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JUN 21 2005

HEARING OFFICER, OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER)	Nos. 03-0043, 03-1282, 04-0339
OF THE STATE BAR OF ARIZONA,)	04-0995, 04-2149
)	
MARK L. JOHNSON,)	
Bar No. 019505)	
)	HEARING OFFICER'S REPORT
RESPONDENT.)	

PROCEDURAL HISTORY

The State Bar filed a Complaint on December 30, 2004. An extension was granted and Respondent filed an Answer on March 4, 2005. A hearing was then scheduled for May 6, 2005. The Settlement Officer conducted a settlement conference on April 7, 2005 at which the parties were unable to reach a settlement. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on May 20, 2005. A hearing was not been held in this matter.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 21, 1999.

1 January 9, 2003 letter. Respondent was given a copy of the January 9, 2003 letter
2 and an additional ten days in which to respond.

3
4 8. Respondent did not respond to Ms. Mauger's February 5, 2003 letter.

5 9. On or about February 24, 2003, Ms. Mauger telephoned Respondent
6 and he stated that he was still investigating the cause of the returned item on his
7 trust account. Respondent acknowledged his need to respond to Ms. Mauger's
8 January 9, 2003, and February 5, 2003, letters. Respondent stated that he would
9 fax his response that afternoon.
10

11 10. On or about February 27, 2003, Respondent submitted his response
12 via facsimile. In that response, he stated that he had received the January 9, 2003
13 letter and that he had been researching to determine the cause for the returned
14 item on his trust account. Respondent explained that he could not find an
15 explanation for the returned item, but believed that it was the result of a bank
16 processing error. Respondent reported that he was continuing to work with his
17 bank to learn the cause of the returned item and provide an answer to the State
18 Bar.
19
20

21 11. On or about February 27, 2003, Ms. Mauger sent Respondent
22 correspondence requesting copies of his trust account bank statements, cancelled
23 checks, duplicate deposit slips, and individual client ledgers for the period of
24
25

1 December 1, 2002, through January 31, 2003. Respondent was given ten days in
2 which to provide the requested trust account records.

3
4 12. Respondent did not respond to Ms. Mauger's February 27, 2003
5 letter.

6 13. On or about August 5, 2003, Ms. Mauger sent Respondent follow-up
7 correspondence advising him that she had not received his response to her
8 February 27, 2003 letter, and gave him an additional ten days in which to
9 respond.
10

11 14. By facsimile dated August 21, 2003, Respondent responded and
12 provided copies of the requested trust account bank statements and cancelled
13 checks, covering the period of November 16, 2002, through February 17, 2003.
14 Respondent indicated that he was working to recover data from his computer,
15 which contained his client ledgers for transactions between October 2001 and
16 April 2002. Respondent reported that he was working on re-creating the ledger
17 information from client files and would provide that information as soon as
18 possible.
19
20

21 15. On or about August 25, 2003, Ms. Mauger sent Respondent
22 correspondence requesting that he explain seven trust account disbursement
23 transactions and provide the relevant client ledgers. In addition, Ms. Mauger
24 requested that Respondent provide the duplicate deposit slips or their equivalents
25

1 and individual client ledgers or their equivalents for the period of November 17,
2 2002 through February 14, 2003. Respondent was given ten days in which to
3 respond.
4

5 16. On or about September 8, 2003, Respondent faxed his response to
6 Ms. Mauger's August 25, 2003, letter. In regard to the seven trust account
7 disbursements that appeared to be non-client related transactions, Respondent
8 explained that the disbursements were for general office purposes and not on the
9 behalf of any client. Respondent reported that those disbursements were
10 mistakenly drawn from his trust account instead of his operating account. In
11 response to Ms. Mauger's request for duplicate deposit slips, Respondent
12 provided a copy of a transaction detail report from the Quicken software he uses.
13 In addition, Respondent supplied copies of "Completed Activity" reports as his
14 individual client ledgers.
15
16

17 17. The submitted "Completed Activity" reports did not contain the
18 required information to be considered individual client ledgers or the equivalent.
19 The "Completed Activity" reports simply capture the work or tasks that
20 Respondent completed for each client. The reports do not reflect any deposits or
21 disbursements pertaining to the individual clients.
22
23

24 18. On or about September 10, 2003, Ms. Mauger sent Respondent
25 correspondence with a copy of the Trust Account Transaction Register

1 spreadsheet that she had generated from Respondent's submitted trust account
2 records. Ms. Mauger requested that Respondent provide an accounting of the
3 \$194.00 balance in the trust account on November 17, 2002. Specifically,
4 Ms. Mauger requested that Respondent provide each client's name and
5 corresponding balance in the trust account. In addition, Ms. Mauger advised
6 Respondent that the "Completed Activity" reports that he supplied in lieu of
7 individual client ledgers did not reflect the dollar amounts deposited into the trust
8 account for clients nor did they indicate the dollar amounts disbursed from the
9 trust account for particular clients. Ms. Mauger requested that Respondent refer
10 to the Trust Account Transaction Register spreadsheet and provide the associated
11 client(s) for each and every deposit and disbursement transaction to and from the
12 trust account. Respondent was given twenty days in which to respond.
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16 19. Respondent did not respond to the September 10, 2003, letter.

17
18 20. On or about October 6, 2003, Ms. Mauger sent Respondent follow-
19 up correspondence advising him that she had not received his response to her
20 September 10, 2003, letter. Ms. Mauger sent Respondent a copy of the
21 September 10, 2003, letter and gave him an additional ten days in which to
22 respond.
23

24 21. Respondent did not respond to Ms. Mauger's follow-up
25 correspondence of October 6, 2003.

1 22. On or about October 17, 2003, Ms. Mauger called Respondent's
2 office and left a message advising that she had not received his response to her
3 September 10, 2003, and October 6, 2003 letters. Ms. Mauger requested that
4 Respondent contact her office to discuss his response as soon as possible.
5

6 23. Respondent did not return Ms. Mauger's October 17, 2003,
7 telephone call.
8

9 24. On or about October 30, 2003, the State Bar of Arizona requested a
10 Subpoena Duces Tecum for bank records on Respondent's Wells Fargo Arizona
11 Bar Foundation client trust account. The Subpoena Duces Tecum requested
12 copies of bank statements, cancelled checks, and deposits with offsets occurring
13 on Respondent's trust account from November 1, 2002, through June 30, 2003.
14 The Subpoena requested that Wells Fargo produce the copies of the bank records
15 by November 30, 2003.
16

17 25. Due to a delay with the Probable Cause Panelist, the State Bar did
18 not receive the signed Subpoena Duces Tecum back until December 3, 2003. A
19 new Subpoena Duces Tecum was drafted requesting the same records, changing
20 the response deadline from November 30, 2003, to December 31, 2003.
21

22 26. On or about December 5, 2003, the Subpoena Duces Tecum was
23 served on Wells Fargo.
24
25

1 27. On or about January 16, 2004, Wells Fargo produced the requested
2 trust account bank records pursuant to the Subpoena Duces Tecum.

