BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **HAROLD HYAMS,** **Bar No. 003731** RESPONDENT.	Nos. 06-1086, 06-1848 **DISCIPLINARY COMMISSION REPORT**

This case[1] came before the Disciplinary Commission of the Supreme Court of Arizona on July 10, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed November 24, 2009, recommending censure, three years of probation (requiring completion of 20 hours of continuing legal education ("CLE") in appellate procedure, and report to the State Bar any cases on appeal and associate with experienced appellate counsel for any case on appeal), and costs. Both the State Bar and Respondent filed objections and requested oral argument. Respondent, Respondent's counsel and counsel for the State Bar were present.

The State Bar argues that the Hearing Officer's recommended sanction is inadequate and does not reflect the serious nature of the violations established by the record evidence. The State Bar asserts that, given those violations, a suspension requiring proof of rehabilitation is warranted. In addition, the State Bar asserts that the Hearing Officer gave inappropriate weight to mitigating factor 9.32(k) (imposition of other penalties or sanctions) because Respondent did not voluntarily pay and aggressively

[1] Pursuant to Rule 57(j)(2)(B), Ariz.R.Sup.Ct., this matter was designated as complex. *See* Order filed January 27, 2009.

opposed those sanctions which were imposed in the underlying litigation. *See* American Bar Association *Standards for Imposing Lawyer Sanctions* ("*Standards*") 9.3 and *Commentary*.

Respondent argues that the Hearing Officer's findings of fact are not clearly erroneous and should, therefore, be adopted. Respondent maintains that the Hearing Officer made findings of fact after carefully reviewing all of the evidence, including exhibits, and made appropriate credibility determinations of the witness testimony. Regarding Respondent's state of mind, the Hearing Officer correctly determined that there was no fraud or intent to deceive by Respondent.

Respondent contends that, although he did, in a number of instances, violate the Court's order prohibiting supplemental pleadings, Respondent felt compelled to file those supplemental pleadings to protect his client's rights and to preserve the record for appeal.

Respondent asserts that the Hearing Officer correctly found that the mitigating factors, specifically including 9.32(a) absence of prior disciplinary offenses and 9.32(g) character and or reputation, were "overwhelming" and should be given great weight. Respondent contends that the cases offered for proportionality are factually similar to the instant matter and support informal reprimand with a term of probation as the appropriate sanction.

On July 30, 2010, the parties filed a joint Stipulation to supplement the record with the Arizona Court of Appeals Memorandum Decision in *Tricia Mason, a minor, by and through Teresa Johnson (Mother), et. al. v. Eastside Place Apartments, Inc., an Arizona corporation, et. al.*, No. 1CA-CV 09-0155, Court of Appeals for the State of Arizona, Division One (2010). The Court of Appeals held that the trial court erred in precluding

some experts and reversed summary judgment on the Tenants' physical injury claims. The appellate court further held that the trial court erred in dismissing a party.

Decision

Having found no facts clearly erroneous, the eight members[2] of the Disciplinary Commission by a majority of five[3] recommend accepting and incorporating the Hearing Officer's findings of fact and conclusions of law, with certain modifications addressed below, and the Hearing Officer's recommendation for censure and two years of probation[4] on the terms and conditions set forth below, and payment of costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[5] The Commission further recommends that Respondent complete the State Bar's Professionalism Course during the period of probation. The terms of probation are as follows:

Terms of Probation

1. Respondent shall complete 20 hours of CLE approved by bar counsel regarding appellate procedure.

2. Respondent shall report to the State Bar any case that is pending on appeal or which goes on appeal.

3. Respondent shall associate with experienced appellate counsel for any case on appeal.

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[2] Commissioner Horsley recused.

[3] Commissioners Flores, Gooding and Messing were opposed having concluded that a 30 day suspension is the appropriate sanction. *See* dissenting opinion below.

[4] The Hearing Officer recommended three years of probation, however, Rule 60(a)(5)(A), Ariz.R.Sup.Ct., provides for two years of probation with a 2 year renewal period.

[5] The Hearing Officer's Report is attached as Exhibit A.

4. Respondent shall complete the State Bar's Professionalism Course during the period of probation.

5. 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.

6. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz. R. Sup. Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.[6]

Discussion of Decision

The Disciplinary Commission's standard of review is set forth in Rule 58(b), Ariz.R.Sup.Ct., which states that the commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the commission applies a clearly erroneous standard. Mixed findings of fact are also review *de novo*. *State v. Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

Respondent's misconduct in this matter arose during the course of a single, complex personal injury case involving the alleged exposure to mold in apartment

[6] The Commission adds standard terms 5 and 6.

complexes. Respondent was sanctioned $750,000.00 by the trial judge due to his repeated misstatements and conduct. Additionally, the Arizona Court of Appeals referred Respondent to the State Bar based on his conduct during a special action from the trial court's ruling in the same case.

The Complaint alleged violations of ERs 1.1 (competence), 1.3 (diligence), 3.1 (meritorious claims and contentions), 3.2 (expediting litigation), 3.3(a) (false statement of material fact or law), 3.4(c) (knowingly disobey an obligation under rules of a tribunal), 4.1 (truthfulness in statements to others), 5.1 (failure to supervise), 5.3 (responsibilities regarding non-lawyer assistants), 8.2 (judicial and legal officials), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation, 8.4(d) (conduct prejudicial to the administration of justice), Rules 41(c) (maintain respect due courts of justice and judicial officers), 41(d) (legal and just actions), 41(e) (means consistent with the truth), 41(g) (unprofessional conduct), 53(c) knowingly violate court rule or order, and Arizona Rules of Civil Procedures, specifically, Rules 11, 33.1(a) and 33.1(c).

In Count One, the Hearing Officer found that the State Bar failed to prove by clear and convincing evidence violations of ERs 3.3, 3.4(c), 4.1, 8.4(c), 8.4(d) and Rules 41(e) and 53(c). In Count Two, the Hearing Officer found that the State Bar failed to prove by clear and convincing evidence violations of ERs 1.1, 1.3, 3,1, 3.2, 3.3(a)(1), 3.4(c), 4.1, 8.4(c), 8.4(d) and Rules 41(e) and 53(c).

The Hearing Officer found that Respondent violated ER 1.1 (competence) in Count One, because it was clear that he did not understand the rules governing special actions and what constitutes the record in such proceedings, and violated ER 1.3 (diligence) in Count Two because, although he initially communicated with the expert witness, he failed to stay

in contact with the expert or properly disclose his opinions, which resulted in the plaintiffs' expert being stricken, and because he failed to timely file an amended complaint. The Hearing Officer found that the Respondent's mental state was negligent. The presumptive sanction for a negligent violation of ERs 1.1 and 1.3 is censure.

On *de novo* review, the Disciplinary Commission determined that, based on the facts found by the Hearing Officer in Count Two, Respondent violated ERs 1.1 (competence), 1.3 (diligence), 3.4(c) (knowingly disobey rules of tribunal), 41(g) (offensive personality) and Rule 53(c) (knowing violation of rule or court order).

The record establishes that the trial court entered a specific order barring the parties from filing supplemental motion pleadings beyond the usual motion, response and reply and Respondent clearly violated that order. Although the Hearing Officer found Respondent did not violate the Court's order, on appeal, Respondent admits that in reaching that conclusion, the Hearing Officer confused the two trial court orders.[7] Therefore, the Commission finds that the Hearing Officer erroneously concluded that Respondent did not violate ERs 1.1, 1.3, 3.4(c) and Rule 53(c).

Respondent justified his knowing violation of a Court order by arguing he did so to help his client's case. *See* Respondent's Answering Brief, pp. 30-32. However, as officers of the court, lawyers have a fundamental duty to obey court orders, even if they believe the court ruled incorrectly. A lawyer may challenge a court order on appeal or through special action, but may not simply disregard a court's order.

The Hearing Officer also found that Respondent did not violate Rule 41(g)

[7] The Hearing Officer found that Respondent did not violate Judge Davis's Order filed January 26, 2006, but as Respondent admits on appeal, he did violate Judge Harrington's prior Order dated February 22, 2005.

(offensive personality); however, the record establishes that during two depositions, Respondent used inappropriate language and engaged in name calling. Respondent admits that he made the statements and that they were improper. *See* Report, p. 40 ¶ 26. Based on those admitted facts, the Commission determines, on *de novo* review, that Respondent violated former Rule 41(g) (offensive personality).[8]

Sanction

In determining the appropriate sanction, we are reminded that the purpose of professional discipline is two fold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in misconduct. It is also the Commission's duty to assure public confidence is met with the concomitant responsibility to show fairness to the Respondent. *In re Scholl*, 200 Ariz. 222, 227, 25 P.3d 710, 716 (2001). The sanction imposed must be fair and proportional to the ethical violations found. *In re Savoy*, 181 Ariz. 368, 372, 891 P.2d, 236, 240 (1995).

The American Bar Associations *Standards for Imposing Lawyer Sanctions* ("*Standards*") are utilized in our disciplinary system as a "guide in determining the proper extent of discipline in a given case. *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). The *Standards* are guidelines, not mandatory minimums that must be strictly applied. We may consider that, although the *Standards* suggest one sanction, the facts of each case must be considered in the determination of whether that sanction is appropriate.

In applying the *Standards*, consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury, and the existence of aggravating and mitigating

[8] Because Respondent's conduct occurred in 2005, former Rule 41(g) Duties and Obligations of Members, which provides in part that members shall abstain from all offensive personality...applies.

factors *Standard* 3.0. In *In re Van Dox*, 214 Ariz. 300, 304 ¶ 14, 152 P.3d 1183, 1187 (2007), the Court held that a lawyer's mental state is a fact question; and "knowledge requires the conscious awareness of the nature or attendant circumstances of the conduct." *In re White Steiner*, 219 Ariz. 323, 198 P.3d 1195 (2009). The Commission therefore, must give great deference to a hearing officer's findings, unless the findings are not supported by reasonable evidence and therefore, clearly erroneous. *Id* at 324.

