

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

BARRY S. WAGNER,
Bar No. 022745,

Respondent.

PDJ-2017-9038

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 15-3310]

FILED APRIL 14, 2017

The Presiding Disciplinary Judge having reviewed the Agreement for Discipline by Consent filed on March 22, 2017, under Rule 57(a), Ariz. R. Sup. Ct., accepted the parties' proposed agreement.

Accordingly:

IT IS ORDERED Respondent, **BARRY S. WAGNER, Bar No. 022745** is reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents effective the date of this order.

IT IS FURTHER ORDERED Mr. Wagner shall be placed on probation for a period of two (2) years. The period of probation shall commence upon entry of this final judgment and order and will conclude two (2) years from that date.

IT IS FURTHER ORDERED as a term of probation, Mr. Wagner shall attend a half-day Trust Account Ethics Enhancement Program (TAEEP). Mr. Wagner shall contact

the State Bar Compliance Monitor at (602) 340-7258 within ten (10) days from the date of this order to schedule attendance at the next available class. Mr. Wagner shall be responsible for the cost of attending the program.

IT IS FURTHER ORDERED as a term of probation, Mr. Wagner shall contact the State Bar Compliance Monitor at (602) 340-7258 within ten (10) days from the date of entry of this order. Mr. Wagner shall submit to a LOMAP examination of his office procedures. Mr. Wagner shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. The probation period will commence at the time of entry of the final judgment and order and will conclude two (2) years from that date. Mr. Wagner shall be responsible for any costs associated with LOMAP.

NON-COMPLIANCE LANGUAGE

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), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether a term of probation has been breached and, 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.

IT IS FURTHER ORDERED that Mr. Wagner pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00, within thirty (30) days from the date of this order. There are no costs or expenses incurred by the Disciplinary Clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings.

DATED this 14th day of April, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 14th day of April, 2017, to:

Nicole S. Kaseta
State Bar of Arizona
4201 N 24th Street, Suite 100
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J. Scott Rhodes
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Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

by: [AMcQueen](#)

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

BARRY S. WAGNER,
Bar No. 022745

Respondent.

PDJ-2017-9038

**DECISION AND ORDER
ACCEPTING DISCIPLINE
BY CONSENT**

[State Bar File No. 15-3310]

FILED APRIL 14, 2017

This direct Agreement for Discipline by Consent was filed by the parties on March 22, 2017 pursuant to Rule 57(a), Ariz. R. Sup. Ct. No probable cause has been found in this matter and no formal complaint has been filed.

Rule 57 requires admissions be tendered solely "...in exchange for the stated form of discipline..." Under that rule, the right to an adjudicatory hearing is waived only if the "...conditional admission and proposed form of discipline is approved..." If the agreement is not accepted, those conditional admissions are automatically withdrawn and shall not be used against the parties in any subsequent proceeding. Mr. Wagner has voluntarily waives the right to an adjudicatory hearing, and waives all motions, defenses, objections or requests that could be asserted upon approval of the proposed form of discipline. Notice of this Agreement and an

opportunity to object as required by Rule 53(b)(3), Ariz. R. Sup. Ct., was provided by letter to the complainant on March 6, 2017. No objection have been filed.

The Agreement details a factual basis to support the conditional admissions. Mr. Wagner conditionally admits he violated Rule 42, ERs 1.15(a), (d), and (e) safekeeping property, and Rule 43(b)(1)(A), (B) and (C), 43(b)(2)(A), (B), (C) and (D). The agreed upon sanctions include reprimand, two (2) years of probation with the State Bar's Law Office Management Assistance Program (LOMAP), Trust Account Ethics Enhancement Program (TAEEP), and the payment of costs within thirty (30) days. Restitution is not an issue.

Mr. Wagner represented a client in a personal injury matter. Thereafter, Mr. Wagner failed to adhere to the rules and guidelines that govern his handling of his client trust account and client settlement funds. Specifically, Mr. Wagner over-disbursed funds from his trust account and compensated for those disbursements by depositing personal funds into his trust account. Upon receiving client settlement funds, Mr. Wagner failed to satisfy all of the medical liens and the lien holder ultimately forwarded the client balances to collections. The client inquired about the status of the liens in 2015. Mr. Wagner believed he had settled all of the liens however, two liens totaling \$5,766.64 remained active. Mr. Wagner estimated the amounts of disputed funds to be held on deposit in the trust account instead of

confirming the true amount disputed by third parties. Mr. Wagoner's over-disbursement caused a conversion of other client funds in the amount of \$975.80.

