BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **DANIEL E. GARRISON,** **Bar No. 021495** RESPONDENT.	)	No. 09-0694 **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 28, 2010, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for censure and costs.

Decision

Having found no facts clearly erroneous, the seven members[1] of the Disciplinary Commission unanimously accept the Hearing Officer's findings of fact, conclusion of law, and recommendation for censure and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[2]

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

Pamela M. Katzenberg /mps
Pamela M. Katzenberg, Chair
Disciplinary Commission

[1] Commissioners Houle and Horsley did not participate in these proceedings.
[2] A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total $1,200.00.

Original filed with the Disciplinary Clerk
this 21st day of September, 2010.

Copy of the foregoing mailed
this 21 day of September, 2010, to:

Karen Clark
Respondent's Counsel
Adams & Clark, P.C.
520 E. Portland, Suite 200
Phoenix, AZ 85004

Thomas E. McCauley, Jr.
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

Copy of the foregoing hand delivered
this 21 day of September, 2010, to:

Hon. Jonathan H. Schwartz
Hearing Officer 6S
1501 W Washington, Suite 104
Phoenix, AZ 85007

by: Deann Baker

/mps

EXHIBIT
A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	)	No. 09-0694
DANIEL E. GARRISON, Bar No. 021495	)	**Hearing Officer's Report**
Respondent.	)	

PROCEDURAL HISTORY

The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent on May 25 2010. No Complaint was filed. The Hearing Officer was assigned on May 27 2010. The hearing was held on June 22, 2010.

FINDINGS OF FACT[1]

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 24, 2002. (TR 5:9-11)

2. Respondent was first licensed as an attorney in the State of Utah in 1995. (TR 5:13-15)

3. In May 2003 Respondent, while working for a law firm, provided legal services to S & S Sales, Inc. (or "the company") when it was facing serious financial difficulties. (TR 5:19 through 6:6)

4. At that time, S & S Sales was solely owned by Sid Stern. (TR 6:7-9)

[1] The facts are found in the Tender of Admissions and Joint Memorandum and in the transcript of the hearing.

5. After Mr. Garrison successfully negotiated a forbearance agreement with the company's revolving lender, in July 2003 Mr. Stern offered Respondent a job as the company's interim CEO, president, and as a director, after he had decided to terminate the current COO of the company and step down himself as CEO and president. Mr. Stern's decision to terminate the COO and step aside as CEO was recommended by an independent turnaround adviser that the company's lender had insisted the company engage as a condition of the forbearance agreement. (TR 6:10 through 7:13)

6. The day after receiving this employment offer, Respondent resigned from his law firm and accepted the position with the company. He began working for the company in the capacity as interim CEO, president, and as a director; he did not thereafter act as an attorney for the company or any of the parties involved in the company, nor was he its general counsel. (TR 7:14 through 8:6)

7. Respondent continued working with the outside turnaround adviser and was able to resolve some of S & S Sales' operational and financial difficulties. However, in the ensuing month the company still needed an injection of new capital. (TR 8:7-20)

8. In August 2003, to forestall potential collapse, S & S Sales obtained a $1 million "bridge loan" from Steve Casselman, a local business person and investor introduced to the company by the outside turnaround adviser. Mr. Casselman's loan included a "change of control" provision which, if triggered, entitled Mr. Casselman to a 5% share of ownership in the company, in addition to accelerated repayment of the debt. (TR 8:21 through 10:7)

9. After extending the loan, Mr. Casselman became a director of the company and began working as its de facto chief financial officer. In October 2003, Mr. Casselman introduced Respondent to Randal Bernard. Mr. Bernard had worked with Mr. Casselman at Corporate Express, as the company's lead controller. Mr. Bernard was hired as an outside consultant to the company on a monthly fee basis, and the outside turnaround consultant's engagement was terminated. (TR 10:8 through 12:21)

10. Within weeks of his involvement with the company, Mr. Bernard indicated his desire to take on a majority interest in the company in exchange for providing it additional financial assistance. (TR 12:22 through 13:10)

