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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) No. 03-1798
OF THE STATE BAR OF ARIZONA,)

CARL D. LEE,
Bar No. 007439

RESPONDENT.)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

A Probable Cause Order was filed on January 10, 2005. A one-count Complaint was filed on March 2, 2005 and served by mail on March 3, 2005; Respondent filed his Answer on April 14, 2005. A settlement conference was set for June 7, 2005; however, the parties reached a tentative agreement prior to that date and waived their right to the settlement conference. A Tender of Admissions and Agreement for Discipline by Consent (the "Tender") and a Joint Memorandum in Support of Agreement for Discipline by Consent (the "Joint Memo") were filed on July 6, 2005. Exhibit B to the Joint Memo was subsequently filed on July 8, 2005. No hearing has been held in this matter.

FINDINGS OF FACT

1. At all times relevant to this matter, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice on October 23, 1982.

2. On or about September 26, 2003, the State Bar of Arizona received an overdraft notice regarding Respondent's Wells Fargo Arizona Bar Foundation client trust account (the "Trust Account").

3. On or about September 24, 2003, check number 5593 in the amount of \$350.00

1 attempted to pay against the Trust Account at a time when the balance at the time was only
2 \$235.68. Wells Fargo paid check number 5593 and charged a \$29.00 overdraft fee; thereby
3 overdrawing the Trust Account by a total of \$142.62.

4 4. On or about October 2, 2003, Leigh Ann Mauger ("Ms. Mauger"), then the State
5 Bar's staff examiner, sent Respondent a copy of the overdraft notice with a letter requesting an
6 explanation.

7 5. On or about October 21, 2003, Respondent responded that the overdraft was the
8 result of a deposit that he had credited on his Trust Account check register but failed to actually
9 deposit. Respondent stated that, on August 29, 2003, he received a check for \$250.00 from a
10 client for advanced fees. He prepared the Trust Account deposit slip and documented the
11 deposit on his Trust Account check register. After waiting for an extended period of time at the
12 bank to make the deposit, he decided to leave and return to the bank the next day. Respondent
13 stated that he placed the deposit in the zipper compartment of his briefcase.

14 6. However, Respondent also indicated that his mother-in-law passed away on
15 August 30, 2003. He explained that, consequently, he had become consumed with travel
16 arrangements and attending her funeral in North Carolina. After attending the funeral, he went
17 to a conference in Denver and didn't return to Phoenix until September 6, 2003. Respondent
18 provided a copy of his travel itinerary and explained that, during these events, he had forgotten
19 about the \$250.00 deposit in his briefcase.

20 7. Respondent further advised that, on September 8, 2003, he completed and filed
21 the complaint for the client who had provided him the \$250.00 fee. He did not remember that
22 he had forgotten to deposit the \$250.00 to the Trust Account until he received the overdraft
23 notice. On September 29, 2003, after receiving the overdraft notice, he deposited the \$250.00
24 to the trust account. Respondent provided the deposit receipt for the deposit and a partial trust

1 account bank statement for September 2003.

2 8. On or about October 24, 2003, Ms. Mauger wrote to Respondent and requested
3 copies of the missing pages of his September 2003 Trust Account bank statement, with
4 corresponding cancelled checks and individual client ledgers.

5 9. On or about November 12, 2003, Respondent submitted a written request for an
6 extension of time to respond. Ms. Mauger granted Respondent an extension to December 5,
7 2003.

8 10. On or about December 8, 2003, Ms. Mauger received a facsimile from
9 Respondent advising that he was still collecting information to respond to her October 24, 2003
10 letter.

11 11. Respondent submitted a response dated December 16, 2003. In it, Respondent
12 provided the requested Trust Account bank statement and the cancelled checks. He explained
13 that all of the funds deposited into the Trust Account in September 2003 were earned and
14 therefore he did not maintain individual client ledgers. Respondent indicated that he could
15 identify the source of funds for each transaction.

16 12. On or about December 23, 2003, Ms. Mauger sent Respondent another letter
17 requesting additional information.

18 13. Respondent failed to respond to Ms. Mauger's December 23, 2003 letter.

19 14. On or about January 21, 2004, Ms. Mauger again wrote to Respondent
20 requesting he respond to her December 23, 2003, letter and giving him an additional ten days in
21 which to comply.