Rule 58(k) provides sanctions shall be determined in accordance with the *American Bar Association Standards for Imposing Lawyer Sanctions*, ("Standards"). The parties agree *Standard 4.1, Failure to Preserve Client's Property* applies to the ethical rule violations of Mr. Wagner. Reprimand is the presumptive sanction when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. Here, the parties stipulate Mr. Wagner negligently violated his duty to clients resulting in actual injury to one client and potential injury to other clients. Mr. Wagner negligently mishandled client property by failing to pay a client's medical liens which caused the outstanding lien balances to be forwarded to collections.

The parties further agree the following aggravating and mitigating factors are present in the record:

Standard 9.22(c) pattern of misconduct and *Standard 9.32(a)* absence of prior disciplinary offenses, *9.32(b)* absence of dishonest or selfish motive, and *9.32(e)* full and free disclosure to the State Bar and cooperative attitude towards the proceedings. Upon consideration, the Presiding Disciplinary Judge finds the proposed sanctions of reprimand and probation meets the objectives of attorney discipline. Now therefore,

IT IS ORDERED incorporating the Agreement and any supporting documents by this reference. The agreed upon sanction are: reprimand, two (2) years of probation (LOMAP & TAEPP), and the payment of costs and expenses of the disciplinary proceeding totaling \$1,200.00, to be paid within thirty (30) days from this date. There are no costs incurred by the office of the presiding disciplinary judge.

IT IS FURTHER ORDERED the Agreement is accepted. Costs as submitted are approved for \$1,200.00. A final judgment and order is signed this date.

DATED this April 14, 2017.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed this 14th day of April, 2017, to:

Nicole S. Kaseta
State Bar of Arizona
4201 N 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

J. Scott Rhodes
Jennings Strouss & Salmon, PLC
One E. Washington Street, Ste 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

by: AMcQueen

OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA

MAR 22 2017

FILED 
BY _____

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Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

**IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,**

**BARRY S. WAGNER,
Bar No. 022745**

Respondent.

~~PDJ 2016-~~

PDJ-2017-9038

State Bar File No. 15-3310

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, Barry S. Wagner, who is represented in this matter by counsel, J. Scott Rhodes, hereby submit their Agreement for Discipline by Consent, pursuant to Rule 57(a), Ariz. R. Sup. Ct. No probable cause order was entered in this matter. Respondent voluntarily waives the right

to an adjudicatory hearing, unless otherwise ordered, and waives all motions, defenses, objections or requests which have been made or raised, or could be asserted thereafter, if the conditional admission and proposed form of discipline is approved.

Pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct., notice of this agreement was provided to the complainant by letter on March 6, 2017. Complainant has been notified of the opportunity to file a written objection to the agreement with the State Bar within five (5) business days of bar counsel's notice. Copies of Complainant's objections, if any, have been or will be provided to the presiding disciplinary judge.

Respondent conditionally admits that his conduct, as set forth below, violated Rule 42, ERs 1.15(a), 1.15(d), and 1.15(e), and Rules 43(b)(1)(A), 43(b)(1)(B), 43(b)(1)(C), 43(b)(2)(A), 43(b)(2)(B), 43(b)(2)(C), and 43(b)(2)(D), Ariz. R. Sup. Ct. Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand with two (2) years of probation to include participation in the Law Office Management Assistance Program (LOMAP) and attendance at a half-day Trust Account Ethics Enhancement Program (TAEEP). Respondent also agrees to pay the costs and expenses of the disciplinary proceeding, within 30 days from the date of this order, and if

costs are not paid within the 30 days, interest will begin to accrue at the legal rate.¹ The State Bar's Statement of Costs and Expenses is attached hereto as Exhibit A.

FACTS

GENERAL ALLEGATIONS

1. Respondent was licensed to practice law in Arizona on February 10, 2004.

COUNT ONE (File no. 15-3310/ Donahue)

2. On December 17, 2015, the State Bar received a bar charge from client R.D. (Complainant) regarding Respondent's management of his settlement funds.
3. Complainant alleged that Respondent failed to timely disburse funds to third-party lien holders, resulting in the lien holders forwarding his and his wife's outstanding balances to collections.
4. Respondent represented Complainant and his wife in a personal injury matter.
5. Respondent settled the matter for \$16,500.00.
6. Respondent deposited the settlement funds into his IOLTA on or about April 10, 2015.

