**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	Nos. 05-2050, 06-0657, 06-1062, 06-1742, 07-1217
JAMES R. ECKLEY, Bar No. 010854	)	**DISCIPLINARY COMMISSION REPORT**
RESPONDENT.	)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 13, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed April 15, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent and Joint Memorandum providing for censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP" audit), fee arbitration, and costs.

Decision

Having found no facts clearly erroneous, the seven members[1] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP audit), participation in the State Bar's Fee Arbitration Program with client Bloom (Count One), and costs of these disciplinary proceedings including any costs

[1]. Commissioners Gooding, Horsely and Todd did not participate in these proceedings. Mary Carlton participated as an ad hoc public member.

incurred by the Disciplinary Clerk's office and the Supreme Court of Arizona.[2] The terms of probation are as follows:

Terms of Probation

1. Respondent shall undergo a complete LOMAP audit and comply with the recommendations as to the terms and conditions of probation as recommended by the LOMAP director or designee, but will specifically address ERs 1.8 and 5.7. Respondent shall submit to an audit of his trust account by Gloria Barr and agree to all terms and conditions as recommended by Ms. Barr based on her audit of his trust account practices and procedures. The probation time shall start from the signing of the Terms and Conditions of Probation.

2. Respondent shall participate in fee arbitration through the State Bar of Arizona's Fee Arbitration Program with Ms. Bloom, if she is willing, and be bound by the results thereof.

3. In the event that Applicant fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the imposing entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-

[2] A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total $1,665.53.

compliance by a preponderance of evidence.[3]

RESPECTFULLY SUBMITTED this 6th day of July, 2009.

Jeffrey Messing/cs
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 6th day of July, 2009.

Copy of the foregoing mailed
this 6th day of July, 2009, to:

Honorable H. Jeffrey Coker
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[3] As amended pursuant to Rule 60(a)(5)(c), effective January 1, 2009, and stipulated to by the parties. The Hearing Officer's Report and the consent documents inadvertently contained the former compliance language of clear and convincing evidence.

EXHIBIT
A

FILED

APR 1 5 2009

HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

BY [signature]

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **JAMES R. ECKLEY,** **Bar No. 010854** RESPONDENT.	File Nos. 05-2050, 06-0657, 06-1062 06-1742, and 07-1217 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

1. Probable cause was found in this matter as follows: 05-2050 (Longfellow) on March 19, 2006; 06-0657 (Jaksic) on January 10, 2007; 06-1062 (Balsis) and 06-1742 (Garcia) on August 31, 2007; 07-1217 (Ward) on January 30, 2008. The original Complaint was filed on September 30, 2008, and service was made on October 2, 2008. The case was originally assigned to Hearing Officer 7M on October 6, 2008, and Respondent filed a Notice of Transfer on October 10, 2008. The case was then reassigned to Hearing Officer 6T on October 10, 2008, and the State Bar filed a Notice of Transfer on October 20, 2008. Respondent filed his Answer on October 22, 2008, and the case was ultimately assigned to the undersigned Hearing Officer on October 28, 2008. An Initial Case Management Conference was held on November 13, 2008, and a final hearing was set to start on February 17, 2009.

2. Respondent filed an extensive Motion for Partial Summary Judgment and Motion in Limine on January 20, 2009, and in response thereto the State Bar filed a Motion to Continue the Final Hearing and to be allowed to obtain affidavits and

take depositions. That Motion was granted on January 26, 2009, and the Final Hearing was reset to March 18, 19 and 20, 2009. The State Bar filed an Amended Complaint on January 26, 2009, and Respondent filed an Answer thereto. After oral argument on the Motion for Partial Summary Judgment and Motion in Limine, the undersigned Hearing Officer issued a ruling on March 9, 2009, granting portions of Respondent's Motion and denying others. Subsequently the parties were able to settle the case just prior to the Final Hearing date and the matter proceeded to hearing on the Tender and Agreement on March 19, 2009, approximately 21 days beyond the 150 day time limit.[1]

3. At the hearing on the Tender and Agreement, the parties submitted to the Hearing Officer their proposed Tender and Agreement. The Tender and Agreement submitted to the Hearing Officer did not contain reference to the dismissed counts and the parties wished to supplement the Tender and Agreement post hearing and have the Hearing Officer consider that filing. The amended Tender and Agreement was received by the Hearing Officer on April 7, 2009.

