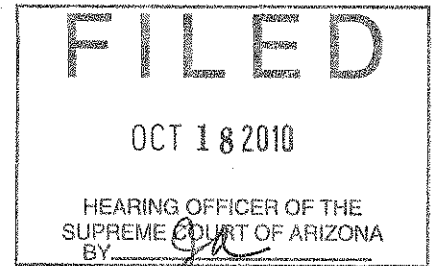


**BEFORE A HEARING OFFICER
THE SUPREME COURT OF ARIZONA**



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
MARSHALL FEALK,)
 Bar No.003332)
)
)
RESPONDENT.)
_____)

No. 09-0841

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

A Complaint was filed on April 30, 2010. The Hearing Officer was assigned on May 13, 2010. The Initial Case Management Conference was held on May 25, 2010. Respondent filed an answer on June 8, 2010. The State Bar filed a Motion for Leave to File Amended Complaint on August 13, 2010. On August 19, 2010 the parties filed a Notice of Settlement. The Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent were filed on August 30, 2010. A hearing on the agreement was held on August 31, 2010.

FINDINGS OF FACT¹

1. 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 April 28, 1973. (TR 4:18)

¹ The facts are found in the Tender of Admissions and Agreement for Discipline by Consent, in the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent and in the transcript of the hearing.

COUNT ONE (File no. 09-0841)

2. On or about May 4, 2009, check number 999991 in the amount of \$2,500 was presented for payment against Respondent's J.P. Morgan Chase client trust account, account number XXXX9353. (TR 5:20 through 6:9)

3. At the time the check was presented, there was a balance of \$900 in Respondent's client trust account number XXXX9353. (TR 6:11-15)

4. The bank returned the check and did not charge an overdraft fee, leaving the account with a balance of \$900. Respondent affirmatively asserts that Bank of America has admitted it failed to follow Respondent's instructions to transfer funds from his old IOLTA account to his new IOLTA account, which funds would have been sufficient to cover this check.² (TR 6:16 through 8:5)

5. After being notified of this occurrence, the State Bar of Arizona's Staff Examiner ("Staff Examiner") requested an explanation from Respondent, and requested that he provide the State Bar with copies of his trust account records corresponding to check number 999991 and Respondent's client trust account ending in 9353, for the months of April and May, 2009. (TR 8:14 through 9:4)

6. After Respondent provided the requested records and responded to additional questions from the Staff Examiner, the Staff Examiner conducted an examination of the records, including a reconstruction of the activity on the account during the months of April and May 2009. (TR 9:5-11)

7. Based on her review of Respondent's records relating to his client trust account XXXX9353, as well as records of other accounts maintained by Respondent as client trust

² The parties agreed at the hearing that the bank was Chase Bank, not the Bank of America. (TR 7:5-11)

accounts and/or operating or general accounts, and records provided by Respondent in April 2010, the Staff Examiner identified the following violations:

- a. Respondent failed to safe-keep client property in his possession when he withdrew \$700 on April 20, 2009, for the benefit of client Tornabene when the amount held in trust for that client was only \$250, and remained in the negative until June 5, 2009; (TR 10:5)
- b. Respondent withdrew \$700 for the benefit of client Tornabene when the funds held in trust for that client were insufficient to cover that withdrawal and remained in the negative until June 5, 2009;

With regard to Paragraphs 7(a) and 7(b), Respondent affirmatively asserts that these discrepancies were addressed in a subsequent review and accounting of the Tornabene matter and the account has now balanced. The State Bar does not contest this assertion.³

- c. Respondent failed to maintain and preserve complete records according to the minimum standards as not all client ledgers reviewed included dates for each transaction, payors, payees, or unexpended balances. (TR 18:25 through 19:8)
- d. Respondent failed to maintain and preserve complete records according to the minimum standards as not all duplicate deposit records included the corresponding client names, and Respondent's checkbook register did not include unexpended balances; (TR 19:9 from 20:1)
- e. Respondent failed to maintain and preserve complete records according to the minimum standards as he did not maintain an administrative funds ledger or its equivalent that corresponded to \$1,000 held on deposit in his trust accounts; (TR 23:7-11)

³ At hearing Bar Counsel agreed to withdraw paragraphs 7 (a) and 7 (b). (TR 17:4-21)

