243, and to explore a dismissal of charges based upon competency issues. RT 242. His primary purpose, however, was to obtain a reduced sentence.

A. No testimony was adduced from PA intake personnel or others suggesting that RU's recollection of the retention process was incorrect.

7. PA assigned Michael Yucevicius to represent Craig. RU met with Yucevicius up to three times. RT 220. Yucevicius believed his role was to examine the plea and handle the sentencing. RT 249. He was not involved in the retention process. RT 252.

A) RU told the attorney he spoke with that his son was incompetent to enter the plea, he was severely autistic, and he could not read or write. RT 221. RU was not told that his son would have to withdraw from the plea in order to obtain the relief RU was seeking.

Id. However, he later understood that in order to have his sentence reduced, his son would have to withdraw from the plea agreement and either stand trial or seek a different agreement. RT 224.

B) Based upon the conversations he had with Yucevicius, RU believed that there was a good possibility that his son could withdraw from the plea agreement because previous criminal charges had been dismissed due to competency. RT 235.

C) Yucevicius reviewed records indicating that Craig suffered from depression and ADHD, but not autism. RT 257.

D) Yucevicius testified that RU stated that he understood there was no possibility of obtaining a sentence less than 3.5 years and the only reason he hired PA was to convince his son to "stay with the plea agreement." RT 258. I find RU's testimony more credible on this point, especially given the language of the fee agreement.[63]

8. Craig was sentenced to 3.5 years pursuant to the plea agreement. RT 222. Yucevicius did not seek a sentence less than the stipulated one at sentencing after discussing with his client the possibility of a more severe term if the plea were withdrawn. RT 253. Yucevicius had discussed his representation of Craig with Respondent Arentz because the file came to him with the direction to perform a mitigation hearing, and, with a stipulated sentence, there was no need to conduct a mitigation hearing.[64] RT 272.

A) On May 4, 2006, Craig appeared before a commissioner sitting in for the assigned judge for sentencing. The commissioner was inclined to reject the plea agreement. Accordingly, Craig was offered the option of sentencing before the commissioner outside the parameters of the plea agreement, or to continue the sentencing before a different judge. He

---

[63]It appears that Mr. Yucevicius explored the possibility of seeking to withdraw from the plea and ultimately concluded that it would not be wise to do so. *E.g.* RT 252, 256-57, 260, 269.

[64]The purpose of a mitigation hearing is to try to persuade the Court to impose a lesser sentence than might otherwise be imposed.

opted to continue the sentencing. RT 258; Resp. Ex. 9-35.[65]

9. A "manifest injustice" must be shown to withdraw from a plea agreement. RT 253. A motion to withdraw from a plea agreement is rarely granted. *Id.*

10. No refund, full or partial, issued from PA. RT 223. No testimony was adduced suggesting that a refund was requested.

11. PA expert Belanger believed that the fee charged to RU was reasonable. RT 2594.

12. PA expert Picarretta testified that the fee was reasonable because this was a "second opinion" plus take over for sentencing. RT 2824.

A. Mr. Picarretta's understanding of the facts giving rise to this Count are mistaken.

B. The testimony establishes that RU retained PA to mitigate the sentence which means, to obtain a sentence less than that stipulated to in the plea agreement contained in Bar Ex. 40.

13. Bar expert Derickson testified that the fee was unreasonable for essentially the same reasons as in Count 12, *infra*. RT 1724-25.

14. The firm did not complete the scope of representation as stated in the fee agreement.

---

[65]Respondents appear to contend that this afforded Craig the opportunity to withdraw from the plea which he declined. Proposed Findings of Fact and Conclusions of Law, p. 134. To the contrary, the rejection of a stipulated plea agreement, if accepted by the parties, authorizes the Court to impose any sentence authorized by law, without being bound by the agreement. *See* Resp. Ex. 9-35 (Court inclined to reject the "plea agreement"). This typically signifies that the Court was inclined to reject the sentencing stipulations in the plea agreement because the Court felt that a harsher sentence was appropriate. It does not, as Respondents suggest, and as Yucevicius testified, RT 258, offer the defendant the opportunity to withdraw from the plea; rather, the defendant may agree that the Court is not bound by the sentencing stipulations. In Craig's case, that would have exposed him to 12.5 years in prison. The minimum sentence was four years (with a "super-minimum" sentence of 3 years if the court found exceptional circumstances). Bar Ex. 40. The Court's rejection of the plea agreement, with a stipulated sentence of 3.5 years, halfway between the minimum and the 'super-minimum,' cannot be reasonably interpreted to mean that the Court would have imposed less time, especially in light of the charges which would not be filed.

15. Respondent Arentz was made aware of the incongruity between the scope of services as provided in the fee agreement and the circumstances of the case which made "mitigation of sentence" unattainable. Other than being made aware of the problem by Yucevicius, Respondent Arentz was not directly involved in the representation.

16. Respondent Arentz conducted a review of the fees charged after the representation terminated and determined the fee to be reasonable.

17. PA misled RU by advising him that PA would seek to mitigate the sentence without advising him of the difficulties of doing so given the previously entered plea agreements.

Conclusions of Law

1. Notwithstanding any conflicting testimony, the written fee agreement states that PA would provide "Mitigation of Sentencing" for the $6,000 fee. That was simply impossible given the circumstances. Craig had already entered into a plea agreement with a stipulated sentence.[66] The scope of services was impossible to attain. The only potential was to explore and seek, if possible, a withdrawal from the plea agreement which would likely have led to a trial; this was not contemplated at the time of retention. Moreover, the fee agreement contains a clause which states: "I understand that I am not yet a client of the Firm. I will not disclose any secrets about my case or information that I regard as confidential until I agree to retain the firm and the Firm agrees to accept my case." This clause inhibits the type of information and communication necessary to allow the potential client to make an informed decision about retention.

2. Accordingly, I find that the Bar has proven, by clear and convincing evidence, a violation of E.R. 1.5(a) and a violation of 8.4(c), for misleading RU with respect to the scope of services and the ease or difficulty of attaining his goal.

---

[66]The suggestion that counsel successfully gained a consecutive probation term as opposed to intensive probation misses the mark. RU was motivated by the amount of time his son would have to spend in prison and the "mitigation of sentencing" related to that amount of time.

3. Arentz reviewed the fee and was aware of the circumstances surrounding the retention. He is, therefore, responsible for the 1.5(a) violation but there was no evidence that Phillips was involved in this matter or that Arentz personally violated E.R. 8.4(c). Another attorney signed the fee agreement and Arentz was not made aware of the problem until later.

4. The firm's retention practices are largely responsible for this occurrence. These practices do not require that a knowledgeable attorney speak with the potential client or family member. The practices inhibit the free flow of information that attorney and potential client should engage in by counseling the client not to discuss confidential information. In this case, it appears that the fee agreement was signed by a lawyer who does not practice criminal law. In a situation like this, where a plea agreement has already been entered, counseling as to the options should be made at the time of retention in order for the client to make an informed decision. The firm failed to employ reasonable measures giving reasonable assurance that subordinate members of the firm would act in conformity with, or that the conduct would be compatible with, the Rules of Professional Responsibility in the retention process.

5. Accordingly, I find a violation of E.R. 5.1(a) as to both Phillips and Arentz. Because PA utilizes non-attorneys in the retention process as well, I find a violation of E.R. 5.3(a) as to both Phillips and Arentz..

6. Respondent Arentz has direct supervisory responsibility over the criminal department at PA. Accordingly, as to him, I find a violation of E.R. 5.1(b) and E.R. 5.3(b).

7. Respondent Phillips does not have direct supervisory responsibility over the criminal department and, therefore, I find that the Bar has failed to prove a violation of E.R. 5.1(b) or 5.3(b), as to him.

Count 10

1. On July 17, 2005, EE retained PA for representation for a second offense DUI. RT 66, 72.

A. The fee agreement was reviewed with attorney Robert Teague. Bar Ex. 43. Teague does not practice criminal law.

2. The fee was $7,000. RT 68.

3. Respondent David DeCosta was assigned to represent EE.

A. PA assigns attorneys by region. DeCosta was assigned the Gilbert and Chandler courts. RT 112.

B. Arentz was DeCosta's supervisor. RT 112.

C. DeCosta was not responsible for setting fees or refunding fees. RT 112-113.

4. EE did not meet DeCosta until a court date on or about September 22, 2005. EE testified that that is when DeCosta advised him to plead guilty pursuant to a plea agreement.

A. EE entered a guilty plea that date. RT 114.

B. EE testified that he spoke with his attorney for about ten minutes. RT 75. DeCosta remembered that they met for 30 minutes that date. RT 152.

C. EE testified that he did not recall DeCosta telling him that he could postpone the court date to consider the plea agreement; rather, De Costa advised that by postponing, he could not guarantee receipt of the same plea agreement. RT 88. DeCosta testified, however, that Gilbert prosecutors do not withdraw plea agreements unless the case is set for trial so he would not, and did not, tell EE that the plea had to be accepted that day. RT 155.

D. DeCosta testified that he discussed the proposed plea agreement, by phone, on September 8, 2005, RT 120,[67] and again when they met for 30 minutes prior to the change of plea proceeding. RT 155. DeCosta asserts that they "reviewed his entire case" at that time. *Id.*

5. EE testified that he was upset because he had not had the opportunity to discuss the police report, his blood alcohol content, whether the police officer was a licensed

---

[67]September 8, 2005, was the original date set for EE to enter a guilty plea. This was continued to September 22, 2005. RT 123-24.

phlebotomist, whether there were grounds for his arrest and, in general, case strategy, with DeCosta prior to receiving the advice to plead guilty. RT 72 *et seq.*

A. DeCosta, on the other hand testified that he discussed the discovery and the proposed plea agreement, by phone, on September 8, 2005, and on another occasion in the office. RT 120. DeCosta testified that he spent 15 minutes on the phone with EE on September 8th discussing the discovery, and 15 minutes on September 20th as well. RT 124. He did not account for his time in the PA time record keeping system. *Id.* DeCosta also asserts that EE's goal was to process the case as quickly as possible while ensuring that his jail time was delayed and scheduled consistent with his surgery schedule and military commitments. RT 152. DeCosta testified that there was a proper basis for the stop giving rise to the arrest and that the BAC was consistent with EE's drinking history as relayed to him and to the police officer. RT 152-53.

1) Attorney contact forms from PA files show the following;

a) a pretrial conference was conducted on August 22, 2005, and a change of plea was set for September 8, 2005. DeCosta asked his assistant to schedule an office visit with EE. Resp. Ex. 10-7.

b) the change of plea on September 8, 2005, was continued until September 22, 2005. Resp. Ex. 10-7.

c) On September 20, 2008, Mr. DeCosta left a message for EE to remind him of the September 22nd change of plea date. Resp. Ex. 10-8. That contact does not show up in the time record system. RT 126.

d) On September 20, 2008, DeCosta spoke with EE by telephone and advised him of "plea\ offer / rights" and issues relating to the self-surrender date. Resp. Ex. 10-9.

e) On September 22, 2008, DeCosta appeared in Court and EE pled guilty. Resp. Ex. 10-11.

f) On September 26, 2008, DeCosta spoke with EE to discuss

service of sentence in Casa Grande which EE rejected. Resp. Ex. 10-11.

g) On September 28, 2008, DeCosta instructed his legal assistant to determine if any local jails would allow EE to serve his sentence. Resp. Ex. 10-12.

h) On September 28, 2008, DeCosta spoke with EE to advise that he would have to serve time in "lower Buckeye." Resp. Ex. 10-13.

I) On December 2, 2005, DeCosta spoke with EE about his surrender date, and asked his assistant to file a motion to delay the jail term. A time slip for .3 was signed by DeCosta. Resp. Ex. 10-15, 10-17.

j) There were numerous phone calls between EE and legal assistants regarding the date and place of his jail term.

k) A legal assistant sent letters to the Gilbert, Mesa, and Chandler police departments asking if EE could serve his time in their city jail.

2) PA's file in this matter does not reflect that the police report was sent to EE by PA. RT 141. EE, however, had a copy of the police report.

2) No witnesses were interviewed. RT 136.

3) The work done by DeCosta consisted of reviewing the discovery, consulting with the client, attending three court dates, accepting the plea offer tendered by the prosecutor (RT 139), and arranging for the postponement of EE's surrender date.

6. DeCosta had numerous clients in court the day that EE pled guilty. RT 75. DeCosta handled 130 cases in 2005. RT 119.

7. EE was sentenced to thirty days in the county jail with work release. RT 77. His report date was delayed a number of time due to physical problems and other commitments. He reported to serve his sentence in April, 2006. RT 78.

A. EE asked DeCosta to see if the sentence could be served somewhere other than "tent city."[68] He was unhappy when DeCosta suggested Casa Grande as an alternative

---

[68]I take notice that "tent city" is part of the Maricopa County Jail system where convicted misdemeanor DUI offenders may go to serve their sentence.

place of incarceration. RT 91. He wanted to serve his time in Mesa. RT 92.