¹ Respondent understands that the costs and expenses of the disciplinary proceeding include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Probable Cause Committee, the Presiding Disciplinary Judge and the Supreme Court of Arizona.

7. Respondent failed to satisfy all lien holders until January 2016.
8. Respondent forgot that an unexpended balance was still held on behalf of Complainant and his wife.
9. Respondent believed that he had settled all liens, when in fact two liens totaling \$5,766.64 remained active.
10. Respondent failed to realize that he still held client funds even after Complainant and his wife asked Respondent about the status of the liens in mid-2015.
11. Respondent estimated the amounts of disputed funds to be held on deposit in the IOLTA rather than confirming the true amount disputed by third-parties for each client.
12. In estimating the amounts of disputed funds, Respondent caused an over-disbursement of <\$2,426.71> to Complainant and his wife during the course of representation, calculated as follows: (a) Respondent obtained a recovery totaling \$8,500.00 for Complainant. Respondent took \$2,125.00 as his portion of earned fees, disbursed \$2,007.00 to Complainant, and retained \$4,368.00 as an estimated amount of liens. However, the final amount of third-party disbursements totaled \$6,358.76, for a shortage of <\$1,990.76>. Of that amount, Respondent disbursed \$1,559.76 from the IOLTA and then paid \$431.00 of that amount directly; and (b) Respondent obtained a recovery totaling \$8,000.00 for Complainant's wife. Respondent took \$2,000.00 as his

portion of earned fees, disbursed \$2,003.00 to Complainant's wife, and retained \$3,997.00 as an estimated amount of liens. The final amount of third-party disbursements totaled \$2,605.05. Of that amount, Respondent disbursed \$2,174.68 from the IOLTA and then paid \$431.00 directly. Accordingly, the client was due the remaining \$1,391.95 but Respondent disbursed \$1,827.90 to the client and this resulted in an over-disbursement to the client of <\$435.95>.

13. The over-disbursements resulted in the total conversion of \$975.80 of other client funds.

14. Respondent converted these \$970.85 for no less than seven days while the remaining \$10.24 was converted for no less than six months, as explained below.

15. In responding to the State Bar, Respondent acknowledged that he made mistakes, stating the following: "Estimating Hospital balances and not having all precise medical debt information in a tentative Disbursement was sloppy."

16. Respondent also acknowledged that he failed to recognize the unexpended funds during the monthly reconciliation and admitted that he should have realized all liens were not satisfied and immediately corrected the issue the first time Complainant inquired about the liens.

17. Respondent informed the State Bar that he was undertaking measures to avoid repeated errors and improve his practice management, including that he hired a full time paralegal to aid him with remedial tasks as part of the process of ensuring this never happens again.

18. In response to the bar charge, Respondent provided copies of the mandatory trust account records (with certain exceptions that he explained), covering the period of December 2015 through January 2016 (period of review). Respondent also provided a number of additional pertinent client ledgers reflecting activity from December 2010 through October 2015.

19. In response to the bar charge, Respondent stated that he conducted a complete review of his IOLTA management practices and had undertaken corrective actions since realizing he had made mistakes with Complainant.

20. In response to the bar charge, Respondent wrote that he “regretfully acknowledges that his trust account management has been negligent, due in part to his rapidly growing practice with insufficient staff, in part to his desire to please clients that resulted in some cases to overpayment to them, and in part to his misunderstanding of the requirements of trust account management.”

21. In response to the bar charge, Respondent stated that his review of the IOLTA revealed that overpayments had been made to some clients and third-parties, resulting in a deficit in the IOLTA.

22. With his response to the bar charge, Respondent provided an accounting of the deficiencies, which he believed to be complete, and proof that he had deposited funds to rectify the amount of the deficiency according to his calculations.

23. The documentation Respondent provided, however, contained discrepancies, which the State Bar does not contend were intentional.

24. Specifically, the accounting Respondent provided to the State Bar identified thirty-five instances of over-disbursements totaling <\$16,393.24>. These instances of over-disbursements occurred between April 2011 and August 2015. The individual amounts ranged from .99¢ to \$1,875.00.

25. The State Bar's review of Respondent's trust records indicated that the deficit held in the IOLTA at the onset of the examination was <\$21,856.24>, for a difference compared to Respondent's analysis of \$5,463.00.