- f. Respondent failed to exercise due professional care due to the conduct described above and because he failed to provide a reconciliation of his account and did not explain the difference between the amount maintained in his client trust account and the amount reflected on his bank statements; (TR 23:12-19)
- g. Respondent failed to maintain on a current basis, complete records of the handling, maintenance and disposition of all funds as required by the conduct described above and following; (TR 23:20-25)
- h. Respondent failed to maintain adequate internal controls by the conduct described above, as well as that:
 - i. Check number 1711 in the amount of \$187, payable to the Clerk of Court FBO Rothrock was not included in the checkbook register. Respondent affirmatively asserts that this check is now included in the checkbook register. For purposes of this agreement, the State Bar does not contest Respondent's assertion; (TR 24:1-13)
 - ii. The reconstructed checkbook register transactions for client Tornabene did not correspond to the billing statement dated September 8, 2009, submitted for review as the billing statement showed \$4,000 as earned fees with a balance of \$1,175 and the reconstructed checkbook register showed the remaining balance as \$1,550; (TR 24:19 through 25:4)
 - iii. The reconstructed client ledger for client Tornabene indicated several discrepancies including that check number 1706 was recorded as dated on 2/10/09 and 2/11/09 in the amounts of \$750 and \$500, respectively, when the actual disbursements were by check 1704 for \$750 and check

number 1705 for \$500; check number 1707, dated 2/12/09 payable to Respondent was included on Respondent's reconstructed general ledger but was not included on the client's individual ledger; the balance on the client's ledger on 1/8/09 was shown as \$3,564 and after a deduction of \$750 was shown as \$2,754 rather than \$2,814, a difference of \$60; (TR 25:5-23)

- iv. The reconstructed checkbook register for client Solari did not correspond to the billing statement submitted for review, as the billing statement showed \$880 as earned fees but the reconstructed checkbook register showed that \$1,000 was disbursed. Respondent affirmatively asserts that a subsequent billing statement with additional earned fees for this period shows greater time expended than on the original billing statement, and this now balances. For purposes of this agreement, the State Bar does not contest this assertion; (TR 25: 24th through 26:12)
- v. The entry on the general ledger for client Schantz dated 1/7/2009, check number 1702 payable to MetLife indicated that the amount of the check was \$4,200, which left an unexpended balance of \$3,978.07. Respondent's calculation for the unexpended balance was \$4,478.07. Respondent provided a checkbook register indicating that check number 1702 was written for \$4,700, not \$4,200, creating a discrepancy of \$500; (TR 26:13 through 27:10)

- vi. Respondent's reconstructed client ledger for client Huot indicated that check number 1708, payable to Respondent, was dated 1/3/1900, when the correct date of issue was 2/18/2009. (TR 27:11-20)
- i. Respondent failed to maintain or cause to be maintained appropriate and required individual client ledgers as his ledgers omitted required information as described above; (TR 27:21 through 28:2)
- j. Respondent did not maintain individual client ledgers and checkbook registers according to the minimum standards, therefore a proper monthly three-way reconciliation could not be conducted; (TR 28:3-9)
- k. Respondent's March 2009, bank statement showed a balance of \$9,128.07, the general ledger balance at the same time was \$9,138.07. Respondent indicated an unexplained \$162 adjustment bringing the total of his client ledgers to \$9,138.07. The attempted three-way reconciliation does not balance; (TR 28:10-19)
- l. Respondent's April 2009, bank statement balance was \$8,941.07, the general ledger balance was \$8,851.07, and the total of all client ledgers was \$8,851.07. The attempted three-way reconciliation does not balance; (TR 28:20-25)
- m. In May 2009, Respondent's bank statement balance was \$741.07; his general ledger balance was \$754. On Respondent's attempted three-way reconciliation the total of the client ledgers was left blank, making the three-way reconciliation impossible; (TR 29:1-10)
- n. Respondent was unable to provide a reconciliation of the trust account bank statement balance, providing rather a "rough recalculation;" and (TR 29:11-18)

- o. Respondent disbursed funds from his client trust account by means other than a pre-numbered check or electronic transfer and did not maintain a record of such disbursements in accordance with the applicable Rule when he signed a withdrawal slip for \$2,300 which was disbursed from the trust account on April 20, 2009. Respondent affirmatively asserts that the transfer of these funds from account to account within the bank was accomplished electronically. The State Bar does not withdraw its allegation that Respondent initiated this transfer by signing a withdrawal slip, but for purposes of this agreement does not contest Respondent's assertion. (TR 29:19 through 30:10)

