BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **ROBERT J. ROSEPINK,** **Bar No. 004251** RESPONDENT.	No. 08-1678, 09-0687, and 09-2184 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

1. On April 1, 2010, the State Bar of Arizona filed its Complaint. On April 9, 2010, the State Bar filed its First Amended Complaint. On April 30, the State Bar filed its Second Amended Complaint (Complaint). Answers were filed and this Hearing Officer ruled on various pre-trial motions. On June 4, 2010, upon motion, the Disciplinary Commission designated the case as a complex case.[1] The hearing was held daily from October 4, 2010 to October 18, 2010. Present at the hearing were State Bar counsel Russell J. Anderson and Shauna R. Miller, Robert J. Rosepink (hereafter "Respondent"), his counsel Brian Holohan and Vicki Lopez, and this Hearing Officer. The parties filed Post-Hearing memoranda and Proposed Findings of Fact and Conclusions of Law after receipt of the transcript.

THE COMPLAINT

2. In this lengthy and factually complex case, initial review of the Complaint provides a better understanding of the violations alleged by the State Bar.

[1] Rule 57(j)(2), effective until January 1, 2011, authorized the Disciplinary Commission to designate a case as "complex" upon motion by either the State Bar or the Respondent. A complex case is defined as a case ... "that in the interests of justice, cannot be heard within one hundred fifty (150) days of the filing of the complaint."

COUNT ONE (Dawson)

3. Count One alleges that in approximately 1999 John Dawson, a client of Respondent, invested in Futech Interactive Products ("Futech"). Futech failed, and Mr. Dawson lost his monies. Count One charges eleven (11) violations alleging that Respondent ERs:

(1) 1.4(a)(1): fail to promptly inform client of information or a circumstance for which informed consent is needed;

(2) 1.4(b): fail to explain matter to extent necessary to permit informed decision;

(3) 1.6: improper use of confidential information to identify client as potential investor;

(4) 1.7(a): conflict of interest between or among client and Respondent and Futech;

(5) 1.8(a): enter into business transaction with client;

(6) 1.8(b): improper use of confidential information without informed consent;

(7) 1.9(c) (1): improper use of confidential information to identify client as potential investor without informed consent;

(8) 1.9(c) (2): revealing information about client to identify client as potential investor;

(9) 8.4(c): knowingly misleading or deceiving client;

(10) 8.4(c): knowing misrepresentation to client of investment-related information; and

(11) 8.4(d) conduct prejudicial to the administration of justice because Respondent's conduct resulted in "a massive lawsuit that used enormous amounts of judicial resources."

COUNT TWO (ENTI)

4. Count Two alleges that between 2002 and 2006 Respondent committed multiple ethical rule violations when various individual and entities involving clients, nonclients and prospective clients invested in ENTI Capital and ENTI entertainment (collectively "ENTI"). ENTI failed after the approximate four year time period, resulting in the loss of significant investment monies to the investors.

5. Count Two identified twenty-three (23) individual persons as investors (at hearing, the State Bar's motion to dismiss William Radford and Terri Radford from the investor list was

granted). Count Two also identified entities such as several trusts and one or more foundations, which invested in ENTI.

6. Count Two (Complaint, pp. 68 - 73) charges twenty (20) violations against Respondent:

(1) Rule 41, Ariz. R. Sup. Ct, failing to support the laws of the State of Arizona due to Respondent's later plea of guilty to four misdemeanor offenses for solicitation of sale of unregistered securities;

(2) ER 1.1: competence;

(3) ER 1.4 (a)(1): failure to inform client of a decision or circumstance to which informed consent is required [by 1.0(e)];

(4) ER 1.4(a)(3): failure to keep client reasonably informed about status of matter;

(5) ER 1.4(b): failure to explain to extent necessary to permit informed decisions regarding client objectives or representation;

(6) ER 1.5(a): charging unreasonable fee or expenses;

(7) ER 1.6(a): revealing confidential information without client's informed consent;

(8) ER 1.7: conflict of interest;

(9) ER 1.9: use of information relating to representation to disadvantage of former client;

(10) ER 1.8(a): entering into a business transaction with a client or acquiring a pecuniary interest adverse to client;

(11) ER 1.9((b): use of information relating to representation to disadvantage of former client; and

(12) ER 1.8(b): using information relating to representation to disadvantage of client;

(13) ER 1.9: use of information relating to representation to disadvantage of a former client;

(14) ER 1.9(c): use of information relating to the representation to disadvantage of former client;

(15) ER 1.16(a)(1): failing to withdraw when representation resulted in violation of Rules of Professional Conduct as alleged in Complaint;

(16) ER 2.1: failing to exercise independent professional judgment and render candid advice;

(17) ER 5.7: engaging in law related services not distinct from legal services and violating other Rules of Professional Conduct as alleged in Complaint;

(18) ER 8.4(b): committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness;

(19) ER 8.4(c): engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and

(20) ER 8.4(d): engage in conduct prejudicial to the administration of justice.

COUNT THREE (McQUAID)

7. Count three involves the 2005 contact that Peter McQuaid had with Respondent in which Mr. McQuaid expressed interest in investing in ENTI. Mr. McQuaid invested in ENTI, received interest payments, and then ENTI failed.

8. Count Three charges five violations of ERs:

(1) 2.1: failing to exercise independent professional judgment and render candid advice;

(2) 4. 1(a): knowingly make a false statement of material fact to a third person;

(3) 5.7: providing law related services not distinct from legal services and violating other provisions of the Rules of Professional Conduct as alleged in Complaint;

(4) 8.4(c): engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and

(5) 8.4(d): engage in conduct prejudicial to the administration of justice.

FINDINGS OF FACT [2]

The Parties Stipulated Facts

9. In their Joint Pre-Hearing statement the parties stipulated to the facts below (paragraphs 10 to 83). The stipulated facts provide a parameter for the case about the ENTI investments by individuals and entities associated with various family groups for which Respondent had provided trust and estate planning and related services in the past.

10. 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 October 11, 1975.

COUNT ONE (File No. 09-2184/Dawson)

11. Respondent, for some period of time before the Dawson loan, was made a director for Futech Interactive Products, an Arizona Corporation.

12. John Dawson was one of Respondent's estate planning clients.

13. Dawson made a loan to Futech that was not repaid.

COUNT TWO (File No. 08-1678/ENTI Investors)

14. At all relevant times, David Estes, P.C., was a member of Rosepink & Estes, PLLC. Robert J. Rosepink, P.C. was the other member.

15. Respondent was acquainted socially with Jim Galyon, a principal in ENTI, whom Respondent met some time in 2002.

16. Galyon brought to Respondent's attention the opportunity to lend money to Galyon's business, ENTI, Inc., which Galyon represented lent money to concert promoters.

17. Respondent conducted an investigation into ENTI in 2002.

18. As part of his investigation, Respondent reviewed a balance sheet from ENTI Entertainment, Inc. dated September 30, 2002.

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[2] The facts are taken from the transcript of the hearing, the stipulated facts from the Joint Pre-Hearing Statement, the Exhibits and the parties' Proposed Findings of Fact.

19. The September 30, 2002 balance sheet showed that ENTI, Inc. had assets greater than its liabilities.

20. As part of his investigation, Respondent hired a private investigation firm, Spinelli Corporation, to conduct a background check on Mr. Galyon, Mr. Nozicka, and ENTI, Inc.

21. As part of his investigation, Respondent contacted Harris Trust Bank to verify whether credit could be extended to concert promotion companies.

22. Respondent was told that Harris Trust would not lend to concert promotion companies.

23. After conducting an investigation, Respondent determined that investing with ENTI was a high-risk investment.

24. Respondent made loans to ENTI in his representative capacity.

25. Respondent's family members made loans to ENTI.

26. Respondent introduced the opportunity to lend money to ENTI to some clients, some third persons who were not clients but were affiliated with clients and persons who were not clients.

27. Some of the persons who lent money were Respondent's estate planning clients.

28. Some of the individuals to whom Respondent introduced ENTI invested through entities that were not Respondent's client.

29. Respondent's law firm was paid commissions by ENTI for loans made to it by investors referred to ENTI by Respondent.

30. Sometime in early to mid 2003, Mr. Galyon asked Respondent to help Mr. Galyon with his estate planning and with protecting his interests in ENTI.

31. Respondent declined to help Mr. Galyon and instead referred Mr. Galyon to another Phoenix attorney, Alfred J. Olsen ("Mr. Olsen").

32. Mr. Galyon and ENTI were thereafter represented by Mr. Olsen.

33. ENTI defaulted on its loan obligations sometime in 2005.

34. In January, 2006, Respondent was sued by a variety of individuals and entities in connection with the ENTI defaults. Respondent was not sued by Nackard or Gohr.

35. ENTI subsequently filed bankruptcy.

36. Sometime in 2007, Respondent settled the civil claims against him and made payments to several lenders, including former law clients that lent money to ENTI.

37. Respondent was indicted in CR2008-006750 and plead guilty to four counts of the solicitation of the sale of unregistered securities, which were designated misdemeanors upon sentencing.

38. Respondent formed the Harriet Brewster Foundation (Brewster Foundation) and became successor trustee of the Foundation upon Ms. Brewster's death.

