

**FILED**

MAY 24 2005

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY: *Mark S. Sifferman*

**BEFORE A HEARING OFFICER**

IN THE MATTER OF A MEMBER OF  
THE STATE BAR OF ARIZONA

**EDMUND Y. NOMURA,**  
Bar No. 007209

**RESPONDENT.**

File No. 03-0944, 04-0815

**HEARING OFFICER'S REPORT**

(Assigned to Hearing Officer 9J  
Mark S. Sifferman)

**PROCEDURAL BACKGROUND**

Probable Cause Orders were filed on July 22, 2004. The Complaint in this matter was filed September 2, 2004. The Complaint contained 102 paragraphs, separated into two counts, each concerning a different client. Count One alleges that eleven ethical rules and three Supreme Court rules were violated by Respondent in handling a business bankruptcy. Count Two alleges that seven ethical rules and three Supreme Court rules were violated by Respondent in handling the bankruptcy of a husband and wife.

Pursuant to Rule 57(i)(1), Arizona Rules of the Supreme Court, the hearing on the Complaint should have been completed no later than January 31, 2005. By an order entered November 24, 2004, an evidentiary hearing was set for January 4, 2005. Prior to an Answer, Respondent filed (i) a Motion for More Definite Statement and (ii) a Motion

1 to Dismiss. After briefing, the Motions were denied. Respondent filed an Answer on  
2 December 8, 2004.

3 On December 7, 2004, the State Bar moved to amend the Complaint. The  
4 proffered Amended Complaint would have added counts relating to three additional  
5 clients. Respondent opposed the Motion to Amend. For reason set forth in an Order  
6 entered January 13, 2005, the Motion to Amend was denied.

7 By an order entered December 15, 2004, the Supreme Court extended the time to  
8 complete the hearing under the original Complaint until April 1, 2005. The prior order  
9 rendered by this Hearing Officer setting an evidentiary hearing for January 4, 2005 was  
10 vacated. The evidentiary hearing was reset for March 21 and 22, 2005. The State Bar  
11 and the Respondent, on or about March 4, 2005, submitted a Joint Pre-hearing Statement,  
12 which included certain stipulated facts.  
13

14 **EXCLUSION OF SOME TESTIMONY**

15 Objections to some witnesses and exhibits were heard and determined prior to the  
16 evidentiary hearing. See *Transcript, March 14, 2005*. One *pre-hearing* ruling excluding  
17 testimony should be noted.  
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19 A disclosure of an expert witness must include "the subject matter on which the  
20 expert is expected to testify, the substance of the facts and opinions to which the expert is  
21 expected to testify, [and] a summary of the grounds for each opinion . . ." *Rule 57(e)(4)*,  
22 *Rules of the Supreme Court*. The State Bar's disclosure for Randy Nussbaum was:  
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1 "Mr. Nussbaum took over the St. Germain representation following their  
2 termination of Respondent. It's expected Mr. Nussbaum will testify  
3 regarding his correspondence and conversations with Respondent on behalf  
4 of the St. Germain." *Transcript, March 14, 2005, page 17.*

5 Bar Counsel honorably conceded the inadequacy of this disclosure. *Id.* Mr.  
6 Nussbaum is eminently qualified to testify as a bankruptcy expert. *Tr. 141 - 142.* He  
7 would have been allowed to provide opinion testimony, particularly on Respondent's  
8 competency in bankruptcy matters, had the State Bar's disclosure not been so inadequate.  
9 Mr. Nussbaum, however, was not allowed to provide opinion testimony.

10 Another ruling precluding a witness was made, but this ruling was made *during the*  
11 *evidentiary hearing.* Respondent requested to call Bar Counsel as a witness. *Tr. 508 -*  
12 *510.* This motion was denied as the examination would have been on a collateral matter.  
13 *Id.*

#### 14 THE EVIDENTIARY HEARING

15 The duly noticed evidentiary hearing in this matter began March 21, 2005,  
16 continuing March 22 and April 1. The final evidence was taken April 4. Respondent was  
17 present in person and through counsel, John O'Connor. The State Bar was represented by  
18 Denise Quinterri.

19 The Transcripts from the evidentiary hearing will be cited hereafter with the  
20 abbreviation "Tr.", followed by page. The hearing exhibits will be cited as either "SB  
21 Ex." for an exhibit marked by the State Bar or "Resp. Ex." for an exhibit marked by  
22 Respondent.  
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POST HEARING MEMORANDA

1 At the conclusion of the evidentiary hearing, the parties were requested to submit  
2 post-hearing memoranda and proposed findings and conclusions. Because numerous ERs  
3 were alleged to have been violated, the parties were requested to specify, for the State  
4 Bar's analysis, what specific facts supported which particular ER violations, and for  
5 Respondent's analysis, what requisite facts were not proven as to particular ER violations.  
6 *Tr. 796 - 797.*

7  
8 While the State Bar did propose findings, inadequate citations to the record were  
9 provided. For example, proposed Finding of Fact 55 states: "Mr. and Mrs. St. Germain  
10 asked Respondent to have the legal file ready to be picked up on February 28, 2003."  
11 *State Bar's Proposed Findings of Fact and Conclusions of Law, page 12, lines 10 - 12.*  
12 In support of this very date-specific finding, the record citation is to *124 pages of*  
13 *testimony. Id.* All but a few of the proposed findings suffer from this type of citation.  
14 Therefore, the post-hearing memorandum was not as useful as it should have been.  
15 *Hubbs v. Costello, 22 Ariz. App. 498, 501, 528 P.2d 1257, 1260 (App. 1974)* ("The  
16 Court is not under any obligation to search a voluminous record to ascertain if such  
17 evidence exists.").

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20 In addition, in its post-hearing memorandum, the State Bar asserts many "facts"  
21 about Respondent's conduct during pre-hearing discovery. See *State Bar's Proposed*  
22 *Findings of Fact and Conclusions of Law, Page 2, lines 11 - 25.* These "facts" were not  
23 established with evidence admitted at the disciplinary hearing. They are statements of  
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1 counsel, which are not evidence of "facts." *Walker v. Coconino County*, 12 Ariz. App.  
2 547, 473 P.2d 472, 476 (1970); *Readenour v. Marion Power Shovel, a Div. of Dresser*  
3 *Industries, Inc.*, 149 Ariz. 454, 719 P.2d 1070 (App. 1985), modified 149 Ariz. 442, 719  
4 P.2d 1058 (1986). Those statements were not considered.

5 **JUDICIAL NOTICE BY THE HEARING OFFICER**

6 In his post-hearing memorandum, Respondent complains that by questioning  
7 Respondent based upon documents of public record, the Hearing Officer lost the  
8 "appearance of impartiality." *Respondent's Post-Hearing Memorandum, page 2, lines 1 -*  
9 *10*. This Hearing Officer examined Respondent on whether a notice of trustee's sale was  
10 recorded against his residence, whether he gave his parents a deed of trust on his  
11 property, and whether he was sued by the Internal Revenue Service. *Tr. 791 - 793*. The  
12 Hearing Officer's examination regarding public records occurred only after there was  
13 testimony that checks were written from Respondent's trust account to reinstate his  
14 delinquent home loan, that a check payable to his parents was deposited in his trust  
15 account, and that he was delinquent with the IRS. *Tr. 436, 578 - 579, 608 - 610*.