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that his conduct, as described above, violated Rule 42, Ariz. R. Sup. Ct., specifically: ER 1.15 [failing to safeguard client property], and Rule 43 [not complying with trust account requirements], Ariz. R. Sup. Ct. (TR 30:11-18)

CONDITIONAL DISMISSALS

The State Bar has agreed to conditionally dismiss the allegation that Respondent converted client funds by a disbursement for client Tornabene as alleged in Paragraph 7(b) in consideration of Respondent's admission of all other violations and this agreement. ⁴

RESTITUTION

There are no issues of restitution in this matter. (TR 31:1-4)

⁴ At the hearing Bar Counsel stated that this paragraph should be amended to reflect a conditional dismissal of paragraphs 7 (a) and 7 (b). (TR 30:19-25)

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 court and commission consider the *Standards* a suitable guideline. *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); ABA *Standard* 3.0.

The Hearing Officer agrees with the parties that *Standard* 4.12 is the appropriate *Standard* given the facts and circumstances of this matter. (TR 32:24 through 33:6) *Standard* 4.12 provides that suspension is the appropriate sanction when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury. As Respondent had previously completed the State Bar's Trust Account Ethics Enhancement Program ("TAEHP"), the Hearing Officer agrees with the parties that at a minimum Respondent should have known that he was not appropriately managing and maintaining his client trust account(s). (TR 33:7-15)

Additionally, given the facts and circumstances of the instant matter, *Standard* 8.2 is applicable as well. *Standard* 8.2 provides in pertinent part that suspension is generally appropriate when a lawyer has been reprimanded (censure in Arizona) for the same or similar misconduct and engages in further acts of misconduct. (TR 33:16 through 34:18)

Duty Violated

Respondent violated his duty to his clients and to the profession when he failed to safeguard client property by failing to keep appropriate records related to his trust account. (TR 31:5-22)

Mental State

Respondent acted knowingly. (TR 31:23 through 32:6)

Injury

There was no actual injury to a specific client. However the potential for injury existed. (TR 32:7-23)

Aggravating Factors:

The parties conditionally agree that the following aggravating factors apply:

Standard 9.22(a) Prior disciplinary offenses. In addition to being informally reprimanded in 1991 for violations of ERs 1.1 and 1.2, Respondent was censured in 2008 for issues relating to fees and trust account violations. In addition to the censure, Respondent was placed on probation for two years, the terms of which included completion of the State Bar's Trust Account Ethics Enhancement Program ("TAEHP") and participation in the State Bar's Trust Account Program. Respondent had completed TAEHP prior to the conduct in the instant matter. (TR 33:23 through 34:5)

Standard 9.22(c) Pattern of misconduct. Respondent's misconduct in the instant matter was actually a series of events over several months, as well as being similar to the misconduct for which he was sanctioned in 2008. (TR 35:14 through 36:1, 39:9-15)

Standard 9.22(i) Substantial experience in the practice of law. Respondent was admitted to the practice of law in Arizona in 1973. (TR 39:16-22)

Mitigating Factors:

Standard 9.32(b) Absence of a selfish or dishonest motive. There is no indication that Respondent's misconduct was committed to benefit himself or resulting from any dishonesty. (TR 39:23 through 40:3)

Standard 9.32(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent has supplied the State Bar with information as requested and has participated fully in the formal discipline process. (TR 40:4-9)

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 27, 35, ¶ 33, 90 P.3d 764, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 41, ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In *In re Diodati*, (SB007-0197-D, 2008), the lawyer had previously been placed on diversion for trust account violations and was ordered to complete an educational program. After new trust account violations arose, and after Respondent failed to cooperate in the investigation and produce records, and with the inclusion of an additional matter still under investigation.⁵ Respondent was suspended for 60 days and placed on probation upon reinstatement."

⁵ Although the Hearing Officer's Report in *Diodati* found a mitigating factor of "full and free disclosure to disciplinary board or cooperative attitude toward proceedings", the Hearing Officer also adopted by reference the Tender of Admissions which contained numerous facts agreed to by the parties that Respondent failed to cooperate with the Bar's requests for information. The Joint Memorandum supporting the Tender contained the specific agreement of the parties finding the aggravating factor of "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency."