39. The Harriet Brewster Foundation lent money to ENTI.

40. Respondent prepared estate planning documents for Mr. and Mrs. Bidstrup and served for a time as the Secretary of the Bidstrup Foundation. The Bidstrup Foundation was not a client of Respondent's law practice.

41. Respondent presented the ENTI loan opportunity to the Bidstrup Foundation Board, which included at the time the founding principal of a national financial advisory firm.

42. Respondent prepared estate planning documents for Jon Coates in 2000.

43. Respondent played golf with Mr. Coates and Mr. Galyon in 2003.

44. Mr. Coates, individually, through a trust and through a GRAT,[3] lent money to ENTI.

45. Before Coates lent money to ENTI, he was given a multi-page letter written by Respondent making certain disclosures, including that Respondent was not an investment advisor, that

[3] A "GRAT" is a specialized trust document.

Respondent would not act as Coates's lawyer in the transaction and that ENTI loans involved a high degree of risk. Coates was encouraged in the letter to seek independent counsel.

46. Respondent's law firm received commissions from ENTI based on each loan made to ENTI by Mr. Coates through his trust and through a GRAT.

47. Respondent prepared an LLC (Silver Lynx, LLC) for Ruth Crawford as part of her estate planning.

48. Respondent's law firm was paid commissions from ENTI for the Crawford Loans.

49. Respondent drafted documents to create the Greening 1999 Charitable Remainder Unitrust.

50. Respondent served for a time as trustee of the Greening Trust.

51. Respondent, with Mr. Greening's permission, lent Greening CLAT funds to ENTI.

52. Respondent's law firm was paid commissions from ENTI for the loans made to it by the Greening Trust.

53. Respondent prepared estate planning documents for Michael Dennis "Denny" Gohr.

54. Mr. Gohr lent money to ENTI.

55. Respondent's law firm received commissions for loans Mr. Gohr made to ENTI.

56. Respondent was engaged by William Lund to provide legal work to the Estate of Victoria Lund.

57. Respondent or others in his firm formed the Victoria Lund Foundation, BRALU, LLC and BDL Foundation.

58. Cameron Lund, Lund's daughter, lent funds on behalf of her children's' trusts to ENTI.

59. Respondent's law firm received commissions on loans made to ENTI by Mr. Lund, his entities, Victoria Lund Foundation, BRALU, LLC, BDL Foundation and Cameron Lund's children's' trust.

60. Respondent prepared estate planning documents for Mr. and Mrs. C. Douglas Marsh ("Mr. Marsh").

61. Respondent played golf with Messrs. Marsh and Galyon.

62 During the golf outing, Respondent told Marsh that Respondent would receive commissions from ENTI on any loan Marsh made to ENTI.

63. Mr. Marsh, either personally or through a trust, lent money to ENTI.

64. Before Marsh lent money, Respondent provided Marsh with a multi-page letter similar to Mr. Coates' letter. Marsh did not sign a copy acknowledging its receipt.

65. Respondent's law firm received commissions from ENTI for all of the loans made to it by Mr. Marsh.

66. Respondent prepared two trusts for the benefit of the children of Patrick Nackard, one for Palmer Michael Nackard and the other for Monica Jewel Nackard ("Trusts I"). A second set of trusts established for the benefit of Palmer and Monica ("Trusts II") were not prepared by Respondent.

67. Respondent acted as trustee for Nackard Trusts I and II.

68. With the input and consent of Patrick Nackard as the settlor of the trusts, the Nackard Trusts I and II made loans to ENTI.

69. Respondent's law firm received commissions for the loans made to ENTI by the Nackard Trusts I and II. The fact Respondent would receive commissions for the Nackard trusts loans was disclosed to, and approved by, Patrick Nackard.

70. Respondent prepared a trust for the benefit of Mr. Raymond Sach's three daughters ("Sachs Trust").

71. Respondent served for a time as trustee for the Sachs Trust.

72. Respondent, in his capacity as trustee, lent money to ENTI for the Sachs Trust. The loans, and the fact Respondent would receive a commission, was discussed with the trust's settlor, Raymond Sachs, before the loans were made.

73. Respondent's law firm received a commission from ENTI for the loans made to it by the Sachs Trust.

74. Respondent prepared estate planning documents for Harold Simpson and created the Simpson Family Foundation.

75. Mr. Simpson lent money to ENTI through GRATs established for each of his three children and through a family trust. Simpson received, and signed, a copy of the disclosure letter before these entities made loans to ENTI.

76. Gail Bryan is Harold Simpson's daughter, and was trustee for the Simpson Family Foundation. Ms. Bryan lent money to ENTI.

77. Respondent's law firm received commissions for the loans made to ENTI by the three GRATS, the Simpson Family Trust, and the Simpson Family Foundation.

78. Respondent prepared estate planning documents for Mr. Henry and Mrs. Barbara Wick ("the Wicks").

79. Respondent attended a meeting with Mrs. Wick and Mr. Galyon.

80. Mrs. Wick and various family members lent money to ENTI.

81. Respondent provided Mrs. Wick five copies of the disclosure letter. Each letter was addressed to Mrs. Wick in her individual capacity and in her capacity as trustee of her children's' trusts. Mrs. Wick signed the acknowledgements to the multi-page letters on the same day the Wick family investments were made.

82. Respondent received commissions from ENTI for money lent to it by the Wick family.

COUNT THREE (File No. 09-0687/McQuaid)

83. Respondent spoke to McQuaid once or twice before McQuaid invested in ENTI.

Additional Facts Found from the Evidence at Hearing Background

84. Respondent's first job was with the law firm that was then known as Fennemore, Craig, von Ammon & Udall. Vol. 7, p. 1477. Respondent became a Fennemore Craig shareholder five years later. *Id.*, p. 1478.

85. Respondent left the Fennemore, Craig law firm in 1985 to join the Snell & Wilmer law firm. *Id.*, p. 1480. In approximately 1988, Respondent left the Snell & Wilmer firm to form his own law practice, Robert J. Rosepink, P.C. *Id.*, pp. 1481-2.

86. From the beginning of his practice career, Respondent's practice has emphasized trusts and estate planning, and related taxation issues. Vol. 5, p. 1063; vol. 7. pp. 1478, 1480-1481, 1484, 1485-1486.

87. While at Snell & Wilmer, Respondent became a fellow of the American College of Trusts and Estate Counsel ("ACTEC"). *Id.*, p. 1482. Respondent has been in the THE BEST LAWYERS IN AMERICA since 1989. *Id.*

Practices by Respondent for Billing and Identifying the Client

88. The manner in which Respondent addressed his bills was intended to convey, in part, to the bill's recipient who the client was. *Id.*, pp. 1493-1494. The expert witness for the State Bar, Lynda Shely, stated that a lawyer's bill could be some indication of who is the client. Vol. 1, p. 191.

89. As part of Respondent's practice, he sends engagement letters to every new client. *Id.*, p. 1487. He testified that his engagement letters serve several purposes and "take pains" to identify who is the client. *Id.*, pp. 1487-1488. Ms. Shely testified that her own engagement letters in part, identify who the client is. Vol. 1, p. 191.

90. From time-to-time, Respondent was engaged to represent clients in a "representative capacity," that is where one person is acting on behalf of another pursuant to some sort of

recognized legal relationship or document. Vol. 7. p. 148. 7. In Respondent's experience, when he was engaged by someone acting as a representative capacity, he viewed the entity which the representative represented to be the client and not the representative . *Id.*, p. 1489. Respondent's billings in the representative capacity scenario were sent addressed to the entity who was the client, not the individual acting in the representative capacity. Vol. 7, p. 1491-1493.

91. For example, when he was engaged to represent the personal representative of the estate, the estate, not the individual, was in Respondent's view his client. *Id.*

92. If an individual sought both individual representation and representation in a representative capacity, Respondent's practice was to send two engagement letters, one for each representation. *Id.*, p. 1490.

93. Attorney Murray Henner, an adjunct professor of the Phoenix School of Law testified as a witness for Respondent as to standards of conduct by trustees. He stated that Respondent's belief as to who was his client in the represented client situation is the view commonly held by practitioners in the area. *Id.*, pp. 1426-1427, 1428-1429.

94. Respondent testified that the ACTEC Commentary on the Model Rules also states that when representing someone in a representative capacity, the individual is not the client. Vol. 9, p. 1900. Respondent was aware of the ACTEC position before introducing the ENTI loan opportunity to clients and others.

95. Prior to 2002, Respondent had been asked by clients to act as trustee of a trust several dozen times. Vol. 7, p. 1496. In such situations, Respondent had a practice from at least the inception of Robert J. Rosepink, P.C. to give the client something described as a fiduciary selection disclosure statement. *Id.*, p. 1496, 1531.

96. The fiduciary selection disclosure statement advised the client that Respondent is not a professional fiduciary, confirms that it was the client's idea in the first instance to ask Respondent to act and explains to the client that they can make a change at any time. *Id.*

97. Respondent testified that he did not believe that a trust was a "client" in those instances in which he agreed to act as trustee. *Id.*, p. 1532. Mr. Henner also testified that under prevailing

community standards, a lawyer who agrees to be the trustee of a trust is not also automatically the trust's lawyer. *Id.*, p. 1419.

98. Respondent has, however, provided legal services to a trust over which he acted as trustee. *Id.*, p. 1533.

99. Billings for trustee services were submitted on bills generated by Respondent's law firm's billing software. *Id.*, p. 1533.

