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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY PK

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6 Hearing Officer

7
8 **BEFORE A HEARING OFFICER**

9 **OF THE SUPREME COURT OF ARIZONA**

10 IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
11 ARIZONA

12 **JAMES F. MILLER,**
Bar No. 017381

13 Respondent.
14

Nos. 04-0681; 04-2059;
05-0142; 05-0209; 05-0389;
05-0475; 05-0806; 05-0980

**HEARING OFFICER'S
REPORT AND
RECOMMENDATION**

(Assigned to Hearing Officer 7T)
Pamela Katzenberg

15
16 **I. PROCEDURAL HISTORY:**

17 The State Bar filed the complaint in this matter on December 21, 2005.
18 Respondent accepted service on January 11, 2006. A notice of default was filed on
19 January 30, 2006, and default was entered on February 24, 2006. An Aggravation and
20 Mitigation hearing was held in this matter before the Hearing Officer at 1:00 p.m., March
21 16, 2006, at 177 North Church Avenue, Suite 200, Tucson, Arizona. Having reviewed
22 the record in this matter, including the exhibits, testimony and arguments of bar counsel
23 and the Respondent, who appeared pro se and provided testimony and evidence in
24 mitigation, the Hearing Officer finds, concludes and recommends as follows:

25 **II. FINDINGS OF FACT (DEEMED ADMITTED):**

26 1. At all times relevant, Respondent was an attorney licensed to practice law

1 in Arizona, having been admitted to practice in Arizona on December 17, 1996.

2 2. The allegations of the Complaint are deemed admitted and are as follows:

3 **COUNT ONE (File No. 04-0681/State Bar)**

4 3. On April 16, 2004, the State Bar received a non-sufficient funds notice on
5 Respondent's Bank One client trust account. The notice indicated that on April 15, 2004,
6 check number 1143 in the amount of \$300.00 attempted to pay against the account when
7 the balance was only \$56.25. The bank paid the check and charged a \$29.00 overdraft
8 fee, thereby overdrawing Respondent's trust account a total of \$272.75.

9 4. On April 20, 2004, the State Bar received a second non-sufficient funds
10 notice on Respondent's client trust account. The notice indicated that, on April 17, 2004,
11 check number 1147 in the amount of \$300.00 attempted to pay against the account when
12 the balance was \$218.50. The bank paid the check and charged a \$29.00 overdraft fee,
13 thereby overdrawing Respondent's trust account a total of \$110.50.

14 5. On April 26, 2004, then State Bar Staff Examiner, Leigh Ann Mauger,
15 requested an explanation as to the apparent overdrafts on Respondent's client trust
16 account.

17 6. In his May 13, 2004 response, Respondent admitted that the first overdraft
18 was caused when he attempted to use the credit card machine attached to the account to
19 withdraw personal funds. Respondent thought that he had deposited \$500.00 from his
20 credit card into the account. He then tore up the receipt, waited 48 hours, then wrote
21 check 1143 for \$300.00 to "cash". However, because he was not familiar with the credit
22 card machine, he made a mistake and failed to properly complete the deposit transaction.
23 As a result, the \$500.00 was not in the account when check 1143 paid against it.

24 7. Respondent admitted that the second overdraft was an extension of the first.
25 The day after the first overdraft posted against the account, one of Respondent's clients
26 made a deposit via credit card into the account. Respondent was not aware that there was

1 a problem with the first overdraft and, believing that there was more money in the
2 account than there actually was, wrote check 1147 to himself.

3 8. Respondent commingled client funds for services in this account with
4 personal funds that he used to pay office expenses and for personal withdrawals for cash.

5 9. Pursuant to a discussion with Ms. Mauger, Respondent stated that he had
6 changed his retainer agreements so that he would charge a maximum of \$1,000.00
7 non-refundable minimum fee, with the remainder to go into the trust account to be billed
8 when earned.

9 10. On May 24, 2004, Ms. Mauger sent Respondent a request for
10 additional information.

11 11. In his June 13, 2004 response, Respondent attached the requested records.
12 He further stated that he will never again "use [his] trust account to deposit personal
13 funds, however slight, in any manner except to cover credit card expenses," and that "[n]o
14 credit card deposits that are earned shall ever be removed from [the account] until such
15 time as the posting of the funds can be established beyond a doubt."

16 12. On June 18, 2004, Ms. Mauger sent Respondent another request for
17 additional information and he complied in a response filed June 25, 2004.

18 13. In his June 25, 2004 response, Respondent described a situation in which one
19 of his past clients performed some bodywork on his car. Respondent paid the client for
20 the work, but the client charged him an "outrageously small fee," so Respondent did not
21 charge the client anything beyond the initial retainer fee. However, right before the
22 client's sentencing, the client gave Respondent a \$500.00 refund of the fees Respondent
23 had paid for the work done to his car. Respondent tried to refuse to take it, but the client
24 would not let him and asked him to check on his (the client's) wife and children from time
25 to time while the client was in prison. Respondent agreed to do this. He did not spend
26 the money on himself, but spent \$200.00 on items for the client's children and, a year after

1 receiving the funds, put the rest of the money in the trust account. In April 2004,
2 Respondent wrote a check for the remaining \$300.00 and gave it to the client's wife.
3 Respondent kept no records of any of the transactions regarding the \$500.00.

4 14. Respondent violated the trust account rules by: 1) commingling his personal
5 funds with client funds; 2) taking cash advances on his credit card from the account; 3)
6 failing to maintain client ledgers; and 4) failing to perform three-way reconciliations.

7 15. The State Bar filed an Order of Diversion on September 22, 2004.
8 Respondent was ordered to: 1) attend a half-day Trust Account Ethics Enhancement
9 Program ("TAEEP"); 2) participate in the Trust Account Program ("TAP") by
10 participating in an assessment with the Staff Examiner; and 3) submit quarterly trust
11 account reports to the Staff Examiner for one year thereafter.

12 16. Respondent paid for and attended TAEEP on December 14, 2004. However,
13 Respondent's behavior during class was odd. Respondent slept through the first half of
14 the class. He stayed awake after the break, but participated in strange fashion with
15 negative comments about the practice of law and lawyers in general. He did not
16 participate in the "hands on" portion of the class, was the first to leave and left behind his
17 checkbook.

18 17. Respondent did not complete the TAP program.

19 18. Due to the Respondent's failure to successfully complete the terms of
20 the order of diversion, the State Bar filed a notice of non-compliance on July 29, 2005.
21 Respondent did not respond, the diversion order was vacated and a probable cause order
22 entered.

23 **COUNT TWO (File No. 04-2059/State Bar)**

24 19. On December 6, 2004, the State Bar received a non-sufficient funds notice
25 on Respondent's Bank One client trust account. The notice indicated that, on December
26 2, 2004, one ACH debit in the amount of \$65.09 attempted to pay against the account

1 when the balance at the time was \$0.00. The bank paid the ACH item and charged a
2 \$29.00 overdraft fee and an extended overdraft fee of \$25.00, thereby overdrawing
3 Respondent's trust account by \$119.09.

