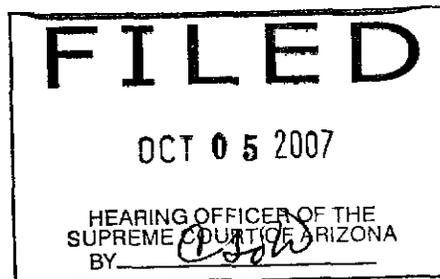


1 Bruce G. Macdonald
2 State Bar No. 010355
3 1670 E. River Road #200
4 Tucson, AZ 85718
5 Hearing Officer 6M



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

8 **IN THE MATTER OF A MEMBER**
9 **OF THE STATE BAR OF ARIZONA,**

No. 06-0972

10 **ROBERT M. HERSCH,**
11 **Bar No. 007929**

HEARING OFFICER'S REPORT
(Bruce G. Macdonald
Hearing Officer 6M)

12 Respondent.

13
14 **PROCEDURAL HISTORY**

15
16 A Probable Cause Order was filed by Probable Cause Panelist, Steven P.
17 Sherick, on April 27, 2007. A Complaint was filed on May 9, 2007.
18 Respondent's Counsel accepted service of the Complaint on May 15, 2007.
19 Respondent filed an Answer on June 5, 2007. The case was assigned to this
20 Hearing Officer on May 22, 2007. A telephonic Initial Case Management
21 Conference took place on June 22, 2007, at which time a hearing on the merits
22 was scheduled for September 7, 2007. On June 11, 2007, the case was assigned
23 to Settlement Officer 8F, Jeffrey A Marks, for the sole purpose of facilitating a
24 settlement of the case On June 20, 2007, the State Bar filed a Motion for
25

1 Leave to File Amended Complaint. Respondent filed his opposition to the
2 Motion to Amend Complaint on August 25, 2007. A Pre-Hearing Telephonic
3 Conference took place on August 7, 2007, at which time this Hearing Officer
4 granted the State Bar's Motion for Leave to File Amended Complaint. A Joint
5 Pre-Hearing Statement was filed on August 24, 2007. On September 4, 2007,
6 the parties reached a settlement agreement. A Tender of Admissions and
7 Agreement for Discipline by Consent and Joint Memorandum in Support of
8 Agreement for Discipline by Consent were filed on September 4, 2007. On
9 September 5, 2007, an Order was filed vacating the hearing on the merits.
10
11

12 FINDINGS OF FACT

13
14 1. At all times relevant, Respondent was an attorney licensed to
15 practice law in Arizona, having been admitted to practice in this State on
16 October 8, 1977

17
18 2. On or about June 14, 2006, the State Bar of Arizona received a
19 Notice of Insufficient Funds from JP Morgan Chase Bank ("Chase Bank")
20 regarding Respondent's Arizona Bar Foundation Attorney Trust Account.

21
22 3. On June 9, 2006, check number 3329 in the amount of \$185.50,
23 check number 3331 in the amount of \$151.50, and check number 3336 in the
24 amount of \$615.00, all together totaling \$952.00, attempted to pay against
25 Respondent's trust account when the balance at the time was \$228.09.

1 4. Chase Bank paid the three checks and charged Respondent a
2 \$96.00 overdraft fee, thereby overdrawing Respondent's trust account a total of
3 \$819.91.
4

5 5. On June 16, 2006, the State Bar of Arizona's Trust Account Staff
6 Examiner sent Respondent a copy of the Notice of Insufficient Funds with a
7 letter requesting an explanation of the overdraft of his client trust account.
8

9 6. Respondent, or those under his direct supervision, made a total of
10 six (6) errors regarding the accounts of five (5) individual clients resulting in
11 the insufficient funds situation.

12 7. Respondent provided his Trust Account Reconciliation prepared
13 by Respondent and his assistant and dated June 20, 2006.
14

15 8. As documented on his Trust Account Reconciliation, the trust
16 account balance was \$1,776.09 as of June 20, 2006.
17

18 9. However, Respondent's trust account "Quicken" report showed
19 the trust account balance was \$1,274.59 as of June 20, 2006; a difference of
20 \$501.50.

21 10. On July 13, 2006, the State Bar of Arizona Trust Account Staff
22 Examiner requested Respondent to provide additional records.
23

24 11. Respondent provided six (6) fee agreements that designated the
25 fees as "earned upon receipt and non-refundable." One (1) of the agreements

1 did not advise the client ("Joan Morrison") of the right to a full or partial
2 refund upon the decision to discharge the attorney, as is required by the Rules
3 of Professional Conduct.
4

5 12. On August 10, 2006, Respondent voluntarily submitted a
6 supplement to his response and identified an additional error discovered by
7 Respondent where Respondent's staff under his direct supervision had failed to
8 enter a disbursement through check number 3302, written on May 1, 2006, on
9 behalf of client Jensen in the individual client ledger.
10

11 13. On August 21, 2006, the State Bar of Arizona Staff Trust Account
12 Examiner requested additional information including explanations for negative
13 balances on three (3) individual client ledgers for clients Little, Lewis, and
14 Love.
15

16 14. With respect to client Little, Respondent wrote and disbursed
17 check number 2463 and check number 2464 on March 10, 2003, in the
18 amounts of \$18 00 and \$200.00, respectively, when the balance for client Little
19 in Respondent's client trust account at that time was \$0.00.
20

21 a. On March 11, 2003, Respondent received a check in the
22 amount of \$218.00 from client Little
23
24
25

1 b. On March 12, 2003, check number 2463 in the amount of
2 \$18.00 paid out from Respondent's bank. Respondent's client trust account
3 balanced at -\$18.00 for client Little.
4

5 c. On March 13, 2003, check number 2464 in the amount of
6 \$200.00 paid out from Respondent's bank. Respondent's client trust account
7 balanced at -\$218.00 for client Little.
8

9 d. On March 15, 2003, Respondent deposited client Little's
10 check in the amount of \$218.00 into Respondent's client trust account.
11

12 e. On March 17, 2003, the deposit of client Little's check in
13 the amount of \$218.00 was posted to Respondent's client trust account
14 Respondent's client trust account balanced at \$0.00 for client Little.

