BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	Nos. 08-2061
DONALD E. FERGUS JR. **Bar No. 019459**	**HEARING OFFICER'S REPORT**
Respondent.	

PROCEDURAL HISTORY

The State Bar filed a Complaint in this matter on November 13, 2009. Respondent filed an Answer on January 8, 2010. Respondent admitted the allegations in all but five of the 28 paragraphs in the Complaint. In paragraphs 5, 7, 21, 27, and 28 Respondent in his Answer said that he was without sufficient information concerning these allegations and therefore denied the same. An Initial Case Management Conference was held on December 21, 2009. The parties filed a Joint Pre-Hearing Statement on March 4, 2010. Respondent filed a Trial Memorandum on March 10, 2010. The State Bar filed a Trial Memorandum on the day of the hearing, March 15, 2010. The hearing was held on March 15, 2010.

FINDINGS OF FACT

The parties have stipulated in the Joint Pre-Hearing Statement to the following facts in paragraphs 1 through 20.

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 21, 1999.

2. Respondent was admitted to the State Bar of California on August 1, 1979.

COUNT ONE (File no. 08-2061)

2. On or about March 6, 2008, Respondent began representing Hugo Van Vliet ("Hugo") relating to an estate matter.

3. At the time, Hugo was suffering from terminal lung cancer, was near death and was receiving hospice care.

4. On March 10 and 11, 2008, Hugo was unable to speak.

5. On March 10, 2008, Respondent attended a meeting with Van Vliet family members relating to Hugo's estate; on that date, Hugo's three adult children signed an engagement letter Respondent had prepared retaining him to conduct estate planning and/or other legal tasks relating to Hugo's estate.

6. On March 11, 2008, under Respondent's supervision and direction, Respondent's paralegal and his secretary worked to prepare a power of attorney for Hugo's signature and a trust document. On March 11, 2008, work on those documents continued until approximately 6:00 p.m.; work on at least one of the documents continued on the morning of March 12, 2008.

7. Respondent had previously instructed his secretary to be prepared to travel to Hugo's home on the morning of March 12, 2008, to notarize Hugo's signature on the power of attorney, and to witness the execution of the power of attorney and trust.

8. Hugo died at approximately 4:00 a.m. on March 12, 2008.

9. When Respondent arrived at his office on the morning of March 12, 2008, he instructed his secretary that she did not need to accompany him to Hugo's home.

10. Respondent knew prior to his arrival at his office, prior to his arrival at Hugo's home, and/or prior to the execution of the power of attorney and trust that Hugo had died.

11. Respondent traveled to Hugo's home on the morning of March 12, 2008, bringing with him the unsigned power of attorney and trust documents.

12. The signature on the power of attorney purports to be that of Hugo, and the document bears the date of March 11, 2008. Respondent witnessed the signing of the power of attorney and swore that Hugo had signed the document on March 11, 2008, and that he had been of sound mind when he did so. Respondent's sworn statements were false and known by him to be false.

13. When Respondent arrived at Hugo's home, Respondent knowingly instructed and/or permitted Nick Van Vliet ("Nick"), Hugo's son, to fraudulently forge Hugo's name on the power of attorney.

14. Using the fraudulent power of attorney, Nick and Hugo's other adult children executed the separate property trust prepared by Respondent and his staff affecting some or all of Hugo's property.

15. Respondent knowingly assisted, permitted and/or instructed Nick and the other Van Vliet heirs to execute the trust based on the fraudulent power of attorney.

16. Respondent returned to his office on March 12, 2008, and his secretary thereafter notarized the power of attorney pursuant to direction from Respondent. Respondent falsely indicated to his secretary that the purported signature of Hugo on the power of attorney was authentic when he knew it was a forgery.

17. Respondent thereafter continued to represent Hugo's estate.

18. In October, 2008, the attorneys for Geri Van Vliet (Hugo's widow) filed on her behalf a pleading entitled "Objection to Inventory, Request for Emergency Hearing, and Petition to Remove Personal Representative," in Maricopa County Superior Court in PB2008-050244. The

pleading alleged, among other things, doubts that Hugo had executed the power of attorney and trust, or that he was not competent to do so at that time.

19. Prior to Geri's filing of the Objection, Respondent had consulted attorneys Michael J. Farrell ("Mr. Farrell") and John R. Christian, members of Respondent's firm Jennings Strouss and Salmon, about matters relating to the probate of Hugo's estate but knowingly and/or intentionally had not revealed to them any misconduct relating to the execution of the power of attorney and trust.

20. In preparation for the October 16, 2008, hearing, Mr. Farrell met with Respondent; Respondent admitted to Mr. Farrell only that there had been some "irregularities" relating to the notarization of the power of attorney. Respondent did not, however, at that time, reveal the true nature of the false signature on the power of attorney nor his specific role in obtaining that signature.

