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DEC 22 2006

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

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

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5 IN THE MATTER OF A MEMBER) No. 03-2296, 04-0875, 05-0060
6 OF THE STATE BAR OF ARIZONA,)

7 **BRUCE A. SHOLES,**)
8 **Bar No. 007793**)

9 **RESPONDENT.**)

HEARING OFFICER'S REPORT

10
11 **PROCEDURAL HISTORY**

12 This matter was initiated by the filing of a Complaint on September
13 13, 2006. The parties entered in negotiations for Settlement of all matters
14 included in the Complaint and a Notice of Settlement was filed on November 7,
15 2006. Subsequently, a Tender of Admissions and Agreement for Discipline by
16 Consent was filed on December 1, 2006, in conjunction with a Joint
17 Memorandum in Support of Agreement for Discipline by Consent. The Hearing
18 Officer hereby accepts the Tender of Admissions and Agreement for Discipline
19 by Consent and the related Joint Memorandum in Support of Agreement for
20 Discipline by Consent.
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1 provide him with the funds, an accounting, or a response. This December 18,
2 2003 date, was the last time Respondent heard from Mr. DeWerth, who failed to
3 maintain contact with Respondent or the State Bar throughout this proceeding.
4 On September 15, 2004, Respondent told the State Bar that he disbursed the rest
5 of Mr. DeWerth's funds to Mr. DeWerth in or about February 2004. This was a
6 false statement.
7

8
9 5. In January 2005, Respondent was asked to provide the State Bar
10 with, among other things, complete trust account records to show how Mr.
11 DeWerth's money had been handled.

12
13 6. In March 2005, Respondent's counsel declined to immediately
14 produce the requested records. In a letter dated March 17, 2005, the State Bar
15 agreed to temporarily limit the scope of its trust account inquiry.

16
17 7. Reassigned bar counsel requested production of the trust account
18 records from Respondent on several more occasions. On each occasion,
19 Respondent timely responded with information he had available and/or requested
20 clarification. Respondent subsequently produced the records he had available.

21
22 8. As of October 19, 2005, Respondent still had \$6,180.24 in trust for
23 Mr. DeWerth due to Respondent's inability to locate Mr. DeWerth.

24
25 9. Bar counsel met with Respondent's counsel to discuss Respondent's
files and to again request production of specific trust account information.

1 10. Respondent's counsel responded in October 2005, but was unable to
2 provide all of the requested records.

3
4 11. On November 17, 2005, a subpoena duces tecum was served on
5 Bank of America requesting Respondent's trust account records. On December
6 8, 2005, Bank of America produced the documents it had.

7 12. The State Bar's staff examiner for trust accounts determined from
8 the trust account records that \$54,147.80 was paid to Respondent, \$46,311.49
9 was paid to Mr. DeWerth, and \$12,360.47 was paid to St. Joseph's Hospital. A
10 total of \$112,819.76 was disbursed from the \$130,000.00 settlement, leaving a
11 remaining balance of \$17,180.24.
12

13
14 13. The Respondent's records for the individual client ledger for Mr.
15 DeWerth indicated that the remaining balance had been held in the trust account
16 from June 11, 2003, through October 19, 2005, with \$11,000.00 owed to
17 Respondent for fees and \$6,180.24 owed to Mr. DeWerth.
18

19 14. Respondent failed to communicate with Mr. DeWerth about the
20 money that was still being held for Mr. DeWerth in the trust account.

21 15. Respondent seems to have made a persistent, good faith effort to
22 communicate with Mr. DeWerth about the outstanding funds, which Mr.
23 DeWerth knew or should have known remained in Mr. Sholes' trust account.
24 Respondent believed that during the time of Respondent's representation of Mr.
25

1 DeWerth, Mr. DeWerth was unavailable or non-responsive to Respondent's
2 attempts to locate him on at least two occasions and that since the December 18,
3 2003 contact, Respondent has attempted to locate Mr. DeWerth by searching the
4 Internet, the yellow pages, and the white pages, to no avail.
5

6 16. Despite Respondent's subsequent attempts to locate Mr. DeWerth,
7 Respondent failed to provide Mr. DeWerth with an accurate settlement statement
8 at the end of the representation.
9

10 17. A review of Respondent's files for Mr. DeWerth, and the
11 subpoenaed bank records revealed the following:

12 (a) Respondent failed to properly safeguard client funds and failed to
13 exercise due professional care in the performance of his duties.

