BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	File Nos. 08-1748, 08-2179, 09-0061, 09-0221
JOSEPH W. CHARLES, Bar No. 003038	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

1. Probable cause was found in each of the four case numbers on June 3, 2009. A four count Complaint was filed by the State Bar on September 17, 2009. Service was accomplished by mail on September 23, 2009. Respondent filed a Notice of Transfer on October 2, 2009, and an Answer on October 16, 2009. The matter was assigned to the undersigned Hearing Officer on October 6, 2009, and an Initial Case Management Conference was held on October 19, 2009. After resolving Respondent's Motion for Summary Judgment, this matter went to a contested formal hearing on January 7 and 8, 2010.

2. This case started out with numerous allegations of misconduct set forth in the Complaint. After the filing by Respondent of a Motion for Summary Judgment, some of these allegations did not make it into the Joint Pre-Hearing Statement and Bar Counsel advised this Hearing Officer at the start of the hearing in this matter that they did not intend to go forward with the violations not contained in the Joint Pre-Hearing Statement, Transcript of Hearing ("T/R') 12:18 – 13:1. After a two day contested hearing the parties were given time to file Post Hearing

Memoranda. In the State Bar's Post Hearing Memoranda the State Bar focuses on two specific areas:

In Count Three, the alleged violation of ER's 3.3 and 8.4(c) and (d).

In Counts One, Two, and Four, the alleged violation of ER's 1.5 and 1.15.

3. The State Bar, in its Post Hearing Memorandum, goes on to state the following:

> "The State Bar does not concede that it did not prove any other violations as listed in [the] Joint Pre-hearing Statement, but believes the hearing officer can find any violations supported by the evidence presented at hearing, whether they are argued in this memorandum or not." State Bar Post Hearing Memoranda 2:6-11.

4. This comment requires the Hearing Officer to address each and every violation alleged in the Joint Pre-Hearing statement and I will do so even though it appears that the State Bar really only has confidence in the issues of: Whether Respondent violated the rules concerning his fee agreement and trust account; and whether Respondent was honest with the Court in his pleadings.

5. The State Bar recommends that Respondent be suspended for six months and one day and be placed on probation for two years.

FINDINGS OF FACT

6. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to practice on September 23, 1972.

COUNT ONE (File no. 08-1748-Sumpter)

Summary of Allegations:

7. In Count One, the State Bar alleges that Respondent did not refund to Ms. Sumpter an unearned fee in a timely manner in violation of ER 1.3; that Respondent did not promptly comply with Ms. Sumpter's request for information

when she was seeking the refund of her unearned fees in violation of ER 1.4; that Respondent did not communicate in writing the scope of the representation or the basis or rate of the fee and expenses for his services in violation of ER 1.5(b); that Respondent failed to deposit Ms. Sumpter's payments into his trust account in violation of ER 1.15(a) and Rules 43(b) and 44(a); and finally that Respondent failed to ensure that the conduct of his employee, Kevin Aitchison, was compatible with Respondent's professional obligations in violation of ER 5.3(b).

FINDINGS OF FACT REGARDING COUNT ONE

8. On March 25, 2008, Patricia Sumpter ("Ms. Sumpter") went to Respondent's office for a free consultation regarding a contemplated bankruptcy.[1]

9. Ms. Sumpter met with Janice Smith ("Ms. Smith"), a Nevada bankruptcy attorney working for Respondent as a paralegal, who advised Ms. Sumpter that she would start the bankruptcy once Ms. Sumpter paid the $1,500 fee.

10. On May 4, 2008, Ms. Sumpter paid Respondent's office $400. In August 2008, Ms. Sumpter paid an additional $500 to Respondent.

11. On September 2, 2008, Ms. Sumpter called Respondent's office and was told that Ms. Smith no longer worked there.

12. On September 3, 2008, Ms. Sumpter had a meeting with Respondent's paralegal, Kevin Aitchison, in regard to her bankruptcy. The meeting with Kevin Aitchison lasted approximately 7 minutes.

13. Ms. Sumpter was uncomfortable working with Mr. Aitchison and requested a refund.

[1] Unless otherwise cited, the facts referred to herein are taken from the Joint Pre-Hearing Statement.

14. Respondent contends that Ms. Sumpter had money belonging to others in accounts in her name that she did not want to disclose in her bankruptcy documents, Transcript of Hearing ("T/R") 23:5-24:24. Ms. Smith and Mr. Aitchison advised Ms. Sumpter that she could not not list the monies in the accounts in her bankruptcy documents, T/R 34:7-8, 52:8-12, 69:4-11.

15. Ms. Sumpter claims that she left Respondent's office because she was uncomfortable working with Mr. Aitchison, and the Respondent claims that Ms. Sumpter left his office because they would not facilitate her filing untrue documents with the Bankruptcy Court. The reason that Ms. Sumpter left Respondent's office is really not important, the issue is whether she was refunded her payments in a timely fashion, and whether Respondent violated the ethical rules by not placing Ms. Sumpter's fee payments in his trust account.

16. On September 3, 2008, Ms. Sumpter asked for a refund of the $900 that she had paid to Respondent's law firm. On October 6, 2008, Respondent sent Ms. Sumpter $1,000 which was $100 more than Ms. Sumpter had coming, together with a letter of apology even though there had been some work done by Respondent's firm.

17. During the 33 day interval between the time Ms. Sumpter asked for the return of her fees and when she finally received a refund for fees, there was an exchange of telephone calls and messages between Ms. Sumpter and Mr. Charles concerning the amount of work that had been done and how much of her fee Ms. Sumpter would be refunded. Additionally, there was an erroneous bill sent to Ms. Sumpter by Respondent's firm in the amount of $500 on September 25, 2008.

18. Respondent contends that there had been a considerable amount of work done on Ms. Sumpter's file and while he initially intended not to refund the entire amount of her payments, ultimately, he decided to do so and did so before receiving the Bar charge filed by Ms. Sumpter.

19. Respondent admits that he did not place Ms. Sumpter's payments into his trust account, claiming that the "minimal" fee of $1,500 for a Chapter 7 Bankruptcy was set as a "flat" fee that is earned upon receipt. Respondent also contends that bankruptcy clients are informed that the fee is earned upon receipt, and that the office will allow the client to make installment payments if needed so that creditors can be advised of the pending bankruptcy to relieve the client of harassing phone calls from the creditors.