8. In or about October, 2005, EE spoke with Respondent Arentz about the fee paid to the firm. RT 99. Arentz told EE that he could not review the fee until the work was completed and, unless the firm were terminated, the fees would not be reviewed. RT 99-100. EE did not want to terminate the firm because he was not guaranteed he would receive a refund. RT 100.

9. On or about July 10, 2006, EE complained in writing about his representation to Arentz, and copied the Bar on his correspondence. RT 81; Bar Ex. 43.

A. EE was upset because DeCosta was not returning phone calls. RT 93. After complaining to DeCosta, DeCosta provided EE with his cell phone number which EE subsequently used to call DeCosta. RT 93-94.

B. DeCosta acknowledged that he did not return many phone calls and attributed the failure to an errant legal assistant who did not pass along the messages. RT 114.

10. Sometime between July 11, 2006, and July 21, 2006, EE spoke with Arentz and discussed and settled on a fee reduction. RT 106.

11. On or about July 21, 2006, PA refunded $5,000 (of the $7,000 fee) to EE. Resp. Ex. 10-35.

12. Bar expert Derickson testified that the $7,000 fee initial fee could have been reasonable depending on the amount of work done, and that the $2,000 ultimate fee was reasonable. RT 1729-1730. There was no evidence to the contrary.

Conclusions of Law

1. The Bar failed to prove, by clear and convincing evidence, a violation of E.R. 1.5(a). The fee was not unreasonable.

2. The Bar failed to prove, by clear and convincing evidence, that Mr. DeCosta violated E.R. 1.2 (scope), 1.3 (diligence), or 1.4 (communication). While reasonable minds may differ with respect to the E.R. 1.4 violation, when weighing the testimony of EE and

DeCosta, I cannot find, by clear and convincing evidence, that DeCosta violated E.R. 1.4.

3. Accordingly, I find that the Bar has failed to prove, by clear and convincing evidence, a violation of E.R. 5.1(a), (b), or E.R. 5.3(a), (b), as to this Count.

Count 11

1. On July 14, 2005, CB was arrested as an armed robbery suspect by La Paz County Sheriff's Detective Rick Patterson. RT 526-27; Resp. Ex. 11-46.

2. On or about July 14, 2005,[69] CB's friend, Sherri, retained PA for $35,000; $18,000 was paid initially via credit card. RT 529. The other $17,000 was going to be paid by re-financing a house. RT 560.

A. PA representatives[70] sent paperwork to effectuate the re-financing, but the paperwork was not signed due to concerns about the financing fees. RT 561. By that time, CB had been released from custody and was having second thoughts about being represented. *Id.* A decision was made to request a refund because of the credit card interest. RT 562.

3. On or about July 15, 2005, Det. Patterson determined that CB may not be a probable suspect and arranged for him to be released. CB testified that Patterson told him that he did not think him as much a suspect as he had the day before. Resp. Ex. 1-46; RT 527-28.

A. CB has maintained his innocence and has not been charged with the robbery;. RT 712. The police took another suspect into custody. RT 528, 534.

4. PA attorney Alan Hock was assigned to represent CB. RT 710.

5. On or about July 15, 2005, PA attorney De Costa drove to the La Paz County jail to have CB sign the fee agreement and to advise him that the public defender would handle

---

[69]The paperwork reveals that CB signed a fee contract on July 14, 2005, and a schedule of payments on July 15, 2005. Resp. Misc. 100-11. As noted *infra.*, a PA representative did not meet with CB until July 15, 2005.

[70]It appears that the re-financing of the home was to be effectuated through a Steve Harris who is not be a PA employee. It further appears that Mr. Harris was contacted by PA employee Thomas Beck and conferenced into a phone call with Beck and CB's girlfriend. RT 569.

the preliminary hearing or that they would waive the preliminary hearing. Resp. Ex. 11-11. Although Mr. DeCosta testified that he spoke to the court administrator and the prosecutor, there was no testimony about the nature of the conversation and no notes corroborating the conversation. *Id.*; RT 168-69. Mr. DeCosta did not account for his seven hour trip in 'Time Matters,' and PA accounting records do not reflect the time. RT 169.

6. On or about July 21, 2005, CB received paperwork which he interpreted to mean that his case was vacated.[71] The preliminary hearing had been "scratched."[72] RT 711.

7. Sometime after receiving the July 21st paperwork, CB called Hock to terminate the firm's representation because CB believed he would not be charged with an offense. RT 531-32. Hock advised CB not to terminate the firm but that if he wanted to, another employee at PA would contact him to discuss it. RT 532, 544.[73]

8. PA employee Tom Beck[74] called CB and advised him that it would take two to eight weeks to refund the money because PA needed to obtain paperwork from La Paz County. RT 532.

9. On or about August 25, 2005, CB's girlfriend, CS, called and spoke with Tom Beck. Beck advised her that the firm needed paperwork showing that Mr. Bowen would not

---

[71]"Vacated" has come to mean, in Maricopa County, that a preliminary hearing is removed from the calendar because the case is going to be heard by the grand jury. In this context, however, the term means that the preliminary hearing was cancelled. There is a seven year statute of limitations, generally, for felony cases in Arizona.

[72]"Scratched," in Maricopa County, generally means that the preliminary hearing was cancelled because no complaint was filed within the time frame required by the Rules of Criminal Procedure. Hock understands a "scratch" to be equivalent to a "vacate." RT 712.

[73]Hock testified that he explained that charges could subsequently be filed and, until there is official confirmation that no charges would be filed, it might be wise to maintain representation. RT 714. Hock stated that he had no confidence that the police in La Paz County would tell the truth. RT 739. Consistently, Yucevicius testified that police officers do not necessarily tell defense attorneys what they really know. RT 2573. My experience is consistent with Yucevicius.

[74]Hock referred CB to Beck pursuant to PA policy, which required that the client be referred to the legal administrator to determine if something could be adjusted in the contract. RT 740.

be charged with a criminal offense before the firm could be terminated. RT 563-65.

A. CS denied being told that cancellations were required to be in writing. RT 568.

10. On or about September 20, 2005, Patterson called CB to advise him that the police had apprehended the person who committed the armed robbery. RT 533-34, 549.

11. On September 20, 2005, Patterson called PA and advised that CB had been exonerated. RT 2553; Bar Ex. 50-A.[75]

12. On or about September 20, 2005, CB and/or his girlfriend, called Beck or Hock to advise that he had been exonerated and left a message with an assistant. RT 534-35.

13. On October 5, 2005, CB received a letter from PA attorney Michael Yucevicius, with a copy of the police report in his case.[76] CB was asked to read the report carefully, note inaccuracies, and provide a list of witnesses who may be helpful to the case. Bar Ex. 44. The report stated that it was apparent to the investigator that "[CB] was not actually suspect in committing the robbery . . .". Resp. Ex. 11-46.

A. CB did not know who Yucevicius was. RT 537. In November, Yucevicius called CB and advised him that he was the assigned attorney. *Id.* CB asked about his refund during that conversation. RT 540, 553. Yucevicius told CB that the file would not be closed until PA received documentation from the police that he had been exonerated. RT 2555-56.

B. CB already had a copy of the police report. RT 539.

C. The police report was not carefully reviewed by a PA attorney before it was sent to CB.

14. On or about November 1, 2005, CB filed a bar complaint.

---

[75]Hock's response to the Bar's inquiry about this matter did not reflect this contact. Rather, Hock stated that PA did not receive confirmation that CB had been exonerated until two months later. RT 719.

[76]The file was transferred to Yucevicius because it was no longer active, pursuant to PA's organizational structure. RT 736, 2550.

15. On or about November 15, 2005, CB sent a certified letter to PA supervising attorney John Schill, who CB believed to be Hock's supervising attorney, requesting an accounting and a refund. Bar Ex. 49, RT 551.

16. On or about November 29, 2005, Yucevicius spoke with Det. Patterson who advised Yucevicius that CB had been exonerated and that another suspect had been arrested and charged with the offense. Resp. Ex. 11-24. That same day, a PA legal assistant was advised by a representative of the La Paz County Sheriff's Office that a supplement to the police report indicated that CB had been exonerated. Resp. Ex. 11-27.

A. On November 30, 2005, PA requested the supplement from the La Paz Count Sheriff's department; later that day, the Sheriff's Office advised that it would not release a copy of the report. Resp. Ex. 11-28, 11-29.

17. In December, 2005, CB spoke with Respondent Arentz who advised him that he would be receiving a refund. RT 540.

18. At the end of December, 2005, PA refunded $16,000. RT 541.

19. Belanger believed that the initial fee ($35,000) and the ultimate fee ($2,000) was reasonable. RT 2594.

20. Derickson did not offer an opinion on the reasonableness of either the initial fee or the ultimate fee.

21. Picarretta believed that the initial fee and the ultimate fee was reasonable. RT 2826-27.

22. There was no testimony that Respondent Phillips was directly involved in CB's representation or that he was aware of the allegations in the complaint while they were occurring.

23. There was no testimony that Respondent Arentz was directly involved in CB's representation or that he was aware of the representation until a refund request was submitted to him.

24. PA was aware that CB had requested a refund as of September 20, 2005, and did not begin to address the request until CB's letter to Mr. Shill in mid-November, 2005.

Conclusions of Law

1. As to E.R. 1.5, the Bar failed to prove, by clear and convincing evidence, that the fee, as initially charged or as ultimately reduced, was unreasonable.

2. I do not agree with the assertion made in these proceedings that PA need not process a request to terminate its services until it obtains a request in writing.

3. For the reasons stated in the general conclusions, I find no E.R. 1.15(d) violation.

4. By failing to act on the termination request when initially made, PA employees failed to promptly deliver its refund of an advance payment of a fee that was not earned in violation of 1.16(d). However, there was no evidence that Respondents were aware of the September refund requests and, accordingly, I conclude that the Bar has failed to prove by clear and convincing evidence a violation as to either of them.

5. PA failed to withdraw from representation after termination in violation of E.R. 1.16(a). However, there was no evidence that Respondents were aware of the termination request and, accordingly, I conclude that the Bar has failed to prove by clear and convincing evidence a violation as to either of them.

6. I conclude that Respondents Arentz and Phillips violated E.R. 5.1(a) and E.R. 5.3(a) for failing to have practices in place to prevent the difficulty in obtaining a refund.

7. With respect to E.R. 5.1(b) and E.R. 5.3(b), attorney Hock referred the termination request to non-attorney Beck pursuant to PA policy. Beck, thereafter, impeded the processing of the withdrawal and refund request. Arentz has supervisory responsibility over the criminal department. I therefore conclude that the Bar has proven, by clear and convincing evidence, a violation of E.R. 5.3(b) as to Respondent Arentz, but not Phillips.

8. The Bar has failed to prove, by clear and convincing evidence, a violation of E.R. 5.1(b) (supervisory responsibilities over attorneys) as to Phillips or Arentz.

Count 12

1. In 2005, OC, then represented by a public attorney, signed a plea agreement stipulating to a 2 ½ year sentence. RT 285-86; Bar Ex. 51.[77]

2. OC's mother, Maria, subsequently sought a second opinion to see if a less lengthy sentence was possible. RT 286-87.

3. Maria met with a legal administrator,[78] provided a copy of the signed plea agreement, and asked if PA could do something to help. RT 289. After waiting a length of time for the administrator to return to the office, Maria was told that "the lawyer" said he could do something to help. RT 290. Maria interpreted this statement to mean that PA guaranteed it could help her son, and that her son may only have to serve a four or six month sentence. RT 291-2.

A. Because Maria does not speak English well, she was able to meet with a Spanish speaking PA representative. RT 289.

B. Maria signed a Spanish language form which, among other things, stated that PA does not guarantee results. RT 305-06; Resp. Ex. 12-06. Maria testified that the administrator told her that that is why she has to trust our lawyers. RT 305.

4. Maria did not retain PA on the day of her visit; she discussed the requested fee of $5,000, and her belief that PA could help, with her husband. RT 293. Her husband expressed skepticism so he accompanied Maria to meet a second time with the PA representative.[79]

---

[77]Respondents called OC to describe, among other things, the facts of his crime to support the reasonableness of the fee. RT 334-337. In light of the evidence adduced at the hearing, those facts are not particularly germane to the issue.

[78]The administrator was believed to be William Jovell. He did not testify during these proceedings. Jovell used to be employed at PA as an intake person but had not been there for two or three years. RT 1386.

[79]Maria's husband did not testify.

5. On or about September 12, 2005, after meeting with the PA administrator and hearing again what had been said during the first meeting, Maria paid PA $1,500 with an agreement to pay the additional $3,500 prior to the next court date, which was OC's sentencing date. RT 294-6.

A. OC's parents re-financed their home to obtain the balance. RT 295.

B. Maria signed a fee agreement, Resp. Ex. 12-07, which stated that there was no guarantee of any particular result. *Id.*; RT 309-11. The scope of services is handwritten in English and provides that OC will be represented "for sentencing only." Resp. Ex. 12-07. Notwithstanding the language in the fee agreement, Maria believed, based upon the representations of the administrator, that, despite the paperwork, her son would receive a better sentence than what had been stipulated in the plea agreement. RT 311-12, 317.

