



BEFORE A HEARING OFFICER

IN THE MATTER OF A DISBARRED )  
MEMBER OF THE STATE BAR OF ARIZONA, )  
GARY P. KLAHR, )  
Bar No. 002102 )  
RESPONDENT. )

Nos. 00-0797, 00-1776, 00-1839  
00-2095, 00-2121, 00-2187  
01-0321, 01-0481

HEARING OFFICER'S  
REPORT

Relevant Procedural History

The following probable cause orders were filed between February 2001 and May 2001: 00-0797 (Mooney-Waung); 00-1776 (Frisbee); 00-1839 (LeBarre); 00-2095 (Robertson); 00-2121 (Vernimb); 00-2187 (Adkins); 01-0321 (Jewell); and 01-0481 (Wiley). Pursuant to these orders, a consolidated nine-count complaint was belatedly filed on September 27, 2001. Respondent timely filed an Answer on October 22, 2001, following a brief extension. On October 29, 2001, this Hearing Officer filed Notice of Hearing and Scheduling Order that was subsequently amended on December 10, 2001. On January 11, 2002 the parties met but were unable to reach a settlement. The 8-day hearing commenced February 21, 2002. The hearing continued on February 25, 26, 27, March 1, 4, 5, and 6. Over the objection of the State Bar, Respondent was permitted to call 20 character witnesses, many of them out-of-order. Additionally, over the objection of the State Bar, Respondent was permitted to submit the testimony of three character witnesses who had testified at a prior proceeding, and the affidavits of six additional character witnesses. Respondent also submitted an affidavit from John M. Carpenter, who had testified at the hearing, purportedly correcting a portion of his testimony. At the conclusion of the evidence, on motion of Respondent, a portion of the allegation in Count 4 was dismissed. Following the testimony, Respondent was given an opportunity to submit affidavits from his treating psychiatrists and the Phoenix Police Report memorializing his complaint against Larry Kelly, his former office manager. The parties were

1 given until April 8, 2002 to submit legal memoranda and argument in support of their  
2 positions.

### 3 Overview

4 Respondent has practice law in Arizona since November 22, 1967, over 34 years. In  
5 February 2002, the Arizona Supreme Court ordered an interim suspension based on the  
6 Disciplinary Commission's decision in an unrelated matter and subsequently entered judgment-  
7 disbaring Respondent. Respondent was unrepresented during the entire course of these  
8 proceedings. The State Bar is seeking his disbarment based on the allegations in this  
9 complaint.

10 The complaint charges Respondent with a variety of unethical acts that occurred  
11 between September 1999 and March 2001 involving six clients. It also alleges five prior  
12 informal reprimands. During time period covered by this complaint, Respondent had his law  
13 offices first at 917 West McDowell Road in Phoenix, and then he relocated to 2520 North 16<sup>th</sup>  
14 Street in Phoenix.

15 At both locations his office operation was essentially the same. His office was staffed  
16 with non-lawyers, one acting as an office manger. Respondent characterized his office as a  
17 "zoo." (Tr. 3/6/02, at 1883.) From the testimony of the various witnesses, his office was at  
18 times pure bedlam filled with screaming and shouting among the staff and Respondent. Adam  
19 Tryon, who acted as a paralegal/typist/receptionist and suffered from a serious substance abuse  
20 problems and possible brain damage, worked for Respondent during most of the relevant time  
21 period, and for a while actually lived at both offices. Adam periodically exhibited erratic  
22 behavior while working with Respondent's clients. Vance Bradley worked as office manger in  
23 1998 through 2000. During at least a portion of this period, Vance Bradley also did business  
24 as "Lightning Strikes Enterprises." Larry Kelly became Respondents' office manger around  
25 February 2000, after the office changed locations. When Kelly "disappeared" around the fall  
26 of 2000, Randy Cutts replaced Kelly who in turn was replaced by Vance Bradley who returned  
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1 in early 2001. Eric Snyder may have also acted as office manager in first part of 2001. The  
2 majority of the allegations occurred during the tenure of Larry Kelly (Counts 1, 4, 5, 6, and 7).

3 Respondent is well known and respected in certain political and social circles. Based  
4 on his reputation, as well as advertising in certain journals, Respondent was able to attract  
5 clients who had relatively minor legal problems. Respondent served a clientele of limited  
6 means. Respondent describes his practice as "a high-risk practice, catering to people who are  
7 'down on what they're not up on'. Most . . . clients have very little money and even less  
8 knowledge of the law pertaining to their case." (Answer at 2.) "Although the clients may be,  
9 and in most cases are, 'flakes', nevertheless they often have legitimate legal problems that an  
10 attorney may be able to solve." (*Id.*)

11 Respondent kept unconventional business hours, often not arriving at his office until  
12 early afternoon. During normal business hours staff members would be in the office.  
13 Respondent did not want a lot of office visits because his office was "not a nice place to be,"  
14 and being primarily a telephone person, he did not want potential clients coming to the office  
15 "unless they had money and were ready to hire [him]." (Tr. 3/4/02, at 1480.) He prided  
16 himself on providing clients with his business card, his home phone number as well as a cellular  
17 telephone number. (Hearing Exhibit 50; apparently the "night" number was his home number.)  
18 Respondent claims to always expeditiously return phone calls from clients.

19 Respondent's clients would either initially meet with him or a paralegal staff member,  
20 sign a fee agreement and pay a small retainer, a portion of which would be consumed by the  
21 initial meeting and consultation. When Respondent spoke with a client, he would first try to  
22 determine if they have a case, and second, if they have money. If the case were a personal  
23 injury case, a paralegal normally would conduct the first interview.

24 Respondent's "fee for services" agreement involved in most of these counts would  
25 inform the client in writing "[a]ll fees are nonrefundable and fully earned upon payment or  
26 signing of this contract." (Hearing Exhibit 2 is an example of such a fee agreement). The  
27 agreement further informed the client in writing that "much of the work on my case may be  
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1 done by an independent contract attorney who is a professional associate of Mr. Klahr, is  
2 supervised by Mr. Klahr, but is not an employee of the Klahr firm. . . . Nevertheless, Mr.  
3 Klahr takes the responsibility for your case and is ultimately responsible for providing the  
4 services as agreed herein." (*Id.*; emphasis added.) The fee agreement would be stapled to the  
5 back of the billing card that Respondent maintained for each client, so that Respondent would  
6 know the rate at which to bill the hours.

7 Respondent used a different agreement for contingent fee arrangements. (Hearing  
8 Exhibit 4 is an example of this agreement.) It does not contain language similar to the  
9 provisions quoted above, but does state that should the client remove the case from the law  
10 firm, the client understands "that Klahr will impose a lien upon the file and the value of that  
11 case with the adjusters" if Respondent and the client are unable to agree on a fee for services  
12 upon discharge. (*Id.*) The agreement also informs the client that "no hourly records are  
13 normally kept so this has to be estimated" even though the amount of time spent on the case is  
14 a factor in determining the fee. (*Id.*) This agreement would normally be kept in the case file,  
15 rather than stapled to the back of the billing card.

16 Respondent's staff was not authorized to quote fees or retainers except for contingency  
17 cases.

18 The fee agreements that are exhibits state hourly fees ranging between \$150 and \$200.  
19 The Office Manager was responsible for maintaining a "stable of attorneys" willing and able to  
20 take cases on contract at a fee that Respondent was willing to pay—usually at an hourly rate  
21 substantially less than his hourly rate, such as \$50 per hour. After the client signed a fee  
22 agreement, either Respondent or the Office Manager would assign the case to the contract  
23 attorney. During the period covered by the formal complaint, the contract attorneys did not  
24 have offices at Respondent's firm, but would have a box there for mail. Generally, the  
25 independent contract attorneys would meet with the client, work on the case, and give their  
26 hours to Respondent who would obtain additional funds from the client once the small retainer  
27 had been exhausted. Respondent's recollection was that the hours from the contract attorneys  
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1 would not necessarily be itemized by case. Rarely would the contract attorneys see the fee  
2 agreements. Among the stable of 10 to 20 attorneys that worked with Respondent during the  
3 time period covered by the complaint were Robert M. Frisbee worked as an independent  
4 contractor for Respondent starting in 1998, Barbara Brown who started in May 2000, and  
5 Steven Edward Hill, who also started in 2000.

6 Respondent used the billing cards to monitor all the firm's cases. He would record on  
7 these billing cards the date, the description of service, the fee, costs, amount paid and balance  
8 owed. (Hearing Exhibit 88 is an example of this document) He kept these cards in his desk  
9 drawer. Once a month, Respondent would review the billing cards. Based on the billing card,  
10 he would direct his staff to bill the client for unpaid services. Respondent would also review  
11 the contract attorney's bill with "a fine-tooth comb." Respondent made all the deposits into  
12 his accounts.

13 In summary, the Complaint charged the following:

14  
15 Count 1 (#00-0797) **Hillya Mooney-Waung Allegation:** Ms. Mooney-Waung  
16 was injured in an accident while a passenger on a city bus. Eventually, she  
17 signed a contingency fee agreement and tendered a check for filing fees. She  
18 understood that the statute of limitations expired on March 23, 2000. When  
19 Ms. Mooney-Waung learned that the suit had not been filed, she terminated the  
20 representation and stopped payment on the check. Nevertheless, Respondent  
21 attempted to cash the check, attempted to retain the *representation*, and  
22 threaten to assert a \$1,000 lien against her case, that was without basis.  
23 Respondent's conduct violated ERs 1.5(a), 1.7(b), 1.16 (a) and (d), and 8.4.

24 Count 2 (# 00-1776) **Non-lawyer Assistants:** Respondent permitted non-  
25 lawyer assistants to attend depositions and "sworn statements" on behalf of his  
26 law firm and shared fees with his non-lawyer assistants. Respondent's conduct  
27 violated ERs 5.3, 5.4, and 5.5.

28 Count 3 (# 00-1839) **Failure to Provide Information:** Respondent failed to  
provide requested information and documents to the State Bar. Respondent's  
conduct violated ERs 8.1 and Rule 51(h) and (i), Ariz.R.S.Ct.

Count 4 (# 00-2095) **Shamil Robertson Allegation:** Respondent entered into  
a fee agreement with Ms. Robertson concerning a traffic violation. The firm

1 assigned the case to a contract attorney Barbara Brown. Neither Respondent  
2 nor Ms. Brown appeared at the scheduled Tempe City Court proceeding. Ms.  
3 Robertson terminated the representation and sought a refund of any unearned  
4 fees and the return of her file. Respondent's office staff refused to return the  
5 file, threaten to call the police, and Respondent refused to refund any fees.

6 Count 5 (# 00-2121) : | Vernimb Allegation: Ms. Vernimb sought  
7 representation in a criminal misdemeanor charge and was quoted over the  
8 phone a fee of \$750.00, however, when she arrived Respondent's office staff  
9 increased the fee to a minimum of \$1,500. Ms. Vernimb signed the agreement,  
10 paid the \$1,500 retainer. Respondent did not earn the entire retainer, but failed  
11 to refund any portion of the unearned fee and failed to properly supervise his  
12 office staff permitting them to enter into agreements by signing his name.  
13 Respondent's conduct violated ER 1.15 and 5.3

14 Count 6 (# 00-2187) Dorey Adkins Allegation: Mr. Adkins retained  
15 Respondent's law firm for services regarding a dissolution matter paying \$900  
16 of a \$1,000 retainer. No one from Respondent's office appeared at the  
17 February 16, 2000 hearing. Mr. Adkins terminated the representation.  
18 Respondent refused to return any of the retainers. Nor did he notify Mr.  
19 Adkins of a subsequent hearing, thus Mr. Adkins did not appear nor did anyone  
20 on his behalf. During the hearing issues of child support and visitation were  
21 decided. Respondent's conduct violated ERs 1.3, 1.4, 1.5, 1.15, 5.1, 5.3, and  
22 8.4

23 Count 7 (# 01-0321) Sandra Jewell Allegation: Ms. Jewell met with  
24 Respondent's paralegal/office manager, Larry Kelly, seeking representation in a  
25 bankruptcy case and a social security appeal. Kelly signed Respondent's name  
26 to the fee agreement and Ms. Jewell gave Kelly \$750 retainer. Thereafter, Ms.  
27 Jewell was unable to get information about her case. Eventually she was told  
28 that Larry Kelly had committed a fraud. Nevertheless, Respondent failed to  
perform services for Ms. Jewell and failed to properly supervise his office staff.  
Respondent's conduct violated ERs 1.3, 1.4, 1.5, 1.16(d), and 5.3.

Count 8 (# 01-0481) Sharon Wiley Allegation: Ms. Wiley retained  
Respondent to represent her in a child support case, signed a fee agreement,  
and paid a \$500 retainer. Respondent advised her that an associate attorney  
would be assigned the case and his office would timely file the appropriate  
documents. Her documents were not filed, and when she contacted  
Respondent, he refused to refund her \$500 so she could retain another attorney.  
Respondent's conduct violated ERs 1.15 and 1.16(d).

1                    Count 9 Prior Violations Allegation: Respondent received informal  
2                    reprimands on October 28, 1991, September 22, 1992, December 22, 1992,  
3                    April 22, 1997, and June 3, 1998.

4                    The allegations do not concern Respondent's legal abilities and personal conduct of  
5                    cases, but rather his ethical conduct as it relates to supervision and managing a law practice.  
6                    The root issues asserted in the complaint are Respondent's failure to supervise attorneys and  
7                    non-attorneys and his refusal to refund purported unearned fees. Other than to aver that none  
8                    of the State Bar's allegations had "any substantial validity, legally or factually," claim lack of  
9                    knowledge, and to blame others, Respondent's defense was based essentially on his good  
10                    character.

11                    **Findings of Fact and Conclusions of Law by Count**

12                    Rather than discuss each of the counts in the order they appear in the complaint, this  
13                    Report will discuss in chronological order those counts where there is a named victim.  
14                    Thereafter, this Report will discuss Counts 2 and 3. Following the discussion of each count,  
15                    specific relevant findings of fact will be made and conclusions concerning the charged ethical  
16                    violation. The findings of fact are made based upon clear and convincing evidence after  
17                    considering the testimony, the exhibits, and making credibility determinations.

18                    Before discussing the individual counts, several points applicable to more than one  
19                    count warrant discussion.

20                    **Fiduciary Relationship:** The attorney-client relationship is a fiduciary one of utmost  
21                    trust. *In Matter of Piatt*, 191 Ariz. 24, 26, 951 P.2d 889, 891 (1997); *see also Kiley v.*  
22                    *Jennings, Strouss & Salmon*, 187 Ariz. 136, 140, 927 P.2d 796, 800 (App. 1996). Thus, an  
23                    attorney owes a duty to exercise "the utmost honest, good faith, fairness, integrity and fidelity  
24                    to the client." *Trebilcox v. Brown & Bain, P.A.*, 133 Ariz. 588, 591, 653 P.2d 45, 48 (App.  
25                    1982). A breach of this fiduciary duty may be so serious that it constitutes fraud. *In Matter of*  
26                    *Swartz*, 129 Ariz. 288, 294, 630 P.2d 1020, 1026 (1981). Moreover, this basic obligation of  
27                    an attorney transcends the requirements of the ethical rules. *Piatt*, 191 Ariz. at 26, 951 P.3d at  
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1 891. The ethic rules do "not purport to describe in exhaustive detail the different ways in  
2 which a lawyer may breach the fiduciary duty to the client." *Id.* Rather than focusing on this  
3 basic obligation, Respondent focuses on the ethical rules in the manner that a tax attorney  
4 might scrutinize the I.R.S. code.

