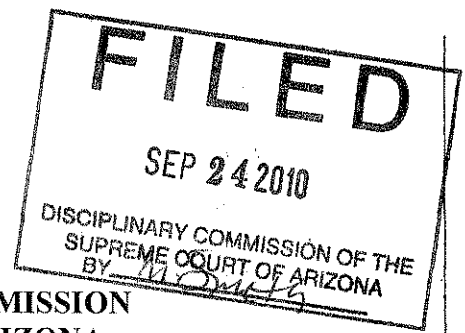




BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA

JEFFREY R. FINLEY,
Bar No. 009683

RESPONDENT.

No. 09-0157

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on September 11, 2010, pursuant to Rules 56 and 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed July 6, 2010, recommending rejection of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for a 30 day suspension, two years of probation upon reinstatement with terms and conditions to be determined in connection with *Matter of Massey*, companion File No. 09-0156,¹ including a Law Office Management Assistance Program ("LOMAP") evaluation and costs.

The Hearing Officer determined that the agreed-upon sanction was inadequate given that Respondent was on probation for similar misconduct when this conduct occurred. On July 26, 2010, the parties filed a Joint Notice of Appeal for Review pursuant to Rule 56(f)(3), Ariz.R.Sup.Ct.,² and the matter was set for executive session.

¹ An Order severing this matter was filed on May 20, 2010 and two separate reports were filed by Hearing Officer 6T.

² Rule 56(f)(3) provides that the parties may appeal the hearing officer's decision to the Disciplinary Commission within 10 days after service of the hearing officer's report.

Decision

1 Upon consideration, the seven members³ of the Disciplinary Commission
2 unanimously reject the Hearing Officer's recommendation and accept the Tender and Joint
3 Memorandum filed April 28, 2010 providing for a 30 day suspension,⁴ two years of
4 probation upon reinstatement with conditions and terms to be determined in connection
5 with *Matter of Massey*, File No. 09-0156 (LOMAP evaluation) and costs of these
6 disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.⁵
7 The terms of probation are as follows:

Terms of Probation

- 9
- 10 1. Upon reinstatement, Respondent shall be placed on probation for a period
11 of two years, under terms and conditions to be determined in connection with *Matter of*
12 *Massey*, File No. 09-0156.
- 13 2. The probation will begin when the final judgment and order is entered in
14 this matter and terminate two years from the date that the LOMAP agreement is signed.⁶
- 15 3. The Massey and Finley firm will participate in a complete LOMAP
16 evaluation and comply with all of the recommendations made based the LOMAP
17 evaluation.
- 18 4. In the event that Respondent fails to comply with any of the foregoing
19
20

21
22 ³ Commissioners Houle and Horsley did not participate in these proceedings.

23 ⁴ Respondent has requested that his suspension commence on December 1, 2010, and the State Bar
24 does not oppose the request. *See* Joint Notice of Appeal for Review. However, only the Supreme
25 Court of Arizona has the authority to impose a fixed date for the period of suspension.

26 ⁵ A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total
 \$1,200.00.

⁶ The Commission notes that Rule 60(a)(5)(A), Ariz.R.Sup.Ct., provides that probation shall be
 imposed for a specific period not in excess of two years but may be renewed for an additional two
 years.

1 conditions, and the State Bar receives information thereof, bar counsel shall file with the
2 imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct.
3 The imposing entity may refer the matter to a hearing officer to conduct a hearing at the
4 earliest practicable date, but in no event later than 30 days after receipt of notice, to
5 determine whether the terms of probation have been breached and, if so, to recommend
6 appropriate action and response. If there is an allegation that Respondent failed to comply
7 with any of the foregoing terms, the State Bar of Arizona bears the burden to prove non-
8 compliance by a preponderance of the evidence.