C. After signing the fee agreement, and as part of the initial retention, Maria met with PA attorney Tatiana Froes. RT 2258 - 2262. Froes is a bankruptcy attorney and is not qualified to give advice in a criminal case. RT 2272. She does not know what a stipulated plea agreement is. RT 2273.[80] Maria never met with an attorney who could describe her options with her in an intelligent manner prior to retaining PA.

D. Maria was advised that PA attorney Larry Magid was assigned to OC's case. RT 315. For reasons not addressed at the hearing, Mr. Magid did not represent OC.

E. No one at PA advised Maria of the need to withdraw from the plea in order to try to obtain a better sentence, the requirements or the difficulty of such an effort, or the potential negative consequences.

6. OC signed documents indicating that no guarantees could be made regarding the outcome of his case. Resp. Ex. 12-7, 12-8.

7. Maria met OC's assigned attorney, Alan Hock, for the first time at OC's sentencing, in the courtroom. RT 297. Prior to sentencing, Mr. Hock advised her that OC

---

[80]When Froes "closed" a criminal case, she would not provide any answers to questions about the case, instead advising the client to call the assigned attorney. RT 2260.

would receive the 2 ½ year sentence as previously stipulated. *Id.* Maria was surprised to hear that. *Id.* OC was sentenced that day to 2 ½ years in prison. RT 298, 350.[81]

8. Maria returned to PA to meet with the legal administrator she had previously spoken to because she was upset. RT 299. She waited for over two hours before he came to talk with her in the lobby. RT 299-300. She complained that nothing had been done for her son, and requested an explanation and refund. She was told that he will speak to a supervisor and PA will send a letter. RT 300, 301.

9. Not having heard from PA in two weeks, Maria returned to the office but no one was available to speak with her. RT 301.

10. Maria received paperwork purporting to show the number of hours spent by PA representing OC. RT 302.

11. Maria never received a refund. RT 303.

12. Based upon her testimony at the hearing, it is evident that Maria was a well meaning but unsophisticated woman and one who could easily believe oral representations over the written contracts, especially because she was vulnerable due to her distress over her son's incarceration. As such, it would have been easy for someone to take advantage of her.

13. Alan Hock had little recollection of this case. RT 359. Nevertheless, he testified that he had an in depth discussion with OC about the option of seeking to withdraw from the plea agreement, counseled him not to week a withdrawal, RT 393, and that he consulted with Maria, reviewed the plea agreement, reviewed the police reports, and spoke with previously appointed counsel. RT365-66, 371.

14. Hock consulted with Respondent Arentz about "what the [client] needed to have done in this case." RT 359, 366-67.

---

[81]OC testified that prior to sentencing, Alan Hock told him that he would receive six to eight months of incarceration notwithstanding the stipulated plea agreement. This testimony was not credible to me.

15. Hock testified that in order to obtain a better sentence, OC would need first to withdraw from the plea agreement by establishing a 'manifest injustice,' which is difficult to do. RT 363. Mr. Hock further testified that he reviewed the file and interviewed OC; he did not file a motion to withdraw from the plea agreement. RT 365. After this review, Hock testified that he advised "the clients" that the best course of action was to be sentenced pursuant to the terms of the plea agreement.[82]

16. Hock, although not a respondent, was very defensive in his questioning by Bar counsel. Bar counsel had a difficult time obtaining a direct answer to his questions.

17. Derickson opined that a $5,000 could be a reasonable fee in a case like this but in this case, it was not. RT 1719. He would have first explored what could be done for the client given the stipulated plea agreement. RT 1721. He would have charged a lower fee to advise the client of potential options and then let the client make an intelligent choice. RT 1722-23.

18. Picarretta believed that all fees in all counts were reasonable when set and reasonable upon retrospective review. RT 2801-02.

A. He referred to this case as a "second opinion/ sentencing" case. RT 2850. This opinion is contrary to the facts adduced at this hearing surrounding the initial retention.

19. Belanger testified that all fees set at the initial retention were reasonable and that all fees, reviewed after the representation ended were reasonable. RT 2594.

A. In order to enable an informed decision, the client should be advised of the need, difficulty and consequences of withdrawing from the plea in stipulated plea matters. RT 2634.

20. No testimony was adduced that Respondent Phillips had any involvement in this matter.

---

[82]Hock also testified that there is an ethical rule which prevents an attorney from providing a second opinion if they are not "attorneys of record." RT 365. He could not provide the Rule number or opinion, RT 380-81, and my independent research failed to locate a Rule or opinion.

Conclusions of Law

1. PA charged an unreasonable fee. ER 1.5(a). Arentz was made aware of the problem by Hock and failed to take remedial measures. Accordingly, this allegation is proven as to Arentz, but not as to Phillips.

2. The PA legal administrator engaged in conduct involving dishonesty, deception, and misrepresentation as circumscribed in ER 8.4(c). However, there is no evidence to support that conclusion as to Respondents.

3. The professional misconduct is a direct result of the firm's retention policies and practices. This Count is one of five in which PA members failed to provide information sufficient to enable an informed decision about the retention. The policy permitting the use of attorneys to "close" a criminal case who know nothing about criminal law is a part of the problem. A knowledgeable attorney would have counseled the potential client about the options so that an informed decision could be made. Maria did not have the information to make an informed decisions. Accordingly, as to both Phillips and Arentz, I find a violation of E.R. 5.1(a) and 5.3(a).

4. As to Respondent Arentz, as supervisor of the criminal section, I find a violation of E.R. 5.3(b) (supervision of non attorneys) but no violation of E.R. 5.1(b) (supervision of attorneys).

5. Respondent Phillips does not have direct supervisory responsibility over the criminal section and, therefore, I find that the Bar has not proven a violation of E.R. 5.1(b) or 5.3(b), as to him.

Count 13

1. On November 23, 2006, DW was cited for Extreme DUI. RT 46

2. On or about December 14, 2006, DW retained PA. RT 47. He agreed to pay $7,490, by paying an initial fee of $500, followed by $600 per month for 11 months, and $390 on the 12th month. RT 29; Resp. Ex. 13-16, Resp. Misc. 100-13. The agreement does not authorize the withdrawal of funds from DW's bank account; rather, DW left post dated

checks to cover his obligations to the firm.

3. PA assigned DeCosta to represent DW. Joint Prehearing Statement at 12.

4. In December, 2006, DW elected to retain attorney Michael Wicks in lieu of PA. RT 26-27.[83]

5. On January 2, 2007, Wicks contacted PA to arrange for the substitution of counsel and requested a refund for his client. RT 27-28. PA immediately complied with the request to process the substitution of counsel but did not immediately respond to the refund request. RT 28.

6. Subsequent to January 2, 2007, PA caused $600 to be drawn from DW's account by depositing one of the post dated checks DW had left with PA. RT 29; *See* Resp. Ex. 13-18; DW incurred a $30 insufficient funds fee as a result of that withdrawal. RT 29. When DW retained the firm, he authorized the processing of a $600 post-dated check on January 16, 2007. Resp. Ex. 13-16. The transaction should not have been processed after the firm was terminated.

7. On January 22, 2007, Wicks sent a facsimile transmission to De Costa expressing outrage at the withdrawal and demanding the return of the withdrawn funds, compensation for the fee, and a refund of the initial retainer. RT 30, 34; Bar Ex. 55.

8. On March 2, 2007, PA attorney Julio LaBoy called Wicks and advised that the return of the improper withdrawal (plus fee) had been processed.

A. PA told DW that the withdrawal of funds resulted from a clerical error. RT 61.

B. The check had been sent to DW's former address but he had moved and there was no forwarding address on file. PA was not aware that DW had moved when it mailed the check.

---

[83]DW mistakenly believed that he terminated PA because of a withdrawal of funds from his account on January 16, 2007. Based upon the other evidence presented in this case, I do not find that testimony credible; it appears that DW is genuinely mistaken as opposed to purposefully mis-stating the facts.

C. Respondent Arentz testified that the January bank transaction was the result of a misplaced file. RT 1588. The file was lost and has never been found. RT 1588-89. He further testified that an employee who he held responsible for the problem was fired and that this case was one of the reasons. RT 1589.

9. Sometime prior to March 7, 2007, La Boy received the refund check back in the mail after it could not be delivered as addressed. On or about March 7, LaBoy asked Wicks to have DW sign an agreement acknowledging the finality of any financial dispute between DW and PA. RT 35. Wicks advised LaBoy that DW would not do that until he received a refund of his initial retainer. *Id.*

10. On or about March 9, 2007, PA provided an accounting of its time to Wicks. RT 36.

11. Wicks demanded a refund of $310 of the $500 initial retainer; PA refunded $310. RT 39. The $310 check bears a notation which states: "[DW] to settle State Bar Complaint." RT 54; Bar Ex. 53. PA provided an "agreement" for DW's signature which states, in part: ". . . I am now satisfied with the legal fees, service, and representation as to Phillips & Associates and will no longer pursue any State Bar complaints. I no longer have a complaint against this office." *Id.* Respondent Arentz testified that this document is not typical and that he has never seen that kind of document before. RT 1596. He uses a form intended to resolve fee disputes and fee arbitrations which do not mention bar complaints. *Id.*

12. Respondent De Costa had no responsibility at PA in connection with the collection of, or refund of fees. RT 1590. Respondent De Costa was not involved in the fee refund in this matter.

13. Respondent Arentz testified that he was out of the state when the request for a refund was made and, therefore, supervisory attorney Julio LaBoy handled the refund. RT 1592.

14. Respondent Phillips had no direct involvement in this matter.

15. Respondent Arentz had no direct involvement in this matter.

Conclusions of Law

1. The Bar has failed to prove, by clear and convincing evidence that Respondent De Costa, Respondent Arentz, or Respondent Phillips violated E.R. 1.15(d). The problems were caused by a lost file and a misdelivered check. There is no suggestion that there was any intent to delay or otherwise disregard the Rules of Professional Conduct.

2. No underlying ER violation having been found, the Bar has failed to prove, by clear and convincing evidence, that Respondent Arentz or Respondent Phillips violated E.R. 5.1(a), 5.1(b), 5.3(a), or 5.3(b).

Count 14

The Bar dismissed this Count. RT 668.

Count 15

1. In July, 2006, MC was arrested for an alleged probation violation. RT 1106, Resp. Ex. 15-44.

2. On or about July, 11, 2006, MC's mother, JC, retained PA to represent her son for $3,000. RT 1107.

A. PA attorney Magnus Erickson was assigned to represent MC. RT 1062.

B. During this time period, Mr. Erickson was busy with felony trials. RT 1063.[84] Erickson had mainly a misdemeanor case load but also carried felonies as serious as class 3 dangerous offenses; he would carry in excess of 100 cases and, at one point, had 140 cases. RT 1076-77, 1078. He estimated, generally, that his felony case load would not be more than 20% of his entire case load. RT 1077. At times it was hard for him to keep up with the case load which was one of the reasons he left the firm. *Id.*

C. PA sent form letters to the client at an address in Scottsdale, Arizona, although the client was in jail. Resp. Ex. 15-32, 15-33. The letters contains a great deal of information inapplicable to a probation violation proceeding. Instead, they describe the trial

[84]Phillips agreed that the firm erred by assigning an in-custody case with immediate needs to a lawyer who was currently in a jury trial. RT 1885.

process in Superior Court.

3. Although JC was advised by a PA employee that an attorney would immediately visit MC, he was not immediately seen. RT 1109.

4. Between July 11, 2006, and July 19, 2006, JC left messages Erickson complaining that an attorney had not seen her son. RT 1109-10.

A. PA records reflect that JC called PA many times in the few days following retention with a number of issues. The primary issues were her desire to have someone immediately see her son in jail, and her concerns about the validity of the alcohol detection device which, apparently, resulted, at least in part, in the probation violation allegations. Resp. Ex. 15-10 through 15-12, 15-16 through 15-21, 15-23, 15-25, 15-28, 15-29 through 15-31.

5. On or about July 13, 2006, an investigator from PA visited MC at the jail. RT 1110, 1083.

6. On July 14, 2006, Erickson spent 1.7 hours speaking with JC about her concerns with the allegations in the petition to revoke probation. RT 1066-67, Resp. Ex. 15-14.

7. On July 19, 2006, Erickson visited with MC at the jail. RT 1064; Resp. Ex. 15-24.

8. After meeting with Erickson, MC told his mother that he had no confidence in Erickson, prompting JC to retain different counsel. RT 1111-12. She obtained new counsel eight or nine days after she had retained PA. *Id.*

A. Erickson testified that MC was essentially seeking a promise that he would be released on his next court date. Erickson would not make that promise. RT 1066, 1083.

9. On July 20, 2006, Erickson spoke with MC's probation officer. Resp. Ex. 15-24; 1088-89.

10. Other tasks by Erickson included e-mail communications with JC, Resp. Ex. 15-12, 15-13, as well as a phone call and some reading to learn more about the alcohol monitoring device at issue. RT 1066-1067, 1091-92; Resp. Ex. 15-14. It appears he also spoke with Mr. Arentz about the alcohol monitoring device, RT 1092. He did not review

discovery, did not file pleadings, did not discuss the case with the prosecution, and did not appear in Court in this matter.

