

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 SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,

FRED L. HOWE,
Bar No. 013270

Respondent.

PDJ-2014-9055

FINAL JUDGMENT AND ORDER

[State Bar Nos. 12-1849, 12-2586,
13-1993 and 13-3229]

FILED OCTOBER 27, 2014

This matter having come before the Hearing Panel of the Supreme Court of Arizona, it having duly rendered its decision; and no appeal having been filed and the time for appeal having passed, accordingly,

IT IS HEREBY ORDERED Respondent, **FRED L. HOWE**, is disbarred from the practice of law effective September 25, 2014, and his name is stricken from the roll of lawyers for conduct in violation of his duties and obligations as a lawyer, as disclosed in the Hearing Panel's Report. Respondent 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 Respondent 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.

IT IS FURTHER ORDERED that Respondent shall pay restitution, with interest at the legal rate until paid, to the following persons in the following amounts:

RESTITUTION

Scott Nix	\$282.00
Martha Vasquez and Donald Evans	\$20,703.60
Gordon Nichols	\$40,000.00

IT IS FURTHER ORDERED that, upon reinstatement, Respondent shall be subject to terms imposed by the Presiding Disciplinary Judge as a result of reinstatement hearings held.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$4,000.00, within thirty (30) days from the date of service of this Order. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 27th day of October, 2014.

William J. O'Neil

**William J. O'Neil, Presiding Disciplinary
Judge**

Copies of the foregoing mailed/emailed
this 27th day of October, 2014, to:

Fred L. Howe
Law Office of Fred L Howe
14239 W Bell Rd, Suite 205
Surprise, AZ 85374-2471
Email: fredhowe@cox.net
Respondent

James D. Lee
Senior Bar Counsel
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4201 North 24th Street, Suite 100
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by: JAlbright

**BEFORE THE PRESIDING DISCIPLINARY JUDGE
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,

FRED L. HOWE,
Bar No. 013270

Respondent.

PDJ-2014-9055

**REPORT AND ORDER IMPOSING
SANCTIONS**

[State Bar Nos. 12-1849, 12-2586,
13-1993 and 13-3229]

FILED SEPTEMBER 25, 2014

PROCEDURAL HISTORY

The State Bar of Arizona ("SBA") filed its complaint on June 27, 2014. On June 30, 2014, the complaint was served on Respondent 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. The Presiding Disciplinary Judge (PDJ) was assigned to the matter. A notice of default was properly issued on August 4, 2014, given Respondent's failure to file an answer or otherwise defend. Default was properly entered on August 26, 2014, because Respondent failed to file an answer or otherwise defend against the allegations following entry of the notice of default. At that time, a notice of the setting of an aggravation/mitigation hearing was sent to all parties, notifying them that an aggravation/mitigating hearing was scheduled for September 29, 2014, at 1:30 p.m. On August 29, 2014, the Disciplinary Clerk filed and served a *Notice of Change of Hearing* upon Respondent and the State Bar, which changed the date of the aggravation/mitigation hearing to September 25, 2014, at 9:00 a.m., at the State

Courts Building, 1501 West Washington, Phoenix, Arizona 85007-3231. Notice was provided to Respondent by mailing to his address of record, as well as by email to fredhowe@cox.net.

On September 25, 2014, the Hearing Panel, duly empanelled, and composed of Scott I. Palumbo, the attorney member, Linda S. Smith, the public member, and William J. O'Neil, Presiding Disciplinary Judge, heard this matter. Senior Bar Counsel James Lee appeared for the State Bar. Mr. Howe did not appear.

The purpose of the aggravation/mitigation hearing is not only to weigh mitigating and aggravating factors, but also to assure there is a nexus between a respondent's conduct deemed admitted and the merits of the SBA's case. A respondent against whom a default has been entered no longer has the right to litigate the merits of the factual allegations of the complaint. However, the respondent retains the right to appear and participate in the hearing concerning that nexus and the sanctions sought. Included with that right to appear is the right to dispute the allegations relating to aggravation and to offer evidence in mitigation. Mr. Howe was afforded these rights.

Due process requires a hearing panel to independently determine whether, under the facts deemed admitted, ethical violations have been proven by clear and convincing evidence. The hearing panel must also exercise discretion in deciding whether sanctions should issue for the respondent's misconduct. If the hearing panel finds that sanctions are warranted, then it independently determines which sanctions should be imposed. It is not the function of the hearing panel to simply endorse or "rubber stamp" any request for sanctions.

FINDINGS OF FACT

The facts listed below are those set forth in the SBA's complaint, which were deemed admitted based upon Respondent's default.

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on October 27, 1990. The Supreme Court of Arizona suspended Respondent's privilege to practice law for 60 days, effective July 1, 2012. He was reinstated on September 17, 2012. Respondent was again suspended from the practice of law in Arizona for six months and one day, effective January 17, 2014. Respondent was also admitted to practice law in Iowa on January 19, 1990, but was suspended from the practice in that state on March 19, 2013, when the Supreme Court of Iowa suspended his license to practice law for an indefinite period (with no possibility of reinstatement for 60 days) based upon his 60-day suspension in Arizona. Respondent was still suspended in both Arizona and Iowa on the date this complaint was filed.

COUNT ONE (File No. 12-1849/Nix)

2. Shawn and Brian Waddell were married on November 8, 1997. They had a daughter prior to their marriage and two more children while married.
3. On May 25, 2005, a decree of dissolution of marriage with children (by default) was entered by Maricopa County Superior Court Judge Joseph Heilman, which dissolved the marriage between Shawn and Brian Waddell (*In re the Marriage of Waddell and Waddell*, Maricopa County Superior Court File No. FC2004-070609).
4. Sometime thereafter, Scott Nix (Scott) married Shawn Waddell, who changed her name to Shawn Nix (Shawn).

