BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **HECTOR MONTOYA,** **Bar No. 020139** RESPONDENT.	No. 08-0193 **DISCIPLINARY COMMISSION REPORT**

Following an evidentiary hearing, this matter came before the Disciplinary Commission of the Supreme Court of Arizona on September 11, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed June 1, 2010, recommending censure, two years of probation effective October 21, 2009 and a referral to the State Bar's Law Office Management Assistance Program ("LOMAP") and costs. The State Bar and Respondent each filed objections and requested oral argument. Respondent did not file an Opening Brief. Respondent, Respondent's counsel and counsel for the State Bar were present for oral argument.

The State Bar filed a two-count complaint against Respondent. The parties' appeal in this matter concerns only Count Two of the complaint. In Count One, Respondent was victimized by a scheme involving a bogus client and a phony check. Respondent deposited the check into his client trust account. It was later dishonored and the bank froze Respondent's account. On January 31, 2008, Respondent self-reported the event to the State Bar and subsequent investigations revealed that Respondent failed to adequately maintain his trust account by failing to keep client ledgers and failing to keep funds in the trust account to pay for bank charges. The Hearing Officer found that Respondent

negligently violated ERs 1.15(a) and 1.15(b) and that his conduct resulted in no actual injury. Hearing Officer's Report, p. 3 ¶ 9. The Hearing Officer recommended that no discipline be imposed for the conduct in Count One. *Id.*, at ¶ 19. Neither side appealed or challenged the Hearing Officer's findings, conclusions or recommendation with regard to Count One.

Count Two arose out of Respondent's arrest on August 13, 2004 in connection with a marijuana trafficking sting operation. Respondent ultimately pled guilty in 2008 to Facilitation of Money Laundering in the Second Degree, a Class 6 undesignated felony. Both the preparatory offense of Facilitation and the offense of Money Laundering require a knowing or intentional mental state. *See* A.R.S. §§ 13-1004(A); -2317(B)(4) and (C). Respondent received 18 months of unsupervised probation. He successfully completed probation and in 2009, his conviction was designated a misdemeanor and later set aside. *See* A.R.S. § 13-907. The State Bar based Count Two not on the fact of Respondent's felony conviction, but rather on his underlying *conduct*. At the State Bar evidentiary hearing, Respondent testified and was cross examined regarding his plea and the factual basis and various exhibits from the state-court plea proceeding were admitted. Based on this evidence concerning Respondent's conduct, the Hearing Officer made the following relevant findings:

While on vacation with his family in August 2004, Respondent received a phone call from Casin Mclean. Ms. Mclean had been referred to him by his client, Isabel Dominguez for the purpose of representing one Marcus Maragh following his arrest on drug charges.

Respondent told Ms. Mclean that his fee was $20,000 and repeatedly told her and Ms. Dominguez that he could only accept the retainer if a proper identification was submitted to him and Ms. Mclean would need to sign a Federal Tax Form 8300 to report the transaction. "When Mclean balked, Respondent said he would not accept the fee or the representation without the form being signed." (Hearing Officer's Report at 4 ¶ 16.) Ms. Dominguez told Respondent she would "get somebody's ID." (*Id.*, at ¶ 17.) Respondent agreed to this "even though he should have known" that this "might facilitate" money laundering by causing his law firm to file the IRS form 8300 materially omitting that Ms. Mclean was the person involved in the transaction. (*Id.*, at ¶ 18.) In fact, no where on the form 8300 does Ms. Mclean's name appear. Ms. Dominguez son's name appears as the person from whom the cash was received. *See* Stipulated Exhibit 1. The Hearing Officer found that because Respondent was on vacation at the time, he was not aware who brought the money to the office or what names were on the form until after his arrest when he returned to his office. (*Id.*, at ¶ 19)

In this appeal, the State Bar argues that the Hearing Officer erred in failing to give preclusive effect to Respondent's guilty plea and therefore, erred in not finding a knowing mental state which would have supported violations of ER 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and 8.4(c) (engage in conduct involving dishonesty, fraud, deceit or misrepresentation). The State Bar asserts that a long-term suspension or disbarment is warranted.

Respondent asserts that the State Bar cannot rely on the plea as conclusive evidence as to his mental state under Rule 53(h)(1) because it charged him with the underlying

conduct rather than the conviction itself under Rule 53(h). Respondent argues the Hearing Officer correctly found that the Bar failed to prove by clear and convincing evidence that Respondent acted knowingly or intentionally and therefore, correctly found no violations of ERs 8.4(b) and 8.4(c). Respondent further asserts that the Hearing Officer correctly applied the *Standards* and found censure to be the appropriate sanction.

Decision

The seven members[1] of the Disciplinary Commission by a majority of four[2] recommend accepting and incorporating the majority of Hearing Officer's findings of fact and conclusions of law but modify the recommended sanction to reflect a 30 day suspension. As discussed below, a majority of the Commission concludes that the Hearing Officer erred in failing to consider Respondent's guilty plea as evidence, in the form of an admission, that his conduct, including his mental state, satisfied all of the required elements of the crime to which he pled guilty. Considering the record, including that evidence/admission, the majority concludes that Respondent did violate ER 8.4(c) and a 30 day suspension followed by two years of probation (LOMAP) and the payment of costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office is the appropriate sanction.[3]

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[1] Commissioners Houle and Horsley did not participate in these proceedings.

[2] Commissioners Belleau and Katzenberg were opposed and would have adopted the Hearing Officer's Report, which recommended censure, in its entirety. *See* dissenting Opinion below. Commissioner Todd concluded that the Hearing Officer should have considered the mental requirements of the plea as admissions, but determined that the recommended sanction of censure was sufficient in fulfilling the purposes of discipline. *See In re Walker*, 200 Ariz. 155 24 P.3d 602 (2001).

[3] The Hearing Officer's Report filed June 1, 2010 is attached as Exhibit A.