4 20. On December 13, 2004, the State Bar Records Examiner, Michele Wildner,
5 requested an explanation.

6 21. On January 5, 2005, the State Bar received another non-sufficient funds
7 notice on Respondent's Bank One trust account. The notice indicated that, on January 3,
8 2005, one ACH debit in the amount of \$28.00 attempted to pay against the account when
9 the balance at the time was negative \$119.09. The bank paid the ACH item and charged
10 a \$29.00 overdraft fee, thereby overdrawing Respondent's trust account a total of negative
11 \$176.09.

12 22. On January 5, 2005, Ms. Wildner requested an explanation as to the January
13 3, 2005, overdraft.

14 23. On January 7, 2005, Respondent called the State Bar and left a lengthy
15 message on the trust account legal secretary's voice mail. Respondent stated that he had
16 transferred his client trust account to Wells Fargo. Respondent stated that when he first
17 transferred the account, he left several hundred dollars in the Bank One account to cover
18 one outstanding check. Respondent stated he thought he would get a refund when he
19 closed out the trust account completely. He did not know why the overdraft occurred.

20 24. On January 18, 2005, Respondent called and left a message with the trust
21 account legal secretary, explaining the overdraft notices. When Respondent changed
22 accounts, he did not change the credit card machine deposit to Wells Fargo. Respondent
23 stated that he would provide the documentation to the State Bar that same day (January
24 18, 2005).

25 25. On January 19, 2005, Respondent was arrested in a drug-related matter and
26 was placed in jail on \$250,000.00 bond.

1 26. Respondent's sister timely reported the arrest to the State Bar.

2 27. On February 7, 2005, a Subpoena Duces Tecum was served upon Bank One
3 for bank records regarding Respondent's trust account.

4 28. Bank One produced the requested trust account records on February 25 and
5 March 22, 2005.

6 29. On February 8, 2005, Respondent voluntarily signed a consent to
7 conservatorship with the State Bar. Approximately two weeks later, Respondent's sister,
8 mother and girlfriend cooperated in gathering Respondent's files and delivering them to
9 the State Bar.

10 30. An order appointing conservator was filed in the Superior Court of Cochise
11 County on March 2, 2005 appointing Robert B. Van Wyck as conservator to Respondent's
12 client files and bank accounts.

13 31. Staff Examiner Gloria Barr sent a letter on April 14, 2005, to Jane
14 Brooks-Smith at Wells Fargo Bank Law Department requesting confirmation that
15 Respondent maintained an Arizona Bar Foundation client trust account with Wells Fargo.

16 32. On April 26, 2005, a Subpoena Duces Tecum was served upon Wells Fargo
17 for bank records regarding Respondent's trust account. Wells Fargo produced the
18 requested trust account records on June 7, 2005.

19 33. Ms. Barr's investigation of the trust account records was significantly limited
20 in scope because Respondent's client ledgers that correspond to the bank account
21 statements were not available for examination. However, Ms. Barr determined that
22 Respondent's explanation of the overdrafts on his client trust account were accurate in
23 that the overdraft was caused by automatic credit card transactions posting to the
24 incorrect client trust account. Ms. Barr confirmed other trust account violations by
25 Respondent. The available trust account records reflected negative balances on seven
26 separate occasions.

COUNT THREE (File No. 05-0142/Judicial Referral)

1
2 34. In January 2005, the State Bar received information regarding Respondent's
3 arrest and began the investigation.

4 35. On January 19, 2005, Respondent was arrested after Sierra Vista Police
5 executed search warrants on his office, home and vehicles. During the search,
6 methamphetamine, marijuana, illegal prescription pills, drug paraphernalia and a loaded
7 gun were found.

8 36. Respondent admitted, during a post-arrest interview, that he was addicted
9 to methamphetamine.

10 37. Respondent was detained in Cochise County jail on \$250,000.00 bond.
11 Respondent was appointed a public defender, then later substituted attorney Joe
12 DiRoberto as his counsel.

13 38. The police and court records also show that Respondent had been arrested
14 for driving under the influence ("DUI") on January 11, 2005, prior to his drug charge
15 arrest, and failed to appear for a hearing regarding that charge. Attorney DiRoberto was
16 substituted as counsel for that pending case as well.

17 39. Respondent's family members contacted the State Bar regarding
18 Respondent's arrest and assisted in facilitating the subsequent conservatorship established
19 to deal with the client files.

20 40. On January 28, 2005, Respondent was indicted on five felony counts in
21 Cochise County including unlawful possession of drugs for sale and possession of a
22 deadly weapon during commission of a felony drug offense.

23 41. On February 7, 2005, Respondent was released from jail to his mother's
24 custody. As a condition of his release he was to attend a 28-day residential treatment
25 program in Sedona, Arizona. The release conditions were modified to include drug
26 testing to be submitted to his Pretrial Services Officer.

1 42. On February 8, 2005, Respondent voluntarily signed a consent to
2 conservatorship. Approximately two weeks later, Respondent's sister, mother and
3 girlfriend cooperated in gathering Respondent's files and delivering them to the State Bar.

4 43. An order appointing conservator was filed in the Superior Court of Cochise
5 County on March 2, 2005, appointing Robert B. Van Wyck as conservator over
6 Respondent's client files and bank accounts.

7 44. Following his release, Respondent contacted bar counsel and cooperated in
8 the attempt to determine which of his clients were owed money. Respondent's computer
9 billing program, Abacus, for unknown reasons, was not accessible. He said he would try
10 to reconstruct billing.

11 45. Respondent voluntarily stopped practicing law and informed bar counsel that
12 he was working as a paralegal in Tucson for a law school classmate.

13 46. On May 6, 2005, before Cochise County Superior Court Judge Douglas Holt,
14 Respondent pled guilty to possession of a deadly weapon during the commission of a
15 felony drug offense (class four felony), and all other counts were dismissed pursuant to
16 his plea agreement. At the same proceeding, Respondent also pled guilty to his January
17 11, 2005 DUI charge.

18 47. On May 17, 2005, Respondent sent a lengthy written statement to Judge
19 Holt. In summary, Respondent stated that he was completely responsible for his behavior
20 and conduct and that he accepted the consequences of his conduct. Respondent admitted
21 to possession of illegal drugs and knowing they were in his home, and admitted that he
22 could have disposed of them at any time, but did not do so. (See State Bar's Exhibit 32).

23 48. Respondent further stated that about one year before he was arrested he
24 began using methamphetamine, which quickly became a habit. Respondent also stated
25 that he subsequently learned that he suffered from a medical condition that contributed
26 to the very real physical feeling of being so run down he could not function. He stated

1 that he previously believed that the physical feelings he was having were the direct result
2 of being hooked on meth only, but now believes his medical condition definitely
3 contributed, and had he known about the condition, he might have been persuaded to get
4 the help he needed sooner. (See Respondent's Exhibit B, medical records from Dr.
5 Tovey).