5. On March 29, 2012, Brian Waddell (Brian) filed *pro se* a *Petition to Modify Child Custody, Parenting Time and Child Support* in which he moved the court to modify the amount of child support he was ordered to pay because one of his three children began residing with him in or about December 2011 and primarily lived with him thereafter. He also moved the court to modify the custody order so that he and Shawn shared joint legal custody of their children and award reasonable parenting time to both parents. On that same date, Brian also filed a proposed parenting plan, a *Request for Order Granting or Denying a Custody Hearing*, and a *Blank Pleading Motion* in which he moved the court to “freeze or hold [his] child support payments” until the court could hold a hearing on his *Petition to Modify Child Custody, Parenting Time and Child Support*.
6. During the second week of April 2012, Scott hired Respondent to represent Shawn in the child custody and support case. Respondent was primarily hired to file a response to Brian’s *Petition to Modify Child Custody, Parenting Time and Child Support* and *Blank Pleading Motion*. Scott paid an advance fee of \$2,000.00 to Respondent. At the time Scott hired Respondent, Scott believed that Shawn had only 20 days to file a response to Brian’s motions.
7. Respondent failed to file a response to Brian’s *Blank Pleading Motion* (i.e., his motion to discontinue child support payments pending a hearing).
8. On April 23, 2012, Maricopa County Superior Court Judge Harriett Chavez entered an order discontinuing child support payments by Brian until further notice, but ordered Brian’s \$28.00 payments toward arrearages to remain in effect.

9. Upon receipt of the April 23, 2012, order, Scott, who was acting on Shawn's behalf, sent a copy of that order to Respondent by email, but had difficulty communicating with him. When he finally spoke with Respondent, Respondent informed him that he had not received the April 23, 2012, order that Scott had sent to him.
10. On April 30, 2012, Respondent sent a letter to Brian in which he addressed various issues in an attempt to resolve the outstanding motions without the need for further hearings or additional expense.
11. On May 1, 2012, Respondent filed on Shawn's behalf a two-sentence *Notice of Appearance* and a *Response to Motion to Modify Child Custody Parenting Time and Child Support*.
12. On May 10, 2012, Respondent filed a *Motion to Reconsider Order of April 23, 2012*. In that motion, Respondent argued it was unfair for the court to discontinue all child support since two of the parties' children continued to reside with Shawn and Scott. Respondent moved the court to rescind its order dated April 23, 2012.
13. On May 11, 2012, the Presiding Disciplinary Judge of the Supreme Court of Arizona entered a Final Judgment and Order suspending Respondent from the practice of law for 60 days, effective July 1, 2012.
14. On May 17, 2012, Judge Chavez entered a minute entry order giving Brian 20 days to file a response to Respondent's *Motion to Reconsider Order of April 23, 2012*, and scheduled a Post-Resolution Management Conference for July 27, 2012.

15. On or about June 11, 2012, Shawn and Scott first learned about Respondent's suspension.
16. On June 18, 2012, Respondent mailed a letter to Shawn informing her that he would be suspended from the practice of law for two months, effective July 1, 2012. On that same date, Judge Chavez entered a minute entry order in which she ordered Shawn's *Motion to Reconsider Order of April 23, 2012*, to "abide the Resolution Management Conference currently set on July 27, 2012."
17. On June 20, 2012, Respondent filed a *Motion to Continue* the Resolution Management Conference scheduled for July 27, 2012, because he would be suspended from the practice of law in Arizona on the date the conference was scheduled. He moved the court to continue the Resolution Management Conference until sometime after September 1, 2012.
18. On June 25, 2012, Shawn and Scott went to Respondent's office, discharged Respondent as Shawn's counsel, and requested a refund of all unearned fees. Thereafter, Respondent failed to file a motion to withdraw as Shawn's counsel.
19. On June 27, 2012, Shawn filed *pro se* a *Motion to Extend Court Date* because she was seeking new counsel due to Respondent's forthcoming suspension.
20. On July 6, 2012, Brian filed a *Response to: Motion to Extend Court Date (Dated 6-27-2012)*, in which he objected to Shawn's *Motion to Continue*.
21. On July 26, attorney Patrick Sampair (attorney Sampair) filed a *Motion for Substitution of Counsel with Consent* on Shawn's behalf.
22. On July 27, 2012, Maricopa County Superior Court Judge Jose Padilla denied the motion to continue/extend the Post-Resolution Management Conference scheduled for that day. Judge Padilla reinstated child support in the amount

that was in effect prior to the April 23, 2012, order; affirmed the parenting time schedule then in effect (with one exception); and scheduled mediation and an evidentiary hearing.

23. On July 30, 2012, attorney Sampair filed a *Notice of Limited Appearance for Petitioner* on Shawn's behalf.
24. On August 24, 2012, Scott received a refund of \$1,718.00 from Respondent. Scott, however, believed (and continues to believe) he is entitled to a refund of the remainder of the \$2,000.00 fee because of the "unethical, unprofessional way [Respondent] dealt with [Shawn's] case."
25. On July 31, 2012, Judge Padilla signed an order (filed on August 13, 2012) substituting attorney Sampair as counsel of record for Shawn in place of Respondent.
26. During the period of representation, Scott, who was given permission by Shawn to communicate with Respondent regarding the representation, had difficulty communicating with Respondent. Scott left voice-mail messages for Respondent and, in one instance, was unable to communicate with him for approximately two weeks. On average, it took Respondent between three and seven days to return Scott's telephone calls. Based upon Respondent's failure to file a response to Brian's motions prior to Judge Chavez entering an order on April 23, 2012 (which granted the Brian's motion to stop child support payments), Shawn did not receive child support from Brian from May 2012 through at least August 2012.

COUNT TWO (File No. 12-2586/Anderson)

Representation of Tony Anderson

27. Tony Anderson (Anderson) paid \$2,000.00 to Respondent to represent him in his divorce proceeding (*In re the Matter of Anderson and Anderson*, Maricopa County Superior Court File No. FN2012-051135).
28. On May 24, 2012, Maricopa County Superior Court Judge *Pro Tem* Daniella Viola entered a decree of dissolution of marriage (by consent).
29. Following entry of the decree, Respondent sent Anderson a billing statement that reflected that he owed Anderson a refund of \$1,200.00.
30. As of September 13, 2012, Respondent still had not refunded the money to Anderson or communicated with him about the refund.
31. On or about November 26, 2012, Respondent sent a check in the amount of \$1,500.00 to Anderson, which was issued on his operating or business account. Respondent did so because a non-lawyer assistant in his office had inadvertently deposited unearned fees from one or more clients into Respondent's operating account rather than his client trust account.