9 RESPECTFULLY SUBMITTED this 24th day of September, 2010.

10 Pamela M. Katzenberg/MPs
11 Pamela M. Katzenberg, Chair
12 Disciplinary Commission

13 Original filed with the Disciplinary Clerk
14 this 24th day of September, 2010.

15 Copy of the foregoing mailed
16 this 24 day of September, 2010, to:

17 Hon. Michael O. Wilkinson
18 Hearing Officer 6T
1244 W. Solano Drive
Phoenix, AZ 85013

19 Nancy A. Greenlee
20 Respondent's Counsel
821 E. Fern Drive North
21 Phoenix, AZ 85014
22
23
24
25
26

Shauna R. Miller
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State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

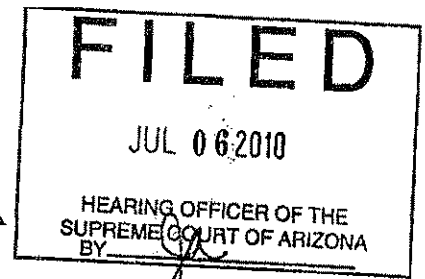
by: Loretta Diaz

/mps

EXHIBIT

A

BEFORE A HEARING OFFICER OF
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

No. 09-0157

JEFFREY R. FINLEY
Bar No. 009683

RESPONDENT.

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The State Bar of Arizona filed an Amended Complaint in this matter on December 4, 2009. Mr. Finley filed his Answer on January 5, 2010. An Initial Case Management Conference was held on January 19, 2010. On March 10th the parties filed a Notice of Settlement. A Hearing on the Tender of Admissions And Agreement For Discipline By Consent was held on May 3rd, 2010.

FINDINGS OF FACT

1. Jeffrey R. Finley was admitted to practice as a lawyer in Arizona on October 20, 1984.
2. Respondents Massey and Finley are equal shareholders in Massey & Finley P.C. (the Firm).

COUNT ONE

3. Respondent Finley and the Firm represented Hans Mueller ("Mr. Mueller") in connection with injuries Mr. Mueller sustained while he was detained in an INS facility located in Florence, Arizona. The INS facility was being run at the time by Correction Corporations of America ("CCA").

4. Following Mr. Mueller's detention in the INS facility, he was deported to his native country of Germany.

5. After his deportation to Germany, Mr. Mueller's close friend, Joan Walter discussed the injuries Mr. Mueller sustained while he was detained in an INS facility with Mr. Mueller's ex Father-in-law, William Stanfield.

6. On information and belief, Mr. Stanfield, a former senior partner of the firm Stanfield & McCarville, discussed the matter with Mr. Mueller by telephone, and assured Mr. Mueller he had a well-documented case that had a high chance of success.

7. On information and belief, Mr. Mueller also discussed his injuries in the matter in which he was mistreated while being detained in the INS facility with attorney A. Thomas Cole, an acquaintance of his in Arizona.

8. At the time, Mr. Cole was the owner of an office building located in Casa Grande in which the Firm was a tenant.

9. Mr. Cole recommended that Mr. Mueller contact the Firm to discuss possible legal action for his injuries.

10. On information and belief, Mr. Mueller subsequently had Ms. Walter contact the Firm regarding Mr. Mueller's injuries.

11. In or around July 2003, Ms. Walter met with Respondent Massey and gave him copies of some documents related to Mr. Mueller's claims. Respondent Massey told Ms. Walter he would need a few days to familiarize himself with the documentation.

12. A few days later, Respondent Massey told Ms. Walter the Firm would represent Mr. Mueller for a fee of \$30,000 and that Mr. Mueller should contact him.

13. Mr. Mueller called Respondent Massey, a call to which Respondent Finley was not a party. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that he and Respondent Massey discussed the following:

- a. the case would be drawn out over a fairly long period of time,
- b. Respondent Massey believed that Mr. Mueller's chances of receiving some restitution appeared to be good,
- c. Respondent Massey assured Mr. Mueller the Firm was qualified to handle his case,
- d. Respondent Massey told Mr. Mueller to call back later and ask for the paralegal assigned to his case.

14. The Firm would contact Mr. Mueller only when necessary since communication would be expensive and difficult due to the time difference between Phoenix and Germany.

15. If this matter were to proceed to contested hearing, Mr. Mueller would testify that he called approximately one week later and was connected with Andy Carp, a paralegal at the Firm and that he provided Mr. Carp with all the pertinent information about his case. Mr. Carp told Mr. Mueller he would be contacted by telephone, e-mail or mail as the need arose.

16. A Legal Representation Agreement (the “fee agreement”) was mailed to Mr. Mueller under a cover letter dated July 8, 2003. The \$30,000 fee was documented in the fee agreement along with the scope of the representation.