5 **Potential for Fraud:** The very structure of Respondent's practice creates a significant  
6 potential for fraud. The combination of: (1) the lack of "free" consultations, (2) the "low  
7 retainers," (3) the misrepresentation of "non-refundable" retainers, (4) the initial evaluation of  
8 the case sometimes performed by a paralegal, and (5) the subsequent revaluation of the case by  
9 a contract attorney creates a potential for clients paying a \$500 retainer to learn from the  
10 contract attorney that either they have no case or that the case will be prohibitively expensive  
11 to pursue. In either situation, the client stands to lose \$500 that arguably has been consumed  
12 in unproductive conversations.

13 On June 24, 1994, Respondent agreed to a diversion program that addressed this  
14 structural problem in two ways. (Hearing Exhibit 84.) First, while the contract permitted staff  
15 members to screen potential clients, "all prospective clients must meet with either  
16 [Respondent] or an attorney associated with [Respondent's] firm *before* the fee agreement is  
17 signed." (*Id.* at 4, term 3; emphasis added.) Second, Respondent was required to keep time  
18 records for *all* cases handled by him or his office, "including cases taken on a contingency fee  
19 basis." (*Id.*, term 5.) These records would detail "all activities" for which Respondent would  
20 claim entitlement to fees on a quantum meruit basis. (*Id.*) Respondent, however, failed to  
21 maintain these procedures after the completion of his diversion program.

22 **Respondent's Attitude:** This structural potential for fraud is aggravated by  
23 Respondent's myopic focus towards keeping unearned fees and his apparent belief that if he  
24 does not have personal knowledge of a problem, he has no responsibility for it even though it is  
25 caused by an attorney he is suppose to be supervising or by a staff member working for him.  
26 His statement in his fee agreement "[a]ll fees are nonrefundable and fully earned upon payment  
27 or signing of this contact" is a flagrant misrepresentation and discourages a client to seek a  
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1 refund. This misrepresentation is further exacerbated by Respondent's unsupportable position  
2 that he has no obligation to refund unearned fees unless a client makes a demand. Yet,  
3 ethically the fees are to be refund, unless they are earned, with or without a demand.

4 Additionally, his manner of operation isolates him from having personal knowledge of  
5 problems caused by his staff or contract attorneys. While on one hand he encourages his  
6 clients to contact him personally at home by phone if they have a problem, when they do, he is  
7 rude and offensive. The practical effect of this behavior is to deter further contact. Then he is  
8 able to blame the clients for not personally contacting him with their problems. Moreover, his  
9 work habits make it less likely he will have direct face-to-face contact with clients. Contact  
10 that he generally does not want.

11 **Failure to Return Unearned Fees:** While the record discloses that Respondent has  
12 been very generous to various charitable works, he does not believe in refunds. "I give to  
13 charity, but I am not a charity. I am not a non-profit organization, never claimed to be. I am  
14 not Mother Teresa or Father Teresa. I am in this to make a living. But the point is I did not  
15 make a living by cheating people, but by serving people." (Tr. 3/5/02, at 1602.) According to  
16 Barbara Brown, Respondent's "philosophy is that he doesn't give back money." (Tr. 3/4/02,  
17 at 1378.)

18 This attitude does not square with the requirements of the ethical rules and Arizona's  
19 case law. Ethically a lawyer may only charge a reasonable fee. When retainer is unearned, the  
20 attorney must return the unearned portion and cannot stand upon the contract representing that  
21 the retainer is "non-refundable." *In Matter of Hirschfeld*, 192 Ariz. 40, 43, 960 P.2d 640, 643  
22 (1998). The legal profession is "a branch of the administration of justice and not a mere money  
23 getting trade" thus the profession has "an obligation of public service and duties to clients  
24 which transcend ordinary business relationships and prohibit the lawyer from taking advantage  
25 of the client." *In Matter of Swartz*, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984).

26 On the other hand, the State Bar does not regulate prices for legal services. When  
27 there has been actual representation of a client, what is a reasonable fee is to a large extent a  
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1 subjective determination, because the reasonableness of a fee is not determined solely by the  
2 amount of time the attorney devotes to the representation. ER 1.5(a)(1) considers many more  
3 factors than mere time, including the results obtained. Thus, it is appropriate that the State Bar  
4 must prove by clear and convincing evidence that the attorney has been basically unfair to his  
5 client and has charged a clearly unreasonable fee. It is also appropriate, however, that an  
6 unreasonable fee can be established by the lack of records to substantiate the reasonableness of  
7 the fee once there is evidence to question the reasonableness of the fee.

8 Respondent's diversion agreement addressed this issue and required that upon  
9 termination, Respondent was to supply the client with a letter that "details the fees, . . . and the  
10 reason the fees are being withheld." (Hearing Exhibit 84, at 5, item 7.) The addendum to the  
11 diversion contract signed November 30, 1994, provided that Respondent shall promptly deliver  
12 to his client any funds his client is entitled to receive. (Hearing Exhibit 85.) Here, however,  
13 Respondent failed to follow the reasonable provisions of his diversion contract and allowed his  
14 attitude about returning fees to control.

15 **Failure To Supervise Attorneys and Non-Lawyers:** Respondent has an ethical duty  
16 to supervise attorneys working for him and non-lawyer staff. ERs 5.1 and 5.3. This duty is  
17 uniquely significant in Respondent's practice for two reasons. First, Respondent *affirmatively*  
18 *represents* to his clients that he will *supervise* the contract attorneys he assigns to their cases.  
19 (Exhibit 1.) Second, the record is clear that Respondent delegates substantial authority to his  
20 non-lawyer staff to act for him. However, in his Answer to the complaint and at the hearing,  
21 Respondent's position was unless he had personal knowledge of a problem and then fails to  
22 act, there can no ethical violation. Thus, rather than taking responsibility for the conduct of his  
23 independent contractors or his staff, he attempts to distance his culpability from their improper  
24 actions.

25 Under the ethical rules, Respondent cannot close his eyes and exercise no oversight  
26 over his "associates" and employees to avoid being held accountable. *See In the Matter of*  
27 *Struthers*, 179 Ariz. 216, 219, 877 P.2d 789, 792 (1994). The issue is not simply whether  
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1 Respondent knew of the misconduct, but whether he "should have known" of the potential for  
2 abuse and acted quickly to correction the situation. *In Matter of Galbasini*, 163 Ariz. 120,  
3 123, 786 P.2d 971, 974 (1990). The ethical rules require a supervising lawyer to be proactive,  
4 to take precautionary steps. *In Matter of Miller*, 178 Ariz. 257, 259, 872 P.2d 661, 663  
5 (1994).

6 In 1997, Respondent was placed on probation, and as a condition of that probation  
7 required to promulgate various procedures to aid in the supervision of his non-lawyer staff that  
8 may have prevented some of these ethical violations. (Hearing Exhibit 87, at 4.) However,  
9 once no longer on probation, these procedures were not continued.

10 **The Larry Kelly Issue:** Respondent contends that he was unaware that Larry Kelly  
11 was signing his name to fee agreements and thus obligating Respondent to represent various  
12 clients. In light of the chronology of events, this position is simply not credible. Respondent  
13 claims that Kelly forged his name to both of the Mooney-Waung fee agreements in March  
14 2000. Yet no later than May 2000, Respondent was claiming a \$1,000 lien for work his firm  
15 performed on behalf of Mooney-Waung. It is inconceivable that Respondent would not have  
16 at least looked at the fee agreement before making such a claim.

17 In June 2000, Vernimb met with Kelly and saw him sign Respondent's name to the fee  
18 agreement. Three or four weeks afterwards, when she received a subsequent bill for a \$1,000,  
19 her father contacted Respondent and told him that Kelly had signed the agreement and  
20 suggested that his daughter should contact the police about Kelly. Respondent denied that  
21 Kelly had authority to sign the agreement, but did not want the police contacted. Thus, by  
22 early July, Respondent was specifically told about Kelly signing fee agreements. Additionally,  
23 in correcting the \$1,000 mistaken billing, it is not plausible that Respondent would not have  
24 reviewed the fee agreement and seen his "forged" signature. One of Respondent's contract  
25 attorneys also told Respondent in July 2000 that Kelly was signing fee agreements in  
26 Respondent's name. Yet, by September 2000, Kelly was still signing Respondent's name to  
27 the fee agreements as the Robertsons witnessed.  
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1 In his Answer and at the hearing, Respondent claimed that Larry Kelly stole thousands  
2 of dollars from him and his clients in 2000. (Tr.3/4/02, at 1494.) Respondent, in fact, testified  
3 that they had made a police report. (*Id.*) When given the opportunity to submit a copy of the  
4 official police report, Respondent submitted an affidavit stating that he had instructed Cutts to  
5 "compile information and send it to the police." According to the affidavit, although Cutts told  
6 him that he did so, there is no corroboration that Respondent ever filed a complaint with the  
7 police department. Respondent does not have a copy of any transmittal letter. He does not  
8 have any file of the information provide the police. The Phoenix Police Department has no  
9 record of any report being filed by his firm. (Affidavit dated March 29, 2002.)

10 Respondent's attempt to blame Kelly is not credible on this record. But even if it had  
11 been, Kelly's misdeeds would not relieve Respondent of his fiduciary duty to his clients

12 Count 1: Hillya Mooney Waung [March 21, 2000]. According to a Notice of Claim  
13 filed with the City of Phoenix, on September 16, 1999, Hillya Mooney Mooney-Waung, a  
14 former paralegal, had been a passenger in a city bus on March 23, 1999, when it entered an  
15 intersection on a red light striking a northbound vehicle that was already in the intersection.  
16 (Hearing Exhibit 1.) The collision propelled Mooney-Waung into the front panel of the bus  
17 injuring her. (*Id.*)

18 After the accident Mooney-Waung sought a lawyer. Respondent was the second  
19 lawyer she consulted. Over the telephone, she gave him a brief sketch of the accident and her  
20 injuries. (Tr. 2/21/02, at 44-45.) Respondent recalls this conversation occurring in late 1999.  
21 Mooney-Waung told him that she had been badly injured in a bus accident, and because they  
22 had previously done a number of bus cases, he was "very interested" in the case and told her to  
23 see Adam Tryon in his office. (Tr. 3/6/02, at 1711; Tr. 2/21/02, at 45-47.) Respondent  
24 considered this to be an "excellent" case. (Tr. 3/6/02, at 1729, 1741-42.) Respondent  
25 believed that he would realize between \$20,000 to \$100,000 from it. (Hearing Exhibit 15, at  
26 2, 10.)

1           Although she spent about an hour with Adam, Mooney-Waung testified that only about  
2 6 to 7 minutes were spent on her case, the remainder of the time Adam spoke to her about his  
3 problems. (Tr. 2/21/02, at 48.) Before leaving, she gave Adam two physician's billing  
4 statements and a possibly a letter from the claims department of the City of Phoenix and Adam  
5 gave her a prospective client information form, but no fee agreement. (*Id.* at 47, 49, 56-57,  
6 158.) She decided not to retain Respondent, and instead hired Steve Tidmore to file a notice  
7 of claim with the City of Phoenix. (*Id.* at 50-52.) When Adam called her seeing if she wanted  
8 to retain Respondent, she told him that she had already retained another attorney. (*Id.* at 56-  
9 57.) The notice of claim was filed on September 16, 1999, just days within the 6-month  
10 limitation period for claims against the City. (Hearing Exhibit 1.)

11           About 3 weeks later, Tidmore informed Mooney-Waung that after reviewing the police  
12 report, he could no longer represent her because of the amount of work the case would take.  
13 (*Id.* at 53-55.) She then contacted several other attorneys. (*Id.* at 55-56.)

14           As the 1-year statute of limitations approached for suing the City of Phoenix, Mooney-  
15 Waung again contacted Respondent's office because his firm "had pursued me for some time."  
16 (*Id.* at 149-50, 159, 188.) She personally contacted Respondent about 2 weeks before March  
17 23, 2000. (*Id.* at 58-59.) Mooney-Waung testified that she told him that the letter she had  
18 received from the transit company said that they do not carrying insurance for passengers, and  
19 Respondent assured her having been a city councilman that he was quite familiar with the city  
20 and these type of suits. (*Id.* at 59.) Mooney-Waung testified that Respondent specifically told  
21 her that she had a cause of action against the City of Phoenix. (*Id.* at 182, 186.) Mooney-  
22 Waung also testified that Respondent told her that there would be no problem in filing her case  
23 before March 23<sup>rd</sup>. (*Id.* at 74, 187.) Mooney-Waung told Respondent that she found Adam to  
24 be "highly unprofessional" and that she would not work with Adam. (*Id.* at 60.) Respondent  
25 told her to speak instead with Larry Kelly in his office. (*Id.* at 63.)

26           She contacted Kelly who explained that she needed to sign a fee agreement. (*Id.* at  
27 64.) Kelly faxed her a "fee for service" agreement form. (Hearing Exhibit 2.) Respondent  
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1 denies that he executed signature on the document or that he authorized Kelly to use that  
2 document for Mooney-Waung's case. (Tr. 2/21/02, at 64; Tr. 2/27/02, at 944.) Kelly told her  
3 that in order to retain Respondent so that her claim could be filed by March 23, 2000, she  
4 needed to sign the fee agreement and bring a check for \$140 filing fee to the office. (Tr.  
5 2/21/02, at 66-67.) The date on the original "fee for service" agreement and the check is  
6 March 21, 2000. (Hearing Exhibits 2 and 3.)

7 Mooney-Waung went to the office and met with Larry Kelly. (*Id.* at 70-71.) It was  
8 probably at this time that she turned over her file from Tidmore. (Tr. 3/6/02, at 1714.) Larry  
9 Kelly told her that Respondent insisted, because the case was going to be litigated, that she had  
10 to sign a second agreement. (Tr. 2/21/02, at 72, 190.) The second agreement was a  
11 contingent fee agreement to litigate a claim against "Phoenix Transit" for damages resulting  
12 from a "bus accident." (Hearing Exhibit 4.) It was dated March 22, 2000. (*Id.*) The  
13 agreement specifically provided that the "client shall pay only the all *out-of-pocket* costs" if the  
14 client discharges Respondent for "good cause," otherwise the client would be liable for a fee  
15 based on "estimated" number of hours expended as well as other factors. (*Id.*)

16 A billing card was prepared dated March 22<sup>nd</sup> and reflected \$140 paid as an advance  
17 for costs and showed a "0" balance. (Hearing Exhibit 88.) Someone other than Respondent  
18 filled in the top portion of the card, but Respondent completed the remainder of the card  
19 reflecting the amounts, dates, and description of service. (Tr. 3/6/02, at 1704, 1749.)  
20 Respondent does not know whether he entered the information on the date indicated or as late  
21 as May 2000. (*Id.* at 1748-49, 1751.) In this area of the billing card, there are only two entries,  
22 both dated March 22<sup>nd</sup>. (Hearing Exhibit 88.)

