

**FILED**

JUN 06 2005

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

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

IN THE MATTER OF A MEMBER	)	Nos. 03-0513, 03-0808
OF THE STATE BAR OF ARIZONA,	)	
	)	
<b>GREG R. DAVIS,</b>	)	
<b>Bar No. 014387</b>	)	
	)	<b>HEARING OFFICER'S REPORT</b>
<b>RESPONDENT.</b>	)	

**PROCEDURAL HISTORY**

The State Bar filed a Complaint on November 23, 2004. Respondent filed an Answer on January 3, 2005. A hearing was scheduled for March 25, 2005. The Settlement Officer conducted a settlement conference on March 3, 2005. The parties reached a tentative agreement and the matter was referred to this Hearing Officer for further proceedings. The hearing was continued and rescheduled for April 15, 2005. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on April 14, 2005. A hearing on the Tender and Joint Memo was held on April 15, 2005.

1 **FINDINGS OF FACT**

2 1. At all times relevant, Respondent was an attorney licensed to practice law  
3 in the State of Arizona, having been admitted to practice in Arizona on October 24,  
4 1992.  
5

6 **COUNT ONE (File No. 03-0513-Umlauf/Trust Account)**

7 2. Respondent represented Mr. Umlauf in settling a personal injury motor  
8 vehicle claim. On or about April 27, 2000, Respondent disbursed Mr. Umlauf's  
9 initial share of settlement proceeds to him and provided an accounting of the  
10 settlement. At that time Respondent indicated to Mr. Umlauf that Respondent was  
11 keeping \$2,566.39 of the settlement proceeds for use as needed to pay outstanding  
12 related medical bills and liens.  
13  
14

15 3. However, in December 2002, while reviewing his credit reports, Mr.  
16 Umlauf discovered \$2,556.39 in unpaid medical liens related to his accident that  
17 were affecting his credit rating.  
18

19 4. For several months, Mr. Umlauf unsuccessfully attempted to contact  
20 Respondent, to resolve the issue of the unpaid liens and finally by letter dated  
21 March 10, 2003 Mr. Umlauf filed charges against Respondent with the State Bar.  
22

23 5. Respondent explained that the payments to the lien holders had been  
24 made, although some had been paid to third parties/assignees such as collection  
25 agencies.

1 6. In his response letter Respondent also stated

2 *It appears Mr. Umlauf has been caught in the midst of a dispute*  
3 *or miscommunication between his providers and their*  
4 *collectors or assignees. Some time ago, I was bombarded with*  
5 *numerous communications from one particular collection*  
6 *agency, insisting that a particular bill be paid, though it had*  
*previously been paid in connection with a healthcare lien, if*  
*memory serves, asserted by the Teamsters Union.*

7 7. Bar Counsel requested that Respondent provide records reflecting activity  
8 in Respondent's client trust account relative to Respondent's representation of Mr.  
9 Umlauf, including receipts, cancelled checks and monthly bank statements,  
10 demonstrating payments to the lien holders.  
11

12 8. On December 23, 2003 Respondent provided receipts relevant to Mr.  
13 Umlauf's settlement showing that a payment was made to a collection agency on  
14 October 13, 2003, almost 30 months after Respondent initially indicated to Mr.  
15 Umlauf that he would see to the payment of outstanding medical bills and liens)  
16

17 9. A second invoice provided by Respondent to the State Bar showed that, as  
18 of December 18, 2003, four outstanding payments had been made to another  
19 collections agency, almost 32 months after Respondent initially indicated to Mr.  
20 Umlauf that he would see to the payment of outstanding medical bills and liens.  
21

22 10. When an explanation was requested by the State Bar, by letter dated  
23 January 28, 2004, Respondent explained that the lien had not been paid until  
24 October 13, 2003 because he believed that the Teamsters Union had paid it on  
25

1 behalf of Mr. Umlauf and that Respondent had repaid the Teamsters Union from the  
2 Trust Account.

