

FILED

AUG 04 2008

THE ARIZONA
ms

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

No. 05-1347

**Paul Lenkowsky,
Bar No. 005529**

**AMENDED
HEARING OFFICER'S REPORT
ON TENDER OF ADMISSIONS
AND AGREEMENT FOR
DISCIPLINE BY CONSENT**

Respondent

(Assigned to Hearing Officer 8Z,
Christopher D. Thomas)

INTRODUCTION.

Respondent Paul Lenkowsky is a member of the State Bar of Arizona alleged by the Bar to have committed a series of ethical violations during the course of representing a client in a domestic relations matter, including the charging of unreasonable fees, disclosure of confidential information, and various conflicts of interest. The State Bar and Respondent have proposed to resolve the Bar's allegations as set forth in a Tender of Admissions and Agreement for Discipline by Consent, dated May 1, 2008, jointly submitted pursuant to Rule 56 (a), Ariz. R. Sup. Ct., and the Guidelines for Discipline by Consent issued by the Disciplinary Commission of the Arizona Supreme Court.

In the Tender, Respondent conditionally admits certain of the violations. More particularly, Respondent conditionally admits that he violated Rule 42, Ariz. R. Sup. Ct., when he charged his client unreasonable fees and expenses (ER 15), revealed information relating to the representation of a client without the

1 client's informed consent (ER 1.6), engaged in a concurrent conflict of interest by
2 representing one client against another client (ER 1.7(a)(1)); engaged in a
3 concurrent conflict of interest by representing one client with a significant risk that
4 the representation was materially limited by his responsibilities to another client, a
5 former client, a third person or by his personal interest (ER 1.7(a)(2)), engaged in
6 a conflict of interest by knowingly acquiring an ownership, possessory, security or
7 other pecuniary interest adverse to a client without advising the client in writing of
8 the desirability of seeking and being given a reasonable opportunity to seek the
9 advice of independent legal counsel on the transaction, and without obtaining the
10 client's informed consent in a writing signed by the client to the lawyer's role in
11 the transaction including whether the lawyer represented the client in the
12 transaction (ER 1.8(a)), engaged in a conflict of interest by using information
13 relating to a client's representation to the disadvantage of the client without the
14 client's informed consent (ER 1.8(b)); engaged in a conflict of interest by
15 representing a person in which the person's interests were materially adverse to
16 the interests of a former client in the same or substantially related matter without
17 obtaining informed consent of the former client (ER 1.9); failed to safe keep client
18 property and keep records of client account funds and other property for five (5)
19 years after termination of representation (ER 1.15); engaged in conduct prejudicial
20 to the administration of justice (ER 8.4(d)); and Rule 43, Ariz R Sup.Ct (relating
21 to accounting for trust account funds and maintaining trust account records)

22 The parties jointly proposed a sanction involving, *inter alia*, a 90-day
23 suspension, two years of probation with LOMAP, and payment of the costs and
24 expenses of the disciplinary proceeding. Respondent agreed to participate in fee
25

1 arbitration with the client/complainant, and the fee arbitration proceedings have
2 concluded. There are no issues of restitution in this matter.

3 The Hearing Officer finds that the facts admitted and conditionally
4 admitted in the Tender support the alleged violations, and further that the proposed
5 sanction is fair and appropriate

6 GENERAL ALLEGATIONS

7 1 During all times relevant to this proceeding, Respondent was a
8 lawyer licensed to practice law in the state of Arizona, having been first admitted
9 to practice in Arizona on October 7, 1978 Tender, ¶ 1

10 Tyler Representation

11 2. In 1998, Ms. Brie Tyler, ("Ms Tyler"), hired an attorney in
12 Respondent's law firm, Tina Ezzell, to represent her in divorce proceedings.
13 Tender, ¶ 2

14 3 In 2001, Ms. Ezzell left Respondent's law firm, and Respondent
15 assumed responsibility for Ms Tyler's case. Tender, ¶ 3

16 4 The divorce matter was litigated for five years, and included an
17 appeal and remand. Tender, ¶ 4

18 5. Ms Tyler and Ms Ezzell did not enter into a written fee agreement at
19 the outset of the engagement in 1998 Tender, ¶ 5

20 6 Likewise, Respondent and Ms. Tyler did not enter into a written fee
21 agreement in 2001, when Respondent's representation of Ms. Tyler on appeal of
22 the divorce proceedings commenced. Tender, ¶ 6

23 7. Over the course of the representation, Respondent increased the
24 hourly rates charged to Ms. Tyler four times Tender, ¶ 7

25

1 8 Ms. Tyler and Respondent did not enter into a written fee agreement
2 or modification thereof at any time Tender, ¶ 8

3 9 Respondent charged Ms. Tyler 18% interest on all unpaid balances,
4 but failed to communicate the interest amount and specific balances incurring the
5 interest charges during the course of doing so. Tender, ¶ 9.

6 10 During prior representations of Ms. Tyler, Respondent's law firm had
7 not charged Ms Tyler interest on unpaid balances. Tender, ¶ 10

8 11 Respondent billed Ms Tyler for clerical services at attorney rates and
9 failed to communicate the rate of these charges to Ms. Tyler. Tender, ¶ 11.

