BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DONALD H. SMITH,** **Bar No. 010462** Respondent.	**PDJ-2019-9016** **FINAL JUDGMENT AND ORDER OF DISBARMENT** [State Bar No. 18-0602] **FILED SEPTEMBER 18, 2019**

On August 14, 2019, the hearing panel (Panel) rendered its decision and ordered the disbarment of Donald H. Smith. Mr. Smith filed a Notice of Appeal and Request for stay. The Panel denied the request for stay on September 4, 2019. The State Bar filed its Statement of Costs and Expenses on September 10, 2019. On September 17, 2019, Mr. Smith filed an objection which was overruled by separate order.

IT IS ORDERED Respondent, **DONALD H. SMITH, Bar No. 010462,** is disbarred from the State Bar of Arizona and his name is stricken from the roll of lawyers, effective September 13, 2019, as set forth in the Panel's Decision and Order Imposing Sanctions. Mr. Smith is no longer entitled to the rights and privileges of a lawyer but remains subject to the jurisdiction of the Court.

IT IS FURTHER ORDERED Mr. Smith shall immediately comply with the requirements relating to notification of clients and others and provide and/or file all notices and affidavits required by Rule 72, Ariz. R. Sup. Ct.

IT IS FURTHER ORDERED Mr. Smith shall pay the costs and expenses of the State Bar of Arizona in the amount of $4,948.12 pursuant to Rule 60(b), Ariz. R. Sup. Ct. There are no costs or expenses incurred by the disciplinary clerk and/or Presiding Disciplinary Judge's Office in these disciplinary proceedings.

DATED this 18th day of September 2019.

William J. O'Neil

William J. O'Neil, Presiding Disciplinary Judge

COPY of the foregoing e-mailed/mailed
this 18th day of September 2019 to:

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by: MSmith

BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DONALD H. SMITH,** **Bar No. 010462** Respondent.	**PDJ 2019-9016** **DECISION AND ORDER IMPOSING SANCTIONS** [State Bar No. 18-0602] **FILED AUGUST 14, 2019**

SUMMARY

In February 2016, Mr. Smith was hired by Dolores McCargar ("Ms. McCargar") to pursue a personal injury claim. Mr. Smith obtained a settlement of $5,000.00 on behalf of Ms. McCargar in August 2017. The portion of the settlement owed to Ms. McCargar was $2,679.31. A disbursement sheet was provided by Mr. Smith and signed by Ms. McCargar on September 3, 2017. However, Ms. McCargar did not receive the funds owed to her from the settlement until mid-October 2018, more than one year after the funds became available to Mr. Smith on her behalf. During that period, Mr. Smith converted Ms. McCargar's funds for his own use and for the benefit of his firm.

On November 16, 2017, Mr. Smith received $5,498.00 in settlement funds on behalf of Jamie Hanson ("Mr. Hanson"), who had hired Mr. Smith to represent him in a dog bite case. At the outset of the representation, Mr. Smith and Mr. Hanson

shook hands and verbally agreed to a rate of $200/hour, with about four hours expected. No written fee agreement was ever prepared.

Mr. Smith notified Mr. Hanson promptly that the funds had been received, but converted the funds for his own use and for the benefit of his firm. Mr. Smith did not provide any portion of the funds to Mr. Hanson until March 13, 2018 – nearly four months after the settlement was received by Mr. Smith. Mr. Smith never notified Mr. Hanson about the portion of the settlement funds were owed to Mr. Hanson, but the first payment was only $500.00. Over the next ten months, Mr. Smith made four additional payments to Mr. Hanson. Due to deficient accounting and a lack of overall record-keeping, the total amount paid to Mr. Hanson was $498.00 more than Mr. Hanson was owed as reflected in the disbursement sheet Mr. Smith had prepared

The State Bar alleges that Mr. Smith's conduct violated:

Arizona Rules of Professional Conduct

- ER 1.4 - Communication
- ER 1.5 – Fees: lack of a fee agreement with Mr. Hanson
- ER 1.15(a) and (d) – Safekeeping Property: converting funds owed to clients
- ER 8.1 – Bar Admission and Disciplinary Matters: knowingly making a false statement in a disciplinary matter

- ER 8.4(c) - Misconduct: engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation

Ariz. R. Sup. Ct. 43 – Trust Account Rules

- Rule 43(b)(1)(A): Failure to exercise due professional care in the performance of lawyer's duties
- Rule 43(b)(1)(C): Failure to maintain adequate internal controls to safeguard funds or other property held in trust
- Rule 43(b)(2)(A): Failure to maintain current and complete records of funds and other property belonging at least in part to a client
- Rule 43(b)(2)(B): Failure to maintain an account ledger for each client for which funds have been received in trust.
- Rule 43(b)(2)(C): Failure to make a monthly three-way reconciliation of client ledgers, trust account general ledger, and the trust account bank statement
- Rule 43(b)(5): disbursing funds without using a pre-numbered check or electronic transfer

He is ordered disbarred from the practice of law.

PROCEDURAL HISTORY

This matter proceeded to a contested hearing on July 10, 2019 before the assigned hearing panel. Presiding Disciplinary Judge ("PDJ") William J. O'Neil was

joined by volunteer attorney member Judge Maurice Portley (ret.), and volunteer public member Ellen Kirschbaum ("Hearing Panel"). Staff Bar Counsel Rebecca Kennelly represented the State Bar. Mr. Smith elected to represent himself. Multiple exhibits were admitted,[1] either in whole or in part.[2] The parties filed a Joint Pre-Hearing Statement ("JPS") and the State Bar filed a Pre-Hearing Memorandum.

The Hearing Panel heard and considered telephonic testimony from Ms. McCargar and Mr. Hanson, and live testimony from the State Bar's trust account examiner, Jamie Sochor. The Hearing Panel also heard and considered testimony from Mr. Smith, and Pastor Dennis Adams and Pastor Randall Record, who testified as character witnesses on Mr. Smith's behalf.