11. Mr. Bernard prepared an analysis of the company's finances, which recited the company's cash difficulties and indicated a troubling financial picture for 2004. He opined, based upon these projections, that the company would run out of cash by the end of the first quarter of 2004. (TR 14:21 through 15:7)

12. Near the end of 2003, a meeting was held with the company's board, its accountant Sheldon Epstein, of the Epstein, Weber & Conover CPA firm, and Mr. Bernard, to discuss Mr. Bernard's proposal to acquire a majority interest in the company. Mr. Epstein discussed whether any of the owners/board members present could use the company's operating losses to offset their taxable income for 2003, or to carry back those losses against taxable income in prior years, thereby generating tax refunds. (TR 15:8 through 16:19)

13. Respondent asserts that Mr. Epstein advised him and Messrs Stern, Casselman and Bernard that the company's losses could be taken by Mr. Casselman and Mr.

Bernard individually, if certain documents were created indicating that these two individuals had ownership interests in the company as of January 1, 2003, and "basis" for taking those losses. Respondent asserts that prior to this discussion, he had no training, education or experience in tax law, and that the rules concerning the potential tax implications of operating losses and the concept of "basis" were unfamiliar to him. (TR 16:20 through 19:4)

14. Respondent asserts that Mr. Epstein advised that the proposed documents would allow Messrs. Casselman and Bernard to utilize the operating losses of the company to generate tax refunds, which would then be used to recapitalize the company. Respondent further asserts that Mr. Epstein indicated this tax strategy might not be in strict compliance with the tax code, but that if the Internal Revenue Service questioned the transaction, the tax refunds would simply need to be repaid, perhaps with penalties and interest. (TR 19:5 through 20:12)

15. As a result of Mr. Bernard's financial projections, and the discussion with Mr. Epstein, the board decided to move forward with a stock transaction with Mr. Bernard. Mr. Bernard conditioned his offer on the tax refund strategy detailed above being pursued. (TR 20:24 through 21:10)

16. Mr. Casselman and Mr. Bernard demanded that Respondent create and sign such documents on behalf of the company. Respondent reluctantly agreed to generate and sign the documents, even though he knew that doing so was likely improper. (TR 21:11 through 22:6)

17. Thereafter Respondent, in an attempt to avoid going forward with the plan proposed by Mr. Epstein, endeavored on his own to seek out other potential investors to supplant Mr. Bernard. (TR 22:22 through 23:18)

18. Respondent was not successful in this effort, and at the end of December 2003, Mr. Casselman threatened to foreclose on his outstanding bridge loan if Respondent did not generate the contemplated documents immediately and close the transaction with Mr. Bernard before December 31 2003. (TR 25:19 through 26:1)

19. Respondent asserts that he prepared the documents that Mr. Epstein suggested solely in order to prevent the company's demise. (TR 26:2-5)

20. Respondent in drafting the documents did not act as the attorney for company or any of the parties involved, but only as CEO and President of the company. (TR 26:6-13)

21. During the last week of December 2003, and after he had begun drafting the documents, Respondent tried to contact Mr. Epstein concerning Epstein's advice about the documents and the transaction, but was directed to Glenn Conover of the firm. (TR 26:14-21)

22. When Respondent recounted Mr. Epstein's advice to Mr. Conover, he was advised that Mr. Epstein's advice was incorrect and that the firm would not assist Messrs Casselman or Bernard with their effort to allot company losses to their individual tax returns. (TR 26:22 through 27:6)

23. Mr. Casselman and Mr. Bernard never used the documents generated and signed by Respondent to take company losses on their tax returns as proposed by Mr. Epstein. (TR 27:7-15)

24. Mr. Bernard later sued Mr. Epstein for his faulty advice. (TR 27:16-18)

25. Respondent testified at the trial in that case and freely admitted that his creation and execution of the documents was wrongful. (TR 27:19-22)

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that his conduct, as set forth above, knowingly violated Rule 42, Ariz.R.Sup.Ct., specifically, ER 8.4 (c). Based on this admission and on the record in this matter the Hearing Officer finds that the Bar has established by clear and convincing evidence that Respondent violated ER 8.4 (c), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. (TR 27:23 through 28:8)

RESTITUTION

There are no issues of restitution in this matter.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* 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, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 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 knowingly engaged in conduct involving deceit when he was neither acting as an attorney nor representing a client, and which caused no harm. Accordingly, *Standard* 5.1 (Failure to Maintain Personal Integrity), is the appropriate *Standard* to consider.