Failure to Respond to Bar Counsel re: File No. 12-2586

32. On July 9, 2013, bar counsel sent a letter to Respondent explaining that a screening investigation was being initiated and that he was required to submit a written response to the State Bar even though he had previously submitted a written response to the State Bar's earlier informal request for information.

That letter stated in part:

As you are aware, the State Bar received information concerning your professional conduct. On November 30, 2012, I sent you a letter requesting additional information regarding the charge received by Tony Anderson. I received your letter dated December 7, 2012, which responds to my letter of November 30, 2012. After reviewing your letter, I determined this matter warrants a screening investigation pursuant to Rule 55(b), Ariz. R. Sup. Ct.

At this point, the matter is not considered a formal complaint, but rather a "bar charge" that is being investigated through a "screening investigation." Your participation in the screening investigation is extremely important, as Bar Counsel will make a recommendation at the end of the investigation as to the disposition of this matter. Pursuant to ER 8.1(b) 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.

A copy of the information received by the State Bar has been included with this letter. Please submit a written response to the enclosed information, directed to my office, within 20 days of the date of this letter. . . . If you cannot file a timely response, you should contact my office immediately. . . .

The ethical rules that should be addressed in your response include, but are not limited to: 1.15(a) (failure to deposit advance fees into a trust account), 1.15(d) (failure to promptly refund unearned fees), 1.16(d) (failure to promptly refund unearned fees upon termination of representation), 5.3 (failure to adequately supervise non-lawyer staff to ensure a[d]vance fees were deposited [sic] into a trust account), Rule 43(a), Ariz. R. Sup. Ct. (failure to use due professional care regarding trust [sic] account, failure to safeguard funds, and failure to properly train and supervise employees).

(Underline in original; ellipses added).

33. On July 26, 2013, Respondent mailed a letter to bar counsel in which he acknowledged receipt of the charge submitted by Tony Anderson and requested additional time to submit his written response. Respondent stated he wanted to more completely address the charge and seek the assistance of counsel. He requested an extension to August 12, 2013.
34. On July 26, 2013, bar counsel's assistant notified Respondent that his request had been granted and that his written response was due by August 12, 2013.
35. Respondent failed to submit to bar counsel a written response to Tony Anderson's charge, as directed by bar counsel in his letter dated July 9, 2013, and the notice he was given by bar counsel's assistant on July 26, 2013.

COUNT THREE (File No. 13-1993/McCaffrey)

Representation of Gordon Nichols

36. On November 5, 2010, Gordon Nichols (Nichols) was injured in an automobile accident.
37. Sometime thereafter, Nichols hired Respondent to represent him regarding a personal injury claim arising from the accident.
38. At some point in time, Respondent settled Nichols's case, without Nichols's consent, for the policy limits of the at-fault vehicle owner's third-party, bodily-injury policy for \$25,000.00, and the at-fault vehicle owner's "excess" policy for \$15,000.00.
39. On or about April 4, 2012, State Farm Insurance Company issued two settlement drafts or checks in the amounts of \$25,000.00 and \$15,000.00 to Respondent and Nichols. [State Bar Exhibit 26 and Exhibit 72.]
40. The settlement checks issued by State Far were cashed or negotiated by Respondent. [State Bar Exhibit 22, Bates 092, Exhibit 26, Bates 098, and Exhibit 72, Bates 332-333.]
41. On July 15, 2013, Nichols hired the Law Offices of Larry H. Parker, P.C. (the firm), to represent him regarding the first-party, underinsured motorist claim.
42. On July 16, 2013, Summer Brooks (pre-litigation assistant to Kathleen McCaffrey, an attorney at the firm) sent a letter to Respondent by fax and certified mail, informing him that the firm was representing Nichols and requesting a copy of the file he maintained on Nichols's behalf. Respondent signed the certified letter receipt.

43. On July 16, July 17, July 23, and August 5, 2013, someone at the firm called Respondent's office and left voice-mail messages for Respondent requesting the file he maintained on Nichols's behalf and a return call regarding the status of their requests.
44. Respondent never returned the firm's telephone calls or provided the firm or Nichols with the file he maintained on Nichols's behalf.

Failure to Respond to Bar Counsel re: File No. 13-1993

45. On August 5, 2013, an A/CAP bar counsel called Respondent's law office and left a voice-mail message for Respondent, directing him to call her to discuss the transfer of the file he maintained on Gordon Nichols's behalf to the Law Offices of Larry H. Parker, P.C. Respondent failed to call bar counsel, as directed.
46. On September 9, 2013, bar counsel mailed a screening letter to Respondent, which stated in part:

The State Bar has received information concerning your professional conduct that warrants a screening investigation pursuant to Rule 55(b), Ariz. R. Sup. Ct. At this point, the matter is not considered a formal complaint, but rather a "bar charge" that is being investigated through a "screening investigation." Your participation in the screening investigation is extremely important, as Bar Counsel will make a recommendation at the end of the investigation as to the disposition of this matter. Pursuant to ER 8.1(b) 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.

A copy of the information received by the State Bar has been included with this letter. Please submit a written response to the enclosed information, directed to my office, within 20 days of the date of this letter. . . . If you cannot file a timely response, you should contact my office immediately. . . .

The ethical rules that should be addressed in your response include, but are not limited to: ERs 1.4, 1.15(d), 1.16(d), 5.5, 8.4(b) (theft), 8.4(d), and Rule 54(c), Ariz. R. Sup. Ct.

(Underline in original; ellipses added).

47. Respondent failed to submit a written response to the charges filed by Kathleen McCaffrey, as instructed by bar counsel in his letter dated September 9, 2013.
48. On October 21, 2013, bar counsel sent another letter to Respondent, which stated in part:

Reference is made to my letter dated September 9, 2013[,] advising you of the allegations of Ms. McCaffrey. A copy of that letter is enclosed. It was requested that your response be filed within 20 days of the date of my letter. This office has no record of the receipt of your response.

Pursuant to Rule 47(h) and 55(b)(1)(B), Ariz. R. Sup. Ct., you are hereby given notice that your failure to comply with this request for response **within ten (10) days of the date of this letter** may require the taking of your deposition pursuant to subpoena, or a recommendation to the Attorney Discipline Probable Cause Committee for an order of probable cause. Please be further advised that, should your failure to cooperate result in the taking of a deposition pursuant to Rule 47, you "shall be liable for the actual costs of conducting the deposition. ..." If you fail to comply with an investigative subpoena, you may be subject to contempt proceedings, and could be summarily suspended.

