BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **ROBERT R. JUNG,** **Bar No. 014198** RESPONDENT.	)	No. 08-1801, 08-1842, 08-1966 **THIRD AMENDED AND FINAL HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A Complaint was filed on February 9, 2009. The Initial Case Management Conference was held on February 23, 2009. Respondent filed an Answer to the Complaint on March 2, 2009. On March 5, 2009 Settlement Officer Philip Haggerty was assigned to this case. A Settlement Conference was held on April 13, 2009. The parties made progress toward settlement at the conference, but did not resolve the case at that time. A Notice of Settlement was received on May 14, 2009. The parties submitted the Tender of Admissions and Agreement for Discipline by Consent ("First Tender") and the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent on May 21, 2009. The Hearing was held on May 27, 2009. The Hearing Officer's Report filed July 1, 2009 did not agree with the parties' resolution of this matter. In the First Tender the parties agreed to a 30 day suspension, 2 years probation and 60 days for Respondent to pay restitution. The Hearing Officer's Report called for a modification of the parties' agreement to a 60 day suspension, 2 years of probation and 60 days to pay restitution.

On August 3, 2009, the parties filed a Modified Tender of Admissions and Agreement for Discipline by Consent ("Second Tender") in which they accepted the Hearing Officer's

recommended modification to 60 days of suspension (instead of 30 days of suspension) and two years of probation, but they changed the Hearing Officer's recommendation of 60 days to pay restitution to one year for Respondent to pay restitution. The Hearing Officer did not notice that the Second Tender changed the time for Respondent to pay restitution. In error the Hearing Officer filed on August 5, 2009, the Amended Hearing Officer's Report informing the Commission that the Hearing Officer and the parties were in agreement on the recommended sanction.

When Bar Counsel informed the Hearing Officer of the change in the time for Respondent to pay restitution, the Hearing Officer filed on August 11, 2009, the Second Amended Hearing Officer's Report and Notice of Errata, stating that the Hearing Officer was not in agreement with the extension of the time for Respondent to pay a total of $16,150 in restitution to three former clients. The Hearing Officer noted that the parties had in effect rejected the Hearing Officer's suggested modification. The matter was set for Hearing on September 23, 2009 unless one of the parties appealed the Second Amended Hearing Officer's Report within ten days.

On August 14, 2009 the parties filed the Third Tender of Admissions and Agreement for Discipline by Consent (Third Tender) in which they proposed a 60 day suspension, 2 years of probation and 90 days for Respondent to pay restitution. The Hearing Officer recommends the agreement of the parties in the Third Tender. The Hearing Officer is filing this Third Amended Hearing Officer's Report reflecting the agreement of the parties and the Hearing Officer on the recommended sanctions.

FINDINGS OF FACT[1]

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 July 17, 1992.

COUNT ONE (File no. 08-1801)

2. On or about July 7, 2008, Roger Rossi ("Mr. Rossi") retained Respondent to defend him in a criminal matter.

3. On or about July 7, 2008, Mr. Rossi's father paid Respondent $5,000 in anticipation of Respondent's representation of Mr. Rossi.

4. Respondent did not provide any type of fee agreement or writing memorializing the fee and scope of representation to either Mr. Rossi or Mr. Rossi's father.

5. Respondent performed some work on the matter, and on or about August 18, 2008, Respondent appeared at the Initial Pretrial Conference in Mr. Rossi's case.

6. Mr. Rossi began to have difficulty contacting Respondent, and left multiple messages for Respondent requesting Respondent contact him or provide at least a partial refund of his fees.

7. Respondent did not return Mr. Rossi's phone calls. Eventually, Respondent's phone number was disconnected, and Mr. Rossi was unable to even leave messages for Respondent. Respondent testified that Mr. Rossi was in jail so he could not have left Respondent messages, so Respondent could not have failed to return messages. (TR 14:11) But Respondent admitted that he went to the jail to see Mr. Rossi only once in a month. Respondent

[1] The facts are found in the Third Tender of Admissions and Agreement for Discipline by Consent and in the Third Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent or in the Transcript of the Hearing ("TR")

acknowledged that he should have seen Mr. Rossi more than once in a month (TR 15:22-24, 16:7-13)

8. On or about September 23, 2008, Mr. Rossi obtained new counsel who substituted in as a replacement for Respondent.

9. Respondent retained the full $5,000 and returned no portion of the fee to Mr. Rossi or Mr. Rossi's father. Respondent knew that he should have refunded the money he had received. (TR 17:12-16) He did not refund the money because he had spent it. (TR 20:6-18) Respondent put the $5000 into his general account, not his trust account, and it was used to pay Respondent's bills. (TR 21:2) Respondent did not have Mr. Rossi's father sign a fee agreement (perhaps because the father lived in Florida). (TR 17:19 through 18:6) The standard language in Respondent's fee agreements referred to the retainer as "earned upon receipt", but did not refer to the required text from ER 1.5 (d) (3) advising the client that he may "...discharge Respondent at any time and in that event may be entitled to a refund of the fee based upon the value of the representation pursuant to paragraph (a)." (TR 20:20 through 21:1) See also ER 1.16(d) requiring an attorney upon termination of the representation to protect the client's interests including "...refunding any advance payment of a fee that has not been earned."