3
4 28. On or about January 21, 2004, Ms. Mauger telephoned Respondent
5 to arrange a meeting to go over the subpoenaed bank records as well as to discuss
6 his trust account maintenance in an attempt to conclude the investigation.
7 Respondent agreed to meet with Ms. Mauger on January 28, 2004.

8
9 29. During their January 21, 2004, conversation, Ms. Mauger advised
10 Respondent that she was going to send him a copy of the Trust Account
11 Transaction Register spreadsheet that she had constructed from the records he
12 supplied as well as the bank records received pursuant to the State Bar's
13 subpoena. Ms. Mauger requested that Respondent review the spreadsheet and
14 supply supporting documentation relevant to the funds deposited to the trust
15 account at their January 28, 2004, meeting.

16
17 30. On or about January 22, 2004, Ms. Mauger faxed Respondent
18 correspondence confirming their January 28, 2004, meeting. Included in that fax
19 was a copy of the Trust Account Transaction Register spreadsheet. Ms. Mauger
20 again reminded Respondent to bring supporting documentation to their meeting
21 on January 28, 2004 relevant to the funds deposited to his trust account during the
22 period of November 17, 2002 through June 30, 2003.
23
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1 31. On or about January 28, 2004, Ms. Mauger met with Respondent at
2 the State Bar of Arizona offices in Phoenix, Arizona at 2:00 p.m. At that meeting
3 Ms. Mauger gave Respondent copies of the subpoenaed trust account records
4 received from Wells Fargo.
5

6 32. During the January 28, 2004, meeting, Respondent admitted that he
7 initially only had a trust account and did not maintain an operating account;
8 however, after attending the State Bar's Managing Your Trust Account
9 Continuing Legal Education program on September 12, 2003, Respondent opened
10 an operating account.
11

12 33. During the January 28, 2004 meeting, Respondent confirmed that he
13 did not maintain duplicate deposit slips or their equivalent.
14

15 34. During the January 28, 2004 meeting, Respondent advised that he
16 has a standard fee agreement that he always uses. Respondent indicated that he
17 does not have copies of all of the fee agreements. For example, when there was
18 no copy machine available, Respondent would let his client keep the original, as
19 he believed it was for their benefit.
20

21 35. During the January 28, 2004 meeting, Respondent admitted that the
22 disbursements made to Hong Kong Café from his trust account were payments to
23 his landlord for his office rent. Respondent indicated that these payments were
24 not related to a client.
25

1 36. During the January 28, 2004 meeting, Ms. Mauger requested that
2 Respondent provide the additional documentation to support that the funds in the
3 trust account for the period of November 17, 2002 through June 30, 2003 were
4 earned funds, and Ms. Mauger discussed specific examples of documentation that
5 Respondent could provide.
6

7 37. On or about January 30, 2004, Ms. Mauger sent Respondent follow-
8 up correspondence reminding him of the additional information that he had
9 agreed to provide to her within thirty days from the date of the January 28, 2004
10 meeting.
11

12 38. Respondent did not respond to Ms. Mauger's January 30, 2004 letter,
13 and failed to provide the agreed upon records.
14

15 39. On or about March 3, 2004, Ms. Mauger sent Respondent follow-up
16 correspondence advising him that she had not received a response to her January
17 30, 2004 letter, and gave Respondent an additional ten days in which to respond.
18

19 40. Respondent failed to respond to the March 3, 2004 letter.

20 41. On or about March 24, 2004, Ms. Mauger left a message at
21 Respondent's Flagstaff office advising him that she had not received his response
22 to her January 30, 2004 and March 3, 2004 letters. Ms. Mauger requested that
23 Respondent call her back to advise as to the status of his response.
24
25

1 42. Respondent never responded to Ms. Mauger's March 24, 2004 voice
2 mail message.

3
4 43. On or about April 30, 2004, the State Bar served a second Subpoena
5 Duces Tecum on Respondent's Wells Fargo Arizona Bar Foundation client trust
6 account, this time requesting bank statements covering the period of September 1,
7 2003 through March 30, 2004, with copies of corresponding cancelled checks and
8 deposits with offsets.

9
10 44. Wells Fargo produced the requested trust account records on or
11 about May 26, 2004.

12 45. Ms. Mauger's investigation of this matter revealed that on
13 December 27, 2002, Respondent's clients, the Milldrums, overpaid by \$425.00,
14 which Respondent deposited into his trust account. Respondent's office did not
15 determine the overpayment until February 25, 2003, at which time he issued trust
16 account check #1061 to the Milldrums. Review of the trust account bank
17 statements revealed that from December 27, 2002 through February 25, 2003,
18 Respondent's trust account fell below the \$425.00 that should have been in the
19 account for the Milldrums.
20
21

22 46. Ms. Mauger's investigation of this matter also revealed that
23 Respondent acknowledged his policy of depositing completely earned fees as
24 well as personal funds into his trust account; Respondent failed to maintain
25

1 duplicate deposit slips or the equivalent and individual client ledgers or the
2 equivalent; Respondent failed to conduct monthly reconciliations of the trust
3 account; Respondent was unable to account for all transactions in and out of his
4 client trust account; Respondent would deposit funds into the trust account via
5 automatic teller machine, and at the same time of the deposit he would receive
6 cash back from the deposit; and that Respondent conducted ATM withdrawals,
7 non-check withdrawals, and electronic funds transfers out of his client trust
8 account.
9
10

11 47. On or about July 26, 2004, Respondent was served with a Subpoena
12 Duces Tecum requesting documents pertaining to this matter.
13

14 48. On or about August 9, 2004, in response to the July 26, 2004
15 subpoena, Respondent provided client fee agreements/engagement letters,
16 signature pages of trust/emergency documents, client invoices, client billing
17 statements, and duplicate deposit slips for the period of November 1, 2002
18 through March 30, 2004. Respondent failed to provide bank statements for the
19 period of July 1, 2003 through August 31, 2003.
20

21 49. On or about November 2, 2004, the matter was transferred to the
22 new State Bar Staff Examiner, Gloria Barr.
23

24 50. Ms. Barr's investigation of this matter resulted in the following
25 additional findings: the majority of the funds deposited into the trust account from

1 November 1, 2002, through March 30, 2004, appear to have consisted of entirely
2 earned fees or personal funds; there were several deposits into the trust account
3 between November 1, 2002 and March 30, 2004 for which the documentation
4 was insufficient, not submitted, or no explanation was provided; there are
5 numerous checks contained in the documents submitted by Respondent that are
6 not recorded as deposits to the trust account and/or no explanation was provided;
7 there were ATM withdrawals made through January 27, 2004; and an apparent
8 bank error occurred on March 2, 2004 when a check from Flagstaff Floral in the
9 amount of \$195.67 was deposited as \$195.00.
10
11

12 51. Respondent failed to properly safeguard client funds, in violation of
13 ER 1.15(a), and Rules 43(d) (State Bar of Arizona Trust Account Guideline 1(c))
14 and 44(b).
15