FINDINGS OF FACT[3] AND RULE VIOLATIONS

1. At all times relevant, Mr. Smith was a lawyer licensed to practice law in Arizona having been first admitted to practice in Arizona on November 9, 1985.

Count I: Representation of Delores McCargar

2. Mr. Smith was retained by one Delores McCargar in February 2016 to pursue a personal injury claim.

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[1] Exhibits 3, 5-19, 21-22, 24-25, 27-29, 31-36, 38-39 were admitted.
[2] SBA000081 & SBA000084 were the only pages admitted from Exhibit 10; SBA000131-135 were the only pages admitted from Exhibi 21.
[3] These facts were stipulated in the parties' June 19, 2019 JPS, or established at the hearing on July 10, 2019.

3. Mr. Smith filed a civil complaint for Ms. McCargar in April 2017, and conveyed an offer of settlement to her in June 2017. He received authorization from Ms. McCargar to accept an offer of settlement for $5,000.00 in August 2017.

4. On August 31, 2017, Mr. Smith mailed Ms. McCargar a letter and disbursement sheet. Both documents reflected that Ms. McCargar would receive a payment of $2,679.31. Mr. Smith received the disbursement sheet back from her, with her signature that was dated on September 3, 2017.

5. On November 13, 2017, Mr. Smith sent Ms. McCargar a letter to notify her of his firm's new address and he stated in the letter, "On a related issue, I was happy to receive notice from my bank that the original check to [sic] was received and cashed."

6. Ms. McCargar contacted Mr. Smith and informed him she had neither received nor cashed any settlement check. Mr. Smith said he would contact his bank and issue Ms. McCargar a new check.

7. The following week, Ms. McCargar contacted Mr. Smith and informed him that she had not received a replacement check. Mr. Smith told Ms. McCargar that the new check had been lost in the mail.

8. Some weeks later, on December 8, 2017, Mr. Smith mailed Ms. McCargar a letter stating, "As of yesterday, the funds still have not posted to my account. However, I am enclosing a partial payment of $1,000.00 from my

business account. I hope by the time you get this letter; the funds will have posted and I will be able to send you the remaining amount."

9. Ms. McCargar attempted to negotiate this check for $1,000.00, but the check was returned by the bank due to insufficient funds. Mr. Smith attributed the lack of funds to an error that occurred during the changeover of his offices and staff.

10. Mr. Smith stopped communicating with Ms. McCargar and did not provide her with her settlement funds by March 7, 2018, resulting in Ms. McCargar's submission of a bar charge.

11. In an April 4, 2018 letter to the State Bar, Mr. Smith said that following his deposit of the settlement check, he drafted a check to Ms. McCargar and mailed it to her address in Oregon. Mr. Smith said the check to Ms. McCargar was written and mailed before the expiration of the bank's standard seven-day-hold period on new deposits. He stated that he did that so Ms. McCargar "would not have to wait the additional time to attain [sic] her funds."

12. Mr. Smith provided the State Bar with a copy of the client file in April 2018. The file was 345 pages and included correspondence between Mr. Smith and Ms. McCargar, but it contained no copy of the letter or check

purportedly mailed to Ms. McCargar on or around August 18, 2017, the date Ms. McCargar's settlement funds were deposited.

13. On September 18, 2018, in response to the State Bar's request for additional information, Mr. Smith provided a copy of a September 18, 2017 letter Mr. Smith said had been mailed to Ms. McCargar with the settlement check. Mr. Smith said that the letter was not contained in the client file but was in a box of closed matters. The letter referenced an enclosed check for $2,679.31. Mr. Smith provided no copy of the check. The panel does not believe that Mr. Smith found the letter at such a late date in a miscellaneous box of closed files separate and apart from the case file, or that he had even sent it to his client.

14. Mr. Smith said in his April 2018 letter to the State Bar he had yet to reimburse Ms. McCargar before the bar charge because she instructed him not to send any payments until she could receive her full payment, and he "honored those directions."

15. On April 26, 2018, Mr. Smith informed the State Bar that Ms. McCargar offered to withdraw her bar charge if he provided her with her portion of the settlement funds. Mr. Smith did not forward payment to Ms. McCargar because, as he feared it would "look like an attempt to pay her off."

16. On September 18, 2018, Mr. Smith said that he was prepared to overnight the funds to Ms. McCargar if so advised by the State Bar.

17. On September 21, 2018, Mr. Smith received an email from the State Bar that instructed him to provide Ms. McCargar with the funds owed to her. Mr. Smith did not send the check to Ms. McCargar until October 11, 2018.

18. On September 14, 2018, Mr. Smith was asked by the State Bar to provide deposit records, client ledgers, and bank documents related to the McCargar matter by September 19, 2018.

19. On September 18, 2018, Mr. Smith provided, with a letter, a "copy of the deposit on an Excel sheet" that stated : "8/18/2017 5000* DEPOSIT." Mr. Smith did not provide any copies of checks issued, bank statements, deposit records, or client ledgers.

20. When Mr. Smith sent Ms. McCargar her settlement funds in October 2018, he issued the check from a different trust account than the one he used in August 2017.

21. The Hearing Panel finds Mr. Smith, in his representation of Ms. McCargar, violated the following ERs and Supreme Court rules:

a. ER 1.4(a)(3)-(4)

b. ER 1.15(a) and (d)

c. ER 8.1

d. ER 8.4(c)

e. Rule 43(b)(1)(A) and (C)

f. Rule 43(b)(2)(A)-(C)

g. Rule 43(b)(5)

Count II: Represenation of James Hanson

22. Mr. Smith was retained by Mr. James Hanson to pursue a matter involving a dog bite injury to Mr. Hanson's hand.

23. A State Bar investigator contacted Mr. Hanson on January 24, 2019. Mr. Hanson reported that Mr. Smith is a friend from church who agreed on or about July 2015 to give him a "church discount" of $200.00 per hour to work on his case. Mr. Smith told Mr. Hanson that the case should not take over four hours to finalize. There was no fee agreement; instead, the two shook hands on the terms.