10. Respondent explained his need for money because his practice was slow, he was going through a divorce, he was paying for his 5 year old son's private school, and his ex-wife sold the family home, but kept all the proceeds from the sale (after, according to Respondent, verbally agreeing to divide the proceeds evenly with him). (TR 21:8, 21:21 through 22:13) Although Respondent stated that he filed for Emergency Relief in Family Court concerning the proceeds from the sale of the home, by the time he got a court date his ex-wife had spent all the proceeds ($15,000). (TR 22:5 through 23:9) Respondent and his ex-wife were having marital

problems in 2007 and were seeing a counselor. His wife told the counselor that she was pregnant with another man's child, but the counselor did not tell Respondent. (TR 23:21 through 24:17) His wife then told Respondent that she wanted a divorce. Respondent moved out of the family home in August or September 2007. He gained access to the family computer and discovered e-mails his wife had sent to some of their friends telling them of the pregnancy and how mad Respondent would be when he found out. (TR 24:20) His wife had the baby in early 2008. She lived in the family home until about August, 2008 with the father of the baby and her 5 year old son by Respondent. Respondent testified that he went into a severe depression in 2007 over these circumstances. (TR 24:24, 25:3)

11. On or about October 24, 2008, Mr. Rossi sent a letter to the State Bar complaining about Respondent's conduct in his case.

12. On or about November 4, 2008, the State Bar forwarded a copy of Mr. Rossi's charge to Respondent's address of record along with a request that he provide a response within 20 days. Respondent stated that this was the first time he got a request for a refund from Mr. Rossi or his father. (TR 17:3, 7, 12-16) Respondent did not respond to the Bar's initial screening letter of November 4, 2008.

13. On or about December 8, 2008, the State Bar sent a follow-up non-response letter to Respondent's address of record.

14. This letter noted Respondent's failure to respond to the letter of November 4, 2008, reminded Respondent of his duty to cooperate under the rules, and requested a response within 10 days.

15. Respondent did not respond to the follow-up letter of December 8, 2008. Respondent stated that the Bar had two or three matters going on against him at this time and he

was in denial. (TR 19:18-25) Later Respondent finally responded to the Bar, but his responses were not prompt.

16. On or about December 15, 2008, Mr. Rossi provided additional information to the State Bar.

17. On or about December 16, 2008, the State Bar forwarded Mr. Rossi's additional information to Respondent at his address of record and requested a response by December 22, 2008.

18. Respondent did not provide a response to the letter of December 16, 2008.

19. After the filing of the Complaint, Respondent provided a response to the Bar's inquiries.

COUNT TWO (File no. 08-1842)

20. On or about May 23, 2008, Michael Morris ("Mr. Morris") retained Respondent to defend him from DUI charges.

21. Mr. Morris paid Respondent $2,500 in anticipation of the representation Respondent was to provide him.

22. Respondent performed some work on Mr. Morris' matter, and made a court appearance on Mr. Morris' behalf.

23. Over the next three months, Mr. Morris called Respondent approximately once every two weeks to request a status update.

24. Respondent did not return Mr. Morris' calls. Respondent testified that he did not return all of Mr. Morris' calls. (TR 31:12)

25. On or about August 6, 2008, Mr. Morris obtained replacement counsel to substitute in for Respondent.

26. On or about August 6, 2008, Mr. Morris requested a refund of his $2,500 fee and an accounting of work completed.

27. Respondent agreed to provide an accounting, but said he would discuss a refund with Mr. Morris at that time.

28. Respondent did not provide an accounting or refund to Mr. Morris. (TR 35:3-25)

29. On or about August 20, 2008, Mr. Morris called and left a message for Respondent complaining that he still had not received his accounting or refund.

30. Respondent did not return Mr. Morris' call, provide an accounting or provide any refund.

31. On or about October 2, 2008, Mr. Morris again called Mr. Morris and complained that he still had not received his accounting or refund.

32. Respondent told Mr. Morris that he had forgotten about the accounting and refund, but that he would provide one.

33. Respondent never provided an accounting or refund. Respondent testified that Mr. Morris thought Respondent earned only $500 of the retainer and the rest should be returned ($2000). Respondent said he told Mr. Morris that Respondent disagreed with Mr. Morris' assessment of the refund. After the Complaint was filed in this matter, Respondent has agreed to refund to Mr. Morris $1500. (TR 35:22 through 36:19)

34. On or about October 21, 2008, Mr. Morris sent a letter to the State Bar complaining about Respondent's conduct in his case.

