

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

WILLIAM A. NEBEKER,
Bar No. 004919

Respondent.

PDJ 2018-9049

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 16-0828]

FILED JUNE 28, 2018

The Presiding Disciplinary Judge having reviewed the Agreement for Discipline by Consent filed on June 14, 2018, pursuant to Rule 57(a), Ariz. R. Sup. Ct., accepts the parties' proposed agreement. Accordingly:

IT IS ORDERED Respondent, **William A. Nebeker**, is reprimanded effective the date of this order for his conduct in violation of the Arizona Rules of Professional Conduct, as outlined in the consent documents.

IT IS FURTHER ORDERED Mr. Nebeker shall be placed on probation for two (2) years. The period of probation shall commence upon this date and conclude in two (2) years.

IT IS FURTHER ORDERED as a term of probation, Mr. Nebeker shall attend a half-day Trust Account Ethics Enhancement Program (TAEEP). Mr. Nebeker shall contact the State Bar Compliance Monitor at (602) 340-7258, within

ten (10) days from this order to schedule attendance at the next class. Mr. Nebeker shall be responsible for the cost of attending the program.

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

IT IS FURTHER ORDERED as a term of probation, Mr. Nebeker shall pay restitution to the clients/third parties, as set forth in Exhibit B to the Agreement for Discipline by Consent, within thirty (30) days from this date. However, if Mr. Nebeker cannot complete such restitution payments within thirty (30) days because of the inability to contact the affected client/third party or because the client/third party is unwilling to accept such payment until they complete their own investigation, Mr. Nebeker shall provide the State Bar monthly updates as part of his probation regarding the same. The monthly updates shall explain why Mr. Nebeker has been unable to complete the restitution payments and what efforts he has made to contact the applicable client/third party and to make the applicable restitution payments.

NON-COMPLIANCE LANGUAGE

If Mr. Nebeker 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 thirty (30) days to determine whether a term of probation has been breached and, if so, to determine whether a 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 a preponderance of the evidence.

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

DATED this 28th day of June, 2018.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 28th day of June, 2018, 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 St Ste 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslw.com
Respondent's Counsel

by: AMcQueen

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

WILLIAM A. NEBEKER,
Bar No. 004919

Respondent.

PDJ 2018-9049

**DECISION ACCEPTING
DISCIPLINE BY CONSENT**

[State Bar No. 16-0828]

FILED JUNE 28, 2018

Under Rule 57(a), Ariz. R. S. Ct.,¹ an Agreement for Discipline by Consent (“Agreement”), was filed June 14, 2018. A probable cause order was entered on June 27, 2017, but no formal complaint has been filed. The State Bar of Arizona is represented by Staff Bar Counsel, Nicole Kaseta. Mr. Nebeker is represented by J. Scott Rhodes, *Jennings Strouss & Salmon PLC*.

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. Nebeker has voluntarily waived the right to an adjudicatory hearing, and waived all

¹ Unless otherwise stated all rule references are to the Ariz. R. Sup. Ct.

motions, defenses, objections or requests that could be asserted upon approval of the proposed form of discipline. The State Bar is the complainant and, therefore, no notice of this agreement is required under Rule 53(b)(3).

The Agreement details a factual basis to support the conditional admissions. It is incorporated by reference. Mr. Nebeker conditionally admits he violated Rule 42, ERs 5.3~Nonlawyer Assistants, 1.15(a), 1.15(d)~Safekeeping Property, and Trust Account Rule 43(a), 43(b)(1)(A)-(C), and 43(b)(2)(A)-(D). The misconduct is briefly summarized.

Mr. Nebeker is a partner at the firm of *Koeller, Nebeker, Carlson, & Haluck LLP(KNCH)*. One of his duties at KNCH included being the sole signatory on KNCH's trust account for the Phoenix office². This case involves embezzlement from the trust account of that office by a long-time employee.

On October 24, 2005, Dale Langley, the principal KNCH Director of Administration at its Irvine Office, traveled to Phoenix, interviewed and hired Carlos Cortez as the accountant for the Phoenix office. Mr. Cortez's job duties involved maintaining the requisite trust account documents for the Phoenix office, including client and general ledgers, and depositing or disbursing checks to or from the Phoenix trust account at the direction of KNCH attorneys in Phoenix.

² KNCH has approximately 80 attorneys at the firm's offices in California, Nevada, Florida, and Texas. The principal office is in Irvine, California.

Although Mr. Nebeker was the sole signatory on the Phoenix trust account, he believed that, Mr. Langley was supervising Cortez from the Irvine Office relating to his accounting duties, including management of the Phoenix trust account. He assumed Langley was performing monthly three-way reconciliations.

When KNCH received a check for deposit into the Phoenix trust account, the responsible attorney would initially review the check and add the check to a case ledger. Then the responsible attorney would instruct Mr. Cortez on how to treat the check (i.e., place in trust account or apply to earned fees, or hold overnight in the KNCH's safe until a billing number can be crated for the new matter.)

Insufficient Funds

In Count One, the State Bar of Arizona (SBA) received an insufficient funds notice on the KNCH client trust account³ on March 14, 2016 and requested an explanation from Nebeker. The insufficient funds notice demonstrated that a check from the firm trust account, for \$378,000.00, attempted to pay against the firm's trust account on March 7, 2016. The collectible balance in the trust account was \$372,475.91, causing a temporary negative balance, resulting in the overdraft reported to the SBA.

³ Unless otherwise stated, all KNCH references are to its Phoenix office.

Mr. Nebeker assigned to Cortez the task of assembling the information for the reply. Based on the information provided by Cortez he replied to the SBA's trust account examiner (Examiner). The information he was provided was that the overdraft resulted from a disbursement error. Relying on Cortez he replied that KNCH wrote checks for \$150,000.00 and \$378,000.00 on February 26, 2016⁴. He stated that although the checks were drafted on that day, they were not anticipated to be released until the following month. Mr. Nebeker explained that postdating was done because he is the only signer on that account and was scheduled to be out of town when the checks had to be disbursed.

From the information provided by Mr. Cortez, Mr. Nebeker also explained that the IOLTA balance when the checks were drafted was \$535,974.91 comprising of funds belonging to thirteen unrelated client matters. However, client ledgers provided to the SBA reflected sufficient funds were not held on behalf of the applicable client to cover the disbursement check for \$150,000.00.

Cortez explained this discrepancy to Mr. Nebeker who then explained that the bank placed a hold on the funds which was not released until March 10, 2016. He was unaware of the hold. Because of this hold, Mr. Nebeker stated that when the check cleared the IOLTA on March 7, 2016, it caused a negative balance.

⁴ Check number 5075 for \$150,000 and check number 5076 for \$378,000

Based on the information provided by Mr. Cortez, Mr. Nebeker stated that the overdraft occurred on March 7, 2016 due to an unknown hold, and a subsequent deposit occurred on March 8, 2016 which cleared the negative balance. However, unbeknownst to Mr. Nebeker, the deposit on March 8, 2016 comprised funds deposited on behalf of unrelated client matters.

The SBA's examination revealed an additional instance of a check drafted when sufficient funds were not held on deposit to cover the disbursement. On January 19, 2016, check number 5065 was drafted to a third party for \$31,900.00 when the unexpended balance at the time was \$1,390.00. The payee received the check on February 1, 2016. The over-disbursement was made in reliance on an insurance check not deposited until February 9, 2016 (22 days after the disbursement).

