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

5 IN THE MATTER OF A MEMBER ) Nos. 98-1232, 99-0835, 00-0585  
6 OF THE STATE BAR OF ARIZONA, ) 00-1328, 00-1447  
7 )  
7 **WENDY B. MORGAN,** )  
8 **Bar No. 015503** )  
9 ) **HEARING OFFICER'S REPORT**  
9 RESPONDENT. )  
10 \_\_\_\_\_ )

11 **PROCEDURAL HISTORY**

12 Probable Cause Orders were filed on April 26, 1999, October 27, 1999,  
13 August 15, 2000, August 29, 2000 and November 14, 2000. A Complaint was  
14 filed on October 28, 1999 in File Nos. 98-1232 and 99-0835 and an Amended  
15 Complaint was filed on September 21, 2000 to include File Nos. 00-0585 and 00-  
16 1328. Respondent filed an Answer on November 26, 1999 to File Nos. 98-1232  
17 and 99-0835 and on October 11, 2000 to File Nos. 00-0585 and 00-1328.  
18 Respondent moved to consolidate File No. 00-1447 with the above-mentioned  
19 matters and the motion was granted on January 9, 2001. On February 27, 2001  
20 Respondent filed a Petition for Transfer to Disability Inactive Status (File No. 01-  
21 0454). On March 23, 2001 the Disciplinary Commission temporarily transferred  
22 Respondent to disability inactive status and stayed these proceedings pending  
23 final determination of actual incapacity. On August 7, 2001 the Disciplinary  
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1 Commission permanently transferred Respondent to disability inactive status for  
2 an indefinite period and until further order of the Supreme Court. On May 6, 2003  
3 Respondent filed an Application for Reinstatement (File No. 03-6002). On April  
4 20, 2004, the Supreme Court reinstated Respondent as a member of the State Bar  
5 of Arizona, with terms of probation, and vacated the Commission's stay in these  
6 matters. The parties filed a Tender of Admissions and Agreement for Discipline  
7 by Consent (Tender) and a Joint Memorandum in Support of Agreement for  
8 Discipline by Consent (Joint Memo) on May 21, 2004. The Complainants have  
9 been notified of this consent agreement. No hearing has been held.  
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11

### 12 **FINDINGS OF FACT**

13  
14 1. Respondent was, at all times relevant hereto, a member of the State  
15 Bar of Arizona, having been admitted to practice law in Arizona on December  
16 20, 1994.

17  
18 2. Respondent was placed on disability inactive status by judgment  
19 and order dated March 23, 2001, effective that date.

20  
21 3. Respondent filed an application for reinstatement on May 6, 2003.  
22 A hearing was held, the Disciplinary Commission considered the matter and  
23 issued a report, and, on April 19, 2004, the Supreme Court reinstated  
24 Respondent to active status, subject to terms of probation.  
25



1 expressed her concern for immediate financial support for herself and Child, as  
2 she had no income. In addition, she discussed the need for continued insurance  
3 coverage for Child.  
4

5 9. On April 8, 1998, opposing counsel in the dissolution matter  
6 informed Respondent that Mr. Dukepoo intended to resign as Child's co-  
7 guardian.  
8

9 10. On April 14, 1998, Respondent received a Notice of Resignation  
10 of Co-Guardian from opposing counsel.

11 11. Also on April 14, 1998, Respondent received both state and federal  
12 income tax returns from opposing counsel in the dissolution matter.  
13 Respondent was to present those returns to Ms. Dukepoo for signature and then  
14 return them to opposing counsel. Ms. Dukepoo instructed Respondent to hold  
15 the returns until she could meet with her in Arizona.  
16

17 12. By order dated April 30, 1998, the Jackson County (Oregon)  
18 Circuit Court allowed Mr. Dukepoo to resign as Child's co-guardian.  
19 Respondent did not represent Ms. Dukepoo in the parallel Oregon proceeding,  
20 but she received a copy of the Circuit Court order on May 12, 1998. No similar  
21 order was entered in Arizona.  
22

23 13. In Respondent's May 15, 1998, billing statement, an entry for April  
24 16, 1998, reflected a \$125.00 charge for, in part, the preparation and filing of  
25

1 documents to challenge the Notice of Resignation as Co-Guardian filed by Mr.  
2 Dukepoo. However, no such documents were filed on Ms. Dukepoo's behalf  
3 with the Oregon court. Respondent contends she believed her secretary had  
4 filed the documents.  
5

6 14. Respondent met Ms. Dukepoo for the first time on June 5, 1998.  
7 On that date, Respondent presented the state and federal tax returns to Ms.  
8 Dukepoo for signature.  
9

10 15. Although opposing counsel had been requesting return of the signed  
11 tax returns, it was not until on or about July 1, 1998, that Respondent forwarded  
12 the signed tax returns to opposing counsel. Respondent was in trial in June 1998,  
13 a fact that both opposing counsel and Ms. Dukepoo were aware.  
14