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18 The Hearing Officer gave notice that he wished to take judicial notice of certain  
19 documents recorded with the Maricopa County Recorder and a certain lawsuit filed in the  
20 United States District Court. *Tr. 791 - 793*. A Hearing Officer may take judicial notice  
21 of anything allowed by the Rules of Evidence. *In re Sabino R.*, 198 Ariz. 424, ¶ 4, 10  
22 P.3d 1211, 1212 (App. 2000); Rule 201, *Arizona Rules of Evidence*. Judicial notice may  
23 be taken of a case pending before another court. *In re Ronwin*, 139 Ariz. 576, 579, 680  
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P.2d 107, 110 (1983); *In re Horwitz*, 180 Ariz. 20, 23, 881 P.2d 352, 355, n. 3 (1994).

1 Judicial notice also may be taken of records of a public agency, such as the county  
2 recorder. *Jarvis v. State Land Department*, 104 Ariz. 527, 456 P.2d 385 (1969), *Adams v.*  
3 *Bolin*, 74 Ariz. 269, 247 P.2d 612 (1952); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204  
4 P.2d 854 (1949). Respondent, in his post-hearing objection, does not dispute that the IRS  
5 sued him for non-payment of taxes, that his home was being foreclosed, or that he  
6 borrowed money from his parents secured with a deed of trust on his property.  
7

8 Respondent, instead, suggests "the appearance of impartiality" was lost.

9  
10 A hearing officer need not be passive. A hearing officer may interrogate witnesses  
11 to see that the truth is developed. See, *Rule 614(b), Arizona Rule of Evidence; State v.*  
12 *Mendez*, 2 Ariz. App. 77, 79, 406 P.2d 427, 429 (1965); *State v. Schackart*, 190 Ariz. 238,  
13 947 P.2d 315 (1997); *Dutton v. Territory*, 13 Ariz. 7, 9, 108 P. 224, 225 (1910). Due  
14 process is not violated when a judicial or quasi-judicial officer questions or calls  
15 witnesses. Due process is violated where the record establishes that the mind of the  
16 decision maker was "irrevocably closed" or that the decision maker had prejudged the  
17 specific facts that were at issue. *Havasu Heights Ranch and Dev. Corp. v. Desert Valley*  
18 *Wood Prod., Inc.*, 167 Ariz. 383, 386 - 387, 807 P.2d 1119, 1123 - 1124 1122 (App.  
19 1990); see *In re Cornelius*, 520 P.2d 76, 83 - 84, *affirmed on rehearing*, 521 P.2d 497,  
20 498 (Alaska 1974). Respondent has failed to establish any due process violation. See, *In*  
21 *re Peasley*, 208 Ariz. 27, 35, 90 P.3d 764, 772, ¶ 31 (2004); *In re Flournoy*, 195 Ariz.  
22 441, 445, 990 P.2d 642, 646, ¶ 22 (1999).  
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**FINDINGS OF FACT**

1           Based on the stipulated facts contained in the Joint Pre-hearing Statement and the  
2 evidence presented at the evidentiary hearing, the following facts are found to exist:

3                           **GENERAL BACKGROUND REGARDING RESPONDENT AND HIS PRACTICE**

4           1.       At all times relevant hereto, Respondent was an attorney licensed to  
5 practice law in Arizona, having first been admitted to practice on May 5, 1982. See  
6 “Uncontested Facts Deemed Material” in *Joint Pre-hearing Statement dated March 4,*  
7 *2005 (hereafter “Stipulated Fact”), Stipulated Fact 1.*

8           2.       Respondent originally practiced under the name “Edmund Y. Nomura,  
9 P.C.” *Tr. 776 - 777; SB Ex. 50, at 919.*

10          3.       During the times relevant to the allegations contained in this Complaint,  
11 Respondent was operating through the entity “The Nomura Law Offices, P.C.” *Tr. 776 -*  
12 *777; SB Ex. 50, at 843.*

13          4.       Respondent could not explain what specific reason prompted the creation of  
14 the new professional corporation. He stated only that the formation of the new entity  
15 might have been on the advice of his accountant. *Tr. 777 - 778.*

16          5.       Respondent kept track of the legal services he rendered by using a form for  
17 each client, and noting the date of the service, the nature of the service and time incurred.  
18 *Tr. 534 - 535, 547 - 548, 765 - 766; Resp. Ex. R.*

1           6.       Respondent's staff sporadically collected Respondent's timesheets and  
2 entered the information noted on the timesheets into Respondent's billing software  
3 program. *Tr. 535 - 536, 547 - 548, 765 - 766.*

4           7.       Respondent originally used the billing program known as "Timeslips." The  
5 "Timeslips" software was located on a computer in the possession of Denessa Davis, who  
6 was the employee responsible for inputting the time into the program and then generating  
7 bills. *Tr. 535 - 540; 556 - 558.*

8           8.       Sometime in 2002, Respondent switched to "Quickbooks," another billing  
9 software program. When this conversion occurred, Ms. Davis received a new computer  
10 containing the Quickbooks software. Ms. Davis' "old" computer containing the  
11 Timeslips software was used by another employee but the billing information remained  
12 on that "old" computer and could be accessed. *Tr. 535 - 540; 545 - 546, 557 - 559.*

13           9.       Draft billings were printed out by Respondent's staff and then reviewed by  
14 Respondent. Final billings would be produced and sent to clients. *Tr. 535 - 540, 765 -*  
15 *766.*

16           10.      Copies of the billings sent to clients were stored in files located in  
17 Respondent's file room, although the oldest copies might be moved to off-site storage if  
18 room was necessary. *Tr. 587 - 589, 787.*

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21           **GENERAL BACKGROUND REGARDING RESPONDENT'S FINANCIAL SITUATION**

22           11.      In early 2002, Respondent was suffering financially.  
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12. His professional corporation known as "Edmund Y. Nomura, P.C.," was delinquent in payment of taxes. *Tr. 436, 570, 578 - 579, 737 - 738, 780 - 784.*

13. Respondent was delinquent in his home mortgage held by GMAC, with a non-judicial foreclosure being scheduled for Respondent's residence. *Tr. 570, 608 - 609, 780 - 784.*

**COUNT ONE - SCORPION TRUCKING AND THE ST. GERMAINS**

14. Bruce and Patricia St. Germain were the shareholders and officers of a construction company named Scorpion Trucking and Contracting, Inc. ("Scorpion"). *Stipulated Fact 2; Tr. 10.*

15. Respondent performed legal services for Scorpion and the St. Germaines from time to time prior to January 2002. Respondent had developed a friendship with the St. Germaines. Because of that friendship, Respondent did not always bill Scorpion or the St. Germaines for all the legal work he performed for them. *Tr. 644 - 645.*

16. Scorpion was indebted to GE Capital. The St. Germaines either were direct obligors or guarantors of the GE Capital debt. The GE Capital debt was secured with a lien on Scorpion's equipment. In late January 2002, GE Capital repossessed Scorpion's equipment. As the equipment was Scorpion's major income producing asset, the repossession caused a severe financial setback for the company. *Stipulated Fact 3; Tr. 11 - 12.*

17. When negotiations with GE Capital for the return of equipment failed, Respondent met with Mrs. St. Germain to discuss options. On Respondent's advice, Mrs.

