IN THE

SUPREME COURT OF THE STATE OF ARIZONA

BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE

1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DOUGLAS E. THOMAS,** **Bar No.** 011742 Respondent.	**PDJ-2013-9040** **REPORT AND ORDER IMPOSING SANCTIONS** [State Bar No. 12-3136] **FILED SEPTEMBER 17, 2013**

On August 15, 2013, the Hearing Panel ("Panel"), composed of Archer Shelton, a public member, George A. Riemer, an attorney member, and the Presiding Disciplinary Judge, William J. O'Neil ("PDJ"), held a one-day hearing pursuant to Rule 58(j), Ariz. R. Sup. Ct. David L. Sandweiss appeared on behalf of the State Bar of Arizona ("State Bar"). Douglas E. Thomas appeared pro per. Rule 615 of the Arizona Rules of Evidence, the witness exclusion rule, was invoked in the parties' joint pre-trial memorandum; however, at the hearing the parties indicated that the rule was no longer being invoked.[1] In addition, the Panel carefully considered the admitted factual paragraphs of the Complaint, admitted exhibits, the parties' Joint Prehearing Statement, and the State Bar's Prehearing Memorandum. The Panel now issues the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz. R. Sup. Ct.

[1] Consideration was given to sworn testimony of Douglas E. Thomas, Honorable Michael R. McVey (retired), William J. Maledon, Esq., Charles R. Price, Esq., and James Schollian, Esq.

I. SANCTION IMPOSED:

RESPONDENT IS DISBARRED AND PAYMENT OF COSTS OF THESE DISCIPLINARY PROCEEDINGS IMPOSED.

II. BACKGROUND AND PROCEDURAL HISTORY

A Probable Cause Order was filed on April 15, 2013. The State Bar filed its Complaint on May 2, 2013. On May 3, 2013, the Complaint was served on Mr. Thomas by certified, delivery restricted, mail, as well as by regular first class mail, pursuant to Rules 47(c) and 58(a)(2), Ariz. R. Sup. Ct. On May 6, 2013, Mr. Thomas filed a Motion to Dismiss the Complaint under Rule 12(b)(1) and (2), Ariz. R. Civ. P. On May 7, 2013, the PDJ entered an order denying the motion to dismiss, holding that the court had subject matter and personal jurisdiction over Mr. Thomas pursuant to Rule 46, Ariz. Sup. Ct. On May 28, 2013, Mr. Thomas filed his Answer admitting paragraphs 1 through 81 of the Complaint.

The Complaint alleges a total of seven (7) violations of the Arizona Rules of Professional Conduct, specifically, ER 1.1 (competence), ER 1.5(c) (contingency fees in writing), ER 1.9 (duties to former clients), ER 3.1 (meritorious claims and contentions), ER 3.4(c) (fairness to opposing party and counsel), ER 4.4(a) (respect for rights of others), and ER 8.4(d) (conduct prejudicial to the administration of justice). The Complaint also alleged Mr. Thomas violated Rule 54(c), Ariz.R.Sup.Ct.

On June 11, 2013, the Initial Case Management Conference ("ICMC") was held and the matter was set for a two-day hearing. An Order regarding the ICMC was filed and provided to the parties pursuant to Rule 58(c), Ariz. R. Sup. Ct. On June 19, 2013, Mr. Thomas filed a Motion for Summary Judgment and a separate pleading titled Statement of Facts containing alleged undisputed facts in support of his Motion for Summary Judgment. On July 16, 2013, the State Bar filed a

response to Mr. Thomas' Motion for Summary Judgment and a separate statement of facts in support of that response. On July 18, 2013, Mr. Thomas filed a reply to the State Bar's response and filed a Motion to Strike the State Bar's response and separate statement of facts. The State Bar filed its response to the Motion to Strike on July 19, 2013, and the PDJ entered an Order ruling on Mr. Thomas' motions to strike and for summary judgment, denying both motions.

The State Bar argued that Mr. Thomas violated all of the rules cited in the Complaint and that a lengthy suspension is appropriate. [See State Bar's Proposed Finding of Fact and Conclusion of Law.] Mr. Thomas argued that the complaint against him should be dismissed.

III. FINDINGS OF FACT

The Panel hereby adopts and incorporates as part of this report the facts of paragraphs 1 through 81 of the State Bar's Complaint, as admitted in paragraphs 1 through 81 of Mr. Thomas' Answer to said Complaint. [Complaint, pp. 1-16; Answer, pp. 1-5.] The Panel further adopts and incorporates as part of this report the stipulated facts of this case as detailed in the parties' Joint Prehearing Statement. [Joint Prehearing Statement, pp. 1-16.].

At all relevant times, Douglas E. Thomas ("Mr. Thomas") was a lawyer, having first been admitted to practice law in the state of Arizona on October 24, 1987. [Joint Prehearing Statement, p. 1.]

This matter arose out of a commercial litigation case filed in 2007 and captioned *Poling; Lightwave Technologies, LLC v. Paterno*, Maricopa County Superior Court Case No. CV2007-052861 ("*Poling* case"). [Joint Prehearing Statement, p. 1, ¶ 2.] Mr. Thomas represented all the various Paterno defendants,

counter-claimants, and third-party plaintiffs, in that litigation up until the date of trial. [Joint Prehearing Statement. at p. 2, ¶¶ 5, 10.] The *Poling* case involved the break-up of Microgroup Manufacturing, Inc., and also involved competing claims to verdicts exceeding $1 million awarded in a separate, but related, lawsuit involving production of an electronic cigarette ("*Sottera* case"). [Id. at p. 2, ¶ 6.] Counsel for some of the parties in the *Sottera* case included Robert Sullivan. [Id. at ¶ 7.] At some point Mr. Sullivan became counsel for the Poling parties in the *Poling* case.