35. On or about November 4, 2008, the State Bar forwarded a copy of Mr. Morris' charge to Respondent's address of record along with a request that he provide a response within 20 days. (TR 38:1)

36. Respondent did not respond to the initial screening letter of November 4, 2008. (TR 38:1-12)

37. On or about December 8, 2008, the State Bar sent a follow-up non-response letter to Respondent's address of record.

38. This letter noted Respondent's failure to respond to the letter of November 4, 2008, reminded Respondent of his duty to cooperate under the rules, and requested a response within 10 days.

39. Respondent did not respond to the follow-up letter of December 8, 2008. (TR 38:1-12) Respondent testified that he was in denial. (TR 39:2-5)

40. On or about December 31, 2008, Respondent left a voicemail for the State Bar indicating that he would send a response on January 2, 2009.

41. After the filing of the Complaint, Respondent provided a response to the Bar's inquiries.

COUNT THREE (File no. 08-1966)

42. On or about August 8, 2008, Scott Eder ("Mr. Eder") retained Respondent to defend him from criminal charges involving money laundering and running a house of prostitution. (TR 40:21, 42:7)

43. Respondent presented Mr. Eder's mother with a written fee agreement that called for a $25,000 "non-refundable" fee. (TR 41:2)

44. The fee agreement did not advise that the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee based upon the value of the representation. (TR 41:4-22)

45. Mr. Eder's mother paid Respondent $15,000 in anticipation of Respondent's representation of Mr. Eder. (TR 41:23)

46. Respondent did some initial work for Mr. Eder and on or about August 11, 2008 Respondent appeared at an Initial Appearance Hearing in Mr. Eder's case. (TR 42:15-21)

47. On or about August 12, 2008, Mr. Eder terminated Respondent's services. Respondent testified that new counsel for Mr. Eder did not file a substitution of counsel for several months. (TR 43:1, 44:1-24)

48. On or about August 15, 2008, Mr. Eder obtained new counsel who substituted in for Respondent in Mr. Eder's case.

49. On or about August 15, 2008, Mr. Eder's mother requested Respondent provide an accounting of work done and a refund of any unearned fees.

50. On or about August 27, 2008, Mr. Eder's sister e-mailed Respondent complaining that he still had not provided an accounting or refund.

51. On or about August 29, 2008, Respondent e-mailed Mr. Eder's sister back and stated that he would provide an accounting.

52. Respondent never provided an accounting of work performed or refund of unearned fees to Mr. Eder or his mother. Respondent testified that he did not give Mr. Eder an accounting when it was requested even though Mr. Eder had terminated his services, because new counsel had not substituted and Respondent was still counsel of record and Respondent had to do some work. (TR 44:1-24) However, Respondent admitted that in October 2008 new counsel filed the substitution of counsel. Even then Respondent did not provide a refund because he did not have the money to refund. (TR 44:1-24)

53. On or about November 7, 2008, Mr. Eder's mother sent a letter to the State Bar complaining about Respondent's conduct in her son's case.

54. On or about November 12, 2008, the State Bar forwarded a copy of Mr. Eder's mother's charge to Respondent's address of record along with a request that he provide a response within 20 days. (TR 45:23)

55. Respondent did not respond to the initial screening letter of November 12, 2008.

56. On or about December 12, 2008, the State Bar sent a follow-up non-response letter to Respondent's address of record. (TR 46:12)

57. This letter noted Respondent's failure to respond to the letter of November 12, 2008, reminded Respondent of his duty to cooperate under the rules, and requested a response within 10 days.

58. Respondent did not respond to the follow-up letter of December 12, 2008. (TR 46:12)

59. On or about December 31, 2008, Respondent left a voicemail for the State Bar indicating that he would send a response on January 2, 2009.

60. After the filing of the Complaint, Respondent provided a response to the Bar's inquiries.

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that the State Bar's evidence would show that his conduct, as set forth above, violated the following Rules of Professional Conduct: Count 1: ERs 1.4, 1.5 and Rule 53(f). Count 2: ERs 1.4, 1.15, 1.16 and Rule 53(f). Count 3: ERs 1.15, 1.16 and Rule 53(f).

Based on the evidence presented in the Tender of Admissions and at the hearing and based on the conditional admissions the Hearing Officer finds that the State Bar has proven by clear and convincing evidence the violations set forth in the paragraph above.

DISMISSED ALLEGATIONS

No counts of the complaint are being dismissed. The responses ultimately provided by Respondent after the filing of the Complaint have made apparent that several allegations of ethical violations are not supported by the evidence. Those allegations are being dismissed, and include the following. Count 1: ERs 1.2, 1.3 and 8.1(b). Count 2: ERs 1.2, 1.3, 1.5, 3.2, 3.4(c), 8.1(b) and 8.4(d). Count 3: ERs 1.5, 8.1(b) and 8.4(d).

RESTITUTION

Respondent agrees in the Third Tender to pay restitution within 90 days from the Judgment and Order as follows: Count 1: $5,000 payable to H. Andrew Rossi. Count 2: $1,500 payable to Michael Morris. Count 3: $10,000 payable to Suzanne Eder. The Hearing Officer recommends that the restitution be made within 90 days of the Judgment and Order in this matter.