20. Regarding the failure of the Respondent to have a fee agreement signed by Ms. Sumpter, Respondent is adamant that it is his office policy that all clients must execute a fee agreement in all cases and that he communicated this regularly to all members of his firm, including Ms. Smith, at various staff meetings, T/R T/H 291:11 – 17; 291:21 – 292:11; 315:24 - 28. Ms. Smith acknowledged that Respondent insisted that there be a fee agreement in every case and that she was in staff meetings where that issue was stressed by Respondent, T/R 36:21-37:10, 58:8-14 . Ms. Smith also testified that she felt that the fee agreement in use in Respondent's office was not in compliance with the requirements of the Bankruptcy Court, and that is why she did not have Ms. Sumpter sign a fee agreement, T/R 30:21. Ms. Smith also testified that both she and Respondent were too busy to get around to rewriting the fee agreement, but that they sent memos

back-and-forth about it, T/R 27:23 & 30:17. Respondent disagrees with Ms. Smith, and his testimony was that he feels that his fee agreement is in compliance with the Bankruptcy Court Rules, T/R 366:15 - 20.

21. Ms. Smith further testified that she explained the nature of the flat fee agreement to all three clients at issue herein, but was not very specific in her testimony about exactly what she told these clients, T/R 31:1- 32:20.

22. Ms. Smith testified that a "bankruptcy packet" was given to each and every client, and there was testimony by multiple staff members that a fee agreement was stapled into each bankruptcy packet, see Hearing Exhibit ("H/Ex") G, page 49,[2] T/R 46:12 – 20; 289:25 – 290:10; 294:4 – 7; 317:2 – 15. Respondent testified that he is certain that there was a fee agreement in each and every bankruptcy packet, T/R 378:22 – 379:4, and that it was the fee agreement set forth in H/Ex G, page 49, T/R 379:10 – 17.

CONCLUSIONS OF LAW REGARDING COUNT ONE

23. The State Bar alleges that Respondent violated, the following ERs in Count One:

A) ER 1.3, failing to refund unearned fee to Ms. Sumpter.

B) ER 1.4, failure to comply with Ms. Sumpter's request for information.

C) ER 1.5(b), failing to communicate in writing the scope of representation, and the basis or rate of the fee and expenses.

D) ER 1.15(a), failing to deposit bankruptcy fees into trust account.

E) ER 5.3(b), failing to assure that his staff (Kevin Acheson) was compatible with Respondent's professional obligations.

[2] There was no evidence presented at the hearing in this matter as to whether Respondent's fee agreement complied with either the Bankruptcy Court or the State Bar's requirements and so this issue is not addressed herein.

24. The Hearing Officer finds that the State Bar has failed to prove by clear and convincing evidence a violation by Respondent in Count One of: A) ER 1.3; B) ER 1.4; and E) ER 5.3(b).

25. There is a factual dispute concerning whether there was or was not a written fee agreement in this case (as well as in Counts Two and Four) in violation ER 1.5(b). While it is required that there be a written fee agreement, it is not required that it be signed by the client. Respondent and his staff all testified that Respondent regularly and consistently mandated that all clients of his firm have a signed fee agreement. There was also testimony that the "packet" that all bankruptcy clients received had the fee agreement in it, H/Ex G pages 49 and 50. The fact that there was no signed fee agreement in the Sumpter file is reflected in Respondent's exhibit C, which appears to be a note to Ms. Smith that there was not a signed fee agreement in the Sumpter case. This also supports Respondent's contention that it was a priority in his firm that each and every client have a fee agreement.

26. The testimony at the hearing in this matter, as well as the language of exhibit C, supports Respondent's testimony that no case was to proceed without a written signed plea agreement.

27. Respondent concedes that in all three Counts he does not have copies of fee agreements signed by Ms. Sumpter, Mr. & Mrs. Griffen, or Ms. Ball, T/R 240:19–21. Respondent also concedes that none of the money paid by any of these three clients went into his trust account because he felt that they were flat fees, T/R 241:6 – 10.

28. Apparently, even though the fact that there was not a written fee agreement signed by Ms. Sumpter in the file and this fact was brought to Ms. Smith's attention, the error did not preclude the case from going forward. Respondent responds that the fee agreement is in the bankruptcy packet for all bankruptcy clients, and even though Ms. Sumpter did not sign it, the written fee agreement would have been in the packet and it set out the services to be rendered for the flat fee. Respondent testified that the fee agreement set forth in H/Ex G, p.49 and 50 would have been in the Bankruptcy packets of Sumpter as well as complainants Griffin and Ball in Counts Two and Four, T/H 240:19-21.

29. There are really two issues here: Did Respondent provide a written fee agreement to his clients in Counts One, Two and Four; and was Respondent required to put the fee payments received by his firm for "flat fee" Bankruptcy filings in a trust account. It must be noted that while the term "flat fee" was used throughout the hearing in this matter and in the pleadings, and Respondent claimed that the fees were "earned upon receipt" it is clear that the fees were fully refundable as he refunded Ms. Sumpter her fees even though work had been done in her file. So in this case we have a bit of confusion caused by the terminology "flat fee" which usually entails earned upon receipt and no refund. While Respondent used the terminology, he did not invoke its troublesome second stage of not refunding unused portions of client's fees. The term "flat fee" is also used as a description of a set fee, or a cap for which certain services are rendered. To the client "flat fee" probably means the latter, while to an attorney it can mean either.

30. Because there is an allegation of an ER 1.5 violation this Hearing Officer must look at the fee charged and the services rendered for those fees to determine whether they are reasonable or not. Based upon the testimony of Ms. Smith on what she did in a Bankruptcy, and this Hearing Officer's experience and knowledge of what other attorneys charge for a Bankruptcy, the fees charged by Respondent were reasonable.

31. The evidence in this and Respondent's prior case before this Hearing Officer was that Respondent's practice is one of high volume, catering very substantially to people of limited financial means. While Respondent works on thin margins, he tries very hard to emphasize a firm ethos of client welfare and service. Unfortunately, Respondent is at the sharp top of a very large triangle (two other lawyers and approximately 7-8 staff) and it appears that it is difficult for him to make sure everyone in his firm is on the same page in both the firm philosophy, as well as firm policies and procedures.