Mr. Thomas testified he was not prepared for trial because he believed the Superior Court, Judge McVey (now retired), would continue the matter in light of issues involving Mr. Sullivan's disclosure of documents from the *Sottera* case in violation of a protective order issued by the judge in that case prohibiting the disclosure of or use of those documents "for any other purpose whatsoever." [Id. at p. 2, ¶ 8.] On October 19, 2010, Mr. Thomas filed a motion to intervene in the *Sottera* case on behalf of his clients, the Paternos. [Ex. 17, Bates 91-95]. He did so in order to gain access to all of the protected documents because he suspected Mr. Sullivan had disclosed more documents than the three (3) that were known to have been disclosed. He was also of the belief that Mr. Sullivan had committed a fraud upon the court not only by violating the protective order but by appearing as counsel in the *Poling* case. The motion was denied on December 17, 2010. [Joint Prehearing Statement, p. 3, ¶¶ 13-19.]

On April 7, 2011, Mr. Thomas filed a motion requesting Mr. Sullivan be disqualified as counsel in the *Poling* case. While the motion was not an exhibit, the parties stipulated to the pertinent language of that motion.

> Pursuant to the authority of Alexander v. Superior Court, the Paterno Parties move for the disqualification of Robert Sullivan, Esq. and his

> law firm from their representation of the Poling Parties, for which the conflict of interest between them should provide. 141 Ariz. 157, 165, 685 P.2d 1309, 1317 (1984)... As the former lawyers of the Paterno Parties in matters salient to this litigation and the lawyers sued for misconduct established in the Sottera litigation, April 27, 2007 letter of Mark Weiss, Esq. to the Poling Parties, attached as Exhibit 1; June 2, 2007 e-mail of Mark Weiss, Esq. and Jeff Weiss, Esq., A.R.S. § 10-2234, owed the Paterno Parties ongoing duties of confidentiality, loyalty, Shano, 177 Ariz. at 557, 869 P.2d at 1210, and good faith and fair dealing. Restatement (Third) of the Law Governing Lawyers § 7 *cmt. b*. The applicable Restatement provision declares standard of care evidence relevant to these duties violated other than the Rules of Professional Conduct competent, Restatement (Third) of the Laws Governing Lawyer 52 (2) (2010), and the complementary nature of the laws of contract with these Rules. Restatement (Third) of the Law Governing Lawyers § 1 *mct. b*. (2010). Consistent with the authority of Barmat v. John and Jane Doe Partners, 155 Ariz. 519, 523, 747 P.2d 1218, 1122 (1987), the Restatement also acknowledges the recoverability of tort relief in the absence of an underlying agreement. Restatement (Second) of Contracts § 205 *cmt. c*. Accord Rawlings v. Apodaca, 151 Ariz. 149, 160, 726 P.2d 565 (1986).

Mr. Sullivan argued that the motion "is a nearly indecipherable morass of words." His motion was denied. [Joint Prehearing Statement, p. 3-4, ¶¶ 20-21.]

Mr. Thomas also sought to extend discovery to seek the sealed *Sottera* documents in the *Poling* case to discover if Mr. Sullivan had disclosed other sealed documents. [Joint Prehearing Statement p. 4, ¶ 22.] From this point forward Mr. Thomas became nothing less than obsessed over Mr. Sullivan's disclosure of sealed documents in the *Sottera* case. This obsession ultimately led to his actions, which were to the detriment of his clients and in turn led to his presence before this Panel.

The jury trial in the *Poling* case was scheduled for and began on August 1, 2011. On June 9, 2011, Mr. Thomas filed a first Motion in Limine. In that motion he requested the court exclude "from allowed testimony and jury consideration" "that Bobby Sullivan, Esq.: Tyler Abrahams, Esq.' and others in the law firm of

Broening, Oberg, Wood and Wilson law firm were privy to sensitive and protection information, as a result of their representation of Mark Weiss in the Sottera litigation." [Ex. 46; 149.] In addition, Mr. Thomas moved to exclude on the basis that the information disclosed was privileged and subject to a court order in the *Sottera* case restricting the use of that information. He also requested exclusion on the basis that "Robert Sullivan, Esq. admitted to the passing of protected documents" and that Mr. Sullivan had admitted "discovery was occurring in the Sottera litigation for the sole purpose and benefit of the Poling Parties." [Id.] Judge McVey granted that request on July 29, 2011, excluding that information. [Ex. 8, Bates 61-62.]

Judge McVey made it clear in his rulings that the *Poling* case would not proceed in any fashion that involved any litigation of, or reference to, Mr. Sullivan's disclosures. Judge McVey testified that he found Mr. Sullivan's disclosures were inadvertent, but nevertheless, he fashioned a remedy to prevent further disclosures, thereby addressing Mr. Thomas' concerns and exercising his discretion to manage the case in a manner that would avoid further delay of trial. [Exhibit 8, Bates 000061-000062.] Mr. Thomas testified that he was certain the trial would be continued, and therefore, he did not prepare for trial. This led one of the Paterno parties, Greg Paterno, to move to discharge Mr. Thomas as his counsel. Judge McVey granted Greg Paterno's motion and the record reflects Greg Paterno went forward pro per while Mr. Thomas represented the remainder of the Paterno parties. [Ex. 10, Bates 000067.] Ultimately, the Paternos lost at trial and a judgment in the amount of $761,294 was entered against them, which included

$300,000 in attorney fees pursuant to A.R.S § 12-341.01. [Joint Prehearing Statement, p. 8, ¶¶ 42-43.]