10 12 Respondent's total fees for Ms Tyler's representation exceeded
11 \$63,000 00. Of that amount, some of the fees were incurred while Ms Ezzell
12 represented Ms Tyler, and some were incurred during the time Respondent
13 represented Ms Tyler Tender, ¶ 12

14 13 On or about May 16, 2001, the Honorable R.A. Bartlett, Judge of the
15 Superior Court for Mohave County, entered the Decree of Dissolution and Release
16 of *Lis Pendens* in the divorce proceedings Tender, ¶ 13

17 14 Respondent's law firm filed a Motion to Withdraw as Attorney of
18 Record with the Mohave County Superior Court on or about June 12, 2001 The
19 Court granted the Motion on or about June 18, 2001 Tender, ¶ 14.

20 15 In a letter to Ms. Tyler dated June 25, 2001, Respondent
21 acknowledged his understanding that Ms Tyler was then

22 in the process of refinancing your home and ... will shortly be in a
23 position to retain us to represent you in connection with the
24 pending appeal. As soon as we receive payment in full of our
 outstanding bill, we will promptly re-notice our appearance as
 counsel of record for you in connection with the pending
 appeal...

25 Tender, ¶ 15

1 16 Ms Tyler retained Respondent to represent her in her appeal of the
2 court's rulings related to specific sole and community property division issues.

3 Tender, ¶ 16

4 17 Prior to pursuing an appeal of the court's decisions in the divorce
5 matter, Respondent informed Ms Tyler that his payment for services needed to be
6 secured. Tender, ¶ 17

7 18. On or about September 17, 2001, Respondent requested a Limited
8 Realty Report on Ms Tyler's property Tender, ¶ 18

9 19. On or about October 2, 2001 Ms. Tyler signed a Promissory Note
10 ("the Note") to Respondent, secured by a Deed of Trust and Assignment of Rents.
11 Tender, ¶ 19

12 20. On or about October 4, 2001 Respondent recorded the Deed of Trust
13 on Ms Tyler's property Tender, ¶ 20

14 21 Respondent filed his Notice of Appearance with the Court of Appeals
15 on or about October 8, 2001. Tender, ¶ 21

16 22 Respondent did not inform Ms. Tyler that she could seek the advice
17 of another attorney, nor did he obtain Ms Tyler's informed consent in writing,
18 prior to her execution of the Promissory Note. Tender, ¶ 22.

19 23 On or about November 16, 2001 Respondent filed an "Assignment of
20 Beneficial Interest Under Deed of Trust," conveying all beneficial interest under
21 the Deed of Trust and Assignment of Rents dated October 1, 2001, from himself
22 to his mother, Helen Summar ("Ms Summar") Tender, ¶ 23.

23 24 Respondent did not inform Ms Tyler that Ms Summar was his
24 mother Tender, ¶ 24.

25

1 25 On November 26, 2001, April 23, 2002 and August 8, 2002,
2 Respondent informed Ms Tyler that the holder of the Note had instructed him to
3 begin foreclosure proceedings due to non-payments on the note by Ms. Tyler.
4 Tender, ¶ 25.

5 26. On or about October 1, 2002 Respondent informed Ms Tyler that he
6 would initiate trustee sale proceedings against her to enforce the Deed of Trust and
7 Assignments of Rents Tender, ¶ 26

8 27 In his letter to Ms Tyler Respondent informed her

9 Under the ethical rules which apply to attorneys, I cannot
10 ethically initiate collection proceedings against you while
11 concurrently representing you as your attorney. I will, therefore,
12 be filing a Motion to Withdraw as your counsel of record.

12 Tender, ¶ 27

13 28 On or about May 1, 2003, Respondent's office manager provided Ms.
14 Tyler with a revised payment ledger and an amortization schedule on the Note
15 Tender, ¶ 28.

16 29. In October 2003, Ms. Tyler received her final divorce award after
17 remand. Tender, ¶ 29.

18 30. Respondent continued to represent Ms. Tyler through January 4,
19 2004 Tender, ¶ 30.

20 31 In April 2004 Respondent, on behalf of his client, claimant Helen
21 Summar, reviewed various Chapter 13 bankruptcy documents filed by Ms Tyler.
22 Tender, ¶ 31

23 32. On or about May 21, 2004 Respondent drafted the Calculated Payoff,
24 and filed the Objection to Ms. Tyler's Bankruptcy Plan on behalf of his mother,
25 Helen Summar as a "*Pro Per*" claimant. Tender, ¶ 32

1 33 The Objection to the Chapter 13 Plan identifies the principal payoff
2 amount on Ms Tyler's Note as \$4,802 21. Tender, ¶ 33

3 34 On or about December 1, 2004, Respondent filed Ms. Summar's
4 Objection to Amended/Modified Plan as both "Attorney for" Ms. Summar and
5 with Ms Summar's electronic signature as "*Pro Per*" claimant. Tender, ¶ 34.

6 35 Respondent was copied on the Bankruptcy Court's March 5, 2005
7 Order of Dismissal as "Counsel for Creditor." Tender, ¶ 35

8 36 On or about March 16, 2005, Respondent's office manager accepted
9 Ms Tyler's offer to settle her account in full for \$2,500, for the total owed of
10 \$4,300 Tender, ¶ 36.

