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DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A NON-MEMBER )	No. 04-1846
OF THE STATE BAR OF ARIZONA, )	
)	
<b>CARLY R. VAN DOX,</b> )	
)	<b>DISCIPLINARY COMMISSION</b>
)	<b>REPORT</b>
RESPONDENT. )	
_____ )	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on March 11, 2006, pursuant to Rule 58, Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed November 2, 2005, recommending that the Complaint be dismissed and the matter remanded to the probable cause panelist with instructions to vacate the Probable Cause Order and refer the matter for diversion. The State Bar filed a Notice of Appeal objecting to the Hearing Officer's Report and requested oral argument. Respondent, Respondent's Counsel, and Counsel for the State Bar were present.

At oral argument, the Disciplinary Commission requested the parties address whether subject matter jurisdiction exists in this matter. The State Bar argues that Supreme Court Rules 31 and 46, are the controlling authority for the unauthorized practice of law for a non-member attorney, and that this case is appropriately before the Disciplinary Commission.

The State Bar contends that Supreme Court Rules 75-80, effective July 1, 2003, regarding the unauthorized practice of law were established primarily for the deterrence and prosecution of non-lawyers engaging in the practice of law. Respondent agrees with the State Bar on jurisdiction and stated that Rules 31 and 46 and the new rules governing

1 the unauthorized practice of law proceedings are not mutually exclusive. Respondent  
2 presently defends this bar complaint and does not contend that Supreme Court Rule 79(b)  
3 applies. Respondent requests costs if this matter is ultimately decided to be within the  
4 exclusive jurisdiction of the Superior Court.

5 In its appeal on the merits, the State Bar argues that the Hearing Officer  
6 erroneously omitted facts stipulated to by the parties in the Joint Pre-Hearing Statement  
7 filed September 15, 2005, from his Report and made erroneous conclusions by relying on  
8 documents that were not properly considered. The State Bar contends that the Hearing  
9 Officer misstated the law regarding ER 8.4(c) and erroneously concluded that  
10 Respondent did not act knowingly. The State Bar contends that the Hearing Officer  
11 misstated the law regarding ER 8.4(d) and Supreme Court 53(d)<sup>1</sup> and further erroneously  
12 concluded that Respondent did not violate either provision. The State Bar asserts that the  
13 Hearing Officer erroneously considered the impact of discipline upon Respondent and  
14 erroneously concluded that the *Standards* support a sanction less than a censure.  
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16 The State Bar also contends that the Hearing Officer erroneously failed to find  
17 aggravating factors 9.22(b) selfish or dishonest motive, (c) pattern of misconduct, (d)  
18 multiple offenses, (e) bad faith obstruction of the disciplinary proceeding, and (i)  
19 substantial experience in the practice of law, and erroneously found mitigating factors not  
20 supported by the *Standards*.  
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22 The State Bar contends that in arriving at an appropriate sanction the Hearing  
23 Officer considered improper and unsupported opinion evidence that the public does not  
24 need protection from lawyers like Respondent. In the State Bar's view, case law clearly  
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26 <sup>1</sup> The Hearing Officer inadvertently stated 53(f) instead of 53(d). See Hearing Officer's Report, p. 10, conclusion of law #1.

1 supports censure and not diversion in this matter. There are no alternative programs in  
2 diversion that remedy the conduct of a non-member who engages in the unauthorized  
3 practice of law. Moreover, diversion is not an appropriate remedy for a non-member and  
4 in cases involving willful and dishonest conduct. Lastly, the State Bar maintains that  
5 censure is proportional and fulfills the purposes of discipline, which is deterring similar  
6 misconduct by other lawyers and maintaining the integrity of the profession in the eyes of  
7 the public.

8 Respondent answers that the Hearing Officer appropriately found that  
9 Respondent's mental state was negligent; therefore, a violation of ER 8.4(c) cannot be  
10 proven by clear and convincing evidence. The Hearing Officer appropriately found that  
11 the State Bar failed to prove by clear and convincing evidence a violation of ER 8.4(d)  
12 and SCR 53(d).