Mr. Nebeker stated that until the SBA's screening letter, he was not aware of the insufficient funds incident. Mr. Cortez learned of the overdraft on March 8, 2016 but failed to disclose the overdraft to Mr. Nebeker. All responses, information and documents provided to the Examiner were based on information given by Mr. Cortez.

The Examiner completed a review of the trust account records provided, which revealed various discrepancies. These discrepancies included findings that: not all ledger entries were recorded on the actual date on which the transaction occurred; not all entries were properly attributed to the corresponding client matter and; not all duplicate deposit records reflected the actual date on which funds were deposited.

Because of the information from Mr. Cortez, Mr. Nebeker believed and reported that all these inconsistencies were corrected after the Examiner informed him of the issues.

The copies of the monthly reconciliations provided were inaccurate, due, in part, because Mr. Nebeker did not maintain the mandatory trust account records according to the minimum standards.

Mr. Nebeker believed that Mr. Cortez was a competent employee. He believed that KNCH utilized internal controls to adequately safeguard funds held in trust, such as limiting the number of signers on the account to only himself.

While Mr. Nebeker believed these were inadvertent errors, many of the discrepancies appeared to have been deliberate. Cortez provided Mr. Nebeker with a breakdown he created that reconciled to the penny. However, it was inaccurate showing a discrepancy between the amount held on deposit for a certain client matter and the corresponding client ledger reflecting a differing balance. There were multiple other instances of misleading information given to Mr. Nebeker by Cortez.

The SBA learned that Mr. Nebeker did not intend to submit to the SBA the ledgers attached to his response to the bar charge. During a conference with the Examiner, Mr. Nebeker explained that he provided his response to the bar charge to Mr. Cortez for delivery and Mr. Cortez either knowingly or unknowingly provided the incorrect ledgers to the SBA.

Mr. Cortez's Misappropriation of Trust Account Funds

Based on the concerns of the SBA and the concerns Mr. Nebeker had about the conduct of Mr. Cortez, KNCH met with Mr. Cortez on April 5, 2017 to discuss the issues. At this meeting, Mr. Cortez admitted that he misappropriated funds from KNCH's trust account. KNCH immediately terminated Mr. Cortez's employment and two days later opened a new trust account with a different bank. KNCH also terminated its Director of Administration, Mr. Langley, who was supposed to be supervising Mr. Cortez and conducting monthly three-way reconciliations. Until this meeting, Mr. Nebeker was unaware of Mr. Cortez's misappropriation.

The day that Mr. Nebeker learned of Mr. Cortez's misappropriation, KNCH retained BDO USA, LLP (BDO), an accounting firm, to reconstruct its trust account. BDO discovered that Mr. Cortez fraudulently added himself as a signatory to the trust account on March 29, 2006 and issued his first fraudulent check on June 23, 2006. Mr. Cortez's misappropriation continued through March of 2017. Before adding his name as a signatory on the trust account, Mr. Cortez had Mr. Nebeker sign a check to a legitimate client or third party. Mr. Cortez would then hold the check for a period of time. When the client or third party did not complain about not receiving the funds, Mr. Cortez would insert the name of "La Casa Homes" as the payee of a check. Mr. Cortez created La Casa Homes, a fictitious entity, to facilitate his fraud. Mr. Cortez would then deposit the check into an account in the name of La Casa Homes.

Mr. Cortez maintained a second ledger, which he showed to attorneys including Mr. Nebeker when he was asked about the balance in the trust account for specific client matters. This fraudulent ledger deceived Mr. Nebeker and all other responsible attorneys about the funds existing in the trust account to believe that funds existed and were properly attributed to specific client matters when neither was true due to Mr. Cortez's embezzlement.

BDO determined that Mr. Cortez embezzled \$2,833,701.16 from KNCH's trust account, of which \$2,390,683.20 belonged to clients or third parties in both active and closed matters. Since then, KNCH voluntarily deposited \$1,554,558.71 into its trust account to prepare for making restitution payments and to ensure that all open and active matters were correctly funded. In addition, KNCH deposited into its IOLTA \$760,961.75 on December 8, 2017, and \$686,668.19 on February 21, 2018, of its own funds.

Corrective Measures

Once BDO completed its reconstruction and identified the clients/third parties that Mr. Cortez misappropriated funds from, Mr. Nebeker began contacting these clients/third parties to explain what happened and repay the funds.

During screening, Mr. Nebeker met with attorney Lynda Shely to assist with improving KNCH's trust account procedures. The new procedures included amending

their process for billing attorneys to notify accounting of client matter numbers for deposits and requiring billing attorneys to better review trust balances monthly.

KNCH sued Mr. Cortez. Among the allegations were claims of breach of fiduciary duty, theft, and conversion. On December 6, 2017, the Maricopa County Superior Court entered a final judgment in favor of KNCH for approximately \$8.5 million.

The agreed upon sanction includes reprimand with two (2) years of probation to include participation in the Law Office Management Assistance Program (LOMAP), completion of the Trust Account Ethics Enhancement Program (TAEEP), and restitution.

Rule 58(k) provides sanction shall be determined under the *American Bar Association Standards for Imposing Lawyer Sanctions*, (“Standards”). The parties stipulate that either *Standard* 4.12 or 4.13 could apply. Mr. Nebeker has acknowledged that his reliance on a nonlawyer did not reduce his responsibilities.

Standard 4.12, Failure to Preserve the Client’s Property

Provides that suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Standard 4.13, Failure to Preserve the Client’s Property

Provides that reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Mr. Cortez was a sophisticated criminal who obfuscated his acts. The firm's Director of Administration was Mr. Cortez's supervisor and also failed to identify Mr. Cortez's embezzlement. Regardless, Mr. Nebeker acknowledges that "the buck stops with him."

The parties agree that, whether *Standard* 4.12 or 4.13 applies, the ultimate sanction of reprimand with probation is appropriate. Mr. Nebeker negligently failed to maintain adequate trust account records, negligently failed to perform monthly three-way reconciliations, negligently failed to safe keep client property and maintain adequate internal controls to safeguard funds held in trust. He left these to Cortez and he negligently failed to supervise Mr. Cortez in violation of the Rules of Professional Conduct.

The presumptive sanction is suspension. his misconduct caused actual harm to clients and certain third parties. The parties stipulate in aggravation are factors 9.22(c) pattern of misconduct and 9.22(i) substantial experience in the practice of law. In mitigation are factors 9.32(a) absence of a prior disciplinary record, 9.32(b) absence of a dishonest or selfish motive, 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct, 9.32(e) full and free disclosure to disciplinary

board or cooperative attitude toward proceedings, 9.32(k) imposition of other penalties or sanctions, and 9.32(l) remorse.

The parties stipulate, and the presiding disciplinary judge agrees that upon application of the aggravating and mitigation factors, and the facts and circumstances that a lesser sanction is appropriate. Therefore, the presumptive sanction is properly mitigated to a reprimand with two (2) years of probation.

Accordingly:

IT IS ORDERED accepting and incorporating the Agreement and any supporting documents by this reference. The agreed upon sanctions are reprimand with two (2) years of probation, attendance of a half-day Trust Account Ethics Enhancement Program (TAEEP), participation in the Law Office Management Assistance Program (LOMAP), and restitution paid to the clients and third parties in Exhibit B of the Agreement. A final judgment and order is signed this date.

