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JUN 23 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY Orto

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

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5 IN THE MATTER OF A MEMBER) No. 04-0972
6 OF THE STATE BAR OF ARIZONA,)
7)
8 **SHERMAN R. BENDALIN,**)
9 **Bar No. 002344**)
10) **HEARING OFFICER'S REPORT**
11)
12) **RESPONDENT.**)
13)
14)

PROCEDURAL HISTORY

11 A Probable Cause Order was filed on October 5, 2005. A Complaint was
12 filed on November 30, 2005. Respondent filed an Answer on January 13, 2006.
13 Respondent filed a Notice of Settlement on March 8, 2006. The parties filed a
14 Tender of Admissions and Agreement for Discipline by Consent (Tender) and
15 Joint Memorandum in Support of Tender of Admissions and Agreement for
16 Discipline by Consent (Joint Memo) on March 27, 2006. No hearing has been
17 held in this matter.
18
19

FINDINGS OF FACT

20
21 1. At all times relevant, Respondent was a lawyer, admitted to practice
22 in the State of Arizona on September 20, 1969.
23

24 **A. COUNT ONE (File No. 04- 0972 – Connie M. Mills)**
25

1 2. On or about April 18, 2002, Respondent entered into a retainer
2 agreement with Connie M. Mills (" Ms. Mills"), to represent her in pursuing two
3 claims, consisting of:

4 a. Disability Insurance Claim ("SSDI"), based on Title II of the
5 Social Security Act;

6 b. Supplemental Security Income Claim ("SSI"), based on Title XVI
7 of the Social Security Act.
8

9
10 3. Respondent's retainer agreement provided for a fee of the lesser of
11 25% of past due benefits or \$5,300. The agreement further provided that in the
12 event the claim progressed beyond the initial ALJ hearing, then upon a favorable
13 decision Ms. Mills would pay an attorney's fee of 25% of the past due benefits not
14 subject to the maximum of \$5,300. All such fees were subject to authorization by
15 the Social Security Administration.
16

17 4. On or about June 18, 2002, Respondent sent Ms. Mills a letter
18 explaining:
19

20 a. SSDI Benefits and attorney fees: That with regard to SSDI past
21 due benefits, 25% would be withheld by the Social Security
22 Administration for direct payment to Respondent and that the
23 check Ms. Mills would receive would constitute only 75% of her
24
25

1 total past-due benefits. Respondent also requested that Ms. Mills
2 provide him with a photocopy of the check when she received it.

3
4 b. SSI Benefits and attorney fees: That with regard to SSI past due
5 benefits, Ms. Mills would receive a check for 100% of such
6 benefits and that upon receipt, she should contact Respondent and
7 pay him 25% of the check she received as his attorney fee.
8 Respondent also requested that Ms. Mills provide him with a
9 photocopy of that SSI benefit check for his file. Respondent
10 carefully explained that:
11

12 *In other words, you must personally pay directly to me attorney's fees from*
13 *your SSI past-due benefits, whereas attorney's fees in a disability claim are*
14 *withheld by the Administration who then pays my fees from your withheld*
15 *past-due benefits.*

16 5. SSDI benefits and attorney fees approved: On or about August 25,
17 2003, the Social Security Administration notified Respondent and Ms. Mills by a
18 "Notice of Award" of that date that she was being awarded withheld past due
19 SSDI benefits of \$10,264, from which a 25% attorney fee of \$2,566 was
20 authorized. Pursuant to the applicable rules, the Social Security Administration
21 then deducted a user fee of \$161.66 from Respondent's attorney fee, yielding a net
22 fee to Respondent \$2404.34 from Ms. Mills' SSDI award. The Social Security
23 Administration paid such fee directly to Respondent by a United States Treasury
24 check, no. 2049-70749012 dated August 22, 2003.
25