CONCLUSIONS OF LAW

1. The State Bar has proven by clear and convincing evidence that by continuing to represent the estate of Hugo Van Vliet after Nick Van Vliet signed the power of attorney, and the trust documents Respondent engaged in a conflict of interest when there was a significant risk that his representation would be materially limited by his personal interest in violation of ER 1.7, Rule 42, Ariz. R. Sup. Ct. Respondent had a personal interest in keeping quiet his participation in the forgery of Hugo Van Vliet's signature on the power of attorney. Hugo's three adult children witnessed the forgery. Hugo's wife Geri was not the mother of Hugo's grown children. Through her attorney Geri challenged the probate of Hugo's estate. The children testified that Respondent told them it was appropriate under the circumstances for Hugo's son Nick to sign his deceased father's name to the power of attorney. (Nick's testimony at TR 134: 25 through 135:17 and Kathleen

Haagsma's testimony at TR 161:18) The conflict was present from the time that Respondent advised or permitted Nick to sign his deceased father's name to the power of attorney. The three children of Hugo were now at risk of having the power of attorney and trust attacked by Hugo's widow Geri. The children would have a potential action against Respondent and his law firm for the faulty advice to forge father's name. When Michael Farrell an attorney at the law firm learned that Hugo's signature was not actually notarized by the firm's notary on October 13, 2008, he contacted the firm's general counsel J. Scott Rhodes. Knowing that the notary was defective and appreciating a conflict with the children, Mr. Farrell contacted them to begin the process of withdrawing from representing them due the conflict. (TR 123:24)

2. The State Bar has proven by clear and convincing evidence that by advising, instructing or knowingly permitting Nick Van Vliet to sign the power of attorney as Hugo, when Hugo was deceased, advising the family to sign the remaining trust documents, and instructing his assistant to fraudulently complete the notary book Respondent violated the Rules of Professional Conduct, knowingly assisted and/or induced another to do so or did so through the acts of another in violation of ER 8.4(a), Rule 42, Ariz. R. Sup. Ct. Respondent was engaging in conduct that involved dishonesty, fraud, deceit and misrepresentation when he instructed Nick to sign his deceased father's name to the power of attorney. Therefore, Respondent was committing a violation of ER 8.4 (c) by knowingly inducing Nick to commit the act of dishonesty in signing his father's name.

3. The State Bar has proven by clear and convincing evidence that by advising, instructing or knowingly permitting Nick Van Vliet to sign the power of attorney as Hugo, when Hugo was deceased, advising the family to sign the remaining trust documents, and instructing his assistant to fraudulently complete the notary book Respondent committed a criminal act that reflects

adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects in violation of ER 8.4(b), Rule 42, Ariz. R. Sup. Ct. In its Trial Memorandum the State Bar refers to the forging of Hugo's signature as a criminal act. (State Bar's Trial Memorandum, page 8, line 20) The Bar also asserted that when Respondent instructed Ms. Perlmutter to notarize signatures she had not witnessed, Respondent was instructing her to engage in a violation of Arizona law. (Trial Memorandum page 9, line 11) The Bar did not include in its Trial Memorandum any reference to a specific criminal statute. A. R. S. Section 13-2002 describes forgery as a person who with intent to defraud falsely makes a written instrument. It is clear that Respondent was responsible for falsely making a written instrument. It is also clear that Respondent was having the power of attorney falsely indicate that it was signed by Hugo. It is less clear that by this action Respondent was attempting to defraud anyone.

Respondent explained that the purpose of the power of attorney was to create a trust which would hold the property of Hugo and in particular his dairy farm. (TR 23:20-23) If Hugo died without the farm and other property having been transferred to his three children in a trust before his death, then Hugo's will would have to go through the probate process. Respondent was advising the formation of a trust to assist the children in avoiding probate. (TR 21:7-14) Although there was some suggestion in the testimony at the hearing that the purpose of the trust was to avoid inheritance tax, Respondent testified that the trust would not have accomplished that goal.

Respondent explained that the purpose of the power of the attorney was to give the three children of Hugo the power to create the trust. (TR 24:13 through 25:14)

If "intent to defraud" is an intention to mislead everyone into believing that Hugo signed the power of attorney, then Respondent may be guilty of a criminal offense of

forgery. A review of the notary statutes ARS section 41-311 reveals that an "acknowledgment" by a notary is when a signer appears before the notary. Respondent was asking Ms. Perlmutter to violate this statutory requirement when he asked her to notarize Hugo's signature when she had not witnessed the signing. The notary statutes do not contain a specific criminal act for notarizing a document when the notary did not see the signature. However ARS section 39-161 states that a person who notarizes an instrument he knows to be false or forged which if genuine could be filed under any law of this state is guilty of a class 6 felony. The evidence is clear that Ms. Perlmutter did not know that Hugo had not signed the power of attorney. Respondent testified that he told Ms. Perlmutter that he saw Hugo sign the power of attorney. (TR 36:18) Respondent also stated that he knew that he was leading Ms. Perlmutter to violate the notary laws. (TR 36:24 through 37:4)

4. The State Bar has proven by clear and convincing evidence that by advising, instructing or knowingly permitting Nick Van Vliet to sign the power of attorney as Hugo, when Hugo was deceased, advising the family to sign the remaining trust documents, by instructing his assistant to fraudulently complete the notary book and later deceiving his employer, Jennings Strouss & Salmon about what had actually occurred, Respondent engaged in conduct involving fraud, deceit or misrepresentation in violation of ER 8.4(c), Rule 42, Ariz. R. Sup. Ct.

