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**FINDINGS OF FACT<sup>1</sup>**

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 15, 1961.

**COUNT ONE**

2. On or about November 17, 2004, two checks, one in the amount of \$3,812.14 and the other in the amount of \$241.61, attempted to pay against Respondent's client trust account at Bank One when the balance in the account was only \$2,393.38. The bank paid the checks, and charged an overdraft fee to the account overdrawing Respondent's client trust account a total of \$1,476.76.

3. After the State Bar received the insufficient funds notice on Respondent's client trust account, a screening investigation was opened, and Respondent was requested to provide an explanation of the cause of the overdraft, along with supporting documentation.

4. In response to the bar charge, Respondent explained that the overdraft was the result of an accounting error resulting from an inadvertent overpayment to a client.

5. Specifically, Respondent explained that he settled a case on behalf of

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<sup>1</sup> The statement of facts is based upon the tender submitted by the parties.

1 client Ducoffe in July 2002 for \$100,000. The client requested that Respondent  
2 hold her settlement proceeds in his trust account for a time because of possible  
3 claims that might be made. In August, a nurse made a claim against the proceeds,  
4 which Respondent successfully compromised on behalf of his client. On or about  
5 August 14, 2002, Respondent disbursed a check for \$2400 from his trust account  
6 to the nurse. However, someone other than Respondent or his secretary wrote the  
7 check, and no entry was made to his records. Thereafter, the client's remaining  
8 share was disbursed to the client, including the \$2400 that was previously  
9 disbursed to the nurse. Therefore, since that time, until the insufficient funds  
10 notice in this matter, Respondent's trust account has been out of balance.  
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14 6. Respondent further explained that he terminated his office manager  
15 in late 2001. After that point, he was not able to satisfactorily access his  
16 computer trust account records. He was still in the process of establishing a new  
17 record-keeping system in mid-2002 when the problems in this case arose.  
18

19 7. The two checks that caused the overdraft of Respondent's trust  
20 account were related to a settlement Respondent received for client McCorkle.  
21 The checks represented a check for costs and for attorney's fees related to that  
22 case.  
23

24 8. Upon learning of the overdraft, Respondent deposited \$3,000 in the  
25 trust account to cover the shortage.

1           9.    During the investigation, Respondent informed the State Bar that he  
2 also maintained a client trust account at Wells Fargo Bank, which he had  
3 maintained prior to opening a new account at Bank One.  
4

5           10. Respondent was asked to provide numerous trust account records for  
6 both trust account. Respondent timely complied with all requests for information.  
7

8           11. Upon review of Respondent's trust account records and explanation,  
9 it appears that his explanation of the cause of the overdraft was accurate. A  
10 review of the trust account documents submitted, along with Respondent's  
11 explanations, revealed that Respondent:

- 12           a. failed to properly safeguard client funds; Respondent's records  
13            reveal that from July of 2002, until approximately November of  
14            2004, the balance in the trust account was \$2400 less than it  
15            should have been. In addition, Respondent carried a negative  
16            balance for bank fees/administrative funds in the months of  
17            August 2002, January 2004, September 2004 and October 2004;  
18            b. failed to exercise due professional care in the performance of his  
19            duties as is required by Rule 43(d)(1)(A) and (d)(1)(B) regarding  
20            the failure to document the initial \$2400 disbursement;  
21            c. failed to maintain proper internal controls within his office to  
22            adequately safeguard funds on deposit in the trust account as  
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1 required by Rule 43(d)(1)(C) relating to the \$2400 accounting  
2 error in this matter;

3  
4 d. failed to make a monthly three-way reconciliation of the client  
5 ledgers, trust account general ledger or register, and trust account  
6 bank statement as is required by Rule 43(d)(2)(D); The trust  
7 account was out of balance for approximately 27 months. Had  
8 Respondent performed the reconciliation, the error would have  
9 been detected. In addition, Respondent had fees and costs for two  
10 clients in the trust account that remained to be distributed to him.  
11

### 12 **CONCLUSIONS OF LAW**

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14 Respondent's conduct as described in this count violates Rule 42, Ariz. R.  
15 S. Ct., specifically, ER 1.15, and Rules 43 and 44, Ariz. R. S. Ct.