1 6. SSI benefits and attorney fees approved: On or about October 27,
2 2003, the Social Security Administration sent Respondent a document entitled
3 "Important Information" dated October 24, 2003, that was a copy of a notice the
4 Administration had sent to Ms. Mills. Such notice advised that Ms. Mills' past
5 due Supplemental Security Income ("SSI") benefits amounted to \$1,635 and that
6 the maximum fee Respondent could charge Ms. Mills was \$408.75 exclusive of
7 costs.
8

9
10 7. However, after the notification of the SSDI award of August 25,
11 2003 but before the notification of the SSI award of October 27, 2003, on October
12 2, 2003, Respondent received two money orders from Ms. Mills, both dated
13 October 1, 2003, including:
14

- 15 a. U.S. Postal Service money order number 05661177647 in the
16 amount of \$1000 payable to "Mr. Bendalin, P.C."
- 17 b. U.S. Postal Service money order number 05661177658 in the
18 amount of \$568 payable to "Mr. Bendalin, P.C."
- 19

20 8. Ms. Mills knew that Respondent's fee was 25% of her past-due
21 benefits and when she received her past-due benefit check of \$6,272.02 she
22 voluntarily mailed to Respondent the two money orders, totaling \$1568, believing
23 that amount was due Respondent as his fee for the SSI component of his
24 representation. \$1,568 is approximately 25% of \$ 6,272.02.
25

1 9. Ms. Mills indicates that as she received more paperwork about her
2 favorable decision, she realized she had overpaid Respondent and started leaving
3 messages on Respondent's voicemail regarding the discrepancy. Ms. Mills
4 believes she left two voice mails and spoke to Respondent's legal assistant once,
5 without receiving any acknowledgment. Respondent does not recall the number
6 of phone calls made by Ms. Mills, but assuming such calls were made, any failure
7 to promptly respond was an oversight by Respondent and/or his staff.
8
9

10 10. On or about December 1, 2003, Ms. Mills sent Respondent a letter
11 indicating that she was confused about the wording of the SSI paperwork and that
12 with the assistance of the Social Security office in Stafford, it became evident the
13 \$1,568.00 she sent to him on October 1, 2003 was an overpayment.
14

15 11. Shortly after receiving Ms. Mills' letter, on about December 18,
16 2003, Respondent or his staff prepared invoice number 12376, acknowledging
17 Ms. Mills' payments of October 1, 2003 and indicating "12/18/03 Refund Client
18 Retainer \$1000".
19

20 12. Ms. Mills believes that in February 2004 she wrote and mailed a
21 second letter to Respondent asking for her refund. Ms. Mills' letter of February
22 2004 enclosed Social Security Administration form SSA- 1099, which described
23 the benefits paid and fees deducted by the Social Security Administration for
24
25

1 direct payment to Respondent. Ms. Mills does not recall being contacted by
2 Respondent's office in response to the February 2004 letter.

3
4 13. On or about May 9, 2004, Respondent sent Ms. Mills a letter
5 enclosing his "Office Account No. 1" check number 019466 in the amount of
6 \$1000 and apologizing for "the delay in refunding you these funds and for any
7 inconvenience caused." Respondent and/or his office staff had inadvertently
8 failed to send the refund to Ms. Mills immediately. Ms. Mills had paid
9 Respondent a total of \$1,568, and Respondent refunded Ms. Mills \$1,000. The
10 difference represented incurred costs owed by Ms. Mills to Respondent.
11

12
13 14. Before Ms. Mills received Respondent's refund check, on or about
14 May 12, 2004, Ms. Mills filed a complaint with the Office of the Attorney
15 General for the state of Arizona, requesting assistance due to Respondent's failure
16 to refund her overpayment. On or about June 4, 2004, such complaint was
17 forwarded to the State Bar of Arizona and State Bar investigative file 04-0972
18 was opened.
19

20 **II. COUNT TWO (File No. 04-0972):**

21 **A. Client Trust Account Rule Violations**

22
23 15. On or about October 8, 2004, bar counsel requested Respondent to
24 respond concerning why in spite of the fact Ms. Mills sent him two letters and
25 made one phone call to his legal assistant and Respondent prepared a December