15 15. With respect to client Lewis, check number 3058 in the amount of
16 \$12.60, which cleared the trust account on July 15, 2005, was recorded on the
17 client ledger as "General Disbursement" by Respondent or his staff, and was
18 recorded on the trust account general ledger.
19

20 a. As a direct result of this bookkeeping error, the individual
21 client ledger for client Lewis reflected an amount of available funds different
22 from what Respondent truly held in trust for client Lewis
23

24 b. Before anyone discovered the bookkeeping error,
25 Respondent wrote and disbursed check number 3162 on November 2, 2005, in

1 the amount of \$610.99 when the true balance for client Lewis in Respondent's
2 client trust account at that time was \$598.39

3
4 c. On November 7, 2005, check number 3162 in the amount
5 of \$610.99 paid out from Respondent's bank. Respondent's client trust account
6 balanced at -\$12.60 for client Lewis.

7
8 d. On December 2, 2005, client Lewis gave Respondent a
9 check that was mistakenly written in the amount of \$3.00, instead of the correct
10 amount of \$3,000.00. Respondent discovered this specific client error and held
11 onto the client check.

12
13 e. Again, before anyone discovered the bookkeeping error,
14 Respondent wrote check number 3185 on December 2, 2005, in the amount of
15 \$2,010.22 when the true balance for client Lewis in Respondent's client trust
16 account at that time was -\$12.60.

17
18 f. On December 6, 2005, Respondent received a corrected
19 check in the amount of \$3,000.00 from client Lewis.

20
21 g. On December 10, 2005, the corrected \$3,000.00 check was
22 deposited into Respondent's client trust account.

23
24 h. On December 12, 2005, the corrected \$3,000.00 check
25 posted to Respondent's client trust account Respondent's client trust account
balanced at \$2,987.40 for client Lewis.

1 i. On December 12, 2005, check number 3185 paid out from
2 Respondent's bank. Respondent's client trust account balanced at \$977.18 for
3 client Lewis.

4
5 j. Before anyone discovered the bookkeeping error, there was
6 one (1) other instance of Respondent writing a check on behalf of client Lewis
7 when Respondent's client trust account held a balance for client Lewis that was
8 insufficient to cover the check amount, a \$0 balance, or a negative balance.
9

10 16. With respect to client Love, Respondent received a check in the
11 amount of \$885.00 from client Love on May 12, 2006.

12 a. On May 12, 2006, Respondent wrote and disbursed check
13 number 3322 in the amount of \$85.00.
14

15 b. On May 12, 2006, Respondent deposited the check from
16 client Love in the amount of \$885.00 into Respondent's client trust account.
17 Respondent's client trust account balanced at \$885.00 for client Love.
18

19 c. On May 16, 2006, check number 3322 paid out from
20 Respondent's bank. Respondent's client trust account balanced at \$800.00 for
21 client Love.
22

23 17. With respect to client Homer Clouch, a deposit in the amount of
24 \$151.57 and credited to Respondent's client trust account on May 5, 2005, was
25 not recorded on the client ledger by Respondent or his staff, but was recorded

1 on the general ledger. In addition, check number 2988 in the amount of
2 \$100.36, which cleared the trust account on 05/10/2005, was not recorded on
3 the client ledger by Respondent or his staff, but was recorded on the trust
4 account general ledger.
5

6 a As a direct result of these bookkeeping errors, the
7 individual client ledger for client Clouch reflected a larger amount of
8 available funds than Respondent truly held in trust for client Clouch.
9

10 b. Before anyone discovered the bookkeeping error,
11 Respondent wrote and disbursed check number 3072 on August 3, 2005, in the
12 amount of \$203.27 when the balance for client Homer Clouch in
13 Respondent's client trust account at that time was \$199.61.
14

15 c On August 8, 2005, check number 3072 paid out from
16 Respondent's bank. Respondent's client trust account balanced at -\$3.66 for
17 client Homer Clouch.
18

19 18. During settlement negotiations in July 2007, the State Bar's
20 Certified Forensic Account Examiner and Bar Counsel discovered that
21 Respondent's individual client ledgers for some clients over the three and one-
22 half (3 1/2) year period that the State Bar's investigation covered from January
23 2003 thru June 2006 were inaccurate and it was necessary to re-create them
24
25

1 using the bank statements, cancelled checks, and Respondent's general
2 accounting ledger.