Mr. Thomas was removed as counsel of record for Greg Paterno on the morning of trial and officially withdrew as counsel for the rest of the Paterno parties on September 19, 2011. [Ex. 15, 16, 19, 22, Bates 83-90, 102-105, 111.] Between the end of trial on August 4, 2011, and the official withdrawal of Mr. Thomas from the *Poling* case in September, the Paternos secured new counsel, Charles S. Price.

After a review of the record, Mr. Price, on August 23, 2011, moved for a new trial. [See Ex. 23, Bates 112, and Testimony of Charles S. Price.] The motion was denied leaving Mr. Price to decide whether to file an appeal or seek an alternative means of finding relief for the Paternos. [Id.] Mr. Price testified that a malpractice claim of approximately $1.5 million was made against Mr. Thomas by the Paterno parties. [See Ex. 34, Bates 163; Testimony of Charles S. Price.] In the meantime, the judgment against the Paternos led them to file for bankruptcy. Attorney James Schollian testified that he eventually took on representation of the Paternos in the bankruptcy matter, which was originally handled by the Paternos pro per.

Despite no longer representing any party in the *Poling* case, on October 6, 2011, and without advance notice or consent of the Paternos, Mr. Thomas filed a motion for leave to intervene. [Ex. 17, Bates 91-95.] The motion is nearly incomprehensible. Mr. Thomas admits as a material fact that "It is unclear from this and subsequent motions to what Respondent referred with his terminology." [Joint Prehearing Statement, p. 8, ¶ 37.]

Mr. Price, who had become post-judgment counsel for the Paternos, responded to the motion on the basis that the motion stated no basis in law or fact for allowing intervention. [Ex. 20, Bates 106-109.] The Poling parties filed a response asserting that Mr. Thomas had not established any of the elements of Civil Rule 24(a) justifying intervention. [Joint Prehearing Statement, p. 8, ¶ 40.] Judge McVey denied the motion, noting that Mr. Thomas was "former" counsel for the Paternos. [Ex. 21, Bates 110.]

Due to the size of the judgment against the Paternos, they filed for bankruptcy. Due to the conduct of Mr. Thomas and his admitted failure to prepare for trial, the Paternos filed a malpractice claim against him. Attorneys Price and Schollian testified that in order to best serve their clients, the Paternos, a complex plan was developed to get the Paternos out of bankruptcy, allow the Paternos to satisfy the judgment of $761,294 against them, and resolve the malpractice action against Mr. Thomas. That plan involved settling the malpractice claim and using the proceeds of that settlement to satisfy the judgment owed to the Poling parties. [See Testimony of Mr. Price and Mr. Schollian, August 15, 2013.]

The Paterno parties and the Poling parties agreed to mediation with mediator William J. Maledon, Esq. to resolve the issues created by the outstanding judgment in the Poling parties' favor and the impending bankruptcy litigation by the Paternos. Due to the malpractice claim against Mr. Thomas by the Paternos, his participation in the mediation was sought and Mr. Thomas voluntarily agreed to join the mediation.

In the settlement of the mediation, all parties, including Mr. Thomas, signed full mutual releases of all future claims and potential actions related to the *Poling*

case.[2] The mediation that led to the settlement was held, with Mr. Maledon as mediator, on April 26, 2012, and reduced to writing and signed by all parties. [See Ex. 48, Bates 219-222.] The settlement agreement contained a "confidentiality provision stating that the terms of the Agreement were to remain absolutely confidential." [Ex. 48, Bates 220; Ex. 50, Bates 226.]

Mr. Thomas admits as a material fact that "all claims were resolved and complete mutual releases were signed (including by Respondent) and exchanged." He also admits that "The parties agreed to keep the terms of the settlement absolutely confidential." [Joint Prehearing Statement, p. 9, ¶¶ 46-47.]

Despite having withdrawn from the *Poling* case, participated in mediation, and having signed a settlement agreement resolving all claims and matters related to the *Poling* case and his malpractice, Mr. Thomas, beginning with a May 6, 2012 motion to intervene, began to file a series of nearly incomprehensible, frivolous, motions in the *Poling* case. He never sought, nor had the permission of the Paternos to file these motions. He also referred to the settlement agreement in his May 6, 2012, motion to intervene, thereby violating the confidentiality agreement. The following is a general timeline regarding those motions:

1. May 6, 2012, Mr. Thomas signed a Motion for the Right of Intervention of Douglas E. Thomas, Esq., Individually (second motion to intervene) and a Motion to Vacate Judgment. [Exs. 26, 27, Bates 119-127.]

2. May 31, 2012, after reviewing the motions, Mr. Price's responses to those motions [Exs. 28, 29, Bates 128-135], and Mr. Thomas' replies [Exs. 30-36, Bates

[2] The mediation agreement was sealed and therefore the specifics of the agreement were not disclosed during the hearing before this Panel; however, as the citations to the record reflect, the goals and ultimate outcome of the mediation were testified to by Mr. Maledon, Mr. Price and Mr. Schollian.

136-173], Judge McVey denied the motion to intervene and striking the motion to vacate judgment, noting Mr. Thomas was no longer attorney of record for the Paternos and that he was not a party to the matter [Ex. 37, Bates 174.].

