BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA, **GRANT H. GOODMAN,** **Bar No. 009463,** **Respondent.**	**PDJ-2011-9054** **REPORT AND ORDER** [Nos. 10-0598, 10-0703, 10-0742, 10-1930, and 11-1023]

A hearing Panel comprised of John Hall, a public member from Maricopa County, the Honorable Noel Fidel (retired), an attorney member from Maricopa County, and George Riemer, Acting Presiding Disciplinary Judge ("APDJ"), held a hearing in this matter over five days (February 6, 7, 27, and 28, and March 2, 2012) pursuant to Arizona Supreme Court Rule 58(j). Shauna R. Miller appeared on behalf of the State Bar of Arizona ("State Bar") and Grant H. Goodman appeared *pro se*. The Panel has considered the State Bar's charges, Respondent's answer, the testimony presented at the hearing, the admitted exhibits, and the parties' post-hearing briefs. The APDJ and Hearing Panel ("Panel") now issue the following "Report and Order," pursuant to Arizona Supreme Court Rule 58(k).

GENERAL PROCEDURAL BACKGROUND

The State Bar filed a motion seeking the interim suspension of Respondent pursuant to Arizona Supreme Court Rule 61(c)(2) with the Presiding Disciplinary Judge ("PDJ") on June 14, 2011. Respondent filed a response on July 7, 2011. On

July 21, 2011, the PDJ issued an order temporarily suspending Respondent from the practice law and recommending the Arizona Supreme Court approve an order of interim suspension. On August 25, 2011, the Arizona Supreme Court entered an order suspending Respondent from the practice of law until final disposition of all pending proceedings, unless the order was earlier vacated or modified.

The State Bar's six-count complaint against Respondent was filed on September 9, 2011. [1] Respondent was served with the complaint on September 20, 2011. He failed to comply with the deadline for filing his answer (October 26, 2011).

Respondent did, however, file a motion to dismiss the proceedings against him on October 26, 2011. The PDJ denied the motion on October 27, 2011. Respondent filed a notice of appeal on November 7, 2011. The PDJ dismissed the appeal on November 10, 2011, without prejudice, based on the fact that a final report and order had not been filed in Respondent's case. Respondent was advised he could file a notice of appeal within the time permitted by the applicable rules upon enter of the Panel's report and order.

The PDJ entered an order of default against Respondent on October 27, 2011, for not filing his answer on time. The PDJ ordered an aggravation/mitigation hearing to be held and the APDJ and Panel members Fidel and Hall were appointed to conduct it. The hearing was held on November 17, 2011. The Panel raised the issue whether the default entered against Respondent should be vacated based on his prior filing of a motion to dismiss. The APDJ entered an order giving Respondent

[1] The State Bar subsequently withdrew Count Five (No. 11-0653) and the APDJ entered an order on January 17, 2012, dismissing it without prejudice.

the opportunity to move to set aside the default if he chose to do so and to also file an answer by November 21, 2011. Respondent filed a motion to set aside the default and filed his answer on November 21, 2011. [2] The State Bar was given an opportunity to respond to Respondent's motion and did so. After reviewing Respondent's motion and the State Bar's response, the APDJ entered an order on December 7, 2011, setting the default aside based on Respondent having "otherwise defended" against the State Bar's complaint [3] by filing his motion to dismiss within the time set forth in the applicable rules notwithstanding his failure to file an answer by the specified date.

The APDJ and Panel members agreed to continue to serve as the hearing Panel and the APDJ entered an order following a telephonic prehearing conference that set the dates for the hearing on the merits and other due dates for completion of discovery and other requirements.

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[2] Respondent included in his answer a number of alleged affirmative defenses, including estoppel; issue and claim preclusion; pervasive bias; violation of his due process and free speech rights and his right to equal protection of the laws; absolute immunity of a lawyer in judicial proceedings; lack of jurisdiction; ultra vires actions; selective prosecution; violation of his right to petition for redress of grievances; interference with the attorney-client relationship and right to contract; invalid interim suspension; perjured testimony; waiver; release; and suppression of material evidence. Respondent made no opening statement at his disciplinary hearing, did not argue the merits of any of these alleged affirmative defenses to the Panel at his disciplinary hearing, and only alluded to claims of alleged collateral estoppel, issue and claim preclusion, and the alleged violation of the "last-in-time judgment rule" and his first amendment and due process rights regarding this proceeding in his written closing argument. The Panel does not reconsider alleged affirmative defenses that were already considered and rejected by the PDJ in his previous order denying Respondents motion to dismiss; does not consider those merely identified but waived by non-argument; and finds no others to have merit.

[3] *See* Arizona Supreme Court Rule 58(d), which provides, in part, "A default shall not be entered if the respondent files an answer or otherwise defends prior to the expiration of ten (10) days from the service of the notice of default."

By order dated December 1, 2011, the APDJ granted the State Bar until December 13, 2011, to serve its initial disclosure statement on Respondent. Respondent was granted until December 28, 2011, to serve his initial disclosure statement on the State Bar. The State Bar complied with this order; Respondent did not. The State Bar advised Respondent, without seeking approval of the APDJ, that he could have until January 13, 2012, to serve his initial disclosure statement. Respondent never filed an initial disclosure statement though he argued that the State Bar had waived the requirement due to the parties' anticipated filing of a joint prehearing statement by the due date of January 18, 2012.

Neither party initiated discovery within the time set forth in Arizona Supreme Court Rule 58(f)(2) though they entered into an agreement to conduct certain discovery past the deadline, starting with the deposition of non-party witness John Everroad. The State Bar suspended that deposition and moved to terminate it. Respondent moved to compel the completion of Mr. Everroad's deposition and for sanctions against the State Bar and Mr. Everroad. The APDJ, by order dated January 17, 2012, granted the State Bar's motion, denied Respondent's motions, and ordered no further discovery occur due to the passage of the deadline to initiate discovery.

The parties did not file a joint prehearing statement. The State Bar filed a unilateral prehearing statement on January 19, 2012, pursuant to the language of Arizona Supreme Court Rule 58(i) that states, "A party shall file a unilateral prehearing statement if the opposing party is not cooperating in good faith to

prepare a joint prehearing statement." Respondent filed a redlined version of a prior draft of the required joint prehearing statement on January 18, 2012.

The State Bar filed a motion in limine to preclude Respondent from calling witnesses and presenting documentary evidence at the hearing on the merits based on Respondent's noncompliance with the applicable discovery and disclosure rules. Respondent filed a motion to compel the issuance of subpoenas. The APDJ, assisted by Panel members Fidel and Hall, held a hearing on those motions on January 27, 2012. By order dated January 30, 2012, the APDJ granted the State Bar's motion in limine and denied Respondent's motion to compel the issuance of various subpoenas. The APDJ ordered that the documents listed in Respondent's January 18, 2012, filing not be accepted as evidence at the hearing on the merits. Respondent was advised he would have the opportunity to cross examine the witnesses called by the State Bar and to make objections concerning the documents the State Bar sought to admit as evidence at the hearing. Additionally, although Respondent had forfeited the opportunity to call other witnesses, he was permitted to testify on his own behalf.

The Panel conducted the hearing on the merits over February 6, 7, 27, 28, and March 2, 2012. At the end of the hearing on March 2, 2012, the State Bar and Respondent were directed to file two documents by the end of business on March 23, 2012: (1) a memorandum concerning the admissibility as evidence of various court decisions conditionally admitted as evidence during the hearing; and (2) their closing arguments. By order dated March 22, 2012, the parties were subsequently

granted one additional week to file these documents, to the end of business on March 30, 2012.

Pursuant to Arizona Supreme Court Rule 48(d), the allegations in the State Bar's complaint against Respondent must be established by clear and convincing evidence. Clear and convincing evidence is evidence that causes the Panel to conclude that it is highly probable that the State Bar's charges are true. Pursuant to Arizona Supreme Court Rule 48(e), the burden of proof in proceedings seeking discipline is on the State Bar.

CONSIDERATION OF PRIOR COURT RULINGS

The State Bar moved to admit as evidence in this proceeding a number of pleadings in, and orders and rulings of, other courts. Respondent objected to their admission on the basis that they were hearsay and could not be considered for the truth of any finding of fact or conclusion of law therein and could not be judicially noticed. The Panel conditionally admitted these exhibits, subject to briefing by the parties on the extent to which the Panel could rely on them as evidence, and a subsequent ruling by the Panel on that issue.

a. Exhibit 4 (Minute entry order of Judge O'Connor dated March 24, 2010);

b. Exhibit 6 (ruling and orders of Judge Hegyi dated May 19, 2010);

c. Exhibit 12 (Order of Commissioner Hamner dated October 23, 2009, approving first and final account of conservator in the conservatorship of Helga Mallet);

d. Exhibit 18 (Minute entry order of Judge Cahill dated November 24, 2010);

e. Exhibit 19 (Minute entry order of Judge Cahill dated May 12, 2011);

f. Exhibit 23 (Memorandum decision of U.S. Bankruptcy Court Judge Curley dated September 15, 2009);

g. Exhibit 24 (Order of U.S. Bankruptcy Court Judge Curley dated September 17, 2009);

h. Exhibit 33 (Order of U.S. District Court Judge Murguia dated July 29, 2010);

i. Exhibit 38 (Order of U.S. District Court Judge Murguia dated March 21, 2011).

Exhibit 24 is final (order affirmed by U.S. District Court). Exhibit 33 is final inasmuch as the plaintiff subsequently dismissed its federal court lawsuit. Exhibit 38 is not final as Respondent's petition for rehearing before the U.S. Court of Appeals for the Ninth Circuit is pending. The panel is not aware that any of the remaining exhibits (Exhibits 4, 6, 12, 18, and 19) are currently subject to appeal or have been reversed.

Lawyer discipline proceedings are neither civil nor criminal, but are sui generis. Arizona Supreme Court Rule 48(a). Only specified rules of civil procedure apply. Arizona Supreme Court Rule 48(b). Arizona Supreme Court Rule 48(c) provides that, "Except as otherwise provided in these rules, the rules of evidence applicable to the superior court shall be followed as far as practicable."

Rule of Evidence 201(a) allows judicial notice of adjudicative facts. Under Rule 201(b), a court can take judicial notice of a fact that is not subject to reasonable dispute because it is generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. A court may take judicial notice on its own, Rule 201(c)(1), and a court may take judicial notice at any stage of the proceeding, Rule 201(d).

Respondent did not object to the admissibility of the court records on the basis of a lack of their authenticity.

The State Bar in its post-hearing memorandum on this issue argued as follows: The Panel should give preclusive effect to Exhibits 4, 6, 18, 19, 23, 24, and 38. Respondent should be collaterally stopped from relitigating any issue addressed in Exhibits 19, 23, 24, and 38. And the Panel should take judicial notice of exhibits 11 and 12. Respondent, although give the opportunity, did not file a post-hearing memorandum on this issue.

The Arizona Supreme Court has considered the issue of prior court rulings as evidence in a number of admission and discipline cases. In *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993), the court found no error in the consideration of such evidence where the hearing and review bodies did not give preclusive effect to the rulings and made independent findings and conclusions based on the totality of the evidence before them.

In *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004), the court found no error in the consideration of trial court findings as evidence "of what happened in the trial

court," but reiterated that a judge's findings in an underlying case "do not necessarily determine whether or not an ethical violation occurred." 208 Ariz. at 34-35, 90 P.3d at 771-72, citing *In re Wolfram*, 174 Ariz. 49, 53, 847 P.2d 94, 98 (1993). And in *Wolfram*, declining to accept as determinative a finding of ineffective assistance of counsel in a post-conviction relief proceeding, the court explained that even though the lower court proceeding and the disciplinary proceeding "may share the same universe of facts, this court must independently determine, under the proper standard, the existence of those facts salient to the disciplinary matter and whether those facts, even if identical to those established in the [underlying] proceedings, warrant discipline." 174 Ariz. at 54, 847 P.2d at 99.

The Arizona Supreme Court took judicial notice of various court cases involving an applicant for admission to practice law in *In re Ronwin*, 139 Ariz. 576, 680 P.2d 107, cert. den., 464 U.S. 977, 104 S.Ct. 413, 78 L.Ed.2d 351 (1983), and the court cited *Ronwin* with approval in taking judicial notice of other court records in the case of *In re Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994). Footnote 4 of the *Ronwin* decision provides as follows: "Under Ariz.R.Evid. 201(b), we take notice of the contents and disposition of the file in each of the cases referenced in this opinion. We take notice that the cases exist, that allegations are made, etc. We cannot and do not take notice of the truth or falsity of specific allegations except as established by final judgment."