1 St. Germain decided that a Chapter 11 bankruptcy should be filed for Scorpion. The  
2 bankruptcy petition was filed February 19, 2002. *Stipulated Fact 4; Tr. 12 - 14; SB Ex.*  
3 *1, at 7.*

4 18. Respondent was not owed pre-petition attorneys' fees by Scorpion, at least  
5 according to the bankruptcy schedules which Respondent filed on behalf of Scorpion.  
6 *Tr. 785 - 786; SB Ex. 51, at 1085 - 1087.* But according to a document produced from  
7 Respondent's office, Scorpion owed Respondent \$6,799.10 for pre-petition attorneys'  
8 fees. *Resp. Ex. O; Tr. 785 - 786.*

9  
10 19. The existence of a pre-petition debt owed by Scorpion to Respondent was  
11 important in the Scorpion bankruptcy. Unless Respondent waived the pre-petition debt,  
12 he was not entitled to be approved as Scorpion's bankruptcy counsel. *U.S. Trustee v.*  
13 *Price Waterhouse*, 19 F.3d 138 (3<sup>rd</sup> Cir. 1994); *In re CIC Inv. Corp.*, 175 B.R. 52 (9<sup>th</sup> Cir.  
14 BAP 1994); *In re 7th Street & Beardsley Partnership*, 181 B.R. 426 (Bankr. D. Ariz.  
15 1994).<sup>1</sup>

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21 <sup>1</sup> Every professional (e.g. attorneys, accountants) retained by a bankruptcy debtor  
22 must be approved by the court and must be "disinterested." 11 U.S.C. § 327. A creditor  
23 is not a disinterested person. 11 U.S.C. § 101(14)(A). Therefore, the Bankruptcy Code  
24 prohibits retention of a professional who is a pre-petition creditor of the debtor. *U.S.*  
*Trustee v. Price Waterhouse*, 19 F.3d 138 (3<sup>rd</sup> Cir. 1994); *In re CIC Inv. Corp.*, 175 B.R.  
52 (9<sup>th</sup> Cir. BAP 1994); *In re 7th Street & Beardsley Partnership*, 181 B.R. 426 (Bankr.  
D. Ariz. 1994).

THE CONFLICT BETWEEN SCORPION AND THE ST. GERMAINS

1           20.    At the time Scorpion's bankruptcy petition was filed, Scorpion owed  
2 \$75,000 to Mr. and Mrs. St. Germain personally, making them the largest unsecured  
3 creditor. *SB Ex. 51 at 1085 - 1087*. The St. Germain also were jointly obligated on  
4 much of Scorpion's debt.  
5

6           21.    At no time did Respondent discuss the possible conflict of interest which  
7 could exist between the corporate entity and the St. Germain due to the St. Germain  
8 being creditors of the debtor and being jointly liable on most of Scorpion's debt. *Tr. 696*  
9 *- 697, 760, 770*. Respondent was negligent in not recognizing the conflict.  
10

11           22.    Moreover, in seeking approval to serve as Scorpion's bankruptcy attorney,  
12 Respondent did not disclose to the Bankruptcy Court that he represented both the debtor  
13 (Scorpion) and the St. Germain. This disclosure is clearly required. *Tr. 154 - 155; Rule*  
14 *2014, Federal Rules of Bankruptcy Procedure; In re Park-Helena Corp.*, 63 F.3d 877, 880  
15 *- 882 (9<sup>th</sup> Cir.1995); In re Crimson Investments, N.V.*, 109 B.R. 397 (Bkrcty. D. Ariz.  
16 1989). .  
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18                           THE FEE AGREEMENT FOR THE SCORPION BANKRUPTCY

19           23.    A written fee agreement was signed February 19 by Respondent and Mrs.  
20 St. Germain, on behalf of Scorpion. The written fee agreement stated that the fee for the  
21 Chapter 11 bankruptcy would be \$10,000, but there was a provision that additional  
22 amounts could be billed at \$175 per hour. *SB Ex. at 1, at 9; Tr. 14 - 17*.  
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THE SALE OF THE BLACK MOUNTAIN PROPERTY

1           31.    Some months *before* its bankruptcy petition was filed, Scorpion transferred  
2 the "Black Mountain" Property to Black Mountain Commercial Center and Mobile Home  
3 Park, Inc., another corporation owned by the St. Germain. *Stipulated Facts 6 - 7; Tr. 88*  
4 *- 90, 106 - 107*. Respondent attempted to attack the credibility of Mrs. St. Germain by  
5 implying that the pre-bankruptcy transfer of the Black Mountain Property was in fraud of  
6 creditors. *Tr 106 - 107, 687 - 688*. This attack was doomed from the start. The transfer  
7 of the property was plainly and correctly disclosed in Scorpion's Statement of Financial  
8 Affairs which Respondent filed. *SB Ex. 51, at 1096*.

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11           32.    Even after the transfer of the Black Mountain Property, Scorpion still was  
12 indebted to Black Mountain Commercial Center. At the time Scorpion's bankruptcy  
13 petition was filed, Scorpion owed Black Mountain Commercial Center \$48,000. *SB Ex.*  
14 *51, at 1085 - 1087*.

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16           33.    When Scorpion filed bankruptcy, the Black Mountain Property was in the  
17 process of being sold. Respondent was aware of and involved in the sale, although the  
18 extent of his involvement with the sale is unclear. *Tr. 18 - 20, 763 - 764*.

19                   THE \$35,000 PAID FROM THE BLACK MOUNTAIN PROPERTY SALE

20           34.    From the Black Mountain Property sale escrow, a check in the amount of  
21 \$35,000 was made payable to Edmund Y. Nomura, P.C. *SB Ex. 1, at 16; Tr. 18 - 23*.

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23           35.    Mrs. St. Germain testified that \$5,000 of this \$35,000 was to cover the  
24 unpaid balance of the \$10,000 bankruptcy fee. The balance of the Black Mountain

1 Property sale proceeds (\$30,000) were to be held by Respondent to pay Scorpion  
2 creditors. *Tr. 18 - 22.*

3 36. Mrs. St. Germain's explanation is plausible in light of Scorpion's  
4 bankruptcy schedules. The total amount owed to unsecured creditors of Scorpion,  
5 exclusive of debt owed to the St. Germain's or their related companies, was \$43,300. *SB*  
6 *Ex. 51 at 1085 - 1087.*

7 37. Respondent and his bookkeeper testified they believed all \$35,000 was for  
8 attorneys' fees. *Tr. 552 - 556, 565 - 568, 771 - 772.* It is plausible that Scorpion and/or  
9 the St. Germain's owed Respondent some part of the \$35,000 for attorneys' fees.  
10 Respondent was defending a number of state court actions filed against the St. Germain's.  
11 It is plausible that Respondent reasonably required fee payment from the Black Mountain  
12 Property sale as Scorpion and the St. Germain's had previously accumulated a large,  
13 unpaid legal bill with some other lawyers. *Tr. 78 - 80, 552 - 556, 565 - 568, 771 - 772.*

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15 **RESPONDENT'S USE OF THE \$35,000**

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17 38. The \$35,000 check was deposited in Respondent's *trust* account at Bank of  
18 America on April 12, 2002. *SB Ex. 5, at 350, SB Ex. 42, at 755; Tr. 434 - 435.*

19 39. Prior to the deposit of the \$35,000, there was a zero balance in the trust  
20 account. *SB Ex. 42, at 755; Tr. 434 - 435.*

21 40. A \$10,000 check then was drawn on the trust account payable to the  
22 Nomura Law Office, P.C., signed by Respondent, and deposited into Respondent's  
23 general operating account. *SB Ex. 5, at 350, SB Ex. 42, at 755.*

1           41.     The transfer of the \$10,000 from the trust account to the operating account  
2 left \$25,000 of the Black Mountain Property sale proceeds in the trust account. Within a  
3 short time, Respondent disbursed the \$25,000 directly from his trust account to pay his  
4 personal debts.