23 According to Mooney-Waung, both Kelly and Adam assured her that filing the  
24 complaint by March 23<sup>rd</sup> would not be a problem. (Tr. 2/21/02, at 73-77.) Mooney-Waung  
25 testified that she called on March 24<sup>th</sup> when she had not heard anything and was told by Adam  
26 that Respondent decided not to file against the City of Phoenix. (Tr. 2/21/02, at 78.)  
27 However, a letter dated March 23<sup>rd</sup> written by Mooney-Waung contradicts this testimony.  
28

1 (Hearing Exhibit 5.) In the letter to Respondent, Mooney-Waung wrote that she had called  
2 Adam on March 23<sup>rd</sup> and that Respondent "came on the phone very angrily and stated that the  
3 parties in my claim could NOT include the City of Phoenix, and that the previous attorney was  
4 all wrong, etc, etc." (*Id.* at 4; emphasis original.) The letter is internally consistent as being  
5 written on March 23<sup>rd</sup>. Mooney-Waung told the Bar that she had mailed the letter to  
6 Respondent on March 24, 2000. (*Id.* cover sheet.)

7 Although Respondent testified that he did not know he was "fired" until the end of  
8 March or early April, Mooney-Waung testified that she personally and directly told  
9 Respondent he was "fired" on March 23<sup>rd</sup> or on March 24<sup>th</sup> and that she immediately stopped  
10 payment on her check for the filing fees. (Tr. 2/21/02, at 81; Tr. 3/6/02, at 1722-23, 1755;  
11 Hearing Exhibit 5, at 5.)

12 Respondent's firm deposited Mooney-Waung's \$140 check in the firm's bank account  
13 on March 23<sup>rd</sup>. (Hearing Exhibit 7.) It was returned March 28, 2000. (*Id.*) At some point in  
14 time, someone wrote on the return notice "get this re-issued." (*Id.*)

15 On April 15, 2000, about 20 days after Mooney-Waung advised Respondent he was  
16 "fired," Larry Kelly sent her a letter purporting that she and the firm had "reached a mutual  
17 agreement as to why the suit should not be filed" and advising her that she could contact them  
18 within 20 days if she still wanted the Respondent to represent her. (Tr. 2/21/02, at 82-83,  
19 117-18; Hearing Exhibit 6.) Kelly's letter said that if Respondent did not hear from her, the  
20 firm would "return all paper work" in their possession. (Hearing Exhibit 6.)

21 After receiving the letter, Mooney-Waung called Kelly and told him that the  
22 Respondent was "fired" and followed with a letter dated April 18, 2000 to Respondent. (Tr.  
23 2/21/02, at 119-21; Hearing Exhibit 8.) Mooney-Waung began her letter to Respondent "You  
24 were dismissed as my attorney effective March 23, 2000, via telephone conversation with you .  
25 . . ." (Hearing Exhibit 8, emphasis added.) In a letter dated April 19, 2000, Larry Kelly  
26 responded by sending her file. (*Id.* at 125-26; Hearing Exhibit 9.) This was nearly a month  
27 after she had terminated Respondent. (Tr. 2/21/02, at 174.)  
28

1           Approximately 3 weeks later, Respondent sent Mooney-Waung a letter stating that if  
2 she did not "rehire" him, he would lien her case in "the amount of \$1,000" for the time the firm  
3 had expended on her case. (Hearing Exhibit 10, at 1; emphasis original.) Respondent told  
4 Mooney-Waung in the letter "I will avow to you that myself, Adam Tryon, Vance Bradley, and  
5 many other persons in this office have worked on your case over the past 9 months." (*Id.* at  
6 4-5.) Mooney-Waung did not believe him. (Tr. 2/21/02, at 128.)

7           When Mooney-Waung did not respond to the letter, Respondent sent a second letter,  
8 dated May 26, 2000, stating:

9           this is your final notice that unless you agree to return to this firm and let us  
10 handle your case, we will place a lien for \$1,000 for the fair value of our time  
11 on your case with the insurance company or adjuster for the bus company and  
12 for the lady that may have caused the accident.

13 (Hearing Exhibit 13, at 1; emphasis original.) Respondent asserted, "we spent quite a bit of  
14 time chasing you down and trying to make a case out of this, . . . ." (*Id.* at 2.) He also advised  
15 her it would do no good to complain "to the State Bar, the state police, the FBI," if he did not  
16 hear from her, he would "impose the lien without further notice or delay." (*Id.*) Mooney-  
17 Waung felt threaten by the May letters. (2/21/02, at 191.)

18           Respondent testified that in May 2000, he had a "good faith belief" that his firm had  
19 expended sufficient hours on the case to justify a \$1,000 lien. (Tr. 2/27/02, at 927-29, 933,  
20 958.) Respondent asserted that his "impression" from his staff was that after Mooney-  
21 Waung's initial visit, she was going to retain Respondent, and Adam therefore was "checking  
22 with her on the medical situation and the other things that you do in working up a personal  
23 injury case . . . ." (*Id.* at 947-49, 956; *see also* Hearing Exhibit 17.) Respondent testified that  
24 they were preparing to sue the estate of the woman whose vehicle had been struck by the bus.  
25 (Tr. 2/27/02, at 950.) He also noted that a complaint had been prepared, but he ordered it not  
26 be filed against the city. (*Id.* at 930.) Additionally, he claimed to have a "good faith belief"  
27 because the firm had 5 hours in the case based on his billing rate of \$200 per hour. (*Id.* at 960;  
28

1 3/6/02, at 1731.) Respondent testified that he had spent some time "reading [the material from  
2 Tidmore] and laughing about [it] with Adam." (Tr. 3/6/02, at 1714.) Nevertheless,  
3 Respondent admitted that at the time he wrote the first May letter, he had not reviewed the  
4 case; he had not reviewed the documentation; and he had not done due diligence. (*Id.* at 960-  
5 64.) Yet, in his June 2000 letter to the Bar, he still maintained that he was owed "something  
6 like \$1,000 for the time put into this case during the past year." (Hearing Exhibit 6, at 3.) In  
7 Respondent's November 2000 letter to the Bar, he admitted—even by then—that he did not  
8 know "the full facts of this matter" but maintained that his firm was retained in the fall of 1999  
9 and he understood that a fee agreement was signed at that time. (Hearing Exhibit 17, at 2.)

10 Ultimately, Respondent did not file a lien and would not file one today because he  
11 determined that he did not have the documentation to support a lien in such an amount. (Tr.  
12 3/27/02, at 929, 957; Tr. 3/6/02, at 1734, 1745, 1758.) He does not believe he ever told  
13 Mooney-Waung that he was not going to file a lien. (Tr. 3/6/02, at 1734.)

14 Eventually, Mooney-Waung filed her suit pro se with the assistance of another lawyer.  
15 (Tr. 3/21/02, at 179.) The suit is currently pending. (*Id.* at 180.)

16 At the disciplinary hearing, both Mooney-Waung and Respondent testified that their  
17 recollection of events was less than perfect. (Tr. 2/21/02, at 142, 147; Tr. 3/6/02, at 1756.)

18 **Findings of Fact:** (1) Mooney-Waung was injured while a bus passenger. (2)  
19 Prior to September 1999, Mooney-Waung discussed her case with Respondent and with Adam  
20 Tryon. (3) Mooney-Waung, however, did not employ Respondent until March 22, 2000 when  
21 she believed that a complaint needed to be filed prior to the expiration of the statute of  
22 limitation. (4) Respondent directed that she sign a contingency instead of the "fee for service"  
23 agreement. (5) She was told that the firm would file a complaint against the City of Phoenix  
24 by March 23, 2000. (6) On March 23, 2000, the day the 1-year statute of limitations would  
25 have expired if it applied, Mooney-Waung immediately and unequivocally terminated  
26 Respondent's firm when Respondent advised her that he would not file a complaint against the  
27 City of Phoenix. (7) Respondent believed that Mooney-Waung had an excellent case that  
28

1 would be potentially be very profitable for him. (8) Respondent did not return her file until  
2 approximately April 19, 2000, after Mooney-Waung had complained to the Bar. (9) With his  
3 letters of May 3 and May 19, Respondent attempted to leverage Mooney-Waung into re-  
4 employing him by threatening to file a \$1,000 lien when he had no good faith belief that his  
5 firm had earned that amount in the two days they were employed.

6 **Conclusions of Law:** Respondent's claim of \$1,000 was not reasonable and  
7 violated ER 1.5. Even though Respondent never actually "charged" this amount, he portrayed  
8 it as his fee. It was not reasonable. Respondent had no documentation that his firm did  
9 anything for Mooney-Waung. The only evidence that he had to support such a claim was rake  
10 hearsay or not credible and assumed that his firm was employed in the fall of 1999, rather than  
11 March of 2000. The State Bar did not prove a conflict of interest and therefore the ER 1.7(b)  
12 is dismissed. The State Bar's argument that Respondent's attempts to regain Mooney-Waung  
13 as a client violated ER 1.7(b) is not reasonable because at that time, she was *not* a client. ER  
14 1.7(b) requires the predicate of having a client in order to have a conflict. Respondent failed to  
15 timely return Mooney-Waung's files violating ER 1.16(d). The State Bar did not establish any  
16 failure to withdraw. It was never established that Respondent's physical or mental condition  
17 impaired his ability to represent Mooney-Waung. Therefore the ER 1.16(a) violation is  
18 dismissed. Respondent violated ER 8.4(a) and (c), in that he engaged in deceitful conduct by  
19 threatening to file a \$1,000 lien to induce Mooney-Waung to re-employ him when he had no  
20 legitimate good faith basis for believing that his firm had earned such a fee.

21 Count 5: Vernimb [June 1, 2000]. Vernimb was charged with  
22 misdemeanor criminal trespass. A friend gave her an advertisement for Respondent. She  
23 called the office and spoke with someone she assumed was Respondent, who quoted her a fee  
24 of \$750 if the case did not go to trial. (Tr. 2/21/02, at 198-99.) She went to Respondent's  
25 16<sup>th</sup> Street office on June 1, 2000. (*Id.* at 200.) She met with a man with whom she had  
26 spoken on the phone and who represented himself as Respondent, but who was Larry Kelly  
27 according to Respondent. (*Id.* at 201-02, 205-06.) Although there was another person in the  
28

1 room at the time who appeared to be a legal secretary or paralegal, he never said Kelly was not  
2 Respondent. (*Id.* at 207-08, 225-26.)

3 She was uncomfortable with him because he seemed aggressive. (*Id.* at 218.) After  
4 they discussed the case and Kelly characterized the case as a "simple" one, he said that a  
5 continuance would be needed and that the fee would be \$1,500, double what she had been told  
6 on the phone. (*Id.* at 202, 204, 226.) Kelly signed Respondent's name to the "fee for service"  
7 agreement in front of Vernimb and her father who had accompanied her. (*Id.* at 207.) The  
8 agreement also provide for a \$200 per hour rate. (Hearing Exhibit at 37.) She paid the \$1,500  
9 and Kelly told her that he was going to turn her case over to someone who worked in the  
10 Scottsdale City courts and let her know about the continuance. (Tr. 2/21/02, at 209.)

11 About 3 to 4 weeks later, she received another billing from Respondent's firm for  
12 \$1,000. (*Id.* at 210.) She had her father call Respondent's office. (*Id.*) Her father spoke to  
13 Respondent, and Respondent then called Vernimb. (*Id.* at 212.) When Respondent initially  
14 spoke with Vernimb's father he was rude, accusatory, and verbally abusive until he "suddenly  
15 remembered the case" and said the extra \$1,000 was a mistake. (Hearing Exhibit 39, at 1.)  
16 Her father told Respondent that he had seen Kelly sign Respondents' name, and Respondent  
17 emphatically denied that Kelly had the authority to do that. (*Id.* at 2.) Respondent told  
18 Vernimb's father that Kelly had not been at work "for several days" and he had been unable to  
19 contact him. (*Id.*) When her father suggested that Vernimb should contact the police,  
20 Respondent "rejected this suggestion in an agitated manner." (*Id.*)

21 When Respondent phoned Vernimb, he told her not to worry about the \$1,000 bill, it  
22 was a mistake. (Tr. 2/21/02, at 212, 215-16.) He also said that he was suppose to personally  
23 see each new client. (*Id.* at 216.) Respondent told her that Kelly had disappeared and was  
24 causing him all kinds of "problems." (*Id.* at 212, 216-17.) When Vernimb told him about the  
25 difference in fee between the original quote and what she paid, Vernimb testified that  
26 Respondent said that she had been overcharged, but a refund was "out of the question." (*Id.* at  
27 213-14, 226.)  
28

1 Respondent assigned Lori J. Clark to the case. (Tr. 3/4/02, at 1417.) Vernimb was  
2 satisfied with the service Clark provided. (Tr. 2/21/02, at 214.) Vernimb understood the case  
3 concluded with her paying a "\$99 fee" to the City of Scottsdale and the case being dismissed  
4 after 6 months. (*Id.* at 224-25.)

5 Respondent's billing card reflects that \$1,500 was paid as a retainer and "Crim.  
6 Trepass" is noted on it. (Hearing Exhibit 38.) No other description of work is reflected on the  
7 billing card. (*Id.*) The copy of the billing card indicates that it was stapled to something. (*Id.*)  
8 Respondent wrote the "Crim. Trepass" notation. (Tr. 3/6/02, at 1842.)

9 In October 2000, Vernimb complained to State Bar primarily because of the "bait and  
10 switch" between the phone quote and what she paid. (Hearing Exhibit 39.) Respondent  
11 answer the complaint arguing that the \$1,500 "flat fee" was "not at all out of line." (*Id.* at 2.)  
12 That he had to "drastically increase" his fees because of monthly losses. (*Id.* at 1.) He  
13 asserted that he spent "at least 1 hour of time talking to the client *and* supervising the matter."  
14 (*Id.* at 2; emphasis added.) And that Lori Clark had spent "at least 5 hours of time in the  
15 case." (*Id.*) Thus, an "earned fee" of \$1,500 was "not out of line" for 6 hours work at \$250  
16 per hour. (*Id.*) The standard "fee for service" agreement, however, stated the rate as \$200 per  
17 hour and did not state that the \$1,500 was a "flat fee," but rather that it was a "retainer."  
18 (Hearing Exhibit 37.) In his letter to the Bar, Respondent specifically pointed out that the  
19 \$1,500 fee was a *minimum* fee. (Hearing Exhibit 41, at 6.) Respondent testified that his  
20 current hourly rate is \$175 per hour on a misdemeanor. (Tr. 3/4/02, at 1420.)

21 At the disciplinary hearing, Respondent testified that he did not recall "when I talked to  
22 the client." (Tr.3/4/02, at 1411.) And he stated that the case "did not require much  
23 supervision." (*Id.* at 1417.) He felt that the case "was not such an easy case as she described  
24 it." (*Id.* at 1418.) Respondent admitted he had no record that showed the actually number of  
25 hours the case consumed. (3/6/02, at 1841, 1848-49.) Nevertheless, even if the case had  
26 consumed 2 hours, he would "never" refund any fees in that situation. (*Id.* at 1844.)  
27  
28

1 Respondent testified that Vernimb never requested a refund. (Tr. 3/4/02, at 1412,  
2 1414; Tr. 3/6/02, at 1839.) Initially, Respondent testified that it was possible that he had told  
3 her that she was overcharged, but later denied he ever said she was overcharged. (Tr. 3/4/02,  
4 at 1415; Tr. 3/6/02, at 1848.) Nevertheless, he considered the fee reasonable. (*Id.* at 1416.)  
5 "I agree this fee is the upper limits of what is reasonable. It does not exceed what is  
6 reasonable, . . . ." (*Id.*) He would not have paid it—"not because it was so high but because I  
7 would never have allowed anybody to bait and switch me." (*Id.* at 1418.)