As the Panel understands the series of cases reviewed above, it concludes that it may and hereby does take judicial notice of the pleadings, court orders, and court rulings mentioned in the record of this case. In accordance with *In re Peasley*,

we consider such records as evidence of "what happened"—that is, the procedures that unfolded, the positions that were taken, and the events recorded as having occurred—in the proceedings they concern. When it comes to the evaluation of Respondent's conduct, however, the Panel concludes that it must do so independently of the characterization of other courts. The Panel, therefore, has made independent findings and conclusions as to whether Respondent violated the rules of professional conduct and other rules charged in the State Bar's complaint based on the totality of the evidence presented, taking into account the purpose of lawyer discipline proceedings and the evidentiary standard in Arizona Supreme Court Rule 48(c). The Panel likewise rejects the State Bar's assertion that Respondent is subject to issue preclusion, by virtue of having participated in some of the judicial proceedings in question, from contesting those courts' characterizations of his behavior, and the Panel concludes that such proceedings cannot be given preclusive effect in this matter. Those proceedings did not resolve the alleged violations of the rules of professional conduct and other rules that confront the Panel here; nor were they conducted pursuant to the same standards of proof.

FINDINGS OF FACT

COUNT ONE (File No. 10-0598)

1. Maricopa County Superior Court Commissioner Michael D. Hintze appointed Paul Theut as Edward Abbott Ravenscroft, III's (Ravenscroft) guardian ad litem on or about January 28, 2009.

2. Commissioner Hintze appointed the Sun Valley Group, Inc. (SVG) as Ravenscroft's temporary conservator on or about March 5, 2009.

3. Theut petitioned the Maricopa County Superior Court for the appointment of a temporary guardian with mental health authority over Ravenscroft. Commissioner Hinzte appointed the Maricopa County Public Fiduciary (MCPF) as Ravenscroft's temporary guardian with that authority on September 1, 2009. Exhibit 1. The order provided, in part, that "An emergency exists with regard to the alleged incapacitated person, which requires immediate court action based on the following facts[:] the alleged incapacitated person has no insight into his mental health illness, impaired judgment, is a Danger to Self, and has been directed by Adult Probation for [a] drug rehabilitation program, and absented himself from a variety of programs." The order further provided, in part, that MCPF was "expressly authorized to make health care treatment decisions on behalf of the incapacitated person as well as to execute those general powers and duties of a guardian as provided by law including the authority to receive money, marshal financial assets and investment accounts and collect other assets of the estate."

4. The evidence shows that Respondent initially came into contact with Ravenscroft through a referral from attorney Jon Kitchel.

5. Attorney Tyler Swenson worked for Respondent between January 2010 and early to mid March 2010. Respondent asked Swenson to assist him in obtaining funds of Ravenscroft to facilitate their representation of him. Swenson did not succeed in doing so. Respondent also assigned Swenson to work directly with Ravenscroft and Swenson met with him from time to time. In a telephone

conversation initiated at Ravenscroft's request by Ravenscroft's guardian, Brian Williamson, on January 26, 2010, Swenson asked Williamson if he would agree to Respondent representing Ravenscroft in connection with concerns Ravenscroft had about the conduct of his temporary guardian and conservator. Williamson told Swenson he did not personally have the authority to do so, but would inform the Public Fiduciary and the MCPF's attorney of the request. Swenson advised Respondent of Williamson's position and also advised Respondent that he did not believe Respondent had a valid basis to represent Ravenscroft if he did not obtain the guardian's consent. Swenson testified that Respondent had obtained the consent of another guardian to represent a protected person in another case.

6. Ravenscroft entered into a contingency fee agreement with Respondent that also included a provision that a fee of $100,000 was earned on receipt. Swenson testified that Ravenscroft had the tendency to jump to conclusions, required careful explanations, and did not understand that his fee agreement with Respondent provided that Respondent's $100,000 fee was earned on receipt. Ravenscroft believed, according to Swenson, that Respondent would merely receive $100,000 of his money and that Ravenscroft would then have access to and be able to use those funds as he deemed appropriate. The Panel finds Swenson's testimony credible. Respondent testified that he never received any portion of this fee and that Ravenscroft's conservator would have had to approve any such payment.

7. Respondent filed a lawsuit on behalf of Ravenscroft in the U.S. District Court for the District of Arizona on January 27, 2010, against a number of defendants, including Theut and SVG. The lawsuit made various claims, including the following:

that Theut, SVG and the other defendants in the handling of Ravenscroft's affairs had violated Ravenscroft's constitutional rights; had engaged in racketeering activities in violation of federal and state law; had breached their fiduciary and other duties to Ravenscroft, and had violated various state laws protecting vulnerable adults and against consumer fraud. Respondent did not seek or obtain the Maricopa County Superior Court's approval to represent Ravenscroft in a lawsuit against his temporary guardian, his temporary conservator, or others.

8. Gary Strickland was an attorney representing MCPF in 2010. When he became aware that Respondent had filed the foregoing federal court lawsuit, Strickland telephoned Respondent on behalf of MCPF seeking a copy of Respondent's fee agreement with Ravenscroft. Strickland had a one and one half to two minute conversation with Respondent. Strickland testified that he was taken aback by Respondent's comments and interpreted them as a "veiled intimation of a threat" against him. Strickland told Respondent that he would not be intimidated and the conversation ended. Transcript of hearing, February 7, 2012, beginning at approximately 11:26:14 am. When Respondent refused to provide a copy of his fee agreement, Strickland filed and served on Respondent a subpoena duces tecum in both the federal court lawsuit and in Ravenscroft's state court guardianship proceeding seeking a copy of that agreement. Respondent did not provide the requested document by the deadline set forth in the state court subpoena. Instead, Respondent filed a motion to quash the subpoena in the federal court lawsuit and Strickland filed a response thereto. Strickland also applied in Ravenscroft's state court guardianship proceeding for an order directing Respondent to show cause why

he should not be held in contempt for failing to honor the subpoena to produce a copy of the fee agreement.

9. The Maricopa County Superior Court issued the requested order to show cause. Exhibit 3. Respondent, however, had previously moved to quash the subpoena and also for a protective order. A hearing was held in the matter on March 24, 2010, before Judge Karen L. O'Connor, a transcript of which was admitted into evidence in this proceeding. Exhibit 5. Respondent interrupted Judge O'Connor at various points during this hearing.

10. Judge O'Connor considered, among other issues, Respondent's objections on attorney-client privilege grounds to being required to produce a copy of his fee agreement with Ravenscroft. She ordered that Respondent produce a copy of the fee agreement for her in camera inspection by 12 Noon on March 24, 2010. She indicated she would review whether the document contained any information that was protected by the attorney-client privilege and redact that information before turning a copy over to MCPF, Ravenscroft's guardian.

11. Shortly before the hearing was recessed at 11:43 am, Respondent agreed that, while not conceding his attorney-client privilege position, he would produce the agreement for an in camera inspection by the judge. Judge O'Connor asked him to have it faxed to her office by 12 Noon that day. Respondent indicated that he would bring it in personally when the court reconvened. When the court reconvened at 1:30 pm, Respondent had not yet provided the judge with a copy of the fee agreement. The judge sometime shortly after 2:27 pm indicated on the record (Exhibit 5, SBA000130, line 17) that she had received the fee agreement, redacted

a portion of a sentence, and then filed the original copy and redacted copy under seal. A copy of the redacted fee agreement was provided to MCPF and the court appointed medical examiner, Dr. Jack Potts, for the purpose of Potts providing his opinion on the need to continue Ravenscroft's temporary guardianship and conservatorship.

12. Dr. Potts testified at the hearing on March 24, 2010, that it was his opinion Ravenscroft was a vulnerable adult. Exhibit 5, SBA000149, lines 4-19. The doctor testified that Ravenscroft had over the prior year been taken advantage of financially by various individuals. The doctor expressed concern that while Ravenscroft's guardian would not sign Respondent's fee agreement, Ravenscroft went ahead and did so himself. The fee agreement had a signature line for the guardian (Brian Williamson, an employee of MCPF), but it did not contain his signature. The doctor was concerned that Ravenscroft did not understand what a nonrefundable fee was and that Ravenscroft's entry into the fee agreement was consistent with his pattern of believing people, being brought in. "This is consistent with his diagnosis of mental illness and is reflective of his vulnerability, in my opinion." Exhibit 5, SBA000151, lines 9-11.

13. Brian Williamson, Ravenscroft's guardian, also testified at the hearing on March 24, 2010, and stated that Tyler Swenson, an attorney acting on behalf of Respondent, asked for his consent to allow Respondent to represent Ravenscroft in the investigation of possible financial losses that Ravenscroft may have incurred. Exhibit 5, SBA000193-200. Williamson testified to the same effect at the hearing in this proceeding. Transcript of hearing on February 7, 2012, at approximately

2:43:30 pm. Williamson talked to Swenson on the phone on January 26, 2010. Williamson told Swenson that he was not authorized to make such a decision on Ravenscroft's behalf and would have to discuss the request with the public guardian and Strickland.

14. Ravenscroft's temporary conservator filed an emergency petition for instructions regarding the federal lawsuit Respondent had filed on Ravenscroft's behalf on February 19, 2010. Ravenscroft's guardian ad litem filed a motion to terminate the agreement on April 13, 2010. These motions and Respondent's response thereto were considered by Maricopa County Superior Court Judge Hugh Hegyi on May 13, 2010. Judge Hegyi by minute entry order dated May 19, 2010, granted the two motions and declared that Respondent's fee agreements with Ravenscroft (the first signed January 27, 2010, and the second signed March 30, 2010) were invalid and of no effect. The judge ruled that Ravenscroft had no capacity or ability to enter into these agreements and that only the court or Ravenscroft's temporary conservator had the authority to do so. Neither having done so, the agreements were invalid. The judge also denied an oral motion by Ravenscroft's court appointed attorney to approve an engagement agreement with Respondent. Exhibit 4.

15. On Respondent's motion filed on March 25, 2010, Ravenscroft's federal court lawsuit was dismissed without prejudice.

16. Respondent, however, filed a state court lawsuit on behalf of Ravenscroft against Theut, SVG, and others on April 13, 2010, and then, despite Judge Hegyi's

May 19, 2010, order invalidating his fee agreement with Ravenscroft, filed a first amended complaint in that lawsuit on July 15, 2010. Exhibit 9.

17. Respondent's first amended state court complaint on behalf of Ravenscroft against Theut, SVG, and others, made various claims, including the following: that Theut, SVG and the other defendants had violated Ravenscroft's constitutional rights; had engaged in racketeering activities in violation of federal and state law; had breached their fiduciary and other duties to Ravenscroft, and had violated various state laws protecting vulnerable adults and against consumer fraud.

18. Respondent's actions regarding Ravenscroft are not the only actions germane to Count One. Respondent filed a federal court lawsuit on behalf of Helga Mallet (Mallet) against various defendants, including SVG and Southwest Fiduciaries (SFI), on January 26, 2010. [4] This lawsuit also alleged, among other things, that the defendants had engaged in racketeering activities in violation of state and federal law, had violated Mallet's constitutional rights, breached their fiduciary duties to Mallet, and violated state law that protected vulnerable adults. Respondent filed a similar state court lawsuit on behalf of Mallet against SVG, SFI, and others, on April 13, 2010. Respondent subsequently withdrew his federal court lawsuit on behalf of Mallet, and it was dismissed without prejudice. Respondent subsequently filed a first amended complaint in his state court lawsuit on behalf of Mallet on or about July 30, 2010.

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[4] The record does not contain a copy of Respondent's fee agreement with Mallet. Respondent did testify at the hearing in this proceeding that at some point in time Judge Mroz ruled that his fee agreement with Mallet was invalid. Transcript of hearing, February 27, 2012, at approximately 11:17:15 am.