6 49. Also in his letter to Judge Holt, Respondent stated that he was extremely
7 busy at work and had more than 80 active cases. He knew he had to stop using meth, but
8 had to plan his withdrawal or his business would come crashing down. He did not know
9 how to stop using and he let the whole thing snowball. Respondent stated that finally he
10 was arrested and the arrest probably saved his life.

11 50. The Presentence Report refers to three physical ailments that Respondent has
12 been diagnosed with. However, only two were confirmed: hepatitis C and hypertension.
13 Respondent only learned of these conditions during his stay at the Desert Canyon
14 Treatment Center in Sedona, Arizona.

15 51. On June 2, 2005, Respondent's attorney, Mr. DiRoberto, sent a letter to
16 Ronald Shiflet, Respondent's probation officer, explaining that Respondent had
17 previously entered the Desert Canyon Treatment Center ("Desert Canyon") in Sedona on
18 February 7, 2005 for a 28-day residential treatment program. However, Respondent was
19 discharged from the treatment center approximately one week early, due to the discovery
20 of a physical ailment by the physicians that examined him at Desert Canyon.

21 52. On June 15, 2005, Respondent was sentenced to four years of supervised
22 probation to begin immediately. As conditions of probation, Respondent was ordered to
23 complete 1,000 hours of community service to be served as a legal aide or paralegal, and
24 to serve one year in the Cochise County jail, with 270 days suspended upon Respondent's
25 successful completion of a long-term residential treatment program. Respondent was also
26 sentenced to an additional 95 days in the Cochise County jail, presumably for the DUI

1 charge, to begin June 24, 2005, with credit for 19 days served. Respondent was also
2 ordered to pay over \$11,000.00 in fines, to participate in substance abuse counseling, and
3 to submit to drug testing prior to entering jail.

4 53. Respondent wrote to bar counsel by e-mail dated June 17, 2005, to report the
5 sentencing terms. He further stated that he had been unable to reconstruct billing and that
6 he would agree to make full restitution to the majority of the clients with outstanding files
7 who had contacted the State Bar.

8 54. Respondent immediately violated his probation. Respondent failed to report
9 to the Cochise County Probation Department on June 15, 2005 after being sentenced, and
10 failed to report to the Cochise County jail on June 24, 2005 to begin serving the 95-day
11 term. A bench warrant was issued and Respondent was arrested on the warrant. An
12 initial appearance on a Petition to Revoke Probation was held on June 30, 2005.

13 55. Mr. DiRoberto requested the next status hearing be delayed as long as
14 possible as Respondent had some dire mental health issues that needed to be addressed.
15 The next hearing was set for July 22, 2005 to address any mental health issues or request
16 a Rule 11 evaluation at that time. Respondent was ordered to remain in the Cochise
17 County jail for a minimum of 90 days, with credit for time served.

18 56. On July 11, 2005 Respondent filed a handwritten motion to change his plea
19 and for disposition of all allegations contained in the Petition to Revoke Probation.

20 57. Respondent was sentenced on the Petition to Revoke on July 17, 2005. He
21 was again placed on probation, served three months in a residential rehabilitation center,
22 was placed on intensive probation, 1,000 hours of community service, \$15,000.00 in
23 fines, and four years of probation. (RT, 03/16/06, at p. 38).

24 58. As of the date of the complaint, December 21, 2005, Respondent had not
25 personally communicated with the State Bar since June 17, 2005. However, Respondent
26 resumed communications during the formal proceedings process.

1 65. On December 22, 2004, Respondent sent Campbell an invoice totaling
2 \$1,162.15 for legal services and costs rendered for the period of November 1 through
3 December 22, 2004, leaving a credit balance of \$3,837.85 in Respondent's trust account.
4 Campbell received no other invoices from Respondent.

5 66. On March 7, 2005, Campbell, who was incarcerated in Cochise County jail,
6 sent the State Bar a letter stating that he was a former client of Respondent's and that he
7 was aware that Respondent had been arrested on criminal charges. Campbell requested
8 a refund of his unearned fee. He attached copies of his fee agreement and
9 November/December invoice.

10 67. On July 4, 2005, Campbell sent a second letter to the State Bar requesting
11 the status of his unearned fees from Respondent.

12 68. Respondent did not formally respond to the State Bar's inquiry on Campbell,
13 but communicated with bar counsel after his release from the drug treatment facility
14 beginning April 2005 and ending mid-June 2005.

15 69. Respondent acknowledged that he owed Campbell between "\$750.00 to
16 \$2,000.00, tops", because he knows he did work. However, Respondent was never able
17 to access his computer billing system to determine who was owed money, and his hard
18 copies were incomplete. In that there is no reliable evidence to support Respondent's
19 recollection regarding the amount owed to Campbell, the amount of unearned fees owed
20 to Campbell is \$3,837.85.

21 70. Respondent had insufficient funds in his trust account to repay the unearned
22 fees owed to Campbell.

23 **COUNT SIX (File No. 05-0475/Burrescia)**

24 71. In July 2004, Complainant Tony Burrescia ("Burrescia") was involved in an
25 automobile accident involving a pedestrian. His insurance company advised him to retain
26 an attorney. On September 8, 2004, Burrescia met with Respondent and paid him a

1 \$500.00 retainer, to be held in Respondent's trust account in the event that Burrescia was
2 sued. Respondent told Burrescia that he would send him a statement if he had to perform
3 any work on Burrescia's behalf.

4 72. On March 3, 2005, Chief Bar Counsel Robert Van Wyck sent a letter to
5 Burrescia notifying him that Respondent had signed a Declaration of Consent to
6 Conservatorship, as he was unable to handle client matters. Mr. Van Wyck had been
7 appointed as conservator of Respondent's cases and Burrescia's case was included.

8 73. On March 19, 2005, Burrescia wrote to the State Bar stating that Respondent
9 had never done any work on his case and he had never received any statements or billing
10 notices from Respondent.

11 74. Respondent did not formally respond to the State Bar's written inquiry
12 concerning Burrescia, but communicated with bar counsel beginning April 2005 and
13 ending mid-June 2005, after his release from the drug treatment facility.

14 75. Respondent acknowledged he had only generated a file and sent a letter or
15 two on Burrescia's behalf. This was confirmed by bar counsel's review of the file.
16 Respondent stated he thought it would be fair to refund Burrescia at least \$350.00, maybe
17 \$400.00, out of the total \$500.00 paid.

18 76. Again, Respondent's hard copies of his records were incomplete and he was
19 unable to access his computer billing system to determine the amount owed. In that
20 Respondent did perform some work, the amount owed to Burrescia is \$400.00.

21 77. Respondent's trust account funds are insufficient to repay the unearned fees
22 to Burrescia.