8 **Findings of Fact:** (1) Vernimb met with Larry Kelly who agreed to take her  
9 case on behalf of Respondent. (2) Vernimb paid Respondent's firm \$1,500 as retainer for her  
10 misdemeanor criminal trespass case and agreed to pay at a rate of \$200 per hour. (3) She  
11 understood this to be a "flat fee" unless the case went to trial. (4) Around the beginning of  
12 July 2000, when Vernimb spoke to Respondent about a subsequent \$1,000 bill, Respondent  
13 told her that she was "overcharged." (5) Respondent also told her that a refund was "out of  
14 the question." (6) Respondent assigned the case to Lori Clark. (7) Respondent knew either  
15 at that time, or at the latest, when he spoke with Vernimb, that Larry Kelly had signed  
16 Respondent's name to the "fee for service" agreement. (8) Vernimb was very satisfied with  
17 the service provided by Lori Clark.

18 **Conclusions of Law:** The State Bar did not charge the "bait and switch"  
19 allegation. It did charged a violation of ER 1.15 based on Respondent's refusal to return a  
20 portion of his fee based on his admission that she was overcharged. This is a close question.  
21 From the record, it appears that Respondent's admission that Vernimb was overcharged was  
22 made prior to the completion of her case. It is unknown how much time the case took or how  
23 complicated the case actually was. This is unlike the situations where Respondent provides no  
24 true representation. What is known in this case is that Vernimb was satisfied with the  
25 representation and the result. Thus, despite Respondent's lack of candor with the Bar in  
26 responding to the complaint, on this record there is not sufficient evidence, given the ER 1.5(a)  
27 factors, that the \$1,500 fee was unreasonable or that a portion of it was unearned.  
28

1 The State Bar also charged a violation of ER 5.3, failure to adequately supervise a non-  
2 lawyer assistant. The State Bar has established, considering the totality of the evidence, that  
3 Respondent failed to have in place effective and reasonable measures to ensure that Larry  
4 Kelly's conduct was compatible with Respondent's obligations. Without adequate oversight,  
5 Respondent permitted Larry Kelly to make appointments with prospective clients and engage  
6 the firm in representation, including signing Respondent's name to the contractual agreements.  
7 Thus, Respondent violated ER 5.3.

8 Count 7: Sandra Marie Jewell [July 14, 2000] In July 2000, Sandra Jewell, a disabled  
9 Registered Nurse, sought an attorney to assist her in a bankruptcy and to appeal her claim for  
10 social security disability that had been rejected. A friend referred her to Respondent's office.  
11 Both she and her friend, who personally knew Respondent, met with Larry Kelly at  
12 Respondent's 16<sup>th</sup> Street office on July 14<sup>th</sup>. (Tr. 2/26/02, at 681-83.) Kelly told her the fee  
13 for the bankruptcy would be \$750. (*Id.* at 684; Hearing Exhibit 49.) After she signed the "fee  
14 for service" agreement, Kelly told her that he would have Respondent sign the agreement and  
15 he would mail it to her. (*Id.*) He also told her that if she got calls from creditors, to refer them  
16 to the firm. (*Id.* at 692.) She paid \$750 cash to Kelly and received a receipt. (*Id.* at 686-87;  
17 Hearing Exhibit 50.) The receipt was from a standard type of receipt book that Respondent's  
18 office has used for 20 years and appears similar to the receipt given Wiley, although neither  
19 receipts have Respondent's name on them. (Tr. 3/6/02, at 1877; Hearing Exhibits 50, 58.)  
20 Kelly also recommended an attorney outside of Respondent's office for her to call about the  
21 social security appeal, who she did not employ. (Tr. 2/26/02, at 689-90.) On August 1, 2000,  
22 Jewell found another attorney to pursue her social security matter. (*Id.*, at 690.)

23 Barbara Brown received a small file on the Jewell case from Kelly and agreed to do the  
24 case. (Tr. 3/4/02, at 1329, 1342, 1384.) She contacted Jewell, and explained she needed a list  
25 of her creditors and all her bills. (*Id.* at 1329, 1396.) Jewell told her that she was going to  
26 have another operation, so Brown advised her to wait until after the operation to file  
27 bankruptcy. (*Id.*) Brown believed she gave Jewell her phone number. (*Id.* at 1384.)  
28

1 On August 14<sup>th</sup>, Jewell had surgery, was unable to do anything for quite a while and for  
2 a couple of months did not even have a voice. (*Id.* at 691–92.) She assumed that her  
3 bankruptcy case was going fine. (*Id.* at 692.)

4 Meanwhile, on several different occasions, Barbara Brown asked Respondent and staff  
5 members what had happened to Jewell. (Tr. 3/4/02, at 1330, 1334.) Respondent may have  
6 not seemed to be familiar with the case or perhaps Brown did not mention the name. (*Id.* at  
7 1332, 1346–47.) Because she had only spoken with Jewell, Brown did not bill Respondent for  
8 this time. (*Id.* at 1331, 1332, 1336, 1339.) Jewell never paid the \$160 bankruptcy filing fee or  
9 filled out the bankruptcy form. (*Id.* at 1384.)

10 Finally, in late 2000, Jewell attempted to find out the status of her case. (Tr. 2/26/02,  
11 at 693–95.) Eventually she spoke with Barbara Brown who requested additional funds. (*Id.* at  
12 693, 699, 717–19, 721–22.) When Jewell told her that she had already paid \$750, Brown told  
13 her that she would have to get back with her about that because she did not believe there was  
14 any record of that payment. (*Id.* at 718, 720.) Jewell never got a call back from her. (*Id.* at  
15 720, 732.) Jewell called the office again, but never spoke with Brown again. (*Id.* at 732.)

16 In January 2001, when Jewell contacted Respondent's office to learn of the progress of  
17 her bankruptcy case, Adam told her that he had checked with Respondent and she did not have  
18 a contract with him. (*Id.* at 695–96.) He told her that Larry Kelly had not been there for  
19 months and they thought he had been embezzling clients. (*Id.* at 696, 698, 732.) When she  
20 heard screaming in the background about her having a contract, but being uncooperative and  
21 having never paid any money, Adam told her that it was Respondent, but she should not speak  
22 with him directly because he was very intimidating. (*Id.* at 696–97, 726–27.) After hearing  
23 Respondent, she was afraid to personally contact him. (*Id.* at 697–98, 715–16, 729.)

24 At Adam's request, she faxed him a copy of her receipt. (*Id.* at 696, 698.) They  
25 already had a copy of the fee agreement. (*Id.* at 698; Tr. 3/4/02, at 1438.) Adam told her that  
26 because she was "uncooperative," they were not going to work with her because she had not  
27 paid additional money. (Tr. 2/26/02, at 699, 727.) Jewell asked Adam and later Barbara  
28

1 Brown to refund her \$750. (*Id.* at 701-02, 731-32.) Jewell never received a refund and  
2 eventually, Jewell hired another attorney to handle her bankruptcy. (*Id.* at 700, 702.)

3 Barbara Brown had seen Larry Kelly sign Respondent's name on a complaint in July  
4 2000 and she told Respondent about it. (3/4/02, at 1341-42.)

5 Respondent claimed to know nothing of this situation until he received the bar  
6 complaint. (Tr. 3/6/02, at 1879.) However, Respondent could not testify that there was not a  
7 billing card for Jewell. (*Id.* at 1880.) He claimed, however, he never saw one and never  
8 received the \$750. (*Id.*) His bank statement did not reflect a separate entry of \$750, but it  
9 could have been deposited with other funds. (*Id.* at 1882.) But he cannot be sure whether or  
10 not he received the \$750 because of the state of his records. (*Id.* at 1883, 1887.) Respondent  
11 claimed Jewell never spoke to him, so he has no responsibility for her case. (*Id.* at 1883-88.)

12 **Findings of Fact:** (1) On July 14, 2000, Jewell paid \$750 and retained  
13 Respondent to represent her in filing for bankruptcy. (2) Jewell never paid a bankruptcy court  
14 filing fee. (3) One of Respondent's contract attorneys advised Jewell to wait until after her  
15 operation to file for bankruptcy. (4) In January 2001, when Jewell attempted to learn of the  
16 status of her case, she was informed that Respondent claimed that she was not a client. (5)  
17 Respondent had no reasonable basis for making such a claim.

18 **Conclusions of Law:** The State Bar did not establish by clear and convincing  
19 evidence that Respondent violated ER 1.3 (diligence) in his representation of Jewell. It was  
20 reasonable to wait until after Jewell's last operation before filing for bankruptcy. The evidence  
21 was not clear that Jewell had provided all the paperwork to Brown or that she ever paid the  
22 necessary filing fee. Respondent did violate ER 1.4 in that he failed to keep his client  
23 reasonably informed about the status of the matter. Respondent also violated ER 1.5 in that he  
24 did not refund the \$750. While Barbara Brown advised Jewell to wait on filing her bankruptcy  
25 petition, Brown did not bill against the retainer for this advice. No other work was done on  
26 the case other than not responding to the client's request for information. Respondent did not  
27 earn the retainer. Thus, he also violated ER 1.15 and 1.16 (safekeeping of property;  
28

1 terminating representation). The State Bar established that Respondent violated ER 5.3 in his  
2 failure to adequately supervise non-lawyer assistants. *See In Matter of Miller*, 178 Ariz. 257,  
3 258-59, 872 P.2d 661, 662-63 (1994). Respondent asserts that this was one of many  
4 misappropriations perpetrated by Larry Kelly. If this is correct, the misappropriation occurred  
5 in early July, months before finally Kelly "disappeared." For Kelly to go undetected for so  
6 much longer demonstrates that Respondent did not make reasonable efforts to ensure that  
7 Kelly's conduct was compatible with Respondent's obligations. Even if Kelly's role was  
8 simply interviewing Jewel and engaging her as a firm client, the fact that Respondent denied  
9 she was a firm client, also demonstrates that Respondent did not make reasonable efforts to  
10 ensure that his non-attorney staff correctly processed all client's cases.

11 Count 6: Dorcy Adkins [August 2000] Although neither Adkins or the assigned  
12 contract attorney, Charles "Chuck" George, testified at the hearing, the documents admitted at  
13 the hearing set forth the salient facts. In September 1999, after Respondent spoke with Dorcy  
14 Adkins, Adkins paid \$700 of a \$1,000 retainer to Respondent for representation in a custody  
15 case. (Hearing Exhibit 44, at 1.) Vance Bradley assigned the case to a contract attorney,  
16 Chuck George. There was a hearing on October 15, 1999 at which George did not appear, but  
17 another contract attorney, Kirk Thompson, appeared. (*Id.* at 2.) Apparently, Adkins believed  
18 that Thompson was unprepared. On November 22, 1999, when Adkins called Respondent's  
19 office to learn the results of the hearing, he was told the information would be mailed to him,  
20 but nothing ever was. (*Id.* at 2-3.) On November 26, 1999, Adkins made a \$200 payment on  
21 his retainer. (*Id.* at 3; Answer at 21.) On December 5, 1999, Adkins called again seeking  
22 information on the next court date and the results of the last hearing and was told that George  
23 had the paperwork. (*Id.* at 3.) On December 29, 1999, Adkins called George and claims  
24 George told him that George had not been paid by Respondent, so he would not turn over  
25 Adkins' filed. (*Id.* at 4.) According to Adkins, George was willing to continue with the case  
26 and would charge an hourly rate of less than \$150 Respondent was charging, but Adkins did  
27 not want to pay another retainer. (*Id.* at 4-5.)  
28

1 In May 2000, George sent a letter to the trial court apparently stating that he was no  
2 longer representing Adkins, but according to the letter Respondent was not copied on the  
3 letter. (*Id.* at 7.) Respondent claimed to the State Bar, if he had received a copy of the letter,  
4 he would have provided alternative representation. (*Id.*)

5 In June 2000 and again in July 2000, apparently Larry Kelly sent a bill to Adkins  
6 requesting the final \$100 on the \$1,000 retainer and threatened to send his account to a  
7 collections agency. (*Id.* at 5-6.) On October 26, 2000, the State Bar sent Respondent Adkins'  
8 complaint. (*Id.* at 1.) Around this time, Adkins complained personally to Respondent. (*Id.*  
9 at 5-6.) Respondent testified that it was around this time, October or November 2000 that  
10 George refused to provide Respondent with his monthly billing sheets. (Tr. 3/6/02, at 1870-  
11 71.)

12 A few days before to Bar sent Adkins' complaint to Respondent, the trial court entered  
13 a minute entry ordering a Status Conference for December 13, 2000 in Adkins' case. (Hearing  
14 Exhibit 45.) Respondent was endorsed as counsel for Adkins on the minute entry. (*Id.*)  
15 Despite the complaint and his answer dated November 4, 2000, Respondent did not appear at  
16 the December 13, 2000 hearing where Adkins' visitation schedule was altered and he was  
17 required to pay for supervised visits. (*Id.* second minute entry.) The court refused to modify  
18 the custody arrangement because it lacked the necessary information. (*Id.*)

19 On December 28, 2000, after receiving the trial court's December minute entry,  
20 Respondent wrote Adkins and claimed to be "shocked" to learn that his case was "still active."  
21 (Hearing Exhibit 46, at 1.) He told Adkins that he probably still "have a credit for further  
22 services without paying further money," and he was willing to assign a new contract attorney,  
23 however, if continued to press for a refund, it would "not be granted." (*Id.*) Respondent  
24 contended that Adkins "had hours on account in the sense that he would get additional hours"  
25 but because it was a "nonrefundable" account, he was not entitled to any money back. (Tr.  
26 3/6/02, at 1863.)  
27  
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1 On May 8, 2001, Respondent advised the Bar that he was not responsible for the  
2 actions of George, however, he was still willing to provide legal services, but there is no  
3 money for a refund. (Hearing Exhibit 48.) Respondent did not know how much time George  
4 had spent on the case. (Tr. 3/6/02, at 1860; 1863-64.) He did not know where George's  
5 monthly billing sheets were. (*Id.* at 1869.) Nevertheless, as a moral matter, Respondent  
6 speculates that Adkins did not receive full value. (*Id.* at 1869-70.) Respondent believes at  
7 some point he filed a motion to withdraw and it was granted. (*Id.* at 1874-75.)

8 **Findings of Fact:** (1) Dorcy Adkins retained Respondent's firm to represent  
9 him in a custody matter and paid \$900 of a \$1,000 retainer; (2) Respondent failed to  
10 communicate with Adkins; (3) Respondent failed to represent him, specifically at the December  
11 13, 2000 hearing; (4) Respondent refused to refund Adkins' unearned retainer.