24. Mr. Smith contacted Mr. Hanson on November 15, 2017, to report that the settlement check had arrived. With Mr. Hanson's permission, Mr. Smith endorsed the check. The funds were then deposited into Mr. Smith's client trust account. Over the next month, multiple disbursements were made from the trust account by way of transfers to Mr. Smith's operating account, payment to his credit card and electronic withdrawals for court payments. By December 14, 2017, the trust account held a balance of $64.70, with no disbursements identified as payment to Mr. Hanson.

25. The individual client ledger referenced check number 1068 for the

disbursement to Mr. Hanson for $3,498.00; however, the check did not post to the trust account during the period of the State Bar's review of Mr. Smith's client trust account.When Mr. Hanson contacted Mr. Smith the week after the check was endorsed to say that he had not received his portion of the funds, Mr. Smith said that Wells Fargo mistakenly disbursed the money to someone else. No evidence regarding any banking mistake or erroneous disbursement was found or presented at the hearing.

26. On December 22, 2017, Mr. Smith told Mr. Hanson that he too had not been paid. He stated he would pay Mr. Hanson from his personal funds. The banking records reflect, however, that Mr. Smith had been paid by multiple disbursements to his operating account from Mr. Hanson's settlement funds. [Ex. 16, 25-30; Testimony of Jamie Sochor.]

27. The settlement sheet reflected costs and fees owed to Mr. Smith for $2,000.00, and an amount due Mr. Hanson of $3,498.00. The entries on the general ledger and individual client ledger reflected the same transactions as the settlement sheet, but the recorded entries did not reflect the actual activity in the trust account.

28. Mr. Smith told Mr. Hanson that Mr. Hanson's settlement portion totaled $3,498.00, but did not provide Mr. Hanson with a final accounting of Mr. Smith's time or retained fees. Mr. Smith made partial payments to Mr. Hanson

beginning in March 2018 and concluding in January 2019.

29. On December 4, 2018, in response to a question from the examiner about the check for Mr. Hanson's portion of the settlement funds, Mr. Smith said "the original check was cut for Mr. Hanson, but he later informed us that it had not been received. Because of the problems with Wells Fargo account, we cut him checks from another account." Mr. Smith said he ordered copies of the checks and would provide them when received. He did not, however, present any evidence regarding problems with his Wells Fargo account.

30. On January 9, 2019, Mr. Smith provided copies of two checks sent to Mr. Hanson: (1) check number 1083 for $500.00 disbursed from Mr. Smith's Wells Fargo trust account on March 13, 2018; and (2) check number 1032 for $1,500.00 disbursed from Mr. Smith's MidFirst Bank trust account on October 31, 2018. Mr. Smith said he ordered copies of the remaining checks from Wells Fargo and would forward them when received.

31. On January 23, 2019, Mr. Smith provided a copy of another check sent to Mr. Hanson: check number 7425 for $500.00 disbursed from Mr. Smith's Wells Fargo operating account on April 5, 2018. Mr. Smith said that he was still waiting on a copy of another check.

32. Mr. Hanson provided the State Bar with the copies of the checks he received. Mr. Smith, however, had not presented three chiecks to the State Bar

before the hearing or at the hearing. The checks were : (1) the disbursement[4] on June 19, 2018, for $500.00 from Mr. Smith's MidFirst Bank trust account; (2) check number 1031 dated September 4, 2018, for $500.00 from a MidFirst Bank account in the name of Mr. Smith and Naomi S. Smith; and (3) check number 1048 dated January 9, 2019, for $498.00 from Mr. Smith's MidFirst Bank trust account.

33. On February 4, 2019, Mr. Smith authored a letter in response to the State Bar's Report of Investigation. In his letter, Mr. Smith stated,

> Unlike Mrs. McCargar, Mr. Hanson was willing to accept payments and we started paying him. On October 30, 2018, Mr. Hanson communicate (sic) that he believed he was still owed $1,500.00 and on October 31, 2018 my check #1032 in that amount was mailed to Mr. Hanson. After that I again communicated to Mr. Hanson and informed him that I was not sure that he was correct that he had been fully paid. After reviewing the account and getting copies of the checks, I sent Mr. Hanson a final check in the amount of $498.00 (#1048). Mr. Hanson has provided me with copies of the checks he received, and these are enclosed.

34. Given that Mr. Smith made a series of partial payments to Mr. Hanson, he was unable to provide a copy of the checks making up the payment. Moreover, when asked to provide copies of the checks that he had sent to Mr. Hanson, Mr. Smith had not retained copies and sought to secure them from Mr. Hanson. Mr. Smith then supplied the State Bar with copies of the checks that he

[4] No check number was present as this was a counter check.

received from Mr. Hanson, but he did not provide the State Bar with any of the additional bank records that he claimed he requested of his bank.

35. Mr. Smith told the State Bar, and Mr. Hanson, that Mr. Hanson was due $3,498.00; however, Mr. Smith did not accurately track the payments that he made to Mr. Hanson, and ended up paying Mr. Hanson a of $3,998.00. We expressly decline to determine what the correct amount was.

36. The Hearing Panel finds Mr. Smith, in his representation of Mr. Hanson, violated the following ERs and Supreme Court rules:

a) ER 1.4(a)(3)-(4)

b) ER 1.5

c) ER 1.15(a) and (d)

d) ER 8.1

e) ER 8.4(c)

f) Rule 43(b)(1)(A) and (C)

g) Rule 43(b)(2)(A)-(C)

h) Rule 43(b)(5)

ANALYSIS UNDER THE ABA STANDARDS

"Sanctions imposed shall be determined in accordance with the American Bar Association *Standards for Imposing Lawyer Sanctions . . . .*"[5] Those *Standards* and Arizona Supreme Court case law guide the imposition of sanctions for lawyer misconduct.