3  
4 11.Pursuant to Respondent's documentations, between April 27, 2000 and  
5 October 18, 2003 the balance of Mr. Umlauf's funds on deposit in Respondent's  
6 trust account should have been \$2,566.39. In fact, between August 11, 2003 and  
7 September 24, 2003, Respondent issued 14 separate checks that drew the total trust  
8 account balance below \$2,566.39 thus converting the balance of Mr. Umlauf's  
9 settlement funds.  
10

11 12.In addition, the examination of Respondent's client Trust Account records  
12 revealed that, at times over the course of the three years between April 2000 and  
13 October 2003, eight other separate clients' sub-accounts showed a negative balance,  
14 indicating that such clients' funds were misappropriated to cover the disbursements.  
15

16 13.On September 8, 2003 Respondent overdrew his client Trust Account  
17 when a disbursement attempted to pay against the account while a hold was placed  
18 on a deposit.  
19

20 14.On October 15, 2001 Respondent deposited \$17,600 into his client Trust  
21 Account and recorded it in a sub account ledger titled "personal funds" an amount  
22 clearly in excess of a "reasonable" amount for bank charges.  
23

24 COUNT TWO (File No. 03-0808- McDonnell)  
25

1           15. In November 1999, Respondent brought an action in Maricopa County  
2 Superior Court cause No. CV99-019778 for slander on behalf of Alexine W.  
3 McDonnell against her former husband John C. ("Jack") McDonnell for allegedly  
4 falsely stating that Ms. McDonnell had herpes and had transmitted the disease to  
5 Mr. McDonnell.  
6

7           16. After summary judgments were granted in favor of defendant, Mr.  
8 McDonnell, based on "substantial truth" of the alleged slanderous statements, on  
9 September 4, 2001, the Superior court found that the complaint filed by Respondent  
10 was groundless and brought without substantial justification.  
11

12           17. The Superior court further found that Respondent failed to remedy the  
13 situation which expanded and delayed the proceedings unnecessarily as well as  
14 abusing discovery by filing a motion to set trial while ignoring Mr. McDonnell's  
15 written discovery requests.  
16

17           18. The trial court entered a minute entry judgment making Respondent and  
18 Ms. McDonnell jointly and severally liable for attorney fees of \$10,000 and making  
19 Respondent individually liable for an additional \$5,000 in double damages pursuant  
20 to A.R.S. §12-349. A.R.S. §12-349(f) provides that the court:  
21

22           *... shall assess reasonable attorney fees, expenses and, at the*  
23 *court's discretion, double damages of not to exceed five*  
24 *thousand dollars against an attorney or party . . . if the*  
25 *attorney or party does any of the following: Brings or defends a*  
*claim without substantial justification. Brings or defends a*  
*claim solely or primarily for delay or harassment.*

1            *Unreasonably expands or delays the proceeding. Engages in*  
2            *abuse of discovery. “[W]ithout substantial justification”*  
3            *“means that the claim or defense constitutes harassment, is*  
              *groundless and is not made in good faith.” A.R.S. §12-349(F).*

4            19. The trial court decided Ms. McDonnell and Respondent were subject to  
5 §12-349 sanctions, finding specifically:  
6

7            *[Wife] knew that [Husband]’s allegedly slanderous statements*  
8            *were true or substantially true prior to the filing of the suit. It*  
9            *is equally clear that [Wife]’s counsel knew or should have*  
10           *know[n] about the truth or substantial truth of those statements*  
              *and that a factual basis did not exist for the claim.*

11           20. The trial court also found Ms. McDonnell’s complaint, filed by  
12 Respondent on her behalf, was “groundless and was brought without substantial  
13 justifications;” that Respondent failed to remedy the situation when the truth  
14 became clear, “which expanded and delayed the proceedings unnecessarily,” and  
15 that Respondent had “abused discovery by filing a motion to set trial while ignoring  
16 [Mr. McDonnell’s] written discovery requests.”  
17

18           21. Respondent then appealed the award against him. However, on or about  
19 August 1, 2002, the Arizona Court of Appeals, Division One, in case No. 1 CA-CV  
20 01-0561, affirmed the trial court’s findings that the lawsuit was brought “without  
21 substantial justification” and “expanded and delayed the proceedings unnecessarily”  
22 and upheld the imposition of sanctions on Respondent.  
23