32. Respondent charges a minimal amount for a Bankruptcy filing in simple cases and is presumably working in very slim margins based on what this Hearing Officer has seen of what other attorneys charge in simple Bankruptcy cases. There is a certain amount of "sharing of the risk" by both the client and Respondent that the case can be resolved quickly and without further expense to the client, or more work by the attorney.

33. Given this high volume, low margin environment, it is incumbent on the attorney to streamline the process as much as possible, i.e. the Bankruptcy packets, which by all the evidence had the fee agreements in them. This Hearing Officer must

conclude from the evidence that Respondent consistently and persistently insisted that everyone in his firm knew of the requirement that each client have a fee agreement and he did what he could to assure that this requirement was met. The communications between Respondent and Ms. Smith were not the best and perhaps Respondent is guilty of not properly supervising his staff. However, there was insufficient evidence to prove this by a clear and convincing standard.

34. This Hearing Officer concludes that the State Bar has not proven by clear and convincing evidence that the written fee agreement that was in Respondent's Bankruptcy packets was not in Ms. Sumpter's packet, or the packets of Mr. and Mrs. Griffin or Ms. Ball, so there is no violation of ER 1.5(b) in Counts One, Two or Three.

35. Regarding ER 1.15(a), failing to deposit fees into trust account, this issue is tied to the issue of having a written fee agreement. The Bar's position is that Respondent, if he was going to use "flat fee" agreements, had an obligation to have a written fee agreement that sets forth explicitly what justifies treating all or a portion of the flat fee as non-refundable or "earned on receipt" and also the conditions under which the client would have a right to a refund of all or a portion of the unearned fees, Bar's Post Hearing Memorandum 8:2. Absent that, Respondent was required to put the money in a trust fund. The Bar cites Ethics Opinion 99-02 to say that:

"It is the lawyer's responsibility to ensure that the fee agreement clearly describes, in terms intelligible to the client, how the lawyer will treat a pre-paid fee. Absent a fee agreement, explicitly stating that a prepaid fee is nonrefundable or "earned

on receipt" and will not be held in trust, a lawyer who deposits the funds into his operating account risks a violation of ER 1.15."

36. Respondent replies that the money paid by Ms. Sumpter, The Griffin's, and Ms. Ball was a flat fee, which was not required to be deposited into his trust account, and that the language of Ethics Opinion 99-02 states that "preferably" the terms and basis for a "flat fee" should be in a written instrument, Respondent's Post Hearing Memorandum, 17:9.

37. The Ethics Opinion also points out that a lawyer should not deposit an "earned upon receipt" fee into his trust account because it is the attorney's property and to co-mingle these moneys with client funds is improper.

38. A review of Respondent's fee agreement, H/Ex G p. 49-50, shows that the agreement is to pay a set amount for the basic Bankruptcy filing and Court fees, and if the case gets more complicated, then the client agrees to pay attorney fees by the hour. There is no evidence that any of the three clients in this case were other than basic Bankruptcy filings.

39. This Hearing Officer has reviewed both Ethics Opinion 99-02 and *In the Matter of Connelly,* 203 Ariz. 413, 55 P.3d 756 (2002), and is still in a quandary. While Respondent says that the fee was a nonrefundable "flat fee", he still refunded Ms. Sumpter's full fee plus overpaid her $100.00. Had Respondent **not** refunded Ms. Sumpter's fee and stood on the terms of his fee agreement there would be the question of whether it was excessive (see ER 1.5). In Count Two, the Griffins, as well as Count Four, Ms. Ball, they were complaining that the advice they got was faulty as opposed to being overcharged so there is no issue of reasonableness.

40. A full reading of Opinion 99-22 says that a flat fee with a nonrefundable proviso is not disallowed as long as it is clearly set forth in the fee agreement, "preferably in writing" (p. 6, para. 1). The opinion also says that each case should be "subject to "individual analysis" (p. 5, para. 3). Certainly Respondent's fee agreement could have been more detailed, but this Hearing Officer finds that given Ms. Smith's testimony that she explained the "flat fee" provisions, it meets a minimum standard.

41. The Ethical Opinion goes on to give some guidance on when the fee must be put into a trust account. Based on a review of those factors, the Hearing Officer finds that given the nature of Respondent's practice and the way that Bankruptcy cases are handled, Respondent was not required to place the "flat fee" into a trust account. However, the opinion also states that the filing fee, which never becomes the property of the attorney, must be placed in a trust account until it is disbursed to the Court. There was conflicting evidence whether these clients paid separate checks payable to the Bankruptcy Court, or whether Respondent put the filing fees in his trust account. Therefore, there is insufficient evidence that Respondent violated ER 1.15(a).

COUNT TWO (File no. 08-2179-Griffin)

Summary of allegations

42. The Bar alleges that Respondent's employee, Ms. Smith, gave advice to Mr. and Mrs. Griffin that was not only erroneous but also perpetrated a fraud on the Bankruptcy Court. It is also alleged that the Respondent, in filing a response to a Trustee's motion, gave false information to the Bankruptcy Court. Finally, as in

Count One, it is alleged that Respondent failed to have a written fee agreement and failed to deposit the "flat fee" in his trust account.

FINDINGS OF FACT IN REGARD TO COUNT TWO

43. In March 2008, Jonathan Griffin and his former wife, Andrea Griffin ("Mr. Griffin", "Ms. Griffin", and/or the "Griffin's"), hired Respondent to represent them in the filing of a Chapter 7 Bankruptcy.

44. Attorney Ms. Smith, Respondent's employee mentioned above, told the Griffins they could have only $300 in their bank accounts when they filed the bankruptcy petition or the trustee would seize the money.

45. The Griffins testified that Ms. Smith told them that they could withdraw the money from their checking account just prior to the filing of the bankruptcy petition, and after the petition was filed, redeposit the money back into their checking account, T/R 103:1-104:2. Mr. Griffin withdrew $1,800 just prior to the filing of their bankruptcy petition and then, after the filing, re-deposited the money back into the checking account.

46. Ms. Smith testified that she advised Mr. and Mrs. Griffin that they could use money to pay for housing, food and other living necessities, T/R 34:11-23, but absolutely denied that she told the Griffins that they could simply withdraw the money and then redeposit it, T/R 34:7-8, 52:8-12, 69:4-11 .