22 15. By letter dated February 5, 2004, Respondent submitted a portion of the
23 requested information. Respondent claimed that, due to a medical situation with his son, he
24 was unable to provide the other items requested in Ms. Mauger's letter. Respondent reported

1 that he would continue to work on the other items and submit them within two weeks.

2 16. On or about February 13, 2004, Respondent sent Ms. Mauger a fax advising that
3 he was still in the process of compiling the requested records. Respondent indicated that his
4 computer had developed a virus and had caused delays in his being able to retrieve some of the
5 requested items. Respondent reported that he would mail the other documents on Monday,
6 February 16, 2004.

7 17. By letter dated February 16, 2004, Respondent submitted copies of client billing
8 and settlement statements. Respondent explained that he did not maintain duplicate deposit
9 slips, as he did not realize that it was a requirement. In addition, Respondent indicated that he
10 maintained client ledgers only for a client to whom he charged an hourly rate. Respondent
11 explained that he did a fair amount of work wherein he charged a flat fee, for which he did not
12 bill the client or maintain a client ledger. Respondent explained that he was confused by Ms.
13 Mauger's request to provide documentation to support the nature of the funds deposited to the
14 trust account if a client ledger was not maintained.

15 18. On or about February 26, 2004, Ms. Mauger wrote and asked Respondent for
16 additional information, including certain trust account statements and an explanation of why he
17 deposited earned funds into his trust account. She also asked Respondent to explain if he
18 advanced the costs or if his clients advanced him funds to cover the anticipated costs.
19 Respondent was given ten days to respond.

20 19. Respondent did not respond to Ms. Mauger's February 26, 2004, letter within
21 ten days.

22 20. On March 15, 2004, Ms. Mauger sent Respondent follow-up correspondence
23 advising him that she had not received a response to her February 26, 2004 letter. Ms. Mauger
24 gave Respondent an additional ten days in which to respond.

1 21. On or about March 31, 2004, Respondent submitted his response and provided
2 the missing trust account bank statements. In addition, he explained that he usually advanced
3 costs to his clients, but not always, because sometimes clients paid them in advance.
4 Respondent neglected to respond to Ms. Mauger's question with regard to his depositing earned
5 fees into his trust account.

6 22. On or about April 9, 2004, Ms. Mauger sent Respondent correspondence with a
7 copy of the daily balance spreadsheet she had created using previously provided records and
8 requested additional information necessary to reconcile the account.

9 23. Respondent did not respond to Ms. Mauger's April 9, 2004 letter.

10 24. On or about May 18, 2004, Ms. Mauger sent Respondent correspondence
11 advising him that she had not received a response to her April 9, 2004 letter and gave him an
12 additional ten days in which to respond.

13 25. Respondent did not respond to Ms. Mauger's May 18, 2004 letter.

14 26. On or about May 28, 2004, Ms. Mauger left a message for Respondent advising
15 him that she had not received a response to her April 9, 2004 or May 18, 2004 letters.

16 27. On or about June 1, 2004, Respondent returned Ms. Mauger's phone call and
17 advised that he would reply to her requests within the next week or so.

18 28. Respondent never submitted his response.

19 29. On or about June 22, 2004, Ms. Mauger left another message for Respondent
20 advising him that she still had not received his response to her April 9, 2004 requests.

21 30. On or about June 24, 2004, Respondent left Ms. Mauger a message advising that
22 he would respond within the next week. Respondent indicated that he was having health issues
23 and that, if he was unable to complete his response within the following week, he would call
24 and let Ms. Mauger know.

1 31. Respondent did not respond nor did he contact Ms. Mauger to advise her as to
2 when he anticipated submitting his response.

3 32. On August 20, 2004, bar counsel caused a subpoena duces tecum to be served
4 on Wells Fargo, requesting records of Respondent's Trust Account transactions for the time
5 period of July 2003 through September 2003.

6 33. On August 20, 2004, bar counsel caused a subpoena to be served on Respondent
7 to produce documents responsive to Ms. Mauger's April 9, 2004 requests.

8 34. On September 27, 2004, Respondent wrote bar counsel requesting a copy of the
9 April 9, 2004 correspondence from Ms. Mauger.

10 35. Bar counsel responded on September 30, 2004, and directed Respondent to
11 respond on or before October 11, 2004.