15 16. Ms. Dukepoo became dissatisfied with the services rendered by  
16 Respondent and terminated the attorney/client relationship.  
17

18 17. At the time the attorney/client relationship was severed, Respondent  
19 had not filed a motion for temporary support in the dissolution matter.  
20

21 18. Upon information and belief, Ms. Dukepoo was unable to obtain  
22 payment of support for the period of time between separation from Mr. Dukepoo  
23 in December 1997 and the date of trial in late 1998.  
24  
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1 ultimately responsible for the oversight of her staff and independent  
2 contractors. The negative effect of her general inexperience in business and  
3 the management of a sole practice appears to have been exacerbated by third-  
4 party negligence.  
5

6 COUNT THREE (Prior Sanctions)

7 23. Respondent was previously sanctioned for violations of the Rules  
8 of Professional Conduct. Specifically, in file number 98-0585, Respondent  
9 received an informal reprimand and probation by order filed on June 15, 1999,  
10 for violations of ERs 1.2, 1.3, 1.4 and 8.4(d).  
11

12 COUNT FOUR (File No. 00-0585)

13 24. Respondent represented Richard Ging in a dissolution of marriage  
14 proceeding against Kimberly Ging.  
15

16 25. Respondent engaged in a personal relationship with Mr. Ging, which  
17 relationship began near the end of her attorney/client relationship with Mr. Ging.  
18

19 26. Respondent accompanied Mr. Ging and his children on shopping  
20 excursions and social engagements, including dinners and visitations at Mr.  
21 Ging's residence.  
22

23 27. Respondent, who was living in Flagstaff, Arizona, at the time,  
24 traveled to the Phoenix metropolitan area with Mr. Ging on or about March 21,  
25

1 2000. On that date, Respondent and Mr. Ging registered and stayed overnight  
2 in the same room at a hotel in Scottsdale, Arizona.

3  
4 28. During the State Bar's investigation into the charge addressed in  
5 this count, Respondent denied that she traveled to the Phoenix metropolitan  
6 area with Mr. Ging. Respondent, through counsel, stated in a letter to the State  
7 Bar dated April 28, 2000, that "[Respondent] also, formally denies that she and  
8 Mr. Ging traveled together on an overnight trip to Phoenix on March 21, 2000,  
9 or any other date."

10  
11 29. Following receipt of Respondent's April 28, 2000, letter, the State  
12 Bar presented Respondent with a copy of a private investigator's report that  
13 stated that Respondent and Mr. Ging were followed to the Phoenix  
14 metropolitan area by the private investigator.

15  
16 30. Only after being presented with the private investigator's report  
17 did Respondent admit that her prior statement to the State Bar regarding the  
18 trip to the Phoenix area was a false statement.

19  
20 31. On an unknown date prior to Memorial Day weekend, 2000, the  
21 Gings made a decision to meet and discuss possible settlement of their  
22 dissolution. The Gings reached a settlement agreement without the assistance  
23 of counsel and, on May 28, 2000, the Gings reduced their settlement to writing  
24 and signed it.  
25

1           32. On or about May 30, 2000, the Gings asked Respondent to  
2 represent them both in finalizing the dissolution proceeding.

3           33. Respondent agreed to represent both of the Gings in finalizing their  
4 dissolution, and prepared a representation agreement regarding the dual  
5 representation.  
6

7           34. Respondent consulted and advised both of the Gings concerning  
8 factors to consider and the impact of their decisions. Respondent subsequently  
9 moved the court to accept the confidential settlement agreement prepared by  
10 Respondent to reflect the parties' independently negotiated agreement.  
11 Respondent appeared in court on behalf of both of the Gings regarding  
12 completion of the dissolution proceeding.  
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15           35. Prior to representing both the Gings, Respondent failed to discuss  
16 with Ms. Ging the professional and personal relationship she had with Mr.  
17 Ging, or the conflict of interest her relationship created.  
18

19           36. This matter was brought to the State Bar's attention by the attorney  
20 who had previously represented Ms. Ging before Ms. Ging withdrew from that  
21 representation. Ms. Ging later became aware of the relationship between  
22 Respondent and Mr. Ging, but apparently neither she nor Mr. Ging considered  
23 there was a conflict of interest, because neither filed a State Bar charge or  
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1 expressed agreement with the conflict of interest alleged by Ms. Ging's former  
2 counsel.