23 **COUNT SEVEN (File No. 05-0806/Marlow)**

24 78. In May 2004, Matt and Barbara Marlow (the "Marlows") decided to file
25 bankruptcy after losing their jobs. On May 17, 2004, the Marlows paid Respondent
26 \$75.00 (check no. 1398) and on June 17, 2004, \$609.00 (check no. 1410), for a total of

1 \$684.00. In addition to these payments, the Marlows stated they gave Respondent three
2 Kachina dolls for which Respondent credited them \$216.00. Accordingly, the total fee
3 paid for the bankruptcy representation was \$900.00.

4 79. Respondent took no action on their case. Respondent moved his offices, but
5 did not notify the Marlows. They went to visit Respondent's new offices on Wilcox
6 Drive, after they found out the phone had been disconnected, and discovered
7 Respondent's offices were closed. The Marlows contacted Respondent's former partner,
8 Larry Scheafer, and hired him to finish their bankruptcy.

9 80. The Marlows wrote to the State Bar in May 2005 and requested a refund of
10 all fees paid to Respondent. They provided copies of the checks paid to Respondent but
11 did not provide a copy of a fee agreement.

12 81. Respondent did not formally respond to the State Bar's inquiry, but
13 communicated with bar counsel after his release from the drug treatment facility,
14 beginning April 2005 and ending mid-June 2005. Respondent stated that his hard copies
15 of his records were incomplete and he hoped to access his computer billing system to
16 determine who was owed money, but he was never able to get the system to work.

17 82. On June 3, 2005, bar counsel sent Respondent an e-mail with a list of
18 additional clients who had sent in charges against him. The Marlows were referenced in
19 this e-mail. Respondent again stated that he would try to reconcile his billing, and that
20 he was willing to pay back what was owed.

21 83. The State Bar Investigator, Vic Ayala, contacted attorney Larry Scheafer to
22 determine what work Respondent had performed for the Marlows. Mr. Scheafer was
23 unable to identify any work performed prior to his taking over the file.

24 84. The Respondent owes the Marlows unearned fees in the amount of \$900.00
25 in that he failed to perform any work.

26 85. Respondent's trust account has insufficient funds to repay the money owed

1 to the Marlows.

2 **COUNT EIGHT (File No. 05-0980/Andrade)**

3 86. Karla Andrade (hereafter "Andrade") wrote to the State Bar on June 12, 2005.
4 She had hired Respondent to represent her in a bankruptcy, but Respondent had been
5 arrested on drug charges before her case was filed.

6 87. Andrade paid Respondent \$209.00 for the filing fee and an additional
7 \$600.00, for a total of \$809.00. She provided copies of records establishing these
8 payments on August 6, 2004, and approximately October 29, 2004, respectively.

9 88. Andrade stated that she has a new lawyer (Larry Scheafer) but could not
10 afford to pay him what she had already paid Respondent, and requested a refund of the
11 money paid to Respondent.

12 89. Respondent did not formally respond to the State Bar's inquiry, but
13 communicated with bar counsel after his release from the drug treatment facility,
14 beginning April 2005 and ending mid-June 2005, regarding various client complaints.
15 Respondent stated that his hard copies of his records were incomplete and he was unable
16 to access his computer billing system to determine who was owed money. Therefore,
17 Respondent has no records regarding the fees paid by Andrade.

18 90. The State Bar Investigator, Vic Ayala, contacted attorney Larry Scheafer to
19 determine what work Respondent had performed for Andrade. Mr. Scheafer stated that
20 the \$209.00 was used for a court filing fee, and that the records show that Respondent had
21 prepared the "Petition of Schedules", but there were changes to be made on it which
22 Respondent had not made before his arrest. Mr. Scheafer believed the client was
23 probably due some amount of refund.

24 91. On June 3, 2005, bar counsel sent Respondent an e-mail with a list of
25 additional clients who had sent in charges against him. Andrade was referenced in this
26 e-mail. Respondent again stated that he would try to reconcile his billing, and that he was

1 willing to pay back what was owed.

2 92. On July 17, 2005, the day Respondent was sentenced, he wrote to bar
3 counsel and stated that he wished to refund money to clients who had money due.

4 93. The Respondent owes Andrade \$600.00 in that he failed to perform any
5 work.

6 94. Respondent's trust account funds are insufficient to repay Andrade.

7 **III. ADDITIONAL FINDINGS OF FACT:**

8 95. Respondent has claimed in various correspondence that the insufficient
9 funds in his trust account are a result of another attorney stealing money from him, as
10 well as a former secretary, while he was under the influence of drugs. Respondent has
11 also stated that he was not supervising his secretary properly during this time and was
12 pretty sure that sometimes money that belonged in the trust account was not deposited in
13 it. Other than Respondent's claim, there is no evidence, such as records, notes or ledgers,
14 to support this theory and it is, therefore, not credible.

15 96. Respondent has also stated that his home was burglarized several times while
16 he was jail (at the time of his initial arrest) and in the treatment facility. Respondent's
17 sister has confirmed this during telephone conversations with bar counsel. The Hearing
18 Officer finds that this is not a mitigating factor as it is solely attributable to Respondent's
19 criminal conduct.

20 **IV. CONCLUSIONS OF LAW (DEEMED ADMITTED):**

21 The following conclusions were charged in the complaint and consequently
22 deemed admitted by virtue of the default in this matter:

23 **COUNT ONE (File No. 04-0681/State Bar)**

24 97. Respondent failed to properly safeguard client funds in violation of Rule 42,
25 ER 1.15(a), and Rule 44(b), Ariz.R.S.Ct.

26 98. Respondent failed to keep his funds separate from that of his client funds on

1 deposit in his trust account, in violation of Rules 42, ER 1.15(a), and Rule 44(a),
2 Ariz.R.S.Ct.

3 99. Respondent failed to maintain complete trust account records for a period
4 of five years in violation of Rule 42, ER 1.15(a), and Rule 43(a) and (d), Ariz.R.S.Ct.

5 100. Respondent failed to maintain proper internal controls and to exercise due
6 professional care in the maintenance of his client trust account in violation of Rule 43(d),
7 Ariz.R.S.Ct.

8 **COUNT TWO (File No. 04-2059/State Bar)**

9 101. Respondent failed to properly safeguard client funds or maintain complete
10 records, in violation of Rule 42, ER 1.15(a), and Rule 44(b)(2) and (3), Ariz.R.S.Ct.

11 102. Respondent failed to exercise due professional care in the performance of
12 his duties, in violation of Rule 43(d)(1)(A), Ariz.R.S.Ct.

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

16 104. Respondent failed to make or cause to be made a monthly three-way
17 reconciliation of the client ledgers, trust account general ledger or register, and trust
18 account bank statement, in violation of Rule 43(d)(2)(D).

19 **COUNT THREE (File No. 05-0142/Judicial Referral)**

20 105. Respondent committed a criminal act that resulted in a felony conviction.
21 This conduct reflects adversely on his honesty, trustworthiness, and fitness as a lawyer,
22 in violation of Rule 42, ER 8.4(b), Ariz.R.S.Ct.

