

Discipline by Consent. A hearing on the Agreement was held on Tuesday, July 6, 2004. Appearing on behalf of the State Bar was State Bar staff attorney Amy Rehm. Respondent Kenneth J. Whitehead ("Respondent") appeared pro se. Prior to the hearing, a request was made by a local television station to videotape the hearing. The Hearing Officer, at the beginning of the hearing, overruled an objection to the presence of a television camera and filming of the proceeding. *Transcript, July 6, 2004*, page 3, line 15 - page 5, line 2.

Based on the whole record, the following facts are found to exist:

FINDINGS RELEVANT TO ALL COUNTS OF THE COMPLAINT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 9, 1987. Tender of Admissions Fact (hereafter "T.A. Fact") 1.
2. On or about March 3, 2000, Respondent formed a new firm called Whitehead & Associates ("W&A") concentrating on domestic relations law. T.A. Fact 2.
3. At all times relevant hereto, Respondent was the sole managing partner of the law firm of W&A. T.A. Fact 3.
4. At all times relevant hereto, Respondent had supervisory authority over W&A attorney and non-attorney staff. T.A. Fact 4.
5. Although W&A was initially profitable, the firm later began to operate at a loss. T.A. Fact 5; Hearing Exhibit 2, page 52, lines 9 - 23.
6. In or about September of 2002, Respondent and the State Bar reached a tentative settlement agreement in Arizona Supreme Court No. SB-03-0076 requiring Respondent's nine-month suspension from the practice of law. T.A. Fact 6; Hearing Exhibit 2, page 9, line 11 - page 10, line 25.

7. Based on the contemplated suspension in SB-03-0076, and on the advice of counsel, Respondent determined, in or about September 2002, to close his law practice as soon as practicable. T.A. Fact 7.

8. At the time Respondent determined to close his law practice, there were between 400 and 500 existing clients of the law firm of W&A. *Transcript July 6, 2004*, page 12, lines 4 - 19.

9. Respondent reached an agreement with an attorney employed by W&A, Michael Schloss, regarding the closing of W&A. Mr. Schloss decided to open a new practice, Schloss Law Offices, upon the closure of W&A. The majority of the attorneys and staff employed by W&A would be employed by Schloss Law Offices upon W&A's closure. T.A. Fact 8; Hearing Exhibit 2, page 11, line 1 - page 15, line 20.

10. Respondent and Mr. Schloss agreed that Schloss Law Offices would offer to undertake representation of some of W&A's current clients. Those clients would be represented, for the most part, by the same attorney who represented them at W&A, and under the same fee agreement as reached with W&A. T.A. Fact 9.

11. In preparation for the closing, Respondent personally received each client's time and billing records, and the files were reviewed by the assigned attorneys. Upon review, if Respondent determined that the services performed exceeded the fees paid, and that no imminent legal dates were pending, Respondent sent a letter to those clients stating that the firm was closing and that the client needed to obtain substitute counsel. In other cases, with Mr. Schloss' approval, Respondent sent a letter to the client indicating that the representation would be undertaken by Schloss Law Office, under the same fee arrangement as the client had with W&A, if the client agreed. T.A. Fact 10; Hearing Exhibit 2, page 30, line 20 - page 40, line 8; page 43, line 9 - page 47, line 21.

12. Respondent then filed motions to withdraw in all pending cases. The motions, for the most part, were granted by the courts. T.A. Fact 11; Hearing Exhibit 2, page 34, lines 14 - 25.

13. Most of the client letters were sent in early October of 2002, and the firm effectively closed as of November 1, 2002. T.A. Fact 12.

14. Respondent then proceeded, for a brief period of time, to continue the W&A closing process from Schloss Law Offices' location. Respondent handled the closing himself. T.A. Fact 13.

15. Respondent admits that he did not consistently or fully communicate with all his former clients regarding questions they had about the closing of the firm and about fee accountings. T.A. Fact 14.

16. For clients whose representation was not continued by Schloss Law Office, Respondent determined that some were due a refund of the monies paid by clients towards a flat fee arrangement. In other instances, a determination was made in a fee arbitration proceeding regarding a refund. Respondent made every effort to make the refunds, but lacked sufficient financial ability to refund all unearned fees where the clients elected not to continue representation with Schloss Law Offices. It is important to note that the refund of fees has nothing to do with trust funds or trust accounts. The flat fees were payable according to agreement, but Respondent was under an obligation to make a "backward" adjustment to ensure that a reasonable fee was charged for what actually was provided to the clients. T.A. Fact 15; *Transcript, July 6, 2004*, page 11, line 24 - page 12, line 3; page 13, lines 5 - 13; page 16, lines 8 - 19; Hearing Exhibit 2, page 51, line 3- page 52, line 8.

17. One focus of the State Bar's discovery in this matter was the location of client files and accounting records maintained by Respondent or the W&A law firm. In an attempt to locate those client files and accounting records, the State Bar served interrogatories and document requests on Respondent.

Respondent failed to provide any written response to the interrogatories or the document requests.

Respondent further failed to serve an appropriate Rule 26.1 disclosure statement. The State Bar was forced to file a motion to compel, which motion was granted. It was not until oral argument on the motion to compel that basic information was provided by Respondent to the State Bar about the location and custodian of client files and financial records. *Transcript, April 6, 2004*, page 5, lines 1 - 4; page 9, line 7 - page 10, line 13; page 12, lines 16 - 20; page 18, line 24 - page 21, line 16.

18. Some client files obviously were in the possession of Schloss Law Offices. Nevertheless, Respondent never asked Schloss Law Offices to provide the information about which files were physically transferred to Schloss Law Offices so that Respondent could respond to the State Bar's discovery. *Transcript, April 6, 2004*, page 9, line 7 - page 10, line 13.

19. Other client files were in the possession of a third party storage facility, whose rental charge was not being paid. Because of lack of payment, the third party storage facility owner resisted voluntary production of any records. *Transcript, April 6, 2004*, page 15, line 4 - page 20, line 17.

20. Subsequent to the motion to compel oral argument, through the cooperation of Respondent, the State Bar was able to review all client files and relevant financial information it desired. Based upon the State Bar's review of those records, a determination was made whether any refund (i.e., restitution) was warranted. *Transcript, July 6, 2004*, page 9, line 3 - page 10, line 9.

21. Client files of the Respondent or of W&A in the hands of the third party storage facility owner will be protected through a consensual agreement between Respondent and the State Bar's LOMAP program. *Transcript, July 6, 2004*, page 15, line 10 - page 16, line 12.

22. Those clients who made bar complaints against Respondent were notified of the Tender of

Admissions and Agreement. Those complainants for whom restitution was determined were given notice of that determination. *Transcript, July 6, 2004*, page 10, lines 10 - 18.

23. Respondent was eligible to apply for reinstatement as an active member of the State Bar in April 2004 as his nine-month suspension in SB-03-0076 had expired. Respondent opted not to apply for reinstatement. *Transcript July 6, 2004*, page 8, lines 4 - 15.

COUNT ONE (File No. 02-1698/Franklin)

24. Respondent's law firm represented Steven Franklin in a divorce matter. Mr. Franklin paid a flat fee of \$5,700 for the representation. T.A. Fact 16.

25. Prior to the conclusion of the representation, Mr. Franklin terminated W&A's services on June 6, 2002. Mr. Franklin provided the firm with both verbal and written notice on that date. T.A. Fact 17.

26. Thereafter, Mr. Franklin made in excess of fifteen requests over the next three months in an attempt to get an accounting and refund. None was given. T.A. Fact 18.

27. Mr. Franklin submitted a bar charge against Respondent dated August 29, 2002. T.A. Fact 19.

28. On or about September 19, 2002, Respondent provided Mr. Franklin with an accounting and a refund of \$5,000. T.A. Fact 20. Because of the refund, no restitution is warranted. *Tender of Admissions*, page 57.

