SUPREME COURT OF ARIZONA

In the Matter of Members of the State Bar of Arizona	)	Arizona Supreme Court No. SB-14-0004-AP
CHARLES E. MAXWELL, Attorney No. 9763,	)	Office of the Presiding Disciplinary Judge No. PDJ20129112
and	)	
BRIAN W. MORGAN, Attorney No. 19913,	)	
Respondents.	)	**FILED 5/28/2014**

O R D E R

The Court has received Respondent Maxwell's "Opening Brief" on appeal, the "State Bar of Arizona's/Appellant's Consolidated Opening/Answering Brief as to Respondent/Appellant/Cross-Appellee Charles E. Maxwell," and "Respondent Maxwell's Reply Brief and Answering Brief in Cross-Appeal." The Court also has received the "State Bar of Arizona's/Appellant's Opening Brief as to Respondent/Appellee Brian Morgan" and "Respondent Morgan's Answering Brief."

Upon consideration of the briefs, the record, and the "Report and Order Imposing Sanctions" filed by the Hearing Panel,

IT IS ORDERED that the decision and sanction of the Hearing Panel are affirmed.

DATED this 28th day of May, 2014.

REBECCA WHITE BERCH
Chief Justice

TO:
J Scott Rhodes
Kerry A Hodges
Stacy L Shuman
Laura L Hopkins
Sandra Montoya
Maret Vessella
Don Lewis
Beth Stephenson
Mary Pieper
Lexis Nexis

BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **CHARLES E. MAXWELL,** **Bar No. 009763,** **and** **BRIAN MORGAN** **Bar No. 019913,** Respondents.	**PDJ-2012-9112** **REPORT AND ORDER IMPOSING SANCTIONS** [State Bar Nos. 11-1695 and 11-1712] **FILED JULY 19, 2013**

On May 16 and 17, 2013, the Hearing Panel ("Panel") composed of James D. Dixon, II, a public member, Mark S. Sifferman, an attorney member, and the Acting Presiding Disciplinary Judge, Judge David R. Cole (retired) ("APDJ") held a two-day hearing pursuant to Rule 58(j), Ariz. R. Sup. Ct. Stacy L. Shuman appeared on behalf of the State Bar of Arizona ("State Bar"). J. Scott Rhodes and Kerry A. Hodges of Jennings, Strouss & Salmon, PLC appeared on behalf of Respondents Charles E. Maxwell ("Mr. Maxwell") and Brian Morgan ("Mr. Morgan"). Rule 615 of the Arizona Rules of Evidence, the witness exclusionary rule, was invoked.[1] In addition, the Panel carefully considered the admitted exhibits, the parties' Joint Prehearing Statement and their Proposed Findings of Fact and Conclusions of Law.

[1] Consideration was given to sworn testimony of Charles E. Maxwell, Brian Morgan, Judge Raymond Lee (retired), Arika Hover, Warren William Nikolaus, J. Roger Wood, John Buric and Larry Heywood.

[2] The evidence was not clear whether the homeowner placed a deed of trust on the property

The Panel now issues the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz. R. Sup. Ct.

I. SANCTION IMPOSED:

MR. MAXWELL REPRIMANDED AND PAYMENT OF COSTS OF THESE DISCIPLINARY PROCEEDINGS IMPOSED.

II. BACKGROUND AND PROCEDURAL HISTORY

A Probable Cause Order was filed on April 16, 2012. The State Bar of Arizona ("State Bar") filed its complaint on December 18, 2012. On December 20, 2012, the complaint was served on Respondents Mr. Maxwell and Mr. Morgan by certified, delivery restricted mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a)(2), Ariz. R. Sup. Ct. Mr. Maxwell and Mr. Morgan jointly filed their Answer on January 3, 2013. The Complaint alleged a total of nineteen (19) violations of the Arizona Rules of Professional Conduct, specifically ER 3.3(a)(1) (knowingly making false statements of material fact or law), ER 3.3(d) (knowingly failing to disclose materials facts in an ex parte proceedings), ER 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and ER 8.4(d) (conduct prejudicial to the administration of justice). Whether the Complaint alleges a violation of ER 5.1(c)(2) (lawyers with supervisory authority responsible for other lawyers) is discussed *infra*.