100. Mr. Henner testified that it is not inappropriate for an estate planning lawyer to introduce investment opportunities to clients whose tax planning relies on high rates of return. On the contrary, a lawyer could theoretically breach an obligation to a client by failing to bring to the client's attention a high rate of return investment. *Id.*, pp. 1424-1425.

101. Mr. Henner also testified that in his view introducing an investment opportunity to an estate planning client is not the provision of legal services or representing a client as those expressions are used in the Rules of Professional Conduct. *Id.*, pp 1425- 1426. A trustee can make an investment that fails but which still complies with the prudent person standard. *Id.*1418.

102. Mr. Henner testified that it is usual practice for a trustee to be paid appropriate compensation in the form of commissions. *Id.* 1421.

103. Mr. Henner stated that Respondent could properly rely on the fact that ENTI loans were performing for a several-year period of time in meeting his prudent person standard to the Brewster Foundation. . *Id.*, p. 1421. Mr. Henner also testified that it is not a per se breach of a trustee's duty of loyalty to invest trust corpus in an investment in which the trustee is receiving remuneration from a third party in connection with the investment. *Id.*, pp. 1443. Mr. Henner testified that a trustee can make an investment that fails but nonetheless complies with the prudent person standard. Vol. 7, p. 1418.

Facts Relating to Count One (Dawson)

104. The facts relating to the Dawson loan to Futech, and the surrounding events, occurred in 1999, eleven years ago. *Id.*, p. 1535.

105. Futech Educational Products, Inc. owned one or more patents relating to the manufacture of interactive books for children. *Id.*, pp. 1535-1536.

106. Respondent first became involved with Futech through his position as co-trustee of the Herbert K. Cummings Trust. *Id.*, p. 1536. The Cummings trust traded limited partnership interests for Futech stock. *Id.*, p. 1537. Some time thereafter in the late 1990s, Respondent became a member of the Futech Board of Directors. *Id.*, 1538-1539.

107. Respondent mentioned his involvement in Futech to Keith Withycombe, who was at the time one of Respondent's estate planning clients. *Id.*, pp. 1539, 1540-1541. Eventually, Withycombe lent money to Futech. *Id.*, p. 1541. Respondent did not represent Withycombe or Futech in connection with Withycombe's loan to Futech. *Id.*

108. Withycombe made a second loan to Futech, a transaction in which Respondent again represented neither Withycombe nor Futech. *Id.*, p. 1542.

109. After Withycombe made his loan, Respondent received from Futech options to purchase its stock. Respondent testified that the options were not a quid pro quo; Futech's CEO, Vince Goett, gave the options to Respondent as a gift. Vol. 5, p. 1110; vol. 7, p. 1543.

110. John Dawson was also one of Respondent's estate planning clients. Vol. 5, p. 1064; vol. 7, p. 1543. In about 1998, Respondent brought the opportunity to invest in Futech to Dawson's attention after Dawson indicated that he wanted Respondent to bring investment opportunities to his attention. *Id.*, p. 1077; vol. 7, p. 1544. After doing some due diligence, Dawson declined to invest in Futech.

111. Later, Respondent brought to Dawson's attention the opportunity to lend money to Futech. Vol. 5, pp. 1079, 1088; vol. 7, pp. 1544-1546. Dawson was receptive to the second overture. He evaluated Futech. Vol. 5, p. 1090; vol. 7, pp. 1548, 1550.

112. Mr. Dawson had received information and warning that Futech was not solvent at the

time he made the loan. Mr. Dawson's CFO, Kirk Mathers, evaluated the company and called it a "leap of faith." Exhibit 261, Dawson deposition (hereafter "Dawson"), pp. 14, 22-23.

113. Although Respondent testified that he was not acting as Dawson's lawyer in the transaction, he did review the loan documents prepared by Futech's lawyer to see if they matched Respondent's understanding of the agreement Dawson had reached with Futech. Vol. 5, pp. 1104-1105; vol. 7, p. 1548.

114. In his deposition, from almost eleven years ago after the transaction, Dawson admitted knowing before he made the loan to Futech that Respondent had "some kind of financial stake" in Futech and would profit personally from Dawson's loan to Futech. It was "okay" with Dawson if Respondent benefitted from the loan. Dawson, pp. 14, 27-28.

115. Ultimately, Dawson made a line of credit available to Futech. Futech drew down on the line. Futech defaulted on the loan. Vol. 5, pp. 1094, *Id.*, p. 1550, 1570-1571.

116. Dawson does not think Respondent intentionally misled him about the loan. Dawson believes Respondent merely relied on others in Futech. Dawson, pp. 17-18.

117. Dawson believed that Respondent was acting as his lawyer in the Futech loan transaction. Dawson, p. 15.

118. Respondent testified that he believed at the time of the transaction that Dawson knew that he was not acting as Dawson's lawyer in the transaction. *Id.*, pp. 1546, 1549.

119. Respondent testified that at the time the loan was made he did not think he was doing business with a client. However, in retrospect he realized that helping Mr. Dawson lend money to Futech was a business transaction with a client and that he should have counseled Mr. Dawson to seek the advice of independent counsel. Vol. 5, pp. 1111-1112, 1117-1118.

120. On August 2, 2000, a lawsuit was filed on behalf of Mr. Dawson against Respondent and other defendants. Prior to December 16, 2004, Respondent settled Mr. Dawson's claim against him. Complaint, p. 7.

Facts Relating to Respondent's Criminal Conviction in 2009

121. Tim Linnins, the Assistant Attorney General who charged the criminal case against

Respondent, testified. Vol 7, pp. 1499-1529.

122. According to Mr. Linnins, during Respondent's criminal case and that of attorney Al Olsen, James Galyon and Bradley Nozicka, a motion to remand the case to the grand jury was filed. *Id.*, p. 1501-1502.

123. In the course of preparing a response to the motion, Mr. Linnins reviewed the voluminous discovery the State produced and met with the ENTI receiver, Peter Davis. *Id.*

124. Mr. Linnins concluded, and Davis concurred, that there was no evidence that Respondent knew that ENTI was a so-called Ponzi scheme. *Id.*, p. 1503

125. Mr. Linnins then had a "free talk" with Respondent, that is, he granted Respondent use immunity. Respondent met with Mr. Linnins and answered his questions with Mr. Linnins being aware that he could not use Respondent's statements against him. *Id.*, p. 1504.

126. Mr. Linnins found Respondent credible. *Id.*, p. 1505.

127. Mr. Linnins was also contacted by Mary Radford, one of the victims, who indicated that she did not think Respondent had misled her. Mr. Linnins found her information credible. *Id.*, pp. 1505-1506.

128. According to Mr. Linnins, as the result of his review, he came to the conclusion that Respondent had been overcharged. In Mr. Linnins' view, there was no credible evidence that Respondent knew ENTI was insolvent or that ENTI was involved in fraud. Linnins did not believe that Respondent had not been a knowing participant in fraud. *Id.*, pp. 1501-1503, 1507-1508, 1512, 1520, 1521-1522. A critical factor for Mr. Linnins' belief in Respondent's credibility was the information he had that a few weeks before Respondent was named in a lawsuit filed by Mr. Olsen, Mr. Olsen had informed Respondent that everything was fine with ENTI and Mr. Olsen's client Mr. Galyon. *Id.* 1505. Mr. Linnins did not consider the criminal case evidence to support fraud or theft charges under A.R.S. §44-1991(A)(2). *Id.*, pp. 1509-1510.

129. On March 27, 2009 pursuant to the plea agreement, Respondent pled guilty to reduced

charges of four counts of the solicitation of the sale of unregistered securities in violation of A.R.S. § 44-1841. which does not require mens rea or intent. Vol 7, p. 1510, 1523. Exhibit 23. The State Bar did not offer into evidence the transcript of the change of plea proceedings which would have contained Respondent's statement regarding the factual basis for his plea. No other evidence regarding Respondent's factual basis was presented.

130. On May 11, 2009, at sentencing, the judge placed Respondent on three years supervised probation and designated the offenses as misdemeanors. *Id.*, p. 1525; Exhibit 25. The plea agreement contained a maximum potential restitution amount of ten million dollars. *Id.* pp. 8-13.

131. The State Bar's other expert witness Mr. Dee Harris testified that a violation of the sale of unregistered securities statute does not necessarily involve dishonesty or untrustworthiness. Vol. 5, p. 1025.

132. Mr. Harris stated that a violation of the statute prohibiting the sale of unregistered securities could occur even though the defendant was not trying to deceive anyone and was trying to make full disclosure. *Id.*

133. Mr. Harris stated that the failure of an attorney to appreciate that the ENTI note transactions constituted the sale of unregistered securities does not indicate that the attorney is a bad lawyer or unfit to practice law. *Id.*, p. 1027.

Facts Relating to the Harriet Brewster Foundation

134. The Harriet Brewster Foundation was presented as the first investor in ENTI. The due diligence investigation by Respondent applies to it and the later investors.

135. Respondent formed the Harriet Brewster Foundation, a wholly charitable trust, for his client Harriet Brewster. Vol. 5, pp. 1134-1135; Vol. 7, p. 1573.

136. Respondent became the trustee of the Foundation upon Mrs. Brewster's death. *Id.*, pp. 1572-1573.

137. Before her death, Mrs. Brewster directed Respondent to use his best judgment when making grants from the trust, but that she wanted the money to "be used for children." *Id.*, pp. 1573-1574.

