

SUPREME COURT OF ARIZONA

In the Matter of a Member of the) Arizona Supreme Court
State Bar of Arizona) No. SB-15-0050-AP
)
TIMOTHY W. HOLT,) Office of the Presiding
Attorney No. 9724) Disciplinary Judge
) No. PDJ20159030
Respondent.)
_____) **FILED 03/23/2016**

DECISION ORDER

Pursuant to Rule 59, Rules of the Supreme Court of Arizona, the State Bar appealed the hearing panel's imposition of a sixty day suspension against Respondent Timothy Holt. The State Bar does not challenge the hearing panel's findings or conclusions regarding the charged ethical violations. The only issue on appeal is the appropriate sanction. In attorney discipline matters, this Court reviews the imposed sanction de novo as a question of law. *In re Alexander*, 232 Ariz. 1, 13 ¶ 48, 300 P.3d 536, 548 (2013). "Although we consider the panel's view, we do not defer to it because we are ultimately responsible for deciding the appropriate sanction." *Id.* The Court has considered the parties' briefs, the hearing panel's decision, and the record in this matter. Upon consideration, the Court concludes that a suspension of six months is the appropriate sanction.

In determining the appropriate sanction, the Court and the hearing panel look to the American Bar Association's *Standards for Imposing Lawyer Sanctions*. Ariz. R. Sup. Ct. 58(k); *In re Alexander*, 232 Ariz. at 14 ¶ 57, 300 P.3d at 549. (The hearing panel also

applied the Standards in identifying violations of the Ethical Rules, see Decision and Order Imposing Sanctions, pp. 8-18, but we note that the Standards guide the selection of sanctions rather than the identification of violations.) Several factors affect the appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's conduct, and (4) the existence of aggravating or mitigating factors. *In re Phillips*, 226 Ariz. 112, 117 ¶ 29, 244 P.3d 549, 554 (2010).

Respondent negligently prepared a trust document and, rather than disclose and correct the error, sought to alter the document to suggest it was originally prepared consistent with his client's instructions. By altering the trust document and misrepresenting the altered document to others, Respondent violated his duties to his client and the public. The public expects a lawyer to be honest and to maintain personal integrity. Standard 5.0. Respondent admitted that he knowingly altered the trust document and misrepresented the altered trust document to others. Further, the hearing panel found that Respondent made the misrepresentations with the "purpose to deceive." Decision and Order Imposing Sanctions, p. 17. "Intent is the conscious objective or purpose to accomplish a particular task." Standards, Definitions, p. 9. Based on the hearing panel's findings, Respondent engaged in intentional, fraudulent misconduct. This conduct resulted in injury to his client and to those to whom he misrepresented the altered trust document.

Here, the presumptive sanction is determined under Standard 5.0, Violations of Duties Owed to the Public. Under Standard 5.11 (b), disbarment is appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." The hearing panel found that Respondent unlawfully altered the trust document with the intent to mislead others into believing that it was executed by his client. This amounted to conduct involving "dishonesty, fraud, deceit, or misrepresentation." Further, this unlawful conduct "seriously adversely reflects" on his fitness to practice law. Avoiding conduct involving dishonesty and misrepresentation is a fundamental ethical duty of lawyers. The Court finds that the presumptive sanction for this misconduct is disbarment.

A presumptive sanction, however, may be overcome by aggravating or mitigating factors. *In re Abrams*, 227 Ariz. 248, 252 ¶ 26, 257 P.3d 167, 171 (2011). The record supports three aggravating factors. First, Respondent had both a dishonest and selfish motive. Standard 9.22(b). The hearing panel found no selfish motive because there was no evidence that Respondent "experienced personal gain from the misrepresentation of the altered document." This finding was clearly erroneous. Personal or pecuniary gain is one indication of a selfish motive, but it is not the only one. This Court has found a selfish motive when an attorney made misrepresentations to conceal his or her

negligence. See *In re Peasley*, 208 Ariz. 27, 37 ¶ 43, 90 P.3d 764, 774 (2004). Respondent admitted to altering the trust document to avoid a challenge made possible by his own negligent drafting. There was reasonable evidence to find that Respondent acted out of a selfish motive to cover up his mistake and to limit his exposure to litigation and a malpractice charge.

Second, having been a practicing attorney in this area of law for almost thirty years, Respondent had substantial experience in the practice of law. Standard 9.22(i).

Third, the hearing panel found illegal conduct as a factor in aggravation. Standard 9.22(k). The panel gave this factor minimal weight, however, because it found the State Bar did not offer proof of the elements of the crime of forgery under A.R.S. § 13-2002(A). The Standards, however, do not require proof of a criminal conviction. Aggravating factors "need only be supported by reasonable evidence." *In re Peasley*, 208 Ariz. at 36 ¶ 36, 90 P.3d at 773. The hearing panel found there was clear and convincing evidence that Respondent's conduct violated ER 8.4(b), which prohibits "commit[ting] a criminal act that reflects adversely on the lawyer's honesty..." Thus, sufficient evidence supported the aggravator of illegal conduct.

With respect to mitigation, the record clearly establishes five factors. First, Respondent has no prior disciplinary record. Standard 9.32(a). Second, Respondent made a timely, good-faith

effort to make restitution and rectify the consequences of his conduct. Standard 9.32(d). Third, Respondent cooperated fully in the disciplinary proceedings. Standard 9.32(e). Fourth, Respondent presented evidence of his good character and reputation. Standard 9.32(g). Fifth, Respondent expressed sincere remorse for his misconduct. Standard 9.32(l).

The factors in mitigation outweigh the aggravating factors and support a downward adjustment of the sanction from disbarment to suspension. Bar counsel argues that a period of suspension requiring formal reinstatement proceedings, for at least six months and one day, is necessary to protect the public and deter other attorneys from similar misconduct. The cases cited by the State Bar involving forgery, however, were more egregious because the lawyer respondents involved others in altering documents that were then filed in court, thus violating additional ethical duties. In this matter, Respondent has an unblemished, thirty-year career. Moreover, there is nothing to suggest that Respondent will engage in this conduct again. The Court finds that a six month suspension will serve to protect the public and deter other lawyers from engaging in such misconduct. Accordingly,

IT IS ORDERED granting the State Bar's appeal.

IT IS FURTHER ORDERED modifying the sanction to reflect a six month suspension, effective thirty days from the date of this order.

IT IS FURTHER ORDERED that Respondent must comply with all applicable provisions of Rule 72, Ariz. R. Sup. Ct., and shall promptly inform this Court and the Disciplinary Clerk of his compliance with this Order as provided in Rule 72(e).

IT IS FURTHER ORDERED that Respondent be assessed costs and expenses of the disciplinary proceedings as provided in Rule 60(b)(2)(B).

DATED this 23rd day of March, 2016.

/s/

SCOTT BALES
Chief Justice

TO:

Russell R Yurk
Timothy W Holt
Stacy L Shuman
Amanda McQueen
Sandra Montoya
Maret Vessella
Don Lewis
Beth Stephenson
Mary Pieper
Netz Tuvera
Raziel Atienza
Lexis Nexis

**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

IN THE MATTER OF A MEMBER OF THE
STATE BAR OF ARIZONA,

TIMOTHY W. HOLT,

Bar No. 009724

Respondent.

No. PDJ-2015-9030

**DECISION AND ORDER
IMPOSING SANCTIONS**

[State Bar No. 14-0897]

FILED: AUGUST 24, 2015

On July 15, 2015 the Hearing Panel ("Panel"), composed of Carole Kempes, volunteer public member, Sandra E. Hunter, volunteer attorney member, and Presiding Disciplinary Judge, William J. O'Neil ("PDJ"), held a one (1) day hearing under Rule 58(j), Ariz. R. Sup. Ct. Stacy L. Shuman appeared on behalf of the State Bar of Arizona ("State Bar"). Russell R. Yurk ("Mr. Yurk") appeared on behalf of Respondent, Timothy W. Holt ("Mr. Holt"), who was also present.