24                            **CONDITIONAL ADMISSIONS & DISMISSED COUNTS**  
25

1 Respondent conditionally admits he failed to properly safeguard client funds;  
2 failed to hold property of clients separate from his own property; failed to exercise  
3 due professional care in the maintenance of his client trust accounts; failed to  
4 properly supervised employees or others assisting him in the performance of his  
5 duties under the trust account guidelines, failed to maintain proper internal controls  
6 within his office to adequately safeguard funds on deposit in the Trust Account;  
7 failed to record all transactions to the Trust Account promptly and completely;  
8 failed to maintain records complying with ER 1.15 and the trust account guidelines,  
9 failed to maintain an account ledger or the equivalent for each person or entity for  
10 whom monies were received in trust and failed to conduct a monthly reconciliation  
11 of his trust account records and bank statement.  
12

13  
14  
15 Respondent's conduct violated Rule 42, Ariz. R. S. Ct., specifically: ER  
16 1.15, Rule 43(d) (which incorporated by reference the State Bar of Arizona Trust  
17 Account Guidelines in effect at the time, including Trust Account Guidelines 1(a),  
18 1(b), 1(c), 1(d), 1(e), 2(d), 2(e)) and Rule 44.  
19

20 The State Bar conditionally admits that Respondent has provided a sufficient  
21 explanation for each of the trust account violations enumerated such that the State  
22 Bar could not prove Respondent's conduct was "intentional" or "knowing" as  
23 contemplated by the ABA's *Standards for Imposing Lawyer Sanctions* ("ABA  
24  
25

1 *Standards*)<sup>1</sup> but was instead “negligent.” Respondent’s detailed explanation of  
2 each violation of the trust account rules is attached to the Tender as Exhibit A.

3  
4 The State Bar conditionally dismisses Count Two. Pursuant to the principle  
5 of collateral estoppel, the State Bar believes would preclude Respondent from  
6 contesting at hearing the findings of fact and conclusions of law of the trial court  
7 and court of appeals regarding the violations of court rules for which Respondent  
8 was sanctioned. However, the State Bar concedes a violation of a court rules does  
9 not automatically result in a finding of an ethical violation. Respondent denies that  
10 collateral estoppel would apply.  
11

12 During discovery in these lawyer discipline proceedings, Respondent came  
13 forward with evidence that was not presented to the trial court in Maricopa Count  
14 Superior Court cause No. CV 99-019778. Such evidence would be admissible at  
15 hearing herein if this matter were to proceed and consists of documentation and  
16 testimony supporting Respondent’s assertions he acted in good faith in continuing  
17 to pursue the litigation.  
18  
19

20 In particular, prior to filing the action in Maricopa Count Superior Court  
21 cause No. CV 99-019778, contrary to the finding by the trial court, Respondent did  
22 not know that the alleged slanderous remarks by the defendant were “true or  
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24 <sup>1</sup> The ABA’s *Standards* definitions are as follows: “Intent” is the conscious objective or purpose to accomplish a  
25 particular result. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct  
but without the conscious objective or purpose to accomplish a particular result. “Negligence” is the failure of a  
lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation  
from the standard of care that a reasonable lawyer would exercise in the situation.



1 substantially true.” Respondent has produced documentation that prior to filing the  
2 lawsuit, Respondent obtained and relied upon a medical report prepared by his  
3 client’s physician substantiating her claim she was not infected with herpes. In fact,  
4 during the course of the litigation Respondent received substantial documentation  
5 supporting the position that his client was not infected with herpes or any other  
6 venereal disease. This position again confirmed by the client’s personal physician  
7 who submitted a report stating that the client did “not suffer from any infections,  
8 gynecological or otherwise” and that “all cultures have been done for her for all  
9 sexually transmitted diseases” and that “all cultures have been negative.” In the  
10 same litigation, Dr John Ritland stated in an affidavit that that the Respondent’s  
11 client had the presence of a virus found in 80% of sexually active women and that  
12 he would not refer to it as a venereal disease. Further, in sworn testimony, the client  
13 repeatedly stated that she did not have herpes and therefore did not transmit herpes  
14 to her husband, as he published.

