BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **DONNA PLATT,** **Bar No. 012317** RESPONDENT.	Nos. 09-1182, 09-1202 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 12, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed April 12, 2010, recommending a six month and one day suspension, two years of probation with the State Bar's Member Assistance Program ("MAP") and Law Office Management Assistance Program ("LOMAP") with specific terms and conditions to be determined upon reinstatement, restitution, and costs.

On May 6, 2010, Respondent filed an untimely Notice of Appeal. On May 11, 2010, the State Bar filed an Objection to Notice of Appeal and Motion to Strike Same. Pursuant to Rule 57(l),[1] the Commission granted the State Bar's Motion. *See* Commission Order filed May 26, 2010. The matter was noticed and set for executive session. On June 11, 2010, at approximately 4:55 p.m., the day before the Disciplinary Commission's session, Respondent filed for the Hearing Officer's consideration, a pleading entitled "Respondent's Request for Leave to File a Brief Before the Disciplinary Commission." The Disciplinary Commission was advised of Respondent's 11th hour request, but did not

[1] Rule 57(l), Ariz.R.Sup.Ct., provides that the failure of a party to appeal within the time provided *shall* constitute consent to the hearing officer's recommendation.

consider it, as it was not properly before the Commission.

Decision

Having found no facts clearly erroneous, the seven members[2] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for a six month and one day suspension, two years of probation (MAP and LOMAP) upon reinstatement with specific terms to be determined at the time of reinstatement, restitution, and costs of these disciplinary proceedings.[3] The amount of restitution and terms of probation are as follows:

Restitution

1. Respondent shall pay Ms. Gisela Glassel $10,157.47 from the trust account (Mr. Stephenson's account). If the Medicare lien cannot be settled without the interest accrued after March 2008, then Respondent should pay out of Mr. Stephenson's trust account the interest from March 2008 until June 1, 2009. If Medicare insists on any interest after June 1, 2009, Respondent shall pay this sum but may not use funds from Mr. Stephenson's trust account. All these sums should be paid within 30 days[4] of the Judgment and Order.[5]

2. Respondent shall pay Mr. Dyer McCarl $14,724.23 plus any interest accrued in the account where Respondent was holding the money. This sum should be paid within 30 days of the final Judgment and Order.

Terms of Probation

1. Respondent shall be placed on probation upon reinstatement for a period of two years, with the specific terms to be decided upon reinstatement. In addition to the terms imposed on reinstatement, the probation terms shall include MAP and LOMAP and shall also include the following:

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

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[2] Commissioners Belleau and Horsley did not participate in these proceedings.
[3] A copy of the Hearing Officer's Report is attached as Exhibit A.
[4] The Hearing Officer recommended 90 days; however, the Commission determined that 30 days is more appropriate given the ongoing urgent medical needs of Ms. Glassel.
[5] *See* Hearing Officer's Notice of Errata filed April 13, 2010.

3. 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.

RESPECTFULLY SUBMITTED this 28th day of June, 2010.

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

Original filed with the Disciplinary Clerk
this 28th day of June, 2010.

Copy of the foregoing mailed
this 28th day of June, 2010, to:

Donna Platt
Respondent
125 E. Coronado Road
Phoenix, AZ 85004-0001

and

Donna Platt
Respondent
2402 E. Montebello Avenue
Phoenix, AZ 85016

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

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

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

by

/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,	Nos. 09-1182; 09-1202
DONNA PLATT, **Bar No. 012317** Respondent.	**HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A complaint was filed on September 26, 2009. The Hearing Officer was assigned on September 30, 2009. An answer to the complaint was filed on November 6, 2009. The Bar filed a Motion for Leave to File a First Amended Complaint on December 15, 2009. On December 29, 2009 the Hearing Officer granted the Motion to File the Amended Complaint. On January 21, 2010 Respondent filed an answer to the First Amended Complaint. The State Bar filed two Unilateral Pre-Hearing Statements because Respondent did not return a completed response to the State Bar's draft by February 10, 2010 and did not correspond with the State Bar about the Statement after February 10, 2010. The hearing was on February 22, 23 and 24, 2010. The State Bar filed its Post-Hearing Memorandum on March 29, 2010. Respondent did not file a Post-Hearing Memorandum.

FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice on October 21, 1988. (TR 22:24)

COUNT ONE (File No. 09-1182/Glassel)

2. On or about November 18, 2003, Gisela Glassel ("Ms. Glassel") retained Respondent to represent her in a claim for injuries stemming from a hip replacement surgery that Ms. Glassel had previously received. (TR 284:24 through 285:8)

3. Respondent associated California counsel and prosecuted the case in California with associated counsel. (TR 286:4; 356:9-19)

4. In or about August of 2006, Respondent and associated counsel settled Ms. Glassel's case with Ms. Glassel's consent for $100,000.00. (TR 287:25; 357:22)

5. Respondent and associated counsel disbursed $23,115.04 to themselves for costs and expenses. (TR 288:22, Exhibit 4)

6. Respondent and associated counsel disbursed $28,952.69 to themselves for attorneys' fees. (TR 289:8, Exhibit 4)

7. Respondent and associated counsel disbursed $18,969.51 to Ms. Glassel as her share of the settlement. (TR 289:21 Exhibit 4)

8. Respondent and associated counsel retained the remaining $28,962.76 to pay a Medicare lien. (TR 289:17, Exhibit 4)

9. In or about September of 2006, Respondent and associated counsel discovered an error in the Medicare lien amount and disbursed an additional $5,310.91 to Ms. Glassel, bringing the total amount still retained to pay the Medicare lien down to $23,651.85. (TR 293:11 through 294:15, Exhibit 11)

10. Respondent informed Ms. Glassel that she would work with Medicare to negotiate a hardship reduction in the lien amount. (TR 337:19)

11. On or about March 18, 2008, Medicare offered to reduce the lien amount to $11,250.46. (TR 303:20 through 306:7, Exhibit 20, Exhibit H)

12. Medicare's notice indicated that payment of the new amount was due by April 11, 2008, and that 12.625% interest would be assessed on a monthly basis, dating back retroactively to August of 2006. According to Medicare interest had already accrued totaling $2248.92. (Exhibit H)

13. Respondent did not pay the Medicare lien. (TR 362:15-18)

14. As early as July 3, 2007 Ms. Glassel wrote to Respondent asking for a resolution of this matter. She stated "now, I hope this will be the final communication and get it desolved. I am sure you feel the same." (TR 290:20 through 291:15, Exhibit 7) In letters of July 21, 2007, December 12, 2007, January 11, 2008, February 26, 2008, May 27, 2008 and July 17, 2008 Ms. Glassel repeatedly asked Respondent about progress in satisfying the Medicare lien. (TR 292:16 through 293:11, Exhibit 8, TR 298:8-24, Exhibit 13, TR 298:8 through 300:7, Exhibit 14, TR 301:14 through 302:10, Exhibit 17, TR 302:21 through 303:13, Exhibit 19 and TR 303:20 through TR 306:7 Exhibit 20)

In her May 27, 2008 letter Ms. Glassel stated, "I have been very patient and I feel you want to finish my case. It is going on too long for so little. I know you did your best." In the July 17, 2008 letter she stated, "I think it is time to settle all of this."

15. Ms. Glassel wrote to Respondent on August 8, 2008. She stated, "I think it is time to get my case desolved (sic) ... I need to replace my brace, but I can't because Medicare won't pay for it. Please let me know." (Exhibit 21) This letter becomes more significant when Respondent testified that she was trying to resolve the lien with Medicare. Respondent blamed the difficulty in dealing with Medicare for the delay in resolving the lien. (TR 465:2) Respondent stated that from the time she first knew that her client was not receiving medical care because the lien was not satisfied,

Respondent should have resolved the matter. Respondent testified that in June 2009 was the first notice Respondent had that her client was not getting medical care. (TR 472:22 through 473:9) Respondent stated, "That may have been the first day that she told me that she wanted me just to go pay the whole thing." (TR 473:2)

Respondent knew as early as August 2008 that her client was desperate to resolve the Medicare lien so that the client could receive medical care and receive the balance of the funds that were being held in the trust account of co-counsel Mr. Stephenson. In her August 8, 2008 letter Ms. Glassel stated that Medicare would not pay to replace her brace.