I again refer you to Rule 54(d), and caution you that failure to cooperate with a disciplinary investigation is grounds, in itself, for discipline.

(Bold and ellipsis in original).

49. Respondent failed to submit a written response to the charges filed by Kathleen McCaffrey, as instructed by bar counsel in his letter dated October 21, 2013.

COUNT FOUR (File No. 13-3229/State Bar)

Representation of Martha Vasquez

50. Martha Vasquez (Vasquez) and her husband, Donald Evans (Evans), hired Respondent to represent Vasquez regarding injuries she suffered during a fall at Maryvale Hospital in July 2009.

51. On July 21, 2011, Respondent filed a complaint on Vasquez's behalf against Maryvale Hospital and Integrated Medical Group, PLLC (*Vasquez v. Maryvale Hospital, et al.*, Maricopa County Superior Court File No. CV2011-070535).
52. On August 16, 2011, Respondent filed an amended complaint on Vasquez's behalf against Vanguard Health Management, Inc., dba Abrazo Health Care, dba Maryvale Hospital (the defendants). For a period of several months after service of the amended complaint, the parties attempted unsuccessfully to resolve the matter without further litigation.
53. On May 11, 2012, the Presiding Disciplinary Judge of the Supreme Court of Arizona entered a Final Judgment and Order suspending Respondent from the practice of law for 60 days, effective July 1, 2012. Respondent failed to notify the defendants' counsel that he had been suspended.
54. On June 8, 2012, the defendants' counsel filed an answer to the amended complaint (pursuant to the court's 150-day order, entered on December 28, 2011). Also on June 8, 2012, the defendants' counsel served written discovery requests, including interrogatories and requests for production of documents, on Respondent. Despite a number of requests made by the defendants' counsel, Respondent failed to provide a disclosure statement (which was due July 23, 2012) or respond to any of the discovery requests (which were due July 18, 2012).
55. On September 27, 2012, the defendants' counsel filed a *Defendants' Motion to Dismiss or in the Alternative Motion to Compel Disclosure and Discovery Responses and for Sanctions* (motion to dismiss). Respondent was "copied" on that motion. The motion to dismiss was based upon Respondent's failure to

prosecute the complaint by failing to serve a disclosure statement or respond to any of the discovery requests. In the alternative, the defendants requested an order that Respondent be directed to provide an initial disclosure statement, responses to all written discovery requests, and copies of all related medical records.

56. Respondent failed to file a response to the defendants' motion to dismiss.
57. On November 6, 2012, Maricopa County Superior Court Judge Eileen Willett dismissed Vasquez's personal injury lawsuit with prejudice (the order was filed on November 9, 2012).
58. Thereafter, Vasquez and Evans hired attorney David Hume (attorney Hume) to represent them regarding a legal malpractice claim against Respondent.
59. On February 15, 2013, attorney Hume sent a letter to Respondent in which he requested the file that Respondent maintained on Vasquez's behalf. Respondent failed to provide attorney Hume or Vasquez with the file he maintained on Vasquez's behalf.
60. On March 20, 2013, attorney Hume filed a legal malpractice complaint against Respondent on Vasquez and Evans' behalf.
61. On May 16, 2013, Respondent was served with a subpoena *duces tecum* directing his appearance for a deposition on June 3, 2013, and directing him to bring with him the file he maintained on Vasquez's behalf and his malpractice insurance information.
62. Respondent failed to appear at the June 3, 2013, deposition and failed to provide the documents, records, and information requested.

63. On July 22, 2013, attorney Hume filed a *Petition for Contempt Order against the Defendant* in which he requested the issuance of a civil arrest warrant against Respondent for failing to appear for the June 3, 2013, deposition.
64. On July 29, 2013, Maricopa County Superior Court Judge Michael Herrod scheduled a hearing on the *Petition for Contempt Order* for August 12, 2013.
65. On August 12, 2013, Respondent appeared telephonically at the hearing. During that hearing, Judge Herrod ordered Respondent to appear for his deposition, which was to be scheduled within the following two weeks. The minute entry regarding that hearing stated that a civil arrest warrant would be issued if Respondent failed to appear at his re-scheduled deposition. Respondent's name and address were included on that minute entry.
66. Sometime thereafter, Respondent's deposition was scheduled for August 20, 2013. Respondent appeared over 30 minutes late and failed to bring with him all of the requested malpractice insurance information and documents, as directed by the subpoena, and brought only a "digital file" that he maintained on Vasquez's behalf, which consisted of the documents he could print from his computer. During the deposition, Respondent agreed he would produce the paper copy of the file he maintained on Vasquez's behalf and a copy of his professional malpractice insurance file by September 15, 2013.
67. On September 14, 2013, attorney Hume sent a letter to Respondent in which he reminded Respondent that he had agreed at his deposition to provide him with the paper copy of the file he maintained on Vasquez's behalf and a copy of his professional malpractice insurance file by September 15, 2013.
68. Respondent failed to provide the two requested files by September 15, 2013.

69. On October 9, 2013, attorney Hume sent another letter to Respondent in which he stated that Respondent had missed the deadline he agreed to during his deposition to provide the paper copy of the file he maintained on Vasquez's behalf and a copy of his professional malpractice insurance file. Attorney Hume stated in that letter that he would take the matter up with the court, probably in the form of another petition for contempt, if he failed to produce the two requested files by October 20, 2013.
70. Respondent failed to provide attorney Hume with the two requested files by October 20, 2013.
71. On October 29, 2013, attorney Hume filed a *Petition for Contempt Order (Second) Against the Defendant* in which he requested the issuance of a civil arrest warrant against Respondent for failing to provide the two requested files.
72. On October 30, 2013, Judge Herrod scheduled a hearing on the *Petition for Contempt Order (Second)* for November 19, 2013. Respondent's name and address were included on the minute entry order.
73. Respondent failed to appear at the hearing on November 19, 2013. Judge Herrod took the matter under advisement.
74. On November 22, 2013, Judge Herrod, in a written *Under Advisement Ruling*, "conclude[d] that [Respondent] ha[d] committed indirect civil contempt of court by failing to comply with a court order, and by failing to comply with a lawful subpoena." Judge Herrod found Respondent in indirect civil contempt and ordered the issuance of a civil arrest warrant for Respondent's arrest. Respondent's name and address were included on that *Under Advisement Ruling*.