Discussion of Decision

The Commission's standard of review is set forth in Rule 58(b) Ariz.R.Sup.Ct. In reviewing findings of fact, the Commission applies a clearly erroneous standard. Mixed questions of fact and law or errors of law, the Commission reviews *de novo*. *State v. Altieri*, 191 Ariz. 1, 951 P.2d 866 (1997).

Based on the evidence presented at the disciplinary hearing, the Hearing Officer found that Respondent's conduct was negligent (should have known) and violated ER 8.4(d) (conduct prejudicial to the administration of justice). In the factual bases submitted to the state-court judge, Respondent admitted he "knew or should have known." Focusing on the "should have known" language of the factual basis to the plea agreement, the Hearing Officer concluded that the Bar had failed to establish violations of ER 8.4(b) or 8.4(c) because they require knowing or intentional misconduct.

The Bar argues that the Hearing Officer erred by failing to give preclusive effect to the plea itself which established Respondent's mental state was intentional or knowing. Rule 53(h) (Conviction of a Crime) provides that:

> "a lawyer shall be disciplined as the facts warrant upon conviction of a misdemeanor involving a serious crime or any felony.

53(h)(1) further provides that:

> "Proof of conviction shall be conclusive evidence of guilt of the crime for which convicted in any discipline proceeding **based on the conviction**."

(Emphasis added.)

In a disciplinary proceeding in which a Respondent is charged with a violation of Rule 53(h), the criminal conviction does establish all of the required elements of the crime

(including any required mental state) and the Respondent is not free to re-litigate them. In this case, Respondent was convicted of a crime, but the Bar did not charge him with a violation of Rule 53(h). Instead, as the Rules permit, the Bar charged Respondent with violations of ER 8.4 based on the underlying facts which led to the conviction. *See In re Beren*, 178 Ariz. 400, 401, 874 P.2d 320, 321 (1994). As the proceeding was **not** based on the conviction itself, the conclusive presumption of Rule 53(h)(1) did not apply.

The Bar, nonetheless, argues that the guilty plea is entitled to preclusive effect under a traditional collateral estoppel. The Bar correctly notes that unlike *In re Beren*, which involved a strict liability offense, here, Respondent's mental state was an essential element of the crime to which he pled guilty. The fact that Respondent's criminal conviction was set aside pursuant to A.R.S. § 13-907, does not alter that fact. *See In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990) (Relying on former Rule 57(a)(3) and *Matter of Coarser*, 122 Ariz. 500, 501, 596 P.2d 26, 27 (1979)). However, the question of what weight, if any, to give Respondent's guilty plea in a proceeding under ER 8.4 remains. There is a split of authority nationally as to whether a guilty plea should be given preclusive effect in civil litigation, and it remains an open question in Arizona. *Picaso v. Tucson Unified School District*, 217 Ariz. 178, 171 P.3d 1219 (2007) (Discussing national split of authority on preclusive effect of guilty pleas in later civil litigation).

At a minimum, however, it is clear that Respondent's guilty plea is admissible as an admission against interest in subsequent litigation and the Hearing Officer should have considered it in weighing the evidence presented below as to Respondent's mental state. *See* Ariz. Evid. R. 804(b)(3); *Hays v. Richardson*, 95 Ariz. 263, 267, 389 P.2d 260, 263 (1964) ("a guilty plea of guilty in a Municipal Court to charges of drunk and reckless

driving is admissible as an admission against interest in a subsequent civil suit arising out of the same facts."); *cf.* A.R.S. § 13-807(A) (a defendant who pleads guilty is precluded from denying the "essential allegations" of the criminal offense in any civil proceedings brought by the victim or State).

The Hearing Officer recognized that Respondent did plead guilty to Facilitation of Money Laundering in the Second Degree (Findings at ¶ 10), but he failed to recognize that it was, in fact, evidence that Respondent's conduct was intentional or knowing. Instead, the Hearing Officer found that "No evidence has been presented indicating that Respondent possessed any conscious awareness of the circumstances and consequences of his conduct." Findings at ¶ 32. Further, the Hearing Officer stated Respondent's "conviction may not be considered for disciplinary purposes." Report at ¶ 16.

Based on its *de novo* review, the Commission concludes that the Hearing Officer erred as a matter of law in failing to consider Respondent's plea as an admission that his conduct had been either knowing or intentional pursuant to *Hays v. Richardson.* The Bar did present evidence of Respondent's plea which was evidence of a knowing or intentional mental state, the Hearing Officer's findings to the contrary was based on his erroneous legal conclusion that he could not consider Respondent's conviction at all and was, therefore, clearly erroneous.

Evaluating the evidence, including the factual basis of the plea, as well as the actual plea itself, a majority of the Commission finds that Respondent's conduct was knowing or intentional and did violate ER 8.4(c).

The presumptive sanction for a knowing violation of ER 8.4(c) is suspension. *See Standard* 5.12. Based on its independent analysis of the aggravating and mitigating

circumstances in this case, a majority of the Commission concludes that the appropriate sanction in this case is a 30 day suspension followed by a two year probation which includes a LOMAP referral.

RESPECTFULLY SUBMITTED this 13 day of October 2010.

Jeffrey Messing, Member
Disciplinary Commission

Commissioners Belleau and Katzenberg respectfully dissent.

In this case had the State Bar charged Respondent under Rule 53(h) (Conviction of a Crime), the fact that it was reduced to a misdemeanor would have resulted in censure as the presumptive sanction because Respondent's conviction was a misdemeanor, not a felony. To circumvent that problem, the State Bar charged Respondent with the underlying conduct and the Hearing Officer had discretion to make his own conclusions after a thoroughly litigated evidentiary hearing as to Respondent's mental state. The Hearing Officer concluded that the conduct was not "knowing" but "should have known" under the circumstances and facts presented, including, significantly, the factual basis of the plea agreement and the plea colloquy. The Hearing Officer heard the testimony and reviewed the evidence and his factual determination in this regard is entitled to great deference. *See In re Van Dox*, 214 Ariz. 300, 152 P.3d 1183 (2007) and *In re White-Steiner*, 219 Ariz. 323, 198 P.3d 1195 (2009).