### 16 **CONDITIONAL ADMISSIONS**

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18 Respondent conditionally admits that his conduct violated ER 1.15, Rule  
19 42, Ariz. R. S. Ct., and Rules 43 and 44, Ariz. R. S. Ct.

### 20 **ABA STANDARDS**

21  
22 The *ABA Standards* list the following factors to consider in imposing the  
23 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the  
24 actual or potential injury caused by the lawyer's misconduct, and (4) the  
25 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*

4 that censure is the presumptive sanction for these violations. *Standard 4.13*

5 (Failure to Preserve the Client's Property) specifically provides:

6           Reprimand [censure] is generally appropriate when a lawyer  
7           is negligent in dealing with client property and causes injury  
8           or potential injury to a client.

9           However, *Standard 4.14* calls for an informal reprimand where there is  
10          little or no actual or potential injury to a client. Although, Respondent violated  
11          his duties to his clients by failing to observe the rules governing the treatment of  
12          client funds by attorneys, there was no actual injury and little potential injury to a  
13          client. These rules are designed to ensure that a client's money is not put in  
14          jeopardy, or used or taken improperly, by the client's attorney. Respondent  
15          recognizes that he was negligent in failing to supervise his staff concerning  
16          proper procedures in the handling of client funds and failing to reconcile this trust  
17          account records, both of which led to the ultimate overdraft of the trust account,  
18          but it is obvious that there was no intentional or knowing conduct. The parties  
19          agree that Respondent was negligent in failing to strictly comply with the rules  
20          governing the treatment of client funds by attorneys.  
21  
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23

24                 Respondent's failure to document the deposit of client funds, along with  
25          his failure to maintain proper internal controls within his office and failure to

1 make three-way reconciliations as required by the Trust account Guidelines,  
2 exposed his clients to potential injury by causing their funds to be held without  
3 the protections against intentional or inadvertent misdirection or depletion that are  
4 provided through strict compliance with E.R. 1.15, Rule 42, Ariz.R.S.Ct., and  
5 Rules 43, 44, Ariz.R.S.Ct.  
6

7 As set forth above, the presumptive sanction for this sort of negligent  
8 infraction, where there is no actual or little potential injury to a client is an  
9 informal reprimand whereas censure is the presumptive sanction when s/he  
10 causes injury or potential injury to a client.  
11

### 12 AGGRAVATING AND MITIGATING FACTORS

13  
14 This Hearing Officer then considered aggravating and mitigating factors in  
15 this case, pursuant to *Standards* 9.22 and 9.32, respectively.

16 This Hearing Officer agrees with the parties that there are no applicable  
17 aggravating factors in this matter.<sup>2</sup>  
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19 This Hearing Officer agrees with the parties that four factors are present in  
20 mitigation:

21 (a) absence of a prior disciplinary record for over forty years.  
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24 <sup>2</sup> The aggravating factor of substantial experience in the practice of law is often offset by the  
25 corresponding factor of an unblemished disciplinary record during the same time period.  
*Matter of Shannon*, 179. Ariz. 52, 68 (1994). Respondent has had a lengthy career of  
approximately 43 years in practice with no prior discipline record.