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.[6]

Upholding the integrity of the legal system, assuring the fair administration of justice, protecting the public and deterring other lawyers from similar conduct are the primary purposes of lawyer discipline.[7] When imposing a sanction after a finding of lawyer misconduct, the Court must consider the duty violated, the lawyer's mental state, and the actual or potential injury caused by the misconduct.[8] These variables yield a presumptive sanction that may be overcome based on aggravating and mitigating factors.[9]

If multiple ethical violations are at issue, "[t]he ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of

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[5] Rule 58(k), Ariz. R. Sup. Ct.
[6] *Standards*, Section III (A)(1.1).
[7] *In re Abrams*, 227 Ariz. 248, 250-51 (2011).
[8] *In re Van Dox*, 214 Ariz. 300, 303 (2007) (citing *Standard* 3.0).
[9] *Id.* at 306.

misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct."[10]

Standard 3.0 – Duty, Mental State, and Injury

Duty: The most important of a lawyer's ethical duties are those owed to clients.[11] Mr. Smith violated his duties to his clients and to the legal profession.

Mental State: The *Standards* define "intent" as the "conscious objective or purpose to accomplish a particular result" and "knowledge" as the "conscious awareness of the nature or attendant circumstances of the conduct" but without the same conscious objective.[12] Mr. Smith intentionally violated multiple ethical and Supreme Court rules, and knowingly violated others. He intentionally converted funds belonging to his clients and deceived his clients about such conversion. He knowingly kept deficient accounting records and failed to have any internal safeguards. The Hearing Panel determined disbarment is the presumptive sanction for Mr. Smith's misconduct.

Injury: There was actual financial and emotional harm to Mr. Smith's clients and potential reputational harm to the legal profession.

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[10] *Standards*, Section II, Theoretical Framework, p. 7.
[11] *Standards*, Section II, Theoretical Framework, p. 5.
[12] *Standards*, Section III, Definitions.

1. *Standard* 4.11 – Failure to Preserve the Client's Property

This *Standard* applies to Mr. Smith's violation of ER 1.15(a) and (d). It provides that "[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."

Mr. Smith knowingly, if not intentionally, used funds belonging to clients McCargar and Hanson for his own benefit and for the benefit of his firm. He transferred client funds from the client trust account to his firm's operating account and used the money for payroll, expenses in other cases, to pay off credit card debt, and other inappropriate purposes. Records concerning both the firm's operating account and the client trust account were poorly maintained.

Enigmatically, Mr. Smith notified both clients promptly when settlement funds became available. However, ER 1.15(d) mandates that funds also be *delivered* promptly. Mr. Smith took more than one year to reimburse Ms. McCargar for the funds he had converted, and then only after instruction by the State Bar. Mr. Hanson was reimbursed in partial payments, but also not made whole for more than one year after the funds were received by Mr. Smith.

2. *Standard* 4.42 – Lack of Diligence

This *Standard* applies to Mr. Smith's violation of ER 1.4(a)(3)-(4). It provides that "[s]uspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a

lawyer engages in a pattern of neglect and causes injury or potential injury to a client." Mr. Smith failed to communicate adequately with either Ms. McCargar or Mr. Hanson regarding the status of the settlement funds owed to them. He also failed to provide an accounting to Mr. Hanson, as Mr. Hanson requested on multiple occasions.

3. *Standard* 4.61 – Lack of Candor

This *Standard* applies to Mr. Smith's violation of ER 8.4(c). It provides that "[d]isbarment is generally appropriate when: (a) a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client." On multiple occasions, Mr. Smith gave both Ms. McCargar and Mr. Hanson a variety of explanations for why they had not obtained their shares of their respective settlements. Mr. Smith shifted blame to the bank, to the post office, and to his staff. He claimed the funds were not timely disbursed because of banking errors, but failed to adequately explain what these errors were or present any objective evidence of any such errors. He claimed checks were issued, mailed, and lost, but no copies of these alleged checks were retained and no evidence of their existence was presented. When Ms. McCargar's $1,000.00 check was returned for insufficient funds, Mr. Smith attributed this to a staff error in the midst of changing offices.

If a lawyer deceives a client for the benefit of the lawyer or another, the *Standards* focus on the severity of the harm caused in determining the appropriate sanction. If there is harm or potential harm, the presumptive sanction is a suspension. If there is *serious* harm, the presumptive sanction is elevated to disbarment. Whether a certain harm is considered "serious" is answered in the *Standards* by way of example:

> [A]ssume that the client gave the lawyer $100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction - disbarment - would be appropriate.[13]

Mr. Smith received settlement funds on behalf of his clients and initially deposited them into the client trust account. However, Mr. Smith intentionally used these funds for personal and business expenses, causing actual injury to his clients - much greater than the $100 noted in the example.

4. *Standard* 7.2 – Violations of Other Duties as a Professional

This *Standard* applies to Mr. Smith's violation of ER 1.5, ER 8.1, and each violation of Ariz. R. Sup. Ct. 43. It provides that "[s]uspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or

[13] *Standards*, Section II, Theoretical Framework, p. 6.

the legal system." As a new client, Mr. Hanson was entitled to a written explanation of what Mr. Smith's fee would be.[14] Mr. Smith and Mr. Hanson verbally agreed to an hourly fee, but this rate did not match the amount represented on the final disbursement sheet. No evidence of any written agreement was presented.

In this disciplinary matter, Mr. Smith provided multiple false statements to the State Bar regarding his handling of client funds. Further, during the hearing he made multiple statements that were false. The most glaring of these statements is the alleged Wells Fargo banking errors. The State Bar's Trust Account Examiner ("TAE") found no evidence of any banking errors. Mr. Smith produced no communication with any Wells Fargo branch manager or employee that would have supported his version of the facts. And none of Mr. Smith's explanations for delay in delivering the settlement funds to the two clients was supported by bank statements, client/general ledgers, or other firm records.