We believe the State Bar is attempting to circumvent the problem it has with the conviction by trying to give preclusive effect to the plea. The State Bar however, elected

to charge only the underlying facts and the Hearing Officer clearly has discretion to evaluate those facts.

Even if it is determined that the guilty plea does support a finding of a knowing violation, then we believe that there is considerable mitigation to support the recommended sanction of censure, all of which was thoroughly evaluated by the Hearing Officer. In particular, this conduct occurred in 2004. The delay in the proceedings should be a factor taken into account as well. Respondent testified the telephone virtually stopped ringing after his arrest. Thus, Respondent had a de facto suspension because the arrest was public and clients were aware. Respondent has conducted himself appropriately since that arrest and successfully completed his probation in the criminal case so that the conviction is a misdemeanor. He has gradually developed a practice in a different area of law, which takes a considerable amount of time and effort to do. While the length of time from arrest to hearing in these proceedings was helpful to the Respondent, it also could have been favorable to the State Bar had Respondent not successfully completed his probation. A felony conviction would have been helpful to the Bar's position.

Censure is an adequate sanction under the unique facts of this case to promote the purposes of discipline. A 30 day suspension in these circumstances, as recommended by the majority, is punishment.

Original filed with the Disciplinary Clerk
this 13th day of October, 2010.

Copy of the foregoing mailed
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EXHIBIT
A

BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **Hector A. Montoya,** **Bar No. 015499** Respondent.	Nos. 08-0193 and 08-1253 **HEARING OFFICER'S REPORT** (Assigned to Hearing Officer 8J, David M. Waterman)

PROCEDURAL HISTORY

The State Bar of Arizona ("State Bar") filed a Complaint in this matter on December 23, 2008. Respondent filed his Answer on January 26, 2009. On June 30, 2009, a hearing was held on the Tender of Admissions and Agreement for Discipline by Consent in which Respondent gave his testimony before this Hearing Officer. On November 12, 2009, I filed my report recommending modification of the parties' Agreement for Discipline by Consent. Unable to reach agreement regarding modification, the parties participated in an evidentiary hearing before me on March 22, 2010.

I have carefully considered the complete record in this matter, which consists of the testimony presented at the hearing, the stipulated exhibits, including Respondent's plea agreement and attached factual basis, and the stipulated facts submitted by the parties in their Joint Pre-Hearing Memorandum. In reaching my decision, I have not considered the evidence presented at the June 30 hearing on the Agreement for Discipline by Consent. My decision is based exclusively on the record before me in this proceeding, as well as the appearance and demeanor of the witnesses testifying on the record under oath.

At all times during these proceedings this Hearing Officer has been the beneficiary of two extremely fine and professional presentations from counsel for both parties. The contrasting approaches generated by the unique fact pattern of the instant case, which were further complicated by procedural rules which are currently under review, have resulted in a protracted process which required strong and able advocacy to sharply bring into focus the distinctions necessitated by a case which must distinguish between criminality and unethical conduct from which the public must be protected. My gratitude for this aid, and my humility in the face of

exemplary professional advocacy from both sides is hopefully adequately reflected in the present Hearing Officer's Report which follows.

FINDINGS OF FACT

At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona having been first admitted to practice in Arizona on May 21, 1994.

COUNT ONE (File No. 08-0193)

1. On January 31, 2008, Respondent self-reported to the State Bar an insufficient funds event in his client trust account with JPMorgan Chase Bank ("Chase").
2. Chase charged back $76,864.89 to Respondent's trust account because a check he received in payment of collection work he had undertaken on behalf of a party whom Respondent mistakenly believed was a bona fide client was returned for insufficient funds.
3. On February 7, 2008, Respondent's attorney advised the State Bar that Chase had frozen Respondent's trust account because a check received by Respondent from a putative client was returned for insufficient funds. The bank charged the loss against all of Respondent's accounts, including his trust account. The following day, Respondent's attorney again brought this situation to the attention of the State Bar.
4. The State Bar's subsequent examination of Respondent's client trust account records identified the following:
    a. Client Maragh's flat, earned upon receipt fee, was deposited into the trust account;
    b. There was no client ledger for Client Maragh;
    c. Client Fimbres's retainer check had been returned for insufficient funds, yet trust fund monies were withdrawn to pay for fees on Client Fimbres's case;
    d. Client Garcia's account had a negative balance;
    e. Client Obmer's account had a negative balance;
    f. Client Perez's account had a negative balance;
    g. Client Potts's account had a negative balance;
    h. Respondent did not maintain funds in the trust account to pay for bank charges.

5. Respondent's accounting issues were identified because of a scheme to which he and other attorneys around the country, including Arizona, have fallen victim. He was contacted by a putative client, a Japanese-based corporation, regarding collection work in the United States. Respondent performed his due diligence by researching the client, the company from which he was tasked to collect, and verified the parties involved. He only learned of the scheme when the check he received from the "client" was uncollectible.
6. After the foregoing matters described in Paragraph 4 were brought to Respondent's attention, he took prompt steps to correct these issues which included hiring an outside bookkeeper to reconcile his trust account.
7. Furthermore, Respondent took all necessary steps to ensure that no client lost any money whatsoever as the result of this situation. He testified that "No client lost any money. . . . I took money out of my business account to reimburse those clients . . . which was approximately $25,000."
8. Respondent also immediately self-reported the trust account issue to the State Bar.
9. Respondent's conduct with respect to Count One was negligent, causing no actual injury to his clients.

COUNT TWO (File No. 08-1253)

10. On August 13, 2004, Respondent was arrested in a marijuana trafficking sting operation and subsequently indicted.
11. On April 21, 2008, Respondent pled guilty to Facilitation of Money Laundering in the Second Degree, a class 6 undesignated felony, and was sentenced to 18 months unsupervised probation. Respondent successfully completed probation.
12. On October 26, 2009, Respondent's conviction was designated as a misdemeanor.
13. On October 29, 2009, Respondent's conviction was set aside, the charging documents dismissed and Respondent was released from any and all "penalties" from the conviction.
14. August 2, 2004, while on vacation with his family, Respondent was speaking on the phone to Casin Mclean who was referred to him by his client, Isabel Dominguez, for the purpose of representing Marcus Maragh following his arrest on drug charges.
15. Respondent told Ms. Mclean his fee was $20,000 and repeatedly told her and Ms. Dominguez that he could only accept the retainer if a proper identification was submitted

to him and that Ms. Mclean would need to sign a Federal Tax Form 8300 to report the transaction.