COUNT TWO (File No. 02-1765/Welty)

29. On or about May 29, 2002, Douglas and Tammy Welty retained the law firm of W&A to represent them in a child custody matter. The Weltys agreed to pay a flat fee of \$7500 for the services. On May 29, 2002, the Weltys provided a check for \$1,000 to the firm, along with thirteen post-dated checks in

the amount of \$500 each. T.A. Fact 21.

30. On or about May 31, 2002, the Weltys met with W&A attorney Michael Schloss about their case. T.A. Fact 22.

31. On or about June 4, 2002, the Weltys notified W&A that they had changed their minds, and no longer required representation. The Weltys were informed by Dave Ryan that they had to submit a notarized letter to cancel the firm's services. The Weltys delivered a notarized letter canceling the firm's services on that same date. T.A. Fact 23.

32. Thereafter, for a period of approximately three months, the Weltys made numerous attempts to contact someone at the law firm about receiving a refund of the \$1,000 payment. The Weltys were repeatedly informed that the case was "under review" by Respondent. T.A. Fact 24.

33. On September 6, 2002, the Weltys submitted a bar charge against Respondent. T.A. Fact 25.

34. On or about September 19, 2002, Respondent refunded \$850 to the Weltys. TA. 26.

35. Because of the refund, albeit delayed, no restitution is warranted. Tender of Admissions, page 57.

COUNT THREE (File No. 02-1863/Murphy)

36. On or about July 9, 2001, Yvonne Benavidez retained W&A to represent her in a child custody matter. She agreed to pay a flat fee of \$6300 for the services. Paul Murphy agreed to pay the monies on Ms. Benavidez's behalf, and signed the fee agreement as a third-party payor. T.A. Fact 27.

37. On March 11, 2002, W&A filed a Motion to Withdraw from Ms. Benavidez's case at her request. At that time, Ms. Benavidez and Mr. Murphy had paid \$3,086 towards the flat fee. T.A. Fact 28.

38. Thereafter, Ms. Benavidez and Mr. Murphy made several calls to the firm in an attempt to

receive a refund. They were told by firm employees that either someone would return the call, or that the money was in the mail. No money was ever received. T.A. Fact 29.

39. On or about October 1, 2002, Ms. Benavidez and Mr. Murphy submitted a bar charge against Respondent. T.A. Fact 30.

40. In his response, Respondent characterized the issue as a simple fee dispute, and offered to submit the matter to fee arbitration. T.A. Fact 31.

41. The matter proceeded to fee arbitration, and a hearing was held on February 21, 2003. T.A. Fact 32.

42. At the conclusion of the fee arbitration hearing, the hearing officer determined that Respondent charged an unreasonable fee, and that a refund of \$2,000 was due to Mr. Murphy. T.A. Fact 33.

43. Respondent failed to pay the fee arbitration award. T.A. Fact 34.

44. Restitution of \$2,000 to Mr. Murphy or Yvonne Benavidez is warranted. Tender of Admissions, page 57.

COUNT FOUR (File No. 02-1950/Gutierrez)

45. On or about August 7, 2002, Tomas Gutierrez retained W&A to represent him in a paternity action. Mr. Gutierrez paid a flat fee of \$7,000 in full for the legal services. T.A. Fact 35.

46. Shortly after retaining the firm, Mr. Gutierrez learned that he could not bring his daughter from Mexico to the United States legally, and that custody of his daughter had been awarded to her mother in Mexico. T.A. Fact 36.

47. On or about September 4, 2002, Mr. Gutierrez terminated the services of the firm and requested a refund. T.A. Fact 37.

48. When no refund was made, Mr. Gutierrez filed a bar charge against Respondent. T.A. Fact 38.

49. In his response, dated November 20, 2002, Respondent admitted that Mr. Gutierrez is due a refund of \$6,500. T.A. Fact 39.

50. Respondent has failed to pay the refund to Mr. Gutierrez. T.A. Fact 40.

51. Restitution of \$6,500 to Mr. Gutierrez is warranted. Tender of Admissions, page 57.

COUNT FIVE (File No. 02-1985/Hainsworth)

52. On or about August 8, 2000, Angelo Hainsworth retained W&A to represent him in a marriage dissolution. He agreed to pay a flat fee of \$7,590 for the services. The agreement was later amended to add an additional \$4,500 in fees. Mr. Hainsworth paid \$8,592 towards the total amount due to the firm. T.A. Fact 41.

53. Mr. Hainsworth was dissatisfied with the firm's services, and terminated the representation. Mr. Hainsworth then filed a request for fee arbitration as he believed he was overcharged for the case. T.A. Fact 42.

54. Respondent agreed to participate in binding fee arbitration. T.A. Fact 43.

55. The fee arbitration matter proceeded to a hearing on January 4, 2003. At the conclusion of the hearing, the arbitrator entered an award on behalf of Mr. Hainsworth. T.A. Fact 44.

56. The arbitrator concluded that the fees charged by Respondent were unreasonable, and ordered that Respondent refund \$1,002 to Mr. Hainsworth. T.A. Fact 45.

57. Respondent failed to pay the arbitration award. T.A. Fact 46.

58. Restitution of \$1,002 to Mr. Hainsworth is warranted. Tender of Admissions, page 57.

COUNT SIX (File No. 02-2069/Rogers)

59. On or about August 8, 2000, Sean Rogers retained W&A to represent him in a child support matter. He paid a flat fee of \$6,590 for the legal representation. T.A. Fact 47.

60. Mr. Rogers contends that little substantive work was performed on his case. He contends that little or no paperwork was filed on his behalf, and that his objectives were not achieved. T.A. Fact 48.

61. On or about October 7, 2002, Mr. Rogers received a letter from Respondent stating that the firm was closing and would be terminating its representation. T.A. Fact 49.

62. Thereafter, Mr. Rogers made numerous attempts to contact the firm to receive a refund of fees and accounting so that he could retain a new attorney. His calls were either not returned, or he was told that an accounting would be sent shortly. T.A. Fact 50.

63. Mr. Rogers did not receive an accounting or a refund. T.A. Fact 51.

64. On or about October 16, 2002, Mr. Rogers submitted a bar charge against Respondent. T.A. Fact 52.

65. In his response of November 19, 2002, Respondent simply indicated that the matter was being reviewed. T.A. Fact 53.

66. Restitution of \$6,000 to Mr. Rogers is warranted. Tender of Admissions, page 57.

COUNT SEVEN (File No. 02-2084/Kuhn)

67. On or about May 7, 2002, Dian Kuhn retained the services of W&A to represent her in a marriage dissolution. She paid the firm a flat fee of \$9,000 in full for the services. T.A. Fact 54.

68. A Petition for Dissolution was filed on Ms. Kuhn's behalf on or about July 29, 2002. Little other substantive work was performed on her behalf. T.A. Fact 55.

69. In early October, Ms. Kuhn received a letter from Respondent dated October 7, 2002, stating that the firm was closing and that they would be withdrawing from her case. T.A. Fact 56.

70. Thereafter, Ms. Kuhn made numerous requests, verbally and in writing, to receive an accounting and refund. Respondent failed to provide neither. T.A. Fact 57.

71. On or about October 21, 2002, Ms. Kuhn filed a bar charge against Respondent. T.A. Fact 58.

72. In his response dated November 19, 2002, Respondent merely stated that he must be given a reasonable amount of time to comply with a request for a refund or accounting. To date, he has failed to provide neither. T.A. Fact 59.

73. Respondent, as part of the Agreement, has agreed to pay restitution to Ms. Kuhn of \$7,000.00. Hearing Exhibit 1.

COUNT EIGHT (File No. 02-2094/Voisin)

74. On or about July 23, 2002, Michael and Naomi Voisin retained W&A to represent them in a termination of parental rights/adoption matter. They paid a flat fee of \$7,000 for the services on that same date. T.A. Fact 60.

75. Within a week thereafter, the Voisins had an initial consultation with their assigned attorney. After meeting with the attorney, the Voisins decided to terminate the representation, and seek representation elsewhere. T.A. Fact 61.

76. The Voisins telephoned W&A the day after their initial consultation, and informed the firm that they wished to terminate the representation and receive a refund. The Voisins were told by the firm to put their request in writing with a notary public witness, which they immediately did. T.A. Fact 62.