In her August 22, 2008 letter Ms. Glassel said, "I know you have other clients, but is it time to get my case to bring it to an end? I need a new brace and also make an appointment with Dr. Firestone. I can't do either, because Medicare want the refund of $11,250.46 which they agreed to. I called and wrote (you have a copy) to Medicare. They say, they're waiting on you to acknowledge. Again -- Please." (Exhibit 22)

In the September 5, 2008 letter Ms. Glassel wrote, "I can't even make an Doctor's appointment or get a needed new brace." (Exhibit 23)

16. In her letters Ms. Glassel referred to phone calls she had made to Respondent that were not returned. (Exhibit 14)

17. Respondent was able to produce only two letters from her office to Medicare. (Exhibits 15 and 16) In the letter of January 24, 2008 Respondent requested that unrelated charges of $597.41 be removed from the $23,651.95 that Medicare was claiming and that any interest and penalties be waived. (Exhibit 15)

The letter of February 14, 2008 refers to an appeal letter of September 12, 2007 for a lien waiver and compromise of the amount owed to Medicare for nearly two years. Respondent is asking

for a status report on an expedited basis. (Exhibit 16) Up to this point in time Respondent seems to have a good argument that she was trying to resolve this matter. However, there is almost no evidence that after Medicare's position was stated on March 18, 2008 that the lien amount was reduced to $11,250.46 plus interest, that Respondent made reasonable efforts to finally resolve this lien. Respondent testified that she was trying to get Medicare to waive the entire lien by a hardship procedure. (TR 466:13)

There were some blank Social Security Administration forms that Respondent claimed were necessary for the hardship waiver, but the forms though marked as Exhibit 27, were not admitted in evidence. However, when Respondent asked Ms. Glassel on cross examination about purported conversations they had about the hardship waiver, Ms Glassel answered that she did not recall such a conversation. (TR 333:2).

If Respondent had been trying to get Medicare to eliminate the $11,250.46 lien plus interest, why didn't she respond to Ms. Glassel's many letters with a letter saying, "Ms. Glassel, the delay we are experiencing in resolving your lien with Medicare is due to the conversation we had when you agreed with me that we would not pay even the compromised amount of $11,250.46 plus interest, but we would continue to try get a hardship waiver and ask Medicare to agree to eliminate the whole lien."

There is no evidence that Respondent in writing took this position with her client. In addition, there is no evidence that after March, 2008, Respondent did anything with Medicare. If Respondent is given the benefit of the evidence that Ms. Glassel did not want to pay interest on the $11,250.46, until at least Ms. Glassel's letter of June 1, 2009, two problems still remain with Respondent's inaction. First, Respondent knew in August, 2008 that Ms. Glassel was suffering without medical care because of the unresolved lien. Even if Ms. Glassel did not want to pay interest, Respondent

should have been actively contacting Medicare to see if Medicare would stop demanding the interest. If Medicare continued to insist on the interest, then Respondent should have promptly reported that decision to her client and then let Ms. Glassel decide if she wanted to accept Medicare's offer. This simply was not done. Second, after the June 1, 2009 letter from Ms. Glassel when even Respondent recognized that Ms. Glassel was giving up and begging that Respondent pay Medicare the $11,250.46 plus interest, there is no evidence that Respondent did anything with Medicare for Ms. Glassel.

18. Ms. Glassel sent additional letters on August 22, 2008, September 5, 2008, October 28, 2008, November 20, 2008, and in June 1, 2009 in which she begged Respondent to resolve the lien. (TR 307:24 through 313:10, Exhibits 22-26) Respondent asserted that Ms. Glassel wanted to resolve the lien for $11,250.46, but that Ms. Glassel consistently refused to pay the interest that Medicare had required. (TR 466:21-24) There is support in the record for Respondent's position.

In the September 2, 2008 letter from Ms. Glassel referred to in paragraph 15 above, Ms. Glassel ended with this request, "Will you and can you finalize the offer they made in March '08 for $11,250.46 without interest." (Exhibit 23) On cross examination Ms. Glassel stated she wanted Respondent to finalize the lien to pay Medicare $11,250.46, but with no interest. (TR 351:9) But by June 1, 2009, Ms. Glassel was so desperate, she wrote to Respondent, "I have not heard from you since I received your letter from April 6th 2009 where you promised me priority within that week. Since then I left you 4 messages and this is my second letter. I also wrote and called Mr. Stephenson. Have not heard either of you. I wonder, after all these years if the money is still in 'Trust Account'! Again been over one year since Medicare was going to settle for $11,250.46 plus interest. Why have you not pay them? I pleaded with you that I need a new brace and a Doctors appointment. I will do

this things and mail you the bill. I don't understand your reason why you won't pay them. I hope this will be my last plea." (Exhibit 26)

In attempting to clarify, the Hearing Officer asked Ms. Glassel, "Did you write her a letter instructing her, never mind about that, I've changed my mind and I, Gigi, would like you to pay the 11,250, plus the interest, and give me what's ever left? ... Tell her never mind, don't discuss it anymore with Medicare, don't delay in my case anymore, don't sue them over the interest, just pay them the 11,250, plus the interest, and give me what's left?" Ms. Glassel answered, "That's why I wrote all those letters, just pay." (TR 348: 25 through 349:11)

Respondent seems to be saying that the first time her client Ms. Glassel appeared to want to pay the $11,250.46 with interest would have been in the letter of June 1, 2009. (Exhibit 26) It is apparent from this record that Ms. Glassel did not want to pay interest. However, the resolution of the lien took so long and caused Ms. Glassel to be without needed medical care, that finally she was even willing for the interest to be paid. Of more significance is the fact that even after June 1, 2009 there is no evidence that Respondent made any effort to contact Medicare and agree on behalf of her client to pay at least some interest to finally resolve the matter. Her co-counsel Mr. Stephenson testified that it was Respondent's responsibility to settle the liens. (TR 357:9)

As of the date of the hearing, the interest has accrued on the Medicare lien in the amount of $5089.56. (TR 315:12-21)

19. On or about June 25, 2009, Ms. Glassel submitted a charge regarding Respondent's conduct to the State Bar. (Exhibit 28)

20. On or about June 29, 2009, the State Bar forwarded a copy of Ms. Glassel's bar charge to Respondent at her address of record along with a request that she provide a response within 20 days. (Exhibit 29)

21. Respondent failed to provide a response to Ms. Glassel's bar charge or the State Bar's letter. (Exhibit 32)

22. On or about July 9, 2009, Ms. Glassel submitted supplemental information regarding her bar charge to the State Bar. (Exhibit 30)

23. On or about July 13, 2009, the State Bar forwarded Ms. Glassel's supplemental information to Respondent at her address of record. (Exhibit 31)

24. On or about July 29, 2009, the State Bar sent a follow-up letter to Respondent at her address of record as well as at her listed email address advising her of her failure to respond to the bar charge, reminding her of her obligations pursuant to Rule 53 Ariz. R. Sup. Ct., and requesting a response to the bar charge within 10 days. (TR 389:8-20, 391:3-12, Exhibits 32 and 33)

25. Respondent failed to provide a response to Ms. Glassel's bar charge, the State Bar's letters or emails. (TR 404:17 through 405:10)

26. On or about August 10, 2009, Staff Bar Counsel Thomas McCauley left a voicemail for Respondent at her listed telephone number reminding her of the pending matter and noting her failure to respond to the bar charge. (TR 405:11 through 406:1)

27. On or about August 12, 2009, the State Bar sent another letter to Respondent at her address of record noting her failure to respond to the bar charge, noting the seriousness of the allegations, and requesting she immediately provide a response. (TR 392:6 through 393:6)