12 **Conclusions of Law:** Respondent failed to appear at the December 13, 2000  
13 hearing or provide any other true representation for Adkins, and thus in that sense failed to act  
14 "with reasonable diligence and promptness in representing a client." ER 1.3 (diligence). The  
15 State Bar struck the ER 1.4 allegation. (Tr. 3/6/02, at 1854.) Respondent violated ER 1.5 by  
16 failing to return the unearned portion of the retainer. While it is possible that Respondent  
17 earned some of the retainer, Respondent made it clear that had Adkins decided to remain with  
18 the firm, he was entitled to additional representation at no costs. Respondent claimed that  
19 Adkins never sought a refund. But that is beside the point, because Respondent had retained  
20 unearned fees—no demand is necessary. His fiduciary and ethical obligations require the  
21 return of unearned fees without any demand. Thus, Respondent also violated ER 1.15 and ER  
22 1.16 (safekeeping property and termination of representation). Respondent violated ER 5.1 in  
23 failing to reasonably supervise George. He did not have in effect measures giving reasonable  
24 assurance that all lawyers in the firm conformed to the rules of professional conduct. He had  
25 no system that assured that George would not miss court dates. Although Respondent had a  
26 system to monitor George through billing, he apparently never detected that George was not  
27 fulfilling his client obligation. He also violated ER 5.3 in failing to reasonably supervisor his  
28

1 non-lawyer assistants. Respondent's failure to appear at the December hearing, was by  
2 definition prejudicial to the administration of justice. ER 8.1(d).

3 Count 4: Shamil Robertson [September 12, 2000]: Shamil Robertson had been  
4 arrested for failing to appear in a Tempe City court. The Reverend Robert Tillman  
5 recommended to Shamil's father, Jimmy Robertson, that they retain Respondent. (Tr. 2/25/02,  
6 at 299.) Jimmy Robertson discussed his daughter's case with Respondent on the phone, told  
7 him her next court date, and scheduled an appointment with his assistant Larry Kelly for  
8 September 12, 2000. (*Id.* at 300, 303-05, 378.) Her next court date was September 27, 2000.  
9 (*Id.* at 305, 385.)

10 At the appointed time, the Shamil and Jimmy Robertson met with Larry Kelly and  
11 signed a "fee for service" agreement with a \$500 retainer and a \$150 per hour rate. (Hearing  
12 Exhibit 32.) Until Jimmy Robertson asked Larry Kelly directly if he was a lawyer, Kelly gave  
13 the impression that he was. (Tr. 2/25/02, at 370.) At Jimmy Robertson's insistence, a  
14 sentence was added to the bottom of the agreement that required consultation with the client  
15 prior to reaching \$1,500. (*Id.*; Tr. 2/25/02, at 307-08, 311-13.) Larry Kelly signed his name  
16 for "Gary Peter Klahr, P.C." (Hearing Exhibit 32.) The Robertsons paid the \$500, although  
17 Kelly had asked for \$700, but had to be reminded that his "boss" had agreed to \$500. (Tr.  
18 2/25/02, at 310.)

19 The staff knew Shamil's next court date was September 27<sup>th</sup>, so Kelly told them that at  
20 attorney would be contacting them by September 14<sup>th</sup> or 15<sup>th</sup>. (*Id.* at 313-14, 380, 385.)  
21 When Jimmy Robertson did not hear from anyone by the 14<sup>th</sup>, he called Respondent's office  
22 several times and could hear Larry Kelly refusing to take his call. (*Id.* at 314-15.) The next  
23 day, he called Respondent on his home phone. (*Id.* at 315.) Respondent was "very offensive."  
24 (*Id.*) He denied everything and accused Robertson with "slandering his staff." (*Id.*) After  
25 about 10 minutes of being "chewed out," Respondent gave him a phone number for Barbara  
26 Brown. (*Id.* at 316, 360.) He was screamed at; shouted at. (*Id.* at 317, 360.) Respondent  
27 told him "not to call him again unless his staff gave me the bird." (*Id.* at 318-20, 361.) But by  
28

1 the end of the conversation Respondent was "very conciliatory." (*Id.* at 316.) He explained  
2 that Brown was representing some clients in Northern Arizona and that it may take a little  
3 longer, but she should be free by the 20<sup>th</sup>. (*Id.*) During the conversation, Robertson told  
4 Respondent that Kelly was not returning his phone calls. (*Id.* at 355.) He also told  
5 Respondent that he did not want Kelly working on his daughter's case. (*Id.* at 356, 371.)

6 After her father called, Shamil also called Respondent and got "chewed out badly" for  
7 calling him on his home number. (*Id.* at 380-81, 393-95.) "He was very upset I called his  
8 home. He even said I was to deal with his office staff, not to call, . . . ." (*Id.* at 381.) He also  
9 did give her Barbara Brown's phone number. (*Id.*)

10 Both Shamil and Jimmy Robertson felt they should not call Respondent again at home.  
11 (*Id.* at 321, 266-68, 370, 382, 394.) Because of her experience as a collector, Shamil  
12 believed that once Respondent said not to call him at home, they should not. (*Id.* at 394.) In  
13 addition, she considered him to be a "vulgar person." (*Id.*) She considered Respondent "rude"  
14 and unprofessional for yelling on the phone not to call him. (*Id.* at 395, 406.)

15 After speaking with Respondent, Jimmy Robertson immediately called Larry Kelly, and  
16 again heard him in the background not wanting to speak to him. (*Id.*) He called Barbara  
17 Brown on her cell phone. (*Id.* at 322.) She was in transit on her way home from northern  
18 Arizona. (*Id.*) He explained the case and she sounded interested and he was impressed with  
19 her. (*Id.*) He gave her his daughter's phone number and Brown said she would call within a  
20 few days. (*Id.* at 323.)

21 Shamil also called Barbara Brown's cell phone. (*Id.* at 382.) She left a message, but  
22 Brown did not return her call that day. (*Id.*) Shamil called Brown the next day, and Brown  
23 asked her to call back. (*Id.*) When Shamil called back, Brown told her that she was in a rush  
24 handling another case, but she was going to fit her in. (*Id.* at 383-84.) But she did not call  
25 back. (*Id.* at 384, 398.) As a result, Shamil never had a substantive conversation with Brown  
26 about her case. (*Id.* at 397.)

1           When his daughter was unable to communicate with Brown, Jimmy Robertson called  
2 Larry Kelly on the 18<sup>th</sup>, 19<sup>th</sup>, and 21<sup>st</sup>. (*Id.* at 325–26.) Again he could hear Kelly in the  
3 background not wanting to take his call. (*Id.* at 326.) Kelly never called him back. (*Id.*)  
4 Finally, he called Kelly when he knew that Kelly would be answering the office phone and told  
5 him that Brown had not contacted his daughter. (*Id.* at 327.) Kelly blamed it on Brown's  
6 schedule and said he was not positive that she would be able to represent his daughter—Brown  
7 and Respondent needed to “work out” the assignment. (*Id.* at 328, 331.) Kelly said he did not  
8 return the phone calls because nothing was yet settled. (*Id.* at 331.) When Jimmy Robertson  
9 contacted Kelly later, he said that Brown had agreed to take the case and that she had given  
10 him instructions to file a continuance in the Tempe city court. (*Id.* at 329, 332–33.) This was  
11 about a week before his daughter's appearance date. (*Id.*) Kelly did not call back to say that  
12 the continuance had been granted. (*Id.* at 333.) Jimmy Robertson then attempted to contact  
13 Barbara Brown, but was unable to do so. (*Id.* at 334.)

14           Barbara Brown recalled conversing with both Shamil and Jimmy Robertson, but she  
15 testified that she told them that she was *not* taking the case; it was not her type of case. (Tr.  
16 3/4/02, at 1326–28, 1353–55, 1381–83.) It was never on her list of cases and she never billed  
17 for it. (*Id.* at 1327.)

18           Shamil also called Kelly. (Tr. 2/25/02, at 384.) Kelly explained that Brown had  
19 another case, but there was no conflict, that she had reviewed Shamil's case, and would be  
20 back in time for the hearing. (*Id.* at 385.) Brown called her twice and left back-to-back  
21 messages, but when Shamil attempted to return them, Brown's cell phone service was  
22 temporarily disconnected. (*Id.* at 385–86.) Shamil then called Kelly who assured her that  
23 Brown would be there and they were working on a continuance. (*Id.* at 386–87.)

24           According to Respondent, Kelly told him either Brown would be available and he  
25 would get the continuance to give additional time to reach a firm agreement with Brown, or  
26 that he would send out a notice of appearance by the firm and a motion for continuance and  
27 gets another attorney. (Tr. 3/4/02, at 1403; Tr. 3/6/02, at 1821, 1823; Hearing Exhibit 35, at  
28

1 2.) At this point, Respondent trusted Kelly. (Tr. 3/4/02, at 1404.) And believed Kelly when  
2 he said he had the situation under control. (*Id.* at 1405.)

3 Although Shamil had the impression that because the case was going to be continued  
4 she did not have to attend, she and her father went after her father was unable to reach Kelly.  
5 (Tr. 2/27/02, at 336, 387.) No one from Respondent's office was at court. (*Id.* at 337, 388.)  
6 The prosecutors accused Shamil of lying about having retained an attorney. (*Id.* at 337.)  
7 Another attorney in the courtroom overheard the confrontation and advised them to file their  
8 own continuance and it was granted. (*Id.* at 338-39, 388.) That day Shamil fired  
9 Respondent's firm, requested a full refund, and demanded their paperwork. (*Id.* at 340-41,  
10 389.)

11 When they went to the office the next day, Kelly was not there. (*Id.* at 342, 344.)  
12 They asked the secretary of the day for Shamil's file the woman did not know where it was.  
13 (*Id.* at 345, 353, 402.) The Robertsons refused to leave with out it. (*Id.* at 345.) After  
14 speaking with Respondent on the phone, the woman picked up the file in the Robertson's  
15 original folder from where Robertson had seen it laid a week and half before. (*Id.* at 345-46,  
16 348, 390.) She would not turn over the file until she had made copies. (*Id.* at 346.) When a  
17 young man ordered them to leave and said they were trespassing became aggressive and  
18 threaten to call the police, they refused to go without the file. (*Id.* at 346-47, 352, 390, 402.)  
19 When Jimmy Robertson told the staff that this was being recorded and would be turned over to  
20 the Bar, the woman immediately returned from the copy machine and handed the file to  
21 Shamil. (*Id.* at 352.) Besides the original documents, the only thing in the file were two notes,  
22 Kelly's original interview note and a note from Brown agreeing to take the case, "if continued  
23 and we work with an advance." (*Id.* at 350-51, 391; Hearing Exhibits, 70 and 71.) The  
24 Robertsons never received a refund of their \$500 fee. (*Id.* at 354, 391.) Not only did they not  
25 receive a refund, but the experience greatly affected Shamil's character and spirit. (*Id.* at 398.)  
26 Respondent, contrary to his October 30, 2000 response to the Bar, found the billing card for  
27 Shamil Robertson and it reflects that she paid a \$500 retainer fee. (Tr. 3/4/02, at 1402.)  
28

1 Respondent is willing to have his contract attorneys represent them and pay the expense out of  
2 his own pocket or he is willing to give a partial refund of \$250. (*Id.* at 1408, 1410; Tr. 3/6/02,  
3 at 1825, 1827.)

4 Respondent answered the State Bar's initial complaint October 30, 2000. (Hearing  
5 Exhibit 35.) Jimmy Robertson felt that this letter was mere an "attempt to absolve yourself of  
6 all responsibility for your staff." (Tr. 2/25/02, at 364.) Jimmy Robertson had dealt with  
7 lawyers before, but until he dealt with Respondent "I've never had a lawyer do this with me  
8 before." (*Id.* at 368.)

9 **Statement of Facts:** (1) Jimmy Robertson contacted Respondent prior to the  
10 September hearing date and explained the circumstances of the case; (2) Shamil and Jimmy  
11 Robertson met with Larry Kelly paid a \$500 retainer and were assured that they would receive  
12 representation from Respondent's firm at the hearing; (3) When the Robertsons subsequently  
13 were not informed concerning who would represent them, each of them called Respondent at  
14 home; (4) Respondent offended each of them separately in a manner so they did not want to  
15 call Respondent again at home; (5) Respondent failed to secure a contract attorney to  
16 represent them, failed to move for a continuance as promised, and failed to communicate with  
17 them; (6) The Robertsons were unrepresented at the hearing and had to move for a  
18 continuance on their own that required them to return to court once again; (7) the  
19 prosecutor's accused the Robertsons of lying about being represented; (8) the Robertsons  
20 informed Respondent that his firm was terminated and demanded a refund; (9) Respondent  
21 refused to fund any portion of their fee until after the formal complaint was file; (10) The  
22 Robertsons demanded their file and it was returned to them under inappropriate circumstances.

23 **Conclusions of Law:** Even though Respondent accepted the Robertson's  
24 money, he failed to provide *any* representation for Shamil Robertson, so in that sense he failed  
25 to abide by his client's decisions concerning the objectives of the representation thus violating  
26 ER 1.2 (scope of representation). *Cf. In Matter of Petrie*, 154 Ariz. 296, 299-300, 742 P.2d  
27 796, 800-01 (1987) (an attorney-client relationship can be established even without the  
28

1 payment of a fee) Respondent also did not act with reasonable diligence in representing Shamil  
2 Robertson violating ER 1.3. Additionally, Respondent violated ER 1.4 by failing to keep his  
3 client reasonably informed and by failing to comply with reasonable requests for information.  
4 The record is demonstrated that Respondent discouraged his client and her father from  
5 personally contacting him. Respondent violated ER 1.5 and ER 1.15 and ER 1.16(d) by failing  
6 to refund the \$500 *retainer*. Respondent has failed to show using the factors set forth in ER  
7 1.5 why he should be entitled to any fee. The record indicates that his firm spent some time on  
8 the case in the intake and assignment phase. *See* ER 1.5(a)(1). But simply because an attorney  
9 spends time on a case without any showing of "representation" should not entitle the attorney  
10 to keep any part of the fee. The allegation that Respondent's staff refused to surrender the  
11 Robertson's file was dismissed. Under the circumstances, the refusal was *de minimis* and quickly  
12 cured. Concerning the ER 3.2 allegation, there is nothing specific in the record about Shamil's  
13 case that supports any claim that a continuance was in her legal interest. Thus, Respondent's  
14 failure to make reasonable efforts to expedite the litigation is not excusable. Respondent  
15 violated ER 5.1 and ER 5.3 for failing to make reasonable efforts to supervise the contract  
16 attorneys and the non-attorney assistants to prevent the client arriving in court unrepresented.  
17 Respondent violated ER 8.4(a) and (d) because his omissions prejudiced the administration of  
18 justice by causing unnecessary delay that disrupted his client.

19 Count 8: Sharon Wiley [February 8, 2001]. In December 2000, Sharon Wiley's ex-  
20 husband had stop paying child support for their son who was still in high school. A friend  
21 referred her to Respondent. On the evening of February 8, 2001, Wiley met with Respondent  
22 at his 16<sup>th</sup> Street office. (Tr 2/26/02, at 604.) Respondent told her that her ex-husband was "a  
23 beast," that she was entitled to child support, that it was illegal for her ex-husband to stop  
24 payments, and his firm would represent her. (*Id.* at 606.) She allowed him to make copies of  
25 her divorce papers and current papers. (*Id.*) She had to file a response in about 10 days, by  
26 February 19, 2001. (*Id.* at 606-07.) Respondent was aware of this. (*Id.* at 607.) The retainer  
27 was \$500 billed at \$150 per hour. (*Id.*; Hearing Exhibit 57.) The "fee for service" agreement  
28

1 stated that Respondent was to "attempt to continue child support for Robert (son) until he  
2 graduated from high school although he is already 18." (*Id.*) Wiley believes that Respondent  
3 "lied" to her because he knew that her son was 19 and not handicapped, thus she was not  
4 entitled to child support. (*Id.* at 638-39.) Wiley testified that she told Respondent that her  
5 son would be 19 years old before her response was due because his birthday was February 16<sup>th</sup>  
6 . (*Id.* at 639.) Respondent testified that at the time he thought a parent could receive child  
7 support for a child through high school and there was a broad exception for children suffering  
8 mental and physical disabilities. (Tr. 3/6/02, at 1890.)