77. Thereafter, the Voisins made numerous calls to W&A in an attempt to receive a refund. The calls were either not returned, or the Voisins were informed that their case was "under review." T.A. Fact 63.

78. On October 19, 2002, the Voisins filed a bar charge against Respondent. T.A. Fact 64.

79. In his response dated December 2, 2002, Respondent admits that the Voisins are due a refund but states that the refund is "bogged down in processing." T.A. Fact 65.

80. The Voisins have not received a refund. T.A. Fact 66.

81. Restitution of \$7,000 to the Voisins is warranted. Tender of Admissions, page 58.

COUNT NINE (File No. 02-2131/Megge)

82. The State Bar admits it cannot prove the allegations of this Court with clear and convincing evidence. T.A. Fact 67; *Transcript, July 6, 2004*, page 15, lines 2 - 9.

COUNT TEN (File No. 02-2171/Sanford)

83. On or about September 20, 2002, Michelle Sanford retained W&A to represent her in a domestic relations matter. She paid a flat fee of \$6,500 in full for the representation. T.A. Fact 68.

84. Ms. Sanford was never able to actually meet with her assigned attorney at the firm as her appointments were canceled. T.A. Fact 69.

85. On or about October 11, 2002, Ms. Sanford received a letter from the Respondent dated October 7, 2002, informing her that the firm was closing and would not be able to represent her. T.A. Fact 70.

86. On or about October 12, 2002, Ms. Sanford requested a refund and the return of her file. T.A. Fact 71.

87. Thereafter, Ms. Sanford left numerous telephone messages for Respondent, none of which were returned. T.A. Fact 72.

88. On or about October 31, 2002, Ms. Sanford filed a bar charge against Respondent. T.A. Fact 73.

89. In his response to the bar charge, Respondent simply characterized the complaint as a fee dispute and states that the two parties have agreed to fee arbitrate the matter. T.A. Fact 74.

90. Thereafter, at Respondent's insistence, the matter proceeded to fee arbitration on February 24, 2003. Respondent, however, failed to appear for the hearing. A fee arbitration award was entered in favor of Ms. Sanford for her entire fee in the amount of \$6,500. T.A. Fact 75.

91. Respondent has failed to pay the arbitration award. T.A. Fact 76.

92. Restitution of \$6,500 to Ms. Sanford is warranted. Tender of Admissions, page 58

COUNT ELEVEN (File No. 02-2172/Carignan)

93. On or about November 12, 2001, Patricia Carignan retained W&A to represent her in a custody matter involving her grandson. She paid, in full, a flat fee of \$6,500 for the representation. T.A. Fact 77.

94. Ms. Carignan contends that she received poor service from the firm. T.A. Fact 78.

95. On or about October 5, 2002, Respondent sent a letter to Ms. Carignan stating that the firm was closing and would be withdrawing from her representation. T.A. Fact 79.

96. Respondent sent a second letter to Ms. Carignan dated October 18, 2002 stating that she was not due a refund. T.A. Fact 80.

97. Thereafter, Ms. Carignan requested on numerous occasions an itemized accounting. None was provided. T.A. Fact 81.

98. Ms. Carignan filed a bar charge against Respondent on or about November 5, 2002. T.A.

Fact 82.

99. In his response, dated November 27, 2002, Respondent provided the State Bar with an itemized billing statement. The State Bar forwarded the billing statement to Ms. Carignan. T.A. Fact 83.

100. Ms. Carignan contends that many of the items on the billing statement are incorrect or unfair, and that she is due a refund of \$1,036.20. T.A. Fact 84.

101. Restitution of \$1,036.20 to Ms. Carignan is warranted. Tender of Admissions, page 58

COUNT TWELVE (File No. 02-2193/Sanchez)

102. On or about June 27, 2002, Joaquin Sanchez retained W&A to represent he and his wife in an attempt to obtain custody of their grandson who resides in Utah. Mr. Sanchez paid a flat fee of \$7,000 in full for the representation. T.A. Fact 85.

103. There was only one court date set in the matter. The attorney assigned to the case did not appear, and the attorney who did appear was unprepared. The court ruled that the matter had to be heard in Utah. T.A. Fact 86.

104. As a result of the court's ruling, W&A withdrew from the representation in September of 2002. T.A. Fact 87.

105. Thereafter, Mr. Sanchez made numerous attempts to contact Respondent in order to obtain an accounting and refund. Respondent failed to comply with his requests. T.A. Fact 88.

106. On or about October 29, 2002, Mr. Sanchez filed a bar charge against Respondent. T.A. Fact 89.

107. Although Respondent provided an initial response to the charge, he failed to address many issues raised by Mr. Sanchez. By letter, Respondent was asked to provide additional information to the bar

about the case. He failed to respond to the letter or to provide the requested information. T.A. Fact 90.

108. Respondent, as part of the Agreement, has agreed to pay restitution to Mr. Sanchez of \$3,500.00. Hearing Exhibit 1.

COUNT THIRTEEN (File No. 02-2235/Shakir)

109. On or about August 5, 2002, Malukah Shakir retained W&A to represent her in a termination of parental rights/order of protection matter. She agreed to pay a flat fee of \$7,500 for the services. She made a down payment of \$1,300 and agreed to have subsequent payments of \$1,550 withdrawn automatically from her account until the flat fee was paid in full. T.A. Fact 91.

110. On or about September 4, 2002, Ms. Shakir had her first meeting with her assigned attorney at W&A. Thereafter, Ms. Shakir had no additional communication from the firm. She is unaware of any work being performed on her behalf. T.A. Fact 92.

111. Ms. Shakir received a letter from Respondent, dated October 7, 2002, stating that the law firm was closing, and that the firm would be terminating its representation. T.A. Fact 93.

112. Thereafter, Ms. Shakir made numerous attempts at receiving an accounting and a refund. Respondent failed to provide either. T.A. Fact 94.

113. As of the date of receiving the letter from Respondent indicating that the firm was closing, Ms. Shakir had paid a total of \$4,400 in fees. T.A. Fact 95.

114. Although Ms. Shakir had been informed that the firm was closing, Respondent still took an additional automatic withdrawal of \$1,550 from Ms. Shakir's account on October 28, 2002. Ms. Shakir had to close her account to prevent future automatic withdrawals from Respondent. T.A. Fact 96.

115. As a result of the subsequent automatic withdrawal, Respondent was paid a total of \$5,950 in

fees. He failed to refund any of those fees. T.A. Fact 97.

116. On or about November 7, 2002, Ms. Shakir filed a bar charge against Respondent. T.A. Fact 98.

117. Respondent was sent two requests by the State Bar to respond to Ms. Shakir's charge. Respondent failed to submit any response. T.A. Fact 99.

118. Restitution of \$5,950.00 to Ms. Shakir is warranted. Tender of Admissions, page 58

COUNT FOURTEEN (File No. 02-2236/Rogers)

119. On or about January 25, 2002, Alia Rogers retained W&A to represent her in a custody case. She agreed to pay a flat fee of \$6,000 for the representation. She paid \$1,000 down payment towards the flat fee on January 25, 2002, and wrote post-dated checks to be cashed monthly for the remainder. T.A. Fact 100.

120. By letter dated September 23, 2002, Ms. Rogers terminated the firm's services. She also requested a refund. T.A. Fact 101.

121. After receiving no response to her September 23, 2002 letter, Ms. Rogers sent a second letter to Respondent dated October 21, 2002, requesting a refund and an accounting. Respondent failed to respond to the second letter. T.A. Fact 102.

122. Ms. Rogers does not believe that the firm performed sufficient services to earn the \$6,000 fee. T.A. Fact 103. In fact, substantial work was performed on behalf of Ms. Rogers. Tender of Admissions, page 58.

123. On or about November 14, 2002, Ms. Rogers filed a bar charge against Respondent. T.A. Fact 104.

124. Respondent failed to respond to the charge or to a subsequent letter from the State Bar. T.A. Fact 105.

COUNT FIFTEEN (File No. 02-2243/Tackett)

125. On or about April 29, 2002, Pamela Tackett retained W&A to represent her in a marriage dissolution. She agreed to pay a flat fee of \$7,500 for the services. Ms. Tackett paid a \$2,000 down payment toward the fee and agreed to allow the firm to charge \$350 monthly on her credit card until the flat fee was paid in full. T.A. Fact 106.