AGGRAVATING/MITIGATING FACTORS

Aggravating factors are any that "may justify an increase in the degree of discipline to be imposed."[15] Conversely, mitigating factors justify a more lenient level of discipline.[16] In this case, the State Bar presented several factors in aggravation and mitigation for the Hearing Panel to consider. The weight of each

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[14] *See* Comment 2, ER 1.5.
[15] *Standard* 9.21, *ABA Standards*.
[16] *Standard* 9.31, *ABA Standards*.

factor is determined in light of the circumstances that resulted in the misconduct. The factors, as presented by the State Bar and found by the Hearing Panel, are:

In aggravation:

1. *Standard* 9.22(b) – Dishonest or Selfish Motive

A dishonest or selfish motive is an aggravating factor when an attorney makes misrepresentations to hide negligence.[17] False statements to a client, opposing counsel or other individuals can result in a finding of dishonest or selfish motive under *Standard* 9.22(b).[18]

The evidence shows Mr. Smith actively deceived Ms. McCargar, Mr. Hanson, and the State Bar to hide his own misconduct regarding his conversion of client settlement funds. Mr. Smith made a series of misrepresentations to his clients and to the State Bar. These included that:

- Wells Fargo had improperly diverted funds due to banking errors;
- Checks were issued, but lost in the mail;
- Ms. McCargar had signed and returned settlement documents; and
- Mr. Smith had not been paid and would pay Mr. Hanson from his personal funds.

[17] *In re Peasley*, 208 Ariz. 27, 37 (2004).
[18] *In re Arrick*, 180 Ariz. 136 (1994).

These statements were untrue. When confronted with objective evidence that proved a statement of his was not accurate, Mr. Smith still refused to change his position or admit any factual error because he stated that nothing would change his recollection. The Hearing Panel finds Mr. Smith's motives were dishonest, misleading, deceitful, and selfish, all in aggravation of his disciplinary sanction.

2. *Standard* 9.22(c) - Pattern of Misconduct

The State Bar asserts Mr. Smith's misconduct regarding settlement funds belonging to two separate clients amounts to a pattern of misconduct. The Hearing Panel agrees. Though Mr. Smith has no disciplinary history, his repeated misrepresentations and misconduct lasted more than a year and involved two separate clients' matters. The Hearing Panel finds Mr. Smith's misconduct constitutes an aggravating pattern.

3. *Standard* 9.22(d) – Multiple Offenses

The aggravating factor of multiple offenses may be applied when misconduct involves multiple clients or multiple matters.[19] The Hearing Panel finds Mr. Smith's misconduct regarding the conversion of settlement funds belonging to Ms. McCargar and Mr. Hanson satisfy the requirements for this factor's application.

[19] *In Re Peasley*, 208 Ariz. 27 at 37 (2004).

Standard 9.22(e) – Bad Faith Obstruction of a Disciplinary Proceeding

Failing to cooperate with the State Bar's investigation is a significant aggravating factor.[20] The State Bar repeatedly requested copies of checks and letters that Mr. Smith claimed to have sent to Ms. McCargar and Mr. Hanson. After these repeated requests, Mr. Smith provided only part of what had been requested without explanation for the missing items. The State Bar asked Mr. Smith to provide deposit records, client ledgers, and relevant bank documents. Mr. Smith provided none of the requested items, but instead provided a letter and an Excel sheet stating tht Mr. Hanson's settlement funds had been deposited on 8/18/2017.

The State Bar asked Mr. Smith to show proof that Mr. Hanson had been paid, but Mr. Smith only provided copies of two checks – the rest were obtained from Mr. Hanson directly. Mr. Smith also provided inaccurate statements to the State Bar regarding dates and times that checks and letters were sent.

Mr. Smith's lack of cooperation and untimely provision of the requested documents required the State Bar to obtain subpoenas and conduct further investigation that would have otherwise been unnecessary. The Hearing Panel finds the evidence supports the application of this aggravating factor.

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[20] *Matter of Pappas*, 159 Ariz. 516, 527 (1988).

4. *Standard* 9.22(g) – Refusal to Acknowledge Wrongful Nature of Conduct

Mr. Smith stated that he "regret[s] the incident involving Mrs. McCargar and understand[s] her frustration."[21] Regarding Mr. Hanson's settlement funds, Mr. Smith stated that he "understands that he [is] is responsible for what happens to the money," but ultimately blamed Wells Fargo for the missing funds.[22] Mr. Smith stated this position throughout the State Bar's investigation, and again at the hearing. Mr. Smith recognized that Ms. McCargar and Mr. Hanson were harmed, but these quoted statements represent the extent of Mr. Smith's acceptance of any wrong in either matter.

Mr. Smith indicated that "as best as [he could] recall," Ms. McCargar's settlement check was forwarded to her along with the disbursement sheet, and that it was returned to Mr. Smith's office with her signature. Only then was the check deposited into the client trust account.[23] The Hearing Panel and Mr. Smith were presented with evidence that proved this was not true and that Mr. Smith knew it was not true each time the claim was made.[24] Mr. Smith again stood by his recollection of events rather than his own records or the evidence presented to him.

Mr. Smith consistently shifted any blame from himself to Wells Fargo or the post office. He recognized the harm to Ms. McCargar and Mr. Hanson was

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[21] Contested Facts Deemed Material by Respondent, JPS p. 15 ¶ 1.
[22] *Id.* at p. 20 ¶ 10.
[23] *Id.* at p. 16 ¶ 4.
[24] Testimony of Donald Smith 7/10/19 at 11:34:30 am.

unfortunate, but refused to accept any blame for having caused it. The Hearing Panel finds it appropriate to apply this aggravating factor.

5. *Standard* 9.22(i) – Substantial Experience in the Practice of Law

Mr. Smith was admitted to the practice of law in Arizona in 1985. Since being admitted, he was an associate and partner at Snell & Wilmer for twenty years, acting as the head of the professional liability/medical malpractice litigation group for most of that time. In 2005, he left Snell & Wilmer and formed a small partnership, which operated for about ten years.[25] Mr. Smith has been an attorney for about 34 years, and has been entrusted with positions of leadership and responsibility. The Hearing Panel finds his experience sufficient to apply this aggravating factor.

When taken together, some aggravating factors may be offset by certain mitigating factors. For example, where an attorney's substantial experience in the practice of law portends to aggravate his/her disciplinary sanction, this factor may sometimes be offset if the attorney can also show an absence of prior disciplinary history.[26] Mr. Smith's lack of a disciplinary record is considered in mitigation.