3
4 19. Analysis of the State Bar's Certified Forensic Account Examiner's
5 re-creation of Respondent's individual client ledgers for each client revealed
6 multiple bookkeeping errors which led to Respondent negligently disbursing
7 funds on behalf of clients who did not have enough money in Respondent's
8 trust account to cover disbursements made by Respondent on their behalf.
9

10 a. With respect to client Asato, check number 2616 in the
11 amount of \$663.80, which cleared the trust account on October 8, 2003, was
12 not recorded on the client ledger by Respondent or his staff, but was recorded
13 on the trust account general ledger.
14

15 1. As a direct result of this bookkeeping error, the
16 individual client ledger for client Asato reflected a larger amount of available
17 funds than Respondent truly held in trust for client Asato.
18

19 2. Before anyone discovered this bookkeeping error,
20 Respondent wrote and disbursed check number 2676 on January 8, 2004, in the
21 amount of \$1,216.00 when the true balance for client Asato in Respondent's
22 client trust account at that time was \$718.04.
23
24
25

1 3. On January 20, 2004, check number 2676 paid out
2 from Respondent's bank. Respondent's client trust account balanced at -
3 \$497.96 for client Asato.
4

5 4. Again, before anyone discovered the bookkeeping
6 error, there was one (1) other instance of Respondent writing a check on behalf
7 of client Asato when Respondent's client trust account held a balance for client
8 Asato that was insufficient to cover the check amount, a \$0 balance, or a
9 negative balance.
10

11 b With respect to client Boyer, check number 2452 in the
12 amount of \$902.88, which cleared the trust account on March 7, 2003, was not
13 recorded on the client ledger by Respondent or his staff, but was recorded on
14 the trust account general ledger.
15

16 1. As a direct result of this bookkeeping error, the
17 individual client ledger for client Boyer reflected a larger amount of available
18 funds than Respondent truly held in trust for client Boyer.
19

20 2. Before anyone discovered this bookkeeping error,
21 Respondent wrote and disbursed check number 2475 on April 7, 2003, in the
22 amount of \$938.88 when the true balance for client Boyer in Respondent's
23 client trust account at that time was \$97.12
24
25

1 3 On April 11, 2003, check number 2475 paid out from
2 Respondent's bank. Respondent's client trust account balanced out at -\$841.76
3 for client Boyer
4

5 4. Again, before anyone discovered the bookkeeping
6 error, there was one (1) other instance of Respondent writing a check on behalf
7 of client Boyer when Respondent's client trust account held a balance for client
8 Boyer that was insufficient to cover the check amount, a \$0 balance, or a
9 negative balance.
10

11 c. With respect to client Carlson, check number 2752 in the
12 amount of \$269.20, which cleared the trust account on 05/10/2004, was not
13 recorded on the client ledger by Respondent or his staff, but was recorded on
14 the trust account general ledger.
15

16 1. As a direct result of this bookkeeping error, the
17 individual client ledger for client Carlson reflected a larger amount of available
18 funds than Respondent truly held in trust for client Carlson.
19

20 2. Before anyone discovered this bookkeeping error,
21 Respondent wrote and disbursed check number 2766 on June 8, 2004, in the
22 amount of \$247.00 when the true balance for client Carlson in Respondent's
23 client trust account at that time was \$218.37.
24
25

1 3. On June 14, 2004, check number 2766 was paid out
2 from Respondent's bank. Respondent's client trust account balanced out at -
3 \$28.63 for client Carlson.
4

5 4. Again, before anyone discovered the bookkeeping
6 error, there was one (1) other instance of Respondent writing a check on behalf
7 of client Carlson when Respondent's client trust account held a balance for
8 client Carlson that was insufficient to cover the check amount, a \$0 balance, or
9 a negative balance.
10

11 d. With respect to client Desert Sky, check number 2791 in the
12 amount of \$863 80, which cleared the trust account on July 12, 2004, was not
13 recorded on the client ledger by Respondent or his staff, but was recorded on
14 the trust account general ledger.
15

16 1 As a direct result of this bookkeeping error, the
17 individual client ledger for client Desert Sky reflected a larger amount of
18 available funds than Respondent truly held in trust for client Desert Sky.
19

20 2. Before anyone discovered the bookkeeping error,
21 Respondent wrote and disbursed check number 2817 on August 4, 2004, in the
22 amount of \$2,000.00 when the true balance for client Desert Sky in
23 Respondent's client trust account at that time was \$1,136.20
24
25

1 3 On August 4, 2004, check number 2817 paid out
2 from Respondent's bank. Respondent's client trust account balanced out at -
3 \$863.80 for client Desert Sky.
4

5 e. With respect to client Gastelum, check number 2620 in the
6 amount of \$68.59, which cleared the trust account on October 8, 2003, was not
7 recorded on the client ledger by Respondent or his staff, but was recorded on
8 the trust account general ledger.
9

10 1. As a direct result of this bookkeeping error, the
11 individual client ledger for client Gastelum reflected a larger amount of
12 available funds than Respondent truly held in trust for client Gastelum.
13

14 2. Before anyone discovered this bookkeeping error,
15 Respondent wrote and disbursed check number 2575 on August 7, 2003, in the
16 amount of \$784.31 when the true balance for client Gastelum in Respondent's
17 client trust account at that time was \$604.02.
18

19 3. On August 11, 2003, check number 2575 was paid
20 out from Respondent's bank. Respondent's client trust account balanced at -
21 \$180.29 for client Gastelum
22

23 4 Again, before anyone discovered the bookkeeping
24 error, there was one (1) other instance of Respondent writing a check on behalf
25 of client Gastelum when Respondent's client trust account held a balance for

1 client Gastelum that was insufficient to cover the check amount, a \$0 balance,
2 or a negative balance.

3
4 f. With respect to client Kaufman, check number 2919 in the
5 amount of \$190, which cleared the trust account on February 4, 2005, was not
6 recorded on the client ledger by Respondent or his staff, but was recorded on
7 the trust account general ledger.

8
9 1. As a direct result of this bookkeeping error, the
10 individual client ledger for client Kaufman reflected a larger amount of
11 available funds than Respondent truly held in trust for client Kaufman.