17. Mr. Mueller signed the fee agreement on July 18, 2003, and returned it to the Firm along with the \$30,000 fee, paid by Ms. Walter. Respondent Massey signed the fee agreement on September 1, 2003.

18. On September 8, 2004, approximately fourteen (14)months later, the Firm filed a lawsuit against CCA, Case No. CV 2004 - 01051. Jones, Skelton & Hochuli, P.L.C. (“Jones Skelton”) defended CCA.

19. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that he promptly provided all information requested by the Firm, including answers to Defendant's discovery and requests for information about his case. Respondent would present evidence rebutting Mr. Mueller's testimony. For the purposes of the tender of admissions, the parties agree that the extent to which Mr. Mueller did, or did not, cooperate with the Firm is not relevant to the outcome of this case.

20. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that neither Respondent Massey nor Respondent Finley, nor anyone else from the Firm, ever telephoned or e-mailed him regarding his case or to request additional information from him, except for an August 15, 2005, letter from Respondent Finley. Mr. Mueller would further testify that this letter was the sole communication from the Firm to Mr. Mueller regarding any need for additional information in response to discovery requests. If this case were to go to a contested hearing, Respondent Finley would present evidence rebutting Mr. Mueller's testimony; however, Respondent Finley would admit that communications with Mr. Mueller were inadequate.

21. During the representation of Mr. Mueller, specifically on June 20, 2005, Respondent Finley received an Informal Reprimand for violation of ER's 1.2, 1.3, 1.4, and 8.4(d) and began a one-year term of Probation on August 20, 2005.

22. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that neither Respondent Massey nor Respondent Finley informed him of any problems in the litigation process or any difficulty in timely responding to discovery requests.

23. If this matter were to proceed to a contested hearing, Respondent Finley would testify that he and his legal assistant, Donna Goetzenberger, both had multiple conversations with Mr. Mueller in which they attempted to obtain further documentation that the injuries sustained by Mr. Mueller occurred while he was detained in the INS facility. However for purposes of the tender of admissions, Respondent Finley will admit that communications with Mr. Mueller were inadequate.

24. If this matter were to proceed to a contested hearing, Respondent Finley would testify that Mr. Mueller continued to insist in his telephone conversations with both he and Donna Goetzenberger that Mr. Mueller had provided all relevant medical documentation to the Firm, despite Respondent Finley's and Ms. Goetzenberger's explanations to Mr. Mueller about what information the Firm needed.

25. On or about October 28, 2005, Jones Skelton filed Defendant's Motion to Dismiss or in the alternative Motion for Summary Judgment ("Motion to Dismiss") and mailed a copy to Respondent Finley.

26. Neither Respondent Massey nor Respondent Finley responded to the Motion to Dismiss despite Respondent Finley asking for and being granted an extension until November 21, 2005, to file the Response.

27. On or about December 2, 2005, Jones Skelton filed a Request for Summary Disposition regarding the Motion to Dismiss or the alternative Motion for Summary Judgment and mailed a copy of this motion to the Firm.

28. The Firm did not respond to the Motion for Summary Disposition.

29. On or about January 6, 2005, Judge William J. O'Neil, Pinal County Superior Court, signed an order granting defendant's Motion to Dismiss and a copy was mailed to Respondent Finley.

30. On or about January 23, 2006, Jones Skelton filed a Notice of Lodging of Proposed Judgment and mailed a copy along with the Proposed Judgment to Respondent Massey.

31. On January 27, 2006, the Court mailed a copy of a Judgment/Order Lodged to Respondent Massey to show for the record that a formal proposed judgment dismissing all claims against CCA was lodged with the Court and notifying Respondent Massey that if no objection was filed within the time provided by the Rules of Civil Procedure, the order would be signed by the Judge and filed.

32. The Firm did not file an objection to the Proposed Form of Judgment.

33. On or about February 13, 2006, Judge O'Neil signed the Proposed Form of Judgment and a copy was mailed to Respondent Massey.

34. On or about February 28, 2006, the Firm filed Plaintiff's Rule 59 Motion for New Trial and Rule 60 Motion for Relief from Judgment under Respondent Massey's signature ("Motion for New Trial").