12 36. Respondent failed to respond to the subpoena.

13 37. On or about November 9, 2004, bar counsel wrote Respondent and requested
14 that he contact the State Bar immediately to arrange for the delivery of the required documents
15 within the next seven days, or the State Bar would be forced to take further action, to include
16 petitioning the Superior Court to issue a writ of attachment to obtain his compliance.

17 38. On or about November 23, 2004, Respondent submitted his response.
18 Respondent provided some of the requested items. In addition, Respondent stated that he did
19 not maintain a permanent check register or ledgers other than any previously provided.
20 Respondent stated that most of the legal work that he does is for regular clients or referrals
21 from people whom he knows and trusts. Therefore, unless it was going to be a substantial or
22 long-term matter, he billed after the work was done and the fees were earned.

23 39. Respondent attached Ms. Mauger's draft daily balance spreadsheet to his
24 November 23, 2004 response. Respondent admitted that his recordkeeping during that time

1 was inadequate and stated that he could provide only a limited amount of information.
2 Respondent stated that he reviewed all of his records to obtain as much information as he could
3 but he did not keep records to identify the source of deposits. He stated that he had provided all
4 of the records that he had and, in reviewing these records, he determined that the liens for one
5 case (the Garcia matter) had not yet been paid. Respondent stated that he would pay those liens
6 and provide documentation.

7 40. In his November 23, 2004 response, Respondent neglected to respond and/or
8 provide documentation for the following outstanding issues:

- 9 a. Whether Respondent maintained a business or operating account during
10 the period of June 30, 2003 through September 30, 2003 and, if so, to
11 provide a copy of a bank statement for the account;
- 12 b. Explain the non-client-related disbursements from Respondent's client
13 trust account; and
- 14 c. Provide proof that non-client-related disbursements from Respondent's
15 client trust account consisted of earned client fees.

16 41. On or about November 23, 2004, staff examiner Gloria Barr ("Ms. Barr") took
17 over the trust account investigation.

18 42. On or about December 2, 2004, bar counsel sent Respondent a letter requesting
19 that he provide the items he omitted from his November 23, 2004 response to the subpoena.

20 43. On or about December 13, 2004, Respondent responded and provided copies of
21 documentation showing payment of the Garcia liens.

22 44. In his December 13, 2004 response, Respondent also stated that:

- 23 a. He had previously explained that the non-client-related disbursements
24 from the Trust Account were personal expenses and not related to

1 clients;

2 b. His bookkeeping was inadequate during the period requested and
3 therefore he did not believe he could provide proof that the non-client-
4 related disbursements from the Trust Account consisted of earned client
5 fees; and

6 c. He did not maintain a business or operating account during that time
7 period.

8 45. Based on the records they were able to obtain, Ms. Mauger and Ms. Barr
9 determined that:

10 a. Respondent acknowledged in his December 16, 2003 response that all of
11 the funds deposited into the Trust Account in September 2003 were
12 earned;

13 b. Respondent acknowledged in his December 16, 2003 letter that he did
14 not maintain a permanent check register or individual client ledgers or
15 the equivalent;

16 c. Respondent explained that all of the funds deposited into the Trust
17 Account were earned and, therefore, he did not maintain individual client
18 ledgers;

19 d. Individual client ledgers or the equivalent should reflect the date and
20 amount of each receipt and disbursement and any unexpended balance.
21 The individual client ledgers and settlement disbursement sheets
22 submitted by the Respondent do not meet the minimum standards to be
23 considered true individual client ledgers;

24 e. Respondent commingled entirely earned and personal funds in the Trust

1 Account;

2 f. Respondent acknowledged in his November 23, 2004 letter that the
3 Garcia liens had not yet been paid. Respondent subsequently paid these
4 liens on December 9, 2004. The subject funds had been deposited to the
5 Trust Account in November 2003;

6 g. Respondent disbursed funds from the Trust Account in reliance on a
7 \$250.00 deposit that was not yet deposited funds and this resulted in
8 funds of clients or third persons being used, endangered or encumbered.
9 Failure to safeguard client property by disbursing against a non-deposit
10 of funds results in the conversion of other client funds in the client trust
11 account;