11 37 Ms. Tyler submitted a payoff check to Respondent on or about March
12 23, 2005, relying on the office manager's acceptance of the offer Tender, ¶ 37.

13 38 On or about April 4, 2005 and April 8, 2005, Respondent notified Ms.
14 Tyler that the total due on the note was \$5,224 61 and that the holder of the Note
15 was not interested in accepting a discounted amount in exchange for a payoff on
16 the Note. Tender, ¶ 38.

17 39 On or about April 4, 2005 Respondent notified the title company
18 working with Ms Tyler on refinancing her property that the payoff on the Note
19 was \$8,978 50. Tender, ¶ 39.

20 40. Respondent claimed in his letter to the title company that the total
21 included \$2,978 50 in attorney's fees and costs incurred in connection with
22 Trustee Sale proceedings commenced against the subject property. Tender, ¶ 40.

23 41 On or about May 5, 2005, Respondent filed an Affidavit of
24 Attorney's Fees and Costs, as attorney for claimant Helen Summar. In his
25 Affidavit, Respondent requested a total of \$2,054 90 for fees and costs incurred by

1 his office relating to the legal services provided in connection with the litigation of
2 the bankruptcy matter. Tender, ¶ 41

3 42. Respondent billed Ms Tyler for legal work performed on behalf of
4 his mother and client, Ms Summar Tender, ¶ 42.

5 43 On or about June 2, 2005 the title company paid Respondent
6 \$2,978 50 from Ms. Tyler's refinancing Tender, ¶ 43

7 Trust Account

8 44 Based on Ms Tyler's charge to the Bar regarding Respondent's
9 duplicate billings for legal services related to her divorce proceedings, Respondent
10 and Ms Tyler participated in Fee Arbitration before the Bar's Committee on
11 Arbitration of Fee Disputes ("Arbitration panel"). Tender, ¶ 44.

12 45 The Arbitration panel concluded that Respondent had failed to
13 produce a trust account ledger with respect to the disposition of client funds, the
14 payment of fees, or receipt and disbursement of monies in connection with the
15 representation of Ms Tyler Tender, ¶ 45

16 46. The Arbitration panel concluded that Respondent had failed to
17 maintain adequate records regarding spousal maintenance checks, and was "deeply
18 concerned" about the manner in which Respondent had handled the
19 proceeds/settlement of the California property in issue (namely a check in the
20 amount of \$102,000 00) Tender, ¶ 46.

21 47 The Arbitration panel concluded that Respondent was unable to
22 verify to whom the funds had been distributed. Tender, ¶ 47

23 48 In addition, the Arbitration panel stated that it was "disturbed" that
24 Respondent had disbursed client funds to Ms. Tyler in the form of a cashier's
25 check, rather than through the trust account, making it virtually impossible to

1 determine when, how or in what amount, the funds were ever given to her Tender,
2 ¶ 48

3 49 In essence, the Arbitration panel found that there was "little or no
4 paper trail" for such funds, in violation of Rule 43, Ariz R.Sup.Ct. Tender, ¶ 49.

5 50. The Arbitration panel determined that Respondent had charged Ms.
6 Tyler unreasonable fees because he billed fees to Ms. Tyler in connection with
7 Respondent's representation of Ms Summar *against* Ms Tyler. Tender, ¶ 50

8 51 The Arbitration panel concluded that all of Respondent's post-July 5,
9 2002 billings had been generated while Respondent engaged in an "obvious and
10 clearly recognizable conflict of interest." Tender, ¶ 51.

11 52 On or about June 22, 2007 the SBA's Staff Examiner ("Staff
12 Examiner") requested all trust account and supporting documents related to
13 Respondent's representation of Ms Tyler Tender, ¶ 52

14 53 On July 25, 2007 Respondent informed the Staff Examiner that his
15 office was still collecting the requested information. Tender, ¶ 53.

16 54 On July 30, 2007 Respondent provided a partial response to the Staff
17 Examiner's original request Tender, ¶ 54

18 55. On or about August 1, 2007 the Staff Examiner requested additional,
19 specific information Tender, ¶ 55.

20 56 On August 27, 2007 the Staff Examiner received a partial response to
21 the requested information. Tender, ¶ 56.

22 57. On or about August 28, 2007 the Staff Examiner requested a legible
23 copy of Respondent's IOLTA October 2000 bank statement and an explanation
24 regarding a deposit dated October 23, 2000. The Staff Examiner had requested this
25 information previously Tender, ¶ 57

1 58 Respondent provided the requested information on September 5,
2 2007 Tender, ¶ 58.

3 59 On or about September 28, 2007, bar counsel requested specific trust
4 account statements, cancelled checks, general and check ledgers and other
5 specifically identified documents. Respondent was asked to provide the requested
6 documents by October 12, 2007 Tender, ¶ 59.

7 60. Respondent provided a partial response, explaining that some of the
8 requested documents no longer existed. Tender, ¶ 60.

9 61 The Staff Examiner's review of the records provided by Respondent
10 for the period of June 1, 1998 through June 27, 200 (excluding January 1999)
11 revealed:

12 a. Respondent converted other client funds when he deposited
13 \$12,750, on November 14, 2001, to the trust account for Ms. Tyler's
14 benefit, and made a corresponding disbursement from the account in
15 the amount of \$12,750, check number 3619, payable to himself on the
16 same day. Since Ms. Tyler's balance held in trust prior to the deposit
17 was only \$5,662 90, Respondent converted other client's funds.