4. As part of the agreement, the parties stipulated to dismiss the ER 1.5, unreasonable fee issues in Counts One (Bloom) and Three (Garcia), (Garcia is one of the dismissed Counts, but as part of the agreement the parties stipulated that it should be treated similarly to Bloom), and have the Hearing Officer decide whether either of those matters should be submitted to fee arbitration and, if so, whether it should be before this Hearing Officer. The Bar felt that there were questions about Respondent's fees in his dealings with Ms. Bloom and Ms. Garcia that did not raise to the level of an ER violation that they could prove, but still felt

[1] The Disciplinary Commission ultimately granted an extension of time to hold the hearing.

that the fee issue should be addressed by this Hearing Officer as to these two clients. This issue will be addressed herein.

FINDINGS OF FACT

5. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on January 5, 1988.

6. This case originated as a multi-count, very complex recitation of numerous allegations of misconduct by the Respondent. As a result of both the Hearing Officer's ruling on the Motion for Partial Summary Judgment, as well as the State Bar's acknowledgment that the clear and convincing standard could not be met on several of the claims, we are left with a primary admission of an ER 5.7 Conflict of Interest violation, with an aggravator of Trust Account violations under Rules 43 and 44, Hearing Transcript ("Tr.") p. 8:5.

7. The first two Counts, 06-0657 (Bloom) and 06-1062 (Balsis), share some common facts set forth below.

8. Respondent practices law in the areas of real estate, specifically cases involving construction defects and the Registrar of Contractors.

9. At all times relevant, Respondent was the owner/manager, a member of and statutory agent for National BuildMasters, LLC ("NB") which he incorporated on July 15, 2003.

10. Respondent has overall management and decision-making authority for NB.

11. NB provides technical assistance to Respondent's clients in construction defect cases, although NB employees cannot be the client's expert at trial.

12. Respondent is the person who ordinarily advises Eckley & Associates' clients on whether NB should be asked to provide technical assistance to a client.

13. NB contracts with various independent contractors to supervise the technical projects for which NB is hired. NB employs no W-2 employees.

14. NB independent contractors are given Forms 1099 at the end of the tax year.

15. Respondent is entitled to compensation from NB because he is the owner.

16. Although Tori Dunphy and Karen Eckley are employed by Respondent's law firm, they provide administrative and accounting services to NB, but are not paid a salary by NB.

COUNT ONE (File No. 06-0657 Bloom)

17. Ms. Cynthia Bloom ("Ms. Bloom") purchased a home in Sedona, Arizona in 2001 only to discover that the house had many construction defects that had not been disclosed to her.

18. On or about December 15, 2003, Ms. Bloom retained Respondent to represent her in the construction defect case.

19. At some point during the representation, NB was hired to perform services on Ms. Bloom's behalf.

20. Although Respondent orally explained his relationship to NB to Ms. Bloom, Respondent did not disclose in writing to Ms. Bloom that NB was owned and operated by him.

21. It is Ms. Bloom's position that Respondent never informed her that he owned NB. However, the State Bar is not confident that it can prove this fact by clear and convincing evidence.

22. Respondent did not disclose in writing the extent to which he benefited from his employment of NB for Ms. Bloom's case.

23. Respondent did not inform Ms. Bloom of the advisability to seek independent counsel with regard to Respondent's ownership of NB and the use of NB on Ms. Bloom's case.