12 h. Review of the Trust Account bank statements revealed several non-
13 client-related disbursements. In his response dated December 9, 2004,
14 Respondent acknowledged that disbursements from the Trust Account
15 for personal expenses were not related to clients. Respondent admitted
16 that he could not provide documentation that the non-client
17 disbursements consisted of earned client fees because his bookkeeping
18 was inadequate at that time;

19 i. Respondent also acknowledged that he did not maintain a business or
20 operating account during this time period;

21 j. Respondent entered a deposit to his check register on August 29, 2003,
22 but the deposit was not actually made until September 29, 2003;

23 k. Respondent admitted that he did not keep records identifying the source
24 of deposits. Respondent was unable to account for all transactions in and

1 out of the Trust Account; and

- 2 1. Review of the submitted Trust Account bank statements revealed several
3 online electronic payments to Capital One and a VZ wireless VW e-
4 check.

5 46. Respondent failed to keep his funds separate from those of his clients on deposit
6 in his client trust account, in violation of Rule 42, Ariz. R. S. Ct., ER 1.15(a), and Rule 43(a)
7 and (d)(2)(B), and Rule 44(a), Ariz. R. S. Ct.

8 47. Respondent failed to maintain complete client trust account records for a period
9 of five years after termination of the representation, in violation of Rule 42, Ariz. R. S. Ct., ER
10 1.15(a), and Rule 43(a) and (d)(1)(E), Ariz. R. S. Ct.

11 48. Respondent failed to exercise due professional care in the maintenance of the
12 Trust Account, in violation of Rule 43(d)(1)(A), Ariz. R. S. Ct.

13 49. Respondent failed to maintain proper internal controls within his office to
14 adequately safeguard funds on deposit in the Trust Account, in violation of Rule 43(d)(1)(C),
15 Ariz. R. S. Ct.

16 50. Respondent failed to record all transactions to the Trust Account promptly and
17 completely, in violation of Rule 43(d)(1)(D), Ariz. R. S. Ct.

18 51. Respondent failed to only disburse from the Trust Account with pre-numbered
19 checks, in violation of Rule 43(d)(2)(E), Ariz. R. S. Ct.

20 52. Respondent failed to conduct a monthly reconciliation of the Trust Account, in
21 violation of Rule 43(d)(2)(D), Ariz. R. S. Ct.

22 53. Respondent failed to act with reasonable diligence and promptness in
23 representing his clients, in violation of ER 1.3, Rule 42, Ariz. R. S. Ct. Respondent failed to
24 diligently maintain appropriate records relating to the representation of his clients.

1 Respondent asserts that he was merely negligent in failing to realize that his treatment of client
2 funds was improper, he had an affirmative duty to familiarize himself with the rules governing
3 his practice of law in Arizona. In addition, Respondent violated his duties to clients by failing
4 to act with reasonable diligence and promptness in maintaining appropriate records relating to
5 their representation; and failing to promptly notify the appropriate persons upon receipt of
6 funds in which they had an interest. Respondent violated his duties to the legal system and to
7 the profession by failing to comply with the ethical rules, in particular the trust account rules,
8 and by failing to cooperate with the State Bar in its investigation. Respondent admits that his
9 conduct, taken as a whole, has violated his duty to clients, the profession and the legal system.

10 The parties agree that Respondent was negligent in failing to be aware of, familiarize
11 himself with and comply with the rules governing the treatment of client funds by attorneys. If
12 the matter went to hearing, the State Bar would argue that Respondent should have known that
13 his treatment of client property was inadequate under the relevant rules. Respondent would
14 argue that he was merely negligent and that no injury resulted. The parties agree that
15 Respondent had a knowing state of mind in relation to his failures to respond timely and
16 completely to the State Bar. However, Respondent has provided evidence that he was suffering
17 from personal and emotional problems during the time of the State Bar's investigation, and this
18 factor significantly mitigates his less than satisfactory cooperation.

19 There was potential injury to clients in all of Respondent's rule violations. Respondent's
20 failure to comply with the rules governing treatment of client funds exposed his clients to
21 potential injury by causing their funds to be held without the protections against intentional or
22 inadvertent misdirection or depletion that are provided through strict compliance with ER 1.15
23 and Rules 43 and 44, Ariz.R.S.Ct.