26. The State Bar identified the difference as consisting of the following negative balances: L.X. - <\$5,075.00>; J.M. - <\$300.00>; and "Other"- <\$88.00>.

27. On March 3, 2016, Respondent had deposited administrative funds in the amount of \$16,383.24 as a trust account reimbursement.

28. This deposit, however was \$10.00 short of the total of all deficiencies listed in Respondent's accounting, and was \$5,173.00 short of the apparent total deficit held as of January 31, 2016 pursuant to the State Bar's analysis.

29. The State Bar asked Respondent for additional information pertaining to the differences between Respondent's explanations and the State Bar's analysis. Respondent again cooperated with the State Bar's investigation, explaining that, after receipt of the State Bar's analysis, he had discovered the following when he examined the discrepancies:

(a) The <\$88.00> deficit was the result of a check order charge withdrawn from the IOLTA on or about May 28, 2014 that should have been withdrawn from his operating account; (b) the \$10.00 shortage of the administrative funds deposit intended to correct the <\$16,393.24> calculated deficit "was a mistake"; and (c) on February 10, 2015, Respondent had deposited two items into the IOLTA consisting of \$3,500.00 received on behalf of client L.X. and \$35,000.00 received on behalf of client J.H. Respondent inadvertently attributed both checks to client J.H. Respondent then attributed a <\$2,600.00> deduction of attorney's fees to client L.X., when it should have been attributed as L.X. - <\$1,850.00> and J.H. - <\$750.00>.

30. Respondent had failed to identify these issues until the State Bar brought it to his attention.

31. Respondent thereby maintained false client balances for approximately two years. The State Bar does not contend that this was intentional.

32. Despite not recording any deposits for client L.X., Respondent proceeded to disburse on behalf of this client, resulting in the negative unexpended balance of <\$5,075.00> for client L.X. and an inflated unexpended balance of \$12,500.00 for client J.H.

33. The true client balances at the onset of the trust account examination were L.X. – negative <\$825.00> and J.H. - \$8,250.00, and the actual deficit at the onset of the trust account examination was <\$17,606.24>.

34. On February 8, 2017, Respondent deposited administrative funds to make the IOLTA whole.

35. Accordingly, Respondent converted other clients' funds for a duration ranging from approximately six months to nearly five years. Again, the State Bar does not contend that this was intentional.

36. Respondent has accepted responsibility for the deficiencies with his IOLTA and has stated they are the product of several factors.

37. First, Respondent stated that his practice has grown rapidly and, consequently, he was negligent in his review of his bookkeeper's monthly reconciliations of his IOLTA.

38. Respondent further stated that he "did not fully comprehend the requirements of trust account management." Respondent stated that he did not understand all of the elements of a true, three-way reconciliation. Respondent stated that he now performs three-way reconciliations based on the model contained in the State Bar's Trust Account Manual and that he and his bookkeeper now sign the summary sheet.

39. In addition, Respondent stated that he recognizes that he tends to want to make his clients happy after a settlement by paying them their share of settlement proceeds too early, before reviewing all third-party claims and assuring that the client file has all relevant documents.

40. Accordingly, the deficiencies resulted because Respondent did not carefully review each month's reconciliation and did not notice the errors. Respondent states that he now understands that he needs to explain better to clients post-settlement processes and time periods, and that he is not required to accede to client demands for immediate payment before he has properly calculated third-party claims.

41. Respondent also stated that he was practicing from home, where he was sometimes distracted. In order to assist him with his practice management, Respondent stated that he no longer practices from home and has moved to office space.

42. The State Bar's review of Respondent's IOLTA documentation confirmed Respondent exhibited sustained negligence in the management of the IOLTA and failed to maintain adequate internal controls to safeguard client and third-party funds.

43. Respondent also exhibited some instances of disbursing checks out of sequential order, specifically, the following gaps in sequencing during the period of review: the numerical value of checks posted began with check number 2584 and ended with 2977 which indicates that Respondent drafted a total of 394 checks but only eighty-nine checks cleared during the period of review. An additional check was initially disbursed to a lien holder on behalf of Complainant but subsequently returned to Respondent and presumably voided, leaving 304 checks unaccounted.

44. Respondent stated that there are no lost or outstanding checks. Respondent explained that the gap in check numbers was the result of confusion caused while changing offices. Respondent stated that he maintains each set of checks in binders and, during his move, he became confused about which book he should be using, causing the gap in check numbers that are observed.