24. Ms. Bloom terminated Respondent's services in June of 2005.

25. It is Respondent's position that although he did not properly disclose his relationship with NB in writing, Ms. Bloom was aware that Respondent possesses an interest in NB and gave her informed consent to employ NB on her case. Ms. Bloom gave no indication that she was dissatisfied with NB's work and eventually hired a former NB contractor to provide technical services on her case after Respondent withdrew from the representation of Ms. Bloom. Alan Shelton, a former NB employee, would also testify that Ms. Bloom was aware of Respondent's relationship with NB.

26. It is Ms. Bloom's position that she indicated to Respondent that she was dissatisfied with the direction her case was taking and the amount of fees she was being billed without first being consulted. It is the State Bar's position that it might not be able to prove this by clear and convincing evidence.

27. It is further Respondent's position that after learning of the deficiency in his disclosures concerning NB, he revised his procedures so that the disclosures now conform fully to the requirements of ER 5.7 and 1.8(a).

28. In March 2005, Respondent represented Ms. Bloom in mediation with the sellers of the home at issue. As a result of the mediation, the parties agreed to a process whereby a Special Master would be appointed to decide the extent of the seller's responsibility to make repairs to Ms. Bloom's residence. The seller agreed to contribute $10,000 towards the Special Master's fees. On approximately June 15, 2005, the sellers delivered to Respondent a $10,000 check, which the sellers made payable to Eckley and Associates Client Trust Account. Respondent failed to deposit the check in his client trust account.

29. Respondent instead sent the settlement check directly to Ms. Bloom with a restrictive endorsement, which created issues for Ms. Bloom when she tried to deposit or cash the check.

30. It is Respondent's positions that the Uniform Commercial Code and the Arizona Revised Statutes allow the restrictive endorsement that Respondent placed on the check. Respondent has placed the same restrictive endorsement on other checks and has experienced no issues as a result. At the time Respondent placed the restrictive endorsement on Ms. Bloom's check, he did not realize that it would create issues for her when she went to deposit or cash the check.

31. It is Respondent's position that he has revised his trust account policies so that all checks made payable to Eckley and Associates Trust Account are promptly deposited into his client trust account.

COUNT TWO (File No. 06-1062 Balsis)

32. Mr. John Balsis ("Mr. Balsis") purchased a newly constructed home in Goodyear, Arizona, only to discover that the House had many construction defects.

33. Mr. Balsis attempted to negotiate with the builders to remedy the problems.

34. In March of 2006, Mr. Balsis retained Respondent to represent him in a construction defect case. Mr. Balsis paid Respondent a $3,000 advance fee.

35. Mr. Balsis hired NB to perform services on his behalf.

36. Respondent had a personal interest in deriving profits through NB, which conflicted with his duties to Mr. Balsis.

37. Although Respondent disclosed to Mr. Balsis that NB was owned by him, that he shares in the profits realized by NB, and that Mr. Balsis was free to hire another consultant, Respondent did not do so in a separate, written disclosure and Respondent did not inform Mr. Balsis of the advisability to seek independent counsel with regard to Respondent's ownership of NB.

38. It is Mr. Balsis' position that he was never informed that Respondent owned NB. It is the State Bar's position that it is not confident that it could prove this by clear and convincing evidence.

39. It is further Respondent's position that Mr. Balsis was fully aware of his ownership interest in NB and gave informed consent for NB to perform work on his case. Moreover, Respondent would submit the deposition testimony of Scott Warga, the former NB employee who worked on Mr. Balsis' case, wherein Mr. Warga explains that it was NB's policy to explain that Eckley and Associates and NB share common ownership and that NB would only be serving as a consulting expert, not a testifying expert.

40. It is Respondent's position that, upon learning of the deficiencies of his disclosures concerning NB, Respondent revised his procedures so that the disclosures now conform fully to the requirements of ER 5.7 and 1.8(a).