On February 7, 2013, the Initial Case Management Conference was held and the matter was set for a two-day hearing. The parties filed a Joint Prehearing Statement on May 13, 2013. The parties filed their individual Proposed Findings of Fact and Conclusions of Law on June 19, 2013.

The State Bar argues that Mr. Maxwell and Mr. Morgan violated all of the cited ERs and that suspension is an appropriate sanction. Mr. Maxwell and Mr.

Morgan argue they did not violate ERs 3.3(a)(1), 3.3(d), 5.1(c)(2), and 8.4(c) because, among other things, their conduct was based upon a good faith belief that the law allowed for the course of action they undertook. Moreover, Mr. Maxwell and Mr. Morgan argue their conduct was not prejudicial to the administration of justice in violation of ER 8.4(d); rather, their conduct was consistent with a reasonable attorney's conduct when advocating for a position not directly prohibited by law.

III. FINDINGS OF FACT

The Panel hereby adopts and incorporates the stipulated facts of this case as detailed in the Joint Prehearing Statement. At all relevant times, Respondent Charles E. Maxwell ("Mr. Maxwell") was a lawyer licensed to practice law in the state of Arizona, having first been admitted to practice in Arizona on October 20, 1984. [Joint Prehearing Statement, page 2, lines 2-4.] At all relevant times, Respondent Brian Morgan ("Mr. Morgan") was a lawyer licensed to practice law in the state of Arizona, having first been admitted to practice in Arizona on October 25, 1999. [Joint Prehearing Statement, page 2, lines 5-7.]

Mr. Maxwell and Mr. Morgan are the managing partners of the law firm Maxwell and Morgan, P.L.C. ("the Firm"). [Joint Prehearing Statement, page 2, lines 9-12.] During the relevant times, attorneys Arika Hover and William J. Nikolaus were employees of the Firm and acted at the direction of Mr. Maxwell and Mr. Morgan.

This matter arose as a result of two experienced attorneys, with a combined forty-one (41) years of practice in Homeowner Association law, pursuing a cause of action under an untested theory of law. The parties agree that the issues central to

this disciplinary action involve Mr. Maxwell and Mr. Morgan's legal argument concerning lien priority between homeowner association assessment liens and deeds of trust as well as the manner in which they obtained a default judgment foreclosing the deed of trust in question. In particular, Mr. Maxwell and Mr. Morgan contended that the deed of trust in question did not have priority over the HOA lien under A.R.S. § 33-1807(B)(2) because it was not the type of first deed of trust covered by that statute and because it was not recorded until *after* the HOA lien arose.

A. The HOA Assessment Lien and Deeds of Trust.

Cypress on Sunland Homeowners Association ("the HOA") was one of the Firm's clients. [Joint Prehearing Statement, page 2, lines 9.12.] The Declaration of Covenants, Conditions, Restrictions and Easements ("CC&Rs") for the Cypress on Sunland subdivision was executed and recorded on January 6, 2003. [Joint Prehearing Statement, page 2, lines 13-16; Exhibit 1.] Those CC&Rs provide for a lien against a particular property when a homeowner becomes delinquent on HOA assessments. [Joint Prehearing Statement, page 2, line 17; page 3, line 3; Exhibit 1.] In this case the homeowner became delinquent in paying HOA assessments in September 2005. As such, it was the position of the HOA and the Firm that under the CC&Rs the HOA lien arose in September 2005, which is the date Mr. Maxwell and Mr. Morgan relied upon in asserting the HOA lien was superior to later recorded deeds of trust.

The homeowner purchased the property in question in June 2004. On June 2, 2006, two years after the purchase of the property, and eight months after the HOA assessment became delinquent, the homeowner executed a deed of trust

against the property in the amount of $190,000 ("First Deed of Trust") and another deed of trust for $23,800 ("Second Deed of Trust").[2] [Joint Prehearing Statement, page 3, lines 4-17.] Both deeds of trust, which were recorded on June 8, 2006, named American Lending Corporation ("ALC") as the beneficiary. [Id.]