3. June 2, 2012, Mr. Thomas filed a Motion for New Trial. [Ex. 39, Bates 179-183.]

4. July 2, 2012, after reviewing the motion for new trial, Mr. Price's motion to strike that motion and seeking sanctions [Ex. 41, Bates 185-190], as well as Mr. Thomas' reply [Ex. 42, Bates 191-195], Judge McVey struck the motion for new trial and sanctioned Mr. Thomas $500 to be paid by July 18, 2012 [Ex. 43, Bates 196-197]. In the minute entry order, Judge McVey detailed that Mr. Thomas had no standing to file motions in the case and noted that any doubt as to his ability to file motions should have been resolved by the court's order of May 30, 2012, denying his previous motions to intervene and vacate. [Id.]

5. July 17, 2012, Mr. Thomas again filed a motion to intervene (third such motion) and a motion to vacate judgment (second such motion). [Exs. 44-47, Bates 198-217.]

6. On July 23, 2012, after having reviewed the above motions, Mr. Price's Emergency Motion to Strike; Application for Injunction; and Motion for Sanctions and Mr. Thomas' responses and replies, Judge McVey denied the motion to intervene, struck the motion to vacate judgment [Ex. 66, 77, Bates 279, 308], ordered sanctions in the amount of $5,000 to be paid by Mr. Thomas by September 7, 2012, ordered that he file no further pleadings in the case without first obtaining leave of court, and ordered that Mr. Thomas not violate the terms of the

confidential settlement agreement reached before Mr. Maledon [Ex. 69, Bates 287-288].

7. October 8, 2012, Mr. Thomas again filed motions to intervene (fourth such motion) and vacate judgment (third such motion) without first obtaining leave of court. [Ex. 78-79, Bates 310-319.]

8. November 1, 2012, after having reviewed Mr. Thomas motions, Mr. Price's response to those motions and his Motion for Sanctions [Ex. 82, Bates 324-326], and Mr. Thomas' reply [Ex. 83-84, Bates 327-332.], Judge McVey, via minute entry order, struck both motions, detailed what he believed were ethical violations resulting from Mr. Thomas' conduct, noted a concern for Mr. Thomas' fitness and noted he was forwarding the minute entry order to the State Bar for investigation [Ex. 85, Bates 333-335.].

9. November 4, 2012, Mr. Thomas filed a Motion for Leave to File Motion to Intervene and Motion to Vacate. [Ex. 86, Bates, 336-340.]

10. November 26, 2012, minute entry order by Judge McVey denying Mr. Thomas' motion for leave to file motions to intervene and vacate judgment. [Ex. 87, Bates 341.]

11. November 25, 2012, Mr. Thomas filed a Motion for New Trial. [Ex. 88, Bates 342-346.]

12. December 24, 2012, Judge McVey, via minute entry order, denied the above motion for new trial. [Ex. 103, Bates 391.]

13. December 22, 2012, through January 11, 2013, Mr. Thomas filed a series of pleadings seeking a signed order on the denial of his November 25, 2012, Motion

for New Trial. He ultimately obtained that signed order. [Exs. 104-105, 110-111, Bates 393-398, 404-406.]

14. January 11, 2013, Mr. Thomas filed a motion for leave to appeal Judge McVey's order denying his November 25, 2012, motion for new trial. [Ex. 112, Bates 407-409.]

15. January 13, 2013, Judge McVey, via minute entry order, granted Mr. Thomas' motion for leave to appeal. [Ex. 113, Bates 410.]

16. Mr. Thomas filed an appeal of Judge McVey's denial of his motion for new trial, requiring his former clients to move to dismiss the appeal. [Ex. 144, Bates 462-468.] Mr. Thomas subsequently filed a notice of dismissal of his appeal, explaining in it that "The fraudulent misconduct of the judicial system has discouraged [him] so much he sees no choice but to appeal to the public arena." [Ex. 155, Bates 482.]

In response to the initial motions to intervene and to vacate the judgment filed by Mr. Thomas, Mr. Price emailed Mr. Thomas and the other individuals involved in the settlement on May 6, 2012, pointing out that the actions of Mr. Thomas violated the confidentiality agreement. Mr. Price, on behalf of the Paternos, demanded the motions be withdrawn. [Exhibit 35, Bates 169-171.] This led to a series of emails between the various individuals. [Exhibits 36, 38, Bates 172-173, 176-178.]

Mr. Thomas responded in those emails, "If those now representing the Paterno Parties refuse to assert their equitable right to have the judgment now vacated, please advise me so I can move forward with my insistence upon the enforceability of it. Please advise. DET" [Exhibit 38, Bates 176.]

On July 16, 2012, Mr. Maledon, as Arbitrator, enjoined Mr. Thomas from "filing his threatened lawsuit against the Paterno Parties or from otherwise instituting any lawsuit or claim against the Paterno Parties that violates the release provisions of the Settlement Agreement." [Joint Prehearing Statement, p. 12, 61; Exhibit 49.]

On July 18, 2012, Mr. Price filed an Emergency Motion to Strike; Application for an Injunction; and Motion for Sanctions against Mr. Thomas on behalf of the Paternos. [Exhibit 48.] On that same date Mr. Price, by email (copied to all individuals including Mr. Thomas) requested Mr. Maledon to enjoin Mr. Thomas and award attorney fee sanctions against him. [Ex. 50.]

Mr. Thomas initially responded to the emergency motion and application filed by Mr. Price by sending him an email, copied to all individuals involved in the mediation. It stated,

> In response to the attached emergency motions, I spent 12 years on the Phoenix Union School Board and know precisely how to make a public spectacle out of the instant misconduct. Furthermore the transparency of the manner in which the system has enabled the participation of the Poling Parties in the ongoing fraud of Bobby Sullivan, Esq. upon the integrity of it continues to astound me. Under no circumstances will I withdraw my most recent motions. Unless you wish to find yourself implicated publically in the participation of the Poling Parties in the ongoing fraud of Bobby Sullivan, Esq. upon the integrity of the judicial system, you will leave it to Judge McVey alone to dispose of my instant motions.