16. When Ms. Mclean balked, Respondent said he would not accept the fee or the representation without the form being signed.
17. Ms. Dominguez then took the phone from Ms. Mclean and assured Respondent she would "get somebody's ID" to complete the form.
18. According to the factual basis, Respondent agreed to this even though he should have known that this might facilitate Ms. Dominguez in committing money laundering by her causing his law firm to file the Form 8300 with a material omission, i.e. that Ms. Mclean was the person involved in the transaction.
19. The person that ultimately signed the Form 8300 was Ms. Dominguez's son. Respondent was not aware of who signed the Form 8300 because he was on vacation at the time. Respondent was not aware of who brought in the money or signed the form until after his arrest when he returned to the office.
20. According to the factual basis, Respondent became aware that Ms. Dominguez was the target of a drug-related law enforcement investigation and advised her to be careful and cautious, which he should have known she could interpret as advice relating to the manner in which she committed her drug related crimes to avoid detection and arrest. However, the parties have stipulated that "careful and cautious" came from the English translation of the Spanish word "cuidate" or "cuidado," which Respondent used to close the telephone conversation. "Cuidate" or "cuidado" means "take care" or "so long," which is what Respondent intended the salutation to mean at the end of the phone call with Ms. Dominguez, but Respondent admits that it can also be translated as "be careful."
21. He further became aware that a pole camera was operating at a residence controlled by Ms. Dominguez and jokingly told her to have individuals pose for the camera engaging in legitimate activity although he should have known this could be interpreted in such a way so as to mislead investigators about criminal activity that may have been occurring at the location.
22. In the factual basis, Respondent accepted responsibility for his statements and his conduct and acknowledged that he facilitated Ms. Dominguez in her criminal activity. During the hearing Respondent specifically acknowledged having made a mistake; he

testified that "I made a mistake by not being more specific with [Ms. Dominguez] in saying . . . you need to bring in the ID of the individual whose money this belongs to. That was my mistake."

23. No evidence has been produced to show that the $20,000 fee was derived from any illegal source.

24. Respondent was offered a diversion plea agreement, but rejected it based upon the advice of his attorneys. Later in the litigation, Respondent through his counsel negotiated the plea agreement and factual basis which are part of the evidence in this proceeding. The factual basis was the result of hard-fought negotiations with the Pima County prosecutors. Respondent testified that the factual basis to the plea agreement was a "product of negotiations, extensive negotiations. It's not necessarily all encompassing of everything that occurred in this particular case. . . . And it was for purposes of resolving this ongoing litigation."

25. Respondent stopped representing criminal drug defendants in 2006. Respondent does not intend to practice criminal law in the future as evidenced by his website that advertises that his practice areas are only family law and business. Respondent will not under any circumstances represent a defendant charged with a drug-related offense. He testified that "I never ever will take another drug-related criminal case again ever."

26. Due to the publicity surrounding the arrest and conviction Respondent has suffered significant financial, professional, and personal hardship. Respondent has incurred at least $250,000 in legal and other fees during his criminal case that, among other things, resulted in his having to sell his share of an office building where he had previously practiced. Respondent also has suffered a great loss of business as a result of his arrest and conviction. He testified that after his arrest "there was virtually nobody coming into my office. The first six months after the initial arrest there was nothing coming in. No one was calling." Respondent testified that even today his income "is nowhere near" what it was before the arrest.

27. Respondent has no other disciplinary record.

28. Respondent has been a practicing Arizona attorney for 15 years, although he had only been a practicing for 10 years at the time of the events in question.

29. Respondent and his family suffered a great deal of public humiliation as a result of and in connection with his arrest and subsequent indictment.
30. Respondent feels great remorse for his actions and for not being more careful in anticipating and avoiding any of the potential illegality or unethical results of his conduct.
31. Respondent has made a full and free disclosure to the Bar in its investigation of this matter and has maintained a cooperative attitude throughout these proceedings.
32. No evidence has been presented indicating that Respondent possessed any conscious awareness of the circumstances and consequences of his conduct.
33. The conduct at issue here was an isolated incident of negligence and that while Respondent's conduct may have been misguided, Respondent is in no danger of repeating that conduct.
34. Respondent does not pose a threat to the public and his conduct was sufficiently addressed and punished by the criminal justice system

ABA STANDARDS

The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standards* 1.3, Commentary. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Arizona Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Peasley,* 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990). *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276 (1994). In determining an appropriate sanction, both the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Tarletz,* 163 Ariz. 548, 789 P.2d 1049 (1990); *Standard* 3.0.

The *Standards* define each mental state, drawing an important distinction between the mental states of "knowledge" and "negligence." Under the *Standards*, "knowledge" means "the conscious awareness of the nature or attendant circumstances of the conduct." "[M]erely knowing one performs particular actions is not the same as consciously intending by those

actions to engage in unethical conduct. The actor must also know the natures and circumstances of those actions." *In re Non-Member of the State Bar of Arizona, Van Dox*, 214 Ariz. 300, 311, 152 P.3d 1183, 1188 (2007). In contrast, the *Standards* define "negligence" as when a lawyer fails "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."

The mere fact that the person "should have known" that conduct was criminal or that it violated an ethical rule cannot raise the mental state associated with the conduct to the level of "knowing." In *In re Tocco*, the Arizona Supreme Court held that a lawyer cannot violate ethical rules that require a mental state of knowledge if the lawyer merely "should have known that [the] conduct was in violation of the rules." 194 Ariz. 453, 456-57, 984 P.2d 539, 542-43 (1999). "Knowledge" cannot therefore be imputed to an individual if that individual only "should have known" the consequences of his or her conduct. The *Tocco* court reasoned that "[h]olding otherwise would support an allegation in every case that, because lawyers are expected to be familiar with the Rules of Professional Conduct, they 'should have known' of their infractions, thereby effectively reducing the actual knowledge requirement to a nullity." *Id.* at 457 n.3, 984 P.2d at 543 n.3. Thus, there is a significant difference between a lawyer who "knew" the consequences of his conduct and one that "should have known."