ALC assigned the First Deed of Trust to Alliance Bank Corp. ("ABC") on June 6, 2006.[3] ABC never recorded the assignment. On June 12, 2006, ABC assigned the First Deed of Trust to HSBC Bank USA ("HSBC"). HSBC recorded the assignment on November 10, 2008, more than two years after the execution of the assignment and more than a year after the filing of the HOA Lien Foreclosure Complaint at issue in this proceeding. [Joint Prehearing Statement, page 4, lines 8-11.]

B. The Lien Foreclosure Complaint and Default Hearing.

On April 9, 2007, Mr. Maxwell prepared and filed a complaint on behalf of the HOA against the homeowner and ALC to foreclose on the HOA lien. Such foreclosure is provided for under A.R.S. § 33-1807(A) and § 7.8(b) of the CC&Rs. Mr. Maxwell testified he obtained and reviewed a litigation guarantee that listed each person and entity holding a recorded interest in the property in question. The evidence was uncontroverted that the homeowner and ALC were the only persons with a recorded interest at the time the complaint was filed. No other parties were named in the Complaint because no other parties were listed in the litigation

[2] The evidence was not clear whether the homeowner placed a deed of trust on the property at the time of its purchase in June 2004, or at any other time prior to June 2, 2006. Respondents assume not, but the evidence does not preclude the possibility that any such deeds of trust, if they existed, were paid off and released with the loans secured by the June 2006 deeds of trust. The material and uncontroverted fact is that no unreleased deed of trust had a recording date prior to the recording date of the First Deed of Trust. [Joint Prehearing Statement, page 3, lines 13 - 14.]

[3] The First Deed of Trust is the only deed of trust at issue; and therefore, the Second Deed of Trust will not be discussed further.

guarantee as having a recorded interest in the property. The Complaint sought a declaration that the HOA assessment lien was prior and superior to any interest or lien of any defendant and requested a judgment foreclosing the interests or liens of the defendants. [Exhibit 3.]

C. The Default Hearing.

Neither the homeowner nor ALC responded to the complaint. A default was entered as to both defendants. [Exhibits 6, 7, 8 and 9.] Mr. Morgan thereafter prepared and caused to be filed a "Motion and Affidavit for Entry of Judgment by Default with Hearing" ("Motion"). [Joint Prehearing Statement, page 5, lines 10-19; Exhibit 10.]

Mr. Morgan testified that the Firm's standard form motion and affidavit were used in this case. The form documents were drafted to cover all types of lien foreclosures. The evidence demonstrated that those forms were not adequately edited in the HOA case to remove the inconsistent and inaccurate assertion that "the relief sought is for money only" and "no other form of relief" was requested. [Exhibits 10.] Despite the use of a poorly adapted form, all the papers related to the default judgment, including the Motion and the lodged "Judgment on Foreclosure," clearly indicated the matter was a foreclosure action, and that the relief sought was for more than "money only." [Joint Prehearing Statement, page 5, lines 17-22; Exhibits 10 and 14.]

During weekly calendaring meetings, the Firm assigned junior attorneys to work on various cases. Attorney Arika Hover was assigned to handle the default hearing. The testimony indicated that neither Mr. Maxwell nor Mr. Morgan spoke to Ms. Hover directly about the case, told her that the matter was at all unusual, or

otherwise discussed the matter with her before she appeared before Commissioner McCoy. Although the State Bar investigated Ms. Hover for an ethical violation concerning her statements to the court in the default hearing, its investigation was dismissed for lack of probable cause. [Transcript, May 16, 2013, page 148, lines 10-25; page 245, lines 2-25.]

A recording of the default hearing was admitted in evidence. The default hearing proceeded in the typical fashion before Commissioner McCoy with Attorney Hover affirming the relevant procedural facts and asking the court if it had any questions. The default judgment presented to and signed by Commissioner McCoy stated the HOA lien was "adjudged to be a first lien upon the Property and is prior and superior to any right, title, interest, lien, equity or estate of the Defendants . . .[were] foreclosed," and a special execution was issued commanding the county sheriff to sell the property. [Joint Prehearing Statement, page 6, lines 11-23; Exhibit 14.]