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19 In fact, during the course of the proceeding, Respondent secured testimony  
20 from the defendant husband’s former wife, from a prior marriage, that she observed,  
21 while married to defendant, that he had lesions on his genitals which appeared  
22 consistent with herpes. The defendant then accused that wife of “giving him  
23 something.” The same claim made by the husband in the underlying action here.  
24  
25

1           Therefore, Respondent had substantial medical and testimonial evidence to  
2 support his client's position that she had not infected her husband with the herpes  
3 virus and that his publication of such allegations were false.  
4

5           During the course of the litigation, further medical tests confirmed that  
6 Respondent's client was infected with the virus that she was acknowledged to have  
7 had and that was common to most sexually active women. The issue was whether  
8 that "virus" was properly categorized as a "sexually transmitted disease." When the  
9 husband in the underlying action filed a motion for summary judgment on the issue,  
10 Respondent discussed the motion and the controversy concerning the classification  
11 of the viral exposure as a sexually transmitted disease. (By definition, the virus in  
12 question, common to sexually active women, is a virus transmitted by sexual  
13 relations.) Despite ample evidence that the client did not have "herpes" and did not  
14 transmit "herpes" to her husband the client decided to end the litigation and not  
15 dispute the fact that she had a "virus" which could be categorized as a STD.  
16 Therefore, the client decided to immediately end the litigation rather than contest  
17 the issue further, despite ample evidence that the "herpes" allegation was not true.  
18 The client instructed the Respondent to end the litigation by admitting, that she may  
19 have a "STD" but did not have "herpes" which was the slanderous publication. In  
20 furtherance of the client's instruction and in order to expedite resolution of the case,  
21 Respondent conceded there was "substantial truth" in defendant's alleged  
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1 slanderous statement, but not actual truth. The Respondent believed, given his  
2 client's intent to end litigation that it would best not to burden the Court with the  
3 ample evidence, the sheer volume of which would have created a question of fact  
4 and certainly defeated the motion. Respondent believed that this would  
5 expeditiously put an end to the litigation.  
6

7         While the Respondent's response was well intended, it did not obtain the  
8 anticipated result of quickly ending the litigation. The Court construed the  
9 Respondent's response as an admission that the cause of action was unfounded and  
10 in bad faith. In retrospect, Respondent acknowledges that the better course of action  
11 would have been to present to the Court the substantial evidence supporting his  
12 client's position, which, if placed before the Court would have undoubtedly resulted  
13 in the denial of the motion. After denial of the motion, subsequent negotiations  
14 could have been undertaken to terminate the case. However, such actions would not  
15 have been consistent with the client's instructions. Based on the foregoing, the  
16 State Bar conditionally admits that it could not prove by clear and convincing  
17 evidence that Respondent's conduct as alleged in Count Two violated ER 3.1  
18 (Meritorious Claims and Contentions), 3.3 (Candor toward the Tribunal), 3.4(a) and  
19 (d) (Fairness to Opposing Party and Counsel), 4.4 (Respect for Rights of Others),  
20 8.4(c) (Misconduct-involving dishonesty) and 8.4(d) (Misconduct-prejudicial to  
21 the administration of justice).  
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1 ABA STANDARDS

2 The ABA's *Standards* list the following factors to consider in imposing the  
3 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the  
4 actual or potential injury caused by the lawyer's misconduct, and (4) the  
5 existence of aggravating or mitigating circumstances. *ABA Standard 3.0*.  
6

7 A review of *ABA Standard 4.0 (Violations of Duties Owed to Clients)*  
8 indicates that censure is the presumptive sanction for Respondent's misconduct.  
9  
10 *Standard 4.13 (Failure to Preserve the Client's Property)* specifically provides:

11 Reprimand (censure in Arizona) is generally appropriate  
12 when a lawyer is negligent in dealing with client property  
13 and causes injury or potential injury to a client.