24 If this matter were to proceed to hearing, Respondent would take the position that his

1 conduct caused no actual harm to any client and exposed his clients to minimal potential harm
2 at worst, and that he corrected the non-compliance upon discovering it. The State Bar would
3 take the position that Respondent's failure to be aware of and comply with these rules exposed
4 his clients to significant potential injury. Additionally, there was actual injury to a lien-holder
5 who did not have the use of their funds for over a year, which could possibly have resulted in
6 action against the relevant client.

7 AGGRAVATING AND MITIGATING FACTORS

8 This Hearing Officer then considered aggravating and mitigating factors in this case,
9 pursuant to *Standards* 9.22 and 9.32, respectively.

10 This Hearing Officer agrees with the parties that there is one applicable aggravating
11 circumstance in this matter: 9.22(c) a pattern of misconduct. Respondent was not maintaining
12 his trust account properly over a significant period of time.

13 This Hearing Officer also agrees with the parties that four¹ factors are present in
14 mitigation:

15 9.32(a) -- absence of a prior disciplinary record. Respondent has never before received
16 bar discipline and he has 25 years in practice.

17 9.32(b) -- absence of a dishonest or selfish motive. Respondent did not act out of any
18 dishonest or selfish motive (*see* personal problems section below). Respondent did not
19 intentionally misappropriate client funds.

20 9.32(c) -- personal or emotional problems. *See* the sealed confidential report attached
21 as Exhibit B to the Joint Memo. Respondent was experiencing personal and emotional
22 problems during the period of time relating to the charges in this complaint. Respondent's

23 ¹ This Hearing Officer did not consider factor 9.32(j) (interim rehabilitation), as it was deleted in the February
24 1992 amendments to the *Standards* as a factor that can be considered in mitigation. The undersigned, however,
congratulates Respondent for voluntarily taking action to address the personal and emotional problems that
contributed to this situation.

1 personal problems affected his conduct, and Exhibit B demonstrates that Respondent did not
2 have an intentional state of mind with regard to his failure to cooperate with the State Bar.
3 Respondent was avoiding dealing with the State Bar which, while not appropriate behavior,
4 does not rise to the level of intentional obstruction.

5 9.32(1) -- remorse. See the sealed confidential report attached as Exhibit B to the Joint
6 Memo. Respondent has expressed remorse for his conduct regarding the disciplinary case and
7 his failure to maintain accurate trust account files.

8 PROPORTIONALITY REVIEW

9 To have an effective system of professional sanctions, there must be internal
10 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
11 similar. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764 (Ariz. 2004). However, the discipline in each
12 case must be tailored to the individual case, as neither perfection nor absolute uniformity can be
13 achieved. *Id.* (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135
14 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

15 The most serious instance of misconduct in this case involves Respondent's failure to
16 be aware of, familiarize himself with and comply with, the rules governing the treatment of
17 client funds. It is also relevant that Respondent's cooperation with the Bar was less than stellar.
18 The following cases are instructive concerning these types of misconduct.

19 In *In re Johnson*, SB-02-0005-D (2002), Johnson received censure and two years
20 probation for violations of the trust account rules combined with a lack of cooperation with the
21 State Bar's investigation. Johnson also failed to communicate with a client and to return that
22 client's retainer on a timely basis. Johnson had an overdraft on his trust account and failed to
23 file responses to the Staff Examiner's inquiries. He personally appeared in response to a
24 subpoena *duces tecum*, but neglected to bring the requested documents, and failed to produce

1 them at a later date as promised. He finally produced the requested documentation at a
2 settlement conference approximately seven months later.

3 The Commission found two aggravating factors: bad faith obstruction of the
4 disciplinary process and substantial experience in the law, and four mitigating factors: absence
5 of prior discipline; absence of dishonest/selfish motive; personal/emotional problems (alcohol
6 and depression); and remorse. In his terms of probation, Johnson received a referral to the Law
7 Office Management Assistance Program (LOMAP) for the preparation of a two-year contract.
8 Johnson was required to have a practice monitor, was to attend the Trust Account Ethics
9 Enhancement Program (TAEEP) and was also to consult with the Member Assistance Program
10 (MAP).

