BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	No. 09-1079
HARRIET K. HEMERLING, Bar No. 025533	**HEARING OFFICER'S REPORT**
Respondent.	

PROCEDURAL HISTORY

The Complaint was filed on September 8, 2009. The Hearing Officer was assigned on September 24, 2009. Respondent filed her answer on September 28, 2009. An Initial Case Management Conference was held on October 6, 2009. A Joint Pre-hearing Statement (JPS) was filed on December 3, 2009.The hearing occurred on December 14, 2009 and December 15, 2009.

FINDINGS OF FACT

The parties stipulated in the JPS to the following facts set forth in paragraphs 1 through 11:

1. At all times relevant, Respondent was a lawyer conditionally admitted to practice law in the State of Arizona having been conditionally admitted to the State Bar of Arizona on May 20, 2008, subject to specific terms and conditions.

2. Prior to being admitted, Respondent had to enter into a two (2) year Member's Assistance Program ("MAP") Therapeutic Terms and Conditions of Admission ("MAP Terms and Conditions").

3. Respondent's two (2) year participation in MAP began on March 10, 2008, when she signed the MAP Terms and Conditions of Admission setting forth the terms of her participation.

4. The MAP Terms and Conditions specified that Respondent was to completely abstain from using alcohol, other drugs, or any other mood-altering chemicals, for two years.

5. On or about January 31, 2009, Respondent was found non-responsive behind the wheel of her automobile. Respondent was arrested by the Phoenix Police Department and charged with Driving Under the Influence ("DUI"), DUI with a Blood Alcohol Concentration ("B.A.C.") of 0.08 or Greater, and Extreme DUI, in Complaint Number 13831619.

6. On or about April 4, 2009, Respondent was involved in an automobile collision. Respondent was arrested by the Phoenix Police Department and charged with DUI, DUI with a B.A.C. of 0.08 or Greater, Extreme DUI, and Leaving the Scene of a Collision in Complaint Number 13791809.

7. Respondent's arrest of April 4, 2009, was her third arrest for alcohol related offenses within thirty-six (36) months.

8. On April 27, 2009, the State, in Complaint Number 13791809, added an additional count of Extreme DUI with a B.A.C. of 0.20 or Greater.

9. On June 11, 2009, in Complaint Number 13831619, a jury found Respondent guilty of DUI, in violation of A.R.S. §28-1381(a)(1); DUI with a B.A.C. of 0.08 or Greater, in violation of A.R.S. §28-1381(a)(2); and Extreme DUI, in violation of A.R.S. §28-1382(a)(1). The Court found Respondent had a prior DUI conviction within thirty-six (36) months, dismissed the DUI with a B.A.C. of 0.08 or Greater, and sentenced Respondent to one hundred and twenty (120) days in jail and placed on probation for 3 years.

10. The Court's June 11, 2009 Confinement Order ordered Respondent to serve 15 days at the Buckeye Jail, with Work Release conditions, and placed Respondent under Home Detention for 105 days.

11. On or about June 12, 2009, Respondent informed the State Bar's MAP Director, Mr. Hal Nevitt ("Mr. Nevitt"), that she had been convicted of DUI. Further, Respondent informed Mr. Nevitt that she regularly drank alcoholic beverages from January 2009 to about March 2009. Respondent did not inform Mr. Nevitt about the incident that occurred on or about April 4, 2009.

12. Respondent testified to certain matters at the hearing and asserted her Fifth Amendment right against self-incrimination to questions about the April 4, 2009 alleged DUI incident. Charges in the April 4, 2009 incident were first filed by City of Phoenix prosecutors as misdemeanors in City Court. However, those charges were dismissed without prejudice to re-filing the charges either as misdemeanors in City Court (one year statute of limitations on misdemeanors) or as felonies in Superior Court (See ARS sec. 28-1383 (a) (2), a third DUI within 60 months may be treated as Aggravated DUI, a class 4 Felony) (TR 15:9 through 16:6; 26:1 through 29:6)

13. Respondent entered a guilty plea to a DUI misdemeanor in Tempe Municipal Court on October 2, 2006. (Exhibit 2, page 51) (TR 22:13) This DUI occurred while Respondent was in her third year of law school. (TR 191: 9-13)

14. Respondent disclosed the Tempe DUI in her application for admission to the bar. (Exhibit 11, SBA 126)

15. The Committee on Character and Fitness required that as a condition of admission to the Bar Respondent must enter into a MAP contract. (Exhibits 11 and 12)

16. Respondent stated that she knew it was a violation of her conditions of admission to drink alcohol on a regular basis from January through March 2009. (TR 24:7-21)

17. Respondent invoked her Fifth Amendment privilege against self-incrimination to the following questions (paragraphs 18-30) about the April 4, 2009 incident when she was called as a witness by counsel for the Bar: (TR 26:1 through 29:6)

18. Did she drive her vehicle at about 6:00 pm?

19. Was she was impaired by alcohol?

20. Did she collide with a fence?

21. Did she collide with a shed?

22. Did she drive away from the scene of her collisions?

23. Was she confronted by the victim of her collisions and did she refuse to return to the scene of the collisions when requested to return by the victim?

24. Did she instead drive home?

25. Did she try to put the garage door down on the Phoenix police officers?

26. Did she tell the police officer that she did not understand her Miranda rights?

27. Did she tell the police officer "Fuck you, I will not talk to you"?

28. Did she refuse to take the field sobriety tests?

29. Did she refuse to consent to the drawing of her blood?

30. Did she tell the police officer that they could not get a search warrant because it was Saturday?

31. Respondent only told Hal Nevitt the director of the Member Assistance Program (MAP) of her drinking on June 12, 2008. On that date Respondent did not tell Mr. Nevitt of the April 4, 2009 incident. (TR 29:11 through 30:5)

32. Respondent's monitor in the MAP contract was Cynthia Estrella. Respondent told Ms. Estrella that Respondent was in compliance with the MAP contract in January, February and

March, 2009. At the hearing Respondent admitted that she lied to Ms. Estrella about her compliance. (TR 30:6-19)

33. Respondent first told Cynthia Estrella about Respondent's drinking in August 2009. (Exhibit 13, page 168)

34. Laura Sillivan was the victim of Respondent's driving on April 4, 2009. Ms. Sillivan was at home in Phoenix on the evening of April 4, 2009 at about 6:00 pm when she heard a loud bang. She observed Respondent's car in Ms. Sillivan's backyard crashed in to the side of Ms. Sillivan's storage shed. (TR 32:16 through 34:14)

35. Respondent's car had traveled through Ms. Sillivan's wrought iron gate and hit the shed. The car drove halfway into the shed through a wall.