The State Bar filed its Complaint on April 10, 2015 alleging the following violations of five (5) different Ethical Rules ("ERs") stemming from improperly modifying a client's trust documents and misrepresenting those altered documents to opposing counsel. The Panel carefully considered the Complaint, Answer, Joint Pre-Hearing Statement, Respondent's Pre-Trial Memorandum, the State Bar's Pre-Hearing Memorandum, admitted exhibits, and testimony. The Panel now issues the following "Decisions and Order Imposing Sanctions," under Rule 58(k), Ariz. R. Sup. Ct.

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I. SANCTION IMPOSED:
SUSPENSION FOR A PERIOD OF SIXTY (60) DAYS AND COSTS OF THESE
DISCIPLINARY HEARINGS

II. BACKGROUND AND PROCEDURAL HISTORY

On March 14, 2014, Commissioner Geoffrey H. Fish sent a letter to the State Bar to inform of Mr. Holt's misconduct. [Exhibit 1.] The State Bar submitted an initial screening letter to Mr. Holt on April 14, 2014, as part of investigation into the misconduct alleged by Commissioner Fish. [Exhibit 2.] The State Bar requested a response by May 4, 2014, but later gave additional time to respond. [Id., Exhibit 10 (granting time extension to respond to screening letter).] On May 27, 2014, Mr. Holt's counsel, Russell Yurk, responded to the initial screening letter. [Exhibit 3.] On June 3, 2014, the State Bar forwarded Mr. Holt's response to the initial screening letter to Commissioner Fish and notified him the State Bar would be listed as complainant on all further pleading.¹ [Exhibit 4.] On the same day, the State Bar sent a letter to Mr. Yurk acknowledging receipt of the response to the initial screening letter and to inform him of ongoing investigations into the matter. [Exhibit 5.]

On December 17, 2015, the State Bar sent a letter to inform Mr. Yurk of the intent to submit the case to the Attorney Disciplinary Probable Cause Committee (ADPCC) and to request a copy of the client file for the matter being investigated. [Exhibit 6.] On the same day, the State Bar sent letters to Mr. Holt and Commissioner Fish to inform them about completing the investigation and the recommendation that

¹ The State Bar informed Commissioner Fish that all future agreements would be provided to him for an opportunity to object. [Exhibit 4.]

the matter be submitted to the ADPCC requesting a Probable Cause Order. [Exhibits 7 and 8.]

On January 7, 2015, Mr. Yurk sent the State Bar an electronic copy of the Farmen file and noted a pending issue for a Protective Order regarding sensitive information, attorney client communication, and other confidential client information. [Exhibit 12.] On February 10, 2015, Mr. Holt filed a Request for Protective Order Sealing the Record under Rule 70(g), Ariz. R. Sup. Ct. [Exhibit 9.] In the request, Mr. Holt sought to seal information, provided to the State Bar about the client, based on the sensitive nature of information pertaining to an ongoing litigation regarding the Farmen Trust. [Id.]

A Probable Cause Order was issued on March 4, 2015 and on March 6, 2015, the State Bar sent letters to Mr. Holt and Commissioner Fish to inform them of the ADPCC's findings of sufficient evidence of probable cause and the intent to file a formal complaint. [Exhibits 13 and 14.]

The State Bar filed its Complaint on April 10, 2015 alleging the following ethical violations stemming from improperly modifying a client's trust documents and misrepresenting those altered documents to opposing counsel: 1.1 (Competence); 1.3 (Diligence); 3.4(a) and (b) (Fairness to Opposing Party and Counsel); 4.1(a) (Truthfulness in Statements to Others); and 8.4(b), (c), and (d) (Misconduct).

On April 16, 2015, Notice of Service of the Complaint was filed with the PDJ. On April 20, 2015, Notice of Assignment of PDJ was filed. On May 12, 2015, a Notice of Default and Entry of Default was filed putting Mr. Holt on notice the allegations in the Complaint would be deemed admitted if he did not file his response pleadings within ten (10) days of the notice. On May 14, 2015, Mr. Holt filed his Answer. In

his Answer, Mr. Holt admitted to having changed the Trust because “he originally thought a correction of the Trust would be appropriate because it would reflect what [his client] had instructed [him] to draft.” [Answer, ¶ 9.] Mr. Holt admitted to violating ER 4.1(a) by creating a second trust document and claiming his then decedent client, Mr. Farmen, had executed it. [Joint Pre-Hearing Statement, p. 5.]

On May 15, 2015, a Notice of Initial Case Management Conference was filed with the parties setting a telephonic conference for May 26, 2015. On May 26, 2015, the telephonic conference was held. Standard written scheduling orders were issued controlling the subsequent course of action by the PDJ.

On June 24, 2015 the parties filed the Joint Pre-Hearing Statement with the PDJ. On July 6, 2015, Notice of Assignment of Panel Members was filed by the PDJ. On July 8, 2015, the State Bar’s Prehearing Memorandum and the Respondent’s Pre-hearing Memorandum were filed with the PDJ.

III. FINDINGS OF FACT

Mr. Holt was licensed to practice law in the State of Arizona on October 20, 1984. [Joint Pre-Hearing Statement, ¶ 1.]

On April 16, 2012, Mr. Holt met with Frederick Farmen (“Mr. Farmen”) and Karen Miller (“Ms. Miller”) regarding Mr. Farmen’s estate planning. [Id., ¶ 2.] It is unclear to us what the ultimate purpose of the meeting was. The general purpose of the meeting was stated by Mr. Holt to determine a way to create a revocable living trust which would ensure Ms. Miller was the sole beneficiary of Mr. Farmen’s estate with Mr. Farmen’s other daughter, Linda Richey (“Ms. Richey”) being disinherited. However, contrary to the standard practices of Mr. Holt from other testimony we received, there were no notes prepared by Mr. Holt nor other documentary forms of

any kind that give evidence of the true intent of his client. We make no findings in that regard. [Id., Timothy Holt Testimony, 10:52:20.] After the meeting, Mr. Holt prepared The Farmen Living Trust ("Farmen Trust"). [Joint Pre-Hearing Statement, ¶ 3.]

On May 9, 2012, Mr. Farmen went to Mr. Holt's office to sign the Farmen Trust. Again, seemingly inconsistent with his standard offices practices, Mr. Holt testified he was unsure about whether he reviewed the documents with Mr. Farmen prior to the signing. [Id., ¶ 4.] We give no credence to the testimony his client may have had vision issues. Regardless, Mr. Holt was unaware of any vision problems. [Timothy Holt Testimony, 11:22:45.] The signed Farmen Trust gave equal shares of the estate to Ms. Miller and Ms. Richey. [Exhibit 20, SBA000153.] Mr. Holt had no further contact with Mr. Farmen after signing the Farmen Trust. [Timothy Holt Testimony, 11:01:20.]

On July 30, 2013, Mr. Farmen passed away. [Exhibit 20, SBA000164.] After Mr. Farmen's passing, Ms. Miller realized the Farmen Trust provided equal shares for herself and her sister and sought Mr. Holt's advice on how to correct this mistake. [Timothy Holt Testimony, 11:05:20.] Mr. Holt improperly changed the language in the "Distribution at My Death" section of the Farmen Trust to indicate Ms. Miller was the sole beneficiary. [Id., 11:08:50, *Compare* Exhibit 20, SBA000153 (original "Distribution at My Death") *with* Exhibit 20, SBA000274 (altered "Distribution at My Death").] Mr. Holt testified to changing the section by opening up a WORD document, manually typing out the changes, and then inserting the altered pages for the original pages into the document. [Timothy Holt Testimony, 11:10:00.]