ABA STANDARDS

The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *See In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P. 2d 1037, 1040 (1990). In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or

potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *See, Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

Duty Violated

In Counts One, Two and Three Respondent violated duties to his clients and to the legal profession by: failing to keep the client reasonably informed about the status of the matter, failing to promptly comply with reasonable requests for information, failing to communicate in writing the scope of representation and the basis or rate of the fee and expenses for which the client would be responsible, failing to furnish information or respond promptly to any inquiry or request from Bar Counsel, failing to promptly deliver to the client any funds or other property that the client was entitled to receive, failing to, upon request by the client, promptly render a full accounting regarding the client's property, upon termination of representation, failing to refund any advance payment of a fee that had not been earned, and upon termination of representation and client request, failing to provide the client with all of the client's documents and all documents reflecting work performed for the client. (TR 46:18-20)

Respondent conditionally admits the facts as set forth in the Tender and conditionally admits that his conduct violated: Count 1: ERs 1.4, 1.5 and Rule 53(f). Count 2: ERs 1.4, 1.15, 1.16 and Rule 53(f). Count 3: ERs 1.15, 1.16 and Rule 53(f).

The Lawyer's Mental State

Respondent acted negligently in all of the violations set forth above. The mental state may be perceived at two times; first, when Respondent accepted the retainers in the three matters, and second, after each client terminated his representation and when Respondent failed to refund unearned portions of the retainer. When Respondent accepted the three retainers there is no evidence that 1) he knew he would not perform the work, 2) he knew he would be terminated, 3)

he knew he would spend all of the retainers on his own personal financial needs, and 4) he knew he would not refund any unearned portions to the three clients. (TR 49:10-13) What the Bar and Respondent seem to be saying is that after Respondent accepted the retainers (which Respondent initially intended to earn) Respondent negligently failed to communicate with his clients to such an extent that Respondent was in each instance terminated. Through this negligence and the fact that Respondent had spent the retainers, Respondent did not have the money to make the required refunds. The Bar accepts the fact that Respondent's personal problems caused him 1) not to be able to spend the time necessary to communicate with these clients (thus leading to their respective terminations of Respondent's services) and 2) to need to spend the money from the retainers on his personal financial needs. (TR 51:3-21)

Another way to look at Respondent's mental state in the second phase of this situation is that when each client terminated Respondent's services Respondent knew that 1) he had spent the money, 2) there were unearned portions of the retainers that he must refund, and 3) he made no effort to refund the money before the Bar became involved. The Hearing Officer agrees with the stipulation of the parties that the mental state for purposes of the *Standards* should be negligence because there is no proof in this record that Respondent knew when accepting the three retainers that he would not successfully complete the representation in each case. (TR 51:3-21)

Actual or Potential Injury

Although the evidence does not reveal that any of the clients' criminal cases were prejudiced by Respondent's negligence, each client was financially injured when fees they paid in advance that were unearned by Respondent were not returned by Respondent. (TR 46:25 through 47:8). In Count Two, Mr. Morris claimed that Respondent should have been able to get the prosecutor on the DUI charge to dismiss the case if Respondent had arranged for the arresting

police officer to talk with the prosecutor about the case. Counsel for Respondent in the disciplinary matter stated at the Hearing that after Mr. Morris terminated Respondent's services and acquired another counsel on the DUI case, Mr. Morris pled guilty to DUI. (TR 33:19 through 34:5) Therefore, the record by implication indicates that the police officer did not have information that would lead the prosecutor to dismiss the charges. A prosecutor would not permit a defendant to plead guilty to a charge if the prosecutor knew the charge was not supported by probable cause. Such conduct would violate ER 3.8(a). The Hearing Officer will infer from the fact of Mr. Morris' guilty plea on the DUI charge that Mr. Morris' new counsel on the DUI charge learned that the police officer did not have information that would exonerate Mr. Morris. Therefore, Respondent's alleged failure to arrange an interview for the prosecutor to question the police officer would not have led to a dismissal of the charge. The record does not support a conclusion that any of the court cases of the three clients in this Complaint were prejudiced by Respondent's negligence.