45. Respondent exhibited an unintentional lack of due professional care by disbursing funds on behalf of clients prior to the corresponding deposit being presented for payment. The following is a list of such instances: (a) The J.M. ledger reflects that the client held a negative <\$300.00> unexpended balance at the onset of the period of review. Though the origin of the deficit is unknown, on December 22, 2015, a settlement deposit in the amount of \$15,000.00 offset the deficit. Respondent thereby, converted other client's funds for no less than twenty-two days; (b) on December 1, 2015, Respondent drafted check number 2845 on behalf of client K.L. made payable to a medical care provider in the amount of \$620.00 when no funds were held on deposit on behalf of the client. The corresponding funds were not presented for deposit until twenty-one days later on December 22, 2015. The disbursement cleared on December 4, 2015. Respondent, therefore, converted other client's funds for approximately eighteen days; (c) on January 18, 2016, Respondent drafted check number 2969 on behalf of client C.L. made payable to a medical provider in the amount of \$2,000.00 when no funds were held on deposit on behalf of the client. The corresponding funds were not presented for deposit until the following day on January 19, 2016. The check posted after the deposit cleared and, therefore, no actual instance of conversion occurred; (d) on December 20, 2015, Respondent drafted check number 2880 payable to client C.D. in amount of \$3,000.00

when no funds were held on deposit on behalf of the client. The corresponding funds were not presented for deposit until two days later on December 22, 2015. The check posted after the deposit cleared and, therefore, no actual instance of conversion occurred; (e) on December 21, 2015, Respondent drafted check number 2881 payable to client M.D. in the amount of \$2,500.00 when no funds were held on deposit on behalf of the client. The corresponding funds were not presented for deposit until the following day on December 22, 2015. The check posted after the deposit cleared and, therefore, no actual instance of conversion occurred; and (f) on January 11, 2016, Respondent drafted check number 2961 payable to client M.N. in the amount of \$720.00 when no funds were held on deposit on behalf of the client. The corresponding funds were not presented for deposit until the following day on January 12, 2016. The check posted after the deposit cleared and, therefore, no actual instance of conversion occurred.

46. Respondent failed to maintain adequate duplicate deposit records. The deposit receipts provided do not reflect a breakdown by client name and amount for each transaction.

47. In addition, on December 28, 2015, Respondent deposited four items totaling \$64,460.00. Respondent calculated the total as \$58,910.00 on the corresponding deposit

slip, for a difference of \$6,550.00. As a result, the bank initially only credited \$58,910.00 to the IOLTA.

48. Respondent failed to provide an adequate equivalent of a general ledger/checkbook register. Instead, Respondent provided a copy of a two-way reconciliation detail conducted on QuickBooks during the period of review.

49. Respondent failed to maintain contemporaneous client ledgers which properly account for all client funds. Respondent caused false negative balances to reflect by recording same day disbursements prior to the corresponding deposit. In other instances, Respondent carried true negative balances on behalf of clients. In addition, not all of the client ledger entries are recorded on the actual date on which transactions occurred, but are instead recorded on arbitrary dates.

50. When a complete and accurate accounting of the activity transacted on behalf of each client is not maintained, an inaccurate unexpended balance results, outstanding items cannot be properly identified, and a proper three-way reconciliation cannot be performed.

51. Respondent failed to conduct proper monthly three-way reconciliations.

CONDITIONAL ADMISSIONS

Respondent's admissions are being tendered in exchange for the form of discipline stated below and are submitted freely and voluntarily and not as a result of coercion or intimidation.

Respondent conditionally admits that his conduct violated Rule 42, Ariz. R. Sup. Ct., specifically ERs 1.15(a), 1.15(d), and 1.15(e), and Rules 43(b)(1)(A), 43(b)(1)(B), 43(b)(1)(C), 43(b)(2)(A), 43(b)(2)(B), 43(b)(2)(C), and 43(b)(2)(D), Ariz. R. Sup. Ct.

RESTITUTION

Restitution is not an issue in this matter. As stated above, Respondent deposited funds into his IOLTA to correct the deficiencies in his IOLTA. No clients were negatively affected. If anything, some clients were overpaid. Respondent himself appears to have suffered the only financial prejudice, as he was underpaid for some matters as a result of this trust accounting deficiencies.