11. Between July 20, 2006, and July 26, 2006, JC sent PA a letter advising that she had retained different counsel and requested a refund. RT 1112. She also called to discuss the situation. RT 1113.

A. On or about July 26, 2006, JC signed a cancellation agreement. RT 1122.

12. JC spoke to Robert Arentz who offered a $500 refund. JC thought that amount unacceptable because "they had done nothing." RT 1113.

A. Using PA's time accounting records, Arentz determined that approximately 15 hours of "office time" had been expended in the representation which equated to $2,765. He then rounded this amount to $2,500, which resulted in a $500 refund to the client. RT 1578.[85]

A. On July 27, 2006, PA sent a letter to JC advising that PA had closed the file and that a $500 credit was issued. Resp. Ex. 15-37. PA also provided its accounting of services. RT 1125. JC believed that there was a "whole lot of padding" in the accounting. RT 1113.

B. After this letter was sent, Arentz and JC called each other on a number of occasions, leaving messages for each other for a time until they spoke. RT 1125-26.

13. On or about August 10, 2006, after speaking with Arentz, JC wrote a letter to Phillips requesting a refund and advising that she intended to notify the Bar of her complaint. RT 1114, 1125.

14. On or about August 18, 2006, JC and Arentz spoke; Arentz offered to reduce the fee to $1,500. RT 1126-27.

---

[85]PA's accounting records show 15.1 hours of 'office time.' Bar Ex. 60. The office rate, therefore, would be $183.11 per hour. Attorney time reflected on the records is 6 hours. 2.6 hours were attributed to closing the file and handling the refund.

15. On or about August 30, Arentz sent a letter to JC re-iterating his offer to reduce the fee to $1,500. RT 1127. This letter is not in the record.[86]

16. On September 20, 2006, JC filed a complaint with the Bar. RT 1130.

17. In October, 2006, JC and Arentz met and agreed to a reduced fee of $1,000. RT 1130.

18. PA refunded JC $2,000. RT 1114, 1123.

19. All three witnesses called as experts opined that the fees charged were reasonable. RT 1725, 2594, 2829.

20. Other than receiving a letter of complaint from JC, Respondent Phillips was not involved in the underlying matters giving rise to these allegations.

Conclusions of Law

1. The Bar has failed to prove, by clear and convincing evidence, that the initial fee or ultimate fee was unreasonable. Six hours of attorney time were spent for a $1,000 fee which equates to $166.67 per hour. The time spent was reasonable given the nature of the case and the needs of the client and his mother. Accordingly, no violation of E.R. 1.5(a) has been established.

2. For the reasons stated in the general conclusions, I conclude that there has been no violation of E.R. 1.15(d).

3. The Bar has failed to prove, by clear and convincing evidence, that there was a delay in the transfer of client funds. The evidence established an immediate offer of a $500 refund, and a good faith attempt to resolve the difference over the next few weeks. Accordingly, no violation of E.R. 1.16(d) has been established.

4. Because no underlying violations of the ethical rules has been proven with respect to this count, the Bar has failed to prove a violation of supervisory responsibilities pursuant to E.R. 5.1(a), 5.1(b), 5.3(a), or 5.3(b).

---

[86]JC never accepted or responded to the refund offers of $500 or $1,500. She believed she was entitled to the entirety of the fee because PA "did nothing." RT 1128.

Count 16

1. In February, 2006, RB was contacted by the Tempe Police Department about a molestation allegation made against him by his step-daughter. RT 1187-88.

2. On or about February 28, 2006, RB retained PA to represent him in connection with the investigation for $4,590 with a $1,750 down payment. RT 1188-90. RB agreed to pay the remainder of the fee on March 14, 2006, by leaving a post dated check with PA. RT 1208; Resp. Ex. 16-43, 16-44.

3. PA assigned attorney Michael Yucevicius to represent RB. RT 1191.

A. Although RB did not remember meeting with PA attorney Martin Creaven when he retained PA, RT 1203, a letter was sent on behalf of Mr. Creaven (although signed by Yucevicius's legal assistant) 'welcoming' RB to the firm and suggesting that he make an appointment to see his assigned attorney in thirty days and inviting him to call for a telephone conference if there was a more immediate need. Resp. Ex. 16-33.

1) This letter also states that RB may call Creaven if he has questions or concerns about his case or if he does not receive a return call within 24 hours. Resp. Ex. 16-33. RB did not recall this letter or its contents. RT 1210-11.

4. Yucevicius was on vacation at the time and RB was unable to have another attorney assigned to him. RT 1191.

A) On March 1, 2006, however, Yucevicius called RB, introduced himself, and advised him not to speak with the police or anyone else about the matter. RT 1212; Resp. Ex. 16-11. Yucevicius called RB back later that day to advise that he had spoken to the police. Resp. Ex. 16-13.

5. Between March 1, 2006, and March 3, 2006, Yucevicius contacted the police and advised them that RB invoked his right to counsel. RT 2563; Resp. Ex. 16-12, 16-16, 16-34. Efforts were made by PA to obtain the police report. Resp. Ex. 16-14, 16-15.

6. On March 14, 2006, RB met with Yucevicius for the first time. RT 1191, 1212; Resp. Ex. 16-19. PA records indicate that the visit was 2.5 hours, Resp. Ex. 16-21,

generating less than one page of notes. RT 16-19.

A. RB felt that Yucevicius was disinterested in the case and left the meeting "confused." RT 1192.

B. RB left some paperwork with Yucevicius which included statements from his step-daughter which accused RB of wrongdoing. RT 1215-1216.

7. Prior to March 17, 2006, Yucevicius discussed a defense conducted polygraph test with RB, Resp. Ex. 16-22, and interviewed RB's wife by phone about the matter. Resp. Ex. 16-23. Yucevicius discussed the wife's interview with RB and advised RB not to share his diary with anyone. Resp. Ex. 16-24, 16-25. He continued to advise the investigating officer that RB will not be interviewed and informed RB of his contact. Resp. Ex. 16-26, 16-27.

8. On March 17, 2006, RB learned that his step-daughter recanted. RT 1193.

9. On March 17, 2006, after learning that his step-daughter recanted, RB called and left a message for Yucevicius advising him of the recantation and expressing a desire to terminate services. RT 1193, 1198; Resp. Ex. 16-28. RB spoke to Yucevicius later that day. RT 1194.

10. On March 17, 2006, Yucevicius told RB that he (Yucevicius) needed confirmation of the recantation from the police and stated he would then contact RB. RT 1194. RB said "all right." *Id.*

11. On March 21, 2006, RB called Yucevicius and told him that his step-daughter refused to take a lie detector test with the police and, therefore, they were closing the case. RT 1194-95. Yucevicius again stated that he needed confirmation from the police. RT 1195.

12. RB did not want PA services after March 17, 2006. RT 1196. However he agreed that PA should obtain a copy of the report documenting the recantation. Yucevicius's memory is that RB did not seek termination of services until April 7, 2006. RT 2566. I find that RB initially requested termination of services on March 17, 2006, but that RB did not specifically request a fee adjustment / review until April 7, 2006, as described below.

A. RB also testified that, as a foster parent, he wanted documentation showing that he was cleared of the allegation. RT 1204.

13. After March 17, 2006, Yucevicius continued to have contact with the investigating police officer, Resp. Ex. 16-29, and sought the police report indicating that the police had closed the investigation, Resp. Ex. 16-30.

14. On March 21, 2006, the investigating police detective advised Yucevicius that the complaining witness had recanted and that the case was closed. Resp. Ex. 16-31.

15. On April 7, 2006, RB contacted Yucevicius and inquired, among other things, about the fee. Yucevicius informed RB that he had not heard from the police and referred RB to Respondent Arentz regarding the fee. RT 1196. This is the first time RB specifically requested a fee adjustment.

16. Sometime in mid to late April, 2006, RB spoke to Arentz who told RB that he would review the fee and contact him. RT 1196.

17. On May 8, 2006, Arentz sent a letter to RB advising him that he has reviewed the matter and determined that the original fee agreement was "reasonable for the services provided" and that an adjustment was not "appropriate." Resp. Ex. 16-35.

18. On May 19, 2006, Arentz sent, at RB's request, an itemization of the time spent on RB's case inviting RB to call if he would "like to discuss a fee adjustment." Resp. Ex. 16-36.

19. RB called Arentz after receipt of the May 19, 2006, letter, and was told he was on vacation and, therefore, would have to await his return. RT 1196-97.

20. RB and Arentz did not speak further about the issue until late in the year when they settled the fee dispute. RT 1197-1200, 1207.

21. In September, 2006, a representative of PA called and advised RB that he owed money to PA (the difference between the quoted fee and the down payment).[87] RT 1197-98.

---

[87]RB left a check dated March, 2006, with PA. There was no explanation for the apparent failure to negotiate (or attempt to negotiate) this check.

22. RB advised that he did not intend to the pay the difference because he felt that he did not get representation from PA. RT 1198.

A. One of RB's complaints was that Yucevicius had advised RB not to speak with the police contrary to RB's desires. RT 1201.[88]

23. On November 12, 2006, RB filed a complaint with the Bar. RT 1199.

24. On or about November 17, 2006, Arentz learned that RB requested fee arbitration. RT 1656.

25. In December, 2006, PA refunded $300 of the $1,700 down payment and did not seek the balance of the fee quoted at the time PA was retained. RT 1199, 1656.

26. Bar expert Derickson testified that a $1,750[89] fee was reasonable. RT 1732.

27. Respondent's experts Belanger and Picarretta testified that the initial fee and the ultimate fee were reasonable. RT 2594, 2831.

28. Respondent Phillips was not directly involved in any of the activities that give rise to this count.

Conclusions of Law

1. The Bar has failed to prove, by clear and convincing evidence, that the fee charged, either initially, or ultimately, was unreasonable. Accordingly, the Bar has failed to prove an E.R. 1.5 violation.

2. For the reasons stated in the general conclusions, I find no E.R. 1.15(d) violation.

3. The Bar has failed to prove, by clear and convincing evidence, a violation of E.R. 1.16(a). Although RB started to express a desire to terminate representation on March 17, 2006, he agreed to have the firm attempt to obtain confirmation of the recantation. Moreover, RB testified that he wanted that confirmation because he is a foster parent.

---

[88]The Bar does not allege, nor is there any indication of, a competence violation.

[89]With the refund, the actual fee was $1,450.

4. Although the parties dispute the date RB requested a refund (March 17, 2006 or April 7, 2006), Respondent Arentz sent a letter to RB on May 8, 2006, advising him that PA considered the entirety of the fee reasonable and inviting further input into the issue. RB called but, when he learned that Arentz was on vacation, he "forgot" to follow up. He did not pursue the issue until September, 2006, when a PA financial employee called seeking the remainder of the agreed upon fee. Accordingly, I find that PA complied with E.R. 1.16(d) by considering whether any part of the advance fee should be refunded and, after making a determination, inviting RB to follow up on their decision.

5. Because the Bar failed to establish any underlying violation of the ethical rules in this count, I find that the Bar has failed to prove a violation of E.R. 5.1(a), 5.1(b), 5.3(a), or 5.3(b).

Count 17

1. Sometime shortly after September 15, 2006, JH received a letter from the Department of Motor Vehicles dated September 15, 2006, advising him that his request for reinstatement of his revoked driver's license had been denied due to an unadjudicated DUI charge from June 4, 2005. The letter advised that he had fifteen days from the mailing date of the letter to request a hearing. RT 1237-38; Bar Ex. 68; Resp. Ex. 17-62.

2. On September 26, 2006, JH's mother, CM retained PA to represent JH before the MVD at a hearing as described in the letter referenced above. RT 645, 679-80. She paid $2,090 with her credit card. RT 650. When setting up the initial appointment, CM made clear that there was a September 30, 2006, deadline to request a hearing. RT 704. She had sent the MVD letter to PA the previous day via facsimile.[90] RT 690-91.

---

[90]CM and Arentz were questioned about the hand written notation "deadline of September 30, 2006" on the copy of the MVD letter she had faxed to PA and whether that had been written on the document prior to it being transmitted to PA. I find this immaterial because the letter clearly states that a hearing must be requested within fifteen days of the mailing of the letter - September 15, 2006. To the extent that Respondents assert that the scope of services did not include the timely request for a hearing, that was clearly not CM's understanding and, to the extent that PA believed it did not need to request a hearing because it would be fruitless (*see infra.*), PA did not

3. CM and JH met with PA bankruptcy attorney Charles Leftwich when they retained PA. RT 648. No attorney with MVD expertise was involved in the retention.

4. Leftwich was advised of the client's desire to have the hearing request filed prior to the September 30th deadline. RT 648. Mr. Leftwich said that would be no problem. RT 650, 703.

A. PA used a form "driver's license reinstatement" fee agreement in this case. RT 1610; Bar Ex. Misc. 7. Arentz testified that PA will not "spin our wheels" and submit a request for reinstatement if the client is ineligible. RT 1610.