5           42.     Respondent used some of the money to pay his IRS obligations. The IRS  
6 was threatening enforcement action (e.g., garnishment or attachment) and Respondent had  
7 entered into an IRS payment plan. *SB Ex. 17, at 656, SB Ex. 42 at 755; Tr. 436, 578 -*  
8 *579, 780 - 781.*

9           43.     Respondent also used some of the money to bring his delinquent home  
10 mortgage current. The mortgage holder had commenced a foreclosure of Respondent's  
11 residence. *Tr. 570, 608 - 610, 780 - 784; SB Ex. 17, at 655, SB Ex. 42, at 755.*

12           44.     The balance of the \$25,000 was used for operating expenses of the law firm  
13 and for airfare to Hawaii so Respondent's children could visit relatives. *Tr. 608 - 610,*  
14 *780 - 878; SB Ex. 17, at 662; SB Ex. 42, at 755.*

15           45.     Respondent knew funds from his trust account were being used for personal  
16 use. He signed the relevant checks. *SB Ex. 17, at 655 - 657, 662; SB Ex. 42, at 755.*  
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1 through February 24, 2004 (when the \$17,000 was paid to Scorpion). In fact, the balance  
2 was always less than \$17,000 with a low of \$4,306.94. *SB Ex. 43, at 756 - 757.*

3 52. As of February 3, 2003, the balance in Respondent's trust account was  
4 \$6,822.94. *SB Ex. 5, at 367, SB Ex. 43, at 757.*

5 53. How then was it possible for Respondent to pay to Scorpion \$17,000 from  
6 the trust account on February 24, 2003? Here is how: on February 18, 2003, Respondent  
7 deposited into his trust account a check from Petroleum Helicopters, Inc. in the amount of  
8 \$11,671.40. This deposit raised the balance in Respondent's trust account sufficiently so  
9 that reimbursement of the \$17,000 could be made to Scorpion. *SB Ex. 5, at 367, SB Ex.*  
10 *43, at 757.*

11 54. The \$11,671.40 paid from Petroleum Helicopters, Inc. was for legal fees.  
12 *Tr. 650 - 651.* At least this is what Respondent's staff remembered. *Tr. 650 - 651.*  
13 Respondent could not remember who Petroleum Helicopters, Inc. was or what the check  
14 was for. *Tr. 776.*

#### 17 TRUST LEDGERS

18 55. There were two documents which could be termed a "trust account ledger"  
19 reflecting the \$19,500. One ledger was hand-written. The other was computer generated.  
20 *SB Ex. 1, at 40, SB Ex. 5, at 193.*

21 56. There never has been a trust account ledger, hand-written or computerized,  
22 reflecting the \$35,000.  
23



62. Respondent, of course, is wrong. *Tr. 190 - 191; 11 U.S.C. § 329(a), Rule*  
1 *2016(b), Federal Rules of Bankruptcy Procedure; In re Park-Helena Corp.*, 63 F.3d 877,  
2 880 - 882 (9<sup>th</sup> Cir.1995); *In re Yermakof*, 718 F.2d 1465, 1470, n. 8 (9<sup>th</sup> Cir. 1983); *In re*  
3 *LSS Supply, Inc.*, 247 B.R. 280 (Bankr. D. Ariz. 2000); *In re Guy Apple Masonry*  
4 *Contractor*, 45 B.R. 160 (Bankr. D. Ariz. 1984). The Bankruptcy court is obligated, even  
5 *sua sponte*, to review the fee of debtor's counsel, irrespective of the source of  
6 compensation. *In re Lewis*, 113 F.3d 1040, 1045 (9<sup>th</sup> Cir. 1997); *In re Crimson*  
7 *Investments, N.V.*, 109 B.R. 397 (Bkrcty. D. Ariz. 1989).

63. The proper way to disclose payment of fees to debtor's counsel by someone  
8 other than the debtor is shown by the Jaburg & Wilk fee application. *SB Ex. 51, at 1392.*

#### 12 REQUESTS FOR ACCOUNTINGS

64. During Respondent's bankruptcy representation of Scorpion, Mrs. St.  
13 Germain continually requested an accounting. An adequate accounting was not provided.  
14 *Tr. 29.*

65. After becoming completely disenchanted with Respondent, the St.  
15 Germain's sought out new counsel. In January 2003, the St. Germain's consulted with  
16 attorney Randy Nussbaum to assist with the Scorpion bankruptcy. *Tr. 30 - 32, 142 - 143.*

66. Mr. Nussbaum asked Respondent where the \$40,000 (\$5,000 paid near the  
17 time of the petition plus the \$35,000) had gone. Respondent said he had spent the entire  
18 \$40,000 on the St. Germain's personal legal matters and on the Scorpion bankruptcy. *Tr.*  
19 *146 - 147.*







1 his prior stipulation, Respondent objected to the appointment of an examiner. The Court  
2 rejected the Respondent's objection and ordered the U.S. Trustee to appoint an examiner.  
3 The Court also ordered Respondent and The Nomura Law Offices, P.C., to produce the  
4 documents requested within two weeks or provide an affidavit establishing that the  
5 document did not exist. *SB Ex. 50, at 942.*

6 84. Because The Nomura Law Offices, P.C., now was unrepresented, the  
7 bankruptcy proceeding was subject to being dismissed. A corporation may not appear  
8 *pro se*. In a June 18, 2003 hearing, Respondent asked that the Nomura Law Offices, P.C.,  
9 case be dismissed. The United States Trustee objected to the dismissal as an examiner  
10 had been appointed and financial matters needed to be investigated. The Court did not  
11 dismiss the bankruptcy. *SB Ex. 50, at 955.*

13 85. During the disciplinary hearing, Respondent faulted the U.S. Trustee for  
14 opposing the dismissal of the Chapter 11 proceeding for Nomura Law Offices, P.C.  
15 Respondent suggested that because the bankruptcy was not dismissed, Respondent could  
16 not perform some of his ethical duties. The United States Trustee is charged with  
17 policing bankruptcies. When an attorney or law firm files bankruptcy, the U.S. Trustee  
18 rightly takes an active role to review the financial records of the attorney or law firm to  
19 determine, among other things, whether clients are being protected. Because  
20 Respondent's accounting records were in such disarray, neither the U.S. Trustee nor the  
21 bankruptcy examiner could determine whether clients were safe. They could conclude,  
22 and did so, that serious improprieties regarding client funds were evident in Respondent's  
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1 financial records. *SB Ex. 4, at 80 - 81*. Respondent cannot avoid his ethical obligations  
2 by complaining that the Bankruptcy Court and the U.S. Trustee fulfilled their obligations.