DATED this 28th day of June, 2018.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

Copies of the foregoing mailed/emailed
this 28th day of June, 2018, 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 St Ste 1900
Phoenix, AZ 85004-2554
Email: srhodes@jsslaw.com
Respondent's Counsel

by: AMcQueen

Nicole S. Kasetta, Bar No. 025244
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016-6266
Telephone (602) 340-7250
Email: LRO@staff.azbar.org

J. Scott Rhodes, Bar No. 016721
Jennings Strouss & Salmon PLC
One E. Washington Street, Ste 1900
Phoenix, AZ 85004-2554
Telephone 602-262-5862
Email: srhodes@jsslaw.com
Respondent's Counsel

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

**WILLIAM A. NEBEKER,
Bar No. 004919**

Respondent.

PDJ 2018

State Bar File Nos. **16-0828**

**AGREEMENT FOR DISCIPLINE
BY CONSENT**

The State Bar of Arizona, through undersigned Bar Counsel, and Respondent, William A. Nebeker, 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. A probable cause order was entered on June 27,

2017, but no formal complaint has been filed 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.

The State Bar is the complainant in this matter and, therefore, no notice of this agreement is required pursuant to Rule 53(b)(3), Ariz. R. Sup. Ct.

Respondent conditionally admits that his conduct, as set forth below, violated Arizona Supreme Court Rule 42, ERs 5.3, 1.15(a), and ER 1.15(d), and Arizona Supreme Court Rules 43(a), 43(b)(1)(A)-(C), 43(b)(2)(A)-(D). Upon acceptance of this agreement, Respondent agrees to accept imposition of the following discipline: Reprimand with two years of probation to include participation in the Law Office Management Assistance Program (LOMAP), completion of the Trust Account Ethics Enhancement Program (TAEEP), and the payment of restitution. 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. At all relevant times, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on April 30, 1977.

2. Respondent is a partner at the firm of Koeller, Nebeker, Carlson, & Haluck LLP (KNCH).

3. KNCH has approximately 80 attorneys.

4. KNCH has three offices in California and offices in Nevada, Florida, Texas, and in Phoenix, Arizona. The firm's principal office is in Irvine, California.

5. A significant portion of KNCH's practice involves defense of construction defect litigation.

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.

6. At all relevant times and unless otherwise specified, Respondent was the sole signatory on KNCH's trust account for the firm's Phoenix office.

7. This case involves embezzlement from the firm's Phoenix trust account by a long-time employee. The embezzlement was discovered in the course of the State Bar's investigation of an insufficient funds notice. No client or third party complained, and no client or third party noticed that funds had not been paid that were due to them. Respondent reports that clients and third parties that have now been informed of the embezzlement have generally expressed both surprise (because they did not notice they had not been paid) and sympathy for the firm.

8. On October 24, 2005, KNCH hired Carlos Cortez (Cortez) as its accountant for the Phoenix office. The firm's Director of Administration, who worked in the Irvine office, traveled to Phoenix to interview Cortez and made the final hiring decision.

9. Cortez's job duties involved maintaining the requisite trust account documents for the Phoenix office, including client and general ledgers, and depositing or disbursing checks to or from the Phoenix trust account at the direction of KNCH attorneys in Phoenix.

10. Although Respondent was the sole signatory on the Phoenix trust account, Respondent believed that Dale Langley (Langley), KNCH's Director of Administration, was supervising Cortez from the Irvine office in relation to all of Cortez's accounting duties, including management of the Phoenix trust account and performing monthly three-way reconciliations.

11. In fact, Langley was not performing monthly three-way reconciliations.

12. Although Respondent was the sole signatory on the Phoenix trust account, other KNCH attorneys in Phoenix directed Cortez with regard to transactions in and out of on the Phoenix trust account, including by directing Cortez to issue certain checks. Cortez would then present the checks to Respondent for his signature, and Respondent would review the client ledger for the applicable client to ensure that there were adequate funds to cover the check.

13. When KNCH received a check for deposit into the Phoenix trust account, its process was for the Phoenix responsible attorney to initially review the check and add the check to a case ledger. The responsible attorney then instructed Cortez on how to treat the check (i.e., place in trust account or apply to earned

fees, or hold overnight in the KNCH's safe until a billing number can be created for the new matter).

COUNT ONE (File no. 16-0828/ Trust Account)

I. The Insufficient Funds Notice and the State Bar's Investigation

14. On March 14, 2016, the State Bar of Arizona (SBA) received an insufficient funds notice on Respondent's client trust account.

15. The insufficient funds notice demonstrated that check number 5076 from the firm's Phoenix trust account, in the amount of \$378,000.00, attempted to pay against the firm's Phoenix trust account on March 7, 2016, when the balance was \$697,618.15, but uncollectible. The bank paid the check, and did not charge an overdraft fee. At the time the check was presented for payment, the collectible balance was \$372,475.91, thereby causing a temporary negative <\$5,525.09> unexpended balance which resulted in the overdraft reported to the SBA.

16. The SBA's trust account examiner (Examiner) sent Respondent a copy of the overdraft notice, and requested an explanation of the overdraft and copies of the related mandatory records.

17. Respondent assigned to Cortez the task of assembling the information necessary to respond to the State Bar. Based on documents and information that

Cortez provided, Respondent sent the requested information to the SBA with exceptions, and explained, based on Cortez's explanation to him, that the occurrence of overdraft was the result of a disbursement error. Respondent further stated that KNCH wrote checks numbered 5075 in the amount of \$150,000.00 and 5076 in the amount of \$378,000.00 on February 26, 2016.

18. Also based on information from Cortez, Respondent stated that, even though the checks were drafted on that day, they were not anticipated to be released until the following month. Respondent explained that this was done because he is the only signer on the account and he was scheduled to be out of town at the time the checks were required to be disbursed.

19. Also based on information from Cortez, Respondent further stated that the IOLTA balance at the time the checks were drafted was \$535,974.91.

20. The balance was comprised of funds belonging to thirteen unrelated client matters.

21. Respondent provided the SBA client ledgers with his response to the screening letter. These client ledgers were provided to Respondent by Cortez. They reflected that sufficient funds were not held on behalf of the applicable client to cover the disbursement of check number 5075.

22. Based on information from Cortez, Respondent explained that KNCH held the checks until the corresponding funds were deposited by Cortez on March 1, 2016, and that KNCH released check number 5076 via UPS overnight the same day, while check number 5075 was hand delivered to the payee the following day.

23. Respondent stated that the bank placed a hold on the funds which was not released until March 10, 2016 and he was unaware of the hold at the time. As a result, Respondent stated that check number 5076 caused a negative balance when it cleared the IOLTA on March 7, 2016.

24. The examination revealed an additional instance of a check drafted when sufficient funds were not held on deposit to cover the disbursement. Specifically, on January 19, 2016, check number 5065 was drafted to a third party in the amount of \$31,900.00 when the unexpended balance at the time was \$1,390.00, leaving a negative matter balance of <\$30,000.00>. The copy of the cancelled check reflects the payee received the check on February 1, 2016. The over-disbursement was made in reliance on an insurance check which was not deposited until February 9, 2016 or 22 days after the disbursement. The

disbursement did not result in an actual conversion because the check did not clear until February 17, 2016.

25. In his response to the screening letter, Respondent informed the Examiner that due professional care was exercised in the performance of the KNCH's duties. That statement was accurate when made to the extent of Respondent's knowledge. Respondent initially stated that Cortez was a competent employee, and he believed at the time that this statement was true. Additionally, Respondent stated that KNCH utilized internal controls to adequately safeguard funds held in trust, such as limiting the number of signers on the account to only himself. Respondent also believed that this statement was true.