In a letter sent on August 13, 2013, Mr. Holt notified Ms. Richey she was not a beneficiary under the Farmen Trust. [Exhibit 20, SBA000158.] This was the first and only time Mr. Holt had any communication with Ms. Richey. [Timothy Holt Testimony, 11:52:15.] Mr. Holt testified he referenced the 2007 will in this letter because he felt it was important to express to Ms. Richey it was her father's intent for some time to disinherit her and wished to provide her with some history on this intent. [Id., 11:52:30.] Mr. Holt found it to be implausible for Ms. Richey not to know Mr. Farmen's intent to disinherit her, based on his knowledge of Ms. Richey's relationship with the rest of the family. [Id., 11:45:00.] Further, Mr. Holt testified to not wanting to "invite her lawsuit" by trying to convince Ms. Richey she had no basis for a claim. [Id., 11:45:25.] However, at the time of writing the letter, Mr. Holt was aware his representation of the Farmen Trust was misleading. [Id., 11:42:15.] Further, the Panel noted Mr. Holt's own statement that his representation to Ms. Richey was done despite knowing of the error in the Farmen Trust. [Id., 11:41:45.]

Ms. Richey retained Aaron R. Shahan of *Gorman & Jones, PLC* to represent her. In a letter dated September 5, 2013, Mr. Shahan requested a complete copy of the Farmen Trust. [Exhibit 20, SBA000160.] On September 16, 2013, Mr. Holt sent Mr. Shahan a letter and the Estate Planning Portfolio of Fredrick Farmen, which contained the unaltered Farmen Trust giving equal shares to both of Mr. Farmen's daughters. [Id., SBA000162-251.] Upon review, Mr. Shahan contacted Mr. Holt to inquire why Ms. Richey was not a beneficiary when the Farmen Trust stated otherwise. [Aaron Shahan Testimony.] Mr. Holt informed Mr. Shahan that a second trust had been executed naming Ms. Miller as the sole beneficiary and he had sent the wrong document. [Id.]

On September 19, 2013, Mr. Holt emailed the purported second trust to Mr. Shahan with the altered "Distribution at My Death" section of the Farmen Trust. [Exhibit 20, SBA000252.] In this email, Mr. Holt stated: "I apologize for sending the earlier, incorrect version. Nothing like that to stir up confusion in an already contentious case." [Id.]

In a letter dated September 25, 2013, Mr. Shahan pointed out the identical nature of the signature pages on both documents suggesting "someone removed pages from the executed Trust and simply exchanged them for pages which were not a part of the original (executed) agreement." [Id., SBA000278.] After receiving this letter, Mr. Holt realized he had acted improperly and met with Ms. Miller to advise her to retain independent counsel, referring her to Dean Brekke.² [Timothy Holt Testimony, 11:50:25.] Until this September 25, 2013 letter, Mr. Holt alleged to have been operating under belief that the informal correction was the way to handle the situation. [Id., 11:51:00.]

On December 6, 2013, Mr. Brekke submitted a Petition for Reformation of Trust Agreement in the formal probate hearings citing a scrivener's error. [Exhibit 15.] On December 27, 2013, Mr. Shahan filed an Objection to Petition for Reformation and Counter-Petition for Removal of Trustee. [Exhibit 16.]

On May 1, 2014, Mr. Brekke moved for summary judgment to have the 2012 Farmen Trust reformed or declare the 2012 Farmen trust void and declare the 2007 will to be controlling. [Exhibit 19.] In the statement of facts accompanying the

² Mr. Holt paid for Mr. Brekke's legal fees incurred by Ms. Miller in the probate of the Farmen Trust in the amount of \$8,298.15. [Exhibit 27.] Mr. Brekke testified the fees were closer to \$30,000 in total when considering fees charged by Andersen PLLC after Mr. Brekke left the firm. [Dean Brekke Testimony.]

motion, Mr. Holt provided an affidavit to explain his mistake in preparing the Farmen Trust. [Exhibit 18, SBA000071.] On August 15, 2014, Mr. Shahan filed a Response to the Motion for Summary Judgment and a Cross Motion for Summary Judgment to grant equal shares to Ms. Miller and Ms. Richey as described in the Farmen Trust. [Exhibit 21.]

On December 10, 2014, Commissioner Kerstin LeMaire denied summary judgment to both parties' claims, citing genuine issues of material fact about whether the language in the Farmen Trust was unknown or unnoticed by Mr. Farmen and whether Mr. Farmen intended to disinherit Ms. Richey. [Exhibit 24.] On February 19, 2015, the parties filed a Notice of Settlement and Stipulation for Dismissal of Probate Proceedings, which was accepted on March 3, 2015. [Exhibits 25 and 26.] In the settlement, Ms. Richey received \$200,000 out of the \$700,000 estate. [Aaron Shahan Testimony, Dean Brekke Testimony.]

IV. CONCLUSIONS OF LAW AND DISCUSSION OF THE DECISION

The *American Bar Association Standards for Imposing Lawyer Discipline* ("ABA Standards") are a "useful tool in determining the proper sanction" to be imposed on a lawyer found in violation of the Ethical Rules. *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). We give consideration to the following factors: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating factors. *ABA Standards Standard 3.0, In re Peasley*, 208 Ariz. 27, 32, 90 P.3d 764, 769 (2004). A lawyer's misconduct may violate a duty owed to a client, the public, the legal system, or the profession. *Commentary, ABA Standards Standard 3.0, See also ABA Standards Theoretical Framework*. When disciplinary proceedings are brought

against lawyers alleged to have engaged in ethical misconduct, the State Bar must prove misconduct by clear and convincing evidence. *Commentary, ABA Standards Standard 1.3.*

DUTY VIOLATED

The Panel considered the charges alleged by the State Bar in its single count complaint and finds clear and convincing evidence Mr. Holt violated ERs 3.4(a) and (b), 4.1(a), and 8.4(b), (c), and (d). The Panel did not find violations of ER 1.1 and 1.3 by clear and convincing evidence.

- **ER 1.1 (Competence)**

ER 1.1 provides, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar,” however “[t]he required attention and preparation are determined in part by what is at stake.” Comments 2 and 5, ER 1.1.

“A lawyer's negligence in handling a matter does not necessarily constitute a violation of ER 1.1.” *In re Alexander*, 232 Ariz. 1, 8, 300 P.3d 536, 543 (2013), *citing Matter of Curtis*, 184 Ariz. 256, 261-62, 908 P.2d 472, 477-78 (1995). “A lawyer crosses the line between negligence and unethical incompetence by failing to possess or acquire the legal knowledge and skill necessary for the representation or by neglecting to investigate the facts and law as required to represent the client's interests.” *See Id.*; *see also* Comments 2 and 5, ER 1.1. In deciding whether a lawyer violated ER 1.1, “[t]he focus is not on whether a lawyer may have neglected a particular task, but rather whether his or her representation in the broader context

of the representation' reflects the knowledge, skill, thoroughness, and preparation that the rule requires." *In re Obert*, 352 Or. 231, 282 P.3d 825, 837 (2012). Therefore, the Panel will employ an objective standard to assess competent representation. *Id.*

The Panel finds Mr. Holt competent for his area of practice, having spent nearly half of his 30 year legal career in estate planning and asset protection. [Timothy Holt Testimony, 10:45:00.] The Panel finds there to be no lacking in Mr. Holt's competency regarding the mistake made when preparing the Farmen Trust. The error is an isolated incident. Therefore the Panel finds no violation of ER 1.1.

