BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **BRAD REINHART** **Bar No. 020272** RESPONDENT.	Nos. 09-0604, 09-1934, 10-0494 **DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on March 19, 2011, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed January 10, 2011, recommending censure, two years of probation with the State Bar's Law Office Management Program ("LOMAP") and costs related to Count Two. The State Bar filed an objection and requested oral argument.

The State Bar argues that based on the findings of fact relative to Count One and Count Three, the Hearing Officer erred in failing to conclude that Respondent violated ERs 1.3, 1.4 and 8.4(d) in Count One and ERs 1.3 and 8.4(d) in Count Three.

The State Bar stated that Respondent almost completely abandoned his clients, did little to protect them, could not provide the client with options about his case without undertaking any investigation, and offered *Matter of Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993) ["Lack of competent investigation, preparation of defense, lack of diligence in adequately preparing for trial, failure to consult criminal client on possible lesser included offenses…warrants 18-month suspension."]

The State Bar further argues the Hearing Officer further erred in failing to find aggravating factors 9.22(d) multiple offenses and 9.22(h) vulnerability of victim as clients Wynn and Moore were incarcerated during the criminal proceedings.

The State Bar asserts that the Hearing Officer's recommended sanction is insufficient based on his erroneous conclusion that none of the misconduct in Count One and Three were proven by clear and convincing evidence. The State Bar argues that this is not an isolated instance of misconduct as Respondent has engaged in a pattern of neglect of his clients. Respondent was ordered on three (3) separate occasions to participate in Diversion and one instance involved the ineffective assistance of counsel. The State Bar stresses that a period of suspension, preferably a six month suspension and two years of probation is the appropriate sanction given the extreme harm suffered by client Moore.

Respondent argues that the Hearing Office appropriately found that the clients in Count One and Three were not credible. Respondent asserts that the Hearing Officer's findings and conclusions are not clearly erroneous and urges the Disciplinary Commission to affirm his Report and Recommendation.

Decision

The eight members[1] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law and recommendation for censure, two (2) years of probation (LOMAP), and costs related to Count Two of these disciplinary proceedings including any costs incurred by the

[1] Commissioner Belleau did not participate in this proceeding.

Disciplinary Clerk's office.[2] The terms of probation are as follows:

Terms of Probation

1. Respondent shall comply with a period of probation for two years with an evaluation by LOMAP, and other terms and conditions as recommended by LOMAP.

2. The term of probation shall begin at the time of the final Judgment and Order and shall end two years from the final Judgment and Order.

3. Respondent shall contact the Director of LOMAP within thirty (30) days of the date of the final Judgment and Order.

4. The State Bar shall report material violations of the terms of probation pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct., and a hearing may be held within thirty (30) days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence.

RESPECTFULLY SUBMITTED this 28 day of March, 2011.

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

Commissioner Todd concurring:

I fully concur in this matter. I write because, in my view, this case illustrates an important limitation on the ethical rule concerning competency. Respondent Brad

[2] A copy of the Hearing Officer's Report is attached as Exhibit A. The Commission notes that aggravating factor 9.22(i) substantial experience in the practice of law was found. However, Respondent was admitted to practice law in Arizona on August 4, 2000, and the conduct occurred in 2004. The Commission determined the absence of this factor would not have affected the outcome.

Reinhart's performance in two criminal cases was found to be constitutionally ineffective by the trial court. Serious consequences flowed from those findings. The administration of justice is certainly harmed when an attorney's performance is found to be constitutionally deficient in a criminal case. Worst yet, in one of Respondent's cases, his innocent client was convicted and spent over three (3) years incarcerated for an armed robbery he did not commit. Yet to impose ethical sanctions for how an attorney exercises judgment in a case, in my view, is contrary to the *constitutionally* protected independence of defense counsel that former Justice O'Connor identified in *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The constitutional right of counsel to act independently and not be told by a Bar Association or any other organization how he is to proceed with a case should be paramount and immutable. This is one of those situations where the law must balance competing interests. Here, I would balance it on the side of the independence of counsel. If counsel exercises poor judgment, natural consequences will follow but this should be beyond the preview of the State Bar's regulation.

Original filed with the Disciplinary Clerk
this 28th day of March, 2011.

Copy of the foregoing mailed
this 29 day of March, 2011, to:

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/mps

EXHIBIT
A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	Nos. 09-0604, 09-1934, 10-0494
BRAD REINHART, Bar No. 020272	)	**HEARING OFFICER'S REPORT**
Respondent.	)	

PROCEDURAL HISTORY

1. In case number 09-0604, the State Bar filed a Complaint on November 12, 2009. The case was assigned to the undersigned Hearing Officer on December 2, 2009. Thereafter, on January 26, 2010, the State Bar filed a Motion for Leave to File Amended Complaint, which was granted. The Amended Complaint, including new cause number 09-1934, was filed on February 22, 2010. Respondent filed his Answer to the original Complaint on January 11, 2010. An amended Answer was thereafter filed on January 24, 2010, and new counsel for Respondent substituted in on March 29, 2010. Thereafter, on May 24, 2010, the State Bar filed a Motion for Leave to File Second Amended Complaint, which included the third case number 10-0494. Respondent did not object to the amendment of the Complaint, and the last Amended Complaint, which included all three case numbers, was filed on June 16, 2010. Respondent filed his answer to the Second Amended Complaint on June 29, 2010.

2. All three cases were set for contested hearing on October 27, 28 and 29, 2010, and the matter proceeded to hearing on those dates.

SUMMARY OF ALLEGATIONS

Count One (09-0604 Wynn)

3. In this Count, it is alleged that in 2008 Respondent, in representing a defendant in a criminal matter, failed to provide competent representation to his client; failed to act with reasonable diligence in representing his client; failed to consult with his client; failed to keep his client reasonably informed; made a false statement of fact to a tribunal; failed to correct a false statement of material fact previously made to a tribunal; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and engaged in conduct that was prejudicial to the administration of justice.

Count Two (09-1934 Flores)

4. In this Count, it is alleged that in 2004 Respondent, in representing a defendant in a criminal matter, failed to provide competent representation to a client; failed to act with reasonable diligence in representing his client; failed to reasonably consult with his client about the means by which the client's objectives were to be accomplished; failed to keep the client reasonably informed about the status of the matter; failed to promptly comply with reasonable requests for information; failed to explain a matter to the client to the extent reasonably necessary to permit the client to make an informed decision regarding the representation; and engaged in conduct prejudicial to the administration of justice.

Count Three (10-0494 Moore)

5. In this Count, it is alleged that Respondent, in representing a defendant in a criminal matter, failed to provide competent representation to a client; failed to

act with reasonable diligence in representing his client; and engaged in conduct prejudicial to the administration of justice

FINDINGS OF FACT

6. At all times relevant, Respondent was an attorney licensed to practice law in the state of Arizona, having been admitted to practice in this state on August 4, 2000.

7. In all three counts, Respondent's conduct as an attorney working on contract with the Maricopa Office of Court Appointed Counsel (OCAC) as conflict counsel in criminal cases is called into question.

Count One (09-0604 Wynn)

8. On August 15, 2008, Respondent was appointed as criminal Defense counsel for Defendant Willis Edward Wynn ("Defendant or Mr.Wynn") in CR 2008-144570001 DT before the Superior Court of Arizona in Maricopa County.[1]

9. Defendant was indicted for: two counts of Molestation of a Child, class 2 felonies and Dangerous Crimes Against Children; two counts of Sexual Conduct with a Minor, class 2 felonies and Dangerous Crimes Against Children; and five counts of Sexual Conduct with a Minor, class 2 felonies. In the event Defendant was convicted on all charges, the minimum sentence possible was 104 years.