B. The contract states, under Scope of Services: "Client retains the Firm to provide only the following legal advice regarding the restoration of Client's Arizona drivers license or driving privileges. Assistance in preparation and completion of Arizona Department of Transportation Application Packet, and hearing if the application is denied and the Client wishes to request a hearing. . . .". Bar Misc. Ex. 7. The agreement further states: "Client understands that Client must be eligible to apply for re-instatement by the Department of Transportation before an application Packet may be submitted for filing. If the Firm finds out that the Client is presently not eligible, the Client authorizes the Firm to hold the file without working on it until the time Client is eligible." *Id.*

5. PA assigned the case to attorney Jose Saldivar. RT 648; Alma Canales was provided as a contact at PA if Mr. Saldivar could not be reached. RT 650-51.

A. Arentz and Saldivar believed that a request for a hearing would be futile due to the reasons for MVD's refusal to reinstate JH's license. RT 1604, 2755, 2763. Saldivar was also concerned that a hearing request may cause the hearing officer to contact the prosecutor's office about the unadjudicated DUI which could "instigate" the filing of a felony

---

communicate that to the client prior to December, 2006, RT 696, 1239-40, and as evidenced by PA's untimely October request for hearing. Morever, I cannot find that the failure to clearly delineate the deadline informs Respondent Arentz's initial fee review after the request for a refund; Arentz is obligated to review the entire file, not just the time records maintained by PA (which, in any event, are inaccurate).

charge. RT 1613. Arentz believed that to be highly unlikely. RT 1613-14.

6. On September 29, 2006, CM spoke to Canales to remind Canales of the September 30th deadline. RT 651.

7. Respondent Arentz did not know whether or not the September 30, 2006, deadline was calendared. RT 1609. Had it been calendared, it should have appeared in PA's records.

8. PA did not file a timely request for hearing. RT 1677-78.

A. Saldivar was aware of the deadline for requesting a hearing but, based on his review of the scope of services outlined in the fee agreement, instructed his legal assistant not to file the request because of the need to resolve the underlying reason for the denial. RT 2754-55. This was never communicated to the client. RT 2755.

9. On or about October 2, 2006, JH received a letter from MVD advising that no hearing had been requested and that his driver's license would be revoked for an additional period of time. RT 652.

10. CM called PA to speak to Saldivar after receiving the letter but was only able to reach Canales. RT 652. Canales told her that PA was in contact with MVD and that another hearing would be requested. *Id.* PA documents reflect that Canales spoke with "client" who agreed to sign documents and send them back to PA. Resp. Ex. 17-08.

A. On or about October 19, 2006, PA requested a hearing with MVD. Bar Ex. 70-B; RT 2780-81.

11 Between October and December, 2006, CM repeatedly called PA to ascertain the status of the hearing request; Canales stated that PA was requesting a new hearing. RT 653.

12. On December 6, 2006, MVD sent a letter to JH advising him that the request for hearing was untimely and therefore had been denied. Bar Ex. 70.

13. On December 20, 2006, three months after retention, and two and a half months after the hearing request was due, Saldivar made contact with CM and advised her that reinstating the license would not be simple because of the unadjudicated 2005 DUI allegation; he advised that PA would investigate the matter. RT 656.

14. No one at PA explained to CM why a timely hearing request had not been filed. RT 657.

15. In March, 2007, CM received a call from an unknown person at PA who advised her that a warrant had issued for JH's arrest. RT 659. CM was asked to come into the office for a consultation with another attorney. RT 659-660.

16. On or about March 19, 2007, JH and CM had a consultation at PA. *See* Resp. Ex. 17-54. They were advised that the unadjudicated DUI charge had been filed and were quoted a fee of $18,000, with $9,000 due and immediately payable. RT 660. The $2,090 would be applied to the fee. RT 674.

A. PA representatives said that the fee was higher because they had to get their best attorneys involved due to the seriousness of the allegations. RT 675.

17. JH and CM declined the offer because they could not afford the fee and requested a refund of the monies previously paid. RT 661. A cancellation agreement was signed. Resp. Ex. 17-54. CM sent a letter requesting a refund, received by PA on March 30, 2007. RT 2475-76; Resp. Ex. 17-57.

18. On April 9, 2007, Respondent Arentz, based on his review of the March 30, 2007, letter and review of the work performed on JH's behalf, sent a letter to CM stating that he was denying the refund request. RT 662, 2476.

19. On April 11, 2007, CM wrote another letter to PA requesting a refund. Bar Ex. 66. That letter set forth the failure to timely request a hearing and failure to abide the scope of services as understood by CM and JH. It appears that this letter was sent just prior to CM receiving notice that Arentz had denied the refund request.

20. On April 13, 2007, CM sent a letter to Arentz again seeking a refund. CM stated her reasons why she believed that PA had not earned a fee and cited PA's failure to timely request a hearing, her difficulty reaching PA employees, and that she had hired another firm for $6,000 (rather than the $18,000 quoted by PA). The letter stated that she had filed a complaint with the Bar. Bar Ex. 67.

21. On or about April 15, 2007, Arentz called CM and advised that he had reviewed the letter and re-assessed PA's work in the case. He further advised that he would cause a full refund to issue. RT 663-64. Arentz contended that the April 13, 2006, letter provided additional information he had not previously known and, based on that information (which he did not know was correct), he decided the best thing to do was to offer her a full refund. RT 1618.

A. Arentz asked if the complaint had been sent to the Bar. CM stated that she had put in the mail that morning. Arentz asked her to pull the letter from the mail. RT 664. Arentz testified that he was referring to the notation that indicated that a copy of the letter was being sent to the "consumer assistance program" of the State Bar which refers to fee arbitration. RT 1619. Accordingly, with a full refund, he requested the letter be pulled. *Id.* Neither exhibit 66 or 67, however, refer to the "consumer assistance program;" rather, exhibit 67 states that a complaint had been filed with the Bar.

22. Arentz had provided an accounting of time spent to CM. RT 664-65; Bar Ex. 65. Arentz believes that the accounting supports a fee of $2,555 based on a *quantum meruit* value. RT 1617. The time records do not reflect any communication between attorney Saldivar and either JH or CM until December 11, 2006. RT 1679. The records reflect 2.2 hours of attorney time. Bar Ex. 65.[91]

A. PA requested a copy of JH's MVD record and copy of the police report related to the unadjudicated DUI. RT 2768.

23. PA issued a $2,090 credit to CM's credit card account. RT 695.

24. Bar expert Derickson opined that an experienced attorney could have recognized at the outset that nothing could be done for the client and that the little work that was done did not justify the fee. RT 1773-75.

---

[91]I have not included the automatic .3 hours per month for 'status reviews,' the .3 closing file attribution, or the .5 attributed to Respondent Arentz's fee review.

25. Respondents' expert Belanger agreed with Derickson in the sense that the case was confusing; based on the client's expectations, the fee may not have been reasonable, but based on the language of the fee agreement describing the scope of services, the fee was reasonable. RT 2605-06. Respondents' expert Picarretta testified that the fee was reasonable, RT 2831, but qualified his answer stating that a determination would need to be made with respect to the expectations of the retention. RT 2832. He believed the fee to be reasonable as defined in the scope of services of the fee agreement. *Id.*

26. Neither Arentz nor Phillips were involved in the representation.

27. Arentz was involved in the JH matter. He discussed the scope of services with Saldivar and determined the fee.

28. PA personnel did not adequately communicate with JH or CM.

29. PA policies allowed this representation to proceed without adequate communication between client and lawyer such that the expectations of the client and the understanding of the assigned lawyer were not the same.

30. JH and CM expected PA to file a request for a hearing before the September 30, 2006 deadline.

31. Neither JH nor CM knew or were advised that the request for hearing would be a futile gesture.

32. Arentz was aware of the failure to timely file a request for a hearing based on his conversation with Saldivar but, nevertheless, refused to refund the fee until the client threatened a bar complaint.

Conclusions of Law

1. Although the E.R. 1.2, 1.3, and 1.4 allegations were dismissed against Phillips and Arentz, I find that PA violated 1.2 (scope) and 1.4 (communication). The scope of services as written in the fee agreement was different from the client expectations and the firm did not abide the client's decisions concerning the scope of representation. Moreover, from the time of the initial retention until many weeks later, the client was never informed that he would

not be able to obtain re-instatement of his driver's license until the unadjudicated charge was cleared. I do not find a violation of E.R. 1.3 (diligence / promptness) because the failure to timely file a request for hearing was the result of a review of the circumstances and the determination that it would be futile. The problem lay not with the attorney's diligence, but with the scope of retention and communication with the client.

2. PA charged an unreasonable fee at the outset in violation of E.R. 1.5(a). The fee was unreasonable because PA failed to adequately inform the potential client of the inability to accomplish the client's goals. Ultimately, however, Arentz issued a full refund. Accordingly, I do not find a violation of E.R. 1.5(a) as to Arentz. Phillips was not involved in this matter and, therefore, I do not find a violation of E.R. 1.5(a) as to Phillips.

3. For reasons explained in the general conclusions, I conclude that the Bar has not proven a violation of E.R. 1.15(d) and 1.16(d).

4. The unreasonable fee which was initially set and paid is directly attributable to PA retention policies. PA should not have accepted representation in this matter without fully advising the client of the need to clear up the underlying problem prior to seeking re-instatement of the driver's license. A bankruptcy attorney and a non-attorney were the only employees the clients spoke with prior to retention. Accordingly, I find a violation of E.R. 5.1(a) as to Phillips and Arentz. Because Arentz is the supervisor of the criminal department, I find a violation of E.R. 5.1(b) as to him, but not as to Phillips.

Count 18

1. In July, 2006, RW was charged with aggravated assault with a dangerous weapon (vehicle). RT 812. She had driven her car in the direction of a teen age boy who believed that RW was trying to run him down. RW's daughter, who was in the vehicle, got out of the vehicle and assaulted the boy. RT 789.

2. RW believed herself to completely innocent of the charges. RT 818.

3. RW retained PA for $20,000. A down payment of $15,000 was paid by re-financing her home, and a payment plan was negotiated for the balance. RT 812-13, 828.

4. PA attorney Alan Hock was assigned to represent RW.

5. The charge carried a mandatory minimum prison term of 5 years. RT 803.

6. Soon after he reviewed the case, the prosecutor offered a plea agreement to a class six open-ended offense[92] with a stipulated term of probation. RT 814. The prosecutor believed that there were weaknesses in the case and that it was over-charged. RT 790 - 91.[93]

A. There was conflicting testimony about whether the prosecutor spoke to Hock prior to making the decision to offer a favorable plea agreement. Resolving the conflict, I find that the prosecutor's decision to offer the plea was a unilateral one and not the result of any discussions he may have had with Hock. RT 792. The prosecutor never spoke to Mr. Hock about this case. *Id.* He just sent out the plea and it was accepted. RT 793.[94]

B. RW accepted the plea; however, there was difficulty in establishing a "factual basis" for the plea because RW believed herself to be innocent.[95] RW testified she had to lie to the judge in order to gain the benefit of the generous plea agreement. RT 818.

---

[92]A class six open ended offense may be designated a misdemeanor by the Court at the time of sentencing, or at the conclusion of a probationary term. A.R.S. § 13-702(G)

[93]Along with the plea agreement, the prosecutor forwarded standard (form) pleadings which are designed to increase the defendant's sentence if convicted after trial. Resp. Ex. 18-18, 18-19. The policy at the County Attorney's Office is to file all sentence enhancing allegations appropriate to the charge returned by the grand jury. RT 798-99, 807.

[94]My conclusion is supported by, but not dependent on, Respondent's exhibits. Hock testified, based upon PA records, that he spoke with the prosecutor on August 30, 2006. However, on September 13, 2006, PA started to schedule witness interviews in the case. Resp. Ex. 8-25. The prosecutor's letter conveying the plea offer is dated October 3, 2006. Bar Misc. Ex. 15.

[95]A "factual basis" for the offense must be found by the Court before it may accept a guilty plea. Rule 17, Arizona Rules of Criminal Procedure. In a guilty plea (as opposed to 'no contest'), the defendant must admit the facts upon which the factual basis if found. If the Court fails to find a factual basis, it will not accept a guilty plea. Often times, in weaker cases, the prosecutor will extend a highly advantageous plea offer to a defendant who, given the risks of going to trial (as in this case, a mandatory prison term), will accept the offer even though the defendant believes themself innocent. All attorneys practicing criminal defense have experienced the difficulty of establishing a factual basis in those circumstances.

7. Hock interviewed no witnesses and conducted no independent investigation. RW believed that Hock was supposed to investigate and perform more tasks than he did.[96] No substantive pleadings were filed by PA. Although RW obtained a good result, she was dissatisfied with PA services.

8. RW met with Hock two or three times in his office and there were two or three court appearances, each lasting less than an hour. RT 815. The discovery was twenty-one pages. Bar Misc. Ex. 14.

9. Upon conclusion of the case, RW requested a fee adjustment. RT 815-86.

10. RW and her husband met with Respondent Arentz to discuss the fee adjustment request; Arentz stated that there would be no reimbursement. RT 816.

A. On November 29, 2006, Arentz sent a letter to RW along with PA's time accounting system print-out related to her case. Resp. Ex. 18-9; RT 822.