- **ER 1.3 (Diligence)**

ER 1.3 provides, "[a] lawyer shall act with reasonable diligence and promptness in representing a client."

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client.

Comment 1, ER 1.3.

Prior to 2003, the Preamble to the Arizona Rules of Professional Conduct stated:

[A]s an advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system, and that a lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process. Thus, when an opposing party is well represented, a lawyer can be a *zealous* advocate on behalf of a client and at the same time assumes that justice is being done.

Preamble to the Arizona Rules of Professional Conduct (1983) (emphasis added).

The Panel notes that Mr. Holt was misguided in his attempts to carry out the purported wishes of his client regarding the Farmen Trust. The Panel considers the zealous nature of Mr. Holt's representation of his client in consideration of the facts.

The Preamble now reads:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Preamble to the Arizona Rules of Professional Conduct.

Mr. Holt's initial actions in preparing the Farmen Trust appear to meet the minimum standards of diligence under the current version of the Preamble. Short of catching the error in the initial mistake a unique issue with estate planning is the potential for not discovering an error until it is too late to correct. The Panel looked to the preparation of the Farmen Trust in trying to find a lacking of diligence in its preparation. Ms. Miller, an interested party in the trust, was with Mr. Farmen when he signed the trust documents and did not notice the purported error. We are only given Mr. Holt's testimony because he simply does not recall whether he went over the trust document with Mr. Farmen before its signing. [Timothy Holt Testimony, 10:59:45.]

The Panel notes Mr. Holt's use of the document assembly software Fore! Trust and his failure to appropriately "check the box" when building the Farmen Trust. [Id., 10:54:00.] The Panel considered the suggestion this error might be the source of all resulting issues before us. However, we have no evidence or testimony showing Mr. Holt to be lacking in diligence when he prepared the original Farmen Trust. Therefore,

without more evidence of Mr. Holt's shortcomings when reviewing the document with Mr. Farnen the Panel does not find by clear and convincing evidence that Mr. Holt violated ER 1.3.

- **ER 3.4 (Fairness to Opposing Party and Counsel)**

Mr. Holt suggested ERs 3.4(a) and 3.4(b) are inapplicable because the misrepresentation did not occur in litigation. [Respondent's Prehearing Memorandum.] Mr. Holt points out "Rule 3.4 explains the lawyer's duties to adverse parties and counsel to ensure litigation is conducted fairly." Ellen J. Bennett et al., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4, at 370 (8th ed. 2015). If the Panel proclaimed this rule inapplicable because the parties were not involved in probate litigation we would ignore an underlying purpose of those misrepresentations. [Timothy Holt Testimony, 11:45:00 (under impression Ms. Richey would "fight" being disinherited and lied to her to not invite her lawsuit), 11:45:25 (referencing 2007 will to convince Ms. Richey she had no basis for a claim in the Farnen Trust).] The Panel finds no reason to declare ERs 3.4(a) and 3.4(b) inapplicable where the alteration of the trust documents and subsequent misrepresentation of those altered documents were to avoid litigation. The Panel wonders how litigation could be conducted fairly if premeditated steps, such as taken here, are taken to dissuade a potential adverse party from bringing forth a claim.

ER 3.4(a) provides that "[a] lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." "All of the ethical rules in question- 3.4(a), 3.4(b), and 4.1, expressly or impliedly require some sort of knowledge on the part of the attorney." *Matter of Shannon*, 179 Ariz. 52, 64, 876 P.2d 548, 560 (1994).

Mr. Holt unlawfully altered the Farmen Trust to fulfill his purpose. [Timothy Holt Testimony, 11:02:45.] While the Panel knows of his stated intentions, we again decline on the scarcity of this record to conclude what the intentions of his client were. Regardless, there is no excuse for the blatant misrepresentation of the Farmen Trust to Ms. Richey or her attorney, Mr. Shahan. Since, Mr. Holt's misrepresentation of the Farmen Trust to Ms. Richey was admitted to have been knowing, it is implied that the subsequent misrepresentations to Mr. Shahan were knowing. [Id., 11:41:45.] Mr. Holt originally sent Mr. Shahan the unaltered Farmen Trust, but later emailed the altered version and referred to the unaltered trust documents as the "incorrect version." [Exhibit 20, SBA000252.] Mr. Holt violated ER 3.4(a) when he provided Mr. Shahan with the altered version of the Farmen Trust and affirmatively represented those documents to be correct.

ER 3.4(b) provides that "[a] lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." The Panel finds no excuse for the alteration of the Farmen Trust. While the Panel frowns upon the alteration of the "Distribution at My Death" section, the issue before us was the use of the altered document to dissuade Ms. Richey from taking the matter to probate and disinheriting her. [Timothy Holt Testimony., 11:44:30.] Mr. Holt's misrepresentation to Ms. Richey was admitted to have been knowing. [Id., 11:41:45.] Mr. Holt violated ER 3.4(b) when he altered the Farmen Trust and tried to use the altered documents to prevent probate litigation.

- **ER 4.1 (Truthfulness in Statements to Others)**

ER 4.1(a) states "[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."

Comment 2 of ER 4.1 provides “[t]his Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances.” As stated above, ER 4.1, expressly or impliedly, requires some sort of knowledge on the part of the attorney. *Shannon*, 179 Ariz. at 64, 876 P.2d at 560.

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see ER 8.4.

Comment 1, ER 4.1.

Mr. Holt was untruthful in his representation to Ms. Richey regarding her status with the Farmen Trust. Mr. Holt knew his statement was false, or at the least a misrepresentation of the facts surrounding the Farmen Trust. [Timothy Holt Testimony, 11:41:45.] As stated above and conditionally agreed by both parties, Mr. Holt admitted to violating ER 4.1(a) by creating a second trust document and claiming that Mr. Farmen had executed it. [Joint Pre-Hearing Statement, p.5.] Further, Mr. Holt has admitted “the rule [is] directly applicable to [his] conduct.” [Respondent’s Prehearing Memorandum, p. 2.] Therefore, the Panel finds Mr. Holt violated ER 4.1(a).

- **ER 8.4 (Misconduct)**

ER 8.4(b) provides “[i]t is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” Discipline and disability proceedings are neither civil nor criminal, but are *sui generis*. Rule 48(a), Ariz. R. Sup. Ct. “Although we use

criminal convictions in the realm of lawyer discipline to shortcut the process of proving professional misconduct, disciplinary actions are *sui generis* proceedings that have no other connection with the criminal law." *Matter of Beren*, 178 Ariz. 400, 874 P.2d 320 (1994).

The State Bar presented *In re Fergus*, SB-10-0111-D (2010), where an attorney was given a three (3) year suspension for misrepresenting a forged power of attorney document to execute a separate trust document. The Arizona Supreme Court agreed with the Disciplinary Commission's report in finding a violation of ER 8.4(b) for committing forgery to be the most serious violation of the attorney's duties to the legal profession. Similar to *Fergus*, Mr. Holt knowingly misrepresented a document created after the client's death. However, unlike *Fergus*, Mr. Holt was purporting to fulfill the intent of his client with his effort to correct a document rather than create an entirely new document.

The Panel looked to the nature of the misconduct Mr. Holt engaged in from a complete standpoint. The posthumous changing of the Farmen Trust raises a concern among the Panel members whether Mr. Holt's actions reflect adversely on his fitness as a lawyer. Mr. Holt testified his actions were mistaken, not intentionally defrauding. Intent matters. Should there be a need to charge Mr. Holt with forgery, a disciplinary proceeding will not be the place for such charges to be levied. The Panel does not ignore the admission to changing a document and misrepresenting the altered trust documents. Therefore, the Panel finds Mr. Holt to have violated ER 8.4(b).