23 **COUNT FOUR (File No. 05-0209/Hoover)**

24 106. Respondent failed to keep his client reasonably informed about the status of
25 a matter and/or failed to promptly comply with reasonable requests for information, in
26 violation of ER 1.4.

1 107. Respondent failed to properly safeguard client property in violation of ER
2 1.15.¹

3 108. Respondent failed, upon termination of the representation, to take steps
4 reasonably practicable to protect a client's interests, in violation of ER 1.16(d).

5 109. Respondent's conduct as described in this count violated Rule 42,
6 Ariz.R.S.Ct., specifically ERs 1.4, 1.15 and 1.16(d).

7 **COUNT FIVE (File No. 05-0389/Campbell)**

8 110. Respondent failed to keep his client reasonably informed about the status of
9 a matter and/or failed to promptly comply with reasonable requests for information, in
10 violation of ER 1.4.

11 111. Respondent failed to properly safeguard client property in
12 violation of ER 1.15. (See footnote No. 1).

13 112. Respondent failed, upon termination of the representation, to take steps
14 reasonably practicable to protect a client's interests, in violation of ER 1.16(d).

15 113. Respondent's conduct as described in this count violated Rule 42,
16 Ariz.R.S.Ct., specifically ERs 1.4, 1.15 and 1.16(d).

17 **COUNT SIX (File No. 05-0475/Burrencia)**

18 114. Respondent failed to keep his client reasonably informed about the status of
19 a matter in violation of ER 1.4.

20 115. Respondent failed to properly safeguard client property in violation of ER
21 1.15. (See footnote No. 1).

22 116. Respondent's conduct as described in this count violated Rule 42,
23 Ariz.R.S.Ct., specifically ERs 1.4 and 1.15.

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¹ Although deemed admitted by default, the State Bar has withdrawn its charge that Respondent charged an unreasonable fee in violation of ER 1.5 because the underlying conduct is more appropriately a violation of ERs 1.15 and 1.16.

1 106, 708 P.2d 1297 (1985). In determining the appropriate sanctions for discipline, the
2 Arizona Supreme Court and the Disciplinary Commission consider the American Bar
3 Association *Standards for Imposing Lawyer Sanctions* ("*Standards*") as an appropriate
4 guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

5 127. In applying the *Standards*, the Arizona Supreme Court considers 1) the duty
6 violated; 2) respondent's mental state; 3) the injury to the client' and 4) any aggravating
7 or mitigating factors. In cases of multiple charges of misconduct, the *Standards* suggest
8 the attorney be sanctioned for the most serious misconduct, with the additional instances
9 of misconduct treated as aggravating factors. *See Standard 3.0 and Theoretical*
10 *Framework of the ABA Standards; Matter of Redeker*, 177 Ariz. 305, 868 P.2d 318
11 (1994).

12 128. The *ABA Standards* provide that a lawyer has a specific duty not only to his
13 client, but also to the general public, the legal system and the profession. In this case,
14 Respondent violated his duty to his clients, the public and to the profession. There is
15 evidence that Respondent was suffering from mental illness, specifically depression and
16 bipolar disorder, and he had a significant addiction to methamphetamine. There is
17 evidence of other physical conditions that affected his chemical dependency, specifically,
18 hepatitis C, of which he was unaware at the time of the misconduct. There was injury to
19 several clients due to Respondent's conduct. There are aggravating and mitigating factors
20 present.

21 **A. The Duties Violated**

22 129. The *ABA Standards* applicable to the Respondent's conduct in this matter
23 are:

24 *Standard 5.1. Failure to Maintain Personal Integrity due to the*
25 *Conviction of Criminal Charges.*

26 *Standard 4.1. Failure to Preserve the Client's Property.*

1 *Standard 4.4. Failure to Act with Reasonable Diligence and*
2 *Promptness in Representing a Client.*

3 *Standard 4.5. Failure to Provide Competent Representation to*
4 *a Client.*

4 **B. Respondent's Mental State**

5 130. Respondent had an intentional mental state concerning his criminal conduct.
6 He was negligent in failing to comply with the rules governing the treatment of client
7 funds by attorneys. Respondent should have known that his treatment of client property
8 in his trust account was inadequate under the relevant rules. However, Respondent has
9 provided evidence that he was suffering from personal and emotional problems related
10 to chemical dependency, specifically, depression and bipolar disorders, which contributed
11 to the chemical dependency. In addition, he had an underlying physical condition, during
12 the time of his misconduct and during the time of the State Bar's investigation. These
13 factors may be considered in mitigation. *See, e.g., In re Gieszl*, State Bar file 03-1278
14 (Commission Report dated October 21, 2005), p. 10, citing *In re Hoover*, 155 Ariz. 192,
15 198-99, 745 P.2d 939, 945-46 (1987); *In re Hoover II*, 161 Ariz. 529, 779 P.2d 1268
16 (1989).

17 **C. The Actual or Potential Injury to Clients and the Profession.**

18 131. In this case, Respondent's clients suffered actual injury. Due to his
19 substance abuse and incarceration, five clients had to hire a new attorney and the
20 unearned fees paid to Respondent have not been refunded. There was potential injury,
21 if not actual, to some of the clients whose work was neglected or postponed by the
22 necessity of finding other counsel upon Respondent's arrest. However, there is no
23 evidence that any client has suffered any permanent harm such as the loss of a case due
24 to a statute of limitations problem or neglect. (*See RT, 03/16/06, at pp. 24-27*).

25 132. The fact that Respondent cooperated immediately with the State Bar to
26 establish a conservatorship helped to get the active client files returned and reassigned

1 to new counsel quickly. It has been over a year since the conservatorship was
2 established, and presumably all existing claims for refunds have been filed. Through the
3 client protection fund, some of the clients have received refunds and others are in the
4 process of applying. An order of restitution for each client in this complaint is part of the
5 recommended sanctions set forth below. Additionally, restitution has been ordered
6 through the probable cause panelist in several cases that came in through the
7 conservatorship process. Respondent will have to pay any restitution due, whether to a
8 client or to the client protection fund, before he can be reinstated.

9 133. Finally, there was actual injury to the legal profession. When lawyers
10 engage in illegal conduct, the public confidence in the legal system is undermined.

11 **D. Aggravating and Mitigating Factors.**

12 134. The *ABA Standards* also require consideration of the relevant aggravating
13 and mitigating factors in arriving at the appropriate sanction. Several aggravating factors
14 in *Standard 9.22* are present:

15 (b) Dishonest or selfish motive: Respondent abandoned his clients and failed to
16 refund their fees. He used unearned fees from the trust account for office expenses and
17 his personal use. due to commingling of his personal funds with client funds. See
18 Reporter's Transcript ("RT"), March 16, 2006, at 20:21-23:1.

19 (c) Pattern of misconduct: There are multiple offenses, including abandonment of
20 several clients and the criminal conduct. Respondent obtained fees from the clients, then
21 abandoned their cases.

22 (d) Multiple offenses: There are eight counts of misconduct, five of them involving
23 clients.