In mitigation:

1. *Standard* 9.32(a) – Absence of Prior Discipline

Mr. Smith's long legal career without prior discipline is mitigation.

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[25] Testimony of Donald Smith 7/10/2019, 3:23:28 pm – 3:24:33 pm.
[26] *In Re Shannon*, 179 Ariz. 52 at 68 (1994).

2. *Standard* 9.32(c) – Personal/Emotional Problems

Mr. Smith testified he has been diagnosed with stage 1 prostate cancer.[27] The Hearing Panel finds it appropriate to apply this mitigating factor, but also finds the connection between the diagnosis and the misconduct was unclear. Therefore, this factor was not be given much weight in mitigation as there was no substantive evidence that his the cancer had contributed to his misconduct.

3. *Standard* 9.32(g) – Character or Reputation

Evidence of a lawyer's good character and reputation may be presented in mitigation of that lawyer's disciplinary sanction.[28] Mr. Smith presented two witnesses that testified on his behalf in this regard. The first, Pastor Dennis Adams, testified that he had knowledge of Mr. Smith's good reputation from a former partner of Mr. Smith's and through individuals that been referred to Mr. Smith as clients by Pastor Adams. [29] The second witness, Pastor Randall Record, testified that Mr. Smith has "impeccable standing" as a lawyer and that he was comfortable referring potential clients to Mr. Smith.[30]

Mr. Smith has had a long and distinguished career, and has built up a positive professional reputation. The Hearing Panel finds that Mr. Smith's good character and reputation are mitigation.

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[27] Testimony of Donald Smith 7/10/19, 3:25:00 pm – 3:26:45 pm.
[28] *See Matter of Murray*, 159 Ariz. 280, 281 (1988).
[29] Testimony of Pastor Dennis Adams 7/10/19, 1:13:48 pm – 1:18:10 pm.
[30] Testimony of Pastor Randall Record 7/10/19, 1:18:13 pm – 1:23:19 pm

CONCLUSION

The Arizona Supreme Court has directed that a hearing panel exercise discretion in imposing sanctions and to carefully apply aggravating and mitigating factors. We have considered that "individual circumstances make extremely problematic any meaningful comparison of discipline ultimately imposed in different cases."[31] Though prior cases are helpful by way of analogy, the panel is charged with determining the sanction for a lawyer's misconduct on a case-by-case basis.

Mr. Smith denied many of the allegations of wrongdoing within the complaint but the evidence indicates his actions constitute professional misconduct. The presumptive sanction for Mr. Smith's misconduct is disbarment.

The Hearing Panel finds the mitigating factors are not sufficient to reduce the preumptive sanction of disbarment.

IT IS ORDERED Donald Smith, Bar No. 010462, is disbarred from the practice of law effective thirty (30) days from this order pursuant to Rule 72(d), Ariz R. Sup. Ct.

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[31] *In re Attorney F.*, 285 P.3d 322, 327 (Colo. 2012).

DATED this 14th day of August 2019.

Signature on File
William J. O'Neil, Presiding Disciplinary Judge

Signature on File
Ellen Kirschbaum, Volunteer Public Member

Signature on File
Judge Maurice Portley (ret.),
Volunteer Attorney Member

COPY of the foregoing e-mailed/mailed
this 14th day of August 2019, to:

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OFFICE OF THE
PRESIDING DISCIPLINARY JUDGE
SUPREME COURT OF ARIZONA
APR 01 2019
FILED
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BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	**PDJ 2019-9016**
DONALD H. SMITH, Bar No. 010462,	**COMPLAINT**
Respondent.	[State Bar No. 18-0602]

Complaint is made against Respondent as follows:

GENERAL ALLEGATIONS

1. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on November 09, 1985.

COUNT ONE (File No. 18-0602/McCargar)

2. Respondent was retained by Delores McCargar in February 2016 to pursue a personal injury claim.

3. Respondent filed a civil complaint in Ms. McCargar's case in April 2017, conveyed an offer of settlement to Ms. McCargar in June 2017, and received authorization from Ms. McCargar to accept an offer of settlement in the amount of $5,000.00 in August 2017.

4. On August 31, 2017, Respondent mailed Ms. McCargar a letter and disbursement sheet, and both documents reflected that Ms. McCargar would be receiving a payment of $2,679.31. Respondent received the disbursement sheet with Ms. McCargar's signature and a date of signing of September 3, 2017.

5. On November 13, 2017, Respondent sent Ms. McCargar a letter to notify her of his firm's new address, and he stated in the letter, "On a related issue, I was happy to receive notice from my bank that the original check to [sic] was received and cashed."

6. Ms. McCargar contacted Respondent and informed him that she had not received or cashed a settlement check. Respondent said he would contact his bank and issue Ms. McCargar a new check.

7. The following week, Ms. McCargar contacted Respondent and informed him that she had not received a replacement check. Respondent told Ms. McCargar that the new check had been lost in the mail.

8. On December 8, 2017, Respondent mailed Ms. McCargar a letter stating, "As of yesterday, the funds still have not posted to my account. However, I am enclosing a partial payment of $1,000.00 from my business account. I hope by the time you get this letter; the funds will have posted and I will be able to send you the remaining amount."

9. Ms. McCargar attempted to negotiate Respondent's check for $1,000.00, but the check was returned due to insufficient funds.

10. Respondent stopped communicating with Ms. McCargar and did not provide her with her settlement funds by March 7, 2018, resulting in Ms. McCargar's submission of a bar charge.

11. Respondent sent an initial response to the bar charge on April 4, 2018, and he detailed the sequence of events surrounding his receipt and deposit of the settlement check. Respondent told the State Bar of Arizona ("SBA") that he received the settlement check on August 14, 2017, and he forwarded the check and the distribution sheet to Ms. McCargar. Respondent said that the signed distribution sheet and check were returned to his office, "and [the check] was deposited into the trust account." This statement was not true.

12. Bank records revealed that the settlement check was deposited into Respondent's trust account on August 18, 2017, which was two weeks prior to Ms. McCargar's receipt of the distribution sheet. Respondent had not mailed the settlement check to Ms. McCargar to get her signature prior to his deposit of the check into his account.