126. On or about September 11, 2002, Ms. Tackett notified W&A in writing that she was terminating their services. She also asked for a refund. T.A. Fact 107.

127. Thereafter, Ms. Tackett contacted the firm on several occasions to obtain an accounting or refund and her file. None was provided. T.A. Fact 108.

128. After the time that Ms. Tackett terminated the firm's services and requested a refund, the firm continued to charge \$350 on her credit card. T.A. Fact 109.

129. Ms. Tackett paid a total of \$4,100 in fees, and does not believe that this much was earned by the firm. T.A. Fact 110. In fact, substantial work was performed on behalf of Ms. Tackett. Tender of Admissions, page 58.

130. On or about November 12, 2002, Ms. Tackett filed a bar charge against Respondent. T.A. Fact 111.

131. Respondent failed to respond to the bar charge. T.A. Fact 112.

COUNT SIXTEEN (File No. 02-2255/Mourning-Saiz)

132. On or about July 21, 1999, Regina Mourning Saiz retained the law firm of Phillips and

Associates to represent her in a divorce. She paid a flat fee of \$6,500 for the representation. T.A. Fact 113.

133. Ms. Mourning-Saiz's case was initially assigned to attorney Richard Clark. Mr. Clark left the firm in October of 1999. After that time, Respondent was assigned as Ms. Mourning-Saiz's attorney. T.A. Fact 114.

134. In or about March of 2000, Respondent left Phillips & Associates to open W&A. Respondent continued to represent Ms. Mourning-Saiz at W&A. T.A. Fact 115.

135. During the time that Respondent represented Ms. Mourning-Saiz, he failed to pursue her case diligently. He failed to consistently file timely pleadings and motions on her behalf. T.A. Fact 116.

136. Ms. Mourning-Saiz complained to Respondent about his handling of her matter. T.A. Fact 117.

137. By letter dated February 15, 2002, Respondent offered to pay Ms. Mourning-Saiz's potential claims against him for \$14,850. In so offering, Respondent advised Ms. Mourning-Saiz to seek independent counsel's advice on the offer. T.A. Fact 118.

138. Ms. Mourning-Saiz accepted Respondent's offer, and Respondent subsequently withdrew from her case. T.A. Fact 119.

139. Thereafter, Ms. Mourning-Saiz made numerous attempts to contact Respondent about the matter. Respondent failed to respond to her attempts at contact. T.A. Fact 120.

140. Respondent did not pay the settlement amount to Ms. Mourning-Saiz. T.A. Fact 121.

141. On or about November 12, 2002, Ms. Mourning-Saiz filed a bar charge against Respondent. T.A. Fact 122.

142. Respondent failed to answer the bar charge, or to respond to a second letter sent by the State

Bar. T.A. Fact 123.

143. Restitution of \$14,850 to Ms. Mourning-Saiz is warranted. Tender of Admissions, page 59.

COUNT SEVENTEEN (File No. 02-2266/Klusek)

144. On or about July 29, 2002, John Klusek retained W&A to represent him in a divorce case. He agreed to pay the firm a flat fee of \$5,500 for the representation. T.A. Fact 124.

145. Mr. Klusek paid \$1,500 as a down payment, and agreed to pay installments of \$400 by post-dated checks provided up front until the flat fee was paid in full. T.A. Fact 125.

146. By letter dated October 10, 2002, Respondent informed Mr. Klusek that the firm was closing, and that the representation would be terminated. T.A. Fact 126.

147. By separate letter, also dated October 10, 2002, Mr. Klusek's assigned attorney, Clarence Calvin, informed Mr. Klusek that his case could not be handled by the firm as the names on the deed to the property in question did not list the parties as being married. Mr. Calvin informed Mr. Klusek that the matter was being transferred to the accounting department to issue a refund. T.A. Fact 127.

148. Thereafter, subsequent attempts by Mr. Klusek to obtain a refund or accounting from Respondent were unsuccessful. T.A. Fact 128.

149. At the time the representation was terminated (on or about October 10, 2002), Mr. Klusek had paid \$1,900. After that date, on or about October 16, 2002, Respondent cashed an additional post-dated check from Mr. Klusek in the amount of \$400 even though the representation had terminated. Mr. Klusek was forced to close his account to prevent future checks from being cashed. Thus, Mr. Klusek paid a total of \$2,200. T.A. Fact 129.

150. On or about November 18, 2002, Mr. Klusek filed a bar charge against Respondent. T.A.

Fact 130.

151. Respondent failed to respond to the bar charge or subsequent letter sent to him by the State Bar. T.A. Fact 131.

152. Restitution of \$2,200 to Mr. Klusek is warranted. Tender of Admissions, page 59.

COUNT EIGHTEEN (File No. 02-2268/Wagner)

153. On or about October 10, 2001, Deandra Wagner retained W&A to represent her in a modification of child custody matter. She paid a flat fee of \$6,000 for the services. T.A. Fact 132.

154. Ms. Wagner contends that her case was transferred to several attorneys within the firm, and also little substantive work of any value was performed on the matter. T.A. Fact 133. In fact, a substantial amount of work was performed on Ms. Wagner's matter. Hearing Exhibit 1.

155. Ms. Wagner's attempts to communicate with Respondent about obtaining a refund were unsuccessful. She has been unable to obtain a refund on her file. T.A. Fact 134.

156. On or about November 16, 2002, Ms. Wagner filed a bar charge against Respondent. T.A. Fact 135.

157. Respondent failed to respond to the bar charge, or to a subsequent letter from the State Bar. T.A. Fact 136.

COUNT NINETEEN (File No. 02-2271/Womach)

158. On or about May 15, 2002, Bret Womach retained W&A to represent him in a divorce case. Mr. Womach paid, in full, a flat fee of \$6,000 for the representation. T.A. Fact 137.

159. Thereafter, Mr. Womach's case was transferred to several attorneys at W&A. Little substantive work was done on the case. T.A. Fact 138.

160. On or about October 8, 2002, Mr. Womach terminated the firm's services as he was dissatisfied with the representation. T.A. Fact 139.

161. Thereafter, Mr. Womach made numerous requests for a refund and accounting to Respondent. Respondent failed to provide neither. T.A. Fact 140.

162. On or about November 4, 2002, Mr. Womach filed a bar charge against Respondent. T.A. Fact 141.

163. Respondent failed to respond to the bar charge, or to a subsequent letter from the State Bar. T.A. Fact 142.

164. Respondent, as part of the Agreement, has agreed to pay restitution to Mr. Womach of \$1,000.00. Hearing Exhibit 1.

COUNT TWENTY (File No. 02-2308/McNamara)

165. On or about October 2, 2001, James McNamara retained W&A to represent him in moving to set aside a decree of legal separation. Mr. McNamara paid a flat fee of \$2,000 in full for the representation. T.A. Fact 143.

166. Mr. McNamara terminated the firm's services shortly before the February 6, 2002 hearing due to problems with the representation. T.A. Fact 144.

167. After Respondent failed to provide a refund to Mr. McNamara, Mr. McNamara and Respondent agreed to participate in binding fee arbitration to resolve the matter. T.A. Fact 145.

168. On October 15, 2002, the fee arbitration matter proceeded to a hearing. T.A. Fact 146.

169. At the conclusion of the hearing, the arbitrator ruled that the \$2,000 charged was excessive, and that a refund of \$1,000 should be made. T.A. Fact 147.

170. Respondent has failed to pay the award. T.A. Fact 148.

171. On or about December 6, 2002, a bar charge concerning the matter was forwarded to Respondent for a response. Respondent failed to respond to the bar charge, or to a subsequent letter from the State Bar. T.A. Fact 149.