SANCTION

Respondent and the State Bar of Arizona agree that based on the facts and circumstances of this matter, as set forth above, the following sanctions are appropriate: Reprimand with two (2) years of probation to include participation in the Law Office

Management Assistance Program (LOMAP) and attendance at a half-day Trust Account Ethics Enhancement Program (TAEPP).

If Respondent violates any of the terms of this agreement, further discipline proceedings may be brought.

LOMAP

Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of entry of the final judgment and order. Respondent shall submit to a LOMAP examination of his office's procedures. Respondent shall sign terms and conditions of probation, including reporting requirements, which shall be incorporated herein. The probation period will commence at the time of entry of the final judgment and order and will conclude two (2) years from that date. Respondent will be responsible for any costs associated with LOMAP.

CLE

Respondent shall attend a half-day Trust Account Ethics Enhancement Program (TAEPP). Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of entry of the final judgment and order to schedule attendance at the next available class. Respondent will be responsible for the costs of attending this program.

LEGAL GROUNDS IN SUPPORT OF SANCTION

In determining an appropriate sanction, the parties consulted the American Bar Association's *Standards for Imposing Lawyer Sanctions (Standards)* pursuant to Rule 57(a)(2)(E). The *Standards* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying those 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. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *In re Rivkind*, 162 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction consideration is given to 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. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

The parties agree that *Standard* 4.13 is the appropriate *Standard* given the facts and circumstances of this matter. *Standard* 4.13 provides: "Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." Respondent was negligent in dealing with client property, including by

estimating the amounts of disputed funds to be held on deposit in the IOLTA rather than confirming the true amount disputed by third-parties for each client.

The Duty Violated

As described above, Respondent's conduct violated his duty to his clients.

The lawyer's mental state

For purposes of this agreement, the parties agree that Respondent negligently dealt with client property and that his conduct was in violation of the Rules of Professional Conduct.

The extent of the actual or potential injury

For purposes of this agreement, the parties agree that there was actual harm to the Complainant and his wife in that Respondent's failure to pay their medical liens resulted in the lien holders forwarding the outstanding balances to collections. The parties further agree that there was potential harm to Respondent's other clients.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is reprimand. The parties conditionally agree that the following aggravating and mitigating factors should be considered.

In aggravation:

Standard 9.22(c), a pattern of misconduct. As summarized above, Respondent repeatedly over-disbursed funds from his IOLTA.

In mitigation:

Standard 9.32(a), absence of a prior disciplinary record.

Standard 9.32(b), absence of a dishonest or selfish motive. Respondent compensated for his over-disbursements by depositing personal funds into his IOLTA.

Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

Discussion

The parties have conditionally agreed that, upon application of the aggravating and mitigating factors to the facts of this case, the presumptive sanction is appropriate.

The parties have conditionally agreed that a greater or lesser sanction would not be appropriate under the facts and circumstances of this matter. This agreement was based on the following: Although Respondent engaged in sustained mismanagement of his trust account, including by repeatedly over-disbursing funds from his IOLTA, Respondent attempted to rectify his misconduct by depositing funds in his IOLTA to cover the shortfall caused by his over-disbursements, and by hiring a paralegal to assist him. Respondent

also admitted his negligence to the State Bar immediately. Given Respondent's willingness to take remedial measures to ensure that the issues with his IOLTA do not occur again, the presumptive sanction of a reprimand with probation is appropriate and will protect the public.

Based on the *Standards* and in light of the facts and circumstances of this matter, the parties conditionally agree that the sanction set forth above is within the range of appropriate sanction and will serve the purposes of lawyer discipline.

CONCLUSION

The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the Presiding Disciplinary Judge, the State Bar and Respondent believe that the objectives of discipline will be met by the imposition of the proposed sanction of a reprimand with two (2) years of probation, and the imposition of costs and expenses. A proposed form order is attached hereto as Exhibit B.

DATED this 22nd day of March 2017

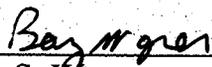
STATE BAR OF ARIZONA



Nicole S. Kaset
Staff Bar Counsel

This agreement, with conditional admissions, is submitted freely and voluntarily and not under coercion or intimidation.

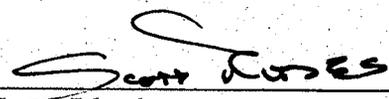
DATED this 20th day of March, 2017.



Barry S. Wagner
Respondent

DATED this 21st day of March, 2017.