16 52. Respondent failed to keep his funds separate from that of his client
17 funds on deposit in his trust account, in violation of ER 1.15(a) and Rules 43(a)
18 and 44(a).
19

20 53. Respondent failed to maintain complete trust account records for a
21 period of five years, in violation of ER 1.15(a) and Rules 43(a) and (d) (State Bar
22 of Arizona Trust Account Guidelines 1(e), 2(b), (d) and (f)).
23
24
25

1 54. Respondent failed to exercise due professional care in the
2 maintenance of his client trust account, in violation of Rule 43(d) (State Bar of
3 Arizona Trust Account Guideline 1(a)).
4

5 55. Respondent failed to maintain proper internal controls within his
6 office to adequately safeguard funds on deposit in the trust account, in violation
7 of Rule 43(d) (State Bar of Arizona Trust Account Guideline 1(c)).
8

9 56. Respondent failed to record all transactions to the trust account
10 promptly and completely, in violation of Rule 43(d) (State Bar of Arizona Trust
11 Account Guideline 1(d)).
12

13 57. Respondent failed to deposit funds intact to his trust account, in
14 violation of Rule 43(d) (State Bar of Arizona Trust Account Guideline 2(b)).
15

16 58. Respondent failed to only disburse from his trust account with pre-
17 numbered checks, in violation of Rule 43(d) (State Bar of Arizona Trust Account
18 Guideline 2(c)).
19

20 59. Respondent failed to conduct a monthly reconciliation of his trust
21 account, in violation of Rule 43(d) (State Bar of Arizona Trust Account Guideline
22 2(e)).
23

24 60. Respondent knowingly failed to respond to a lawful demand for
25 information from a disciplinary authority, in violation of ER 8.1(b).

1 61. Respondent refused to cooperate with staff of the State Bar acting in
2 the course of that person's duties, in violation of Rule 53(d).

3
4 62. Respondent failed to furnish information or respond promptly to an
5 inquiry or request from Bar Counsel made pursuant to the rules for information
6 relevant to the matter under investigation concerning Respondent's conduct, in
7 violation of Rule 53(f).

8
9 63. Respondent's conduct as described in this count violated Rule 42,
10 Ariz.R.S.Ct., specifically, ERs 1.15(a) and 8.1(b), and Rules 43(a) and (d), 44(a),
11 and 53(d) and (f), Ariz.R.S.Ct.

12 **COUNT TWO (File No. 03-1282/Palma)**

13
14 64. In or about December 2002, Andres Palma ("Mr. Palma") retained
15 Respondent to complete garnishment proceedings in two cases and to prepare a
16 complaint in a third case.

17 65. In or about December 2002, Mr. Palma paid Respondent \$250.00.

18
19 66. Mr. Palma's primary language is Spanish and he cannot read English
20 very well.

21 67. When Mr. Palma received correspondence from Respondent on or
22 about March 16, 2003, he did not understand it and asked his daughter, Nancy
23 Palma ("Ms. Palma") for assistance. If this matter went to a hearing, Respondent
24 would argue that, as agreed in the fee agreement, Mr. Palma received monthly
25

1 correspondence, on both January 17, 2003, and February 14, 2003, requesting
2 completion of client action items, but failed to respond.

3
4 68. Ms. Palma translated the correspondence for her father, and he then
5 dictated a response. Ms. Palma remained involved in Mr. Palma's legal matters
6 from that point forward. If this matter went to a hearing, Respondent would
7 argue that he did not receive a written response from Mr. Palma. In fact, Mr.
8 Palma did not communicate with Respondent again until March 28, 2003.

9
10 69. On or about March 28, 2003, Ms. Palma sent Respondent a letter
11 regarding his March 16, 2003 letter to Mr. Palma. Ms. Palma requested that
12 Respondent contact either Mr. Palma or her within five days or return
13 Mr. Palma's documents and \$250.00.

14
15 70. On or about April 1, 2003, Respondent telephoned Ms. Palma to
16 inform her that he could not discuss Mr. Palma's case with her due to attorney-
17 client privilege.

18
19 71. On or about April 16, 2003, Ms. Palma faxed Respondent a letter
20 signed by Mr. Palma authorizing Respondent to release all documentation to, and
21 to discuss any and all issues regarding his case with, Ms. Palma.

22
23 72. Within the April 16, 2003 letter, Mr. Palma states that both he and
24 Ms. Palma have attempted to contact Respondent and have had no response.
25 Mr. Palma also states that, if Respondent does not contact either himself or

1 Ms. Palma, or return the \$250.00, he will file a complaint against Respondent
2 with the State Bar of Arizona. Respondent denies this allegation.

3
4 73. On or about April 21, 2003, Ms. Palma spoke with Respondent
5 regarding the pending cases. At that time, Ms. Palma discussed the work
6 Respondent had completed since December 2002, and determined to terminate
7 his representation. If this matter went to a hearing, Respondent would argue that
8 on April 18, 2003, Respondent contacted Ms. Palma requesting that she retrieve
9 Mr. Palma's files. Respondent would further argue that, with regard to their April
10 21, 2003, conversation, Respondent agreed to terminate his representation of Mr.
11 Palma, and he accordingly prepared and faxed Ms. Palma a close-out letter on
12 April 24, 2003. Respondent would further argue that Ms. Palma failed to retrieve
13 Mr. Palma's file until June 12, 2003.

14
15
16 74. Ms. Palma charges that Respondent failed to respond to her requests
17 for an accounting or records and failed to appropriately communicate during the
18 four months of his employ. Respondent claimed to have prepared documents on
19 behalf of Mr. Palma, but failed to provide any documentation. Ms. Palma
20 charges that the \$250.00 paid to Respondent was only for costs. If this matter
21 went to a hearing, Respondent would argue that Ms. Palma never demanded an
22 accounting of records. Respondent would further argue that, regardless, he
23 provided her with a monthly accounting of Mr. Palma's case and monthly status
24
25

1 reports. Respondent would further argue that the \$250.00 applied toward his
2 hourly legal services, per their fee agreement.

3
4 75. On or about May 6, 2003, Ms. Palma sent Respondent a letter via
5 facsimile requesting a May 9, 2003 appointment for her to pick up Mr. Palma's
6 files and check from Respondent's office. Ms. Palma also requested that
7 Respondent contact her if there are any questions regarding the date and time she
8 proposed. If this matter went to a hearing, Respondent would argue that he never
9 received Ms. Palma's May 6, 2003, fax.

10
11 76. Respondent did not respond to Ms. Palma's May 6, 2003 letter.
12 Respondent denies this allegation.

13
14 77. On or about May 22, 2003, Ms. Palma sent Respondent an e-mail
15 requesting that Respondent contact her with a good date and time for her to go to
16 Respondent's office and pick up Mr. Palma's documents and check.

17
18 78. Respondent did not respond to Ms. Palma's May 22, 2003 letter. If
19 this matter went to a hearing, Respondent would argue that he never received an
20 e-mail from Ms. Palma.