19. Mallet had a temporary conservator when Respondent filed his federal court lawsuit on her behalf. [5] Respondent did not request or receive approval of the Maricopa County Superior Court in Mallet's conservatorship proceeding to file any lawsuits on her behalf against her conservator or others prior to the filing of his federal court lawsuit. Respondent asserted that he did not need the approval of the superior court to pursue litigation on Mallet's behalf because the limited jurisdiction of the probate court did not extend to the types of claims he was pursuing on her behalf. [6]

20. Judge Peter J. Cahill entered an order dated November 11, 2010, granting defendants SFI and Dovicos' (Gregory Dovico was and is the CEO of SFI) motion to dismiss Mallet's state court claims against them. Beyond finding no basis for further consideration of Mallet's specific claims against these defendants, Judge Cahill ruled that Mallet had no authority to file the lawsuit as she had a conservator. "Thus, neither she nor Mr. Goodman (*only Sun Valley*) may maintain this action. Brought by someone without authority, the First Amended Complaint must be dismissed for this reason alone. "Ms. Mallet simply does not have a right to bring this action." Exhibit 18, SBA000603.

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[5] In point and fact, Respondent alleged in his federal court complaint on behalf of Mallet, "Plaintiff Mallet is also, ironically, the protected person pursuant to *In re The Matter of the Guardianship and Conservatorship for Helga Mallet*, Maricopa County Superior Court Probate Case No. PB2008-000488 (the "Probate Case")." Exhibit 13, page 4 (SBA000490).

[6] Respondent testified at one point during the hearing in this proceeding that he did not believe Mallet was under a conservatorship when he began representing her. Transcript of hearing, February 27, 2012, at approximately 11:31:36 am. At another point, he testified that Mallet's conservatorship had been constructively terminated. Transcript of hearing, February 27, 2012, at approximately 11:39:52 am. And yet at another point, Respondent testified that he simply didn't care if Mallet was under a conservatorship because his lawsuit on her behalf was not a probate case. Transcript of hearing, February 27, 2012, at approximately 11:42:37 am.

21. Gregory Dovico, CEO of SFI, testified at the hearing in this proceeding that his company incurred the expense of paying a $10,000 deductible to SFI's malpractice insurer in the defense of Respondent's lawsuits on behalf of Mallet.

22. By order dated May 13, 2011, Judge Cahill awarded various defendants in Ravenscroft's state court lawsuit against them fees and costs as sanctions against Respondent pursuant to A.R.S. §12-349, Arizona Rule of Civil Procedure 11, and A.R.S. §13-2314.04N. [7] The awarded fees and costs totaled over $38,000. By the same order and on the same basis, Judge Cahill awarded various defendants in Mallet's state court lawsuit against them fees and costs against Respondent totaling over $39,000. Exhibit 19.

23. Respondent did not obtain the reversal of any of the foregoing orders.

CONCLUSIONS OF LAW ON COUNT ONE

24. The State Bar alleges that Respondent violated Rule of Professional Conduct (ER) 3.1 by filing his federal and state court lawsuits on behalf of Ravenscroft and Mallet. The State Bar claims Respondent could not represent these individuals because they were protected persons and their guardians and/or conservators had not agreed to such representation. The State Bar also claims Respondent violated ER 3.1 in this context because his complaints did not comply with Arizona Rules of Civil Procedure 8(a)(2) and 11.

25. ER 3.1 provides in pertinent part as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good

[7] Judge Cahill's order of May 13, 2011 (Exhibit 19), indicates that he had previously dismissed Respondent's state court lawsuit on behalf of Ravenscroft, but does not indicate the date of the entry of that dismissal. *See* Footnote 1 (SBA000608).

faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law." Comment [2] to ER 3.1 provides, in part, that an action is frivolous "if the lawyer is unable either to make a nonfrivolous argument on the merits of the action taken or a good faith and nonfrivolous argument for an extension, modification or reversal of existing law."

26. Respondent knew that Ravenscroft had a guardian prior to the time he filed his federal court lawsuit on Ravenscroft's behalf and that the guardian did not consent to Respondent's representation of it or Ravenscroft in that lawsuit or any other lawsuit. In the absence of the guardian's consent, Respondent could have sought authorization from the Maricopa County Superior Court to enter into a fee agreement with Ravenscroft and undertake litigation on his behalf, but Respondent made no effort to obtain such consent. Moreover, Respondent knew at the time he filed his first amended complaint on behalf of Ravenscroft that the Maricopa County Superior Court had ruled his fee agreements with Ravenscroft's were void and of no legal effect.

27. The Panel concludes that there is clear and convincing evidence that Respondent pursued litigation on behalf of Ravenscroft that he had no legal basis to pursue. Respondent made no good faith and nonfrivolous argument in his complaints for an extension, modification or reversal of existing law that would permit him to file his lawsuits on behalf of Ravenscroft without the approval of his guardian and/or the Maricopa County Superior Court. The Panel rejects Respondent's legal argument that he could forego seeking probate court approval

because the probate court lacked jurisdiction over the claims he sought to pursue on Ravenscroft's behalf. Ravenscroft was a protected person, and his capacity to enter into a contract and to bring a lawsuit was precisely within the jurisdiction of the probate court. Respondent knew or as a lawyer should have known so when he sought to represent Ravenscroft. Respondent violated ER 3.1.

28. Respondent was on notice of the issue of his inability as a matter of law to represent a protected person in litigation without the approval of the person's guardian, conservator, and/or the court overseeing those proceedings when he filed his first amended complaint on behalf of Mallet in July 2010. The Panel concludes that there is clear and convincing evidence that Respondent pursued litigation on behalf of Mallet that he had no legal basis to pursue. Respondent made no good faith and nonfrivolous argument in his complaints on her behalf for an extension, modification or reversal of existing law that would permit him to file his lawsuits on behalf of Mallet without the approval of her conservator and/or the Maricopa County Superior Court. The Panel rejects Respondent's legal argument that he could forego seeking probate court approval because the probate court lacked jurisdiction over the claims he sought to pursue on Mallet's behalf. Mallet was a protected person, and her capacity to enter into a contract and to bring a lawsuit was precisely within the jurisdiction of the probate court. Respondent knew or as a lawyer should have known so when he sought to represent Mallet. Respondent violated ER 3.1.

29. Having found for the reasons stated that Respondent's conduct violated ER 3.1, the Panel need not determine in this proceeding whether his conduct also

violated ER 3.1 based on alleged violations of Arizona Rules of Civil Procedure 8(a)(2) and 11.

30. The State Bar alleges that Respondent violated ER 3.4(c) by failing to respond to a duly issued and served subpoena duces tecum and by failing to comply with Arizona Rules of Civil Procedure 8(a)(2) and 11. ER 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists". While it is true that Respondent was duly served with a state court subpoena duces tecum for production of his fee agreement with Ravenscroft, he did file a motion to quash it and for a protective order on the ground that production of the agreement would violate Ravenscroft's attorney-client privilege. An order to show cause was issued on the application of Ravenscroft's temporary guardian to hold Respondent in contempt for failing to comply with the subpoena and a hearing was held on the matter on March 24, 2010. After argument, the judge ordered Respondent to produce the fee agreement for her in camera inspection by 12 Noon that day. Respondent then said, "I will ensure that at least by the time you reconvene, that we will have a copy of that fee agreement because there is nothing to hide." Exhibit 5, Bates 000089, lines 19-21. The judge then reiterated that Respondent needed to fax the fee agreement to her by 12 Noon. The court reconvened at approximately 1:30 pm and Respondent produced the fee agreement some time shortly before 2:27 pm. Exhibit 5, SBA000130, line 17. Based on the evidence presented, the Panel concludes that Respondent did not knowingly disobey an obligation under the rules of the tribunal. The judge did not rebuke

Respondent for being late in producing the document and did not question on the record whether he had a justifiable basis for the delay. Nor was any evidence presented at the hearing regarding the cause of the delay. While Respondent's tardiness in meeting the 12 Noon deadline may have been sanctionable by the court, the Panel does not find that his delay in producing the fee agreement amounted to a violation of ER 3.4(c).

31. As to the allegation that Respondent violated ER 3.4(c) by failing to comply with Arizona Rules of Civil Procedure 8(a)(2) and 11, the State Bar did not demonstrate the applicability of these two rules to the conduct set forth in paragraphs 9-11. The Panel concludes the State Bar did not meet its burden of proof regarding this charge.

32. The State Bar charged Respondent with violating Rule of Professional Conduct (ER) 4.4(a) by filing the Ravenscroft and Mallet federal and state court lawsuits and by failing to comply with Arizona Rules of Civil Procedure 8(a)(2) and 11. ER 4.4(a) provides, in pertinent part, that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden any other person". The Panel concludes that there is clear and convincing evidence that Respondent pursued litigation on behalf of Ravenscroft and Mallet that he had no legal basis to pursue. Having no legal basis to file the lawsuits he filed, the Respondent used means (the lawsuits) that had no substantial purpose other than to embarrass, delay, or burden the defendants. The defendants incurred substantial expense and inconvenience in defending against the claims Respondent filed against them.

33. Having found for the reasons stated that Respondent's conduct violated ER 4.4(a), the Panel need not determine in this proceeding whether his conduct also violated ER 4.4(a) based on alleged violations of Arizona Rules of Civil Procedure 8(a)(2) and 11.

34. The State Bar alleged that Respondent violated Rule of Professional Conduct (ER) 8.4(d) when he filed the Ravenscroft and Mallet federal and state lawsuits, as he did so on behalf of people who were under the protection of a guardianship and/or conservatorship, causing significant harm to the courts, the profession, the litigants and the public. ER 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice". The Panel concludes that that State Bar has proven this charge by clear and convincing evidence. Respondent had no legal basis to pursue the lawsuits he filed on behalf of Ravenscroft and Mallet. The defendants and the courts expended significant private and public resources to address Respondent's multitudinous claims on behalf of his purported clients, none of which he had a legal basis to pursue on their behalves.

35. The State Bar alleges that Respondent violated Arizona Supreme Court Rule 41(c) when he made disparaging remarks about Judge O'Connor, was disrespectful and interrupted Judge O'Connor, and made incomprehensible and delusional assertions and arguments. Supreme Court Rule 41(c) provides the duties and obligations of members of the State Bar include, "To maintain the respect due to courts of justice and judicial officers." The State Bar bases this charge on Exhibit 5, the transcript of the hearing held before Judge O'Connor on March 24, 2010. The

Panel has reviewed that transcript. In the course of an extensive give and take, as Judge O'Connor gave Respondent generous leeway to try to explain his points of view, Respondent interrupted Judge O'Connor on numerous occasions, and Judge O'Connor at times interrupted Respondent in order to complete a question, finish a thought, or refocus Respondent on the issues that she sought him to address. At times during his argument, Respondent challenged the procedural validity of the order to show cause proceeding, but this did not amount to disrespect for the judge herself. And although Respondent attempted to raise issues beyond the narrow focus of the order to show cause, he did not lapse into incoherence. Nor did his interruptions, though inappropriate, so exceed the level of give and take that Judge O'Connor permitted in their exchange as to amount to disrespect. The Panel concludes the State Bar did not meet its burden of proof to show by clear and convincing evidence that Respondent's conduct during this hearing violated Supreme Court Rule 41(c).

36. The State Bar alleges that Respondent violated Arizona Supreme Court Rule 41(g) when he made threats and intimated reprisals in a telephone conversation with Attorney Gary Strickland. Strickland testified that he was taken aback by Respondent's reaction to Strickland's request for a copy of Respondent's fee agreement with Ravenscroft. Strickland quoted Respondent as saying, "I know who you are. You don't want to do this." Strickland interpreted Respondent's comment as a "veiled intimation of a threat", and replied, "I won't be intimidated." Supreme Court Rule 41(g) provides the duties and obligations of members of the State Bar shall include, "To avoid engaging in unprofessional conduct and to advance no fact

prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which the member is charged." Given the ambiguity of Respondent's comment, the Panel concludes that the State Bar did not prove by clear and convincing evidence that Respondent violated this rule during his short telephone conversation with Strickland.

37. The State Bar alleges that Respondent violated Arizona Supreme Court Rule 54(c) by failing to respond to a duly issued and served subpoena duces tecum. Supreme Court Rule 54(c) provides that grounds for discipline of members and non-members include, "Knowing violation of any rule or any order of the court." "This includes court orders issuing from a state, tribe, territory or district of the United States, including child support orders." While Respondent did not produce his fee agreement with Ravenscroft within the time frame set in the subpoena, he did move to quash the subpoena and for a protective order. He attended and participated in a hearing during which his objections to the subpoena were carefully considered by the judge. The judge orally ordered Respondent to produce it, he said he would, and then was approximately one to two and one half hours late in producing it, depending on the point used to determine when he was ordered to do so. The Panel concludes that the State Bar did not prove by clear and convincing evidence that Respondent knowingly violated Judge O'Connor's oral order to produce the fee agreement by 12 Noon on March 24, 2010.