The duty violated in this case is an attorney's obligation to the legal system. *Standard* 6.2 is therefore applicable. As violations of ER 3.4(c) and Rule 53(c) were knowing, *Standard* 6.22 provides that the presumptive sanction is suspension:

> Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding

Having concluded that suspension is the presumptive sanction in this case, the Commission reviewed *Standards* 9.22 and 9.32, aggravating and mitigating factors to determine whether and to what extent aggravating and mitigating factors should affect the ultimate sanction imposed. *In re Augustine*, 178 Ariz. 133, 136, 871 P.2d 254, 257 (1994).

The Hearing Officer found factors 9.22(d) (multiple offenses) and 9.22(i) (substantial experience in the practice of law) in aggravation and found mitigating factors 9.32(a) (absence of prior disciplinary offenses),[9] 9.32(b) (absence of dishonest or selfish motive), 9.32(g) (character or reputation), and 9.32(k) imposition of other penalties or

[9] The State Bar conceded that it was not aware of any cases in 30+ years of practice where Respondent has engaged in similar misconduct. *See* Commission Transcript, pp. 11-12.

sanctions).[10] The Hearing Officer further found the mitigation was "overwhelming". The Commission agrees and concludes that based on the existence of those mitigating factors, a reduction in the presumptive sanction of suspension to censure is justified in this case.

It is well established that we do not consider the nature of the lawyer's practice, the effect on the lawyer's livelihood, or the level of pain inflicted when determining the appropriate sanction. *In re Scholl*, 200 Ariz. 222, 224, 25 P.3d 710, 712 (2001). However, there is also well-established precedent for consideration of the extraordinary sanctions imposed by the trial judges in the Pima County Superior Court proceedings. *See In re Walker*, 200 Ariz. 155, 24 P.3d 602 (2001) (attorney was the subject of significant publicity by local press and agreed to significant malpractice settlement).

Here, as in *Walker,* the civil sanctions imposed against Respondent by the Pima County judges in the underlying cases were well-publicized in the local press, including television reports. Additionally, even greater financial penalties were imposed against Respondent. Respondent advised at oral argument that he has personally paid $565,000 of the sanction issued by Judge Davis. *See* Commission Transcript, p. 24.

The dissent would impose a 30 day suspension for Respondent's knowing violation of the trial court's order not to file supplemental pleadings beyond the usual motion, response and reply. While a lawyer must comply with court orders, the facts as found by the Hearing Officer, established that there was uncertainty as to whether certain pleadings were in violation of the order or were not supplemental pleadings, but rather, pleadings

[10] The Hearing Officer was inconsistent in citing the absence of sanctions as a factor in determining that some of Respondent's conduct did not rise to the level of ethical sanctions, while also finding that the sanctions imposed were financially devastating on Respondent. *See* Report, pp. 41 & 43, ¶ d. The effect of the sanction on the attorney's practice or his livelihood may not be considered in mitigation.

appropriately filed under the procedural rules. The majority further disagrees with the dissent's allegation that Respondent violated the order to "gain a tactical advantage in litigation." The Hearing Officer had the opportunity to fully review the evidence, documents and witnesses and made no such finding.

The Commission agrees with the Hearing Officer's determination that the substantial mitigating evidence supports a sanction of censure rather than suspension.

Conclusion

The purposes of attorney discipline process are to protect the public and the legal profession and to deter other attorneys from engaging in unprofessional conduct. *In re Scholl*, 200 Ariz. 222, 227 ¶ 29, 25 P. 3d 710, 715 (2001). Upon review, the Commission finds that censure and probation will fulfill the purposes of discipline in this matter.

RESPECTFULLY SUBMITTED this 1st day of September, 2010.

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

Commissioners Flores, Gooding and Messing respectfully dissenting:

We respectfully disagree with the recommended sanction. Our judicial system, and indeed society as a whole is based on the respect for the rule of law. Neither can function nor long endure if individual lawyers are free to decide for themselves which Court orders they deem binding and authoritative. Respect for the tribunal and the legal system as a whole is the most fundamental of a lawyer's obligations. "An attorney must set an example for the general public that obedience to a court order is not a matter of personal

convenience and cannot be ignored or disregarded without serious consequence." *In re Arrick*, 161 Ariz. 16, 20, 775 P.2d 1080, 1084 (1989).

Respondent admits that he knowingly violated the Court's Order on repeated occasions because he believed it was in his client's best interest. That is, he admits he repeatedly violated the Court's Order in order to gain a tactical advantage in litigation. Such behavior is inexcusable and unacceptable from any participant in the legal system, but from a licensed attorney, it is even worse. Given these facts and because the mitigation is insufficient to reduce the presumptive sanction of suspension, we believe a thirty day suspension is appropriate and necessary to preserve the integrity of the legal system.

Original filed with the Disciplinary Clerk
this 1st day of September, 2010.

Copy of the foregoing mailed
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EXHIBIT
A

BEFORE A HEARING OFFICER OF THE SUPREME COURT

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

Nos. 06-1086, 06-1848

HAROLD HYAMS,
Bar No. 003731

Hearing Officer's Report

Procedural History

The complaint in this matter was filed on December 2, 2008. Hearing Officer 6S, Hon. Jonathan Schwartz, was assigned this matter on January 12, 2009. Respondent filed a motion to designate case "complex" under rule 57 on January 6, 2009. On January 27, 2009, the Disciplinary Commission issued an order granting the motion in part, and requiring that hearing be held on or before June 22, 2009.

On January 26, 2009, respondent filed an unopposed Motion to Extend Time to Answer, which was granted by the Hon. Jonathan H. Schwartz, and Respondent was given until February 2, 2009, to file his Answer. Respondent filed his Answer on February 2, 2009. In addition, on January 26, 2009, telephonic conference was held, at which time the Hon. Jonathan H. Schwartz offered to recuse himself from this matter due to a potential conflict, and gave the parties 10 days to inform the Disciplinary Clerk's office as to whether anyone would accept his offer of recusal. On February 3, 2009, the State Bar filed a notice of acceptance of Judge Schwartz's Offer to Recuse, and

subsequently on February 4, 2009 this matter was reassigned to Hearing Officer 6R, Hon. H. Jeffrey Coker. On February 12, 2009 respondent filed a Notice of Transfer, requesting that this matter be reassigned from the Hon. H. Jeffrey Coker to another Hearing Officer. On March 26, 2009, this matter was reassigned to undersigned Hearing Officer, and a telephonic initial case management conference was set for April 7, 2009.

On April 7, 2009, the parties agreed to continue the case management conference to April 28, 2009 so they could have more time to engage in settlement negotiations and determine if a settlement was likely.

On April 28, 2009, telephonic initial case management conference was held, at which time the Hearing Officer was informed that the parties thought that a settlement would be unlikely. In addition undersigned hearing officer was informed that there would be a substitution of counsel for the respondent. Due to the fact that new counsel would be substituting in this matter, in addition to the fact that undersigned hearing officer would be on vacation the last week of June through the entire month of July, as well as the complex nature of this case and the large number of allegations in the Complaint, the parties agreed to set the hearing on the merits for August 10, 2009 through August 14, 2009. The Disciplinary Commission approved the hearing dates requested by the parties.

The hearing on the merits commenced on August 10, 2009, in Tucson, Arizona. Testimony was taken over the next three days, concluding on August 13, 2009. Counsel were given 30 days from receipt of the transcript to file proposed findings of fact and conclusions of law. Those were filed on October 28, 2009. The Disciplinary Commission granted the Hearing Officer's request for an extension of time within which to file his report to November 27, 2009.

FINDINGS OF FACT

1. At all times at all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice law in New York in 1971, and in Arizona on April 27, 1974.
2. The State Bar of Arizona ("State Bar") brought a formal complaint against Mr. Hyams on December 22, 2008.
3. All of the allegations of the complaint arise out of litigation that Mr. Hyams filed in approximately 2002 on behalf of approximately 100 plaintiffs alleging personal injury due to mold exposure at an apartment complex in Tucson. Though Mr. Hyams filed numerous lawsuits regarding the mold claims, all the cases were consolidated into one action, commonly referred to as the "*Abad* case".
4. The *Abad* case is still pending and still being litigated. It is currently pending on appeal in Division One, Arizona Court of Appeals. (Cause Nos. 2CA-CV 2008 - 0162 and 2CA-CV No. 2008 -0165).
5. The State Bar Complaint is based on two referrals to the State Bar, one from the Arizona Court of Appeals, forming Count One and the second a letter to the State Bar from former litigants in the *Abad* case, the Hansens, which was written for them by their counsel, Andrew Turk. The letter forms the basis for Count Two of the Complaint.
6. Count One of the complaint alleges that Mr. Hyams violated ERs 1.1, 3.3, 3.4(c),4.1, 8.4(c), 8.4 (d), Rule 41(e) of the Arizona Supreme Court and Rule 53(c) of the Arizona Supreme Court.

7. The allegations of Count One all relate to a Special Action (2CA -SA 2006-0029) Mr. Hyams filed with Division Two of the Arizona Court of Appeals seeking an interlocutory appeal of the granting of summary judgment to certain defendants in the *Abad* case regarding punitive damages.

8. The allegations of Count One assert that Mr. Hyams made false statements to Judge Peter Eckerstrom of the Arizona Court of Appeals during a telephonic hearing regarding Mr. Hyams' request for a stay of the trial court proceedings.