14 i) Respondent did not remit the funds that belonged to Mr.
15 DeWerth when Mr. DeWerth requested the funds.
16

17 ii) Respondent was unable to provide an accounting to Mr.
18 DeWerth, because he failed to keep the appropriate trust
19 account records.
20

21 (b) Respondent failed to maintain timely and complete client trust
22 account records. The individual client ledgers do not accurately
23 reflect all transactions. Respondent failed to retain a duplicate
24 deposit slip or the equivalent for each deposit.
25

- 1 (c) Respondent failed to make or cause to be made a monthly three-
2 way reconciliation of the client ledgers, trust account general
3 ledger or register, and trust account bank statement.
4
- 5 (d) Respondent commingled his personal funds with client funds in
6 the trust account by failing to promptly remove fees and costs that
7 belonged to him.
8

9 **COUNT TWO (File No. 04-0875/Hennessy)**

10 18. Complainant Dawn Hennessy ("Dr. Hennessy") is a chiropractor
11 and filed her complaint with the State Bar on May 12, 2004, on behalf of
12 McKenzie-Hennessy Chiropractic PC ("McKenzie-Hennessy").
13

14 19. Dr. Hennessy's patient, Rene Butler ("Ms. Butler"), was
15 Respondent's client. Ms. Butler informed Dr. Hennessy's office that she had
16 received a settlement check from Respondent for the injuries she sustained on
17 September 7, 2001, and that Respondent was to issue payment for her medical
18 services to Dr. Hennessy's office.
19

20 20. McKenzie-Hennessy filed a valid lien with the Maricopa County
21 Recorder's office for the amount of \$3,085.00 in medical services provided to
22 Ms. Butler related to the September 7, 2001 incident.
23

24 21. Respondent held the \$3,085.00 due to McKenzie-Hennessy, from
25 March 11, 2003, until September 14, 2004.

1 22. Dr. Hennessy attempted to resolve the matter privately with
2 Respondent. As of May 12, 2004, having not been paid, she reported the matter
3 to the State Bar and a trust account investigation was initiated.
4

5 23. After May 12, 2004, and before September 14, 2004, Respondent
6 paid Dr. Hennessy in full.
7

8 24. On August 4, 2005, Respondent was asked to produce specific trust
9 account documents to the State Bar. On October 21, 2005, Respondent produced
10 some, but not all, of the requested records.

11 25. On November 15, 2005, the State Bar subpoenaed Respondent's
12 trust account records from his bank.
13

14 26. A review of the trust account documents from Respondent's file and
15 trust account records from Respondent's bank, revealed the following:

- 16 (a) Respondent failed to keep and preserve complete records of
17 clients or third persons for a period of five years after termination
18 of the representation.
- 19 (b) Respondent failed to record all transactions promptly and
20 completely.
- 21 (c) Respondent failed to make or cause to be made a monthly three-
22 way reconciliation of the client ledgers, trust account general
23 ledger or register, and trust account bank statement. Respondent
24
25

1 could not have performed this required three-way reconciliation
2 because he failed to maintain complete trust account records.

3
4 27. Respondent failed to promptly deliver funds owed to McKenzie-
5 Hennessy and failed to render an accounting of the McKenzie-Hennessy funds.