138. In addition to the gift giving responsibilities, as trustee Respondent had the obligation to monitor and make investments, and to do the Foundation's tax reporting. *Id.*, P. 1574. It was in his capacity as trustee for the Brewster Foundation that Respondent first considered lending money to ENTI.

139. Respondent testified that he undertook his due diligence investigation. Respondent familiarized himself with ENTI's business. Respondent also spoke with two people who had lent money to ENTI. Vol. 5, p. 1132-1133; 1137-1138

140. Respondent commissioned a private investigation firm, the Spinelli Corporation, to do a background check on Messrs. Galyon and Nozicka, and ENTI Inc. Vol. 5, p. 1138; vol. 6, pp. 1207, 1210; exhibits 13, 14 and 15.

141. Respondent requested from Mr. Galyon audited financial statements concerning ENTI. *Id.*, p. 1216; vol. 8, pp. 1777-1778. However, Respondent was told by Mr. Galyon that he could not obtain audited financial statements because auditors could not verify some of the concert expenses. An underlying asserted reason was that the concert performers required that their payment be confidential. *Id.*, pp. 1216-1217.

142. Respondent did receive a balance sheet dated September 30, 2002. *Id.*, p. 1235. The balance sheet indicated there were sufficient assets to cover ENTI's liabilities as of September 30, 2002. *Id.*, p. 1236.

143. Respondent met with Mr. Nozicka, at least once, in Tucson. He inquired how Cal Productions' business was doing, but did not ask for financial information. *Id.*, 1218.

144. The Brewster Foundation made its first ENTI loan around June 2002. *Id.*, p. 1243.

The Disclosure Investment Letter

145. After the Brewster Foundation's first couple of loans were repaid, Respondent considered introducing ENTI to clients. The first client to whom Respondent introduced ENTI was David Cook. *Id.*, p. 1577.

146. On the basis of his experience in the Dawson loan, and in an effort to comply with the

ethical rules, Respondent appreciated the need to provide an appropriate investment disclosure letter ("disclosure letter") before bringing ENTI to any client's attention. Vol. 6, p. 1289; vol. 8, pp. 1578, 1821-1822

147. He researched his ethical obligations, and what the disclosure letter would need to disclose. Vol. 5, pp. 1131-1132; vol. 7, pp. 1580-1583.

148. Exhibit 251 is a copy of the disclosure letter Respondent drafted. Defendant testified that in the disclosure letter he tried to make complete disclosure to his clients. Vol. 7. p. 1579. The acknowledgement page was intended to highlight the most salient points and to provide a place for the client to sign. *Id.*, p. 1596.

149. Respondent testified he did not believe that clients would conclude he was recommending ENTI merely because he was bringing it to their attention. He stated that his belief was based upon the fact the disclosure letter warned clients that Respondent was not an investment advisor and was not recommending the investment. *Id.*, pp. 1598-1599.

150. Respondent testified he made the conscious decision not to send the disclosure letter to people whom he did not believe were his clients because he did not want to create an impression in the eyes of the recipient that they were his clients for any reason. *Id.* p. 1596

151. The Bar's expert, Lynda Shely, admitted the letter was an "admirable attempt" and that Respondent was "trying to comply with the rule." Vol. 1, pp. 151-152.

152. The following clients of Respondent received disclosure letters: Jon Coates (Vol. 8, pp. 1658-1659); Dennis Gohr (Vol. 2, pp. 447, 465-466; exhibit 263); Doug Marsh (Vol. 8, pp. 1761-1762); Harold and Virginia Simpson (Vol. 2, p. 569; vol. 8, p. 1749; exhibit 134); and Barbara Wick, individually and as trustee of her children's trusts (Vol. 4, p. 936; Vol. 8, pp. 1768; exhibits 171-175).

153. Ruth Crawford did not receive a disclosure letter because, although she personally was Respondent's client, she did not invest in ENTI. Vol. 8, p. 1760.

154. As trustee of the Brewster Foundation, Respondent, the decision maker, would essentially

be making disclosures to himself and for that reason he did not issue a disclosure letter to himself. Vol. 8, pp. 1712-1713.

155. In connection with the Sachs Trust, Respondent, even though he was the decision maker, considered generating a letter to Mr. Sachs, but concluded he might put the Trust's tax status at risk by making it appear Sachs had control. Vol. 8, pp. 1753, 1810-1811. Instead, Respondent's law partner generated a disclosure letter addressed to Respondent in connection with the Sachs Trust. The letter was shown to Mr. Sachs. Vol. 8., pp. 1751-1752, 1753.

156. After concluding that a letter addressed from his partner to himself may be confusing, Respondent did not generate disclosure letters in connection with the Greening and Nackard Trusts. However, Respondent did make disclosures to the settlors. Vol. 8, pp. 1719, 1792, 1808-1809.

157. Respondent testified that it was a conscious decision on his part not to give the disclosure letter to the following persons Respondent did not consider to be clients: The Bidstrup Foundation, Peter Bidstrup IRA, CDT Investments, Ruth Crawford Irrevocable Trust, Silver Lynx, LLC, William Lund, Victoria Lund Foundation, BRALU, LLC, BDL Foundation, Torsha S. Baker Trust, Teva J. Shingler Trust, W.S.L. Associates, Newport Rhode Island, LLC. Vol., 8, pp. 1725-1726, 1727, 1754, 1757-1758, 1760.

158. Respondent reiterated his reason for not giving disclosure letters to The Bidstrup Foundation, Peter Bidstrup IRA, CDT Investments, Ruth Crawford Irrevocable Trust, Silver Lynx, LLC, William Lund, Victoria Lund Foundation, BRALU, LLC, BDL Foundation, Torsha S. Baker Trust, Teva J. Shingler Trust, W.S.L. Associates, Newport Rhode Island, LLC. was that they were not in Respondent's view clients, and he did not want to create the erroneous impression on the part of these non-clients that they were clients. *Id.*, pp. 1596, 1819.

159. Regarding Brooke Hart, a daughter of client Barbara Wick, Respondent testified that he had no recollection of ever meeting her and testified that she was not a client. Vol. 8, p. 1766. When called by the Bar to testify, Ms. Hart was never asked if she believed Respondent was her lawyer.

160. Respondent acknowledged that, in retrospect, Mrs. Regina Bidstrup, who was a client should have received a disclosure letter. Vol. 8, pp. 1804-1805. He state that his failure to do so "slipped through the cracks." *Id.*

161. Respondent testified he did not believe that his estate planning legal work for any client to whom he would introduce ENTI would be materially limited by ENTI loans the client made. Vol. 7, p. 1595. Respondent did not foresee circumstances in which he would be forced to withdraw from the representation of an estate planning client because of the estate planning client's loan to ENTI. Vol 7., p. 1598.

162. The ENTI loans kept performing between 2002 through 2005. Respondent sought current financial statements from Mr. Galyon of ENTI and was given various reasons or excuses why the financial information was not available. Ultimately, because the ENTI loans kept performing, Respondent did not obtain more current financial information about ENTI. *Id.*1600.

ENTI Capital and Cal Productions Trusts

163. In April or May, 2003, Al Olsen, Mr. Galyon's then lawyer, began to prepare documents by which Olsen's relatives, the Gates, would lend money to ENTI. Vol. 4, pp. 793-794.

164. Mr. Olsen, as the Gates' lawyer, drafted a complicated loan and security arrangement. Exhibit 18. In essence, the arrangement provided that Mr. Galyon, through a new entity called ENTI Capital, LLC, would lend money to Mr. Nozicka through a new company called Cal Productions, LLC. The loans were secured by collateral pledges of their member interests and assets to the ENTI Capital Trust and the Cal Productions Trust, respectively. *Id.*, pp. 799, 804, 808-809, 822-824, 868, 872-873,

165. Respondent agreed to act as a co-trustee of the two trusts. *Id.*, pp. 817-818. Since the trusts had only a security interest in the ENTI Capital and Cal Productions member interests, the trusts did not own ENTI Capital, LLC or Cal Productions, LLC, and did not have any management rights. *Id.*, pp. 868-870. Since the ENTI Capital and Cal Productions trusts only owned rights under a security agreement, there were no physical assets for the trustees to administer. *Id.*, p. 874.

166. Respondent did not act as, or agree to act as the lawyer for the trusts when he accepted the role of trustee of the ENTI Capital and Cal Production Trusts. Vol. 8, p. 1816.

167. Respondent testified that he relied on the description of the trusts' drafter, Mr. Olsen, an experienced and sophisticated lawyer, as to the dispositive provisions. Vol. 6, p. 1271, 1273-1274, 1814-1815. He did not think that he had any active, ongoing obligation under the trust unless or until Galyon died or became incapacitated. Vol. 8, p. 1814.

168. Respondent did not receive quarterly financial statements from either ENTI or Cal Productions despite a provision of the security agreements that obligated ENTI and Cal Productions to provide them. Vol. 6, p. 1280; vol. 8, pp. 1814-1815. To his knowledge, the Tucson lawyer Mr. Lipartito who was a co-trustee of one of the trusts also did not ask for financial statements. Vol. 8, p. 1816.