1 18, 2003 invoice indicating he owed Ms. Mills a refund, his check to Ms. Mills
2 was not dated until May 9, 2004. It his response dated October 15, 2004,
3 Respondent indicated that the delay in issuing the check was an oversight by him
4 or his office staff.
5

6 16. On or about October 19, 2004 bar counsel wrote Respondent and
7 noted that the refund check came out of Respondents' operating account. Bar
8 counsel asked Respondent to explain why he did not keep the refund money,
9 which was always owed to Ms. Mills, in a trust account. For his response,
10 Respondent noted that the Social Security Administration form inquires as to
11 whether the attorney is holding funds to be applied toward payment of the
12 authorized fee in either a "trust or escrow account." Respondent erroneously
13 believed that the language in the form allowed him to keep funds from clients in
14 any kind of account so long as the account could be reconciled and all deposits
15 and disbursements accounted for. Respondent is now aware that client funds can
16 never be kept in a general operating account, even in Social Security benefit
17 cases. Respondent further indicated, in response to bar counsel's October 19,
18 2004 letter, that effective January 2004 he began practicing in a partnership and
19 that after discussing the issue with his partner, they have agreed to hold funds
20 collected from clients while waiting for authorizations from the Social Security
21 Administration to charge and receive a fee in their respective trust accounts until
22
23
24
25

1 the appropriate authorization order is received. Once the authorization order is
2 received Respondent and his partner will then transfer the funds to the firm
3 operating account.
4

5 17. As set forth above, Respondent admitted commingling client funds
6 with those in his firm operating account and failed to promptly pay funds to a
7 client entitled to them or timely provide an accounting concerning the
8 safekeeping of such funds when requested. Accordingly, the State Bar instituted
9 a further investigation into Respondent's procedures for safekeeping client funds,
10 by inquiring into Respondent's management of his trust account, requesting
11 copies of bank statements, canceled checks, client ledgers and deposit slips or the
12 equivalent.
13
14

15 18. Respondent fully cooperated with the State Bar's inquiries and
16 provided voluminous records as to this trust account. Respondent corresponded
17 frequently with the State Bar during its investigation.
18

19 19. Respondent provided client trust account ledgers revealing that on
20 September 17, 2001, Respondent disbursed \$100 by a client trust account check
21 number 3822 to a bonding company for the benefit of a client named Stahl at a
22 time when that client's trust account balance was only \$55.90, thereby improperly
23 using other client's funds to cover the outstanding bill. Respondent's records
24 including a notation:
25

1 *SRB [Respondent] wrote a trust check to cover the Acordia Bond Fee. There*
2 *was not enough/any money in trust to cover the entire Bond fee. We need to*
3 *reimburse the Trust Account for the overdrawn balance.*

4 Respondent did not repay the \$44.10 to the client trust account until June 1, 2004,
5 two years and 10 months later, when Respondent deposited his firm operating
6 account check number 019457, in the amount of \$44.10, into his client trust
7 account. The client trust account was thus reimbursed the full amount, and the
8 delay in reimbursement was an administrative oversight by Respondent and/or his
9 staff.
10

11 20. On September 30, 2003, issued client trust account check number
12 3059, in the amount of \$1,683.48 payable to himself, (hereafter, "SRB PC") of
13 which \$500.00 was for the benefit of a client named Whittington, at a time when
14 the balance held in the client trust account for client Whittington was only \$200,
15 thereby misusing other client's funds. Respondent's file includes a notation
16

17 *Todd Whittington over transferred \$300 to SRB that was already paid out to*
18 *Medical Eval. 06/16/03 T/A check #3030. Transfer back done 02/27/04,*
19 *check number 3089, \$300.00.*

20 Client trust account records provided by Respondent did not substantiate this
21 note. However, if it were true, it indicates Respondent did not repay the \$300.00
22 to the client trust account until February 27, 2004, five months after the original
23 improper disbursement. Although Respondent's records do not substantiate the
24 information noted, Respondent's reconstruction of the transaction indicates the
25