9. Count Two of the Complaint alleges numerous violations relating to how Mr. Hyams handled other aspects of the *Abad* case. The State Bar alleged that Mr. Hyams violated ER's 1.1, 1.3, 3.1, 3.2, 3.3(a)(1), 3.4(c), 4.1, 5.1, 5.3, 8.2, 8.4(c), 8.4(d) and Arizona Rules of Civil Procedure Rule 11, 33.1(c), and 33.1(a). They also alleged violation of Arizona Supreme Court Rules 41(c), 41(d), 41(e), 41(g), and 53(c).

10. Mr. Hyams was born in Brooklyn, New York, in 1943 and is 66 years old.

11. Mr. Hyams has practiced in Tucson, Arizona since December 1973. In 1974 he opened a law clinic in which he handled a wide variety of cases including bankruptcy, divorce, wills, personal injury and commercial cases. He was a pioneer in lawyer advertising in Tucson. He became successful and at one time had six attorneys working for him. His practice evolved into primarily plaintiffs personal injury cases.

12. Mr. Hyams only disciplinary history with the State Bar dates from approximately 30 years ago, when Mr. Hyams received a letter of reprimand relating to conflict of interest issue.

13. Mr. Hyams estimates that his office has handled approximately 30 appeals over the years. He estimates he has handled 15 of those appeals personally.

14. Mr. Hyams has tried approximately 50 jury trials.

15. Mr. Hyams has handled large cases, some involving seven-figure resolutions.

16. Mr. Hyams prior experience with mold cases is limited to handling a medical malpractice case in which the allegation related to the failure to diagnose valley fever.

17. Mr. Hyams first got involved in the *Abad* case based on receiving calls from several future clients.

18. Mr. Hyams then held meetings at the apartment complex and signed a large number of clients.

19. Initially he did not know anything about mold except as it related to his prior malpractice case.

20. Mr. Hyams attempted to educate himself about handling mold cases. He attended seminars in Santa Monica, California and Phoenix. He attended jury trials involving mold in Phoenix and California. He spoke to at least 20 lawyers and 60 experts regarding mold during the course of the case.

21. Mr. Hyams attempted to bring in other attorneys to help him on the case. He tried to associate numerous lawyers from all over the country to assist on the case, but without success.

22. The *Abad* case was a complicated litigation. There were multiple plaintiffs and numerous defense attorneys. The motion practice was extensive. There were over 90 hearings in this case.

23. Mr. Hyams employed a legal assistant who instituted strict document control procedures. He also used other organizational systems such as litigation software, and a computerized "tickler system". He employed six staff and attorneys to work on the case.

24. The defense lawyers for various parties were Cindy Kuhn, Mick Rusing, and Andrew Turk, all Arizona attorneys, as well as California attorneys Russ Hiles and Frank Kurasz.

25. The defense lawyers defended the case aggressively.

26. The defendants filed a large number of motions. The defendants filed 32 motions *in limine*. Within a six week period, defendants filed 90 motions for summary judgment.

27. Mr. Hyams also filed a lot of motions and often asked for accelerated hearings.

28. One of Mr. Hyams' associates, Bryan Schmid, believed the defense engaged in "scorched earth" litigation tactics, particularly after the failed settlement mediation. Another of Mr. Hyams' associates, Kristen Carlson, characterized the defense as "extremely aggressive".

29. The *Abad* case is still pending on appeal. Defense lawyers Cynthia Kuhn and Andrew Turk are attorneys of record on appeal.

30. The issues pending on appeal include the propriety of trial court's ruling on the *Frye* hearing and whether the trial court properly excluded evidence and expert testimony.

31. Mr. Hyams is being assisted in the appeal by attorney Peter Akmajian, his counsel in this case, and Mr. David Abney.

32. The defendants on appeal filed a motion to strike Mr. Hyams' Opening Brief on the basis that it did not properly cite to the record. The Court of Appeals found the brief deficient, but permitted Mr. Hyams to file an amended Opening Brief, which he did on a timely basis. The defendants then moved to strike that brief, arguing that the Amended Opening Brief also improperly cited the record on appeal. The Court of Appeals denied the second motion to strike without the need for Mr. Hyams to respond. The Court of Appeals ruled that it would not consider any fact not properly cited to the record.

Count One-The Special Action and the Stay Hearing

33. Mr. Hyams filed a Special Action in the *Abad* case relating to the granting of summary judgment by the trial court on plaintiffs' claim for punitive damages.

34. Mr. Hyams requested the trial court stay the trial proceedings pending a decision in the Special Action. The trial court refused to stay the trial proceedings, and Mr. Hyams requested the Court of Appeals to stay the trial proceedings.

35. Judge Peter Eckerstrom of the Arizona Court of Appeals conducted a telephonic stay hearing. No court reporter was present.

36. During this stay hearing, the issue arose whether the appendix Mr. Hyams attached to the Petition for Special Action properly cited the trial record.

37. Judge Eckerstrom and the Court of Appeals chief staff attorney, Beth Beckman, recall that when asked, Mr. Hyams stated that everything in the appendix was part of the record.

38. The lawyer representing the Wasatch defendants, Cynthia Kuhn, recalls the same.

39. The lawyer representing the Hansen defendants, Andy Turk, does not recall what Mr. Hyams said but does remember that after the hearing, "we were left with the impression that his [Mr. Hyams] representations were not correct."

40. Mr. Turk does not recall if there was a discussion with Judge Eckerstrom regarding the appendix that Mr. Hyams filed.

41. Mr. Turk recalls the allegation by Ms. Kuhn that the appendix included matters not in the record. He recalls that Mr. Hyams "generally denied Cindy's allegation and said that on the whole-or maybe all of it, I can't remember either way. I don't want to say he represented everything was fine, but my recollection is his representations to the Court was, essentially, Cindy is wrong, the things that are in the appendix are-are appropriate."

42. Mr. Turk recalls Mr. Hyams consistently taking the position that if it had ever been in the record anywhere, he could cite to it.

43. Mr. Turk remembers coming away from the hearing with the feeling or the belief that Mr. Hyams had represented some things were in their that weren't part of the record.

44. Mr. Hyams recalls telling Judge Eckerstrom that he knew there was one thing in the appendix that was not part of the record because he saw it for the first time that morning. He said it was "brand-new". He remembers telling Judge Eckerstrom that "everything else is probably in the record, I can't be sure, but... I'll check it over and find out and see what's going on."

45. Kristen Carlson, Mr. Hyams' associate at the time, was present in Mr. Hyams' office the day of the telephonic hearing but did not participate in the hearing. She

recalls Mr. Hyams coming out of the conference room where Mr. Hyams had been for the telephonic hearing, and she recalls Mr. Hyams reporting about what occurred in the hearing.

46. She remembers that Mr. Hyams said there was an issue regarding whether all of the exhibits that were attached to the special action were, in fact, part of the record before the trial court. She testified that Mr. Hyams had said that "he knew that there was one exhibit that was not, but wanted to know if there were others."

47. Ms. Carlson looked at the appendix and found additional exhibits that had not been part of the record.

48. Carl Hilber, Mr. Hyams' legal assistant, recalls being asked after the hearing to verify whether materials in the appendix were part of the materials constituting the record before the court.

49. Mr. Hilber recalls conducting the search and that Ms. Carlson assisted. Mr. Hilber recalls discovering that some material in the appendix was not part of the record.

50. Judge Eckerstrom does not recall that Mr. Hyams made this statement. He does not believe the statement that Mr. Hyams contends he made is consistent with the memory Judge Eckerstrom has about the hearing.

51. Ms. Beckman does not recall that Mr. Hyams stated that there might be a few other items outside the record but that if there were things outside the record, they were not significant.

52. Mr. Hyams former associate, Michael Kuborn, was present in Mr. Hyams' conference room for the entirety of the telephonic stay hearing and heard everything that was said.

53. Mr. Kuborn sat in on the hearing specifically because "it had been our practice to make sure that Harold was never alone when any activity occurred with this defense firm."

54. Mr. Kuborn recalls the question by Judge Eckerstrom whether all the items contained in the special action and appendix were part of the record.

55. Mr. Kuborn recalls that Mr. Hyams answer was "as close as I can remember to his actual words, he said well,uh, I know there is one item, there could be a few items, but there's nothing that would effect to any significant degree the issue. I believe that's what he said."

56. Mr. Hyams subsequently filed a response to a motion to dismiss the Special Action in which he conceded that approximately seven items attached to his appendix were not part of the trial court record. Some of the matters defendants alleged were not part of the record were in fact part of the record. However, Mr. Hyams cited portions of those materials in the Special Action that he had not cited in his response to the motion for summary judgment in the trial court.

57. Mr. Hyams informed the court in argument that he was attempting to file a "Brandesian" brief that gave the Court of Appeals a broader view of the pending case than just the narrow issues presented on the Special Action.

58. A "Brandesian" brief is not consistent with the Rules of Civil Appellate Procedure if one did not file a "Brandesian" response to the underlying motion. Mr. Hyams' statements thus reflected a misunderstanding of the rules.

59. The stay hearing was an adversarial proceeding with both sides represented by counsel. Statements and representations of counsel were fully verifiable. Judge

Eckerstrom agreed that opposing counsel would "call you" on any misleading statements about matters that are verifiable.

60. Mr. Hyams stated that he was not trying to mislead the Court of Appeals regarding what was in the record and that there would be no reason to do so because defense counsel would not let him get away with it.

61. The Court of Appeals ultimately issued an order to show cause related to the stay hearing and later held Mr. Hyams in contempt.

62. The Court of Appeals ordered Mr. Hyams to take certain steps to correct his failures with regard to the Special Action. Mr. Hyams followed the Court of Appeals directives take corrective steps.