12
13 2. Before anyone discovered this bookkeeping error,
14 Respondent wrote and disbursed check number 2975 on April 14, 2005, in the
15 amount of \$215.00 when the true balance for client Kaufman in Respondent's
16 client trust account at that time was \$25.00

17
18 3. On April 15, 2005, check number 2975 paid out from
19 Respondent's bank. Respondent's client trust account balanced out at -\$190.00
20 for client Kaufman.

21
22 g. With respect to client King, Respondent wrote and
23 disbursed check number 2492 on April 18, 2003, in the amount of \$45.00 when
24 the true balance for client King in Respondent's client trust account that that
25 time was \$0.00.

1 1 On April 23, 2003, check number 2492 was paid out
2 from Respondent's bank Respondent's client trust account balanced at -\$45.00
3 for client King.
4

5 2. A deposit in the amount of \$50 cleared Respondent's
6 client trust account on April 25, 2003. In addition, the client ledger indicates
7 that the deposit amount was \$45; however, the general ledger indicates that the
8 deposit was for \$50.
9

10 h. With respect to client Mary Lau, check number 3153 in the
11 amount of \$19, which cleared the trust account on October 26, 2005, was not
12 recorded on the client ledger by Respondent or his staff, but was recorded on
13 the trust account general ledger.
14

15 1 As a direct result of this bookkeeping error, the
16 individual client ledger for client Mary Lau reflected a larger amount of
17 available funds than Respondent truly held in trust for client Mary Lau
18

19 2. Before anyone discovered this bookkeeping error,
20 Respondent wrote and disbursed check number 3153 on October 21, 2005, in
21 the amount of \$19.00 when the true balance for client Mary Lau in
22 Respondent's client trust account at that time was \$0.00.
23
24
25

1 3 On October 26, 2005, check number 3153 was paid
2 out from Respondent's bank Respondent's client trust account balanced out at
3 -\$19.00 for client Mary Lau.
4

5 4. Again, before anyone discovered the bookkeeping
6 error, there was one (1) other instance of Respondent writing a check on behalf
7 of client Mary Lau when Respondent's client trust account held a balance for
8 client Mary Lau that was insufficient to cover the check amount, a \$0 balance,
9 or a negative balance.
10

11 i. With respect to client Luciano, check number 3200 in the
12 amount of \$45.39, which cleared the trust account on January 4, 2006, was
13 recorded on the client ledger as "General Disbursement" by Respondent or his
14 staff, and was recorded on the trust account general ledger
15

16 1. As a direct result of this bookkeeping error, the
17 individual client ledger for client Luciano reflected a larger amount of
18 available funds than what Respondent truly held in trust for client Luciano.
19

20 2. Before anyone discovered this bookkeeping error,
21 Respondent wrote and disbursed check number 3255 on March 8, 2006, in the
22 amount of \$85.00 when the true balance for client Luciano in Respondent's
23 client trust account at that time was \$39 61.
24
25

1 3. On March 10, 2006, check number 3255 was paid out
2 from Respondent's bank. Respondent's client trust account balanced out at -
3 \$45.39 for client Luciano
4

5 j. With respect to client Lui, Respondent wrote and disbursed
6 check number 2851 on September 15, 2004, in the amount of \$243.00 when the
7 balance for client Lui in Respondent's client trust account at that time was
8 \$2,500.00
9

10 1. However, on September 17, 2004, the initial
11 \$2,500.00 deposit was returned by the bank and reversed from Respondent's
12 client trust account. Respondent's client trust account balanced out at \$0.00 for
13 client Lui.
14

15 2. On September 20, 2004, check number 2851 was
16 paid out from Respondent's bank. Respondent's client trust account balanced
17 out at -\$243.00 for client Lui.
18

19 3 On September 24, 2004, Respondent re-deposited the
20 \$2,500.00 in cash, which was provided by client Lui.
21

22 4. The reversal and subsequent deposit of the \$2,500
23 were not recorded on the client's ledger by Respondent or his staff, but were
24 recorded on the trust account general ledger.
25

1 k. With respect to client Matsuhashi, Respondent wrote and
2 disbursed check number 2877 on November 4, 2004, in the amount of \$228.00
3 when the balance for client Matsuhashi in Respondent's client trust account at
4 that time was \$500.00.
5

6 1. However, on November 2, 2004, the initial \$500.00
7 deposit was returned by the bank and reversed from Respondent's client trust
8 account. Respondent's client trust account balanced out at \$0.00 for client
9 Matsuhashi.
10

11 2. On November 8, 2004, check number 2877 was paid
12 out from Respondent's bank. Respondent's client trust account balanced out at
13 -\$228.00 for client Matsuhashi.
14

15 3. On November 10, 2004, a deposit in the amount of
16 \$521 cleared Respondent's client trust account for client Matsuhashi.
17

18 4. The reversal of the \$500 deposit and subsequent re-
19 deposit of \$521.00 were not recorded on the client ledger by Respondent or his
20 staff, but were recorded on the trust account general ledger.