28. The August 12, 2009 letter from the State Bar was also emailed to Respondent at her listed email address and faxed to Respondent at her listed fax number. (TR 397:16-25, Exhibit 167)

29. An email "read receipt" attached to the August 12, 2009 email to Respondent indicated that the email was read on August 13, 2009. (TR 393:9 through 396:15, 412:8-23)

30. Respondent provided no response to the bar charge or the State Bar's letters, emails, fax or phone call. (TR 404:17 through 405:10)

COUNT TWO (File No. 09-1202/McCarl)

THE PERSONAL INJURY CASE

31. On or about October 21, 2005, Dyer McCarl ("Mr. McCarl") retained Respondent to represent him in a suit to recover damages for injuries he suffered in a car accident ("the PI case"). (TR 184:2-14, Exhibit 45)

32. On or about April 10, 2008, Respondent settled the PI case with Mr. McCarl's permission for $100,000.00. (TR 184:15, Exhibit 68)

33. Respondent disbursed $1,618.94 to herself for costs. (Exhibit 68)

34. Respondent disbursed $33,333.33 to herself for fees. (Exhibit 68)

35. Respondent disbursed $45,638.95 to Mr. McCarl as his share of the settlement. (Exhibits 67, 68)

36. Respondent retained $19,408.78 of the settlement to pay outstanding liens. (Exhibit 68)

37. In or about October 27, 2008, Respondent paid a Scottsdale Healthcare lien in the reduced amount of $700, bringing the remaining balance she still retained down to $18,708.95. (TR 235:11-20, Exhibit 117)

38. On June 5, 2008 Respondent wrote to Deseret Family Medicine requesting that Dr. Swanson either waive or reduce his $350 bill. (TR 126:19, Exhibit 74)

39. There was one other outstanding PacifiCare medical lien for approximately $5,400.00 that Respondent did not pay because Mr. McCarl negotiated directly with ACS Recovery Services

for the lien to be written off by the insurer. (Exhibit 66, DP000016, TR 186:3-18, Exhibit 144, DP000147, TR 188:1-23)

40. Respondent paid no further liens, nor did she disburse the remaining $18,708.95 to Mr. McCarl. (TR 186:19-22)

41. Throughout the summer of 2008, Mr. McCarl made numerous requests to Respondent that she release the funds being held in trust. (TR 186:22 through 187:1)

42. On or about October 20, 2008, Mr. McCarl met with Respondent and asked about the money still being held in Respondent's trust account from the PI case, and Respondent told Mr. McCarl that she may need the funds to continue litigation in the Malpractice case (discussed below) as she was "broke" and had no money to pay the costs stemming from the Malpractice case. (TR 187:2-9, Exhibit 148)

43. Mr. McCarl informed Respondent at this meeting that he did not want any of the funds from the PI case to be used to pay bills on the Malpractice case. (TR 187:7, Exhibit 148)

44. On or about February 5, 2009, Mr. McCarl sent a letter to Respondent again demanding that she release to him the funds being held. (Exhibit 132)

45. On or about February 9, 2009, Mr. McCarl sent a letter to Respondent informing Respondent that he was not authorizing any further expenditures and that he was again demanding return of the funds. (Exhibit 133)

46. On or about February 10, 2009, Mr. McCarl visited Respondent at her office and requested she disburse the funds she was holding in trust to him. (Exhibit 163, SBA000049)

47. Respondent told Mr. McCarl that she would get back to him within 3 to 4 days. (Exhibits 138, 141, SBA 000034)

48. Respondent did not contact Mr. McCarl, and he began leaving her daily phone messages as of February 16, 2009. (Exhibits 138, 141)

49. On or about February 19, 2009, Mr. McCarl sent a letter to Respondent complaining that she had not gotten back to him and renewing his demand for disbursement of the funds. (Exhibit 138)

50. On or about February 23, 2009, Mr. McCarl sent a letter to Respondent complaining of Respondent's failure to communicate with him in a timely manner and failure to produce the funds being held in trust. (Exhibit 141)

51. On or about March 27, 2009, Mr. McCarl sent a letter to Respondent demanding the monies being held in trust be disbursed to him immediately. (Exhibit 147)

52. Respondent never disbursed the remaining funds to Mr. McCarl and Respondent has not interpleaded the funds. (TR 200: 13-15)

53. The last time Respondent spoke with Mr. McCarl was May, 2009. (TR 132:12-21, 200:19-22) Respondent is still holding the remaining funds from the personal injury case because she is claiming that she and Mr. McCarl have unresolved issues over the $35,000 to $40,000 of costs Respondent advanced on the medical malpractice case. (Exhibit 173, pre-hearing deposition of Respondent, page 134:2-19)

54. Respondent indicated she was also holding Mr. McCarl's P.I. funds "to cover [herself]" from liability stemming from the Malpractice case, as there was a $3,000 sanction issued in that case and Respondent is unsure whether that sanction is against her or Mr. McCarl. (Exhibit 173, pre-hearing deposition of Respondent, page 134:2 through page 135:4)

In the malpractice case Respondent on behalf of Mr. McCarl sued several defendants. One of these defendants LabCorp filed a Request for Admissions. Respondent filed an

objection to the Admissions. LabCorp filed a motion to deem the requests admitted. LabCorp's motion was granted. The court also granted LabCorp's request for its expenses (attorney fees) in bringing the motion. The court did not hold a separate hearing on whether Respondent or her client Mr. McCarl was responsible for paying these expenses.

The award of expenses was for $5441. The court's order in this matter did not specify whether Respondent or Mr. McCarl should pay the sum. (TR 28:24 through 33:14) Respondent testified that at some time during the third round of summary judgment motions in the malpractice case she became concerned that the $5441 sanction was against her. (TR 33:19 through 34:16, Exhibit 46) Respondent also stated that she received a letter from counsel for LabCorp dated May 19 2008 in which the lawyer was following up on not having been paid the $5441. Counsel for LabCorp was asking for a check. (TR 34: 18 through 35:23, Exhibit 71)

55. Respondent informed Mr. McCarl that she would not release any of the funds to him until there was a settlement agreement entered into that sufficiently protected Respondent from liability for the sanctions. (Exhibit 173, page 134:2 through page 135:4)

THE MALPRACTICE CASE

56. Mr. McCarl retained Respondent in 2004 to represent him in a malpractice suit to recover damages ("the Malpractice case"). (TR 26:7-17)

57. On or about November 3, 2008, the Court entered an order granting defendants' motions for summary judgment and granting judgment against Mr. McCarl. (Exhibit 118) On February 12, 2009 the court signed a judgment in favor of the defendants and awarding the four defendants judgments for costs against Mr. McCarl that totaled $21,375.85. (Exhibit 136)

58. On or about March 14, 2008, several defendants in the Malpractice case filed motions for summary judgment. (TR 39:3-10)

59. Respondent's deadline for response to the motions for summary judgment was April 14, 2008. (TR 38:20)

60. Rather than respond, Respondent requested an extension of the deadline, and on April 1, 2008, the Court granted Respondent an extension to June 20, 2008. (TR 41:13-25, 42:3-10, 42:19 through 44:3)

61. On or about April 8, 2008, defendant Lopez in the Malpractice case filed a motion for summary judgment. (Exhibit 118, DP001975)

62. Respondent's deadline for response to the Lopez motion for summary judgment was May 8, 2008. (Exhibit 118, DP001975)

63. Respondent did not file a response to the Lopez motion for summary judgment. Exhibit 118, DP001975)

64. Respondent did not notify Mr. McCarl that she was not filing a response to the Lopez motion for summary judgment. (TR 164:16 through 167:5, Exhibit 88)

65. On or about June 9, 2008, Respondent requested another continuance, until July 11, 2008, in which to file a response to the original motions for summary judgment. (TR 41:13-25) Respondent did not receive a ruling on this motion. She attributes the lack of a ruling to her motion falling between the cracks of a calendar transfer from one judge to another in or about June 2008. (TR 49:14-20)