1 explanation is in fact accurate, the client trust account was thus reimbursed the full
2 amount, and the delay in reimbursement was an administrative oversight by
3 Respondent and/or his staff. The remainder of the withdrawal was a transfer of
4 funds to Respondent's general operating account. Specifically, these were funds
5 comprised of either fees earned by Respondent, or costs to be reimbursed to
6 Respondent, in connection with other clients.
7

8
9 21. On July 26, 2001 Respondent disbursed client trust account check
10 number 3808 in the amount of \$58.00, payable to the Clerk of Court and a client
11 trust account check number 3809, payable to Orange County Sheriff's
12 Department, for the benefit of client Winston-Bell at a time when there were no
13 funds in Respondent's client trust account for client Winston Bell, which thereby
14 misappropriated other clients' funds. Respondent's file includes a notation:
15

16 *Barbara Winston Bell had two checks written out of trust for costs that were*
17 *not posted to Timeslips before I calculated the monthly trust transfer. We*
18 *need to reimburse the Trust Account for that incorrect draw.*

19 Respondent did not repay the \$58.00 to his client trust account until June 1, 2004,
20 two years and 10 months later when he corrected the deficit by depositing his
21 operating account check number 019457. The client trust account was thus
22 reimbursed the full amount, and the delay in reimbursement was an administrative
23 oversight by Respondent and/or his staff.
24
25

1 22. On June 11, 2003, Respondent disbursed \$203.00 by client trust
2 account check number 3029, payable to the Clerk of Court for the benefit of a
3 client named Friedlander. Friedlander was an ongoing representation beginning
4 in 1996 with a conservatorship and guardianship which became a probate in May
5 2003. Over the years, several trust account deposits had been received and
6 applied toward attorney's fees and costs. Many disbursements likewise had been
7 made. The June 11, 2003 disbursement was made when the client's trust account
8 balance was below the amount of the check written, thereby misusing other
9 clients' funds from the client trust account. Respondent's file includes a notation:

12 *Offset of end of month trust transfer trust account check #3047 by \$203.00,*
13 *08/19/03. 06/23/03 trust account balance is 0. Entered this as an expense*
14 *because there wasn't any money in trust. 07/30/03. Trust transfer was*
15 *reduced by \$203 to reimburse trust acct. for check #3029 incorrectly written*
16 *when Friedlander had no \$ to write against. Trust transfer \$2,631.36 -*
17 *\$203.00= \$2,428.36. Reimburse trust for Friedlander incorrect transfer - see*
18 *check #3029 dated 06/11/03- insufficient funds.*

18 Client trust account records provided by Respondent do not substantiate this note.
19 However, if true, Respondent did not deposit the \$203.00 back to his client trust
20 account until August 2003, two months after the inappropriate disbursement.
21 Although Respondent's records do not substantiate the information noted,
22 Respondent's reconstruction of the transaction indicates the explanation is in fact
23 accurate and the client trust account was thus reimbursed the full amount, and the
24

1 delay in reimbursement was an administrative oversight by Respondent and/or his
2 staff.

3
4 23. Respondent disbursed \$19.00 on November 13, 2002 by client trust
5 account check number 3926, payable to the Clerk of the Court, for the benefit of a
6 client named Baker, at a time when Respondent had no funds in his client trust
7 account for the benefit of Baker, thereby misappropriating other clients' funds in
8 the client trust account. Respondents file includes a notation:

9
10 *Advised SRB that no \$ existed for the 11/13/02 cost. We need to transfer it*
11 *back to trust. Done 02/27/04 trust account check #3089 offset.*

12 Client trust account records provided by Respondent contradict this note in that
13 the client ledger for a client Pratt appears to be the only document showing a
14 reimbursement of \$19.00. Respondent now recognizes that either (1) the original
15 check was incorrectly identified as being issued for the benefit of client Baker and
16 should have been identified as paid for client Pratt or (2) the client ledger
17 provided to the State Bar indicating the refund that went to client Pratt was
18 erroneous because the refund actually went to client Baker. Whichever
19 explanation is correct, the client trust account, and in turn the appropriate client
20 was thus reimbursed the full amount, and the delay in reimbursement was an
21 administrative oversight by Respondent and/or his staff.