47. Subsequently, the Trustee in Bankruptcy discovered the withdrawal and redeposit, and demanded the repayment of the $1,800 to the estate. Ultimately, the Trustee in Bankruptcy filed a Motion to Compel Turnover of Estate Property.

48. On October 22, 2008, Respondent filed the Griffin's response to the Trustee's Motion. In that Response, Respondent stated that the Griffins had separated just prior to filing for bankruptcy and withdrew the funds in order to obtain housing for Mr. Griffin.

49. The Trustee's November 5, 2008, reply states that at the Meeting of Creditors, the Griffins testified they withdrew the $1,800 because Ms. Smith told them they were not allowed to have more than $300 in their bank account.

50. Attached to the Trustee's Reply was a copy of the Griffin's checking account statement showing the withdrawal of $1,800 on April 29, 2008, and the deposit of $1,860 on April 30, 2008.

51. On January 9, 2009, the Griffins were ordered to turn over $1,642 to the Trustee.

52. Mr. Griffin testified that when he was initially asked by the trustee about the money that was withdrawn, he testified that the money was used to pay his rent because he and his wife were getting a divorce.

53. The Griffins then provided to Respondent's firm a copy of a statement allegedly from Mr. Griffin's landlord that he had been paid rent, H/Ex H p. 78. Ms. Smith testified that Mr. Griffin told her the money was withdrawn to pay rent, T/R 50:20-51:15.

54. Ms. Smith testified, in response to a question regarding whether she properly advised the Griffins, "It has been my experience, when debtors do not listen to their attorneys and get caught doing something they shouldn't, they always blame their attorney." and Ms. Smith thinks that's what happened in this case, T/R 72:7-14.

55. Respondent testified that prior to filing a response to the Trustee's Motion to Turnover, he tried repeatedly to contact Mr. Griffin but was unable to do so. Respondent did ultimately get a hold of Mrs. Griffin, T/R 252:16-253:15.

56. Given her understanding of the facts, Ms. Smith testified that Respondent's Response to the Trustees Motion, reflected what the clients had told her, and the Response embodied what she would have told the Court as well, T/R 52:6-11, 66:18-67:4, 74:25-75:19.

CONCLUSIONS OF LAW REGARDING COUNT TWO

57. The issues in Count Two are: Whether Respondent and/or his employee, Ms. Smith, advised the Griffins to fraudulently withdraw nonexempt funds from their bank account prior to the Meeting of Creditors in violation of ER 1.2(d) and 8.4(a) and (b); Whether Respondent knowingly made false statements to the Court, and/or Bankruptcy Trustee in his Response to the Bankruptcy Trustee's Motion to Turnover Estate Property in violation of ER 3.3(a) and 8.4(c) and (d), or in the alternative, filing the Response to the Trustee's Motion without consulting with the Griffins, Ms. Smith, or taking steps to determine the truth of the statements Respondent made in the Response, in violation of 3.1 and 3.4(c); That Respondent failed to ensure that Ms. Smith's conduct conformed to the Rules of Professional Conduct in violation of ER 5.1(b); as well as the issues concerning the previous allegations of the State Bar that Respondent failed to have a written fee agreement and failed to deposit bankruptcy fees into his trust account in violation of ER 1.5(b) and 1.15(a), and Supreme Court Rules 43(b) and 44(a).

58. This Hearing Officer finds that there is insufficient evidence to prove by clear and convincing standard that the Respondent or Ms. Smith advised the Griffins to fraudulently withdraw nonexempt funds from their bank account. Further, there is insufficient evidence that either Respondent or Ms. Smith did anything other than tell the Court and Trustee the same thing the clients had been telling them. The evidence tends to support the testimony of Ms. Smith that she advised the clients that there were certain necessities such as rent that could be paid for, and that the Griffins tried to cover their tracks with a phony receipt. There is no indication that either Ms. Smith or Respondent knew of this subterfuge until it came to light after Respondent had already filed his client's response to the Trustee's motion.

59. There was also evidence that Respondent tried to reach his clients and obtain their input on the Response to the Trustee to no avail, and so he relied on the evidence he had at hand, T/R 252:16-253:15.

60. The Hearing Officer finds that there is no violation of ER's 1.2(d); 3.1; 3.3(a); 3.4(c); 5.1; 8.4(a) (b) (c) and (d).

61. The remaining issue in Count Two is whether Respondent violated ER 1.5, not having a written fee agreement and ER 1.15(a), failing to deposit the Griffin's attorney fees into his trust account. As in Count One, there is insufficient evidence to prove a violation of either ER 1.5 or 1.15(a)

COUNT THREE (File no. 09-0061-Deere)

Summary of Allegations

62. The State Bar alleges that Respondent submitted a false statement of fact to an Arbitrator, in violation of ER's 3.3(a), 4.1(a), and 8.4(c) when he filed a Pre-Hearing Statement with a forged signature; that Respondent made a false statement of fact to the Court when he failed to advise the Court of a communication between himself and opposing counsel, in violation of ER 3.3(a), 4.1(a), and 8.4(c); and that Respondent's above described conduct was prejudicial to the administration of justice, in violation of ER 8.4(d).

FINDINGS OF FACT REGARDING COUNT THREE

63. On or about January 9, 2007, Respondent filed a Complaint in Superior Court on behalf of his client Steven Trejo, against Metro Terrace Apartments, LLC, dba Rio Village Apartments and Nolan Real Estate Services, Inc. ("the lawsuit").

64. Joshua Deere ("Mr. Deere") represented the defendants in the lawsuit.

65. The underlying matter was scheduled for arbitration before Mr. John Balitis, who requested the parties submit a Joint Pre-Hearing Statement at least two business days prior to the hearing, which was scheduled for September 11, 2008.

66. Mr. Deere made several attempts to contact Respondent by phone and also requested his e-mail address in order to coordinate the drafting of the Pre-Hearing Statement. Respondent did not respond to Mr. Deere.

67. On September 4, 2008, Mr. Deere sent a letter to Respondent and included a copy of a Separate Arbitration Statement. Mr. Deere advised Respondent that if he did

not contact Mr. Deere by September 8, 2008, Mr. Deere would file a Separate Arbitration Statement.