36. As Ms. Sillivan ran outside, Respondent was backing her car out of the shed and the yard. Ms. Sillivan identified Respondent at the hearing as the person who was driving away from her home. Respondent drove south on 29th Street. (TR 34:17 through 35:13)

37. Ms. Sillivan got into her car and began to follow Respondent. Ms. Sillivan found Respondent pulled off to the side of the road in Respondent's car. Ms. Sillivan confronted Respondent by telling Respondent that she had run into Ms. Sillivan's fence. Respondent twice denied that she had crashed into the fence. Respondent refused Ms. Sillivan's request that Respondent go back to Ms. Sillivan's home and talk to the police. (TR 35:16 through 36:12)

38. Ms. Sillivan memorized the license plate number on Respondent's car. After Ms. Sillivan returned to her home she gave the police the license plate number. (TR 36:13 through 37:6)

39. Officer Ryan McDowell of the Phoenix Police Department testified that he was trained in the signs and symptoms of alcohol impairment. (TR 43:15) On April 4, 2009 he arrived at about 6:23 pm at Ms. Sillivan's home at 2847 E. Nisbet Rd. in Phoenix. (TR 44:7 through 45:10)

Ms. Sillivan told him that a green Toyota had struck her gait and shed. (TR 45:11-16) He observed that the wrought iron gate had been pushed through and the whole side of the shed was gone. (TR 45:17 through 46:12)

40. Officer McDowell obtained from Ms. Sillivan's yard a passenger side view mirror and the front emblem of a Toyota car. (TR 46:13-17) He ran a check on the license plate which revealed that the plate was registered to a person living at 15020 N. 24th Place. (TR 47:1-11)

41. Officer McDowell went to the 24th Place address. He arrived at 6:35 pm. (TR 57:18-21) The man who lived there confirmed that his daughter had a green Toyota. (TR 47:13-19) This man (who was later identified as Respondent's father) consented to opening his garage door for the police officer. (TR 47:20 through 48:4) The officer saw the green Toyota in the garage. The Toyota matched the description that Ms. Sillivan had given him. (TR 48:5-16) The vehicle was missing the same side-view mirror that Officer McDowell had found at Ms. Sillivan's home.

42. Respondent came to the inside of the garage where the button to close the garage door electronically was located. (TR 49:2-12) She told the officers that they needed a search warrant and she hit the button closing the door on the officers. The police officers took Respondent outside of the home. (TR 49:12-17)

43. When her Miranda rights were read from a standard card, Respondent replied, "Fuck you, I will not talk to you." (TR 50:7-14)

44. The victim Ms. Sillivan had been brought to the 24th Place address for a one-on-one identification. Ms. Sillivan identified the Respondent as the person who had driven through her gate and into her shed. (TR 50:22 through 51:15)

45. Respondent refused field sobriety tests (FSTs), the horizontal gaze nystagmus (HGN) test and the breathalyzer. (TR 52:8-14)

46. Officer McDowell noticed a strong odor of alcohol on Respondent. He observed that Respondent urinated on herself. He also described Respondent's big mood swings. He said Respondent was very emotional, upset, yelling or screaming. He noted that Respondent's eyes were watery and bloodshot. Based on his experience the officer stated that all of the above were signs and symptoms of alcohol impairment. (TR 52:20 through 54:7) Respondent was taken into custody at 6:45 pm. (TR 57:16)

47. Officer Cummings Smith of the Phoenix Police Department also observed Respondent at the 24th Place address. He described the symptoms of alcohol impermanent for Respondent were her mood swings, the strong smell of alcohol, her inability to keep her balance, her yelling, screaming and swearing and threatening the officers that they wouldn't have a job, and urinating on herself. (TR 67:9 through 68:9)

48. Officer Cummings Smith found a pint bottle of clear alcohol (rum) in the green Toyota. The bottle contained about a half an inch of liquid. It was located in the back side map pocket of the passenger seat within arm's reach of the driver's seat. (TR 68:10 through 69:12)

49. Forensic scientist John Musselman testified that he has worked for the Phoenix crime lab for eight years. (TR 148:4-8) He has been analyzing blood for alcohol for almost 18 years. (TR 148:16-21) On April 8, 2009 he analyzed Respondent's April 4, 2009 blood sample. He found that the blood alcohol content reading for Respondent was .213. (TR 153:12 through 156:7)

50. Mr. Musselman testified that alcohol is a central nervous system depressant. A person's judgment is affected at readings as low as .02. The senses including loss of visual acuity and reaction time and speech are affected beginning at .04. Impairment (for purposes of operating a

motor vehicle) occurs in all individuals at a reading of .08. He described swearing and belligerence as a sign of alcohol ingestion. (TR 156:11 through 157:23; 162:10-20)

51. Officer Kevin Smith is a six-year veteran of the Phoenix Police Department who has investigated from 500 to 600 DUI cases. (TR 167:5 through 168:5) He is certified to administer the HGN test. (TR 168:18-25) He arrived at 7:20 pm on the evening of April 4, 2009 to attempt to administer the HGN test to Respondent. (TR 170:2) When he asked Respondent if she would consent to the test, she replied that she was not "fucking stupid" and she would not take the test. (TR 171:11-12) Officer Smith noticed a strong odor of alcohol on Respondent, that she had urinated on herself and that her speech was slurred. (TR 170:3 through 171:5)

52. Officer James Lawler first met Respondent at about 8:00 pm on the evening of April 4, 2009, when she was brought by other officers to a substation for DUI processing. (TR 176:21) He advised Respondent of the consequences to her driving privileges if she refused a blood test. (TR 177:9 through 178:13) Respondent tried to find the telephone number of an attorney. (178:15 through 179:6) Then Respondent asked to review the law on Implied Consent. (TR 179:6) Officer Lawler found the appropriate statute and reviewed it with Respondent. (179:10) Respondent asked if she could challenge a driver's license suspension if she took or refused the breath or blood test. (TR 179:15-18) Officer Lawler told her she could challenge a suspension in both those circumstances. (TR 179:18-22)

53. Respondent told Officer Lawler that he could not get a search warrant for a blood draw on Saturday night because no judge was available. (TR 180:22 through 181:1) Respondent refused the blood draw. Officer Lawler drafted an affidavit for search warrant for the blood draw and faxed it with the request for search warrant at 8:45 pm to the Superior Court Commissioner on duty at the Maricopa County Jail Court. (TR 183:7) The search warrant was approved by the

judicial officer and returned to Officer Lawler by 10:00 pm. He observed Sergeant Smith (not Cummings or Kevin Smith) draw Respondent's blood at 10:00 pm. (TR 185:10)

54. Officer Lawler noticed a moderate odor of alcohol, red, bloodshot and watery eyes, slurred speech and gamesmanship about Respondent. (TR 185:16-21)