169. Respondent never served as the attorney for ENTI, Inc., ENTI Capital, LLC, Jim Galyon, Brad Nozicka, Cal Productions, ENTI Capital Trust or Cal Productions Trust. Vol. 6, p. 1291; exhibit 251. He was not involved in the day-to-day operations of ENTI or Cal Productions. Vol. 6, p. 1298.

Testimony of State Bar Expert Lynda Shely

170. The State Bar presented the testimony of its ethics expert witness Lynda Shely. She testified as to Respondent's conduct in relation to the relevant ERs.

171. Ms. Shely testified that an attorney client relationship is created between "Someone reasonably expecting to get legal advice from a lawyer, or legal representation, and the lawyer providing it." It does not require a fee agreement or engagement letter. Vol 4, p. 141.

172. She stated the focus of whether there is an attorney client relationship created is from the prospective client's view and not the lawyer's view. Therefore, the lawyer remains responsible for disclaiming any attorney client relationship. *Id.* 142

173. Ms. Shely stated that the steps that a lawyer generally should take to make it clear that there is no attorney client relationship is for the lawyer to either orally or in writing explain to

the person that the fact that a lawyer is talking to a person does not create an attorney client relationship. *Id.* pp.142-143.

174. She testified that once a lawyer/ client relationship has been established, if a lawyer wants to clarify that the lawyer/client relationship does not apply to a particular transaction between the lawyer and client, the lawyer under ER 5.7 would need to specify that the business transaction or other activity does not involve the attorney/client relationship. *Id.* pp. 143-144.

175. Ms. Shely affirmed that the attorney client relationship carries the duties of providing competent and diligent representation, confidentiality, avoidance of conflicts of interest and other duties required by the relationship. *Id.* p 144.

176. Ms Shely stated that hypothetically, one or more members of a family where a lawyer has provided legal services to a particular family member for years, may also reasonably perceive the lawyer to be the lawyer for all members of the family. Id. pp. 144-146.

Conflicts of Interest

177. Regarding conflicts of interest, Ms. Shely stated that if a lawyer asks a client to waive a conflict, "you have to give them sufficient information to make an informed decision." *Id.* p.

178. She referred to Comment 6 for 1.0 which explains informed consent: "The communication necessary to obtain such [informed] consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation and any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct." *Id.* pp. 146-147.

179. In describing Respondent's relationship to ENTI, Ms Shely acknowledged that Respondent maintained some distance from being perceived as having a legal relationship with

ENTI. She stated: (1) ENTI was not a client of Respondent: (2) Although Respondent was a co-trustee under a trust arrangement [created by attorney Al Olson], those trusts did not take effect unless Mr. Galyon [the principal in ENTI] became incapacitated; (3)Respondent was not an owner of ENTI. *Id.* p.148.

180. Lynda Shely evaluated Respondent's investment disclosure letter provided to various investors [Exhibit No. 171: letter to client Barbara Wick]. She testified: "My general impression is that Mr. Rosepink did a far better job at attempting to comply with Ethics Rule 1.8(a) [conflicts of interest] than most lawyers do. Because he cited to an older version of the rule and not to the one that was in effect in 2004, because we had just amended the rule in December of 2003 that had some additional requirements in it. But he stated the rule, he stated some of the ethics opinions that pertained to this and attempted to make a full disclosure to her about the risks and advantages of investing in this business opportunity. In reviewing it, I don't quibble with what's in it. Again, I think Mr. Rosepink was trying to comply with the rule." *Id.* pp. 150-151.

181. Ms. Shely stated her concern that after reviewing other documents in the case, the disclosure letter failed to disclose material facts regarding the security of the investment including : (1) lack of clarity as to whether the ten million dollar life insurance policy on Mr. Galyon existed; (2) lack of clarity regarding the security for the investments"[language stating "secured" vs. "unsecured"]; and (3)that ENTI would not lend more than 50% of potential ticket sales; and (4) that ENTI would not go above 12 million in investments, when at this time, ENTI had gone above twelve million. She was also concerned that Respondent's reference to using an independent investigation company to investigate ENTI and two principals, Mr. Galyon and Mr. Nozicka perhaps created a false expectation that ENTI was a very safe, secure company to invest in. *Id.* pp 151-152; 203.

182. Regarding the extent of the duty to comply with the conflict of interest rules, Ms. Shely stated that while the letter by Respondent made an "admirable attempt to comply with [conflict rule] 1.8 (a)," a lawyer still has another rule to comply with where there is a business transaction with a client which is 1.7 which rule makes it also necessary to explain to a client what could happen if a conflict were to arise. She stated that as of December 2003, a conflict waiver letter would have needed to disclose what would happen if a conflict arose, for instance, between Ms. Wick and ENTI or Mr. Galyon, that presumably Respondent would not be able to represent Ms. Wick. *Id.* pp.152-153. Under Comment 6 to the definition of "informed consent" in 1.0, disclosure of a "disadvantage" would be disclosing to the client that in the future the lawyer may have to withdraw as the client's lawyer. *Id.* p. 195.

ER 5.7

183. Regarding ER 5.7, [effective December 2003] Ms. Shely testified that 5.7 causes the Rules of Professional Conduct to apply to an ancillary business by a lawyer if the ancillary business is not separate from the law firm. *Id.* p. 163.

Peter McQuaid

184. Ms. Shely described 5.7 and Peter McQuaid, the only investor named in Count three. Ms Shely had reviewed the materials regarding Mr. McQuaid's contact with Respondent. She questioned whether Mr. Mac Quaid had an original expectation of being a client. However, Ms Shely stated that there was an insufficient disclaimer by Respondent that Respondent was not acting as Mr. McQuaid's lawyer: "There wasn't a clarification that Mr. Rosepink was taking off the lawyer hat and only having on the investment hat." *Id.* p. 164. . *Id.* p. 164.

Other ERs

ER 4.1

185. Ms. Shely acknowledged that 5. 7 does not create a separate obligation, but its application of the Rules of Professional Conduct to lawyers involved in law-related services

could impose on a lawyer the obligation under 4.1 [truthfulness in statements to third parties] where 4.1 might not otherwise apply. However the statement or omissions must still be as to a material fact. *Id.* pp. 181-182.

ER 8.4(c)

186. Regarding 8.4(c), Ms. Shely stated that the case law under 8.4(c) finds that it has to be a knowing violation of 8.4(c) and that an inadvertent or negligent failure to comply with 8.4(c) would probably not be a violation . *Id.* p. 184.

ER 1.7

187. In relation to 1.7, and other ERs, Ms. Shely stated that there is a "scary part" to properly identifying a lawyer's client. For example the case law under 1.18, dealing with prospective clients, provides that the creation of the attorney client relationship relies on the reasonable expectation of the potential client and not the expectation of the lawyer. *Id.* p. 185. Ms. Shely agreed that the same "scary part" of relying on the reasonable expectation of the potential client could also apply to conflicts rule 1.7 where a lawyer fails to appreciate that a conflict exists because the lawyer reasonably does not think that a third person is their client. She stated that most likely, if the lawyer reasonably did not believe there was an attorney client- relationship, then it [lawyer's conduct] was probably negligent. *Id.* pp. 185-186.

Research and Reliance on Commentaries by the American College of Trial and Estate Counsel (ACTEC)

188. In her prior deposition, Ms. Shely had agreed with Respondent's acknowledgement that the Commentaries on the Model Rules of Professional Conduct published by ACTEC are not a standard of conduct or care regarding the ethical rules for Arizona attorneys. She was asked if Respondent's disclosure letter in Exhibit 171 is ultimately found to be lacking as to conflict disclosure, would the letter still indicate that Respondent tried to do the right thing [regarding

disclosure, conflicts and waiver]? Ms Shely replied:"As I indicated, Mr. Rosepink's letter goes a lot farther than most lawyers' letters would go." *Id.* pp.186-188.

Confidentiality Rules 1.6 and 1.8(b)

189. Ms Shely testified that if Respondent brought the ENTI investment opportunity to the attention of a client such as Mr. Simpson without disclosure of the client's financial status to somebody else, such action is not a violation of the confidentiality rules. *Id* . 192-193.

8.4(b)

190. Ms. Shely testified that 8.4(b) and its comments do not render every criminal act by a lawyer a violation of 8.4(b). *Id.* p. 208.

Respondent's Writing of the Disclosure Letter

191. Ms. Shely concluded her testimony by describing the disclosure letter drafted by Respondent as tailored or worded toward the" less sophisticated" type of investor given that Respondent was trying to disclose what rules may apply. *Id.* p. 212.

Respondent's Identification of Those Persons or Entities; (1) That He Considered Clients; (2) That Received the Disclosure Letter; and (3) That Invested in ENTI

192. To insure that the record clearly showed Respondent's testimony and position as to who he believed to be clients, who received disclosure letters from him, and who the ENTI investors were, Respondent provided Respondent's Exhibit AAA.

193. Each page of Exhibit AAA identifies persons or entities which are individual family members or trust or foundations or limited liability corporations related to a family member which existed as part of the trust and /or estate instruments. With the exception of Regina. Bidstrup [Vol 8, 1804-1805] a client whom Respondent realized that he overlooked, the individuals who Respondent believed to be clients and whom invested in ENTI received disclosure letters (DennyGohr, Doug Marsh, Patricia Marsh, Harold Simpson, Virginia Simpson, Henry Wick, Barbara Wick) disclosure letters. Exhibit AAA.