35. In the Motion for New Trial, the Firm argued that because of the Firm's difficulty in communicating with Mr. Mueller they were unable to respond to the Motion to Dismiss and also

stated, " Plaintiff is filing this Motion in order to stay the running of the time for appeal, and anticipates supplementing this Motion within the next forty-eight hours."

36. The Firm did not file such a supplement.

37. Jones Skelton's response to the Motion for New Trial was filed on or about March 20, 2006, and detailed a lack of prosecution by the Firm and its failure to respond to discovery requests, correspondence and dispositive motions.

38. The Firm did not file a reply to defendant's Response to the Motion for New Trial.

39. On or about May 8, 2006, the Court entered an order denying Plaintiff's Motion for New Trial.

40. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, in or around November 2006, Mr. Mueller called the Firm and learned for the first time that his case was dismissed. This was approximately ten months after Defendant's Motion to Dismiss was granted and six months after the Motion for New Trial was denied.

41. During this call, Mr. Mueller was told to telephone Respondent Finley a few days later to discuss his case, which he did.

42. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, during this telephone call, Respondent Finley knowingly misrepresented to him that his case had been dismissed because the judge did not want to hear his case, in order to hide the Firm's misconduct in allowing Mr. Mueller's case to be dismissed.

43. If this matter were to proceed to a hearing, Mr. Mueller would testify that Respondent Finley further misled him by falsely telling him that they were still actively working his case with the goal of appealing the dismissal, when the Motion for New Trial had already been

denied. Respondent Finley told Mr. Mueller to contact him in approximately three months to check the status of his case.

44. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that Respondent Finley did not tell him during the November 2006 conversation about Defendant's Motion to Dismiss or Respondent Massey's Motion for New Trial.

45. If this matter were to proceed to a hearing, Mr. Mueller would testify that, during this call, he asked Respondent Finley about his \$30,000 fee and that Respondent Finley falsely assured him that the Firm was working on his case.

46. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, as a result of his November 2006 telephone conversation with Respondent Finley, he believed Respondent Massey and Respondent Finley were still working on his case.

47. If this matter were to proceed to a contested hearing, Respondent Finley would testify that during the November 2006 telephone conversation with Mr. Mueller, he told him that the case was dismissed because the Firm did not have evidence to substantiate that Mr. Mueller's injuries were caused by his fall at the INS facility, and that without such evidence, the judge would not want to hear the case, or words to that effect.

48. If this matter were to proceed to a contested hearing, Respondent Finley would testify that he further told Mr. Mueller that the Firm was researching whether it had grounds to appeal the case, and he asked Mr. Mueller to contact him in a couple of months, at which time, Respondent Finley could update him as to the Firm's research.

49. If this matter were to proceed to a contested hearing, Respondent Finley would testify that in response to Mr. Mueller's question about whether he would be entitled to a refund of some portion of his \$30,000 fee, Respondent Finley told him that he would need to consult with

Respondent Massey and that he would also need to review how much work had been done by the Firm in order to determine whether the Firm was willing to refund some portion of the fee.

50. On or about March 27, 2007, Mr. Mueller called Respondent Finley. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that during this telephone call, Respondent Finley informed him that the Firm had decided they would no longer handle his case or his appeal of the Court's dismissal. Mr. Mueller would also claim that Respondent Finley also asked that Mr. Mueller not contact him again regarding his case. Respondent Finley would contest that testimony were the matter to proceed to a contested hearing.

51. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, when he asked Respondent Finley what had happened on his case, Mr. Finley refused to provide any information and simply told Mr. Mueller that they were no longer his attorneys. Respondent Finley would contest that testimony at a contested hearing.

52. During this call, Mr. Mueller asked Respondent Finley what happened to his \$30,000 fee.

53. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that Respondent Finley told him that he would be receiving an approximately \$10,000 refund, but failed to provide an explanation for the approximately \$20,000 in charges.

54. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that Respondent Finley also told him to contact him only by e-mail regarding the return of his retainer. Accordingly, Mr. Mueller provided his banking information via a March 27, 2007 e-mail to respondent Finley.

55. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, by June 2007, he still had not received the \$10,000 and had not received any communication

from Respondents Massey and Findley. As a result, Mr. Mueller sent an e-mail to Respondent Finley confirming their prior conversations and again asking for return of the \$10,000. He again provided his banking information.

56. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that, on July 6, 2007, he delivered both an e-mail and letter to Respondent Finley expressing his frustration that he had still not received the \$10,000 and recounting the history of his case.

57. In the July 6, 2007 letter, Mr. Mueller confirmed statements that he believed were made to him by Respondent Finley during their November 2006 and March 27, 2007 telephone calls and demanded that he receive the \$10,000 within "10 working days".

58. On August 6, 2007, after another month had passed, Mr. Mueller again provided his banking information to Respondents Massey and Finley in an e-mail to Firm employee Donna Goetzenberger.

59. On August 20, 2007, the Firm wired Mr. Mueller the \$10,000.

60. If this matter were to proceed to a contested hearing, Respondent Finley would refute many of the claims made by Mr. Mueller regarding the sequence of events between March 27, 2007, through August 20, 2007; however for purposes of the Tender of Admissions, Respondent Finley will admit that the Firm failed to timely refund monies due to Mr. Mueller.

61. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that it was only after he retained a new attorney, who then obtained a copy of the Court file from the Pinal County Superior Court, that Mr. Mueller began to understand the extent to which he believes he was misinformed about his case and how it came to be dismissed.

62. On August 20, 2008, Mr. Mueller's new attorney sent a letter to Respondent Massey requesting a copy of Mr. Mueller's file and a detailed billing statement showing time and

amounts billed to his matter and the basis for keeping approximately \$20,000 of Mr. Mueller's \$30,000 fee.

63. Two days later, Respondent Massey delivered a letter and box of documents to Mr. Mueller's new attorney. His letter stated "[t]he file includes all of our correspondence, e-mails, attorney notes, etc. etc." However no billing statement or explanation of charges was provided.

64. If this matter were to proceed to a contested hearing, Mr. Mueller would testify that as a result of the Respondents Massey and Finley's unethical conduct, he is barred from pursuing his cause of action against CCA and has suffered damages as a result. Respondent Finley would testify that Mr. Mueller's case turned out to be merit less because Mr. Mueller could not or would not deliver documents that he had claimed existed and that would establish a causal link necessary to prove his case.

65. Respondent Finley failed to promptly inform Mr. Mueller about the status of his case, and failed to explain Mr. Mueller's options to him when deadlines were missed and the case was dismissed, in violation of ER 1.4 (a) and (b)

66. Respondent Finley failed to promptly return the unearned portion of Mr. Mueller's fee and failed to promptly render a full accounting regarding the fee in violation of the ER 1.15(d).

67. Respondent Massey and Respondent Finley, as the only shareholders of the Firm and having comparable managerial authority in the Firm, failed to have in effect measures giving reasonable assurance that all Firm associate lawyers would conform to the Rules of Professional Conduct in violation of ER 5.1 (a), (b) and (c).

68. In addition, some of the above allegations of misconduct are attributed to Firm non-lawyer employees, and Respondent Finley violated ER 5.3 (a), (b) and (c) by failing to adequately supervise such employees.

69. The Firm's failure to respond to discovery requests and dispositive motions resulted in conduct prejudicial to the administration of justice in violation of ER 8.4 (d).

COUNT TWO

70. The allegations set forth in Count One are incorporated herein.

71. On June 20, 2005, Respondent Finley received an Informal Reprimand and Probation for violation of "ERs 1.2, 1.3, 1.4, and 8.4(d), by failing to notify and advise his client regarding significant developments in a litigation matter, and also failed to notify his client regarding actions taken in response to those developments. Respondent also failed to notify client of a deposition."

72. The one year period of probation started on August 20, 2005, the day Respondent Finley signed the Terms and Conditions of Probation.

73. In Mr. Mueller's matter, in violation of the terms and conditions of probation, Respondent Finley generally failed to communicate adequately with Mr. Mueller, and failed to ensure that the Firm timely responded to appropriate pleadings in Mr. Mueller's case. Respondent Finley further failed to ensure that the Firm promptly returned Mr. Mueller's fee.

74. Respondent Finley's failure to fully comply with all of the terms of probation agreement constitutes a material breach of the agreement in violation of Rule 53(e), Ariz. R. Sup. Ct.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, ERs 1.4(a) and (b), 3.2, 1.15(d), 5.3 and 8.4(d) and Rule 53(e) Ariz. R. Sup. Ct.