21
22 79. On or about June 3, 2003, Ms. Palma left Respondent a voicemail
23 requesting that he call her to schedule a date and time for her to pick up
24 Mr. Palma's documents and check.

1 80. On or about June 4, 2003, Respondent sent Ms. Palma a fax stating
2 that he had tried "several times" to return her voicemail but that her system was
3 no longer taking incoming messages, and requested that she call him again to
4 coordinate the retrieval of Mr. Palma's documents.
5

6 81. On or about June 10, 2003, Ms. Palma sent Respondent a letter via
7 facsimile requesting that he contact her to set up a date and time so she can pick
8 up Mr. Palma's documents and check from Respondent.
9

10 82. Respondent did not respond to Ms. Palma's June 10, 2003 letter.
11 Respondent denies this allegation. If this matter went to a hearing, Respondent
12 would argue that he responded to Ms. Palma's June 10, 2003, letter, and, in fact,
13 agreed to meet with her on June 12, 2003, at 9:00 a.m., to deliver Mr. Palma's
14 file.
15

16 83. On or about July 8, 2003, Ms. Palma filed a complaint against
17 Respondent on behalf of Mr. Palma, and included a letter of release from
18 Mr. Palma with the complaint.
19

20 84. On or about August 21, 2003, the assigned Bar Counsel sent
21 Respondent the initial screening letter with a copy of the complaint and requested
22 a response within twenty days.
23

24 85. Respondent failed to respond to the August 21, 2003 letter.
25

1 86. On or about October 3, 2003, Bar Counsel sent Respondent a letter
2 reminding him of his duty to cooperate with the disciplinary investigation, and
3 requesting a response within ten days.
4

5 87. Respondent failed to respond to the October 3, 2003 letter.

6 88. On or about February 12, 2004, Bar Counsel telephoned Respondent
7 and asked why he had never filed a response to the allegations against him. At
8 that point Respondent claimed he had sent his response already and promised to
9 fax a copy on February 13, 2004. Respondent never faxed or sent a response.
10

11 89. On or about July 26, 2004, Respondent was served with a Subpoena
12 Duces Tecum requesting documents pertaining to this matter.
13

14 90. On or about July 26, 2004, Respondent sent a fax to Kevin McBay,
15 State Bar Staff Investigator, acknowledging receipt of the subpoena, and stating
16 that he had reviewed it and scheduled a deposition.
17

18 91. On August 9, 2004, Respondent produced a copy of the client file in
19 response to the subpoena.

20 92. Respondent failed to abide by his client's decisions concerning the
21 objectives of representation and/or failed to consult with the client as to the
22 means by which they are to be pursued, in violation of ER 1.2.
23

24 93. Respondent failed to act with reasonable diligence and promptness in
25 representing a client, in violation of ER 1.3.

1 94. Respondent failed to keep his client reasonably informed about the
2 status of a matter and/or failed to promptly comply with reasonable requests for
3 information, in violation of ER 1.4.
4

5 95. Respondent failed, upon termination of the representation, to take
6 steps reasonably practicable to protect a client's interests, in violation of
7 ER 1.16(d).
8

9 96. Respondent knowingly failed to respond to a lawful demand for
10 information from a disciplinary authority, in violation of ER 8.1(b).
11

12 97. Respondent refused to cooperate with staff of the State Bar acting in
13 the course of that person's duties, in violation of Rule 53(d).
14

15 98. Respondent failed to furnish information or respond promptly to an
16 inquiry or request from Bar Counsel made pursuant to the rules for information
17 relevant to the matter under investigation concerning Respondent's conduct, in
18 violation of Rule 53(f).
19

20 99. Respondent's conduct as described in this count violated Rule 42,
21 Ariz.R.S.Ct., specifically ERs 1.2, 1.3, 1.4, 1.16(d) and 8.1(b), and Rule 53(d)
22 and (f), Ariz.R.S.Ct.
23

COUNT THREE (04-0339/State Bar)

24 100. On February 23, 2004, the State Bar of Arizona received an
25 overdraft notice on Respondent's Wells Fargo Arizona Bar Foundation client

1 trust account. The notice indicated that, on February 18, 2004, check number
2 1134 for \$200.00 attempted to pay against the trust account when the balance at
3 the time was insufficient for payment.
4

5 101. At the time check number 1134 was presented, the balance in
6 Respondent's trust account was \$131.39.

7 102. It appears the bank paid check number 1134 and charged a \$33.00
8 overdraft charge, thereby overdrawing Respondent's trust account a total of
9 \$101.61.
10

11 103. On March 4, 2004, Leigh Ann Mauger ("Ms. Mauger"), former State
12 Bar Staff Examiner, sent Respondent an initial screening letter with a copy of the
13 non-sufficient funds notice, and requested an explanation as to the apparent cause
14 of the overdraft on his client trust account. Respondent was given twenty days in
15 which to provide his response.
16

17 104. Respondent failed to respond to the March 4, 2004 letter.
18

19 105. On April 2, 2004, Ms. Mauger sent Respondent follow-up
20 correspondence advising him that she had not received his response to the March
21 4, 2004 letter. Ms. Mauger also provided a copy of the March 4, 2004 letter and
22 gave respondent an additional ten days in which to respond.
23

24 106. Respondent failed to respond to the April 2, 2004 letter.
25

1 107. On or about April 30, 2004, the State Bar served a Subpoena Duces
2 Tecum on Respondent's Wells Fargo Arizona Bar Foundation client trust account
3 requesting bank statements covering the period of September 1, 2003 through
4 March 30, 2004 with copies of corresponding cancelled checks and deposits with
5 offsets.
6

7 108. Wells Fargo produced the requested trust account records on or
8 about May 26, 2004.
9

10 109. Ms. Mauger's investigation of this matter revealed that Respondent
11 conducted several "less cash" deposits, wherein he would receive cash back at the
12 time he made deposits to the trust account, and Respondent made numerous ATM
13 withdrawals from the trust account.
14

15 110. On or about July 26, 2004, Respondent was served with a Subpoena
16 Duces Tecum requesting documents pertaining to this matter.
17

18 111. On or about August 9, 2004, in response to the July 26, 2004
19 subpoena, Respondent provided client fee agreements/engagement letters,
20 signature pages of trust/emergency documents, client invoices, client billing
21 statements, and duplicate deposit slips for the period of November 1, 2002
22 through March 30, 2004. Respondent failed to provide bank statements for the
23 period of July 1, 2003 through August 31, 2003.
24
25

1 112. On or about November 2, 2004, the matter was transferred to the
2 new State Bar Staff Examiner, Gloria Barr ("Ms. Barr").

3
4 113. After reviewing Respondent's November 1, 2002 through March 30,
5 2004 records, Ms. Barr concluded that there were no significant factors to warrant
6 an amendment or addition to Ms. Mauger's findings, but noted that no bank
7 statements were submitted for the period of July 1, 2003 through August 31,
8 2003, and therefore were not part of her examination.