Respondent had Nick forge Hugo's signature on March 12, 2008. Respondent represented the children and the personal representative of the Estate of Hugo Van Vliet for six more months while he knew the signature was a forgery. Respondent's stated purpose in instigating the forged power of attorney was to spare the children the long drawn out process of probate, by having the property and dairy farm of Hugo pass to the children in trust purportedly while Hugo was still alive. (TR 42:12-19) Respondent had practiced estate

law in California for many years before coming to Arizona to practice with several large law firms. He testified that he was trained in California to avoid probate because it was very expensive. (TR 40:15-19) His motivation was, "... and I'm just trying to help the family do this as easily as possible without being tied up in court. And it was a terrible mistake. The end result was the will that he had would have left the dairy to the three children. It had no impact at all on the surviving spouse. She wasn't a beneficiary of separate property. So that's why -- you know, it was wrong, but the end result is the same." (TR 40:19 through 41:1)

Respondent acknowledged that after practicing in Arizona he started to learn that Arizona probate procedures were not as time-consuming and expensive as California. (TR 44:15-19)

Respondent's conduct in continuously lying to his own law firm about his role in the fraudulent power of attorney is reprehensible. Respondent said nothing about the forged signature for months after March 12, 2008. In April, 2008 Lora Johnson an attorney representing Hugo's widow Geraldine ("Geri") contacted Respondent to ask for information about certain things that happened close in time to Hugo's death. (TR 140:23 through 141:5) Ms. Johnson knew about the March 10, 2008 meeting at Hugo's home with Respondent and Hugo's three children. (TR 141:17) When on April 15, 2008 Ms. Johnson asked Respondent if there were any documents about estate planning for Hugo, Respondent told her that there was not sufficient time to prepare any documents to complete any transfers of property from Hugo to the children. (TR 142:3-10)

In a letter of May 1, 2008 responding to another letter from Ms. Johnson, Respondent referred to an L.L.C. Ms Johnson assumed that this L.L.C. was from before Hugo's death. Respondent did not tell her that it was formed at the time of Hugo's death. (TR 142:21

through 143:9) In a telephone conversation with Ms. Johnson in August, 2008 Respondent for the first time mentioned the power of attorney and the transfers of property to the children. Ms. Johnson requested copies of these documents. Respondent sent her the documents. (TR 143:19-24) Lora Johnson hired a questioned document examiner to analyze the signatures on the documents. She also requested a copy of the notary book involved in the notarization of the documents. (TR 144:13-19) Ms. Perlmutter, the notary at Respondent's firm testified that she got a call from Ms. Johnson requesting her notary book. (TR 111:6) Ms. Perlmutter told Respondent of this call. He did not instruct her to disclose the notary book to Ms. Johnson. (TR 112:3)

On October 8, 2008, Lora Johnson on behalf of Geraldine Van Vliet filed in Superior Court, Maricopa County an Objection to Inventory, Request for Emergency Hearing and Petition to Remove Personal Representative in the Matter of the Estate of Hugo Van Vliet, No. PB2008-050244. (Exhibit 1) She described the allegation of Hugo's children that on March 10, 2008 Hugo signed a power of attorney giving his son Nick the ability to act as his agent, and the allegation of the children that at the time the power of attorney was signed Hugo was of 'sound mind' and that he 'understands' the provisions of the document. (Exhibit 1, SBA 000002) Ms. Johnson informed the court that the power of attorney was witnessed by Respondent and notarized by Michelle Perlmutter, a legal assistant to Respondent and that Respondent and Ms. Perlmutter had not responded to Ms. Johnson's request for the notary book made pursuant to ARS section 41-319 (A). Ms. Johnson also informed the court that the questioned document examiner, Rosemarie Urbanski opined that it was "inconclusive" that the Hugo Van Vliet signature on the power of attorney was authentic.

Michael Farrell, another attorney at the law firm, had been sought by Respondent to help in responding to Ms. Johnson's Objection. When Respondent first revealed to Mr. Farrell in October, 2008 that there were "irregularities" with the notary on the power of attorney, the law firm began an investigation into the notary and Respondent's conduct. The investigation was conducted by J. Scott Rhodes, the firm's general counsel. (TR 74:6) Ms. Perlmutter was interviewed. Mr. Rhodes told her that he learned Hugo had died before the power of attorney was signed. Ms. Perlmutter admitted that she should not have notarized the document without witnessing the signatures. She testified that she was grateful that she was not fired by the firm. (TR 112:8 through 113:16)