3  
4 COUNT FIVE (File No. 00-1328)

5 37. On November 26, 1999, Respondent entered the Wal-Mart store  
6 located in Flagstaff, Arizona. She left the store with various items, including  
7 film, CDs, a camera and other items totaling approximately \$191.95. She  
8 concealed and failed to pay for those items before leaving the store, although  
9 she had a sufficient amount of cash in her possession at the time to pay for  
10 them.  
11

12 38. A Flagstaff police officer issued a criminal citation to Respondent,  
13 alleging violation of A.R.S. §13-1805, shoplifting. (*See* Exh. "A" to the  
14 Tender).  
15

16 39. On January 20, 2000, Respondent signed a plea agreement in  
17 which she agreed to plead "no contest" to shoplifting, a class 1 misdemeanor,  
18 in violation of A.R.S. §13-1805(a). (*See* Exh. "B" to the Tender).  
19 Respondent's "no contest" plea was accepted by a Flagstaff Municipal Court  
20 Magistrate Judge on April 5, 2000, in case number CR99-004632. (*See* Exh.  
21 "C" to the Tender). Respondent was ordered to pay a \$165.00 fine, which she  
22 paid on April 5, 2000. (*See* Exh. "D" to the Tender).  
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1           40. On August 21, 2000, the judgment of guilt was set aside and the  
2 accusation dismissed. (See Exh. "E" to the Tender).  
3

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5                                   COUNT SIX (File No. 00-1447)

6           41. Attorney Tony Cullum represented Tess Tessler and Ken Carter in a  
7 matter involving their homeowners' association.

8           42. As of September 30, 1996, Mr. Cullum, Ms. Tessler and Mr.  
9 Carter agreed that Mr. Cullum was owed \$4,166.66, which sum represented  
10 one-third of the offer that had been made by the homeowners' association to  
11 settle the matter.  
12

13           43. On or about September 30, 1996, Ms. Tessler and Mr. Carter  
14 (hereafter "Clients") retained Respondent on a 50% contingency fee basis to  
15 represent them in their dispute with their homeowners' association.  
16 Respondent agreed that if she were successful in the lawsuit, she would  
17 compensate Mr. Cullum from the funds she received as fees in the matter.  
18

19           44. After a successful trial on June 13, 1998, the court entered a  
20 judgment against the homeowners' association and in favor of Clients for  
21 \$50,000.00 and costs. The homeowners' association indicated that it intended  
22 to appeal. The matter ultimately settled for \$40,000.00.  
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1           45. By letter dated June 29, 1998, Mr. Cullum requested that  
2 Respondent forward funds from the settlement to compensate him for his  
3 representation.  
4

5           46. Respondent distributed \$20,000.00 of the settlement funds to  
6 Clients in mid August 1998, but did not forward funds to which Mr. Cullum  
7 claimed an interest. Believing the funds in which Mr. Cullum claimed an  
8 interest were her earned fees, she distributed said funds to herself.  
9

10           47. By letter dated March 13, 2000, Mr. Cullum once again wrote to  
11 Respondent to request that she forward the funds he claimed were due him.

12           48. In response to Mr. Cullum's March 13, 2000, letter, Respondent  
13 wrote to Mr. Cullum on March 28, 2000, and stated, among other things, "You  
14 and I have been friends for a long time, but the recovery was de minimis given  
15 the status of the matter which I inherited from you. Why don't you attempt  
16 recovery from Carter/Tessler, rather than from me?"  
17

18           49. Respondent failed to forward funds to Mr. Cullum at that time.  
19

20           50. Clients filed a charge with the State Bar on July 17, 2000. The  
21 State Bar forwarded the charge to Respondent by letter dated July 20, 2000.  
22

23           51. After receiving the charge, Respondent forwarded \$4,166.66 to  
24 Mr. Cullum, which represented his claimed attorney's fees.  
25



1 Rule 43, Ariz. R. S. Ct. 2 violations (Counts Two and Six)

2 Rule 44, Ariz. R. S. Ct. 2 violations (Counts Two and Six)

3 TOTAL VIOLATIONS: 14

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5 An alleged violation of ER 8.4(c) in Count One is being dismissed  
6 because the State Bar has concluded that it cannot prove by clear and  
7 convincing evidence that Respondent knowingly made a false statement to Ms.  
8 Dukepoo when she informed Ms. Dukepoo that she would file the necessary  
9 documents to challenge the resignation of Mr. Dukepoo as one of Child's co-  
10 guardians. As part of this consent agreement, the parties have agreed that the  
11 alleged violation of ER 8.4(c) in Count Four, which was based upon a  
12 misrepresentation to the State Bar, will be dismissed because Respondent is  
13 admitting to a violation of ER 8.1, which also prohibits making a  
14 misrepresentation to the State Bar. The alleged violation of Rule 51(a) in  
15 Count Five is being dismissed because Respondent is admitting to a violation  
16 of ER 8.4(b). The alleged violations of ER 1.4, ER 1.7, ER 1.16(d) and ER  
17 8.4(a) and (c) in Count Six are being dismissed because the State Bar has  
18 concluded that it is unable to prove those allegations by clear and convincing  
19 evidence.  
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24 As noted above, Count Three in the Amended Complaint alleged prior  
25 discipline, and duplicated Count Two in the original two-count Complaint.