9
10 114. Respondent failed to properly safeguard client funds, in violation of
11 ER 1.15(a), and Rule 43(d) State Bar of Arizona Trust Account Guideline 1(c),
12 and 44(b).

13
14 115. Respondent failed to maintain complete trust account records for a
15 period of five years, in violation of ER 1.15(a), and Rule 43(a) and (d) State Bar
16 of Arizona Trust Account Guidelines 1(e), 2(b), (d) and (f).

17
18 116. Respondent failed to exercise due professional care in the
19 maintenance of his client trust account, in violation of Rule 43(d) State Bar of
20 Arizona Trust Account Guideline 1(a).

21 117. Respondent failed to maintain proper internal controls within his
22 office to adequately safeguard funds on deposit in the trust account, in violation
23 of Rule 43(d) State Bar of Arizona Trust Account Guideline 1(c).
24
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1 118. Respondent failed to deposit funds intact to his trust account, in
2 violation of Rule 43(d) State Bar of Arizona Trust Account Guideline 2(b).

3
4 119. Respondent failed to only disburse from his trust account with pre-
5 numbered checks, in violation of Rule 43(d) State Bar of Arizona Trust Account
6 Guideline 2(c).

7
8 120. Respondent failed to conduct a monthly reconciliation of his trust
9 account, in violation of Rule 43(d) State Bar of Arizona Trust Account Guideline
10 2(e).

11 121. Respondent knowingly failed to respond to a lawful demand for
12 information from a disciplinary authority, in violation of ER 8.1(b).

13
14 122. Respondent failed to cooperate with staff of the State Bar acting in
15 the course of that person's duties, in violation of Rule 53(d).

16 123. Respondent failed to furnish information or respond promptly to an
17 inquiry or request from Bar Counsel made pursuant to the rules for information
18 relevant to the matter under investigation concerning Respondent's conduct, in
19 violation of Rule 53(f).

20
21 124. Respondent's conduct as described in this count violated Rule 42,
22 Ariz.R.S.Ct., specifically, ERs 1.15(a) and 8.1(b), and Rules 43(a) and (d), 44(b),
23 and 53(d) and (f), Ariz.R.S.Ct.
24
25

1 **COUNT FOUR (04-0995/Durfee)**

2 125. Respondent was employed by Richard Durfee ("Mr. Durfee") from
3 approximately December 2000 through July 2002.
4

5 126. On or about June 10, 2004, Mr. Durfee filed a complaint against
6 Respondent alleging unethical conduct on Respondent's part in reference to eight
7 former clients: Christensen, Grammond, Hangee, Loftis, Rogerson, Morse,
8 Gregg, and Martin.
9

10 Christensen

11
12 127. Todd and Cheryl Christensen (the Christensens") were referred to
13 Mr. Durfee's firm by Mr. Durfee's brother for assistance in establishing a
14 professional LLC, East Valley Dental Anesthesia, PLLC ("EVDA").
15

16 128. Respondent was named statutory agent for EVDA, on behalf of
17 Mr. Durfee's firm. If this matter went to a hearing, Respondent would argue that
18 that he was named statutory agent for EVDA, on behalf of the client.
19

20 129. In or about July 2002, Respondent left Mr. Durfee's firm.

21 130. In or about February 2003, Mr. Durfee prepared the necessary
22 documentation to change the named statutory agent to himself.

23 131. The Christensens signed the change and the documents were filed
24 with the Arizona Corporation Commission ("ACC") on or about February 26,
25 2003.

1 132. On or about March 11, 2003, the ACC sent a letter to Mr. Durfee's
2 firm's address indicating that Respondent had attempted to change the statutory
3 agent address to Respondent's new firm's address, and had signed on behalf of
4 the Christensens. If this matter went to a hearing, Respondent would argue that
5 he signed his name authorizing the change of address as statutory agent.
6

7 133. The Christensens had not consented to Respondent signing on their
8 behalf.
9

10 134. The Christensens had never met Respondent.

11 135. From approximately March 2003 to February 2004, Respondent sent
12 the Christensens billings for statutory agent services he provided through the end
13 of 2002. If this matter went to a hearing, Respondent would argue that once, in
14 March of 2003, and a second time, in February of 2004, he sent the Christensens
15 a billing statement for statutory agent services he provided through the end of
16 2002.
17

18 136. On or about February 15, 2004, the Christensens sent Respondent a
19 note questioning the bill, stating that they had never met with him, and that
20 Mr. Durfee still had their file. The Christensens stated they would not be paying
21 Respondent.
22

23 137. The State Bar Staff Investigator confirmed this information with
24 Cheryl Christensen on or about August 24, 2004.
25

Grammond

1
2 138. Mike Grammond ("Mr. Grammond") retained Mr. Durfee's firm to
3 assist him in setting up MGSP, LLC.
4

5 139. Respondent was named statutory agent for MGSP.

6 140. In or about July 2002, Respondent left Mr. Durfee's firm.

7 141. In or about February 2003, Mr. Durfee prepared the necessary
8 documentation to change the named statutory agent to himself.
9

10 142. Mr. Grammond signed the change and the documents were filed with
11 the ACC on or about February 26, 2003.

12 143. Prior to Mr. Durfee's February 26, 2003 filing, Respondent had
13 changed the statutory agent address to his new firm's address, and had signed on
14 behalf of Mr. Grammond without Mr. Grammond's knowledge or consent. If this
15 matter went to a hearing, Respondent would argue that he signed his name
16 authorizing the change of address as statutory agent.
17

18 144. Mr. Durfee later discovered that he was listed as the statutory agent
19 for MGSP, but Respondent's address was listed.
20

21 145. Mr. Durfee's office contacted the ACC regarding the error, and the
22 ACC changed its records.
23

24 146. From approximately March 2003 to June 2004, Respondent sent
25 Mr. Grammond billings for statutory agent services he provided through the end

1 of 2002. If this matter went to a hearing, Respondent would argue that once, in
2 March of 2003, and a second time, in June of 2004, he sent Mr. Grammond a
3 billing statement for statutory agent services he provided through the end of 2002.
4

5 147. Mr. Grammond did not know Respondent and the two never met.

6 148. The State Bar Staff Investigator confirmed the above referenced
7 information with Mr. Grammond on or about August 25, 2004.
8

9 Hangee

10 149. On or about June 13, 2002, George Hangee ("Mr. Hangee"), gave
11 Respondent check number 1309 for \$200.00 payable to "Goodson, Manley and
12 Durfee". If this matter went to a hearing, Respondent would present evidence
13 that the fees were for services Respondent had already performed.
14

15 150. In or about October 2002, Mr. Hangee called Mr. Durfee and
16 complained that he had received a bill and that a payment he had made to
17 Mr. Durfee's firm had not posted to his account.
18

19 151. If this case went to a hearing, the State Bar would contend that
20 Respondent misappropriated Mr. Hangee's payment to Mr. Durfee's firm by
21 depositing it into Respondent's own account. Respondent would argue that he
22 believed that the Hangees had retained him, not the Durfee firm, and that this
23 belief was reasonable based on the business practices of the Durfee firm.
24
25

1 denies this allegation. If this matter went to a hearing, Respondent would argue
2 that he called the Rogersons on September 18, 2002 and prepared a letter
3 committing to complete their project by September 23, 2002. Respondent would
4 further argue that he followed up on this letter by calling the Rogersons on
5 September 24, 2002, wherein the Rogersons informed him that they decided to
6 return to Mr. Durfee.
7

8 167. Mr. Durfee completed the Rogersons' work at no additional charge.
9

10 168. The State Bar Staff Investigator confirmed this information with
11 Terry Rogerson on August 25, 2004.