6 **COUNT THREE (File No. 05-0060/Gallaway)**

7 28. Complainant Miranda Gallaway ("Ms. Gallaway"), a minor, was hit
8 by an automobile while crossing the street on May 1, 2000. During the period of
9 time that she was recovering from her injuries, she and her sister went to
10 Respondent's office. Later, Ms. Gallaway sent Respondent a copy of the police
11 report, pictures she had taken, and her medical records.
12

13
14 29. Ms. Gallaway's mother retained Respondent on her daughter's
15 behalf on May 2, 2004. She reviewed and signed the fee agreement, met with
16 Respondent to discuss the merits of her daughter's case, consulted with
17 Respondent by telephone, and gave Respondent the legal authority to negotiate
18 her daughter's claim.
19

20 30. Although there is non-disputed evidence that Ms. Gallaway was
21 accompanied by her sister, her legal guardian, in her initial meeting with
22 Respondent, the issue of guardianship or parental rights appears to have little or
23 no bearing on the underlying conduct giving rise to Count Three. It is
24 undisputed that Respondent was retained to represent Ms. Gallaway, that there
25

1 was a fee agreement, and that Ms. Gallaway never discussed with nor authorized
2 any settlement of her case with Respondent.

3
4 31. After the initial meeting with Ms. Gallaway, Respondent failed to
5 communicate with Ms. Gallaway, so she thought that she did not have a case.
6 Although there are disputed facts as to whether Ms. Gallaway moved during the
7 time that Respondent represented Ms. Gallaway, it is undisputed that various
8 members of Ms. Gallaway's family attempted to contact Respondent during the
9 term of Respondent's representation of Ms. Gallaway, and that Ms. Gallaway's
10 residence and telephone number did not change during the term of Respondent's
11 representation of Ms. Gallaway.
12

13
14 32. During the time that Respondent represented Ms. Gallaway, the
15 automobile driver's insurer for the May 1, 2000 automobile accident case had
16 offered a settlement that, in Respondent's judgment, far exceeded what a jury
17 would award for her case. Respondent, therefore, preserved the settlement
18 opportunity on Ms. Gallaway's behalf. Arizona case law allowed Ms. Gallaway
19 to repudiate the settlement once she reached the age of majority. *See Gomez v.*
20 *Maricopa County*, 175 Ariz. 469, 472, 857 P.2d 1323, 1326 (App. 1993).
21
22 Rather than "accepting" the settlement without Ms. Gallaway's approval,
23 Respondent preserved for her, the opportunity to later accept the settlement to
24
25

1 protect her best interests. Once Ms. Gallaway reached the age of majority, she
2 could sign the release and finalize acceptance of the settlement.

3
4 33. Shortly after Ms. Gallaway turned 18 years old, on June 3, 2003, she
5 learned Respondent had settled her case and had received approximately
6 \$40,000.00. Prior to learning of the settlement, Ms. Gallaway had no contact
7 with Respondent since her May 1, 2000 office visit.

8
9 34. Ms. Gallaway did not authorize the settlement, never signed any
10 settlement papers, including a release, and found out about the settlement from
11 an ex-employee of Respondent's. Once informed of the settlement, Ms.
12 Gallaway tried to obtain information from the insurance company representing
13 the automobile driver, but was told it would only release information to her
14 attorney. Ms. Gallaway then reported the matter to the State Bar.

15
16 35. Respondent was asked to provide the State Bar with copies of
17 pertinent documents, such as Ms. Gallaway's retainer agreement, all
18 correspondence contained in Ms. Gallaway's file, e-mail communications, the
19 settlement agreement for disposition of Ms. Gallaway's personal injury claim,
20 the check received in settlement of Ms. Gallaway's claim, Respondent's trust
21 account statement(s) from the date of initial deposit of the settlement amount of
22 \$37,500.00 on June 23, 2003, through and including March 2005, an itemized
23 statement of distribution of Ms. Gallaway's settlement proceeds, and a client
24
25

1 ledger from Ms. Gallaway's proceeds. Respondent produced some, but not all,
2 of the requested documents.

3
4 36. The State Bar subpoenaed the automobile driver's insurance
5 company to obtain its records and subpoenaed Respondent's trust account
6 records from his bank.

7
8 37. When the State Bar received a copy of the settlement check, Ms.
9 Gallaway was asked if she had endorsed the check so it could be deposited into
10 Respondent's trust account and whether she had signed a document entitled
11 "Settlement and Release". Ms. Gallaway did not sign either the settlement check
12 or the release.