172. Restitution of \$1,000 to Mr. McNamara is warranted. Tender of Admissions, page 59.

COUNT TWENTY-ONE (File No. 02-2324/Pepper)

173. The law firm of W&A represented Jacquelin Pepper in a marriage dissolution case. Ms. Pepper paid a \$7,500 flat fee in full for the firm's services. T.A. Fact 150.

174. After approximately ten (10) months of representation, Ms. Pepper terminated the firm's services, and requested a refund. Respondent refused to provide a refund. T.A. Fact 151.

175. In or about June or July of 2002, Ms. Pepper filed a fee arbitration petition with the State Bar. Respondent agreed to participate in binding fee arbitration. T.A. Fact 152.

176. The matter proceeded to a hearing on November 11, 2002. The hearing officer signed an arbitration award on November 20, 2002, awarding a refund of \$3,300 to Ms. Pepper based upon his finding that the fee charged was unreasonable. T.A. Fact 153.

177. Respondent has failed to pay the award. T.A. Fact 154.

178. On or about November 25, 2002, a bar charge concerning the matter was filed against Respondent. T.A. Fact 155.

179. Respondent failed to respond to the bar charge, or to subsequent letters concerning the matter from the State Bar. T.A. Fact 156.

180. Restitution of \$3,300 to Ms. Pepper is warranted. Tender of Admissions, page 59.

COUNT TWENTY-TWO (File No. 02-2357/Renteria)

181. On or about September 18, 2002, Daniel Renteria retained W&A to represent him in a marriage dissolution. Mr. Renteria paid a flat fee of \$4,000 in full for the representation. T.A. Fact 157.

182. Mr. Renteria met with his assigned attorney on September 24, 2002. The attorney informed Mr. Renteria that his wife would be served with papers shortly. T.A. Fact 158.

183. Mr. Renteria's wife was never served. T.A. Fact 159.

184. Mr. Renteria then contacted the firm and informed them that he had reconciled with his wife and wanted a refund. T.A. Fact 160.

185. Thereafter, Mr. Renteria made numerous attempts to obtain a refund from the firm. Respondent failed to respond to any of the communications. T.A. Fact 161.

186. No refund was ever made. T.A. Fact 162.

187. On or about November 27, 2002, Mr. Renteria filed a bar charge against Respondent. T.A. Fact 163.

188. Respondent failed to respond to the bar charge or to subsequent letters from the State Bar. T.A. Fact 164.

189. Restitution of \$4,000 to Mr. Renteria is warranted. Tender of Admissions, page 59.

COUNT TWENTY-THREE (File No. 02-2388/Dybeck)

190. On or about June 11, 2002, Edward Dybeck retained W&A to represent him in post-dissolution proceedings regarding modification of visitation and child support. Mr. Dybeck agreed to pay a flat fee of \$5,850 for the services. Margaret Dybeck signed the fee agreement as a third party payor. The fee was paid in full. T.A. Fact 165.

191. In early October of 2002, Mr. Dybeck was notified that the firm was closing and would be withdrawing from his representation. T.A. Fact 166.

192. Thereafter, several requests were made for a refund and accounting. None was received. T.A. Fact 167.

193. Mr. Dybeck does not believe that Respondent earned the entire fee paid on this matter. T.A. Fact 168.

194. On or about December 13, 2002, Ms. Dybeck filed a bar charge against Respondent. T.A. Fact 169.

195. Respondent failed to respond to the bar charge or to subsequent letters from the State Bar. T.A. Fact 170.

196. Restitution of \$4,500 to Ms. Dybeck is warranted. Tender of Admissions, page 59.

COUNT TWENTY-FOUR (File No. 02-2403/Tena)

197. On or about February 20, 2002, Maria Tena retained W&A to represent her in a marriage dissolution case. She agreed to pay a flat fee of \$7,000 for the representation. Ms. Tena paid \$814 as a down payment toward the flat fee, and agreed to make bi-monthly credit card payments of \$310 until the fee was paid in full. T.A. Fact 171.

198. After being notified that W&A was closing, Ms. Tena made several requests for a refund and accounting. None was received. T.A. Fact 172.

199. As of the time the firm closed, Ms. Tena had paid over \$6,000 in legal fees. She does not believe that the fees charged were reasonable. T.A. Fact 173.

200. On or about December 3, 2002, Ms. Tena filed a bar charge against Respondent. T.A. Fact

174.

201. Respondent failed to respond to the bar charge, or to subsequent letters from the State Bar.

T.A. Fact 176.

202. Respondent, as part of the Agreement, has agreed to pay restitution to Ms. Tena of \$2,000.00.

Hearing Exhibit 1.

COUNT TWENTY-FIVE (File No. 02-2427/Myers)

203. On or about December 16, 2002, Lela Myers filed a bar charge against Respondent. T.A.

Fact 176.

204. Respondent failed to submit a response to the bar charge, or to a subsequent letter from the

State Bar. T.A. Fact 177.

COUNT TWENTY-SIX (File No. 02-2475/Bruer)

205. Renee Bruer retained W&A to represent her in a divorce case. She paid a flat fee of \$10,500, in full, for the representation. T.A. Fact 180.

206. Ms. Bruer was informed, by letter, that W&A was closing, and would be withdrawing from her case. T.A. Fact 181.

207. Ms. Bruer contacted W&A on several occasions requesting a refund. The calls were either not returned, or she was informed that the monies were earned. T.A. Fact 182.

208. Ms. Bruer does not believe that the monies were earned. T.A. Fact 183.

209. Eventually, Ms. Bruer was successful in disputing the charges for legal services with her credit card, thereby obtaining a "refund" in that forum. T.A. Fact 184.

210. On or about December 23, 2002, Ms. Bruer filed a bar charge against Respondent. T.A. Fact

185.

211. Respondent failed to respond to the bar charge. T.A. Fact 186

COUNT TWENTY-SEVEN (File No. 02-2476/DeNunzio)

212. On or about December 11, 2001, Joseph DeNunzio retained W&A to represent him in a paternity matter. He agreed to pay a flat fee of \$5,850 for the representation, which he paid in full. T.A. Fact 187.

213. By letter dated October 5, 2002, Respondent informed Mr. DeNunzio that the firm was closing and would be withdrawing from his representation. T.A. Fact 188.

214. Thereafter, Mr. DeNunzio made numerous requests for an accounting and refund from Respondent. Respondent failed to respond to those requests. T.A. Fact 189.

215. Mr. DeNunzio does not believe that the work performed on the case justified the entire fee paid. T.A. Fact 190.

216. In fact, substantial work was performed on Mr. DeNunzio's behalf. Tender of Admissions, page 60.

217. On or about December 20, 2002, Mr. DeNunzio filed a bar charge against Respondent. T.A. Fact 191.

218. Respondent failed to respond to the bar charge, or to subsequent letters from the State Bar. T.A. Fact 192.

COUNT TWENTY-EIGHT (File No. 02-2482/Moyer)

219. On or about August 22, 2002, Selena Moyer retained W&A to represent her in a divorce. She agreed to pay a flat fee of \$7,500 for the representation. On the date of her free initial consultation, she

paid the firm \$5,731. T.A. Fact 193.

220. Two days after her free initial consultation, and prior to speaking with anyone else at the firm, Ms. Moyer informed the firm that she changed her mind and would not be proceeding with her case. T.A. Fact 194.

221. Ms. Moyer was told that she needed to put her request in writing. On that same date, Ms. Moyer sent the firm a letter terminating the services. T.A. Fact 195.

222. No legal work was performed for Ms. Moyer by W&A. T.A. Fact 196.

223. Thereafter, Ms. Moyer made numerous requests for a refund. No refund was ever made. T.A. Fact 197.

224. On or about November 21, 2002, Ms. Moyer filed a bar charge against Respondent. T.A. Fact 198.

225. Respondent failed to respond to the bar charge. T.A. Fact 199.

226. Restitution of \$5,731 to Ms. Moyer is warranted. Tender of Admissions, page 60.

COUNT TWENTY-NINE (File No. 03-0047/Ray)

227. On or about January 8, 2003, Charles Ray filed a bar charge against Respondent. T.A. Fact 200.

228. Respondent failed to respond to the bar charge. T.A. Fact 201.

COUNT THIRTY (File No. 03-0063/Le)

229. On or about March 29, 2002, Hanh H. Le retained W&A to represent her in a divorce. She paid a flat fee of \$6,500 in full. T.A. Fact 202.