55. Hal Nevitt, Director of MAP, testified that on June 12, 2009 Respondent told him for the first time that she had been drinking daily between January and April, 2009. She said that on June 11, 2009 she had been convicted of DUI in City Court. She did not mention the April 4, 2009 incident. He thinks she disclosed the April 4 incident to him two weeks before the December 14, 2009 hearing. (TR 77:20 through 78:23)

56. When Respondent met with Hal Nevitt on January 31 and February 19, 2009 she told him that she was in compliance with the terms of her MAP contract. (TR 79:3-16)

57. Cynthia Estrella testified that she became Respondent's monitor in April or May, 2008. She would meet in person with Respondent once each month and talk to Respondent by telephone or e-mail once each week. When Ms. Estrella would ask Respondent if she was in compliance with her MAP contract, Respondent replied, "yes". Respondent did not tell Ms. Estrella until about August 31, 2009 that she was not in compliance and that Respondent had been drinking daily from January through March 2009, and that she had been convicted of the January, 2009 DUI. (TR 109:15 through 113:4)

CONCLUSIONS OF LAW

58. The Bar has not proven by clear and convincing evidence that Respondent violated Rule 53 (h), Ariz. R. Sup. Ct. when she was convicted of the January 31, 2009 DUI misdemeanor. Rule 53 (h) requires conviction of a misdemeanor involving a serious crime. DUI is a serious crime,

but it does not meet the specific definition of "serious crime" set forth in Rule 53 (h). The "serious crime" for Rule 53 (h) purposes must involve interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, theft or moral turpitude. DUI is a malum prohibitum offense, not a malum in se offense. It does not involve an element of moral turpitude. At the conclusion of the hearing the Bar moved to dismiss the alleged Rule 53 (h) violation.

59. The Bar has proven by clear and convincing evidence that Respondent violated ER 8.4 (b) by committing a criminal act (the January 31, 2009 DUI) that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Respondent was convicted of three misdemeanor offenses for the one act of driving on January 31, 2009; 1) driving with alcohol concentration of 0.08 or more within two hours of driving, 2) driving while under the influence of intoxicating liquor, and 3) driving with an alcohol concentration of 0.15 or more within two hours of driving [Extreme DUI]. The DUI offense reflects either poor judgment or an inability (due to the disease of alcoholism) to control one's actions to conform to the law. Either of these conditions reflects adversely on a lawyer's fitness. Sound judgment and the ability to control her conduct are vital to a member of the legal profession.

60. The Bar has proven by clear and convincing evidence that Respondent has violated Rule 53 (g) when Respondent from January through early April 2009 repeatedly violated a condition of admission imposed by the court or the Committee on Character and Fitness that she not consume alcoholic beverages.

61. The Bar has proven by clear and convincing evidence that the Respondent has also violated ER 8.4 (b) by committing the criminal act of Aggravated DUI on April 4, 2009. The parties have stipulated that the Hearing Officer may draw a negative inference against Respondent if

Respondent invoked her Fifth Amendment privilege against self-incrimination at the disciplinary hearing. The following authorities cited by counsel in the Joint Pre-Hearing Statement support drawing a negative inference: Rule 48(a), Ariz. R. Sup. Ct., (stating that discipline proceedings are neither civil nor criminal, but are *sui generis*); *Baxter v. Palmigiano*, 425 U.S. 308, 318-20, 96 S.Ct. 1551, 1558-59 (1976)(holding that allowing the fact-finder to draw an adverse inference from a prison inmate's silence in a prison discipline proceeding, when criminal charges are not pending, is permissible); *Berenter v. Gallinger*, 173 Ariz. 75, 82, 839 P.2d 1120, 1127 (App.Div. 1 1992)(stating that an administrative agency may draw an adverse inference from an assertion of the Fifth Amendment privilege against self-incrimination since the privilege is not applicable in civil matters); and *In re Shannon*, 179 Ariz. 52, 70, 876 P.2d 548, 566 (1994)(holding that since the primary function of stare bar disciplinary sanctions is remedial, the right against self-incrimination does not attach when disciplinary sanctions are the only penalties to which a respondent is exposed)(citing *In re Daley* 549 F.2d 469, 476 (7th Cir.1977). (TR 16:7-21)

However, the evidence is clear and convincing **without an inference from Respondent's assertion of the privilege** that Respondent was driving while under the influence of intoxicating liquor on April 4, 2009. The evidence is also clear and convincing that as of April 4, 2009 Respondent had been previously convicted of two DUI charges within 60 months.

Respondent was convicted of DUI in the Tempe Municipal Court on October 2, 2006. (Exhibit 2, pages 52-53) Respondent was convicted of DUI in the Phoenix Municipal Court on June 11, 2009. (Exhibit 1, pages 7-9)

The combined testimony of Laura Sillivan, Officer Ryan McDowell, Officer Cummings Smith, John Musselman, Officer Kevin Smith and Officer James Lawler provides clear and convincing evidence independent of any inference from Respondent's assertion of the Fifth

Amendment privilege that Respondent was driving under the influence of intoxicating liquor on April 4, 2009. Even without the results of the blood alcohol test that occurred at 10 PM, about four hours after the driving, the evidence is clear and convincing that Respondent was driving under the influence. First, her driving was very erratic. She struck a wrought iron gate and then proceeded to drive her car into the side of a storage shed in Ms. Sillivan's backyard. Second, Officer McDowell smelled the strong over of alcohol on Respondent. He observed her bloodshot and watery eyes and her extreme moods swing that he described as very emotional, upset, yelling or screaming. He saw that Respondent had urinated on herself. Third, this testimony was corroborated by Officer Cummings Smith who also smelled a strong order of alcohol, noticed the urination, and the yelling and screaming. Fourth, Officer Cummings Smith noted that Respondent was unable to keep her balance. (TR 67:11 through 68:9)

Fifth, Officer Kevin Smith saw Respondent at about 7:20 PM. He noticed a strong odor of alcohol, that she had urinated on herself, and that she had severely slurred speech. Officer Lawler first saw Respondent at 8:00 pm almost 2 hours after the driving. He noticed the moderate odor of alcohol, red and bloodshot and watery eyes and slurred speech. All of the officers testified that what they observed about Respondent were the signs and symptoms of alcohol impairment.

The standard of proof in a disciplinary proceeding is by clear and convincing evidence. This standard is a lower burden of proof than the burden in a criminal case of beyond a reasonable doubt. The combination of 1) Respondent's erratic driving, 2) her signs and symptoms of alcohol impairment both shortly after the driving and up to two hours later and 3) the Respondent's refusal to take field sobriety tests, the HGN test, a breathalyzer and to consent to a blood draw, constitute strongly circumstantial evidence that Respondent was driving on April 4, 2009 while under the influence of intoxicating liquor.