13 Respondent contends that the Hearing Officer correctly found that the *Standards*  
14 support a sanction less than censure and Respondent is not precluded from diversion  
15 because of her non-member status. The duty violated in this matter was not to the client  
16 and Respondent did not knowingly violate any ethical rules. Respondent argues that she  
17 was negligent as to what constitutes "the practice of law" – a question about which there  
18 has been considerable uncertainty. Additionally, Respondent asserts that her misconduct  
19 caused little or no actual injury to any party and her non-licensed status did not affect the  
20 mediation. Respondent agrees with the Hearing Officer's conclusions that there are no  
21 aggravating factors and that numerous mitigating factors are present in the record.

22 In closing, Respondent asserts Arizona case law involving the unauthorized  
23 practice of law demonstrates that an isolated instance of the unauthorized practice of law  
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causing no actual harm does not warrant a sanction of censure, and the Hearing Officer did not err in recommending diversion for a non-member.

### Decision

The nine members of the Disciplinary Commission by a majority of five,<sup>2</sup> recommend accepting and adopting by reference the majority of the Hearing Officer's findings of fact and conclusions of law, and modify the recommended sanction to reflect censure and costs.<sup>3</sup>

### Discussion

The Disciplinary Commission's standard of review is set forth in Rule 58(b), Ariz. R. S. Ct., which states that the commission reviews questions of law *de novo*. In reviewing findings of fact made by a hearing officer, the commission applies a clearly erroneous standard. *Id.* Mixed findings of fact and law are also reviewed *de novo*. *State v. Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985). Although great deference is historically given to the Hearing Officer's report and recommendation, *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1989), the Disciplinary Commission rejects the Hearing Officer's recommendation of dismissal and diversion.

Supreme Court Rule 31(a)(1) and (2), effective December 1, 2003, provides that the Supreme Court has jurisdiction over the practice of law and defines the unauthorized practice of law as: providing legal advice or services to or for another by:

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<sup>2</sup> Commissioners Choate, Flores, Mehrens and Messing dissented concluding that dismissal for lack of jurisdiction is appropriate, based on application of Supreme Court Rules 75-80, governing the unauthorized practice of law. Rule 79(b) states that a complaint *shall* be filed in Superior Court, and is not discretionary. *See* dissenting Opinion stated below.

<sup>3</sup> The Hearing Officer's Report and Order are attached as Exhibit A.

1 (3) representing another in a judicial, quasi-judicial, or  
2 administrative proceeding, or other formal dispute  
3 resolution processes such as arbitration and mediation.

4 Rule 46(b), Ariz. R. S. Ct., gives the Supreme Court the authority over anyone  
5 practicing law as defined in Rule 31, including non-members of the State Bar. A non-  
6 member is defined as a lawyer admitted in another jurisdiction. See Rule 46(f)(15).

7 On the jurisdictional question, the Disciplinary Commission does not interpret  
8 Supreme Court Rule 79, Formal Proceedings Before the Superior Court, as providing  
9 exclusive authority over the unauthorized practice of law of non-members, thereby  
10 displacing the existing authority in attorney discipline proceedings set forth in Supreme  
11 Court Rules 31 and 46. In *Matter of Mothershed*, SB-01-0076-D (2001), and *Matter of*  
12 *Mothershed*, SB-03-0109-D (2003), the Disciplinary Commission censured the  
13 respondent for numerous ethical violations including the unauthorized practice of law.  
14 The Disciplinary Commission, as well as the Hearing Officer, determined that had  
15 Mothershed been a member of the Arizona bar, disbarment would have been the  
16 appropriate sanction. Mothershed was also licensed in Oklahoma and was subsequently  
17 disbarred based on his misconduct in Arizona. Thus, a respondent attorney who is  
18 disciplined for the unauthorized practice of law may also be subjected to reciprocal  
19 discipline in any other state in which he or she is a licensed bar member.  
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21 The Disciplinary Commission views Supreme Court Rules 75 – 80, as primarily  
22 designed for those individuals who are not licensed to practice law in any jurisdiction and  
23 are engaged in the practice of law, thereby endangering the public. The new rules permit  
24 formal unauthorized practice of law proceedings to be commenced in superior court  
25 through which various judicial sanctions may be imposed, including injunctive relief and  
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1 civil contempt. See Supreme Court Rule 76. The range of sanctions ensures that the  
2 court has authority to bring a halt to the activity deemed to be the unauthorized practice  
3 of law.