APPLICABLE STANDARD

The parties agree and the Hearing Officer concurs that the most applicable standard is *Standard* 4.13 based on the most serious conduct, Respondent's failures to provide timely accountings and failures to pay refunds in violation of ERs 1.15 and 1.16. *Standard* 4.13 provides: "Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Although the presumptive sanction appears to be Censure the aggravating and mitigating factors must still be considered. In selecting this standard the parties apparently think that the money that should have been refunded was "client property". Were these retainers "earned upon receipt"? If so, they became the

attorney's property when received, subject to the conditions of ER 1.5(d)(3) and ER 1.16(d). Upon termination of the Respondent by the clients, those portions of the fees that were unearned would have become "client property". ER 1.5(d)(3) and ER 1.16(d)

The Hearing Officer has considered whether *Standard* 4.12 may also be applicable. "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Respondent caused actual injury to three clients who lost $5000, $1500 and $10,000 respectively, even by Respondent's conditional agreement for restitution of these amounts. Did Respondent know or should he have known that he was dealing improperly with client property? The answer depends on the time period. If the question is asked about Respondent's knowledge when he received the retainers, the record does not establish that he knew he was incorrectly handling the client's property. If the question is directed to the time Respondent's representation was terminated, then Respondent knew or should have known (at the very least he should have known of the requirements of ER 1.5(d)(3) and ER 1.16(d) that he had to refund the money. His reason for not refunding the money was not that he was intending to cheat the clients, but that he had spent the money.

The comments to *Standard* 4.12 (Suspension) and *Standard* 4.13 (Censure) are somewhat revealing. In *Standard* 4.12 the commentator states: "Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or **fail to remit client funds promptly.**" (Emphasis added) Yet the comment to *Standard* 4.13 states: "Reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client... The courts have typically imposed reprimands in

cases when lawyers fail to maintain adequate trust accounting procedures, or **neglect to return the client's property promptly.**" (Emphasis added) Respondent did not just fail to return the clients' funds promptly; he has not refunded them any money. In the Hearing he testified that he still does not have the money to pay the restitution at this time when he said that it will be hard to repay these amounts but that he is "...trying to save up now because I - - because I know it's coming." The "it" he was referring to is the expected suspension. (TR 52:15 through 53:2) However, the cases discussed in the comment on *Standard* 4.12 (Suspension) involve lawyers commingling of funds; a situation not similar to Respondent's conduct in this Complaint. Instead, the case cited in the comment to *Standard* 4.13 (Censure), *The Florida Bar v. Golden,* 401 So. 2d 1340 (Fla. 1981) is closer to the facts of Respondent's case. There a reprimand was given for an attorney who had borrowed money from a client, but had not repaid the loan for two years. The Hearing Officer concludes that although an argument may be made for the application of *Standard* 4.12 (Suspension) in this case, that *Standard* 4.13 (Censure) is more appropriate.

Aggravating Factors

Standard 9.32(a) Prior Disciplinary Offenses.

Respondent received a six month suspension on 08/23/06 followed by six months of probation for violation of ERs 1.5(b), 1.15, 8.4(c) and 8.4(d). Since this is the area of greatest concern for the Hearing Officer a recitation of the events in this matter will be helpful in determining if the parties' agreed upon sanction may be recommended. Although a three-count Complaint was originally filed in that matter, File Numbers 04-1688 and 04-1815, the Bar agreed to dismiss Count Three and Respondent admitted to violations in Counts One and Two. In Count One Respondent had agreed to represent Ms. Macias in a personal injury matter, even though Respondent specialized in criminal law. He negotiated a settlement and received a check of

$14,500. He paid the client her share of the proceeds. He withheld funds to pay doctor bills the client incurred. Instead of using some of the settlement proceeds to pay doctors who had treated Ms. Macias he used some of the funds to pay his own bills. When he reimbursed his trust account for the monies he had diverted to his own personal use he failed to put back enough money to later cover the checks he wrote to the doctors. His bank reported that his trust account was overdrawn by $225.53, when the account attempted to pay a check to a doctor for $5800, but the account balance was only $5604.47. These events occurred in July, August and September, 2004. The Hearing Officer's Report, March 8, 2006 noted that in Respondent's response to the Bar's inquiry of November 4, 2004, Respondent related that "His personal financial problems were such that he was in danger of losing his house and as a result he made 'the wrong decision to try and float some of the settlement money owed to the doctors and pay [Respondent's] bills.'" (Hearing Officer's Report, page 3, paragraph 6 (d)

Respondent admitted that he had originally deposited the $14,500 settlement check into his personal checking account rather than his trust account. He then transferred some of the funds from his personal checking account to his trust account so that he could issue some checks (to his client and later to her doctors) from his trust account.

Standard 9.32(c) Pattern of Misconduct.

Respondent's prior discipline was for ERs 1.5(b) and 1.15, both of which are implicated in this case.

Standard 9.32(d) Multiple Offenses.

Respondent is facing multiple counts of misconduct in this matter.

Standard 9.32 (i) Substantial Experience In The Practice Of Law.

Respondent was admitted to practice on 07/17/92.

Mitigating Factors

Standard 9.32 (b) Absence of Dishonest Or Selfish Motive.

Respondent did not intend to deceive his clients or defraud them out of any funds.

Standard 9.32 (c) Personal Or Emotional Problems.