68. When Mr. Deere did not hear from Respondent by September 8, 2008, he filed the Defendant's Separate Arbitration Statement with the Arbitrator.

69. On September 9, 2008, Mr. Deere received a pre-hearing statement from Respondent's office. The pre-hearing statement contained, in addition to a signature line for Respondent, a signature line for Jay Powell ("Mr. Powell").

70. Mr. Powell had not worked for Mr. Deere's firm for almost 3 months. The signature on the pre-hearing statement did not match other documents Mr. Powell had previously signed.

71. Mr. Deere immediately sent a letter to Respondent asking him to explain Mr. Powell's signature on the document. Mr. Deere also advised the Arbitrator that his firm was not involved in the preparation of Respondent's pre-hearing statement.

72. Respondent claimed in letters to Mr. Deere and the Arbitrator dated September 10, 2009, that his office staff had put an "X" through the signature box to show that only he was submitting a statement. The statement submitted by the Respondent was entitled "Plaintiffs Separate Pre-Hearing Arbitration Statement".

73. Respondent's employee, Kevin Aitcheson, testified that the Joint Pre-Hearing Statement was a cut and paste job and the inclusion of the signature line for Mr. Powell was a mistake, T/R 288:20-289:12. This was also supported by another employee, Gwen Kimnitz, T/R 330:3-334:20.

74. The Arbitrator found against Respondent's client and in favor of the Defendants, and subsequently awarded attorney's fees in the amount of $2,000 and costs in the amount of $191 to the Defendants.

75. On October 24, 2008, Respondent sent a letter to Mr. Deere, which stated the following: "Obviously Mr. Trejo is going to appeal the arbitration award. I would welcome the opportunity to settle this matter with the litigation ending and neither party to obtain fees or costs and a correction to the credit report of Mr. Trejo. Would you review that matter, and advise me accordingly", see H/Ex 37.

76. Because the time for appeal had not yet run, Defendant's decided to accept the offer and Mr. Deere sent Respondent a letter dated November 4, 2008, which stated in part: "My client accepts the offer to end the litigation with each party paying its own fees and costs", see H/Ex 38.

77. Respondent responded to the above letter with a November 5, 2008, letter which stated in part: **"Please be reminded that I am working with a client who has not yet given the authority to do anything, but it is my hope to end this matter for both your client and Mr. Trejo. I am awaiting word from him based upon your correspondence dated November 4, 2008, and will advise you accordingly",** see H/Ex 39.

78. Respondent testified that he sent his client, Mr. Trejo, a letter on November 5, 2008, informing him that Mr. Deere's client was willing to settle the case for a "walk away", and for Mr. Trejo to "please let me know immediately [if that is agreeable]", H/Ex 45 BSN 000095. According to the Respondent, on or about

December 3, 2008, Mr. Trejo finally provided Respondent with his authority to accept Mr. Deere's client's November 4, 2008, "walk away" settlement offer.

79. On December 3, 2008, Respondent sent Mr. Deere a letter confirming that the case had been settled. Each side to assume their own costs and attorney's fees and further stating that it was Respondent's understanding that Mr. Deere's client would take steps to correct any negative credit information as it relates to Mr. Trejo, Ex 40. In the interim the appeal time had run and there was no reason why Mr. Deere's client would still want to settle the case, H/Ex 42, T/H 179:9. Mr. Deere testified that he felt that Respondent's November 5, 2008, letter meant what it says, that Respondent did not have his client's authority to settle so there was not yet an agreement, T/H 178:6-20.

80. On December 31, 2008, Mr. Deere filed an Application for Entry of Judgment requesting a final judgment be entered for the previously awarded attorney's fees and costs, H/Ex 40.

81. On February 9, 2009, Respondent filed an Objection to Judgment ("the Objection") on the basis that the parties had agreed to settle. The Objection referenced the October 24, 2008, letter and the November 4, 2008, letter between counsel and falsely stated: **"It is absolutely clear that there was no further communications between the parties until December 3, 2008,... when Plaintiff confirmed that he had agreed and therefore the matter was resolved and settled"**. In his Response, Respondent failed to inform the Court of the November 5, 2008, letter that he had sent to Mr. Deere with the qualifying statement that he did not have authority from his client to settle the case.

Respondent also stated to the Court in his Response that there was **"... no further communications between the parties until December 3, 2008,** H/Ex 45 p. 2.

82. Ultimately, the case did settle along the lines proposed by Respondent to Mr. Deere, T/H 201:17-202:15.

CONCLUSIONS OF LAW REGARDING COUNT THREE

83. In its Post Hearing Memoranda, the State Bar appropriately focuses only on the second part of this Count as the evidence showed that Respondent's staff simply took the Joint Pre-Hearing Statement that Mr. Deere had prepared, modified it to fit their own version of the case and then sent it out without taking off the signature line of the defendant's attorney. There was no satisfactory explanation of where the signature of "Jay Powell" came from. The Copy of the Joint Pre-Hearing Statement sent to the Arbitrator did have the signature line stricken through, while the one sent to Mr. Deere had no strike through and had a scribbled signature over the name "Jay Powell". The Respondent did take steps to tell the Arbitrator what happened. While this is sloppy conduct and should have been caught by the Respondent, there is insufficient evidence to conclude that it was done as an intentional forgery.

84. Of greater concern, and certainly more serious, is the fact that the Respondent, in his February 9, 2009, Objection to Judgment made a unequivocal statement to the Court that, while there were letters between him and Mr. Deere dated October 24, 2008, and November 4, 2008, "**... there was no further communications between the parties until December 3, 2008... when Plaintiff confirmed that he had agreed and therefore the matter was resolved and settled**".

85. This is not just an academic exercise. The unmentioned November 5, 2008, letter sent by Respondent to Mr. Deere is critical to an analysis of whether there was or was not a settlement in the case, and not only should have been presented to the Judge, Respondent made the affirmative statement that there were no other letters, when there were. The importance of the November 5, 2008, letter is illustrated as follows:

a) On October 24, 2008, Respondent proposes to Mr. Deere that they settle the case with each party to just walk away, with corrections to Mr. Trejo's credit report.

b) On November 4, 2008, Mr. Deere sends a letter to Respondent, accepting his offer to settle the case with each party to pay their own fees and costs, and advises that steps have already been taken to correct Mr. Trejo's credit report.

c) The very next day, on November 5, 2008, Respondent **qualifies** his previous offer by stating that he is: "...working with a client who has not yet given me authority to do anything, but it is my hope to end this matter for both your client and Mr. Trejo. I am awaiting word from him based upon your correspondence dated November 4, 2008, and will advise you accordingly...." H/E 39.

d) On December 3, 2008, Respondent sends a letter to Mr. Deere confirming the fact that there was a settlement.