3 86. Respondent's financial and billing records were and are in such disarray,  
4 that it is impossible to determine if Respondent failed to comply with the Bankruptcy  
5 Court Orders that he produce to the U.S. Trustee and the Bankruptcy Examiner certain  
6 documents. Respondent, however, failed to comply with the Bankruptcy Court's June 3,  
7 2003 Order to submit an affidavit establishing that the unproduced document did not  
8 exist. *SB Ex. 50, at 942*.

9  
10 **WHAT WAS PREVENTING RESPONDENT FROM ACCOUNTING FOR THE \$40,000?**

11 87. Respondent claimed that a fire had impeded the accounting of the \$40,000.  
12 *SB Ex. 1 at 52, SB Ex. 4, at 89, SB Ex. 50, at 932*.

13 88. A fire had occurred in the law firm's office. But, according to  
14 Respondent's staff, the fire did not affect the computer on which were located the  
15 accounting and billing records for Scorpion and the St. Germaines. *Tr. 557 - 558, 585 -*  
16 *586*.

17  
18 89. At no time during the Scorpion bankruptcy and the Nomura Law Offices,  
19 P.C. bankruptcy, did Respondent ever provide any accounting or other documentation  
20 explaining what had happened with the \$40,000.

21 90. During the discovery phase of this disciplinary proceeding, Respondent did  
22 not produce any documentation or accounting to explain what happened with the \$40,000.  
23





100. It is unclear whether Respondent knew in Spring 2003 that his billing records did not justify a \$35,000 fee. His staff was sufficiently unsupervised and his billing practices were sufficiently informal that it is possible Respondent did not specifically know that his billing data did not support a \$35,000 fee. And he had so little control over his office procedures and his financial procedures, that he could claim honestly that he could not produce an accounting for the \$40,000 once Ms. Davis left his employ.

#### HARM CAUSED BY RESPONDENT

101. Respondent's actions or inactions caused harm to Scorpion and the St. Germaines. Respondent never attempted to force GE Capital to return the repossessed equipment. Respondent was unclear about the terms of his fee arrangement, and failed to provide explanations and accountings to Scorpion and the St. Germaines. Scorpion and the St. Germaines needed to retain new counsel at a considerable expense to deal with the fallout caused by Respondent.

102. While there is no clear and convincing evidence that Respondent did not turn over specific documentation to the U.S. Trustee or the Examiner, it is clear that Respondent only half-heartedly cooperated with the U.S. Trustee and the Examiner. Therefore, the U.S. Trustee and the Examiner needed to devote services and time in an attempt to reconcile Respondent's financial records. The complete disarray of Respondent's financial and billing records stymied any final reconciliation.

103. Respondent's shoddy bookkeeping and documentation also required the  
1 Bankruptcy Court to devote judicial time to Respondent's representation of Scorpion.  
2

3 **RESPONDENT'S FAILURE TO COOPERATE WITH THE BAR INVESTIGATION**

4 104. On August 28, 2003, Respondent was provided notice of the disciplinary  
5 charge made by Scorpion and the St. Germaines. Respondent was informed that he needed  
6 to submit a response within twenty days. *SB Ex. 6; Tr. 746*. He did not respond.

7 105. Respondent subsequently requested an additional thirty days to respond to  
8 the disciplinary charge. *SB Ex. 12*. And once Respondent retained counsel, that counsel  
9 asked for additional time. *SB Ex. 16*.

10 106. No written response was made to the Notice of Disciplinary Charges. *SB*  
11 *Ex. 9, 25*.

12  
13 **COUNT TWO - STEPHEN AND SHERRY FRY**

14 **THE FRYS RETAIN RESPONDENT**

15 107. In October 2002, Stephen and Sherry Fry, residents of Colorado, retained  
16 Respondent to file a personal bankruptcy in Arizona. Respondent filed the Frys' Chapter  
17 7 bankruptcy petition on October 16, 2002.

18 108. Initially, Respondent agreed with the Frys to handle their bankruptcy matter  
19 for a \$1,500 fee. *Tr. 455, 767*.

20 109. The Frys made a payment of \$250.00 on October 2, 2002 and a second  
21 payment of \$500 on October 3, 2002. *SB Ex. 52, at 776*.

110. Respondent increased the fee to \$2,750. *Tr. 456*. Since the Frys had paid \$750, this meant the Frys needed to pay another \$2,000.

111. Respondent was not clear with the Frys on why the fee needed to be increased and he was not clear at the disciplinary hearing. *Tr. 456 - 457, 464 - 465, 767*. Although the bankruptcy was to be handled on a flat fee, Respondent billed the Frys on an hourly basis. *SB Ex. 52, 61, 62 - 62*.

112. On December 2, 2002, the Frys sent Respondent four money orders, totaling \$2,000. *Tr. 448; SB Ex. 52, at 782 - 785*.

113. The Frys received a billing statement dated February 18, 2003. This billing did not reflect the \$2,000 payment. *SB Ex. 52, at 787*.

114. When the Frys inquired about the missing \$2,000 payment, Respondent claimed that he never received the money. *Tr. 448*.

115. Mr. and Mrs. Fry then made payment of \$1,000 by check dated March 17, 2003, and a second \$1,000 payment by check dated April 24, 2003. *Tr. 448; SB Ex. 52 at 786*.

116. The Frys placed a trace request for the missing four money orders. The Frys paid \$51.60 to obtain copies of the money orders previously sent to Respondent. *SB Ex. 52, at 777 - 781*.

117. When the Frys received the copies of the money orders, they discovered that the money orders had been deposited in the bank account of the Nomura Law Office, P.C. *Tr. 449; SB Ex. 52, at 777 - 780, 782 - 785*.



1 bankruptcy. *Tr. 788*. The corporate bankruptcy does not prevent Respondent from  
2 fulfilling his personal professional obligations.

3 126. By not refunding money to the Frys, Respondent has caused his clients  
4 harm.

5 **RESPONDENT'S RESPONSE TO THE FRY BAR COMPLAINT**

6 127. The Frys filed a charge against Respondent with the State Bar of Arizona.  
7 On May 26, 2004, the Frys' charge was sent to Respondent, and he was requested to  
8 submit a response within twenty days. *Stipulated Facts 14 and 15*.

9 128. Respondent failed to respond to the request for a response to the Frys'  
10 charge. *Stipulated Fact 16*.

11 **RESPONDENT'S FAULTY MEMORY**

12 129. Respondent had no explanation why \$35,000 in what he called earned fees  
13 were deposited into his trust account. Respondent also could not remember why he  
14 created a second professional corporation from which he ran his law practice. It is hard to  
15 believe that any attorney could not explain why he created two separate professional  
16 corporations. It is obvious the new corporation was formed and the \$35,000 was placed  
17 in the trust account to ensure its safety from the IRS.

18 130. Respondent said he was not sure whether a foreclosure had been  
19 commenced on his home. *Tr. 782 - 783*. It is hard to believe that someone cannot  
20 remember whether his home was threatened by a foreclosure during the past three years.