22
23
24 24. Recognizing his own oversight and/or that of his staff in handling
25 Ms. Mills' refund, on his own initiative Respondent began to review his trust

1 account records and improve management procedures prior to Ms. Mills' filing a
2 charge with the State Bar. He also reimbursed the client trust accounts described
3 above before he knew that a State Bar complaint or investigation were underway.
4

5 **III. CONDITIONAL ADMISSIONS**

6 **A. RESPONDENT'S CONDITIONAL ADMISSIONS:**

7 **1. Count One**

8
9 **25.** By failing to act with reasonable diligence and promptness in
10 resolving Ms. Mills' questions about the resolution of her case and failing to
11 timely refund her money Respondent violated ER 1.3 (Diligence); by failing to
12 keep Ms. Mills reasonably informed about the status of her matter, failing to
13 promptly comply with her reasonable requests for information, and failing to
14 explain the matter to the extent reasonably necessary to permit Ms. Mills to make
15 informed decisions regarding the representation Respondent violated ER 1.4; by
16 failing to hold Ms. Mills' funds separate from his office operating account, and by
17 failing to promptly deliver to the Ms. Mills funds she was entitled to receive,
18 Respondent violated ER 1.15.
19
20

21 **2. Count One and Two: Pre-December 1, 2003 conduct**

22
23 **26.** As set forth in Counts One and Two Respondent's conduct occurring
24 prior to December 1, 2003, violated ER 1.15 of Rule 42 Ariz.R.S.Ct. as well as
25 Rules 43 and 44 Ariz.R.S.Ct. in effect until December 1, 2003. Respondent's

1 Conduct occurring prior to December 1, 2003 violated the State Bar of Arizona
2 Trust Account Guidelines ("Guidelines") as incorporated into the Rules of
3 Professional Conduct by Rule 43(d) Ariz.R.S.Ct. in effect at the time. In
4 particular, Respondent's failure to exercise due professional care in the
5 performance of his duties under the Guidelines, his failure to ensure that
6 employees and others assisting him were competent and properly supervised, his
7 failure to maintain internal controls within his office to safeguard funds held in
8 trust and his failure to record all transactions promptly and accurately, violated
9 Guidelines 1.a., 1.b., 1.c., and 1.d. With the exception of client Mills, (see Count
10 One, supra.) Respondent deposited all funds received on behalf of clients intact
11 into an account designated as a trust account, but failed to consistently maintain
12 an accurate account ledger or the equivalent for each person or entity for whom
13 monies were received in trust, showing the date of receipt, the amount received,
14 the date of any disbursements, the amount disbursed, and any unexpended
15 balance, and failed to accurately perform a monthly reconciliation of the trust
16 account records and the bank statement violated Guidelines 2.b., 2.d., and 2.e.
17 Such conduct also violated Rule 44(a) and (b) Ariz.R.S.Ct.

22
23 **3. Count One and Two Post December 1, 2003 conduct**

24 27. As set forth in Counts One and Two, Respondent's conduct occurring
25 after December 1, 2003, violated ER 1.15 of Rule 42 Ariz.R.S.Ct. as well as

1 Rules 43 and 44 Ariz.R.S.Ct. in effect after December 1, 2003, as follows: With
2 the exception of client Mills, (see Count One, supra.) Respondent deposited all
3 funds received on behalf of clients intact into an account designated as a trust
4 account. However, Respondent's failure to exercise due professional care in the
5 performance of his duties under Rule 43 Ariz.R.S.Ct., his failure to ensure that
6 employees and others assisting him were competent and properly supervised, his
7 failure to maintain internal controls within his office to safeguard funds held in
8 trust and his failure to record all transactions promptly and accurately, his failure
9 to deposit unearned funds received on behalf of client Mills into an account
10 designated as a trust account, his failure to maintain an accurate account ledger or
11 the equivalent for each person or entity for whom monies were received in trust,
12 showing the date of receipt, the amount received, the date of any disbursements,
13 the amount disbursed, and any unexpended balance, and his failure to accurately
14 perform a monthly three-way reconciliation of the client ledgers, trust account
15 general ledger or register, and trust account bank statement violated Rule 43(d)
16 Ariz.R.S.Ct. and Rule 44 Ariz.R.S.Ct.