CONDITIONAL DISMISSALS

The State Bar conditionally agrees to dismiss alleged violations of Rule 42, ERs 1.3, 1.16(d), 3.3, 5.1 and 8.4(c), Ariz. R. Sup. Ct. The State Bar conditionally agrees to dismiss the following ERs for the reasons stated below.

1. ER 1.3 as it is covered by Respondent's admission that he violated ER 3.2.
2. ER 1.16(d) as it is covered by Respondent's admission that he violated ER 1.15(d).
3. The State Bar may have a problem at hearing proving a knowing violation of ERs 3.3 and 8.4(c).
4. The State Bar does not agree that Respondent did not violate ER 5.1, but is willing to conditionally dismiss this rule violation in exchange for Respondent's conditional admissions as stated above.

RESTITUTION

The Hearing Officer agrees with the State Bar and Respondent Finley that restitution is not an issue in this matter. The firm returned the \$30,000 to Mr. Mueller.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer has considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, 35, 90 P. 3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P2d 1037, 1040 (1990).

In determining an appropriate sanction, both the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury

caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

Respondent and his partner were retained to represent Hans Mueller for personal injuries Mr. Mueller allegedly sustained while detained in an INS facility. Respondent Finley failed to move the case forward, failed to satisfy discovery and disclosure obligations, and failed to respond to dispositive motions that led to the case being dismissed. During the course of the representation communication between Mr. Mueller and the Firm was sporadic. In a November 2006 telephone call with Respondent Finley, approximately 10 months after his case had been dismissed, Mr. Mueller was informed that the case had been dismissed and no other action could be taken by the Firm.

Standards 4.0 (Duties to Clients) and 7.0 (Other Duties Owed as a Professional), are the appropriate *Standards* to consider.

Standard 4.42 provides: "Suspension is generally appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client." *Standard* 7.2 provides: "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of the duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." Additionally, the theoretical framework analysis contained in the *Standards* states that where there are multiple acts of misconduct, the sanction should be based on the most serious violation, with the other acts being considered in aggravation.

The following aggravating and mitigating circumstances should be considered in deciding what sanction to impose.

Aggravating Factors:

ABA Standard 9.22:

(a) Prior disciplinary offenses. Informal Reprimand and Probation, State Bar File No. 04-2066 (June 2005), for violations of ERs 1.2, 1.3, 1.4, and 8.4(d) Rule 42, Ariz. R. Sup. Ct.

(c) Pattern of Misconduct. Respondent has been sanctioned before for failing to communicate with clients and for failure to notify them of significant developments during litigation.

(i) Substantial experience in the practice of law. Respondent has been practicing law in Arizona since 1984.

Mitigating Factors:

(b) Absence of dishonest or selfish motive. The mistakes made in this matter were not as a result any dishonesty or selfishness on the part of Respondent.

(c) Personal or emotional problems. Respondent received counseling from Marsena Bryant, MSW, in and around 2006 for depression and related issues.

(d) Good faith effort to make restitution or record to rectify consequences of misconduct. Respondent's firm refunded all funds paid to the firm by Mr. Mueller. Respondent has also been an active participant with the Member Assistance Program, serving as a monitor for other attorneys. Respondent began working with MAP as a committee member and monitor following his previous probation as a way of giving back to other attorneys facing personal issues.

(e) Full and free disclosure and cooperative attitude toward proceedings. Respondent has provided all information requested of him and has shown his cooperation by entering into a consent agreement with the State Bar.

(g) Character and reputation. Were this matter to proceed to a contested hearing, Respondent would present witnesses who would attest to his character and excellent reputation in the legal community.

(l) Remorse. Respondent is sincerely remorseful Mr. Mueller's case was handled in a fashion that it was, and deeply regrets his mistakes and handling of the case.