9  
10 Nevertheless, both she and Respondent signed the agreement and she put the retainer  
11 on her charge card. (Tr. 2/26/02, at 608-09.) She did not sign the credit card receipt, but did  
12 not think that was unusual. (*Id.* at 657-58.) The firm gave her a receipt. (Hearing Exhibit  
13 58.) According to Wiley, Respondent told her that an associate would be handling her case  
14 because "his license was revoked" due to a change in insurance. (Tr. 2/26/02, at 640-41;  
15 Hearing Exhibit 59, at 1.) At first, she had not realized that her initial phone conversation and  
16 her initial office visit would be billed against her retainer. (Tr. 2/26/02, at 607, 609, 651-52.)  
17 In her other dealings with lawyers over child support issues, she never been charged for the  
18 initial consultation. (*Id.* at 652-53.) She wanted a refund, but Respondent convinced her to  
19 stay with his firm. (Tr. 3/4/02, at 1476.) Respondent told her to call the office the next day in  
20 the late afternoon and the papers would be ready and she would be told who was going to  
21 represent her. (Tr. 2/26/02, at 609-10.)

22 When Wiley called the next day, the office manager, who she understood to be Eric  
23 Snyder, told her to call back Monday, February 12<sup>th</sup> because he had had a bad day. (*Id.* at  
24 610.) When she called back on Monday, the office phone was disconnected so she called  
25 Respondent at home. (*Id.* at 611.) Respondent had no explanation why the phone was cut off,  
26 but yelled at Wiley when she told him that Eric had not done the paperwork on Friday blaming  
27 her for not being more forceful with Eric. (*Id.* at 611-12, 667.) At some point in the  
28 conversation, Respondent said her papers were missing. (*Id.* at 612.) Hearing that, she asked

1 for a refund. (*Id.*) Respondent told her "absolutely not." (*Id.*) He said "nothing was going to  
2 be returned" and she would speak with an attorney who would help her. (*Id.* at 612-13.)

3 Respondent testified that one of his staff had put her file in the box for attorney Steve  
4 Hill, so it was temporarily lost. (Tr. 3/6/02, at 1982.) Respondent stated they found the file  
5 the next day. (*Id.* at 1894.) While the file was missing, Respondent testified, Cutts convinced  
6 him to assign the matter to Bond, who Cutts liked better. (*Id.* at 1891-93.)

7 Respondent first told her to make new copies of her papers and take them to Randy  
8 Cutts home that evening who in turn would then take them to attorney Gary Bond. (Tr.  
9 2/26/02, at 613-15, 659-60.) When she called Cutts to see if he would meet her halfway,  
10 Cutts told her that he did not even have a vehicle that worked. (*Id.* at 614-15.) So Wiley  
11 called Respondent again and accused him of lying to her about Cutts being able to take her  
12 papers to Bond that evening and again told him that she wanted her money back. (*Id.* at 615.)

13 Respondent told her "no," she would not get her money back and told her that she could drive  
14 the papers to Bond's residence. (*Id.* at 615, 661-62.)

15 So, the evening of February 13th , Wiley drove to Bond' apartment and met Bond  
16 under a street light. (*Id.* at 617-18, 663.) Because at this point, she was very skeptical, she  
17 asked to see his State Bar license. (*Id.*) Bond told her that he would have her response filed  
18 by Friday, the 16<sup>th</sup> . (*Id.*)

19 Wiley called Bond that Friday. (*Id.* at 619.) He told that he had to order her file and  
20 was not able to do anything until Monday, the 19<sup>th</sup> . (*Id.*) On Monday, Bond did not answer  
21 his phone because of the holiday. (*Id.*) Wiley called Bond on Tuesday and Wednesday, and  
22 Bond told her that he still had not been able to study her file. (*Id.* at 619-20.) She had called  
23 Bond on these days and not Respondent because he had yelled at her the last time she called  
24 him. (*Id.* at 664.)

25 On Thursday, February 22<sup>nd</sup> , Wiley spoke with Respondent who told her that he had  
26 fired Eric. (*Id.* at 629.) She told Respondent that Bond would not respond to her. (*Id.* at  
27 672.) Wiley said she wanted her money back, and Respondent told her "absolutely not." (*Id.*

1 at 630.) Respondent "yelled" at her, was very forceful and abrupt. (*Id.* at 643.) She  
2 terminated his services at that point. (*Id.*) He wanted her to come to the office and pay \$500  
3 because the first charge did not debit her account and the firm was not paid. (*Id.* at 671-72,  
4 676-78; Hearing Exhibit 59, at 2.) This is when Wiley first learned that her credit card had  
5 not been processed so her account had not been debited the \$500. (Tr. 2/26/02, at 616-17.)  
6 After the 22<sup>nd</sup>, Respondent's law office also called her on Feb. 23<sup>rd</sup>, 26<sup>th</sup> and 28<sup>th</sup> asking to run  
7 another \$500 charge. (Hearing Exhibit 59.)

8 That evening, about 6:00 p.m., Bond told her that she could pick up her papers and file  
9 them herself on February 23<sup>rd</sup>. (Tr. 2/26/02, at 620.) He just gave her a printout sheet with  
10 her name and address and one box checked. (*Id.*) When she tried to file what Bond had given  
11 her, the Court Clerk gave her the correct papers. (*Id.* at 620-21.)

12 When Wiley got her March statement, she learned that her credit card account had  
13 been debited for \$500 on March 6<sup>th</sup>. (*Id.* at 622, 624-25, 630; Hearing Exhibit 73A.) She  
14 filed a grievance with her credit card company. (Tr. 2/26/02, at 630.) On July 11, 2001, she  
15 was credited with the \$500, and Respondent had 90 days to show proof he was entitled to the  
16 \$500. (*Id.* at 631-32; Hearing Exhibits 73B, 73C and 73D.) Thus, Respondent's firm was  
17 credited with her \$500 during the March to July time period. (Tr. 2/26/02, at 669, 674-75.)

18 On August 21, 2001, Respondent's firm re-ran the credit card. (*Id.* at 632.) Wiley  
19 responded by again contesting the charge with the credit card company. (*Id.* at 632-33.) And  
20 the charge was reversed. (*Id.* at 633.)

21 At the hearing, Respondent indicated that Wiley's son would still be entitled to 2  
22 months child support, from December 2000 until February 2001. (*Id.* at 639.) Wiley said the  
23 court told her he was not. (*Id.*)

24 Wiley filed her complaint against Respondent because her agreement was with  
25 Respondent and he did not do what he said he would. (*Id.* at 647.) She did not file against  
26 Bond, because he was working "under your office and your supervision and the fee agreement  
27  
28

1 and our agreement was under your law office.” (*Id.* at 648.) Wiley understood Bond to be an  
2 “associate” of Respondent’s law firm. (*Id.* at 649.)

3 According to Respondent, Bond billed for 4.8 hours he spent on Wiley’s file. (Hearing  
4 Exhibit 6, at 8.)

5 Findings of Fact: (1) On September February 8, 2001 Wiley met with  
6 Respondent and retained his firm to attempt to continue child support payments for her son  
7 who was in high school. (2) By credit card, Wiley paid a \$500 retainer and agreed to be  
8 charged \$150 per hour. (3) When her file lost and a contract attorney was not assigned as  
9 promised, she called Respondent and told him that she wanted a refund. (4) He refused. (5)  
10 He was rude. (6) Reluctantly Wiley agreed to create a new file and transport it to he assigned  
11 attorney Bond. (7) Bond failed to performed the agreed upon work in a timely manner. (8)  
12 Wiley was forced to file her own pleadings. (9) Wiley terminated her relationship with  
13 Respondent’s firm and held Respondent responsible for Bond’s failure to complete the work.  
14 (10) After Respondent was terminated, he attempted to charge \$500 against her credit card  
15 account. (11) While Wiley ultimately did not pay the \$500, that amount was credited to  
16 Respondent’s account and debited to her account for about a 3-month period.

17 Conclusions of Law: Respondent violated ERs 1.15(b) and 1.16(d) in that he  
18 did not “promptly deliver” to his client the unearned portion of the fee upon the client’s  
19 request. Rather, after his services had been terminated, Respondent debited Wiley’s account  
20 for the \$500. For purposes of the ethic rules, the fact that Wiley eventually was credited with  
21 the \$500, does not change Respondent’s obligation to promptly return unearned fees.

22 Count 2 Non-lawyer Assistants: The count actually alleges two different violations  
23 involving non-lawyer assistants: (1) permitting non-lawyer assistants to attend depositions on  
24 behalf of clients represented by Respondent’s firm, more broadly failure to supervise non-  
25 lawyer assistants, and (2) sharing fees with non-lawyer assistants. Respondent admitted in his  
26 answer that “on one or more rare occasions” paralegals may attended depositions when  
27 attorneys were not available to “comfort” clients, but “not purporting to represent them.”  
28

1 (Answer at 10.) Respondent denied ever "knowingly" allowing a non-lawyer to pretend to  
2 serve as a lawyer for a client at a deposition. (*Id.* at 11.) He admitted paying "bonuses for  
3 good work," but denied "sharing fees" with non-lawyer assistants. (*Id.* at 10.)

4 Concerning the second part of the count, Respondent admitted in his answer that he  
5 "does indeed pay bonuses for good work" to his non-attorney staff, but denied "sharing fees"  
6 with non-lawyer staff. (Answer at 10.)

7 In January 1999, a deposition was scheduled in the case of *Copeland v. Liborio*.  
8 Ronald E. Huser on behalf of an insurance company represented the Abigail and Oscar Liborio.  
9 Respondent's law firm represented Douglas Copeland. Vance Brady appeared with Mr.  
10 Copeland at the deposition. When Mr. Huser introduced himself, Vance Brady said that he  
11 was there for Respondent's law office. Brady stated that he was an attorney admitted to  
12 practice in Mississippi, but that he was not licensed in Arizona. (Tr. 2/26/02, at 451.) Mr.  
13 Huser refused to proceed when it was clear to him that Vance Bradley intended to represent  
14 Copeland at the deposition. (*Id.* at 451, 469.) Mr. Copeland did not want to proceed with the  
15 deposition unrepresented, so the deposition was canceled. When the deposition took place in  
16 February 1999, Robert M. Frisbee, one of Respondent's contract attorneys appeared on behalf  
17 of Mr. Copeland. In May 1999, Vance Bradley who wanted to enter into settlement  
18 negotiations contacted Ronald Huser. (*Id.* at 457.) Huser eventually settled the case with  
19 Bradley in September for \$500. (*Id.* at 460.) During the course of the litigation, several of  
20 Respondent's contract attorneys had acted on behalf of Douglas Copeland. (*Id.* at 453, 461-  
21 63.)

22 Robert Frisbee had practiced law for about 30 years in Minnesota. After he was  
23 admitted to the Arizona Bar in May 1998, he answered an ad in the Arizona Republic for an  
24 attorney interested in contract work. Around November of 1998, he met with Vance Bradley  
25 who gave him a few files to review. After reviewing the files, Frisbee returned the files he was  
26 not interested in and kept the ones he was. Except for one case, he had no employment  
27 contract. (*Id.* at 486-7.) His understanding from Vance Bradley was that he would bill  
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1 Respondent's office on an hourly basis for the work that he did on a contingency fee case and  
2 that they would work something out as far as a split in fees. (*Id.* at 485-86.)

3 After learning about what happened at the Copeland deposition, Frisbee confronted  
4 Vance Bradley and condemned him. (*Id.* at 535.) Bradley's response was "Well, I have to do  
5 that from time to time for Gary." (*Id.*) Frisbee did not testify that he informed Respondent.  
6 Frisbee stopped working with Respondent's law office in late February 1999. About 9 months  
7 after leaving Respondent, Frisbee wrote a letter to Respondent dated November 2, 1999, in  
8 which he specifically advised Respondent that Vance Bradley about the deposition incident as  
9 well as Vance Bradley appearing "several times" without a lawyer present. (Hearing Exhibit  
10 18.)

11 Respondent testified that Bradley appearing at the deposition did not make sense,  
12 because Frisbee had been hired to handle the Copeland matter. (Tr. 3/6/02, at 1769-70.)  
13 Respondent denied giving Bradley permission to attend the deposition noting "Mr. Bradley did  
14 a lot of things on his own." (*Id.* at 1770.)

15 Concerning the second part of Count 2, Frisbee testified over Respondent's hearsay  
16 objection that Bradley had told him that in addition to his salary Bradley was getting a  
17 "percentage" on some cases. (Tr. 2/26/02, at 503-505.) An exhibit in the Patterson case  
18 indicates that "Lightning Strikes Ent.", Vance Bradley's company. (Hearing Exhibit 21.)  
19 Respondent testified that virtually every source of revenue in his firm is from is from fees. (Tr.  
20 3/6/02, at 1771.) From this revenue, Respondent testified he paid "bonus" for good work.  
21 (*Id.* at 1771-73.) He also reurged his hearsay objection. (*Id.* at 1773.)

22 **Findings of Fact:** (1) On more than one occasion, a non-lawyer assistant  
23 under Respondent's supervision appeared on behalf of a client at a deposition or hearing. (2)  
24 The evidence is not clear and convincing that Respondent knew this. The only direct evidence  
25 of knowledge is the letter written by Frisbee months after the event and there is no evidence  
26 that such appearance occurred after the November 1999. (3) Nor is there any evidence that  
27 Respondent assisted Vance Bradley in attending the deposition or hearing. (4) However, there  
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1 is also no evidence that Respondent had in place procedures to prevent a non-lawyer assistant  
2 from representing clients at depositions or hearings. (5) Throughout the complaint there are  
3 examples of Respondent's failure to adequately supervise his non-attorney staff. (6)  
4 Respondent pays low salaries and supplements the salaries with bonus for good from client  
5 fees.

6 **Conclusion of Law:** The first part of this count concerns the application of  
7 ERs are 5.3 and 5.5. While this is a close issue, there is not clear and convincing evidence that  
8 Respondent violated 5.5 because there was no evidence that he *assisted* Vance Bradley in the  
9 unauthorized practice of law. Respondents' argument is specious that when a clients attends a  
10 court appearance or deposition with a non-attorney aide for "comfort and support" the client is  
11 representing himself at the proceeding. (Respondent's Final Argument, at 12.) There is no  
12 evidence of to support such an argument. The only reasonable inference from evidence in the  
13 record is that the client is relying on the non-attorney to represent him. The deposition was  
14 canceled when the client appeared with Brady. Furthermore, why would a client retain  
15 Respondent's firm to represent him, only to appear pro per at some proceeding. Nevertheless,  
16 the evidence is lacking that Respondent affirmatively *assisted* Brady in the unauthorized  
17 practice of law.