In *In re Gonzales*, (SB-08-0177-D, 2009) the lawyer failed to adhere to the guidelines for managing his client trust account, failed to maintain trust account records, commingled client property and failed to safeguard funds. Gonzales was suspended for 30 days and was placed on probation for one year upon reinstatement. Gonzales had no prior disciplinary offenses, but he had been ordered into diversion for trust account violations in a 2006 matter. As part of diversion he completed the State Bar's Trust Account Ethics Enhancement Program (TAEPP) on February 6, 2007 before he violated trust account rules in August and September 2007 in this matter.

In *In re Hudspeth*, (SB-09-0090-D, 2009) the lawyer was suspended for 30 days with one year of probation upon reinstatement after he failed to appropriately maintain his client trust account, failed to maintain records, failed to conduct monthly three-way reconciliations, converted client funds and commingled client and personal funds in his trust account. Although Hudspeth had no prior disciplinary offenses, he had attended TAEPP on May 1, 2007 and the violations in his case were found to have occurred between July 1, 2007 and February 29, 2008.

In *In re Steven Allen* DC No. 99-1247, SB-01-0112-D August 30, 2001) Respondent failed to maintain client ledger cards, failed to sufficiently identify deposited funds, failed to keep client funds separate from his own, failed to identify clients associated with payments to Respondent and failed to maintain adequate funds in his trust account. He had a prior disciplinary offense. He received a 30 day suspension and 2 years probation with LOMAP and TAEPP.

Based on the *Standards* and case law, the Hearing Officer agrees with the parties that suspension from the practice of law for 30 days followed by probation for one year with the terms and conditions set forth in the Tender of Admissions is an appropriate sanction in this case and will serve the purposes of lawyer discipline. The sanction will serve to protect the public,

instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of the bar.

RECOMMENDATION/CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Recognizing it is the prerogative of the Disciplinary Commission and the Supreme Court to determine the appropriate sanction, the Hearing Officer agrees with the assertion of the State Bar and Respondent that the objectives of discipline will be met by the imposition of the proposed sanction.

The Hearing Officer has considered whether a 30 day suspension and one year of probation is an appropriate sanction. Respondent has been previously sanctioned for trust account violations. At the hearing Bar Counsel explained her reasoning for agreeing to the sanction as follows: "Your Honor, we took into consideration and weighted heavily the fact that Mr. Fealk has hired a CPA to maintain his client trust accounts. And if Your Honor will notice that one of the conditions in his probation in this matter is that he continue to use the services of an accountant who has been trained by the State Bar at a State Bar trust accounting seminar to maintain his client trust accounts. And in addition, the LOMAP component of his probation will ensure that someone from the State Bar will be following up with him on a regular basis, I would anticipate at least monthly if not more often, to make sure that the accountant is appropriately managing the account and that Mr. Fealk is appropriately supervising the accountant." (TR 37:8-23)

The Bar noted that one of the proportionality cases *In re Diodati* involved a longer suspension than 30 days. The Bar distinguished Respondent's conduct in this case from the

attorney in *Diodati*, "Mr. Fealk took these actions during that period of time that we were finalizing our investigation and did not wait for the agreement to go through before he referred to the accountant, which I believe that Mr. Christoffel [Respondent's counsel] and Mr. Fealk will agree will in great part alleviate the potential for harm. And so under those circumstances, we believe that although a suspension was still appropriate, that because of the remedial measures that Mr. Fealk had taken, that reducing the potential length of that was appropriate as well." (TR 37: 24 through 38:11)

Another distinguishing factor between Respondent and the attorney in *Diodati* is that Respondent cooperated fully with the Bar and Mr. Diodati did not cooperate. (TR 40:16-22)

Respondent recognizes his responsibility in managing trust accounts. When asked at the hearing what he has learned about trust accounts, he stated, "That every trust account must, in the sub-trust, must individually be signed. And all the entries with regard to disbursements for legal fees and associated costs must be reflected in the client ledgers. And that the total of them must equal to the general ledger, and the general ledger must equal to the bank statements. So that if there's some problem that occurs in any one of those things that they don't reconcile, you need to discover that within just a few days of discovering the problem and figure out a way to rectify it. I have someone who does this for many attorneys in town, and his name is Harold Johnson, and Mr. Johnson will be my contact for trust accounts as long as he's willing to stay. And if he doesn't want to stay at any point, I will replace him with someone of similar attributes. But I think we have a fairly good relationship, and I think he would like to help me with my trust accounts." (TR 42:24 through 43:17)

The Hearing Officer recommends the 30 day suspension and one year probation because the public will be protected by Respondent having extra time during the suspension to make sure

his management of his trust account is fully compliant. While on probation Respondent will be required to use the services of a qualified bookkeeper who will also receive Bar-sponsored training in trust account management. Respondent will be supervised by LOMAP. The combination of the suspension and the detailed probation will serve the interests of deterring Respondent and others from trust account violations, while protecting the public by assisting Respondent in bringing his practice into full compliance with the Rules of Professional Conduct.