11 In this case, the parties suggested and the undersigned recommends that Respondent
12 also be referred to LOMAP and attend TAEEP. Because Respondent here does not have the
13 added violation concerning client communication and delay in returning a retainer, the State
14 Bar and Respondent have agreed that Respondent does not need a practice monitor, and that
15 one year of probation is recommended rather than two. Finally, because Respondent here has
16 already taken steps to deal with his personal and emotional problems, the parties agree that he
17 does not presently need a referral to MAP.²

18 The respondent in *In re Buffenstein*, SB-01-0171-D (2002), received a 30-day
19 suspension and one-year probation for trust account violations and failure to cooperate with the
20 State Bar. Buffenstein failed to respond to the Bar until his Answer to the formal complaint,
21 commingled his own funds with those of his clients and failed to keep individual client ledgers
22 or any proper accounting records of his trust account. The Commission found that suspension
23 under ABA Standard 4.12 was the presumptive sanction, as Buffenstein's conduct with regard

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² Respondent understands that the MAP is always available should he need to make use of it.

1 to his trust account was grossly negligent. Two factors were present in aggravation: bad faith
2 obstruction and substantial experience in the practice of law. Two factors were found in
3 mitigation: no prior discipline and no dishonest/selfish motive. Two other mitigating factors
4 were alleged – personal problems and character and reputation – but the Commission found
5 that Respondent had not provided sufficient evidence to support those factors.

6 The Commission noted that Buffenstein could possibly have received a censure, but for
7 the multiple instances of failure to respond to the State Bar, which it noted borders on
8 contempt,³ and the fact that there were no remedial measures taken or remorse shown. Because
9 Respondent here has 25 years in practice without any discipline, has provided evidence of
10 personal and emotional problems which are a mitigating factor and negate his state of mind
11 during the relevant time period, and because he is cooperating in preparing this consent
12 agreement, the parties believe that a censure with one year of probation is acceptable rather
13 than the short-term suspension which the *Buffenstein* case would suggest is appropriate.

14 Straight trust account cases support the application of a censure and probation as the
15 appropriate sanction. In *In re Inserra*, SB-02-0144-D (2002), the respondent failed to keep his
16 earned fees separate from client funds held in his trust account, failed to transfer fees from his
17 trust account when earned, and commingled his own funds with those of his clients. He also
18 failed to maintain complete trust account records for a period of five years, failed to exercise
19 due professional care in the maintenance of his trust account, failed to only disburse from his
20 trust account with pre-numbered checks, and failed to conduct a monthly reconciliation of his

21
22 ³ The State Bar notes that failure to cooperate with a discipline investigation, standing alone, could warrant a
23 censure. In *In re Anderson*, SB-01-0173 (2001), the attorney received a censure for failing to respond to the
24 discipline investigation in two cases. There was no other misconduct in that matter. See also *In re Shaw*, Nos. 03-
0263, et al., Disciplinary Commission Report (March 11, 2005) (citing *In re Galusha*, 164 Ariz. 503, 794 P.2d 136
(1990)).

1 trust account. There was one aggravating factor present: multiple offenses. There were five
2 mitigating factors present: absence of a prior disciplinary record; absence of dishonest or
3 selfish motive; timely and good faith effort to rectify consequences of misconduct; full and free
4 disclosure; and remorse. Inserra and the State Bar submitted a consent agreement, agreeing
5 that a censure, with two years of probation and costs, was appropriate. The Disciplinary
6 Commission unanimously recommended acceptance of the agreement. The Supreme Court
7 accepted the Disciplinary Commission's recommendation.

8 In *In re Randall*, SB-02-0146-D (2002), Randall failed to conduct proper monthly
9 reconciliations, failed to use pre-numbered checks as required by the Guidelines, and also
10 deposited and commingled his own separate funds, including earned fees, with client funds in
11 his trust account. He failed to maintain adequate funds in the trust account resulting in the
12 account being overdrawn on two occasions. There was one aggravating factor in *Randall*:
13 substantial experience in the practice of law. There were five (5) mitigating factors present:
14 absence of a prior disciplinary record; timely good faith effort to rectify consequences of
15 misconduct; full and free disclosure to the disciplinary board; character and reputation; and
16 remorse. The hearing officer recommended that Randall receive a censure for his misconduct,
17 which was accepted by the Disciplinary Commission and the Supreme Court. Randall was not
18 placed on probation, presumably because he was no longer working as a sole practitioner and
19 was employed by a medium-size firm where he was not in charge of any accounting
20 procedures.