Jennings Strouss & Salmon PLC



J. Scott Rhodes
Counsel for Respondent

Approved as to form and content


Maret Vessella
Chief Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 23 day of March, 2017.

Copy of the foregoing emailed
this 22 day of March, 2017, to:

The Honorable William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
1501 West Washington Street, Suite 102
Phoenix, Arizona 85007
E-mail: officepdj@courts.az.gov

Copy of the foregoing mailed/emailed
this 22 day of March, 2017, to:

J. Scott Rhodes
Jennings Strouss & Salmon, PLC
One E. Washington Street, Suite 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

Copy of the foregoing hand-delivered
this 22 day of March, 2017, to:

Lawyer Regulation Records Manager
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266

by:

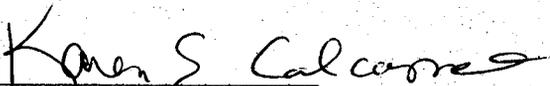

NSK: kec

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Barry S. Wagner, Bar No. 022745, Respondent

File No. 15-3310

Administrative Expenses

The Supreme Court of Arizona has adopted a schedule of administrative expenses to be assessed in lawyer discipline. If the number of charges/complainants exceeds five, the assessment for the general administrative expenses shall increase by 20% for each additional charge/complainant where a violation is admitted or proven.

Factors considered in the administrative expense are time expended by staff bar counsel, paralegal, secretaries, typists, file clerks and messenger; and normal postage charges, telephone costs, office supplies and all similar factors generally attributed to office overhead. As a matter of course, administrative costs will increase based on the length of time it takes a matter to proceed through the adjudication process.

General Administrative Expenses for above-numbered proceedings

\$1,200.00

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

Total for staff investigator charges \$ 0.00

TOTAL COSTS AND EXPENSES INCURRED \$1,200.00

EXHIBIT B

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF
THE STATE BAR OF ARIZONA,

BARRY S. WAGNER,
Bar No. 022745,

Respondent.

PDJ 2016-009

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 15-3310]

The undersigned Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on March ____, 2017, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **Barry S. Wagner**, is hereby reprimanded for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED that Respondent shall be placed on probation for a period of two (2) years. The period of probation shall commence upon entry of this final judgment and order and will conclude two (2) years from that date.

IT IS FURTHER ORDERED that, as a term of probation, Respondent shall attend a half-day Trust Account Ethics Enhancement Program (TAEEP). Respondent shall

contact the State Bar Compliance Monitor at (602) 340-7258, within 10 days from the date of service of this Order/Agreement, to schedule attendance at the next available class. Respondent will be responsible for the cost of attending the program.

IT IS FURTHER ORDERED that, as a term of probation, Respondent shall contact the State Bar Compliance Monitor at (602) 340-7258, within ten (10) days from the date of entry of this Final Judgment and Order. Respondent shall submit to a LOMAP examination of his office procedures. Respondent shall sign terms and conditions of participation, including reporting requirements, which shall be incorporated herein. The probation period will commence at the time of entry of the final judgment and order and will conclude two (2) years from that date. Respondent will be responsible for any costs associated with LOMAP.

NON-COMPLIANCE LANGUAGE

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), Ariz. R. Sup. Ct. The Presiding Disciplinary Judge may conduct a hearing within 30 days to determine whether a term of probation has been breached and, 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.

IT IS FURTHER ORDERED that Respondent pay the costs and expenses of the State Bar of Arizona in the amount of \$1,200.00, within 30 days from the date of service of this Order.

IT IS FURTHER ORDERED that Respondent shall pay the costs and expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in connection with these disciplinary proceedings in the amount of _____, within 30 days from the date of service of this Order.

DATED this _____ day of March, 2017

William J. O'Neil, Presiding Disciplinary Judge

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this _____ day of March, 2017.

Copies of the foregoing mailed/emailed
this _____ day of March, 2017, to:

J. Scott Rhodes
Jennings Strouss & Salmon, PLC
One E. Washington Street, Ste 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

Copy of the foregoing emailed/hand-delivered
this _____ day of March, 2017, to:

Nicole S. Kasetta
Bar Counsel - Litigation
State Bar of Arizona
4201 N 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Email: LRO@staff.azbar.org

Copy of the foregoing hand-delivered
this _____ day of March, 2017 to:

Lawyer Regulation Records Manager
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Phoenix, Arizona 85016-6266

by: _____