75. On January 31, 2014, attorney Hume filed an *Application for Entry of Default* and an *Affidavit on Default and Entry of Default* on Vasquez and Evans's behalf because Respondent had failed to file a pleading or otherwise defend against the legal malpractice complaint.
76. On February 6, 2014, attorney Hume filed a *Motion for Default Judgment* against Respondent and sought a hearing at which he could present evidence to support a damages claim against Respondent.
77. On February 21, 2014, attorney Hume filed an *Application for Entry of Default* and an *Affidavit on Default and Entry of Default* on Vasquez and Evans's behalf.
78. On February 28, 2014, attorney Hume filed a motion to continue the case on the inactive calendar. That motion stated that a default hearing was scheduled for March 17, 2014, before Commissioner Michael Barth. Respondent was "copied" on that motion.
79. Respondent failed to appear at the default hearing on March 17, 2014, before Judge Pro Tem Victoria Orze, who was sitting for Commissioner Barth.
80. On March 21, 2014, Judge Pro Tem Orze entered an *Under Advisement Ruling* in which she awarded Martha Vasquez \$18,517.46 for her injuries and awarded Donald Evans \$1,482.54 for his loss of consortium. Judge Orze granted judgment against Respondent for \$20,000.00, plus \$703.60 for costs. [State Bar Exhibit 47.]

Failure to Respond to Bar Counsel re: File No. 13-3229

81. On January 2, 2014, bar counsel mailed a screening letter to Respondent, which stated in part:

The State Bar has received information concerning your professional conduct that warrants a screening investigation pursuant to Rule 55(b),

Ariz. R. Sup. Ct. At this point, the matter is not considered a formal complaint, but rather a "bar charge" that is being investigated through a "screening investigation." Your participation in the screening investigation is extremely important, as Bar Counsel will make a recommendation at the end of the investigation as to the disposition of this matter. Pursuant to ER 8.1(b) 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.

A copy of the information received by the State Bar has been included with this letter. Please submit a written response to the enclosed information, directed to my office, within 20 days of the date of this letter. . . . If you cannot file a timely response, you should contact my office immediately. .

The ethical rules that should be addressed in your response include, but are not limited to: ERs 1.15(d), 1.16(d), 3.4(c), 8.4(d) and Rule 54(c), Ariz.R.Sup.Ct.

(Underline in original; ellipses added).

82. Respondent failed to submit a written response to the charges, as instructed by bar counsel in his letter dated January 2, 2014.

CONCLUSIONS OF LAW

Respondent failed to file an answer or otherwise defend against the allegations in the SBA's complaint. Default was properly entered and the allegations of misconduct were deemed admitted pursuant to Rule 58(d), Ariz. R. Sup. Ct. Based upon the facts deemed admitted, as set forth above, the Hearing Panel finds by clear and convincing evidence that Respondent violated the following:

Count One

1. ER 1.2(a) by failing to abide by Shawn Nix's decisions concerning the objectives of representation and failing to consult with Shawn Nix regarding the means by which they were to be pursued (e.g., Respondent failed to file a response to the motion to stop child support payments pending a hearing to address Brian Waddell's motion to modify child support);

2. ER 1.3 by failing to act with reasonable diligence and promptness in representing Shawn Nix (e.g., Respondent failed to file a response to the motion to stop child support payments pending a hearing to address Brian Waddell's motion to modify child support);
3. ER 1.4(a) by failing to reasonably consult with Shawn Nix, either directly with Shawn or indirectly through Scott Nix, about the means by which her objectives were to be accomplished and failed to promptly comply with reasonable requests for information (e.g., Respondent failed to adequately communicate with Shawn or Scott Nix regarding Brian Waddell's motion to stop child support payments pending a hearing to address Brian's motion to modify child support and failed to promptly return Shawn and Scott Nix's telephone calls);
4. ER 1.16(a) by failing to withdraw as counsel for Shawn Nix after he was discharged as her counsel and failed to withdraw as counsel for Shawn Nix prior to the effective date of his suspension;
5. ER 1.16(d) by failing, upon termination of representation, to take steps to the extent reasonably practicable to protect Shawn Nix's interests, such as giving reasonable notice to Shawn Nix, allowing time for employment of other counsel, surrendering property to which Shawn or Scott Nix was entitled, and refunding any advance payment of a fee that had not been earned (e.g., Respondent failed to refund unearned fees for approximately two months, which was during a period of time that Respondent knew or should have known that Shawn might need the unearned fees to hire replacement counsel);
6. ER 8.4(d) by engaging in conduct prejudicial to the administration of justice (e.g., Respondent's failure to timely file responses to Brian Waddell's motions resulted

in Shawn Nix's temporary loss of child support, and the court had to address motions that were filed due to Respondent's failure to timely file responses);

7. Rule 72(a), Ariz. R. Sup. Ct., by failing, within ten days of the Final Judgment and Order suspending him for 60 days, to notify Shawn Nix by registered or certified mail, return receipt requested, of the Final Judgment and Order, and of the fact that he would be disqualified to act as her lawyer beginning July 1, 2012; and
8. Rule 72(b)(2), Ariz. R. Sup. Ct., by failing to obtain Shawn Nix's consent to associate counsel to represent her during the period of his suspension and failing to file either a motion to withdraw as counsel for Shawn Nix or a notice of substitution of counsel.