21 l. With respect to client Morgan, check number 2677 in the
22 amount of \$551, which cleared the trust account on January 20, 2004, was not
23 recorded on the client ledger by Respondent or his staff, but was recorded on
24 the trust account general ledger.
25

1 1. As a direct result of this bookkeeping error, the
2 individual client ledger for client Morgan reflected a larger amount of available
3 funds than Respondent truly held in trust for client Morgan
4

5 2. Before anyone discovered this bookkeeping error,
6 Respondent wrote and disbursed check number 2705 on February 16, 2004, in
7 the amount of \$2,335.00 when the true balance for client Morgan in
8 Respondent's client trust account at that time was \$1,784.00.
9

10 3. On February 23, 2004, check number 2705 was paid
11 out from Respondent's bank. Respondent's client trust account balanced out at
12 -\$551.00 for client Morgan.
13

14 m With respect to client Morrison, the client ledger indicates
15 that a deposit was made on February 19, 2004, in the amount of \$100 and
16 another for \$100 on February 23, 2004. However, the bank records do not
17 indicate that these deposits were made into Respondent's client trust account,
18 nor does the trust account general ledger show a record of these deposits.
19

20 1. Respondent indicates that these two deposits were
21 inadvertently made to the operating account instead of Respondent's client
22 trust account as a result of staff error.
23
24
25

1 2. As a direct result of these bookkeeping and deposit
2 errors, the individual client ledger for client Morrison reflected a larger amount
3 of available funds than Respondent truly held in trust for client Morrison.
4

5 3. Before anyone discovered these bookkeeping and
6 deposit errors, Respondent wrote and disbursed check number 2737 on April 5,
7 2004, in the amount of \$540.00 when the true balance for client Morrison in
8 Respondent's client trust account at that time was \$340.00.
9

10 4. On April 9, 2004, check number 2737 was paid out
11 from Respondent's bank. Respondent's client trust account balanced out at -
12 \$200.00 for client Morrison.
13

14 n. With respect to client Mullins, check number 2854 in the
15 amount of \$9, which cleared the trust account on October 21, 2004, was
16 recorded on the client ledger as "General Disbursement" by Respondent or his
17 staff, and was recorded on the trust account general ledger.
18

19 1. As a direct result of this bookkeeping error, the
20 individual client ledger for client Mullins reflected a larger amount of available
21 funds than what Respondent truly held in trust for client Mullins.
22

23 2 Before anyone discovered this bookkeeping error,
24 Respondent wrote and disbursed check number 2854 on September 21, 2004,
25

1 in the amount of \$9 00 when the balance for client Mullins in Respondent's
2 client trust account at that time was \$0.00.

3
4 3. On October 21, 2004, check number 2854 was paid
5 out from Respondent's bank. Respondent's client trust account balanced out at
6 -\$9.00 for client Mullins.

7
8 o. With respect to client NARSC, Respondent wrote and
9 disbursed check number 2848 on September 3, 2004, in the amount of \$418.00
10 when the balance for client NARSC in Respondent's client trust account at that
11 time was \$262.01.

12
13 1. On September 7, 2004, check number 2848 was paid
14 out from Respondent's bank. Respondent's client trust account balanced at -
15 \$155.99 for client NARSC.

16
17 2. A subsequent deposit in the amount of \$1,537.01 was
18 not credited to Respondent's client trust account for client NARSC until
19 September 13, 2004.

20
21 p With respect to client Nash, Respondent wrote and
22 disbursed check number 3198 on December 27, 2005, in the amount of
23 \$243.00 when the balance for client Nash in Respondent's client trust account
24 at that time was \$0.00.

1 1. On December 29, 2005, check number 3198 was paid
2 out from Respondent's bank Respondent's client trust account balanced at -
3 \$243.00 for client Nash.
4

5 2. A subsequent deposit in the amount of \$3,000 was
6 not credited to Respondent's client trust account for client Nash until
7 December 30, 2005.
8

9 q. With respect to client O'Neil, check number 2722 in the
10 amount of \$216, which cleared the trust account on March 11, 2004, was
11 recorded on the client ledger as "General Disbursement" by Respondent or his
12 staff, and was recorded on the trust account general ledger.
13

14 1 As a direct result of this bookkeeping error, the
15 individual client ledger for client O'Neil reflected a larger amount of available
16 funds than what Respondent truly held in trust for client O'Neil.
17

18 2. Before anyone discovered this bookkeeping error,
19 Respondent wrote and disbursed check number 2757 on May 3, 2004, in the
20 amount of \$769.43 when the true balance for client O'Neil in Respondent's
21 client trust account at that time was \$553.43.
22

23 3 On May 10, 2004, check number 2757 was paid out
24 from Respondent's bank. Respondent's client trust account balanced out at -
25 \$216.00 for client O'Neil.

1 4 Again, before anyone discovered the bookkeeping
2 error, there was one (1) other instance of Respondent writing a check on behalf
3 of client O'Neil when Respondent's client trust account held a balance for
4 client O'Neil that was insufficient to cover the check amount, a \$0 balance, or
5 a negative balance.
6

7 r. With respect to client Rotello, check number 3201 in the
8 amount of \$146, which cleared the trust account on January 5, 2006, was not
9 recorded on the client ledger by Respondent or his staff, but was recorded on
10 the trust account general ledger.
11

12 1. As a direct result of this bookkeeping error, the
13 individual client ledger for client Rotello reflected a larger amount of available
14 funds than what Respondent truly held in trust for client Rotello.
15

16 2. Before anyone discovered this bookkeeping error,
17 Respondent wrote and disbursed check number 3246 on March 7, 2006, in the
18 amount of \$931.31 when the true balance for client Rotello in Respondent's
19 client trust account at that time was \$803.81.
20

21 3. On March 8, 2006, check number 3246 was paid out
22 from Respondent's bank. Respondent's client trust account balanced out at -
23 \$127.50 for client Rotello.
24
25

1 4. Again, before anyone discovered the bookkeeping
2 error, there were three (3) other instances of Respondent writing a check on
3 behalf of client Rotello when Respondent's client trust account held a balance
4 for client Rotello that was insufficient to cover the check amount, a \$0 balance,
5 or a negative balance.
6