1 ABA STANDARDS

2 The ABA *Standards for Imposing Lawyer Sanctions* (hereafter  
3 “*Standards*”) provide guidance with respect to an appropriate sanction in this  
4 matter. The Supreme Court and the Disciplinary Commission are consistent in  
5 utilizing the *Standards* to determine appropriate sanctions for attorney discipline.  
6 *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). When determining an  
7 appropriate sanction following a finding of misconduct, consideration is given to  
8 the duty violated, the lawyer’s mental state, the actual or potential injury caused  
9 by the misconduct, and the existence of aggravating and mitigating factors. *See*  
10 *Standard 3.0; In re Mulhall*, 170 Ariz. 152, 822 P.2d 947 (1992). The purpose of  
11 attorney discipline is not to punish Respondent but to protect the public, deter  
12 similar conduct by other lawyers, and preserve the bar’s integrity. *In re Levine*,  
13 174 Ariz. 146, 170, 847 P.2d 1093, 1117 (1993).

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17 In cases involving multiple counts, a sanction should be determined for  
18 the most serious count, and the other counts should be considered in  
19 aggravation. *In re Cassalia*, 173 Ariz. 373, 843 P.2d 654 (1992). In this case,  
20 Counts Four and Six are the most serious counts: Count Four because it  
21 involves a conflict of interest created by an inappropriate relationship with a  
22 client, lack of full disclosure of the conflict to another client (the client’s spouse  
23 in a divorce proceeding in which Respondent eventually represented both  
24  
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1 spouses), and a false statement to the State Bar during the course of its  
2 investigation, and Count Six because it involves failure to segregate and protect  
3 third-party funds.  
4

5 Absent aggravating or mitigating circumstances, “[s]uspension is  
6 generally appropriate when a lawyer knows of a conflict of interest and does not  
7 fully disclose to a client the possible effect of that conflict, and causes injury or  
8 potential injury to a client.” *Standard* 4.32. Censure is “generally appropriate  
9 when a lawyer is negligent in determining whether the representation of a client  
10 may be materially affected by the lawyer’s own interests, or whether the  
11 representation will adversely affect another client, and causes injury or potential  
12 injury to a client.” *Standard* 4.33. An informal reprimand is appropriate “when  
13 a lawyer engages in an isolated instance of negligence in determining whether  
14 the representation of a client may be materially affected by the lawyer’s own  
15 interests, or whether the representation will adversely affect another client, and  
16 causes little or no actual or potential injury to a client.” *Standard* 4.34.  
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19

20 Respondent knew or should have known that her relationship with Mr.  
21 Ging created a conflict of interest. Respondent contends Mr. Ging effectively  
22 consented to the conflict and, even if he did not consent, he was not harmed  
23 because he later independently negotiated a divorce settlement with his ex-  
24 spouse and trusted Respondent to document the agreement and present it to the  
25

1 court for approval. The State Bar contends that this conflict of interest, alone,  
2 warrants a censure because Respondent negligently failed to identify the  
3 conflict of interest and failed to consult with Mr. Ging regarding the conflict  
4 before concluding that Mr. Ging consented to the conflict. *See In re Walker*,  
5 200 Ariz. 155, 24 P.3d 602 (2001) (imposing a censure for a negligent belief  
6 that a client consented to a personal relationship). Based on the fact that Mr.  
7 Ging has claimed neither lack of consent nor prejudice, nor even joined in the  
8 State Bar charge, Respondent believes an informal reprimand is within the  
9 range of reasonable sanctions for the conflict of interest regarding Mr. Ging.  
10  
11

12 Respondent also failed to disclose the relationship to Ms. Ging when Mr.  
13 Ging and Ms. Ging asked her to represent both of them for the limited purpose  
14 of documenting and presenting to the court the divorce agreement that they had  
15 negotiated independently. Because of Respondent's limited involvement in the  
16 divorce agreement, the risk of prejudice to Ms. Ging was minimal.  
17 Nevertheless, Respondent had a duty to fully inform Ms. Ging and let her make  
18 her own decision whether to accept joint representation under the  
19 circumstances.  
20  
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22 This count was not reported to the Bar by the Gings, despite both  
23 individuals' eventual knowledge of the facts. The Gings never joined in the  
24 charge, nor expressed a belief that their interests were prejudiced. The matter  
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1 was reported by the lawyer who formerly represented Ms. Ging. Respondent  
2 believes these facts demonstrate lack of prejudice. The State Bar gives them  
3 minimal, if any, weight. The parties agree, however, that the facts related to  
4 Count Four (before considering the misstatement to the State Bar) merit an  
5 informal reprimand or censure.  
6

7       Regarding Respondent’s misrepresentation to the State Bar, “[d]isbarment  
8 is generally appropriate when a lawyer knowingly engages in conduct that is a  
9 violation of a duty owed as a professional with the intent to obtain a benefit for  
10 the lawyer or another, and causes serious or potentially serious injury to a  
11 client, the public, or the legal system.” *Standard 7.1*. “Suspension is generally  
12 appropriate when a lawyer knowingly engages in conduct that is a violation of a  
13 duty owed as a professional, and causes injury or potential injury to a client, the  
14 public, or the legal system.” *Standard 7.2*.  
15  
16