Count Two

9. ER 1.15(a) by failing to hold property in his possession in connection with his representation of Tony Anderson separate from his own property (e.g., Respondent failed to deposit advance fees into his trust account or failed to ensure that his non-lawyer staff deposited advance fees into his trust account);
10. ER 1.15(d) by failing to promptly deliver to Tony Anderson any funds he was entitled to receive (i.e., Respondent failed to promptly refund unearned fees to Tony Anderson);
11. ER 1.16(d) by failing, upon termination of representation, to take steps to the extent reasonably practicable to protect Tony Anderson's interests, including surrendering property to which Tony Anderson was entitled (e.g., Respondent failed to promptly refund unearned fees to Tony Anderson upon termination of representation);

12. ER 8.1(b) by knowingly failing to respond to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter (e.g., Respondent failed to provide bar counsel with a written response to Tony Anderson's charges, as directed by bar counsel);
13. Rule 43(a), Ariz. R. Sup. Ct., by failing to hold funds belonging in whole or in part to Tony Anderson in connection with his representation of him separate and apart from his personal and business accounts and failing to deposit such funds into his trust account (e.g., Respondent failed to ensure that advance fees were deposited into his trust account); and
14. Rule 54(d), Ariz. R. Sup. Ct., by refusing to cooperate with State Bar staff regarding a disciplinary investigation and failing to furnish information or respond promptly to an inquiry or request from bar counsel regarding a disciplinary investigation or, alternatively, failing to assert a ground for refusing to do so (e.g., Respondent failed to provide bar counsel with a written response to Tony Anderson's charges, as directed by bar counsel).

Count Three

15. ER 1.4(a) & (b) by failing to reasonably consult with Gordon Nichols about the means by which his objectives were to be accomplished, failing to keep Gordon Nichols reasonably informed about the status of his matter, failing to comply with reasonable requests for information, and failing to explain matters to the extent reasonably necessary to permit Gordon Nichols to make informed decisions regarding the representation;

16. ER 1.15(d) by failing to promptly deliver to Gordon Nichols (or his subsequent counsel) the funds and other property (including the file he maintained on Gordon Nichols's behalf) that he was entitled to receive;
17. ER 1.16(d) by failing, upon termination of representation, to take steps to the extent reasonably practicable to protect Gordon Nichols's interests, such as giving reasonable notice to Gordon Nichols and surrendering (either to Gordon Nichols or his subsequent counsel) documents and property to which Gordon Nichols was entitled;
18. ER 8.1(b) by knowingly failing to respond to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter (e.g., Respondent failed to provide bar counsel with a written response to Kathleen McCaffrey's charges, as directed by bar counsel);
19. ER 8.4(b) by committing a criminal act (i.e., theft) that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects;
20. ER 8.4(d) by engaging in conduct that was prejudicial to the administration of justice (e.g., Gordon Nichols had to hire subsequent counsel to complete the representation started by Respondent and, due to the misappropriation of the settlement funds, Gordon Nichols's lienholders have not been paid); and
21. Rule 54(d), Ariz. R. Sup. Ct., by refusing to cooperate with State Bar staff regarding a disciplinary investigation and failing to furnish information or respond promptly to an inquiry or request from bar counsel regarding a disciplinary investigation or, alternatively, failing to assert a ground for refusing to do so (e.g., Respondent failed to provide bar counsel with a written response to Kathleen McCaffrey's charges, as directed by bar counsel).

Count Four

22. ER 1.15(d) by failing to promptly deliver to Martha Vasquez or her subsequent counsel, David Hume, the documents, records, files and information they were entitled to receive;
23. ER 1.16(d) by failing, upon termination of representation, to take steps to the extent reasonably practicable to protect Martha Vasquez's interests, such as surrendering documents and property to which she and her subsequent counsel, David Hume, were entitled;
24. ER 3.4(c) by failing to comply with a subpoena directing his appearance for a deposition and failing to comply with Judge Herrod's order(s);
25. ER 8.4(d) by engaging in conduct prejudicial to the administration of justice (e.g., Martha Vasquez, Donald Evans, and David Hume had to undertake additional (and otherwise unnecessary) action to attempt to obtain information from Respondent due to his failure to appear at his initial deposition and failing to provide Vasquez or attorney Hume with the file he maintained on Vazquez's behalf, and caused the court to undertake additional (and otherwise unnecessary) action, including the issuance of a civil arrest warrant against Respondent, to address Respondent's failure to comply with discovery requests); and
26. Rule 54(c), Ariz. R. Sup. Ct., by failing to comply with Judge Herrod's order(s).
27. ER 8.1(b) by knowingly failing to respond to a lawful demand for information from a disciplinary authority in connection with a disciplinary matter (e.g., Respondent failed to provide bar counsel with a written response to the charges, as directed by bar counsel); and

28. Rule 54(d), Ariz. R. Sup. Ct., by refusing to cooperate with State Bar staff regarding a disciplinary investigation and failing to furnish information or respond promptly to an inquiry or request from bar counsel regarding a disciplinary investigation or, alternatively, failing to assert a ground for refusing to do so (e.g., Respondent failed to provide bar counsel with a written response to the charges, as directed by bar counsel).

In all, Respondent violated ER 1.2(a), ER 1.3, ER 1.4(a) & (b), ER 1.15(a) and (d), ER 1.16(a) and (d), ER 3.4(c), ER 8.1(b), ER 8.4(b) and (d), Rule 43(a), Ariz. R. Sup. Ct., Rule 54(c) and (d), Ariz. R. Sup. Ct., and Rule 72(a) and (b)(2), Ariz. R. Sup. Ct.

ABA STANDARDS ANALYSIS

The American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") are a "useful tool in determining the proper sanction." *In re Cardenas*, 164 Ariz. 149, 152, 791 P.2d 1032, 1035 (1990). In imposing a sanction, the following factors should consider: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors. *Standard 3.0*.

Duties violated

Respondent violated his duty to his clients by violating ER 1.2(a), 1.3, ER 1.4(a) and (b), ER 1.15(a) and (d), Rule 43(a) and (b), and Rule 72(a), Ariz. R. Sup. Ct.; his duty to the legal system by violating ER 3.4(c), ER 8.4(d), and Rules 72(a) and (b)(2), Ariz. R. Sup. Ct.; his duty to the general public by violating ER 8.4(b); and his duty owed as a professional by violating ER 1.16(a) and (d), ER 5.3(a) and (b), ER 8.1(b), and Rule 54(d), Ariz. R. Sup. Ct.

Mental State and Injury

Respondent intentionally or knowingly engaged in most instances of misconduct, including the most serious misconduct (e.g., theft), but may have been negligent in his commission of other instances of misconduct (e.g., the failure to adequately supervise his non-lawyer assistant to ensure that s/he deposited advance fees into his trust account).

Respondent violated his duty to clients, thereby implicating *Standards* 4.1 and 4.4. *Standard* 4.11 states, "Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client." *Standard* 4.41 states, "Disbarment is generally appropriate when: (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client." *Standard* 4.42 states, "Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client."