Mr. Rhodes reviewed Metadata maintained by the firm. (Exhibit 3, SBA000108) He concluded that work on the power of attorney and related documents started in the evening of March 11, 2008, and concluded on March 12, 2008. If, Respondent had gotten Hugo's signature on the power of attorney before Hugo's death at 4:00 am on March 12, 2008, Respondent would have had to make a late night trip to Goodyear, Arizona to have accomplished this feat. (TR 74:14 through 76:12) The Management Committee of the firm met twice with Respondent. In the one of these meetings Respondent stated that Hugo had executed the documents but that he was very ill so his son Nick guided Hugo's hand. (TR 77:1 through 78:4) After Mr. Rhodes conducted more investigation, including obtaining the death certificate indicating that Hugo died at 4:00 am on March 12, 2008, Mr. Rhodes confronted Respondent with the fact that the law firm records proved that the power of attorney and related documents were not completed until the morning of March 12, 2008. Respondent insisted that Hugo had been alive when the power of attorney had been signed and Respondent must have gone to Goodyear after 6:30 pm on March 11, 2008 and got

Hugo's signature. (TR 79:8 through 80:16) Mr. Rhodes asked Respondent to provide any evidence that Respondent had made this trip to Goodyear. Respondent never provided any proof of this phantom trip, nor did Respondent's billings reflect this trip on any day other than March 12, 2008. (TR 80:9 through 81:9) The Management Committee of the law firm voted unanimously to terminate Respondent. (TR 81:24 through 82:2)

The Van Vliet children threatened to sue the law firm. The firm's resolution of this matter with the Van Vliet children is reflected in Exhibit 6, which is sealed. (TR 82:23 through 83:25)

Only after the law firm filed a charge about Respondent with the State Bar, did Respondent for the first time admit that he had participated in the forgery. The Declaration of Donald E. Fergus is Exhibit 5 to the hearing. It is dated June 8, 2009, one year and three months after Respondent advised Nick Van Vliet that it was appropriate to forge his deceased father's name to the power of attorney.

RESTITUTION

In the Trial Memorandum the State Bar has not asked for restitution. In the ABA Standards portion of this report the Hearing Officer will discuss the concept of the injury to Respondent's former law firm.

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.

Duty

When Respondent advised Nick to forge his father's name on the power of attorney Respondent violated his duty to his clients, the profession and the legal system. A lawyer is required to uphold the law. When a lawyer counsels the violation of the law it is a very serious matter. The clients, the legal profession and the legal system are damaged when a lawyer counsels forgery.

Injury

The injury to the clients, the children of Hugo was that they received improper advice on the morning of their father's death. They were led by Respondent to forge Hugo's signature on the power of attorney. They were exposed to a challenge filed by the attorney for Hugo's widow Geri of the probate. When Respondent's law firm in preparation for an October 2008 hearing learned of irregularities with the notary on the power of attorney, the firm had to withdraw from representing his clients. The hearing was continued and the children had to obtain new counsel. They were however reimbursed for the cost of new counsel. (TR 89:20 through 90:15)

Respondent's law firm terminated him after an investigation into this matter. After that termination the law firm had to confront the fact that the children of Hugo now represented by new counsel were claiming that Respondent had advised them to sign their deceased father's name to the power of attorney. The law firm suffered actual injury in the amount of time that it took to investigate Respondent's misconduct. The manner in which the law firm handled the complaint of the children of Hugo concerning Respondent's conduct is set forth in a sealed exhibit, Exhibit 6. A

review of that exhibit will reveal further injury to the firm from Respondent's conduct in this matter. (TR 91:8 through 92:20) The firm also had to contact its malpractice carrier although the coverage was not impacted. In order to reimburse the firm for much greater expenditures caused by Respondent's misconduct, the firm withheld $7000 that otherwise would have been due to Respondent. (TR 95:4-22)

Respondent's conduct also injured Geraldine Van Vliet, Hugo's widow. Her attorney Lora Johnson testified that Respondent's conduct in not admitting what he had done caused Geri a three to four month delay in uncovering the truth. Geri paid her lawyer approximately $20,000. When the October hearing in the probate matter was continued due to the withdrawal of the law firm as counsel for Hugo's children, the next hearing did not occur until February, 2009.

Mental State

Respondent knowingly directed the children to forge their deceased father's signature on the power of attorney. Respondent knew that the power of attorney was necessary to give the children the authority to establish the trust.

Applicable Standard

ABA Standard 5.11 states: "Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

Respondent urges the Hearing Officer to apply Standards 4.42, 4.43 and 5.12. Standard 4.42 requires a suspension when a lawyer knowingly fails to perform services for a client. That is not the situation in the instant case. Standard 4.43 requires a reprimand when a lawyer does not act with reasonable diligence in representing a client. This Standard is not applicable to the facts of this case. Respondent was not neglecting the clients. He was advising them to cheat.

Standard 5.12 states, "Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice."