21 In *In re Goff*, SB-01-0152-D (2001), Goff had three trust account violations for checks
22 drawn on his account resulting in a negative balance and he also commingled his personal
23 funds with trust account funds. Although there was no evidence of actual harm to a client, the
24 attorney did not properly identify his trust account as such, did not keep a correct running

1 balance of old journal or register transactions, and did not have individual client ledgers. In
2 addition, he paid his bar dues, phone bills and other personal expenses with trust account funds.
3 The State Bar and Goff submitted a joint memorandum in support of agreement for discipline,
4 agreeing that censure, probation and costs were the appropriate sanctions. The Disciplinary
5 Commission unanimously recommended acceptance of the agreement and joint memorandum
6 noting that ABA Standard 4.13 allowed for reprimand (censure) where an attorney was
7 negligent in dealing with client property. The Supreme Court accepted the Disciplinary
8 Commission's recommendation for censure and two years of probation.

9 In *In re Leiber*, SB-01-0122-D (July 2, 2001), Leiber was charged with failing to
10 comply with trust account guidelines and with causing a check in the amount of \$8,000.00 to be
11 returned for insufficient funds because his trust account only had a balance of \$5,859.00.
12 Leiber's client, a long-time friend and lawyer, had agreed to deposit \$8,000.00 in Leiber's
13 California branch of his trust account but only deposited \$5,000.00. Leiber also commingled
14 funds over a period of years by placing earned fees and other personal funds into his trust
15 account. The Supreme Court accepted the Disciplinary Commission's recommendation for
16 censure and one year of probation.

17 In this case, Respondent failed to segregate client funds from his own funds; failed to
18 maintain the required client trust account records; failed to exercise due professional care;
19 failed to safeguard client funds, failed to act with reasonable diligence and promptness in
20 representing his clients; failed to promptly notify the appropriate persons upon receipt of funds
21 in which they had an interest; and failed to respond to lawful demands for information from a
22 disciplinary authority. The Supreme Court has long held that "the objective of disciplinary
23 proceedings is to protect the public, the profession and the administration of justice and not to
24 punish the offender." *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re*

1 *Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)).

2 **RECOMMENDATION**

3 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
4 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320
5 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the
6 administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another
7 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,
8 29, 881 P.2d 352, 361 (1994).

9 In imposing discipline, it is appropriate to consider the facts of each case, the American
10 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the
11 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,
12 872 P.2d 1235, 1238 (1994).

13 Upon consideration of the facts, application of the *Standards*, including aggravating and
14 mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance
15 of the Tender the Joint Memo which provide for the following:

- 16 1. Respondent shall receive a censure.
- 17 2. Respondent shall be placed on probation for a period of one year, effective upon
18 the signing of the Memorandum of Understanding (MOU). Bar Counsel shall notify the
19 Disciplinary Clerk of the date probation begins. The terms of probation are as follows:
- 20 a. Respondent shall, within 30 days of the Supreme Court's final judgment
21 and order, contact the director of LOMAP to schedule an audit of his trust account. Following
22 the audit, Respondent shall enter into a MOU. Respondent shall comply with all
23 recommendations of the LOMAP director or her designee.
- 24 b. Respondent shall complete TAEEP during the probation period.

1 c. In the event that Respondent fails to comply with any of the foregoing
2 conditions, and the State Bar receives information regarding such failure, bar counsel shall file
3 with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz.R.S.Ct.
4 The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice to
5 determine whether the terms of probation have been violated and if an additional sanction
6 should be imposed. In the event there is an allegation that any terms of probation have been
7 violated, the burden of proof shall be on the State Bar to prove non-compliance by clear and
8 convincing evidence.

9 3. Respondent shall pay the costs and expenses incurred in this disciplinary
10 proceeding.

11 DATED this 8th day of August, 2005.


Patricia E. Nolan
Hearing Officer 7Y

14 Original filed with the Disciplinary Clerk
15 this 8th day of August, 2005.

16 Copy of the foregoing was mailed
17 this 8th day of August, 2005, to:

18 Carl D. Lee
19 Respondent
20 780 North 23rd Avenue
21 Phoenix, AZ 85021-6808

22 Denise M. Quinterri
23 Bar Counsel
24 State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

By: 