The Hearing Officer has also considered the blood alcohol reading of .213 at 10 PM on April 4, 2009. Even though the reading was four hours after the driving it was so high that the Hearing Officer concludes that it is at least strongly circumstantial evidence that Respondent was driving under the influence of intoxicating liquor at about 6:00 pm on April 4, 2009.

Although the Hearing Officer has concluded that independent of the blood alcohol reading of .213 and the inference from Respondent's invocation of the privilege that the evidence is clear and convincing, applying the inference provides an additional basis to find that the Respondent was driving under the influence of intoxicating liquor on April 4, 2009. The adverse inference from Respondent's assertion of the privilege to the questions of Bar Counsel in paragraphs 18 through 30 above leads to the conclusion that Respondent drove a vehicle on or about 6:00 pm on April 4, 2009 while she was impaired by alcohol. She collided with a fence and then drove into the victim's backyard and collided with a shed. She then drove away from the scene of the accident. When Ms. Sillivan confronted Respondent she refused Ms. Sillivan's request to return to the scene of the accident. At her home she tried to put the garage door down on the Phoenix police officers. She told the officers that she did not understand her Miranda rights. She swore at them, "Fuck you, I will not talk to you." She refused field sobriety tests, a breathalyzer and a blood draw. She told the officers they could not get a search warrant on a Saturday because a judge was not available.

Respondent displayed bad judgment, erratic driving, mood swings, a strong odor of alcohol, bloodshot and watery eyes, slurred speech, an inability to maintain her balance and self-urination. It is clear to the Hearing Officer that she was under the influence of intoxicating liquor when driving her vehicle on April 4, 2009. Respondent's testimony somewhat corroborates this conclusion. Respondent testified that between January and March 2009 she would drink daily. She

would try not to drink at home because she did not want her nine-year-old son to see her drink. On questioning by her counsel she revealed that she would leave work and drink alcohol in her car at a shopping center about ¼ of a mile from her home. Ms. Sillivan's home was not far from Respondent's home. Officer McDowell described these residences in an area north of Cactus/Thunderbird and south of Greenway. Respondent's home was about three blocks from Ms. Sillivan's house. (TR 47:8-12) Ms. Sillivan lived on 2847 E. Nisbet Road and Respondent lived at 15020 N. 24th Place. Ms Sillivan, at 2847 E. Nisbet, was just east of 28th Street, while Respondent lived approximately four blocks west of Ms. Sillivan on 24th Place. (TR 51:20-25) From this evidence the Hearing Officer infers that on April 4, 2009 Respondent was adhering to her regular pattern (in January through March, 2009) of drinking in her car after work (about 6:00 pm), not too far from her home, when she drove under the influence of intoxicating liquor and collided with Ms. Sillivan's wrought iron gate and storage shed.

Respondent's counsel asked Officer McDowell hypothetically if Respondent, in the time between the alleged one-car accident at Ms. Sillivan's home (6:00 pm) and the police contact at Respondent's residence (6:35 pm), drank three quarters of a bottle of Jack Daniels, would that affect the level of the alcohol in her blood at the time of the blood draw. Officer McDowell stated that if an adult had drank that much alcohol it would affect the level of the alcohol in the blood, but that the adult probably would not be standing. (60:2-25) No evidence was offered as to what Respondent was doing in the interval between 6:00 pm and 6:35 pm. Respondent was not falling down when the officers first saw her at 6:35 pm. In addition, the fact that a bottle of alcohol (mostly consumed) was found in Respondent's vehicle combined with Respondent's testimony of her drinking habits, leads to the inference that on her way home from work Respondent had stopped to drink alcohol. Sober drivers do not normally strike a gate and drive into a person's backyard and through the side of a

shed. An accident of this nature may occur without a driver being under the influence of alcohol. In this matter no other explanation has been offered for the erratic driving.

RESTITUTION

Restitution is not an issue in this proceeding because Ms. Sillivan's loss has been covered by Respondent's insurance carrier. Ms. Sillivan received a check for $7500. (TR 38:22 through 39:1)

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 Violated

Respondent violated duties owed to the public by failing to maintain personal integrity when she violated the criminal laws. The "Introduction" to *Standard* 5.0 states in part, "The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of the officers of the court is undermined when lawyers engage in illegal conduct."

Respondent also violated duties owed to the profession when she violated the conditions of her admission to the Bar by consuming alcohol. *Standard* 7.0 is generally applicable.

Mental State

Respondent knowingly drank alcohol and drove a vehicle while impaired on January 31, 2009 and April 4, 2009. She also knowingly violated her condition of admission to the Bar by drinking alcohol daily from January through early April, 2009.

Injury

Respondent caused actual injury to Ms. Sillivan's property on April 4, 2009. Her insurance paid Ms. Sillivan $7500 to cover the damage. (TR 37:18 through 38:21) Respondent also caused injury to the legal system and the profession because the public loses confidence in both the legal system and the legal profession when an officer of the court violates the law. Respondent's inability to abstain from alcohol can cause the potential for injury to her clients. It could have led to the diminution of her ability to effectively represent her clients. Respondent's violation of her condition of admission to the Bar causes potential injury to the public's confidence in the legal profession's ability to protect the public.

The Hearing Officer finds that *Standards* 5.12 and 7.2 are the most applicable in Respondent's situation.

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.**"

Standard 7.2 states: **"Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system."**

The elements listed in *Standard* 5.11 (intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft, sale, importation or distribution of controlled substances, or the intentional killing of another) are not present in Respondent's acts of driving under the influence of intoxicating liquor. Therefore, *Standard* 5.12 is appropriate.

The Hearing Officer concludes that the presumptive sanction in this matter is suspension.

Aggravating Factors

Standard 9.22 (c) – Pattern of Misconduct. Respondent committed two separate acts of driving under the influence of intoxicating liquor, on January 31, 2009 and again on April 4, 2009. Respondent violated the condition of her MAP Contract to abstain from alcohol on a daily basis for three months from January, 2009 through early April, 2009.

Standard 9.22 (d) – Multiple Offenses. Respondent committed violations of Rule 53 (g), and ER 8.4 (b). She violated Rule 53 (g) on numerous occasions with her daily drinking of alcohol for at least three consecutive months. She violated ER 8.4 (b) on two occasions, January 31 and April 4, 2009. However, because these matters are being used as an aggravating factor in *Standard* 9.22 (c), they will not be given double weight.

Standard 9.22 (k) – Illegal Conduct. Respondent was convicted of DUI for the January 31, 2009 incident. The Hearing Officer has found that Respondent violated the law with another DUI on April 4, 2009.