63. Judge Eckerstrom testified that the Court of Appeals really counts on attorneys to help clarify what is in the record and what is not. "And, you know, it went to the core of the panel's decision to the contempt proceedings wasn't that there might have been an error or someone might have misspoken at the stay conference. It was that ultimately, our court and opposing counsel were now having to do an awful lot of work to try to sort out what was in the record and what wasn't in the record, and we were getting no assistance with that from the person. I think our grudge against Mr. Hyams was we [sic] made it our problem, not his."

COUNT TWO

Count Two, Section I. <u>The Alleged Filing of Frivolous Motions Related to Discovery and Disclosure</u>

64. With regard to the discovery motions that Mr. Hyams filed discussed in Count Two, Section I, A-C these motions were opposed, the court ruled on the motions, no sanctions were sought and none were awarded.

65. One motion dealt with Mr. Hyams' request to preserve testing results from consulting experts to determine the state of the apartment complex in 2001.

66. The defense argued that one could not "extrapolate back" the condition of the apartments. Mr. Hyams argued to the contrary. The issue of "extrapolation back" is pending on appeal.

67. Although Mr. Hyams brought his discovery motions without filing a certification under the Rules of Civil Procedure regarding consultation of counsel, attorneys sometimes skip this step even though it is in the rules.

68. Mr. Hyams contended that he complied with the "heart of it [the rule requiring a certification of consultation] but not the form of it." He said he tried to work out these disputes informally, through e-mail communications and otherwise.

Count Two, Section I. A. <u>The Allegation that Mr. Hyams Brought a Frivolous Motion to Compel Discovery</u>

69. In approximately December of 2002, Mr. Hyams brought a motion to compel disclosure of the identity and opinions of defendants' non-testifying consulting experts.

70. The motion was briefed, heard and denied. No sanctions were sought and none were awarded regarding this motion.

71. Mr. Hyams brought this motion because he believed the defendants were failing to provide discovery and disclosure to which he was entitled.

Count Two, Section I. B. The Allegation that Mr. Hyams Brought a Frivolous Motion to Postpone the Disclosure Deadline

72. In approximately December 2002, Mr. Hyams brought a motion for leave of court to postpone the disclosure deadline.

73. The motion was briefed, heard and denied. No sanctions were sought and none were awarded regarding this motion.

74. Mr. Hyams brought this motion because he believed defendants were not providing proper disclosure, and he did not want to disclose everything he had before defendants had to do so.

Count Two, Section I. C. The Allegation that Mr. Hyams Filed a Frivolous Motion to Propound Additional Interrogatories

75. In approximately December, 2002 Mr. Hyams filed a motion for leave of court to propound additional interrogatories, beyond the presumptive limit of 40, to the Wasatch defendants.

76. Previous to this motion, Mr. Hyams had served 65 to 70 interrogatories.

77. Defendants responded that they did not need to answer any more than the presumptive 40 interrogatories.

78. Mr. Hyams filed the motion because he desired approximately 100 interrogatories total.

79. Mr. Hyams did not ask the court for permission to file thousands of interrogatories. He pointed out to the court that theoretically, given the number of plaintiffs involved he could have done so. But that was not his request.

80. The motion was heard, briefed and denied. According to the minute entry, one defendant "Abracadabra" sought sanctions. The court denied that request.

Count Two, Section I. D. <u>The Allegation that Mr. Hyams Filed a Motion for Leave of Court to Supplement Opposition to Defendant Boise Cascade's Motion for Summary Judgment</u>

81. On February 18, 2003, defendant Boise Cascade filed a motion for summary judgment.

82. Mr. Hyams filed a response/Rule 56(f) motion on March 6, 2003.

83. On April 1, 2003 Mr. Hyams filed a supplemental exhibit to his response consisting of the CV of Dr. Richard Lipsey, a toxicologist. (The document bears a date of February 25, 2003, but the mailing certificate recites that it was mailed on April 1, 2003.)

84. On April 8, 2003 Mr. Hyams filed a Motion for Leave of Court to Supplement the Opposition to the Motion for Summary Judgment. The motion attached the affidavit of Dr. Lipsey.

85. The parties briefed the issue and the court denied the motion to supplement. No parties sought sanctions, and the court did not award sanctions related to this motion.

Count Two, Section I. E. The Allegation that Mr. Hyams Frivolously Attempted to Call the Opposing Party's Non-Testifying Consulting Expert as His Own Testifying Expert Witness

86. Mr. Hyams obtained an affidavit from a witness, Philip Opsal, who had previously consulted with the Wasatch defendants.

87. Mr. Opsal's potential testimony dealt with the liability of the Boise Cascade Company, which the parties were discussing dismissing from the case.

88. Mr. Hyams was concerned that the Wasatch defendants were going to name Boise Cascade as a non-party at fault if it were dismissed. He was also concerned that the Wasatch defendants would try to deflect fault to Boise Cascade without formally naming Boise Cascade as a non-party at fault.

89. When Mr. Hyams contacted Mr. Opsal, Mr. Hyams did not know Mr. Opsal was a consulting expert for the Wasatch defendants.

90. When Mr. Hyams learned that Mr. Opsal was a consulting expert for the Wasatch defendants, he contacted a State Bar ethics hot line to determine if he had the right to discuss the case with Mr. Opsal. He spoke to former bar Council, Linda Shely, who told Mr. Hyams he could utilize the expert.

91. Mr. Hyams filed a motion attaching the Opsal affidavit asking permission to use the expert.

92. The motion was denied, but no sanctions were sought or awarded with regard to this motion.

Count Two, Section I. F. The Allegation that Mr. Hyams Failed to Obey the Court-Ordered Deposition Schedule

93. On May 17, 2004, the court entered a minute entry setting forth the schedule for taking plaintiffs' depositions. The order required three day per week depositions, beginning May 31, 2004.

94. On June 15, 2004, the trial court filed a minute entry documenting a telephonic discovery dispute and ordered "that Harold Hyams and his client shall pay a sanction to defendant Wasatch in the amount of $300 within 14 days from the date of this order for failure to produce the deponent as scheduled."

95. On July 16, 2004, the Wasatch defendants moved to dismiss seven plaintiffs for failure to appear at their depositions.

96. On August 5, 2004, Mr. Hyams responded to this motion and explained that with respect to each plaintiff, there were difficulties in reaching them, they had moved or they had otherwise lost contact with Mr. Hyams. Mr. Hyams also informed the court that certain of the plaintiffs involved no longer desired to be part of the case and wanted to be dismissed.

97. On September 27, 2004, the trial court found that six of the plaintiffs willfully failed to appear for deposition and would be dismissed. The court gave one of the plaintiffs additional time to provide discovery before deciding the dismissal issue.

98. It appears from the minute entry that some defendant requested attorney fees. However, the court denied the request for attorney fees.

99. Mr. Hyams' legal assistant, Mr. Hilber, stated that it was incredibly difficult to keep track of the numerous plaintiffs because they moved around so much. Mr. Hilbert indicated Mr. Hyams hired investigators to try to find his clients.

Count Two, Section I. G. <u>The Allegation that Mr. Hyams Violated the Court's Order Relating to Defendant Wasatch's Motion for Partial Summary Judgment</u>

100. Prior to February 22, 2005, the Wasatch defendants filed a Motion for Partial Summary Judgment to which Mr. Hyams filed a response on behalf of plaintiffs.

101. Prior to February 22, 2005, Mr. Hyams filed a Motion to File a Supplemental Response to the motion.

102. On February 22, 2005,the trial court entered an order stating that any party filing a supplemental response would be subjected to a $10,000 fine.

103. On March 11, 2005, Mr. Hyams filed a supplement, citing and quoting from one case.

104. On April 8 10, 2005, the trial court set an Order to Show Cause hearing regarding the supplement that Mr. Hyams filed.

105. By minute entry of May 2, 2005, the trial court finded Mr. Hyams $200. The court stated in the minute entry that "Mr. Hyams violated both the spirit and the letter of the Order entered. The court ordered that Mr. Hyams pay the fine himself and that he could not charge it to his clients nor claim it as a taxable cost.

106. Mr. Hyams discovered the case he discussed in the supplement after he filed his response. He did not want to bring up the case in oral argument for the first time because he felt it would be sandbagging his opponent.

Count Two, Section I. H. <u>The Allegation that Mr. Hyams was Dishonest in Explaining his Alleged Failure to Comply with Expert Witness Disclosure and Discovery</u>

107 In October 2003, Mr. Hyams disclosed the identity of expert witness Joseph DeCarlo.

108 Mr. DeCarlo sent to Mr. Hyams a retainer contract.

109 Through inadvertence, Mr. Hyams did not sign the contract.

110 Mr. Hyams did not contact Mr. DeCarlo again until December of 2004. When Mr. Hyams did reach Mr. DeCarlo, Mr. DeCarlo told Mr. Hyams that he would not act as a testifying expert, just a consulting expert.

111 Mr. Hyams filed a motion dated March 25, 2005 to substitute Mr. DeCarlo. Although the motion begins by stating the substitution is due to "unavailability", the next sentence explains Mr. DeCarlo thought he was a consultant only, while Mr. Hyams thought he would act as a testifying expert.

112 By minute entry dated May 13, 2005, the trial court denied the motion to substitute Mr. DeCarlo.

113 Although the court did not sanction Mr. Hyams, the court chastised Mr. Hyams related to his claim of inadvertence and regarding Mr. Hyams level of diligence.

Count Two, Section I. I. <u>The Allegation that Mr. Hyams Failed to File a Timely Amended Complaint</u>

114 Prior to February 4, 2004, Mr. Hyams filed a Motion for Leave to File an Amended Complaint to add Wasatch Premier Properties, LLC as a defendant.