Respondent has provided information from his counselor regarding his difficult family situation. Apparently the Bar is satisfied from information it has received that Respondent was seeing a counselor for his personal problems (see Paragraph 10 above). Bar Counsel stated at the Hearing that he had received a letter from Respondent relating that Respondent had been seeing a counselor. (TR 56:8) The record does not contain a letter from Respondent's counselor confirming his information. The Hearing Officer discussed with both counsel the opportunity for Respondent to submit such a letter for this record after the Hearing. (TR 55:21 through 56:18) As of the filing of this Report the Hearing Officer has not received a copy of a letter from Respondent's counselor.

Respondent testified that he moved out of the family home in August or September, 2007. When he became severely depressed about the fact that his wife was pregnant by another man, he went to a counselor, Gail Ziv, a psychiatric nurse practitioner. For several months he was medicated (Abilify) for the depression so that he could not get out of bed (except to go to work). (TR 24:20 through 25:21) Respondent was still taking some of the drugs when the events in this Complaint occurred, but he was not seeing Ms. Ziv that much in 2008. In 2007 Respondent was seeing Ms. Ziv frequently. (TR 25:23 through 26:15)

Apparently the most difficult time for Respondent was in 2007. In referring to 2008 and his depression Respondent testified, "I mean it was very bad the year before and it had gotten better." (TR 26:21) However, Respondent also stated that when, in 2008, his wife had the baby "... that

kind of made it difficult again." (TR 26:24) He felt his wife was "flaunting the baby" and it was very hard on Respondent to have to, in 2008, go to the house where he once lived with his wife to pick up their five year old son and see his wife living there with another man and with the baby she had with that other person. (TR 26:23 through 27:5) When, in August 2008, his wife sold the house but would not split the proceeds with him, Respondent suffered a big financial blow. (TR 28:7-18) When the Hearing Officer asked Respondent what role his personal problems played in the three Counts in this Complaint, he said, "I think it played a big role. Because it was - - my personal life was in a lot of turmoil, and, you know, I think these three clients were affected by it." (TR 29:9-11)

The problem for the Hearing Officer in recommending the 30 day suspension (called for in the First Tender) coupled with two years of probation is that "family problems" was the same reason Respondent gave for his prior disciplinary matter in which he received a six month suspension for knowingly comingling client funds. The purpose of attorney discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz.182, 187, 859 P.2d 315, 1320 (1993). Lawyer discipline protects the profession and the administration of justice and instills public confidence in the Bar's integrity. *In re Neville,* 147 Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994)

Respondent asserted that his misconduct in 2004 (comingling client funds) was caused by personal financial problems that put him in danger of losing his house. (Hearing Officer's Report March 8, 2006 Nos. 04-1688, 04-1815, page 3, lines 9-12) The six month suspension he received in that prior matter did not protect the three clients in the current Complaint from being injured by Respondent's further misconduct. Once again Respondent cited personal problems as having caused him to need to spend all of the three retainers he received from the clients and therefore not

to have the money to pay the refunds to which the clients were clearly entitled under the Ethical Rules. In the prior misconduct case the Hearing Officer cited four aggravating factors; 1) dishonest or selfish motive, 2) a pattern of misconduct, 3) multiple offenses, and 4) substantial experience in the practice of law. In the current case all of the same aggravating factors are present except a dishonest or selfish motive. A significant additional factor is present; a prior disciplinary offense.

The seven mitigating factors in the prior matter were; 1) absence of a prior disciplinary record, 2) personal and emotional problems, 3) timely good faith effort to make restitution or to rectify consequences of misconduct, 4) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, 5) character or reputation, 6) mental disability or chemical dependency and 7) remorse. Only two mitigating factors are stipulated by the parties as present in the current case; 1) absence of dishonest or selfish motive and 2) personal or emotional problems.

In light of the fact that Respondent is now involved in his second case of professional misconduct within four years involving client funds, the Hearing Officer thinks that a 30 day suspension followed by two years of probation is not enough of a consequence to protect future clients, to deter future misconduct and to instill public confidence in the disciplinary system. The Hearing Officer understands that the *Standards* would call for a Censure. Due to aggravating factors the sanction should be revised upward to a suspension in this case. However, the suspension should be 60 days instead of 30 days to reflect a number of factors.

1) Respondent cannot continue to use personal problems as an explanation for harming clients and others. In the prior disciplinary matter the client was paid first from the proceeds of the settlement. But the doctors who treated the client were made to wait while Respondent used the money that was to pay doctor bills for his own personal financial problems. In the current

Complaint Respondent may not have intended to take retainers from three separate clients and not do the work for which those retainers were paid. However, the practical effect of Respondent's conduct was that Respondent spent the money of three separate clients received over four months on his own personal needs. He did not give the three clients the services they were entitled to expect. He was justifiably terminated by the clients. And he did not give the clients either an accounting or any refund of unearned portions of the "earned upon receipt" retainers.

2) In the prior matter Respondent was able to cover the money he had taken from the settlement proceeds for himself by replacing those funds to later pay the doctors. The parties recognized Respondent's ability to rectify the situation by finding the mitigating factor; timely good faith effort to make restitution or to rectify consequences of misconduct. In the current matter Respondent took the retainers in May, July and August 2008. Almost a year later, the clients still do not have any money in refunds.