In the instant case, Respondent stole \$40,000.00 in settlement funds (Respondent was not entitled to any fee related to the settlement of Gordon Nichols's case because he settled Nichols's case without his consent) and engaged in a pattern of neglect that resulted in serious or potentially serious injury to more than one client.

Respondent violated his duty to the legal system, thereby implicating *Standard* 6.2. *Standard* 6.21 states, "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." *Standard* 6.22 states, "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."

In the instant case, Respondent failed to comply with a subpoena directing his appearance for a deposition and failed to comply with Judge Herrod's order(s).

Respondent violated his duty to the general public, thereby implicating *Standards* 4.6 and 5.1. *Standard* 4.61 states, "Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client." *Standard* 5.11 states, "Disbarment is generally appropriate when: (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

In the instant case, Respondent stole \$40,000.00 in settlement funds (Respondent was not entitled to any fee related to the settlement of Gordon Nichols's case because he settled Nichols's case without his consent).

Respondent also violated his duty owed as a professional, which implicates *Standard 7.0*. *Standard 7.1* states, Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.” *Standard 7.2* states, “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.”

In the instant case, Respondent failed to promptly refund unearned fees to his clients and return any documents they were entitled to receive upon termination of representation. Furthermore, he failed to comply with bar counsel’s requests for information during the State Bar’s investigation into the charges of misconduct.

Suspension may be the presumptive sanction regarding some acts of misconduct, but given the nature and scope of Respondent’s misconduct, the presumptive sanction is disbarment.

AGGRAVATING AND MITIGATING FACTORS

The Hearing Panel finds the following aggravating factors are present in this matter:

- *Standard 9.22(a)* – prior disciplinary offenses (In File No. 10-1688, Respondent initially received an admonition and two years of probation (LOMAP and CLE) for violation of ER 1.2(a), ER 1.3, ER 3.2, ER 8.1(b), and Rule 53(d) & (f), Ariz. R. Sup. Ct.; in File Nos. 11-1562, 11-1592, 11-1984, and 11-2359, Respondent was initially suspended for 60 days, placed on two years of probation (LOMAP, MAP, CLE and TA-EEP) and ordered to pay restitution for violation of ER 1.1, ER 1.3, ER 1.4(b), ER 1.5(b), ER 1.7(a), ER 1.8(a), ER 1.15(a), ER 3.4(c), ER 3.7, ER 8.4(a) and (d), and Rules 43(b)(1)(A) & (C), 43(b)(2)(B) & (C), and 54(d)(2), Ariz. R. Sup. Ct.; Respondent was subsequently suspended for six months and one day for violating the terms of probation in the above files);

- *Standard 9.22(b)* – a dishonest or selfish motive;
- *Standard 9.22(c)* - a pattern of misconduct;
- *Standard 9.22(d)* – multiple offenses;
- *Standard 9.22(e)* – bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- *Standard 9.22(g)* – refusal to acknowledge the wrongful nature of his misconduct;
- *Standard 9.22(h)* – vulnerability of the victims;
- *Standard 9.22(i)* – substantial experience in the practice of law (Respondent was admitted to practice law in Arizona on October 27, 1990);
- *Standard 9.22(j)* – indifference to making restitution; and
- *Standard 9.22(k)* – illegal conduct.

The Hearing Panel finds the following mitigating factor is present in this matter:

- *Standard 9.32(j)* – delay in the disciplinary proceeding.

PROPORTIONALITY

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers*, 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or proportionality review is “an imperfect process.” *In re Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases “are ever alike.” *Id.*

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *See In re Peasley*, 208 Ariz. 27, 35, 90 P.3d 764, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither

perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The Arizona Supreme Court had made it clear that it considers a lawyer's misappropriation of a client's funds to be very serious misconduct.

The misappropriation of a client's funds is an offense involving moral turpitude and warrants disbarment in the absence of extenuating circumstances. *In re Freiburghouse*, 52 Cal.2d 514, 342 P.2d 1 (1959); see *Bradpiece v. State Bar of California*, 10 Cal.3d 742, 111 Cal.Rptr. 905, 518 P.2d 337 (1974).

In re Couser, 122 Ariz. 500, 502, 596 P.2d 26, 28 (1979).

Attorney Haacke was disbarred and ordered to pay restitution and the costs and expenses of the disciplinary proceeding for misconduct she engaged in during her representation of three clients. *In re Haacke*, PDJ-2012-9116 (2013). Ms. Haacke failed to adequately communicate with her clients and charged an unreasonable fee in all three matters. In two of those matters, Ms. Haacke failed to hold funds in trust that she was required to hold in trust. In one case she misappropriated \$40,000.00 belonging to a client or the client's expert witness, and in a second case stole at least \$51,722.57 belonging to her client. Ms. Haacke falsely stated in an interim accounting to one client that she was still holding funds in trust and falsely informed another client that she had made a \$30,000.00 payment to another attorney on his behalf. Ms. Haacke failed, at the termination of representation in two matters, to promptly refund unearned fees and return documents she had been given. In one matter, Ms. Haacke engaged in a conflict of interest by representing a client at a time when there was a significant risk that her representation of him would be materially limited by

her personal interests and by entering into a business transaction with her client that was not fair and reasonable.

During the State Bar's investigation, Ms. Haacke knowingly made a false statement of material fact and knowingly failed to provide bar counsel with a full and complete written response to his inquires and requests for information. Aggravating factors included a dishonest or selfish motive, a pattern of misconduct, multiple offenses, bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, refusal to acknowledge the wrongful nature of her misconduct, vulnerability of the victims, substantial experience in the practice of law, and indifference to making restitution. The only mitigating factors were absence of a prior disciplinary history and delay in the disciplinary proceedings. Ms. Haacke violated ER 1.2(a), ER 1.3, ER 1.4, ER 1.5(a), (b) and (d)(3), ER 1.7(a), ER 1.8(a), ER 1.15(a) and (d), ER 1.16(d), ER 8.1(b), and ER 8.4(b), (c) and (d), and Rules 43 and Rule 54(d), Ariz. R. Sup. Ct.