12 169. Terry Rogerson stated that there were many communication
13 problems with Respondent. If this matter went to a hearing, Respondent would
14 argue that Mr. Durfee's staff was the source of their communication problems.
15

16 Morse

17 170. Gary and Jan Morse ("the Morses") retained Mr. Durfee's firm to
18 assist them with estate planning.
19

20 171. Respondent was their assigned attorney on behalf of the firm.

21 172. Mr. Durfee's firm created the necessary documents, and scheduled a
22 signing ceremony which Respondent was to attend.
23

24 173. Respondent failed to attend the original signing ceremony as well as
25 those rescheduled for June 21, 2002, and August 27, 2002. Respondent denies

1 this allegation. If this matter went to a hearing, Respondent would argue that Mr.
2 Durfee's staff was the source of their scheduling problems. Respondent would
3 further argue that there was no meeting scheduled for August 27, 2002, but he
4 was nonetheless in contact with the Morses three times that day.
5

6 174. On or about August 30, 2002, Mr. Durfee received a letter from the
7 Morses complaining that their work had never been done and requesting a refund.
8 Mr. Durfee offered to complete the work, explaining that he did not know what
9 had happened in regards to Respondent. The Morses were too upset and just
10 wanted their money back, so Mr. Durfee refunded their \$750.00 retainer.
11 Respondent denies this allegation. If this matter went to a hearing, Respondent
12 would argue that he, in fact, prepared the Morse's letter to Mr. Durfee.
13 Respondent would further argue that this letter additionally requested Mr. Durfee
14 to transfer the Morse's file to Respondent.
15
16

17 175. The State Bar Staff Investigator confirmed this information with
18 Gary Morse on or about August 26, 2004.
19

20 176. Mr. Morse stated that there were communication problems with
21 Respondent from the start of the representation. If this matter went to a hearing,
22 Respondent would argue that the communication problems resulted from Mr.
23 Durfee and his administrative staff. Respondent further documents nine contacts
24
25

1 with the Morses between his decision to leave Mr. Durfee's firm and the Morse's
2 decision to seek other counsel.

3
4 Gregg

5 177. Prior to his employment with Mr. Durfee, Respondent was retained
6 to represent the estate of Margaret Gregg.

7 178. Mr. Durfee received a letter dated October 28, 2002 from Louis
8 Emerson, the grandson of the executor of the estate complaining about the billing
9 and stating that the fee agreement provides that all legal fees would be paid from
10 the estate.
11

12 179. Upon researching the matter, Mr. Durfee discovered outstanding fees
13 and costs in the amount of \$7,607.50. If this matter went to a hearing,
14 Respondent would argue that Mr. Durfee himself charged the outstanding fees
15 and costs in the amount of \$7,607.50 and had no right to do so.
16

17 180. Respondent was responsible for all billing and legal work in the
18 matter.
19

20 181. On or about May 26, 2004, Mr. Durfee received a phone call from
21 Jenna Gomez ("Ms. Gomez"), a beneficiary of the estate stating that she has not
22 received her distribution from Respondent. Ms. Gomez claimed that she
23 contacted Respondent repeatedly, but he refused to communicate with her and
24 threatened to seek an injunction for harassment if she did not stop calling. If this
25

1 matter went to a hearing, Respondent would argue that he urged Ms. Gomez to
2 contact the trustee with her questions and concerns.

3
4 182. Ms. Gomez asked Mr. Durfee to contact the State Bar.

5 183. Thereafter, Respondent paid Ms. Gomez \$4,385.54. If this matter
6 went to a hearing, Respondent would argue that he met with the trustee and all the
7 available beneficiaries to discuss the trust's administration. Respondent would
8 further argue that this meeting resolved everyone's concerns, and, thereafter, the
9 trustee authorized a distribution to Ms. Gomez in the amount of \$4,385.54.
10

11 184. Ms. Gomez believes that she is entitled to receive \$6000.00 total, but
12 claims that Respondent told her she received less because of his fees and because
13 she "called too many times." Respondent denies these allegations. If this matter
14 went to a hearing, he would argue that Ms. Gomez received the correct
15 disbursement, as approved by the trustee in June of 2002
16

17 185. Respondent claimed that he had mailed the payment to Ms. Gomez
18 two years earlier and did not realize that she had not received payment.
19

20 186. The State Bar Staff Investigator confirmed this information with
21 Ms. Gomez on or about August 24, 2004.
22
23
24
25

1 the probate matter was on track so long as Mr. Durfee's administrative staff
2 completed the filing.

3
4 193. Following Respondent's departure from Mr. Durfee's firm,
5 Mr. Durfee received a complaint that the probate had not closed.

6 194. Upon researching the matter, Mr. Durfee discovered that Respondent
7 had not prepared any documents, the Martins had not signed anything, the probate
8 had never been filed with the court, and the statutory period had not run.
9 Respondent denies this allegation. If this matter went to a hearing, Respondent
10 would argue that he prepared the documents, which the Martins signed.
11

12 195. Thereafter, Mr. Durfee completed the probate work and refunded
13 money to the Martins.
14

15 196. The State Bar Staff Investigator contacted Susan Martin on
16 August 27, 2004. Ms. Martin confirmed that she was dissatisfied with the work
17 performed on her case by Respondent and also stated her dissatisfaction with
18 Mr. Durfee as the supervisor of Respondent.
19

20 197. Respondent failed to abide by his clients' decisions concerning the
21 objectives of representation and/or failed to consult with the client as to the
22 means by which they are to be pursued, in violation of ER 1.2.
23

24 198. Respondent failed to act with reasonable diligence and promptness in
25 representing clients, in violation of ER 1.3.

1 200. Respondent failed to keep his clients reasonably informed about the
2 status of a matter and/or failed to promptly comply with reasonable requests for
3 information, in violation of ER 1.4.
4

5 201. Respondent charged an unreasonable fee, in violation of ER 1.5.

6 202. Respondent failed to properly safeguard client property in violation
7 of ER 1.15.
8

9 203. Respondent failed, upon termination of the representation, to take
10 steps reasonably practicable to protect clients' interests, in violation of ER
11 1.16(d).
12

13 204. Respondent failed to make reasonable efforts to expedite litigation
14 consistent with the interests of the clients, in violation of ER 3.2.