3) The Hearing Officer understands that Respondent received a significant sanction of suspension for six months followed by six months of probation for his 2004 misconduct of comingling funds. The Bar justifiably considers that conduct a serious matter. But the Hearing Officer considers the current matter to be significant also. Whereas, in the prior matter the client did not complain and the client and the doctors were made whole before the Tender of Admissions, in the current case all three clients complained and not one of them has received any money as a refund for portions of retainers that Respondent admits he did not earn. To Respondent's credit he has agreed to refund Mr. Roger Rossi's father in Count One $5000, even though Roger Rossi said that $4000 would be an acceptable refund. (TR 11:18 through 12:11)

4) There is a downside to a 60 day suspension (instead of a 30 day suspension) followed by two years of probation. The extension of the suspension might cause the clients who are owed

refunds to have to wait even longer for their money. Apparently Respondent is not able to take on many new clients when he is expecting a suspension. The length of the suspension might put the legal matters of these potential clients at risk. Respondent has testified that as a practical matter his six month suspension in the previous matter was in effect a twelve month bar from accepting clients. (TR 52:15 through 53:2) The Hearing Officer has weighed the negative effect a 60 day suspension might have on the client victims in this Complaint against the fact that a 30 day suspension is not significant enough in view of Respondent's prior misconduct and his misconduct in the current case. In this Hearing Officer's opinion the value of protecting the public by separating Respondent from the practice of law for 60 days, outweighs the potential delay in restitution for the clients of Respondent.

Although Respondent's personal problems have been difficult, many attorneys will at some time have personal or family problems. Sadly many members of the Bar (just as many people in our society) will experience divorce. Respondent has now twice committed professional misconduct. The citizens who may become his future clients are entitled to protection from any further misconduct on his part. Hopefully the disciplinary system will not see Respondent again.

Having reviewed the aggravating and mitigating factors, the Hearing Officer does not recommend a suspension for thirty days, coupled with two years of probation as appropriate in this matter. Instead the Hearing Officer recommends a modification of the parties' agreement, in that the suspension should be for 60 days and the other terms of the agreement (including probation) are approved.

PROPORTIONALITY REVIEW

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 of 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. *Peasley, supra,* 208 Ariz. at ¶ 33, 90 P.3d at 772. 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 cases set forth below demonstrate that a suspension is an appropriate sanction in this matter.

In *In re Gertell,* SB-04-0147, (2005), the lawyer was suspended for 90 days with two years of probation. The lawyer failed to respond to the State Bar's investigation, failed to act diligently and communicate adequately with clients, controverted an issue without a good-faith basis and failed to provide timely accountings to clients. ERs 1.2, 1.3, 1.4, 1.15, 1.16, 3.1, 8.1(b), 8.4(d) Rule 51(h), Rule 51(i) and Rule 63. Respondent represented a client in a dissolution matter. The issue in that case was which spouse filed the Petition of Dissolution first; Respondent's client in Maricopa County, Arizona or the other spouse in Cook County, Illinois?

Both Petitions were filed on the same day. Respondent filed an affidavit in Illinois stating that his client's Petition was filed at 9:00 am Arizona time (which would have preceded the

Illinois filing). 9:00 am was the time that Respondent gave the Petition to a delivery service for filing. In fact the Petition was not filed in Arizona court until after noon. The Illinois judge who received Respondent's affidavit thought Respondent had perpetrated a fraud on the Cook County Clerk's Office. The Hearing Officer thought that Respondent was somewhat justified in asserting the 9:00 am time, but that Respondent was "sloppy" in not checking the exact time of the filing of the Petition before filing the affidavit. In other counts of the Complaint Respondent did not provide some clients who had paid retainers with accountings after he no longer represented them.

In aggravation the Hearing Officer found four factors: 1) prior discipline, 2) pattern of misconduct, 3) multiple offenses and 4) substantial experience in the practice of law. All of these factors are present in Respondent's case. Three mitigating factors were found in *Gertell*: 1) personal and emotional problems (Gertell was so severely injured in an auto accident that he had six surgical procedures in two years and he was left with a rare wrist disease that rendered him disabled for most of the time when he was committing the misconduct), 2) timely good faith effort to make restitution (Gertell refunded one client the entire fee before the disciplinary proceedings concluded), and 3) remorse. When the sanction in *Gertell* is compared with Respondent's case it leads to the conclusion that a 60 day suspension is more appropriate for Respondent than the 30 day suspension agreed to by the parties.

In *In re Odneal*, SB-02-0085-D (2002), the lawyer was suspended for 90 days with two years of probation. The lawyer failed to communicate with her clients, failed to provide an accounting, failed to respond to reasonable requests for information, failed to return unused retainers in a timely manner, made false statements in her Answer and misrepresented facts in her motion to extend time, and failed to cooperate with the State Bar's inquiries of these matters. ERs 1.4, 1.15, 1.16(d), 8.1(a), 8.1(b), 8.4(c), Rule 51(h) and Rule 51(i).