115 The court granted leave to file the Amended Complaint within 30 days of February 2, 2004.

116 Mr. Hyams failed to timely file the Amended Complaint.

117 Mr. Hyams did not intentionally fail to file the amended complaint.

Count Two, Section I. J. The Allegation that Mr. Hyams Filed Frivolous "Emergency" Motions that were not Emergencies

118 On May 26, 2005, the trial court issued a minute entry stating that Mr. Hyams had filed "another in a long line of emergency motions."

119 The motion pertaining to the court's May 26, 2005 minute entry was a motion on which plaintiff ultimately prevailed.

120 The court issued no sanction regarding the request for an emergency motion.

Count Two, Section I. K. The Allegation that Mr. Hyams Filed a Frivolous Appeal

121 Mr. Hyams filed a notice of the appeal dated July 21, 2005, appealing to the Court of Appeals from a trial court order dated June 22, 2005.

122 The appeal was premature because the order in question was not a final, appealable order.

123 Mr. Hyams explained that he filed the appeal because it was not clear in his mind whether the order was appealable and he did not want to waive right to appeal.

124 The Court of Appeals granted attorney fees to defendants in the amount of $6600 regarding the premature appeal.

125 The matter that was at issue in the premature appeal, the dismissal of Premier Properties, is now at issue in the pending appeal before Division I of the Court of Appeals.

126 Mr. Hyams accepts responsibility for bringing the premature appeal.

Count Two, Section I. L. The Allegation that Mr. Hyams Failed to Comply with the Rules of Procedure Related to Motions for Summary Judgment

127 Judge Davis struck a signed report from expert witness John Terranova that Mr. Hyams attached to a statement of facts supporting an opposition to a motion for summary judgment.

128 The basis of the ruling was the Terranova report was not an affidavit.

Count Two, Section I. M. The Allegation that Mr. Hyams Failed to Provide the Court a Complete Briefing Book Relating to His Motion for Summary Judgment re Negligence Per Se

129 The trial court ordered that Mr. Hyams provide a briefing notebook regarding the above referenced motion for summary judgment.

130 Missing from the briefing book was one of the defendants Motion to Strike certain material.

131 The trial court ordered Mr. Hyams correct the briefing notebook. Mr. Hyams did so.

Count Two, Section I, N. The Allegation that Mr. Hyams Intentionally, Knowingly, Recklessly and/or Willfully Violated the Court's Order Relating to Supplemental Briefing in Motions

132 On January 27, 2006, Judge Davis issued an order stating that Mr. Hyams could not in the future supplement motion papers without great good cause.

133 Up to January 27, 2006 Mr. Hyams had filed approximately 20 supplemental matters in the *Abad* case, though some items deemed "supplements" included notices of errata and supplemental supporting affidavits.

134 The case lasted six years with hundreds and hundreds of court papers filed.

135 The State Bar does not allege that Mr. Hyams filed any improper supplements after Judge Davis entered his order of January 27, 2006.

Count Two, Section I. O. The Allegation that Mr. Hyams Unjustifiably Blamed Associates for Making Unsupported Allegations

136 On January 27, 2006, the trial court admonished Mr. Hyams and ordered that "Mr. Hyams shall not again blame anyone else in his firm for any errors or omissions contained in documents prepared in this case."

137 Mr. Hyams has stated that "Everything that's done in my office is my responsibility. I took full responsibility for whatever I did. That does not mean I can't give an explanation for what went on and why it happened." Mr. Hyams informed the trial court on numerous occasions that he was responsible for whatever was filed in the case.

Count Two, Section I. P. The Allegation that Mr. Hyams Misrepresented the Capacity in Which a Plaintiff Appeared in the Case, Resulting in His Being Found in Contempt of Court and Sanctioned

138 Judge Davis entered certain orders regarding plaintiff Sienna Ruhoff.

139 Judge Davis did not find Mr. Hyams in contempt regarding Ms. Ruhoff. However, the court found that Rule 11 sanctions were proper.

140 Mr. Hyams cited to the trial court a deposition where defense councel asked Ms. Ruhoff questions as if she were a plaintiff.

141 The deposition of Ms. Ruhoff attached to Mr. Hyams submission showed that the defense attorney asked Ms. Ruhoff questions about her own claims, including the identity of her doctors.

Count Two, Section I. Q. The Allegation that Mr. Hyams Violated Court Orders Related to Amending the Complaint and was Sanctioned for Such Conduct

142 Mr. Hyams filed a Third Amended Complaint on May 17, 2005.

143 Mr. Hyams filed a Motion to Amend to file a Fourth Amended Complaint on January 11, 2006.

144 The Wasatch defendants opposed the motion, asserting that plaintiffs had abandoned wrongful death claims in the Third Amended Complaint and that Mr. Hyams added new plaintiffs without properly requesting to do so.

145 The trial court rejected the defendant's arguments that the wrongful death claims were intentionally abandoned and also found that the 72 day "delay" in amending to cure the problem was not undue delay.

146 However, the court found that inclusion of additional plaintiffs was in violation of Rule 11 and stated that sanctions would be awarded.

Count Two, Section I. R. The Allegation that Mr. Hyams Violated Court Orders and Rules of Procedure Related to Briefing his Responses to Defendants' Motions for Summary Judgment re: Personal Liability

147 On or about October 26, 2005, the Hansen defendants moved for summary judgment regarding personal liability, accompanied by a separate statement of facts in support of the motion.

148 Mr. Hyams filed a response on November 15, 2005, accompanied by a separate statement of facts.

149 The Hansen defendants replied on December 5, 2005. They also moved to strike the separate statement of facts filed by Mr. Hyams.

150 One of the arguments the Hansen defendants raised was that some of the cited deposition testimony took place before the Hansen defendants were parties to the case. The Hansen defendants cited Rule 32 Arizona Rules of Civil Procedure to support this argument.

151 The trial court ultimately issued a ruling finding that there were "extensive miss-citations [sic] on the record, omissions, and other miss-statements [sic]."

152 The trial court subsequently granted the motion to strike the entirety of the statement of facts and sustained all of defendants' objections to the statement of facts without allowing Mr. Hyams any opportunity to cure any defects.

153 Mr. Hyams did not supplement his briefing after oral argument as alleged by the State Bar. Rather he filed a Motion for Reconsideration.

154 The trial court awarded sanctions against Mr. Hyams regarding the statement of facts.

Count Two, Section I. S. <u>The Allegation that Mr. Hyams Filed Frivolous Motions to Amend the Complaint and was Sanctioned by the Trial Court for Filing Frivolous or False Documents in Violation of Rules and Court Orders</u>

155 Mr. Hyams filed a Motion to file a Fourth Amended Complaint.

156 The defendants opposed this motion, moved to strike it and sought sanctions.

157 In a minute entry of April 24, 2006, the trial court issued sanctions against Mr. Hyams totaling $4500 for including a defendant that should not have been included in the amendment.

158 Mr. Hyams filed a Fifth Amended Complaint. Defendants opposed the amendment.

159 By minute entry of April 27, 2006, the court denied the motion to amend to file a Fifth Amended Complaint. The trial court did not grant any sanctions to defendants regarding the motions to amend discussed on that day.

Count Two, Section I. T. The Allegation that the Trial Court Held Mr. Hyams in Contempt for Making Misleading and Insulting Comments to the Court that were Beneath the Dignity of any Member of the Bar

160 In a hearing dated April 27, 2006, the defense lawyers were arguing a motion and were utilizing a Power Point presentation.

161 Mr. Hyams made the following objection to this presentation: " And just for the record, I would say that any time that the defendants have given the court its outline of what they are presenting at the motions, which is, in effect, is a supplemental pleading, I object to any of those things having been done and being entered into at this time. I do not think that it's appropriate because in effect what they are doing is they are entering supplemental pleadings to this court that the court is relying on in coming to its conclusions, which is obvious from the court reading from the defendants' summary that it provided to the court at this motion and this hearing."

162 Mr. Hyams made the objection because the court had set a "firm parameter" regarding supplementation. Mr. Hyams believed the Power Point presentation contained new material.

163 In response to this objection, Judge Davis stated: "Well, Mr. Hyams, you have the same access to the court in your presentation and when you don't choose to

prepare as well as the defendants, I don't propose that the Court should somehow level the playing field down to the level of your advocacy.

164 Judge Davis took a recess, then returned and questioned Mr. Hyams regarding presentations Mr. Hyams had made in court. Then Judge Davis stated as follows: All right, Mr. Hyams, I find you in direct civil contempt. Your comments to the Court are misleading, they are insulting to the Court and beneath the dignity of any member of the bar, and as a sanction, you are to pay to the clerk of the court $1000 before 5:00 on Friday.

165 In explaining why he held Mr. Hyams in contempt instead of simply overruling Mr. Hyams objection, Judge Davis stated at the hearing in this case: "It's what he said and his implications. His clients were present. And he was making statements that would have led any layperson, not to mention somebody who didn't see exactly what he was talking about, as if the defendants were misconducting themselves. And that the court was not acting properly in viewing what the defendants presented to the court."

Count Two, Section I. U. <u>The Allegation that Mr. Hyams Failed to Satisfy Basic Evidentiary Requirements at and Following the *Frye* Hearing</u>

166 During the *Frye* hearing, one of plaintiffs' expert witnesses, Dr. James Dahlgren, testified telephonically.

167 Defendants invoked the rule of exclusion pursuant to Rule 615 of the Arizona Rules of Evidence.

168 Mr. Hyams provided Dr. Dahlgren a transcript of testimony of another of the plaintiffs' experts, Dr. Marinkovich, to aid the presentation of Dr. Dahlgren's testimony.