1 It is interesting that Respondent's staff easily remembered that Respondent's home was in  
2 foreclosure. *Tr. 608 - 610, 780 - 784.*

3 131. Respondent could not remember why money from his parents was  
4 deposited into his trust account. After initially denying it, Respondent admitted that he  
5 had borrowed money from his parents and had given his parents a deed of trust on his  
6 home for repayment on the loan. *Tr. 575 - 578, 783 - 784; SB Ex. 42, at 755; SB Ex. 17,*  
7 *at 355.*

8 132. Respondent could not remember who Petroleum Helicopters, Inc. was or  
9 what the \$11,671.40 check was for. *Tr. 650 - 651, 776.* Considering that the issue of the  
10 \$11,671.40 check was discussed days before Respondent testified, *Tr. 650 - 651,* it is  
11 difficult to understand why Respondent did not refresh his recollection before he testified.  
12

13 **AGGRAVATING AND MITIGATING FACTS**

14 133. During the direct examination of Mrs. St. Germain, Respondent sat across  
15 the conference room table from her and read the Arizona Republic. Once Respondent's  
16 counsel began to cross-examine Mrs. St. Germain, Respondent put down the newspaper  
17 and paid attention. The only thing more shocking than this behavior is Respondent's  
18 denial that his behavior was disrespectful. *Tr 787.*

19 134. Respondent refused to acknowledge that he had done anything wrong or  
20 that he caused any harm.  
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22 135. Respondent showed no remorse.  
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24 136. Respondent showed no interest in providing restitution.  
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137. Respondent had a selfish motive.

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138. Respondent has a record of prior discipline: In 1994, Respondent was informally reprimanded for a violation of ER 1.15 by not promptly notifying a client of the receipt of funds in which the client had an interest. While the 1994 sanction is dated, it significantly was followed fairly quickly by more sanctions in 1996, when Respondent was censured, informally reprimanded, and placed on probation for conduct while representing a number of clients. Respondent was found to have violated ER 1.1 (competence), 1.3 (diligence) (two violations), 1.4 (communication) (three violations), 1.15 (client property) (two violations), 1.16(d) (returning file) and 8.1 and Rule 51 (now Rule 53) (failures to respond or respond promptly). Respondent's probation lasted two years. Notably, during that probation period, Respondent had a practice monitor and an audit was performed on his office by staff of the State Bar's Law Office Management Assistance Program ("LOMAP"). Also as a result of his probation, Respondent participated in additional continuing legal education ("CLE") in ethics. On July 22, 2004, Respondent was informally reprimanded for violations of ER 1.4 and 1.16.

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139. In mitigation, Respondent, during this time, was under substantial financial and personal stress. Respondent admitted he suffers from alcoholism, and he stated that, at the time of these events, he had started drinking again, stopped attending AA meetings, and lost contact with his AA sponsor. *Tr. 712*. Respondent's evidence, however, was superficial, and he does not claim that these problems caused the events in question.

## FINDINGS RELEVANT TO RESTITUTION

1           140. Respondent should provide restitution to the Frys in the amount of  
2 \$2,051.60, which consists of the additional \$2,000 sent to Respondent because of the  
3 improper posting by Respondent's staff plus the cost of tracing the money orders  
4 comprising the first \$2,000 payment.  
5

6           141. As for the \$40,000 delivered to Respondent in the Scorpion matter, the  
7 State Bar suggests that, based on *In re Crimson Investments, N.V.*, 109 B.R. 397 (Bkrtcy.  
8 D. Az. 1989), restitution or disgorgement of those funds can be determined by the  
9 bankruptcy court. This is true. Therefore, a copy of this Report shall be delivered to (i)  
10 the bankruptcy judges assigned to the Scorpion case and the Nomura Law Offices, P.C.,  
11 case, and (ii) the U.S. Trustee. While this record establishes that \$40,000 was not a  
12 reasonable fee, the record is not sufficient for this Hearing Officer to determine what fee  
13 would be reasonable and who (Scorpion, Scorpion's creditors, the St. Germain's or Black  
14 Mountain Commercial Center) is entitled to restitution.  
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16

## CONCLUSIONS OF LAW

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18           1. Based on the foregoing, this Hearing Officer concludes as to Count One, (i)  
19 that there is clear and convincing evidence that Respondent violated ERs 1.1, 1.2, 1.3,  
20 1.4, 1.5, 1.7, 1.15, 8.1 and Rules 43, 44 and 53(f), and (ii) that there is not clear and  
21 convincing evidence that Respondent violated ERs 1.16, 8.4(c) and 8.4(d).  
22

23           2. Based on the foregoing, this Hearing Officer concludes as to Count Two, (i)  
24 that there is clear and convincing evidence that Respondent violated ERs 1.4, 1.5, 1.15,  
25  
26

1 8.1 and Rules 43, 44 and 53(f), and (ii) that there is not clear and convincing evidence  
2 that Respondent violated ERs 1.3, 1.16, 8.4(c) and 8.4(d).

3 3. Respondent, in his Answer, claims that a violation of ER 1.7 was  
4 improperly alleged in Count One of the Complaint as the Probable Cause Order did not  
5 specifically cite ER 1.7. The citation to ERs in the Probable Cause Order, however, is not  
6 exclusive. Moreover, any error was cured by the allegation in the Complaint of an ER 1.7  
7 violation.

8 4. The Complaint alleged trust account violations as to two specific clients,  
9 Scorpion and the Frys. During Bar Counsel's examination of the trust account examiner,  
10 there was an attempt to elicit testimony that Respondent had violated the trust account  
11 rules generally, for example, by not monthly reconciling his trust account. Respondent  
12 objected to evidence relating to trust account violations which did not involve the  
13 Scorpion and the Frys. *Tr 383 - 385, 389 - 399*. Considering the excellent and detailed  
14 report of the trust account examiner, it would have been simple for the State Bar to draft a  
15 Complaint that gave notice that Respondent could be disciplined for how he *generally*  
16 handled his trust account. Even with its 102 paragraphs, however, the Complaint did not  
17 adequately charge Respondent with *general* trust account misconduct, but only gave  
18 Respondent notice of trust account misconduct concerning Scorpion and the Frys. *In re*  
19 *Tocco*, 194 Ariz. 453, 457, 984 P.2d 539, 543 (1989); *Matter of Levine*, 174 Ariz. 146,  
20 169 - 170, 847 P.2d 1093, 1116 - 1117 (1993); *In re Myers*, 164 Ariz. 558, 795 P.2d 201  
21 (1990).  
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1 Furthermore, Respondent could not adequately described how Scorpion could  
2 recover the repossessed equipment from GE Capital. Considering the clarity of the  
3 applicable Code provisions, *11 U.S.C. §§ 361, 541, 542*, and the relevant case law, *In re*  
4 *Colortran, Inc.*, supra; *In re Peralta*, supra, Respondent's inability to articulate  
5 Scorpion's rights reflects either that he is not competent to represent a Chapter 11 debtor,  
6 see *Matter of Curtis*, 184 Ariz. 256, 908 P.2d 472 (1995),<sup>2</sup> or that he was less than candid  
7 at the disciplinary hearing.