18 b. Respondent converted other client funds when he deposited
19 \$8,764.34, on June 3, 2005, to the trust account for Ms Tyler's
20 benefit, and made corresponding disbursements from the account in
21 the amounts of \$5,786 34, check number 3928, payable to Helen
22 Summar and \$2978.50, check number 3929, payable to himself on
23 the same day. Since Ms Tyler's trust balance prior to the deposit was
24 only \$3,034 31, Respondent converted other client's funds

25 c. In the transcript of Respondent's Fee Arbitration, Page 24, lines
13-18, Respondent acknowledged that, ". . . there may be as much as
\$4,800 that we cannot account for – I'm not saying that she didn't
receive it, but we can't – we can't trace it to the statement, in all
honesty "

 d. In the transcript of Respondent's Fee Arbitration, Page 101, lines
22-25 and Page 102 line 1, Ms. Ezzell testified that, "... there was a
file area that specifically had each client's name on it, and all the
documentation with regard to their account would all go there, so---I
don't think it was a ledger, *per se*, as far as I remember "

 e. When asked to what matter check no 3362 for \$2,000, payable to
Respondent, and disbursed from the trust account on 10/06/1999 was

1 credited, Respondent stated that the payment was mistakenly not
2 credited, but Ms. Tyler was compensated through fee arbitration

3 f When asked to provide the account, date and amount of the
4 deposit that identifies the source of funds for \$4,800.00 credited on
03/21/2000, Respondent stated that the March 2000 records no
longer exist; therefore, the source cannot be determined.

5 g The billing statements submitted are not an appropriate equivalent
6 for an individual client ledger because the billing statements do not
7 indicate the date and amount of each deposit and disbursement, and
unexpended balance after each transaction

8 h Respondent disbursed by "Counter Debit" from the client trust
9 account on May 4, 2000 in the amount of \$102,140.25, and not by pre-
10 numbered check This disbursement was made to purchase two
cashier's checks, one in the amount of \$16,000 and the other in the
amount of \$86,140.25

11 i Several payments meant to reduce the balance owed on the
12 promissory note, were credited to Ms. Tyler's appeal matter instead:
\$500.00 dated 10/31/2001; \$802 75 dated 01/04/2002; \$300 00 dated
01/18/2002, and, \$200.00 dated 01/22/2002

13 j Ms. Tyler's payment in the amount of \$500.00, received on August
14 10, 1998, and credited to the promissory note was not recorded on the
trust account general ledger.

15 k. The deposit and subsequent debit in the amounts of \$102,140.25
16 dated May 5, 2000, were not recorded on the trust account general
ledger

17 l Ms Tyler's \$400 00 payment deposited to the client trust account
18 on November 14, 2001, was not recorded on the trust account general
ledger.

19 m. The \$400.00 return item chargeback from the client trust account
20 on November 19, 2001, was not recorded on the trust account general
ledger.

21 n The \$802.75 deposit made to the client trust account on January 4,
22 2002, was credited to the Appeal Matter when it should have been
credited to Ms. Tyler's promissory note amortization schedule.

23 o The \$802.00 deposit made to the client trust account on June 25,
24 2002, was recorded on the Respondent's billing statement for Ms.
Tyler as \$802 63.

25 p The \$400.00 deposit made to the client trust account on September
23, 2002. was not recorded on Ms Tyler's promissory note
amortization schedule

1
2 q The billing statements submitted are not appropriate equivalents for
3 individual client ledgers because the billing statements do not indicate
4 the date and amount of each deposit and disbursement, and
unexpended balance after each transaction. Without maintaining
individual client ledgers according to the minimum standards, a proper
monthly three-way reconciliation cannot be conducted

5 Tender, ¶ 61

6 **CONDITIONAL ADMISSIONS**

7 **Tyler Representation**

8 62 Respondent conditionally admits that he charged Ms. Tyler
9 unreasonable fees, in violation of ER 1.5, Rule 42, Ariz R.Sup.Ct. Tender, ¶ 62.

10 63. Respondent conditionally admits that he revealed information to his
11 mother, Ms Summar, relating to his representation of Ms Tyler without Ms
12 Tyler's informed consent in violation of ER 1 6, Rule 42, Ariz.R Sup Ct Tender, ¶
13 63

14 64 Respondent conditionally admits that he engaged in representation of
15 clients that involved a concurrent conflict of interest when he represented Ms.
16 Summar in a legal action that was directly adverse to Ms. Tyler in violation of ER
17 1.7(a)(1), Rule 42, Ariz.R.Sup.Ct. Tender, ¶ 64

18 65 Respondent conditionally admits that he engaged in representation
19 involving a concurrent conflict of interest when there was a significant risk that
20 the representation of one client would be materially limited by his responsibilities
21 to another client or person, or by a personal interest, in violation of ER 1.7(a)(2),
22 Rule 42, Ariz R Sup Ct Tender, ¶ 65

23 66 Respondent conditionally admits that he entered into a business
24 transaction with Ms. Tyler and knowingly acquired an ownership or other
25 pecuniary interest in Ms Tyler's property without advising Ms Tyler in writing of

1 the desirability of seeking, or giving her a reasonable opportunity to seek, the
2 advice of independent legal counsel on the transaction, in violation of ER 1 8(a),
3 Rule 42, Ariz.R.Sup.Ct. Tender, ¶ 66.