21 **B. STATE BAR'S CONDITIONAL ADMISSIONS**

22
23 28. The State Bar conditionally admits that based on Respondent's
24 explanation for each of the trust account violations identified and the supporting
25 documentation provided, Respondent's conduct was not "intentional" or

1 "knowing" as contemplated by the ABA Standards for Imposing Lawyer
2 Sanctions ("ABA Standards") but was instead "negligent."

3 4 ABA STANDARDS

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

9
10 The parties indicated that *Standard 4.0* (Violations of Duties Owed to
11 Clients) is the most applicable in this matter. A review of *ABA Standard 4.1*
12 (Failure to Preserve the Client's Property) indicates that censure is the
13 presumptive sanction for Respondent's misconduct. *Standard 4.13* specifically
14 provides:
15

16 Reprimand (censure in Arizona) is generally appropriate
17 when a lawyer is negligent in dealing with client property
18 and causes injury or potential injury to a client.

19 Respondent entrusted many accounting functions regarding his trust account
20 to his staff believing that he had procedures in place sufficient to appropriately deal
21 with client funds and communicate with his clients concerning their matters. It was
22 not until the client who ultimately filed a charge with the State Bar in connection
23 with this matter complained to Respondent that that Respondent realized that his
24 procedures for management of his trust account were inadequate. As indicated in
25

1 the Tender of Admissions filed contemporaneously here with, Respondent began to
2 review his trust account records and improve management procedures prior to the
3 client filing a charge with the State Bar. He also reimbursed the client trust
4 accounts at issue before knowing that a State Bar complaint or investigation were
5 underway.
6

7 **AGGRAVATING AND MITIGATING FACTORS**

8 This Hearing Officer then considered aggravating and mitigating factors in
9 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
10

11 This Hearing Officer agrees with the parties that there are three aggravating
12 factors are present:

- 13 (c) a pattern of misconduct;
- 14 (d) multiple offenses; and,
- 15 (i) substantial experience in the practice of law.

16 This Hearing Officer agrees with the parties that five factors are present in
17 mitigation:
18

- 19 (a) absence of a prior disciplinary record;
- 20 (d) timely good faith effort to make restitution or to rectify consequences
21 of misconduct;
- 22 (e) full and free disclosure to disciplinary board or cooperative attitude
23 toward proceedings;
- 24
- 25

1 (g) character or reputation; and,

2 (l) remorse.

3 **PROPORTIONALITY REVIEW**

4
5 To have an effective system of professional sanctions, there must be
6 internal consistency, and it is appropriate to examine sanctions imposed in cases
7 that are factually similar. *Peasley, supra*, 33, 61. However, the discipline in each
8 case must be tailored to the individual case, as neither perfection nor absolute
9 uniformity can be achieved. *Id.* at 61 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41
10 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458
11 (1983)).
12

13
14 An analysis of similar discipline cases indicate that in Arizona an appropriate and
15 proportional sanction for the conduct herein is a censure. There are several cases
16 that consider conduct similar in nature to the facts presented in the instant case.
17 The following are cases instructive in the present matter.