17       The parties agree that Respondent’s misstatement to the State Bar was a  
18 serious offense. The parties also agree, however, that Respondent’s conduct  
19 was made at a time of extreme personal distress and was in all respects a  
20 complete departure from her cooperative and forthcoming demeanor prior to  
21 that event. Count Four was reported to the State Bar after the initial formal  
22 complaint had been filed and was being prosecuted. Certainly it is no excuse  
23 that Respondent was in the throes of an active bar complaint at the time of her  
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1 misstatement, but the parties believe her conduct was reactive and emotional in  
2 nature. In the current proceeding and in the separate reinstatement proceeding,  
3 Respondent has admitted to, and apologized for, this behavior. The State Bar  
4 believes the misrepresentation merits a six-month retroactive presumptive  
5 sanction. Because it occurred during a period of Respondent's life that is  
6 directly related to her transfer to disability inactive status, Respondent believes  
7 a lesser sanction is reasonable. Moreover, if this case were to go to hearing,  
8 Respondent would argue that *Standards* 7.1 and 7.2 should not apply to this  
9 count, because the *Standards* contain an aggravating factor that directly  
10 addresses lack of candor in the disciplinary process (*Standard* 9.22(f)). She  
11 takes the position that if lack of candor in the disciplinary process is an  
12 aggravating factor, it must not have been intended to be treated as primary  
13 misconduct under *Standards* 7.1 and 7.2, or else a respondent could be  
14 penalized twice for the same offense.  
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19 Although none of the *Standards* directly addresses misuse of third-party  
20 funds, the *Standards* applicable to client funds provide a useful analysis.  
21 "Suspension is generally appropriate when a lawyer knows or should know that  
22 [s]he is dealing improperly with client property and causes injury or potential  
23 injury to a client." *Standard* 4.12. When a lawyer is "negligent in dealing with  
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1 client property and causes injury or potential injury to a client,” a censure is  
2 generally appropriate. *Standard* 4.13.

3 Respondent failed to retain in her trust account funds to which a third-  
4 party claimed an interest. When Respondent’s failure to pay Mr. Cullum was  
5 brought to her attention by the State Bar, she promptly paid him the funds he  
6 was due. The State Bar believes a three-month suspension is appropriate for  
7 this violation.  
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10 In general, after living with the weight of these proceedings since 1998,  
11 and with the effect of them continuing still, Respondent is prepared to agree  
12 with the State Bar that a six-month retroactive suspension could be within the  
13 “range of reasonableness” for all counts. *See Matter of Mohling*, SB-01-0074-  
14 D (2001). Respondent elects to accept a sanction that arguably is harsher than a  
15 proportionality analysis would require, in order to end this continuing drain on  
16 her well-being. If this case were to go to a hearing, however, Respondent  
17 would argue that insufficient weight has been given her mitigation evidence  
18 (discussed below), and that suspension ultimately is too harsh a penalty under  
19 the totality of facts and circumstances involved in this case.  
20  
21

### 22 **AGGRAVATING AND MITIGATING FACTORS**

23  
24 This Hearing Officer then considered aggravating and mitigating factors  
25 in this case. This Hearing Officer agrees with the parties that five aggravating

1 factors apply and should be considered in this matter: *Standard 9.22(a)* prior  
2 disciplinary offenses - In File No. 98-0585, Respondent received an informal  
3 reprimand and probation by order filed on June 15, 1999, for violations of ERs  
4 1.2, 1.3, 1.4 and 8.4(d); *Standard 9.22(c)* a pattern of misconduct - Respondent  
5 previously received an informal reprimand for violations of ERs 1.2, 1.3, 1.4 and  
6 8.4(d). In this case, Respondent once again violated ERs 1.2, 1.3 and 1.4;  
7 *Standard 9.22(d)* multiple offenses; *Standard 9.22(f)* submission of false  
8 evidence, false statements, or other deceptive practices during the disciplinary  
9 process; and *Standard 9.22(i)* substantial experience in the practice of law.  
10  
11