13
14 38. Respondent erroneously believed, contrary to rules of professional
15 conduct and supporting formal opinions, that his standard fee agreement gave
16 him a limited power of attorney to "negotiate checks or drafts" on his clients'
17 behalf, such that he had the authority to sign the Settlement check and release on
18 Ms. Gallaway's behalf. *See*, Ethics Opinions 01-08 and 06-07 that prohibit such
19 a practice.

20
21 39. According to the trust account bank statements for Ms. Gallaway,
22 from June 23, 2003 through October 19, 2005, Respondent held \$221.20 in trust
23 in the Gallaway matter.
24
25

- 1 i) Since 2005, from client Gallaway, \$221.20 for costs not
2 transferred to the operating account.
- 3 ii) Since 2005, from client Jones, E., \$211.38 for costs not
4 transferred to the operating account.
- 5 iii) Since 2005, from client Jones, N., \$223.70 for costs not
6 transferred to the operating account.
- 7
- 8
- 9 (b) Respondent committed an overdraft for one of his trust accounts
10 by \$6.67 when he disbursed \$600 on June 1, 2004, for client
11 Brown, Kathryn, when the balance held in trust at the time for
12 client Brown, Kathryn, was only \$593.33.
- 13
- 14 (c) Respondent failed to maintain individual client ledgers for clients
15 identified as follows: Brown, Carafa, Corelia, Cillinan, England,
16 Espinoza, Higuera, Jones, Estelle, Jones, Norma, Kean, Leon-
17 Higuera, Lindermann, Lusk, Macias, Madden, Massey, McGill,
18 Melki, Moreno, Morris, Munoz, Ngo, Nguyen, Nilles, Oasis at
19 Wildhorse Ranch, Perez, Pensmith, Ramani, Rancon, Roqueni,
20 Rozo, Sikkar, Truong, Vardon, Wagner, Walters, and Weedman.
- 21
- 22 (d) Respondent was unable to identify all of the transactions where
23 client names are illegible or unknown on the trust account
24 reconstruction documents submitted to Respondent for review.
- 25

1 51. Respondent's conduct in Count One violated Rule 42, ARIZ.R.S.Ct.,
2 specifically, ERs 1.4(a), 1.5(c), 1.15(a) and (d), 8.1(b), and Rules 43(a) and (d),
3 44(b), and 53(f), ARIZ.R.S.Ct.
4

5 52. Respondent's conduct in Count Two violated Rule 42,
6 ARIZ.R.S.Ct., specifically, ERs 1.15 (a) and (d), and Rules 43(a) and (d), 44(b),
7 and 53(f), ARIZ.R.S.Ct.
8

9 53. Respondent's conduct in Count Three violated Rule 42,
10 ARIZ.R.S.Ct., specifically, ERs 1.2(a), 1.4, 1.15(a) and (d), 8.4(c) and (d), and
11 Rules 43(a) and (d), 44(b), and 53(f), ARIZ.R.S.Ct.
12

13 54. Respondent's conduct in Count Four violated Rule 42,
14 ARIZ.R.S.Ct., specifically, ERs 1.15(a) and (d), 8.1(b), and Rules 43(a) and (d),
15 44(b), and 53(f), ARIZ.R.S.Ct.
16

17 ABA STANDARDS

18 In determining the appropriate sanctions, this Hearing Officer considered both the
19 American Bar Association's Standards for Imposing Lawyer Sanctions
20 ("Standards" or "Standard ___") and applicable case law.

21 I. ABA Standards

22 The Supreme Court and the Disciplinary Commission consistently use the
23 *Standards* to determine appropriate sanctions for attorney discipline. *See In re*
24 *Clark*, 207 Ariz. 414, 87 P.3d 827 (2004); *In re Peasley*, 427 Ariz. Adv. Rep. 23,
25 90 P.3d 764, §§ 23, 33 (2004). The *Standards* are designed to promote

1 consistency in sanctions by identifying relevant factors the court should consider
2 and then applying these factors to situations in which lawyers have engaged in
3 various types of misconduct. *Standard 1.3, Commentary.*

4
5 In determining an appropriate sanction, the court and the Disciplinary
6 Commission consider the duty violated, the lawyer's mental state, the presence or
7 absence of actual or potential injury, and the existence of aggravating and
8 mitigating factors. *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990);
9 *Standard 3.0.*

10
11 Given the conduct in this matter, it is appropriate to consider Standard 4.0
12 (Violations of Duties Owed to the Client).