169 Defendants moved to strike Dr. Dahlgren's testimony, alleging that Mr. Hyams violated rule 615.

170 In this motion, defense counsel argued that while"the sequestration rule is somewhat relaxed in the context of expert witnesses... it is only relaxed in order to allow a party's expert witness to hear the testimony of opposing witnesses, for the purposes of rebuttal or preparing for cross-examination."

171 Defense counsel cited *Mcguire v. Caterpillar Tractor Co.*, 151 Ariz.420, 425, 728 P.2d 290, 295 (App.1986) for this proposition.

172 Mr. Hyams did not believe providing Dr. Dahlgren with the transcript of Mr. Marinkovich violated Rule 615.

173 Mr. Hyams believed that experts could see the testimony of other experts. The defendants had moved to permit the same thing, and the trial court had allowed it.

174 Judge Davis granted the motion to strike by way of minute entry dated July 13, 2006.

175 Judge Davis acknowledged that Rule 615 has built-in flexibility when it comes to expert witnesses. Had Dr. Dahlgren been testifying in person, Judge Davis quote "probably" would not have found a violation of Rule 615.

176 The parties disputed numerous other evidentiary issues related to the *Frye* hearings. The trial court ruled in defendants' favor, a ruling that is currently pending on appeal.

177 On or about May 8, 2006, Mr. Hyams moved to amend the complaint to file a Seventh Amended Complaint.

178 The trial court denied the motion on September 14, 2006, based on the fact that the court's *Frye* ruling rendered the amendment futile.

179 The court also ruled that Mr. Hyams had not properly disclosed evidence to support other health claims that might have survived the *Frye* ruleing. Mr. Hyams contended he provided such evidence, and the court's ruling denying the amendment is an issue pending on appeal.

Count Two, Section II. <u>The Allegation that Mr. Hyams Engaged in Unprofessional Conduct During Depositions</u>

180 During two depositions that Mr. Hyams attended, he made inappropriate remarks.

181 In one deposition of Mr. Hyams' expert witness on June 23, 2005, Mr. Hyams referring to Ms. Kuhn stated, "Excuse me. Do you have a shit-eating grin on your face, Cindy?"

182 In that same deposition, during a discussion of whether defense counsel would permit Mr. Hyams to question his own expert witness during the time set aside for the deposition that day, Mr. Hyams said, "I don't have to do that [obtain an affidavit from the expert]. Listen, don't lead me around the bush. I'm asking you for a reasonable amount of time. Stop being a pig about it. If I want to have 15 minutes or half an hour in order to ask questions, you ought to give it to me, period."

183 The deposition had been ongoing for approximately 7 hours when Mr. Hyams made the statement.

184 In a subsequent deposition dated February 7, 2006, referring to an order by the Hon. Charles Sabalos that Mr. Hyams could not conduct ex-parte interviews of ex-employees of the defendants, Mr. Hyams stated, "The court previously has ordered that I'm only allowed to speak to ex-employees when the--when an attorney is present. I do not believe this comports with the law of Arizona and it sounds more like a neo-Nazi type determination. But nonetheless I have to follow the rules of this court.

Count Two, Section III. The Allegation that Mr. Hyams Presented Misleading, Undisclosed Evidence to the Court

185 On or about November 4, 2005, Mr. Hyams showed to the trial court a 23 minute videotape that Mr. Hyams prepared regarding the Case.

186 The videotape contains photographs, video and testimony relating to the case.

187 Mr. Hyams sought the court's permission to show the videotape during a hearing, the defendants objected, and the court granted permission to Mr. Hyams to present the tape.

188 Although the defense was concerned that the video was not the same as that presented at the prior settlement conference or given to them in the morning before the November 4th hearing, defense counsel Ms. Kuhn confirmed after the hearing of November 4, 2005 that it was the same video.

189 The defense alleged that the video omitted leading questions in a key part of Keith Strawser's deposition. However, at Mr. Hyams' hearing, defense counsel Ms. Kuhn could not identify any leading questions.

190 The video testimony on the tape included the running date and time of testimony.

191 The defense alleged that the video was misleading because it did not make clear that witness Lauri Chin only visited the apartment complex once. Nevertheless, defense counsel admitted that Ms. Chin testified as to what she observed. Defense counsel further admitted that the fact Ms. Chen only visited the complex once might create an argument for the plaintiffs that the mold problem was so evident even a one time visitor could see it. Defense counsel admitted that issues such as this go to the weight of the evidence.

192 The defendants objected to the video because it contained hearsay and narrative answers. These are both evidentiary issues for the court.

193 The defendants asserted that the video was falsified or doctored, but the trial court never made such a finding. The trial court ruled on November 4, 2005 that it would treat the tape as demonstrative evidence.

194 Although the court granted a motion *in limine* to exclude the tape as evidence at trial, the court did not find that the tape was doctored or otherwise false.

Count Two, Section IV. The Allegation that Mr. Hyams Misconduct Impacted Every Aspect of the Cases, From Beginning to End, and the $750,000 Sanction

195 Judge Davis justified the $750,000 sanction based on the "whole record" of the case, including "being unprepared", "supplementing pleadings", dealing with Mr. Hyams' conduct and the case going on "for years" to resolve issues related to amending the complaint.

196 Defense Counsel Cynthia Kuhn and Andrew Turk filed motions seeking sanctions that ultimately led to the $750,000 award.

197 Ms. Kuhn was willing to withdraw her motion for sanctions in exchange for plaintiffs dropping their lawsuit and waiving the appeal against the Wasatch defendants.

198 Judge Davis ordered sanctions solely under ARS section 12-349 relating to the unnecessary expansion of litigation. He additionally granted $50,000 of fees based on a contract theory.

199 Judge Davis did not grant the motion pursuant to Rule 11, which provides that the case was not brought and/or prosecuted with a reasonable basis.

200 Judge Davis did not refer Mr. Hyams to the State Bar as a result of his ruling. He considered it within his discretion to make such a referral and he recalls making such a referral in the past.

CONCLUSIONS OF LAW

COUNT ONE

E.R. 1.1:

1. The Hearing Officer finds clear and convincing evidence that Mr. Hyams violated E.R. 1.1. The evidence shows that Mr. Hyams did not understand the Rules of Civil Appellate Procedure as they related to citing the record, and Mr. Hyams has admitted this fact.

2. The Hearing Officer finds that there is not clear and convincing evidence Mr. Hyams violated E.R.s 3.3; 3.4(c); 4.1; 8.4 (c); 8 .4 (d); Rule 41(e) of the Arizona Supreme Court; Ruled 53 (c) of the Arizona Supreme Court. Specifically, there is

not clear and convincing evidence that Mr. Hyams made any knowingly false representations to the Court of Appeals or others that would invoke the above rules. Mr. Hyams did not knowingly violate any ethical rule. The stay hearing in question was not transcribed, and the witnesses, some of who are still actively involved in representing parties in the pending litigation, disputed what was said. Mr. Hyams' contention that he informed the court there was definitely one item not in the record and that there might be more, is supported by several witnesses and is supported by his subsequent filing with the Court of Appeals in which he conceded that numerous items were not part of the record.

COUNT TWO

3. As to Count Two, generally, the State Bar characterized these allegations as "lower-level violations" and that "ordinarily, standing alone, these would go nowhere with State Bar. They would be reprimands, very low-level type of things."

SECTION I. A-D. <u>THE ALLEGATIONS REGARDING FRIVOLOUS MOTIONS</u>

4. The hearing officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c), or Rule 53 (c) of the Arizona Supreme Court. Mr. Hyams filed the discovery motions in the context of hotly disputed litigation that involved thousands of pleadings and motions. He articulated reasonable grounds for filing each motion and while the trial court denied these motions there is no indication or clear and convincing evidence the motions were frivolous.

SECTION I. E. THE ALLEGATION REGARDING ATTEMPTING TO CALL THE OPPOSING PARTY'S NON-TESTIFYING EXPERT AS HIS OWN TESTIFYING WITNESS

5. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c), or Rule 53 (c) of the Arizona Supreme Court. Mr. Hyams was able to explain how and why he contacted Mr. Opsal and under the complex facts and circumstances of the *Abad* case, his doing so was a reasonably debatable issue. His moving for permission to use the expert was likewise not ethically improper. While the court had the discretion to rule against Mr. Hyams, there was no ethical violation.

SECTION I. F. THE ALLEGATION THAT MR. HYAMS FAILED TO OBEY THE COURT-ORDERED DEPOSITION SCHEDULE

6. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c), or Rule 53 (c) of the Arizona Supreme Court. Given the number of plaintiffs, the fact that plaintiffs were transient, as well as evidence Mr. Hyams and his legal assistant attempted in good faith to comply with deposition scheduling, there is no violation of any ethical rule. The evidence established that only a small number of plaintiffs compared to the total amount failed to appear for deposition. Defense counsel's contention that Mr. Hyams intentionally had a witness show up late is speculation that does not constitute clear and convincing evidence.

SECTION I. G. THE ALLEGATION RELATING TO SUPPLEMENTING IN CONTRAVENTION OF JUDGE HARRINGTON'S ORDER

7. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c), or Rule 53 (c) of the Arizona Supreme Court. Mr. Hyams testified he considered the ethical implications of the issue, consulted the ABA Model Rules and determined that he had to bring the case in question to the court's attention for his clients' benefit. Furthermore, he did not consider it fair to bring up the case for the first time at the hearing. Mr. Hyams cited a single case in supplementation.