SANCTION

The Hearing Officer recommends that Respondent be sanctioned as follows:

1. Respondent shall be suspended for a period of 30 days.
2. Upon reinstatement, Respondent shall be placed on probation for one year under the following terms and conditions:
 - a. Respondent shall participate in the State Bar's Law Office Management Assistance Program (LOMAP) for the period of probation;
 - b. Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) at (602) 340-7332 within 30 days of the date of the final Judgment and Order. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ER 1.15 and Rule 43. The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of the Judgment and Order and will

conclude one year from that date.⁶ Respondent shall be responsible for any costs associated with LOMAP.

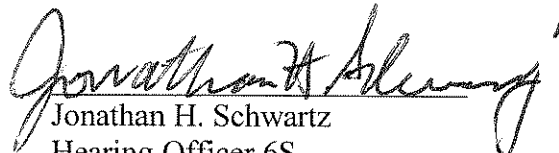
- c. Respondent shall, at his own expense, utilize the services of a qualified bookkeeper/accountant approved by LOMAP to maintain his client trust account(s);
- d. The individual selected by Respondent to maintain his client trust account(s) shall, within 30 days of the final Judgment and Order, complete a three-hour course sponsored by the State Bar of Arizona on Trust Account Management at Respondent's expense, or shall provide proof to LOMAP that they have previously attended such a program. This requirement may be satisfied by completion of such a program in person, by webcast or by completing a program available on-line through the State Bar of Arizona's Continuing Legal Education department.
- e. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and,

⁶ The Tender of Admissions stated that the probation would begin at the time of the Judgment and Order and would end one year from the time Respondent signed terms and conditions of probation. The Hearing Officer in preparing this Report noticed that since the date of the Judgment and Order and the date Respondent signed terms and conditions of probation would be different dates, this would lead to probation of more than one year. Counsel for the parties were contacted and they agreed to the modification of the Tender of Admissions to allow for the probation to start at the Judgment and Order and to end one year from that date.

if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.

3. Respondent shall pay the costs and expenses of these disciplinary proceedings. Respondent understands that these costs and expenses include the costs and expenses of the State Bar of Arizona, of the Disciplinary Clerk, of the Disciplinary Commission and of the Supreme Court of Arizona. The costs incurred by the State Bar are attached as "Exhibit A".

DATED this 18 day of October, 2010.


Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 18th day of October, 2010.

Copy of the foregoing mailed
this 18th day of October, 2010, to:

Dean Christoffel
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Roberta Tepper
Senior Bar Counsel
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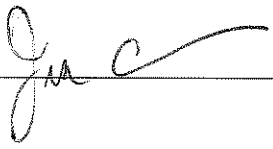
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EXHIBIT A

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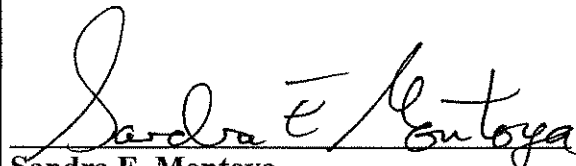
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04/20/10	Review response; Reconcile general ledgers, client ledgers, bank statement, billing statements	\$225.00
04/21/10	Complete supplement 1.	\$ 75.00
07/08/10	Review disclosure statement and document discrepancies	\$131.25
07/09/10	Review disclosure statement and document discrepancies; Complete Supplement 2.	\$150.00
07/19/10	Travel and mileage to settlement conference in Tucson	\$412.50
08/18/10	Review response and supporting documents; Issue supplement 3.	\$ 56.25
08/19/10	Complete supplement 3.	\$ 7.50
Total for staff investigator charges		\$1282.50

TOTAL COSTS AND EXPENSES INCURRED **\$2,482.50**


Sandra E. Montoya
Lawyer Regulation Records Manager

8-23-10
Date