4 67. Respondent conditionally admits that he used information relating to
5 Ms Tyler's representation to her disadvantage and without her informed consent,
6 in violation of ER 1 8(b), Rule 42, Ariz.R Sup Ct Tender, ¶ 67

7 68. Respondent conditionally admits that he represented Ms Summar in
8 matters substantially related to Ms Tyler's legal matters, which were adverse to
9 Ms Tyler's interests, in violation of ER 1 9, Rule 42, Ariz R Sup.Ct. Tender, ¶
10 68

11 69 Respondent conditionally admits that he engaged in conduct
12 prejudicial to the administration of justice, in violation of ER 8.4(d), Rule 42,
13 Ariz.R Sup Ct Tender, ¶ 69.

14 **Trust Account**

15 70 Respondent conditionally admits that he charged Ms Tyler
16 unreasonable fees, in violation of Rule 42, ER1 5, Ariz R Sup.Ct. Tender, ¶ 70

17 71. Respondent conditionally admits that he failed to safe-keep client
18 property as is required by Rule 42, ER 1 15(a) Tender, ¶ 71

19 72. Respondent conditionally admits that he failed to keep complete
20 records of such account funds and other property and preserve the records for a
21 period of five years after termination of the representation as is required by Rule
22 42, ER 1.15(a). Tender, ¶ 72

23 73 Respondent conditionally admits that he failed to maintain complete
24 records of the handling, maintenance and disposition of all funds, securities and
25

1 other assets of a client that have at any time come into the member's possession as
2 is required by Rule 43(a) Tender, ¶ 73.

3 74 Respondent conditionally admits that he failed to exercise due
4 professional care in the performance of the lawyer's duties as is required by Rule
5 43(d)(1)(A). Tender, ¶ 74

6 75 Respondent conditionally admits that he failed to maintain internal
7 controls within the lawyer's office that are adequate under the circumstances to
8 safeguard funds or other property held in trust as is required by Rule 43(d)(1)(C).
9 Tender, ¶ 75

10 76 Respondent conditionally admits that he failed to record all
11 transactions promptly and completely as is required by Rule 43(d)(1)(D). Tender,
12 ¶ 76

13 77 Respondent conditionally admits that he failed to maintain on a
14 current basis, records complying with ER 1 15 and Rule 43(d)(1)(E), and preserve
15 such records for at least 5 years following final disbursement of the funds.
16 Tender, ¶ 77

17 78 Respondent conditionally admits that he failed to maintain or cause to
18 be maintained an account ledger or the equivalent for each client, person or entity
19 for whom the monies have been received in trust, showing the date and the amount
20 of each receipt and disbursement and any unexpended balance as is required by
21 Rule 43(d)(2)(C) Tender, ¶ 78

22 79 Respondent conditionally admits that he failed to make or cause to be
23 made a monthly three-way reconciliation of the client ledgers, trust account
24 general ledger or register, and trust account bank statement as is required by Rule
25 43(d)(2)(D) Tender, ¶ 79

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

compliance, preserving clients' confidential information, conflicts of interest, and safekeeping client property and funds. The director of LOMAP shall develop written "Terms and Conditions of Probation" the terms of which shall be incorporated herein by this reference. The "Terms and Conditions of Probation" shall include retention of a practice monitor. Respondent may suggest a Practice Monitor for LOMAP approval. The probation period will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation." Respondent shall be responsible for any costs associated with LOMAP.

b. Respondent shall contact the director of the SBA's Member Assistance Program (MAP) within 30 days of the date of the final judgment and order. Respondent shall submit to a MAP assessment. The director of MAP shall develop written "Terms and Conditions of Probation" if he determines that the result of the assessment so indicate, and the terms shall be incorporated herein by this reference. The probation period will begin to run at the time of the judgment and order, and will conclude two years from the date that all parties have signed the "Terms and Conditions of Probation." Should the director of MAP conclude that no MAP probation terms are necessary, probation shall conclude two years from the entry of judgment and order. On request, Respondent shall furnish to the MAP director and/or to the SBA any and all written and signed information release authorization forms.

1 deemed necessary by the MAP director and/or the SBA, and
2 Respondent waives any and all claims of confidentiality or
3 privilege associated with information sought or obtained by reason
4 thereof, including but not necessarily limited to the
5 physician/patient privilege. However, the foregoing waiver does
6 not apply to the attorney/client privilege Respondent shall be
7 responsible for any costs associated with MAP.

8 c Respondent shall attend a half-day Trust Account Ethics
9 Enhancement Program (TAEPP). Respondent must contact Gloria
10 Green, Program Coordinator, of the SBA, (602) 340-7278, within
11 20 days from the date of the Judgment and Order Respondent
12 shall be responsible for the cost of attending the program

13 d Respondent shall attend a one-day Ethics Enhancement Program
14 (EEP) Respondent must contact Cathy McNeelege, Program
15 Coordinator, SBA, (602) 340-7241, within 20 days from the date
16 of the Judgment and Order. Respondent shall be responsible for
17 the cost of attending the program.