7 s. With respect to client Tavaréz, check number 3240 in the
8 amount of \$11, which cleared the trust account on March 22, 2006, was not
9 recorded on the client ledger by Respondent or his staff, but was recorded on
10 the trust account general ledger. In addition, check number 3218 in the amount
11 of \$185, which cleared the trust account on January 20, 2006, was recorded on
12 the client ledger as "General Disbursement" by Respondent or his staff, and
13 was recorded on the trust account general ledger.
14
15

16 1. As a direct result of these bookkeeping errors, the
17 individual client ledger for client Tavaréz reflected a larger amount of available
18 funds than what Respondent truly held in trust for client Tavaréz.
19

20 2 Before anyone discovered these bookkeeping errors,
21 Respondent wrote and disbursed check number 3264 on March 8, 2006, in the
22 amount of \$470.80 when the true balance for client Tavaréz in Respondent's
23 client trust account at that time was \$285.80
24
25

1 3. On March 10, 2006, check number 3264 was paid out
2 from Respondent's bank. Respondent's client trust account balanced out at -
3 \$185.00 for client Tavaréz.
4

5 4. Again, before anyone discovered the bookkeeping
6 errors, there were two (2) other instances of Respondent writing a check on
7 behalf of client Tavaréz when Respondent's client trust account held a balance
8 for client Tavaréz that was insufficient to cover the check amount, a \$0
9 balance, or a negative balance.
10

11 t. With respect to client Thomas, the client ledger indicates
12 that a deposit was made in September of 2003 in the amount of \$152.00.
13 However, the bank records do not indicate that this deposit was made into
14 Respondent's client trust account, nor does the trust account general ledger
15 show a record of this deposit
16

17 1. Respondent indicates that this deposit of earned fees
18 was made to the operating account as was appropriate, but was negligently
19 recorded on Respondent's individual client ledger for client Thomas. As a
20 direct result of this bookkeeping error, the individual client ledger for client
21 Thomas reflected a larger amount of available funds than Respondent truly
22 held in trust for client Thomas.
23
24
25

1 2 Before anyone discovered this bookkeeping error,
2 Respondent wrote and disbursed check number 2775 on June 8, 2004, in the
3 amount of \$503.36 when the true balance for client Thomas in Respondent's
4 client trust account at that time was \$351.36
5

6 3. On June 14, 2004, check number 2775 was paid out
7 from Respondent's bank. Respondent's client trust account balanced out at -
8 \$152.00 for client Thomas
9

10 4. Again, before anyone discovered the bookkeeping
11 error, there were three (3) other instances of Respondent writing a check on
12 behalf of client Thomas when Respondent's client trust account held a balance
13 for client Thomas that was insufficient to cover the check amount, a \$0
14 balance, or a negative balance.
15

16 u. With respect to client Vasquez, check number 2914 in the
17 amount of \$185, which cleared the trust account on January 24, 2005, was
18 recorded on the client ledger as "General Disbursement" by Respondent or his
19 staff, and was recorded on the trust account general ledger
20

21 1. As a direct result of this bookkeeping error, the
22 individual client ledger for client Vasquez reflected a larger amount of
23 available funds than Respondent truly held in trust for client Vasquez.
24
25

1 2. Before anyone discovered this bookkeeping error,
2 Respondent wrote and disbursed check number 2990 on May 6, 2005, in the
3 amount of \$301.80 when the true balance for client Vasquez in Respondent's
4 client trust account at that time was \$116.80.

5
6 3. On May 13, 2005, check number 2990 was paid out
7 from Respondent's bank Respondent's client trust account balanced out at -
8 \$185 00 for client Vasquez
9

10 4. Again, before anyone discovered the bookkeeping
11 error, there was one (1) other instance of Respondent writing a check on behalf
12 of client Vasquez when Respondent's client trust account held a balance for
13 client Vasquez that was insufficient to cover the check amount, a \$0 balance,
14 or a negative balance.
15

16 v With respect to client Watters, Respondent wrote and
17 disbursed check number 2512 on May 13, 2003, in the amount of \$64.00 when
18 the balance for client Watters in Respondent's client trust account at that time
19 was \$0.00
20

21 1 On May 15, 2003, check number 2512 was paid out
22 from Respondent's bank. Respondent's client trust account balanced out at -
23 \$64.00 for client Watters.
24
25

1 ABA *Standard* 3.0. Given the conduct in this matter, it is appropriate to
2 consider several *Standards*.

3
4 For the violation of Rule 42, Ariz.R.Sup.Ct., ER 1.5, it is appropriate to
5 consider *Standard* 4.64. *Standard* 4.64 states, “ Admonition [informal
6 reprimand in Arizona] is generally appropriate when a lawyer engages in an
7 isolated instance of negligence in failing to provide a client with accurate or
8 complete information, and causes little or no actual or potential injury to the
9 client.”

10
11 Respondent admits that he failed to advise client Morrison of her
12 entitlement to a full or partial refund if client Morrison decided to terminate
13 Respondent’s services. Out of six (6) fee agreements requested from and
14 provided by Respondent, this is the only fee agreement that did not comply
15 with Rule 42, Ariz.R Sup.Ct., specifically ER 1.5.

16
17 Given Respondent’s conduct in violation of Rule 42, Ariz.R.Sup.Ct., ER
18 1.15, and Rules 43 and 44, Ariz.R.Sup.Ct., it is appropriate to consider
19 *Standard* 4.13. *Standard* 4.13 states, “Reprimand [censure in Arizona] is
20 generally appropriate when a lawyer is negligent in dealing with client property
21 and causes injury or potential injury to a client.”