In evaluating the aggravating and mitigating factors, the parties have agreed and this Hearing Officer concurs, that they do not justify departing from the presumptive sanction of suspension.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* 208 Ariz. at 61, 90 P.3d at 778, (citing *In re Alcorn* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002): *In re Wines* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In re Hyndman, SB-06-0170-D (February 9, 2007). Mr. Hyndman violated the terms of probation in File 03-1331. Mr. Hyndman also failed to withdraw from a representation, appear in court, and pay a sanction as ordered. Mr. Hyndman further failed to respond and cooperate with the State Bar's investigation. Mr. Hyndman violated ERs 3.2, 3.4(c), 8.1(b), 8.4(d) and Rules 53(f) and 53(e). In aggravation there were prior disciplinary offenses (9.22(a)), and a pattern of misconduct (9.22(c)). In mitigation there were an absence of a dishonest or selfish motive (9.32(b)), personal or emotional problems (9.32(c)), imposition of other penalties or sanctions (9.32(k)), and remorse (9.32(l)). Mr. Hyndman's mental state was knowing and there

was potential injury. Mr. Hyndman was suspended for 90 days and ordered to one year of probation upon reinstatement (MAP and LOMAP).

In re Gregory, SB-08-0153-D (November 4, 2008). Mr. Gregory failed to comply with the terms of his probation contract as imposed by Judgment and Order in File No. SB-07-0013-D (2007). Mr. Gregory specifically failed to timely file quarterly trust account reports, failed to properly reconcile his trust account and failed to pay the Trust Account Program fee as agreed in his probation contract. Mr. Gregory violated Rule 53(e). In aggravation there were prior disciplinary offenses (9.22(a)) and a pattern of misconduct (9.22(c)). In mitigation there was an absence of a dishonest or selfish motive (9.32(b)). Mr. Gregory's mental state was negligent and there was potential injury. Mr. Gregory was censured and placed on probation for an additional year.

In re Brinton, SB-07-0153-D (November 1, 2007). Mr. Brinton altered his client's affidavit without her knowledge or consent and thereafter, submitted the altered affidavit to the court without informing the court of the changes. Mr. Brinton further disclosed confidential information, failed to adhere to trust account rules and guidelines in the maintenance of his trust account, thereby resulting in the conversion of client funds for a short period of time, and violating a condition of his probation. Mr. Brinton violated ERs 1.15, 1.6, 3.3, 8.4(c), 8.4(d) and Rules 43, 44 and 53(e). In aggravation there were prior disciplinary offenses (9.22(a)), multiple offenses (9.22(d)) and substantial experience in the practice of law (9.22(i)). There were no factors in mitigation. Mr. Brinton's mental state was negligent with regard to the trust account violations, but was knowing for all other violations. There was the potential for serious injury. Mr. Brinton was suspended for six months and a day, with two years of probation upon reinstatement.

SANCTIONS

The parties Tender of the Admissions and Agreement for Discipline by Consent proposes that Respondent Finley shall be suspended for 30 days and upon reinstatement be placed on probation for period of two years.

The Hearing Officer has considered the appropriateness of this sanction in light of the facts, Respondent's mental state, and the harm caused. In addition the Hearing Officer has considered the similar cases cited above. Clearly the case which is most on point is the *Brinton* matter. In both cases there was a direct violation of the terms of probation. In both cases there was a new violation of ethical rules, which caused harm or potential harm to the client. Respondent Finley's neglect of Mr. Mueller's case resulted in his claim for damages being permanently barred. This occurred in spite of Respondent's agreement in the contract of probation. Inaction on motions, failure to meet deadlines and an abysmal lack of communication with the client were inexcusable. Respondent Finley's excuse for his failures is that the client was in Germany. However, Respondent knew that this would be the situation when the case was accepted. These factors make this case more egregious than the *Brinton* case.

If these violations occurred while Respondent was not on probation, a sanction of a 30 day suspension followed by probation would be appropriate. These violations committed while on probation call for a sanction at least as significant as that imposed in the *Brinton* matter. The Hearing Officer cannot in good conscience concur with the proposed sanction.

The Hearing Officer recommends rejection of the Tender of Admissions and Agreement for Discipline by Consent.

DATED this 6th day of July, 2010.

Hon. Michael O. Wilkinson / L. D'Amico
Honorable Michael O. Wilkinson
Hearing Officer 6T

Original filed with the Disciplinary Clerk
this 6th day of July, 2010.

Copy of the foregoing mailed
this 7 day of July, 2010, to:

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/jsa