15 205. Respondent engaged in conduct prejudicial to the administration of
16 justice, in violation of ER 8.4(d).
17

18 206. Respondent's conduct as described in this count violated Rule 42,
19 Ariz.R.S.Ct., specifically, ERs 1.2, 1.3, 1.4, 1.5, 1.15, 1.16(d), 3.2, and 8.4(d).
20

State Bar Screening File No. 04-2149/Ciula

21 207. John and Agnes Ciula retained Respondent to prepare estate
22 planning documents.
23

24 208. On November 3, 2004 Respondent personally notarized the Ciulas'
25 and the witness signatures on the Trust documents.

1 208. Respondent's notary commission was invalid on November 3, 2004,
2 the commission having expired over a year before on October 6, 2003.

3 209. If this matter proceeded to hearing, the State Bar would take the
4 position that Respondent was aware that his notary commission was invalid at the
5 time that he notarized the Ciulas' documents. Respondent denies this allegation.
6 If this matter went to a hearing, Respondent would argue that he believed by that
7 time that his commission had been renewed.
8

9 210. Respondent changed the date of expiration on the notary stamp by
10 crossing-out the commission expiration year "2003" and writing "7" over the
11 number "3," making it appear that the expiration year was "2007". If this matter
12 proceeded to hearing, the State Bar would take the position that did so knowingly.
13 Respondent would argue that he believed that he was making a mere ministerial
14 change that was permissible because he thought a new stamp had been sent to
15 him that had not yet arrived or that had been lost in the mail. Respondent,
16 however, did not attempt to learn why he had not received a new stamp.
17

18 211. Respondent recorded the Ciulas' residential deed on December 2,
19 2004.
20

21 212. Due to Respondent's actions, the Ciulas' had to re-record the deed
22 with the Maricopa County Recorder's Office and had to provide certification
23 stating the reason for the need to re-record their Special Warranty Deed.
24
25

1 213. Respondent engaged in conduct prejudicial to the administration of
2 justice, in violation of ER 8.4(d).

3 214. Respondent's conduct as described in this count violated Rule 42,
4 Ariz.R.S.Ct., specifically, ER 8.4(d).

5
6 **CONDITIONAL ADMISSIONS**

7 Respondent conditionally admits, for purposes of this agreement only, that
8 his conduct as described above violated Rule 42, Ariz.R.S.Ct., specifically, ER
9 1.2, ER 1.3, ER 1.4, ER 1.5, ER 1.15, ER 1.16(d), ER 3.2, ER 8.1(b) and ER
10 8.4(d); and Rules 43(a) and (d), 44(a) and 53(d) and (f), Ariz.R.S.Ct.

11
12 **CONDITIONAL DISMISSALS**

13 The State Bar conditionally agrees, for purposes of this agreement only, to
14 dismiss the alleged violations of ERs 4.1 and 8.4(c), Rule 42, Ariz.R.S.Ct.

15
16 **ABA STANDARDS**

17 The *ABA Standards* list the following factors to consider in imposing the
18 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
19 actual or potential injury caused by the lawyer's misconduct, and (4) the
20 existence of aggravating or mitigating circumstances. *ABA Standard 3.0*.

21
22 The parties indicated that *Standards 4.1, 4.4, 6.2, 7.0* are the most
23 applicable in this matter. A review of *ABA Standard 4.0 (Violations of Duties*
24 *Owed to Clients)* indicates that suspension is the presumptive sanction for
25

1 Respondent's misconduct. *Standard 4.42 (Lack of Diligence)* specifically
2 provides:

3 Suspension is generally appropriate when:

- 4 (a) a lawyer knowingly fails to perform services for a client
5 and causes injury or potential injury to a client; or
6 (b) a lawyer engages in a pattern of neglect and causes
7 injury or potential injury to a client.

8 Respondent violated his duties to clients by failing to properly safeguard
9 client funds and by failing to exercise due professional care in the maintenance of
10 his client trust account. In addition, Respondent violated his duties to clients by
11 failing to consult with clients about the objectives of representation or the means by
12 which the objectives were to be pursued; failing to keep clients reasonably informed
13 about the status of a matter or to comply with the clients' requests for information;
14 failing to act with reasonable diligence and promptness; and failing to take
15 reasonable steps to protect clients' interests (such as returning their files and/or their
16 monies) at the close of a representation. Respondent violated his duties to the legal
17 system and to the profession by failing to comply with the ethical rules, in particular
18 the trust account rules, and by failing to cooperate with the State Bar in its
19 investigation. Respondent failed to abide by his clients' decisions concerning the
20 objectives of representation and/or failed to consult with the clients as to the means
21 by which they were to be pursued; failed to act with reasonable diligence and
22 promptness in representing a client; failed to keep his client reasonably informed
23
24
25

1 about the status of a matter and/or failed to promptly comply with reasonable
2 requests for information; charged an unreasonable fee; failed, upon termination of
3 the representation, to take steps reasonably practicable to protect a client's interests;
4 and failed to make reasonable efforts to expedite litigation consistent with the
5 interests of the client.
6

7 With regard to the trust account violations, it is clear that Respondent had a
8 knowing state of mind as he attended a CLE class on trust accounts after his first
9 overdraft, but continued to mismanage his trust account afterwards, resulting in a
10 second overdraft. The parties agree that Respondent had a knowing state of mind in
11 relation to the trust account violations and the failures to respond to the State Bar;
12 however, if the matter were to proceed to hearing, Respondent would introduce
13 evidence that his trust account has been properly managed for over a year.
14
15

16 The parties are not in agreement with regard to the client related charges. If
17 this matter went to hearing, Respondent would testify that the charges related to
18 client funds (cashing the checks) were related to an employment dispute with Mr.
19 Durfee. Respondent would testify that he did not misappropriate any client funds
20 because, per his arrangement with Mr. Durfee, the clients who made payments to
21 the firm were, in fact, supposed to pay Respondent directly.
22
23

24 As to the use of an expired notary stamp, Respondent would testify that, at
25 the time that he used the notary stamp, he was under the belief that his bonding

1 company was in the process of re-issuing the notary bond and submitting the
2 necessary documentation to the Secretary of State. Respondent would
3 additionally testify that no malice was intended by making the change to the
4 notary stamp's expiration date and that, once he discovered the problem, he made
5 every attempt to rectify the situation with his clients. Therefore, Respondent
6 would argue that, if there was a violation, his state of mind was negligent rather
7 than knowing. Respondent would deny the client charges relating to 1.2, 1.3, 1.4,
8 1.5, 1.15(a), 1.16(d), 3.2, or 8.4(d). He would also deny charges related to 4.1,
9 and 8.4(c), or would argue that if there was a violation, it was negligent rather
10 than knowing.
11
12
13

14 If the matter went to hearing, the State Bar would argue that all the charges
15 were ethical violations on the part of Respondent, performed with at least a
16 knowing state of mind. There was potential injury to clients involved in all of
17 Respondent's rule violations. With regard to the trust account violations, there was
18 actual harm to clients as there was a period of time during Count One where client
19 funds were misappropriated because the balance fell below that which was required
20 to be in the account. Additionally, with the overdrafts, there were also periods of
21 time where the funds in the account are insufficient.
22
23
24
25