Attorney Bumstead was disbarred and ordered to pay restitution and the costs and expenses of the disciplinary proceeding for misconduct related to his representation of four clients in two matters. *In re Bumstead*, PDJ-2012-9082 (2012). Mr. Bumstead settled three related clients' cases and endorsed and negotiated three settlement checks totaling \$18,220.00 without his clients' knowledge or consent. During his representation of another client, and while suspended from the practice of law, Mr. Bumstead settled his client's case and endorsed and negotiated a settlement check for \$62,500.00 without his client's knowledge or consent. Mr. Bumstead also failed to respond timely to bar counsel's requests for information during the State Bar's investigation. Aggravating factors included a dishonest or selfish motive, a

pattern of misconduct, multiple offenses, bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, refusal to acknowledge the wrongful nature of his misconduct, substantial experience in the practice of law, indifference to making restitution, and illegal conduct. No mitigating factors were found. Mr. Bumstead violated ER 1.2, ER 1.3, ER 1.4(a) and (b), ER 1.15(a) and (d), ER 5.5, ER 8.1(b), ER 8.4(b), (c) and (d), and Rules 43(a) and 54(d), Ariz. R. Sup. Ct.

Attorney Shuga was disbarred and ordered to pay restitution and the costs and expenses of the disciplinary proceeding for misconduct related to his representation of five clients. *In re Shuga*, PDJ-2011-9082 (2012). Mr. Shuga received and endorsed three settlement checks totaling \$12,000.00 without one client's knowledge or consent, and then unlawfully retained those funds. Mr. Shuga also abandoned four clients, which resulted in the dismissal of two clients' cases. In addition, Mr. Shuga failed to respond timely to the bar counsel's inquiries during the State Bar's investigation. The following aggravating factors were present: a dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency; refusal to acknowledge the wrongful nature of his misconduct; substantial experience in the practice of law; indifference to making restitution; and illegal conduct. The only mitigating factor was absence of a prior disciplinary record. Mr. Shuga violated ER 1.2(a), ER 1.3, ER 1.4(a) and (b), ER 1.15(a) and (d), ER 1.16(d), ER 8.1(b), ER 8.4(b), (c) and (d), and Rules 43 and 54(d), Ariz. R. Sup. Ct.

Attorney Giles was disbarred and ordered to pay restitution and the costs and expenses of the disciplinary proceeding for misconduct that mostly occurred while he

was acting in the capacity of a trustee. *In re Giles*, PDJ-2011-9023 (2011). A court removed Mr. Giles as trustee of a trust and ordered him to provide the new trustee with the trust's records and funds. Mr. Giles, however, failed to timely comply with the court's order. Mr. Giles admitted to having used the trust's funds for his benefit. Records provided by Mr. Giles reflected that he used \$1,730.58 in trust funds to pay his office rent and \$1,097.51 in trust funds to pay his secretary, and made \$11,900.00 in cash withdrawals from the trust funds. Mr. Giles also failed to substantively respond to bar counsel's inquiries during the State Bar's investigation. Aggravating factors included a dishonest or selfish motive, multiple offenses, bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, refusal to acknowledge the wrongful nature of his misconduct, substantial experience in the practice of law, indifference to making restitution, and illegal conduct. The only mitigating factor was absence of a prior disciplinary record. Mr. Giles violated ER 3.4(c), ER 8.1(b), ER 8.4(b), (c) and (d), and Rules 53(c), (d) and (f), Ariz. R. Sup. Ct.

The instant case is similar to the above cases in that they all involve, among other things, theft of client or third-party funds and failures to respond to bar counsel's inquiries during the State Bar's investigations.

CONCLUSION

The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.'" *Alcorn*, 202 Ariz. at 74, 41 P.3d at 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). It is also the purpose of lawyer discipline to deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d

1315 (1993). It is also a goal of lawyer regulation to protect and instill public confidence in the integrity of individual members of the SBA. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

The Hearing Panel found by a preponderance of the evidence that orders of restitution are appropriate. Based upon the findings of fact and conclusions of law, the appropriate ABA *Standards*, the existence of multiple aggravating factors, the existence of a single mitigating factor, cases relevant to determining proportionality, and the goals of the attorney discipline system, this Hearing Panel determines the following sanctions are appropriate, and enters the following orders:

1. Respondent is immediately disbarred from the practice of law in Arizona;
2. Respondent must pay all costs and expenses incurred by the State Bar of Arizona and the Office of the Presiding Disciplinary Judge in this proceeding;
3. Respondent must pay restitution to the following persons in the following amounts: \$282.00 to Scott Nix; \$20,703.60 to Martha Vasquez and Donald Evans (plus any interest accrued based upon the judgment entered in their favor); and \$40,000.00 to Gordon Nichols; and
4. The Hearing Panel will enter an appropriate Final Judgment and Order.

DATED this 25th day of September, 2014.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Linda S. Smith

**Linda Smith
Volunteer Public Member**

Scott I. Palumbo

Scott Palumbo
Volunteer Attorney Member

Copies of the foregoing mailed/emailed
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by: JAlbright

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 SUSPENDED MEMBER
OF THE STATE BAR OF ARIZONA,

FRED L. HOWE,
Bar No. 013270,

Respondent.

No. PDJ-2014-9055

**EFFECTIVE ENTRY OF DEFAULT
AND NOTICE OF AGGRAVATION
/MITIGATION HEARING**

[State Bar Nos. 12-1849, 12-2586,
13-1993, 13-3229]

FILED: AUGUST 26, 2014

EFFECTIVE ENTRY OF DEFAULT occurred on August 25, 2014, pursuant to Rule 58(d) of the Rules of the Arizona Supreme Court. The allegations in the complaint are deemed admitted. Default shall not be set aside except in cases where such relief would be warranted under Rule 60(c) of the Arizona Rules of Civil Procedure.

NOTICE IS HEREBY GIVEN by the Presiding Disciplinary Judge that an aggravation/mitigation hearing has been set before the Hearing Panel on **Monday, September 29, 2014**, at **1:30 p.m.** The location of hearing is State Courts Building, 1501 West Washington, Hearing Room 109, Phoenix, AZ 85007-3231.

DATED this 26th of August, 2014.

Jennifer R. Albright

Jennifer R. Albright, Disciplinary Clerk
Office of the Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk
this 26th day of August, 2014.

COPY of the foregoing e-mailed/mailed
this 26th day of August, 2014, to:

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