[Ex. 51.]

Mr. Maledon responded by email dated July 18, 2012. He stated, in part, "I have already issued an injunction against violations of the Settlement Agreement by Mr. Thomas, and I believe that the Court filings by Mr. Thomas yesterday violate that injunction." [Ex. 52.]

Mr. Thomas admits as a material fact that he believes:

> that ultimately Judge McVey "will do the right thing", accept his fraud theory, and *sua sponte* reverse his earlier decisions. If he does not do so, the Court of Appeals will. Therefore his personal intervention now is warranted in order to give him procedural standing to rescind the malpractice settlement and position himself to share in the contingent fee that later will be generated. The 'joint venture' is the collaboration between himself and his former clients to resurrect their case and for Respondent to share in the anticipated contingent fee.

[Joint Prehearing Statement, p. 10-11, ¶ 55.]

Despite Mr. Thomas' assertions, there was no "joint venture" of any kind between himself and the Paternos. The Paternos never consented to any efforts to vacate the judgment against them. In fact, such efforts were not in their best interest. The Paternos, through their attorney Charles S. Price, actively opposed the actions of Mr. Thomas. [Testimony of Charles S. Price.]

Mr. Thomas, on February 11, 2012, wrote to the State Bar of Arizona, "I saw no other manner of overcoming the complicity of the trial court in the fraudulent misconduct of Bobby Sullivan, Esq. and those responsible for it other than to violate its applicable order and the terms of the underlying settlement." [Ex. 117, Bates 417.]

At the hearing in this matter Mr. Thomas testified he deliberately violated Judge McVey's court orders. He testified he was acting out of "my personal interest" and that he would get a lot of money. [Trial Testimony Douglas E. Thomas]

IV. CONCLUSIONS OF LAW AND DISCUSSION OF DECISION

The Panel finds clear and convincing evidence that Mr. Thomas violated ERs 1.1, 1.5, 1.9, 3.1, 3.4(c), 4.4, 8.4(d), and Rule 54(c), Ariz.R.Sup.Ct., as alleged in paragraphs 82-88 of the Complaint.

The repetitive, unrelenting, nature of Mr. Thomas' misconduct distinguishes this case from others involving the filing of frivolous and vexatious pleadings. Mr. Thomas persisted in filing motion after motion that had no basis in fact or law. The record clearly demonstrates that Mr. Thomas was not competent to handle a commercial litigation case such as the *Poling* case and he was admittedly not prepared for trial in the case. Mr. Thomas admitted to this misconduct and it is clear that his lack of competence and preparedness led to, or contributed substantially to, the nearly three-quarter million dollar judgment against his clients. The issue of Mr. Thomas' malpractice was resolved through the April 2012 mediation that involved him, his malpractice carrier and the *Poling* case parties. In order to justify his actions, Mr. Thomas has rationalized his conduct rather than face the harsh reality of the cost and effect of his malpractice.

Respondent came to believe, irrationally and without any basis in law, that his malpractice carrier's payment to his former clients, the Paterno parties, granted him legal standing to seek to recover from others the entirety of what he thought his former clients' claims in the *Poling* case were worth. Mr. Thomas went so far as to argue, frivolously, that he had a right to recover a contingency fee from any such illusory recovery and valued the recovery at over fifteen million dollars ($15,000,000).

ER 1.5

The Panel finds clear and convincing evidence that Mr. Thomas violated ER 1.5(c). In relevant part, ER 1.5(c) requires that a contingent fee agreement shall be in a writing signed by the client. Mr. Thomas admitted at the hearing that no written contingent fee agreement was executed in relation to his representation of

the Paternos. [Testimony of Douglas E. Thomas.] Respondent's argument that he relied on another attorney to comply with this requirement is unavailing as he had an independent duty to comply with the rule.

ER 3.4(c) and Rule 54(c), Ariz. R. Sup. Ct.

The Panel finds clear and convincing evidence that Mr. Thomas violated ER 3.4(c) and Rule 54(c), Ariz. R. Sup. Ct., by knowingly disobeying an obligation under the rules of a tribunal, specifically, knowingly and intentionally violating the orders of Judge McVey, the injunction by mediator Maledon prohibiting him from instituting any suit or litigation against his former clients, and violating the mediation confidentiality agreement.

Orders of Judge McVey

The Panel finds there is clear and convincing evidence that Mr. Thomas knowingly and intentionally violated orders of Judge McVey. Final Order of Judgment was entered in the *Poling* case on November 4, 2011. [Ex. 25, Bates 115-118.] Mr. Thomas was removed as counsel of record for Greg Paterno on the morning of trial and officially moved to withdraw as counsel for the rest of the Paterno parties on September 19, 2011. [Ex. 15, 16, 19, 22 Bates 83-90, 102-105, 111.] On October 18, 2011, Judge McVey granted that motion and Charles Price became attorney of record on behalf of all Paterno parties as of that date. [Ex. 69, Bates 287.]

Despite withdrawing as counsel in September 2011, Mr. Thomas engaged in a campaign of unethical conduct involving the incessant filing of obtuse and nearly incomprehensible motions with no authority or standing to file such motions and repeatedly disregarded the orders of Judge McVey to obtain leave of the court

before filing any further pleadings in the *Poling* case. Judge McVey twice imposed Rule 11 sanctions against Mr. Thomas.