11. On December 13, 2006, RW filed a bar complaint, with a copy to Arentz. RT 816, 823.[97]

12. Within a month after filing the bar complaint, RW received a refund of $4,000. RT 817.

13. There was no evidence that Respondent Phillips had any involvement in the setting of the fee or determination of the refund amount.

14. Bar expert Derickson believed that the $20,000 fee initially charged "could have been" reasonable. RT 1726. After reviewing the work done on the case, he believed the $20,000 fee to be unreasonable and the ultimate $16,000 fee to be high. RT 1726 - 29. Respondent's experts felt the fee was reasonable.

---

[96]The Bar did not allege a violation of E.R 1.1, 1.3, or 1.4, so the facts giving rise to this belief are not discussed at length except as may otherwise be relevant to an analysis of the E.R. 1.5 allegation.

[97]The testimony did not demonstrate if the complaint was sent to Arentz with a copy to the Bar or to the Bar with a copy to Arentz. Although the complaint was marked as exhibit Resp. Ex. 18-1, it was not admitted into evidence.

Conclusions of Law

1. I agree with Derickson; the initial fee was reasonable and the ultimate fee was high. However, the question is whether the ultimate fee is unreasonable under the E.R. 1.5 factors. Although it is a close call, I am unable to conclude that the $16,000 fee was unreasonable. RW obtained a good result. PA took the risk that the case could have proceeded to trial especially because RW believed herself to be innocent. Accordingly, no E.R. 1.5(a) violation has been proven.

2. For the reasons stated in the general conclusions, I find no violation of E.R. 1.15(d) or 1.16(d).

3. Having found no underlying violation, I find no violation of E.R. 5.1 or 5.3.

Count 19

1. On or about September 10, 2007, LM retained PA for a DUI and agreed to pay $6,990. RT 182; Bar Misc. Ex. 6.

2. LM met with PA administrator Beck and was asked to return later that afternoon because Beck had to meet with another client. LM was presented with a drawn fee agreement upon his return. RT 183-84. Because he did not have his check book with him, he provided Beck with the information necessary to draw the initial payment of $3,090 from his checking account. RT 184-85.[98]

A. Robert Teague, a PA bankruptcy attorney, met with LM at the time of retention. Bar Misc. Ex. 6.

3. Later that day, LM decided to meet with another attorney because he did not feel good about retaining PA. RT 185.

---

[98]Contrary to a sworn affidavit by PA employee Roque, submitted as part of PA's response to the Bar's investigatory letter, LM had sufficient funds in his account to cover the $3,090. Bar Ex. 90. Roque's affidavit states that LM's reason for cancellation was due, in part, to the lack of funds in the account. Bar Ex. 79-A, at exh. 5. Roque did not testify. I find that LM did not tell PA that he had insufficient funds in the account to cover the check.

4. Later that evening, after business hours, LM called and e-mailed Beck and left a message. He stated that he had reconsidered and that he would like to cancel the contract.

5. On September 11, 2007, LM went to the PA offices to see Beck. He was told that Beck was unavailable and he met with Juan Armando Roque instead. RT 188.

A. LM asked to cancel his contract. He was told by Roque that he should not cancel the contract, and to stop payment on the check was a crime. RT 189-90. LM was especially troubled by this because he was in the process of becoming a United States citizen. RT 189. He had previously communicated his naturalization status to PA. RT 195.

B. LM offered to pay for the initial consultation. RT 190.

C. LM asked Roque to return the arrest paperwork to him and was told that PA needed permission to withdraw because the case had already been assigned. RT 191.

D. LM signed a PA form called "Agreement" which is a cancellation agreement. Resp. Ex. 19-05.

6. LM left PA and met with attorney Lisa Posada. While there, a taped recorded phone call was made to PA. RT 205; Bar Ex. 79. It is hard to characterize the call to someone who has not listened to the tape. The PA employee, identified in these proceedings as Manuel Davila, RT 1420, was rude, abrupt, condescending and intimidating. LM wanted to retrieve his paperwork so that his new attorney could review it. Rather than accomplish that simple task, Davila accused LM of committing a fraud, lied to him about PA's need to withdraw from the case, and lied to him by stating that funds had already been drawn from LM's account by PA. The purpose of these lies was to intimidate LM and to avoid PA's responsibilities to LM. Some portions of the conversation are detailed below.

A. After spending some time trying to reach someone, LM was able to speak with a person who identified himself as Manuel. This was after initially speaking to Beck the previous day, and Roque earlier that day.

B. Davila initially claimed he was unable to locate any record regarding LM.

C. Davila was very condescending to LM. He accused LM of committing a crime. Davila spoke to LM as if he were a criminal because he stopped payment on the check. Davila stated "you're the one that is looking to lose his citizenship. You're the one that's looking at fraud charges [for the stop payment]."

1. Davila said that if he wanted to accuse him of anything, which PA hadn't done, the police would be at his door step right now.

D. Davila claimed that PA needed to file a motion to withdraw because a Notice of Appearance had been sent to the Court that morning that fax.[99] Davila would not provide a time when the Notice of Appearance was filed but then said it happened at 8:30 a.m. when the office opened up. He did not specifically cite to any document he saw in LM's case.

E. Davila falsely stated that, because LM had provided his banking information, PA had already withdrawn funds from LM's account. This created additional stress for LM because now he had to obtain a refund of the unearned fees in addition to securing his property (arrest report). Bar Ex. 90; RT 202.

F. Davila falsely accused LM of lying to him.

G. Davila told LM that despite his cancellation, he was obligated under the fee contract.

H. Davila said that LM's paperwork could not be released until the Court releases PA from the case.

I. When LM asked for Davila's name, he stated: "that's none of your business," and hung up the phone.

7. After the taped phone call, Posada spoke with an assistant at PA and arranged for LM to get his paperwork back. RT 193. LM received his paperwork later that day, September 11, 2007. RT 202. On September 12, 2007, PA sent notice to MVD that the firm

---

[99]This turned out to be untrue as well, although PA had filed a hearing request with MVD prior to cancellation.

was no longer representing LM.

8. Davila is an intake supervisor for PA who has worked for PA over five years. RT 1420-21.

9. Respondent Arentz was disappointed and angry when he first heard the tape. RT 1421. Arentz testified that he had not had any problems with Davila before this. *Id.*

10. Davila was disciplined by PA after Respondents heard the tape. He was suspended for a week and his pay was temporarily 'docked.' RT 1426. The extent of the discipline was determined after Respondents met with their counsel. RT 1881.

11. Neither Davila, Roque nor Beck testified as to this count.

12. PA did not seek any fees from LM.

13. Respondents were not directly involved in any of the acts complained of until after being made aware of them.

Conclusions of Law

1. The Bar has failed to prove by clear and convincing evidence a violation of E.R. 1.16(a).

2. PA failed to deliver documents to which the client was entitled in violation of E.R. 1.16(d). Even though the documents were delivered on the day requested, I find that the E.R. was violated based on what LM was required to go through to obtain those documents, including the abuse he suffered and the need to have an attorney obtain those documents. Neither Phillips nor Arentz, however, were involved in these actions. Accordingly, the violation has not been proven as to them.

3. PA employees engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of E.R. 8.4(c). Neither Phillips nor Arentz, however, were involved in these actions. Accordingly, the violation has not been proven as to them.

4. There is no vicarious responsibility.[100] However, as noted above, the question under E.R. 5.3(a), dealing with non-attorneys, is whether the managing lawyers made reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the subordinate's conduct is compatible with the professional obligations of the lawyer. With respect to E.R. 5.3(b), a supervisor is required to make reasonable efforts to ensure that the subordinate's conduct is compatible with the professional obligations of a lawyer.

5. Roque and Davila's conduct was improper, like Beck's conduct in Count 8. As noted in the conclusions in Count 8, the words in the policy manual are insufficient to insulate managers and supervisors when the practices are contrary. The evidence revealed the practice of using client retention incentives to help determine administrator's bonuses. Those incentives can motivate the kind of conduct adduced at the hearing. Accordingly, I conclude that the Bar has proven, by clear and convincing evidence, a violation of E.R. 5.3(a) as to Phillips and Arentz.

6. Because Arentz is the supervisor of the criminal department, I conclude that the Bar has proven, by clear and convincing evidence, a violation of E.R. 5.3(b) as to Arentz, but not as to Phillips.

Count 20

1. For several weeks during the summer of 2007, and continuing through September 17, 2007, PA ran an advertisement on Phoenix area television stations which stated:

> A new Arizona DUI law takes effect later this summer and it contains drastically increased penalties like an ignition interlock device, and up to 45 days jail time even for a first offense DUI. To avoid the max, don't wait until its too late. At Phillips and Associates, our experienced attorneys are familiar with all the new DUI laws and are prepared to help you. Don't delay. Call now before the new laws take effect. 602-258-8888.

Bar Ex. 80; RT 835-836.

---

[100] *See* Comment 7, Rule 5.1, which states, "[a]part from this Rule and ER 8.4(a), a lawyer does not have disciplinary liability for the misconduct of a partner, associate or subordinate."

2. This advertisement was one of many that ran as part of a PA advertising campaign after a revised DUI law was enacted, and prior to its effective date. RT 834.

3. PA stopped airing the advertisement upon its receipt of the Bar's inquiry about the ad. RT 841-42.

4. Respondent Phillips drafted the script for the advertisement. RT 834.

5. Respondent Phillips was aware, at the time he drafted the advertisement, that the law was not retroactive. RT 838.

6. Respondent Phillips testified that he did not believe that the ad was misleading. RT 838.

7. The Bar did not seek to, and did not establish, that anyone was misled by the advertisement.

8. Professor Lynk that the ad was not misleading because the ad did not contain an affirmatively incorrect statement, and did not state that the new law would be retroactive. RT 2113-16.

A. Prof. Lynk testified that the standard, under ER 7.1 is whether a reasonable person would be misled. RT 2168-69.

B. Prof. Lynk believed the ad was targeted to persons arrested or charged after the new law took effect, although the last sentence of the advertisement asks the viewer to call PA before the new law takes effect. RT 2169.

9. I find that the statements in the advertisement were materially misleading in that a viewer, especially the kind of unsophisticated client targeted by PA, would reasonably believe that pending DUI charges would need to be resolved prior to the effective date of the harsher sentencing provisions of the new law which would apply to their cases, as evidenced by the concluding sentence, "[c]all now before the new laws take effect." The advertisement did not advise the viewer that the new law applied only to those persons charged with committing the offense after the law's effective date.

Conclusions of Law

1. Respondent Phillips made a misleading communication about PA's services in violation of E.R. 7.1. The advertisement, as a whole, was materially misleading.

Count 21

1. PF, a resident of Prescott Valley, Arizona, was convicted of aggravated assault in 2005, in Illinois. RT 402-04.

2. On or about February 2, 2007, PF was arrested in Yavapai County for an allegation that he violated the terms of his Illinois probation by moving to Arizona without permission. RT 405-06.[101] PF was in his seventies at the time.

3. PF was released on bail on or about February 10, 2007. RT 407. He had not yet retained counsel. His next court date was March 5, 2007.[102]

4. PF retained PA on or about February 15, 2007, for a fee of $4,900. RT 408.

5. Respondent Arentz set the fee. RT 408-09.

6. PF explained to Arentz that he wanted his probation transferred from Illinois to Arizona, and a modification of the previously imposed condition of seventy-five days of home monitoring to community service. RT 409.

7. PA attorney Magnus Erickson was assigned to represent PF. RT 409-410.

---

[101]It appears that PF missed an Illinois court date which likely gave rise to the warrant. PF's failure to attend that court proceedings may have been the result of a miscommunication with his Illinois lawyer. *See* RT 423-24. Although these "facts" help complete the story, they are not necessary to the disposition of this count. The testimony was also unclear as to whether or not PF was properly serving his probation in Arizona or whether the complaint in Illinois concerned simply the service of a home confinement term. Because the only allegations raised in this count concern fees and managing / supervisory responsibility, these factual issues need not be resolved.

[102]PF's matter was an extradition matter. RT 450. In extradition matters, the State seeking the return of an individual will issue a warrant which authorizes any State in which the fugitive is found to arrest him or her. The fugitive is entitled to bond pending the issuance of a governor's warrant of extradition. Once that warrant issues, the fugitive is no longer entitled to bond and will be taken into custody, without bond, and transferred to the issuing State. Typically, the Court will schedule hearings every thirty days to ensure that the fugitive is compliant with the terms of their release and/or to determine if the governor's warrant has issued. If the governor's warrant has not issued within ninety days from arrest, the fugitive is released. *See* A.R.S. §§ 13-3841 *et. seq.*

8. PF met with Erickson on or about February 21, 2007, and discussed PF's objectives and methods to achieve them. RT 410. PF stated that he was led to believe that his goals could be met. RT 410-12, 428-29.[103] Erickson's understanding of PF's goals were consistent with PF's, although Erickson states that he advised PF that if he (Erikson) was unable to reach an accord with the authorities in Illinois, that PF should self-surrender in Illinois. RT 451-52.