D. Post Default Inquiry

After the entry of the Default Judgment, a number of legal actions occurred involving the property. Those actions are detailed in the Joint Prehearing Statement. In short, two different persons obtained deeds to the property in question because both a sheriff's sale under the HOA's default judgment and a trustee's sale under the First Deed of Trust were conducted. Mr. Jacoby, the successor-in-interest to the purchaser at the sheriff's sale, initiated a quiet title action ("Quiet Title Action") in Maricopa County Superior Court. The court proceedings surrounding the Quiet Title Action did not name Respondents, the HOA, the original property owner, or ALC as parties. The successor-in-interest to the

trustee's sale purchaser and his title insurance company intervened ("Intervenors") in the Quiet Title Action and sought to set aside the default judgment entered by Commissioner McCoy. The Intervenors did not bring in the HOA or Mr. Maxwell and Mr. Morgan as parties. The Intervenors argued that the HOA assessment lien did not have priority over the first deed of trust by virtue of A.R.S. § 33-1807(B)(2) which states:

> "A lien for assessments, for charges for late payment of those assessments, for reasonable collection costs and for reasonable attorney fees and costs incurred with respect to those assessments under this section is prior to all other liens, interest and encumbrances on a unit except:
>
> . . . . . a recorded first deed of trust on the unit."

At the conclusion of the Quiet Title Action, Judge Burke set aside the default judgment on the basis that Mr. Maxwell and Mr. Morgan had obtained the default judgment through a fraud upon the court by asserting the HOA assessment lien was superior to the First Deed of Trust.

The Quiet Title Action and the original default judgment ended up before Commissioner Kongable. At that time, Mr. Maxwell and Mr. Morgan were able to explain, for the first time, their legal argument that the HOA's statutory and/or contractual assessment liens had priority over the First Deed of Trust under the CC&Rs and A.R.S. § 33-1807(B)(2) because the original property owner's delinquency on his HOA assessments arose before the First Deed of Trust was recorded.

During a December 15, 2009 hearing before Commissioner Kongable[4], Mr. Maxwell made the following argument regarding A.R.S. § 33-1807:

> This is a new statute, You Honor. It's only been around for a few years. I am on the legislative action committee, I have been involved . . . with this legislation since the inception . . . . There is no legislative history that establishes 33-1807. There is no canon of statutory construction regarding 33-1807, and there is no hornbook . . . [T]here is only one [AV] rated firm in the entire state of Arizona that limits its practice to homeowner association law and litigation, and that's Maxwell & Morgan . . .[T]hat's the difference between our firm and those that continue to attack us.

[Joint Prehearing Statement, page 12; Exhibit 52, Bates 000367-000368.]

Commissioner Kongable issued an order affirming the default judgment and a separate order awarding sanctions in favor of the HOA against the Intervenors in the Quiet Title Action. The Intervenors then appealed to the Arizona Court of Appeals. The Court of Appeals, in *Cypress on Sunland Homeowner's Association v. Orlandini, II, et al.*, 227 Ariz. 288, 257 P.3d 1168 (2011), vacated Commissioner Kongable's order reinstating the default judgment. The Court of Appeals held that (1) Mr. Maxwell and Mr. Morgan's conduct in obtaining the default judgment constituted a fraud upon the trial court, and (2) the Firm's interpretation of A.R.S. § 33-1807 and the CC&Rs was "not supportable on any legitimate ground." *Cypress on Sunland*, 227 Ariz. at 299, 257 P.3d at 1179. The Court of Appeals imposed sanctions upon the Firm. The court also made a referral to the State Bar of Arizona resulting in the proceedings before this Panel.

Mr. Maxwell and Mr. Morgan testified before this Panel and explained their thought process that led them to believe that, under the CC&Rs and A.R.S. § 33-

[4] The Complaint mistakenly alleged that this hearing was before Commissioner McCoy. [Complaint, ¶¶61, 71]. The Joint Prehearing Statement correctly reflected that it was heard by Commissioner Kongable.