38. To summarize, the Panel concludes that the State Bar has proven by clear and convincing evidence that Respondent violated ER 3.1, 4.4(a), and 8.4(d) by filing litigation on behalf of Ravenscroft and Mallet when he did not have a legal

basis to do so. Respondent asserts that he pursued these lawsuits without seeking probate court approval because the claims he was pursuing were not within the jurisdiction of the probate court. Respondent chose to ignore that the probate court had both the jurisdiction and the responsibility to decide whether his purported clients had the independent capacity to hire a lawyer and initiate non-probate litigation. Lacking the approval of his purported clients' guardians and/or conservators, [8] Respondent had the opportunity to seek the probate court's authorization, but sidestepped that requirement. Respondent did not have a good faith, nonfrivolous, basis in law for doing so and he did not make a good faith and nonfrivolous argument for an extension, modification or reversal of existing law in order to do so. The Panel notes that the State Bar included various allegations in this count that Respondent's substantive legal claims on behalf of Ravenscroft and Mallet were not properly pled. Having concluded that Respondent lacked the legal basis to represent Ravenscroft and Mallet in the lawsuits he filed on their behalves, the Panel does not address the legal sufficiency or insufficiency of the substantive claims he asserted in those lawsuits. The Panel nevertheless notes that it was not brought to its attention that any of the court orders dismissing Respondent's lawsuits on behalf of his purported clients (excluding, of course, the voluntary dismissal of Ravenscroft and Mallet's federal court lawsuits) or any of the orders sanctioning Respondent in connection therewith were reversed on appeal.

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[8] The Panel notes in passing an inconsistency in Respondent's position: although he argued that he did not need the approval of his purported clients' guardians and/or conservators to file litigation on their behalves, Respondent also testified that the earned fee which was part of his fee agreement with Ravenscroft would have necessarily been submitted for approval by Ravenscroft's guardian and/or lawyer before he would have received the specified earned fee of $100,000. Transcript of hearing, March 2, 2012, at approximately 1:08 pm.

FINDINGS OF FACT

COUNT TWO (File No. 10-0703)

39. Southwest Fiduciary, Inc. (SFI) was appointed the temporary conservator for Helga Mallet (Mallet) in February 2008. Gregory Dovico was the CEO of SFI. Attorney Stacey Johnson was appointed Mallet's counsel and Attorney Jon Kitchel her guardian ad litem.

40. Attorney Johnson on behalf of Mallet asked SFI to step aside as Mallet's temporary conservator and it agreed to do so. In September 2008, Sun Valley Group (SVG) was appointed by the Maricopa County Superior Court as successor temporary conservator for Mallet, resulting in SFI's discharge as Mallet's temporary conservator.

41. On January 22, 2009, SFI filed a petition for the approval of its first and final account as Mallet's temporary conservator. Exhibit 11. The Maricopa County Superior Court approved that accounting by order dated October 23, 2009. Exhibit 12.

42. Respondent filed a federal court lawsuit on behalf of Mallet against various defendants, including SVG and SFI, on January 26, 2010. This lawsuit, similar to the lawsuit Respondent filed on behalf of Ravenscroft (*see* Count One), alleged, among other things, that the defendants had engaged in racketeering activities in violation of state and federal law, had violated Mallet's constitutional rights, breached their fiduciary duties to Mallet, and violated state law that protected vulnerable adults. Respondent filed a similar state court lawsuit on behalf of Mallet against SVG, SFI, and others, on April 13, 2010. Respondent subsequently

withdrew his federal court lawsuit on behalf of Mallet, and it was dismissed without prejudice. Respondent subsequently filed a first amended complaint in his state court lawsuit on behalf of Mallet on or about July 30, 2010.

43. Paragraphs 44, 45, and 46 of Mallet's federal court lawsuit against SFI (Exhibit 13), the Dovicos, and others provided as follows:

> "44. On February 22, 2008, Defendant SFI was appointed Temporary Conservator for Plaintiff Mallet and the Mallet Trusts.
>
> 45. As soon as that was accomplished, the SFI Defendants . . . extracted $100,000.00 from Mallet's Trust account with A.G. Edwards. (See Exhibit 1, Financial Data for Helga Mallet for the period of February 2008 through April 2009, Bates OC000001-56, hereto.)[footnote omitted]
>
> 46. The SFI Defendants then proceeded to spend virtually every penny of the $100,000.00 they had taken from Helga's A.G. Edwards account while doing nothing to protect her other assets."

44. Paragraph 53 of Respondent's first amended complaint on behalf of Mallet and against SFI, the Dovicos, and others in state court (Exhibit 18) alleged that, "Instead of acting as fiduciaries for Helga [Mallet] as required by A.R.S. §14-5417, the SFI Defendants spent every penny of the $100,000 from Helga's Trust 1 while doing little to protect or preserve her assets."

45. In Exhibit 11, the petition that SFI had filed with the probate court in January 2009, and in particular, Schedules 5 and 6 attached thereto, SFI had provided an accounting for the expenditures that it had incurred on behalf of Mallet between

March 13, 2008 and November 30, 2008, totaling $99,746.86, approximately $82,000 of which were for Mallet's personal expenses and expenses to maintain property she owned and to pay utilities. Exhibit 12 shows that the Maricopa County Superior Court had approved these expenditures by order dated October 23, 2009, nine months after SFI's petition, but approximately three months before Respondent filed Mallet's federal court lawsuit and approximately six months before Respondent filed Mallet's state court lawsuit.

46. Gregory Dovico, CEO of SFI, testified at Respondent's hearing that he and his firm did not, as Respondent alleged, spend virtually every penny of the $100,000.00 they had received from Mallet's A.G. Edwards account without doing anything to protect her other assets. Dovico testified that much of the money was used to pay Mallet's expenses and to protect her assets. Transcript of hearing, February 6, 2012, at approximately 2:34 pm.

47. Dovico further testified that Respondent's federal court lawsuit had attached to it a document (Exhibit 1) relating to the accounting SFI filed with the probate court in Mallet's conservatorship. "Therefore, if he took one page of our, ah, accounting, he had to have seen the entire accounting and was just picking and choosing. So he knew that that [Paragraph 46 of Exhibit 13] was an untrue statement when it was offered." Transcript of hearing, February 6, 2012, at approximately 2:35:16 pm. Dovico identified the attachment to Respondent's complaint as part of Exhibit 11, SBA000479.

48. Respondent testified at the hearing in this proceeding that the defendants named in his lawsuit on Mallet's behalf had stolen money from her and that when

they had taken her money improperly her conservatorship was constructively terminated. Transcript of hearing, February 27, 2012, at approximately 11:39:52 am.

49. Judge Peter J. Cahill entered an order dated November 11, 2010, granting defendants SFI and the Dovicos' motion to dismiss Mallet's state court claims against them. Beyond finding no basis for further consideration of Mallet's specific claims against these defendants, Judge Cahill ruled that Mallet had no authority to file the lawsuit as she had a conservator. "Thus, neither she nor Mr. Goodman (*only Sun Valley*) may maintain this action. Brought by someone without authority, the First Amended Complaint must be dismissed for this reason alone; "Ms. Mallet simply does not have a right to bring this action." Exhibit 18, SBA000603.

50. By order dated May 13, 2011, Judge Cahill awarded various defendants in Mallet's state court lawsuit against them fees and costs as sanctions against Respondent pursuant to A.R.S. 12-349, Arizona Rule of Civil Procedure 11, and A.R.S. 13-2314.04N. The awarded fees and costs totaled over $39,000. Exhibit 19.

CONCLUSIONS OF LAW ON COUNT TWO

51. The State Bar alleges that Respondent violated Rules of Professional Conduct (ER) 3.3(a)(1), 4.1(a), and 8.4(c) by filing federal and state court lawsuits on behalf of Mallet and against SF, the Dovicos, and others that contained allegations that Respondent knew or should have known were untrue. ER 3.3(a)(1) provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer". ER 4.1(a) provides that 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". ER 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." ER 1.0 defines "knowingly", "known" or "knows" as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

52. The Panel finds by clear and convincing evidence that Respondent knowingly made false statements to the court, opposing counsel, and their clients in his lawsuits on behalf of Mallet against SFI, the Dovicos, and others that the SFI defendants had done little or nothing, in the expenditure of funds on Mallet's behalf, to protect or preserve her assets. Respondent offered no defense to the charges in this count other than his personal belief that the SFI defendants were stealing from Mallet. Respondent violated ER 3.3(a), ER 4.1(a), and 8.4(c).

FINDINGS OF FACT

COUNT THREE (File No. 10-0742)

53. On June 18, 2003, pursuant to petitions for relief that Respondent filed under Chapter 11 of the U.S. Bankruptcy Code, the U.S. Bankruptcy Court for the District of Arizona placed two entities--GTI Capital Holdings, LLC, dba Rockland Materials ("GIT"), and G.H. Goodman Investment Companies, LLC ("GHG")—under joint administration. Respondent and his wife Teri Goodman each owned a 49.5% interest in GIT and a 50% interest in GHG, both of which were Arizona Limited Liability Companies. [9]

[9] In describing the bankruptcy proceedings in question, we draw upon the factual accounting of those proceedings contained in a Memorandum Decision filed by the Honorable Sarah Sharer Curley on September 15, 2009. That decision, Exhibit 23 to these proceedings, is titled "Memorandum Decision Dismissing This Adversary and Granting

54. Respondent acted as debtor in possession until July 3, 2003, when the Court appointed an examiner to control both entities' funds, accounts, and disbursements.

55. In January 2004, both entities ceased business operations and their assets were sold. Subsequently, upon the examiner's Motion to Convert to Chapter 7, David M. Reaves was appointed the Trustee of Respondent's estates.

56. Among multiple intra-party disputes, one central to this Count was commenced within the Bankruptcy proceedings by Respondent, seeking the equitable subordination of the claims of creditor Comerica Bank-California to those of all other creditors. Respondent alleged that Comerica's conduct warranted equitable subordination because Comerica had withheld critical information from Respondent, other creditors, and the Court as to the perfection of Comerica's security interests on items of GTI and GHG's equipment and vehicles. In the course of the Comerica adversary proceeding, the bankruptcy estates became administratively insolvent.

57. The Trustee pursued and ultimately settled the Comerica adversary proceeding that Respondent had commenced. On March 11, 2008, however, at a hearing set for Bankruptcy Court consideration and approval of the Settlement Agreement, Respondent objected that the Agreement over broadly released

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CPPC's Motion for Stay Pursuant to All Writs Act." Exhibit 24 is Judge Curley's formal Order incorporating that decision. The Curley decision and order were entered in Case Nos. 2:03-bk-07923-SSC and 2:03-bk-07924-SSC and Adv. No. 2:09-ap-00006-SSC. Although we draw upon Judge Curley's account of events, we independently determine whether the events that she described and the other evidence submitted by the State Bar constitute clear and convincing evidence of the violations alleged in Count Three.

Comerica from third-party claims and disserved the best interests of the bankruptcy estates' creditors.

58. The Bankruptcy Court considered Respondent's objections at the March 11, 2008, hearing, as well as the testimony of Trustee Reaves regarding the intent of the Agreement, and on March 17, 2008, issued a memorandum decision approving the Settlement Agreement, rejecting the assertion that it released third party claims, and stating that it did not release any claims asserted by non-debtor parties.

59. In an appeal to the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP"), Respondent reiterated his objections to the release language of the Settlement Agreement. The BAP, however, concluded that the Bankruptcy Court did not abuse its discretion in approving the Settlement Agreement. In a Memorandum and Judgment issued on December 9, 2008, and filed on January 21, 2009, the BAP stated, "Based on a review of the record, the Panel finds Appellants' objections to the release are without merit. The plain language of the release states that it merely extinguishes claims between the estates and Comerica. It has no effect on claims held by any of the Appellants." [10]

60. The BAP decision was the subject of a further appeal to the United States Court of Appeals for the Ninth Circuit, which affirmed in a Memorandum Disposition filed on October 8, 2010, giving rise to a mandate issued on November 1, 2010. The Court stated in part, "Appellants appear to be seeking on appeal an advisory

[10] In this and the subsequent paragraph, in describing the appellate disposition of the Bankruptcy Court's 3/17/08 approval of the Settlement Agreement, the Panel takes judicial notice pursuant to Rule 201, Arizona Rules of Evidence, of the BAP Memorandum disposition entered in BAP No. AZ-08-1079-Mk-EMo on 1/21/09 and the Ninth Circuit Memorandum disposition entered in No. 09-60003 in the same matter on November 1, 2010.

opinion about the effects of the settlement agreement on other litigation. We lack jurisdiction to render advisory opinions."