10. False statement to tribunal, failure to correct false statement, conduct involving dishonesty, fraud, deceit or misrepresentation, conduct prejudicial to the administration of justice.

[1] Unless otherwise cited, all findings set forth herein are taken from the Joint Pre-Hearing Statement submitted by the parties.

11. On September 15, 2008, Respondent attended the Initial Pretrial Conference on behalf of Defendant Wynn. At the Initial Pretrial Conference, the Court set the case for a Comprehensive Pretrial Conference (CPTC) on October 17, 2008, before the trial court judge, the Honorable John R. Hannah ("Judge Hannah").

12. On October 17, 2008, Respondent did not personally attend the CPTC, but sent an office mate to cover the matter.

13. At this CPTC, Defendant Wynn stated that the only time he had met with Respondent was at the September 15, 2008, Initial Pretrial Conference, which took place 32 days earlier.

14. Judge Hannah then reset the CPTC for October 27, 2008. Additionally, Judge Hannah issued an Order that Respondent meet with Defendant prior to the October 27, 2008, CPTC.

15. On October 27, 2008, Respondent attended the CPTC on behalf of the Defendant Wynn. At this hearing, Respondent confirmed to Judge Hannah that he had met with the Defendant before the CPTC. Respondent also stated that he had not conducted interviews of any of the 15 potential witnesses. Respondent did not elaborate at that time because of the attorney client privilege, and so informed the Court, and there were other in custody defendants present.

16. At the CPTC Respondent further stated to Judge Hannah that Defendant's case did not require a lot of interviews because the facts of Defendant's case would not change as a result, and that he would not be interviewing any of the 15 potential witnesses in the next three or four weeks. Respondent confirmed this during his

testimony at the hearing in this matter, Transcript of Hearing ("T/R") 529:13-530:15.

17. Respondent told the Court that he had two upcoming scheduled trials and would attempt to schedule a settlement conference in the Wynn case. Judge Hannah set Defendant Wynn's trial for December 8, 2008. The Court also set a Trial Management Conference hearing for December 5, 2008.

18. Respondent informed the Court at that time that if the Wynn case proceeded to trial in mid-December, it was unlikely he would be available. Respondent had four jury trials set around this time: Wynn, Knight, Ressenger, and would be in trial in Rodriguez, T/R 534:19-25. However, Respondent accepted the trial date because the defendant's "last day for trial" was looming.

19. During the same time that Respondent was representing Defendant Wynn, Respondent was also Defense counsel of record for Mr. Jermaine Knight ("Mr. Knight") in CR 2007-008905 DT before the Superior Court of Arizona in Maricopa County. This case was set for trial on December 8, 2010.

20. On December 2, 2008, Respondent filed a Motion to Continue the December 8, 2010, Knight trial for two days to December 10, 2010. Respondent stated that he hoped to get Knight continued just long enough to finish Rodriguez, then try Knight and then either Ressenger or Wynn.

21. On December 3, 2008, Respondent filed a Motion to Continue Firm Trial Date on behalf of Defendant Wynn. In this Motion to Continue, Respondent stated he would be in trial on State v. Rodriguez, which he expected would end on December 9, 2010. Also in this Motion to Continue, Respondent stated he was

scheduled to start trial in Mr. Knight's case on December 10, 2008, Hearing Exhibit ("H/Ex") 13. The December 10, 2008, date incorporated the two day continuance that Respondent had asked for in his Motion in the Knight case. Respondent asserted that the Motion itself was made in good faith and not for the purpose of any unnecessary delay.

22. Also on December 3, 2008, after the Motion to Continue was filed, Respondent attended a hearing on behalf of Mr. Knight before the Honorable Judge Timothy Ryan ("Judge Ryan"), which was set for consideration of the Motion to Continue filed on December 2, 2008, by Respondent on behalf of Mr. Knight.

23. At this hearing, Judge Ryan vacated Mr. Knight's trial date, which had been scheduled for December 8, 2008, before the Honorable Sally Duncan. Judge Ryan stated, on the record, in open court and in Respondent's presence, that the trial date of December 8, 2008, was vacated.

24. Judge Ryan set Mr. Knight's case for a Status Conference on December 16, 2008. Judge Ryan further stated, on the record in open court and in Respondent's presence that the Status Conference of December 16, 2008, was to select a new trial date. No new trial date for Mr. Knight's case was set. No schedule for trial in Mr. Knight's case was discussed.

25. On December 5, 2008, Respondent attended the Trial Management Conference before Judge Hannah on behalf of Defendant Wynn. Judge Hannah asked Respondent if Respondent was going to start trial in Mr. Knight's case after finishing the trial that Respondent was currently engaged in, which was likely going to end on December 11, 2008. Respondent informed the Court that he was

currently in trial in State v. Rodriguez and was set to end that trial by December 11, which was after the trial setting in Wynn of December 8.

26. Respondent informed the Court that following his present trial, trial would start in either Mr. Knight's case or the Ressenger case. Respondent indicated that he was not sure if Ressenger was actually going to start because the State had moved for a continuance in that case. Respondent indicated that if the Ressenger case did start, it would start on December 15, 2008, as it was a firm trial date.

27. Regarding Mr. Knight's trial, Respondent stated, "The Knight case will probably be three to four days. It's the one more likely to go, because it's an out-of-state witness, it will probably bump the Ressenger case and it will, in all likelihood, have to go before this one."

28. Respondent testified that he believed the Knight case was before Judge Ryan because it was part of the new Master Calendar Program. Respondent knew that one of the written basis for Respondent's December 3, 2008, Motion to Continue the Wynn case was that Mr. Knight's trial would start on December 10, 2008. Respondent knew that Judge Ryan had already vacated Mr. Knight's December 8, 2008, trial date. Respondent knew that a new trial date for Mr. Knight's case had not been set yet.

29. Judge Hannah felt that Respondent was not being honest with him when Respondent told him at the December 5, 2008, hearing that Respondent was going to be in trial in Knight after learning that Respondent had filed a Motion to Continue in Knight (and had not mentioned it in his motion to continue Wynn) and that Judge Ryan had already granted the continuance in Knight.

30. Respondent testified that he thought initially that the Knight case would only be continued the two days that he had asked for, and that when Judge Ryan set a new date on December 16, 2008, Respondent thought that the Knight case was in the new case management program that had just gone into effect on December 1, 2008, T/R 190:8-10, and meant Judge Ryan would start trial either on December 16 or the next day, which would mean that he still could not go to trial in the Wynn case. Respondent adamantly denies that he lied or misrepresented anything to Judge Hannah, T/R 620:20-23.

31. Both Judge Hannah and Judge Ryan testified that the trial scheduling system in place in the latter part of 2008, was confusing and not clearly understood by all, T/R 133:8-134:6, 138:11-24, 182:17-185:3. Judge Ryan testified that under the still existing "Case Transfer" program, a case could start the day after the case status conference, T/R 185:20-25, 211:12-14. However Judge Ryan testified that Respondent should not have concluded that the trial could go in Knight on December 16 because the hearing was set at 9:30 a.m. and trials start at 8:00 a.m., T/R 209:19-210:18. Judge Ryan admitted that "It got a little complicated at times", T/R186:13.