Mitigating Factors

Standard 9.32 (a) - Absence of a prior disciplinary record. Respondent has only been admitted to the Bar since May 20, 2008. However she has had no disciplinary record in that brief

time. Respondent is practicing in the areas of family law, bankruptcy, and personal injury. The family law area many times involves complaints to the bar because of the highly emotional nature of the controversies. Therefore it is somewhat significant that Respondent has not received any complaints.

Standard 9.32 (c) - Personal or emotional problems. Respondent is now an admitted alcoholic. In the Findings of Fact and Recommendation of Admission with Conditions issued by the Committee on Character and Fitness for Respondent on March 18, 2008 the Committee commented in detail on Respondent's situation at that time. (Exhibit 11) Respondent's application disclosed seven citations for speeding and other moving violations which she received while she was a law student from late 2003 until 2007. The Committee accepted Respondent's explanation that the speeding tickets were because she was attending law school in Tucson and traveling to Phoenix to see her son who was living with other family members. However she received so many points that the Department of Motor Vehicle's suspended her license for part of her last year of law school. Respondent's description of her August 2006 DUI in Tempe was troubling for the Committee. The report states in part: "The Committee was most troubled by the incongruence between the facts of her DUI and her explanation of it. For instance, Ms. Hemerling cannot recall anything that happened on August 8, 2006, from the time she left Los Angeles until she was arrested in Tempe behind the wheel some 8 to 12 hours later, and when she was stopped, she blew just under .15 on one Breathalyzer test and over .16 on another; yet, Ms. Hemerling insisted she had only consumed approximately 4 alcoholic beverages before she left Los Angeles, all those hours before. Additionally, even after this event, Ms. Hemerling was adamant that she did not have any issues with alcohol." (Exhibit 11, SBA 127)

The Committee was impressed with Respondent's statements that she had not consumed alcohol since her arrest in August, 2006, she was willing to abstain from alcohol, and to abide by any conditions the Committee recommended. The Committee also relied on, "Mr. Nevitt's assessment that her alcohol abuse is in full sustained remission." The Committee concluded, "It was the feeling of the panel that Ms. Hemerling understood well the seriousness of her offense and how much it could have cost her or someone else, and that she is not likely to put herself in that situation again."

During the hearing in the instant matter Respondent stated that after her arrest in January 2009 for DUI it occurred to her that she had a problem with alcohol and that she had a difficult time controlling her problem. (TR 196:5-8) She did not seek help at that time because she felt helpless and hopeless and that she could work harder at being able to stop drinking. (TR 196:11-16) She was meeting regularly in January and February with Hal Nevitt and her monitor Cynthia Estrella. Yet she rationalized not telling Hal or Cynthia of the arrest and her daily drinking because she told herself she was not an alcoholic, she did not have a problem and she was going to stop drinking. She admitted that she was afraid that Hal and Cynthia would be extremely disappointed in her. (TR 196:17 through 197:11) Respondent testified that her arrest in April 2009 caused her to realize that she needed to accept the fact that she was an alcoholic and there was nothing she could do to control it. The only way she could control it would be to get some help. She marked the beginning of her sobriety as the day of the April 2009 incident. (TR 197:21 through 198:10)

Hal Nevitt testified that he diagnosed Respondent for the Committee on Character and Fitness in November, 2007, as having alcohol abuse in full sustained remission. He explained that this diagnosis is different from his current diagnosis for Respondent as an alcoholic. (TR 83:7-10) In 2007, he explained that his diagnosis of Respondent as an alcohol abuser meant that she was

not a person who in his opinion was alcohol dependant. "Abuse" was defined as disruptions in a biological, psychological, or social function. (TR 81:3-14) When Mr. Nevitt diagnoses a person as dependant on alcohol (an alcoholic), he looks for the phenomena of withdrawal and progression. The progression of psychosocial consequences as a result of a person's continued use of alcohol is a more specific description of what Mr. Nevitt means by "progression". He also explained that the phenomenon of denial is a largely unconscious process that protects a person from harmful or painful information about themselves. (TR 83:15-22) Mr. Nevitt testified that in his opinion Respondent was in denial in November 2007 when she did not admit that she was abusing alcohol. She was also in denial when she obviously lied to Mr. Nevitt by repeatedly telling him from January through June 12, 2009 that she was in compliance with her conditional admission contract. (TR 84:8-21; 86:9 through 87:14)

Hal Nevitt did not equate denial as a phenomenon of people who are alcoholics with dishonesty. (TR 87:8-14) He has noticed positive changes in Respondent, since she admitted to him in June, 2009 that she had been drinking again and had been arrested for DUI in January, 2009. She took direction from him and began attending the intensive outpatient program (Chandler Valley Hope). She began a program of biological fluid testing. She began attending lawyer's AA meetings. She got a lawyer sponsor. She began attending the Lawyer Support Group. (TR 87:15 through 88:10) As a consequence of being under house arrest for 105 days of her 120-day jail sentence for Extreme DUI (sentenced June 11, 2009), Respondent was monitored. When a device in her home alarmed her, she was required to provide a breath sample while a camera fixed to that device ensured that she was actually giving the sample. (TR 88:15-25) All of her tests for alcohol consumption in the home arrest (three times per day) monitoring system were negative. These tests were performed from June through September, 2009. (TR 89:1 through 90:10) After the Court's

monitoring concluded in November, 2009, Mr. Nevitt has asked Respondent to test a minimum of twice a month with MAP. Yet, Respondent has tested more frequently with MAP than required by Mr. Nevitt; once each week. Her tests with MAP since November, 2009 (she had done at least two of these tests up to the time of the December 14, 2009 hearing) did not indicate the use of alcohol. (TR 90:10 through 91:18)

Mr. Nevitt stated that he believed Respondent is now committed to being sober. (TR 92:9-11) He bases this belief not as much on what Respondent currently says, but on the actions she has taken. In addition to Respondent's actions that have been described above, Respondent also regularly attends an AA meeting through her church, Celebrate Recovery. She has moved her residence and changed the circle of "friends" with whom she socialized. (TR 93:4-19)

Mr. Nevitt currently diagnoses Respondent (through the use of the DSM-IV, the manual psychologists use to diagnose mental health and substance abuse conditions) as being in the stage of "early partial remission" for a person who is alcohol dependant, because she has not consumed alcohol for eight months. (Since the hearing was on December 14, 2009, Mr. Nevitt is apparently crediting Respondent with having been sober since April 4, 2009, yet the City Court did not begin the home arrest monitoring program with breath tests for alcohol use until after Respondent's conviction for the January, 2009 DUI on June 11, 2009. The record before the Hearing Officer does not contain evidence verifying Respondent's statement that she stopped drinking alcohol on April 4, 2009) After she demonstrates 12 months of abstinence from alcohol, she will qualify for the diagnosis of "full sustained remission" according to the DSM-IV. (TR 93:24 through 95:10)