18 e Respondent shall participate in the SBA's Trust Account Program
19 (TAP). Respondent shall contact the SBA's Staff Examiner at
20 (602) 340-7242 to begin participation in TAP Respondent shall
21 sign a "Terms and Conditions of Probation" that shall include all
22 applicable terms of participation including reporting requirements,
23 and shall be incorporated in the terms of probation Respondent
24 shall participate in TAP for a period of two years from the signing
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

of the Terms and Conditions of Probation. Respondent shall be responsible for all costs of TAP.

f Respondent may initiate LOMAP, TAEPP, TAP, EEP and MAP during the period of his inactivity, complete TAEPP and EEP during the period of his inactivity; and return to active status 90 days after July 1 (assuming no order precludes him from doing so).

g Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

h. In the event that Respondent fails to comply with any of the foregoing probation terms, and the SBA receives information thereof, Bar counsel shall file a Notice of Non-Compliance with the imposing entity pursuant to Rule 60(a)(5), Ariz R Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than thirty (30) days following receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the SBA to prove non-compliance by clear and convincing evidence.

4. Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding. In addition, Respondent shall pay all

1 costs incurred by the Disciplinary Commission, the Supreme Court
2 and the Disciplinary Clerk's Office in this matter.

3 SANCTION ANALYSIS

4 In determining the appropriate sanction for a disciplinary matter, it is
5 appropriate to consider both the American Bar Association's *Standards for*
6 *Imposing Lawyer Sanctions* ("Standards") and Arizona case law. The *Standards*
7 provide guidance with respect to an appropriate sanction in this matter. The
8 Supreme Court and Disciplinary Commission consider the *Standards* a suitable
9 guideline. See *In re Peasley*, 208 Ariz. 27,33,35, 90 P.2d 764,770,772 (2002), *In*
10 *re Rivkind*, 164 Ariz. 154,157, 791 P.2d 1037,1040 (1990). The Standards are
11 designed to promote consistency in the imposition of sanctions by identifying
12 relevant factors that courts should consider and then applying those factors to
13 situations where lawyers have engaged in various types of misconduct. *Standards*
14 *I 3, Commentary*

15 In determining the appropriate sanction, the Supreme Court and the
16 Disciplinary Commission consider the duty violated, the lawyer's mental state, the
17 actual or potential injury caused by the misconduct and the existence of
18 aggravating and mitigating factors. See *Peasley*, 208 Ariz. at 35, 90 P.3d at 772;
19 *Standard 3 0*

20 The parties propose, and the Hearing Officer concurs, that the most serious
21 misconduct in this case is Respondent's conflicts of interest. Respondent also
22 violated rules relating to client confidentiality, reasonable fees, safekeeping
23 property and trust accounts. The following *Standards* are applicable:

24 **Safekeeping Property**
25 **Standard 4.12**

1 Suspension is generally appropriate when a lawyer knows or should know that he
2 is dealing improperly with client property and causes injury or potential injury to a
client

3 **Confidentiality of Information**
4 **Standard 4.22**

5 Suspension is generally appropriate when a lawyer knowingly reveals information
6 relating to the representation of a client not otherwise lawfully permitted to be
disclosed, and this disclosure causes injury or potential injury to a client.

7 **Conflict of Interest**
8 **Standard 4.32**

9 Suspension is generally appropriate when a lawyer knows of a conflict of interest
10 and does not fully disclose to a client the possible effect of that conflict, and
causes injury or potential injury to a client.

11 **Fees**
12 **Standard 4.63**

13 Reprimand [censure] is generally appropriate when a lawyer negligently fails to
14 provide a client with accurate or complete information, and causes injury or
potential injury to the client

15 Based upon the conditional admissions in this matter, the presumptive
16 sanction with regard to the most serious charges under *Standards* 4.32, 4.22 and
17 4.12 is suspension

18 **The duty violated**

19 As described above and in the accompanying Tender, Respondent violated
20 rules relating to conflicts of interest, client confidentiality, reasonable fees,
21 safekeeping property and trust accounts. Respondent's conduct, taken as a whole,
22 violated his duty to his client

23 **The lawyer's mental state**
24
25

1 Respondent's conduct was knowing regarding the conflicts of interest and
2 client confidentiality charges, and negligent with respect to the unreasonable fees,
3 safekeeping property and trust account charges

4 **The extent of the actual or potential injury**

5 Respondent's conduct in this matter caused actual financial injury to his
6 client but that the injury, although that injury was subsequently largely cured by
7 Respondent's voluntary participation in and compliance with the result of fee
8 arbitration

9 **The aggravating and mitigating circumstances**

10 The parties stipulated, and the Hearing Officer concurs, that the following
11 factors should be considered in aggravation:

12 Standard 9 22(a), prior disciplinary offenses – Respondent previously received
13 two Informal Reprimands (1987 and 2003). The latter involved violations of ERs
1.7 and 1.9, as in this case

14 Standard 9 22(b), dishonest or selfish motive – Respondent acted contrary to his
15 client's interests to secure his own fees, and to enable his mother to collect on a
note against his current and/or former client Tyler

16 Standard 9 22(c), a pattern of misconduct – Respondent committed several
17 different acts and types of conflicts of interest.