> *Standard* 5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Respondent was not representing a client at the time he breached ER 8.4(c), and his conduct did not cause injury to a client.

The Hearing Officer considered whether *Standard* 5.12 was applicable. *Standard* 5.12 states: "Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice." The record shows that no criminal charge was brought against Respondent for his conduct in this matter. However, the Comment to *Standard* 5.12 states in part, "As in the case of disbarment, a suspension can be imposed even where no criminal charges have been filed against the lawyer."

The Hearing Officer asked Respondent about whether he had considered that his conduct in preparing false documents that he knew would be used for tax purposes was criminal tax fraud. Respondent said that he had not thought about criminal consequences.

(TR 22:16 through 23:1) It is not clear whether a prosecutor would have filed charges in this fact situation. The false documents were never used to even attempt to obtain a tax refund. However, Respondent did not withdraw from a plan to submit the false documents for tax purposes. (TR 35:14)

Instead, Respondent contacted the accounting firm where Mr. Epstein worked to question Mr. Epstein's advice. The Hearing Officer concludes that when Respondent spoke with Mr. Epstein's partner Mr. Conover, Mr. Conover did not agree with Mr. Epstein's advice in this matter. The accounting firm thereafter took the position that the firm would not prepare tax returns for the subject company using the false documents that Respondent created. When Mr. Bernard sued Mr. Epstein in the accounting malpractice action, Mr. Epstein testified in the trial of that matter that he had never given the advice that Mr. Bernard could use the losses of the company to secure refunds for prior tax years. (TR 35:16 through 37:5) However, Respondent testified at that same trial that Mr. Epstein had given the advice and that Respondent had created and executed the false documents. (TR 37:3-10)

If, by "criminal conduct" the *Standards* mean that conduct which a prosecutor would charge, the Hearing Officer would conclude that a prosecutor would probably not charge a crime in this instance. If, on the other hand the *Standards* are concerned with dishonest conduct that could also be criminal, the Hearing Officer would conclude that when Respondent created the documents he was engaged in the criminal act of conspiring in a scheme to defraud the government on income taxes. The Comment to *Standard* 5.12 also states in part, "Not every lawyer who commits a criminal act should be suspended, however. As pointed out in the Model Rules of Professional Conduct:

'Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category.' "

Respondent's conduct clearly involved dishonesty. It may be considered less egregious because Respondent was not acting in the capacity of an attorney and he was not directing his dishonest acts at court proceedings. But ER 8.4 (c) does not require that a lawyer must be representing a client before he can violate this rule. Respondent knew that it was wrong to create false documents. He knew that Mr. Casselman and Mr. Bernard did not have ownership interests in S & S Sales as a January 1, 2003. Respondent knew that he had created documents to be used for tax purposes that falsely stated that Mr. Casselman and Mr. Bernard had ownership interests in the company as of January 1, 2003. Respondent also knew that he did not need a detailed knowledge of tax law to understand at the time that he was creating these documents that they were false. (TR 20:13 through 22:15) Respondent stated in the hearing,

"I was troubled very much by the fact that I knew these documents represented false facts. And I knew that they were going to be used - - or were intended to be used for tax purpose. And at the time, I frankly delayed as long as I could dealing with this as I tried to find another investor for the company and tried to find some other way to deal with the company's problems. And eventually - - and this was happening just prior to the holidays, in December, mid to late December of 2003 - - eventually, I realized I didn't have - - the company didn't have any alternatives in terms of another investor or lender or somebody else who could come in. And Mr. Casselman came to me and told me that if I didn't effect this transaction with Mr. Bernard as had been discussed, he was going to default the company on the bridge loan and that the next conversation I had - - and this is virtually a quote - - would be with his attorney regarding the default of that loan. And so I let myself get bullied, frankly, into doing something that I knew I shouldn't do." (TR 22:23 through 23:18)

The Hearing Officer thinks that either a suspension under *Standard* 5.12 or a reprimand (censure) under *Standard* 5.13 could be applicable in Respondent's case.