61. When, as indicated in Paragraph 55, GIT and GHC ceased business operations and their assets were liquidated in 2004, creditors of those entities began to seek collection on personal guarantees that had been executed by Respondent and his wife. As these efforts gave rise to litigation, Respondent eventually asserted after the Settlement Agreement was entered in the Comerica adversary proceeding that the Agreement had released him and his wife from their obligations to guarantee the GIT and GHC debt.

62. This assertion by Respondent against one guarantee creditor, California Portland Cement Company ("CPCC"), is a central focus of Count Three. In 2005, CPCC obtained a $5 million judgment against Respondent and his wife. On December 15, 2008, acting on behalf of his wife, himself, and other Goodman entities, Respondent filed a complaint in the Maricopa County Superior Court against CPCC, Mariscal, Weeks, McIntyre and Friedlander (CPCC's lawyers), [11] and others, asserting violations of the Arizona Racketeering Act, Securities Fraud, Civil Rights violations, and Aiding and Abetting Fraud. In the course of the Complaint, Respondent invoked the Comerica Settlement Agreement, asserting that CPCC and the other defendants had inappropriately engaged in garnishments, wage and bank

[11] At the outset of these proceedings, when advised that members of the Mariscal, Weeks, McIntyre & Friedlander firm ("MWMF") might be called as witnesses, Panel member Noel Fidel advised Respondent and Bar Counsel that, although never a shareholder or employee of that firm, he had maintained a contractual "of counsel" relationship with MWMF for approximately three years ending on April 1, 2011, but had not represented CPCC in this or any other matter and did not believe that testimony from one or more members of the firm would affect his ability to impartially assess the evidence. Both Respondent and Bar Counsel waived any objection to Fidel's service on the Panel.

account seizures, post-judgment provisional remedy proceedings, and other actions despite having "waived and forever discharged" their right to do so by their consent to the terms of the Comerica settlement.

63. CPCC and Mariscal, Weeks, McIntyre and Friedlander filed a Notice of Removal of Respondent's state court lawsuit to the Bankruptcy Court. Over Respondent's objection, Bankruptcy Judge Curley asserted jurisdiction, finding that, because Respondent's Complaint asked the Superior Court to interpret the Settlement Agreement that the Bankruptcy Court approved in the Comerica adversary proceeding, the Bankruptcy Court had ancillary jurisdiction to interpret and enforce its own order.

64. In a Memorandum Decision of September 15, 2009, dismissing Respondent's Complaint with prejudice (Exhibit 23 to this proceeding), Judge Curley wrote, "Since the Settlement Agreement and Order Approving Settlement Agreement bind only the bankruptcy estates and Comerica, the parties to the Settlement Agreement, the Court finds that the Plaintiffs have failed to state a claim upon which relief may be granted. The Settlement Agreement does not pertain to the release of any guarantee that the Plaintiffs may have entered into with any creditor of these estates or any other party."

65. Judge Curley went on to identify other proceedings in which Respondent had asserted the same interpretation of the Settlement Agreement, persisting despite its rejection and despite awards of monetary sanctions against him. Characterizing Respondent's persistence as "frivolous and vexatious," "offensive," and "abusive," Judge Curley issued an "All Writs" order providing, in part, as follows:

> If Mr. Goodman, acting pro se or on behalf of Ms. Goodman or any of the Goodman-related entities, wishes to proceed, in any state or federal court, with any litigation involving any claim related to their guarantees of the Debtors' obligations which relies in whole, or in part, on a position or argument that the Settlement Agreement, the Order Approving the Settlement Agreement, or any memorandum decision or order of this Court in the Debtors' cases somehow releases, extinguishes, or in any manner affects their liability on their guarantee of the Debtors' obligations, Mr. Goodman must first file the proposed complaint with this Court.... If the Court determines that the proposed complaint is in contravention of this memorandum decision, and related injunction to be entered separately, the Court will summarily deny any affirmative relief therein, dismiss the complaint, and place the Court's summary denial, dismissal, and Mr. Goodman's proposed complaint on the docket of this Court.

(footnotes omitted)

66. This Memorandum decision was embodied in an Order (Exhibit 24) entered on September 17, 2009. It became final on September 16, 2010, with the filing of an Order, Judgment, and Mandate of the Appellate Court disposing of the appeal. [12]

CONCLUSIONS OF LAW ON COUNT THREE

67. The State Bar alleges that Respondent violated ER 3.1 "by continually filing frivolous pleadings in an attempt to keep from paying debts the court determined he owed"; that he violated ERs 3.3(a)(1), 4.1(a), and 8.4(c) "by continually asserting that a settlement agreement had released him, his wife and his companies from any liability, when in at least six separate actions this assertion had been patently rejected;" and that he violated ER 8.4(d) "when he filed numerous pleadings that were frivolous and a burden on the court system." (The Panel has quoted the language of each of these ERs in its discussions of Counts One

[12] Respondent's appeal was heard by the Honorable Susan R. Bolton of the U.S. District Court for the District of Arizona, who affirmed Judge Curley's ruling in an Order of September 16, 2010, which may be found as Document 35 in the District Court's Case No. CV 09-2247-PHX-SRB. The Panel takes judicial notice of that Order.

and Two.) These allegations boil down to the assertion that Respondent burdened the courts with repeated iterations of a frivolous interpretation of the Comerica Settlement Agreement, put forward in bad faith in an effort to obstruct, delay, or avoid his and his wife's obligation to honor their guarantees.

68. The State Bar has rested its position almost entirely upon the September 15 and 17, 2009, Memorandum and Order of Judge Curley. Much as the Panel respects the findings embodied in Judge Curley's decision, summarized above, it may not, as the State Bar wishes, give them "legal or preclusive effect." *In re Levine*, 174 Ariz. 146, 155, 847 P.2d 1093, 1102 (1993). Rather, we "must independently determine, under the proper standard, the existence of those facts salient to the disciplinary matter and whether those facts ... warrant discipline." *In re Wolfram*, 174 Ariz. 49, 54, 847 P.2d 94, 99 (1993). The "proper standard" is by clear and convincing evidence.

69. Although Judge Curley described other proceedings in the state and federal trial and appellate courts where Respondent unsuccessfully urged his interpretation of the Comerica Settlement, and although the State Bar listed the case numbers of those proceedings in its Complaint, neither in the Curley decision nor elsewhere in the State Bar's evidence has the State Bar provided the Panel with dates or details of those proceedings that demonstrate that any rejection of Respondent's interpretation had achieved sufficient finality to result in issue preclusion. Judge Curley's own 3/17/08 interpretation—that the Settlement Agreement applied only to the debtor parties and Comerica and did not release any claims of the non-debtor parties—was appealed to the BAP and the Ninth Circuit and did not achieve

finality until November 1, 2010, well after the conduct that is the focus of Count Three. The Panel has been provided no evidence, in other words, that Respondent *continued* to assert his interpretation of the Comerica Settlement Agreement *after* issue preclusion had taken hold. [13]

70. In the absence of evidentiary support for the conclusion that issue preclusion placed Respondent's persistence in his position beyond the bounds of ethical advocacy, the Panel must instead determine whether, from the outset, Respondent's interpretation of the Settlement Agreement was so deficient in arguable merit as to be frivolous, an exercise in bad faith, and/or a sanctionable administrative imposition on the courts.

71. The State Bar, however, has not submitted evidence that would permit the Panel to independently draw such a conclusion. Specifically, the State Bar has not placed the precise release language of the Comerica Settlement Agreement in evidence. [14] Nor has it submitted a record of the arguments that Respondent advanced in support of his interpretation of that Agreement in his proceeding against CPCC et al or in his proceedings vis a vis other creditors. And in the absence of such evidence, the Panel cannot "independently determine" whether "the facts salient to the disciplinary matter ... warrant sanction" pursuant to the set

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[13] The Panel takes judicial notice that in a separate proceeding, the Arizona Court of Appeals also rejected Respondent's interpretation of the Settlement Agreement. *See Goodman v. Comerica Bank*, 1 CA-CV 09-0504 (Ariz. App. Dec. August 26, 2010)(mem. decision). This decision, however, was also issued well after the conduct that is the focus of Count Three and does not establish that Respondent continued to assert his interpretation after issue preclusion took effect.

[14] Portions of the release language are quoted in Exhibit 20, which is the Superior Court Complaint that Respondent filed against CPCC, but the full language has not been made part of the record.

of ERs in question in this Count. *See In re Wolfram*, 174 Ariz. at 54, 847 P.2d at 99.

72. For the foregoing reasons, the Panel concludes that the State Bar has not met its burden of proving by clear and convincing evidence that Respondent violated ERs 3.1, 3.3(a)(1), 4.1(a), and 8.4(c) and (d) by the conduct alleged in Count Three.

FINDINGS OF FACT

COUNT FOUR (File No. 10-1930)

73. Attorney Denise Shepard petitioned to become and was appointed by the Pima County Superior Court (Probate Department) the guardian and conservator of a person identified herein as Ms. L in or about 2008. The court also appointed Attorney Leigh Bernstein as the attorney for Ms. L in that proceeding. Attorneys Shepard and Bernstein continued in these capacities during all times relevant to this count.

74. Respondent testified that he became aware of Ms. L through contact he had with a person by the name of Mark McCune. McCune passed information on to Respondent that led him to believe Ms. L desired to talk with him about the care she was receiving and about the conduct of her guardian and conservator, Attorney Shepard.

75. Respondent went to Ms. L's care facility early in the evening of October 3, 2010. Care facility staff members were concerned about Respondent's request to see Ms. L and initially resisted it. Ms. L was advised that a lawyer was there to see her and she agreed to see the lawyer. Respondent attempted to have a private

conversation with Ms. L, but various care facility staff members insisted that they be present. Respondent decided that the circumstances would not allow his having a private conversation with Ms. L and he left the care facility.

76. Respondent was never engaged by Ms. L as her attorney and he had no further contact with her after October 3, 2010. Respondent testified that Ms. L and care facility staff knew of his intention to visit her. The testimony of various witnesses associated with the care facility and Ms. Shepard suggest that Respondent's visit to see Ms. L was unannounced and that she and they did not know he was coming. [15]

77. Attorney Shepard's staff informed her that a lawyer by the name of Goodman had attempted to have contact with Ms. L at the care facility where she resided on Sunday, October 3, 2010. Attorney Shepard notified Attorney Bernstein, among others, of Respondent's visit to see Ms. L.

78. Attorney Bernstein subsequently had a telephone conversation with Respondent about his contact with Ms. L. Attorney Bernstein advised Respondent that she was Ms. L's court-appointed attorney in connection with Ms. L's guardianship and conservatorship. Attorney Bernstein told Respondent that Attorney Shepard was Ms. L's guardian and conservator. Attorney Bernstein

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[15] Respondent testified that he offered the State Bar a tape of a telephone conversation that supported his argument that Ms. L had asked him to visit her. Exhibit 27, a letter Respondent sent to the State Bar, states, in part, as follows: "Here however a phone conversation detailing all the above with respect to retention, knowledge by the "care-giver" that [Ms. L] acknowledged her desire to retain Goodman, and admission of restricted phone access by the same care giver writing the mess of falsified information adopted by Shepard and Harrington – was recorded. Another prospective client of the undersigned (without direction on my part) fortunately made the recording and advised Goodman of the contents, which will now be shared with everyone. Please make arrangements to receive the recording in some fashion and advise."

suggested Respondent consider whether the issue of his having authority to represent Ms. L should be taken up with the Pima County Superior Court in light of possible concerns about whether Ms. L had the capacity to hire a lawyer under the circumstances. Respondent asked Attorney Bernstein who the probate judge was and when told it was Judge Charles Harrington, he replied that he didn't have to listen to anything Harrington had to say. Respondent's position at the hearing in this proceeding was that any claims Ms. L might pursue through the use of his services would not be within the jurisdiction of a probate court to consider and that there was therefore no need to ask a probate court for permission to represent Ms. L.