26. Based on information and documentation provided by Cortez, Respondent stated that the overdraft occurred on March 7, 2016 due to an unknown hold and a subsequent deposit occurred on March 8, 2016 in the amount of \$166,308.00, which cleared the negative balance.

27. Unbeknownst to Respondent, the deposit referenced, however, was comprised of funds deposited on behalf of unrelated client matters.

28. Respondent stated that the unknown and unanticipated hold was released on March 10, 2016, "more than covering all account activity." This

statement was based on information received from Cortez, and Respondent believed that it was true.

29. Respondent stated that he was not aware of the insufficient funds incident until the receipt of the SBA's screening letter dated March 17, 2016. This statement was true.

30. Cortez became aware of the overdraft on March 8, 2016 but he failed to disclose the overdraft to Respondent.

31. The Examiner sent Respondent multiple requests for additional information and Respondent timely responded to the requests for additional information. His responses were all based on information and documents provided by Cortez.

32. The Examiner completed the review of the trust account records provided, which revealed various discrepancies referenced herein.

33. The examination revealed that not all ledger entries were recorded on the actual date on which the transactions occurred. Also, not all entries were properly attributed to the corresponding client matter and not all duplicate deposit records reflected the actual date on which funds were deposited. Examples include

the following, which Respondent stated (based on information from Cortez) were corrected after the Examiner informed Respondent of the same:

- a. The client ledger for a client matter reflected the deposit of a \$30,000.00 insurance remittance on January 9, 2016 but the corresponding deposit slip is dated February 9, 2016. The deposit receipt, however, indicated the funds were presented for deposit on February 10, 2016. Based on information received from Cortez, Respondent explained that Cortez recorded the deposit on January 9, 2016 but delayed presenting the item for deposit at the request of the handling attorney. Respondent stated there are circumstances wherein payors request KNCH refrain from negotiating funds until a specific date or until a specific task has been completed (e.g. receipt of a fully executed Settlement Agreement);
- b. The client ledger for a client matter reflected the deposit of \$150.00 on February 9, 2016. The corresponding deposit slip is dated the same date. The duplicate deposit receipt, however, indicated the funds were presented for deposit on February 10, 2016. Furthermore, while the duplicate deposit slip reflected that the funds were deposited on behalf of a certain client matter, the general ledger reflected that the check was deposited on behalf of a general matter number that KNCH utilized for unidentified transactions;
- c. The general ledger reflected a \$500.00 and \$5,000.00 deposit on February 9, 2016, associated to a client matter. The corresponding deposit slip attributed the deposits to a different client matter;
- d. The client ledger for a matter reflected a \$5,000.00 deposit on March 18, 2016 and a \$25,000.00 deposit on March 21, 2016. Neither deposit was recorded on the general ledger, nor were any corresponding deposits transacted during the period of review. Respondent stated that the funds were actually deposited on October 21, 2015. Based on information provided by Cortez, Respondent explained that the funds were designated to an incorrect matter number when KNCH deposited the funds. Respondent stated that the March entries reflected the dates on which the errors were discovered rather than the actual date of deposit;

- e. On February 26, 2016, two insurance checks in the amount of \$13,750.00 and a third in the amount of \$1,000.00 were deposited on behalf of a matter. The corresponding client ledger did not reflect an entry for the \$1,000 check. Moreover, although the ledger reflected entries for both of the \$13,750 deposits, only one of the entries reflected an amount. The general ledger indicated that the two checks not reflected on the client ledger had stopped payments issued by the payors and a corresponding deduction was recorded on March 2, 2016. Based on information provided by Cortez, Respondent stated that normal practice was that Cortez removed them from the client ledger and reconciled the status as unfunded/cancelled on the general ledger when Cortez learns of unfunded checks. Therefore, Respondent stated that Cortez removed the \$1,000.00 deposit entry and amended the \$13,750.00 unfunded deposit to reflect a zero dollar deposit. Respondent stated that Cortez elected to leave the entry as a means of preserving a record of its specific check number; and
- f. Respondent drafted checks numbered 5072 on February 9, 2016 and 5074 on February 22, 2016. The final recipient of the funds changed his name and this necessitated Respondent voiding the checks and issuing replacements. The general ledger reflected the drafting of the checks but no corresponding amount. Instead, the general ledger described the checks as "Void." The client ledger did not reflect an entry for the disbursements.

34. The Examiner also determined that the copies of the monthly reconciliations provided were inaccurate, including because Respondent did not maintain the mandatory trust account records according to the minimum standards.

II. Respondent's Initial Corrective Measures During the Screening Investigation

35. While this matter was in screening, Respondent informed the Examiner that he met with attorney Lynda Shely to assist KNCH with its trust

account and would continue to involve her going forward as KNCH improved its trust account procedures.

36. Respondent stated that these improved trust account procedures included amending their process for billing attorneys to notify accounting of appropriate client matter numbers for deposits and requiring billing attorneys to better review trust balances monthly.

37. Respondent also stated that KNCH was preparing a new form for its trust account that identified the date the check was received, the client matter number, and the date the check was deposited.

38. Respondent stated that KNCH would train all billing attorneys about the need to document directions for trust deposits.

39. Additionally, Respondent stated that personnel from KNCH's home office located in Irvine, California, would also be involved in the process and provide oversight for an additional level of internal control. Among other things, the Irvine office would perform additional reconciliations and monitoring of their bookkeeping and accounting.

40. Respondent also stated that KNCH was instituting an additional internal control in the Phoenix office by having two-person verifications of all

deposits, and that the Irvine office would review the monthly three-way reconciliation before it was sent to Respondent for final verification.

41. For disbursements from trust, Respondent stated that a general ledger for the client matter at issue and other documentation supporting the disbursement (such as an expert witness bill, a signed settlement agreement, an invoice for KNCH earned fees, etc.) is necessary before he will sign a check disbursing funds from the trust account.

42. Respondent stated KNCH also trained all accounting personnel and lawyers that checks must be deposited within one business day after receipt and they will wait ten business days before disbursing against any check deposit, regardless of Supreme Court Rule 43(b)(4)'s authorization for earlier disbursements against limited risk deposits.

43. Respondent stated that billing attorneys would be instructed to advise all clients the deposit must be wired or electronically transferred into trust if a disbursement must be made in a shorter time period.

44. As for other changes, Respondent stated that two other equity partners would be added as signatories to the trust account. Respondent stated that he and the new signatory partners (and others within KNCH) intended to work with Ms.

Shely as she monitors their process to make sure it is fully compliant. Respondent further stated that he and the new signatory partners will also take the SBA course related to managing trust accounts. Respondent also stated that he intended to move the trust account to an approved financial institution in their current office building, to facilitate daily deposits, once this matter is resolved.

45. As for other specific process changes, Respondent stated that the attorneys would now be responsible for reviewing all transactions for his or her matters on a monthly basis and initialing the monthly client trust balance reports. In addition, a partner in their office would be assigned to review the monthly three-way reconciliations and initial the form, to assure the reconciliation is accurate.