Respondent has not been reported to criminal authorities for prosecution. He has not been charged with or convicted of a criminal offense. However Standards 5.11 and 5.12 do not require a conviction. These Standards refer to "criminal conduct", not criminal conviction. It is clear to this Hearing Officer that Respondent intended to mislead everyone into believing that Hugo Van Vliet had granted the power of attorney to his son Nick to establish a trust for Hugo's property and dairy farm. This constitutes an intention to defraud. Therefore the criminal conduct is forgery. The crime of forgery is not specifically listed in Standard 5.11. However, forgery is certainly encompassed within the terms "misrepresentation", "fraud", and "conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice".

The Hearing Officer concludes that the presumptive sanction under the ABA Standards is disbarment.

Aggravating Factors:

Standard 9.22 (b) Dishonest or selfish motive. Respondent was dishonest in advising Nick Van Vliet that it was appropriate to forge his deceased father's name on the power of attorney. It is not clear that Respondent personally gained from counseling this forgery. Respondent testified that he was on salary at the law firm, billing hourly for his work. (TR 63:25 through 64:10) Respondent was trying to help the children avoid probate. When the Hearing Officer asked Mr. Rhodes why he did not refer Respondent to criminal authorities for prosecution for forgery, Mr. Rhodes responded that he thought Respondent was just trying to help the Van Vliet children. (TR 94:8-20)

Standard 9.22 (c) Pattern of misconduct. Although Respondent did not disclose his wrongdoing until one year and three months after the event and after his law firm had reported him to the State Bar, the Hearing Officer does not find that this aggravating factor has been established. The Bar did not charge in this Complaint separate counts that form a pattern of misconduct. Respondent does not have prior discipline that would form the basis for a pattern of misconduct. However, the Hearing Officer has considered Respondent's continuous refusal to admit his wrongdoing when confronted by the General Counsel of his law firm.

Standard 9.22 (h) Vulnerability of victim. The Hearing Officer does not find that this aggravating factor has been established. The children of Hugo, Nick, Kathleen and Jacqueline were grief stricken on March 12, 2008, when Respondent arrived at the home. Their father had died at approximately 4 AM. They should have known that it was wrong to forge their father's name to the power of attorney. Kathleen testified at the hearing that she now understands that for her brother to forge his father's name was not the right thing to do. (TR 155:6) She thought Respondent told her brother Nick that it was appropriate to sign his father's name. Respondent had testified that Nick told him on March 12, 2008 that Nick had signed his father's name before. (TR 30:7-19) Kathleen

first stated that she did not recall Nick saying that he had signed his father's name before. (TR 162:22) Later in her testimony Kathleen stated that she remembered Nick on March 12, 2008 practicing her father's squiggly little "H". (TR 165:21) These adult children went along with the forgery to further their own interests. Respondent actively encouraged them in the forgery. On this record it would not be appropriate to conclude that Respondent took advantage of their grief on March 12, 2008. Instead, it is more accurate to conclude that the children wanted the power of attorney to be effective in establishing the trust for their own benefit.

Standard 9.22 (i) Substantial experience in the practice of law. Respondent has been practicing law since 1979. However, in 30 years of practicing he has never had a complaint. (TR 61:14-19) The Bar has established this factor in aggravation. Certainly, a 30 year lawyer should have known better. Respondent's record of no discipline in 30 years lessens the impact of this aggravating factor. The Hearing Officer was surprised when reviewing the Bar's Trial Memorandum to find that the Bar did not even list as a mitigating factor under *Standard* 9.22 (a), absence of a prior disciplinary record, even though Bar Counsel knew this fact. (TR 11:23-25) Bar Counsel explained that this omission was an oversight. (TR 16:16 through 17:6)

Standard 9.22 (j) Indifference to making restitution. Respondent has not made any restitution to his law firm for their financial loss because of his misconduct. The fact that the law firm withheld $7000 that would otherwise have been due to Respondent should not be credited to Respondent as voluntarily making restitution. There is a substantial difference between saying that you would like to make restitution and making some payment. Although Respondent testified that he simply did not have the money to make restitution to the law firm, the fact remains he has not even made a token payment toward restitution. (TR 58:6 through 60:17) In deciding what weight to give to this factor however, the Hearing Officer notes that the Bar has not asked for restitution in its

Trial Memorandum. When threatened with a lawsuit by the children of Hugo Van Vliet, the law firm decided to resolve that potential action and to acquire a release for Respondent in the process. The children asserted that Respondent's conduct caused them to incur the costs of replacement counsel, Mr. Genske's bill (the personal representative of the estate) and the estate settlement with Hugo's surviving spouse Geraldine. (TR 90:3-15)

The Hearing Officer is not in a position to criticize the law firm for resolving this matter. However, since the adult children knew that they were forging their father's signature on the power of attorney, they were at least complicit in a plan to make everyone believe that Hugo had been the person to sign the power of attorney. The law firm was in the uncomfortable position of possibly having to defend a lawsuit from the children who would claim that they participated in the forgery only because a lawyer of the law firm told them it was appropriate. (TR 98:16 through 100:8) Whether a trier of fact would have believed that the adult children were misled by Respondent's faulty advice or in the alternative a jury or judge would have thought that the children knew that forgery was wrong, is something about which we can only speculate. The law firm was sensitive to the fact that the firm could not deny that Respondent an employee of the firm had done something terribly wrong. Even without considering the financial impact on the law firm of resolving the potential lawsuit from the children, Respondent's actions caused the firm to expend 40 hours of Mr. Rhodes' time investigating the misconduct. If Respondent would have admitted what he had done, much of this time could have been saved.