4 Under Supreme Court Rule 75, "unauthorized practice of law proceeding" means  
5 "any action involving a respondent pursuant to the rules relating to the unauthorized  
6 practice of law." Although not a model of clarity, the definition presumably refers only  
7 to court actions filed under the new rules. Thus, Supreme Court Rule 78's directive that  
8 an unauthorized practice of law proceeding shall be disposed of by dismissal or by filing  
9 a complaint refers only to formal court proceedings under the new rules. The  
10 Commission does not read these provisions to exclude traditional disciplinary authority  
11 under Supreme Court Rules 31 and 46. Viewed together, the new rules create an  
12 alternative track and were not intended to limit the Supreme Court's pre-existing  
13 disciplinary powers over non-members.

14 Turning to the merits, Respondent is licensed to practice law in the state of  
15 Florida and Virginia, and is a certified mediator in Florida. Respondent is not licensed to  
16 practice law in Arizona, but is a licensed real estate agent. Respondent's misconduct  
17 occurred when she agreed to *represent* the sellers of a house who were in dispute with the  
18 purchasers at a mediation session for \$1,000.00. The clients were aware that Respondent  
19 was not licensed to practice law in Arizona. Respondent discussed the facts of the case  
20 with the clients and shared her informal opinion that the buyer's claim was without merit.  
21 The clients signed a form retainer agreement that Respondent used in her law practice in  
22 Florida. The clients were advised by Respondent that if the matter proceeded beyond  
23 mediation, they would be required to retain other counsel. During the mediation,  
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1 opposing counsel investigated Respondent's license status and discovered she was not  
2 licensed to practice law in Arizona. The mediator allowed the mediation session to  
3 continue, but the dispute did not settle. Respondent admits that her conduct at the  
4 mediation constituted the unauthorized practice of law.

5 Based on the facts and Respondent's admissions, the Disciplinary Commission, as  
6 well as the Hearing Officer, determined by clear and convincing evidence that  
7 Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 5.5 (unauthorized practice  
8 of law) and Supreme Court Rules 31 (regulation of the practice of law) and 53(f) (failure  
9 to furnish information). The Hearing Officer found that the State Bar failed to prove by  
10 clear and convincing evidence that Respondent violated ERs 8.4(c) conduct involving  
11 dishonesty, fraud or misrepresentation, 8.4(d) conduct prejudicial to the administration of  
12 justice, and Supreme Court Rule 53(d) evading service.

13 In determining the appropriate sanction, our Supreme Court considers the ABA  
14 *Standards for Imposing Lawyer Sanctions* ("Standards") a suitable guideline. *In re*  
15 *Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission  
16 are consistent in utilizing the *Standards* to determine appropriate sanctions for attorney  
17 discipline. In imposing a sanction after a finding of misconduct, consideration is given to  
18 the duty violated, the lawyer's mental state, the actual or potential injury caused by the  
19 misconduct, and the existence of aggravating and mitigating factors. *See Standard 3.0*.

20 The Disciplinary Commission determined that the Hearing Officer was clearly  
21 erroneous in concluding that Respondent acted negligently. *See Hearing Officer's*  
22 *Report*, p. 13. The record clearly supports that Respondent acted knowingly. On October  
23 12, 2004, Respondent signed a retainer agreement between the client and the "Law  
24 25 26

1 offices of Carly R. Van Dox, P.A.”. See Hearing Officer’s Report, p. 4, finding of fact  
2 #17 and State Bar’s Hearing Exhibit #17. Respondent agreed to the Mediation Agreement  
3 Rules & Procedures provided by Amy Lieberman, Esq., and signed the document “Carly  
4 Van Dox, Atty”. See State Bar’s Hearing Exhibit #9. The unauthorized practice of law  
5 includes the use of the designation of lawyer or other equivalent words by anyone not  
6 authorized to practice law in this state. Supreme Court Rule 31(B)(2).