32. Respondent admits that it was probably an inadvertent mistake not to mention in his Wynn motion that he had also moved to continue the Knight case, but felt at the time of the filing the motion in the Wynn case that Knight would only be continued two days which would preclude Wynn from starting on December 10, T/R 543:3-9.

33. Respondent could also have told Judge Hannah that Knight had been continued to a date that he thought was a new trial date which he thought would have precluded Wynn from going to trial on the assigned date.

34. Failure to competently represent Mr. Wynn, diligence in representing his client, consult with his client, keeping the client reasonably informed.

35. Also, at the December 5, 2008, Trial Management Conference before Judge Hannah:

a. Respondent could not remember the last time, prior to a Settlement Conference date on December 2, 2008, that he saw the Defendant.

b. Defendant indicated that the last time Respondent met with Mr. Wynn prior to the December 2, 2008, Settlement Conference was on October 27, 2008, at the Comprehensive Pretrial Conference. Respondent informed the Court that he had scheduled a settlement conference in November, but had to cancel it because another case was picked up out of case transfer. However, a settlement conference was scheduled on December 2, 2008.

c. At this hearing on December 5, 2008, which occurred three days before Defendant Wynn's trial was scheduled to start, Respondent stated that he had not interviewed any witnesses because he did not feel it was necessary and/or appropriate to do so in this case.

d. At this hearing, Judge Hannah addressed defendant Wynn, who was charged with several sex offenses, in open court without Mr. Wynn requesting to speak with the Court and without Respondent's permission. When Respondent objected he was told by the Court to be quiet.

36. Prior to the December 5, 2008, Trial Management Conference, Respondent met with Defendant on October 22, 2008, at the Maricopa County jail and at the settlement conference on December 2, 2008.

37. Between the October 22, 2008, meeting at the Maricopa County Jail and the December 5, 2008, Trial Management Conference, Respondent met with Defendant at the October 27, 2008, Comprehensive Pretrial Conference and at the December 2, 2008, Settlement Conference.

38. On December 5, 2008, Judge Hannah learned that Mr. Knight's trial was vacated on December 3, 2008. Judge Hannah denied Respondent's December 3, 2008, Motion to Continue Firm Trial filed on behalf of Defendant Wynn and placed defendant Wynn's case into the Case Transfer System. Judge Hannah then recused himself from further presiding over Defendant Wynn's cases.

39. On December 8, 2008, a trial date of December 16, 2008, was affirmed for Defendant Wynn's case. This was a continuance of the original trial date on December 8, 2008, notwithstanding Judge Hannah's denial of Respondent's motion to continue.

40. On December 11, 2008, Defendant Wynn's trial date was continued again and reset to January 13, 2009. On December 16, 2008, Mr. Knight's trial was rescheduled to January 12, 2009. On January 9, 2009, Defendant Wynn's trial date was continued again and reset for February 2, 2009.

41. On January 13, 2009, just 20 days before the new trial date, Respondent wrote to Deputy County Attorney Yigael Cohen (the prosecutor in the Wynn case) and

indicated that he did not have the contact information for witness Freddy Keagon ("Mr. Keagon").

42. On that same date, Maricopa County Attorney Investigator Paul Miller ("Mr. Miller") wrote to Respondent and indicated that Mr. Keagon still resided at the address listed in the Phoenix Police Departmental Report.

43. On January 14, 2009, just 19 days before the new trial date, Respondent wrote to Mr. Miller and indicated that the telephone number for Mr. Keagon, as listed in the Phoenix Police Departmental Report, had been disconnected.

44. Respondent testified that he made a tactical decision not to interview multiple witnesses because they would not have had an impact on Mr. Wynn's admissions to the police.

45. Mr. Wynn testified at the hearing in these proceedings that he told Respondent that he did not want to take a plea and that he wanted to go to trial, T/R 47:18-21, 48:2-8, 53:19, 31:20-23, 65:1-4.

46. While Mr. Wynn testified that he was not pleased with Respondent's representation of him, it is hard to determine whether it was the representation or the outcome of his trial that Mr. Wynn objected to, an outcome that he had almost preordained by his admissions to the police.

47. Mr. Wynn, during his testimony, admitted that while he and Respondent agreed that there would be no correspondence from Respondent to Mr. Wynn in the Jail, T/R: 59:12-61:5, or conversations in open court (with other inmates present) because of the sensitive nature of the charges against him,[2] Respondent did talk to

[2] There was substantial testimony that Mr. Wynn faced retribution from fellow inmates if they were to learn of the nature of the charges against him.

him about the risk of going to trial and yet Mr. Wynn wanted to go to trial, T/R 34:19-35:7.

48. Mr. Wynn testified that he wrote several letters and called Respondent several times and Respondent did not respond, T/R 44:8-46:17. However, Wynn also admitted in his testimony that when Respondent met with him in the jail, Respondent answered all his questions that he could at the time, T/R 40:13-25, 41:4-7,42:1-43:1, and that Wynn never left a message with Respondent asking for specific actions on his behalf, T/R 47:22-48:1. Wynn also testified that Respondent never talked to him about the police reports or the factual basis of the charges against him, T/R 70:4-11, but this Hearing Officer finds that this claim is not credible. Mr. Wynn testified that Respondent went over his admissions to the police with him and talked about the risk of going to trial with the admissions out there. The only way that Mr. Wynn's admissions could have been discussed is relative to talking about the police reports.

49. The State Bar called an expert, Howard Snader, ("Mr. Snader") who testified that Respondent should have interviewed the Police Officer in the Wynn case, T/R 401:20-23 and asked for a Risk Assessment, T/R 406:24-407:5, and there should have been more correspondence in Wynn's file, T/R409:20-410:21. Mr. Snader did admit that Wynn's admissions alone constituted class 2 felonies, T/R 444:25-445:2, and that no papers (correspondence) should go to an incarcerated Defendant in a sex offense case, T/R 459:13-24, 468:15-23.

50. The Prosecutor in the Wynn case, Yigael Cohen ("Mr. Cohen"), testified that Respondent did a fine job of representing Mr. Wynn and that he feels that the

Bar's charges against Respondent are not warranted, T/R 471:20-472:5. Mr. Cohen also testified that he never saw anything that Respondent did that was inappropriate and feels that a risk assessment was unwarranted because of Mr. Wynn's age, T/R 484:25-485:9,472:9-473:2.

51. Generally, Mr. Cohen testified that Respondent, who he has had several cases with, has always been candid, never disingenuous, and completely forthright with him, T/R 478:2-14. Mr. Cohen also testified that Respondent has always done the work necessary in each case and is very good and effective even when he has little to work with, T/R 482:16-483:9.

52. In response to the State Bar's allegations in this Count of lack of diligence, failure to consult with his client, and failure to keep his client reasonably informed, the Respondent states that, in spite of Mr. Wynn's denials, there is a video tape of Mr. Wynn making extraordinarily inculpatory admissions to the police that he had in fact, touched his penis to his 10-year-old daughter's vaginal area on multiple occasions over a period of years, T/R 54:24-57:9. The Police Reports also reflect that Mr. Wynn made these statements. Further, Mr. Wynn made it very clear that he was not interested in a plea agreement, and insisted on going to trial in spite of the fact that his admissions made prevailing at trial very difficult.

Count Two (09-1934 Flores)

53. On June 25, 2004, Adrian Flores ("Mr. Flores") was charged via Direct Complaint with Forgery, a class 4 felony, in CR 2004-017595-001 DT before the Superior Court of Arizona in Maricopa County. The State alleged that Mr. Flores signed a false name to a fingerprint card while being booked in the Maricopa

County Jail. The state of Arizona also alleged that Mr. Flores had at least two prior historical felony convictions that were to be used as sentencing enhancements.