12 This Hearing Officer agrees with the parties that seven factors are present  
13 in mitigation: *Standard 9.32(c)* personal or emotional problems - As evidenced  
14 in the disability action, Respondent's life at the time of misconduct was filled  
15 with tremendous challenges, ranging from divorce and bankruptcy, to personal  
16 health, to her daughter's health, and the challenge of trying to run a sole  
17 practitioner's office in a new state and new city, in a new area of substantive  
18 law, and with all of the personal issues described above. Respondent simply  
19 succumbed to the stress; *Standard 9.32(d)* timely good faith effort to make  
20 restitution or to rectify consequences of misconduct - Following her transfer to  
21 disability inactive status, Respondent worked diligently to remove the causes of  
22 her disability. Her efforts in this regard are on-going; *Standard 9.32(e)* full and  
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1 free disclosure to disciplinary board or cooperative attitude toward proceedings -  
2 at least to the extent that she cooperated with bar counsel in resolving this matter  
3 by consent agreement, and with respect to her responses during the Bar's  
4 investigation into allegations addressed by Counts One, Two, Five and Six;  
5 *Standard 9.32(g)* character or reputation – Attached as Exhibit “A” to the Joint  
6 Memo are letters from individuals attesting to Respondent’s good character and  
7 reputation. The sealed record of the disability and reinstatement proceedings  
8 contains professional testimony (including independent testimony) as to  
9 Respondent’s good character; *Standard 9.32(j)* delay in disciplinary proceedings  
10 - Although the discipline proceedings were held in abeyance pursuant to former  
11 Rule 59(b)(2), Ariz. R. S. Ct., the misconduct occurred between four and six  
12 years ago; *Standard 9.32(l)* remorse - Respondent’s sealed testimony in the  
13 reinstatement hearing demonstrates her remorse. Respondent’s personal efforts  
14 to overcome her disability also evidence remorse insofar as they reflect her  
15 determination to re-direct her professional life so she does not repeat past  
16 mistakes; and *Standard 9.32(m)* remoteness of prior offenses - Respondent  
17 received an informal reprimand and probation for a one-count complaint by order  
18 filed on June 15, 1999, for violations of ER 1.2, ER 1.3, ER 1.4 and ER 8.4(d),  
19 Ariz. R. S. Ct., which occurred in regard to a single representation between 1995  
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1 and 1998. Respondent was released from probation on July 18, 2000. (See Exh.  
2 “B” to Joint Memo).

### 3 NON – ABA MITIGATION

4  
5 Respondent’s disability is not *per se* mitigation. Her personal efforts to  
6 overcome her disability, however, should be considered in mitigation. The  
7 events of misconduct occurred during a period of intense stress in Respondent’s  
8 life. She has addressed those issues in a diligent, responsible, dedicated, and  
9 successful manner. The sealed record of Respondent’s reinstatement  
10 proceeding is replete with evidence of her efforts. Respondent’s commitment to  
11 continue to re-align her professional life through the two-year probation period  
12 is further evidence of the positive mental attitude that now characterizes her  
13 life.  
14  
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### 16 PROPORTIONALITY REVIEW

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18 In cases involving multiple counts, a sanction should be determined for  
19 the most serious count(s), and the other counts should be considered in  
20 aggravation. In this case, the most serious counts are Count Four, which  
21 alleged a conflict of interest and a misrepresentation to the State Bar, and Count  
22 Six, which alleged a failure to segregate and protect third-party funds.  
23

24 Regarding Respondent’s conflict of interest with a client, the parties refer  
25 the hearing officer to the synopsis of *In re Walker* on page 5, *supra*.

1           Regarding misrepresentations to the State Bar, *In re Fresquez*, *In re*  
2 *Fioramonti*, *In re Johnson* and *In re Vargas* are relevant cases. In *In re*  
3 *Fresquez*, 162 Ariz. 328, 783 P.2d 774 (1989), attorney Fresquez submitted to  
4 the State Bar a backdated letter from a client that purportedly absolved him of  
5 responsibility for any wrongdoing. However, at the hearing, evidence was  
6 presented that the client could not have signed the letter when the letter was  
7 dated because he was not in Arizona on that date. In addition, Fresquez  
8 submitted a false affidavit from his secretary regarding the late filing of his  
9 answer to the Bar Complaint. Due to the pattern of fraud and the lack of  
10 significant mitigating evidence, Fresquez was disbarred.

11           In *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), attorney  
12 Fioramonti lied to the bar during its investigation into the charges of  
13 misconduct and during formal proceedings. He initially stated that he made  
14 notes in his file at the time he met with the client in 1985, and then later, after  
15 two other attorneys refused to sign false affidavits about when the notes were  
16 made, changed his story to claim he made the notes in 1989. Fioramonti had  
17 his client sign a false affidavit, but it was not used at the hearing. The court  
18 determined that the presumptive sanction was disbarment. However, the court  
19 found significant mitigation in the fact that Fioramonti had no prior disciplinary  
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1 history and had a good reputation in the community. Fioramonti was suspended  
2 for three years.

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4 In this case, Respondent's false statement to the State Bar occurred during  
5 the course of an on-going and growing bar investigation. Respondent was  
6 already suffering symptoms of excessive stress. Her misstatement to the State  
7 Bar, like her shoplifting incident when she had enough cash in her possession to  
8 pay for the goods, is an example of self-destructive behavior. Respondent's  
9 actions were generally irrational at the time. The context of her conduct,  
10 therefore, is worthy of mitigation.