Given the conduct in this matter, the most applicable *Standards* are *Standard* 4.0, regarding the Duties Owed to the Client, and specifically *Standard* 4.1 for failure to preserve client property (ER 1.15(a) and (b)); *Standard* 5.1 regarding Failure to Maintain Personal Integrity; and *Standard* 6.1 for False Statements, Fraud and Misrepresentation.

With respect to Count One, Standard 4.1 provides the starting point in the analysis of what sanction is appropriate. Censure "is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Standard 4.13. Informal reprimand "is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual injury or potential injury to a client." Standard 4.14. I find that Respondent's conduct was merely negligent and not intentional or knowing.

With respect to Count Two, the applicable Standards are 5.1 and 6.0. Standard 5.13 states that censure "is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." Informal reprimand "is generally appropriate when a

lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law." Standard 5.14. Giving consideration to the entire record in this matter, I find that the State Bar has not established by clear and convincing evidence that Respondent acted knowingly, or with conscious knowledge of the nature or attendant circumstances, with respect to the conduct alleged in the State Bar's complaint. Therefore, the most serious penalty under this Standard that can be imposed is informal reprimand.

Under Standard 6.1, suspension "is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes adverse or potentially adverse effect on the legal proceeding." Standard 6.12. Censure "is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." Standard 6.13. Once again, the State Bar has not shown by clear and convincing evidence that Respondent acted knowingly with regard to submitting any false statements to a court. In fact, nothing in this case involves the submission of false statements to a court, but rather the incorrect filing of a form with the federal government. Thus, Respondent's conduct can at most be categorized as negligent with respect to a violation of Standard 6.1.

AGGRAVATING AND MITIGATING FACTORS

I find the following aggravating factors apply:

(a) **Substantial experience in the practice of law**: Respondent has currently been a practicing Arizona attorney for 15 years, although he had been a practicing Arizona attorney for only 10 years at the time of the incident.

(b) **Illegal conduct**: Respondent pled guilty to Facilitation of Money Laundering in the Second Degree, a class 6 undesignated felony and was sentenced to 18 months unsupervised probation. Respondent, however, successfully completed probation in October 2009 and his conviction was designated a misdemeanor. Shortly thereafter, Respondent's conviction was set aside and vacated.

I find the following mitigating factors apply:

(a) **Absence of prior disciplinary record**: Respondent has been an Arizona attorney for 15 years without a disciplinary record.

(b) **Absence of a dishonest or selfish motive**: There is no evidence that Respondent's conduct resulted from a dishonest or selfish motive.

(c) **Timely good faith effort to make restitution or rectify consequences of misconduct**: With respect to Count 1, upon learning of his accounting errors, Respondent immediately took action to correct his accounting methods and bring them in line with State Bar requirements. Respondent made whole the clients whose money had not been properly accounted for and no clients suffered actual injury. Respondent also immediately self-reported the loss that occurred in his trust account to the State Bar. Further, Respondent immediately hired the services of a bookkeeper to improve the record keeping for his trust account; she has submitted a letter detailing Respondent's diligent efforts to comply with the State Bar's rules for handling client funds. She also stated that Respondent's bookkeeping practices are now in compliance with the State Bar regulations.

(d) **Full and free disclosure to disciplinary board or cooperative attitude toward proceedings**: Respondent has been open and forthcoming, cooperating fully in the State Bar's investigation throughout every stage of this disciplinary proceeding as well as the prior examination of his trust account.

(e) **Character or reputation**: Respondent has provided numerous letters attesting to his good character and reputation. These letters express the uncontroverted opinions that Respondent is honest and trustworthy; that Respondent takes full responsibility for his actions; and that Respondent has suffered a great deal from the criminal proceedings and conviction. These letters were unanimous in their support of Respondent. The following statements are taken from these letters:

Rosemary Marquez, Respondent's law partner during the events at issue:

- "Hector has always had the great gift of patience. His patience with family law clients amazed me and the others in our firm. We frequently commented about what a true 'counselor' Hector was to these clients who were going through horrible divorce and child custody issues. His patience was above

and beyond what any client could afford. Nonetheless, Hector spent hours listening and comforting."

- "The public embarrassment and humiliation that normally accompany criminal charges have been exponential for Hector. . . . In addition to the high personal costs, the monetary impact on Hector and his family can not be ignored. Legal costs alone caused him to sell his share of the office building. The bulk of the criminal caseload, through the U.S. District Court indigent defense contract, ceased the moment of his arrest. Our associates left, and our practice diminished."
- "Hector has endured significant emotional, financial, and professional turmoil over the past five years."

Hon. Jacqueline Marshall, Federal Magistrate Judge, United States District Court for the District of Arizona.

- "I offer my comments from my perspective as a lawyer and judge as well as a family friend and colleague of Mr. Montoya."
- "As a criminal defense attorney, Hector gave his clients the best defense while maintaining a professional focus." "During trial, he treated all people involved . . . with respect and a strong sense of dignity."
- While I was a federal magistrate judge, Hector "was always steadfast and dependable, was never late to court, and never missed a filing deadline."
- "I have seen Hector handle his arrest and conviction with poise and dignity. His determination to recover from his ethical lapse is yet another example of his strength of character. Our legal profession needs lawyers like Hector Montoya, lawyers who understand that all people, even successful leaders, can use poor judgment, endure public and private humiliation, but ultimately bounce back and be successful again."

Hon. Roberto Montiel, retired judge:

- "My impression of Hector is that he was always very polite and professional, both in his dress and demeanor, and well-prepared in the proceedings in which he was appearing. I considered Hector to be credit to the legal profession."
- "I still believe Hector is an honest and upright man."