14 Respondent entrusted the accounting functions regarding his trust account  
15 to his wife believing that as long as he maintained the client trust account check  
16 book and handled client funds consistently with his knowledge of the client's  
17 matters that he was acting appropriately. It was not until the client filed the  
18 charge with the State Bar in connection with the matters alleged in Count One of  
19 the complaint herein that Respondent realized that he and his wife had not been  
20 communicating adequately concerning the management of his trust account and  
21 that funds had been deposited into and disbursed from the wrong accounts and  
22 that because of miscommunication certain mathematical errors ensued resulting  
23 in erroneous balances being reflected in certain accounts.  
24  
25

1 **AGGRAVATING AND MITIGATING FACTORS**

2 This Hearing Officer then considered aggravating and mitigating factors in  
3 this case, pursuant to *Standards* 9.22 and 9.32, respectively.  
4

5 This Hearing Officer agrees with the parties that three aggravating factors  
6 apply and should be considered in this matter:

- 7 (c) a pattern of misconduct  
8  
9 (d) multiple offenses  
10  
11 (i) substantial experience in the practice of law

12 This Hearing Officer agrees with the parties that five<sup>2</sup> factors are present in  
13 mitigation:

- 14 (a) absence of a prior disciplinary record  
15  
16 (b) absence of a dishonest or selfish motive  
17  
18 (d) timely good faith effort to make restitution or to rectify consequences  
19 of misconduct  
20  
21 (e) full and free disclosure to disciplinary board or cooperative attitude  
22 toward proceedings  
23  
24 (l) remorse  
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<sup>2</sup> This Hearing Officer did not consider factor (g) character or reputation, as the record does not contain evidence in support of this factor and notes that this does not affect the outcome.



1 Baskerville's trust account documents revealed that Baskerville failed to properly  
2 safeguard client funds, that he failed to maintain proper internal controls to  
3 adequately safeguard funds on deposit in the trust account and that he failed to  
4 conduct a monthly reconciliation of his trust account. The applicable ABA  
5 Standard establishing the presumptive sanction was found to be Standard 4.13  
6 (censure for negligent dealing with client property). Three aggravating factors  
7 included prior disciplinary offenses, a pattern of misconduct and substantial  
8 experience in the practice of law. Five mitigating factors included absence of a  
9 dishonest or selfish motive; timely good faith effort to rectify consequences, full  
10 and free disclosure to disciplinary board or a cooperative attitude towards  
11 proceedings, character and reputation and non-ABA Standard mitigation of  
12 interim rehabilitation.  
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15  
16 In *In re Lopez*, Supreme Court No. SB-03-0012-D, Disciplinary  
17 Commission No. 98-2215, the Commission imposed a censure and a two-year  
18 period of probation as sanctions for violation of ER 1.15 and Rules 43, 44 and  
19 51(h). In *Lopez*, the Respondent violated various rules concerning the  
20 maintenance and operation of his trust account. Lopez failed to properly  
21 safeguard client property and property belonging to a third party when he made  
22 payments to his client and a medical provider out of his trust account funds when  
23 there were insufficient funds in the account to cover the disbursed amounts.  
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1 Lopez also failed to reconcile his trust account on a monthly basis and failed to  
2 record all transactions promptly and completely. The applicable ABA Standard  
3 for determining the presumptive sanction was found to be 4.12 (Suspension for  
4 knowing improper dealing with client property). In addition, Lopez had been  
5 previously received an Informal Reprimand for violations of ER 8.1 and Rule  
6 51(h) and (i) , Ariz.R.S.Ct. Accordingly, Standard 8.3(b) (Censure appropriate  
7 because of prior informal reprimand for similar misconduct) was also cited. Two  
8 aggravating factors included prior disciplinary record and a pattern of  
9 misconduct. Mitigating factors included delay in disciplinary proceedings, lack  
10 of selfish or dishonest motive, cooperation with the proceedings, remorse, good  
11 reputation, and personal and emotional problems.

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14  
15 In *In re McVay*, Supreme Court No. SB-03-0018-D, Disciplinary  
16 Commission Nos. 01-0764, 01-1017 and 02-0302, McVay was censured and  
17 placed on a two-year term of probation for violations of ER 1.3, 1.4, 1.15(b) and  
18 8.4(d). McVay failed to provide the client with an accounting of funds paid,  
19 failed to return documents, engaged in a pattern of neglect, did not diligently  
20 communicate with clients, and failed to communicate to the client as to how he  
21 accounted for the funds paid to the Respondent. McVay had also received a  
22 prior Informal Reprimand for similar Ethical Rule violations. The applicable  
23 ABA Standard for determining the presumptive sanction was found to be 4.13  
24  
25