SECTION I. H. <u>THE ALLEGATION THAT MR. HYAMS ENGAGED IN DISHONESTY IN EXPLAINING HIS FAILURE TO COMPLY WITH EXPERT WITNESS DISCLOSURE AND DISCOVERY</u>

8. The Hearing Officer finds no clear and convincing evidence Mr. Hyams engaged in dishonest conduct or violated E.R.s 1.1, 3.1, 3.2, 3.3 (a)(1), 3.4 (c), 4 .1, 8.4 (c), 8.4 (d), Rule 41 (e) of the Arizona Supreme Court, or Rule 53 (c) of the Arizona Supreme Court. Although the first sentence of Mr. Hyams' motion says the expert was "unavailable", the full context of the motion explains the situation more clearly, though perhaps not as well as it should have. However, there is no clear and convincing evidence of intentional dishonesty on Mr. Hyams' part. There is also no evidence of lack of competence. Mr. Hyams was competent to handle the matter. As noted below the issue was diligence.
9. The Hearing Officer finds there is clear and convincing evidence Mr. Hyams violated E.R. 1.3. Mr. Hyams initially contacted the expert and then failed to stay in communication with him or properly disclose his opinions. While Mr. Hyams testified that he was preoccupied with other aspects of the case, which led to the

failure to stay in contact with the expert, he should have nonetheless maintained communications with the expert and assured that the expert was properly listed and disclosed. There was a lack of diligence.

SECTION I. I. THE ALLEGATION REGARDING TIMELY FILING AN AMENDED COMPLAINT

10. The Hearing Officer finds there is clear and convincing evidence that Mr. Hyams violated E.R. 1.3. He failed to timely file the amended complaint, which was his obligation to do. There was a lack of diligence.

11. The Hearing Officer finds there is no clear and convincing evidence of a violation of E.R.s 1.1, 3.1, 3.2, 3.3(a)(I), 3.4 (c), 4 .1, 8.4 (c) or Rule 41 (e) of the Arizona Supreme Court. Mr. Hyams was competent to handle the matter, and his violation was not a lack of competence but a lack of diligence. Mr. Hyams' actions were not done with intent to circumvent the rules or violate orders of the court.

SECTION I. J. THE ALLEGATION CONCERNING EMERGENCY MOTIONS

12. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 3.1, 3.2, or 3.4 (c) with regard to requesting emergency motions. The substantive motion in question was ultimately granted. In hotly contested litigation, emergency motions are sometimes justified. Mr. Hyams merely requested permission to have motions heard on an accelerated basis. It is doubtful that seeking permission from the court to do something can be an ethical violation.

SECTION I. K. THE ALLEGATION REGARDING A FRIVOLOUS APPEAL

13. The Hearing Officer. finds there is clear and convincing evidence Mr. Hyams violated ER 1.1 with regard to the filing of a premature appeal that the Court of Appeals deemed frivolous. Mr. Hyams should have apprised himself of the Rules of Civil Appellate Procedure related to appealable orders.

14. The Hearing Officer does not find there is clear and convincing evidence Mr. Hyams violated E.R.s 1.3, 3.1, 3.2, or 3.4 (c). There is no clear and convincing evidence Mr. Hyams conduct was "knowing." Furthermore, there was no issue with diligence. Mr. Hyams filed an appeal and pursued it. The problem was his lack of substantive understanding of the Rules of Civil Appellate Procedure.

SECTION I. L. THE ALLEGATION REGARDING COMPLYING WITH RULES RELATED TO MOTIONS FOR SUMMARY JUDGMENT

15. The Hearing Officer. finds there is no clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3 3.1, 3.2 or 3.4 (c). Though the expert Terranova's signed report was not strictly speaking an affidavit it constituted an un-sworn declaration pursuant to rule 80 (i) Of the Arizona Rules of Civil Procedure. Furthermore, Mr. Terranova's deposition was attached to the Statement of Facts filed by Mr. Hyams. While the trial court certainly had discretion to strike the report, the issue was reasonably debatable, and no ethical violations are implicated.

SECTION I. M. THE ALLEGATION REGARDING THE COMPLETE BRIEFING BOOK

16. The Hearing Officer finds there is no clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.2, 8.4 (c) or Rule 41 (c) of the Arizona Supreme Court.

The incident in question was minor, and Mr. Hyams corrected the briefing book upon request. No ethical rule is implicated.

SECTION I. N. THE ALLEGATION REGARDING SUPPLEMENTAL BRIEFING

17. The Hearing Officer finds there is no clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c) or Rule 53 (c) of the Arizona Supreme Court. The trial court ordered on January 27, 2006 that Mr. Hyams should not supplement "without great good clause." The State Bar makes no allegation that Mr. Hyams violated that order. While the trial court has discretion to police matters such as supplemental filings, none of the conduct alleged rises to the level of any ethical violation.

SECTION I. O. THE ALLEGATION RELATING TO BLAMING ASSOCIATES

18. The Hearing Officer finds there is no clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.3, 3.4 (c), 4.1, 5.1, 5.3, Rule 41 (d) of the Arizona Supreme Court or Rule 53 (c) of the Arizona Supreme Court. The record reflects Mr. Hyams took responsibility for his firm's actions, but explained what had occurred on numerous instances. The conduct alleged does not rise to the level of any ethical violation.

SECTION I. P. THE ALLEGATION REGARDING REPRESENTATIONS ABOUT THE CAPACITY IN WHICH A PLAINTIFF APPEARED

19. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.3, 3.4 (c), 4.1, Rule 41 (d) of the Arizona Supreme Court or Rule 53 (c) of the Arizona Supreme Court. It appears there was

a reasonable dispute whether defendants treated the person in question, Sienna Ruhoff, as a plaintiff "in her own right" versus a plaintiff for her children only. Defense counsel's deposition questioning regarding the plaintiff's medical condition and treating doctors, support Mr. Hyams' view. While the trial court certainly had discretion to rule as it did, no ethical rule is implicated.

SECTION I. Q. THE ALLEGATIONS REGARDING AMENDING THE COMPLAINT

20. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated ER 1.1, 1.3, 3.1, or 3.2. Although Mr. Hyams delayed in preparing the amended complaint, the trial court found that the delay was not "undue" in the context of the litigation. The trial court assessed Rule 11 sanctions for including new plaintiffs, but there is no clear and convincing evidence Mr. Hyams did so intentionally to deceive.

SECTION I. R. THE ALLEGATIONS REGARDING BRIEFING RESPONSES TO MOTIONS FOR SUMMARY JUDGMENT

21. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.4 (c) or Rule 53 (c)of the Arizona Rules of Civil Procedure. The defendants successfully convinced the trial court that Mr. Hyams could not properly cite deposition testimony in summary judgment proceedings concerning depositions taken before the Hansens were parties to the case. There was a reasonable debate regarding the use of the depositions. While the trial court had discretion to make these decisions, no ethical rule was implicated.

SECTION I. S. THE ALLEGATIONS REGARDING AMENDED COMPLAINTS FRIVOLOUS FILINGS OR FALSE DOCUMENTS

22. The Hearing Officer finds that there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.3, 3.4 (c), 4.1, Rule 41 (d) of the Arizona Supreme Court and Rule 53 (c) of the Arizona Supreme Court. The trial court assessed Rule 11 sanctions related to the Fourth Amended Complaint totaling $4500 because Mr. Hyams included Wasatch Pool Holdings as a defendant when it had already been determined that Mr. Hyams could not sue that defendant. The court also assessed fees in the amount of $500 regarding the issue of the status of Ms. Ruhoff as a plaintiff and regarding allegations Mr. Hyams made that defendants threatened Ms. Ruhoff with a C.P.S. complaint if she pursued the mold claim. As noted above regarding Ms. Ruhoff's status as a plaintiff, there appears to have been a valid dispute. Regarding the C.P.S. allegations, Mr. Hyams contended there was circumstantial evidence to support his allegations. Ms. Ruhoff stated she was threatened with an investigation and then later on an investigation occurred. The trial judge did not believe this evidence was sufficient, but Mr. Hyams conduct does not implicate or rise to an ethical violation.

SECTION I. T. THE ALLEGATION REGARDING MR. HYAMS BEING HELD IN CONTEMPT FOR MAKING MISLEADING AND INSULTING COMMENTS TO THE COURT THAT WERE BENEATH THE DIGNITY OF ANY MEMBER OF THE BAR

23. The Hearing Officer finds there is not clear and convincing evidence that Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 8.2, or rule 41 (c) of the Arizona Supreme Court. The trial court record reflects that Mr. Hyams interposed an objection to a Power Point presentation defense counsel was making on the grounds the presentation constituted an improper supplement of prior filings. Judge Davis took great offense to this objection and held Mr. Hyams in contempt. While the trial court had discretion to enter this order, the record does not reflect Mr. Hyams behaved in a manner constituting an ethical violation.

SECTION I. U. THE ALLEGATION REGARDING SATISFYING BASIC EVIDENTIARY REQUIREMENTS AT AND FOLLOWING THE *FRYE* HEARING

24. With regard to the allegations concerning Mr. Hyams' violation of the Rule of Exclusion, the Hearing Officer finds there is not clear and convincing evidence that Mr. Hyams violated E.R.s 1.1, 1.3, 3.1 or 3.2. The issue of the Rule of Exclusion was reasonably debatable. Judge Davis conceded in his testimony that he probably would not have had a problem with Mr. Hyams providing the transcript to Dr. Dahlgren had Dr. Dahlgren testified live. Mr. Hyams testimony establishes he had no intent to deceive or act improperly. Judge Davis had the discretion to make his ruling, but Mr. Hyams did not violate any ethical rules.
25. The last part of this section of the complaint deals with Mr. Hyams' motion to file a Seventh Amended Complaint. According to the trial court's denial of the motion in its September 14, 2006 minute entry, the court considered the amendment futile

because of the Court's prior ruling in the *Frye* hearing. The *Frye* ruling is on appeal. There is not clear and convincing evidence of any ethical violation.