Judge McVey first imposed Rule 11 sanctions in the amount of $500 on July 2, 2012, via minute entry order. [Ex. 43, Bates 196-197.] The minute entry order required the sanction to be paid by July 18, 2012. [Ex. 43 at Bates 197.] The minute entry order detailed that the reason for the sanction was that Mr. Thomas' latest motion for new trial was "not filed in good faith," that Mr. Thomas was not a party to the case nor an attorney of record for a party in the case, and that the motion for new trial was "not well grounded in fact, is not warranted by existing law or a good faith argument for reversal of existing law," and was "filed for an improper purpose." [Id.] Mr. Thomas admitted he failed to pay that sanction and that at the time of the hearing before this Panel he still had not paid the sanction.

The second Rule 11 sanction imposed by Judge McVey came via minute entry order on August 27, 2012, after Mr. Thomas continued to file motions to intervene and motions to vacate judgment and in one of those motions included as an exhibit the confidential mediation settlement agreement. [Ex. 69, Bates, 287-288.] The minute entry order again detailed all of the denials of similar motions by the court. Judge McVey specifically stated that Mr. Thomas had "continued to file frivolous motions in violation of Rule 11, Arizona Rules of Civil Procedure." [Id. at 287.] Judge McVey again noted that the motions were not grounded in fact or warranted by existing law, that the motions were filed to harass the parties and that the filing of the motions had increased the cost of litigation for the Paternos. [Id. at 287-288.] A sanction in the amount of $5,000 was ordered to be paid by September 7, 2012. [Id. at 288.] Mr. Thomas did not pay the sanction and admitted at the

hearing before this Panel that at the time of the hearing he still had not paid the sanction.

In Judge McVey's August 27, 2012, minute entry order, he also ordered Mr. Thomas to obtain leave of court before filing any further pleadings. [Ex. 69, Bates, 287-288.] Despite that order, Mr. Thomas filed his fourth motion to intervene and third motion to vacate the final judgment without first seeking leave of court. [Exs. 78-79, Bates 310-319.] Mr. Thomas also filed a second motion for new trial without first obtaining leave of court. [Ex. 88, Bates 342-346.]

Mediation Settlement and Confidentiality Agreement

On July 17, 2012, Mr. Thomas filed his third motion to intervene and second motion to vacate judgment. [Exs. 44-45, Bates 198-206.] Attached as Exhibit 1 to the motion to intervene was a copy of the settlement agreement. [Ex. 48, Bates 221.] By attaching the settlement agreement to the motion to intervene, Mr. Thomas knowingly violated the terms of Paragraph 21, the confidentiality provision, of that agreement.

Mr. Maledon's Injunction Letter

The Settlement Agreement entered into and signed by Mr. Thomas settled all claims among the parties. Mutual releases were signed and exchanged by all parties – including Mr. Thomas. [Ex. 48, Bates 219-220.] The Agreement also included a provision granting mediator Mr. Maledon plenary power as Arbitrator to resolve any disputes arising under the agreement. [Joint Prehearing Statement, page 9, ¶ 47.]

As cited above, due to Mr. Thomas' course of filing multiple and often repetitive motions, Mr. Price, on behalf of the Paternos, sought an injunction from

mediator Mr. Maledon to stop further filings of such pleadings. On July 16, 2012, Mr. Maledon, as Arbitrator, enjoined Mr. Thomas from "filing his threatened lawsuit against the Paterno Parties or from otherwise instituting any lawsuit or claim against the Paterno Parties that violates the release provisions of the Settlement Agreement." On July 17, 2012, Mr. Thomas filed a motion to intervene and a motion to vacate judgment. [Exs. 44-45, Bates 198-206.]

We find Mr. Thomas intentionally violated the orders of Judge McVey and the injunction of Arbitrator Maledon.

ER 3.1

The Panel finds clear and convincing evidence that Mr. Thomas violated ER 3.1, which states, in relevant part, a "lawyer shall not . . . assert or controvert an issue [in a proceeding], 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." There are a total of fourteen motions filed by Mr. Thomas in the *Poling* case that were presented as evidence of violations of ER 3.1. At the time all of those motions were filed Mr. Thomas was not counsel for any of the Paterno parties. Mr. Thomas was never a party to the *Poling* case. After Mr. Thomas was clearly fired as counsel by his clients he filed two motions for new trial, four motions to intervene, three motions to vacate judgment, and five other motions. (See list of pleadings filed in II. Findings of Fact above.) All but the first motion to intervene and all of the motions for new trial and to vacate judgment were filed after Mr. Thomas had signed a Settlement Agreement with accompanying release of all claims related to the *Poling* case.

As Judge McVey's minute entry orders clearly note, Mr. Thomas had no basis in law or fact, nor standing, to file his first motion to intervene. Judge McVey's minute entry orders indicate the same as to Mr. Thomas' first motion to vacate judgment and motion for a new trial. In each of Judge McVey's minute entry orders denying or striking each of Mr. Thomas' motions, the lack of standing, the lack of basis in law and fact, and the lack of a good faith argument for a ruling contrary to existing law was spelled out.

Mr. Thomas' motions are well-nigh incomprehensible. This is not a case of poorly drafted documents –though they are. The legal and factual basis in support of Mr. Thomas' motions is inscrutable. Even at the hearing before this Panel, Mr. Thomas could not articulate a rational factual or legal basis for any of his motions.