The Duty Violated

Respondent conditionally admits that his conduct adversely reflects on his fitness as a lawyer and, taken as a whole, violated his duty to the profession and the public. The Hearing Officer concludes that Respondent let himself down and let down the profession and the public when he did not stand up to Mr. Casselman and refuse to prepare the false documents. In matters that are close questions it is not appropriate for the Hearing Officer to act as a Monday morning quarterback and with the benefit of hindsight criticize the choices of counsel.

But this case does not present a close question. Respondent's candor is impressive. He refuses to minimize or rationalize his conduct. He boldly admits that he succumbed to pressure to save the company. It is a shame with his stellar background that he did not inform Mr. Casselman that he would not falsify documents.

The Lawyer's Mental State

The Hearing Officer finds that Respondent knowingly violated a Rule of Professional Conduct.

The Extent of the Actual or Potential Injury

The Hearing Officer finds that there was no harm to any client, as Respondent was not acting as an attorney at the time of this misconduct. However, there was potential injury to the public but for a third party's refusal to use documents generated and signed by Respondent. The Hearing Officer concludes that if the accounting firm had gone forward with the plan using the false documents created by Respondent, the public could have been injured. If the Internal Revenue Service did not catch the scheme, then

money that should have remained in the government treasury would have been improperly refunded to Mr. Casselman and Mr. Bernard. If IRS had audited the company's tax return and investigated the veracity of the underlying documents, a criminal prosecution for tax fraud might have followed. In that event the profession and the public would have been injured because the confidence of the public in the honesty of lawyers is vital to our system of law and justice.

Aggravating and Mitigating Circumstances

The parties have agreed that the presumptive sanction in this matter is Censure. The Hearing Officer thinks that either Suspension or Censure could be considered as a presumptive sanction. The parties and the Hearing Officer agree that the following aggravating factors and mitigating factors should be considered in determining the sanction.

In aggravation:

Standard 9.22 (i) substantial experience in the practice of law. Respondent has been an attorney for 15 years.

In mitigation:

Standard 9.32(a) Absence of Prior Disciplinary Record. Mr. Garrison has not been the subject of any prior complaint or referral, or the subject of any bar sanction.

Standard 9.32(b) Absence of Dishonest or Selfish Motive. While Mr. Garrison owned a minority share in the company at the time of the relevant events, his concern was trying to preserve the company for its founding family and its employees. He had been hired to lead the company through a

turnaround and restructuring, and felt a strong moral responsibility to the company's owners and employees. As he has stated twice before under oath, he believes that he "did something wrong for all the right reasons." (Joint Memorandum in Support of the Tender of Admissions, page 4)

Standard 9.32(e) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings. Mr. Garrison has fully cooperated in the State Bar's investigation and in the disciplinary process. He represented himself in the screening investigation, admitted his conduct and provided extensive information and documents to aid in the Bar's review of the matter.

Standard 9.32(g) Character or Reputation. Mr. Garrison is a highly regarded attorney with an impeccable reputation. Mr. Garrison graduated in 1995 from the University of Utah College of Law, where he was elected to the Order of the Coif and served on the *Utah Law Review*. Following graduation, Mr. Garrison clerked for the Honorable Dee V. Benson of the United States District Court for the District of Utah. He started his private practice career in the Salt Lake City office of Snell & Wilmer. Before relocating in 2000 to Phoenix, Mr. Garrison served as President of the Young Lawyers Division of the Utah State Bar and was an *ex officio* member of the Utah Board of Bar Commissioners. He also chaired a state licensing commission for ADR providers and served as a judge *pro tempore* of the Utah Third District Court. Since relocating to Phoenix, Mr. Garrison has been active in the American Bankruptcy Institute and the Arizona State