79. In March 2011 Mark McCune appeared at Ms. L's care facility accompanied by a police officer. Care facility employee Zelma Niados testified that she thought McCune was a messenger from Respondent. Respondent testified that he had no involvement in McCune's appearance at Ms. L's care facility in March 2011. McCune attempted to see Ms. L to ascertain her welfare on the representation that Ms. L was sick and might need help. McCune called 911 and a police officer was sent to check on Ms. L. The police officer talked to various individuals, including Ms. L, and then left, as did McCune. No evidence was presented to prove that Respondent was involved in McCune's attempt to see Ms. L or that he directed McCune's conduct or statements on this occasion.

CONCLUSIONS OF LAW ON COUNT FOUR

80. The State Bar charged Respondent with three rule violations in connection with Count Four. First, that he violated Rule of Professional Conduct (ER) 7.3(a) by

attempting to solicit legal work from Ms. L, knowing that she was under the protection of a guardian and conservator. Second, that he gave false information to employees of Ms. L's care facility in his attempt to solicit legal work from Ms. L, in violation of Rule of Professional Conduct (ER) 8.4(c). Third, that he violated Rule of Professional Conduct (ER) 8.4(d) by giving false information to employees of Ms. L's care facility in his attempt to solicit legal work from Ms. L and by interfering with an on-going attorney/client relationship (between Attorney Bernstein and Ms. L).

81. On the charge of violation of ER 7.3(a), the Panel concludes that the State Bar has not proven the violation by clear and convincing evidence. As applicable to the facts in this count, ER 7.3(a) prohibits a lawyer from soliciting professional employment from a prospective client when the lawyer's motive is his pecuniary gain. The Panel has no doubt that Respondent had as his purpose in meeting with Ms. L his engagement as her counsel to pursue litigation based on alleged violations of her rights by various individuals, including her guardian and conservator. On the other hand, Respondent testified that he contacted Ms. L based on representations by McCune said she wanted to meet with him. While Respondent failed to follow proper procedure in order to call McCune as a witness in his defense, Exhibit 27 reflects that Respondent offered to provide the State Bar with a tape that he claimed would corroborate his explanation that Ms. L had asked to see him and the State Bar did not offer any evidence to negate Respondent's claim that he had a good faith basis to meet with Ms. L because she wanted to meet with him. The State Bar did not charge Respondent with violating ER 4.2 (Communication with Person Represented by Counsel).

82. The State Bar raised the issue whether Ms. L had the capacity to hire a lawyer, given that she had a guardian and conservator (and also a court-appointed lawyer), but the State Bar presented no evidence that Respondent asked Ms. L to sign a fee agreement during his visit on October 3, 2010. Further, the State Bar did not prove that Ms. L's existing guardianship and conservatorship and legal representation prohibited Respondent and Ms. L from meeting to discuss her satisfaction or dissatisfaction with her guardian's and conservator's services or those of her appointed attorney. Nor did the State Bar prove that Ms. L was as a matter of fact mentally incapacitated such that Respondent knew or should have known that she lacked the ability to communicate with Respondent and understand what she was talking to him about. [16] Comment [4] of ER 1.14 (Client with Diminished Capacity) provides, in part, that "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." But the purpose of Respondent's meeting with Ms. L was, in part, to discuss concerns she had about her legal representative, hardly a discussion Respondent could have with that person as the client's alter ego.

83. On the charge of violation of ER 8.4(c), the Panel concludes that the violation has not been proven. The State Bar did not establish by clear and convincing evidence that Respondent gave false information to care facility employees when he visited Ms. L on October 3, 2010. He engaged in conversation with various

[16] Comment [1] of ER 1.14 (Client with Diminished Capacity) states, in part, as follows: ". . . a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."

individuals during that visit, including Ms. L, and gave various individuals his professional business card. But the State Bar failed to prove any specific statement or statements of his to others was false or constituted a misrepresentation. The State Bar did not present any evidence that Respondent directed McCune's statements when he visited Ms. L's care facility in March 2011 or that any of McCune's statements were false or misleading.

84. On the charge of violation of Rule of Professional Conduct 8.4(d), the Panel concludes that the violation has not been proven. The State Bar did not establish by clear and convincing evidence that any specific act of Respondent, individually or taken together with other specific acts, constituted conduct prejudicial to the administration of justice. That Respondent talked to a represented person without permission of the person's court-appointed counsel, chargeable as an alleged violation of ER 4.2, is not, in the opinion of the Panel, clear and convincing evidence of a violation of ER 8.4(d).

FINDINGS OF FACT

COUNT SIX (File No. 11-1023)

85. Respondent filed a lawsuit in the United States District Court for the District of Arizona on behalf of Jeffrey C. Stone, Inc., dba Summit Builders Construction Company (hereafter Summit), against the Greenberg Traurig law firm and numerous other defendants on or about November 23, 2009. Exhibit 28.

86. The lawsuit made numerous claims against the defendants, including that they violated the federal Racketeer Influenced and Corrupt Organizations Act (hereafter RICO), the Arizona racketeering statutes, federal securities statutes,

federal civil rights statutes, and state law against fraudulent transfers, and that they engaged in breach of contract and breach of the covenant of good faith and fair dealing, legal and accounting malpractice, and breach of fiduciary duty.

87. Various defendants filed motions to dismiss the complaint. While those motions were pending, Respondent filed an amended complaint on behalf of his client on or about January 20, 2010. Exhibit 29. The amended complaint made numerous claims against the defendants, including those set forth in paragraph 86, and added claims, including tortious inference with contract and auditing malpractice.

88. By way of brief summary, Respondent claimed on behalf of his client that the defendants violated multiple federal and state laws and otherwise violated his client's legal rights by failing or assisting others in failing to keep commitments to pay Summit for costs it incurred in constructing several buildings. Respondent alleged that lawyers and accountants aided their clients in diverting and dissipating assets and funds that should have been available to pay Summit what it was owed. U.S. District Court Judge Mary Murguia summarized the lawsuit in Exhibit 34, SBA000920-000921 (the transcript of a hearing she held on August 30, 2010, to consider the motions to dismiss Respondent's first amended complaint).

89. In Exhibit 30, his response to several motions to dismiss, Respondent argued that his first amended complaint met applicable pleading standards. Respondent filed responses to other motions to dismiss. See Exhibits 31, 32, and 47.

90. U.S. District Court Judge Mary Murguia entered an order on July 29, 2010, denying the motions to dismiss the original complaint as moot based on the filing of

the first amended complaint. The judge set a hearing to consider the collective motions to dismiss the first amended complaint. Exhibit 33.

91. A transcript of the hearing held before Judge Murguia on August 30, 2010, was admitted into evidence in this proceeding. Exhibit 34. A number of lawyers made arguments to Judge Murguia, including Respondent, who was given approximately one hour to argue against the motions to dismiss.

92. The day after the hearing, on August 31, 2010, co-counsel for Summit, Brian J. Campbell, filed with the U.S. District Court a notice of dismissal without prejudice of Summit's lawsuit. Exhibit 35.

93. Various defendants filed motions seeking the imposition of sanctions against Respondent as a result of the dismissal of Summit's lawsuit. Judge Murguia by order dated September 22, 2010, directed Summit and Respondent to show cause in writing why sanctions should not be entered against them. See the reference to this order on page one of Exhibit 38, SBA001048. Respondent filed a response to the order to show cause and the requests for sanctions and attorney fees (Exhibit 36) and a supplemental response (Exhibit 37).

94. Judge Murguia entered an order dated March 21, 2011, requiring Respondent and his client Summit to pay attorney fees to various defendants totaling tens of thousands of dollars. The judge based her award of attorney fees against Respondent on what she characterized as repeated misrepresentations concerning the facts and law in his briefings and oral argument to the court in connection with Summit's lawsuit. Exhibit 38.

95. Respondent moved to vacate Judge Murguia's order of March 21, 2011, and for a new trial on April 6, 2011. Exhibit 40. Judge Murguia denied this motion by order entered on July 25, 2011. Exhibit 41, SBA001149. An amended clerk's judgment was entered on July 26, 2011, granting judgment to various defendants against Summit and Respondent for attorney fees totaling over $136,000. Exhibit 41, SBA001150.

96. Respondent filed a notice of appeal of the amended clerk's judgment on August 24, 2011. Exhibit 41, SBA001151.

97. A Panel of the United States Circuit Court of Appeals for the Ninth Circuit affirmed the judgment by unpublished memorandum opinion entered on January 25, 2012. Respondent filed a motion for rehearing which is still pending at this time.

98. In Paragraph 137 of its Complaint, the State Bar alleged that in pleadings or oral argument before Judge Murguia, Respondent made a series of misrepresentations. The State Bar's allegations track Judge Murguia's Order of March 21, 2011; however, for reasons previously indicated, the Panel must make its own independent review and evaluation of the conduct in question pursuant to the applicable clear and convincing evidence standard. The Panel will identify and discuss each of the alleged misrepresentations in paragraphs 99-121.

99. The State Bar alleged in Paragraph 137(a) of its Complaint that Respondent misrepresented at the August 30, 2010, hearing before Judge Murguia "that in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S.Ct. 2131 (2008), the Supreme Court had dispensed with a direct injury requirement in the context of RICO claims."

100. Respondent did not so argue at the August 30, 2010, hearing. To the contrary, the thrust of Respondent's argument was that his client *was* directly injured—not by representations to the client itself but rather by representations that had been made to third-parties—and that, under *Bridge*, first-party reliance was not required.

101. Specifically, during oral argument, Respondent made the following statements regarding *Bridge*:

> (a). "[T]he seminal case under the racketeering count is Bridge versus Phoenix Bond & Indemnity. Contrary to the allegations of privity, contractual privity, reliance, detrimental reliance, public statements, direct first-party reliance, the Supreme Court laid to rest once and for all of those frivolous arguments. There is no contractual privity required." Exhibit 34, SBA000957.
>
> (b). "And again, the issue under – is as Your Honor reviews the primary or the seminal racketeering case of Bridge, it's that the representations were made to any third party, not directly to the client. That's all that's required." Exhibit 34, SBA000979.
>
> (c) "Again, under the racketeering laws provided by the U.S. Supreme Court, it isn't that they provided information directly to Summit. It's the fact that they provided the information to a host of federal and state agencies, audit companies, with Greenberg Traurig, with Quarles & Brady, with Deconcini in charge. It is the reliance by any third party. And, in fact, that is an excellent point that Your Honor brings up,

because Bridge versus Phoenix Bond & Indemnity was a case where the reliance was damaging to the actual creditor because of the representations made to county government." Exhibit 34, SBA00099

102. In written argument to the court before the hearing, Exhibit 47 to this proceeding, Respondent had made the same point far more clearly, stating: "Standing is conferred where, as here, Summit specifically and identifiably was damaged in its "business or property" under 18 U.S.C. § 1964(c), which damages were directly and proximately caused by Defendants' RICO predicate acts. *See Bridge v. Phoenix Bond & Indem. Co.,* 128 S. Ct 2131 (2008) (Supreme Court observes there was, and continues to be, no first party reliance, only that *any* third-party may rely upon defendants action(s) ... causing damage to the plaintiff; the Supreme Court's adoption of a "flexible" proximate cause analysis is all that is required; ... ").

103. The U.S. Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), held as follows: "The question presented in this case is whether a plaintiff asserting a RICO claim predicated on mail fraud must plead and prove that it relied on the defendant's alleged misrepresentations. Because we agree with the Court of Appeals that a showing of first-party reliance is not required, we affirm." 553 U.S. at 641-642. "For the foregoing reasons, we hold that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendants' alleged misrepresentations." 553 U.S. at 661.

104. In Paragraph 137(b) of its Complaint, the State Bar alleged that Respondent misrepresented the holding of *SEC v. Zandford*, 535 U.S. 813 (2002) "to try to avoid the holding of *Blue Chip Stamps v. Manor Drug Stores* 421 U.S. 723 (1975), that only a purchaser or seller of securities may pursue a claim for securities fraud."

105. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1974), the U.S. Supreme Court held, in a 6-3 decision, that plaintiff could not pursue a private cause of action for violation of §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) because it was not a purchaser or seller of securities. The majority reversed a decision of the United States Court of Appeals for the Ninth Circuit that would have created an exception to this rule.