18 Standard 9.22(d), multiple offenses

19 Standard 9.22(i), substantial experience in the practice of law – Respondent was
admitted to practice law in 1978.

20 The parties stipulate, and the Hearing Officer concurs, that the following
21 factors should be considered in mitigation:

22 Standard 9 32(c), personal or emotional problems – Respondent was evaluated by
23 Dr Dan Blackwood, Ph D on March 17, 2008, during which Respondent told Dr.
24 Blackwood that "I don't have an explanation' for some of his actions involved in
25 the current complaint " Respondent has been married twice, the second time from
2003-2005, was separated in 2004, and is reconciling with his first wife He has
adult-onset diabetes, which is well controlled, hyperlipidemia, was diagnosed with
depression in 2004, and currently takes several medications including Xanax and
Wellbutrin "His recall of some of the events in question during 2004 and 2005 is
'sketchy ' He states that it has been quite disconcerting at times to read documents

1 which he has no conscious recollection of having seen before or of signing,
2 although he recognizes his signature. He stated that sending repetitive dunning
3 notes to a client concerning fees was out of character for him. He stated that he
4 took no actual legal action against the client in question concerning payment of
5 fees. He stated that his actions described in the case are unique in his work history.
6 He believes that he made some mistakes concerning the handling of financial
7 matters in the case, and he himself sees this matter as 'very serious'. At the same
8 time, however, he believes that he conscientiously provided competent legal
9 services to the client in question." Dr. Blackwood described other factors such as
10 Respondent's work history, stressors, unsuccessful run for mayor of Bullhead City
11 (he lost by 110 votes) and health issues. Dr. Blackwood concluded that "there are
12 no concerns from a psychological standpoint about any particular risk for
13 recurrence of similar problems or actions in the future."

14 Standard 9 32(k), imposition of other penalties or sanctions – Respondent paid his
15 client approximately \$16,000 as a result of fee arbitration

16 PROPORTIONALITY

17 To have an effective system of professional sanctions, there must be internal
18 consistency, and it is appropriate to examine sanctions imposed in cases that are
19 factually similar. *See Peasley*, 208 Ariz. at 35, 90 P.3d at 772. However, the
20 discipline in each case must be tailored to the individual case, as neither perfection
21 nor absolute uniformity can be achieved. *Id.*, 208 Ariz. at 41, 90 P.3d at 778
22 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135
23 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). The cases set forth below demonstrate
24 that a 90-day suspension with probation and costs is an appropriate sanction in this
25 matter

26 In *In re Sholes*, SB-07-0053-D, Respondent failed to observe rules
27 governing the handling of client trust funds. Respondent further failed to consult
28 with his client regarding a settlement offer and signed her name to the settlement
29 check without her knowledge. Respondent further failed to adequately
30 communicate with clients, failed to render an accounting upon request, and failed
31 to adequately respond to the State Bar's investigation. Respondent violated ERs

1 1 2(a), 1.4, 1.4(a), 1.5(c), 1 15(a) and 1 15(d), 8.1(b), 8 4(c) and 8.4(d), and Rules
2 43(a) and 43(d), 44(b) and 53(f) The sanction imposed was for a six-month
3 suspension, two years of Probation (LOMAP and TAEEP) and restitution. The
4 aggravating factors included Standards 9.22(c), (d) and (i) There were no factors
5 in mitigation. The mental state was knowing and there was both actual and
6 potential injury

7 In *In re Watkins*, SB-07-0062-D, Respondent represented a client in a patent
8 infringement matter. Respondent failed to disclose a conflict of interest to his
9 client and demonstrated a lack of candor to the client and the United States Patent
10 and Trademark Office. Respondent further shared legal fees with a non-lawyer. He
11 violated ERs 1 4, 1 6, 1 7(a)(2), 1.8(a), 1.8(b), 1 9(b), 1.13(b), 1.16(a)(1), 3.3(a),
12 3.4(b), 5 4(a), 8 4(a), 8 4(c) and 8 4(d) R was disbarred Aggravating factors were
13 Standards 9.22(b), (g) and (i), and the mitigating factor was Standard 9.32(a).
14 Respondent's mental state was intentional, and there was actual injury.

15 In *In re Brown*, SB-07-0011-D, Respondent entered into a business
16 transaction with a client and traded furniture for legal services Respondent failed
17 to memorialize in writing the terms of the transaction to the client, advice to the
18 client to obtain independent legal advice, and the client's consent to the
19 transaction. In addition, Respondent removed funds held in trust over the objection
20 of his client's directive and prior authorization. Respondent further failed to
21 maintain adequate trust account records. He violated ERs 1.8(a), 1 15(a) and
22 1 15(e), and Rule 43(a) and (d) Respondent was assessed a five-month
23 suspension, two years of probation (LOMAP/Practice Monitor) and Restitution
24 Aggravating factors were Standards 9.22(b), (g) and (i), and the mitigating factor
25

1 was Standard 9 32(a). Respondent's mental state was knowing and there was
2 actual injury

3 In *In re Gregory*, SB-07-0013-D, Respondent failed to maintain proper
4 internal office controls to adequately safeguard funds on deposit. Respondent
5 failed to record all transactions, failed to disburse pre-numbered checks and to
6 conduct a monthly reconciliation. He violated ERs 1.15(a) and Rules 43 and 44.
7 The sanction imposed was Censure and one year of Probation (TAP and TAEEP).
8 The aggravating factor was Standard 9 22(a) and in mitigation, Standard 9.32(f)
9 Respondent's mental state was negligent, and there was potential injury.