41. Respondent was asked to account for his handling of Mr. Balsis' funds.

42. Karen Eckley's ("Ms. Eckley") testimony during her February 10, 2009, deposition shows improper handling of Respondent's trust account, specifically:

a. Mr. Balsis' $3,000 advance fee was never deposited into the firm's client trust account.

b. The client ledger card that Respondent provided to the State Bar is not an accurate record of the handling of Mr. Balsis' funds.

c. During the time Ms. Eckley handled the bookkeeping duties for Respondent from March 2006 until November 2008, she did not perform a three-way monthly reconciliation.

d. Respondent did not properly instruct Ms. Eckley on the trust account rules and failed to properly supervise her handling of the IOLTA account.

e. Respondent deposited unearned client fees into an account that is not or was not a client trust account.

43. If the matter had proceeded to hearing, Respondent and Ms. Eckley would testify that although Ms. Eckley deposited the $3,000 from American Express for Mr. Balsis' retainer into the firm's operational account, Ms. Eckley offset this amount by transferring $3,000 less from the trust fund account to the operational account for fees earned. This transfer occurred after the American Express check was received and deposited so no other client funds were put at risk. Ms. Eckley

would also testify that she began performing a three-way monthly reconciliation on November 2008 after attending a State Bar CLE program about the handling of trust accounts.

44. It is Respondent's position that upon learning of the deficiencies in his trust account policies, he revised his trust account policies so that any check received which contains both earned and unearned fees shall be deposited into the client trust fund account, all entries on client ledgers shall reflect the date upon which the transaction actually occurred, and the accounting staff shall perform a three-way reconciliation of the client ledgers, trust account General ledger, and trust account bank statements on a monthly basis.

CONCLUSIONS OF LAW

45. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically:

ER 1.8(a), Conflict of Interest

ER 5.7, Responsibilities Regarding Law-Related Services

Rules 43 & 44(a), Trust Account rules

DISMISSED COUNTS

46. As a result of this Hearing Officer's ruling on Respondent's Motion for Partial Judgment, several allegations were dismissed as set forth in the ruling. As is more fully set forth in the Amended Tender at pages 28 and 29, the Bar, in exchange for Respondent's agreement and due to evidentiary concerns that it could not meet its clear and convincing burden of proof, dismissed some allegations and Counts.

ABA STANDARDS

47. ABA *Standard* 3.0 provides that four criteria should be considered: (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 and mitigating factors.

The Duty Violated

48. This Hearing Officer considered ABA *Standard* 4.33 (failure to avoid conflicts of interest) as the most applicable *Standard* as the Conflict of Interest is the most serious violation, and it provides:

> "Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests... and causes injury or potential injury to the client."

49. The presumptive sanction then is a reprimand (Censure in Arizona).

The Lawyer's Mental State

50. The parties submit, and the Hearing Officer could find no contrary evidence, that Respondent was negligent in not adequately, and in writing, disclosing the conflict of interest to his client, and following the safeguards outlined in ER 1.8(a).

The Injury

51. The parties submit, and the Hearing Officer could find no contrary evidence, that Respondent's conduct caused potential injury to both Ms. Bloom and Mr. Balsis.

52. The parties further submit that there are no restitution issues to be to be addressed in these proceedings.[2]

Aggravating and Mitigating Factors

Aggravating Factors

53. 9.22(a), prior discipline

Respondent received an Informal Reprimand on February 22, 1994, in File No. 93-1416 for violating ER 4.2, talking to an opposing party rather than the party's attorney in a disputed matter.

54. Respondent received an Informal Reprimand and Probation on February 9, 2004, in File Nos. 02-0504 and 02-0872 for violating ER's 1.4(b) and 5.3, competence issues.

55. 9.22(d), multiple offenses

Respondent's conduct in negligently failing to provide adequate disclosure under ER 5.7 involved at least two clients.

56. 9.22(i), substantial experience in the practice of law

Respondent has had prior discipline, although for different reasons, and as such should have had advanced awareness of potential unethical conduct. Respondent has been practicing law since January 5, 1988.

57. The State Bar cites to Respondent's trust violations of Rules 43 and 44 as additional aggravating factors.

[2] As mentioned previously, the parties have asked this Hearing Officer to determine whether Respondent should be ordered to participate in fee arbitration in Bloom and Garcia, and if so, have also asked that this Hearing Officer conduct any fee arbitration ordered.