194. As in the case of Mr. William Lund and the various trusts, foundations or LLCs that existed which related to Lund family members' trusts or estate plans, Respondent discussed or provided information about the ENTI investment with Mr. Lund (Vol. 3, p. 537) but did not provide the disclosure letter. Of the eleven total Lund family individuals or entities, there were seven investors with six of the seven being entities. Exhibit AAA The individual investor who was grouped as one investor was William and Sherry Lund. Respondent did not believe William and Sherry Lund to be clients, and did not receive the disclosure letter. Exhibit AAA.

195. Review of the listed family individual or entity investments in Exhibit AAA shows that in six cases, both individuals and family related entities invested in ENTI (Regina Bidstrup, Gohr, Lund, Marsh, Simpson and Wick). In the other five cases, only entities invested (Coates, Crawford, Greening, Nackard and Sachs). Exhibit AAA.

Family Group Individuals or Representatives of Family Entities Testified that they Believed that Respondent was their Lawyer

196. The family group individuals who were called as witnesses by the State Bar testified that they believed Respondent was acting as their individual lawyer when an investment was made with ENTI whether it was on behalf of them as an individual or on behalf of a family entity. Vol 2, 262; 293-293 -295; 382, 397; 431; 433; 438; Vol 3, 497;559-560;610; 617;619-620;; Vol. 4, 915; 917;-919; 927;Vol. 6 1192; 1199-1200; 1221-1222; 1224; 1342- 1343; Vol 7, 1559; Vol. 8, 1646; 1654-1655; 1679; 179; 1977 .

197. Family group individuals or representatives of family entities also testified that nearly all of their discussions and paperwork involving the investments took place at or came from Respondent's office.

The Testimony and Impeachment of Peter McQuaid

198. The State Bar presented testimony of Peter McQuaid in support of the Complaint charges that Mr. McQuaid perceived Respondent as acting as his attorney in providing information

about ENTI or that he was the recipient of the law-related investment advice from Respondent. Unlike other witnesses, Mr. McQuaid did not have a family member for whom Respondent had provided trust and estate legal services. In support of his asserted contact with Respondent, Mr. McQuaid stated that he recalled two contacts with Respondent which were a phone call and at a later golf outing. Respondent acknowledged the golf outing but stated that the initial phone call never took place. .Vol. 8, pp.1782-1785. .

199. Mr. McQuaid testified that in early February, 2005, he had a phone conversation with Respondent. Vol 3, pp. 650-651

200. In describing how he made the phone call, Mr. McQuaid first stated that he was urged by his friend Michael Daswick or Mr. Galyon to call Respondent for more information about ENTI, so he just picked up the phone and called Respondent. *Id.* pp. 650-651.

201. Mr. McQuaid then corrected himself to say he must have first called Mr. Galyon to get Respondent's phone number. *Id.* 655.

202. As proof that he had called Respondent, Mr. McQuaid presented a copy of his note paper in which he had written down information that Respondent gave him during the phone conversation. Exhibit 158. Id. pp. 652-653.

203. Mr. McQuaid initially identified all of Exhibit 158 as the notes of his conversation with Respondent. *Id.* 653. He later corrected himself to say that the note paper contained other things written that were not from the conversation. *Id.* p. 655 . Mr. Mc Quaid also talked about the undisputed golf outing he later had with Mr. Galyon, Mr. Daswick and Respondent in May 2005.

204. On cross-examination, Mr. McQuaid acknowledged that he remembered Beth Chapman the paralegal for the attorney who represented attorney Al Olson in subsequent civil litigation. He denied telling Ms. Chapman that he would destroy everybody associated with ENTI. *Id.* p. 680.

205. On October 13, 2010, Ms. Chapman testified telephonically. She stated that in late spring or early summer of 2007, she and Mr. McQuaid were talking alone in a conference room after the attorneys in a deposition were taking an extended break. She was asked if Mr. McQuaid made a statement about his intent to destroy everybody who had anything to do with the lawsuit. Ms Chapman responded: "I believe he made a comment to me or statement to the effect that he really didn't care about the money, all he was out to do was inflict as much pain on all the defendants, the attorneys in the case. He was out to inflict pain and cause them distress." Vol. 7, p. 1624.

206. The credibility of Mr. McQuaid's testimony was substantially undermined. His statements are given little or no credence regarding Count Three. This Hearing Officer finds that the initial phone call never occurred.

Additional Testimony by Respondent

207. Respondent testified that he regretted ever having anything to do with ENTI or Mr. Galyon Vol. 8, p. 1819. In answering what he would have done differently, he stated that he has agonized over this answer during the past five years of civil lawsuits and this disciplinary proceeding. His answer was that while it would be easy to say: "yes., I should have sent it to everybody," he deliberately gave it to clients because the letter was designed to fulfill his ethical obligations to clients. He did not want to create the misimpression or misconception by those he believed were non-clients that they were clients. *Id.* p p. 1819-1820.

208. Respondent testified that in retrospect, he should have also have drafted a different version of the letter for non-clients so that there could be no misunderstanding by the people who testified at the disciplinary hearing that he did not consider them to be his clients. *Id.* pp. 1819-1820.

209. Respondent testified that the lesson he had learned from the Dawson experience was "you needed a written disclosure signed by the client." When ENTI presented itself and because he believed it could benefit clients:

I then tried to research as thoroughly as I could what the ERs, the comments, and the case law said about a lawyer's ability to do this at all. And the case law *Breen* included, maybe most specifically, doesn't say it's prohibited. It seems to say this is what the lawyer needs to do to navigate the ethical waters. And so what I tried to do was to follow what *Breen* had said the lawyer should do as carefully as I could." *Id.* p. 1821.

210. Respondent stated that his regret and remorse includes the lesson that: I don't think there's any way that a lawyer can do this successfully, even though theoretically it's possible. Therefore, I don' think that a lawyer should ever recommend, or present any investment opportunity to any client." *Id.* pp. 1821-1822.

211. At the time of the hearing, a criminal restitution agreement had not been reached. Respondent testified that upon the reaching of the agreement that he would begin monthly payments as provided for in the agreement. *Id.* p. 1823.

212. In the subsequent civil litigation, the plaintiff ENTI investors settled for various sums against Respondent, his then wife, and Respondent's law firm through a malpractice carrier. These settlement amounts were far short of the total monies invested. The settlement amounts were: (1) Bidstrup, $50,000, Exhibit 91; (2) Crawford, $158,000, Exhibit 105; (3) Coates, $88,200, Exhibit 112; (4) Lund, $209,500, Exhibit 132; (5) Simpson, $250,100, Exhibit 136; (6) Wick, $93,000, Exhibit 189;and (7) Marsh, $110,000, Exhibit 197.

213. Retired United States Supreme Court Justice Sandra Day O'Connor testified telephonically as a character witness for Respondent. She knew Respondent individually and through her late husband who was a partner in the former Fennemore, Craig, von Ammon and Udall firm. She and her husband had remained friends with Respondent and his then wife over

the years. She acknowledged her unfamiliarity with this disciplinary matter, but testified as to Respondent's good and honest character. Vol. 8, pp. 1740-1743.

214. This Hearing Officer has considered the testimony of the individuals called by the State Bar to testify. . Practically all of them testified that from their perspective , they considered Respondent to be acting as their attorney when he presented the ENTI investment information to them. Their perspective did not change whether they were individual family members, or acting in a representative capacity such as a trustee or whether they were a recipient of the law-related service of investment information and advice presented by Respondent under 5.7. With the exception of Peter McQuaid , this Hearing Officer finds their perspectives to be reasonable that they considered Respondent as their attorney.

215. This Hearing Officer has also considered the testimony by Respondent that after his ethical and case law research, Respondent believed some individuals were clients, but that others were not. Respondent's beliefs were reasonable but mistaken. He failed to realize that when he gave the law-related investment information and advice about ENTI to individuals for whom he had provided other family members legal services, that it would be reasonable for them to perceive him as their attorney. He also failed to realize that under 5.7 when he gave the law-related investment information about ENTI under circumstances which were not distinct from his provision of legal services, that he owed the recipients of the law-related service the same duties as those owed to clients as imposed by the Rules of Professional Conduct. These same duties included the duty to provide proper written informed consent where a conflict of interest may create future disadvantages such as withdrawal by the attorney. Therefore, Respondent's mental state involving the ethical rule violations with ENTI investors found below was negligent. As negligence is defined, Respondent failed to be aware of 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. Respondent's beliefs were reasonable, but mistaken.

216. Regarding Futech, having considered the evidence from the events and testimony this Hearing Officer finds that Respondent was negligent because in 1999 he had failed to realize that he was doing business with a client.

CONCLUSIONS OF LAW

217. Having considered the evidence and arguments in this case regarding the allegation that Respondent violated Rule 42, Ariz.R. Sup. Ct., this Hearing Officer finds that the State Bar has : (a) proven certain ER violations by clear and convincing evidence; and (2) failed to prove other ER violations as alleged. The proven violations followed by the unproven violations are below. Where the State Bar charged an ER violation as an alternative violation in its Complaint, the alternate ER is identified.

Proven Violations

Count One (Dawson)

218. The State Bar proved that the following ERs were violated:

1.4(a) and 1.4(b) Communication: Respondent failed to inform Mr. Dawson of information for which informed consent was needed [1.4(a)], and failed to explain the Futech matter to the extent reasonably necessary to permit Mr. Dawson to make an informed decision [1.4(b)]. The evidence showed and Respondent admitted in retrospect that the loan by Mr. Dawson to Futech constituted doing business with his client requiring conflict disclosure.