In *In re Zarkou*, SB-02-0059-D (2002), the lawyer was suspended for 30 days with one year of probation. The lawyer misappropriated client trust account funds and failed to maintain proper trust account records. Zarkou deposited client funds into his general operating account instead of his IOLTA account and then failed to remit the funds to the client for five months. Zarkou further failed to comply with the State Bar's request for trust account records, failed to file a timely disclosure statement and failed to answer non-uniform interrogatories. ERs 1.15, 8.1(b), Rule 43, Rule 44, Rule 51(h) and Rule 51(i). Although the misconduct here was more serious than in the current case of Respondent, a significant difference is that *Zarkou* had no prior disciplinary matters. Both *Zarkou* and Respondent had substantial experience in the practice of law.

Based on the above cases, and on the specific facts of Respondent's matter including the aggravating and mitigating factors, the Hearing Officer does not accept the parties' agreement that a suspension for 30 days with two years of probation is an appropriate sanction in this matter. Instead, the Hearing Officer recommends that the parties' agreement would be acceptable if the suspension were for 60 days.

RECOMMENDATION/PROPOSED MODIFICATION

The Hearing Officer recommends modification of the agreement of the parties for a suspension of 30 days with two years probation, to be a suspension of 60 days, followed by two years probation and 90 days to pay restitution. Since the parties have modified their original agreement and have accepted the modification to 60 days of suspension in the Third Tender the Hearing Officer recommends that the parties' agreement (in the Third Tender) be accepted. Respondent shall participate in LOMAP, shall be evaluated by the Member Assistance Program (MAP), shall pay restitution within 90 days of the Judgment and Order, and shall pay the costs and

expenses incurred in this disciplinary proceeding, as set forth in the Third Tender. The Court and the Commission have repeatedly stated that the purpose of lawyer discipline is not to punish the offender but to protect the public, the profession and the administration of justice. *See Peasley*, 208 Ariz. at 41, 90 P.3d at 778; *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1988). The proposed sanction will accomplish those goals.

SANCTIONS

1. Respondent shall receive a suspension of 60 days;
2. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings within thirty, (30) days of the Supreme Court's Final Judgment and Order. An Itemized Statement of Costs and Expenses is attached as Exhibit A and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's office in this matter.
3. Respondent shall to pay restitution within 90 days of the Judgment and Order as follows: Count 1: $5,000 payable to H. Andrew Rossi. Count 2: $1,500 payable to Michael Morris. Count 3: $10,000 payable to Suzanne Eder.
4. Respondent shall be placed on probation for period of two years under the following terms and conditions:

    A. The probation period shall begin to run at the time of reinstatement, and will conclude two years from that date.

    B. Respondent shall first contact the State Bar of Arizona's Member Assistance Program to participate in an evaluation and referral to services as needed. Respondent shall cooperate with any recommendations made by the Member

Assistance Program, including but not limited to entering into a Memorandum of Understanding or Therapeutic Contract with the Member's Assistance Program if deemed necessary by the Member Assistance Program. Respondent shall be responsible for the cost of the evaluation and any subsequent programs.

C. Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) within 30 days of the final Judgment and Order. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ERs 1.4 1.15 and 1.16. The director of LOMAP shall develop Terms and Conditions of Probation, and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of reinstatement and will conclude two years from the date that Respondent is reinstated. [2] Respondent shall be responsible for any costs associated with LOMAP.

D. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

E. In event that Respondent fails to comply with any of the foregoing probation terms and information thereof is received by the State Bar of Arizona, 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 date,

[2] The Third Tender erroneously stated on page 10, line18 that the probation period would run at the time of the judgment and order. The Hearing Officer contacted counsel for the parties on August 18, 2009. Counsel agreed that a mistake was made in drafting this portion of the Third Tender and that the parties agreed that the probation period should run from the time of reinstatement. On August 18, 2009 the Hearing Officer filed a document entitled "Correction" to reflect the results of this conference.

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. 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 of Arizona to prove noncompliance by a preponderance of the evidence.[3]

DATED this 21st day of August, 2009.

Jonathan H. Schwartz/UPA
Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 21st day of August, 2009.

Copy of the foregoing mailed
this 21st day of August, 2009, to:

David G. Derickson
Respondent's Counsel
David G Derickson PC
3636 N Central Avenue, Suite 1050
Phoenix, AZ 85012

Stephen Little
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Evelyn Loza

[3] The Tender of Admissions originally contained a burden of proof for a violation of probation as clear and convincing evidence. The parties agree that Rule 60 (a)(5)(C) has been amended as of January 1, 2009 changing the burden of proof in a violation of probation proceeding from clear and convincing evidence to by a preponderance of the evidence. The parties agree that the preponderance of the evidence burden of proof is applicable in the event of an allegation of a probation violation in these matters. (TR 39:18 through 40:14)