1807, the HOA assessment lien was senior to the First Deed of Trust. The State Bar did little to challenge Respondents' explanation of what they thought the law was at the time. Moreover, the Panel heard testimony from other attorneys who stated that they also thought Respondents' argument was justifiable and legitimate at the time the argument was made. The State Bar did not contradict nor controvert this testimony at all.

IV. CONCLUSIONS OF LAW AND DISCUSSION OF DECISION

1. The Panel finds clear and convincing evidence that Mr. Maxwell violated ERs 3.3(a)(1) and 8.4(c) as alleged in paragraphs 61 and 71 of the Complaint.

2. The Panel finds that there is not clear and convincing evidence that Mr. Maxwell or Mr. Morgan violated ER 3.3(a)(1) as alleged in paragraphs 57-60 and 62 or ER 8.4(c) as alleged in paragraphs 67-70 and 72.

3. The Panel further finds there is not clear and convincing evidence that Mr. Maxwell and Mr. Morgan violated ERs 3.3(d) or 8.4(d).

4. The State Bar's Complaint refers to ER 5.1(c)(2) which states:

> A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: .... (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Complaint, however, does not specifically allege that either Mr. Maxwell or Mr. Morgan violated this rule, much less how they violated it. Although the Complaint mentions the conduct of two associates, there is no allegation that any action of either associate violated any particular ethical rule. The failure to specifically pled a

violation of ER 5.1(c)(2) in the Complaint precludes a finding that Mr. Maxwell and Mr. Morgan violated the Rule. *In re Owens*, 182 Ariz. 121, 123 - 124, 897 P.2d 1284, 1286 - 1287 (1995); *In re Myers*, 146 Ariz. 558, 562, 795 P.2d 201, 205 (1990). Moreover, ER 5.1(c)(2), by its very terms, requires knowledge of the subordinate's misconduct. There was not clear and convincing evidence that either Mr. Maxwell or Mr. Morgan knew of any unethical conduct by the associates.

ER 3.3(a)(1), 3.3(D) and 8.4(C) - ¶¶ 57-60, 62-70, 72

Although Mr. Maxwell and Mr. Morgan were sanctioned by the Court of Appeals for making an argument that was "not supportable on any legitimate ground," that decision to sanction alone does not compel the Panel to find an ethical violation. In attorney discipline matters, although a panel may consider prior judicial findings, it independently reviews those findings and makes its own findings based upon the evidence presented to the panel. *Matter of Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993). A disciplinary proceeding may involve a standard of conduct, mental state and level of proof different from what applied in the prior judicial proceeding. Here, a violation of ER 3.3(a), 3.3(d) or 8.4(c) requires clear and convincing evidence of a knowing violation. Our Supreme Court applies an objective standard in considering whether a matter was brought frivolously and uses a subjective standard to determine the lawyer's motives and whether the lawyer acted in good faith. *Matter of Alexander*, 659 Ariz. Adv. Rep. 19, ___ P.3d ___ (filed May 2, 2013); *Levine*, supra, at 153.

The Panel further determines that Mr. Maxwell and Mr. Morgan's conduct did not rise to the level of a violation of ER 3.3(a)(1), 3.3(d) or 8.4(c), as alleged in paragraphs 57-60, 62-70, and 72, because the State Bar did not present clear and

convincing evidence that Mr. Maxwell and Mr. Morgan knowingly made false statements of law or knowingly failed to inform a tribunal of material facts. Notably, the State Bar completely failed to contradict or controvert the testimony of Respondents and other attorneys regarding what they believed the law to be at the time of the underlying litigation. The Panel finds there was no existing precedent precluding Respondents from pursuing the legal position that the First Deed of Trust by ALC did not qualify as a first deed of trust pursuant to A.R.S. § 33-1807(B)(2), allowing the HOA to pursue foreclosure on that First Deed of Trust, as well as the homeowner's interest.

ER 8.4(d) - ¶ 73

This rule requires a negligent state of mind. The Panel determined Mr. Maxwell and Mr. Morgan's conduct did not constitute a violation of ER 8.4(d) because there is not clear and convincing evidence that they negligently pursued the cause of action on behalf of the HOA in a way that prejudiced to the administration of justice.