Mitigating Factors

58. 9.32(b), absence of dishonest or selfish motive

Respondent's misconduct in this matter was committed negligently and not with a dishonest or selfish motive.

59. 9.32(e), full and free disclosure or cooperative attitude toward proceedings

Respondent believes he cooperated with State Bar's investigation and all proceedings in this matter, and the State Bar does not agree that this should be considered as a mitigating factor. A review of the information provided to this Hearing Officer convinces this Hearing Officer that this should be a mitigating factor in this case.

PROPORTIONALITY

60. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever alike, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection or absolute uniformity can be achieved, *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *Peasley* supra.

61. In this case the State Bar is recommending, and the Respondent has accepted, a sanction of Censure and two years of probation, as well is paying the cost of these proceedings.

62. In *In re Abrams*, SB-08-0113-D (2008), Respondent Abrams received a Censure for violation of ERs 1.5(b), 1.8(a), 1.15 and Rules 43 and 44. Abrams failed to provide two clients with complete information regarding fee agreements and failed to produce a written fee agreement. He failed to properly monitor and refund client funds held in trust when he closed his law practice. He engaged in a conflict of interest when he failed to transmit in writing the terms on which he acquired an interest in a parcel of land from his client, failed to advise the client to seek advice from independent counsel, and failed to obtain the client's informed consent in writing. There were three aggravating factors: 9.22(c), (d) and (i), and seven mitigating factors: 9.32(a) (b) (c) (d) (e) (g) and (i). Respondent's mental state was negligent and there was actual and potential injury.

63. In *In re Hentoff*, SB-06-0145-D (2006), Hentoff received a Censure for violation of ERs 1.4, 1.8(a), 1.15, 1.16(d) and 1.8(a). Hentoff was engaged in a conflict of interest by selling his client's property.. In a separate matter, Respondent failed to adequately communicate with his client, and failed to timely refund an unearned retainer. There were two aggravating factors: 9.22(a) and (d), and two mitigating factors: 9.32(b) and (e). Respondent's mental state was negligent, and there was injury or potential injury.

64. In *In re Cook,* DC No. 04-0713 (2006), Cook received an informal reprimand for violation of ER 1.8(a). Cook improperly entered into a business transaction and acquired an improper interest for payment of legal fees. The client did not give Respondent informed written consent and Respondent did not advise the client to seek independent legal counsel with regard to the transaction. There was one

aggravating factor: 9.22(i), and five mitigating factors: 9.32(a) (d) (e) (g) and (l). Respondent's mental state was negligent and there was little or no actual injury. Cook's conduct was deemed to be an isolated instance of misconduct.

65. The parties point out that there are no cases involving a violation of ER 5.7, but that in comment 5 to ER 5.7 compliance with ER 1.8(a) is required. Therefore, consideration of the above cited cases dealing with ER 1.8 violations is appropriate.

FEE ISSUES

66. There are two aspects to the fee issues in this case. The first is whether the Respondent should be directed to go through fee arbitration in the Bloom and Garcia cases, and the second is whether this Hearing Officer should conduct the fee arbitration if directed.

67. Based upon the information provided, this Hearing Officer concludes that in Count One (Bloom) Respondent should go through fee arbitration with Ms. Bloom if she is willing. Regarding Ms. Garcia, the fee issue has been addressed at length and assuming that Respondent has been paid $3,000 by Ms. Garcia, and assuming that Ms. Garcia has been paid her attorney fees by the opposing party, Respondent is owed $13,410.16 by Ms. Garcia and no further arbitration needs to be conducted.

68. As to the issue of whether this Hearing Officer can conduct the fee arbitration, this Hearing Officer has reviewed the rules and finds no provision in the rules which give a Hearing Officer any authority to conduct a fee arbitration. While the proposal makes sense in a practical way, without some authority to conduct a fee

arbitration, this Hearing Officer has concerns about the validity of any order coming out of the process. Additionally, while the Bar has agreed to this, Ms. Bloom has not and her participation is vital. This Hearing Officer feels that the fee arbitration process established by the Bar and conducted under its aegis is the appropriate forum to address the fee issues between Respondent and Ms. Bloom.