Mitigating Factors

Standard 9.32 (a) Absence of a prior disciplinary record. This factor has been established and is discussed above under aggravating factor 9.22 (i), substantial experience in the practice of law.

Standard 9.32 (g) Character or reputation. This factor has been established by the testimony of Donald Holden and Pamela Lacey. Mr. Holden an attorney in California has known Respondent for 30 to 40 years. (TR 175:16-17) He is not aware of any ethical violations for Respondent. He stated that Respondent has a reputation for outstanding honesty. (TR 175:18-25) Ms. Lacey has known Respondent from her 26 years of law practice in California. They worked in the same law firm and worked together on many files. She described Respondent as having the finest character and integrity and that he never misled clients. (TR 180:14 through 182:12)

Standard 9.32 (e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. After the bar charge was filed, Respondent for the first time admitted his misconduct. (Exhibit 5, Declaration of Donald Fergus) This mitigating factor has been established.

The Hearing Officer has not found remorse as a mitigating factor. Respondent is sorry that he lost his job, that he is without funds and that he made a terrible mistake. (TR 65:1-14) He has not done anything to demonstrate the remorse other than his testimony that he wishes to apologize to everyone. Mr. Rhodes testified that at the second meeting of the firm's Management Committee he practically begged Respondent to come clean, but Respondent did not admit what he had done. (TR 101:12-19) Respondent did not report himself to the Bar. Respondent deliberately kept quiet about the forgery and said nothing of it to anyone in the law firm who also spoke with him about the Van Vliet matter. Respondent had no compunction in using Ms. Perlmutter to advance his purpose in concealing the forgery. He knew on the morning of March 12, 2008 that Hugo Van Vliet had died before Respondent left his office for the long trip to Goodyear. The record before this Hearing Officer supports the inference that Respondent deliberately told Ms. Perlmutter not to come with him because he did not want her to witness the forgery. In that manner he would have no witnesses (except the adult children of Hugo) to the forgery. He probably thought that the children would not

have a problem with the forgery since it was advancing their interests. He was right. These children made no complaint about the forgery until 1) the law firm (with no help from Respondent) uncovered the wrong doing and forced the issue by withdrawing as counsel for the children and 2) Lora Johnson, counsel for Hugo's surviving spouse Geraldine, insisted on learning the truth for her client. The fact that the children later cast themselves as victims of Respondent's wrongdoing is not a conclusion that this Hearing Officer is willing to draw from this record.

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 *In re Charles* 174 Ariz. 91, 847 P.2d 592 (1993), Charles was censured for forging his client's signature to two powers of attorney. His client was also a friend of Charles. The client was in the hospital. The hospital employees wanted a document showing Charles' relationship to his client. When Charles brought a power of attorney with a blank for his client's signature (already notarized by Charles' secretary) to the hospital, his client was too ill to sign his own name. Charles

had a valid power of attorney (that was identical to the power of attorney Charles brought to the hospital) signed by the client, but he did not want to have that document leave his possession. The power of attorney made Charles the client's attorney in fact. Charles signed his client's name to the power of attorney at the hospital. The power of attorney was not used by the hospital for any other purpose than to confirm Charles' relationship to the client. The client's will named Charles as the personal representative.

After his client died Charles used another forged power of attorney to transfer funds from his client's bank account to a joint bank account in the name of the client and Charles that Charles had opened that same day. The transfer was in accordance with the client's wishes and was not for the benefit of Charles. But Charles did not tell the bank that the client had died twelve days before this transaction. The purpose of the transfer of funds was to carry out the client's wishes that the money be used for "assisting and helping others with their education." 174 Ariz. at 92 Charles was found to have violated ER 8.4 (c) by engaging in conduct involving misrepresentation and dishonesty. The Commission chastised Charles for poor judgment in agreeing to handle the estate and in drafting a will that included a bequest to Charles. The Commission noted that Respondent had an apparent belief that "the end justifies the means". 174 Ariz. at 93 The sanction choices were censure or suspension. The Commission chose censure after finding no aggravating factors (Charles had no prior discipline and no selfish motive) and concluding that Charles' "motives were pure". 174 Ariz. at 94