18 ER 5.3 does not appear to establish a rule of vicarious or imputed liability. *See In*  
19 *Matter of Galbasini*, 163 Ariz. 120, 124, 786 P.2d 971, 975 (1990). It does, however,  
20 mandate an independent duty of supervision. *Id.* ER 5.3 (a) & (b) requires Respondent, as the  
21 "partner" and supervising attorney to "make reasonable efforts to ensure that the firm has in  
22 effect measures" that give reasonable assurance the non-lawyer employees' conduct is  
23 "compatible with the professional obligations of the lawyer." ER 5.3(c) makes Respondent  
24 "responsible for conduct" of Vance Bradley if he ratified Bradley's conduct or knows of the  
25 conduct at the time and fails to take action. Conversely, Respondent cannot "close his eyes" to  
26 his non-lawyer's conduct to keep from knowing. *See In Matter of Struthers*, 179 Ariz. 216,  
27 219, 877 P.2d 789, 793 (1994). There is a point where the supervising lawyer "should have  
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1 known" of the potential for abuse. See *In Matter of Galbasini*, 163 Ariz. at 123, 786 P.2d at  
2 974.

3 The entire complaint in this case demonstrates Respondents' failure to supervise. The  
4 evidence shows that Respondent's non-attorney staff were allowed to obligate the firm to  
5 represent clients, to promote retention of Respondent's firm, assign matters to contract  
6 attorneys, and run the day-to-day operations of the firm with inadequate supervision. Proper  
7 supervision may well have eliminated many of the various counts.

8 As the responsible person, Respondent failed to adequately monitor the cases to be  
9 assured that there would be no reason for a paralegal to represent a client at a deposition or  
10 hearing. There was no evidence showing established procedures for the contract attorneys to  
11 directly inform Respondent of the status of the pending cases. (See Tr.2/26/02, at 488-89,  
12 527.) While an a supervising attorney is not required to guarantee that his non-attorney staff  
13 will never engage in conduct incompatible with the attorney's professional obligations, failure  
14 of the supervising attorney to take adequate precautionary steps is an ER 5.3 violations, even if  
15 there is no misconduct by the non-attorney staff member. *In Matter of Miller*, 178 Ariz. 257,  
16 259, 872 P.2d 661, 663 (1994); *Galbasini*, 163 Ariz. at 124, 786 P.3d at 975. Here,  
17 Respondent did not have adequate precautionary steps in place, even though he had previously  
18 had assistance from the bar in establishing procedures. And additionally, he had explicit  
19 misconduct by his non-lawyer staff, such as Brady at the deposition and the allegation that  
20 Kelly defrauded his clients. See *Miller*, 178 Ariz. at 258-59, 872 P.2d at 662-63 (failure to  
21 provide adequate supervision that allowed staff to misappropriate funds was an ethical  
22 violation).

23 The State Bar failed to established a violation of ER 5.4, that Respondent shared fees  
24 with his non-lawyer employees. The majority of evidence on this issue was hearsay. And the  
25 State Bar failed to provide any legal analysis, as requested (Tr. 3/6/02, at 1783) to explain in  
26 light of the testimony how Respondent's conduct amounted to unethical sharing of fees.  
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1            Count 3: Failure to Provide Information: It is unethical and grounds for discipline  
2 for an attorney "to knowingly fail to respond to a lawful demand for information" from the  
3 State Bar's disciplinary authority. E.R. 8.1; *see also* Rule 51 (h) and (i), Ariz. Sup Ct. R. In  
4 connection with a complaint filed with the State Bar, in a letter dated December 4, 2000, the  
5 Bar requested information from Respondent concerning a case involving Respondent's client  
6 John Patterson who had made claims for property damage and person injury arising from an  
7 accident. Apparently, Respondent represented John Patterson in more than one case.  
8 Specifically, the Bar requested (1) a copy of the fee agreement, (2) an explanation concerning a  
9 representation to medical providers about reducing his fee, (3) proof of a payment to Vance  
10 Bradley, and (4) whether Respondent shared in any part of the fund paid to Bradley. (Hearing  
11 Exhibit 22.) These requests concerned events that apparently transpired about 2 years before,  
12 in 1998 and prior to Respondent moving his law office.

13            Respondent answered with a letter dated December 15, 2000 (although the first page is  
14 misdated September 27, 2000) in which he enclosed (1) a copy of the fee agreement, and (2)  
15 an affidavit from Bradley and suggested the Bar interview Bradley. (Hearing Exhibit 21.)  
16 Respondent stated that (3) he did not have a copy of the canceled check for \$150 to Bradley,  
17 but suggested that the Bar subpoena it from the bank. He stated that (4) he did not share in  
18 any money paid to Bradley.

19            On January 24, 2001, the State Bar replied seeking documentation to support  
20 Respondent's response, specifically: (1) copies of checks that memorialize the distribution of  
21 funds to the law firm and Bradley, (2) client ledger cards and all other records concerning the  
22 precise distribution of funds in the Patterson case, and (3) documents substantiating the  
23 amount paid for the personal injury portion of the claim and for the property damage portion  
24 of the claim. (Hearing Exhibit 23.) When Respondent did not promptly reply, the State Bar  
25 made another request by letter dated March 1, 2001 seeking a response within 10 days.  
26 (Hearing Exhibit 24.)  
27  
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1 The hearing record is not clear when Respondent answered this request. Nearly a year  
2 later, in a letter dated January 18, 2002, the State Bar refers to a "recent letter" from  
3 Respondent that indicated on two prior occasions Respondent had offered to provide  
4 information. In the January 18<sup>th</sup> letter the State Bar declined an invitation to go to  
5 Respondent's office to review files. (Hearing Exhibit 25.) With the hearing in this matter only  
6 weeks away, on January 18, 2002 Respondent Faxed a response asserting he did not "know"  
7 what the Bar wanted, but he would bring the Patterson file to the State Bar if the Bar did not  
8 want to inspect it at his office. (Hearing Exhibit 26.) In reply, the State Bar sent Respondent  
9 their previous letters. (Hearing Exhibit 27.)

10 In an email sent January 24, 2002, Respondent asserted that he did not have the  
11 Patterson billing cards for the case, nor the checks, and that his previous correspondence had  
12 answered the Bar's inquires as best he could. (Hearing Exhibit 28.) Respondent's position at  
13 the hearing was that he had furnished the State Bar or made available to the State Bar the  
14 documentation and information he possessed. (Tr. 3/6/02, at 1797, 1799-1800, 1814.) He  
15 had personally looked for the checks and was unable to find them. (*Id.* at 1806.) Because of  
16 the expense, Respondent was not willing to obtain checks from the bank, but would have  
17 cooperated in the State Bar's efforts to obtain the checks from the bank. (*Id.* at 1803.) Nor  
18 did he understand he had an obligation to obtain records from third parties. (*Id.* at 1811-12.)

19 The State Bar contends that the violation occurred when Respondent "did not contact  
20 his bank for the records nor did he contact the insurance carrier to obtain a copy of the  
21 requested settlement check." (Post-Hearing Memo. at 21.)

22 **Findings of Fact:** (1) In connection with a disciplinary matter, the State Bar  
23 made a lawful demand for certain information from Respondent. (2) While Respondent  
24 initially promptly responded, he failed to promptly respond to the State Bar's subsequent  
25 demand for documentation.

26 **Conclusion of Law:** Respondent initially promptly responded. However,  
27 based on the record of the hearing, Respondent did not respond to the State Bar's follow-up  
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1 request for documentation for almost a year. Thus, Respondent violated Rule 51(h), Ariz.  
2 Sup. Ct. R. (requiring a prompt response to an inquiry for information); *see also* ER 8.1(b).

3 A respondent in a disciplinary proceeding cannot be held accountable for failure to  
4 produce documents not in his possession. Nevertheless, a respondent must "promptly  
5 *respond*" to a lawful request even if the response is only to inform the State Bar that the  
6 respondent does not have the documents and explain why the documents are not in his  
7 possession. A respondent need not at his own expense obtain documents from third parties,  
8 but must fully and completely cooperate with the State Bar's efforts to obtain records,  
9 including offering inspection of business records and signing releases. *See* Rule 51(h) and (i),  
10 Ariz. Sup. Ct. R.

11 Count 9: Prior Formal Sanctions: The prior formal sanctions were not considered in  
12 resolving the merits of the above counts. However, because a substantive issue was raised  
13 considering the 1991 Order of Informal Reprimand, it is discussed here. The formal order  
14 stated, "probable cause does *not* exist." (emphasis added) However, a review of the entire  
15 text of the Order clearly demonstrates that the word "not" was a technical clerical error.  
16 Therefore, this Order of Informal Reprimand will be considered.

#### 17 Discussion of Sanctions

18 Respondent is not charged with exercising poor judgment, nor with being an  
19 incompetent supervisor. Rather, the focus of the complaint is Respondent's violation of his  
20 ethical duties to his clients, his profession, and the public. Having found that Respondent has  
21 violated his ethical duty, the ABA's *Standards for Imposing Lawyer Sanctions* (1991) [herein  
22 after "*Standards*"], can be a useful starting point in deciding upon an appropriate sanction,  
23 although not required. *See In Matter of Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996).

#### 24 A.B.A. STANDARDS

25 In applying the *Standards* the Supreme Court considers "(a) the duty violated; (b)  
26 respondent's mental state; (c) the injury to the client; and (d) any aggravating or mitigating  
27

1 factors." *In Matter of Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); see also ABA  
2 MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (1993).

3 The purpose of State Bar discipline is not to punish the offending attorney. *In Matter*  
4 *of Couser*, 122 Ariz. 500, 502, 596 P.2d 26, 28 (1979). Rather, the purpose is threefold: (1)  
5 to protect the public from harm by unethical, dishonest or disabled attorneys, (2) to foster  
6 professional integrity in part through deterrence, and (3) to maintain the public's confidence in  
7 the State Bar and the administration of justice. See *id.*; *In re Hoover (II)*, 161 Ariz. 529, 533,  
8 534, 779 P.2d 1268, 1272, 1273 (1989); see also *In re Scholl*, 200 Ariz. 222, 25 P.3d 710, ¶  
9 29 (2001); *In Matter of Riches*, 179 Ariz. 212, 215, 877 P.2d 785, 788 (1994).

10 Respondent has demonstrated a clear pattern for years of abdicating his responsibilities  
11 of supervision to unreliable or unstable office staff. Moreover, he has affirmatively disclaimed  
12 responsibility when problems are brought to his attention. He has received informal  
13 reprimands on a number of occasions for his failure to adequately supervise his staff.  
14 Additionally, he had the benefit of the State Bar's diversion program to assist him in  
15 establishing reasonable office procedures to meet the requirements of supervision. But once  
16 the program was over, he abandoned the procedures. Thereafter, he was placed on probation  
17 and required to comply with terms and conditions designed to prevent the type of ethical  
18 violations that occurred here.

19 Furthermore, Respondent has also established a pattern of refusing to refund unearned  
20 fees. He has systematically refused to refund any money to clients who were not provided the  
21 representation for which they paid. These two patterns constitute the most serious  
22 misconduct.

23 The State Bar argues given these conclusions the most appropriate standard to apply is  
24 Section 4.11 of the *Standards* that states disbarment is "generally appropriate" when an  
25 attorney "knowingly converts" client property (such as unearned fees) and causes "injury or  
26 potential" injury to a client. If there was clear and convincing evidence that Respondent  
27 knowingly embezzled, stole, misappropriated, converted client funds, disbarment would be the  
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1 starting point to determine the appropriate standard. This is different. While Respondent  
2 knowingly and wrongfully refused to return unearned fees, the evidence is not convincing he  
3 did so believing that he had no legitimate right to the funds.

4 AGGRAVATING AND MITIGATING CIRCUMSTANCES

5 The *Standards* employ a series of aggravating and mitigating circumstances that serve  
6 to increase or decrease the degree of discipline imposed. *Standards* § 9.0; *see also, e.g., In re*  
7 *Ockrassa*, 165 Ariz. 576, 799 P.2d 1350 (1990). Where there are multiple acts of misconduct,  
8 a respondent generally should receive one sanction that is consistent with the most serious  
9 instance of misconduct and the other acts should be considered as aggravating factors. *In re*  
10 *Cassalia*, 173 Ariz. 372, 375, 843 P.2d 654, 657 (1992).

11 **Aggravation:**

12 Prior Disciplinary Offenses [*Standard* 9.22(a)]: Complaints have made against  
13 Respondent in 1989, 1990, 1992, 1994, 1996 and 1997 all of which have resulted in informal  
14 reprimands. (Hearing Exhibits 63, 64, 65, 66, 67, 68, 69, 87.)

15 Selfish/Dishonest Motive [*Standard* 9.22(b)]: Respondent's conduct was  
16 selfish when he refused to return unearned fees knowing that he provided little or no service.

17 Pattern of Misconduct [*Standard* 9.22(c)]: The complaint in this case  
18 demonstrates a pattern of misconduct by Respondent. As previously discussed, Respondent  
19 fails to take responsibility to the conduct of his contract attorneys and non-attorney staff and  
20 fails to return unearned fees. This is despite the State Bar's attempts to work with him  
21 through diversion and probation. (Hearing Exhibits 84, 85, 86, 87.) The diversion program  
22 failed to improve Respondent's practice because, in part, he failed to maintain the procedures  
23 implemented by the diversion agreement. Later, the State Bar implemented an informal  
24 reprimand and probation to address once again the myriad of office problems. As the conduct  
25 that lead to this complain illustrates, again Respondent failed to improve his practice.

26 Following the conclusion of the hearing in this matter, the complaint filed against  
27 Respondent in Nos. 98-0492, 98-1425, 99-0187, 99-0629, 99-2400, 00-0246, and 00-0318  
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1 became final. *In the Matter of a Suspended Member of the State Bar of Arizona, Gary Peter*  
2 *Klahr*, No. SB-02-0036-D (filed May 1, 2002.) Pursuant to the Order and Judgment in that  
3 case, Respondent is disbarred. Therefore, additionally, the Hearing Officer's Report and the  
4 Disciplinary Commission's Report have been considered on the issue of pattern of misconduct.  
5 These reports again document Respondent "abdicated his duties to oversee and supervise both  
6 his non-lawyer staff and his contract attorneys." (Commission Report at 4.) Additionally,  
7 where Respondent did not fully earn the retainer funds, he failed or refused to return the  
8 unearned portion of the retainer funds. (*Id.*)

9 Multiple Offenses [*Standard* 9.22(d)]: Respondent engaged in conduct that  
10 violated numerous rules of professional conduct. Such extensive conduct is considered in  
11 aggravation.

12 Bad Faith Obstruction of the Process [*Standard* 9.22(e)]: The State Bar asserts  
13 that Respondent's conduct concerning discovery was designed "to burden the efficient  
14 prosecution of the case" by (1) listing "eighty character witnesses without providing a synopsis  
15 of their anticipated testimony or a number where the witness could be reached," and (2) by  
16 offering at the last moment Joey Walker as a substantive witness, and when the witness was  
17 about to be deposed withdrawing him.

18 Civil Procedural Rule 26.1(a)(3), applicable to these proceedings, requires each party  
19 to disclose in writing to every other party the "names, addresses, and telephone numbers of any  
20 witnesses whom the disclosing party expects to call at trial with a fair description of the  
21 substance of each witness' expected testimony." On December 17, 2001, Respondent filed his  
22 initial Rule 26.1 disclosure statement listing five witnesses: Adam Tryon, Gary Peter Klahr,  
23 Vance Bradley, Larry Kelly, and Maret Vessella. (Hearing Exhibit 79.) Other than the lack of  
24 phone numbers, this discovery was in substantial compliance with the rule. However, the three  
25 most important witnesses, besides Respondent, did not testify. On January 16, 2002,  
26 Respondent filed a supplemental list with 32 character witnesses and 7 substantive witnesses.  
27 Most of the witnesses were attorneys, and for the attorneys, Respondent did not offer  
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1 telephone numbers. For all, but two of the other witnesses, he did provide phone numbers.  
2 (Hearing Exhibit 79.) On January 29, 2002, Respondent filed a second supplemental  
3 disclosure. He included one potentially important substantive witness, Joey Walker, and three  
4 character witnesses. Then just 10 days before the hearing commenced, on February 11, 2002,  
5 Respondent filed his third supplemental disclosure statement listing 66 character witnesses,  
6 most of who were current or former judges. (Hearing Exhibit 79.)