54. On July 30, 2004, the Maricopa County Public Defenders' Office withdrew from representing Mr. Flores and Respondent was appointed as his criminal defense counsel of record. On July 30, 2004, Mr. Flores was released on bond and remained on release throughout the proceedings.

55. On August 20, 2004, an Initial Pretrial Conference was scheduled in Mr. Flores criminal matter. The following events occurred at that setting:

a. Mr. Flores met with Respondent for the first time, and they had a discussion for approximately 5 minutes in the public hallway of the courthouse.

b. Respondent discussed the charges against him which, if proven, called for mandatory prison sentence of between 6 and 15 years as well as the plea offer which would mean a prison term of between 1 and 3.75 years. The majority of the conversation with Mr. Flores dealt with personal issues on why Mr. Flores did not want to enter the plea agreement on that date and go into custody. Respondent told Mr. Flores that if Mr. Flores had any questions then Mr. Flores should call Respondent.

c. Mr. Flores' criminal matter was set for a Trial Management Conference on November 19, 2004, at which Judge Jeffrey Hotham presided. Mr. Flores attended the Trial Management Conference on November 19, 2004. Respondent's associate, Anthony Knowles, covered the hearing for Respondent.

d. Judge Hotham affirmed the trial date of December 8, 2004, and ordered Mr. Flores to stay in contact with his lawyer.

e. Judge Hotham discussed the State's plea offer with Mr. Flores and the risk of going to trial. Mr. Flores was advised that if he went to trial and was convicted, he faced between 6 and 15 years in prison, and that if he accepted the state's plea offer he was subject to a sentence of between 1 and 3.75 years maximum.

f. Judge Hotham advised Mr. Flores that he needed to appear on the date of the trial and that it could be very bad for him if he did not appear. Judge Hotham asked Mr. Flores if he had any questions about the plea or if there was anything he wished to discuss about the plea or the risk of going to trial and the likelihood of conviction and the likely sentence. Mr. Flores conferred with Mr. Knowles. Mr. Knowles advised the Court that Mr. Flores did not have any questions.

g. Judge Hotham also advised Mr. Flores that he gave prior convictions great weight in sentencing, particularly if they involve violence, and that might help the Defendant reevaluate the plea offer.

56. On the December 8, 2004, trial date, defendant Flores failed to appear and when the Court advised Respondent it was going to proceed with the trial in absentia, Respondent requested a one-week continuance, which was denied. The Court noted it was not going to continue the trial because Mr. Flores was aware of the trial date, (The Judge had personally admonished Defendant Flores about appearing at the trial date at the previous hearing.) and when they conducted a

Donald record on November 19, Judge Hotham concluded that the Defendant was not interested in a plea.

57. Trial started on December 8, 2004, without Mr. Flores being present. Although the jury was selected, the start of the trial was delayed for one day as the jury was not empanelled. On December 9, 2004, Respondent informed the judge that he attempted to contact Mr. Flores, but never was able to speak to him directly. He told the judge that he left messages with Mr. Flores family that the trial would proceed in his absence and to call him immediately. Respondent managed to keep the plea offer open throughout the beginning of the trial on December 9, 2004.

58. On December 9, 2004, after a trial in absentia, Mr. Flores was found guilty of forgery, a class four felony, by jury verdict.

59. After being apprehended, on May 31, 2006, Judge Steinle found the State had proven that Mr. Flores had two prior convictions. Mr. Flores was sentenced to six years in prison, a super mitigated term.

60. After Mr. Flores was sentenced, he filed a Rule 32 petition. Attorney Louise Stark ("Ms. Stark") was appointed to represent Mr. Flores on his Rule 32 Petition. Ms. Stark had difficulty getting Respondent to respond to her calls and ultimately had to subpoena him for his deposition, T/R 170:18.

61. The basis for the Rule 32 Petition was that Respondent had failed to maintain contact with Mr. Flores, H/E 36. Mr. Flores states in his affidavit that Respondent would not return his phone calls, did not adequately discuss the case with him, and did not adequately communicate with him, although Mr. Flores never does explain his failure to appear for trial, H/E 37.

62. On June 25, 2008, Mr. Flores' conviction and sentence of imprisonment was set aside after the Court granted Mr. Flores' Rule 32 Post Conviction Relief Petition. In its decision, the Court made several relevant findings:

a. The Court found that Respondent failed to communicate with Mr. Flores.

b. The Court found that Respondent failed to schedule an appointment with Mr. Flores to discuss the criminal matter.

c. The Court found that Respondent failed to schedule a settlement conference so that Mr. Flores could consider the alternatives to a jury trial and the benefits of the plea agreement.

d. The Court found that Respondent failed to properly perform his duties as criminal defense counsel, which resulted in Mr. Flores' failure to appear at trial and Mr. Flores' failure to accept the plea agreement.

63. Mr. Flores was ultimately resentenced by Judge Steinle to the presumptive term of 2.5 years in prison, H/E 45, BSN 353.

64. In response to the charges in this count, Respondent states that Mr. Flores knew exactly what he was facing and that his primary objection was that he did not want to go into custody on the date that the plea offer was made, T/R 580:10-581:2. It is also clear that Judge Hotham conveyed to Mr. Flores not only his trial date, but also the consequences of his failure to appear, as well as his exposure if he rejected the plea agreement, see H/E 46, BSN 356-361.

65. The question here is whether the Respondent, in 2004, made adequate efforts as Mr. Flores' attorney to confirm that his client was fully informed and actively engaged in the process. The Petition for Post Conviction Relief, the affidavit of

Mr. Flores and the deposition of the Respondent have been reviewed by this Hearing Officer and it is clear that Mr. Flores knew about his trial date and simply chose not to be there. However, it is also clear that Respondent did not respond to his client's inquiries, did not maintain adequate communication with his client and simply did not spend the time with his client necessary to competently represent his client. Respondent also did not cooperate with Mr. Flores' Rule 32 counsel, necessitating her having to have a Subpoena issued for Respondent's deposition.

66. Respondent testified that he recognizes that he did not do a very good job in his communications with Mr. Flores or Ms. Stark, and states that he has changed his practices both as a result of Mr. Flores case and what he learned in LOMAP, T/R 687:9-22. Respondent also testified that the Flores case came up during his original diversion, and referral to LOMAP, and that he discussed the Flores case at that time with the LOMAP coordinator Maria Bahr, T/R 702:7-704:3.

67. While certainly Mr. Flores contributed to his own consequences, that does not excuse the Respondent from making a greater effort to stay in touch with his client, respond to his client's phone calls, and confirm that his client is making decisions based upon complete information and not as a result of his lawyer's failure to communicate. Both due to Mr. Flores' negligence in not appearing at his trial, as well as Respondent's failures, there was conduct that was prejudicial to the administration of justice (all of the post conviction efforts by Ms. Stark and the Court).

Count Three (10-0494 Moore)

68. By way of summary, the Moore case involves a defendant represented by Respondent being wrongfully convicted of an armed robbery charge that he did not commit. The details are somewhat more complicated.

69. On June 3, 2005, Defendant Stephen Moore ("Mr. Moore") was charged with armed robbery, a class 2 felony, in CR 2005-116729 DT before the Superior Court of Arizona in Maricopa County.

70. The Maricopa County Attorney's Office stated its intent to use two of Mr. Moore's six prior felony convictions against him to increase the potential mandatory prison sentence to be imposed upon conviction.