Jesse Figueroa, Assistant United States Attorney:

- "I have also had the opportunity to observe Hector in his practice of law. He is always well prepared and represents his clients well. Hector has a reputation as an extremely competent and ethical lawyer. He is trustworthy. His word is his bond."
- "Hector and his family have endured much and suffered greatly as a result of this situation."
- "Hector continues to have the reputation as being an honest, ethical and trustworthy attorney."

Rev. John P. Lyons, the Priest at Respondent's church:

- "As a consequence of [the criminal] prosecution, Hector and his wife Melinda approached me out of concern for their children to help shield their children from the negative backlash from the criminal prosecution. That criminal prosecution, however, has not changed my opinion of Hector's personal and moral character. I believe that Hector has accepted responsibility for what he has done in the past and is ready to accept the consequence of that conduct and move forward with his future. I still believe him to be a man of integrity with strong moral character."

Rachel Pross, Respondent's bookkeeper and former client:

- Mr. Montoya "was more than happy to provide me with whatever information I requested. He made it clear from day one that his goal was to bring his accounting practices completely in line with State Bar guidelines."
- "Overall, I was very impressed with Mr. Montoya's hands-on approach to learning how to prevent accounting mistakes from occurring in the future and his willingness to take advice and criticism with a very positive attitude."
- "It is my belief that Mr. Montoya's accounting practices have vastly improved and are in compliance with State Bar regulations. . . . I believe Hector is focused on preventing errors and swiftly correcting them if and when they occur."

- "I hold Mr. Montoya in high regard. He represented my husband very well, and he has been a pleasure to work with as a client. . . . I believe he is an honorable person and an excellent attorney."

Eugene N. Goldsmith, professional acquaintance:

- "I always found Hector to be ethical and honest. Hector was also professional towards opposing counsel and clients."
- "I do know that the prosecution had a tremendous effect on [Hector] personally and professionally, and affected his thriving practice and placed a strain on Hector financially and personally. Despite the criminal prosecution, I still hold Hector in high regard and our firm still continues to work with him."

Enrique Serna, City Manager South Tucson:

- As a consequence of his criminal proceedings, Mr. Serna believes that Hector "will not let the crisis go to waste. He will be a stronger advocate in his profession . . . and the criminal justice system will be better off because of him."

(f) **Delay in disciplinary proceedings**: These proceedings are taking place more than five years after the conduct that gave rise to this matter. Moreover, Respondent's criminal probation ended six months ago at which time his conviction was classified as a misdemeanor and subsequently vacated. Both parties have worked diligently to bring this matter to a conclusion, but because of the lengthy criminal proceeding, the delay in this case has been substantial.

(g) **Imposition of other penalties or sanctions**: Respondent was sentenced to 18 months unsupervised probation. Moreover, over the past five years, Respondent has incurred substantial fees in his criminal defense and has suffered significant professional and personal hardship as a result the arrest and subsequent criminal conviction. Respondent and his wife explained his family lost many personal and professional connections as a result of the very public arrest and subsequent criminal process. The testimony of Respondent and his wife, Ms. Melinda Montoya, was credible and persuasive regarding the severe impact that Respondent's conduct has had on their mental and physical health, their marriage, their family, their friends,

their respective careers, and their treatment in the community. Finally, Respondent and his family have spent close to $250,000 in legal and expert fees in defending the criminal charges brought against him.

(h) **Remorse**: Respondent testified that he understands his role in the events that led to his indictment and criminal conviction, including his motivations and that he deeply regrets those actions and the harm they have caused. It is also clear that Respondent feels a great deal of remorse for the pain that his actions have caused his family, his colleagues and friends, and how they may have negatively impacted the legal profession and justice system. Because of the genuine remorse expressed by Respondent, his otherwise unblemished record as a lawyer, and the overwhelming testimonials submitted on his behalf, I find there is no reasonable probability the Respondent will repeat the conduct that led to his criminal conviction.

PROPORTIONALITY REVIEW

The following cases establish that the discipline I propose is proportionate to similar cases:

In *In re Walker*, No. 99-0406, the respondent was charged with violation of ER 1.7 (Conflict of Interest) and ER 8.4 (Misconduct) for allegedly extorting a sexual relationship out of his client in exchange for an insurance settlement. The respondent was arrested and charged with public sexual indecency and prostitution and ultimately, respondent entered a diversion program. Like the Respondent in this case, the evidence also showed that the allegations in the complaint were completely out of character for Mr. Walker. The hearing officer found that "[t]his violation arose out of negligence, poor judgment, rather than purpose. It was an aberration." H.O. Rep. ¶ 43. In addition, the hearing officer found the presence of seven mitigating factors. The disciplinary commission agreed with the hearing officer's findings of fact, but amended the sanction from censure to a 90-day suspension. Respondent then appealed the suspension to the Arizona Supreme Court.

The Supreme Court agreed with the hearing officer and concluded that public censure was the appropriate sanction. *In re Walker*, 200 Ariz. 155, 62, ¶¶ 27-29, 24 P.3d 602, 609 (2001). The court agreed that the respondent's conduct was not intended to further his own personal or financial interests, that respondent made a timely and good faith effort to rectify the

consequences of his conduct, and that he felt genuine remorse. Further, the court held that another mitigating factor in the case was the respondent's "public and personal humiliation," which included respondent's very public arrest and trial, participation in a diversion program, settlement of a malpractice suit and subsequent mental health counseling. 200 Ariz. at 161, ¶ 25, 24 P. 3d at 608. The Supreme Court also agreed with the hearing officer's comment that what happened to respondent as a result of his conduct would be a sufficient deterrent to other attorneys. The holding in *In re Walker* provides direct support for my proposed discipline in this case.

In *In re Michael St. George*, SB No. 98-0007, the respondent "failed to investigate or recognize that he was being used by a judge and another party to defraud a municipal court out of more than $27,000." He pled guilty to theft and was charged by the State Bar with violation of ER 8.4(d). His sanction was only censure. That respondent, like Mr. Montoya, took full responsibility for his actions, had no prior discipline in a long legal career, and presented "extensive evidence of good character."