86. Taking just the Respondent's October 24 letter and Mr. Deere's November 4 letter it is fairly easy to say that you have an offer and acceptance. However, Respondent's November 5, 2008, letter clearly qualifies everything by Respondent stating that he does not have his client's authority to settle the case, and in fact did

not receive that authority until later when he confirms the agreement on December 3, 2008.

87. Respondent argues that the November 5, 2008, letter was immaterial to whether there was or was not an agreement between the parties, or that it was referred to in his Objection to Judgment. However, it is not up to the Respondent to pick and choose the information he presents to the Court as it is the Court's decision whether there was or was not an agreement, and Respondent has an obligation to present everything to the Court so it can make the decision.

88. Respondent further argues that because he and Mr. Deere have debatable positions on whether or not the case was settled does not constitute clear and convincing evidence that Respondent did not have a good-faith belief that the case was ultimately settled, Respondent's Post Hearing Memorandum page 12, para. 48. This argument misses the point. While it is debatable whether there was or was not an agreement between the parties to settle the case, what is **not** debatable is Respondent's obligation to provide the Court with all of the information it should have to make that decision, and not mislead the Court that there were no further communications between the parties when there was.

89. Respondent also contends that the following language in paragraph one on page 2 of his Objection to Judgment:

> "On November 5, 2008, counsel conveyed the settlement offer to his client and made it clear that undersigned counsel was attempting to settle this matter based upon the agreement of the defendants that he would confer with Mr. Trejo to assure settlement and end this litigation." H/E 45, p 2.

makes a conflicting statement which shows that he intended to include the November 5, 2008, letter from him to Mr. Deere in his presentation to the Court,

T/R 196:8-198:23; 349:6-354:22; 353:24-354:3. While perhaps this language is confusing, it is hard to see how, from this language, the judge could imply that there was more communication referred to, but not explained, by the Respondent. The fact is that the judge needed to have the November 5, 2008, letter in order to have a full understanding of the communications between the attorneys, but did not have it, and further, was assured by Respondent that there were no further communications between the attorneys when in fact there was.

90. In his testimony, Respondent seems to still be arguing about whether there was or was not a "deal" when the issue is what he said to the Court, T/R 353:4-18.

91. The greater problem is to try and decide whether this was a knowing omission or simply a negligent omission, as the consequences that derive there from are significant. Unfortunately, there is not much to go on to decide this issue either way. Respondent's testimony regarding his failure to attach the November 5, 2008, letter is confusing and uncertain, T/R 347:13-354:22. At one point, Respondent states that he meant to attach the November 5, 2008, letter, but then insists that reading the above cited sentence in his Objection to Judgment one can imply the substance of the omitted letter. Respondent insists that the language was "inartful" in that it creates confusion, but still one could, according to him, conclude that he was referencing the November 5, 2008, letter T/R 389:10-17.

92. This Hearing Officer is ever mindful of the responsibility of an attorney to be totally candid with the Court. On the other hand, this Hearing Officer is also mindful of the pressures and demands that are made on attorneys, especially attorneys that are trying to run a high-volume practice at very thin margins. There

was scant evidence that Respondent intentionally or knowingly did not include the letter in the pleading he filed with the Court, but because the letter was not in support of his case the implication is there. Respondent's testimony regarding whether he intended to attach it was murky and confusing. The last portion of the cited sentence in his Objection to Judgment wherein he refers to conversing with the defendant to assure settlement does at least implicate that something else was going on, but it is hardly the clarity one would expect when submitting pleadings to a court.

93. "Clear and Convincing" is a fairly high standard of proof, and not one to be satisfied by implication. In the dealings that this Hearing Officer has had with Respondent, it is clear that he is hard-working, conscientious and dedicated to his clients. On the other hand, he is also sloppy in his practice, seems willing to do whatever necessary to help his clients, often does just enough to get by, and perhaps is overworked, overstretched and thin on his ability to control all aspects of his practice. The fact that his clients continued to get bills on fees when they were already paid, or not due, is further indication of this. This gets Respondent into all manner of difficulties with his clients and the State Bar.

94. While it is a close call, this Hearing Officer concludes that Respondent negligently violated his duty of candor to the Court and opposing counsel by omitting the November 5, 2008, letter, and thus violated 8.4(d) engaging in conduct that is prejudicial to the administration of justice, but did not violate ER 8.4(c), ER 4.1 or ER 3.3(a).

COUNT FOUR (File no. 09-0221-Ball)

Summary of Allegations

95. In this Count, the Respondent's office represented a bankruptcy client, Patricia Ball ("Ms. Ball"), and the State Bar again claims that Respondent failed to have a written fee agreement, and also failed to deposit Ms. Ball's fee into his trust account. Ms. Ball complains that she did not get good advice on the timing of when she should file her Bankruptcy Petition and there was confusion over what her fee would be.

FINDINGS OF FACT REGARDING COUNT FOUR

96. On or about September 12, 2007, Patricia Ball met with Respondent to discuss filing for bankruptcy.

97. Respondent quoted a total fee of $1,200, which, according to Ms. Ball's recollection, included $900 in legal fees and $300 and filing fees. Ms. Ball paid the total of $1,200 by cashier's check, which she delivered to Respondent's employee Janice Smith (as previously referenced, Ms. Smith), on February 2, 2008. Miss Ball's bankruptcy was handled to successful conclusion, primarily by Ms. Smith.

98. Although Ms. Ball claims not to have received a written plea agreement, she had a very good understanding of what attorney services would be done for her payment of $1,200, T/R 137:12-24.

99. Ms. Ball's complaint is two-fold, she complains that she was not advised by either Mr. Charles or Ms. Smith, the one with whom she had primary contact, about the timing of when she should file her Bankruptcy Petition to keep her income tax

refund from being taken by the Bankruptcy Trustee. Secondly, Ms. Ball complains that she continued to receive bills from the Respondent's firm even though she had paid what she thought was the total for attorneys fees and filing fees, T/R 154:10-155:12; 157:11-158:11.