A. Erickson spoke with PF's Illinois attorney and probation officers in both Arizona and Illinois. He was advised that any agreement would have to be struck with the Illinois prosecutor. RT 454. .

B. Erickson tried to reach the Illinois prosecutor but did not receive a return phone call. RT 453-54.

9. Erickson and PF appeared before the Court in Yavapai County on March 5, 2007; the matter was brief and continued until March 27, 2007. RT 411.

10. Erikson left PA on or about March, 23, 2007. RT 460. Prior to leaving the firm, and sometime between March 5, 2007, and March 23, 2007, Erickson met with Arentz to discuss the re-assignment of his cases. RT 457-458.

A. Erikson advised Arentz of the status of the PF matter, and was aware, at the time, of the threat of a governor's warrant and the need to speak with the Illinois prosecutor. RT 458. Erikson advised Arentz that this case was "on the front burner." RT 460.

B. Erikson spoke with David Braun, the newly assigned attorney, about PF's case before he left PA. RT 477-78, 492. Erikson provided Braun with the information he had at the time and stated that it was possibly the most urgent matter on his caseload. RT 478. Braun had just started with the firm. RT 478, 493-94.

---

[103] Although PF insists that he was never told that a Governor's warrant could issue and that he could be jailed without bond, RT 429, Erikson testified that PF was fully informed. RT 473. There is no allegation of a violation of E.R. 1.4, and I do not need to resolve this conflicting evidence.

C. Braun believed, after speaking with Erikson, that Erikson had spoken with everyone involved and that the matter would resolve favorably prior to the issuance of the governor's warrant. RT 494. Braun believed that the March 27, 2007, review hearing would be pro-forma and a continuation of the review process. RT 495.

11. On or about March 22, 2007, PF received notice from PA that the firm had reassigned his case to Braun. RT 412. Braun received the file that same day. RT 491-92. He reviewed the file, spoke with Erikson, confirmed that the governor's warrant had not yet issued, and asked his assistant to schedule a time to speak with PF. RT 493, 511; Resp. Ex. 21-10.

12. PF met Braun for the first time on March 27, 2007, at the continued Court hearing. RT 413.

13. PF had no contact with PA between March 5, 2007, and March 22, 2007. RT 413-14.

14. A governor's warrant for extradition had been received by the Yavapai County Court on or just before March 27, 2007. When PF appeared for the March 27, 2007, hearing, he was taken into custody pursuant to that warrant. RT 414-15.

15. Sometime after PF was taken into custody, Braun spoke with the Illinois prosecutor who advised him that Yavapai County would not accept PF on probation because it did not have the technology to accommodate the home monitoring condition of probation. RT 498-99. The prosecutor advised that he did not intend to release the warrant nor authorize a self-surrender. RT 499.

16. Braun visited PF in custody subsequent to his arrest on the governor's warrant and advised that he would be unable to effect his release from custody prior to PF being taken to Illinois. RT 416.

17. PF spent twenty-one days in custody in Yavapai County prior to being transported to Illinois. RT 417.

18. PF arrived in Illinois after approximately seven weeks in custody and was released on $2,000 bond. RT 417-18.

A. Ultimately, the home monitoring condition was deleted from PF's terms of probation in consideration of the time spent in custody, and PF was permitted to transfer his probation to Arizona. RT 418.

19. On July 3, 2007, PF sent a letter to Arentz and requested a fee refund in the amount of $1,300 which was the amount he was required to pay for the costs of extradition. RT 420-21; Resp. Ex. 21-1.

A. In his letter, PF complains that had he known that a Governor's warrant could issue, he would have flown back to Illinois of his own accord. Resp. Ex. 21-19.

20. On or about July 30, 3007, Arentz, on behalf of PA, sent a letter to PF stating that he had reviewed the file, did not believe that a refund was appropriate, and provided an itemization of time spent. RT 420-21; Resp. Ex. 21-24.

A. Arentz did not believe that the result in PF's case was a bad result. RT 1640.

21. On or about August 6, 2007, PF filed a letter of complaint with the Bar. RT 448.

22. Respondent Phillips had no direct involvement in this matter.

23. Respondents experts opined that the fee charged was reasonable, both when initially set and upon review upon conclusion. RT 2594, 2607, 2610 (Belanger)[104]; RT 2833-35 (Picarretta). Bar expert Derickson did not offer an opinion.

Conclusions of Law

1. PA attorneys did not act with reasonable diligence and promptness in representing PF in violation of E.R. 1.3. Due to a miscommunication, Braun thought that all the appropriate parties were agreeable to a non-custodial end to the extradition request. He was

---

[104]Belanger believed there was a "fair amount of work done in association with the extradition hearings and getting - traveling back and forth and actually trying to get that accomplished." RT 2608. Belanger's recollection of the facts of this matter was not precise. RT 2620.

wrong because Erickson never spoke to the Illinois prosecutor. Had a PA attorney done so, PF would have learned that an agreement was not going to be possible, and he would have self-surrendered in Illinois prior to the issuance of the Governor's warrant.

2. With respect to E.R. 1.5(a), the main goal of the representation was to keep PF out of custody and, as discussed above, more probably could have been and should have been done to try to effect that goal. Results, though, are but one factor to consider when assessing the reasonableness of the fee. Other factors are recited within E.R. 1.5. There was more time required than might otherwise be in an extradition case because travel to Yavapai County was required on two occasions. The only experts providing an opinion believed the fee to be reasonable and, therefore, customary. For these reasons, and although I believe that the fee was high considering the work done, the work that should have been done, and the result obtained (which, contrary to Arentz's testimony, I find was not a good result), I cannot find that the fee was unreasonable under E.R. 1.5.

3. This was an isolated instance of a communication breakdown caused when one attorney left PA and was replaced with another. The evidence does not support a finding, by clear and convincing evidence, that there was a failure of policy or practice or a failure of supervisory review. Accordingly, I find that the Bar has failed to prove a violation of E.R. 5.1(a) or 5.1(c).

Count 22

1. MS was charged with a misdemeanor domestic violence offense in 2007. RT 978-79. She disputed the facts upon which the charge was based. RT 994-995.[105]

2. On September 6, 2007, MS's father retained PA to represent her for $5,590. RT 981. PA attorney Cindy Castillo signed the fee agreement as the supervising attorney. Resp. Misc. Ex. 100-22.

---

[105]MS did not have a good understanding of the court processes. She could not remember exactly what she was charged with, or in which court her case had been brought. The fee agreement reflects the charges to be one count of criminal trespass and one count of criminal damage. Resp. Misc. Ex. 100-22. The charge was prosecuted in the Phoenix City Court.

3. On September 6, 2007, Castillo appeared with MS at her initial appearance. RT 2748, 2752. The prosecutor offered a diversion disposition at that time. MS's pretrial conference date was scheduled for September 26, 2007. Resp. Ex. 22-7.[106]

4. Prior to the first pre-trial conference, MS met with PA attorney Jose Saldivar to discuss her case for about one-half hour. RT 983.

5. The September 26, 2007, pre-trial conference was continued for thirty days so that MS could seek advice from an immigration attorney about the consequences of any actions she may take. RT 984-85.

6. MS met with Saldivar after the first pre-trial conference. RT 986.

7. MS appeared in Court a second time and entered into a diversion program. RT 987.

8. PA time keeping records reflect that on or about November 20, 2007, Arentz conducted a fee review. A total of one hour was accounted for that review (.5 by Arentz and .5 by his assistant). Bar Ex. 86. Arentz did not actually conduct a fee review, however, until after he became aware of a subsequently filed bar complaint. RT 1684.

9. Prior to December 7, 2007, MS lodged a complaint with the Bar because she believed that the fee was excessive. On December 7, 2007, the Bar asked Mr. Arentz to respond to the letter. RT 989; Bar Ex. 87-A. MS did not first seek a fee adjustment with PA.

10. After lodging her complaint, MS was invited to PA to discuss the fee with Arentz; an agreement was reached and PA refunded half of the fee. RT 991.

11. On December 3, 2007, Arentz sent a letter to MS agreeing to reduce the fee by $2,795. Resp. Ex. 22-15.

12. On January 2, 2008, MS signed a settlement agreement regarding the fee. Resp. Ex. 22-16, 22-17.

---

[106]The diversion program, if successfully completed, results in the dismissal of the charges.

13. Other than two consultations and three court appearances, no substantive work was done for MS.

14. Phillips was not directly involved in this matter.

15. Bar expert Derickson opined that $5,590 was not a reasonable fee. RT 1734. He was not asked whether $2,795 was a reasonable fee. Respondents Experts Belanger and Picarretta testified that the initial fee of $5,590 and the ultimate fee of $2,795 were reasonable. RT 2604-05. Belanger was not aware that diversion had been offered at the initial appearance. RT 2631, but that would not have changed his opinion. Picarretta believed that the fee was reasonable even without a refund. RT 2860.

Conclusions of Law[107]

1. The Bar has failed to prove, by clear and convincing evidence that the collection of $2,795 for this case violated E.R. 1.5(a).

2. PA immediately reacted when it was informed that the client had a fee dispute. Accordingly, the Bar has failed to prove by clear and convincing evidence, a violation of E.R. 1.16(d). The fee was reviewed, negotiated, and partially refunded within one month of notice of the client's complaint.

3. Having found no other violations, I conclude that the Bar has failed to prove a violation of E.R. 5.1(a) or 5.1(b).

VI. SUMMARY

I have concluded that the Bar has not proven any ethical violation as to DeCosta.

The violations, as to Phillips and Arentz, are largely based on the firm's retention practices and policies and the incentives provided to legal administrators which, in my opinion, largely contributed to the violations I have found.

---

[107]Respondent Arentz contends that the probable cause panelist did not find probable cause to believe that Arentz violated E.R. 5.1, relying on Resp. Ex. 22-2. The probable cause panelist directed the issuance of a complaint against Arentz of violations of Rule 42, "including but not limited to" E.R. 1.5, 1.15, and 1.16. This is not a finding of no probable cause as to any other E.R.

I've also considered the size of the caseloads. Although it appears that they, at times, are so high as to preclude competent representation, the evidence at this hearing was not clear and convincing in a general sense, *i.e.*, that the caseloads, systemically, affected competence as defined in E.R. 1.1. Nevertheless, it is troubling that the fees charged are as high as those charged by experienced and highly competent practitioners who limit their caseloads.

VII. RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect 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).

In imposing discipline, it is appropriate to consider the facts of the case, the ABA's Standards for Imposing Lawyer Sanctions ("*Standards*") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). The factors to consider, generally, are the duty violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, and the existence of aggravating or mitigation factors. *Standards 3.0.*

A. ABA STANDARDS

1. Ethical duty violated

The violations found in this case comprise violations of the duties owed to the legal profession. *Standards,* §II. Arizona courts have analyzed violations of E.R. 5.1 and 5.3 under *Standard* 7.0 (duties to the legal profession). *E.g. In re Rice*, 173 Ariz. 376, 843 P.2d 1268 (1992) (duties owed to profession include accepting, declining or terminating representation and maintaining the integrity of the profession). It appears to me, however, that these same violations implicate duties owed to the client. The client is the one charged with the unreasonable fee and/or the client suffers when policies and procedures cause them

to suffer harm, *e.g.* by believing that a stipulated sentence can be reduced if they retain the firm. Nevertheless, the construct for the determination of the appropriate sanction is found in *Standard* 7.0. *Cf. In the Matter of Lenaburg*, 177 Ariz. 20, 864 P.2d 1052 (1993).

2. The lawyer's mental state

The *Standards* define the mental states:

Intent is a "conscious objective or purpose to accomplish a particular result."

Knowledge is "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result."

Negligence is "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation."

a) E.R 5.1 and 5.3

I have concluded that Phillips and Arentz violated the ethical rules mainly as a result of the practices which incentive unprofessional behavior by legal administrators who receive bonuses based, in part, on clients retained and who do not cancel, and which streamline the retention process to a degree that potential clients are impeded from obtaining the information necessary to make informed decisions about the retention.

In considering the applicable mental state, I am informed by the September 13, 2002, Order of discipline imposed against Phillips. Many terms of the prior order of discipline have been complied with, including, but not limited to, the *Swartz* review at the conclusion of each case, the development of a client complaint tracking system, and the identification of legal administrators as non-attorneys to prospective clients. However, the Order also states, in part:

> Prior to entering into any written attorney/client fee agreement for the firm, an Arizona licensed attorney must speak with the client and approve the legal fees to be charged and retention of the firm by the client
>
> * * *

> Bonuses paid to intake personnel cannot be based exclusively on either the number of clients who retain the firm or on the amount of fees received from those clients. The criteria for determining bonuses must be provided to the intake personnel in writing.
>
> * * *
>
> . . . All attorney's and other billable staff members who work on criminal cases shall keep contemporaneous time records to enable the firm to conduct a "backward glance" at the conclusion of a case in order to determine whether a refund is due.