1.7 (a): Conflict of interest: Respondent had a conflict which existed because there was a significant risk that his representation of his client Mr. Dawson would be materially limited by Respondent's interest in Futech. 1.8(a): Conflict of interest, specific rules: Respondent did not

comply with the specific requirements when entering into a business transaction with client Mr. Dawson as required under 1.8(a)(1), (2), and (3).

Count Two (ENTI)

The State Bar proved that the following ERs were violated:

219. Regarding clients and those to whom Respondent's professional conduct duties were owed pursuant to 5.7 Respondent violated the following ERs:

1.1: Competence: Respondent failed to provide competence representation. 5.7: He failed in his ongoing professional conduct duty to obtain current financial status information about ENTI so that Respondent could factually analyze it.

1.4(a) (1), 1.4(a)(3), and 1.4(b) Communication: Respondent failed to provide information or or advise of circumstances with respect to informed consent, including that a future consequence could require his withdrawal as attorney. [1.4)(a)]. Respondent failed to keep them reasonably informed about ENTI' s financial status [1.4(a)(3)]. Respondent failed to explain the ENTI matter to the extent reasonably necessary to permit informed decisions. [1.4)(b)].

1.7(a) Conflict of interest: Respondent failed to give the information necessary for informed consent including that a future consequence could require his withdrawal as their attorney.

1.8 (a), Conflict of interest –specific rules: Respondent failed to give sufficient information to allow informed consent including that a future consequence could require his withdrawal as their attorney.

1.16 (a)(1) Terminating representation: Client Dennis Gohr confirmed that in 2006 after the collapse of ENTI, he wanted and consented to another attorney in Respondent's law firm to continue to represent him while he was in the middle of another lawsuit. His testimony indicated that consent was oral and not in writing as required.

2.1 Advisor: Respondent failed to exercise independent professional judgment and render candid advice by failing to obtain current financial status information about ENTI.

Alternative 5.7, Responsibilities regarding law-related services: Although 5.7 by itself carries no related ABA sanctions, it serves to apply the Rules of Professional Conduct to recipients of law-related legal services. As such , Respondent violated those ERs as found in this Report by engaging in the law related service of investment advice which he failed to keep distinct from his provision of legal services to clients..

8.4 (d) Conduct that was prejudicial to the administration of justice: Respondent's failure to obtain current financial status information about ENTI very likely was a factor in the loss of substantial amounts of money which was collectively in the millions of dollars. Such failure was prejudicial to the administration of justice.

Unproven Violations

Count One (Dawson)

220. The State Bar failed to prove that the following ERs were violated:

1.6 Confidentiality of information: Respondent's action of bringing the Futech investment opportunity to the attention of Mr. Dawson without disclosure of the client's financial status to someone else was not proven to be a violation of confidentiality.

1.8(b) Conflict: confidentiality. Respondent's action of bringing the Futech investment opportunity to the attention of Mr. Dawson was not proven to be the equivalent of use of the information to the disadvantage of the client where there was no evidence that Respondent knew that the Futech investment would fail.

Alternative 1.9(c)(1), Duty to former client - confidential information: As stated above, Respondent's action of bringing the Futech investment opportunity to the attention of Mr. Dawson was not a violation of confidentiality while Mr. Dawson was a current client . No

evidence was presented that Respondent violated 1.9(c) toward Mr. Dawson as a former client. The State did not argue for a violation of this ER in its post-hearing memorandum..

Alternative 1.9 (c)(2), Duty to former client – revealing information: No evidence was presented that Respondent revealed confidential information when Mr. .Dawson became a former client. The State did not argue for a violation of this ER in its post-hearing memorandum.

8.4(c) knowingly engage in conduct involving dishonesty, fraud , deceit or misrepresentation: The State Bar did not prove by clear and convincing evidence that Respondent knowingly misled or knowingly misrepresented information to Mr. Dawson where Mr. Dawson testified that he believed that Respondent relied on others in Futech.

8.4(d), Conduct prejudicial to the administration of justice: The State Bar stated that the Dawson matter led to a massive lawsuit and used enormous amounts of judicial resources and was harmful to the lawsuit parties involved. The collateral consequences from the failure of Futech and the loss of Mr. .Dawson's investment in Futech are not a violation.

Count Two (ENTI)

The State Bar failed to prove that the following ERs were violated:

Rule 41(b), Ariz.R. Sup. Ct., Failure to support the Constitutions and laws of the United States and Arizona. The State Bar did not charge Respondent's misdemeanor convictions as a "serious crime" as required by Rule 53(h). The evidence does not support a finding that Respondent violated 8.4(c) as charged.

1.5(a) Charging an unreasonable fee or unreasonable amount for services: Respondent's practice was to try to offset commissions received against fees incurred for legal services. The evidence showed that in a few instances administrative and services fees had been generated and billed. The State failed to prove by clear and convincing evidence that the fees were unreasonable.

1.6(a) Confidentiality of information: Respondent's action of bringing the ENTI investment opportunity to the attention of clients and those pursuant to 5.7 to whom professional conduct duties are owed, did not violate confidentiality.

Alternative 1.9 Duty to former client -- confidentiality [charged in the alternative three times]: for the same reasons as to 1.6(a) above, there is not clear and convincing evidence.

1.8(b) Use of information to disadvantage of client: For the same reasons stated as to 1.6 (a) there is not clear and convincing evidence.

1.16 (a) Terminating representation: Unlike Denny Gohr, as to Mr. Marsh, there is no clear and convincing evidence.

8.4 (b) criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Unlike in *In re Montoya* , 08-0193, reported recently, the State Bar never provided any written factual basis or transcript as evidence of Respondent's mental state when he pled guilty. In response to this Hearing Officer's query at the hearing , the State Bar advised that it was not submitting a transcript of Respondent's factual basis. Considering that Respondent's misdemeanors were strict liability offenses, and without more evidence, the mere convictions need not be given preclusive effect. *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1994). 8.4(c) Conduct involving dishonesty, fraud deceit or misrepresentation: The State Bar did not prove by clear and convincing evidence that Respondent knowingly violated this ER.

Count Three (Peter McQuaid)

The State Bar failed to prove that any of the ERs were violated:

This Hearing Officer finds that Mr. McQuaid's testimony is entitled to little or no credence. Given the lack of credibility by Mr. McQuaid, the State did not prove by clear and convincing evidence that professional conduct duties were owed by Respondent to Mr. McQuaid either directly as a client or indirectly through 5.7. The State Bar failed to prove by clear and

convincing evidence the alleged violations of 2.1, 4.1(a), 5.7, 8.4(c) and 8.4(d) as to Mr. McQuaid.

ABA STANDARDS

In determining the sanctions for ethical violations,, this Hearing Officer follows the guidelines provided by the *American Bar Association Standards for Imposing Lawyer Discipline* (1992) (ABA Standards"). ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated ; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

In Count One under ABA *Standard 4.*0, the duty owed to clients was violated by Respondent's 1999 misconduct involving violations of 1.4(a) and 1.4(b), 1.7(a) and 1.8(a).

In Count Two, the same duty owed to clients was violated by Respondent's misconduct involving 1.1, 1.4(a)(1). 1.4)a)(3). 1.4(b), 1.7(a), 1.8(a) and 2.1. The duty owed as a professional was violated by 1.16(a)(1).

The Lawyer's Mental State

As stated in the factual findings, Respondent was negligent in the commission of the above misconduct violations. Where the mental state is negligence, and there is injury the ABA Standards provide for a presumptive sanction of reprimand (censure in Arizona).

Actual or Potential Injury

There is no doubt that the clients and those entitled the same ethical conduct duties owed by Respondent to clients were harmed by their loss of significant sums of money invested in ENTI. Neither their receipt of interest payments during the investment period of 2002 through 2005 nor their subsequent civil law settlement amounts satisfied the large principal amounts they lost. Their injury was substantial. The later representation of Denny Gohr by another attorney in

Respondent's law firm although wanted by Mr. Gohr, fortunately did not injure Mr. Gohr but carried the potential to have harmed him. .

Aggravating and Mitigating Factors

Aggravating factors under ABA *Standard* 9.22

9.22(b) dishonest or selfish motive: Respondent received commissions which unlike the investment loans were not dependent upon the solvency of ENTI. By doing so, Respondent selfishly put his interests before those of the ENTI investors.

9.22 (c) pattern of misconduct: The conflict of interest –centered misconduct applied to various individuals

9.22(d) multiple offenses: Two counts of misconduct were committed approximately eleven years apart during Respondent's thirty-five year legal career.

9.22(h) Vulnerability of victim; Some of the victims such as Barbara Wick were elderly and had a longer term relationship with Respondent.

9.22 (i) substantial experience in the practice of law: Respondent's substantial experience is given some weight.

9. 22 (j) indifference to making restitution: In fairness to Respondent, a finding of this factor is premature since at the time of hearing a restitution agreement was pending but had not yet been made.

Mitigating Factors

9.32(a) absence of a prior disciplinary record: In 35 years of practice, Respondent had no prior disciplinary record.

9.32 (c) personal or emotional factors: It was not a causative factor, but the subsequent dissolution of his marriage was at least a partial result of this matter, given that Respondent's mother in law also lost investment monies in ENTI and that his wife was named as a co-defendant in the subsequent civil litigation.