46. In summary, Respondent initially informed the SBA, based on his knowledge and understanding at the time, that many of the deficiencies caused were based primarily on the untimely deposit of checks into the trust account. Respondent explained that every check was ultimately deposited, but Cortez sometimes waited too long to make the deposit and inadvertently recorded an earlier deposit date. In addition, Respondent stated that Cortez sometimes mistakenly recorded the deposit as pertaining to the wrong case but the correct client. Respondent stated that he did not anticipate such mistakes occurring in the

future because of the KNCH's corrective measures. These statements truthfully reflected Respondent's understanding and belief at the time.

III. Discovery of Cortez's Misappropriation of Trust Account Funds

47. Although Respondent indicated that the various deficiencies identified originated from inadvertent errors, a number of discrepancies appeared to have been deliberate.

48. Primarily, as of February 1, 2016, the opening IOLTA balance was \$1,088,788.51. Respondent provided a breakdown that Cortez created that reconciled to the penny.

49. The breakdown was inaccurate. Specifically, \$778,538.81 of the amount held on deposit was identified as being held on behalf of a certain client matter. The corresponding client ledger, however, reflected an unexpended balance of \$803,872.14 for a difference of \$25,333.33. Respondent explained, based on information that Cortez provided, that the difference was caused due to a \$30,000.00 deposit being credited to the wrong client account.

50. In addition, two deposits totaling \$4,666.67 were calculated as being held on deposit when they were actually not deposited until February 9, 2016.

51. Based on information from Cortez, Respondent explained that the breakdown discrepancy resulted because Cortez made a working copy of the breakdown when he originally began calculating the beginning balance held in trust. Respondent stated, based on Cortez's explanation to him, that Cortez completed his rough draft in the early stages of preparing the response and inadvertently failed to update the breakdown after reconciling the accounts and making adjustments to the client transactions.

52. Moreover, based on information received from Cortez, Respondent initially identified \$278,390.11 as being held on behalf of a certain client matter. The corresponding client ledger identified \$1,500.00 of that amount as originating from a check remitted by "SR." The deposit is recorded on October 21, 2015 but the copies of the duplicate deposit records reflect that the check was actually deposited on February 10, 2016. Accordingly, the beginning balance for this client matter would have been \$276,890.11 without those funds.

53. Respondent explained, based on information received from Cortez, that the check was received in October 2015, but his office relocated in early November and this was "a time-consuming and involved process." Based on Cortez's explanation to him, Respondent stated that Cortez believed he placed the

check in a secure location to deposit after the move was completed, but inadvertently did not deposit it until February 2016.

54. Additionally, a check in the amount of \$3,000.00 was received and recorded as deposited on February 10, 2016, when in fact it was received on that day but not deposited until April 4, 2016. Cortez made a number of revisions to the applicable client ledger prior to submitting it for review, including the addition of four checks totaling \$85,752.35 and a change in the amount reflected for the deposit of a check remitted by payor "GBS." The item was initially recorded as a \$98,795.14 deposit, while the revised ledger now reflected a \$101,295.14 deposit for an increase of \$2,500.00.

55. The SBA subsequently learned that Respondent did not intend to submit to the SBA the ledgers attached to Respondent's response to the bar charge.

56. Respondent informed the SBA that he made a copy of the response prior to mailing the original to the Examiner and stated the following: "I regrettably cannot explain how you received a different version of what we originally had sent to you as we should not have made a copy of anything unless it was the final version."

57. Respondent stated that it appeared that he sent working copies of exhibits instead of the correct ones to the SBA.

58. During a telephonic conference with the Examiner on March 8, 2017, Respondent explained that he provided his response to the bar charge to Cortez for delivery. Respondent stated that Cortez either knowingly or unknowingly provided the incorrect ledgers to the SBA. Respondent further stated that he questioned Cortez about this, and Cortez stated that he did not recall changing anything.

59. Contrary to the breakdown that Cortez sent to the SBA, the IOLTA did not reconcile to the penny, but instead held a deficit balance of approximately <\$23,833.33> at the onset of the examination that was carried through the period of review of February of 2016 through March of 2016.

60. On March 28, 2017, the Examiner addressed the deficit with Respondent. Given the bookkeeping irregularities discovered, the Examiner asked that Respondent review his records one last time and explain the circumstances surrounding the shortage.

61. Based on these concerns and concerns Respondent had about the conduct of Cortez while Respondent was working on a response to the SBA, Respondent and others at KNCH met with Cortez on April 5, 2017.

62. At this meeting, Cortez admitted that he misappropriated funds from KNCH's trust account.

63. Respondent did not know of Cortez's misappropriation until this April 5, 2017 meeting.

64. KNCH immediately terminated Cortez's employment and, two days later, opened a new trust account at a different bank.

65. On April 12, 2017, through counsel, Respondent informed the SBA in writing of the firm's discovery of Cortez's embezzlement, of the actions undertaken since the discovery of the embezzlement on April 5, and pledged to cooperate with and keep the SBA informed of the firm's efforts to determine the scope of the embezzlement.

66. KNCH also terminated its Director of Administration, Langley, who was supposed to be supervising Cortez and conducting the monthly three-way reconciliations.

IV. Respondent's Remedial Efforts After Discovering the Misappropriation

A. KNCH's Retention of BDO and BDO's Reconstruction of the Trust Account

67. On April 5, 2017 or the day that Respondent learned of Cortez's misappropriation, KNCH retained BDO USA, LLP (BDO), an accounting firm to reconstruct its trust account.

68. BDO analyzed the trust account for the period of January of 2002 through March of 2017.

69. BDO conducted meetings and interviews with persons from KNCH.

70. BDO obtained documentation from the trust account bank.

71. In addition to bank statements, BDO reviewed the following documents in collaboration with KNCH: client ledgers, client files, other supporting bank documents that KNCH maintained, and information Cortez inputted into Quicken.

72. BDO then created a bank transaction database and analyzed cancelled check images.

73. BDO discovered that Cortez fraudulently added himself as a signatory to the trust account on March 29, 2006.

74. BDO further discovered that Cortez started misappropriating trust account funds in 2006 and issued his first fraudulent check on June 23, 2006.

75. Cortez's misappropriation continued through March of 2017.

76. In the beginning of his embezzlement (before he fraudulently added his name as a signatory on the trust account), Cortez's scheme involved having Respondent sign a check to a legitimate client or third party. Cortez would then hold the check for a period of time and, when the client or third party did not complain about not receiving the funds, Cortez would "wash" the check. Cortez inserted the name of "La Casa Homes" as the payee of check, and deposited the check into an account in the name of La Casa Homes.

77. Later, after he succeeded at fraudulently obtaining signatory authority, Cortez issued and signed fraudulent checks, then often included references to them on the trust account ledgers for closed matters.

78. Cortez created La Casa Homes, a fictitious entity, to assist him in his fraud.

79. Cortez maintained a second ledger, which he showed to attorneys and Respondent when he was asked about the balance in the trust account for specific client matters. That ledger was fraudulent, because it did not reflect the

funds that Cortez had embezzled. The ledger deceived Respondent and all responsible attorneys and other personnel about the funds existing in the trust account for the client matters, inducing all personnel, including Respondent, to believe that funds existed in the trust account and were properly attributed to specific client matters, when neither was true due to Cortez's embezzlement.

80. BDO determined that, in sum over the course of his criminal conduct, Cortez misappropriated \$2,833,701.16 from KNCH which includes \$2,821,508.16 paid to La Casa Homes and two fraudulent counter debits in the amounts of \$11,683 and \$510.