ER 1.9 and ER 4.4(a)

The Panel finds clear and convincing evidence that Mr. Thomas violated his ethical duties to his former clients. After he was removed as counsel for the Paterno parties in the *Poling* case, Mr. Thomas engaged in a pattern of filing motions on his own behalf in an effort to assert a non-existent cause of action that was substantially adverse to the interests of his former clients. Mr. Thomas' assertions, through his motions to intervene, motions to vacate judgment, and motions for new trial, attempted to assert a claim to a non-existent contingency fee. To begin with, there was no valid contingency fee agreement between the Paterno parties and Mr. Thomas; however, despite that issue, at trial the judgment was against, not for, the Paternos. As such, there was no portion of a judgment in the *Poling* case that could have been recovered as part of a contingency fee agreement.

In order to create a situation where there could be a favorable judgment from which he could recover the fee he felt he deserved, Mr. Thomas latched on to wildly absurd allegations against Judge McVey, the entire court system, and every person that has been involved in this disciplinary matter, of conspiracy to permit and perpetuate the alleged fraud of attorney Robert Sullivan. Mr. Thomas alleges this "fraud" led to the adverse judgment against the Paternos – not his incompetence in handling the case or his failure to be prepared for trial. Mr. Thomas asserted in his motions, and continued to assert to this Panel, that the representation of the Poling parties by Mr. Sullivan and Sullivan having disclosed three documents from the *Sottera* matter, where he represented other parties that were also adverse to the Paternos, are the fraud to which he argues the judicial system has conspired to perpetuate.

In the *Sottera* matter, the trial judge ordered Mr. Sullivan not to use any documents obtained from that case in any other matter or for any other purpose. It came to light shortly before trial in the *Poling* case that Attorney Sullivan had disclosed three documents contrary to that order. Judge McVey addressed this issue fully. He testified that he determined first that the disclosure was inadvertent. He then barred the use of those three documents in the *Poling* case. In doing so, Judge McVey testified he fashioned a remedy that would address the disclosure issue and protect the Paterno parties but also keep the case moving toward trial, particularly since the matter had been pending for several years already.

Mr. Thomas misjudged that Judge McVey would continue the trial in light of the improper disclosure by Sullivan. When that continuance did not occur, Mr. Thomas had to fashion a position that would cover for his admitted unpreparedness

for trial. This is when Mr. Thomas began asserting that the trial court was conspiring against him and the Paternos to perpetuate the "fraud of Bobby Sullivan." When he lost at trial, Mr. Thomas faced a malpractice claim against him by his clients and the reality that he would receive no fee for any work he had done in the case. Undoubtedly, this created an emotional and financial strain on him.

Mr. Thomas used the settlement payment by his malpractice carrier to the Paternos as a basis for asserting his wholly unsupportable personal cause of action claim. This in turn led him to file his first motions in the *Poling* case - after having been removed as counsel and after the final judgment had been entered in the case. Despite that motion being denied, and despite having signed a settlement agreement and signed releases resolving all present and future claims related in any way to the *Poling* matter, Mr. Thomas' obsession with fashioning a remedy to obtain a fee he believed he earned and to right the alleged misconduct of Attorney Sullivan, led him to file the same motions to intervene, vacate, and for new trial, over and over. Each time those motions were denied due to his lack of standing and his failure to state an actionable claim or basis for granting the motions, Mr. Thomas re-filed the motions and alleged a further conspiracy to perpetuate the alleged "fraud" and ignored his ethical duties, his obligations to his former clients, and the orders of Judge McVey.

Those motions were adverse to his former clients, the Paternos. They burdened the Paternos with additional legal fees paid to their new counsel, Mr. Price, for responding to the motions. Further, the motions sought a remedy that was contrary to the settlement agreement, which had effectively allowed the

Paternos to avoid bankruptcy and to resolve the outstanding judgment owed to the Poling parties.

The Panel finds by clearing and convincing evidence that Mr. Thomas, in attempting to pursue these legal matters, used means that had no substantial purpose other than to embarrass, delay or burden other parties and used methods of obtaining evidence that violated the legal rights of such other parties in violation of Rule 4.4(a). Mr. Thomas also had no basis in law or fact to disclose the confidential settlement agreement in pursuing his personal claims for relief.

ER 8.4(d)

The Panel finds clear and convincing evidence that Mr. Thomas' actions in pursuing a wholly unsupportable personal cause of action claim and filing a significant number of frivolous motions in the *Poling* case was conduct that was prejudicial to the administration of justice. To begin with, Mr. Thomas' actions exposed his former clients to unnecessary legal costs, but more significantly, his actions jeopardized the settlement agreement entered into by the Poling Parties, the Paternos, and Mr. Thomas himself, that protected the Paternos from complete insolvency and allowed them to resolve the large judgment resulting from Mr. Thomas' malpractice.

Just as concerning to the Panel is the cost of time and resources expended by the court, particularly Judge McVey, to review and enter orders on all of the frivolous motions filed by Mr. Thomas. Judge McVey testified that each time a motion was filed he reviewed the motion, responses and replies related to the motion, and often, the prior minute entry orders resulting from the prior motions, before drafting and entering his minute entry orders. Judge McVey testified that

the time spent doing this was time he could have spent on other open and active cases that were pending on his docket.

The Panel has detailed numerous pleadings and minute entry orders in the Findings of Fact section above. That list does not include all of the responses and motions filed by Mr. Price in response to those motions and in protection of his clients' interests, nor all of the replies filed by Mr. Thomas. Altogether, there are a multitude of pleadings, orders and minute entry orders totaling approximately 134 pages of material that were filed in the Superior Court related to Mr. Thomas' actions in question here. [Exs. 17, Bates 91-95; 20-21, Bates 106-110; 26-37, Bates 119-175; 39-88, Bates 179-346.] There is overwhelming evidence of conduct prejudicial to the administration of justice.