In re Matheny SB-08-0033-D (2008) resulted in a one year suspension for the attorney. Matheny represented a client who was the beneficiary of a will. The will that the client submitted to Matheny had no witness signatures. Matheny submitted the will to the court. The probate court rejected the will for a lack of witness signatures. Matheny allowed the client to sign fictitious

witness signatures to the will 45 days after the testator died. Matheny even told the client to make the signatures look different. Then Matheny submitted the altered will to the Superior Court of Maricopa County for informal probate. The client had told Matheny that the testator had half relatives. However, Matheny averred in his filing with the court that the testator had no spouse, children or heirs. A lawyer for the testator's half brother and cousin contacted Matheny about this matter. Matheny lied to this attorney (to cover up the false witness scheme) from August 11, 2005 to January 25, 2006, when Matheny first admitted that his client had signed the "witnesses" signatures. On February 10, 2006 Matheny self-reported to the Bar. But in his report Matheny falsely stated that he "suspected" that the witnesses had not witnessed the testator signing the will. Matheny also falsely stated that his client had told him the testator had no family. It was found that Matheny had two prior disciplines, but that they were more than eight years before this matter.

In *In re Gieszl*, SB-06-0013-D (2006) the attorney received a one-year suspension and two years of probation. Gieszl was representing a person with a personal injury claim. Gieszl allowed the statute of limitations to run, thereby barring her client's ability to bring a lawsuit for her injury. Gieszl covered up from the client the fact that through her negligence Gieszl had ruined her client's case. Gieszl created phony settlement documents and repeatedly told the client about negotiations with opposing counsel to create the impression that Gieszl had obtained a settlement in the matter. Gieszl tried to get her client to sign a fictitious settlement agreement. *Standard* 4.61 required disbarment for knowingly deceiving a client. Gieszl suffered from depression. But it was found that her subsequent acts to mislead the client were done knowingly. The Commission reversed the finding of the hearing officer that Gieszl did not have the mental state required for a knowing violation of ethical rules.

In *In re Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994) the Commission disbarred the attorney involved. Redeker was charged in a nine count complaint with continually ignoring numerous clients and abandoning his efforts for one client without even attempting to protect that client's interests. The most serious charge in the complaint was that Redeker arranged for a deceased client's sister-in-law to sign the client's name to trust documents. Redeker arranged for the document to be back dated to the date of the client's death. He also had a notary notarize the forged document. After the disciplinary process began Redeker lied repeatedly about the circumstances concerning the execution of the document and his role in the forgery. Only at the end of the disciplinary process did Redeker finally admit his responsibility in the forgery. His explanation was that he was only trying to help the family. The purpose of the document was to hold the proceeds of a life insurance policy on the life of the deceased client in trust for her minor daughter. The client was concerned that her ex-husband would squander the life insurance money. To aggravate the situation after Redeker sent the trust documents to the insurance company, he failed to handle the deceased client's probate matters and did not communicate with her family about her affairs. The Commission found that Redeker had a lack of respect for the gravity of the matter because he continually failed to respond to the Bar's requests for information. Redeker also repeatedly asked for continuances of hearings. The Commission cited *Standard* 5.11 which suggests disbarment when a lawyer intentionally engages in conduct involving dishonesty. It is important to note that the caption of this matter read "In a Matter of a Suspended Member of the State Bar of Arizona, Harry Schiller Redeker Jr., Respondent". 177 Ariz. at 305 Apparently at the time of these proceedings Redeker had already been suspended for prior disciplinary offense. In aggravation the Commission found a pattern of misconduct, multiple offenses, substantial experience in the practice of law, and "... a prior disciplinary sanction for very similar behavior." 177 Ariz. at 310 The Commission

concluded, "The duty to avoid conduct involving dishonesty, fraud, deceit, or misrepresentation is perhaps the most fundamental ethical duty of a lawyer and is correspondingly supremely important." 177 Ariz. at 310

In re Scholl, 200 Ariz. 222, 25 P.3d 710 (2001) involved a Superior Court judge who was convicted in federal court of seven felony charges for filing false tax returns and structuring currency transactions to avoid treasury reporting requirements. Judge Scholl resigned from the bench shortly after the convictions were announced. The Ninth Circuit later upheld his convictions. The Supreme Court denied certiorari. A disciplinary matter against Scholl proceeded through the State Bar of Arizona. Citing his seven felony convictions the Bar sought his disbarment. The hearing officer recommended censure, probation and payment of costs. The Commission rejected this recommendation and suspended Scholl for two years. Although the Bar and Scholl did not appeal the Commission's decision, the Arizona Supreme Court chose to review the case *sua sponte.* The court found that Scholl violated ER 8.4 (b) by committing a criminal act that reflected adversely on his honesty, trustworthiness and fitness. The court noted that no evidence was submitted that Scholl's activities harmed his clients, other lawyers or other judges. In discussing the mental state the court found that Scholl's criminal convictions required proof that he willfully violated the law with specific intent. The court also cited *Standard* 5.11 which recommends disbarment. The court concluded, "Accordingly, disbarment, though not imposed on Judge Scholl, was an approved sanction." 200 Ariz at 226 In mitigation the court found that the record contained evidence that Scholl was a compulsive or pathological gambler. He had received treatment for his addiction in an outpatient program with follow-up care for a year. A counselor concluded that Scholl was now fit to practice law. The court concluded that *Standard* 5.12 recommending suspension was more applicable than *Standard* 5.11 The court noted that Scholl received five years

probation for his criminal conviction. In reviewing proportionality cases the court quoted a portion of the opinion in *In re Rivkind,* 164 Ariz. 154, 791 P.2d 1037 (1994), "We must tailor the discipline in each case to its facts. ... The circumstances in which the misconduct occurred or subsequent efforts at rehabilitation or contrition may indicate that the conduct is not likely to recur and that disbarment would be excessive. At times, other remedies, such as closely supervised probation, might adequately protect the public so that a harsher discipline would become purely vindictive and punitive." 164 Ariz. at 159 The court suspended Scholl for six months.

