

1 Memorandum), along with the sanctions contained in the Tender and Joint
2 Memorandum.

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4 The Disciplinary Commission filed a report on February 20, 2007,
5 rejecting the Hearing Officer's recommendation outlined in the October 23, 2007
6 report. The State Bar and the Respondent, through his counsel, J. Scott Rhodes
7 have filed an amended Tender of Admissions and Agreement for Discipline by
8 Consent (Amended Tender) and an Amended Joint Memorandum in Support of
9 Agreement for Discipline by Consent (Amended Joint Memorandum)
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11 FINDINGS OF FACT

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13 **The facts listed below are those set forth in the Amended Tender and**
14 **are deemed admitted.**

15 **GENERAL ALLEGATIONS**

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17 1. At all times relevant hereto, Respondent was an attorney licensed to
18 practice law in the State of Arizona, having been admitted to practice in Arizona
19 on October 26, 1991.

20 **COUNT ONE (File No. 05-2003)**

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22 2. In or about 2002, Respondent was the defendant in a legal
malpractice action against him, the first of his career. Attorneys Sid Horwitz and
Richard Gramlich were involved in representation of the plaintiff in that action.

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24 3. The legal malpractice action settled on approximately February 10,
25 2004.

1 4. Shortly thereafter, Respondent under an assumed name implying that
2 he was a prior client, engaged in an exchange of six emails with Mr. Horwitz and
3 Mr. Gramlich. At the time, Mr. Horwitz and Mr. Gramlich were unaware that
4 Respondent was the sender of the emails.

5 5. Some of the emails threatened bodily harm to Mr. Horwitz and Mr.
6 Gramlich, and made reference to their family members and home addresses. The
7 emails further contained profane and abusive language, and some contained slurs.

8 6. The emails caused distress to Mr. Horwitz and Mr. Gramlich, and
9 their families. The distress was, in part, due to the fact that the sender's identity
10 was unknown to the recipients

11 7. Mr. Howritz and/or Mr. Gramlich contacted the police about the
12 emails. After an investigation, it was determined that Respondent sent the emails.
13 Respondent was subsequently prosecuted for his actions.

14 8. This matter came to the attention of the State Bar by way of
15 Respondent's self-report of his pending plea agreement and conviction of one
16 count of Harassment, a class one misdemeanor, occurring on or about October 4,
17 2004 in CR 2005-014914-001DT, in Maricopa County Superior Court related to
18 the incident.

19 9. On or about November 16, 2005, the court accepted Respondent's
20 guilty plea to one count of Harassment, a class one misdemeanor. On the same
21 date, the court sentenced Respondent to 10 days of unsupervised probation and a
22 \$2,500.00 fine. Pursuant to the plea agreement, Respondent was not required to
23 serve his probation provided that he paid his fine. Respondent paid his fine
24 immediately after the Court's acceptance of the plea agreement; therefore, he was
25 not required to serve the 10-day probation period. A copy of the plea agreement,

1 and the sentencing transcript are attached to the Amended Tender and are hereby
2 accepted as part of the record.

3 **CONCLUSIONS OF LAW**

4 10. The facts as deemed admitted above establish that Respondent
5 violated one or more of the Rules of Professional Conduct as follows:
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7 COUNT ONE (File No. 05-2003) Respondent's conduct violated Rule 42,
8 Ariz.R.S.Ct., specifically, ER 8.4(b), and Rule 41(g), Ariz.R.S.Ct.

9 **ABA STANDARDS**

10 11. The *Standards* are designed to promote consistency in the imposition
11 of sanctions by identifying relevant factors that courts should consider and then
12 applying these factors to situations where lawyers have engaged in various types
13 of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance
14 with respect to an appropriate sanction in this matter. The court and commission
15 consider the *Standards* a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157,
16 791 P.2d 1037, 1040 (1990); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276
17 (1994). In determining an appropriate sanction, both the court and the
18 commission consider the duty violated, the lawyer's mental state, the actual or
19 potential injury caused by the misconduct and the existence of aggravating and
20 mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA
21 *Standard* 3.0.
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1 12. In this matter, *Standard 5.1*, applicable to Failure to Maintain
2 Personal Integrity, is the most applicable section. Pursuant to *Standard 5.12*
3 provides, in part:
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5 “Suspension is generally appropriate when a lawyer knowingly engages in
6 criminal conduct....that seriously adversely reflects on the lawyer’s fitness
7 to practice.”