18
19 In *In re Baskerville*, Supreme Court No. SB-03-0006-D,
20 Disciplinary Commission No. 01-1511, (2003), the Commission censured the
21 lawyer and placed him on probation for one (1) year for violations of Ethical
22 Rule 1.15, and Rules 43(d) and 44(b), Ariz.R.S.Ct. The lawyer's trust account
23 became overdrawn when a check attempted to pay against the trust account when
24 the funds balance at the time was insufficient to cover the check. An
25

1 examination of a lawyer's trust account documents revealed that the lawyer
2 failed to properly safeguard client funds, that he failed to maintain proper
3 internal controls to adequately safeguard funds on deposit in the trust account
4 and that he failed to conduct a monthly reconciliation of his trust account. The
5 applicable ABA Standard establishing the presumptive sanction was found to be
6 Standard 4.13 (censure for negligent dealing with client property). Three
7 aggravating factors included prior disciplinary offenses, a pattern of misconduct
8 and substantial experience in the practice of law. Five mitigating factors
9 included absence of a dishonest or selfish motive; timely good faith effort to
10 rectify consequences, full and free disclosure to disciplinary board or a
11 cooperative attitude towards proceedings, character and reputation and non-ABA
12 Standard mitigation of interim rehabilitation.

13
14
15
16 In *In re Crocker*, SB-03-0077-D, Disciplinary Commission No. 01-
17 0165, the lawyer was censured and placed on probation for two years for
18 violating ERs 1.15(a), 8.1(a) and 8.4(c) and Supreme Court Rule 43(b)(3). The
19 State Bar's examination of the lawyer's trust account records revealed that he
20 had entered into a representation agreement that was never reduced to writing;
21 failed to maintain individual client ledger cards or the functional equivalent for
22 the client and the client's company; often made incomplete and/or insufficient
23 entries to accurately reconstruct each transaction. The lawyer's trust account
24
25

1 client ledger did not always identify the client on whose behalf the banking
2 transactions took place, the lawyer failed to perform monthly reconciliations of
3 his trust account and failed to properly safeguard client funds in his trust account.
4 The applicable ABA Standard for determining the presumptive sanction was
5 found to be 4.13 (Censure for negligent dealing with client property). The single
6 aggravating factor was pattern of misconduct. Five mitigating factors included
7 no prior discipline, personal or emotional problems, absence of dishonest or
8 selfish motive, good character and reputation and remorse. Although a two-year
9 probationary period was imposed in *Crocker*, Crocker had also violated ERs
10 8.1(a) and 8.4(c), unlike Respondent in the instant matter, who has not made any
11 false statements to the State Bar or engaged in conduct involving dishonesty or
12 deceit.
13
14
15

16 Finally, in *In re Kazragis*, Supreme Court No. SB-03-0115-D,
17 Disciplinary Commission No. 02-0157, the lawyer was censured and placed on
18 probation for a term of one year. The State Bar received several overdraft
19 notices regarding the lawyer's trust account. Those notices indicated that various
20 items attempted to pay against the trust account when the balance in the account
21 was insufficient to cover items. An examination of the lawyer's trust account by
22 the State Bar's Staff Examiner revealed that there was a deficit in the trust
23 account due to a lawyer's failure to monitor the actual disbursements being made
24
25

1 from the account. The lawyer failed to safeguard client funds since he was not
2 identifying the disbursements, was not recording disbursements on individual
3 client ledgers, was not balancing the client ledgers. In addition, the lawyer failed
4 to keep his funds separate from the client funds, failed to maintain complete trust
5 account records and failed to exercise due professional care. The applicable
6 ABA Standard for determining the presumptive sanction was found to be 4.13
7 (Censure for negligent dealing with client property). The one aggravating factor
8 was substantial experience in the practice of law. Five mitigating factors
9 included absence of a prior disciplinary record, absence of a dishonest or selfish
10 motive, timely good faith effort to rectify consequences of misconduct, full and
11 free disclosure and remorse.