Bar's Bankruptcy Section, serving as a regular speaker and panelist for both organizations. In 2007, Mr. Garrison was awarded the "Turnaround of the Year" award by the Arizona Chapter of the Turnaround Management Association. In 2008, Mr. Garrison was named to the "Best in Business" list of *Arizona Business Magazine* in their business bankruptcy category. Mr. Garrison also recently was named to the 2010 "Southwest SuperLawyers" list in the business bankruptcy category. Mr. Garrison's reputation for honesty and integrity is well-known by other attorneys, clients and judges, and the conduct in question here is an isolated and uncharacteristic departure. Attached to the Joint Memorandum were character letters in support of this mitigating factor. (TR 47:20 through 48:2)

The Hearing Officer has never read more impressive character letters. Respondent disclosed to the lawyers who wrote these ten letters the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum that he signed in this case. Therefore, the authors of the letters knew the full details of Respondent's conduct in this matter. The lawyers who wrote about Respondent have worked with him in law firms or as associate counsel on cases, and/or have opposed him in litigation. Many of these lawyers became personal friends with Respondent. He is described as an honest, non-confrontational, professional person who is held in the highest regard especially by the Bankruptcy Bar. They recognize that his conduct in this matter was reprehensible. But they convincingly describe it

as a very out-of-character occurrence about which Respondent is sincerely remorseful.

The letters combined with all the evidence received at the hearing and the aggravating and mitigating factors lead the Hearing Officer to firmly conclude that Respondent's conduct in this matter did not seriously adversely reflect on his fitness to practice. Therefore, *Standard* 5.12 calling for suspension would not lead to the appropriate result in Respondent's case.

Standard 9.32(l) Remorse. Mr. Garrison expressed remorse for his involvement in the S&S Sales transaction multiple times prior to his referral to the Bar. Mr. Garrison was first asked about his involvement in the transaction in a malpractice lawsuit brought against the company's outside accountant who devised the transaction. When asked—under oath and by his own choice without counsel — about his involvement in drafting the documents, he not only fully admitted his conduct but also expressed remorse. Later, when asked about these same events in the S&S Sales Chapter 7 proceeding — also under oath and by his own choice without counsel — Mr. Garrison once again admitted his conduct and expressed remorse. In response to the Bar's inquiry into these events, Mr. Garrison – once again without counsel – fully admitted his conduct and expressed remorse. At the hearing Bar Counsel cited the above information as the reason that he "strongly" agreed with remorse as a mitigating circumstance in Respondent's case. (TR 48:6-21)

After listening to Respondent testify at the hearing and considering the evidence in this case, the Hearing Officer finds that Respondent is sincerely remorseful. It is significant that the actions Respondent has taken (set forth above) since he prepared the false documents show his remorse. At the hearing Respondent became very emotional when describing his remorse:

> "I have four kids. The oldest of whom is 20. And it's ironic that over the years, I've always told them that a lifetime of -- a lifetime of good choices can be ruined by a single bad choice. Sorry.
>
> I have a perception of myself that is important to me of integrity and competence and that the things that I do make a positive difference, professionally but personally as well. And I don't make excuses for the choice that I made here because I did know it was wrong. Regardless of what I knew or didn't know about criminal law, I knew that the documents represented a false set of facts. And I was never comfortable with it, I didn't want to do it.
>
> And in the situation at the time, having been entrusted to turn this company around and feeling responsible for people's jobs, and I did something that I don't do, which is I let myself get bullied into doing something that I knew was wrong. And I say "get bullied into" only because there was a lot of pressure in the situation to do this. And again, I don't offer that as an excuse. I very easily could have said no, this is wrong, I'm not going to do it. I don't think that this is -- I don't think that this is the right thing for the company. And I wasn't even convinced at the time that it was. It was the only alternative that was apparent, and so I went ahead. Notwithstanding all of my discomfort with the situation.
>
> And, you know, I long since lost count of the number of times I've wished that I could go back and change this. And I've not -- I've not been shy about telling people that since. And there have been easier and harder conversations about that over the years. Telling my wife was really hard. Telling people that I worked with and worked for me was really hard because I have been, over the years, pretty consistently put in positions of being sort of held up as an example to people of, you know, being and doing what a lawyer should be and do. So, yeah, am I remorseful about this?
>
> You know, but the other thing that I've always told my kids is that when you do something wrong, the most important thing, because you can't change that, the most important thing is to own up to it and do what you

can to deal with it. So that's what I'm trying to do now. (TR 42:23 through 44:19)