13
14
15 4.1 Failure to Preserve Client's Property

16 4.12: Suspension is generally appropriate when a lawyer
17 knows or should know that he is dealing improperly with
18 client property and causes injury or potential injury to a client.

19 4.4 Lack of Diligence

20 4.42: Suspension is generally appropriate when a lawyer
21 knowingly fails to perform services for a client or engages in a
22 pattern of neglect and causes injury or potential injury to a
23 client.

24 4.6 Lack of Candor

25 4.62: *Suspension is generally appropriate when a lawyer knowingly deceived
a client, and causes injury or potential injury to the client.*

1
2 5.1 Failure to Maintain Personal Integrity

3 5.12: Suspension is generally appropriate when a lawyer
4 knowingly engages in criminal conduct, which does not
5 contain elements listed in *Standard* 5.11 and that seriously
6 adversely reflects on the lawyer's fitness to practice.

7 6.0 Violations of Duties Owed to the Legal System

8 6.12: Suspension is generally appropriate when a lawyer
9 knows that false statements or documents are being submitted
10 to the court or that material information is improperly being
11 withheld, and takes no remedial action, and causes injury or
12 potential injury to a party to the legal proceeding, or causes an
13 adverse or potentially adverse effect on the legal proceeding.

14 7.0 Violations of Duties Owed to the Profession

15 7.2: Suspension is generally appropriate when a lawyer
16 knowingly engages in conduct that is a violation of a duty
17 owed to the profession and causes injury or potential injury to
18 a client, the public, or the legal system.

19 This Hearing Officer finds that for purposes of this agreement that
20 Respondent's mental state in this matter was knowing rather than negligent. As
21 such, suspension is the presumptive sanction.

22 After determining the presumptive sanction, it is appropriate to evaluate
23 aggravating and mitigating factors enumerated in the *Standards* that would justify
24 an increase or decrease in the presumptive sanction. *In re Scholl*, 200 Ariz. 222,
25 225-26, 25 P.3d 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891 P.2d
 236, 239 (1995).

1 **A. The duty violated**

2 Respondent violated his duties to his clients by failing to observe the rules
3 governing the treatment of client funds by attorneys. These rules are designed to
4 ensure that a client's money is not put in jeopardy, or used or taken improperly,
5 by the client's attorney. In Count Three (Gallaway), Respondent failed to
6 consult with Ms. Gallaway about settling her case and signed her name to the
7 settlement check and the release without her permission. Respondent violated his
8 duties to the legal system and to the profession by failing to comply with the
9 ethical rules.
10
11

12 **B. The lawyer's mental state**

13 Respondent's conduct was knowing, or at least grossly negligent with
14 respect to the management of his trust account.
15

16 **C. The potential or actual injury caused by Respondent's conduct**

17 There was actual injury to Ms. Gallaway as Respondent settled her case
18 without her knowledge or permission and failed to remit the settlement funds to
19 her in a timely manner. There was potential injury to clients with regard to the
20 trust account violations. Respondent's failure to comply with the rules governing
21 treatment of client funds either exposed his clients to potential injury or caused
22 actual injury to clients by causing their funds to be held without the protections
23
24
25

1 against intentional or inadvertent misdirection or depletion that are provided
2 through compliance with ER 1.15 and Rule 43 and 44, Ariz.R.S.Ct.

3
4 **D. The aggravating and mitigating circumstances**

5 The presumptive sanction for a knowing violation is suspension. The presence of
6 aggravating and mitigating factors assists in determining which sanction applies.