66. Respondent failed to file a response by either the Court established June 20, 2008 deadline or her own self-imposed July 11, 2008 deadline. (TR 51:10, 51:15 through 52:24)

67. On or about July 16, 2008, Respondent requested another continuance, requesting until either August 1, 2008 or August 15, 2008 to file her response. (TR 52:25 through 55:13)

68. The Court granted Respondent's request in early August, 2008, again extending her time to respond, this time to August 15, 2008. (TR 66:8-13, Exhibit 89)

69. Respondent did not file a response by the August 15, 2008 deadline. (TR 67:8 through 68:6) Respondent testified that she did not receive the Court's ruling until August 12, 2008. (TR 66:8-23)

70. On or about August 18, 2008, Respondent requested another extension until either "August 2, 2008" [SIC] or September 1, 2008. (TR 68:9-25, Exhibit 92)

71. Respondent did not file a response by her own self-imposed deadline of September 1, 2008. (TR 81:6 through 83:25, Exhibit 108, page 15 or DP000502)

72. Respondent ultimately began filing responses to the motions for summary judgment on or about September 5, 2008. (TR 80:4-11, Exhibit 100)

73. On or about September 12, 2008, the Court denied Respondent's request for extension. (Exhibit 108, page 42 or DP000529)

74 After two evidentiary hearings on the matter, the Court struck Respondent's responses. (Exhibit 108, page 42 or DP000529)

75. On or about October 20, 2008, Respondent met with Mr. McCarl. She did not inform him of her failure to file a response to the motions for summary judgment, of her multiple requests for extensions, or of the Court's denial of her most recent request for extension. (Exhibit 148)

76. At the meeting, Mr. McCarl asked Respondent about the money still being held in her trust account from the PI case, and Respondent told Mr. McCarl that she may need the funds to

continue litigation in the Malpractice case as she was "broke" and had no money to pay the costs stemming from the Malpractice case. (Exhibit 148)

77. Mr. McCarl informed Respondent at the meeting that he did not want any of the funds from the PI case to be used to pay bills on the Malpractice case. (Exhibit 148)

78. On or about November 3, 2008, the Court entered an order granting defendants' motions for summary judgment.

79. On or about November 18, 2008, defendants in the Malpractice case made an offer to Mr. McCarl, through Respondent, not to execute on the judgment against him if he would sign a release stating that he would not appeal the lower Court's ruling. (Exhibit 120)

80. Respondent told Mr. McCarl that she felt she could get the judge to reverse his ruling, and Mr. McCarl told Respondent that he would defer to her decision as to what to do. (Exhibit 148, TR 182:7-10)

81. Respondent did not immediately file a motion for reconsideration or an appeal of the November 3, 2008 order. (Exhibit 148, TR 182:7-10)

82. Respondent did not notify Mr. McCarl that she had not filed a motion for reconsideration or an appeal of the Court's order. (Exhibit 148, TR 82:7-10)

83. On or about January 21, 2009, Respondent called Mr. McCarl

and indicated that she needed to pay Dr. Coulsen, an expert witness she had retained in the Malpractice case. (TR 229:3- through 232:9)

84. Mr. McCarl gave Respondent permission to pay Dr. Coulsen, but requested a copy of Dr. Coulsen's bill in order to verify the amount. (TR 229:3 through 232:9)

85. Respondent did not provide a copy of Dr. Coulsen's bill to Mr. McCarl. (TR 232:3)

86. Shortly after the conversation of January 21, 2009, Respondent paid Dr. Coulsen $3,600.00 using the funds she still retained in her trust account from the PI case. (Exhibit 133)

87. On or about February 9, 2009, Mr. McCarl sent a letter to Respondent complaining that she had paid Dr. Coulsen's bill from the trust funds belonging to the PI case and that she had not sent him a copy of Dr. Coulsen's bill. (Exhibit 133)

88. In his letter, Mr. McCarl informed Respondent that he was not authorizing any further expenditures and that he was again demanding return of the funds. (Exhibit 133)

89. On or about February 10, 2009 and March 5, 2009, Mr. McCarl visited Respondent at her office and informed her that he did not wish to appeal the ruling, as he wanted to take advantage of the settlement offer submitted by the defendants. (Exhibit 148)

90. On or about March 2, 2009, Mr. McCarl went to the courthouse and obtained copies of the case history and minute entries. (Exhibit 169)

91. Mr. McCarl discovered, for the first time, the truth about Respondent's multiple continuance requests and failure to respond to the motions for summary judgment. (TR 173:10 through 175:9, 182:22 through 183:8, Exhibits 148, 169)

92. On or about March 5, 2009, Mr. McCarl visited Respondent at her office and reiterated that he did not wish to appeal the ruling, as he wanted to take advantage of the settlement offer submitted by the defendants. (Exhibit 148)

93. On or about March 13, 2009, Respondent called Mr. McCarl and informed him that she was going to file an appeal of the Court's order. Mr. McCarl again told Respondent that he did not want to file an appeal. (Exhibit 148)

94. On or about March 13, 2009, Respondent filed a Notice of Appeal with the Court. (Exhibit 146)

95. On or about March 16, 2009, Respondent called Mr. McCarl and informed him that he needed to get a "cost bond." (Exhibit 148)

96. Mr. McCarl asked Respondent what the "cost bond" was for, and Respondent told Mr. McCarl that she would get back to him with that information. (Exhibit 148)

97. Respondent was referring to the bond that must be posted in order to pursue an appeal.

98. On or about March 24, 2009, Respondent emailed Mr. McCarl with paperwork concerning the "cost bond."

99. On or about March 26, 2009, Mr. McCarl informed Respondent that he would not obtain a "cost bond." (Exhibit 147)

100. On or about March 27, 2009, Mr. McCarl sent Respondent a letter in which he reiterated his desire not to appeal the ruling, but rather to take advantage of the release offered by the defendants. (Exhibit 147)

101. On or about April 1, 2009, Mr. McCarl sent another letter to Respondent reiterating that he did not want to file an appeal, but rather wanted to take advantage of the release offered by defendants. (Exhibit 148)

102. On or about April 3, 2009, Respondent filed a Motion for Stay of Proceedings to Enforce Judgment Pending Appeal and Motion to Set Amount of Bond with the Court, asking that the Court set a $25,000.00 supersedeas bond pending outcome of the appeal. (Exhibit 149)

103. On or about April 23, 2009, Respondent filed a Notice of Agreement to Dismiss Appeal with the Court. (Exhibit 160)

104. On or about June 25, 2009, Mr. McCarl contacted opposing counsel and worked directly with opposing counsel on executing the release. (TR 183:13 through 184:1)

THE STATE BAR INVESTIGATION

105. On or about June 29, 2009, Mr. McCarl submitted a charge regarding Respondent's conduct to the State Bar. (Exhibit 163)

106. On or about July 3, 2009, Mr. McCarl submitted supplemental information regarding his bar charge to the State Bar. (Exhibit 165)

107. On or about July 17, 2009, the State Bar forwarded a copy of Mr. Mr. McCarl's bar charge and supplemental submission to Respondent at her address of record along with a request that she provide a response no later than August 10, 2009. (Exhibit 166)

108. The State Bar's July 17, 2009 letter also requested Respondent provide several specific pieces of information by August 10, 2009, including, but not limited to, a copy of the client ledger for Mr. McCarl, an explanation of what account Mr. McCarl's remaining funds were being held in, a copy of Dr. Coulson's bill, a list of all liens and costs in the PI case and a copy of the client fee agreements. (Exhibit 166)

109. Respondent failed to provide a response to Mr. McCarl's bar charge or the State Bar's letter. (TR 450:19)

110. On or about August 10, 2009, Staff Bar Counsel Thomas McCauley left a voicemail for Respondent at her listed telephone number reminding her of the pending matter and noting her failure to respond to the bar charge. (TR 405:11 through 406:1)

111. On or about August 12, 2009, the State Bar sent another letter to Respondent at her address of record noting her failure to respond to the bar charge, noting the seriousness of the allegations, and requesting she immediately provide a response. (TR 392:6 through 393:6)

112. The August 12, 2009 letter from the State Bar was also emailed to Respondent at her listed email address and faxed to Respondent at her listed fax number. (TR 396:16-25)

113. An email "read receipt" attached to the August 12, 2009 email to Respondent indicated that the email was read on August 13, 2009. (TR 393:9 through 396:15)

114. Respondent provided no response to the bar charge or the State Bar's letters, emails, fax or phone call. (TR 404:17 through 405:10)

CONCLUSIONS OF LAW

Count One (Glassel)

1. The Bar has proven by clear and convincing evidence that by failing to pay the Medicare lien and failing to respond to numerous phone calls and letters of her client, Ms. Glassel, Respondent failed to abide by the client's decisions concerning the objectives of the representation or consult with her as to the means by which they are to be pursued in violation of ER 1.2, Rule 42, Ariz. R. Sup. Ct.