230. The case was quickly resolved by way of a settlement agreement drafted by the opposing

counsel. The divorce was final on May 20, 2002. T.A. Fact 203.

231. Thereafter, Ms. Le contacted Respondent on numerous occasions to obtain an accounting and refund. None was provided. T.A. Fact 204.

232. On or about December 12, 2002, Ms. Le filed a bar charge against Respondent. T.A. Fact 205.

233. Respondent failed to respond to the bar charge. T.A. Fact 206.

234. Restitution of \$4,500 to Ms. Le is warranted. Tender of Admissions, page 60.

COUNT THIRTY-ONE (File No. 03-0078/Grommet)

235. On or about July 12, 2001, Randy Grommet retained W&A to represent him in a paternity/custody/child support matter. He agreed to pay a flat fee of \$7,500 for the services, which he paid in full in three installments. T.A. Fact 207.

236. By letter dated October 10, 2002, Mr. Grommet received notice from Respondent that he was closing the firm, and would be filing a motion to withdraw. The letter indicated that Mr. Grommet could continue representation with Schloss Law Offices at no additional cost. T.A. Fact 208.

237. When Mr. Grommet attempted to retain Schloss Law Offices, he was informed that he would need to pay additional monies to retain the firm. T.A. Fact 209.

238. Thereafter, Mr. Grommet has requested a refund on numerous occasions from Respondent. None was provided. T.A. Fact 210.

239. Mr. Grommet does not believe that Respondent earned the entire fee. Mr. Grommet estimates that approximately \$3,000 of legal work was performed on his behalf. He believes he is due a refund of \$4,500. T.A. Fact 211.

240. On or about January 8, 2003, Mr. Grommet filed a bar charge against Respondent. T.A. Fact 212.

241. Respondent failed to respond to the bar charge, or to subsequent letters from the State Bar. T.A. Fact 213.

242. Restitution of \$4,500 to Mr. Grommet is warranted. Tender of Admissions, page 60.

COUNT THIRTY-TWO (File No. 03-0101/Payne)

243. On or about August 16, 2002, Coy & Willie Payne retained W&A to represent their son, Douglas Payne, in a paternity action. They agreed to pay a flat fee of \$5,800 for the services, and provided a \$2,000 down payment on that date. T.A. Fact 214.

244. On or about August 28, 2002, Douglas Payne sent a letter to the firm indicating that he had resolved the paternity issue on his own, and legal services were no longer needed. Douglas Payne instructed the firm to send a refund to Coy Payne. As of that date, no legal work had been performed by the firm, and Douglas Payne had not yet had his initial attorney consultation. T.A. Fact 215.

245. Thereafter, Douglas Payne and Coy Payne tried on numerous occasions to communicate with Respondent, by letter, in person, and by phone, to obtain a refund. Respondent failed to respond to any of the attempts at communication. T.A. Fact 216.

246. Respondent failed to refund the fees. T.A. Fact 217.

247. On or about January 11, 2003, the Paynes filed a bar charge against Respondent. T.A. Fact 218.

248. Respondent failed to respond to the bar charge. T.A. Fact 219.

249. Restitution of \$2,000 to Mr. and Mrs. Payne is warranted. Tender of Admissions, page 60.

COUNT THIRTY-THREE (File No. 03-0105/Hirsch)

250. On or about January 17, 2003, Iva Hirsch filed a bar charge against Respondent. T.A. Fact 220.
251. Respondent failed to respond to the bar charge. T.A. Fact 221.

COUNT THIRTY-FOUR (File No. 03-0169/Parmeter)

252. On or about December 30, 2002, Ruth Parmeter filed a bar charge against Respondent. T.A. Fact 222.
253. Respondent failed to respond to the charge. T.A. Fact 223.

COUNT THIRTY-FIVE (File No. 03-0182/Watton)

254. On or about January 28, 2003, Deborah Watton filed a bar charge against Respondent. T.A. Fact 224.
255. Respondent failed to respond to the bar charge. T.A. Fact 225.

COUNT THIRTY-SIX (File No. 03-0280/Brown)

256. On or about February 27, 2002, Lauren Brown retained W&A to represent her in a post-dissolution modification of custody case. She agreed to pay flat fee of \$6,000 in installments for the representation. T.A. Fact 226.
257. On November 1, 2002, Ms. Brown received a letter from Respondent informing her that the firm was closing and would be withdrawing from her case. T.A. Fact 227.
258. Thereafter, Ms. Brown sent numerous letters to Respondent requesting an accounting and a refund. As of the date of the firm's withdrawal, she had paid \$5,700 in fees to the firm. T.A. Fact 228.
259. Ms. Brown does not believe that the work performed on the matter justifies the fee charged by Respondent. T.A. Fact 229.

260. Respondent has not provided an accounting. T.A. Fact 230.

261. In fact, substantial work was performed on Ms. Brown's behalf. Tender of Admissions, page 60.

262. On or about February 11, 2003, Ms. Brown filed a bar charge against Respondent. T.A. Fact 231.

263. Respondent failed to respond to the bar charge. T.A. Fact 232.

COUNT THIRTY-SEVEN (File No. 03-0325/Amaro)

264. On or about January 17, 2002, Johnny D. Amaro retained W&A to represent him in a child custody matter. He agreed to pay a flat fee of \$6,500 for the representation. The flat fee was paid in full. T.A. Fact 233.

265. Mr. Amaro met with his assigned attorney who assured him that a hearing date would be set soon. After no further communication, Mr. Amaro contacted Respondent and the assigned attorney. Mr. Amaro again met with his assigned attorney, who again told him that a hearing date would be set soon. T.A. Fact 234.

266. Mr. Amaro was notified that the children's mother filed paperwork in California in June of 2002, and that jurisdiction was established in California in July of 2002. As a result, he could not proceed with his Arizona case. T.A. Fact 235.

267. Mr. Amaro then requested a refund, as no substantive work was done on his case, and the delay caused him to lose jurisdiction to California. T.A. Fact 236.

268. Mr. Amaro received no response from Respondent, and no refund. T.A. Fact 237.

269. On or about January 31, 2003, Mr. Amaro filed a bar charge against Respondent. T.A. Fact

238.

270. Respondent failed to respond to the bar charge. T.A. Fact 239.

271. Respondent, as part of the Agreement, has agreed to pay restitution to Mr. Amaro of \$3,500.00. Hearing Exhibit 1.

COUNT THIRTY-EIGHT (File No. 03-0411/Bell)

272. On or about February 8, 2002, Deborah Bell retained W&A to represent her in a divorce. She agreed to pay a flat fee of \$8,000 for the representation, in installments. She made a down payment of \$3,000, and provided the firm with post-dated monthly checks in the amount of \$555 each. T.A. Fact 240.

273. In or about December of 2002, Ms. Bell received a copy of the firm's motion to withdraw from her case. T.A. Fact 241.

274. Thereafter, Ms. Bell made numerous attempts to contact Respondent to obtain an accounting and refund. Respondent failed to provide either. T.A. Fact 242.

275. Ms. Bell does not believe that the firm earned the fee charged. T.A. Fact 243.

276. In fact, substantial work was performed on Ms. Bell's behalf. Tender of Admissions, page 61.

277. On or about February 27, 2003, Ms. Bell filed a bar charge against Respondent. T.A. Fact 244.

278. Respondent failed to respond to the bar charge. T.A. Fact 245.

COUNT THIRTY-NINE (File No. 03-0421/Magill)

279. On or about May 17, 2002, Elizabeth Magill retained W&A to represent her in a paternity matter. She agreed to pay a flat fee of \$4,500 for the services, which she paid in full. T.A. Fact 246.

280. In or about October of 2002, Ms. Magill decided not to pursue the matter and requested that

W&A cease representation and withdraw. T.A. Fact 247.