7 *Standard 9.22(c) or (d) (pattern of misconduct or multiple violations).*

8 Respondent has demonstrated a pattern of non-compliance with the trust account
9 rules as the violations in Count Four (Trust Account) sets forth the repeated
10 violations for the period of January 1, 2003 through October 19, 2005.

11
12 *Standard 9.22(i) (substantial experience in the practice of law).*

13 Respondent has been an Arizona attorney for twenty-three years.

14
15 Although diversion cases are not considered prior discipline, it is important
16 to note that Respondent has previously received help from the State Bar to try and
17 correct what were considered minor infractions of the ethical rules, but now form
18 a continuing pattern of misconduct. Respondent previously received an Order of
19 Diversion in expunged File No. 95-2020, for violation of ERs 3.1, 5.3 and 8.4;
20 and in expunged File No. 98-1319, for violation of ERs 1.3, 1.4, 1.6 and 1.15.
21
22

23 There are no mitigating factors.

24 The aggravating and mitigating factors do not warrant a departure from the
25 presumptive sanction of a suspension in this case.

1 **II. Proportionality analysis of analogous cases**

2
3 To have an effective system of professional sanctions, there must be
4 internal consistency, and it is appropriate to examine sanctions imposed in cases
5 that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772.
6 However, the discipline in each case must be tailored to the individual case, as
7 neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶
8 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002);
9 *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
10

11
12 The most serious instance of misconduct in this case is in Count Three
13 when Respondent surrendered complainant Gallaway's right to settle a matter
14 without her knowledge or consent. Although Respondent asserts that at the time
15 of the settlement he could not locate his client and had only a limited time to
16 accept a settlement that was better than he had anticipated receiving, he was
17 aware that Ms. Gallaway's status as a minor would allow her to repudiate the
18 settlement later. It also appears that Respondent caused the endorsement of the
19 settlement check with Ms. Gallaway's signature, in an attempt to make it look
20 like her own, also without her knowledge or consent. There are numerous ethics
21 opinions that advise that a lawyer may not ethically ask a client to authorize the
22 lawyer to unilaterally decide whether to settle the client's case. *See Arizona*
23 *Ethics Opinion No. 06-07, 01-08 and 94-02.*
24
25

1 Arizona Ethics Opinion No. 06-07: Communication; Settlement Authority;
2 Fee Agreements; Conflict of Interest, September 2006.

3 "A lawyer may not ethically ask a client to authorize
4 the lawyer to unilaterally decide whether to settle the
5 client's case if the client disappears or the lawyer is
6 otherwise unable to communicate with the client. A lawyer
7 also may not ask a client for authority to sign drafts or
8 releases necessary to finalize a settlement obtained under
9 such circumstances."

10 This opinion says obtaining such authority violates ERs 1.2, 1.4 and
11 1.8(i).

12 Arizona Ethics Opinion No. 01-08: Withdrawal from Representation;
13 Missing Clients; Communication with Client, September 2001.

14 "When a client moves and fails to communicate
15 with his lawyer, the lawyer may withdraw from the
16 representation if the lawyer uses reasonable efforts to: 1)
17 locate the client to inform him of the withdrawal; and 2)
18 protect the client's interests upon withdrawal, including
19 maintaining client confidences and safeguarding client
20 property."

21 This opinion involves violations of ERs 1.4, 1.6, 1.15, 1.16(b).

22 Arizona Ethics Opinion No. 94-02: Retainer Agreement; Representation;
23 Fees and Files, March 1994.

24 "Attorney's proposed contingent-fee agreement
25 violates Rules as to: 1) limiting client's right to discharge
attorney; 2) attorney's right to withdraw unilaterally; 3)
attorney's overbroad authority; 4) method of calculating
fee; and 5) attorney's withholding client files after
termination of representation."