8 The State Bar contends that Respondent was also incompetent based on the  
9 criticisms made and questions raised by Mr. Nussbaum in his letters to Respondent.  
10 Since Mr. Nussbaum was only a fact witness, clear and convincing evidence of  
11 incompetency was not submitted on this point.  
12

13 Why a violation of ER 1.2 exists. The major reason for the Scorpion bankruptcy  
14 was the repossession of Scorpion's equipment. The St. Germaines and Scorpion wanted to  
15 have that equipment returned to Scorpion. Respondent knew this but did nothing to  
16 attempt the "turn over" of the equipment.  
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20  
21 <sup>2</sup> "Respondent could not provide competent representation because he failed to  
22 have, attempt to obtain, or apply the 'legal knowledge, skill, thoroughness and  
23 preparation reasonably necessary' for his representation of Client in this matter. *ER 1.1*.  
24 Respondent may not have known what to do or how to do it, but for whatever reason he  
did not attempt a thorough review of the matter and did not prepare or do anything  
beyond a cursory check of the bankruptcy file." *Id.*, 184 Ariz. at 261 - 262; 908 P.2d at  
477 - 478.

1                   Why a violation of ER 1.5 exists. The primary requirement of ER 1.5 is that a  
2 “lawyer shall not make an agreement for, charge or collect an unreasonable fee or an  
3 unreasonable amount for expenses.” This requirement applies whether the fee is a fixed  
4 fee, a contingency fee or a fee based upon an hourly rate. *Matter of Swartz*, 141 Ariz.  
5 266, 686 P.2d 1236 (1984); *ABC Supply, Inc. v. Edwards*, 191 Ariz. 48, 952 P.2d 286  
6 (App. 1997). Cases involving ER 1.5 violations can be divided into three groups: (1)  
7 where the fee, whether or not set forth in a written fee agreement, exceeds what is a  
8 “reasonable” fee; (2) where the lawyer charges more than the client agreed to pay or  
9 includes in billings charges for which the client has not agreed to be responsible; and, (3)  
10 where the lawyer accepts a lump sum advance retainer or fixed fee advance payment for  
11 an engagement, and has not completed the task for which the lawyer was hired.  
12

13 Respondent’s bankruptcy fee for Scorpion was not clearly communicated. Promised  
14 billing statements were not sent. Considering the manipulation which needed to occur to  
15 create Exhibits O, P and Q, the \$35,000 was not a reasonable fee for the work performed  
16 by Respondent.  
17

18                   Why a violation of ER 1.7 exists. Respondent’s representation of Scorpion was  
19 “materially limited” by Respondent’s representation of the St. Germaines and by his own  
20 interests. *Matter of Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995); *In re*  
21 *Shannon*, 179 Ariz. 52, 876 P.2d 548, 556-558 (1994). Respondent still could have  
22 represented Scorpion as long as there was proper disclosure and consultation. *ER 1.7(b)*;  
23  
24  
25  
26

*Matter of Owens*, supra. A thorough explanation was required, but was not given.

Respondent's state of mind, however, was negligent.

Why a violation of ER 1.16 does not exist. The overriding obligation of the lawyer in situations governed by this Rule is to "take steps to the extent reasonably practicable to protect a client's interests." This duty exists even if the lawyer believes the discharge is unfair. While Respondent did not react as promptly as he could have to surrender his file and the \$17,500, there is not clear and convincing Respondent's actions fell below the standard of ER 1.16 and no clear and convincing evidence that he exposed Scorpion or the St. Germaines to prejudice.

Why a violation of ER 8.4(c) does not exist. ER 8.4 requires "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." *ER 1.0 and 8.4(c)*. Stated another way, to commit a violation of ER 8.4(c), an attorney must have a purpose to deceive. Respondent's conduct in depositing the \$35,000 in his trust account, paying personal debts from the account, and then failing to provide an accounting for this money is extremely troubling. However, there is not clear and convincing evidence that Respondent's acts were done with a purpose to deceive. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004); *Matter of Arrick*, 180 Ariz. 136, 882 P.2d 943 (1994).

Why a violation of ER 8.4(d) does not exist. ER 8.4(d) proscribes disrespect for the court, abusive or uncivil behavior towards opposing counsel or parties, sexual misconduct, abuse of public office, and deceitful conduct. See ANNOTATED MODEL

1 RULES 615 - 17 (5<sup>th</sup> Ed. 2003). For example, an attorney who manifests by words or  
2 conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age,  
3 sexual orientation or socioeconomic status, violates paragraph (d) when such actions are  
4 prejudicial to the administration of justice. *See comment 2 for former 8.4(d)*. The State  
5 Bar failed to present clear and convincing evidence that Respondent's conduct violated  
6 ER 8.4(d).

7 **EXPLANATION OF SOME CONCLUSIONS OF LAW ON COUNT TWO**

8 Why a violation of ER 1.3 does not exist. Unlike Count One, Count Two involves  
9 representation in a Chapter 7 bankruptcy. The primary goal of a Chapter 7 proceeding is  
10 to obtain a discharge from debt. The Frys were granted their discharge. The State Bar  
11 does not identify anything Respondent should have accomplished in the Frys' Chapter 7  
12 case which he did not.

14 Why a violation of ER 1.5 exists. Respondent was not clear on the legal services  
15 he was to provide under his flat fee agreement with the Frys. Moreover, he was not clear  
16 on why the flat fee needed to be increased.

18 Why a violation of ER 1.16 does not exist. "Upon termination of representation, a  
19 lawyer shall take steps to the extent reasonably practicable to protect a client's interests,  
20 such as giving reasonable notice to the client, allowing time for employment of other  
21 counsel, surrendering documents and property to which the client is entitled and  
22 refunding any advance payment of a fee that has not been earned. Upon the client's  
23

1 request, the lawyer shall provide the client with all of the client's documents. There was  
2 no clear and convincing evidence of such offenses here.

3 Why a violation of ER 8.4(c) does not exist. ER 8.4 requires "conduct that is  
4 fraudulent under the substantive or procedural law of the applicable jurisdiction and has a  
5 purpose to deceive." *ER 1.0 and 8.4(c)*. A showing of negligence is insufficient to  
6 support a determination that a lawyer committed a fraud or engaged in fraudulent  
7 conduct. *In re Clark, supra; Matter of Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288  
8 (1995). There is no clear and convincing evidence of a purposeful deception.