It is clear to this Hearing Officer that the mitigating factor of the personal and emotional problems associated with Respondent's alcoholism is significant. However, it is less clear

that Respondent qualifies for the mitigating factor in *Standard* 9.32 (i) of alcoholism. The first two elements of the four-part test for this factor are met. 1) There is medical evidence (Mr. Nevitt's diagnosis under the DSM-IV) that Respondent is affected by her dependence on alcohol. 2) Respondent's alcohol dependence caused her misconduct of committing DUI offenses and violating her conditions of admission to the Bar. However, the Hearing Officer concludes that the third and fourth factors in *Standard* 9.32 (i) have not been met. 3) Respondent's recovery from alcohol dependence has not been demonstrated by a meaningful and sustained period of successful rehabilitation. Although Hal Nevitt testified that he believed Respondent's rehabilitation has been meaningful and that she has exhibited rehabilitation for a sustained period, he did not state that her recovery was successful. (TR 97:2-14) His earlier testimony was that the DSM-IV would not consider her in full sustained remission until 12 months of demonstrated sobriety. Since her sobriety was only independently verified after the City Court's program of monitoring her under house arrest began, sometime after June 11, 2009 (Respondent spent 15 days in the Tents Jail as part of the June 11, 2009 confinement order), the Hearing Officer thinks that 6 months credit for sobriety is appropriate.

Therefore, Respondent will not have achieved a sustained period of successful rehabilitation until at least June 11, 2010. The third factor of *Standard 9.32* (i) has not been established. Although, the fourth factor need not be discussed, to find that it has been met is problematic. Mr. Nevitt qualified his answer that a recurrence of Respondent's misconduct is unlikely, with the statement that a recurrence is unlikely only if Respondent continues what she is doing now. (TR 97:15 through 98:9) Based on the criteria of the DSM-IV as 12 months of sobriety for a "full sustained remission", the Hearing Officer believes that Respondent should be required to continue doing what she is doing now (and particularly demonstrating by testing that she is not

consuming alcohol) until June 11, 2010. For these reasons the fourth factor of *Standard* 9.32 (i) has not been met.

Standard 9.32 (b) - Absence of a dishonest or selfish motive. The Hearing Officer concludes that this mitigating factor has not been established. Respondent was not honest with Hal Nevitt and Cynthia Estrella. Although the underlying ethical violations were committing criminal conduct and violating a condition of admission to the Bar, allegations that do not require proof of a dishonest or selfish motive, Respondent knowingly covered up her violations by deliberately omitting to tell two people who were monitoring for compliance with the conditions of her admission.

Standard 9.32 (d) - Good faith efforts to rectify consequences of misconduct. This mitigating factor has been established. The actions taken by Respondent to participate in treatment for her condition are set forth in detail above. These actions demonstrate a good faith effort to manage the alcoholism that caused the misconduct.

Standard 9.32 (e) - Full and free disclosure toward the State Bar and cooperative attitude toward proceeding. This factor has been established. After Respondent disclosed to Mr. Nevitt the January 2009 DUI arrest and conviction, he asked her to take certain actions to address her problem. He testified in the hearing that she has done everything since that time that he has required. She is testing for alcohol consumption even more frequently then he required. Although some of her disclosure to the Bar should have been made earlier in the process, and although Respondent may not have disclosed the April 2009 arrest to her monitor until August 31, 2009 and to Mr. Nevitt much later, she has belatedly cooperated to the extent possible. With criminal charges potentially still under consideration for the April 2009 incident, Respondent is entitled to consider

that any statements made to the Bar about her participation in that incident could be used against her in a future prosecution.

Standard 9.32 (f) - Inexperience in the practice of law. This factor has been established. However it will be given less weight because the violations committed by Respondent did not directly relate to her level of experience as a lawyer. Instead Respondent's alcoholism and the denial associated with her condition were the causes of her misconduct.

Standard 9.32 (g) - Character or reputation. This factor has been established by the testimony of Respondent's law partner Christos Agra. He testified that he met Respondent at the Westbrooks law firm in September 2008. By mid-January 2009 he and Respondent decided to establish their own law firm. Therefore, at most, Mr. Agra has been able to observe Respondent's character and reputation for a little more than one year. He described her character as "excellent". She treats her clients with respect and her work product is very good. (TR 133:4 through 136:6) The Hearing Officer will give some weight but not a great amount of weight to this factor because of the limited amount of time that Mr. Agra has had to evaluate Respondent's character or reputation.

Standard 9.32 (k) - Imposition of other penalties or sanctions. This factor has been established when Respondent was sentenced on the January 2009 DUI in City Court to 120 days in jail, a $940 fine, a $1250 DUI assessment, a separate $250 assessment, and a Jail fee of $493.19. 105 days of the Jail term were served in the Home Detention Program, while 15 days were served in the Tents Jail. Respondent testified that during the 15 day jail term she was released from 6:00 am to 6:00 pm each day from Monday through Friday on Work Release. (Exhibit 1, SBA 7-13; TR 212:2-23)

Standard 9.32 (l) - Remorse. This factor has been established. Perhaps it has taken Respondent too long to accept the fact that she is an alcoholic. However, now that she has accepted

that fact, she has demonstrated her remorse by actions instead of mere words. Since sometime in June 2009 she has proven by independent verification (City Court testing and MAP testing) that she is not consuming alcohol. She is attending at least three groups to effectively use support in controlling her disease. She has attended an intensive outpatient treatment program to more completely understand her situation. It is fortunate that the combination of her use of alcohol and driving has not permanently injured or caused the death of another person or herself. Yet, her driving on the evening of April 4, 2009 could easily have permanently changed the lives of the victim or her family members if they had been standing near the gate or in the shed that Respondent's car struck. Only time will tell if Respondent will remain true to her pledge not to take even one drink. She made this same pledge some time ago before the Committee on Character and Fitness.

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)).

The State Bar in a Post-Hearing Memorandum submitted the cases of *Richardson, Pohto, Masters, Wasson and Politi.* The Bar recommends that Respondent receive a two-year suspension.