71. Presumptively, Mr. Moore was facing a potential sentence of 15.75 years in the Arizona Department of Corrections.

72. On or about July 14, 2005, Respondent filed a Notice of Appearance and began representing Mr. Moore as his criminal defense counsel.

73. Mr. Moore had admitted to the police that the picture taken by a surveillance camera in the store it was alleged that he robbed, was in fact Mr. Moore, although he contended that the picture had been doctored because he wasn't wearing the clothes that the person in the picture was wearing, T/R 592:24, 596:9-14, 597:2-4, 680:17-22. Mr. Moore did not say anything to Respondent at their initial meeting about anyone else having committed the crime.

74. Respondent knew that Phoenix police, as part of their investigation, identified Carolyn Thompson as a possible suspect and work associate of the person responsible for the armed robbery.

75. Respondent knew that Phoenix Police, as part of their investigation, spoke with Carolyn Thompson and showed her still photographs of the armed robbery incident taken by a store security camera.

76. Respondent knew that Phoenix Police, as part of their investigation, asked Carolyn Thompson to identify a suspect black male in the still photographs, and that Carolyn Thompson identified the suspect black male as "Crazy Dave". Carolyn Thompson, "Crazy Dave" and Mr. Moore are referred to herein collectively as "the trio".

77. On October 28, 2005, a Settlement Conference was held in an attempt to resolve the criminal case against Mr. Moore. Just prior to that Settlement Conference, Mr. Moore told Respondent for the first time that "Crazy Dave" was a man named Dave Hunter ("Mr. Hunter"), and that Mr. Hunter was responsible for the armed robbery for which Mr. Moore was charged, T/R 589:2-21. Mr. Moore also told Respondent that Mr. Hunter was currently incarcerated in the Maricopa County jail, where Mr. Moore initially claimed to have met him T/R 589:22-25.

78. Respondent told the prosecutor and the Judge at the Settlement Conference that Mr. Moore claimed that Dave Hunter was the perpetrator and that Mr. Hunter was currently housed in the Maricopa County jail. On two separate occasions, the Court mentioned obtaining a "mug shot" of Mr. Hunter and presenting that to the victim for the purposes of comparison. On one of those two occasions, the Court mentioned showing the "mug shot" of Mr. Hunter to the victim at a hearing on the issue of identity.

79. Respondent asked the prosecutor to follow up on the claim by Mr. Moore that Dave Hunter had committed the offense and expected the prosecutor to do so, T/R 591:20-592:17. The investigating officer was told by the prosecutor to follow-up, but the officer did not do so, T/R 675:16-676:2.

80. Respondent did not get a copy of Mr. Hunter's booking photo for comparison, did not investigate the details of Mr. Hunter's crime so as to learn that the robber in both robberies wore the same clothing and that Mr. Hunter left a finger print at the site of the first robbery.

81. Respondent testified that he felt that putting the State on notice of the fact that Mr. Hunter committed the offense required the State to investigate and confirm whether a person that they had in custody, Mr. Hunter, actually committed the offense, and provide that material to him as Brady exculpatory evidence. Respondent testified that he felt that by asking the County Attorney to check on Mr. Hunter, that his obligation to his client had been satisfied T/R 593:22-594:12, 667:13-24.

82. At a later meeting between Respondent and Mr. Moore, when confronted with the difficulty of overcoming his own admissions, Mr. Moore told Respondent that he (Mr. Moore), "Crazy Dave" (Mr. Hunter) and Carolyn Thompson had together engaged in the robberies of several convenience stores, T/R 668:20-25, 668:3-9.

83. Respondent was very concerned:

    a. That pursuing "Crazy Dave" and Carolyn Thompson might in fact lead to other crimes that the trio had committed;

b. That Dave Hunter would never come in and testify that it was him, Mr. Hunter, in the photograph Mr. Moore had identified as himself;

c. That Mr. Hunter and Ms. Thompson would turn on Mr. Moore, resulting in even more charges being brought against Mr. Moore, T/R 670:3-672:6;

d. That Mr. Moore admitted that the picture of the robbery suspect in his case was him because he was just confused over which robbery it was, T/R 714:20-716:4.

84. Respondent asked Mr. Hunter's attorney if he could interview him in relation to the robbery that Mr. Moore had been charged with and had been told no, T/R 665:6-15.

85. Respondent testified that based on these considerations, as well as his belief that the State would check on Dave Hunter, which would either exclude his client or include him without the risk of him getting involved in the dynamics between the trio, he made a tactical decision to go no further. Respondent admits that in hindsight he should have done more to follow up on the Dave Hunter issue, T/R 725:15-728:22. Respondent testified that he discussed this strategy with Mr. Moore and Mr. Moore agreed to it, T/R 735:19-736:20, although he concedes that Mr. Moore did not agree that Respondent would just leave it at that, T/R 738:2-739:12.

86. Respondent testified that he felt that he had good communications with Mr. Moore, but admits that he does not have the documentary trail that he should have, T/R 710:1-17.

87. Respondent failed to obtain a copy of Mr. Hunter's booking photo. The State also never followed up to obtain this information, nor did the State ever arrange to show Mr. Hunter's booking photo to the victim.

88. Respondent's trial strategy was to try and plant doubt by cross examining the Police officer about his follow up on the Dave Hunter lead, T/R 737:17-738:1.

89. On March 16, 2006, at Mr. Moore's trial:

a. Respondent cross examined the store clerk victim of the armed robbery on whether the victim had ever been shown a photo lineup with a guy named Dave.

b. Respondent did not show a booking photo of Mr. Hunter to the victim during the testimony.

c. Respondent cross examined Phoenix police Detective Pablo Garcia about investigating the identity of "Crazy Dave" and showing the victim a picture of "Crazy Dave".

d. Detective Garcia admitted that he had information about "Crazy Dave" before the trial, including information he had received from the prosecutor, but that he never followed up on this information.

e. Respondent did not show a booking photo of Mr. Hunter to Detective Pablo Garcia during the testimony.

f. During his closing argument, Respondent argued to the jury to consider the effect on their verdict if Respondent had shown them a picture of "Crazy Henry". (Respondent meant to refer to "Crazy Dave", who was known to him at the time as Mr. Hunter.)

g. Respondent did not show a booking photo of Mr. Hunter to the jury during closing argument, because the booking photo was not admitted into evidence.

h. During his closing argument, Respondent argued to the jury that if any one of them were curious about seeing what "Crazy Henry" looks like, then that forms the basis of a reasonable doubt. (Respondent meant to refer to "Crazy Dave", who was known to him at the time as Mr. Hunter.)

90. At the conclusion of the jury trial, Mr. Moore was convicted of armed robbery, a class 2 felony. On April 28, 2006, a sentence of 11 years and six months in Arizona Department of Corrections was imposed upon Mr. Moore. The Court credited 353 days of pre-sentence incarceration towards the imposed sentence.

91. On November 9, 2008, Mr. Moore filed a Petition for Post Conviction Relief. In his petition, among other listed grounds for relief, Mr. Moore alleged that Respondent failed to investigate the identity of "Crazy Dave". An affidavit was obtained from Mr. Hunter by Mr. Moore's post conviction attorney stating that Mr. Moore had not committed the crime.

92. On December 11, 2009, the Maricopa County Superior Court scheduled an evidentiary hearing for January 29, 2010, regarding the issue of whether Respondent was ineffective for failing to investigate the identity of "Crazy Dave". Mr. Moore had also claimed then and now that Respondent had failed to communicate with him. The Court denied all claims for relief in the Petition except the issue about "Crazy Dave".