9 Why a violation of ER 8.4(d) does not exist. ER 8.4(d) proscribes disrespect for  
10 the court, abusive or uncivil behavior towards opposing counsel or parties, sexual  
11 misconduct, abuse of public office, and deceitful conduct. *See ANNOTATED MODEL*  
12 *RULES 615 - 17 (5<sup>th</sup> Ed. 2003)*. The State Bar failed to present clear and convincing  
13 evidence that Respondent's conduct violated ER 8.4(d).  
14

#### 15 APPROPRIATE SANCTION

16  
17 The purpose of professional discipline is twofold: (1) to protect the public, the  
18 legal profession, and the justice system, and (2) to deter others from engaging in similar  
19 misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985); *In re Swartz*,  
20 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984). Disciplinary proceedings are not to  
21 punish the attorney. *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004); *In re*  
22 *Beren*, 178 Ariz. 400, 874 P.2d 320 (1994). The State Bar suggests disbarment.  
23 Respondent suggests three years of probation.  
24

## CONSIDERATION OF THE ABA STANDARDS

1 In determining the appropriate sanction, the American Bar Association's  
2 *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, supra. Those  
3 *Standards* counsel that, in determining the proper sanction, four criteria should be  
4 considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential  
5 injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or  
6 mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA  
7 *Standard 3.0*. Where there are multiple charges of misconduct, there should only be one  
8 sanction with the multiple instances of misconduct considered as aggravating factors. See  
9 *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

12 Respondent's violations of ER 1.15 and Rules 43 and 44 are the most serious.  
13 Therefore, the most relevant ABA Standard is 4.1 (failure to preserve the client's  
14 property). The evidence does not clearly and convincingly show a knowing conversion of  
15 client property. The evidence does establish clearly that Respondent knew or should have  
16 known that he was dealing improperly with the funds and was causing injury or potential  
17 injury to a client. Therefore, Standard 4.12 applies:

19 Suspension is generally appropriate when a lawyer knows or should know  
20 that he is dealing improperly with client property and causes injury or  
21 potential injury to a client.

## AGGRAVATION AND MITIGATION

22 This Hearing Officer finds the following aggravating circumstances:

- 24 • prior discipline. [9.22(a)]

- selfish motive. [9.22(b)]
- pattern of misconduct. [9.22(c)]
- multiple offenses. [9.22(d)]
- refusal to acknowledge wrongdoing. [9.22(g)]
- indifference to restitution. [9.22(j)]

“Substantial experience in the law” is not an aggravating factor. The misconduct in this case is not the type of misconduct which is less likely to occur the more experienced the lawyer is. *Matter of Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995). While Respondent’s dealings with the State Bar were lackluster and his testimony, in some regards, was not credible, there is not sufficient evidence of the 9.22(e) and 9.22(f) aggravating factors [“bad faith obstruction of the disciplinary proceeding” and “false statement”].

There is evidence of mitigating personal problems faced by Respondent. The evidence was not substantial, and there was no real effort by Respondent to show that his financial and personal problems are under control or that he had made an active effort to resolve them. Therefore, no significant weight is given to this mitigating factor.

#### PROPORTIONALITY ANALYSIS

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to

1 examine sanctions imposed in cases that are factually similar: *In re Shannon*, 179 Ariz.  
2 52 (1994); *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988). Relevant cases for  
3 proportionality include *Matter of Roberts*, SB-04-0123-D (2004); *Matter of Whithead*,  
4 SB-04-0151-D (2003); *Matter of Weisling*, SB-01-0038-D (2001); *Matter of Silkey*, SB-  
5 02-0084-D (2002); *Matter of Hart*, SB-02-0119-D (2002); and *Matter of Turnage*, SB-01-  
6 0120 (2001).

7 In *Matter of Silkey*, the lawyer was suspended for four years for similar  
8 misconduct in several client matters. In *Matter of Weisling*, the attorney received a two-  
9 year suspension for misconduct in three matters, including violations of ERs 1.15,  
10 1.16(d), and Rule 51(h). It should be noted that *Weisling* also involved several other  
11 violations, and a prior suspension. In *Whitehead*, a four year agreed-upon suspension was  
12 approved where the attorney, in almost fifty client matters, inappropriately dealt with  
13 client funds, failed to timely provide accountings, failed to timely refund unearned fees,  
14 and failed to respond to the State Bar's inquiries.

15  
16  
17 *Hart* involved an approved two year suspension where the attorney failed to  
18 diligently represent his clients and failed to adequately communicate. The attorney also  
19 failed to provide an accounting when requested, mishandled trust funds, commingled  
20 personal funds with client funds in a trust account, and failed to keep accurate trust  
21 records, and failed to respond to bar counsel inquiries.

22  
23 *Matter of Roberts* involved an agreed-upon three and one-half year suspension for  
24 violations of ER 1.2, 1.3, 1.15, 1.16 and 8.4(d), plus Rules 43(d), 44(b)(4). The

1 attorney's misconduct included failing to abide by his client's decision concerning the  
2 objectives of the representation, failing to act with reasonable diligence, failing to protect  
3 his client's property, depositing personal funds in the trust account, failing to abide by the  
4 trust accounts guidelines, and failing to promptly pay to the client funds which the client  
5 was entitled to receive.

6 In *Turnage*, the lawyer received a four year suspension and was ordered to pay  
7 restitution in connection with an eight count complaint, including charges the lawyer  
8 failed to provide diligent representation in five cases, failed to respond to the State Bar in  
9 one case, failed to communicate with the client in another, failed to comply with an order  
10 of the court resulting in dismissal of another case, and committed three violations of the  
11 trust account rules. Aggravating factors found included prior disciplinary offenses,  
12 pattern of misconduct, multiple offenses and failure to cooperate.  
13

#### 14 CONCLUSION

15 The evidence does not support the conclusion that Respondent purposefully set out  
16 to harm his clients. The evidence, however, does support the conclusion that Respondent  
17 is knowingly lax about his fee arrangements, his time-keeping and billing procedures, and  
18 his handling of his trust and operating accounts. While Respondent's prior disciplinary  
19 violations were nowhere near as serious as the violations here, it is clear Respondent  
20 learned little or nothing from the prior sanctions, even though one prior sanction required  
21 LOMAP training. *Tr. 553 - 554, 700 - 702*. Respondent has had ample notice and  
22  
23  
24

1 opportunity to improve his practices and to learn appropriate methods but Respondent has  
2 not changed anything. *Tr.* 553 - 554, 700 - 702, 764.

3 Respondent's reactions to the State Bar show little respect and little appreciation of  
4 the seriousness of the disciplinary process. His conduct during the evidentiary hearing  
5 only reinforces this conclusion. Respondent's lack of remorse and failure to acknowledge  
6 any responsibility portray a lawyer in denial, a status very dangerous for an admitted  
7 alcoholic. A lengthy suspension is warranted.

### 8 RECOMMENDATION

9 Upon consideration of the facts, application of the *Standards*, including  
10 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer  
11 recommends the following:  
12

- 13 1. That Respondent be suspended for two (2) years.
- 14 2. That Respondent be ordered to pay the costs and expenses incurred in these  
15 disciplinary proceedings.
- 16 3. That Respondent provide restitution to the Frys in the amount of \$2,051.60.
- 17 4. That Respondent, after the term of his suspension, be placed on probation  
18 for two (2) years, the terms of which should be set upon reinstatement, but which should  
19 include:  
20
  - 21 a. attendance at a Trust Account Ethics Enhancement Program.  
22  
23  
24  
25  
26



**COPY** of the foregoing mailed this  
24<sup>th</sup> day of May, 2005, to:

John F. O'Connor  
**Respondent's Counsel**  
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The Honorable James M. Marlar  
**United States Bankruptcy Judge**  
District of Arizona  
230 North First Avenue  
Phoenix, AZ 85003

The Honorable Redfield T. Baum Sr.  
**United States Bankruptcy Judge**  
District of Arizona  
230 North First Avenue  
Phoenix, AZ 85003

Office of the United States Trustee  
230 North First Avenue, Suite 204  
Phoenix, AZ 85003

*P. Williams*