COUNT II, SECTION II. UNPROFESSIONAL CONDUCT DURING DEPOSITIONS

26. Mr. Hyams admitted that the statements he made in the deposition quoted in the complaint were improper. In the context of this case in which there were around 100 depositions taken, the allegations against him represent isolated incidents. His comment to Ms. Kuhn does not constitute clear and convincing evidence of any ethical violation.

27. The comment referring to a judicial order as "more like a neo-Nazi type determination", was certainly highly rude and should not have been said. The incident was isolated and made to a limited audience and does not constitute a violation of E.R. 8.2.

COUNT TWO, SECTION III. THE ALLEGATION REGARDING THE VIDEO TAPE PRESENTATION

28. The Hearing Officer finds there is not clear and convincing evidence Mr. Hyams violated E.R.s 1.1, 1.3, 3.1, 3.2, 3.3 (a)(1), 3.4 (c), 4.1, 8.4 (c), Rule 41 (e) of the Arizona Supreme Court, or Rule 53 (c) of the Arizona Supreme Court. It may be unorthodox to present a video to the court that was previously presented at a settlement conference; however, since the judge consented to see the video, there is no rule prohibiting such a presentation. Contrary to the allegations, the video is not falsified or otherwise doctored. The court made no finding that the video was somehow falsified. No ethical violations are implicated.

COUNT TWO, SECTION IV. THE ALLEGATION REGARDING GENERAL MISCONDUCT AND THE SANCTION OF $750,000

29. Judge Davis sanctioned Mr. Hyams in the amount of $750,000. The trial court may exercise its discretion to sanction a lawyer. However, when a trial court does so, it does not necessarily mean there has been an ethical violation. There is not clear and convincing evidence that Mr. Hyams engaged in a course of misconduct that rises to the level of ethical violations, except where previously noted. The Hearing Officer rejects the allegations of Count Two, Section IV.

PROPORTIONALITY

The objective of discipline proceedings is not to punish the lawyer, but to deter future misconduct and protect the public, the profession and the administration of justice. *Peasley*, 208 Ariz. 27, 35, 90 P.3d 764, 772 (2004). In imposing discipline it is appropriate to consider the facts of the case, the ABA Standards for Imposing Lawyer Sanctions and discipline imposed in similar cases. It is appropriate to consider the duty violated, the lawyer's mental state, actual or potential injury caused by the misconduct, and the existence of aggravating or mitigating factors.

As to Count One, Mr. Hyams violated E.R. 1.1. As to Count Two, Section I., H., Mr. Hyams violated E.R. 1.3. As to Count Two, Section I.,I., Mr. Hyams violated E.R. 1.3. As to Count Two, Section I., K., Mr. Hyams violated E.R. 1.1.

Based upon these violations, the appropriate ABA standards to consider are 4.4 (lack of diligence), 4.5 (lack of competence), 9.22 (aggravating factors) and 9.3 (mitigating factors)

With regard to the violation of E.R.1.1 in Count One, ABA Standard 4.53 is most applicable to this case. "Reprimand is generally appropriate when the lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client."

Here Mr. Hyams did not understand the Rules of Civil Appellate Procedure. As a result the defendants moved to dismiss his special action regarding punitive damages. The Court of Appeals assessed attorney fees. The dismissal of the appeal was detrimental to Mr. Hyams' clients at an important time in the case. However, the issue in question, whether punitive damages could go to the jury, is an issue that has been preserved on appeal from the final judgment. The issue is currently pending in the Court of Appeals, making it impossible to determine if his clients have been harmed.

With regards to the violations of ER 1.3 in Sections H. and I. of Count Two, Section I., the appropriate ABA standard is 4.43. Mr. Hyams was not diligent regarding the expert witness and caused some injury to his clients as the expert was stricken. His failure to file an amended complaint caused potential injury to his client. Both of these injuries however are speculative due to the pending appeal. Mr. Hyams violation of E.R. 1.1 in Count Two, Section I., K., for filing a premature appeal did not result in harm to his clients since a timely appeal was filed once there was a final order.

The Hearing Officer finds two aggravating factors:

a. 9.22 (d) (multiple offenses); and

b. 9.22 (i) (substantial experience in the practice of law)

Since all of the offenses occurred in one case out of the thousands that Mr. Hyams

has handled, this Hearing Officer does not find a "pattern of misconduct". Mr. Hyams has practiced over 30 years without having similar problems in other cases.

The Hearing Officer finds the following mitigating factors:

a. 9.32 (a) (absence of prior disciplinary history). Mr. Hyams recalled a letter of reprimand 30 years ago in a matter not similar to this case.

b. 9.32 (b) (absence of a dishonest or selfish motive). There is absolutely no evidence of a dishonest or selfish motive on Mr. Hyams' part.

c. 9.32 (g) (character or reputation). Several witnesses testified as to Mr. Hyams good character and reputation and his honest dealings with them in other cases. Prior to this case, Mr. Hyams had been certified by the State Bar of Arizona as a certified specialist in personal injury and wrongful death, which was a testament to his good character and reputation.

d. 9.32 (k) (imposition of other penalties or sanctions). Mr. Hyams was sanctioned several times by the Court of Appeals and the trial court for matters that are the subject of the Bar Complaint. The trial court sanctioned Mr. Hyams $750,000 for the overall handling of the Abad case. The evidence was uncontroverted that these sanctions were financially and otherwise devastating to Mr. Hyams.

The Hearing Officer looked without success for a case similar to this one. Most of the cases involving lack of diligence and competence involve an attorney failing to act in a variety of cases. Here the violations found are in a single, difficult, complex, piece of litigation lasting over a period of several years. Any injury to the clients is still

speculative since the matter is pending on appeal. And while a great number of allegations were made, only a few were proven by the State Bar by clear and convincing evidence.

In *In re Chard*, 180 Ariz. 1, 881 P.2d 333, the Supreme Court determined that a censure with two-year probation with restitution was appropriate. The attorney demonstrated a lack of competence and diligence. He failed to adequately communicate with clients, allowing a two-year statute of limitations to expire in two matters, failed to communicate the speculative nature of another claim to the client, and failed to ensure that pleadings involving a potential judgment for attorney fees and costs were sent to the client's correct address. There were multiple aggravating factors, including multiple offenses and indifference to making restitution.

In *In re O'Brien-Reyes* , 177 Ariz. 362, 868 P.2d 945 (1994) the attorney failed to file a timely notice of appeal of a client's DUI conviction, failed to keep the client apprised of the status of the case, failed to communicate adequately with another client and even failed to cooperate with the State Bar's investigation. The attorney had a prior disciplinary history, but also had mitigating circumstances including personal and emotional problems and an accident and illness. The court determined that this case warranted a censure and one-year probation.

In *In re Sadacca*, 172 Ariz. 173, 836 P.2d 386 (1992) the lawyer failed to preserve the client's property, consisting of client's checks, failed to communicate with the clients for eight months, and failed to diligently pursue a motion to set aside a default judgment. The Supreme Court determined that probation in addition to censure was appropriate given the aggravating factor of prior discipline and the mitigating factors of

absence of selfish or dishonest motive, full cooperation with disciplinary proceedings and remorse.

Also instructive is *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1983). In that case the attorney brought numerous frivolous lawsuits over a decade-long period arising out of the breakup of his law firm. Not only were the actions frivolous, but Mr. Levine's motives in bringing the actions were improper. Mr. Levine was sanctioned many times by many courts at every judicial level. The commission gave Mr. Levine a three-year suspension. However the Supreme Court found this discipline too harsh. It held a six-month suspension with probation was appropriate.

The cases of Deborah Abernathy (SB-05-0171-D) and John T. Banta (SB-05-0003-D) are instructive. Both cases resulted in censure and probation. Abernethy represented her client in a domestic dispute. An hour before a scheduled hearing Abernathy called the judge's JA and said she would not be appearing because she was not prepared and her client had not provided her sufficient information. The judge noted that Abernathy did not move to continue or vacate the hearing and the hearing went on as scheduled. The judge referred the matter to the State Bar and scheduled an OSC hearing. She failed to appear At the OSC hearing. She was held in contempt for failure to appear, failure to follow proper procedures, and failure to keep her client informed. Banta repeatedly used profanity in a number of cases. He made spurilous claims against opposing counsel and called a ruling by the judge in a case "crazy". He fought with the judge over the phone and was held in contempt.

Unlike many of the cases discussed by the State Bar, the instant case arises out of a single litigation, and there is no evidence of any issues of competence, diligence, or

other ethical issues in Mr. Hyams 30 year history of litigation. The mitigating circumstances in this case are overwhelming. The sanction imposed by the trial judge was unprecedented. It had a devastating effect on Mr. Hyams, his family and his practice. It is also important to consider that the *Abad* case is still on appeal. It is impossible to estimate if there is any harm to the clients until the matter is resolved.

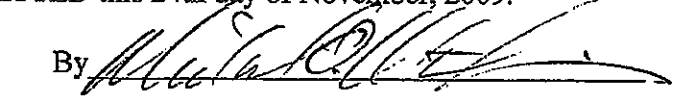
RECOMMENDATION

The State Bar has proved by clear and convincing evidence that Mr. Hyams violated E.R.s 1.1 and 1.3.

Given all the facts and circumstances of this case, including the aggravating and mitigating factors, the Hearing Officer recommends censure followed by three years probation. The probation should include the following terms:

1. Mr. Hyams must take 20 hours of CLE approved by the State Bar regarding appellate procedure.
2. Mr. Hyams must report to the State Bar any case that is pending on appeal or which goes on appeal.
3. Mr. Hyams must associate with experienced appellate counsel for any case on appeal.

RESPECTFULLY SUBMITTED this 24th day of November, 2009.

By 

Michael O. Wilkinson, Hearing Officer 6T

Original filed with the Disciplinary Clerk

This 24th day of November, 2009

Copies of the foregoing mailed

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November 25, 2009