93. After two continuances, the evidentiary hearing was rescheduled for March 10, 2010. Prior to the evidentiary hearing in March of 2010, the State reviewed Mr.

Hunter's files and obtained a surveillance video of Mr. Hunter committing an armed robbery of the Circle K where he had left a fingerprint.

94. This video was in the State's possession at the time of Mr. Moore's trial but was not provided to Respondent even though on October 28, 2005, Respondent provided the State with Mr. Hunter's full name, that he was in custody of the Maricopa County jail, and that Mr. Moore claimed that Dave Hunter had committed the crime.

95. Assistant County Attorney Diane Meloche testified as to the work that she did in responding to the Rule 32 Petition, collecting the information about "Crazy Dave" and comparing the photographs that they had on his robbery conviction with the photographs in the Moore case. The State then conceded that the robbery that Mr. Moore had been convicted of was in fact committed by Mr. Hunter, T/R 314:7-9.

96. On March 4, 2010, without an evidentiary hearing, and without speaking to Respondent, the Maricopa County Attorney's office filed an amended response to Mr. Moore's Petition for Post Conviction Relief. In that Amended Response:

a. The State conceded that Mr. Moore's claim of ineffective assistance of counsel was meritorious.

b. The State conceded that Respondent's failure to investigate the identity of "Crazy Dave", or Mr. Hunter, resulted in the failure to uncover compelling evidence that would have supported Mr. Moore's defense of mistaken identity.

c. The State conceded that, had Respondent presented this compelling evidence at trial, there was a very reasonable probability that the outcome would have been different.

97. On March 4, 2010, at an informal conference on Mr. Moore's Petition, and upon a stipulation of the parties, the Court granted Mr. Moore's Petition without explanation, vacated Mr. Moore's conviction and sentence, and the Court ordered that Mr. Moore was to be released from custody. As of March 4, 2010, from the date of his sentencing on April 28, 2006, Mr. Moore spent 1406 days in custody.

98. Ms. Meloche testified at the hearing in this matter that Respondent could have obtained Mr. Hunter's Police reports, his booking photo, as well as the surveillance tape from both robberies if he had specifically requested them, T/R 318:2-320:2. Assistant County Attorney Ms. Meloche also testified that the State had violated its duty under Brady to respond to the request by Respondent to follow up on the information on Mr. Hunter, T/R 327:18-328:9.

99. Mr. Moore testified that he did not feel that Respondent had good communication with him and did not meet with him in the jail, T/R 270:25-271:6, 271:25-272:19, 273:14-27:19. Mr. Moore's testimony was both very vague and he was uncertain of the number of conversations he had with Respondent as well as the subject matter of those conversations, T/R 278:3-281:3.

100. Respondent testified that in hindsight he probably should have asked for an investigator at the time to follow up on the Dave Hunter issue, T/R 659:17-660:1, but felt that because of Mr. Moore's admission that it was him in the surveillance photo of the robbery that he was charged with, it would not have been productive, T/R 673:6-675:10. Respondent felt that by asking the Prosecution to get the information on Hunter he had done what he could to get the information.

Respondent admits that things are a lot clearer in hindsight than they were at the time given the landmines posed by the previous illegal conduct of the trio.

GENERAL FINDINGS OF FACTS

101. Judge Hannah had stated that he had been frustrated with court-appointed defense counsels not being prepared for trial and that he was going to call them out on it, T/R 147:8, and T/E19 BSN 146:20. Judge Hannah expressed his desire and efforts to get criminal defense attorneys to do their job, H/Ex26: BSN 177. Judge Hannah also expressed his belief that the office supervising the court appointed conflict attorneys (OCAC) does not do a very good job of supervising or providing assistance to the lawyers it retains to do criminal conflict work, T/R 135:25-136:3. Judge Hannah also wrote an ethical opinion, wherein he stated that it was his belief that attorneys that accept cases from OCAC are per se engaging in ineffective assistance of counsel, T/R 136:18-23.

102. Judge Timothy Ryan testified that he always felt that Respondent was prepared and had a good grasp of the cases that he has appeared before Judge Ryan on, T/R 195:3-196:11. Judge Ryan has never experienced Respondent being disingenuous, or not being forthright or lacking candor, T/R 196:19-197:2. Judge Ryan expressed similar concerns to Judge Hannah about OCAC demanding too much from the attorneys and offering very little support.

103. Attorney Howard Snader was called by the State Bar as an expert witness in criminal law, and he testified at length about what he feels should be a minimal preparation in a criminal case. This conduct includes initially reviewing police

reports, talking to the client, identifying the issues, and follow-up investigation. Mr. Snader, after reviewing the Flores case, feels that Respondent did not keep Mr. Flores appraised of everything that was going on in the case, and did not make adequate attempts to stay in touch with Mr. Flores, T/R 415:8-18, 417:21-23. Mr. Snader concedes that after Mr. Flores met with Judge Hotham, that Mr. Flores knew exactly what was expected of him, that it was imperative that he appear for trial, as well as the pros and cons of the plea agreement, T/R 467:8-13.

104. Attorney Jessi Wade, the Maricopa County prosecutor handling a portion of the Wynn case, testified that Respondent is a very proficient attorney, honest with no problems with his candor, integrity or credibility and feels that Respondent is trustworthy and effectively represents his clients, T/R 335:8-337:9.

105. Respondent's former partner and current officemate, Jay Rock, testified that during this period nobody, not even the judges, fully understood the master calendaring program when it was started, T/R 516:19-517:7. Mr. Rock feels that since Respondent went through the LOMAP program in 2004-2005, he has changed his practice very significantly. Respondent now returns all phone calls, documents his phone calls, follows up with improved communication with his clients, goes to the jail to visit his clients, and has a good relationship with his clients, T/R 500:11-25, 520:1-5, 503:3-19, 514:13-20. Mr. Rock also testified that the Respondent is recognized as an authority on criminal law and others seek out his advice, T/R512:13. Mr. Rock has no concerns about Respondent's competence to practice law, T/R. 513:12-15.

106. The Honorable Michael Kemp testified that the Respondent has appeared before him on a number of occasions and that he has always been well prepared and done a good job, T/R 562:2-563:7. Judge Kemp also testified that the Respondent is capable and effectively represents his clients, and never felt that the Respondent has been disingenuous with him or made any misrepresentations regarding any aspect of any case, T/R 563:8-564:24.

107. Attorney Matthew Schwartzstein, an officemate of Respondent, testified that he believes Respondent is one of the best trial lawyers he knows, T/R 353:16-354:1.

108. According to Respondent, up to 2004-2005 he was disorganized, not good at keeping notes and a paper trail of his contacts with his clients, and didn't always return his client's inquiries. However, Respondent now claims he is not the same attorney as he was in 2004 and 2005, T/R 705: 11-706:17. With the help of LOMAP, Respondent has:

a. Set up an efficient calendaring system;

b. Does not miss his court hearings anymore;

c. Returns his client's phone calls;

d. Creates a record of his client contacts;

e. Goes to the jail regularly to meet with his clients; and

f. Sends out extensive correspondence.

109. Respondent also points to the fact that at various times during these cases he was having difficulty with his secretary not giving him his messages and this was supported by Mr. Rock, T/R501:2-22, 502:16-503:2. Respondent also testified

that he has learned from his mistakes, has much more experience in the process of being a lawyer and feels like he has learned his lesson, T/R 707:7-708:3.