2. The Bar has proven by clear and convincing evidence that by failing to resolve the Medicare lien in a reasonable time frame, Respondent failed to act with reasonable diligence and promptness in representing a client in violation of ER 1.3, Rule 42, Ariz. R. Sup. Ct. Ms. Glassel's lawsuit was settled in August 2006. The hearing in this matter began on February 22, 2010. Even taking into account Respondent's testimony that it is difficult to deal with Medicare liens, 3 1/2 years is simply too long to resolve the matter.

3. The Bar has proven by clear and convincing evidence that by failing to respond to her clients numerous phone calls and letters and failing to consult with her client about the Medicare lien issues, Respondent failed to reasonably consult with her client about the means by which the client's objectives were to be accomplished in violation of ER 1.4(a)(2), Rule 42, Ariz. R. Sup. Ct.

4. The Bar has proven by clear and convincing evidence that by failing to respond to Ms. Glassel's numerous phone calls and letters, Respondent failed to keep her client reasonably informed about the status of the matter in violation of ER 1.4(a)(3), Rule 42, Ariz. R. Sup. Ct. Respondent left Ms. Glassel to repeatedly beg for a resolution of the Medicare lien. The client was entitled to the remainder of the funds from her settlement that would not be needed to pay the lien. In addition, the elderly client could not obtain medical care until the lien was satisfied. Respondent knew this situation from the steady stream of letters and telephone calls from Ms. Glassel.

5. The Bar has proven by clear and convincing evidence that by failing to respond to Ms. Glassel's numerous phone calls and letters, Respondent failed to promptly comply with reasonable requests for information in violation of ER 1.4(a)(4), Rule 42, Ariz. R. Sup. Ct.

6. The Bar has proven by clear and convincing evidence that by failing to resolve the Medicare lien and continuing to hold funds set aside for the purpose of resolving such claims, Respondent has failed to promptly notify a third party or deliver to a third party any funds to which the third party was entitled to receive in violation of ER 1.15, Rule 42, Ariz. R. Sup. Ct.

7. The Bar has proven by clear and convincing evidence that by failing to respond to the State Bar's requests for information, Respondent knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of ER 8.1(b), Rule 42, Ariz. R. Sup. Ct.

8. The Bar has proven by clear and convincing evidence that by failing to respond to the state bar's requests for information, Respondent failed to furnish information or respond promptly to an inquiry or request from bar counsel.

COUNT TWO (File No. 09-1202/McCarl)

9. The Bar has proven by clear and convincing evidence that by failing to respond to the motion for summary judgment and failing to advise the client she had not responded; refusing to return the settlement funds from the PI case belonging to Mr. McCarl and using them for the Malpractice Case in direct violation of the requests of the client, and filing an appeal of the Malpractice case against the wishes of the client, Respondent failed to abide by the client's decisions concerning the objectives of the representation or consult with the client as to the means by which they were to be pursued, Respondent violated ER 1.2, Rule 42, Ariz. R. Sup. Ct. Respondent asserted that it was not her fault that the court did not timely rule on her numerous requests for extensions to file responses to the motions for summary judgment. (TR 55:7) Respondent even submitted a Motion for Ruling on Pending Request for Modification of Briefing Schedule on July 16, 2008. (Exhibit 85) Although it was not Respondent's fault that the court did not rule on her requests for extension until August 12, 2008, it is significant that Respondent did not file a response to the motions for summary judgment by any of the deadlines she herself chose, June 20, 2008, July 11, 2008, August 1, 2008, August 15, 2008, or September 1, 2008.

10. The Bar has proven by clear and convincing evidence that by failing to respond to motions for summary judgment; requesting numerous extensions in which to respond and then failing to respond at all to various pleadings, Respondent failed to act with reasonable diligence and promptness in representing a client in violation of ER 1.3, rule 42, Ariz. R. Sup. Ct.

11. The Bar has proven by clear and convincing evidence that by failing to respond to Mr. McCarl's numerous phone calls and letters, Respondent failed to reasonably consult with the

client about the means by which the client's objectives were to be accomplished in violation of ER 1.4(a)(2), Rule 42, Ariz. R. Sup. Ct.

12. The Bar has proven by clear and convincing evidence that by failing to respond to Mr. McCarl's numerous phone calls and letters and failing to consult with him about the status of his case(s), and filing an appeal against the instructions of her client, Respondent failed to promptly inform the client of any decision or circumstance with respect to which the client's informed consent was required by the rules in violation of ER 1.4(a)(2), Rule 42, Ariz. R. Sup. Ct.

13. The Bar has proven by clear and convincing evidence that by failing to respond to Mr. McCarl's numerous phone calls, letters and requests for information, Respondent failed to keep the client reasonably informed about the status of the matter in violation of ER 1.4(a)(3), Rule 42, Ariz. R. Sup. Ct.

14. The Bar has proven by clear and convincing evidence that by failing to return Mr. McCarl's phone calls, answer his letters or send him copies of documents as requested, Respondent filed to promptly comply with reasonable requests for information in violation of ER 1.4(a)(4), Rule 42, Ariz. R. Sup. Ct.

15. The Bar has proven by clear and convincing evidence that by remaining involved in Mr. McCarl's case, advising Mr. McCarl against entering a settlement agreement, and/or by refusing to refund monies held for Mr. McCarl due to Respondent's own interest in possibly being held liable for sanctions, Respondent violated ER 1.7, Rule 42 Ariz. R. Sup. Ct.

16. The Bar has proven by clear and convincing evidence that by failing to return funds belonging to the client received in settlement of a case, despite numerous requests of the

client, Respondent has failed to promptly deliver to the client any funds which he was entitled to receive in violation of ER 1.15, Rule 42, Ariz. R. Sup. Ct.

17. The Bar has proven by clear and convincing evidence that by failing to provide the client with copies of his documents upon request, and failing to provide the client with settlement money to which he was entitled upon termination of representation, Respondent failed to protect the client's interests and failed to provide documents reflecting work performed for the client to which he was entitled in violation of ER 1.16(d), Rule 42, Ariz. R. Sup. Ct.