106. In the pleading in question, Exhibit 30, SBA000865, Respondent cited five cases for the proposition that, in the years since *Blue Chip* was decided, federal courts had allowed exceptions to the purchaser standing requirement. The fifth of those cases was *Zandford*. The State Bar does not claim that the first four cases were inaccurately cited. It challenges only Respondent's assertion that in *Zandford*, "the Court relaxed the purchaser/seller requirement where a scheme was pleaded "in which the securities transactions and breaches of fiduciary duty coincide.""

107. *SEC v. Zandford*, 535 U.S. 813 (2002), involved a civil complaint filed by the Securities and Exchange Commission (SEC) against a securities broker for alleged violation of §10(b) of the Securities Exchange Act of 1934 and the SEC's Rule 10(b)(5) by "selling his customer's securities and using the proceeds for his own benefit without the customer's knowledge or consent. The question presented was whether the alleged fraudulent conduct was "in connection with the purchase or

sale of any security" within the meaning of the statute and Rule." 535 U.S. at 815. The Supreme Court concluded, "As in [several other cases], the SEC complaint describes a fraudulent scheme in which the securities transactions and breaches of fiduciary duty coincide. Those breaches were therefore "in connection with" securities sales within the meaning of §10(b)." 535 U.S. at 825 (footnote omitted).

108. Judge Murguia and Respondent engaged in the following exchange during the hearing on August 30, 2010 (Exhibit 34, SBA000979-980):

> Judge Murguia: "You have a standing issue here as well. And I guess let me just ask you, how do you distinguish the Blue Chips case with respect to your facts here?"
>
> Respondent: "Your Honor, two things: One, I think what I would like to do is our arguments, although addressed, despite the information from the other lawyers, we addressed every single issue and we actually joined with ourselves in our multiple responses as we stagger the response trying to deal with an issue at a time within the page limits. Every issue was addressed, and there is case law that supports the Blue Chip theory. And they are correct, in the purchase of [sic] sale, that's not we are doing here. We are going after the intentional conduct, the racketeering conduct. And for the purpose of argument, I can use the private placement memorandums that were never purchased or sold as evidence of racketeering conduct and intent. I don't need to use the securities fraud count and intent. I don't need to use the securities fraud count. And I can withdraw that."

Judge Murguia: "All right. Do you withdraw it?"

Respondent: "For the purpose of this argument, yes, Your Honor, I would like to."

Judge Murguia: "Well --"

Respondent: "Because I don't --"

Judge Murguia: "-- you don't withdraw it for purposes of the argument. You – with respect to the case, do you withdraw it?"

Respondent: 'Yes. I'll concede those issues."

109. In Paragraph 137(c) of its Complaint, the State Bar alleged that Respondent misrepresented *U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002), to the court by citing it "to support the proposition that bankruptcy fraud and fraudulent transfers can be predicate acts [for RICO violations.]" The State Bar continued, "*Warneke* is a criminal RICO case about a motorcycle gang, addressing guns, shootings, and drugs, not bankruptcy or fraudulent transfers."

110. In Exhibit 47, page 10, the pleading in question, under the heading, "Bankruptcy Crimes as Predicate Act", Respondent was asserting, in response to motions to dismiss, that he had alleged with sufficient specificity that the moving defendants were liable under RICO for conspiring to commit a pattern of unlawful acts (the predicate acts). After first and correctly citing *U.S. v. Weisman,* 624 F.2d 1118, 1124 (2nd Cir. 1980), for the proposition that § 1961(d) of the federal RICO statute is broad enough on its face to include conspiracy involving security and bankruptcy fraud, Respondent followed his citation to *Weisman* with "*cf. U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002)."

111. The Panel takes judicial notice that the Eighteenth Edition of *The Bluebook – A Uniform System of Citation* (2005), at page 47, describes the *Cf.* signal as, "Cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, "*cf.*" means "compare". The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations (rule 1.5), however brief, are therefore strongly recommended."

112. Although *U.S. v. Warneke*, 310 F.3d 542 (7th Cir. 2002), a criminal case, dealt with the defendants' challenges to convictions for RICO violations, among others, it supports the proposition that conspiracies to commit other crimes are unlawful "acts" that qualify as predicate acts for RICO purposes. *Id.* at 546. What serves as a predicate offense for a criminal RICO violation may also serve as a predicate offense for a civil RICO claim.

113. In Paragraph 137(d) of its Complaint, the State Bar alleged that Respondent misrepresented *Natomas Gardens Inv. Group LLC v. Sinadinos*, 2009 U.S. Dist. LEXIS 110063 (E.D. Cal. Nov. 24, 2009), incorrectly citing it "for the proposition that there could be RICO standing for an individual injury apart from a corporation." According to the State Bar, "That case does not address RICO standing issues, rather it deals with a motion to substitute Counsel."

114. In the pleading in question, Exhibit 32, SBA000898-899, Respondent did cite the *Natomas* case as holding, "no shareholder standing to assert RICO claims for harm if derivative of harm to the corporation, but the mere presence of an injury to the corporation does not necessarily negate the simultaneous presence of an

individual injury; an action may lie both derivatively and individually based on the same acts."

115. The State Bar was correct in alleging that the particular *Natomas* decision cited by Respondent—a decision issued on November 24, 2009—did not support the proposition for which he cited it. However, an earlier decision issued by the same court on May 12, 2009, under the same case name, *Natomas Gardens Inv. Group LLC v. Sinadinos*, did support the proposition asserted by Respondent. Respondent's citation was mistaken in that he provided the date of a later decision in the same case.

116. In Paragraph 137(e) of its Complaint, the State Bar likewise alleged that Respondent misrepresented the case of *Quantel Corp. v. Niemuller*, 771 F. Supp. 1372 (S.D.N.Y. 1991) to the court, citing it for a proposition that it did not support. According to the State Bar, Respondent, attempting to establish RICO standing, "stated that the court in *Quantel* "analyzed the question of whether a shareholder had standing to bring a racketeering suit against defendants who had manipulated equipment leases and their receivables arising from those leases,'" whereas the cited decision instead related only to the effort of a corporate director to have the corporation pay his attorney's fees.

117. In the pleading in question, Exhibit 32, SBA000897, Respondent did in fact miscite the *Quantel* decision published at 771 F. Supp 1372 for the proposition summarized in the State Bar's Complaint. The State Bar is also correct that the particular decision Respondent cited does not support that proposition. A concurrent decision by the same court with the same case name does, however,

support the proposition asserted by Respondent. *See Quantel Corp v. Niemuller*, 771 F. Supp. 1361, 1366-6 (S.D.N.Y. 1991). Once again, Respondent was mistaken only insofar as he provided a citation to a different decision in the same case.

118. At paragraph 137(f) of its Complaint, the State Bar alleges that "during oral argument, in response to the Court's questioning, Respondent stated that [his client] Summit had filed a proof of claim in the Mortgages Ltd. Bankruptcy proceeding, which the bankruptcy record demonstrates otherwise."

119. Respondent's precise representation was as follows. When asked by Judge Murguia, "Did you file a claim as a creditor in the bankruptcy case involving Mortgages Limited?", Respondent stated, "I believe they may have, but they haven't participated or pursued it in any way, shape, or form because of this third-party conduct." Judge Murguia then asked, "I'm talking about your plaintiff. You don't know or you – that – whether or not they filed a claim as a creditor in the Mortgages Limited bankruptcy case?" Respondent replied, "I have not represented the client, but I'm almost positive that they filed a claim in the bankruptcy case." Exhibit 34, SBA000961.

120. At paragraph 137(g) of its Complaint, the State Bar alleged, "Respondent also stated that Summit contracted with Mortgages Ltd, which the bankruptcy record demonstrates otherwise." In the course of argument at the August 30, 2010, hearing, Judge Murguia asked Respondent how he could advance a claim of tortious interference with contract against Mortgages Limited when he had not alleged a direct contractual relationship between Summit and Mortgages Limited. In an extended colloquy, Respondent focused on AIA contracts between Mortgages

Limited's borrowers and Summit in which Mortgages Limited had been obliged to sign, and allegedly did sign, verification that funding to support the borrowers' commitments to Summit was in place. Pressing the point, Judge Murguia asked, "Was Summit in a contractual relationship? Did you have a contract with Mortgages Limited? And you are an officer of this Court, and I want you to contemplate that before you answer that question." Respondent answered, "Were the security guarantee and the funding resources, did those need to be made directly to my client for his direct reliance? Yes. Did Mortgages Limited have to sign documents with the owner in order to enable them to fulfill their obligations under the direct contract with my client? Yes. Was my client an intended third-party beneficiary of the relationship between the lender and his warranties and his warranties to the general contractor regarding payment? Yes, under Arizona law, absolutely."

121. Judge Murguia's order of March 21, 2011 (Exhibit 38), awarded substantial attorney's fees to various defendants against Summit and Respondent based on the court's finding "that [Respondent's] repeated misrepresentations concerning the facts and law in his briefing and during oral argument, despite warning by the Court, coupled with counsel's continued misrepresentations in his response to the Court's [Order to Show Cause], cannot be attributed to mere carelessness, but rather constitute an improper effort to mislead both the Court and opposing counsel. [Respondent's] actions in this regard, as well as his improper removal of the probate case and voluntary dismissal at the eleventh hour, constitutes conduct tantamount to bad faith and, as such, is sanctionable under the Court's inherent

power." Included in the misrepresentations cited by Judge Murguia are those set forth in the paragraphs above.

122. Judge Murguia's order of March 21, 2011 (Exhibit 38), SBA001060, included the following: IT IS FURTHER ORDERED that within 20 days of the service of this order Plaintiff's and Defendants' counsel shall jointly cause the delivery of a copy of this order to the appropriate authority within the Arizona State Bar for whatever further investigation, review, or action it may deem appropriate."

123. The State Bar asked Respondent to submit a written response to Judge Murguia's order by letter dated April 4, 2011. Exhibit 39. The State Bar's letter included the following: "The ethical rules that should be addressed in your response include, but are not limited to: "ERs 3.1, 3.3(a), 3.4(c), 4.1(a), 4.4(a), 8.4(c), and 8.4(d)." The letter stated, "Pursuant to ER 8.1(d) and Rule 54(d), Ariz. R. Sup. Ct., you have a duty to cooperate with this investigation. Failure to fully and honestly respond to, or cooperate with, the investigation is, in itself, grounds for discipline."

124. Respondent failed to file a direct response within the twenty days provided in Exhibit 39. On May 11, 2011, however, he did provide the State Bar with a copy of his motion for a new trial and motion to vacate order previously submitted to the U.S. District Court in the Summit litigation and an attachment thereto, Exhibit 40.

CONCLUSIONS OF LAW ON COUNT SIX

125. The State Bar alleges that Respondent violated Rule of Professional Conduct (ER) 3.1 by filing a frivolous complaint and first amended complaint on behalf of Summit. ER 3.1 provides in pertinent part as follows: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a good

faith basis in law and fact for doing so that is not frivolous, which may include a good faith and nonfrivolous argument for an extension, modification or reversal of existing law." Comment [2] to ER 3.1 provides, in part, that an action is frivolous "if the lawyer is unable either to make a nonfrivolous argument on the merits of the action taken or a good faith and nonfrivolous argument for an extension, modification or reversal of existing law."

126. Although the State Bar's complaint identified a series of grounds upon which various defendants moved to dismiss Respondent's first amended complaint, the State Bar's complaint did not allege the basis upon which it claimed that Respondent's complaint and first amended complaint were frivolous under ER 3.1, as distinguished from being legally insufficient as a matter of law. That a complaint may warrant dismissal does not establish that it is frivolous. The Panel concludes that the State Bar's complaint did not provide Respondent notice of which if any specific allegations in his complaints on behalf of Summit were alleged to have violated ER 3.1. *See In re Levine*, 174 Ariz. 146, 169-170, 847 P.2d 1093, 1116-1117 (1993).

127. The State Bar alleges that Respondent violated Rules of Professional Conduct (ER) 3.3(a)(1), 4.1(a), and 8.4(c) by continually making misstatements to the court in pleadings and in oral argument, and by misstating the law in his court filings. ER 3.3(a)(1) provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer". ER 4.1(a) provides that 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". ER 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation".

128. The State Bar inaccurately characterized Respondent's argument concerning the *Bridge* case at paragraph 137(a) of its Complaint. Although Respondent was inaccurate at one point in his oral argument in describing that case as having addressed a privity of contract requirement, his collective oral statements to the court, as well as his written argument to the court, were essentially correct in citing that case for the proposition that, if his client was directly injured by defendants' conduct, his client need not assert first party reliance to achieve standing. The Panel accordingly cannot conclude by clear and convincing evidence that Respondent knowingly made a false statement of fact or law to a tribunal in this regard in violation of ER 3.3(a)(1), ER 4.1(a), or ER 8.4(c).