8 The Comments to the *Standards*, as well as case law, clearly indicate that not all
9 criminal acts should result in a lawyer’s suspension. However, after reviewing the
10 matter, and in reliance on the Disciplinary Commission’s February 20, 2007
11 report in this matter, the parties agree and this Hearing Officer recommends that
12 suspension is the presumptive sanction. In deciding what sanction to impose, the
13 following aggravating and mitigating circumstances should be considered:
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15 **Aggravating Factors:**

16 Standard 9.22(a) (prior disciplinary offenses): While this matter was pending,
17 Respondent received an Informal Reprimand and Probation in File No. 06-1075,
18 by order dated February 23, 2007 for violation of ER 7.3. The probation in that
19 matter requires Respondent to undergo a LOMAP assessment and enter into a
20 LOMAP probation contract based on that assessment. The parties believe, and
21 this Hearing Officer finds that significant weight should not be given to the
22 “prior” disciplinary offense as the underlying violations (which were referred to
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1 the Bar by Robert Clark of Phillips & Associates) are substantially different from
2 those in the present case, and because the misconduct occurred after this matter.

3 Standard 9.22(i) (substantial experience in the practice of law): Respondent was
4 admitted to practice law in the State of Arizona in 1991.

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6 **Mitigating Factors:**

7 Standard 9.32(c) (personal or emotional problems): Respondent asserts that
8 during the time period in question Respondent was in a period of great personal
9 stress resulting from the malpractice action against him. Respondent was
10 evaluated by Dr. H. Daniel Blackwood. Dr. Blackwood's consultation record is
11 attached to the Amended Tender as Exhibit "A" and is incorporated by reference.
12 In his report, Dr. Blackwood concludes that Respondent's actions in this matter
13 were out of character for him and "most probably represent an isolated incident
14 that will not be repeated in the future."
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17 Standard 9.32(e) (full and free disclosure to disciplinary board or cooperative
18 attitude toward proceedings): Respondent was forthcoming and cooperative
19 throughout the investigative stage of these proceedings and continued to be
20 cooperative in negotiating a formal resolution. Respondent's agreement to a
21 criminal plea is also evidence of cooperation. Respondent's self-report to the Bar
22 is not the factual basis for this mitigating factor. The parties agree with the
23 Disciplinary Commission and this Hearing Officer finds that Respondent's self-
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1 report was a requirement of his criminal plea; however, the parties also agree and
2 the Hearing Officer finds that Respondent has been cooperative with the Bar and
3 has demonstrated a sincere desire to accept appropriate consequences for his
4 conduct.

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6 Standard 9.32(g) (character or reputation): Respondent has submitted letters from
7 several individuals attesting to his good character. Those letters are attached to
8 the Amended Tender as Exhibit "B" and are incorporated by reference.

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10 Standard 9.32(k) (imposition of other penalties or sanctions): As described in the
11 Amended Tender, Respondent pleaded guilty to a criminal misdemeanor and was
12 required to pay a fine of \$2,500.00.

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14 13. In evaluating the aggravating and mitigating factors, the parties
15 agree and the Hearing Officer recommends that the relevant factors do not justify
16 varying from the presumptive sanction of a suspension.

17 **PROPORTIONALITY REVIEW**

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19 14. To have an effective system of professional sanctions, there must be
20 internal consistency, and it is appropriate to examine sanctions imposed in cases
21 that are factually similar. In re Shannon, 179 Ariz. 52, 71, 876 P.2d 548, 567
22 (1994), (quoting In re Wines, 135 Ariz. 203, 207 (1983)). However, the
23 discipline in each case must be tailored to the individual case, as neither
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1 perfection nor absolute uniformity can be achieved. Matter of Riley, 142 Ariz.
2 604, 615 (1984).

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4 15. In terms of proportionality, there are several cases that are
5 instructive. The parties note at the outset that proportionality cases for criminal
6 misconduct vary widely depending on the very specific facts of the case, varying
7 from censure to disbarment.

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9 16. There does not appear to a prior case involving a misdemeanor
10 conviction for harassment. There are other cases in which lawyers were
11 disciplined for criminal misconduct resulting in misdemeanor convictions. The
12 most relevant case in proportionality is *In re Sodikoff* (04-1979, 6/15/2006).
13 There, respondent was held in direct and indirect criminal contempt (a Class 2
14 misdemeanor) for verbally and physically assaulting opposing counsel in a
15 divorce case. The Disciplinary Commission reduced the Hearing Officer's
16 recommended 90-day suspension to a 30-day suspension. In this case, the
17 Commission has found that Respondent's conduct (which arose out of a case in
18 which he was a party, not a lawyer of record) was related to the practice of law.
19 Sodikoff's conduct was clearly related to the practice of law (indeed, the assault
20 occurred outside the courthouse). Respondent's conduct did not involve physical
21 assault. Respondent, like Sodikoff, was guilty of a misdemeanor. The Hearing
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1 Officer recommends that that this case should result in a sanction that is no more
2 severe than the sanction imposed in *Sodikoff*.