In *In re Richardson,* SB-08-0144-D (2008), Richardson was suspended for six months and one day and ordered to pay all costs and expenses of the disciplinary matter. Richardson was conditionally admitted to the practice of law in the State of Arizona on July 31, 2007, with a one-year MAP contract that began to run on that date. Richardson's MAP contract contained a provision that she was to completely abstain from using alcohol. On October 17, 2007, Richardson tested positive for an alcohol metabolite and admitted she negligently used cold medication that contained alcohol without prior approval. Richardson and the State Bar initially agreed upon a censure and probation; however, subsequent to Richardson signing the censure and probation consent documents and the hearing on the agreement, Richardson knowingly consumed alcohol in violation of her agreement, thereby warranting the six month and one day suspension. The one aggravating factor was *Standard* 9.22(c) pattern of misconduct. There were two mitigating factors: *Standards* 9.32(a) absence of a prior disciplinary record and 9.32(f) inexperience in the practice of law. Richardson was sanctioned for violation of Rules 53(e) and 53(g), Ariz.R.Sup.Ct.

In *In re Pohto*, SB-03-0145-D (2004), Pohto was suspended for six months and one day and ordered to pay all costs and expenses of the disciplinary matter. Pohto was conditionally admitted to the practice of law in the State of Arizona on August 30, 2000, having signed a MAP contract on July 31, 2000, which contained a provision that he was to completely abstain from using alcohol. On November 10, 2000, Pohto tested positive for alcohol. On June 30, 2001, Pohto was charged

with DUI, which was subsequently dismissed with prejudice on October 24, 2001. Pohto agreed he acted with a knowing mental state. There were no aggravating factors. There were three mitigating factors: *Standards* 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, and 9.32(j) delay in the disciplinary proceeding. Pohto was sanctioned for violating then Rule 51(l), Ariz.R.Sup.Ct.

In addition to the above, non-conditionally admitted members of the State Bar who commit Aggravated Driving Under the Influence have been suspended for a period of two years.

In *In re Masters*, SB-07-0182-D (2008), Masters was suspended retroactively for two years and placed on two years of probation, with a MAP component, upon reinstatement. Masters committed Aggravated Driving Under the Influence. Masters had a knowing mental state. There were three aggravating factors: *Standards* 9.22(a) prior disciplinary offenses, 9.22(i) substantial experience in the practice of law, and 9.22(k) illegal conduct. There were four mitigating factors: *Standards* 9.32(b) absence of a dishonest or selfish motive, 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, 9.32(i) mental disability or chemical dependency including alcoholism or drug abuse, and 9.32(k) imposition of other penalties or sanctions. Masters was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ER 8.4(b) and Rule 53(h), Ariz.R.Sup.Ct. Masters was retroactively suspended because she was previously suspended in a separate disciplinary matter.

In *In re Wasson*, SB-05-0079-D (2005), Wasson was retroactively suspended for two years and placed on two years of probation, with a MAP component, upon reinstatement. Wasson committed Aggravated Driving Under the Influence on two separate occasions. Wasson acted with a knowing mental state. The sole aggravating factor was *Standard* 9.22(k) illegal conduct. There were five mitigating factors: *Standards* 9.32(a) absence of a prior disciplinary record, 9.32(b)

absence of a dishonest or selfish motive, 9.32(c) personal or emotional problems, 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and 9.32(k) imposition of other penalties or sanctions.[1] Wasson was sanctioned for violation of Rule 42, Ariz.R.Sup.Ct., specifically ER 8.4(b) and Rule 53(h), Ariz.R.Sup.Ct. Wasson was retroactively suspended because he was previously placed on interim suspension pending the outcome of this disciplinary proceeding due to the felony convictions mentioned above.

In *In re Politi*, SB-00-0106-D (2001), Politi was suspended for two years and placed on two years of probation, with a MAP component, upon reinstatement. In August 1998, Politi committed misdemeanor DUI and on February 18, 1999, committed Aggravated DUI. Further, Politi represented a husband in divorce proceedings between November 1994 and December 1996. In October 1995, Politi represented the wife, who was also a police officer, in proceedings before the Police Officer Standards and Training ("POST") board. The officer was charged with assault upon a woman she believed to be the husband's girlfriend. Further, the officer continued to be violent towards the husband even after the divorce was finalized and Politi wrote a letter to the husband-client advising him it might be appropriate to seek criminal assault charges against the police officer-client. Politi acted with a knowing mental state when it came to the DUI and Aggravated DUI and with a negligent mental state when it came to the conflict of interest. There were two aggravating factors: *Standards* 9.22(c) pattern of misconduct and 9.22(i) substantial experience in the practice of law. There were six mitigating factors: *Standards* 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, 9.32(d) timely good faith effort

[1] The parties and Hearing Officer found Wasson also had the mitigating factors of *Standard* 9.32(i) mental disability or chemical dependency and 9.32(l) remorse. The Disciplinary Commission found, however, there was insufficient evidence to find there was a sustained period of recovery under 9.32(i)(3) and the recurrence of the misconduct is unlikely under 9.32(i)(4). Further, the Commission found there was insufficient evidence showing Wasson was truly remorseful for his conduct.

to rectify consequences of misconduct, 9.32(e) cooperative attitude toward disciplinary proceedings, 9.32(i) mental disability or chemical dependency, and 9.32(k) imposition of other penalties or sanctions. Politi was sanctioned for violations of Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.7, 1.9, 8.4(b), 8.4(d) and then Rules 51(a) and 57(a), Ariz.R.Sup.Ct.

The Hearing Officer concludes that Respondent's case is closer to the situation in *Richardson* and *Pohto*, and is distinguishable from *Masters*, *Wasson* and *Politi*. *Richardson* and *Pohto* involved conditional admissions. Each attorney was sanctioned for six months and a day.

In *Masters* a two year suspension was imposed in 2007. Unlike Respondent, Masters had a prior disciplinary offense (for which she had been suspended for six months and a day on March 7, 2006) and she had substantial experience in the practice of law (having been admitted to practice in 1977).

In *Wasson* the attorney received a two year suspension after he committed Aggravated Driving Under the Influence on two separate occasions. Respondent has committed one misdemeanor DUI for which she was convicted and sentenced. The Hearing Officer found that the Bar proved by clear and convincing evidence that Respondent committed another DUI on April 4, 2009 that would have been an Aggravated DUI if Respondent had been charged and convicted in criminal court. The difference is that the Hearing Officer did not find that the Bar's proof was beyond a reasonable doubt which is the standard for conviction in a criminal case. Even if the April 4, 2009 DUI is considered the same as a felony, Respondent has not committed two felony DUIs as was the case in *Wasson*.

In *Politi* the attorney not only committed a misdemeanor DUI and an Aggravated DUI, but engaged in a conflict of interest when, while he represented the husband in the divorce proceeding, he also represented the wife, a police officer, before a police certification agency for alleged

assaultive behavior and he even advised one of his clients to take action against the other client. Politi also had substantial experience in the practice of law, which as an aggravating factor would have related to the conflict of interest.