1 (b) absence of a dishonest or selfish motive. Respondent was simply  
2 negligent and did not act out of any dishonest or selfish motive. Respondent's  
3 misconduct was the result of a combination of employee error and Respondent's  
4 negligent failure to supervise his staff and to reconcile his trust account records.  
5 There is no evidence of any intention to place client funds in jeopardy or to  
6 misappropriate client funds.  
7

8 (d) timely good faith effort to make restitution or to rectify consequences  
9 of misconduct. When the matter was brought to Respondent's attention, he sought  
10 the help of his accountant, who reviewed the status of Respondent's trust account  
11 and also provided training to Respondent's secretary. In addition, both  
12 Respondent and his secretary attended a trust account management seminar.  
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15 (e) full and free disclosure to disciplinary board or cooperative attitude  
16 toward proceedings. During the State Bar's investigation into the insufficient  
17 funds notice, Respondent was asked to provide numerous trust account records  
18 for both of his trust accounts. Respondent fully, and timely, complied with all  
19 requests for information.  
20

21 Based on the conditional admissions, the sanction for the admitted conduct  
22 should be an Informal Reprimand.  
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1 **PROPORTIONALITY REVIEW**

2 In the past the Supreme Court has consulted similar cases in an attempt to  
3 assess the proportionality of the sanction recommended. See *In re Struthers*, 179  
4 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized  
5 that the concept of proportionality review is “an imperfect process.” *In re Owens*,  
6 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases  
7 “are ever alike.” *Id.* To have an effective system of professional sanctions, there  
8 must be internal consistency, and it is appropriate to examine sanctions imposed  
9 in cases that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at  
10 772. However, the discipline in each case must be tailored to the individual case,  
11 as neither perfection nor absolute uniformity can be achieved. *Id.* at ¶ 61, 90 P.3d  
12 at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re*  
13 *Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

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Lawyers who have negligently failed to preserve their clients’ property by  
failing to maintain their established trust account procedures have generally  
received a censure.

In *In re Hall*, SB-02-0122-D, 2002 Ariz. LEXIS 152 (2002), Hall received  
a censure for advancing funds from his firm’s operating account and placing  
those funds into the trust account to cover client costs. The trust account records  
examined by the State Bar reflected negative balances for a total of twelve clients.

1 Hall had failed to monitor the clients' funds and as a result of this failure  
2 overdrafts occurred on the account. Hall received a censure and was placed on  
3 probation for one year for failing to establish sufficient internal controls in order  
4 to properly monitor his clients' funds. No factors were found in aggravation and  
5 six factors were found in mitigation: absence of a prior disciplinary record;  
6 absence of a dishonest or selfish motive; timely good effort to rectify  
7 consequences of misconduct; full and free disclosure to disciplinary board or  
8 cooperative attitude towards proceedings; physical disability; and remorse.

11 More recently, in *In Re McKindles*, SB-05-0065-D, McKindles was  
12 censured and placed on probation for a period of one year for failing to safeguard  
13 client funds by keeping unearned fees in his firms' operating account and by  
14 commingling earned fees with client funds in the trust account. McKindles also  
15 failed to maintain complete trust account records and failed to exercise due  
16 professional care in dealing with client funds. There were no aggravating factors  
17 found. As in the present case, McKindles had substantial experience in the  
18 practice of law, which, when considered in conjunction with a clean disciplinary  
19 record, was found not to constitute an aggravating factor. In mitigation, the  
20 Hearing Officer found an absence of a dishonest or selfish motive; timely good  
21 faith effort to make restitution or to rectify consequences of misconduct; full and  
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1 free disclosure to disciplinary board or cooperative attitude towards proceedings;  
2 and, character or reputation.

3  
4 In *In re O'Quinn*, State Bar's investigative file no. 02-1709 (2003),  
5 O'Quinn received an informal reprimand for failing to keep her funds separate  
6 from that of her clients' funds; failing to retain proper trust account records for a  
7 period of five years; failing to conduct monthly reconciliations, failing to  
8 maintain proper internal controls, failing to record all transactions to the trust  
9 account promptly, and failing to account for all transactions in and out of her trust  
10 account. In mitigation, bar counsel found that O'Quinn was a relatively new  
11 attorney and a sole-practitioner when the overdrafts to the trust account occurred.  
12 O'Quinn was also ill at the time the trust account errors occurred. Bar counsel  
13 also determined that although O'Quinn's conduct was negligent, there was  
14 potential for client harm.  
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17  
18 In the instant case Respondent's misconduct arose from a single a  
19 bookkeeping error caused by a member of his staff. Respondent's most  
20 significant misconduct in this case was his failure to reconcile his trust account  
21 records for approximately 27 months. There was never any attempt by  
22 Respondent to misappropriate or convert his clients' funds, and Respondent  
23 immediately took steps to rectify the error upon learning of the problem.  
24  
25