CONCLUSIONS OF LAW

Count One, 09-0604 (Wynn)

110. Competent representation, failure to act with reasonable diligence, failure to consult with his client, failure to keep his client reasonably informed.

111. This Hearing Officer has reviewed the evidence as to the allegations regarding Respondent's attorney-client dealings with Mr. Wynn. As previously stated, this Hearing Officer finds that Mr. Wynn's testimony is not credible concerning his contacts with Respondent. Further, given Mr. Wynn's admissions to the police officer about his conduct with his daughter and his refusal to take any plea, the avenues to explore to prove his innocence were greatly constricted. This Hearing Officer gives great credence to prosecuting attorney Cohen's opinion about Respondent's preparation and trial conduct in the Wynn case. Certainly, Respondent could have kept a better record of the times that he spent with Mr. Wynn, but that does not rise to the level of an ethical violation.

112. While this Hearing Officer might agree with Judge Hannah about the draconian conditions imposed upon the conflict Defense attorneys by OCAC, that is not sufficient basis upon which to find that Respondent was deficient in his representation of Mr. Wynn. This Hearing Officer finds that there has not been proof by clear and convincing evidence of an ethical violation in this portion of Count one.

113. Making false statement of fact to a tribunal, failure to correct a false statement of material fact previously made to a tribunal, engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, and engaging in conduct prejudicial to the administration of justice.

114. This Hearing Officer has reviewed all of the evidence concerning Respondent's statements and conduct leading up to and including the December 5, 2008, hearing before Judge Hannah. What is apparent is that a new system of case management was being implemented at this time that pretty much had everybody, including the judges, confused. Respondent erroneously believed that the Wynn case was due to start trial either on the 16th or shortly thereafter. While it would have helped had he given Judge Hannah more detail about what was going on, and perhaps inquired more fully of Judge Ryan of what his intent was on the 16th, all that is clear in hindsight. Given Respondent's trial caseload at the time, and the fact that a new calendaring system was being implemented, it is certainly possible that Respondent misunderstood the status of the Knight case.

115. There has been no clear and convincing showing that Respondent either intentionally or negligently misrepresented the case status to judge Hannah or engaged in conduct involving dishonesty, fraud, deceit, misrepresentation or conduct that was prejudicial to the administration of justice.

Count Two, 09-1934 (Flores)

116. Failure to communicate, failure to perform his duties as criminal defense attorney.

117. This Hearing Officer has reviewed the record and finds that Respondent did not violate ER 1.1, Competence, but Respondent did violate ER 1.3 diligence; ER 1.4(a)(2) consulting with client about the means by which the client's objectives are to be accomplished; ER 1.4(a)(3), keeping the client reasonably informed; ER 1.4(a)(4) promptly complying with reasonable requests for information; ER 1.4(b) explaining matters to the client to permit the client to make informed decisions; and ER 8.4(d) conduct prejudicial to the administration of justice.

Count Three, 10-0494 (Moore)

118. In the Moore case, the State Bar charges Respondent with violating ER 1.1, competence, ER 1.3 diligence, and ER 8.4(d) conduct prejudicial to the administration of justice. At first blush, one might conclude that Respondent's conduct in the Moore case was incompetent per se because he did not pursue the leads on "Crazy Dave", and Mr. Moore went to prison for a crime he did not commit because of that. However, as in life, the facts of the Moore case are much more complicated than that.

119. While the State Bar's expert, Mr. Snader went through a list of things he would have done differently in representing Mr. Moore, and it is easy to look back and say that Respondent should have done this or that, to be fair to the Respondent, we must accept the fact that he was faced with a very difficult and complex situation. Mr. Moore started out admitting to the police that the picture of the robber in the case for which he was charged was him, and then started out his relationship with Respondent by lying to Respondent on multiple occasions. Respondent then learned that Mr. Moore, Ms. Thompson, and Mr. Hunter had

collectively participated in numerous robberies previously. This certainly caused Respondent to reasonably believe that his client was yet again lying to him when Mr. Wynn came up with an incredible story of just having met the real perpetrator in the jail. Add to this the consideration that Respondent had requested of the State that they investigate the "Crazy Dave" issue, and the State had an affirmative duty to do so, which it failed, and you have a situation ripe for misunderstanding and strategic error.

120. As stated, it is easy to note that Mr. Moore spent several years in prison in error, and simply conclude that it was Respondent's fault. However, an attorney must be given some leeway in making strategic decisions, and before judging an attorney's strategic decisions, the reasons for those decisions must be considered. Yes, Respondent was in error in not hiring an investigator, getting the booking photo of Mr. Hunter, as well as several other things he could have done to show that his client was not Mr. Hunter, the actual robber. Conversely, Respondent had been lied to repeatedly by his client, did have a right to a certain extent to rely on the State to comply with its duty, after having been put on notice, to check for Brady material, and Respondent was legitimately concerned about the potential expansion of his client's liability the more Mr. Hunter and Ms. Thompson were drawn into the case.

121. As has been stated in this case, hindsight is always 2020 and it is easy to say that Respondent clearly should have done this or that, but we can only say that in hindsight and without a full appreciation for the concerns that Respondent had at

the time about entangling his client, who lied to him early and often, in more serious charges.

122. Some might argue that Respondent's conduct, while not intentional, was negligent. Again, to say that Respondent was negligent is to judge his conduct with all the clarity that hindsight gives us and without a full appreciation for what was going through Respondent's mind dealing with Mr. Moore and all of the issues that that entailed.

123. Bearing in mind that the State Bar's burden of proof in this matter is by "clear and convincing" evidence, this Hearing Officer must conclude that Respondent's conduct in Count 3 was not an ethical violation of ER 1.1, ER 1.3, or ER 8.4(d).

124. In Summary, this Hearing Officer finds that Respondent only violated his ethical obligations as stated in Count 2 (Flores).

ABA STANDARDS

125. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

126. Respondents most serious violation is his violation of a duty owed to his client, and to the legal system. *Standard* 4.4 of the ABA *Standards* deals with lack of diligence to one's client. *Standard* 4.42 states that suspension is generally appropriate when a lawyer knowingly fails to perform services for his client and

causes injury or potential injury to a client. *Standard* 4.43 states that reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing his client, and causes injury or potential injury to a client.

127. Similarly, *Standard* 7.2 of the ABA *Standards* states that 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. *Standard* 7.3 provides that a Censure is appropriate where such a violation is done negligently.

The Lawyer's Mental State

128. There was no evidence that Respondent, in failing to communicate with his client, intentionally or knowingly failed to communicate with his client, or in his duty to be diligent toward his client. Between Respondent and Judge Hotham both communicating with Mr. Flores, Mr. Flores knew what was going on. This Hearing Officer finds that Respondent's conduct in failing in his communications with Mr. Flores and his diligence in representing Mr. Flores was negligently performed and not intentional or knowing.

129. There was also no evidence that Respondent intentionally or knowingly engaged in conduct prejudicial to the administration of justice. The delay caused in the Flores case was caused as much by Mr. Flores not attending a trial he knew was taking place as by Respondent's negligent communications with his client. Similarly, there was no evidence that Respondent's failure to contact Ms. Stark was knowingly done. Respondent showed up for his deposition and cooperated.