11  
12 The Disciplinary Commission recently issued its report in *In re Johnson*,  
13 File No. 03-0346 (Commission report dated March 30, 2004), in which it  
14 recommended that attorney Johnson be suspended for 6-months and 1-day for  
15 violating ER 8.1(a). Johnson submitted a fabricated letter to the State Bar in  
16 support of his statement that he adequately communicated with his client.  
17 Johnson admitted the deception when he was confronted by bar counsel with  
18 information that indicated that the letter he submitted had not been sent to his  
19 client, as he claimed. Johnson's prior discipline included an informal  
20 reprimand and suspension for 6-months and 1-day. In aggravation, Johnson had  
21 a significant prior discipline history, engaged in dishonest conduct, and had  
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1 substantial experience in the practice of law. In mitigation, Johnson was  
2 candid, after being confronted, and expressed remorse.

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4 In the instant case, Respondent falsely informed the State Bar, through  
5 counsel, that she never traveled to Phoenix for an overnight trip with Mr. Ging.  
6 Respondent, unlike Johnson, never created a false document to support her false  
7 statement. The additional thought process and planning involved in the creation  
8 of a false document makes such an act more serious than a single  
9 misrepresentation. Cases involving the creation of a false document should be  
10 dealt with more harshly and may require proof of rehabilitation. In this case,  
11 proof of rehabilitation in a reinstatement proceeding is not necessary.  
12 Respondent recently proved rehabilitation at a hearing and was subsequently  
13 reinstated. Furthermore, Respondent has provided mitigation evidence that was  
14 not present in *Johnson*.

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17 The Disciplinary Commission has concluded that substantial and  
18 pervasive deception, generally involving on-going misrepresentations, may  
19 warrant a multiple-year suspension. *In re Vargas*, SB-97-0021-D (1997) (one  
20 year suspension for multiple ethical violations, including false statements to the  
21 State Bar during its investigation, creation of a false memo and persuading an  
22 administrative assistant to prepare and backdate a memo). Respondent herein  
23 made a false statement to bar counsel, but corrected that statement (when  
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1 confronted) prior to a disciplinary hearing. Respondent did not make multiple  
2 representations.

3 A review of the following trust account cases is helpful in determining an  
4 appropriate sanction in the instant case: *Matter of Randall*, *Matter of Van*  
5 *Baalen*, *In re Galbasini*, and *In re Buffenstein*.

7 In *Matter of Randall*, SB-02-146-D (Comm. No. 00-1861) (2002), the  
8 attorney was censured for negligent mishandling of his trust account. *See also*  
9 *Matter of Castro*, 164 Ariz. 428, 793 P.2d 1095 (1990) (censure); *Matter of*  
10 *Goff*, SB-01-0152-D (2001) (censure).

12 Similarly in *Matter of Van Baalen*, SB-01-0160-D (Comm. No. 99-1406)  
13 (2001), respondent was censured for inadvertent and negligent mismanagement  
14 of his trust account.

16 In this case, Respondent has admitted that she was incapable under the  
17 circumstances of managing a sole practice, including her trust account. There is  
18 no evidence of intentional misconduct regarding the handling of her trust  
19 account. In *Matter of Randall*, above, the commission gave weight in  
20 mitigation to the fact that Randall recognized his inability to manage a sole  
21 practice and closed his practice to become employed by a firm where he would  
22 have no direct responsibility for the trust account. This case is very similar.  
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1 Respondent has agreed, as part of her probation, not to engage in the sole  
2 practice of law.

3  
4 In *In re Galbasini*, SB-01-0163-D (2001), attorney Galbasini received a  
5 30-day suspension for depositing earned fees into his trust account and failing  
6 to withdraw them in a timely manner, failing to record all transactions promptly  
7 and completely, and failing to maintain the records required by the Trust  
8 Account Guidelines.  
9

10 In *In re Buffenstein*, SB-01-0171-D (2002), attorney Buffenstein was  
11 suspended for 30 days for failing to keep individual client ledgers and duplicate  
12 deposit slips, failing to keep personal and client funds separate, and failing to  
13 place adequate or complete information on his checks and in his check register.  
14

15 The presumptive sanction based upon Counts Four and Six is suspension.  
16 The following discussion addresses proportionality of Counts One, Two and  
17 Five, which should be considered as aggravation of the presumptive sanction  
18 for Counts Four and Six.  
19

20 Based on the trust account cases discussed above, the parties agree  
21 that Count Two should be given little, if any, weight as an aggravating factor  
22 because Respondent's trust account practices were addressed in reaching the  
23 presumptive sanction for the most serious misconduct and will be addressed  
24 through the terms of probation. Regarding Count One, the parties consider the  
25



1           Upon consideration of the facts, application of the *Standards*, including  
2 aggravating and mitigating factors, and a proportionally analysis, this Hearing  
3 Officer recommends acceptance of the Tender of Admissions and Agreement for  
4 Discipline by Consent and the Joint Memorandum in Support of Agreement for  
5 Discipline by Consent providing for the following:

7           1. Respondent shall be suspended for six months, retroactive to March 23,  
8 2001, the date that Respondent was placed on disability inactive status.<sup>4</sup>