100. Apparently, Ms. Smith helped resolve the issue about the subsequent billings and Ms. Ball did not have to pay anything more. On the issue of whether Ms. Ball received accurate advice on when to file her Petition, there was insufficient evidence to find an ethical violation by clear and convincing standard.

101. The State Bar also alleges that, as in Counts One and Two, Respondent failed to have a written fee agreement with Ms. Ball, and failed to deposit her fees into his trust account. The evidence shows that Ms. Ball had a good understanding of what she was going to receive for the fees that she paid Respondent's firm, and there was no evidence that in her bankruptcy documents there was not a fee agreement, other than Ms. Ball's inability to recall whether there was or was not. Similarly, the Hearing Officer has already ruled on the necessity of placing the fees for bankruptcy work in a trust account.

102. The State Bar also originally alleged that Respondent failed to promptly communicate with the client, failed to act with reasonable diligence; failed to provide competent representation; failed to properly ensure that Ms. Smith's conduct conformed to the Rules of Professional Conduct.

CONCLUSIONS OF LAW REGARDING COUNT FOUR

103. The Hearing Officer finds that there is not clear and convincing evidence that Respondent violated ER's 1.1; 1.3; 1.4; 5.1; 1.5(b); 1.15(a); and Rules 43(b) and 44(a), Ariz.R.Sup.Ct.

ABA STANDARDS

104. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating and mitigating factors. The ABA *Standards* indicate that the ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations.

The Duty Violated

105. The State Bar has proven by clear and convincing evidence that Respondent violated ER 8.4(d) by negligently making a false statement of fact to a tribunal and thereby engaging in conduct that is prejudicial to the administration of justice. This violation implicates *Standard* 6.13, violations of duties owed to the legal system:

> "Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false ..., and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding."

The Lawyers State of Mind

106. As mentioned previously, this Hearing Officer finds that Respondent's state of mind was negligent.

The Injury Caused

107. There was actual harm to Mr. Deere's client, who had to pay Mr. Deere to defend against Respondent's Objection to Judgment. There was no showing of what the injury amount was such that a restitution figure could be established, but it is clear that there was some damage. There was also potential harm to the integrity of the proceedings because of Respondent's misstatements.

Aggravating and Mitigating Factors

Aggravating Factors:

108. *Standard* 9.22(a) Prior Disciplinary Offenses:

a) Respondent was Censured on October 15, 2009, in SB-09-0100-D for knowingly making a false statement of fact to a tribunal in violation of ER's 1.3, 1.4(a)(3), 3.4(c), 8.1(b), 8.4(c) and (d), and Rule 53(c) and (f).

b) Respondent was Censured on June 1, 2009, in SB 09-0029-D for violation of ER 1.9(a).

c) Respondent participated in the Diversion program for three years in 05-0145, for a violation of ER 1.4 (communication). The Diversion in 05-0145 was recently terminated when Respondent was sanctioned and placed on probation in SB 09-0029-D.

It should be noted that the remainder of the listed disciplinary proceedings are all over 10 years old.

d) Respondent received a Censure in 1993 for violation of ER 8.4(c).

e) Respondent received and Informal Reprimand in 1993 for violation of ERs 1.3, 1.5(c), and 1.15.

f) Respondent received an Informal Reprimand in 1994 for violating ERs 1.3, 1.4, 1.16(d), Rule 51(h) and (i).

g) Respondent received a third Informal Reprimand in 1994 for violation of ER 8.1. And Rule 51(h) and (i).

h) Respondent received a fourth Informal Reprimand in 1997 for violation of ERs 1.3 and 1.4.

i) Respondent received a fifth Informal Reprimand in 1997 for violation of ERs 1.5(b) and 1.16(d).

109. *Standard* 8.2 recommends suspension when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

110. *Standard* 9.22(c) Pattern of Misconduct:

Respondent has demonstrated a pattern of misconduct. He has previously been Censured on October 15, 2009, in SB-09-0100-D for violation of: ER 8.4(c) conduct involving dishonesty, fraud, deceit or misrepresentation and (d) conduct prejudicial to the administration of justice; ER 8.1(b) failing to disclose a necessary fact or correct a misapprehension; ER 3.4(c) knowingly disobeying an obligation under the rules of a tribunal; Rule 53(f) failure to furnish information, which are similar to the violations found herein. In 1993 Respondent was Censured for violating ER 8.4(c).

111. *Standard* 9.22(i) Substantial Experience in the Practice of Law:

Respondent has been an attorney in Arizona since September 23, 1972, over 35 years.

Mitigating Factors:

112. *Standard* 9.32(g) Character or Reputation:

Respondent submitted one character letter on his behalf

PROPORTIONALITY REVIEW

113. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever alike, *In re Struthers*, 179 Ariz. to 16, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley,* 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasley*, supra.

114. In this case, the State Bar is recommending a suspension of the Respondent for six months and one day, thereafter to be placed on probation for two years upon reinstatement and pay the costs and expenses of these proceedings. It is also recommended that Respondent's probation should include an order that Respondent participate in a Law Office Management Assistance Program ("LOMAP") evaluation and the Terms and Conditions of Probation should be in place before he is reinstated. The State Bar also recommends that Respondent

should also be ordered to comply with the LOMAP Director and or her designee's recommendations as to the Terms and Conditions.

115. Before this Hearing Officer begins to discuss proportionality, the unique circumstances of this case must be discussed. The most serious misconduct in this matter is, of course, Respondent's misrepresentation to the Court in his pleading. While there is some confusion as to the language that Respondent relies on to say that he intended to point out to the Court that there were still ongoing negotiations, his failure to actually attach the letter, and then his assertion that there were no other communications cannot be explained away. While this Hearing Officer could not find that this was a "knowing" omission, it is very close.

116. It is recognized that under the ABA *Standards,* conduct that is negligent is normally sanctioned with a Censure. However, *Standard* 8.2 states:

> "Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system or the profession."

117. In the commentary to *Standard* 8.2, The Florida Bar v. Glick, 397 So.2d 1140, 1141 (Fla. 1981) is cited saying: "We must deal more severely with an attorney who exhibits cumulative misconduct."