ER 1.1

The Panel finds clear and convincing evidence that Mr. Thomas lacked competence in his representation of the Paternos and in his filing of numerous motions that failed to state a claim and were not supported by law or fact or presented a good faith argument why current law should not be applicable.

V. SANCTIONS

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

Analysis under the ABA *Standards*

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

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

In this matter, Mr. Thomas violated duties owed to the legal system (ERs 3.1, 3.4(c), 4.4(a), and 8.4(d) and Rule 54(c), Ariz. R. Sup. Ct.) and his former clients (ERs 1.1, 1.5, and 1.9). *Standard* 6.0, Violations of Duties Owed to the Legal System, is applicable to Mr. Thomas' violation of ERs 3.1, 3.4(c), 4.4(a), and 8.4(d) and Rule 54(c), Ariz. R. Sup. Ct.. *Standard* 6.21 provides that:

> 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.

Mr. Thomas intentionally failed to obey orders of Judge McVey. Mr. Thomas was twice sanctioned for his filing of frivolous motions and he was directed to not file further motions without leave of court. Mr. Thomas testified he intentionally filed each and every motion and that he would follow the same course of conduct again if the situation repeated itself. Mr. Thomas also testified that at the time of

the hearing before this Panel he had not paid any of the $5,500 in sanctions ordered by Judge McVey.

Standard 4.0, Violations of Duties Owed to Clients, is applicable to Mr. Thomas' violation of ERs 1.1, 1.5, and 1.9. *Standard* 4.31 provides that:

> Disbarment is generally appropriate when a lawyer, without the informed consent of client(s): (c) represents a client in a matter substantially related to a matter in which the interest of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer of another, and causes serious or potentially serious injury to a client.

In failing to be prepared for trial, filing numerous frivolous motions in furtherance of his own interests and against the interests of his former clients, and failing to obtain a written contingency fee agreement signed by the Paterno parties, Mr. Thomas violated all the listed duties to his former clients, the Paternos.

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

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

The Panel finds that Mr. Thomas' actions at issue in this disciplinary proceeding were the result of selfish motive, specifically, his desire to recover a fee he believed he deserved, but not one to which he was entitled. We find the actions of Mr. Thomas resulted in repeated violations of multiple ethical rules.

Mr. Thomas directly refused to acknowledge the wrongful nature of his conduct. Rather than acknowledge the wrongful nature of his conduct, he asserted his conduct was justified. Even if we found that Mr. Thomas was somehow justified in filing his first motion to intervene, which we have not so found, Mr. Thomas' repeated filing of multiple frivolous motions, including after the trial court explicitly prohibited him from filing any further motions without leave of court, were intentional misconduct. We agree with what that court explicitly found; that these repetitive motions also lacked a basis in law or fact. When coupled with the assertions of Mr. Thomas before this Panel that he would act in the same manner again, the Panel is convinced Respondent does not understand his ethical duties as a member of the State Bar and is unfit as a result to continue to practice law.

Although Mr. Thomas lacked experience in the area of commercial litigation impacting his ability to competently represent the Paterno parties, he testified that he had substantial experience in civil matters through his personal injury practice. The Panel finds that his experience in the civil arena is sufficient for us to find that he had the skill and knowledge to know that his actions were frivolous. Respondent believes his ends justify his means regardless of the rules he swore he would comply with when admitted to the practice of law.

The Panel finds the following mitigating factors are present: 9.23(a) (absence of a prior disciplinary record) and 9.32(e) (full and free disclosure to disciplinary

board). Mr. Thomas has no prior disciplinary record. In addition, as acknowledged by the State Bar, Mr. Thomas freely disclosed his conduct and admitted each factual allegation in paragraphs 1 through 81 of the Complaint.

VI. CONCLUSION

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

IT IS ORDERED disbarring Mr. Thomas effective thirty (30) days from the date of this Report and Order.

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

DATED this 17th day of September, 2013.

/s/ *William J. O'Neil*

William J. O'Neil, Presiding Disciplinary Judge

CONCURRING

/s/ *Archer Shelton*

Archer Shelton, Volunteer Public Member

/s/ *George A. Riemer*

George A. Riemer, Volunteer Attorney Member

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 17th day of September, 2013.

Copies of the foregoing mailed/emailed
this 17th day of September, 2013, to:

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IN THE
SUPREME COURT OF THE STATE OF ARIZONA
BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
1501 W. WASHINGTON, SUITE 102, PHOENIX, AZ 85007-3231

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DOUGLAS E. THOMAS,** **Bar No. 011742** Respondent.	**PDJ-2013-9040** **JUDGMENT OF DISBARMENT** [State Bar Nos. 12-3136] **FILED OCTOBER 8, 2013**

This matter having come before the Hearing Panel of the Supreme Court of Arizona, the Hearing Panel having duly rendered its decision, and an appeal having been filed pursuant to Rule 59(a), Ariz.R.Sup.Ct., but no request for stay having been filed pursuant to Rule 59(c), Ariz.R.Sup.Ct., accordingly:

IT IS HEREBY ORDERED that Respondent, **DOUGLAS E. THOMAS**, is hereby disbarred from the State Bar of Arizona and his name is hereby stricken from the roll of lawyers **effective the date of this Order**. Mr. Thomas is no longer entitled to the rights and privileges of a lawyer but remains subject to the jurisdiction of the Court.

IT IS FURTHER ORDERED that **DOUGLAS E. THOMAS** shall immediately comply with the requirements relating to notification of clients and others, and

provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

DATED this 8th day of October, 2013.

/s/ *William J. O'Neil*

The Honorable William J. O'Neil
Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
of the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 8th day of October, 2013.

Copies of the foregoing mailed/emailed
this 8th day of October, 2013, to:

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