81. This amount also includes the amount of \$337,493.49 that Cortez misappropriated from KNCH's operating account and \$180,306.85 in KNCH fees.

82. BDO determined that Cortez embezzled \$2,833,701.16 from KNCH's trust account. Of these funds, \$2,390,683.20 belonged to clients or third parties in both active and closed matters. The balance of \$443,017.96 represents funds that should have been paid to KNCH. KNCH voluntarily deposited \$1,554,558.71 into its trust account in preparation for making restitution payments as well as to ensure that all open and active matters were correctly and completed funded. As part of KNCH's restitution efforts, the firm met with the client that was most impacted by

Cortez's embezzlement. That client elected to retain its own expert to meet with BDO in order to determine if the client agreed with BDO's conclusion about the amount owed to the client. That independent review is ongoing. The firm has pledged to pay full restitution to the client and to reimburse the client for the cost of its independent investigation. As of the date of this Consent, the client has continued its relationship with the firm and remains a valuable client.

83. BDO determined the amount due to clients and third parties by identifying client matters with trust account activity from 2002 through March 2017, creating forensic case matter ledgers for all identified client matters with trust activity, compiling supporting documents, comparing forensic data to KNCH data, and correcting and updating the data as necessary.

84. Through its reconstruction, BDO determined how Cortez was able to hide his misappropriations.

85. Cortez recorded transactions in KNCH's accounting system to a legitimate payee of KNCH and maintained copies of the checks in the client files.

86. As referenced above, the cancelled check images that BDO obtained demonstrate that the actual payee of the checks was La Casa Homes and that

Cortez altered the name of the payee of the checks after Respondent signed the checks.

87. As stated above, Cortez also created incorrect case matter ledgers to conceal the checks to La Casa Homes, and then removed the La Casa Homes cancelled check images from the files.

88. Cortez also failed to record accurate trust account activity in Quicken, included hidden rows in ledgers, and altered bank documents related to the SBA's investigation of Respondent.

89. Over the entire course of Cortez's criminal conduct, no clients or third parties ever complained to Respondent or KNCH that they did not receive funds due to them.

90. From April through November of 2017, BDO expended approximately 1,800 hours in recreating Respondent's trust account records.

91. From April 2017 through April 30, 2018, BDO billed KNCH \$594,524.03 to reconstruct the firm's trust account.

92. BDO completed most of its reconstruction of the trust account by approximately December of 2017 and made final edits to its reconstruction in January of 2018.

93. When BDO completed its reconstruction, it identified the clients and third parties that Cortez misappropriated from and the amounts owing to these clients and third parties.

94. The BDO forensic review team, along with Respondent, his counsel in this matter, and Lynda Shely, met with bar counsel and Examiner and reviewed in detail BDO's methodology and findings. At the end of the meeting, the SBA was given a copy of BDO's findings as well as access to BDO documents and personnel to assist with the SBA's own investigation and review.

95. Exhibit B, attached hereto, identifies the amounts that were or are owed to clients and third parties.

96. In anticipation of paying the clients/third parties the funds that Cortez misappropriated, on December 8, 2017, KNCH deposited \$760,961.75 of its own funds into its IOLTA.

97. Additionally, KNCH obtained funding and deposited another \$686,668.19 into its IOLTA on February 21, 2018.

B. KNCH's Contacts with the Clients/Third Parties and Payments to Clients/Third Parties

98. As soon as BDO completed its reconstruction and identified the clients/third parties that Cortez misappropriated funds from and the amounts owing to those clients/third parties, Respondent and KNCH began contacting these clients/third parties to explain what occurred and to repay these clients/third parties.

99. KNCH contacted the first client in January of 2018. This client was owed the largest amount.

100. As stated above, this client requested that KNCH refrain from transferring any funds to it until it can complete its own independent forensic analysis.

101. Respondent's contacts with clients/third parties have included travel to personally meet with some of these clients/third parties, phone calls, and letters to client/third parties in which Respondent disclosed to the clients/third parties Cortez's misappropriation.

102. Additionally, although Respondent or KNCH have attempted to contact all such clients/third parties, they have not been successful in making

contact with all clients/third parties because of the age of some of the files in which the clients/third parties are owed funds.

103. Exhibit B identifies all the clients/third parties that KNCH has contacted and paid or, if no contact has been made, a summary of KNCH's efforts to contact the clients/third parties.

C. KNCH's Civil Suit Against Cortez and the Involvement of Law Enforcement

104. In addition to retaining and paying BDO to reconstruct its trust account, KNCH also retained Bryan Cave LLP to represent it in a civil action against Cortez.

105. Specifically, on August 7, 2017, KNCH filed a complaint against Cortez, his spouse, and "John Does" (defendants) alleging conversion, fraud, unjust enrichment, and aiding and abetting breach of fiduciary duty and theft.

106. On August 22, 2017, KNCH filed an amended complaint against defendants alleging unlawful acts, fraud, unjust enrichment, restitution, aiding and abetting breach of fiduciary duty and theft, conversion, and seeking a declaratory judgment, the imposition of a constructive trust, and disgorgement.

107. Defendants did not file an answer to the complaint or to the amended complaint.

108. On December 6, 2017, the Maricopa County Superior Court entered a final judgment against defendants and in favor of KNCH in the amount of approximately \$8.5 million.

109. KNCH is currently attempting to collect on this final judgment.

110. KNCH also contacted the U.S. Attorneys' Office regarding Cortez's misappropriation and, upon information and belief, the U.S. Attorneys' Office is investigating Cortez.

D. KNCH's Changes to its Internal Accounting Procedures

111. After discovering Cortez's misappropriation, KNCH amended its internal accounting controls and procedures.

112. KNCH appointed a new director of finance and its executive committee is involved with overseeing its trust account.

113. KNCH also trained its staff relating to the trust account and hired new finance personnel.

114. KNCH also implemented new accounting software and implemented safeguards regarding its trust account. These safeguards include that all

transactions must be assigned to a case matter, all checks must be printed and handwritten checks are not permitted, and KNCH now utilizes Bank Positive Pay with payee verification.

115. KNCH also continued to work with Lynda Shely.

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., ERs 5.3, 1.15(a), and ER 1.15(d), and Rules 43(a), 43(b)(1)(A)-(C), 43(b)(2)(A)-(D).

RESTITUTION

Respondent agrees that KNCH will complete the process of paying restitution as set forth in Exhibit B. Although restitution is typically completed within 30 days of the date of a final judgment and order, this may not be possible in this matter because at least one client informed Respondent that it wants to complete its own investigation before accepting any payment from KNCH and

because Respondent and KNCH have had difficulty reaching certain clients/third parties despite their best efforts.

Accordingly, the SBA demands and Respondent agrees that KNCH pay restitution as set forth in Exhibit B but, if KNCH is unable to complete such restitution payment within 30 days of the date of the final judgment and order because of the inability to make contact with the affected client/third party, or because the client/third party is unwilling to accept such payment until they complete their own investigation, Respondent shall provide the SBA monthly updates as part of his probation regarding the same. The monthly updates shall explain why KNCH has been unable to complete the restitution payments within 30 days of the date of the final judgment and order and what efforts he and KNCH have made to contact the applicable client/third party to make the applicable restitution payments.