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4 17. Also instructive is *In re Medansky*, SB 04-0120-D (2004), in which
5 the lawyer verbally threatened to physically harm the opposing party. The lawyer
6 was suspended for 30 days and placed on probation for violation of ER 8.4(d) and
7 Rule 41(g), Ariz.R.Sup.Ct. There was no criminal conviction in that matter, and
8 the lawyer had prior discipline for similar misconduct.
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10 18. Based on the *Standards* and case law, the Hearing Officer
11 recommends that a short-term suspension and probation are within the range of
12 appropriate sanction in this case and will serve the purposes of lawyer discipline.
13 Dr. Blackwood opines that the misconduct is unlikely to repeat. The character
14 letters submitted on Respondent's behalf also state that Respondent's conduct
15 was aberrational. With the MAP probation requirement, the Hearing Officer
16 believes that a short-term suspension and probation is sufficient to protect the
17 public. The sanction will serve to protect the public, instill the public's
18 confidence, deter other lawyers from similar misconduct, and maintain the
19 integrity of the bar.
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23 RECOMMENDATION

24 19. The purpose of lawyer discipline is not to punish the lawyer, but to
25 protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182,

1 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to
2 protect the public, the profession and the administration of justice. *In re Neville*,
3 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public
4 confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d
5 352, 361 (1994).
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7 20. In imposing discipline, it is appropriate to consider the facts of the
8 case, the American Bar Association's *Standards for Imposing Lawyer Sanctions*
9 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
10 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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12 21. Upon consideration of the facts, application of the *Standards*,
13 including aggravating and mitigating factors, and a proportionality analysis, this
14 Hearing Officer recommends the following:
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16 a. Respondent shall be suspended from the practice of law for a period of
17 thirty (30) days;
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19 b. Upon reinstatement, Respondent shall be placed on probation for a
20 period of one year, under the following terms and conditions:
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22 c. Respondent shall contact the director of the State Bar's Member
23 Assistance Program (MAP) within 30 days of reinstatement to schedule a MAP
24 assessment. Respondent shall submit to a MAP assessment. The director of MAP
25 shall develop a probation contract if he determines that the results of the

1 assessment so indicate, and its terms shall be incorporated herein by reference.

2 The probation period will begin to run at the time of the reinstatement, and will
3 conclude one year from the date that all parties have signed the probation
4 contract. Should the director of MAP conclude that no MAP probation terms are
5 necessary, probation shall conclude one year from reinstatement.
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7 d. Respondent shall refrain from engaging in any conduct that would
8 violate the Rules of Professional Conduct or other rules of the Supreme Court of
9 Arizona.
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11 3. In the event that Respondent fails to comply with any of the foregoing
12 probation terms, and information thereof is received by the State Bar of Arizona,
13 Bar Counsel shall file a Notice of Noncompliance with the imposing entity,
14 pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct.. The imposing entity may refer the
15 matter to a hearing officer to conduct a hearing at the earliest practicable date, but
16 in no event later than 30 days after receipt of notice, to determine whether a term
17 of probation has been breached and, if so, to recommend appropriate action and
18 response. If there is an allegation that Respondent failed to comply with any of
19 the foregoing terms, the burden of proof shall be on the State Bar of Arizona to
20 prove noncompliance by clear and convincing evidence.
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24 22. Respondent shall pay all costs incurred by the State Bar in bringing
25 these disciplinary proceedings. In addition, Respondent shall pay all costs

1 incurred by the Disciplinary Commission, the Supreme Court and the
2 Disciplinary Clerk's Office in this matter. An Itemized Statement of Costs and
3 Expenses is attached to the Amended Tender as Exhibit "C," and incorporated by
4 reference.
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6 DATED this 11th day of June, 2007.

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8 Yvonne R. Hunter /cs
9 Yvonne R. Hunter
10 Hearing Officer 8P
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1 Original filed with the Disciplinary Clerk
2 this 11th day of June, 2007.

3 Copy of the foregoing was mailed
4 this 11th day of June, 2007, to:

5 J. Scott Rhodes
6 Jennings Strouss & Salmon, PLC
7 201 East Washington Street, 11th Floor
8 Phoenix, Arizona 85004-2385
9 Respondent's Counsel

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11 Senior Bar Counsel
12 State Bar of Arizona
13 4201 North 24th Street, Suite 200
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15 Lawyer Regulation Records Manager
16 State Bar of Arizona
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18 Phoenix, Arizona 85016-6288

19 by: Christina A. [Signature]
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