18. The Bar has proven by clear and convincing evidence that by failing to timely respond to Motions for Summary Judgment and failing to meet multiple Court imposed deadlines, Respondent violated ER 3.4(c), Rule 42, Ariz. R. Sup. Ct. Respondent received an extension to file a response to motions for summary judgment by June 20, 2008. Before the response was due Respondent filed a Request for Modification of Briefing Schedule which requested an extension of time to file the response by July 11, 2008. (Exhibit 75) This motion for extension was not ruled on by July 11, 2008. On July 16, 2008, Respondent filed a Motion for Ruling on Pending Request for Modification of Briefing Schedule and requested that her response to the summary judgment motions not be due until either August 1 or August 15, 2008. (Exhibit 85) The Court signed an Order (drafted by Respondent) on August 6, 2008, setting the time for the response as August 15, 2010. Therefore, two Orders of the Court were not complied with by Respondent; 1) the Order setting the response date of June 20, 2008 and 2) the Order setting the response date by August 15, 2008. For the first Order Respondent argues that she had the right to rely on getting a decision of the court on her motion to extend time for the response from June 20 to July 11, 2008. The problem is that Respondent did not file the response by July 11, 2008. Therefore, if one follows Respondent's logic, it leads to a conclusion that if the court

does not rule in a timely fashion on her motion for extension, then she has no time limit. The Hearing Officer agrees with Respondent's conclusion that she was entitled to a ruling on her request for extension. But, if a ruling had not been received by June 20, 2008, the response should have been filed by that date. Even if filing by June 20 were later found to be impossible, Respondent should have filed the response by July 11, 2008. She technically violated the June 20, 2008 deadline order of the court because no other court order had removed that deadline. Respondent has demonstrated that the Order dated August 6, 2008 was not received in her office until August 12, 2008. She has stated that this did not give her enough time to file the responses by August 15, 2008. Since this date was her own suggestion, she cannot reasonably argue that receipt of the court's ruling only three days before the deadline for the response caught her by surprise.

19. The Bar has proven by clear and convincing evidence that by failing to respond to the State Bar's requests for information, Respondent knowingly failed to respond to a lawful demand for information from a disciplinary authority in violation of ER 8.1(b), Rule 42, Ariz. R. Sup. Ct.

20. The Bar has proven by clear and convincing evidence that by failing to respond to the state bar's requests for information, Respondent failed to furnish information or respond promptly to an inquiry or request from bar counsel.

21. The P. I. case and the malpractice case are separate matters involving different events at different times with different defendants and different theories of liability as well as different damages. Mr. McCarl was entitled to receive the balance of the funds from the PI case after the liens were satisfied. If costs were spent on the PI case, then Respondent could have withheld from the P. I. case settlement enough money to reimburse her for those expenses. In

fact that is exactly what Respondent did. In the document entitled "Settlement Agreement" in McCarl v. Moss Respondent withheld $1618.94 for costs advanced plus unbilled costs. (Exhibit 68)

The first motion for summary judgment was filed in March, 2008 and Respondent filed her responses in September 2008. Since Respondent had not obtained a verdict or settlement of money in the malpractice case, she certainly was not entitled to recover the costs that she advanced. The fee agreement in the malpractice case contained the following standard language regarding costs, "However, in the event that no recovery is obtained in this case, it is the policy of this office not to pursue reimbursement of costs from the Client." (Exhibit 44) Respondent inappropriately linked the PI case and the malpractice case by trying to appropriate to herself the funds from the P. I case that she knew Respondent was due, to offset what she says she expended on the malpractice case.

Respondent consistently testified that although correspondence from her clients Ms. Glassel and Mr. McCarl indicated that the clients were not approving Respondent's plan of action, the clients had approved of Respondent's actions in telephone calls or office visits. (TR 150:7 through 151:7) Respondent stated that Mr. McCarl had agreed with her to leave the money from the P. I case that he was due in Respondent's Trust Account. (TR 146:20) Yet, Mr. McCarl's letters consistently say that he was not authorizing any other expenditures from the PI case funds. (Exhibits 132, 133, 138, 141)

There is no proof other than Respondent's word that Respondent agreed to allow the funds from the P.I. case to be used in the malpractice case. The most Mr. McCarl said to Respondent was that if Respondent could negotiate with counsel for defendant in the malpractice case for the waiver of defendant's costs and attorney fee awards against Mr. McCarl in exchange for Mr. McCarl waving an appeal, then Mr. McCarl would have no objection to Respondent

trying to get defendant to even pay Mr. McCarl additional money to give up his appeal. In that event, Mr. McCarl did not care if Respondent got some of her costs in the malpractice case from this potential additional settlement money in the malpractice case. (Exhibit 148, page SBA 000038)

There is no evidence that the defendants in the malpractice case who had just won a summary judgment against Mr. McCarl along with a judgment for costs, were ever willing to pay anything more to get Mr. McCarl to waive his appeal. The court awarded the defendants in the malpractice case the following taxable costs against Mr. McCarl: defendant Dr. Burrell Wolk and Skin & Cancer Center of Arizona P.C. $5100, defendant Beth Lopez PA-C $5000, defendant Laboratory Corporation of America (LabCorp) $4775.85 and defendant Dr. Humberto Rendon and Diagnostic Pathology of Phoenix P.L.L.C. $6500. (Exhibit 136) Mr. McCarl now had a judgment against him for $21,375.85 in costs, not including the $5441 sanction awarded to LabCorp earlier in the case.

Respondent received a letter from counsel for LabCorp dated November 18, 2008 in which LabCorp offered to forego collecting on its prospective judgment for costs and on its November 20, 2007 sanctions award of $5441 if Mr. McCarl would waive his appeals. (Exhibit 120) Mr. McCarl became so concerned about this offer and so frustrated with Respondent's inability to end the malpractice case by settling with these defendants, that he eventually contacted counsel for LabCorp in an effort to accept LabCorp's offer. (TR 143:12-15)

At the hearing Respondent noted that Mr. McCarl's conduct in contacting counsel for LabCorp without telling her, violated the cooperation provision in her fee agreement; "Neither Attorney nor Client will settle Client's claims without the other's approval." (TR 143:5-22) Respondent saw her client's contact with counsel for LabCorp as, "... purposefully undermining

my effort to get cash out of this case." (TR 143:21) Respondent testified repeatedly that she thought strongly that they could not lose on defendants' summary judgment motions in the malpractice case, that the judge was wrong to have granted summary judgment and that she would donate her time to write Mr. McCarl's appeal brief. (TR 498:21, 537:23 through 539:10) Yet in cross examination of Mr. McCarl at the hearing Respondent seemed to agree with him that they both knew that they were not going to get much money out of his malpractice case.

"Q. Well, Mac, you have told me what you remember of the conversations. And you do remember, however, that you and I talked considerable amount of time in the fall of '08 up until when -- through October, November, especially in February and March, we discussed the malpractice case between us many, many times, both in my office and on the phone, correct?

A. Yes. We had some discussion about that. And I think we both agreed we wasn't going to win anything at that time and point.

Q. By March we had come to that conclusion, had we not?

A. Prior to March.

Q. You think it was prior to March?

A. I think so. I don't know." (TR 223:6-20)

Even after Respondent learned that the defendants in the malpractice case were not going to pay anything to settle the matter, Respondent did not return the money from the PI case to Mr. McCarl.

"Q. So, it's your position that Mac, under your fee agreement, did not have authority to settle his own claim without your approval?

A. Without at least telling me. Without undermining, purposefully undermining my effort to get cash out of this case.

Q. And because he settled it, you were therefore entitled to the remainder of these funds?

A. No, I did not think I was automatically entitled to the remainder of the funds.

Q. Then I'm going to ask again, why didn't you disperse (sic) the funds?

A. It was a matter of controversy. And I looked up an ethics opinion, and I came up with an ethics opinion that said the proper thing for an attorney to do if there is a dispute between an attorney's lien for any reason, if an attorney is owed fees or costs or has a lien, I think it says for any reason, then the proper thing to do is to try to settle it with a client. Failing that, to interplead it.

Q. And you didn't file an interpleader, right?

A. You know, the time has totally escaped me since these events. Since trying to deal with the closing out of this -- Mac was gone for the whole summer. He didn't come back again until fall. I sent him communications asking him to get in touch with me so we could finish resolving these issues. He has not called me, he has not talked to me.

Q. So to answer the question, you did not file an interpleader?

A. No, I did not. Initially -- In answer to your question, I did not. Initially, I assumed we would settle our differences and the balance would be refunded. Mac got away from me, time got away from me due to other things I was working on and things that were happening in my personal life, and nothing happened in the interim. Nothing happened in the interim.