13. In his April 4, 2018, letter to the SBA, Respondent said that following his deposit of the settlement check, he drafted a check to Ms. McCargar and mailed it to her address in Oregon. Respondent said the check to Ms. McCargar was written and mailed before the expiration of the seven day hold period, and he did that so Ms. McCargar "would not have to wait the additional time to attain her funds."

14. Respondent provided the SBA with a copy of the client file in April 2018, and although it was 345 pages and included correspondence, the client file did not contain a copy of the letter or check purportedly mailed to Ms. McCargar near August 18, 2017, the time of the deposit of Ms. McCargar's settlement funds.

15. On September 18, 2018, in response to the SBA's request for additional information, Respondent provided a copy of a letter dated September 18, 2017, that Respondent said was mailed to Ms. McCargar with the settlement

check. Respondent said that the letter was not contained in the client file but was in a box of closed matters.

16. The September 18, 2017, letter referenced an enclosed check in the amount of $2,679.31; however, Respondent did not locate a copy of the check.

17. Respondent was not truthful in his April 4, 2018, response to the SBA when he said that he mailed a check to Ms. McCargar within seven days of the August 18, 2017, deposit.

18. Respondent said that when the time came for the settlement funds to clear his trust account, Respondent noticed that the balance in the account did not match Respondent's records.

19. Respondent told the SBA that he promptly communicated this banking issue to Ms. McCargar. Ms. McCargar denies that Respondent told her that he had a banking issue, and there is no record to support Respondent's statement that he promptly communicated the banking issue to Ms. McCargar.

20. The SBA sent a follow-up email to Respondent dated September 14, 2018, asking that he provide a copy of the letter that would have accompanied the second check purportedly sent to Ms. McCargar in November 2017. Respondent failed to provide the letter or any explanation.

21. As for the check for $1,000.00 mailed to Ms. McCargar on December 8, 2017, that subsequently bounced, Respondent attributed the lack of funds to an error that occurred during the changeover of his offices and staff.

22. Respondent said in his April 2018 letter to the SBA that he had yet to reimburse Ms. McCargar prior to the initiation of the bar charge because she instructed him not to send any payments until she could receive her full payment, and he "honored those directions."

23. On April 26, 2018, Respondent informed the SBA that Ms. McCargar offered to withdraw her Bar charge if he provided her with her portion of the settlement funds. Respondent did not forward payment to Ms. McCargar.

24. Respondent said he did not provide Ms. McCargar with her portion of the settlement funds after receiving the Bar charge because he feared it would "look like an attempt to pay her off."

25. On September 18, 2018, Respondent said that he was prepared to overnight the funds to Ms. McCargar if told by the SBA that it would be permissible.

26. On September 21, 2018, Respondent received an email from the SBA that instructed him to provide Ms. McCargar with the funds owed to her.

27. Respondent sent a letter with a check to Ms. McCargar on October 11, 2018.

28. On September 14, 2018, Respondent was asked to provide deposit records, client ledgers, and relevant bank documents by September 19, 2018.

29. On September 18, 2018, Respondent provided a letter and a "copy of the deposit on an Excel sheet" that stated the following: "8/18/2017 5000* DEPOSIT." Respondent did not provide any copies of checks issued, bank statements, deposit records, or client ledgers.

30. A trust account investigation was initiated, with the trust account examiner ("examiner") finding that at the time of the deposit of the settlement check on August 18, 2017, Respondent's trust account held administrative funds in the amount of $21.15. After depositing the settlement funds in the amount of $5,000.00, the following three transfers were made to Respondent's operating account: (1) $2,282.16 on August 22nd, (2) $2,200.00 on August 30th, and (3) $500.00 on September 1st, for a total amount of $4,982.16 instead of the $2,320.69 owed to Respondent.

31. After the three transfers, the trust account held a balance of $38.99, with $21.15 remaining in administrative funds and $17.84 remaining from the

deposit for Ms. McCargar. The general ledger and individual client ledger provided reflected the deposit of the settlement check on August 29, 2017, and two subsequent disbursements in the amounts of $2,679.31 and $2,320.69. These recorded transactions do not match the actual activity in the trust account. On August 30, 2017, when the second transfer of Ms. McCargar's settlement funds was made from the trust account to the operating account in the amount of $2,200.00, the operating account held a balance of $913.60. Over the next two days, four disbursements were made from the operating account, resulting in a total balance of $768.30. Therefore, a portion of Mr. McCargar's funds that were transferred to Respondent's operating account were disbursed by the following day.

32. When Respondent sent Ms. McCargar her settlement funds in October 2018, he issued the check from a different trust account than the one he used in August 2017.

33. Most of Respondent's clients pay on an hourly basis, and though the fees have been earned at the time of payment, Respondent deposits the payments into his trust account. Respondent does not record the deposit and disbursement of the earned fees as entries on the general ledger or individual client ledger.

34. Since the actual transactions in the trust account are not recorded, the unexpended balance on the general ledger is inaccurate. None of the transactions that are recorded on the general ledger and individual client ledgers reflect the payee or payor. Respondent does not perform a monthly three-way reconciliation. On two occasions Respondent disbursed from the trust account by way of a cash withdrawal instead of pre-printed check or electronic transfer.

35. During the period of review, Respondent's trust account reflected two other deposits relating to settlement funds. In the first instance, funds in the amount of $12,000.00 were deposited on behalf of Client A on October 2, 2017. The transactions related to the funds were not recorded on the general ledger, but Respondent provided a copy of a client ledger. The client ledger accurately reflected payment to the client; however, the disbursement for earned fees was made by way of several transfers, which was not accurately recorded on the client ledger.

36. In the second instance, a deposit of settlement funds in the amount of $5,498.00 was made on behalf of Client Hanson. The settlement sheet reflected costs and fees owed to Respondent in the amount of $2,000.00, and an amount due Hanson of $3,498.00. The entries on the general ledger and individual client

ledger reflected the same transactions as the settlement sheet, but the recorded entries did not reflect the actual activity in the trust account.