SANCTION

Respondent and the SBA agree that based on the highly unusual facts and circumstances of this matter, as set forth above, including that KNCH is the victim of a sophisticated criminal embezzlement scheme that, once discovered, KNCH devoted substantial human and financial resources to investigating and then to

making clients and third parties whole at the firm's expense, the following sanctions are appropriate: Reprimand with two years of probation to include participation in the Law Office Management Assistance Program (LOMAP), completion of the Trust Account Ethics Enhancement Program (TAEEP), and restitution as set forth above.

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 (TAEEP). 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.

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.

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.

Standard 4.12 provides that suspension is generally appropriate when a lawyer should have known that he is dealing improperly with client property and causes injury or potential injury to a client. Respondent accepts that this *Standard* could apply, because even though Cortez was a sophisticated criminal who

obfuscated his acts, and even though the firm's Director of Administration was Cortez's supervisor and also failed to identify Cortez's embezzlement, Respondent knows that "the buck stops with him."

The parties believe that *Standard* 4.13 also could apply. This *Standard* states, in pertinent part: "Reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client." The parties have agreed that the mental state in this case is negligence. Respondent believed that oversight of Cortez was occurring from the Irvine office, when in fact it was not. Respondent remains cognizant of his responsibilities as the lawyer responsible for the Phoenix office's trust account, but he thought he had met those responsibilities.

As a long-standing member of the State Bar, Respondent accepts that, if he had asked the Director of Administration for proof that monthly three-way reconciliations of the trust account were being conducted, Cortez may have been stopped earlier.

The SBA and Respondent agree that, whether *Standard* 4.12 or 4.13 applies, the ultimate outcome of the case – reprimand with probation—is appropriate.

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 failed to maintain adequate trust accounting procedures, negligently failed to maintain complete trust account records, negligently failed to perform monthly three-way reconciliations, negligently failed to safe keep client property and maintain adequate internal controls to safeguard funds held in trust, negligently failed to properly supervise Cortez, and that this 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 clients and to certain third parties identified in Exhibit B as a result of Cortez's embezzlement of funds belonging to these clients/third parties.

Aggravating and mitigating circumstances

The presumptive sanction in this matter is suspension. 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, Cortez's misappropriation continued from June 2006 through March of 2017. Respondent failed to properly supervise Cortez and conduct proper, monthly three-way reconciliations during this time. However, the parties note that Cortez engaged in sophisticated obfuscation techniques that delayed Respondent's discovery of the misappropriation.

Standard 9.22(i), substantial experience in the practice of law. Respondent was first admitted to practice in 1977. However, this matter is unrelated to Respondent's ability as a lawyer, and no amount of experience would have prepared Respondent for the shock of discovering the criminal betrayal of a trusted employee.

In mitigation:

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

Standard 9.32(b), absence of a dishonest or selfish motive. Respondent did not know of Cortez's misappropriation until April of 2017 and, when Respondent learned of it, Respondent immediately terminated Cortez.

Standard 9.32(d), timely good faith effort to make restitution or to rectify consequences of misconduct. As summarized above, the day that Respondent learned of Cortez's misappropriation, Respondent's firm retained BDO to reconstruct the trust account. When BDO completed its reconstruction, Respondent and KNCH commenced communication with clients and third parties and commenced refunding such clients and third parties. Respondent also hired Lynda Shely to assist his firm with trust account procedures and provide his firm training regarding the same. Respondent's firm has since revised its trust account procedures as set forth above. Respondent's firm also initiated a civil action against Cortez and obtained a judgment against him. Finally, Respondent or his firm contacted the U.S. Attorney's Office who is now investigating Cortez.

Standard 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent timely responded to the SBA's requests for information and, at the SBA's request, updated the SBA on a monthly basis regarding BDO's trust account reconstruction.

Standard 9.32(k), remorse. As soon as Respondent and his firm learned of Cortez's conduct, they took remedial action as summarized above.

Standard 9.32(k), imposition of other penalties or sanctions. BDO billed KNCH \$594,524.04 to complete reconstruction of the firm's trust account. They have paid and will continue to pay from their own funds restitution to all affected clients and third parties.

Discussion

The parties have conditionally agreed that, upon application of the aggravating and mitigating factors to the facts of this case, the presumptive sanction should be mitigated to a reprimand with two years of probation.

The parties have conditionally agreed that a lesser sanction is appropriate under the facts and circumstances of this matter. This agreement was based on the following: Although Respondent was the lawyer responsible for the Phoenix's office's trust account, is the person responsible for the sustained mismanagement of his trust account, Respondent did not know of Cortez's embezzlement until April of 2017 and, when he and KNCH learned of such misappropriation, they immediately attempted to rectify Cortez's misconduct. Specifically, Respondent and KNCH terminated Cortez and Langley. They also retained BDO to reconstruct their trust account. BDO and KNCH expended numerous hours reconstructing the trust account and, as of April 30, 2018, BDO had billed \$594,524.03 for its

services. When BDO completed its reconstruction and identified the clients/third parties whose funds Cortez misappropriated, Respondent and KNCH began contacting these clients/third parties about what transpired with Cortez and to refund them the monies that Cortez misappropriated from KNCH's trust account. KNCH also deposited funds into its trust account that corresponds with the amounts owed to the clients/third parties. Respondent and KNCH also pursued Cortez civilly and reported Cortez to the U.S. Attorney's Office. Finally, as discussed above, Respondent and KNCH amended their trust account procedures. In short, the day that Respondent and KNCH learned of Cortez's misappropriation, they commenced remediation efforts such that the mitigated sanction of reprimand with probation and restitution is appropriate.

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 sanctions 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 years of probation (LOMAP and TAEEP) and restitution. A proposed form order is attached hereto as Exhibit C.

DATED this 13th day of June 2018.

STATE BAR OF ARIZONA



Nicole S. Kasetta
Staff Bar Counsel

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

DATED this 11th day of June, 2018.



William A. Nebeker
Respondent

DATED this 13th day of June, 2018.

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 14th day of June, 2018.

Copy of the foregoing emailed
this 14th day of June, 2018 to:

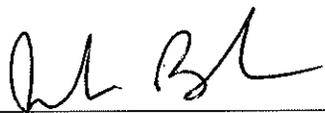
The Honorable William J. O'Neil
Presiding Disciplinary Judge
Supreme Court of Arizona
1501 West Washington Street, Suite 102
Phoenix, Arizona 85007
E-mail: officepdj@courts.az.gov

Copy of the foregoing mailed/emailed
this 14th day of June, 2018, to:

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

Copy of the foregoing hand-delivered
this 14th day of June, 2018, to:

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

by: 

NSK: jlb

EXHIBIT A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
William A Nebeker, Bar No. 004919, Respondent