The Hearing Officer agrees with the parties that after consideration of the facts and law, the *Standards* and the relevant aggravating and mitigating factors that a Censure is the appropriate sanction in this matter. Respondent acted out of character in this situation. He recognizes the damage he has done to his reputation. It is the opinion of the Hearing Officer that Respondent will not again violate the rules of professional conduct. Therefore, a suspension is not necessary to deter Respondent from unethical conduct. It was wrong to facilitate a lie. But Respondent demonstrated his character by questioning what he had done with the accounting firm, and then by admitting his misconduct in circumstances where he could have suffered legal consequences from his admission. He made no effort to protect himself at the expense of the truth. Therefore the Hearing Officer concludes that a suspension is not necessary to deter others from similar misconduct. If other attorneys become aware of Respondent's case, they should take from it that lying will be sanctioned, but that the sanction may be somewhat ameliorated by candidly admitting the misconduct, instead of stonewalling or avoiding the problem they caused.

The public is protected by the sanction of censure and assessment of the costs of these proceedings against Respondent. Even though no harm to a client was caused by the misconduct and Respondent was not acting as an attorney representing a client, the public can be assured that a lawyer engaged in dishonesty will receive a consequence. In the opinion of this Hearing Officer Respondent does not pose a threat to the public in his continued practice of law. The lawyers who know him best and who are aware of the

details of his misconduct, are satisfied that he is an honest lawyer to whom they would refer clients now and in the future.

PROPORTIONALITY REVIEW

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)).

The cases set forth below demonstrate that a Censure is an appropriate disciplinary response.

In Re Charles, SB 09-0100-D (2009). Respondent received a censure and two years probation. The Joint Memorandum in Support of the Tender of Admissions in the instant case incorrectly stated that Respondent in *Charles* misrepresented information concerning fees he charged in a probate matter. Respondent made a misrepresentation in a motion in family court in a child support matter. Respondent was representing mother in a post-decree petition to modify child support. The modification of child support was considered by Commissioner Hegyi. After child support was modified Respondent filed a Motion for Contribution of Attorney 's Fees with Judge Mroz. To lend further support for his position that father should have to pay the attorneys fees that mother incurred, Respondent told Judge Mroz that at the child support hearing on November 16, 2006 Commissioner Hegyi "found" in mother's favor on the issue of her monthly income. This

statement was false and misleading. Instead, before seeing Commissioner Hegyi, mother and father and their attorneys met with an Expedited Services officer. In this meeting mother and father agreed to an amount of child support based on certain monthly incomes for each of them. Father did not agree to the monthly income figures originally submitted by mother. In addition father did not agree to the visitation credit that mother had originally sought in her Child Support Worksheet. The agreement was presented to Commissioner Hegyi. The only contested issue before the Commissioner was mother's request that the modified amount of monthly child support be effective retroactively from February 1, 2006, while father argued for an effective date of September 1, 2006. Commissioner Hegyi "found" for father. As to the amount of modified child support the Commissioner simply adopted the figures agreed to by the parties.