7 *ABA Standard 7.2* provides that:

8 Suspension is generally appropriate when a lawyer  
9 knowingly engages in conduct that is a violation of a duty  
10 owed as a professional, and causes injury or potential injury  
11 to a client, the public, or the legal system.

12 The Hearing Officer found that there was little or no injury to Respondent’s clients, but  
13 erroneously did not consider the harm or potential harm to the public, the legal system  
14 and to the profession.

15 The Hearing Officer also found no factors in aggravation. In mitigation, the  
16 Hearing Officer found that Respondent has no prior discipline, was president of the  
17 Alexandria Bar Association from 1989 to 1990, was appointed to trusteeships and  
18 guardianships by local judges, and enjoyed an excellent reputation within the legal  
19 community in Virginia and Florida, and within the Arizona real estate community. The  
20 Hearing Officer also found that after the filing of the formal complaint, Respondent was  
21 cooperative and forthcoming throughout the proceedings and demonstrated remorse for  
22 her misconduct; mitigating factors 9.32(a), (e), (g) and (l). See Hearing Officer’s Report,  
23 p. 9. The Commission agrees that mitigating factors 9.32(a), (e), (g) and (l) are present.  
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1 On the other hand, the Disciplinary Commission finds that the Hearing Officer  
2 erroneously concluded that Respondent did not have a dishonest motive. See Hearing  
3 Officer's Report, p. 9 Mitigation Finding #39 and p. 14.

4 The Disciplinary Commission determined that the evidence contained in the  
5 record is insufficient to support the presence of mitigating factor 9.22(b) absence of  
6 selfish or dishonest motive. Instead, the Commission determined that the record shows  
7 that Respondent earned a fee of \$1,000.00 for representing the clients in mediation;  
8 therefore, the Commission finds *de novo* that aggravating factor 9.22(b) selfish or  
9 dishonest motive is present.

10 The Commission further finds that the Hearing Officer erroneously considered the  
11 impact any sanction may have on Respondent's real estate license, future livelihood and  
12 the effects of reciprocal discipline in Florida and Virginia. See Hearing Officer's Report,  
13 pp. 1-2 and p. 14. Case law has established that it is not appropriate to consider the  
14 effects that discipline may have on the attorney's practice and livelihood or the degree of  
15 any psychological pain experienced by the attorney. *In re Shannon*, 179 Ariz. 52, 876  
16 P.2d 548 (1994), *In re Scholl*, 200 Ariz. 222, 25 P.3d 710 (2001), and *In re Alcorn and*  
17 *Feola*, 202 Ariz. 62, 41 P.3d 600 (2002).

18 The Hearing Officer gave consideration in mitigation to Respondent's medical  
19 condition as a basis for Respondent's failure to respond to the State Bar's letters of  
20 inquiry. The evidence shows that since her stroke in October of 2002, Respondent  
21 suffers from diminished memory and ability to concentrate. See Hearing Officer's  
22 Report, pp. 2-3 and p. 8. However, direct causation was not established between  
23 Respondent's misconduct and her medical condition. Therefore, little weight is given to  
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this mitigating factor and it is not a valid defense for failure to respond to the State Bar.

1 The Supreme Court has stated that a lawyer's failure to respond to the State Bar inquiries  
2 borders on contempt for the legal system. *In re Galusha*, 164 Ariz. 503, 794 P.2d 136  
3 (1990).

4 The Supreme Court has also held that sanctions against lawyers must have  
5 internal consistency to maintain an effective and enforceable system; therefore, the court  
6 looks to cases that are factually similar to the case before it. *Matter of Pappas*, 159 Ariz.  
7 516, 526, 768 P. 2d 1161, 1171 (1988).

9 The Disciplinary Commission did not find the cases offered for a proportionality  
10 analysis instructive. The majority of cases involved the unauthorized practice of law by a  
11 suspended member of the Arizona State Bar, which is not the case here. Of the  
12 remaining cases relating to the unauthorized practice of law by a non-member, none  
13 involved a knowing mental state and the failure to respond to the State Bar. Moreover,  
14 previous case law established that censure is the most severe sanction that can be  
15 imposed on a non-member lawyer who engages in the unauthorized practice of law in  
16 Arizona. *Matter of Olsen*, 180 Ariz. 5, 881 P.2d 337(1994).