24 (k) Illegal use of controlled substances: Respondent willingly and intentionally
25 began abusing drugs and alcohol, causing injury to his clients.

26 135. The following mitigating factors from *Standard 9.32* are present:

1 (a) Absence of a prior disciplinary record with approximately nine years of
2 practice;

3 (c) Personal and emotional problems (*See (h), infra*);

4 (d) Timely good faith effort to rectify the consequences of misconduct by promptly
5 notifying the Bar of his arrest and signing conservatorship documents to obtain assistance
6 for his clients, and acknowledgment and willingness to make restitution as determined
7 by the Bar;

8 (e) Full and free disclosure to the disciplinary board and cooperative attitude during
9 the proceedings;

10 (g) Character and reputation as evidenced by: (1) the letter from Mathew W.
11 Borowiec: "Jim is a person of considerable integrity and honesty. ... I am inclined to
12 believe that his life got away from him and he got involved in something that he could
13 not handle." State Bar Exhibit 33. (2) See also testimony of Denise Valverde, RT
14 03/16/06, pp. 59-63 and (3) letter from Respondent's sister, Roberta Miller, attached as
15 Exhibit A to this Report.

16 (h) Physical or mental disability or impairment: Respondent established that he
17 had personal and emotional problems relating to his chemical dependency as well as
18 physical and mental problems. Specifically, Respondent has been diagnosed with bipolar
19 disorder Type II, personality disorder and depression; polysubstance abuse, hepatitis C
20 and borderline hypertension. (*See Respondent's exhibits A and B and his treating*
21 *physician's letter filed on April 5, 2006*). Respondent was not aware of his mental and
22 physical conditions at the time he became addicted to methamphetamine, although he
23 knew he had substance abuse issues. (*See, Respondent's Exhibit A, Report of Dr. Barry*
24 *Morenz, Associate Professor of Clinical Psychiatry*).

25 (k) Respondent has received considerable other penalties and sanctions: He spent
26 approximately 123 days in jail and four months in rehabilitation centers, was sentenced

1 to four years probation, some portion of which will be intensive probation, 1,000 hours
2 of community service, and was ordered to pay \$15,000.00 in fines. (See RT, 03/16/06,
3 at p. 36).

4 136. There is some question as to whether Respondent qualifies for mitigating
5 factor *Standard 9.32(I)*, mental disability or chemical dependency, because two of the
6 necessary factors, *i.e.*, (3) a meaningful and sustained period of rehabilitation, and (4)
7 evidence that the recovery arrested the misconduct and recurrence is unlikely, have not
8 been met since there has not been a meaningful period of recovery. Respondent has
9 satisfied the first and second prongs, *i.e.* (1) medical evidence of the problem, and (2)
10 causation. A review of other disciplinary cases, however, establishes that the Arizona
11 Supreme Court and the Disciplinary Commission have considered evidence of mental
12 disability and/or chemical dependency as mitigating, even where the lawyer has not had
13 a lengthy period of recovery. (See Proportionality discussion, below).

14 137. It is also worth noting that in the case at hand, there has not been a lengthy
15 period of time between Respondent's arrest and the hearing on the discipline issues,
16 whereas in many of the reported cases discussed below, several years had passed between
17 the time the Bar investigation began and the discipline hearing. Because Respondent will
18 have to establish his rehabilitation (or lack thereof) if he applies for reinstatement, the
19 absence of evidence of full rehabilitation at this time should not preclude consideration
20 of this mitigating factor. Thus, seven mitigating factors have been established and
21 considered.

22 **VI. SANCTIONS:**

23 138. According to the *ABA Standards* and *In re Cassalia*, 173 Ariz. 372, 843 P.2d
24 654 (1992), where there are multiple acts of misconduct, a lawyer should receive one
25 sanction consistent with the most serious instance of misconduct, and the other acts
26 should be considered as aggravating factors. Respondent's most serious instance of

1 misconduct is his criminal conviction, followed closely by abandonment of his clients and
2 his pattern of neglect of proper trust account maintenance during the time leading up to
3 his conviction. Consequently, the appropriate *Standards* to consider are 5.0 (Violations
4 of Duties Owed to the Public), and 4.0 (Violations of Duties Owed to the Client).

5 **139. 5.0 Violations of Duties Owed to the Public**

6 **5.1 Failure to Maintain Personal Integrity**

7 5.11 Disbarment is generally appropriate when: (a) a lawyer engages in
8 serious criminal conduct a necessary element of which includes intentional
9 interference with the administration of justice, false swearing,
10 misrepresentation, fraud, extortion, misappropriation, or theft; or the sale,
11 distribution or importation of controlled substances; or the intentional
12 killing of another; or an attempt or conspiracy or solicitation of another to
13 commit any of these offenses; or (b) a lawyer engages in any other
14 intentional conduct involving dishonesty, fraud, deceit, or misrepresentation
15 that seriously adversely reflects on the lawyer's fitness to practice.

16 5.12 Suspension is generally appropriate when a lawyer knowingly engages
17 in criminal conduct, which does not contain the elements listed in Standard
18 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
19 (Emphasis added).

20 140. Respondent was convicted of possession of a firearm during a drug offense.
21 Such conduct diminishes the integrity of the profession. *See Standards*, at 5.0. While
22 Respondent was charged with possession of drugs for sale, he was not convicted of a
23 distribution crime. (*See State Bar's exhibits 5 and 30*). Therefore, the presumptive
24 sanction in this case is suspension. *See, e.g., Standards Commentary at 5.12*: "The most
25 common cases involved lawyers who commit felonies other than those listed above
26 [5.11], such as the possession of narcotics ..."

27 **141. 4.1 Failure to Preserve the Client's Property**

28 4.12 Suspension is generally appropriate when a lawyer knows or should
29 know that he is dealing improperly with client property and causes injury or
30 potential injury to a client.

31 The "Commentary" to this "*Standard*" explains:

32 "Suspension should be reserved for lawyers who engage in misconduct that
33 does not amount to misappropriation or conversion. The most common

1 cases involve lawyers who commingle client funds with their own, or fail to
2 remit client funds promptly.

3 142. The Hearing Officer has considered the fact that the Respondent's conduct
4 could warrant the sanction of disbarment pursuant to *Standard 4.11*. However, the
5 evidence also established that Respondent was negligent regarding the management of
6 his trust account and was dealing with undiagnosed physical and mental illnesses during
7 that time, which contributed to the chemical dependency. Therefore, the Hearing Officer
8 finds that the evidence does not establish misappropriation or conversion of client
9 property, *i.e.*, unearned fees, to warrant the sanction of disbarment. Suspension is the
10 appropriate sanction.