118. This Hearing Officer has read the Hearing Officer's report in Respondent's most recent disciplinary case, SB-09-0100-D, and notes some disturbing similarities. In that case, for which the Respondent received a Censure, the Hearing Officer found that Respondent had filed a pleading with the Court with language that was both inaccurate and deceptive. Respondent argued in that case that the judge

could "discern" certain facts from the case even though they were not necessarily evident, again calling on the judge to read his mind and thus explain away his omission. The Hearing Officer in that case found that the Respondent was "cavalier" with the facts and what he told the Court. While in that case the Respondent's misstatement was not of great consequence, in the case at hand there could have been very serious consequences because in this case the judge was trying to decide whether there was an agreement between the parties based upon incomplete information. Fortunately, Respondent's omission and misstatement were brought to the judge's attention by opposing counsel so the judge had the full record upon which to make his decision. There was, therefore, potential harm to the process, and also further expenses incurred by opposing counsel in correcting Respondent's misstatement.

119. While the bulk of Respondent's discipline is almost 15 years old, there is a disturbing trend noted by both the undersigned Hearing Officer in a Hearing Officer's Report in Respondent's SB-0145-D case signed November 20, 2008, and Hearing Officer John Schwartz' Hearing Officer Report in SB-09-0100-D signed May 26, 2009, and now this matter, (for conduct which occurred in February of 2009) for Respondent to get into trouble because he is either too busy to really pay attention to what he's doing, delegating his responsibilities to people who are not competent, or perhaps worse, simply playing fast and loose with the facts, H/Ex 60, first 8 pages.

120. Respondent's misstatements and misrepresentations to the Court are now twofold and counting. This is precisely the circumstance anticipated by ABA *Standard* 8.2. While there was insufficient evidence to find by a clear and convincing standard that Respondent intentionally or knowingly misled the Court, thus implicating a suspension under ABA *Standard* 6.12, the fact that he is yet again before the disciplinary process for misstatements and misrepresentation to the Court definitely implicates ABA *Standard* 8.2.

121. Respondent has been censured three times before, twice in the past two years, and placed on probation twice. Respondent has been censured for an 8.4(c) violation twice, although the first violation dates back to 1993, and now violated 8.4(d) twice. The provisions of ABA *Standard* 8.2 established that the presumptive sanction is suspension.

122. There are, of course, numerous cases, which can be cited for the proposition that an attorney who makes a negligent misrepresentation to the Court should receive a Censure, including the Respondent's previous case. However, the recommendation of this Hearing Officer fits more appropriately under ABA *Standard* 8.2, which requires a suspension. Suspension for repetitive misconduct is supported by the following cases.

123. In *In re John T. Ryan*, 03-2224 (2005), Respondent Ryan had come before the disciplinary process on multiple occasions for trust account violations. In this last one, Mr. Ryan's third, the parties had arrived at an agreement for a second Censure and probation for a violation by Mr. Ryan of his responsibilities to maintain his trust account. The Disciplinary Commission rejected that sanction

saying that repetitive conduct must receive a more serious sanction. Mr. Ryan was ultimately suspended for a period of 60 days given all of the aggravating and mitigating factors in that case.

124. *In re Lee Galusha*, 164 Ariz. 503, 794 P.2d 136 (1990), Mr. Galusha was before the disciplinary process after having previously received a sanction for similar conduct. While the misconduct was different than the Respondent's herein, the Supreme Court noted with disfavor that Respondent Galusha: "... was involved in another disciplinary matter, involving similar misconduct, at the time he agreed to perform the services for the client in this matter... Despite heightened awareness of his duties and responsibilities, respondent knowingly failed to fulfill his ethical obligations to his client." The Supreme Court went on to find: "Not only are the infractions involved in this matter quite serious, respondent's previous bar record demonstrates a chronic pattern of misconduct." Due in no small part to Mr. Galusha's failure to participate in the proceedings, he was disbarred.

125. As these cases point out, inherent in our Rules of Conduct is the notion that an attorney must learn from misconduct and sanctions imposed for that misconduct, and if the misconduct continues, there will be more serious consequences. Here, Respondent has been previously censured twice for violating ER 8.4(c) and now twice for violating ER 8.4(d), all having to do with questions of misrepresentation and honesty. Respondent offered very little in the way of mitigation, especially any awareness that he accepts any responsibility for his repetitive contact with the disciplinary process.

RECOMMENDATION

126. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice, deter future misconduct, and instill public confidence in the Bar's integrity, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985).

127. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).

128. As stated previously, this Hearing Officer is recommending a suspension. Respondent has had the opportunity to learn from his past mistakes on multiple occasions and has not yet done so. While Respondent's commitment to his clients is not in doubt, his commitment to this profession is. While he is a genial and likeable person, he has now three times engaged in dishonest conduct, twice intentionally and now negligently (by the narrowest of margins). It is anticipated in the ABA *Standards* and common sense, that an attorney is given an initial benefit of the doubt and an opportunity to learn from and correct his mistakes. Respondent has not done so.

129. After weighing all of the factors set forth herein, this Hearing Officer recommends the following:

1) That Respondent be suspended from the practice of law for a period of 60 days;

2) That Respondent be placed on probation for two years with conditions and terms to be established after a Law Office Management Assistance Program ("LOMAP") evaluation, and any other terms and conditions that the LOMAP Director and or her designee recommends as to Terms and Conditions;

3) Payment of all costs and expenses incurred by the State Bar in proving only the violations found herein;

4) Payment of all costs and expenses of the Disciplinary Clerk and Supreme Court.

5) In the event Respondent fails to comply with any of the terms of probation recommended by the Hearing Officer and approved by the Disciplinary Commission and Supreme Court at the time of reinstatement proceedings, and the State Bar receives information about this failure, Bar Counsel will file a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(f), 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 30 days following the receipt of notice, and will determine whether the terms have been breached, and, if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving noncompliance by a preponderance of the evidence.

DATED this 5th day of March, 2010.

Hon. H. Jeffrey Coker /ga
Honorable H. Jeffrey Coker
Hearing Officer

Original filed with the Disciplinary Clerk
this 5th day of March, 2010.

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Copy of the foregoing hand-delivered
this 9 day of March, 2010, to:

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//JSA