File No. 16-0828

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

Summary of Amounts Owed

Matter #	Name	Amounts Owed	Amounts Paid	Date Paid	Check No.	Payment Amounts Pending
005.642	9920 Camelback LLC	11,699.74	11,699.74	5/24/2018	2089	
005.106	American Equity Insurance Co. re:	5,451.97				5,451.97
850.371	AGLIC / Zurich	11,610.00				11,610.00
663.075 005.475 167.015 463.002 663.080	AIG	48,388.51	48,388.51	3/22/2018	2044 to 2048	
005.484	Arizona Country Club	1,000.00	1,000.00	3/9/2018	2020	
658.137 658.131 658.145 658.161 85.024 430.040 430.036 658.134 658.061	Auto Owners / Owners	85,481.59	85,481.59	3/9/2018	2009 to 2017	
028.345	Berkley Risk & Insurance	28,834.38				
610.032	Brotherhood Mutual Insurance	234.23				
430.039	C&H Roofing	0.85				
256.243	Cambridge Integrated Services	500.00				
001.182	Carl Cote	4,102.75	4,102.75	4/26/2018	2071	
990.032 990.037 990.012 990.016 990.011	Centex	218,579.25				218,579.25
430.036	CNA (Transportation Ins. Co.)	9,605.28	9,605.28	5/30/2018	2100	
005.210	Commercial Underwriters Insurance Company	1,416.66				
005.706	Courtland Homes	259.00	259.00	3/12/2018	2026	
430.045 005.049 281.008 430.036 005.254 005.034 005.009	Crawford	74,991.39	74,991.39	3/23/2018	2049; 2052 to 2057	
430.040	Crawford Technical Services	309.49	309.49	3/23/2018	2051	
005.493	CSBI - Stephen Bryant	785.00	785.00	4/26/2018	2070	
009.172 001.726 009.193	D.R. Horton	105,663.78	105,663.78	2/12/2018 and 03/28/18	1163 to 1165; 2061	
263.030	Del Webb	27,408.48				27,408.48
005.178	Dubin Medical, Inc. c/o Gil Carpenter	5,000.00	5,000.00	3/19/2018	2037	
005.787	Dunlap & Magee	5,553.01	5,553.01	3/22/2018	2043	
658.105	Eric Kessler, Esq.	17,258.34	17,258.34	3/9/2018	2023	
005.232	ESIS	166.67				
009.306	Esquire	85.00	85.00	3/19/2018	2039	
001.593	Eternal Life Lutheran Church	3,000.00	3,000.00	3/9/2018	2019	
002.344	Family Care Providers of AZ	125.00				
005.254	Farm Bureau (aka Western Ag Ins. Co.)	866.76	866.76	5/30/2018	2097	
005.569	Friedman, Seth	1,593.38	1,593.38	3/9/2018	2018	

Summary of Amounts Owed

Matter #	Name	Amounts Owed	Amounts Paid	Date Paid	Check No.	Payment Amounts Pending
856.044						
005.325						
860.191						
860.370						
860.398						
860.542						
860.524						
860.562						
860.395						
860.366						
860.572						
860.332						
860.018	Gallagher Bassett	308,985.18	1,349.80	3/7/2018	2002	307,635.38
028.345	Golden Eagle / Liberty Mutual	28,834.38				28,834.38
052.199						
052.278						
658.135						
658.161						
658.173	Great American	10,846.73				10,846.73
005.642	Tod Stewart, Esq.	100.00				
002.256	Ingenix	184.00				
001.484	Javier DeSantiago	54.00	54.00	5/24/2018	2088	
009.254	Knight Insurance Group	4,890.00	4,890.00	5/24/2018	2090	
005.232						
009.306	Liberty Mutual	754.55				754.55
953.001	Liberty Mutual Surety	5.07	5.07	3/13/2018	2032	
002.344	Meritain Health	536.19	536.19	5/3/2018	2078	
005.451	McKenzie's	4,704.46	4,704.46	3/9/2018	2006	
005.199	MID-Continent Group	46.74				
430.038					2059 and	
005.294	NAC C/O Crawford Technical Services	9,229.48	9,229.48	3/23/2018	2060	
005.475	NAC	80.20	80.20	3/23/2018	2058	
005.034						
005.009						
005.294						
841.014					2073 to	
005.254	NARS	32,945.79	32,945.79	04.26.18	2077	
005.475						
658.161	NAS	6,103.86				6,103.86
002.099	Native American Air	512.24	512.24	5/30/2018	2098	
009.061	Navigators	4,740.00	4,740.00	3/21/2018	2042	
009.177	Network Adjusters	165.00	165.00	5/24/2018	2092	
430.045						
658.161						
430.036						
005.254	Ohio Casualty	11,254.73				11,254.73
005.232	One Beacon	166.67				
002.341	Phoenix Children's Hospital	1,677.29	1,677.29	3/9/2018	2005	
849.062	Public Consulting Group	500.00	500.00	5/23/2018	2085	
263.218						
860.150						
841.050						
860.078						
860.191						
860.370						
263.248	Pulte	282,768.78				282,768.78
005.475	Quanta	4,263.39				
658.105	REM	6,897.07				
953.001	Sails Lady Inc.	240.00	240.00	3/13/2018	2034	
002.344	Crutchfield, Michelle	2,184.00	2,184.00	4/19/2018	2069	
009.346	Sedgwick	9,420.50	9,420.50	5/24/2018	2091	
001.808	Selective Insurance Company	15.50	15.50	5/30/2018	2099	
438.184	Standard Pacific	393.85	393.85	5/25/2018	2095	
009.177	State Auto	1,000.00	1,000.00	5/24/2018	2093	
860.542	Sussex Insurance Company	10,000.00	10,000.00	5/24/2018	2094	

Summary of Amounts Owed

Matter #	Name	Amounts Owed	Amounts Paid	Date Paid	Check No.	Payment Amounts Pending
629.060 629.039	Toll Brothers	10,341.08	10,341.08	3/9/2018	2007 and 2008	
263.238 028.345 263.206 263.030 263.034 263.195	Travelers	75,328.79	75,328.79	5/8/2018	2079	
001.949	Westport Insurance Corp.	3,500.00				
005.232	Wheeler Construction (Dean Robertson)	48.09				
257.003	William Lyon Homes	20,000.00	20,000.00	3/15/2018	2035	
953.001	Wright Medical	140.00	140.00	3/13/2018	2033	
263.030 263.034 841.005 263.238 263.195 841.014 685.024 005.254 005.294 841.004 629.059 005.049 841.050	Zurich	92,461.91				92,461.91
TOTALS		<u>1,616,290.03</u>	<u>566,096.26</u>			<u>1,003,710.03</u>

EXHIBIT C

BEFORE THE PRESIDING DISCIPLINARY JUDGE

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

WILLIAM A NEBEKER,
Bar No. 004919,

Respondent.

PDJ 2018-

**FINAL JUDGMENT AND
ORDER**

[State Bar No. 16-0828]

The undersigned Presiding Disciplinary Judge of the Supreme Court of Arizona, having reviewed the Agreement for Discipline by Consent filed on June ___, 2018, pursuant to Rule 57(a), Ariz. R. Sup. Ct., hereby accepts the parties' proposed agreement. Accordingly:

IT IS HEREBY ORDERED that Respondent, **William A. Nebeker**, 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.

IT IS FURTHER ORDERED that, as a term of probation, Respondent shall pay restitution to the clients/third parties, as set forth in Exhibit B to the Agreement for Discipline by Consent, within 30 days from the date of entry of the final judgment and order but, if Respondent is unable to complete such restitution

payments within 30 days of the date of this final judgment and order because of the inability to make contact with the affected client/third party or because the client/third party is unwilling to accept such payment until they complete their own investigation, Respondent shall provide the SBA monthly updates as part of his probation regarding the same. The monthly updates shall explain why Respondent has been unable to complete the restitution payments and what efforts he has made to contact the applicable client/third party and to make the applicable restitution payments.

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 June, 2018.

**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 June, 2018.

Copies of the foregoing mailed/mailed
this _____ day of June, 2018, to:

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

Copy of the foregoing emailed/hand-delivered
this ____ day of June, 2018 to:

Nicole S. Kasetta
Staff Bar Counsel
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 June, 2018 to:

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

by: _____