281. Thereafter, Ms. Magill made numerous requests to Respondent for a refund and accounting. None was received. T.A. Fact 248.

282. Ms. Magill does not believe that the firm earned the fee paid. She believes that approximately eleven hours of time was spent on her matter. T.A. Fact 249.

283. On or about February 28, 2003, Ms. Magill filed a bar charge against Respondent. T.A. Fact 250.

284. Respondent failed to respond to the bar charge, or to subsequent letters from the State Bar. T.A. Fact 251.

285. Restitution of \$2,000 to Ms. McGill is warranted. Tender of Admissions, page 61.

COUNT FORTY (File No. 03-0459/Prather)

286. On or about February 13, 2003, Lisa Prather retained W&A to represent her in a post-dissolution modification of child custody case. She agreed to pay a flat fee of \$5,500 for the representation. She made an initial down payment of \$1,500 and agreed to bi-monthly payments of \$200 for the remainder. T.A. Fact 252.

287. On or about May 2, 2002, Lisa Prather retained W&A to represent her in a divorce that was already set for trial. She agreed to pay a flat fee of \$3,500 for the services in bi-monthly installments of \$200. T.A. Fact 253.

288. Thereafter, Ms. Prather's cases were transferred to numerous different attorneys at the firm. T.A. Fact 254.

289. On or about September 30, 2002, Ms. Prather terminated the firm's services, in writing, and

requested an accounting on both cases. T.A. Fact 255.

290. Respondent failed to respond to the requests. T.A. Fact 256.

291. Ms. Prather believes that she was overcharged for the work. T.A. Fact 257.

292. In fact, a substantial amount of work was performed on Ms. Prather's behalf. Hearing Exhibit 1.

293. On or about March 6, 2003, Ms. Prather filed a bar charge against Respondent. T.A. Fact 258.

294. Respondent failed to respond to the charge. T.A. Fact 259.

COUNT FORTY-ONE (File No. 03-0467/Romero)

295. The State Bar admits it cannot prove the allegations of this Court with clear and convincing evidence. T.A. Fact 260, *Transcript July 6, 2004*, page 15, lines 2 - 9.

COUNT FORTY-TWO (File No. 03-0539/Diaz)

296. On or about April 3, 2002, Maria Diaz retained W&A to represent her in a dissolution of marriage case. She paid a flat fee of \$5,000 for the services. T.A. Fact 261.

297. On or about October 14, 2002, Ms. Diaz received a letter from Respondent stating that the firm was closing, and would be withdrawing from her representation. T.A. Fact 262.

298. Thereafter, Ms. Diaz made several requests for a refund and a copy of her file. Respondent failed to respond to those requests. T.A. Fact 263.

299. Ms. Diaz contends that little work was done on her file to justify a \$5,000 fee. T.A. Fact 264.

300. On or about March 13, 2003, Ms. Diaz filed a bar charge against Respondent. T.A. Fact 265.

301. Respondent failed to submit a response to the bar charge. T.A. Fact 266.

302. Respondent, as part of the Agreement, has agreed to pay restitution to Ms. Diaz of \$3,500.00.
Hearing Exhibit 1.

COUNT FORTY-THREE (File No. 03-0584/Burkard)

303. On or about February 7, 2000, Brian Burkard retained Phillips & Associates to represent him in a divorce. He paid a flat fee of \$10,000 for the representation. T.A. Fact 267.

304. In or about March of 2000, Respondent left Phillips & Associates to open W&A. Mr. Burkard's file and fees were transferred to W&A. T.A. Fact 268.

305. In or about October of 2002, Mr. Burkard was notified by Respondent that W&A was closing, and would be withdrawing from his representation. T.A. Fact 269.

306. Thereafter, Mr. Burkard made numerous requests for an accounting and a refund. Respondent failed to respond to those requests. T.A. Fact 270.

307. Mr. Burkard also made numerous requests for his file to be transferred to his new attorney. Respondent was untimely in complying with that request. When the file was transferred, many items necessary for the case, including audiotapes, were missing from the file. T.A. Fact 271.

308. Mr. Burkard does not believe that Respondent earned the fees paid on the case. T.A. Fact 272.

309. In fact, a substantial amount of work was performed on Mr. Burkard's behalf. Tender of Admissions, page 61.

310. On or about March 28, 2003, Mr. Burkard filed a bar charge against Respondent. T.A. Fact 273.

311. Respondent failed to respond to the bar charge. T.A. Fact 274.

COUNT FORTY-FOUR (File No. 03-0614/Mahoney)

312. On or about July 23, 2001, Phillip Mahoney retained W&A to represent him in a domestic relations case. He paid a flat fee of \$6,500 for the services. T.A. Fact 275.

313. On or about February 10, 2002, Respondent's legal services were terminated. At that time, the case had not been concluded. T.A. Fact 276.

314. Mr. Mahoney requested a refund of unearned fees. Respondent refused to provide such, claiming that the entire fee was earned. T.A. Fact 277.

315. Mr. Mahoney petitioned for fee arbitration. Respondent agreed to participate in binding fee arbitration to resolve the matter. T.A. Fact 278.

316. On or about February 25, 2003, a fee arbitration hearing was held. T.A. Fact 279.

317. The arbitrator subsequently entered an award finding Respondent's fee charged to be unreasonable, and ordering a refund to Mr. Mahoney in the amount of \$3,295.60. T.A. Fact 280.

318. Respondent has failed to pay the award. T.A. Fact 281.

319. A bar charge was submitted in this matter on or about March 19, 2003. T.A. Fact 282.

320. Respondent failed to respond to the bar charge. T.A. Fact 283.

321. Restitution of \$3,295.60 to Mr. Mahoney is warranted. Tender of Admissions, page 61.

COUNT FORTY-FIVE (File No. 03-0719/Cisco)

322. On or about June 13, 2002, Tyrone and Serena Cisco retained W&A to represent them in a child custody matter. They paid, in full, a flat fee of \$6,300 for the representation. T.A. Fact 284.

323. Mr. & Mrs. Cisco learned that the firm had closed. T.A. Fact 285.

324. Thereafter, they made several attempts to contact Respondent for a refund. None was

received. T.A. Fact 286.

325. Mr. & Mrs. Cisco do not believe that \$6,300 of work was performed on their case, and they had to hire another attorney to finish the matter. T.A. Fact 287.

326. In fact, a substantial amount of work was performed on behalf of Mr. and Mrs. Cisco. Tender of Admissions, page 62.

327. On or about April 10, 2003, Mr. & Mrs. Cisco filed a bar charge against Respondent. T.A. Fact 288.

328. Respondent failed to submit a response to the bar charge. T.A. Fact 289.

COUNT FORTY-SIX (File No. 03-0890/Shoemaker)

329. In or about May of 2002, Deborah Shoemaker retained W&A to represent her in a divorce. She paid a flat fee of \$8,150 for the services in two installments. T.A. Fact 290.

330. In or about October of 2002, Respondent notified Ms. Shoemaker by letter that his firm was closing and would be withdrawing from her representation. T.A. Fact 291.

331. Ms. Shoemaker requested an accounting and refund on numerous occasions. Respondent failed to provide either. T.A. Fact 292.

332. Ms. Shoemaker does not believe that sufficient work was performed on her case to justify the fees paid. T.A. Fact 293.

333. On or about May 6, 2003, Ms. Shoemaker filed a bar charge against Respondent. T.A. Fact 294.

334. Respondent failed to respond to the bar charge. T.A. Fact 295.

335. Respondent, as part of the Agreement, has agreed to pay restitution to Ms. Shoemaker of

\$6,000.00. Hearing Exhibit 1.

COUNT FORTY-SEVEN (03-1365/Blackman)

336. On or about May 17, 2002, Deanna Sanpetrino retained W&A to represent her in a divorce. She agreed to pay a flat fee of \$7,650 for the services. Ms. Sanpetrino's mother, Debra Blackman, paid the legal fees, in full. T.A. Fact 296.

337. The divorce petition and accompanying paperwork were filed on Ms. Sanpetrino's behalf on or about July 10, 2002. T.A. Fact 297.