3 O'Quinn's misconduct than that of Hall or McKinley. In light of the fact that

4 Respondent has no discipline history, has fully cooperated with the State Bar's  
5 investigation, and has accepted responsibility for his actions, as demonstrated by  
6 his Answer and his willingness to enter into this agreement for discipline by  
7 consent, a sanction of an informal reprimand meets the goals of the disciplinary  
8 system. It cannot be credibly asserted that Respondent is a threat to the public or  
9 is likely to engage in future misconduct.  
10

### 11 RECOMMENDATION

12 The purpose of lawyer discipline is not to punish the lawyer, but to protect  
13 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859  
14 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the  
15 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.  
16 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in  
17 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361  
18 (1994).  
19

20 In imposing discipline, it is appropriate to consider the facts of each case,  
21 the American Bar Association's *Standards for Imposing Lawyer Sanctions*  
22 ("Standards") and the proportionality of discipline imposed in analogous cases.  
23  
24 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).  
25

1           Upon consideration of the facts, application of the *Standards*, including  
2 aggravating and mitigating factors, and a proportionality 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 which provides for the following:  
6

7           1. Respondent shall receive an informal reprimand.<sup>3</sup>

8           2. Respondent shall be placed on probation for a period of six months,  
9 effective upon the final order in this matter. The term of probation is as follows:  
10

11           a. During probation Respondent shall successfully participate in and  
12 complete the State Bar's Trust Account Ethics Enhancement Program<sup>4</sup>;

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

17           c. In the event that Respondent fails to comply with any of the  
18 foregoing conditions, and the State Bar receives information, bar counsel shall  
19 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule  
20 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty  
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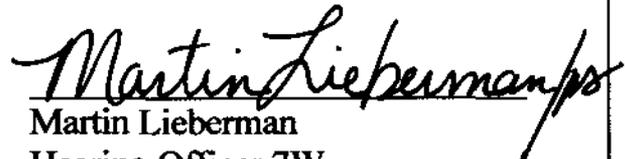
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23 <sup>3</sup> Pursuant to Rule 56(e)1, if an agreement is accepted by the hearing officer it shall be final  
24 unless the sanction to be imposed includes disbarment, suspension or censure; therefore, if  
25 neither party files a notice of appeal pursuant to Rule 58(a), this Hearing Officer will file an  
order of informal reprimand, probation and costs.

<sup>4</sup> But for the Tender, I would recommend that probation be terminated upon successful  
completion of the Trust Account Ethics Enhancement Program.

3 been violated and if an additional sanction should be imposed. In the event there is  
4 an allegation that any of these terms have been violated, the burden of proof shall be  
5 on the State Bar of Arizona to prove non-compliance by clear and convincing  
6 evidence.

7 3. Respondent shall pay the costs and expenses incurred in this  
8 disciplinary proceeding.  
9

10 DATED this 15<sup>th</sup> day of September, 2005.

11   
12 Martin Lieberman  
13 Hearing Officer 7W

14 Original filed with the Disciplinary Clerk  
15 this 15<sup>th</sup> day of September, 2005.

16 Copy of the foregoing was mailed  
17 this 15<sup>th</sup> day of September, 2005, to:

18 Richard A. Segal  
19 Respondent's Counsel  
20 *Gust Rosenfeld, P.L.C.*  
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by: 