1 The case *In re Fuller*, Supreme Court file SB-04-0130-D (2004), is similar
2 to the case at hand. Fuller had failed to perform monthly reconciliations of his
3 trust account; failed to safeguard client funds; failed to keep complete records of
4 trust account funds; and failed to respond to the State Bar's requests for
5 information. In addition, the Hearing Officer concluded that Fuller had submitted
6 altered documents (checks) to the State Bar during a disciplinary proceeding. The
7 Disciplinary Commission agreed with the State Bar that a suspension of no less
8 than six months and one day was appropriate. Fuller was found to have violated
9 Rule 42, Ariz.R.S.Ct., specifically ERs 1.15, 8.1(a) and 8.4(c) as well as Rules 43,
10 44 and 51(h) and (i)¹, Ariz.R.S.Ct. There were six aggravating factors present in
11 *Fuller*: prior disciplinary offenses; pattern of misconduct; bad faith obstruction of
12 the disciplinary proceeding by intentionally failing to comply with rules or orders
13 of the disciplinary agency; submission of false evidence, false statements, or other
14 deceptive practices during the disciplinary process; refusal to acknowledge
15 wrongful nature of conduct; and substantial experience in the practice of law. In
16 mitigation, the only two mitigating factors found to be present were absence of a
17 dishonest or selfish motive and personal or emotional problems.
18
19
20
21
22
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25 ¹ Re-numbered Rule 53 (f) and (d), respectively, in effect as of December 1, 2003, and as charged in the instant case.

1 In this case, the same trust account and failure to cooperate rule violations
2 apply. The aggravating and mitigating factors are also very similar. Notably,
3 there was no submission of false evidence by this Respondent—however, given
4 the number of client communication-related complaints that were not present in
5 *Fuller*, the sanction appears proportional.

7 In the case *In re Crown*, Supreme Court No. SB-03-0129-D (2003), Crown
8 was suspended for six months and one day, with two years probation upon
9 reinstatement and payment of costs. Crown failed to file an answer and a default
10 was entered. A hearing on aggravation and mitigation was scheduled and when
11 Crown failed to appear he was contacted by telephone. The Hearing Officer
12 agreed to continue the hearing and Crown subsequently attended the continued
13 hearing. The State Bar had filed eight counts against Crown for violation of ERs
14 1.2, 1.3, 1.4, 1.15, 1.16(b), 3.2, 4.1, 8.1(b) 8.4 (c) and (d), as well as Rules 43 and
15 44, and Rule 51(h) and (i), Ariz.R.S.Ct. (there were only four consumer charges,
16 but the bar counsel separately charged a trust account count and three failure to
17 respond counts). Prior to the aggravation/mitigation hearing, the State Bar was
18 asking for a two-year suspension.

22 After hearing the evidence during the aggravation/mitigation hearing, the
23 hearing officer opined that two of the counts would not have been proven or
24 would not have been serious. However, as Respondent had defaulted, those
25

1 counts still applied. The counts that the Hearing Officer believed would have
2 been proven involved the failures to respond, the trust account violations, and
3 communication, competence, scope and diligence issues. Crown did not know
4 how to keep his trust account properly. There were four factors in aggravation:
5 multiple offenses; bad faith obstruction and failure to cooperate with the State
6 Bar; refusal to acknowledge the wrongful nature of the conduct (for failing to
7 participate in the proceedings until the aggravating/mitigation stage and Crown's
8 attitude in his failure to accept responsibility); and substantial experience in the
9 practice of law. Two factors were found in mitigation: the absence of a prior
10 disciplinary record and the absence of a dishonest or selfish motive. The *Crown*
11 case is very proportional to the case at hand.

12
13
14
15 In *In re McAlister*, 2002 Ariz. LEXIS 188, Supreme Court case SB-02-
16 0123-D (2002), McAlister entered into an Agreement for Discipline by Consent
17 providing for a six month and one day suspension, probation with specific terms,
18 and payments of costs. It was a two-count complaint—one count related to a
19 client complaint and the other related to trust account violations. The ER
20 violations in the client complaint were, for the most part, not supported by the
21 evidence, but a number of trust account violations were proven. The most serious
22 issue was misappropriation of \$28,000.00 during a one-year period, although
23 McAlister had replaced all the missing funds at some point.
24
25

2 Rule 42, Ariz.R.S.Ct., specifically ERs 1.15, 1.16, 8.4, and Rules 43 and 44,
3 Ariz.R.S.Ct. Three aggravating factors were found: selfish or dishonest motive;
4 vulnerability of the victims; and substantial experience in the practice of law. In
5 mitigation, there were several factors present including absence of a prior
6 disciplinary record; personal or emotional problems; mental disability; timely
7 restitution and efforts to rectify the consequences of her misconduct; full and free
8 disclosure to disciplinary board; and remorse, with the greatest weight being
9 given to McAlister's mental disability (she was bipolar).

12 In the matter at hand, Respondent does not have a mental disability, and
13 has less mitigation and more aggravation. He has trust account violations as well
14 as client related violations. In sum, *McAlister* is another similar case that may be
15 used to determine the appropriate sanction for Respondent's conduct.

17 RECOMMENDATION

18
19 The purpose of lawyer discipline is not to punish the lawyer, but to protect
20 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
21 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
22 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
23 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
24
25

1 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
2 (1994).

3
4 In imposing discipline, it is appropriate to consider the facts of the case, the
5 American Bar Association's *Standards for Imposing Lawyer Sanctions*
6 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
7
8 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

9 Upon consideration of the facts, application of the *Standards*, including
10 aggravating and mitigating factors, and a proportionality analysis, this Hearing
11 Officer recommends acceptance of the Tender of Admissions and Agreement for
12 Discipline by Consent and the Joint Memorandum in Support of Agreement for
13 Discipline by Consent providing for the following:
14

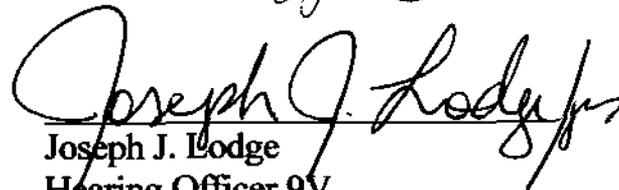
15 1. Respondent shall be suspended for a period of six months and one day
16 retroactive to May 20, 2005.

17 2. Respondent shall be placed on probation upon reinstatement. The length
18 and terms to be determined at the time of reinstatement.

19 3. Respondent shall pay restitution in the amount of \$250.00 to the Palmas.
20
21
22
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24
25

disciplinary proceeding.

DATED this 21st day of June, 2005.


Joseph J. Lodge
Hearing Officer 9V

Original filed with the Disciplinary Clerk
this 21st day of June, 2005.

Copy of the foregoing was mailed
this 21st day of June, 2005, to:

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Respondent's Counsel
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