22
23
24 In the present case, the bookkeeping and trust account procedural errors
25 that were made are clearly negligent. There is no evidence Respondent ever

1 intended to make these errors for any reason. However, "suspension or
2 disbarment as applicable under *Standards* 4.11 and 4.12 and the commentary
3 thereto is appropriate for lawyers who are grossly negligent. For example,
4 lawyers who are grossly negligent in failing to establish proper accounting
5 procedures should be suspended; reprimand is appropriate for lawyers who
6 simply fail to follow their established procedures. Reprimand [censure in
7 Arizona] is also appropriate when a lawyer is negligent in training or
8 supervising his or her office staff concerning proper procedures in handling
9 client funds." *Standards* at 29. Each of the bookkeeping errors in the present
10 case represents a negligent failure by Respondent or his staff to follow the
11 established procedures for handling client funds. *Standard* 4.13 is most
12 appropriate.
13
14
15

16 Based on all of the foregoing, the presumptive sanction for the admitted
17 conduct is Censure. After determining the presumptive sanction, it is
18 appropriate to evaluate factors enumerated in the *Standards* that would justify
19 an increase or decrease in the presumptive sanction.
20

21 **AGGRAVATING AND MITIGATING CIRCUMSTANCES**

22 This Hearing Officer finds that, pursuant to *Standard* 9.22, three (3)
23 aggravating factors should be considered in this matter.
24
25

1 Under *Standard 9.22(a)*, Respondent has a prior disciplinary offense by
2 Judgment and Order of the Supreme Court, dated July 7, 1983, in SB-250.
3 Respondent was re-instated on September 15, 1987, to the practice of law after
4 a term of disbarment that lasted only four years. Both parties agree that due to
5 the age of this aggravating factor and its total lack of relation to the present
6 case, no weight should be given to this factor. It is listed in the interests of
7 being open, honest, and forthright with all the information in the present case.
8
9

10 Under *Standard 9 22(c)*, Respondent engaged in a pattern of misconduct.
11 Respondent's negligent bookkeeping and trust account procedure errors
12 involved the records and funds of twenty-six (26) individual clients.
13 Respondent made several types of errors in managing his trust account and the
14 trust account records. In combining the forty-three occasions where other client
15 funds were inadvertently utilized to cover the difference between the amount of
16 available funds held in trust and check disbursement amounts with the eleven
17 occasions where other client funds were inadvertently utilized to pay bank
18 service or administrative fees, there are a total of fifty-four (54) instances
19 where Respondent inadvertently utilized other client funds to offset
20 disbursements.
21
22
23
24
25

1 Finally, under *Standard 9.22(1)*, Respondent has substantial experience
2 in the practice of law. Respondent has currently been in the active practice of
3 law since September 15, 1987; almost twenty (20) years.
4

5 This Hearing Officer finds that, pursuant to *Standard 9.32*, there are six
6 (6) mitigating factors. Under *Standard 9.32(b)*, there is no evidence of a
7 dishonest or selfish motive for Respondent's conduct. The trust account
8 management errors at issue in this case were all negligent in nature.
9

10 Under *Standard 9.32(d)*, Respondent made timely good faith efforts to
11 rectify the consequences of misconduct. On receipt of the insufficient funds
12 notice, Respondent immediately conducted an investigation with the help of his
13 chosen Certified Public Accountant to determine what had caused the
14 overdraft. Upon learning from his chosen CPA of a deficit of just over \$500.00
15 in a reconciliation of his client trust account, Respondent deposited \$5,000.00
16 of his own funds into the client trust account to safeguard against any further
17 complications. Respondent also put into place numerous office procedures to
18 guard against future bookkeeping and data entry errors.
19
20

21 Under *Standard 9.32(e)*, Respondent has been very cooperative with the
22 State Bar in its investigation. Respondent responded in a timely manner to each
23 and every request for information and records from the State Bar Certified
24
25

1 Forensic Account Examiner through the course of the investigation.

2 Respondent was honest and forthright in answering all questions

3
4 Under *Standard* 9.32(l), Respondent has expressed remorse for his
5 errors. Under *Standard* 9.32(g), Respondent has provided letters to document
6 his exemplary character and strong reputation (Attached hereto as Exhibit A.)

7
8 Under *Standard* 9.32(m), as discussed above, the prior disciplinary
9 offense was over twenty-four (24) years ago and has no relation to the conduct
10 in the present matter. Both parties agree that the age of the prior discipline and
11 its total lack of relation to the present case lead to the conclusion that no weight
12 should be given to the prior discipline.

13
14 This Hearing Officer believes that, given an analysis of the ethical
15 misconduct in light of the aggravating and mitigating factors, the appropriate
16 sanction in this case is a Censure, accompanied by a term of probation.

17
18 **PROPORTIONALITY**

19 To have an effective system of professional sanctions, there must be
20 internal consistency, and it is appropriate to examine sanctions imposed in
21 cases that are factually similar. *In Re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548,
22 567 (1994) (quoting *In Re Wines*, 135 Ariz. 203, 207 (1983)). However, the
23 discipline in each case must be tailored to the individual case, as neither
24

1 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
2 604, 615 (1984).