ER 3.3(A)(1) and 8.4(c) - ¶¶ 61 and 71

Contrary to Mr. Maxwell's statement to Commissioner Kongable at the December 15, 2009 hearing, there is (and was) significant legislative history on A.R.S. § 33-1807(B)(2), which directly impacted the legal argument made by Respondents. [Exhibits 59, 60, 75 and 76.] The Panel concludes this matter turns on Mr. Maxwell's failure to conduct research on the legislative history behind A.R.S.§ 33-1807. Mr. Maxwell was asked more than once by State Bar counsel and the Panel to identify when he conducted legal research on the legislative history of § 33-1807. Mr. Maxwell never answered the question; in fact, he never testified

that he had researched and reviewed the existing legislative history. Rather, the record reflects that Mr. Maxwell's attitude regarding his knowledge of § 33-1807 and his attitude that his firm was the power player in homeowner association law led to his making a false statement before Commissioner Kongable regarding the existence of legislative history and misrepresenting what he knew about the existence of legislative history.

Mr. Maxwell never acknowledged that there was legislative history, and he failed to correct his misrepresentation even after Attorney Ramras referred Commissioner Kongable to specific legislative history cited in his briefs and pleadings. [Exhibit 13, Bates 00000371-000372.] Further, when questioned repeatedly by the Panel as to exactly when he researched the legislative history of A.R.S. § 33-1807, Mr. Maxwell, rather than simply answering the question, repeated that he was intimately aware of the law because of his involvement in the various legislative action committees that participated in the drafting and subsequent amending of the statute that there was nothing there – implying there was no legislative history. [Transcript May 17, 2013 pp. 370-375.]

V. SANCTIONS

In considering an appropriate sanction, we review the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction turns on the unique facts and circumstances of each case. *In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993).

Analysis under the ABA *Standards*

Generally, when weighing what sanction to impose, the hearing panel considers the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004). See also *Standard* 3.0.

Although the *Standards* do not account for multiple charges of lawyer misconduct, the sanction imposed should at least be consistent with the sanction for the most serious misconduct that has been found. *Theoretical Framework*, p. 7. Consideration is also given to the degree of harm caused by the misconduct. *Matter of Scholl*, 200 Ariz. 222, 224-225, 25, P.3d 710 (2001).

In this matter, Mr. Maxwell violated duties owed to the public and the legal system. *Standard* 6.0, Violations of Duties Owed to the Legal System is applicable to Mr. Maxwell's violation of ER 3.3(a)(1). *Standard* 6.12 provides that:

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Mr. Maxwell knowingly made a false representation to Commissioner Kongable that there was no legislative history regarding A.R.S. 33-1807. He later admitted that the statement was not accurate. [Transcript, May 17, 2013, p.371.] Such false statements can lead to injury to the parties and the administration of justice.

Standard 5.0, Violations of Duties Owed to the Public, is applicable to Mr Maxwell's violation of ER 8.4(c). *Standard* 5.13 provides that:

> Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

In representing to Commissioner Kongable that there was no legislative history, Mr. Maxwell implied there was no further guidance concerning how A.R.S. § 33-1807 was to be applied or interpreted. As indicated previously, Mr. Maxwell admitted to the Panel that this statement was not accurate. Such a misrepresentation has the potential to cause injury because it affects a tribunal's ability to make an informed assessment of the issue before it.

The Panel determines that suspension is the presumptive sanction and is warranted in this matter because the violation of ER 3.3(a)(1) is the more serious of the two violations. Generally, when imposing sanctions, the more serious the injury, the more serious the sanction should be. *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). After a lawyer's misconduct has been established, the Panel may consider any aggravating and mitigating factors that may be present to aid in determining the appropriate sanction.

***Standard* 9.0, Aggravating and Mitigating Factors**

In attorney discipline proceedings, aggravating factors need only be supported by reasonable evidence. *In re Matter of Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel determined that the evidence supports the existence of the following aggravating factors: 9.22(g) (refusal to acknowledge wrongful nature of misconduct) and 9.22(i) (substantial experience in the practice of law).