1 (Censure for negligent dealing with client property). Also cited were Standards  
2 4.43 (Censure for negligent lack of diligence) and 8.3(b) (Censure appropriate  
3 because of prior informal reprimand for similar misconduct). Three aggravating  
4 factors included prior discipline, multiple offenses and substantial experience in  
5 the practice of law. Three mitigating factors included absence of dishonest or  
6 selfish motive and full and free disclosure and cooperative attitude toward  
7 proceedings.  
8

9  
10 In *In re Crocker*, SB-03-0077-D, Disciplinary Commission No. 01-0165,  
11 Crocker was censured and placed on probation for two years for violating ERs  
12 1.15(a), 8.1(a) and 8.4(c) and Supreme Court Rule 43(b)(3). The State Bar's  
13 examination of Crocker's trust account records revealed that Crocker had entered  
14 into a representation agreement that was never reduced to writing; failed to  
15 maintain individual client ledger cards or the functional equivalent for the client  
16 and the client's company; often made incomplete and/or insufficient entries to  
17 accurately reconstruct each transaction. Crocker's trust account client ledger did  
18 not always identify the client on whose behalf the banking transactions took  
19 place, Crocker failed to perform monthly reconciliations of his trust account and  
20 failed to properly safeguard client funds in his trust account. The applicable  
21 ABA Standard for determining the presumptive sanction was found to be 4.13  
22 (Censure for negligent dealing with client property). The single aggravating  
23  
24  
25

1 factor was pattern of misconduct. Five mitigating factors included no prior  
2 discipline, personal or emotional problems, absence of dishonest or selfish  
3 motive, good character and reputation and remorse.  
4

5 In *In re Kazragis*, Supreme Court No. SB-03-0115-D, Disciplinary  
6 Commission No. 02-0157, the Respondent was censured and placed on probation  
7 for a term of one year. The State Bar received several overdraft notices  
8 regarding Kazragis's trust account. Those notices indicated that various items  
9 attempted to pay against the trust account when the balance in the account was  
10 insufficient to cover items. An examination of Kazragis's trust account by the  
11 State Bar's Staff Examiner revealed that there was a deficit in the trust account  
12 due to Kazragis's failure to monitor the actual disbursements being made from  
13 the account. Kazragis failed to safeguard client funds since he was not  
14 identifying the disbursements, was not recording disbursements on individual  
15 client ledgers, was not balancing the client ledgers. In addition, Kazragis failed  
16 to keep his funds separate from the client funds, failed to maintain complete trust  
17 account records and failed to exercise due professional care. The applicable  
18 ABA Standard for determining the presumptive sanction was found to be 4.13  
19 (Censure for negligent dealing with client property). The one aggravating factor  
20 was substantial experience in the practice of law. Five mitigating factors  
21 included absence of a prior disciplinary record, absence of a dishonest or selfish  
22  
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1 motive, timely good faith effort to rectify consequences of misconduct, full and  
2 free disclosure and remorse.

3  
4 In *In re Kerrin*, Supreme Court No. SB-02-0140-D, 2002 Ariz. LEXIS 181  
5 (Arizona 2002), the lawyer agree to a discipline by consent for a censure and  
6 probation for violations of ER 1.15 and Rules 43 and 44, Ariz.R.S.Ct. The  
7 misconduct included failing to maintain required trust account records,  
8 commingling personal funds and failing to safeguard client's funds although no  
9 actual harm occurred. The agreement included an admission these failures were  
10 not intentional but rather negligent and also as a result of other factors beyond  
11 the lawyer's control and that the lawyer had spent \$10,000 hiring an accounting  
12 firm that spent a year completing a reconciliation and verification of her trust  
13 account balances. The one aggravating factor was substantial experience in the  
14 practice of law. Five mitigating factors included absence of prior discipline,  
15 absence of dishonest or selfish motive, personal or emotional problems, timely  
16 good faith effort to make restitution and remorse justified reduction of the  
17 presumptive sanction from suspension to censure.  
18  
19  
20

21 In *In re Clark*, State Bar-03-0157-D (Arizona Supreme Court, 2004), the  
22 lawyer agreed to a discipline by consent for a censure and probation for  
23 violations of ERs 1.15, 5.3 (Responsibilities Regarding Nonlawyer Assistants),  
24 and Rules 43 and 44, Ariz.R.Sup.Ct. The lawyer was found to have had no  
25

1 measures in place to routinely check on whether a non-lawyer employee who had  
2 control over his trust account was in fact maintaining records and making  
3 appropriate disbursements, and thereby negligently failing to supervise a non-  
4 lawyer employee who embezzled client funds without the lawyer's knowledge.