1 While there is no case law directly on point in Arizona regarding attorneys
2 disciplined for similar conduct, there is a Rhode Island Supreme Court decision
3 ordering the suspension of a lawyer for sixty days for violating Rules 1.2(a) and
4 8.4(c) of the Rules of Professional Conduct when he settled a personal injury
5 action without the consent of his clients and represented to the Court and defense
6 counsel that he had authority to settle the case. *In Matter of Nugent*, 624A.2d
7 291(R.I. 1993)
8

9
10 Other cases that are instructive include:

11 In *re Augustine*, SB-04-0114-D (2004), Augustine received a two year
12 suspension and restitution for violating ERs 1.3, 1.4, 1.15(b), 1016(d), 8.1 and
13 8.4(c) and (d), and Supreme Court Rule 53(d) and (f). Augustine failed to
14 account to his clients regarding their funds he held in trust, failed to return
15 unearned fees, failed to diligently represent his clients, failed to respond to
16 requests for information, knowingly failed to respond to a lawful demand for
17 information from a disciplinary authority, engaged in conduct involving
18 dishonesty, fraud, deceit or misrepresentation by retaining fees he did not earn.
19

20
21 Augustine's conduct was found to be knowing with actual injury to his
22 clients and was deemed admitted by default. There were four aggravating factors
23 present: a pattern of misconduct, multiple offenses, bad faith obstruction of a
24 disciplinary proceeding and substantial experience in the practice of law. There
25

1 were four mitigating factors present: absence of a prior disciplinary record,
2 absence of dishonest or selfish motive, character or reputation and remorse. In
3 this case, Respondent has similar violations although not as egregious as
4 Augustine's in that Respondent did not keep fees for work he failed to perform,
5 Respondent believed his conduct in Gallaway was in his client's best interests,
6 Respondent followed DeWerth's initial instructions then did not pay the balance
7 of client funds to DeWerth only because DeWerth disappeared, and Respondent's
8 management of his trust account was grossly negligent.

11 In *re Clark*, SB-04-0086-D (2004), Clark received a six month and one day
12 suspension, with two years of probation to include a LOMAP assessment, a MAP
13 assessment, practice monitor, costs and restitution. Clark's misconduct involved
14 three separate client matters and included, failing to perform services for clients,
15 failing to appear at hearings, failing to communicate with clients, and failing to
16 timely refund unearned fees or funds to clients, failing to return client files and
17 failing to promptly respond to requests from the State Bar.

20 Clark's conduct was knowing with actual injury to his clients. There were
21 six aggravating factors present: prior disciplinary offenses, a pattern of
22 misconduct, multiple offenses, bad faith obstruction of the disciplinary
23 proceeding, substantial experience in the practice of law and indifference to
24 making restitution. There were no mitigating factors present. In this case,
25

1 Respondent has similar trust account violations, with fewer aggravating factors
2 (no bad faith obstruction or indifference to making restitution). Also, Respondent
3 did not fail to perform services for clients or fail to appear at hearings.
4

5 In *re Steadman*, SB-04-000-D (2004). Steadman received a one year
6 suspension, with one year of probation. Steadman misappropriated funds; failed
7 to safeguard client funds; failed to keep client funds separate from his personal
8 funds; made a false statement of material fact or law to a client; engaged in
9 conduct involving dishonesty, fraud, deceit or misrepresentation; engaged in
10 conduct prejudicial to the administration of justice; failed to diligently represent
11 his client; failed to adequately communicate with his client; and attempted to
12 settle a claim with a client without first advising in writing that the client should
13 seek independent advice. There were three aggravating factors present: dishonest
14 or selfish motive, multiple offenses and substantial experience in the practice of
15 law. There were four mitigating factors present: absence of a prior disciplinary
16 record, full and free disclosure to a disciplinary board or cooperative attitude
17 toward proceedings, character or reputation, and remorse. In this case,
18 Respondent has similar trust account violations with three aggravating factors but
19 without a dishonest or selfish motive.
20
21
22
23

24 The Supreme Court "has long held that 'the objective of disciplinary
25 proceedings is to protect the public, the profession and the administration of

1 justice and not to punish the offender.” *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d
2 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78
3 (1966)). The State Bar and Respondent believe that the sanctions proposed here
4 are consistent with these principles.
5

6 7 RECOMMENDATION

8
9 The purpose of lawyer discipline is not to punish the lawyer, but to protect
10 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
11 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
12 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
13 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
14 the bar’s integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
15 (1994).
16