In *In re Johnson*, DC No. 06-1667 (2008) the attorney received a suspension of six months and one day. Johnson misplaced the original of the testator's will. He suggested to his client (the daughter of the testator) that they "re-execute" the will. His client signed her father's name to the altered will. The client backdated the will so that it would appear that her father had signed it before his death. Johnson notarized the altered will. He used his secretary and his client's husband as the "witnesses". Johnson backdated the notary date on the altered will to a date prior to the testator's death. Johnson filed an Application for Informal Probate with the Superior Court and attached a copy of the altered will. Johnson later found the original will, but he did not notify the court that he had submitted a fake will. Adult grandchildren of the testator later challenged the will because they thought the signature of their grandfather did not look authentic. Johnson admitted to one of the grandchildren that the signature was not authentic. An attorney representing one of the grandchildren reported Johnson to the Bar. Thereafter, Johnson admitted his conduct to the Bar. Johnson filed an Amended Application for Informal Probate attaching the original will. In this filing Johnson did not reveal what he and his client had done with the altered will, but indicated that the altered will was not signed by the decedent and was not properly executed. However, in telephone conversations with the Deputy Registrar of Superior Court and her supervisor Respondent explained

his actions and apologized. The Hearing Officer concluded that Johnson had created and submitted falsified evidence. In mitigation it was found that Johnson had been practicing law for almost 40 years without any prior discipline. The case was presented as an agreement between the Bar and Johnson for a suspension of six months and a day. The Hearing Officer did not reject the agreed sanction, but suggested "something less". (See Hearing Officer's report March 28, 2008, paragraph 89, page 16) The Commission adopted the suspension of six months and a day.

RECOMMENDATION

The Bar recommends disbarment. Respondent recommends a sanction no greater than a four month suspension. The Hearing Officer recommends a suspension for one year followed upon reinstatement by probation for one year. Respondent's conduct in assisting the forgery of the power of attorney is most troubling. The presumptive sanction is disbarment. Of great concern to the Hearing Officer is Respondent's unwillingness to admit his misconduct when his law firm was investigating his actions. Of even greater concern is Respondent's willingness to use his legal secretary Ms. Perlmutter to assist in the forgery, and to compromise her notary in such a way that she could not witness the forgery. The purpose of discipline is "to protect the public from further acts by respondent, to deter others from similar conduct, and to provide the public with a basis for continued confidence in the Bar and the judicial system." *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d 939, 944 (1987) The purpose of discipline is not to punish the lawyer. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993)

The Bar has a good argument that public confidence in the integrity of the legal profession will not be enhanced if lawyers who commit forgery are not disbarred. However, the Hearing Officer thinks that a suspension from the practice of law for one year is a significant separation of Respondent from the client public. It sends the message that for a period of time Respondent has

forfeited the privilege of practicing law. It sends this message to other attorneys. It deters Respondent from ever engaging in similar conduct. Respondent has practiced law for thirty years and not had any bar complaints. Mostly for this reason the Hearing Officer concludes that the presumptive sanction of disbarment should be mitigated to a one year suspension. Respondent made several errors in judgment for which he should be suspended; advising the forgery, involving Ms. Perlmutter in violating her notary, and refusing to admit his wrongdoing when confronted by his firm. Any harm to his clients was mitigated by the law firm's resolution of their threatened lawsuit. Certainly he harmed the law firm. But for thirty years in law practice Respondent did not conduct himself in this reprehensible manner. Disbarment is too severe a sanction for his dishonest conduct in this circumstance. A review of the proportionality cases reveals that disbarment was appropriate when the attorney had some history of prior disciplinary offenses.

SANCTION

The Hearing Officer recommends the following sanction:

1. Respondent shall be suspended from the practice of law for one year to begin from the time the Judgment and Order is issued.
2. Respondent shall be placed on probation upon reinstatement for a period of one (1) years, with the specific terms to be decided upon reinstatement. The probation terms shall 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.

DATED this 23rd day of April, 2010.

H. Jonathan H. Schwartz/ L. D'Amore
Honorable Jonathan H Schwartz
Hearing Officer

Original filed with the Disciplinary Clerk of
The Supreme Court of Arizona
this 23rd day of April, 2010.

Copies of the foregoing mailed
this 23rd day of April, 2010 to:

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