11 **VII. PROPORTIONALITY:**

12 143. In order to have an effective system of professional sanctions, there must be
13 internal consistency, and it is appropriate to examine sanctions imposed in cases that are
14 factually similar. *In re Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994); *In re*
15 *Levine*, 174 Ariz. 146, 174-75, 847 P.2d 1093, 1121-22 (1993). To achieve
16 proportionality, attorney discipline must be tailored to the facts of each case. *In re*
17 *Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993). The following cases are instructive:

18 144. In *In re Riches*, 179 Ariz. 212, 877 P.2d 785 (1994), the respondent
19 misappropriated approximately \$250,000.00 that belonged to his law firm. For his
20 violation of Ethical Rules 8.4(b) and ©, Ariz.R.S.Ct., the respondent received a three-year
21 suspension, retroactive to the date of his interim suspension. The Disciplinary
22 Commission found that disbarment was the presumptive sanction, under *Standard 5.11*,
23 due to the theft. However, the Commission found that there was significant mitigation
24 that supported a reduction to the three-year suspension.

25 In *Riches*, the Commission cited three cases where lawyers with mental
26 disability and/or substance abuse issues were suspended for three years for conduct

1 involving misappropriating funds or abandoning clients. Those cases are also instructive
2 for the instant case. See *In re Duprey*, No. SB-90-0058-D (1991) (misappropriation of
3 client funds with cocaine and alcohol addiction and severe psychological problems); *In*
4 *re Kame*, No. SB-89-0026-D (1989) (misappropriation of client funds with drug and
5 alcohol addiction); *In re Johnson*, No. SB-89-0027-D (1989) (abandonment of practice
6 while retaining fees with "dysthymic" disorder and post traumatic stress disorder).

7 The most significant mitigating factor in *Riches* was the fact that the
8 respondent had a bipolar manic-depressive disorder. See *id.* at 214, 877 P.2d at 787. The
9 Commission distinguished cases such as *In re Hoover*, 161 Ariz. 529, 779 P.2d 1268
10 (1989), where the bipolar condition caused the respondent to be "M'Naghten insane,"
11 such that he was unable to differentiate between right and wrong, from cases in which the
12 bipolar condition was not conclusively the cause of the conduct. The Commission held
13 that because the bipolar condition was not conclusively the cause of the conduct in
14 *Riches*, but was clearly a contributing factor, a three-year suspension was appropriate.
15 *Riches* at 214, 877 P.2d at 787.

16 Due to *Riches*' efforts at rehabilitation, the length of time that he had already
17 been on interim suspension, and the fact that there was no client harm, the Commission
18 determined that a retroactive suspension was appropriate. See *Riches* at 215, 877 P.2d
19 at 788. However, in this case, Respondent has not had a lengthy period of rehabilitation
20 and there has been client harm. Nevertheless, there are substantial mitigating factors in
21 this case as set forth *supra* at pp. 22-24. Therefore, suspension of three years, applied
22 prospectively rather than retroactively, is an appropriate sanction, given the Respondent's
23 timely cooperation with the State Bar investigation, his remorse, and the absence of a
24 prior disciplinary record.

25 145. In *In re Camacho*, SB 96-0079-D (1997), the lawyer was disbarred after he
26 converted \$3,045.75 in settlement funds to his own use, intentionally misled a client

1 about the disposition of the client's case, and agreed to a settlement without the client's
2 consent. Although the lawyer repaid the settlement funds to Medicare, all aggravating
3 factors were found to apply, including prior disciplinary record and failure to cooperate
4 with the State Bar. The mitigating factors were remorse and depression.

5 146. In *In re Brady*, 923 P.2d 836 (1996), a lawyer was disbarred after he
6 abandoned the cases of several clients. Brady was found to have violated ERs 1.1
7 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping
8 property), 1.16 (terminating representation), 3.3 (candor toward the tribunal), 8.1 (bar
9 admission and disciplinary matters), and 8.4 (misconduct). Applicable aggravating
10 factors included a prior disciplinary history and failure to cooperate with the State Bar.
11 No mitigating factors were found. Brady appeared and participated in some, but not all
12 phases of the disciplinary proceeding.

13 147. *In Re Roberts*, SB-04-0123-D (2004) is instructive. In that case, a lawyer
14 consented to a three and one-half (3-1/2) year suspension, two years probation and
15 restitution after he abandoned two client matters and converted funds, including
16 settlement proceeds in his client trust account to his own use. There were two
17 aggravating factors of dishonesty and selfish motive and multiple offenses. Three
18 mitigating factors were present: absence of prior disciplinary history, personal and
19 emotional problems and cooperative attitude.

20 148. In *In re McGuire*, SB-99-0029-D (1999), the lawyer was the subject of a four
21 count complaint alleging failure to communicate with his clients, failure to prepare
22 necessary documents, abandonment of the clients and, in at least two instances, failure
23 to return unearned retainers and personal property to the clients. In aggravation, the
24 Disciplinary commission found that the matter involved multiple offenses, that the lawyer
25 failed to cooperate with the State Bar in its investigation of the matters and had engaged
26 in bad faith obstruction of the disciplinary process. In mitigation, McGuire's lack of a

1 prior disciplinary history was considered. McGuire received a two year suspension. See
2 also *In re Sorensen*, 2001 Ariz. LEXIS 179, SB-01-0165-D (2001) and *In re Hooper*, File
3 No. 02-0487 (March 8, 2004).

4 149. In *In re Rivkind*, 164 Ariz. 154, 791 P.2d 1037 (1990), the respondent
5 received a retroactive, two-year suspension with one year of probation for a criminal
6 conviction for attempted possession of cocaine, a class 5 felony. The Court noted that the
7 sanction would usually be more severe, but there was exceptional evidence of mitigation,
8 including substantial rehabilitation. In addition, the fact that the respondent did not harm
9 his clients as a result of his drug use weighed very heavily in the decision to impose a
10 retroactive rather than prospective suspension. The respondent had been on interim
11 suspension for over three years at the time of the decision.

12 150. In the instant case, as in *Rivkind*, there is a conviction involving drugs.
13 However, there has been significant client harm in this case, and the Respondent has not
14 been rehabilitated for a significant period of time. Therefore, a prospective term of
15 suspension is appropriate to allow sufficient time to ensure full rehabilitation.

16 151. In *In re Politi*, 2001 Ariz. LEXIS 21, SB-00-0106-D, the lawyer received a
17 two year retroactive suspension, and two years probation. Politi had a class 4 felony
18 conviction for aggravated driving under the influence ("DUI"), and had a violation related
19 to a conflict of interest. Two aggravating factors were noted and six mitigating factors,
20 one of those being no prior disciplinary record. There was a "history of addiction to
21 painkillers and abuse of alcohol" and the mitigating factor 9.32(I), mental disability or
22 chemical dependency, was found to apply. However, unlike the instant case, there was
23 no evidence that his conduct was adverse to his clients and there was no current threat to
24 the public. Again, in this case, a longer, prospective suspension is an appropriate
25 sanction. The harm to Respondent's clients is balanced by the exceptional mitigating
26 factors present in this case.