Ethical Rule 8.4(c) provides "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The

Restatement (Third) of the Law Governing Lawyers points to this “catchall” ethical rule in stating that:

Such provisions are written broadly both to cover a wide array of offensive lawyer conduct and to prevent attempted technical manipulation of a rule stated more narrowly. On the other hand, the breadth of such provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent ... and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it.

In re Alcorn, 202 Ariz. 62, 73-74, 41 P.3d 600, 611-12 (2002) (citing 1 Restatement (Third) of the Law Governing Lawyers § 5 cmt. c. (2000)).

In the “Terminology” section under ER 1.0(d), “[f]raud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” Misconduct involving dishonesty may be generally found under ER 8.4(c). *Alcorn*, 202 Ariz. at 73, 41 P.3d at 611.

The State Bar analogized the present matter to *In re Johnson*, DC No. 06-1667 (2008). In *Johnson*, an attorney’s staff member misplaced a client’s original will, prompting the attorney to “re-execute” the will using a copy of the original will still in the client file. Similar to *Johnson*, Mr. Holt continued to represent the altered trust as valid until confronted with suspicion of illegitimacy. Unlike *Johnson*, Mr. Holt did not submit the altered trust to probate. He was confronted with suspicion of its validity before any probate proceedings were initiated and with the trust there may have been no need for such a probate. In *Johnson*, the Hearing Officer’s Report found a violation of ER 8.4(c) for misrepresenting the altered will.³

³ The Panel notes the Disciplinary Commission in *Johnson* found the violation of ER 3.3 to be the most serious misconduct and based its presumptive sanction on that ER violation. The Disciplinary Commission agreed with the Hearing Officer’s recommendation for a suspension of six (6) months and a day. The sanction was based on the presumptive sanction under ABA

Further, the Panel notes *Matter of Charles*, 174 Ariz. 91, 847 P.2d 592 (1993), where an attorney forged two signatures on a client's power of attorney document to verify his relationship with the client in violation of ER 8.4(c). After the client's death, the attorney used the power of attorney document to open a bank account "for the purpose of assisting and helping others with their education" as requested by his client. *Charles*, 174 Ariz. at 92, 847 P.2d at 593. Similar to *Charles*, Mr. Holt may have been acting in accordance with his client's intent and if so, his "motives were pure"⁴ even though there was an appearance of impropriety. *Id.*, at 94, 847 P.2d at 595.

Mr. Holt not only misrepresented facts related to the Farmen Trust with the "purpose to deceive" Ms. Richey but also to mislead Mr. Shahan. ER 1.0(d), Rule 42, Ariz. R. Sup. Ct. The Panel does not ignore the argument Mr. Holt's "motive were pure" when analyzing a violation of ER 8.4(c). *Charles*, 174 Ariz. at 94, 847 P.2d at 595. Mr. Holt's communications about the altered trust document were dishonest when he provided them to Mr. Shahan under guise of them being the correct documents. [Exhibit 20, SBA000252.] The Panel finds Mr. Holt violated ER 8.4(c).

ER 8.4(d) provides "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." ER 8.4(d) is implicated

Standards Standard 6.1 for a violation of ER 3.3, combined with the aggravating factors of multiple offenses and forty (40) years of practice weighted against the mitigating factors of no prior discipline, remorse, full and free disclosure to the bar, and absence of selfish motive. *Cf., In re Matheny*, SB-08-0033-D (2008) (Attorney received one (1) year suspension based on lack of candor in violation of ER 3.3 for having submitted a knowingly altered will for informal probate).

⁴ The attorney in *Charles* was only censured for the violation of ER 8.4(c). The pure motive was ultimately a mitigating factor which brought the presumptive sanction of suspension down to a censure. The court placed "great weight on the fact that Respondent's judgment was obviously clouded by the fact that he was dealing with a client with whom he had a virtual father/son relationship." *Charles*, 174 Ariz. at 94, 847 P.2d at 595.

and requires no mental state other than negligence. *In re Clark*, 207 Ariz. 414, 418, 87 P.3d 827, 831 (2004).

The Panel finds Mr. Holt violated ER 8.4(d).

MENTAL STATE

ER 1.0(f) states that "knowingly," "known," or "knows" denotes actual knowledge of that fact and a person's knowledge may be inferred from circumstances. The *ABA Standards* define "knowledge" as "the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *ABA Standards* Definitions. The *ABA Standards* define "intent" as "the conscious objective or purpose to accomplish a particular result." *Id.* "[The ABA] definition clarifies that merely knowing one performs particular actions is not the same as consciously intending by those actions to engage in unethical conduct." *In re Non-Member of State Bar of Arizona, Van Dox*, 214 Ariz. 300, 305, 152 P.3d 1183, 1188 (2007). "[T]he knowledge required for setting a higher sanction for professional misconduct is 'knowledge that [respondent] may have been violating an ethical rule.'" *Id.* (quoting *In re Levine*, 174 Ariz. 146, 171, 847 P.2d 1093, 1118 (1993)).

The Panel acknowledges a higher standard beyond mere negligence must be found in some ER violations because "[h]olding otherwise would support an allegation in every case that, because lawyers are expected to be familiar with the Rules of Professional Conduct, they 'should have known' of their infractions, thereby effectively reducing the actual knowledge requirement to a nullity." *In re Tocco*, 194 Ariz. 453, 457, 984 P.2d 539, 543 (1999).

Although "good faith argument" is not a self-defining term, it has come to mean an argument that responsible lawyers would regard as being

seriously arguable. Adoption of this standard does not mean that a lawyer's state of mind is irrelevant, for due process concerns dictate that a lawyer not be punished unless his conduct is knowing, and therefore culpable. On the other hand, an objective standard assumes that a genuinely frivolous claim will be known to be frivolous by most lawyers. Indeed, the definition of "knowing" set forth in the Terminology section of the Model Rules states that knowledge "may be inferred from the circumstances." In many cases, therefore, it will be possible to "infer from the circumstances" of a frivolous litigation maneuver that the lawyer had actual knowledge of its frivolous character.

Levine, 174 Ariz. at 154, 847 P.2d at 1101 (*reinstatement granted*, 176 Ariz. 535, 863 P.2d 254), *citing* Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 331 (Student Ed. 1985).

The Panel considered the argument Mr. Holt's actions were done to fulfill the client's intent might be something "responsible lawyers would regard as being seriously arguable." *Id.* We would be more inclined to give such position more weight if there had been candor with Mr. Shahan. Mr. Holt admitted to knowingly misrepresenting the contents of the Farmen Trust to Ms. Richey. [Timothy Holt Testimony, 11:41:45.] Having knowingly misrepresented his position to Ms. Richey, it is apparent his subsequent misrepresentations to Mr. Shahan were done so knowingly. The negligence in the preparation and review of the Farmen Trust are not as egregious as the knowing alteration and misrepresentation of the invalid, altered trust documents.