Q. All right. So let's –

A. Except that Mac's money is sitting in an interest-bearing account on his own behalf. Nor has he asked me for it." (TR 143:17 through 145:9)

The record is replete with Mr. McCarl's requests of Respondent for the return of those funds from the PI case. In Exhibit 132, Mr. McCarl's letter to Respondent of February 5, 2009 he wrote, "I have requested that you release this money to me for several months. I understand from a letter you sent me that all of the liens against me have been satisfied. I thank you in advance for sending my money that you are holding in your trust account." In Exhibit 133, Mr. McCarl's letter to Respondent of February 9, 2009 he wrote, "As of this date, February 9th, 2009, I do not authorize any further expenditures of any monies held by you in trust for me. I am again requesting that you release the balance of this money to me." In Exhibit 138, Mr. McCarl's letter to Respondent of February 19, 2009 he wrote, "I visited you in your office on February 10, 2009 to discuss my money that you are holding in your trust account and the legality of your holding that money. You told me at that time you were going to call the Arizona Bar Association 'Hot Line' and get back to me with an answer within 3 or 4 days. As of today, February 19, 2009, I still have not heard from you. I have attempted to contact you and have left messages daily for you to contact me starting on February 16, 2009. Also, I have asked in my messages to you that I want a current Trust account statement and a copy of the paid receipt for the $3600 you paid to Dr. Walter Coulson. If I have not heard from you by Monday, February 23, 2009, I will be left with no choice but to contact the Arizona Bar Association to get the answers that I am seeking concerning the balance of the monies you are holding from my automobile accident." Mr. McCarl sent letters on February 23, 2009 (Exhibit 141), March 27, 2009 (Exhibit 147) and on April 1, 2009, asking for a release of the funds.

RESTITUTION

Respondent should be required to pay Ms. Gisella Glassel $10,151.47 out of the trust account. Medicare's offer in March, 2008 to compromise the lien was for $11,250.46 plus interest accrued at that time of $2248.92. This total is $13,409.38. When this sum is subtracted from $23,651.85 withheld in Mr. Stephenson's trust account, the balance due to Ms. Glassel is $10,151.47. Respondent should be ordered to pay this sum within 90 days of the Judgment and Order. If the Medicare lien cannot be settled without the interest accrued after March 2008, then Respondent should pay out of Mr. Stephenson's trust account the interest from March 2008 until June 1, 2009. If Medicare insists on any interest after June 1, 2009, Respondent should be required to pay the additional interest that has accrued since June 1, 2009. Although Medicare made its offer to compromise the lien for $11,250.46 plus interest in March, 2008, Ms. Glassel did not unequivocally state her position to pay the $11,250.46 plus interest until her June 1, 2009 letter to Respondent. However, any additional interest after June 1, 2009 should not be paid out of the funds being held in Mr. Stephenson's trust account. The additional interest shall also be paid within 90 days of the Judgment and Order. Respondent should be required to pay Mr. Dyer McCarl $14,724.23 plus any interest accrued in the account where Respondent was holding his money. This sum should be paid within 90 days of the Judgment and Order.

ABA STANDARDS

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. *See In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P. 2d 1037, 1040 (1990).

In determining an appropriate sanction, 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. *See, Peasley*, 208 Ariz. at 35, 90P.3d at 772; *Standard* 3.0.

The most serious conduct is Respondent's refusal to disburse funds due to her clients and/ or third party lien holders. Standard 4.12 states, "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Therefore, the presumptive sanction is suspension. In evaluating this case and applying the Standards the following matters are to be considered: the duty violated, the mental state of the attorney, the injury, and aggravating and mitigating factors.

Duty Violated

Respondent breached her duties to her clients when she violated ERs 1.2, 1.3, 1.4, 1.7, 1.15 and 1.16(d). . She breached her duty to the legal system when she violated ER 3.4(c). She breached duties to the profession when she violated ER 8.1(b) and Rule 53 (f).

Mental State

Respondent knowingly retained the funds that should have been disbursed to her clients. She knew that Medicare had provided services to Ms. Glassel. She knew that she had not resolved the lien. She knew that Ms. Glassel could not receive the balance of the funds being held in trust by co-counsel Mr. Stephenson until Respondent resolved one

outstanding lien with Medicare. She also knew that Medicare was denying Ms. Glassel medical coverage until the lien was resolved.

Respondent also knew that she had not acquired any recovery for Mr. McCarl in the malpractice case. She knew that she had already withheld from the PI case settlement funds to reimburse her for costs expended in that matter. Respondent also knew that the PI case and the malpractice case involved separate events.

Injury

Respondent's conduct caused actual injury to Ms. Glassel and Mr. McCarl. Both of these clients have been deprived of funds. Ms. Glassel has even been deprived of medical care due to Respondent's inability to resolve the Medicare lien.

Aggravating Factors

Standard 9.22 (a) *Prior Disciplinary Offenses* - Respondent was censured on September 30, 2009 for a violation of ER 1.15 and ER 1.16. In that matter the hearing officer recommended a finding that by failing to not timely surrender documents and by unreasonably failing to provide the client file and then only upon court order providing that file, Respondent had violated ER 1.16 (d). The hearing officer also recommended a finding that by failing to return certain photographs, Respondent had violated ER 1.15 (a). The hearing officer found that the State Bar had not established by clear and convincing evidence 1) that Respondent's failure to respond to the motions in limine violated ER 1.3, 2) that by advising Cody Hall on May 16, 2005 that Respondent's clients rejected the $450,000 joint offer violated ER 1.2 (a), 3) that the manner in which Respondent allocated her trial time (leading the trial court to rule that Respondent had no time for closing

argument) violated ER 1.1, 4) that Respondent's conduct in delaying the production of the client file violated ER 8.4 (c), and 5) that Respondent's statements to the State Bar that the $450,000 offer "evaporated", was "retroactively" withdrawn, "suddenly disappeared", and was "withdrawn ... without warning", violated ER 8.4 (c). (Exhibit 172, page SBA000126) Therefore, the Bar proved only one of the three central ethical violations.

However, a portion of the hearing officer's report concerning Respondent's failure to provide the clients with their complete file over months is similar to the matters in this case: "Respondent failed to timely provide clients with their complete file. Her own testimony that it was "shocking" how long it took for her to deliver the file shows her deference to her own needs over those of her clients. The fact that after the clients' retention of counsel, repeated phone calls and letters, a complaint to the State Bar, and a court ordered injunction, the Respondent still delayed production of the file. The clients expended significant time and money on a matter which should have been resolved in reasonably short order. Respondent's excuses are not compelling and in no way relieved Respondent of her ethical duties." (Exhibit 172, page SBA 000129)

Standard 9.22 (b) *Dishonest or Selfish Motive* – Respondent's conduct was for her own pecuniary gain. Particularly in Mr. McCarl's case, Respondent was interested in the costs that she had advanced in the malpractice case. She was holding the balance of funds due to Mr. McCarl in the PI case, as a way of recouping some of the costs in the malpractice case.

Standard 9.22 (c) *Pattern of Misconduct* - As set forth above under *Standard* 9.22 (a) Respondent's conduct in this case is similar to her misconduct in the prior disciplinary matter. In both cases she has been found to have failed to return property belonging to her clients.

Standard 9.22 (d) *Multiple Offenses* - In this case Respondent has engaged in ethical violations involving more than one client and involving more than one ethical rule.

Standard 9.22 (g) *Refusal to Acknowledge Wrongful Nature of Conduct* - Respondent blamed her inability to settle Ms. Glassel's lien on Ms. Glassel's insistence that she not pay Medicare interest on the compromised lien amount. Although this was Ms. Glassel's position, by June 2009, Ms. Glassel was so desperate that she was willing to pay the interest. There were enough funds held in trust by Mr. Stephenson to pay the compromised lien amount and the interest accrued to that time. Respondent blamed her decision not to disburse Mr. Mc Carl's funds on the fact that he did not ask her for the funds and that she was entitled to the funds from the PI case to reimburse her for some of the costs she expended in the malpractice case. Both of these positions are incorrect.