37. The Hanson funds were deposited into the trust account on November 16, 2017, when the trust account held a balance of $42.20. Over the next month, multiple disbursements were made from the trust account by way of transfers to Respondent's operating account, payment to Respondent's credit card, and electronic withdrawals for court payments. By December 14, 2017, the trust account held a balance of $64.70, with no disbursements identified as payment to Hanson. The individual client ledger referenced check number 1068 for the disbursement to Hanson in the amount of $3,498.00; however, the check did not post to the trust account during the period of review.

38. On December 4, 2018, in response to a question from the examiner about the Hanson check, Respondent said "the original check was cut for Mr. Hanson but he later informed us that it had not been received. Because of the problems with Wells Fargo account, we cut him checks from another account." Respondent said he ordered copies of the checks and would provide them when received.

39. On January 9, 2019, Respondent provided copies of two checks given to Hanson: (1) check number 1083 in the amount of $500.00 disbursed from Respondent's Wells Fargo trust account on March 13, 2018; and (2) check number 1032 in the amount of $1,500.00 disbursed from Respondent's Midfirst Bank trust account on October 31, 2018. Respondent said he ordered copies of the remaining checks from Wells Fargo and would forward them when received.

40. On January 23, 2019, Respondent provided a copy of another check given to Hanson: check number 7425 in the amount of $500.00 disbursed from Respondent's Wells Fargo operating account on April 5, 2018. Respondent said that he was still waiting on a copy of another check.

41. An SBA investigator contacted Client Hanson on January 24, 2019. Hanson reported that Respondent is a friend from church who agreed to give Hanson a "church discount" of $200.00 per hour to work on his case. Respondent told Hanson that the case should not take more than four hours to finalize. There was no fee agreement; instead, the two shook hands on the terms.

42. Respondent contacted Hanson on November 15, 2017, to report that the settlement check had arrived. With Hanson's permission, Respondent signed the check. When Hanson contacted Respondent the next week to say that he had

not received his portion of the funds, Respondent said that his bank disbursed the money to someone else.

43. On December 22, 2017, Respondent misled Hanson by indicating that he had not been paid either and would be paying Hanson from his personal funds.

44. Respondent did not have a written fee agreement with Hanson, and Respondent did not provide Hanson with a final accounting of Respondent's time or retained fees.

45. Respondent told Hanson that Hanson's settlement portion totaled $3,498.00. Respondent made partial payments to Hanson beginning in March 2018 and concluding in January 2019.

46. Hanson provided the SBA with the copies of the checks he received, and three of those checks had not yet been provided to the SBA by Respondent. They included the following: (1) disbursement[1] on June 19, 2018, in the amount of $500.00 from Respondent's MidFirst Bank trust account; (2) check number 1031 on September 4, 2018, in the amount of $500.00 from a MidFirst Bank account in the name of Respondent and Naomi S. Smith; and (3) check number 1048 on

[1] No check number present as this was a counter check.

January 9, 2019, in the amount of $498.00 from Respondent's MidFirst Bank trust account.

47. On February 4, 2019, Respondent authored a letter in response to the SBA's Report of Investigation. In his letter, Respondent stated, "Unlike Mrs. McCargar, Mr. Hanson was willing to accept payments and we started paying him. On October 30, 2018, Mr. Hanson communicate (sic) that he believed he was still owed $1,500.00 and on October 31, 2018 my check #1032 in that amount was mailed to Mr. Hanson. After that I again communicated to Mr. Hanson and informed him that I was not sure that he was correct that he had been fully paid. After reviewing the account and getting copies of the checks, I sent Mr. Hanson a final check in the amount of $498.00 (# 1048). Mr. Hanson has provided me with copies of the checks he received, and these are enclosed."

48. Respondent supplied copies of the checks that he received from Hanson, but he did not provide the SBA with any of the additional bank records that he said he requested of his bank as referenced in his letters on January 9th and January 23rd.

49. Respondent told the SBA that Hanson was due $3,498.00; however, Respondent did not accurately track the payments that he made to Hanson, resulting in Respondent paying Hanson a total amount of $3,998.00.

50. Respondent's conduct in this count violated Rule 42, Ethical Rules 1.4, 1.5, 1.15(a), 1.15(d), 8.1, 8.4(c); Rule 43(b)(1)(A); Rule 43(b)(1)(C); Rule 43(b)(2)(A); Rule 43(b)(2)(B); Rule 43(b)(2)(C); and Rule 43(b)(5).

DATED this 1st day of April, 2019.

STATE BAR OF ARIZONA

Rebecca Nicole Kennelly
Staff Bar Counsel

Original filed with the Disciplinary Clerk of
the Office of the Presiding Disciplinary Judge
of the Supreme Court of Arizona
this 1st day of April, 2019.

by:
RNK:sab

FILED
MAR 22 2019
STATE BAR OF ARIZONA
BY

BEFORE THE ATTORNEY DISCIPLINE PROBABLE CAUSE COMMITTEE OF THE SUPREME COURT OF ARIZONA

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

DONALD H. SMITH, Bar No. 010462,

Respondent.

No. 18-0602

PROBABLE CAUSE ORDER

The Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona ("Committee") reviewed this matter on March 8, 2019, pursuant to Rules 50 and 55, Ariz. R. Sup. Ct., for consideration of the State Bar's Report of Investigation and Recommendation and Respondent's Responses.

By a vote of 7-0-2[1], the Committee finds probable cause exists to file a complaint against Respondent in File No. 18-0602.

IT IS THEREFORE ORDERED pursuant to Rule 55(c) and 58(a), Ariz. R. Sup. Ct., authorizing the State Bar counsel to prepare and file a complaint with the Disciplinary Clerk.

Parties may not file motions for reconsideration of this Order.

DATED this 20 day of March, 2019.

Lawrence F. Winthrop

Judge Lawrence F. Winthrop, Chair
Attorney Discipline Probable Cause
Committee of the Supreme Court of Arizona

[1] Committee members Walt Davis and JoJene Mills did not participate in this matter.

Original filed this 22ND day
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