INJURY

The Panel finds that Mr. Holt's misconduct caused actual and potential injury. The *ABA Standards* define "injury" as harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. Whether a lawyer's

actions caused harm is a question of fact. *Van Dox*, 214 Ariz. at 305, 152 P.3d at 1188. The *ABA Standards* note that the level of injury can range from “serious” injury to “little or no” injury, while a reference to “injury” alone indicates any level of injury greater than “little or no” injury. *ABA Standards Definitions*. A “potential injury” is the harm to a client, the public, the legal system or the profession reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. *Id.*

The Panel is not inclined to speculate what might have happened had it not been for Mr. Shahan’s careful analysis of both the original and altered Farmen Trust. It is beyond the duties of this Panel to speculate what could have happened. However, the Panel feels it is reasonably foreseeable that Mr. Holt would have used the altered document in a probate proceeding. Mr. Holt altered the document after meeting with Ms. Miller. [Timothy Holt Testimony, 11:02:00.] In his testimony, Mr. Holt stated, “I have thought about that time a lot since then trying to understand how I seized upon such a bad idea as a means of correcting.” [Id., 11:06:05.] His only reasoning was to have, with other clients on previous matters, corrected issues with misspelled names and been able to simply print off a revised version of a page and replace the page with the error. [Id., 11:06:30.] However, these facts are distinguishable as prior clients would review the altered page and approved its implementation with an existing draft of a trust prior to signing. Here, we have an attorney unilaterally altering a trust document after the client has passed away, which is wholly different even when considering the client’s intent.

The Panel looks to the statement, “[t]his is wrong, this is never gonna[sic] work” when Mr. Holt referenced Mr. Shahan’s discovery of the identical nature of the altered trust document to the original Farmen Trust. [Timothy Holt, 11:12:45.] Mr. Holt testified he didn’t know why he never filed a petition for reformation. [Timothy Holt Testimony, 11:08:15.] Mr. Holt stated his understanding of Mr. Farmen’s desire to create a trust was to prevent undue probate proceedings. [Id., 10:52:20.]

DISCUSSION

Having considered the testimony and exhibits, the Panel finds the State Bar has shown, by clear and convincing evidence, knowing and negligent misconduct by Mr. Holt regarding the Farmen Trust.

Maintaining the public’s faith in the profession requires maintaining the professional integrity of the judicial system. The misconduct by Mr. Holt will require imposition of sanctions conducive and just to his culpable mental state and injury caused by his misconduct.

PRESUMPTIVE SANCTIONS

The Panel looks to the *ABA Standards* to determine the presumptive sanctions. Standard 4.5 applies for a violation of ER 1.1; Standard 4.4 applies for a violation of ER 1.3; Standard 6.2 applies for a violation of ER 3.4; Standard 5.1 applies for a violation of ER 8.4(b); Standards 4.6 and 5.1 apply for a violation of ER 8.4(c); and Standard 6.0 applies for a violation of ER 8.4(d).

The ABA Standards state “[s]uspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.” *ABA Standards* Standard 6.22. Alternatively, reprimand is appropriate “when a

lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.” *ABA Standards Standard 6.23*

The public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice. Lawyers must always operate within the bounds of the law and cannot create or use false evidence or make a false statement of material fact. *ABA Standards Standard 6.0*. Offenses involving dishonesty or serious interference with the administration of justice are in that category. *Commentary, ABA Standards Standard 5.12*. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations. *Id.*

Reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client. *ABA Standards Standard 4.63*.

AGGRAVATION AND MITIGATION

Each disciplinary case involves unique facts and circumstances. *Commentary, ABA Standards Standard 9.1*. In striving for fair disciplinary sanctions, consideration must be given to the facts pertaining to the professional misconduct and to any aggravating or mitigating factors. *Id.* The Panel determined the following aggravating factors are supported by the record:

- **9.22(b) (dishonest or selfish motive)**

The Panel finds there to be a dishonest motive, but no selfish motive. If Mr. Holt experienced personal gain from the misrepresentation of the altered document, no evidence of it was presented to this panel. What there was presented were the

remedial steps taken by him at a significant cost. Mr. Holt paid for the subsequent probate costs incurred by Ms. Miller and even refunded the fees paid to prepare the Farmen Trust. The Panel notes Mr. Holt's stated honest, if misguided, attempts at meeting his client's intent. However, the Panel only gives minimal weight to the good intentions because "'the end justifies the means' simply does not relieve him of his responsibility to maintain his integrity." *Charles*, 174 Ariz. at 93, 847 P.2d at 594.

- **9.22(i) (substantial experience in the practice of law)**

Time, experience, and knowledge of the attorney are factors in determining whether there should be harsher sanctions imposed. However, since Mr. Holt has no history of prior disciplinary record, the Panel places minimal weight to this aggravating factor.⁵

- **9.22(k) (illegal conduct)**

The State Bar suggested the Panel consider the illegal conduct of forgery under A.R.S. §13-2002 when looking at aggravating factors.⁶ Under that statute, "[a] person commits forgery if, with intent to defraud, the person: (1) Falsely makes, completes or alters a written instrument; or (2) Knowingly possesses a forged

⁵ Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev. 1, 54, n. 241 (1998) ("It is not unusual, however, for the courts to ignore one of these factors when they are both present in the same case. See, e.g., *In re Anderson*, 788 P.2d 95, 97 (Ariz. 1990) (considering no prior discipline as a mitigating factor but not considering experience in practice as an aggravating factor)).

⁶ As guided by the Model Rules of Professional Conduct, it is not necessary for a lawyer to be convicted of, or even charged with, a crime to violate the rule. See, e.g., *People v. Odom*, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing crime for which he never was charged), *Iowa Supreme Court Att'y Disciplinary Bd. v. Stowers*, 823 N.W.2d 1 (Iowa 2012) ("absence of criminal charges, or even acquittal of criminal charges, is not a defense to this rule"), *In re King*, 33 So. 3d 873 (La. 2010) (fact that lawyer's felony conviction set aside and expunged at conclusion of probationary period did not preclude its use for disciplinary purposes).

instrument; or (3) Offers or presents, whether accepted or not, a forged instrument or one that contains false information.” Ariz. Rev. Stat. § 13-2002(A).

The Panel considers the language of the statute, but gives the accusation minimal weight without proof of the elements of the illegal conduct. The State Bar provided no such evidence nor a criminal charge, pending or current. Discipline proceedings are neither civil nor criminal, but are *sui generis*. Rule 48(a), Ariz. R. Sup. Ct. However, the Panel is not tasked with charging Mr. Holt with forgery nor fraud and will not independently analyze such claims in the absence of clear and convincing evidence. The Panel acknowledges the admission by Mr. Holt to having knowingly altered the trust document, but is disinclined to declare an “intent to defraud” as required under the forgery statute.

The Panel determined that the following mitigating factors are supported by the record:

- **9.32(a) (absence of a prior disciplinary record)**

Mr. Holt’s lack of a prior disciplinary record is a mitigating factor in determining sanctions. However, just as with substantial experience in the practice of law, the Panel places minimal weight to this mitigating factor.

- **9.32(b) (absence of a dishonest or selfish motive)**

The Panel finds an absence of a selfish motive in these disciplinary proceedings, but finds a dishonest motive. The Panel cannot ignore the significant evidence of the dishonest manner Mr. Holt handled the issues arising out of the Farmen Trust. Therefore, the Panel only finds an absence of a selfish motive.

- **9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct)**

The Panel praises Mr. Holt for the actions he took after Mr. Shahan pointed out the similarities in the altered trust documents. We place significant weight on this factor as it is evidence of a recognition of an error coupled with the corrective actions one should take. Mr. Holt called Mr. Brekke to discuss him taking over the case and went with Ms. Miller to his office on the same day. [Timothy Holt Testimony, 11:14:00, Dean Brekke Testimony, 09:57:30.] Mr. Holt offered to pay for all fees incurred by Ms. Miller in the inevitable probate litigation. [Id., 11:14:30.] Further, Mr. Holt refunded the fee paid to prepare the Farmen Trust. [Id.]

- **9.32 (e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings)**

The Panel also gives significant weight to Mr. Holt's cooperation with the State Bar through their investigation into the matter before us. Mr. Holt's candor was appreciated. He acknowledged, "it would not be appropriate for the bar to ignore [the misconduct]." [Id., 11:39:20.] The State Bar alleged nothing to the contrary of this position and could openly and cooperatively communicate with Mr. Holt's counsel regarding obtaining exhibits. [Exhibit 12, SBA000038-39.]