Standard 9.22 (i) *Substantial Experience in the Practice of Law* - Respondent was admitted to practice on October 21, 1988.

Standard 9.22 (j) *Indifference to Making Restitution* - Respondent has had ample opportunity to settle Ms. Glassel's Medicare lien and disburse to Ms. Glassel the balance of the funds that have been held by co--counsel since the settlement of August 2006. Respondent has made no effort to disburse to Mr. McCarl the balance of the funds from his PI settlement.

Mitigating Factors

Standard 9.22 (c) *Personal or Emotional Problems* - Respondent testified that she was having a difficult time in her practice in 2005 and 2006. (TR 558:11) Everyone seemed to be forcing her to trial. Her cases were turning into multi-defendant matters. Her father was dying of cancer. She was getting a divorce. (TR 558:14 through 559:18) When Respondent

described her significant cases including a playground case involving a quadriplegic, a case of pit bulls mauling a girl, and three other cases in the Court of Appeals at the same time, Respondent perhaps came closest to acknowledging some mistakes. She admitted that she now realizes that she might have made different case selection decisions. (TR 558:19, 559:19 through 561:13) Respondent said that she was trying to settle the liens in the Glassel case in 2008 and 2009 but that she never knew that the filing of the Bar complaints could stop her in her tracks. (TR 562:5-18) Respondent testified that she fell apart in July and August 2009 and that she could not help Ms. Glassel. (TR 568:18-23)

Respondent testified that she was at times unable to get things done. She described her inability to file matters in a timely fashion in this disciplinary matter, "And my failure to file anything in this case when it was due just puts me in such a panic that - - I mean, I've drafted whole things, drafted them before they were due. I can't get them out the door." (TR 445:3-7) She also testified about inertia, "A feeling that I can't win, a certain amount of paranoia. Inertia is the one that's killing me. ... before I got the complaints in this case because I found myself just sitting at the computer – let me straighten up here - - just sitting at the computer staring at a page and zoned on it, and I'd be there two, three hours later without anything really productive happening." (TR 565:11-19) Respondent has taken steps to seek help. Rather than go into the details, the Hearing Officer will refer to the transcript at page 562 through 567 as Respondent's testimony about the action she has taken in this regard.

PROPORTIONALITY REVIEW

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or proportionality review is "an imperfect process." *In re Owens,* 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*

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, supra,* 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines,* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In re Caspar, SB 08-0123 is a case where the attorney received a suspension of six months and one day. The attorney filed a Chapter 13 Plan on his client's behalf in United States Bankruptcy Court. Later, the U.S. Internal Revenue Service filed an objection to the Plan. The attorney failed to file a response to the objection and he did not respond to letters from the Court or the Trustee in bankruptcy concerning the resolution of the IRS's objection. As a result the client's bankruptcy case was dismissed. The attorney failed to adequately communicate and diligently represent his client. The attorney further failed to actively pursue the client's Chapter 13 bankruptcy and failed to respond to the State Bar's investigation. The attorney violated ER 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 3.2, 8.4 (d) and Rules 53 (d) and 53 (f). This case included some aggravating factors similar to the case in issue; prior disciplinary offense, a pattern of misconduct, multiple offenses, and bad faith obstruction of the disciplinary process by not responding to the Bar's requests for

information. In mitigation the factor of personal or emotional problems was established. The mental state of the attorney was knowingly.

In re Forsyth, SB 08-0159 is a matter where the attorney received a one-year suspension. The attorney failed to diligently represent and communicate with clients. The attorney failed to properly manage his client trust account. He charged for fees not earned and he failed to refund the unearned portion of an advanced payment of a fee. The attorney also failed to respond to the State Bar's investigation. He violated ER 1.3, 1.4, 1.5, 1.15, 1.16 (d), 8.1 (b), 8.4 (d) and Rules 43, 44 and 53 (f). Some aggravating factors were found that are similar to those factors present in the instant case; prior disciplinary offenses, pattern of misconduct/multiple offenses, experience in the practice of law (the lawyer was admitted in 1982), and failing to respond to the Bar's requests for information. Personal or emotional problems were found in mitigation. The attorney's mental state was knowingly and there was actual and potential injury in the case.

In *In re Howell*, SB 08-0139, the attorney was suspended for six months and one day. He represented clients with conflicting interests. He failed to follow the rules governing the handling and maintenance of his client trust account. He co-mingled personal funds with client funds. He converted other clients' funds to cover administrative costs. The attorney failed to respond to the State Bar's investigation. He violated ER 1.5 (d) (3), 1.7 (a), 1.7 (b), 1.15 (a), 1.15 (e), 8.1 (b), 8.4 (d) and Rules 43, 44, 53 (d) and 53 (f). The attorney's mental state was found to be negligent as to the ER 1.5 (d) (3) violation, and knowingly as to all the other violations. In aggravation the hearing officer found prior disciplinary offenses, a pattern of misconduct, multiple offenses, and bad faith obstruction of the disciplinary process.

RECOMMENDATION

The Hearing Officer recommends that Respondent be suspended for six months and one day and that upon reinstatement that Respondent be on probation for two years with terms to be set at the time of the reinstatement but including participation in the Member Assistance Program (MAP) and the Law Office Management Assistance Program (LOMAP). Respondent should pay restitution to Ms. Glassel of $10,151.47 from Mr. Stephenson's trust account within 90 days of the Judgment and Order. If the Medicare lien cannot be settled without accrued interest after March 2008 being demanded, then the interest from March 2008 until June 1, 2009 will be paid from the trust account. Any interest after June 1, 2009 will be paid by Respondent, but not from the trust account funds. Respondent should pay the interest accrued after March 2008 and after June 1, 2009 within 90 days of the Judgment and Order. Respondent should pay Mr. McCarl $14,724.23 plus any interest accrued in the account where Respondent has been holding his money. This sum should be paid within 90 days of the Judgment and Order. Respondent should pay the costs of these proceedings.

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). A suspension of six months and one day will protect the public in that Respondent will be not be able to harm clients by not resolving their matters in a reasonable amount of time and not returning money to clients. Respondent could benefit from assistance in managing (and selecting) her cases, and in understanding and getting help for her tendency

to fail to complete her work. The burden should be on Respondent to establish her fitness to return to the practice of law after the suspension. The probation will both help Respondent by providing her with services and protect the public by providing monitoring of Respondent.

SANCTION

The Hearing Officer recommends the following sanction:

1. Respondent shall be suspended from the practice of law for six months and a day to begin from the time of the Judgment and Order is issued.
2. Respondent shall be placed on probation upon reinstatement for a period of two (2) years, with the specific terms to be decided upon reinstatement. However, the probation terms shall include MAP and LOMAP and shall also include the following:
   a. 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.
   b. 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.

3. Respondent shall pay the costs and expenses of this disciplinary proceeding, including the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Disciplinary Commission and the Supreme Court of Arizona.

4. Respondent shall pay restitution as follows:

   a) Ms. Glassel - $10,157.47 from the trust account (Mr. Stephenson's account). should pay that amount of additional interest using her own funds, not the If the Medicare lien cannot be settled without the interest accrued after March 2008, then Respondent should pay out of Mr. Stephenson's trust account the interest from March 2008 until June 1, 2009. If Medicare insists on any interest after June 1, 2009, Respondent shall pay this sum but may not use funds from Mr. Stephenson's trust account. All these sums should be paid within 90 days of the Judgment and Order.

   b) Mr. McCarl - $14,724.23 plus any interest accrued in the account where Respondent was holding the money. This sum should be paid within 90 day of the Judgment and Order.

Dated this 12th day of April 2010

Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk

this 13 day of April, 2010.

Copy of the foregoing mailed
this 13 day of April, 2010, to:

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/jsa