12
13
14
15 In *In re Kerrin*, Supreme Court No. SB-02-0140-D, 2002 Ariz.
16 LEXIS 181 (Arizona 2002), the lawyer agreed to a discipline by consent for a
17 censure and probation for violations of ER 1.15 and Rules 43 and 44,
18 Ariz.R.S.Ct. The misconduct included failing to maintain required trust account
19 records, commingling personal funds and failing to safeguard client's funds
20 although no actual harm occurred. The agreement included an admission these
21 failures were not intentional but rather negligent and also as a result of other
22 factors beyond the lawyer's control and that the lawyer had spent \$10,000 hiring
23 an accounting firm that spent a year completing a reconciliation and verification
24
25

1 of her trust account balances. The one aggravating factor was substantial
2 experience in the practice of law. Five mitigating factors including absence of
3 prior discipline, absence of dishonest or selfish motive, personal or emotional
4 problems, timely good faith effort to make restitution and remorse justified
5 reduction of the presumptive sanction from suspension to censure.
6

7 In *In re DeLozier*, SB-04-0034-D (Arizona Supreme Court 2004)

8 the lawyer agreed to a public censure and probation for violations of ER 1.15 and
9 Ariz.R.S.Ct. 43 and 44. The lawyer was found to have kept earned funds in his
10 client trust account. Because of this practice, Respondent's records showed
11 positive trust balances for some clients who really did not have a positive
12 balance. The lawyer accordingly failed to safeguard client funds and commingled
13 his personal funds with client funds. Respondent also failed to conduct monthly
14 reconciliations of his trust account; made non-client-related transactions from his
15 trust account; failed to maintain complete trust account records for a period of
16 five years; failed to confirm that funds were on deposit in the trust account for
17 clients prior to drawing offsetting disbursements; and failed to disburse from the
18 trust account with pre-numbered checks. Two aggravating factors included prior
19 disciplinary offenses and substantial experience in the practice of law. Three
20 mitigating factors included absence of a dishonest or selfish motive, timely good
21 faith effort to make restitution or to rectify consequences of misconduct and full
22
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24
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1 and free disclosure to a disciplinary board or cooperative attitude toward
2 proceedings.

3 RECOMMENDATION

4
5 The purpose of lawyer discipline is not to punish the lawyer, but to protect
6 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
7 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
8 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
9 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
10 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
11 (1994).
12

13
14 In imposing discipline, it is appropriate to consider the facts of each case,
15 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
16 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
17 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
18

19 Upon consideration of the facts, application of the *Standards*, including
20 aggravating and mitigating factors, and a proportionality analysis, this Hearing
21 Officer recommends acceptance of the Tender of Admissions and Agreement for
22 Discipline by Consent and the Joint Memorandum in Support of Agreement for
23 Discipline by Consent which provides for the following:
24

- 25 1. Respondent shall be censured.

1 2. Respondent will be placed on probation for a period of one year
2 effective upon the signing of the probation contract. The State Bar will notify the
3 Disciplinary Clerk of the exact date of commencement of probation. The terms of
4 probation are as follows:

5
6 a. Respondent will be required to attend the Trust Account Ethics
7 Enhancement Program (TAEPP), and submit to a quarterly review of his trust
8 account management procedures by the Staff Examiner of the State Bar or her
9 designee. Such review will include a review of Respondent's monthly three-way
10 reconciliation of his general ledger, client ledgers and bank statement as well as
11 any additional supporting documentation reasonably necessary to the Examiner's
12 review.
13
14

15 b. In the event that Respondent fails to comply with any of the
16 foregoing conditions, and the State Bar receives information, bar counsel shall
17 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule
18 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty
19 days after receipt of said notice, to determine whether the terms of probation have
20 been violated and if an additional sanction should be imposed. In the event there is
21 an allegation that any of these terms have been violated, the burden of proof shall be
22 on the State Bar of Arizona to prove non-compliance by clear and convincing
23 evidence.
24
25

9 this 20 day of June, 2006.

10 Copy of the foregoing was mailed
11 this 23rd day of June, 2006, to:

12 Mark I. Harrison
13 Sara Southern
14 Respondent's Counsel
15 *Osborn Maledon, P.A.*
16 2929 North Central Avenue, Suite 2100
17 Phoenix, AZ 85012

18 Loren J. Braud
19 Senior Bar Counsel
20 State Bar of Arizona
21 4201 North 24th Street, Suite 200
22 Phoenix, AZ 85016-6288

23 by: Christina Solo
24
25