- **9.32(g) (character and reputation)**

Shawn Nelson, Anca Iacob, and Kevin Beckwith testified before the Panel as character witnesses for Mr. Holt. Mr. Nelson is an attorney who has worked with Mr. Holt on cases and as a member of the high counsel for the Glendale Arizona Stake of the Mormon Church. [Shawn Nelson Testimony.] Mr. Nelson testified to the misconduct being out of character for Mr. Holt and was a one-time incident. [Id.] Ms. Iacob is an attorney who shared office space with Mr. Holt for several years, including the period when the Farmen Trust was prepared. [Anca Iacob Testimony.] Ms. Iacob

described Mr. Holt as the “most selfless person she knows” and described the misconduct as being uncharacteristic for Mr. Holt. [Id.] Ms. Jacob described a situation where Mr. Holt helped her set up 501(c)(3) for a local Romanian church at no charge. [Id.] Mr. Beckwith has known Mr. Holt since 1986 when they both worked at Sanders & Parks, P.C. [Kevin Beckwith Testimony.] Mr. Beckwith described Mr. Holt as professional, likeable, and easily approachable. [Id.] Further, Mr. Beckwith described two (2) cases where they worked closely with one case involving a monetary award placed in Mr. Holt’s trust account. [Id.] Mr. Holt’s integrity and honesty was never an issue for Mr. Beckwith and felt the misconduct was a “complete aberration” of Mr. Holt’s standard conduct. [Id.]

The Panel notes the positive work done by Mr. Holt in his community, such as his work with Smiles Beyond the Bars, the Peoria Chamber of Commerce, and the Peoria Center for Performing Arts. The Panel finds Mr. Holt’s reputation and character to be a significant mitigating factor as he has done enough “good in the world” to help give weight to this mitigating factor.

- **9.32(I) (remorse)**

Mr. Holt expressed the extreme embarrassment of having to go through the disciplinary process. [Timothy Holt Testimony, 11:35:45.] Mr. Holt described the situation as humiliating and “[felt] very bad [he] caused [Ms. Miller] this much harm.” [Id.] Further, Mr. Holt explained how difficult it was to call different attorneys he knew to be character witnesses in these proceedings and having to admit to them he had done something, which put him into these disciplinary hearings. [Id., 11:36:15.] These are all evidences of regret.

Notably, the Panel found sincere remorse for his actions when talking about how his family would react to the bar charges. [Id., 11:36:30.] Mr. Holt expressed the lasting effect of these proceeding in that “this will never go away.” [Id., 11:36:50.]

There is little middle ground in the expression of remorse. If honest remorse is to be expressed, it is not a time to hide from one’s misdeeds or duck the issues. Mr. Holt was straight forward and has not submitted qualifying language, minimization or the blame-shifting that too often is tendered. Remorse is difficult because of the internalizing of the wrong done and the necessity, because of one’s actions, to strive for restoration through one’s walk (actions) and talk (words). These are both affirmative actions. The Supreme Court referred to the need of such affirmative steps in *Matter of Augenstein*, 178 Ariz. 133, 137, 871 P.2d 254, 258 (1994).

Those seeking mitigation relief based upon remorse must present a showing of more than having said they are sorry.... [T]he best evidence of genuine remorse is affirmative and, if necessary, creative efforts to make the injured client whole. For this reason, we think that respondent's late apology, standing alone, is insufficient to support a finding of remorse.

Here we noted the multiple affirmative remedial actions of Mr. Holt which we have discussed. There can be a reluctance to expose oneself to the transparency self-effacing remorse demands. There is no room for equivocation when one offers authentic remorse. There is no equivocation in the admissions of Mr. Holt. Such open remorse is uncommon. Perhaps it is not that individuals are unclear or uncertain of their misconduct, but pride or ego results in some respondents emphasizing the wrongs of others or rationalizations of their misconduct rather than empathy for the injury caused to the profession and people by the ethical misconduct.

A paper thin remorse fails to uphold human dignity or the profession. To the contrary it assures a deterioration of regard for the profession by the public and an erosion of the recognition of worth and individuality of each individual injured by a don't-bother-me-I'm-too-busy coldness resulting in a greater loss of human dignity. Remorse opens one to the opportunity of resolving injury and healing battered interpersonal relationships. But that requires self-analysis, candor and affirmative action. In unpretentious remorse, self-centered rationalization of one's misconduct and caution are laid aside in favor of the potential of true resolution. Upholding human dignity and the profession is worth the effort. True remorse is a significant mitigating factor in attorney discipline. We are satisfied Mr. Holt has actual remorse and accord it significant mitigation.

V. CONCLUSION

The object of lawyer discipline is to protect the public, the legal profession, the administration of justice, and to deter other attorneys from engaging in unprofessional conduct. *Van Dox*, 214 Ariz. at 303, 152 P.3d at 1186; *Peasley*, 208 Ariz. at 38, 90 P.3d at 775. Attorney discipline is not intended to punish the offending attorney, although the sanctions imposed may have that incidental effect. *Id.* The Panel finds Mr. Holt violated ERs 3.4(a) and (b), 4.1(a), and 8.4(b)-(d).

The State Bar requested suspension for six (6) months and one (1) day as the sanction for Mr. Holt's unethical actions and his lack of candor to adverse parties. Based on the facts, conclusions of law, and application of the *ABA Standards*, including both aggravating and mitigating factors, the Panel did not agreed with this assessment. While the presumptive sanction for the unethical actions suggests a suspension, the Panel gives great weight to the mitigating factors. The Panel does

not endorse the altering of a trust document and feels it warrants a suspension. However, due to the obvious remorse and lengths Mr. Holt took in his subsequent remedial actions, the Panel finds a suspension of sixty (60) days to be warranted. The Panel is not concerned about a repeat violation by Mr. Holt. Accordingly,

IT IS ORDERED that Mr. Holt is suspended from the practice of law effective thirty days from this Decision and Order. Mr. Holt shall remain suspended for sixty (60) days and shall remain suspended until the PDJ enters an order reinstating him to the practice of law under Rule 64(e)(2), Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED that Mr. Holt shall pay costs and expenses in this matter under Rule 60(b), Ariz. R. Sup. Ct.

A final judgment and order will follow.

DATED this 24th day of August, 2015

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Carole Kemps

Carole Kemps, Volunteer Public Member

Sandra E. Hunter

Sandra E. Hunter, Volunteer Attorney Member

Copies of the foregoing mailed/emailed
this 24th day of August, 2015.

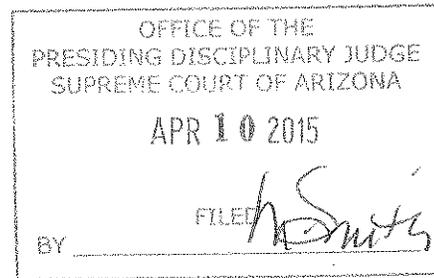
Stacy L. Shuman
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6266
Email: lro@staff.azbar.org

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: lro@staff.azbar.org

Counsel for Respondent
Russell R. Yurk
Jennings, Haug, & Cunningham, LLP
2800 North Central Avenue, Suite 1800
Phoenix, AZ 85004-1409
Email: docket@jhc-law.com

by: JAlbright

Stacy L. Shuman, Bar No. 018399
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602)340-7386
Email: LRO@staff.azbar.org



**BEFORE THE PRESIDING DISCIPLINARY
JUDGE**

**IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,**

**TIMOTHY W. HOLT,
Bar No. 009724,**

Respondent.