Actual or Potential Injury

130. It is hard for this Hearing Officer to say that all of the injury that Mr. Flores sustained in his case was Respondent's fault. Judge Hotham went to great lengths to explain everything that Respondent says he also explained to Mr. Flores, especially the importance of Mr. Flores appearing for trial and consideration of the plea offer. The evidence was that Mr. Flores was very experienced in the criminal justice system with an extensive criminal record and, rather than professing his innocence of the charges, was primarily concerned with staying out of jail as long as he could. While certainly, Respondent could have done a better job of communicating with Mr. Flores, ultimately, Mr. Flores knew when his trial date was and made his situation extraordinarily more serious by failing to show up for his trial date.

Aggravating and Mitigating Factors

Aggravating Factors:

131. *Standard* 9.22(c) Pattern of misconduct.

Respondent has, admittedly, been the subject of different diversions for conduct very similar to the misconduct found in the Flores case. Respondent has been placed on diversion twice before on three different cases for conduct occurring in 2004-2005 similar to the conduct in Flores, which also occurred at about the same time.

132. *Standard* 9.22(i) Substantial experience in the practice of law. Respondent was admitted to practice law in Arizona on August 4, 2000.

Mitigating Factors:

133. *Standard* 9.32(a) Absence of prior disciplinary record. Respondent's prior diversions do not count as prior discipline.

134. *Standard* 9.32(e) Full and free disclosure to Bar Counsel and cooperative attitude towards the disciplinary proceedings.

135. *Standard* 9.32(g) Character or reputation.

This Hearing Officer does not give this mitigating factor very much weight. While many witnesses testified as to the Respondent's good reputation for hard work and honesty, he has a reputation among the judges, presumably based on actions earlier in his career, that would indicate that Respondent did not adequately prepare or communicate with his clients.

136. *Standard* 9.32(l) Remorse.

Respondent testified that he accepts that he could have done a better job in Flores, points out that this occurred while he was in LOMAP in 2004-2005, and that he has made great effort to completely reorganize his practice under the supervision of LOMAP, such that since then he now does everything necessary to avoid these same complaints from his clients.

PROPORTIONALITY REVIEW

137. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever alike, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz.

203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasley*, supra.

138. The Findings of Fact and Conclusions of Law in this case show that we have a young attorney that is extremely well-qualified in the art of being a trial attorney, but is still learning the process of the practice of law and attorney client relations. Respondent's prior diversions indicate that early in his career he was more focused on trying and winning cases and less focused on meeting the needs of his clients. In the years 2004 and 2005 at the same time as Flores Respondent was engaged in the LOMAP process, which, according to him, taught him a lot about what he needed to do to not only meet the needs of his clients but document his efforts to do so.

139. All of the cases cited in proportionality by the State Bar deal with a violation of ER 3.3, candor towards a tribunal, so are inapplicable to this case.

140. This case is almost entirely unique in that Respondent's ethical violations in Flores occurred in 2004-2005, while he was receiving the assistance of LOMAP, and in fact discussed the facts of Flores with his LOMAP counselor. This Hearing Officer has reviewed the matrix for prior disciplinary cases and can find none that fit the unique circumstances of this case.

RECOMMENDATION

141. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville,* 147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill public confidence in the Bar's integrity, *Matter of Horwitz,* 180 Ariz. 20, 881 P.2d 352 (1994).

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

143. The State Bar is recommending a six-month suspension for Respondent, but that is based primarily on the unproven violation of the candor to the court issue and repetitive nature of Respondent's diligence and communications problems. While this Hearing Officer has found that Respondent did violate his responsibility for diligence and communication to Mr. Flores, that violation is tempered by the fact that it occurred in the years 2004-2005, just as Respondent was getting tutored by LOMAP.

144. The impression that the Respondent conveyed during the course of the three-day hearing in this matter is that of a young man who started out his practice of law in the year 2000 with an oversized ego and rampant ambition to make a name for himself trying cases. Once the Respondent got onto the conflict attorney appointment list he apparently never said no to a case and took on far more than

he could legitimately handle. Both his ego and his pride dictated that his job was to take everything that OCAC sent to him, then focusing on the outcome rather than the process of how he got there.

145. This attitude and practice eventually caught up with him in 2004 and 2005, and the hard reality of client relations and the process of the practice of law caused him to step back and take a look at himself. According to the Respondent as well as those attorneys with whom he practices, he has implemented the changes necessary to avoid problems in the future. However, that is not the entire story.

146. While this Hearing Officer could not find an ethical violation in Respondent's dealings with Mr. Moore, it was a very close call. This case took place in 2008, well after Respondent should have learned the lessons he was working on through LOMAP. Were the problems in the Moore case all situational to the difficulties of the case, or compounded by Respondent's brash eagerness to resolve cases by trusting his instincts as a trial attorney doing as little work as necessary and with little input from his client Mr. Moore? There simply is not clear and convincing evidence one way or the other. This Hearing Officer is concerned that Respondent still has some issues to address regarding his perception of how smart and capable he thinks he is. There is no question but that the Respondent has instituted a framework within which to comply with the ethical requirements of the practice of law, and, having gone through this very difficult disciplinary process, even appreciates how important his compliance with those ethical requirements are to the preservation of his license to practice law.

147. What concerns this Hearing Officer is the degree to which Respondent appreciates that the practice of law is not just about how many cases he can take to trial, or how many cases he can win. The practice of law is a service profession where we serve not only our clients, but a higher cause of justice. Respondent is adamant that he will not be before this process again because of the structure that he has put in place to meet the needs of the ethical rules. The fear that this Hearing Officer has is that, unless the Respondent realizes that his priority must be that he serves his profession and his client's needs first and foremost and that his statistics count for little, he will not make the necessary shift in his priorities and will come back to the disciplinary process in the future. It is hoped that Respondent has matured enough to make these changes.

148. ABA *Standard* 4.43 states that a reprimand (Censure in Arizona) is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. Similarly, a Censure is appropriate where a lawyer negligently violates his duty to the profession. This Hearing Officer has found Respondent's mental state to be negligent. This Hearing Officer has also considered the fact that Respondent was in the middle of his previous interactions with the State Bar when the Flores case was taking place and he should have been on notice that he needed to improve his attorney client relations. After weighing these considerations as well as the aggravating and mitigating factors, this Hearing Officer recommends that a censure be imposed on the Respondent, as well as a period of probation to monitor and help Respondent continue to improve his practices, process, attorney

client relations and his overall responsibilities. This Hearing Officer recommends the following:

a. Respondent shall be censured;

b. Respondent shall comply with a period of probation for two years with an evaluation by LOMAP, and other terms and conditions as recommended by LOMAP;

c. The term of probation shall begin at the time of the Final Judgment and Order and shall end two years from the Final Judgment and Order; Respondent shall contact the director of the LOMAP program within 30 days of the date of the Final Judgment and Order;

d. 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, the State Bar shall report material violations of the terms of probation pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct., and a hearing may be held within thirty days to determine if the terms of probation have been violated and if an additional sanction should be imposed. The burden of proof shall be on the State Bar to prove non-compliance by a preponderance of the evidence; and

e. Pursuant to Rule, Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings, but only as to Count 2 Flores, within 30 days of the Supreme Court's Final Judgment and Order. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the

Supreme Court and the Disciplinary Clerks office, but only in relation to Flores.

DATED this 10 day of January, 2011.

H. Jeffrey Coker

H. Jeffrey Coker, Hearing Officer 6R

Original filed with the Disciplinary Clerk
this 11 day of January, 2011.

Copy of the foregoing mailed
this 11 day of January, 2011.

Honorable H. Jeffrey Coker
Hearing Officer 6R
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/rh