10           2. Respondent shall be on probation for a period of two (2) years, retroactive  
11 to April 19, 2004, the date the Supreme Court reinstated Respondent to active  
12 status. The terms of probation will be the same as those imposed in the Supreme  
13 Court's April 19, 2004, Order of Reinstatement.<sup>5</sup> Respondent will pay all costs and  
14 expenses associated with the terms of probation. Because the terms of probation  
15 will be the same as those imposed in the court's Order of Reinstatement, the  
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19           <sup>4</sup> In the usual case, Respondent would be required to comply with the reinstatement requirements of  
20 Rules 64 and 72, Ariz.R.S.Ct. In this case, however, there is no reason to require Respondent to comply with  
21 Rules 64 and 72. The court reinstated her to active status on April 19, 2004, and the retroactive period of  
22 suspension is subsumed into the period of time she was on disability inactive status. Requiring Respondent to  
comply with Rules 64 and 72 would add nothing to protect the public. Compliance with the provisions of Rule  
64 is unnecessary because Respondent recently proved rehabilitation in her reinstatement proceeding.  
Compliance with the notice provisions of Rule 72 is unnecessary because Respondent will not be disqualified  
from continuing to represent any clients she may have obtained since she was reinstated on April 19, 2004.

23           <sup>5</sup> Although Rule 63(g), Ariz. R. S. Ct., states that “[p]roceedings and records relating to transfer to or from  
24 disability inactive status are confidential, except . . . orders transferring a lawyer to or from disability inactive  
25 status,” Respondent hereby grants a limited waiver of confidentiality of the record of the disability and  
reinstatement proceedings, including but not limited to the terms of probation (collectively, the “Disability  
Record”), to the limited extent that the Disability Record shall be available only to Respondent, Respondent’s  
Counsel, Bar Counsel, the Hearing Officer in this matter, and the Disciplinary Commission (the “Released  
Parties”), provided that the Released Parties’ access to the Disability Record shall be expressly limited to  
proceedings related thereto and to this matter, and as otherwise permitted by Rule 70, Ariz. R. S. Ct.

1 probationary terms will be not become a part of any public record, unless a Notice  
2 of Non-Compliance with the Terms of Probation is filed by the State Bar. In the  
3 event such a notice is filed, Respondent retains the right to file a motion to seal that  
4 portion of the record.  
5

6 3. Restitution is not appropriate in this case. Regarding Count One, Ms.  
7 Dukepoo paid a \$500.00 advance retainer, against which Respondent was to bill  
8 services at \$100.00 per hour. Respondent engaged in an exchange of  
9 correspondence with her client and opposing counsel regarding background  
10 information and settlement. Respondent no longer has complete billing records  
11 regarding the Dukepoo matter (or any file from her Flagstaff office), yet it  
12 appears from the documents produced by Respondent during the course of the  
13 State Bar's investigation that she earned the \$500.00 fee she received. (See Exh.  
14 "F", letter dated December 15, 2000, to the State Bar from the opposing counsel  
15 in the Dukepoo matter.) Restitution is not an issue in Count Two because the  
16 misconduct in that count was based on a trust account overdraft that has been  
17 corrected. Count Three merely set forth prior sanctions imposed upon  
18 Respondent. Restitution is not appropriate in Count Four because Respondent  
19 performed the services requested by the clients. Restitution is not an issue in  
20 Count Five because Wal-Mart recovered the items that Respondent had taken.  
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1 Regarding Count Six, Respondent paid the funds owed to Mr. Cullum shortly  
2 after July 20, 2000.

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4 4. In the event that Respondent fails to comply with any of the foregoing  
5 conditions, and the State Bar receives information, bar counsel shall file with the  
6 Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S.  
7 Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of  
8 said notice, to determine whether the terms of probation have been violated and if  
9 an additional sanction should be imposed. In the event there is an allegation that  
10 any of these terms have been violated, the burden of proof shall be on the State  
11 Bar of Arizona to prove non-compliance by clear and convincing evidence.  
12

13  
14 5. Respondent shall pay all costs and expenses incurred in these  
15 proceedings.

16 DATED this \_\_\_\_ day of \_\_\_\_\_, 2004.

17  
18  
19 \_\_\_\_\_  
20 Michael L. Rubin  
21 Hearing Officer 7K

22 Original filed with the Disciplinary Clerk  
23 this \_\_\_\_ day of \_\_\_\_\_, 2004.

24 Copy of the foregoing was mailed  
25 this \_\_\_\_ day of \_\_\_\_\_, 2004, to:

1 J. Scott Rhodes  
2 Respondent's Counsel  
3 *Jennings, Strouss & Salmon, P.L.C.*  
4 Two North Central Avenue, 16<sup>th</sup> Floor  
Phoenix, AZ 85004-2393

5 James D. Lee  
6 Senior Bar Counsel  
7 State Bar of Arizona  
8 111 West Monroe, Suite 1800  
9 Phoenix, AZ 85003-1742

by: \_\_\_\_\_

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