RECOMMENDATION

69. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. It is also the purpose of lawyer discipline to deter future misconduct, and instill public confidence in the Bar's integrity, *In re Fioramonti,* 176 Ariz. 182, 859 P.2d 352 (1994), *In re Neville,* 147 Ariz. 106, 708 P.2d 1297, *Matter of Horwitz,* 180 Ariz. 20, 881 P.2d 352, (1994).

70. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen* 178 Ariz. 283, 872 P.2d 1235 (1994).

71. While this case started out fairly complex with multiple counts and charges, after the Hearing Officer's ruling on the Motion for Partial Summary Judgment and the Bar's decision about which cases it felt comfortable going forward with, we are left with the Respondent admitting that by verbally, rather than in writing, advising his clients of his interest in NB and his trust accounting practices, he violated the following rules: conflict of interest, ER 1.8(a); duties regarding law related services, ER 5.7; and trust account Rules 43 and 44.

72. Two people have expressed objection to the agreement, Ms. Bloom and Ms. Garcia. Ms. Bloom testified at the hearing on the agreement that she was very opposed to the agreement because she felt that Respondent over-billed her and did not follow her instructions. As explained to Ms. Bloom during the hearing, the Bar is constrained by what it can prove and must make its decisions based upon that consideration. While this Hearing Officer could certainly tell that Ms. Bloom was upset with Respondent and felt that he should be disbarred, the case must be decided on the facts and charges as presented. Ms. Bloom stated that she wanted Respondent to return all of the money she paid him, plus money she paid subsequent counsel, this in spite of her admission and other evidence that her home was repaired by the builder at least in part due to Respondent's work on her behalf. Whether Respondent's charges to Ms. Bloom were reasonable, at this stage is more appropriately a matter for fee arbitration.

73. Through Bar Counsel, Ms. Garcia indicated that she simply wanted nothing further to do with Respondent and did not participate in the hearing on the Agreement. If, as was indicated, Ms. Garcia has received approximately $13,000 from an opposing party for attorney's fees in the case in which Respondent represented her, and yet has not paid her attorney's fees in full, it is understandable why she does not want to have further contact with the Respondent. Ms. Garcia previously offered to pay Respondent $13,000 and said that if he did not take it she would report him to the Bar, Tr. 29:7-17. But for the fact that Ms. Garcia put that condition on the acceptance of the $13,000, which

then made it unethical for Respondent to accept it, this aspect of the case would be concluded.

74. Based on the evidence presented, the ER's and Rules that were violated, application of the *Standards*, the aggravating and mitigating factors as well as the proportionality cases considered, this Hearing Officer recommends that the Tender and Agreement be accepted.

75. It is recommended that:

1) Respondent receive a Censure;

2) Respondent be placed on probation for two years. That Respondent undergo a complete LOMAP audit and comply with the recommendations as to the terms and conditions of probation as recommended by the Lawyer Assistance Program Director, or her designee, but will specifically address ERs 1.8 and 5.7. That Respondent undergo an audit of his trust account by Gloria Barr and agree to all terms and conditions as recommended by Ms. Barr based on her audit of his trust account practices and procedures. The probation time shall start from the signing of the Terms and Conditions of Probation;

3) Respondent participate in fee arbitration through the Arizona State Bar fee arbitration program with Ms. Bloom, if she is willing, and be bound by the results thereof;

4) Respondent pay all costs and expenses incurred by the State Bar in bringing these disciplinary proceedings, and all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerks Office;

5) In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule 60(a)(5) Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable time, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove noncompliance by clear and convincing evidence.

DATED this 15th day of April, 2009.

Hon. H. Jeffrey Coker/nm
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 15th day of April, 2009.

Copy of the foregoing mailed
this 16th day of April, 2009, to:

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