PDJ 2015- 9030

COMPLAINT

State Bar No. 14-0897

Complaint is made against Respondent as follows:

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 20, 1984.
2. On April 12, 2012, Frederick Farmen and his daughter, Karen Miller, met with Respondent regarding Mr. Farmen's estate planning. According to Respondent, Mr. Farmen stated that he wanted to create a revocable living trust to ensure that Ms. Miller inherited his entire estate and that his other daughter, Linda Richey, was disinherited.
3. Thereafter, Respondent prepared "The Frederick Farmen Living Trust" (the Trust Document), as well as other various estate planning documents.

4. On May 9, 2012, Mr. Farnen came to Respondent's office to sign the Trust Document. Respondent did not review the Trust Document with Mr. Farnen before it was executed.

5. The Trust Document that Respondent prepared and Mr. Farnen signed on May 9, 2012, divided the estate equally between Mr. Farnen's daughters.

6. On July 30, 2012, Mr. Farnen passed away.

7. After Mr. Farnen's death, Ms. Miller realized that the Trust Document provided for the equal division of the assets between the daughters. She visited Respondent's office to determine what steps could be taken to realize Mr. Farnen's alleged intention to disinherit her sister, Ms. Richey.

8. Respondent suggested that he change a portion of the Trust Document to provide for Ms. Richey to be disinherited. Respondent then did so.

9. Respondent believed that it would be appropriate to alter the Trust Document because it would accord the document to Mr. Farnen's alleged intention to disinherit Ms. Richey.

10. By letter dated August 13, 2013, Respondent advised Ms. Richey that she had been disinherited. In response, Ms. Richey retained counsel, Aaron Shahan, to help her collect more information about her father's estate.

11. By letter dated September 5, 2013, Attorney Shahan requested that Respondent provide him with a complete copy of the estate planning documents.

12. By letter dated September 16, 2013, Respondent provided Attorney Shahan with the original, unaltered Trust Document, which divided the estate equally between the sisters.

13. After reviewing the documents, Attorney Shahan called Respondent to ask why Ms. Richey was not a beneficiary to the Trust when the document stated otherwise. Respondent told Attorney Shahan that he had sent the wrong document and that Mr. Farmen had "re-executed" the Trust Document to remove Ms. Richey as a beneficiary.

14. By email on September 19, 2013, Respondent provided Attorney Shahan with a copy of the altered Trust Document. He apologized "for sending the earlier, incorrect version" of the Trust Document.

15. By letter dated September 25, 2013, Attorney Shahan pointed out to Respondent that the signature pages on the trust documents were identical and the "signatures, date, and notary stamp are a mirror image of one another." He opined that the evidence would establish that a second trust document was never executed. Rather, "someone removed pages from the executed Trust and simply exchanged them for pages which were not a part of the original (executed) agreement. Meaning, [Ms. Richey] was beneficiary of the Trust and someone altered the documents at a later date in an obvious attempt to deny [Ms. Richey] her rightful share or [sic] the Trust."

16. According to Respondent, it was at that time that he realized that he had acted "improperly" and decided to rectify the situation. He met with Ms. Miller and advised her to retain independent counsel. He also referred her to an experienced probate attorney, Dean Brekke, whom she retained.

17. On December 6, 2013, Attorney Brekke caused a Petition for Reformation of Trust Agreement to be filed with the Maricopa County Superior

Court, Case No. PB2013-002831 (Probate Proceedings). Respondent executed an affidavit in support of the petition. However, Respondent did not admit in the affidavit that he altered the Trust Document to disinherit Ms. Richey and that he tried to pass it off as a document executed by the decedent.

18. On December 27, 2013, Ms. Richey filed an objection to the petition for reformation and a counter-petition for removal of trustee, for surcharge and for accounting wherein she accused Respondent of being "a co-conspirer working in concert with [Ms. Miller] to further his own self-interest."

19. On February 19, 2015, the parties filed a Notice of Settlement and Stipulation for Dismissal of the Probate Proceedings, which the Court accepted by Minute Entry filed March 3, 2015:

20. By engaging in the misconduct described above, Respondent violated several ethical rules including, but not limited to the following ethical rules.

21. ER 1.1 [Competence] A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

22. ER 1.3 [Diligence] A lawyer shall act with reasonable diligence and promptness in representing a client.

23. ER 3.4(a) [Fairness to Opposing Party and Counsel] A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

24. ER 3.4(b) [Fairness to Opposing Party and Counsel] A lawyer shall not falsify evidence.

25. ER 4.1(a) [Truthfulness in Statements to Others] In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

26. ER 8.4(b) [Misconduct] It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Under A.R.S. § 13-2002 (A), a person commits forgery if, with intent to defraud, the person (1) falsely makes, completes or alters a written instrument; (2) knowingly possesses a forged instrument; or (3) offers or presents, whether accepted or not, a forged instrument or one that contains false information. Forgery is a class 4 felony. See A.R.S. § 13-2002(C).

27. ER 8.4(c) [Misconduct] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

28. ER 8.4(d) [Misconduct] It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

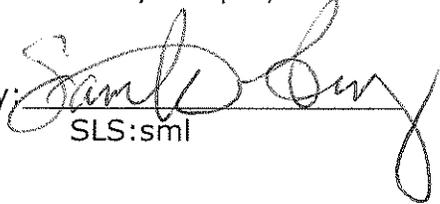
DATED this 10th day of April, 2015.

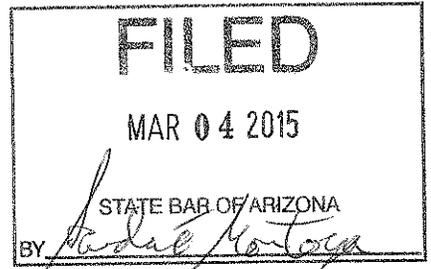
STATE BAR OF ARIZONA



Stacy L. Shuman
Staff Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 10th day of April, 2015

by: 
SLS:sml



**BEFORE THE ATTORNEY DISCIPLINE
PROBABLE CAUSE COMMITTEE
OF THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,**

**TIMOTHY W. HOLT
Bar No. 009724**

Respondent.

No. 14-0897

PROBABLE CAUSE ORDER

The Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona ("Committee") reviewed this matter on February 20, 2015, pursuant to Rules 50 and 55, Ariz. R. Sup. Ct., for consideration of the State Bar's Report of Investigation and Recommendation.

By a vote of 6-0-3¹, the Committee finds probable cause exists to file a complaint against Respondent in File No. 14-0897.

IT IS THEREFORE ORDERED pursuant to Rules 55(c) and 58(a), Ariz. R. Sup. Ct., authorizing the State Bar Counsel to prepare and file a complaint with the Disciplinary Clerk.

Parties may not file motions for reconsideration of this Order.

DATED this 3 day of March 2015.



Judge Lawrence F. Winthrop, Chair
Attorney Discipline Probable Cause
Committee of the Supreme Court of Arizona

¹ Committee members Ella G. Johnson, Ben Harrison and Donald G. Manring did not participate in this matter.

Original filed this 17th day
of March, 2015, with:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266

Copy mailed this 17th day
of March, 2015, to:

Russell Yurk
Jennings Haug & Cunningham
2800 North Central Avenue,
Suite 1800
Phoenix, Arizona 85004-1049
Respondent's Counsel

Copy emailed this 17th day
of March, 2015, to:

Attorney Discipline Probable Cause Committee
of the Supreme Court of Arizona
1501 West Washington Street, Suite 104
Phoenix, Arizona 85007
E-mail: ProbableCauseComm@courts.az.gov

Lawyer Regulation Records Manager
State Bar of Arizona
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266

by *Samuel S. Long*