1 152. In *In re Rose*, file no. 00-1408 (2002), the respondent received a three-year
2 suspension, with one year of probation, for a Class 3 felony involving the theft of
3 approximately \$103,000.00 over the course of three years. The respondent had pled
4 guilty and received a sentence of five years of criminal probation and 500 hours
5 community service. She established a mental disability for the criminal matter, and
6 treatment was included as a term of her criminal probation. It also appears that the
7 respondent had a substance abuse issue. (See Footnote 10: "Respondent also sought
8 treatment for her addiction.")

9 153. In sum, the cases that involve criminal misconduct with physical and/or
10 mental disability support a three-year suspension in this case.

11 154. It is recognized that the evidence in this case would also support disbarment.
12 *Standard 4.11A* provides:

13 "4.11 Disbarment is generally appropriate when a lawyer knowingly
14 converts client property and causes injury or potential injury to a client."

15 In this case, Respondent accepted fees for several clients, performed no or little work,
16 then withdrew funds from the trust account and either used them to pay expenses or for
17 personal use. This conduct occurred during a period of time when he became addicted
18 to methamphetamine. The clients were harmed because their cases were abandoned, they
19 had to hire new attorneys and their fees were gone. Therefore, disbarment would be an
20 appropriate sanction. However, the exceptional mitigating factors established in this
21 case, particularly the absence of prior discipline and the Respondent's significant and
22 timely cooperation with the State Bar throughout these proceedings as well as his
23 criminal proceedings, support a suspension. Additional, there is no evidence that any of
24 the Respondent's clients' cases were compromised or that there was lasting harm.

25 155. The following case is also instructive: The case *In re Hooper*, File No.
26 02-0487 (March 8, 2004) (hearing officer report available online) recognized a physical

1 disability in a respondent with Type II onset diabetes, which had not been diagnosed at
2 the time of the misconduct, and also hepatitis B. This case is relevant because it
3 discusses the effects of the physical ailment in causing exhaustion and depression and
4 contributing to the respondent's conduct.

5 156. In sum, the cases in which the lawyer was disbarred all had two common
6 aggravating factors: prior discipline history and failure to cooperate in the disciplinary
7 proceedings. Both of those factors are absent in this case. Therefore, a period of
8 suspension is an appropriate sanction.

9 **VIII RECOMMENDED SANCTIONS:**

10 In imposing discipline, it is appropriate to consider the facts of the case, the *ABA*
11 *Standards* and the proportionality of discipline imposed in analogous cases. *Matter of*
12 *Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). The hearing officer has
13 considered all of these factors, and has also considered letters submitted on the
14 Respondent's behalf.

15 In this case, the Respondent received retainers in five cases, then abandoned the
16 clients. He failed to communicate with them and caused injury to them. He violated trust
17 account rules and commingled his personal funds in his trust account. Finally, he was
18 convicted of a felony offense. These violations merit a significant sanction.

19 In mitigation, Respondent has no disciplinary history and has cooperated fully in
20 these proceedings. His medical and psychological problems were documented and
21 established. Respondent has shown considerable remorse and is willing to make
22 restitution for unearned fees. In consideration of all of the relevant factors, the hearing
23 officer recommends a three year term of suspension as the appropriate sanction to begin
24 prospectively.

25 On the basis of the foregoing, the hearing officer recommends that Respondent be
26 disciplined as follows:

1 Pamela M Katzenberg
2 Pamela M. Katzenberg
Hearing Officer 7T

3 ORIGINAL filed this 19th day of
4 May, 2006, with the Disciplinary Clerk
of the Supreme Court of Arizona.

5 By: Christina Soto
6

7 COPY of the foregoing mailed
8 this 19th day of May, 2006, to:

9 Denise M. Quinterri, Esq. (Bar No. 020637)
10 Staff Bar Counsel
11 State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288

12 James F. Miller, Respondent
13 5524 South San Pedro
14 Sierra Vista, AZ 85650
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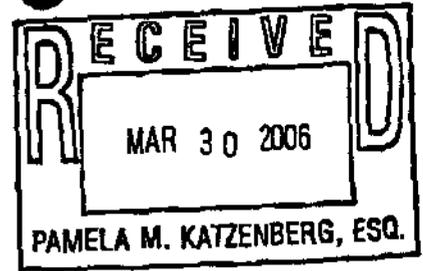
EXHIBIT A

TO

HEARING OFFICER'S

REPORT & RECOMMENDATION

IN RE: JAMES F. MILLER (Bar No. 017381)



Roberta Neil Miller
306 East Del Rio Drive
Tempe, Arizona 85282
480-894-5114

Office of Pamela Katzenberg
177 N. Church, Suite 815
Tucson, AZ 85701-1131

March 29, 2006

Re: James F. Miller, State Bar Case # 04061

Dear Ms. Katzenberg:

My brother, James F. Miller (Jim), has a pending Sate Bar disciplinary matter in which you have been designated as the hearing officer. I also am an attorney licensed to practice law in the state of Arizona. It is my understanding that the State Bar is recommending a suspension period in Jim's case, after which he will be eligible to reinstate his license to practice law. It is my opinion that this is an appropriate recommendation, and I urge you to follow it.

Let me elucidate the reasons for my recommendation. First, most of our fellow bar members and the public at large would agree that lawyers who lie, cheat or steal from their clients should suffer the most stringent punishment the State Bar can impose – disbarment with no possibility for reinstatement. This is because these types of ethical violations undermine the sacred trust and confidentiality that all attorneys must observe on behalf of their clients and thus strikes at the heart of one of the most important ethical principles of our profession.

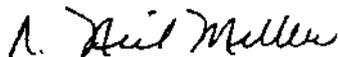
Jim, however, has not been charged with nor admitted ethical violations that involve dishonesty or false statement. In fact, it is my understanding that many, of not most of the ethical violations with which Jim has been accused occurred during the time he was incarcerated for drug offenses and was simply unable to respond to clients and complete work on their cases. I can personally attest that Jim's overriding concern during this period was for his clients and his inability to attend to their cases. Because of this, my mother and I and Jim, during a brief period during his release from jail, all worked extremely hard to organize his case files and made arrangements to deliver them to the State Bar offices in Phoenix.

Of course, another ethics violation is Jim's conviction for a felony drug offense. As a former prosecutor, I cannot condone the behavior that led to Jim's arrest and ultimate conviction for the use and possession of illegal drugs. However, I would point out that the underlying reasons for Jim's unlawful behavior stemmed from a severe substance

abuse addiction that was probably exacerbated, if not motivated, by a bi-polar disorder - a previously undiagnosed mental illness for which Jim is now receiving treatment. Jim is at this time on supervised probation, and is doing extremely well.

I ask you not to punish Jim further than he has already been punished by the criminal justice system by forever taking away his hope to someday again support himself in his chosen profession. I believe that Jim is already well on the way to recovery, and successful completion of probation will provide tangible proof of his rehabilitation, not only with respect to the Court system, but also with respect to his ability to practice law in a manner consistent with the high standards of morality and character required by the State Bar of Arizona.

Very truly yours,



R. Neil Miller
Bar #009217

cc: James F. Miller