7 The State Bar moved in limine to preclude the character witnesses based on  
8 Respondent's failure to comply with the discovery rules. The motion was denied, but the State  
9 Bar was permitted to object to the testimony of any witness based on actual prejudice resulting  
10 from Respondent's discovery, cumulative evidence, or for any other legally cognizable ground.  
11 (Order, filed Feb. 21, 2002.) By the beginning of the hearing, Respondent had narrowed the  
12 list of witnesses that he actually intended to call.

13 The goal of Rule 26.1 was to avoid "litigation by ambush" and to make the judicial  
14 system n Arizona "more efficient, more expeditious, less expensive, and more accessible to the  
15 people" while reducing "expense, delay and abuse." Court Comment to 1991 Amendment.  
16 The rule and its sanctions were never intended to become another means for gamesmanship in  
17 the name of advocacy. *See Bryan v. Riddell*, 178 Ariz. 472, 476, 875 P.2d 131, 135 (1994).  
18 From the circumstances of Respondent's late disclosure, it is glaring apparent that he was  
19 engaged in a flagrant abuse of the purposes of discovery. *See State v. Fendler*, 127 Ariz. 464,  
20 482-83, 622 P.2d 23, 41-42 (App. 1980). He could not have reasonably entertained a good  
21 faith believe that he would be permitted to call so many character witnesses. In fact, during the  
22 hearing, it became apparent that Respondent had not even spoken to many of these witnesses  
23 before listing them or knew that they would be willing to testify. This was an abuse of the  
24 discovery process and a factor in aggravation.

25 Likewise, the listing and then last-minute withdrawal of Joey Walker as a witness was  
26 an abuse of the discovery process and a factor in aggravation. Joey Walker works for  
27 Respondent. Following his late disclosure, the State Bar moved in limine to preclude his  
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1 testimony. At the pre-hearing conference held February 15, 2002, the motion was denied on  
2 the condition that "documentary evidence establishes that Respondent employed him during  
3 the relevant time periods, . . . ." (Order, filed Feb. 21, 2002.) Walker's deposition was  
4 noticed for February 19<sup>th</sup> at 1:30 p.m., 2 days before the hearing commenced. (*Id.*; Hearing  
5 Exhibit 79.) At 12:53 p.m. the day of the deposition, Respondent emailed the State Bar stating  
6 "we are calling off the depo because he won't testify—it seems I just now discovered that he  
7 mainly knew Kelly at the old office—and not at the time of the acts alleged in the current  
8 complaint." (Hearing Exhibit 79, at Exhibit No. 11.) It is not credible that it took Respondent  
9 4 days to determine this. Moreover, a portion of the complaint did occur at the "old office."

10 Refusal to Acknowledge Wrongful Nature of Conduct [*Standard* 9.22(g)]: As  
11 previously discussed, Respondent denies responsibility for the conduct of his contract attorneys  
12 and non-lawyer employees despite his explicit representation that he will supervise the contract  
13 attorneys and his failure to do so as well as his failure to supervise his office staff.

14 Vulnerability of the Victim [*Standard* 9.22(h)]: A number of the clients in this  
15 complaint were in need of immediate assistance. Respondent engaged them as client, but failed  
16 to provide the promised representation. While the State Bar has not shown how any of these  
17 clients were clearly prejudiced by Respondent's failure to do what his firm promised to do, this  
18 does not mitigate that the fact that these victims were vulnerable.

19 Indifference to Making Restitution [*Standard* 9.22(j)]: In counts 4, 6, 7 and 8  
20 Respondent was paid and failed to provide representation. Only in count 4, does Respondent  
21 admit he owes restitution and then only for half the amount of the fee that was paid.

22 **Mitigation:**

23 Personal or Emotional Problems [*Standard* 9.32(c)]: The State Bar suggests  
24 this as a possible mitigating circumstance. This factor normally refers to situations involving  
25 marital or financial problems, but not exclusively. See *In re Scholl*, 200 Ariz. 222, 25 P.3d  
26 710, ¶ 26 (2001) (gambling addiction); *In Matter of Rubenstein*, 170 Ariz. 524, 527, 826 P.2d  
27 1150, 1153 (1992) (stress); *In Matter of Nefstead*, 163 Ariz. 518, 520, 789 P.2d 385, 387  
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1 (1990) (mid-life crisis); Standard 9.32(c) cmt. Respondent has expressed during the hearing  
2 that the extensive litigation with the State Bar has caused him financial hardship. Assuming  
3 this is true, there is no evidence that this financial hardship caused Respondent not to return  
4 fees or contributed to his ethical violations. From observing Respondent during the 7 days of  
5 hearings and reviewing his written work, it is apparent that Respondent has a significant  
6 problem in self-control (Tr. 2/25/02, at 408.) and a very explosive volatile personality. He  
7 displayed characteristic traits of being disorganized, impetuous, intimidating, petulant,  
8 bombastic and boisterous. Rather than research and attempt to factually respond to the Bar's  
9 requests for information, perhaps because of situational paranoia Respondent viewed the  
10 requests as personal attacks. All these personality behaviors contributed to his difficulties with  
11 the State Bar, his clients and his staff. Thus, these personality traits are arguably mitigating on  
12 the issues of volition, intent, lack of evil motive.

13 Mental Disability and Physical Disability [Standards 9.32 (h); 9.32(i)]:

14 Respondent asserts that he was diagnosed 15 years ago as being manic depressive and that he  
15 is currently taking medication for this condition. Respondent testified that he was first under  
16 the care of Dr. Thomas Thomas in the 1980s and 1990s and then Dr. Tracy Collins. (Tr.  
17 3/5/02, at 1574.) Respondent testified that he takes Lithium, Xanax and Vivactil. (*Id.* at  
18 1575-76.) He stated that he has been taking the first two medications for 10 to 15 years, and  
19 the later one since about 1999. (*Id.* at 1576.) Generally, self-serving testimony is insufficient  
20 to establish mitigating circumstances, such as mental disability. See *In re Augenstein*, 178  
21 Ariz. 133, 137, 871 P.2d 254, 258 (1994).

22 In addition to his testimony, Respondent belatedly submitted an unsworn letter signed  
23 in the name of "Tracy Collins, M.D.", Arizona license #24914. (Exhibit 4.) Dr. Collins states  
24 that Respondent has been a patient since February 26, 1999. Dr. Collins sees Respondent  
25 every 3 to 4 months for medication management for "Bipolar I Disorder and Anxiety  
26 Disorder." (*Id.*) Dr. Collins has not witnessed any manic episodes since she has been treating  
27 him, but Respondent appears to remain fairly "hypomanic" (mild manic) "which could account  
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1 for ongoing difficulties in judgment.” (*Id.*) Respondent also notes he suffers from “severe  
2 cardiovascular problems which saps his energy and, perhaps by limiting the amount [of] blood  
3 sent to the brain, may impair his judgment on occasion.” (Final Argument at 39.) Respondent  
4 does not claim that his mental disorder or physical problems are a major cause of the  
5 complaints at issue here. Because there is no evidence that Respondent’s mental disorder  
6 *caused* the misconduct in the complaint, this mitigating factor is not found. See Standard  
7 9.32(i)(2). There was no testimony, expert or otherwise, that there was a casual nexus  
8 between Respondent’s disorder and the complaints. Moreover, during the relevant period of  
9 time the only evidence is that he was under the care of a psychiatrist and taking the prescribed  
10 medication designed to control any adverse affects of the diagnosed disorder.

11 Absence of a Prior Disciplinary Record [*Standard* 9.32(a)]: Respondent argues  
12 that the lack of any prior “serious” disciplinary history, despite hundreds of complaints, is  
13 mitigating. Whether Respondent has been “falsely accused” in the past is not relevant to  
14 mitigation. Although Respondent’s disciplinary record consists of only five prior informal  
15 reprimands, five prior informal reprimands, plus having had the benefit of diversion and  
16 probation, does not equate with mitigation—even in light of Respondent’s years of practice  
17 and the nature of his practice. This is without considering the violations that lead to  
18 Respondent’s disbarment.

19 Character and Reputation [*Standard* 9.32(g)]: Respondent has proved an  
20 outstanding reputation in portions of the legal and political community for engaging in pro  
21 bono activities and extensive community work as well as contributing significant amounts of  
22 money to charitable organizations. This is a strong mitigating factor.

23 In the prior disciplinary hearing Ernest Calderon, Sidney Rosen, Lewis Rhodes, Joe  
24 Lopez, and Marcia Horn all testified to his good character. (Tr.3/21/01, at 446–49.) For  
25 example, Calderon testified that he had seen nothing to indicate that Respondent had acted  
26 unethically in his role as a member of the Phoenix Union governing board. (*Id.* at 450–51.)  
27 And that Respondent had been on the “cutting edge of voting rights, civil rights cases in  
28

1 Arizona." (*Id.* at 449.) Rosen, a friend since law school, testified that Respondent's  
2 reputation for honesty and integrity was "impeccable," as far as he knew. (*Id.* at 457.) He was  
3 shocked, however, by the allegedly "ex-criminals" Respondent had on staff when he visited  
4 Respondent's Van Buren office. (*Id.* at 459.) He asked Respondent how he could trust these  
5 people and told Respondent that he had to just "get it cleaned up." (*Id.* at 465.) Respondent  
6 thanked him for pushing him. (*Id.*) Rosen's impression of Adam was that he was "very  
7 organized and very helpful." (*Id.* at 467.)

8 During the current proceedings the following individual's testified to Respondent's  
9 reputation and character: Richard D. Mahoney (Tr. 2/21/02, at 86-104); Armondo DeLeon  
10 (*Id.* at 231-40); Carol Burton (Tr. 2/25/02, at 258-97); Art Libowitz (*Id.* at 411-33); Linda  
11 Abril (2/26/02, at 569-85); Paul Eckstein (*Id.* at 586-603); Calvin Goode (2/27/02, at 763-  
12 73); Terry Goddard (*Id.* at 774-85); Eileen Umbehr (*Id.* at 786-807); Maurice Portley (*Id.* at  
13 808-22); Robert Gottsfield (*Id.* at 823-44); Garrett Simpson (Tr. 3/1/02, at 1090-1102; 1121-  
14 76); William P. Sargeant, III (*Id.* at 1157-75); David Silcox (*Id.* at 1176-96); and Robert  
15 Young (Tr. 3/5/02, at 1541-1565). For example, Paul Eckstein testified that he believed  
16 Respondent's reputation to be as a "person who is honest, high integrity, you are a person that  
17 brings great passion to your cases and is very committed to social justice." (Tr. 2/26/02, at  
18 590.) He would consider Respondent for employment with the caveat that it would not be  
19 likely that his firm would hire someone who handles the kinds of cases Respondent does. (*Id.*  
20 at 594.) Judge Gottsfield, who had first worked with Respondent when Respondent was a law  
21 clerk at his firm, testified that although he had not seen Respondent for the last 6 to 8 years,  
22 when Respondent appeared before him "whatever he said I could accept as truthful, there is no  
23 doubt in my mind. He would never cite cases that had no application. I regarded Gary as very  
24 brilliant in the law and someone who always would take cases that maybe other lawyers  
25 wouldn't." (*Id.* at 830.) No lawyer or judge had ever suggested to him that Respondent was a  
26 "shyster." (*Id.* at 831.)



1 situation must be tailored for the individual case understanding that it is not possible to achieve  
2 uniformity or perfection. *In re Riley*, 142 Ariz. 604, 615, 691 P.2d 695, 706 (1984).

3 The State Bar relies primarily on *In Matter of Hirschfeld*, 192 Ariz. 40, 960 P.2d 640  
4 (1998). Robert Hirschfeld had 24 complains against him, the largest category were clients who  
5 were left unrepresented at hearings, trials, and other matters when Hirschfeld fled the  
6 jurisdiction to avoid a prior sanction. *Id.* at ¶ 9. The next group of eight concerned  
7 Hirschfeld's "non-refundable retainer" agreements involving significant retainers. *Id.* at ¶¶ 9,  
8 11. In one case he accepted a \$8,000 retainer in a dissolution action. *Id.* at ¶ 12. The client  
9 and wife reconciled within a few days, and even though the reasonable value of Hirschfeld's  
10 services during that short period was \$2,000, he refused to return the remaining retainer. *Id.*  
11 The court did not hold that non-refundable retainers are per se violations of Ethical Rule 1.4  
12 because a retainer is a fee paid to secure a lawyer's availability. *Id.* at ¶ 17. Nevertheless, the  
13 court found that Hirschfeld's actions reflected dishonest and selfish motives, a clear pattern of  
14 willful misconduct, and noted his prior disciplinary offenses. *Id.* at ¶ 18. "Those he has  
15 professed to serve with zeal, his clients, are those he has harmed the most. He continues to  
16 exhibit not only indifference but outright defiance to making restitution." *Id.* As a result, the  
17 court affirmed disbarment as the appropriate sanction. *Id.* at ¶ 20.

18 Respondent did not discuss proportionality.

### 19 RECOMMENDATION

20 I concluded that Respondent violated the following ethical rules:

21 ER 1.2: Count 4  
22 ER 1.3: Counts 4, 6  
23 ER 1.4: Counts 4, 7  
24 ER 1.5: Counts 1, 4, 7, 6  
25 ER 1.15: Counts 4, 6, 7, 8  
26 ER 1.16: Counts 1, 4, 7, 6, 8  
27 ER 3.2: Count 4  
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- ER 5.1: Counts 4, 6
- ER 5.3: Counts 2, 4, 5, 7
- ER 8.1: Count 6
- ER 8.4: Counts 1, 4
- Rule 51(h): Count 3

Considering only the facts and conclusions of the allegations in this complaint, I do not consider Respondent's conduct as serious as the conduct in *Hirschfeld*. Moreover, the mitigation in this case is substantially more than *Hirschfeld*. Nevertheless, disbarment is the only sanction that will protect the public given Respondent's attitude and unrelenting pattern of misconduct. Despite multiple opportunities for change—the informal reprimands, the diversion program, the probation with conditions—Respondent is either unable or unwilling to do so.

Therefore, I recommend disbarment, understanding that given the previous judgment of disbarment this recommendation may have little significance other than to confirm that Respondent was not a victim of an organized vendetta.

I further recommend that Respondent pay restitution in the following amounts.

- Shamil Robertson: \$500
- Dorcy Adkins: \$900
- Sandra Jewell: \$750

I further recommend that Respondent pay the costs and expenses of these proceedings.

DATED this 13<sup>th</sup> day of May, 2002.

*John Pressley Todd*  
 John Pressley Todd  
 Hearing Officer 7X

Original filed with the Disciplinary Clerk  
 this 13<sup>th</sup> day of May, 2002,

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Copy of the foregoing mailed this 13<sup>th</sup> day  
of May, 2002, to:

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