18 **Conclusion**

19 One purpose of lawyer discipline is to deter the Respondent and other attorneys  
20 from engaging in similar unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249  
21 (1982). Another purpose is to instill public confidence in the bar's integrity. *Matter of*  
22 *Horwitz*, 180 Ariz. 20, 29, 881 P.2d, 352, 362 (1994). The sanction that we impose must  
23 help maintain the integrity of the legal system. *In re Fioramonti*, 176 Ariz. 182, 187, 859  
24 P.2d 1315, 1320 (1993).  
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1 Therefore, upon *de novo* review of the appropriate sanction, the Disciplinary  
2 Commission recommends censure for the unauthorized practice of law and failure to  
3 respond to the State Bar.

4 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April, 2006.

5  
6 Barbara A. Atwood, Chair  
7 Disciplinary Commission

8 **Commissioners Choate, Flores, Mehrens and Messing dissent:**

9 We respectfully dissent. We agree with the majority that Respondent's conduct  
10 was knowing; that the hearing officer erred by finding an absence of any selfish motive  
11 and that the hearing officer erred by considering the possible effects of discipline in this  
12 matter on Respondent's other licenses. We also agree that diversion is inappropriate in  
13 this case and that Respondent's conduct merits at least a censure. Our disagreement with  
14 the majority's decision is that we do not think we have subject matter jurisdiction.  
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16 The majority analyzes this case as a disciplinary matter filed pursuant to Supreme  
17 Court Rule 57. That was the traditional approach to unauthorized practice of law cases.  
18 As in this case, it limited the sanctions available to censure regardless of how serious the  
19 misconduct. *See, e.g., Mothershed SB-03-0109-D (2003)*. The Supreme Court addressed  
20 that problem in 2003 by amending its Rules to specifically cover the unauthorized  
21 practice of law. Supreme Court Rule 31 now defines the terms "Practice of Law" and  
22 "Unauthorized Practice of Law" and contains various exemptions which allow non-  
23 lawyers to appear and practice in various limited contexts, none of which are relevant in  
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1 this case. Respondent admits that her conduct leading up to and during the mediation  
2 constituted the unauthorized practice of law.

3 Supreme Court Rule 46 defines the scope of jurisdiction in discipline matters. It  
4 states that a “Non-Member,” which is defined to include a person licensed in another  
5 State who engages in the practice of law in Arizona, “submits himself or herself to the  
6 disciplinary and disability jurisdiction of this court in accordance with these rules.” The  
7 majority relies on that provision to support jurisdiction over this action as a formal  
8 disciplinary proceeding pursuant to Rule 57. As noted, that was the traditional approach  
9 to handling unauthorized practice of law proceedings prior to the 2003 amendments.

10 However, Supreme Court Rules 75 through 80 now provide specific procedures to  
11 be followed in cases involving the alleged unauthorized practice of law. Rule 75(b)(16)  
12 defines an “unauthorized practice of law proceeding” as “any action involving a  
13 respondent pursuant to the rules relating to the unauthorized practice of law.” That is any  
14 proceeding brought, pursuant to Rule 31 which forms the basis for the underlying  
15 Complaint in this case. The term “Respondent” is defined to include “any person subject  
16 to the jurisdiction of the court against whom a charge is received for violation of these  
17 rules.” Sup. Ct. Rule 75(b)(12). That definition ties back to Rule 46 and would include  
18 the Respondent in this case.

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21 Supreme Rule 79 provides that if the unauthorized practice of law matter proceeds  
22 to the formal complaint stage, the “proceedings shall be instituted by unauthorized  
23 practice of law counsel [bar counsel] filing . . . a complaint with the clerk of the superior  
24 court.” Sup. Ct. R. 79(a) (emphasis added). The Rule further provides that the matter is  
25 to be tried in Superior Court which has the power to issue injunctions, order restitution  
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1 and, if necessary, hold the respondent in civil contempt for noncompliance with its  
2 orders. *See* Rule 77(b). Rule 76 also parallels the provisions of Rule 53(d) and (f)  
3 applicable in the discipline of attorneys licensed in Arizona and provides that failing to  
4 provide information to Bar Counsel and/or evading service in an unauthorized practice of  
5 law proceeding serves as a separate basis for sanctions.