In *In re Robert Clark*, SB No. 98-0067, "the respondent plead guilty to one count of solicitation to unlawful possession of a narcotic drug and received a sentence of three years probation. The probation was terminated early and the offense was designated a class 1 misdemeanor." The State Bar charged Mr. Clark with violation of ER 8.4(b), SCR 51(a) and 57(a). Mr. Clark received censure, two years probation upon reinstatement, and costs. The sanction was reduced by "significant" mitigation.

In *In re Jack Levine*, SB No. 97-0325, respondent plead guilty to willful failure to pay income tax, which was a misdemeanor offense. After being charged by the State Bar with a violation of ER 8.4(b), he was sanctioned only by censure. In mitigation, Mr. Levine demonstrated much of the same factors as Mr. Montoya has demonstrated: absence of a dishonest or selfish motive, full and free disclosure to the disciplinary board and cooperative attitude toward the proceedings, imposition of other penalties or sanctions, and remorse. *See* Standards 9.32(b), (e), (g), (k), and (l).

In *In re Timothy Ronan*, SB No. 97-0007, respondent mistakenly indicated on a claim for unemployment benefits that he had not earned any income and he plead guilty to criminal charges filed as a result of filing the "false claim." The State Bar charged respondent with violations of ER 8.4(b) and (c) and SCR 51(a). The sanction was only censure and one year of

probation. Mitigation factors included repayment of unemployment benefits, self-reporting to the State Bar, a fine and surcharge in the criminal matter and no prior discipline.

In *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1984), Beren was indicted for violations of state securities statutes. He pled to 12 counts of Facilitation to Commit Money Laundering, class 6 undesignated felonies, but which had been designated misdemeanors and then vacated prior to the disciplinary hearing. The convictions themselves were the only evidence presented by the State Bar and no evidence of the underlying conduct was provided. In particular, there was no finding of intentional conduct. The hearing officer specifically found, and the Disciplinary Commission and Arizona Supreme Court agreed, that the conviction for a misdemeanor offense of facilitation of money laundering was not a "serious crime" and that it did not reflect adversely on the lawyer's "honesty, trustworthiness or fitness as a lawyer." 178 Ariz. at 402, 874 P.2d at 322. The court did not impose any discipline.

RECOMMENDATION

The purpose of attorney discipline is not to punish the lawyer, but to protect the public. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Discipline in this case must be based on conduct alone. *In re Beren.* Under *Beren*, no discipline should be imposed on the basis of Respondent's conviction. The *Beren* court specifically held that the conviction of 12 counts of facilitation of money laundering, all undesignated offenses, could not form the basis for discipline. 178 Ariz. at 402, 874 P. 2d at 322. Therefore, the State Bar must establish by clear and convincing evidence that Respondent's actual conduct violated the ethical rules; Respondent's conviction cannot be the basis of the discipline. Because the ethical rule violations alleged in Count Two are far more serious and would require greater discipline than those alleged in Count One, I focus my analysis and recommendation based on the conduct alleged in Count Two.

In this case, the State Bar's evidence was based upon Respondent's conviction, plea agreement and accompanying factual basis. But the record also consists of the testimony of Respondent, and the parties' stipulated facts. The issue then is whether Respondent's conduct, as established by the complete record, violated the ethical rules alleged in the Complaint. An analysis of Respondent's mental state is critical to this determination.

Respondent's Mental State

As discussed above, I find that the Respondent's mental state during the conduct described in Count Two was negligent. The State Bar has not established that Respondent acted with "knowledge." Although one element of the crime to which Respondent plead guilty requires knowledge, his plea agreement does not impute knowledge to him for purposes of this disciplinary proceeding. Under *Beren*, the discipline here must be based on Respondent's conduct. His conviction may not be considered for disciplinary purposes. Therefore, it is the State Bar's burden to prove by clear and convincing evidence that in engaging in the underlying conduct Respondent acted with knowledge. Stated differently, the State Bar may not rely on Respondent's conviction to supply critical evidence of his mental state during the conduct alleged.

Based on the complete record, the State Bar did not establish by clear and convincing evidence that Respondent's underlying conduct—in accepting the retainer and his other communications with Ms. Dominquez—was done with the knowledge that he was presently or actively engaging in unlawful conduct. The evidence in this record only supports a finding that Respondent's conduct was negligent: Respondent failed "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." *Standards.*

Analysis under ERs 8.4 (b), (c) and (d)

Each ethical rule that the State Bar alleges Respondent violated has distinct elements and mental state requirements. For instance, a violation of ER 8.4(b) requires not only proof of a criminal act, but it also requires proof that the criminal act reflected adversely on the lawyer's fitness to practice law. *Matter of Horwitz*, 180 Ariz. 20, 24, 881 P.2d 352, 356 (1994). If every conviction of a crime resulted in a *de facto* violation of 8.4(b), it would negate ER 8.4(b)'s requirement that the crime also reflect adversely on the lawyer's fitness. Similarly, a violation of 8.4(c) requires the State Bar to prove that a lawyer acted with knowledge, while 8.4(d) only requires the State Bar to show that a lawyer acted negligently. *See In re Van Dox* and *In re Owen* (mistake in law does not necessarily mean there is knowledge or a violation of 8.4(c)); *In re Clark* (holding there is a difference between violations of 8.4(c) and (d)).

Thus, it cannot be assumed that conviction of a crime necessarily results in a violation of ERs 8.4(b), (c) and (d). Such a conclusion impermissibly conflates the requirements of each

ethical rule, negating important distinctions between them. I therefore analyze the alleged violations of each ethical rule separately.

ER 8.4(b)

ER 8.4(b) requires lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Respondent cannot deny that he plead guilty to an undesignated felony that was later classified as a misdemeanor. Based on the record here, however, the State Bar failed to show that Respondent committed the criminal act of facilitation of money laundering.