While PA has continued to comply with the "letter" of this prior Order, the "spirit" of the Order has been compromised. A licensed attorney who knows nothing about criminal law cannot serve the purpose of the Court's Order as evidenced by the clients who retained the firm expecting a reduced sentence after entering a stipulated plea agreement, without understanding or even being told how that could occur, what the consequences could be, or the likelihood of success. One of the bankruptcy attorneys testified that she did not know what a stipulated plea agreement was. One attorney testified that the purpose of the "rap" in bankruptcy retentions was merely to maintain compliance with the ethical rules by ensuring that the client had an opportunity to speak with an attorney. The opportunity must be meaningful and informed, but the practice at PA did not afford for a meaningful or informed visit with an attorney prior to retention.

The prior Order prohibited bonus determinations to be exclusively based on the number of clients or the amount of fees. The evidence in this hearing revealed that the number of clients retained is one of the factors considered in determining bonus amounts. Other factors are largely subjective, such as PA's determination of the administrator's work ethic, work product, value in assisting the client to retain the firm, client complaints, compliance with policy and procedure, attitude, appearance, as well as some objective factors such as the number of phone appointments set, and nighttime appointments set. Because the administrator's job is to retain clients and bring in fees, and is one of the few objective factors affecting the administrator's bonus, it is hard to separate that main component from

the conduct described in Counts 8 and 19. While PA has complied with the letter of the Order, the evidence convinces me that the Order did not sufficiently address the problem.

Finally, the time keeping system and practices established to comply with the Supreme Court's order was not sufficient to satisfy the purpose of the order. PA, as a result of this hearing, has modified its practices.

I do not find that Phillips or Arentz intended to violate the Rules of Professional Responsibility. I do find, however, that the conduct was knowing. Both Phillips and Arentz were aware that the Arizona Supreme Court previously ordered the firm to have attorneys discuss retention with potential clients. By implementing a system where administrators would find any attorney to sit in for a few minutes and quickly review a checklist, Respondents circumvented the purposes of the provision. Given the prior Order, I cannot accept the assertion that Respondents were merely negligent in establishing their policies and practices. Nor do I accept Respondent's implicit assertion that the Bar somehow had some duty to work with the firm short of initiating formal proceedings based on the firm's stated willingness to do so or the provision of the Order which permitted unidentified "testers" to test the firm's compliance with intake procedures on a quarterly basis.

b) E.R. 1.5

Respondents contend that the highly subjective calculus in determining whether a fee is unreasonable under E.R. 1.5(a), and the lack of clear guidance regarding permissible flat fees, renders any violation merely "negligent," citing *In re Evans*, 113 Ariz. 458, 556 P.2d 792 (1976). This point is well taken. I had considerable difficulty assessing whether or not the fees in these counts were reasonable due to the lack of clarity and the subjective nature of the exercise. I am Monday morning quarterbacking Mr. Arentz and, accordingly, with respect to the E.R. 1.5(a) violation, there was no intent to defeat the Rules of Professional Responsibility. Accordingly, I find that the appropriate mental state for the one violation in which the 1.5 violation is found separate and apart from the retention deficiencies (Count 8) is negligence. Given the thousands of cases Arentz reviews, this violation, alone, is, in my

opinion *de minimus* and, standing alone, would garner at most an informal reprimand.

c) E.R. 7.1

I have found the one advertisement to be misleading. While I believe that Phillips crossed the line by scripting the misleading advertisement, the evidence does not support the conclusion that he consciously sought to avoid the strictures of 7.1. I find the mental state, here, to be negligent, especially given the number of advertisements run by the firm.

3. Extent of injury

I have considered this factor from the point of view of the client, as opposed to the profession, because the ER 5.1 and 5.3 violations, while considered as an affront to the profession, resulted in violations affecting individual clients. I note, however, that the violations also caused actual injury to the profession.

I have found violations in eight of the twenty client related counts, and the one advertising count. In the client related counts, there was actual injury - clients and/or their families experienced difficulty trying to obtain refunds or the return of property, or were misinformed about the reasonable objectives of the representation. Clients were financially harmed in three cases - TG for the unreasonable fee, and RU and OC for the payment of a fee without a full understanding of the reasonable expectations of the representation.[108] RU or OC probably would not have retained the firm had they been properly informed; they suffered injury in the sense that they were led to believe that a better result could result when, in fact, the likelihood was low. Their expectations were dashed after a knowledgeable attorney reviewed the case. In one case, the Court suffered injury because counsel failed to appear for their clients and the Court felt the need to conduct a hearing to determine if the client was being well served by the firm.

I do not find that the actual injury was great with respect to the separate 1.5 violation or the 7.1 violation. The Bar presented no evidence that anyone was harmed by the

[108]JH suffered a similar injury but PA refunded the entirety of the fee.

misleading advertisement.

4. Aggravating and Mitigation Factors

The following aggravating factors are present:

As to Arentz:
1) selfish motive
2) multiple offenses
3) refusal to acknowledge wrongful nature of conduct
4) vulnerability of victim
5) substantial experience in the practice of law

I do not find a pattern of misconduct because all of the misconduct arose from the same circumstances. *In re Rice*, 173 Ariz. 376, 378 n.2, 843 P.2d 1268 (1992). I do not consider any prior orders of diversion as prior discipline as contemplated by the Standards.

As to Phillips:
1) prior disciplinary offense
2) selfish motive
3) multiple offenses
4) refusal to acknowledge wrongful nature of conduct
5) vulnerability of victim
6) substantial experience in the practice of law

I do not find a pattern of misconduct because all of the misconduct arose from the same circumstances. *In re Rice*, 173 Ariz. 376, 378 n.2, 843 P.2d 1268 (1992).

With respect to the refusal to acknowledge the wrongful nature of the conduct by Phillips and Arentz, I note that each has acknowledged the wrongful conduct in Count 19 and have recognized that certain other mistakes were made by employees in other counts as well. They have taken corrective measures. This finding is based on the refusal to acknowledge that their policies and practices are responsible for the violations I have found.

The following mitigating factors are present:

As to Arentz:
1) absence of a prior disciplinary record
2) full and free disclosure to State Bar
3) delay in disciplinary proceedings
4) willingness to remedy practices
5) character

As to Phillips[109]: 1) full and free disclosure to State Bar
2) delay in disciplinary proceedings
3) willingness to remedy practices
4) character

B. PROPORTIONALITY

Sanctions are to be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). Although an effective system of professional sanctions seeks consistency, so that it is appropriate to consider the sanctions imposed in similar cases, the discipline in each case must be tailored to its unique facts. *E.g. In Re Peasley*, 208 Ariz. 27, at ¶ 61, 90 P.3d 764 (2004).

Typically, similar cases are reviewed to consider the proportionality of the discipline. This case, involving a 'consumer law firm' and its practices, appears to be unique and it is difficult to analogize the facts of this case with others. The parties have not provided any similar cases for review although the Bar has provided some prior discipline in cases that reach some of the issues. *E.g. In re Klahr*, SB-02-0138-D (disbarment for, among other things, assigning cases to unsupervised contract attorney unable to perform services, and allowing unqualified and unsupervised employees to manage law practice). Klahr's conduct was more egregious than that alleged in this case.

In *In re Lenaburg*, 177 Ariz. 20, 864 P.2d 1052 (1993), the Court considered, among other things, a 5.1 violation for an attorney's failure to oversee branch offices of a law firm leading to ethical violations in four separate cases involving a lack of communication and a failure to refund advance fees. While the problem was largely created by the firm's policies, the Court held that the respondent "must be held responsible for his own misconduct." The Court found the lawyers conduct to be negligent and imposed a public censure with probation

---

[109]I disagree with Respondent's contention that Phillips had no dishonest or selfish motive. Whether he was aware of the specific conduct alleged in the complaint does not inform the analysis. He was responsible for putting the policy and practice procedures in place, to improve the profitability of the firm, with full knowledge of the potential for injury.

despite prior discipline. The Court thought that the Respondent did the best he could under the circumstances and believed that "the heart of the problem [was] the policies and procedures of the firm." *Id*, at 24, 1055. *In re Rice*, 174 Ariz. 376, 843 P.2d 1268 (1992), involved sloppy office procedures leading to mismanagement during a period of rapid expansion in size and area of practice. This led to Respondent's inability to adequately supervise his staff for which he was censured.

Respondents conduct here is more serious than in *Lenanburg* because Respondents are responsible for the firm's policies and practices. The instant case is different from *Rice* for a number of reasons including numerous mitigating factors with no aggravating factors, the voluntary transition to sole practitioner status with more limited practice areas, and because it involved only two counts. On the other hand, some of the problems in *Rice* are similar to the violations I have found, *e.g.* multiple re-assignment of counsel without notice to the client, and missed court deadlines. I have considered both of these cases, their facts, and their reasoning in my recommendation.

C. DISCUSSION OF APPROPRIATE SANCTION

The purposes of lawyer discipline include the need to deter the Respondent and other attorneys from engaging in similar unethical conduct, *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982), to instill public confidence in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 362 (1994), and to maintain the integrity of the legal system. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is not punishment.

Professor Lynk, in his testimony, encouraged the Bar to review the Rules of Professional Responsibility in the context of consumer law firms and determine best practices for that model, especially because it is a growing model. Having considered PA's practices and policies in this case, and having considered the Standards for Imposing Lawyer Sanctions, I too think the Bar ought to be reviewing the practices of Consumer Law Firms because it is difficult to assess the conduct within the construct of the Standards.

The E.R. 5.1 and 5.3 violations are at the heart of this matter and they are the violations which drive my recommendation. Neither the E.R. 1.5 violation in Count 8 or the 7.1 violation in Count 20 would warrant significant discipline. The other 1.5 violations and virtually all of the other violations I have found stem from the retention practices at the firm. The Bar has proven multiple violations of E.R. 5.1 and 5.3.

The Standards relating to violations of duties owed to the legal profession provide that disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the legal profession with the intent to obtain a benefit for the lawyer and causes serious or potentially serious injury to a client, the public, or the legal system. *Standard* 7.1. Suspension is generally appropriate when the 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* 7.2 Under these facts, disbarment is clearly not warranted. There was no serious or potentially serious injury to a client, the public, or the legal system as a result of PA's practices that would warrant consideration of such a sanction.

The Bar asserts, however, Respondents "acted for their own immense financial benefit, overusing non-attorney employees for inappropriate tasks and overextending attorney employees with unacceptable caseloads to squeeze every last penny out of their clients and their firm. The harm caused by this practice was massive in scale" based on the number of complaints heard in this matter. Bar's Proposed Findings of Fact, pp. 99-100. Hyperbole aside, I do find that PA's practices - its retention practice, its use of legal administrators, and the attorney caseloads - are all implemented to improve profitability. But the ethical rules do not prohibit law firms from employing measures designed to improve profitability. Law firms use non-attorney professionals for all sorts of tasks, and, for those which bill on an hourly basis, charge clients at rates much higher than they pay.

On the other hand, Phillips was previously sanctioned for failing to have practices in place to reasonably ensure compliance with the Rules of Professional Responsibility.[110] The evidence also showed that once clients contacted the Bar, they received more attention to their fee disputes, garnering refunds or additional refunds.

I have also considered testimony establishing a number of changes to the firm's practices and policies since the hearing began including the keeping of precise time records, and the availability of more criminal attorneys for the retention process. Phillips and Arentz have displayed a willingness to cooperate with the Bar. Nevertheless, given the prior consent Order, as to Phillips, and the factors delineated in the *Standards*, I believe a suspension is warranted.

D. CONCLUSION

It is recommended that the complaint be dismissed as to Respondent DeCosta.

It is recommended that Respondent Phillips be suspended for six months and a day.

It is recommended that Respondent Arentz be suspended for sixty days.

As to both Phillips and Arentz, upon re-instatement, it is recommended that each be placed on probation with the same terms as entered in SB-02-0127-D, with the following additional recommendations:

1. Term Four should be amended to make clear that the attorney meeting with a potential client is knowledgeable in the practice area, and that issues which relate to the retention and the retention decision be discussed prior to a decision being made on the retention. Retention attorneys should review all paperwork and ensure that all appropriate information is given, even if the right questions are not asked.

---

[110]Phillips asserts that the prior discipline was based almost entirely on the no longer existing family law division of the firm, and, therefore, has no applicability to this matter. I disagree. Its not the nature of the practice, it's the nature of the violations which informs the issue.

2. Bonuses to legal administrators should not be based, in whole or in part, on the amount of clients retained, the amount of fees generated, the number of clients who cancel, or the amount of fees refunded.

3. The firm shall keep precise time records for all work done on a case.

It is further recommended that restitution be ordered in the following amounts:

TG	$2,990
RU	$6,000
OC	$5,000

DATED this 31st day of March, 2009.

Martin Lieberman LLPA
Martin Lieberman
Hearing Officer 7W

Original of the foregoing has been filed this 31st day of March, 2009, with:

Discipline Clerk of the
Supreme Court of Arizona
1501 West Washington, Suite 104
Phoenix, AZ 85007-3329

Copies this 1st day of April, 2009, to:

Steve Little
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016

Mark I. Harrison
Sara S. Greene
Mark P. Hummels
OSBORN MALEDON, P.A.
2929 North Central Avenue
21st Floor
Phoenix, Arizona 85012-2793

By: Evelyn Loza