5  
6 The lawyer also commingled personal funds in his trust account, failed to  
7 maintain complete trust account records for five years, failed to exercise due  
8 professional care in the maintenance of his client trust account, failed to maintain  
9 proper internal controls to adequately safeguard funds on deposit in the trust  
10 account and failed to conduct a monthly reconciliation of his client trust account.

11  
12 There were no aggravating factors. Four mitigating factors included absence of  
13 prior discipline, absence of dishonest or selfish motive, timely good faith effort  
14 to make restitution or to rectify consequences of misconduct and full and free  
15 disclosure to a disciplinary board or cooperative attitude toward proceedings  
16 were found.  
17

18  
19 In *In re DeLozier*, SB-04-0034-D (Arizona Supreme Court 2004) the  
20 lawyer agreed to a public censure and probation for violations of ER 1.15 and  
21 SCRs 43 and 44. The lawyer was found to have kept earned funds in his client  
22 trust account. Because of this practice, Respondent's records showed positive  
23 trust balances for some clients who really did not have a positive balance. The  
24 lawyer accordingly failed to safeguard client funds and commingled his personal  
25

3 reconciliations of his trust account; made non-client-related transactions from his  
4 trust account; failed to maintain complete trust account records for a period of  
5 five years; failed to confirm that funds were on deposit in the trust account for  
6 clients prior to drawing offsetting disbursements; and failed to disburse from the  
7 trust account with pre-numbered checks. Two aggravating factors included prior  
8 disciplinary offenses and substantial experience in the practice of law. Three  
9 mitigating factors included absence of a dishonest or selfish motive, timely good  
10 faith effort to make restitution or to rectify consequences of misconduct and full  
11 and free disclosure to a disciplinary board or cooperative attitude toward  
12 proceedings.  
13  
14

15 Of the foregoing cases, six (Baskerville, McVay, Crocker, Kazragis, Clark  
16 and DeLozier) cited *Standard* 4.13 (censure for negligent dealing with client  
17 property) as the basis for the presumptive sanction of censure and two (Lopez  
18 and Kerrin) cited *Standard* 4.12 (Suspension for knowing improper dealing with  
19 client property) as the basis for a presumptive sanction of a suspension, mitigated  
20 to a censure.  
21

### 22 RECOMMENDATION

23  
24 The purpose of lawyer discipline is not to punish the lawyer, but to protect  
25 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859

1 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the  
2 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.  
3 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in  
4 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361  
5 (1994).  
6

7 In imposing discipline, it is appropriate to consider the facts of the case, the  
8 American Bar Association's *Standards for Imposing Lawyer Sanctions*  
9 ("*Standards*") and the proportionality of discipline imposed in analogous cases.  
10 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).  
11

12 Upon consideration of the facts, application of the *Standards*, including  
13 aggravating and mitigating factors, and a proportionality analysis, this Hearing  
14 Officer recommends acceptance of the Tender of Admissions and Agreement for  
15 Discipline by Consent and the Joint Memorandum in Support of Agreement for  
16 Discipline by Consent providing for the following:  
17  
18

19 1. Respondent shall receive a censure.

20 2. Respondent shall be placed on probation for a period of one year  
21 effective upon the signing of the probation contract. The terms of probation are  
22 as follows:  
23

24 a. Respondent shall attend the Trust Account Ethics Enhancement  
25 Program (TAEPP).



4 this 6<sup>th</sup> day of June, 2005, to:

5 Brian Holohan  
6 Darrell S. Dudzik  
7 Respondent's Counsel  
8 *Hinshaw & Culbertson, L.L.P.*  
9 3800 North Central Avenue, Suite 1600  
10 Phoenix, AZ 85012-1946

11 Loren J. Braud  
12 Senior Bar Counsel  
13 State Bar of Arizona  
14 4201 North 24<sup>th</sup> Street, Suite 200  
15 Phoenix, AZ 85016-6288

16 by: *P. Williams*