9.32(g) character or reputation: Prior to the instant matter, Respondent's reputation was unblemished. While retired Justice O'Connor knows Respondent as a friend, she also knows him by his prior work with her late husband and by his professional reputation over the years.

9.32(j) delay in disciplinary proceedings: The State Bar is largely entitled to pursue misconduct violations as it sees fit, but no explanation was given as to why it waited to bring misconduct charges in Count One that were eleven years old.

9.32 (k) imposition of other penalties or sanctions: Respondent received the four misdemeanor convictions with probation on his record, with criminal restitution pending or as ordered .

9.32(l) remorse. Respondent was remorseful. His statement was genuine and remorseful that he will not in the future tread into the ethical waters of trying to provide investment advice.

PROPORTIONALITY REVIEW

The Arizona Supreme Court has held that the issue of lawyer sanctions is guided by the principle of internal consistency. *In re Struthers*, 179 Ariz. 216, 887 P. 2d 789 (1994). To achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz.90, 90 P. 3d 772 (2004). However the concept of proportionality remains "an imperfect process" because no two cases are identical. *Struthers, supra.* Therefore, the discipline in each situation must be tailored to the individual case as neither perfection nor absolute uniformity can be achieved. *In re Riley,* 142 Ariz. 604, 691 P. 2d 695 (1984).

The proportionality cases cited by the State Bar in its post hearing memorandum entitled State Bar's Conclusions of Law and Proposed Sanctions , except for one case, are cases where the mental state was knowing or intentional. This Hearing Officer's review began with more recent negligence cases where the conflict of interest usually involved a business or will type of transaction with a client.

In In re Lenkowsky, SB-09-0081-D, Respondent engaged in numerous conflicts of interest and violated other ERs. Mental state was knowing and negligent with actual injury. . Aggravation was 9.22 (c), (d) and (i). Mitigation was 9.32 (a), (b) and (e). Sanction was 90 day retroactive suspension and two years of probation.

In *In re Don Carlos*, SB-10-0048-D, Respondent conducted business with a client without explaining the nature of the business, right to independent counsel and without obtaining consent of client in writing and committed other violations. Mental state was negligent with actual injury. There was no aggravation. Mitigation factors were 9.32(a), (c), (d), (e) (f) and (l). Sanction was censure and one year of probation.

In *In re Droeger*, SB—09-0119-D, Respondent engaged in conflict of interest between two clients by representing a client with interests directly adverse to a will and codicil that Respondent drafted for another client. Mental state was negligent with actual injury. Sanction was censure a viewing of conflict of interest video.

Further review of more recent cases involving conflict of interest violations and negligence almost uniformly have resulted in sanctions of censure where only potential injury existed. (*In re Eckley*, SB-09-0082-D, *In re Johnson*, SB-08-0175-D, *In re Shell*, SB-09-0059-D). Unlike the above negligence cases , Respondent's case involves actual injury.

Other recent cases involve knowing instead of negligent violations of conflict of interest but with only potential injury. *In re Shimko*, SB-09-0061-D (censure after aggravation factors of 9.22(b) and (i) and mitigation of 9.32(a), (e), and (g); *In re Warrick,* 90 day suspension after aggravation factors of 9.22(b) and (i) and mitigation factors of 9.32(a) (d). (e) and (k); and In re Amack, SB-900027-D , six months suspension and two years of probation after aggravation factors of 9.22(a), ((d) and (i) and no mitigation factors. Again, Respondents case involves actual injury.

The one case provided by the State Bar which involved negligence is *In re Groh*, SB-08-0095-D. There an estate planning lawyer received a 40% commission on the sale of time-share related products. The lawyer did not tell the clients who bought the annuities that he was receiving the commissions and the lawyer did no investigation into the investment. By a consent agreement with the State Bar, the lawyer was suspended for two years. *In re Groh,* has some similarity to Respondent's case because it involved an estate planning lawyer who received commissions. But it also differs markedly in that here Respondent disclosed his commission in in his disclosure letter to those he believed were his clients. and orally to others who were representatives of trusts or other entities. s. Respondent also paid for an investigation into ENTI. The cases are also contrasting because in *In re Groh* , the State Bar accepted negligence as the mental state but has refused to do so in Respondent's case.

RECOMMENDATION

Attorney discipline is designed to protect the public, the legal profession, and the legal system and to deter other attorneys from engaging in unprofessional conduct. The sanctions imposed may have the incidental effect of punishing the attorney. *In re Van Dox, 152 P. 3d 1183 (2007).*

This case involves Respondent as an attorney who presented investment advice to individuals he reasonably believed were his clients and to others whom he did not believe to be his clients. When Respondent ventured into the area of giving investment advice to individuals, he walked onto an ethical minefield.

Respondent wrote his disclosure letter because he said he had learned from the Dawson experience in which he realized that he had engaged in a business dealing with Mr. Dawson. Respondent learned the importance of trying to comply with the conflict disclosure requirements as reflected in his disclosure letter . Expert Witness Lynda Shely confirmed the disclosure letter

was an "admirable attempt" and that Respondent "did a far better job of attempting to comply with Ethics Rule 1.8(a) than most lawyers do."

The problem was that Respondent's effort in his letter did not go far enough to explain the disadvantages needed for informed consent especially likely future withdrawal by a lawyer.. Respondent as he acknowledged, cannot use the ACTEC Commentaries regarding ethical standards as a substitute for the Rules of Professional Conduct. The references to the Commentaries research were presented by him and by Mr. Henner as evidence of his effort to comply with the conflict.

Part of the crux beyond the evidence of harmed ENTI investors is the role that 5.7 plays in requiring a lawyer to practice professional conduct duties to users of law-related services, that is to see them as clients even when a lawyer may reasonably believe them to be non-clients. Respondent testified candidly about and provided Exhibit AAA to illustrate who he believed to be clients and who he did not believe to be clients.

As defined by the ABA *Standards,* "negligence" occurs 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."
In its post hearing argument the State Bar argued in part that the ENTI investors between 2002 through 2005, were "lulled" by the receipt of their interest payment on a regular basis. Respondent's failure to exercise independent judgment resulted from his failure to obtain current information about ENTI's financial status.

But more importantly, Respondent placed himself in the very a situation which the conflict rules try to prevent placing himself a position where his duty of loyalty to his client could be compromised. Here after Respondent sought current information about ENTI and was instead given reasons and excuses by Mr. Galyon which did not produce the financial information , Respondent at minimum still owed the duty to advise all the ENTI investors that he

was not receiving current information about ENTI's financial health. His reliance on the ongoing regular payments of interest to the ENTI investors as an indicator of ENTI's ongoing financial health was insufficient.

Respondent's belief that he would have no problem being able to properly represent his clients in the future failed to recognize what Ms Shely stated was the additional requirement by 1.7 to advise of future disadvantages such as likely withdrawal by Respondent. Respondent's failure to recognize this as a substantial risk was a deviation from the standard of care that a reasonable lawyer would exercise and therefore, it was negligent. His beliefs were faulty and resulted in substantial financial harm to ENTI investors. , but his beliefs were negligent.

Another basis for this Hearing Officer's finding that Respondent's mental state was negligent involves what Ms. Shely called the "scary part" when a lawyer is found to owe professional conduct duties to persons to whom under other circumstances such duties would not be owed.

What Ms. Shely called the 'scary part" of dealing with prospective clients applied to Respondents' mistake in not seeing various individuals in the family groups as persons triggering professional conduct duties. These persons included those acting in representatives for an entity which invested in ENTI. As measured by 5.7 , Respondent failed to see that the creation of an attorney client relationship is based on the perspective of the person receiving the information from the attorney. 5.7 provides that when a person receives law related services that are not kept distinct from the lawyer's provision of legal services, the lawyer's conduct is subject to the ERs.

The proportional cases serve as helpful guidelines, but the discipline in each case must be tailored to the individual circumstances. *In re Riley supra.* The substantial financial injury to Respondent's clients and those accorded the professional conduct duties owed to clients under 5.7 renders the presumptive sanction of censure inappropriate.

This Hearing Officer is aware that a complex case like this with voluminous evidence may not be tied up as neatly as we would like. Based on all the evidence and argument, this Hearing Officer recommends a deviation upward from the presumptive sanction of censure to a suspension of 90 days, followed by two years of probation.

Upon consideration of the facts application of the ABA Standards, including aggravating and mitigating factors, this Hearing Officer recommends to the Disciplinary Commission that:

(1) Respondent is suspended for 90 days;

(2) Respondent shall be placed on probation for a period of two years upon terms and conditions deemed appropriate at the time;

(3) 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 Presiding Disciplinary Judge, pursuant to Rule 60(a)(5). [4] The Presiding Disciplinary Judge may conduct a hearing within 30 days after receipt of notice, to determine if the terms of probation have been violated and if an additional sanction should be imposed. 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 preponderance of the evidence.

[4] Rule 60(a)(5), as revised, effective January 1, 2011

(4) Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Clerk's Office in this matter.

DATED this 18th day of January, 2011

Honorable Louis Araneta
Hearing Officer 6U

Original filed with the Disciplinary Clerk
this 18 day of January, 2011.

Copy of the foregoing mailed
This _____ day of January, 2011, to:

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by _____

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