First, the parties have stipulated that there is no evidence that the $20,000 retainer paid to Respondent was the product of an illegal source. Second, even the factual basis made part of Respondent's plea agreement is worded in the disjunctive—Respondent "knew or should have known that [he] . . . would facilitate Ms. Dominguez in committing money laundering." (emphasis added). Third, the unrefuted testimony at the hearing was that when Respondent, while out of the office on vacation, ultimately agreed to accept an ID from someone other than Ms. McLean, he was totally unaware of the potential source of the funds that would be used to pay his retainer. For all of these reasons, the State Bar did not prove by clear and convincing evidence that Respondent committed the criminal act of facilitating money laundering.

The second necessary element of ER 8.4(b) requires the State Bar to show that Respondent's criminal conduct reflects adversely on his fitness to practice law. The Arizona Supreme Court has expressly held that the crime to which Respondent pled guilty is not a "serious crime" and does not "reflect[s] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." 178 Ariz. at 402, 874 P. 2d at 322.

Even if the State Bar could have demonstrated the elements of the ER 8.4(b), I must consider the Respondent's mental state under the *Standards* in recommending a sanction. As I have stated, I find that Respondent's mental state was negligent. Under Standard 5.1, which is the Standard applicable to a violation of 8.4(b), both suspension and censure require the State Bar to show by clear and convincing evidence that Respondent acted with "knowledge." The State Bar has not done this. Informal reprimand under Standard 5.1 requires the State Bar to show that Respondent's conduct "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Because the State Bar also did not establish this element,

informal reprimand is not appropriate. Therefore, I conclude that Respondent did not violate ER 8.4(b).

ER 8.4(c)

ER 8.4(c) requires a lawyer to be disciplined if he "engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation." A lawyer's negligent actions cannot constitute a violation of ER 8.4(c). "[A] violation of ER 8.4(c) *must* rest upon behavior that is knowing or intentional and purposely deceives or involves dishonesty or fraud." *In re Clark*, 207 Ariz. 414, 417, ¶ 15, 87 P.3d 827, 830 (2004) (emphasis added); *see also In re Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995).

The State Bar did not offer any evidence, let alone clear and convincing evidence, that Respondent's conduct was with "knowledge" as defined by the *Standards*. *See In re Van Dox*. As the complete record demonstrates and I have found, Respondent acted negligently. Therefore, Respondent did not violate ER 8.4(c)

ER 8.4(d)

ER 8.4(d) provides "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." A violation of ER 8.4(d) "does not require a mental state other than negligent." *Clark*, 207 Ariz. at 418, ¶ 16, 87 P.3d at 831.

Standard 6.0 provides the presumptive sanctions for a violation of ER 8.4(d), which implicate the duties lawyers owe to the legal system. For negligent conduct involving false statements, fraud and misrepresentation, the presumptive sanction under Standard 6.1 is either censure or informal reprimand. Censure "is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." Standard 6.13. Informal reprimand may also be appropriate considering the alleged conduct was an isolated incident. Informal reprimand "is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding." Standard 6.14.

As evidenced by the record, the conduct in this case was an isolated incidence of negligence which involved the Respondent in a plea to criminal conduct, the ongoing nature of which interfered with his ability to take advantage of the original corrective and less punitive approach of the Bar. Thus, the appropriate presumptive sanction for the conduct alleged in the Complaint is censure. Even if informal reprimand were appropriate under 6.13, the profit motive which the facts show as having led to accepting the criminal retainer require a censure so as to allow future disciplinary enhancement in the unlikely event of future repeated behavior such as the conduct herein complained of. It is the express finding of the undersigned that this sanction will reasonably and probably protect the public from potential future transgressions of the Respondent. I have limited my comments to Count Two.[1] I do not believe any discipline is appropriate for the conduct alleged in Count One.

Mitigation

As discussed above, I find Respondent demonstrated the existence of seven of the thirteen mitigating factors listed in the *Standards*, many of which the State Bar supported by stipulation. I also find that the extensive mitigating factors in this case far outweigh the aggravating factors, as imputing a selfish motive to the acceptance of a retainer in private representation could be meaninglessly found in each and every single case involving private counsel.

Giving consideration to Respondent's otherwise unblemished record as a lawyer, the passage of five years since the events in question and Respondent's continued unblemished record during this period, the letters submitted attesting to his character, and his genuine expression of remorse and contrition during the hearing, I conclude that the public is not in danger that Respondent will repeat the conduct that led to his conviction. I give weight to Respondent's testimony that he feels great remorse for his conduct and that he has already changed the way that he practices law to be more aware of the nature of his conduct. He testified that he has changed his "practice completely." He testified that in the intervening time he has had the "opportunity to . . . look at how I approach clients and how I discuss matters with clients, becoming more aware of how I say things and the way I present issues to them. . . . I will not be as relaxed about the way I speak to my clients in terms of making sure there's a distinct line

[1] Although the factual basis makes reference to other actions by Respondent, the State Bar's prosecution of this case has focused exclusively on the issue of the retainer, as have I.

between a professional attorney and a client, and I crossed that line where it's somewhat . . . like talking to a friend . . . [I am now] much more formal in my approach towards them."

The State Bar has also stipulated that Respondent has already taken ameliorative steps to rectify his conduct by choosing on his own to stop representing criminal drug defendants and intending not to practice criminal law in the future. Moreover, Respondent's experience with the criminal justice system, including the personal and public humiliation that he and his family experienced, along with the substantial cost to him of his criminal defense, will, without further discipline, deter others from engaging in similar conduct. *See In re Walker*, 200 Ariz. at 161, ¶ 25, 24 P.3d at 608.

For all of the foregoing reasons, and giving consideration to the entire record in this matter, I recommend the following sanction:

a. Censure.

b. Probation for two years effective from October 21, 2009, the date Respondent's criminal justice probationary period ended.

c. Referral to the Law Office Management Assistance Program.

DATED this 1st day of June, 2010.

David M. Waterman | K. D'Amore

David M. Waterman, Hearing Officer 8 J

Original filed with the Disciplinary Clerk
this 1st day of June, 2010.

Copy of the foregoing mailed
this 1 day of June, 2010 to:

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