3
4 In *In the Matter of Baskerville*, SB-03-0006-D, Mr. Baskerville failed to
5 properly safeguard client funds in that there were four (4) disbursement errors
6 that resulted in client funds on deposit in Respondent's trust account being
7 negligently utilized. Mr. Baskerville also failed to conduct a proper monthly
8 reconciliation of the trust account and failed to maintain proper controls to
9 adequately safeguard client funds. Mr. Baskerville admitted to violations of ER
10 1.15 and Rules 43 and 44. Two aggravating factors (pattern of misconduct and
11 substantial experience) were found in contrast to six mitigating factors
12 (absence of dishonest motive, timely good faith effort to rectify, full and free
13 disclosure, cooperative attitude, character, and interim rehabilitation). Mr.
14 Baskerville received a censure and was placed on probation for one (1) year.
15
16

17 In *In the Matter of Gregory*, SB-07-0013-D, there was an overdraft in
18 Mr. Gregory's client trust account as a result of Mr. Gregory writing three trust
19 account checks without recording them on client ledgers. The overdraft
20 occurred when Mr. Gregory wrote a fourth check because there were
21 insufficient funds in the client trust account to pay the check. There was no
22 financial loss to a single client. A review of Mr. Gregory's trust account also
23 revealed that Mr. Gregory failed to maintain proper internal office controls to
24
25

1 adequately safeguard funds on deposit in his trust account and failed to record
2 all transactions to the account completely. Mr. Gregory also failed to conduct a
3 monthly reconciliation of the account. There was one aggravating factor found
4 in contrast to one mitigating factor, and they were found to cancel one another
5 out. Mr. Gregory received a censure and was placed on probation for one (1)
6 year.
7

8
9 Those two cases are directly on point to the present matter. They
10 involved bookkeeping errors similar to the ones in the present case and, like in
11 the present matter, no client actually suffered financial loss.

12
13 In *In the Matter of Tucker*, SB-02-0120-D, Mr. Tucker failed to properly
14 safeguard funds when he disbursed two checks when the balance held in trust
15 for the two clients was insufficient to cover the amount of the disbursements.
16 Mr. Tucker also failed to conduct a monthly reconciliation and failed to
17 maintain proper internal controls to adequately safeguard client funds. Mr.
18 Tucker also failed to maintain client ledger records and failed to keep his funds
19 separate from those of his clients. There were no aggravating factors found in
20 contrast to three mitigating factors (absence of prior discipline, full and free
21 disclosure, and remorse). The Court also cited to case law indicating that,
22
23 “suspension or disbarment . . . is appropriate for lawyers who are grossly
24
25

1 negligent.” Mr. Tucker, though, received a censure and was placed on
2 probation for one year.

3
4 Reprimand is appropriate for lawyers who simply fail to follow their
5 established procedures. “Reprimand is also appropriate when a lawyer is
6 negligent in training or supervising his or her office staff concerning proper
7 procedures in handling client funds.” *Standards* at 29

8 SANCTIONS

9
10 This Hearing Officer finds that the appropriate disciplinary sanctions are
11 as follows:

- 12 1. Respondent shall receive a Censure.
- 13 2. Respondent shall pay all costs and expenses incurred by the State
14 Bar in these proceedings within thirty (30) days of the Supreme Court’s Final
15 Judgment and Order. (A statement of costs is attached as Exhibit B.)
- 16 3. Respondent shall be placed on a term of probation for one (1) year
17 under the following conditions:

- 18 a. Respondent shall contact the director of the LOMAP within
19 30 days of the date of the Judgment and Order. Respondent shall submit
20 to a LOMAP audit of his office trust account policies and procedures.
21 The director of LOMAP shall develop a probation contract, and its terms
22 shall be incorporated herein by reference. The probation period will
23
24
25

1 begin to run at the entry of the Judgment and Order in this matter, and
2 will conclude one year from the date that all parties have signed the
3 probation contract.
4

5 b. Respondent and his chosen Certified Public Accountant
6 shall conduct a three-way reconciliation of the trust account general
7 ledger, all individual client ledgers, and all bank statements to determine
8 the extent of any other bookkeeping errors resulting in shortages of
9 client funds held in trust. Respondent and LOMAP shall develop and
10 execute internal controls and procedures through which any other
11 shortages are remedied immediately and future occurrences can be
12 prevented to be included as terms and conditions of probation.
13
14

15 c. Respondent shall refrain from engaging in any conduct that
16 would violate the Rules of Professional Conduct or other rules of the
17 Supreme Court of Arizona.
18

19 d. In the event that Respondent fails to comply with any of the
20 foregoing probation terms, and information thereof is received by the
21 State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance
22 with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.S.Ct. The
23 imposing entity may refer the matter to a hearing officer to conduct a
24 hearing at the earliest practicable date, but in no event later than 30 days
25

1 after receipt of notice, to determine whether a term of probation has been
2 breached and, if so, to recommend appropriate action and response. If
3 there is an allegation that Respondent failed to comply with any of the
4 foregoing terms, the burden of proof shall be on the State Bar of Arizona
5 to prove noncompliance by clear and convincing evidence.
6

7 **CONCLUSION**

8
9 The objective of lawyer discipline is not to punish the lawyer, but to
10 protect the public, the profession, and the administration of justice. *In Re*
11 *Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985).

12 This Hearing Officer finds that the objectives of discipline will be met
13 by the imposition of the proposed sanction of a Censure and an order for
14 Respondent to pay costs, accompanied by a term of probation.

15 DATED this 5th day of October, 2007.
16

17
18 Bruce G. Macdonald / es
19 Bruce G. Macdonald
20 Hearing Officer 6M
21

22 Original filed with the Disciplinary Clerk
23 this 5th day of October, 2007.

24 Copy of the foregoing mailed
25 this 5th day of October, 2007, to:

1 Michael Drake
2 Attorney At Law
3 3085 West Ina Road, Suite 111
4 Tucson, Arizona 85741
5 Attorney for Respondent

6 Matthew E. McGregor
7 Staff Bar Counsel
8 State Bar of Arizona
9 4201 N. 24th Street, Suite 200
10 Phoenix, Arizona 85016-7250

11 By Christina JB

12
13
14
15
16
17
18
19
20
21
22
23
24
25