Therefore, Respondent as counsel for mother was disingenuous when he told Judge Mroz that at the child-support hearing the Commissioner had "found" for mother. Counsel for father responded to Respondent's Motion for Contribution and informed Judge Mroz of the true posture of the child support issue. Judge Mroz denied Respondent's Motion for Contribution of Attorney Fees and included in the minute entry the following comment, "The Court is particularly troubled by the misleading statements in Mother's Motion about what occurred at the Child Support Hearing held on November 16, 2006 and about Father's income." The Hearing Officer found that Respondent's conduct was deceitful in violation of ER 8.4 (c). (Hearing Officer Jonathan Schwartz's Report, page 23 paragraph 72)

In Count Two, a probate matter Respondent failed to diligently process the matter and failed to appropriately communicate with his client. In Count Three, a separate and

distinct dissolution case, Respondent violated a court order requiring each party to bear its own costs, by first paying himself out of the proceeds of the marital residence. Aggravating factors were found to include: prior discipline, pattern of misconduct, multiple offenses, and substantial experience in the practice of law. Mitigation included: character/reputation, and remoteness of prior offenses. Respondent's mental states included both negligence (Count Two) and knowingly (Counts One and Three). The potential for injury was found.

In Re Bond, SB 06-0128-D (2006). Respondent received a censure and one year probation. Respondent left a threatening voicemail for another lawyer and then lied to law enforcement about it, falsely suggesting someone else had done it. Respondent placed a telephone call to Mr. Amaru, a lawyer in a firm where Respondent formerly worked. Respondent left a threatening and profane message on Mr. Amaru's voice mail. Mr. Amaru contacted the Tucson Police Department. Respondent lied to the investigating officer when Respondent: 1) denied having made the call and 2) also told the officer that two other people may have made the call. The Hearing Officer found that Respondent's suggestion of others' involvement "... could have misdirected Det. Smith's investigation." (Hearing Officer Denice Shepherd's Report, page 3, paragraph 11)

Respondent conditionally admitted that her conduct violated ER 8.4(c) because she was dishonest with the police about her involvement. Although she was charged in Tucson City Court with violating the statute on Using a Telephone to Intimidate, Terrify and Annoy, this charge was later dismissed. In *Bond* the Hearing Officer cited both *Standards* 5.12 (suspension) and 5.13 (reprimand - censure in Arizona) and determined that the presumptive sanction fell between suspension and censure. Respondent's conduct

was done knowingly and actual injury occurred when law enforcement had to conduct an investigation and a prosecution commenced. The Hearing Officer noted that Respondent's conduct did not occur during the representation of a client. No aggravating factors were found. In mitigation four factors were found; 1) absence of prior discipline, 2) full disclosure, 3) character/reputation and 4) remorse.

In *Bond* the Hearing Officer's Report erroneously referred to the charge as a violation of ARS section 12 -- 2916. The correct statute is ARS section 13 -- 2916. This offense is a class I misdemeanor. The conduct in the instant case may well have been more serious than in *Bond.* However, leaving a threatening message for an attorney and lying to police investigators is conduct more serious than in *Gwilliam*, the next case in this review.

In Re Gwilliam, SB 06-0025-D (2006). Respondent received a censure for engaging in dishonest conduct by drafting and signing a letter on State Bar letterhead in violation of ERs 8.4(c) and (d). Respondent had been censured in a previous case and was ordered to pay $2386.38 in discipline costs. When he did not pay the costs he received several letters from the State Bar directing him to pay the costs. Mr. Gwilliam was a co-founder of Adoption Media LLC. On November 30, 2004 Respondent hand delivered to the Bar a cashier's check for $2386.38. Respondent's company Adoption Media LLC had sent a check to the State Bar for the same amount signed by Respondent's son Nathan. In the letter containing this check was a letter purportedly sent by the State Bar to Respondent assessing him $2386.38 for his per capita assessment for the purchase of a new State Bar building.

The letter was a fake. It had been created by Respondent using State Bar letterhead from letters Respondent had received. Respondent used the false letter to get the finance director of Adoption Media LLC, Leon Stewart, to issue the check. Mr. Stewart was an employee of Adoption Media LLC. Respondent did not want to reveal to his employee that Respondent had been disciplined by the Supreme Court. The parties agreed that *Standard* 5.13 was applicable because Respondent's conduct was knowingly and he admitted that his actions "... may have harmed the system as a whole, because of the high standards that are set for the integrity of attorneys." (Hearing Officer John Todd's Report, page 6, line 11)

The Hearing Officer found two factors in aggravation: prior discipline and a dishonest/selfish motive. In mitigation three factors were found: timely effort to make restitution, full disclosure, remorse. The Hearing Officer found that there was a potential injury to the legal system.