129. Respondent inaccurately characterized the *Zandford* case as one that "relaxed the purchaser/seller standing requirement" when a scheme was pleaded "in which the securities transactions and breaches of fiduciary duty coincide." See paragraphs 104-108. *Zandford* did not involve a securities fraud claim by private litigants. *Zandford* was brought by the SEC, whose standing to bring its claim was not in issue. Yet the case supported an argument that the applicable statute should be construed flexibly to effectuate its remedial purposes. Based on the foregoing, and because the citation to *Zandford* followed citations to four cases that arguably supported some relaxation of the purchaser/seller standing requirement, the Panel cannot conclude by clear and convincing evidence that Respondent knowingly made

a false statement of fact or law to a tribunal in this regard in violation of ER 3.3(a)(1), ER 4.1(a), or ER 8.4(c).

130. The Panel concludes that Respondent's statement, as set forth in paragraph 104-108, that the *Blue Chip Stamps* case only stated a general rule and that there were therefore exceptions that allowed his client to proceed with a federal securities fraud claim without being a seller or purchaser of a security, considered in the context of the cases he cited to demonstrate those exceptions existed, was not misleading. The Panel concludes that the charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c) in this regard has not been proven.

131. Respondent's statement concerning the case of *U.S. v. Warneke*, as set forth in paragraphs 109-112, considered in the context of the other case he cited in the memorandum in question, was not outside the bounds of permissible usage of the legal signal, *Cf.* The Panel concludes that the charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c)in this regard has not been proven.

132. Because Respondent's incorrect citation to the *Natomas* case, as set forth in paragraphs 113-115, was merely to cite a wrong case of the same name for the proposition stated, the Panel concludes that the charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c) in this regard has not been proven.

133. Because Respondent's incorrect citation to the *Quantel* case, as set forth in paragraphs 116-118, was likewise merely to cite a wrong case of the same name for the proposition stated, the Panel concludes that this charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c) has not been proven.

134. The Panel concludes that Respondent's statement, as set forth in paragraph 118-119, that his client had, "I'm almost positive", filed a claim in Mortgages Limited's bankruptcy proceeding, considered in the context of other contemporaneous equivocations ("I believe they may have", "I have not represented the client"), does not constitute clear and convincing evidence that Respondent intended to deceive the court that his client had, in fact, filed a claim in Mortgage Limited's bankruptcy proceeding. The Panel concludes that this charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c) has not been proven.

135. Respondent's contention, as set forth in paragraph 120, that his client had a contractual relationship with Mortgages Limited was based on his theory that his client was at the very least an intended third-party beneficiary to the warranties Mortgages Limited made in the contracts his client had entered into with "the Grace entities". Whatever the legal merit of this argument, the Panel cannot conclude by clear and convincing evidence that Respondent knowingly made a false statement of fact or law to a tribunal in violation of ER 3.3(a)(1), ER 4.1(a), or ER 8.4(c). Respondent adequately disclosed to the court the factual basis for his legal argument that his client was the intended beneficiary of a contractual commitment between other parties. The Panel concludes that this charge of violation of ER 3.3(a)(1), ER 4.1(a), and ER 8.4(c) has not been proven.

136. The State Bar alleges that Respondent violated Rule of Professional Conduct (ER) 8.1(b) and Arizona Supreme Court Rule 54(d) by failing to provide a substantive response to the State Bar. ER 8.1(b) provides, in pertinent part, that a lawyer in connection with a disciplinary matter shall not "knowingly fail to respond

to a lawful demand for information from . . . a disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by ER 1.6." Arizona Supreme Court Rule 54(d) provides, in pertinent part, that a refusal to cooperate with officials and staff of the State Bar acting in the course of their official duties constitutes grounds for discipline. The rule also states that failure to furnish information or respond promptly to any inquiry or request from bar counsel made pursuant to the Supreme Court's rules for information relevant to complaints or matters under investigation concerning conduct of a lawyer, or failure to assert grounds for refusing to do so, constitutes grounds for discipline. The rule further provides that upon such inquiry or request, every lawyer shall furnish in writing, or orally if requested, a full and complete response to inquiries and questions.

137. The Panel finds by clear and convincing evidence that Respondent violated Arizona Supreme Court Rule 54(d) by failing to provide a full and complete written response to the State Bar's inquiry of April 4, 2011. Respondent's submission of his pleading in the Summit case may have partially responded to the State Bar's inquiry, insofar as it demonstrated that he was contesting Judge Murguia's Order and that her Order was not a final disposition. It was not, however, the requisite full and complete written response to the State Bar's request. Among other things, it did not address the specific Rules of Professional Conduct cited by the State Bar.

138. The Panel does not, however, find that Respondent violated ER 8.1(b) as he did provide the State Bar with a response, however inadequate.

139. The State Bar alleges that Respondent violated Rule of Professional Conduct (ER) 8.4(d) when he filed a notice of voluntary dismissal only after extensive

briefing and a three-hour oral argument, thereby utilizing scare judicial resources and causing others to unwillingly participate in Respondent's legal shenanigans. ER 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice". Respondent did not file the notice of voluntary dismissal; another lawyer, not in Respondent's firm, did. As the State Bar based this charge on Respondent filing the notice, it has not been proven and is dismissed. [17]

SANCTION

The Panel has found Respondent to have violated the following rules: Count One: ER 3.1 (Ravenscroft), ER 3.1 (Mallet), ER 4.4(a) (Ravenscroft), ER 4.4(a) (Mallet), ER 8.4(d) (Ravenscroft), ER 8.4(d) (Mallet); Count 2: ER 3.3(a)(1), ER 4.1(a), ER 8.4(c); Count Six: Arizona Supreme Court Rule 54(d).

In determining an appropriate sanction for a lawyer's violation of these rules, the Arizona Supreme Court utilizes the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") as a guideline. Rule 58(k), Ariz.R.Sup.Ct. The appropriate sanction depends on the facts and circumstances of each case. An appropriate sanction must be considered in light of the purpose of lawyer discipline: (1) to protect the public and the courts; and (2) to deter the attorney and others from engaging in the same or similar misconduct. *See In re Zawada*, 208 Ariz. 232, 92 P.3d 862, 866 (2004).

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[17] While the State Bar moved to conform its pleading to the evidence with respect to errors such as alleging Respondent filed the notice of voluntary dismissal when another lawyer did (transcript of hearing, March 2, 2012, at approximately 11:30:14 am), even if the Panel did so, no evidence was presented at the hearing that Respondent directed the other lawyer to file the notice. Based on the evidence presented, the charge of Respondent's alleged violation of ER 8.4(d) has not been proven.

Analysis under the ABA *Standards*

When imposing a sanction, consideration is given to 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, 90 P.3d 764, 769 (2004). *See also Standard* 3.0.

The *Standards* do not account for multiple charges of misconduct and advise that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct. *See Standards, Theoretical Framework, p.* 7.

In this matter, Respondent has violated duties owed to the public, the legal system, and as a professional and caused actual injury to various parties. His conduct has had a serious adverse effect on his purported clients, the people and entities he sued, and on the court system. The Panel applies the following *Standards* to Respondent's conduct in this case.

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in . . . cases with conduct involving dishonesty, fraud deceit, or misrepresentation:

5.11

Disbarment is generally appropriate when:

(a) . . .

(b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

6.0 Violations of Duties Owed to the Legal System

6.1 False Statements, Fraud, and Misrepresentation

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0[,] the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud deceit, or misrepresentation to a court:

6.11

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding.

6.12

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 takes no remedial action, 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.

6.2 Abuse of the Legal Process

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases

involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

6.21

Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

6.22

Suspension 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.

7.0 Violations of Duties Owed as a Professional

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct:

. . .

7.2

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

Aggravating and Mitigating Factors

Aggravating factors in attorney discipline proceedings need only be supported by reasonable evidence. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004). The Panel finds the following aggravating factors are present in this matter:

1. *Standard* 9.22(b), dishonest or selfish motive. In Count One, Respondent demonstrated a selfish motive in obtaining a protected person's agreement to a $100,000 earned on receipt fee (whether or not he collected any portion of that fee).

2. *Standard* 9.22(c), a pattern of misconduct. Respondent's extended behavior in the Ravenscroft and Mallet matters (Counts One and Two) constitutes a pattern of misconduct. The Arizona Supreme Court in *In re Moak*, 205 Ariz. 351, 71 P.3d 343, 348 (2003), stated, "This court views a continuing pattern of misconduct as calling for a lengthy suspension."

3. *Standard* 9.22(d), multiple offenses. Respondent violated multiple rules of professional conduct.

4. *Standard* 9.22(e), bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency. Respondent failed to fully and completely respond in writing to the State Bar's inquiry concerning Count Six. Respondent's failed to file his answer to the State

Bar's complaint in a timely manner. Respondent engaged in gamesmanship throughout the prehearing stages of this proceeding. See, for example, the APDJ's order of January 30, 2012. Many of Respondent's filings in this proceeding, including his post hearing memorandum, and his testimony before the hearing panel, reflect Respondent's contempt for the judiciary, distain for the State Bar, and scorn for these disciplinary proceedings.

5. *Standard* 9.22(g), refusal to acknowledge wrongful nature of conduct. Blinded to the consequences of his behavior, Respondent is completely unremorseful and does not accept that he has done anything wrong. The Panel considers this a substantial aggravating factor. *See In re Zawada*, supra, 92 P.3d at 869 ("It would be difficult, in view of Zawada's acrimonious statements to the hearing officer, to the Disciplinary Commission, and to this court, to conclude that Zawada acknowledges even a single violation. As a result, we find, pursuant to ABA Standard 9.22(g), that Zawada's continuing refusal to recognize what is clearly gross misconduct is a further aggravator to be considered in the process of determining the sanction in this case."). The Panel has no confidence that Respondent is open to tempering his conduct as a lawyer based on anything he might have learned from his involvement in this proceeding.

6. *Standard* 9.22(h), vulnerability of victim. The purported clients in Counts One and Two were protected persons. Respondent embroiled these individuals in protracted disputes with their own fiduciaries without any legal basis for so doing.

7. *Standard* 9.22(i), substantial experience in the practice of law. Respondent has been practicing law for 28 years. The record reflects he has been involved in

substantial litigation for many years and, under the facts of this case, this is, in the opinion of the Panel, a substantial aggravating factor.

Although Respondent offered no evidence of mitigation, the Panel finds the following mitigating factor is present in this matter:

8. *Standard* 9.32(a), absence of a prior disciplinary record.

Standard 9.1 provides that the failure of an injured client to complain (*Standard* 9.1(f)) is neither an aggravating or mitigating factor.

The Panel has found few lawyer discipline cases that offer comparable sets of circumstances to Respondent's misconduct. *In re Peasley*, supra, resulted in the lawyer's disbarment. *In re Moak*, supra, resulted in a six month and a day suspension, as did *In re Zawada*, supra. In *In re Levine*, 174 Ariz. 146, 847 P.2d 1093 (1993), the lawyer was suspended for six months and on reinstatement was subject to terms of probation for two years. The Panel is most concerned that Respondent does not appreciate the wrongfulness of his conduct and has offered no basis to lead the Panel to believe he will self-correct his conduct on a going forward basis. The public needs to be protected from Respondent, who clearly appears incapable of conforming his conduct to the requirements of the rules Arizona lawyers are obligated to follow.

CONCLUSION AND ORDERS

Based on the entire record and after carefully considering the *Standards,* including the identified aggravating and mitigating factors, the Panel orders Respondent suspended from the practice of law for two years, retroactive to the effective date of his temporary suspension by the PDJ (July 21, 2011). Respondent

must meet the standards set forth in Arizona Supreme Court Rule 64(a) to be reinstated to the practice of law. Respondent is also ordered to pay all chargeable costs and expenses related to this proceeding.

Dated this 8th day of May, 2012.

George A. Riemer
Acting Presiding Disciplinary Judge

CONCURRING:

Noel Fidel, Volunteer Attorney Member

John Hall, Volunteer Public Member

Original filed with the Disciplinary Clerk this 8th day of May, 2012.

COPY of the foregoing mailed this 8th day of May, 2012, to:

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