Although Mr. Maxwell did not directly refuse to acknowledge the wrongful nature of his conduct, the Panel finds that he failed to appreciate or acknowledge the nature of that conduct. When Mr. Maxwell was asked direct questions by the Panel as to when he actually conducted research regarding the legislative history of A.R.S. § 33-1807, he continued to allow his belief that he had superior knowledge

of the law to permeate his attitude concerning the seriousness of having made a false statement relating to the existence of relevant legislative history.

Moreover, Mr. Maxwell testified that he has twenty-nine (29) years of experience practicing HOA law and that his firm is the only AV-rated law firm practicing HOA law in the state of Arizona. The Panel finds that Mr. Maxwell's extensive experience is particularly aggravating not only because of his years of experience, but because of his extensive involvement in the development of A.R.S. § 33-1807 and other legislative enactments involving HOA law. He testified that he was extensively involved in the Community Association Institute, Central Arizona Chapter for over twenty-five (25) years. Specifically, he testified: "I've been its chairperson. I've been a co-chairperson. I have been a member-at-large." One would expect an attorney with such extensive and high-level experience would know the legislative history of the statutes involved in his area of practice.

The Panel determines that the following mitigating factors are present: 9.23(a) (absence of a prior disciplinary record), 9.32(b) (absence of a selfish or dishonest motive), 9.32(d) (timely good faith effort to make restitution or to rectify consequences of misconduct), 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings), and 9.32(k) (imposition of other penalties or sanctions).

Mr. Maxwell has no prior disciplinary record. In addition, as acknowledged by the State Bar, Mr. Maxwell and the Firm maintained a cooperative attitude toward these proceedings. The Panel further finds there is no reasonable evidence supporting a selfish or dishonest motive; rather, Mr. Maxwell zealously pursued a legal argument that was not prohibited by then-existing precedent. However,

"[T]he system cannot function as intended if attorneys, sworn officers of the court, can lie to or mislead judges in the guise of serving their clients." *See Matter of Fee*, 182 Ariz. 597, 601, 898 P.2d 975, 979 (1995). "Zealous advocacy has limits. It clearly does not justify ethical breaches." *Id.* (internal quotations omitted).

The Panel also takes judicial notice of the penalties and sanctions imposed by the Arizona Court of Appeals in its opinion in *Cypress on Sunland*, 227 Ariz. at 299, 257 P.3d at 1179. In the Panel's judgment, the Court of Appeals opinion and resulting sanctions have had a lasting impact upon Mr. Maxwell and the Firm. The public humiliation resulting from the published opinion is a mitigating circumstance. See *In re Walker*, 200 Ariz. 155, 161, ¶ 25, 24 P.3d 602, 608 (2001).

The Panel further acknowledges that Mr. Maxwell and the Firm have made a good faith effort to rectify the consequences of his misconduct. Mr. Maxwell testified that the Firm has changed its practices and procedures for the filing of complaints and default actions in lien foreclosure cases that are factually identical to *Cypress on Sunland*. He identified in detail how those procedures have been altered and what protections are in place to ensure that such allegations of misconduct do not arise again. [Transcript, May 17, 2013, pp. 362-364.]

The Panel finds there is reasonable evidence in support of mitigation justifying a reduction in the sanction to be imposed.

CONCLUSION

The Panel has weighed the facts and circumstances in this matter and has considered the applicable *Standards* including the aggravating and mitigating factors. Therefore,

IT IS ORDERED dismissing the Complaint in its entirety as to Respondent Brian Morgan.

IT IS FURTHER ORDERED that Mr. Maxwell is reprimanded for violating ERs 3.3(a)(1) and 8.4(c) as alleged in paragraphs 61 and 71 of the Complaint, and all other allegations of the Complaint are hereby dismissed.

IT IS FURTHER ORDERED that Mr. Maxwell shall pay the costs associated with these disciplinary proceedings.

DATED this 19th day of July, 2013.

/s/ *David R. Cole*
Hon. David R. Cole (retired)
Acting Presiding Disciplinary Judge

CONCURRING

/s/ *James D. Dixon, II*

James D. Dixon, II, Volunteer Public Member

/s/ *Mark S. Sifferman*

Mark S. Sifferman, Volunteer Attorney Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 19th day of July, 2013.

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