In Proposed Findings of Fact and Conclusions of Law Respondent submitted the case of *Gingras* (which cited *Charles, Hilzendeger* and *Rolph*). Respondent recommended that a short-term suspension of 30 to 60 days followed by two years of probation is the appropriate sanction.

> *In re Gingras*, SB-08-0157-D (2008), involved a conditional admittee who was required to abstain from alcohol for a period of three years following his admission. He was also required for a portion of his conditional admission to comply with random urinalysis. At Gingras' request, after a period of compliance, his MAP contract was modified to eliminate the requirement of biological fluid testing. Following the elimination of that requirement, Gingras contended that the modification of his MAP contract allowed him to consume alcohol. He was then arrested for DUI and pled guilty.
>
> A factor not at issue in the instant case, but important to *Gingras* was the finding that Gingras' failure to abide by the abstinence provision of his MAP Contract was negligent (for unique reasons discussed in the Hearing Officer's Report) as opposed to knowing, which is the mental state most appropriate in Respondent's case (notwithstanding her alcoholism). When the aggravating and mitigating factors were considered, the hearing officer in *Gingras* recommended that Gingras receive a suspension for 30 days.
>
> The Hearing Officer in *Gingras* discussed the relevant case law with regard to conditional admittee cases: *In re Charles,* SB-07-0080-D (2007)(Respondent censured and put on probation for two years for two incidents of drinking alcohol while required to

abstain as part of conditional admission); *In re Hilzendeger*, SB 06-0883 (2006)(respondent taken off conditional admission status and placed on probation when he failed to appear for random biological fluid testing and failed to contact his monitor); *In re Rolph*, SB-06-0011-D (2006)(respondent suspended for 90 days and placed on probation for two years when he failed to comply with his LOMAP contract, had two complaints for which he did not timely respond, and for failure to appear at his deposition when subpoenaed by the State Bar).

The Hearing Officer determines that the cases cited by Respondent are not similar to the situation in the case at bar. In *Gingras* the attorney had demonstrated a period of compliance (more than one year) with the conditions of his admission to the Bar. His performance must have impressed Dr. Sucher the MAP Medical Director enough to recommend the modification of his MAP contract eliminating the requirement of biological fluid testing. Of greater significance in *Gingras* was the detailed finding by the hearing officer that the Bar had not spoken with one voice about the modification to the MAP contract. Although the hearing officer chastised Gingras for wanting to interpret the modification of the contract to permit him to drink alcohol when Gingras should have known better, the hearing officer also recognized that there was confusion in what Dr. Sucher told Gingras about abstinence. This information seemed significant to the hearing officer in recommending a 30 day suspension for Gingras. Nothing like this confusion is present in the instant case.

Respondent in the case at bar had only been admitted to the Bar for seven months (from May 20, 2008 until January 2009) when she began drinking alcohol daily and began to drive under the influence of alcohol. She was arrested in January 2009 for DUI. Even though she had spent time in jail in 2006 for her DUI in Tempe, and even though she was arrested in Phoenix in January 2009

for another DUI, she was again arrested on April 4, 2009 for DUI in Phoenix. The Phoenix City Court found her guilty of the January 2009 DUI in June 2009. This Hearing Officer has found that the Bar has proven by clear and convincing evidence that Respondent was driving under the influence of alcohol again on April 4, 2009. Respondent maintained for months that she was in compliance with her conditions of admission, when she knew that she was drinking every day. Her situation is more egregious than *Charles,* where the attorney was censured and put on probation for two years for two incidents of drinking alcohol. Respondent's case is far different than *Hilzendeger,* where the attorney had failed to appear for testing and failed to contact his monitor. In *Rolph* the attorney failed to comply with his LOMAP contract, did not timely respond to two complaints and failed to appear for a deposition. This conduct is not similar in nature to the more serious behavior of Respondent in the instant case.

RECOMMENDATION

The Hearing Officer recommends that Respondent be suspended for six months and one day. Upon reinstatement, Respondent should be placed on two years of probation with conditions to be set at the time of reinstatement. The conditions of probation should include a MAP contract. Respondent should be directed to pay the expenses of these proceedings.

The Bar's recommendation of a two-year suspension seems unnecessary. Respondent should be given some credit for finally realizing that she is an alcoholic and for taking steps to address her problem. A suspension of six months and one day will place the burden on Respondent to establish that she is in control of her alcoholism. Rule 65, Ariz.R.Sup.Ct. Based on the severity of her conduct in the first four months of 2009 while she was being monitored by both the MAP director and an attorney monitor, the Hearing Officer thinks that a 30 to 60 day suspension is not

appropriate. Respondent promised the Committee on Character and Fitness that she would be able to abstain from alcohol. Her counsel effectively argued at the hearing that alcoholism is a disease over which the individual does not have total control. However, the Hearing Officer determines (and the Respondent has proven) that Respondent can take certain measures to address her alcoholism. The fact that she was either unwilling or unable to take those steps while she was violating her conditions of admission, lying to her monitors, repeatedly driving under the influence of alcohol, violating the criminal laws, endangering citizens and damaging their property, leads to the conclusion that her condition is severe enough that she should bear the burden of establishing her qualifications for reinstatement to the Bar. 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)

Respondent's abuse of alcohol has the potential to severely harm her clients and the profession. If her conduct from January through early April 2009 is a result of poor judgment, then the public is at risk until such time as Respondent sufficiently demonstrates vastly improved judgment. If Respondent's conduct in the beginning of 2009 is a result of uncontrolled alcoholism, the public is still at risk because the consequences from either poor judgment or lack of control of the disease were the same; Respondent was engaged in seriously dangerous behavior when she drove a vehicle under the influence of alcohol. The influence of alcohol could cause her to fail to meet her obligations to clients, thereby exposing clients to harm. In addition, the fact that an attorney spends 15 days in jail, and another 105 days under house arrest, is harmful to the

profession as well as to that attorney. Attorneys are officers of the court and upholders of the law. They should not be violators of the law.

SANCTION

The Hearing Officer recommends the following sanction:

1. Respondent be suspended from the practice of law for six months and a day to begin from the time of the Judgment and Order is issued.

2. Respondent shall be placed on probation upon reinstatement for a period of two (2) years, with the specific terms to be decided upon reinstatement. However, the probation terms shall include a MAP component and shall also include the following:

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

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

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

DATED this 25th day of January, 2010.

Hon. Jonathan Schwartz
Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 25th day of January, 2010.

Copy of the foregoing mailed
this 26 day of January, 2010, to:

Nancy Greenlee
Respondent's Counsel
821 E Fern Drive North
Phoenix, AZ 85014

Jason Easterday
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Deann Barker