The instant case and *Gwilliam* are different on several points. Gwilliam had a prior disciplinary offense and Respondent in the current case has had no prior offenses. However, Gwilliam's use of the false document can be characterized as more benign than Respondent's intended use of the false documents he prepared. Gwilliam was trying to avoid the embarrassment of his employee learning that he had been sanctioned. He used the false State Bar letters internally with his corporation Adoption Media LLC. Respondent knew that Mr. Casselman and Mr. Bernard intended to use the false documents Respondent prepared with the Internal Revenue Service.

Another example of a censure for a violation of ER 8.4 (c) is *In re Leyh* DC No. 06-0600 (2008). The Respondent received a censure for creating a ruse to serve two

witnesses with subpoenas. Respondent represented a criminal defendant charged with first degree murder. Respondent's investigators were not able to serve trial subpoenas on two reluctant females who were very important witnesses and who lived on the Fort McDowell Indian Reservation. Respondent learned that the witnesses would be attending a function on the reservation. Respondent attended the function pretending to be a representative of a marketing company that was testing a new beer. When one of the witnesses was identified by the defendant's mother, Respondent, carrying a clipboard, approached the witness and presented her with a coupon. Respondent asked the witness to put her contact information on the clipboard. The purpose of asking for the contact information was to delay the witness to give Respondent time to serve the subpoena. While the witness filled out the information Respondent handed her the envelope containing the subpoena.

CONCLUSION/RECOMMENDATION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *Peasley, supra,* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Disciplinary Commission and the Supreme Court, the Hearing Officer agrees with the State Bar and Respondent that the objectives of discipline will be met by the imposition of the proposed sanction of a Censure and the imposition of costs and expenses.

This agreement provides for a sanction that meets the goals of the disciplinary system. The terms of the agreement serve to protect the public, instill confidence in the legal system, deter other lawyers from similar conduct, and maintain the integrity of the bar.

SANCTION

The Hearing Officer recommends that Respondent shall be sanctioned as follows:

1. Respondent shall receive a Censure.

2. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter. An itemized Statement of Costs and Expenses is attached as Exhibit "A" and incorporated herein.

DATED this 28th day of July, 2010.

Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
of the Supreme Court of Arizona
this 28th day of July, 2010.

Copies of the foregoing mailed
this 28th day of July, 2010, to:

Karen Clark
ADAMS & CLARK, PC
520 E. Portland, Suite 200
Phoenix, Arizona 85004

Copy of the foregoing hand-delivered
this 28th day of July, 2010, to:

Thomas E. McCauley

State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016-6288

by: L. DiAmo

EXHIBIT
A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Daniel E. Garrison, Bar No. 021495, Respondent

File No(s). 09-0694

Administrative Expenses

The Board of Governors of the State Bar of Arizona with the consent of the Supreme Court of Arizona approved a schedule of general administrative expenses to be assessed in disciplinary proceedings. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. * An additional fee of 20% of the general administrative expenses will be assessed for each separate file/complainant that exceeds five, where a violation is admitted or proven.

General administrative expenses include, but are not limited to, the following types of expenses incurred or payable by the State Bar of Arizona: administrative time expended by staff bar counsel, paralegals, legal assistants, secretaries, typists, file clerks and messengers; postage charges, telephone costs, normal office supplies, and other expenses normally attributed to office overhead. General administrative expenses do not include such things as travel expenses of State Bar employees, investigator's time, deposition or hearing transcripts, or supplies or items purchased specifically for a particular case.

General Administrative Expenses for above-numbered proceedings = **$1200.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges	$0.0
TOTAL COSTS AND EXPENSES INCURRED	***$1,200.00***

Sandra E Montoya
Sandra E. Montoya
Lawyer Regulation Records Manager

5-24-10
Date