17
18 In imposing discipline, it is appropriate to consider the facts of the case, the
19 American Bar Association’s *Standards for Imposing Lawyer Sanctions*
20 (“*Standards*”) and the proportionality of discipline imposed in analogous cases.
21 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
22

23
24 Upon consideration of the facts, application of the *Standards*, including
25 aggravating and mitigating factors, and a proportionality analysis, this Hearing
Officer recommends the following:

1
2 1. Respondent will receive a six-month suspension for violating Rule 42,
3 ARIZ.R.S.CT., specifically ERs 1.2, 1.4, 1.5(c), 1.15(a) and (d), 8.1(b), 8.4(c) and
4 (d), and Rules 43(a) and (d), 44(b) and 53(f).
5

6 2. Respondent shall be placed on probation for a period of two years, under
7 the following terms and conditions:

8 a. Respondent shall contact the director of the State Bar's Law Office
9 Management Assistance Program (LOMAP) within the 30 days prior
10 to the end of his suspension period. Respondent shall submit to a
11 LOMAP audit of his office's trust account procedures and calendaring
12 procedures. The director of LOMAP shall develop a probation
13 contract, and its terms shall be incorporated herein by reference. The
14 probation period will begin to run at the time of Respondent's
15 reinstatement, and will conclude two years from the date that all parties
16 have signed the probation contract.
17

18 b. Respondent shall refrain from engaging in any conduct that would
19 violate the rules of Professional Conduct or other rules of the Supreme
20 Court of Arizona.
21

22 c. Respondent shall complete the Trust Account Ethics Enhancement
23 Program (TAEPP) during the first six months of the probationary
24
25

1 period. To schedule his attendance, Respondent shall contact Barbara
2 Chandler at 602-340-3278.

3
4 d. Respondent shall pay restitution to the following clients:

- 5 i. Miranda Gallaway \$221.20
6 ii. Richard K. DeWerth \$6,180.24

7
8 3. Respondent shall pay all costs incurred by the State Bar in connection with
9 these proceedings, including the assessment by LOMAP and applicable
10 monitoring of the MOU. A statement of costs and expenses incurred by the State
11 Bar to date in this disciplinary proceeding is attached hereto as Exhibit A.

12
13 4. In the event Respondent fails to comply with any of the foregoing terms,
14 Bar Counsel will file a Notice of Non-Compliance with the disciplinary clerk. A
15 hearing officer will conduct a hearing at the earliest practical date, but in no
16 event later than 30 days following receipt of the notice, and will determine
17 whether the terms have been breached and, if so, will recommend appropriate
18 action in response to the breach. The State Bar shall have the burden of proving
19 non-compliance by clear and convincing evidence.

20
21 5. Respondent shall pay all costs incurred by the State Bar in bringing these
22 disciplinary proceedings. In addition, Respondent shall pay all costs incurred by
23 the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's
24
25

1 Office in this matter. An Itemized Statement of Costs and Expenses to date is
2 attached as Exhibit "C," and incorporated herein.

3 DATED this 22 day of December, 2006.

4
5 Yvonne R. Hunter 
6 Yvonne R. Hunter
7 Hearing Officer 8P

1 Original filed with the Disciplinary Clerk
2 this 26 day of December 2006.

3 Copy of the foregoing was mailed
4 this 26 day of December 2006, to:

5 J. Scott Rhodes
6 Jennings Strouss & Salmon, PLC
7 201 East Washington Street, 11th Floor
8 Phoenix, Arizona 85004-2385
9 Respondent's Counsel

10 Copy of the foregoing was hand-delivered
11 this 26 day of December 2006, to:

12 Shauna R. Miller
13 Senior Bar Counsel
14 State Bar of Arizona
15 4201 North 24th Street, Suite 200
16 Phoenix, Arizona 85016-7247

17 Lawyer Regulation Records Manager
18 State Bar of Arizona
19 4201 North 24th Street, Suite 200
20 Phoenix, Arizona 85016-6288

21 by: 