6 Any appeal from a Superior Court order issued in an unauthorized practice of law  
7 proceeding is taken to the Court of Appeals and ultimately to the Supreme Court. Neither  
8 the hearing officer nor the commission plays any role in this process.

9 The majority reasons that notwithstanding the mandatory language of Supreme  
10 Court Rule 79(a), the Bar has the discretion to prosecute an unauthorized practice of law  
11 case in either Superior Court pursuant to Rule 79(a) or at its option, through the  
12 disciplinary process, pursuant to Rule 57. That analysis ignores the language of Rule 78  
13 which provides:  
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15 An authorized practice of law proceeding commences upon  
16 receipt by the state bar of a charge against a respondent.  
17 An authorized practice of law proceeding shall be disposed  
18 of by dismissal or by the filing of a complaint in superior  
19 court seeking imposition of one or more sanctions as  
20 provided in these rules.

21 Supreme Court 78(a).

22 The quoted language is clear and unambiguous. Once the State Bar received the  
23 buyers' charge against Respondent in this case, an unauthorized practice of law  
24 proceeding within the meaning of Superior Court Rules 75(b)(16), 78 and 79, had  
25 "commenced." At that point, the State Bar did not have the discretion to file a  
26 disciplinary action pursuant to Rule 57 as it did in this case. Supreme Court Rule 78(a)  
limited its options to two: "Dismissal or the filing of a complaint in Superior Court . . . ."

1 The majority reasons that Lawyers licensed in other jurisdictions who engage in  
2 the unauthorized practice of law will be subject to reciprocal discipline in the  
3 jurisdictions where they are licensed. Thus, although the maximum sanction available in  
4 a Rule 57 disciplinary action is censure, the disciplined lawyers may ultimately receive a  
5 greater sanction from the jurisdiction in which they are licensed. In contrast, non-lawyers  
6 are not subject to reciprocal discipline, although those who have other professional  
7 licenses may be subject to subsequent discipline. But either way, the sanction imposed in  
8 Arizona and ultimately reviewed by the Arizona Supreme Court for conduct which  
9 violates the Supreme Court's rules should not depend on whether it is possible that  
10 another jurisdiction may some day impose harsher sanctions based on the same conduct.  
11 As we learned through experience gained before the Court adopted the unauthorized  
12 practice of law rules in 2003, such a system does not protect the citizens of this State  
13 from repeat offenders and does not fulfill the need for notice and general deterrence.  
14 Equally important, it distinguishes among offenders and treats them differently based on  
15 their foreign licensing status, rather than based on their degree of culpability and the  
16 actual or potential harm they caused.

17  
18 Given the facts of this case, we do not think the State Bar had the power to file a  
19 disciplinary complaint pursuant to Rule 57. We do not think the hearing officer had the  
20 power to hold a hearing or issue a recommendation and we do not think this commission  
21 has the power to review that recommendation. We would, therefore, dismiss this matter  
22 for lack of subject matter jurisdiction leaving the State Bar free to either dismiss the  
23 unauthorized practice of law proceeding or file a complaint in Superior Court pursuant to  
24 Supreme Court Rules 78 and 79.  
25  
26

Original filed with the Disciplinary Clerk  
this 12<sup>th</sup> day of April, 2006, to:

Copy of the foregoing mailed  
this 12<sup>th</sup> day of April, 2006, to

Richard N. Goldsmith  
Hearing Officer 7I  
*Lewis and Roca, L.L.P.*  
40 North Central Avenue  
Phoenix, AZ 85004-4429

Mark I. Harrison  
Sara Southern  
Respondent's Counsel  
*Osborn Maledon, P.A.*  
2929 North Central Avenue, Suite 2100  
Phoenix, AZ 85012

Denise K. Tomaiko  
Bar Counsel  
State Bar of Arizona  
4201 N. 24<sup>th</sup> Street, Suite 200  
Phoenix, AZ 85016-6288

by: *K. Weigand*

/mps