10 In *In re Allen*, SB-07-0103-D, Respondent failed to adhere to trust account
11 rules and guidelines, mishandled client funds, and failed to maintain adequate trust
12 account records. She commingled personal funds with client trust account funds and
13 converted those funds for the benefit of another client. Respondent further failed to
14 respond or cooperate with the State Bar's investigation. She violated ERs 1.15 and
15 8 1(b) and Rules 43(a) and 43(d), 44 and 53(d) and (f). The sanction imposed was a
16 six-month and one-day suspension and two years of Probation (LOMAP).
17 Aggravating factors were Standards 9 22(c), (d), (e), (g), and (i). The mitigating
18 factor was Standard 9.32(a). Respondent's mental state was knowing and there was
19 actual and potential injury.

20 In *In re Munoz S.*, SB-07-0002-D, Respondent failed to adhere to trust
21 account rules and guidelines. Specifically, Respondent failed to safeguard client
22 funds and to exercise due care regarding overdraft and recordkeeping
23 requirements. failed to consistently record all transactions, failed to disburse funds
24 with pre-numbered checks, failed to consistently maintain duplicate deposit slips
25 and failed to consistently conduct monthly three-way reconciliations. He violated

1 ER 115 and Rules 43 and 44 The sanction was Censure and one year of
2 Probation (LOMAP and TAEEP) The aggravating factor was Standard 9.22(i) and
3 mitigating factors were Standards 9.32(b) and (e). His mental state was negligent
4 and there was potential injury

5 In *In re Nelson*, SB-07-0102-D, Respondent failed to diligently represent
6 clients and preserve client property, perform services requested by clients,
7 communicate with clients, refund unearned fees and timely withdraw from
8 representation. Respondent further failed to comply with trust account rules and
9 guidelines. He violated ERs 1.2, 1.3, 1.4, 1.15 and 1.16(d), and Rules 43 and 44
10 The sanction was for a six-months and one-day Suspension, two years of
11 Probation (LOMAP and MAP), Restitution, and Fee Arbitration Aggravating
12 factors were Standards 9.22(a), (c), (d), and (i), and mitigating factors were
13 Standards 9.32(c) and (e) Respondent's mental state was "knew or should have
14 known" and there was actual and potential injury.

15 In *In re Doyle*, SB-06-0048-D, Respondent represented a client in a tax lien
16 property foreclosure matter and obtained a money judgment for the client
17 Subsequently, the client assigned his interest under the judgment to Respondent as
18 payment for costs and attorney's fees. Shortly thereafter, the judgment debtor died
19 and a sheriff's sale was held on his property to satisfy judgments against him.
20 Respondent attended the sale representing his own interests as judgment creditor
21 and representing his client/wife, a real estate agent. The judgment debtor's
22 property was sold at an amount sufficient to satisfy the judgment. After the sale
23 but before the end of the redemption period, Respondent learned that the judgment
24 debtor had been married at the time of his death. Respondent contacted the
25 judgment debtor's widow and informed her that he had a judgment against her late

1 husband and offered to purchase the property to satisfy the debt. Respondent failed
2 to inform the widow that the sheriff's sale had produced sufficient funds to satisfy
3 the debt, that she should consult independent legal counsel, that he was personally
4 interested in the property, and that the person the property would be transferred to
5 was his client/wife Respondent also failed to advise that an overage may have
6 resulted from the sheriff's sale. Respondent violated ERs 4 1, 4 3, 4 4, 8.1(b) and
7 8 4(d) The sanction was for a 90-day suspension and one year of probation (EEP
8 and CLE). Aggravating factors were Standards 9.22(h) and (i), and mitigating
9 factors were Standards 9.32(a) and (g). Respondent's mental state was knowing
10 and there was actual injury.

11 CONCLUSION

12 As proposed by the parties in their Tender, the Hearing Officer finds, based
13 on the Standards and relevant case law, that a 90-day suspension and two years
14 probation is the appropriate sanction in this matter. Respondent's probation shall
15 begin upon his reinstatement into active status, with the terms and conditions of
16 probation to include TAEPP, EEP, TAP, Practice Monitor, LOMAP and MAP
17 assessments, and agreement to written Terms of Probation deemed appropriate by
18 LOMAP and MAP In addition, Respondent shall pay the costs and expenses
19 incurred in this disciplinary proceeding. Respondent's 90-day suspension shall be
20 retroactive to July 1, 2008, the date upon which he assumed voluntary inactive
21 status for a 90-day period. Respondent may initiate TAEPP, EEP, TAP, LOMAP,
22 MAP and suggest an appropriate practice monitor during his period of inactivity,
23 and he also may complete the TAEPP and EEP classes during his period of
24 inactivity
25