338. On July 16, 2002, Ms. Sanpetrino wrote a letter to Respondent terminating the firm's representation of her and asking them to dismiss the case as she no longer wished to proceed with the divorce. T.A. Fact 298.

339. The firm eventually filed a dismissal on her behalf. T.A. Fact 299.

340. Thereafter, both Ms. Sanpetrino and Ms. Blackman have contacted Respondent on numerous occasions to request an accounting and refund. Neither was provided. T.A. Fact 300.

341. On or about July 16, 2003, Ms. Blackman filed a bar charge against Respondent. T.A. Fact 301.

342. Respondent failed to submit a response to the bar charge. T.A. Fact 302.

343. Respondent, as part of the Agreement, has agreed to pay restitution to Ms. Blackman of \$7,000.00. Hearing Exhibit 1.

FINDINGS RELEVANT TO AGGRAVATION AND MITIGATION

344. In Arizona Supreme Court No. SB-03-0076-D, Respondent was suspended for nine months by an Order entered July 1, 2003. Respondent was found to have violated ER 1.3, ER 1.4, ER 1.5, ER 1.7,

ER 1.15, ER 1.16(d), ER 5.1, ER 5.3, ER 8.1(a), ER 8.4(c) and (d), and Rule 51(h) Ariz.R.S.Ct. Many of the violations in that matter occurred during the same time period as the violations in this matter.

345. Respondent intentionally failed to comply with rules or orders of the disciplinary agency. In a majority of the files in this complaint, Respondent failed to submit timely responses during the screening investigations.

346. Respondent did not act with a dishonest or selfish motive.

Based on the forgoing and the whole record, the following conclusions are found¹:

COUNT ONE (File No. 02-1698)

Respondent's conduct, as described in the findings under Count One, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT TWO (File No. 02-1765)

Respondent's conduct, as described in the findings under Count Two, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT THREE (File No. 02-1863)

Respondent's conduct, as described in the findings under Count Three, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.5.

COUNT FOUR (File No. 02-1950)

¹ Respondent's admissions giving rise to the findings of fact and the conclusions of law are conditioned on acceptance and approval of the Agreement. Therefore, the findings and conclusions are not binding if the Agreement is not approved.

Respondent's conduct, as described in the findings under Count Four, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT FIVE (File No. 02-1985)

Respondent's conduct, as described in the findings under Count Five, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.5.

COUNT SIX (File No. 02-2069)

Respondent's conduct, as described in the findings under Count Six, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT SEVEN (File No. 02-2084)

Respondent's conduct, as described in the findings under Count Seven, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT EIGHT (File No. 02-2094)

Respondent's conduct, as described in the findings under Count Eight, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b) and ER 1.16(d).

COUNT NINE (File No. 02-2131)

Respondent's conduct, as described in the finding under Count Nine, does not violate the Rules of Professional Conduct.

COUNT TEN (File No. 02-2171)

Respondent's conduct, as described in the findings under Count Ten, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d).

COUNT ELEVEN (File No. 02-2172)

Respondent's conduct, as described in the findings under Count Eleven, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d).

COUNT TWELVE (File No. 02-2193)

Respondent's conduct, as described in the findings under Count Twelve, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTEEN (File No. 02-2235)

Respondent's conduct, as described in the findings under Count Thirteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FOURTEEN (File No. 02-2236)

Respondent's conduct, as described in the findings under Count Fourteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FIFTEEN (File No. 02-2243)

Respondent's conduct, as described in the findings under Count Fifteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT SIXTEEN (File No. 02-2255)

Respondent's conduct, as described in the findings under Count Sixteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.3, 1.4, ER 8.1(b), ER 8.4(d) and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT SEVENTEEN (File No. 02-2266)

Respondent's conduct, as described in the findings under Count Seventeen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), ER 8.4 (c) & (d) and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT EIGHTEEN (File No. 02-2268)

Respondent's conduct, as described in the findings under Count Eighteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT NINETEEN (File No. 02-2271)

Respondent's conduct, as described in the findings under Count Nineteen, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY (File No. 02-2308)

Respondent's conduct, as described in the findings under Count Twenty, violated the following Rules of

Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.5, ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-ONE (File No. 02-2324)

Respondent's conduct, as described in the findings under Count Twenty-One, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.5, ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-TWO (File No. 02-2357)

Respondent's conduct, as described in the findings under Count Twenty-Two, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-THREE (File No. 02-2388)

Respondent's conduct, as described in the findings under Count Twenty-Three, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-FOUR (File No. 02-2403)

Respondent's conduct, as described in the findings under Count Twenty-Four, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-FIVE (File No. 02-2427)

Respondent's conduct, as described in the findings under Count Twenty-Five, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 8.1(b),

and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-SIX (File No. 02-2475)

Respondent's conduct, as described in the findings under Count Twenty-Six, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-SEVEN (File No. 02-2476)

Respondent's conduct, as described in the findings under Count Twenty-Seven, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-EIGHT (File No. 02-2482)

Respondent's conduct, as described in the findings under Count Twenty-Eight, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT TWENTY-NINE (File No. 03-0047)

Respondent's conduct, as described in the findings under Count Twenty-Nine, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY (File No. 03-0063)

Respondent's conduct, as described in the findings under Count Thirty, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-ONE (File No. 03-0078)

Respondent's conduct, as described in the findings under Count Thirty-One, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-TWO (File No. 03-0101)

Respondent's conduct, as described in the findings under Count Thirty-Two, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-THREE (File No. 03-0105)

Respondent's conduct, as described in the findings under Count Thirty-Three, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-FOUR (File No. 03-0169)

Respondent's conduct, as described in the findings under Count Thirty-Four, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-FIVE (File No. 03-0182)

Respondent's conduct, as described in the findings under Count Thirty-Five, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-SIX (File No. 03-0280)

Respondent's conduct, as described in the findings under Count Thirty-Six, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-SEVEN (File No. 03-0325)

Respondent's conduct, as described in the findings under Count Thirty-Seven, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-EIGHT (File No. 03-0411)

Respondent's conduct, as described in the findings under Count Thirty-Eight, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT THIRTY-NINE (File No. 03-0421)

Respondent's conduct, as described in the findings under Count Thirty-Nine, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY (File No. 03-0459)

Respondent's conduct, as described in the findings under Count Forty, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-ONE (File No. 03-0467)

Respondent's conduct, as described in the findings under Count Forty-One, does not violate the Rules

of Professional Conduct.

COUNT FORTY-TWO (File No. 03-0539)

Respondent's conduct, as described in the findings under Count Forty-Two, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-THREE (File No. 03-0584)

Respondent's conduct, as described in the findings under Count Forty-Three, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-FOUR (File No. 03-0614)

Respondent's conduct, as described in the findings under Count Forty-Four, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.5, ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-FIVE (File No. 03-0719)

Respondent's conduct, as described in the findings under Count Forty-Five, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-SIX (File No. 03-0890)

Respondent's conduct, as described in the findings under Count Forty-Six, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

COUNT FORTY-SEVEN (File No. 03-1365)

Respondent's conduct, as described in the findings under Count Forty-Seven, violated the following Rules of Professional Conduct and Rules of the Supreme Court: Rule 42, Ariz.R.S.Ct., specifically ER 1.15(b), ER 1.16(d), ER 8.1(b), and Rule 51(h) and (i), Ariz.R.S.Ct.

DISMISSED ALLEGATIONS

The allegation of violations of ER 1.5 contained in counts 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19, 22, 23, 24, 26, 27, 28, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46 and 47 should be dismissed. The basis of the dismissal is the fact that the flat fee, at the time it was charged, was not *per se* unreasonable. Each of those counts also allege violations of ERs 1.15 and 1.16 dealing with the failure to refund unearned fees at the conclusion of the representation which more directly addresses the misconduct. Violations of ER 1.15 and 1.16 have been determined as to those counts.

The allegation of violations of ER 8.4(c) and (d) in counts 3, 5, 10, 13, 20, 21 and 44 should be dismissed. Those allegations concerned Respondent's intentional failure to pay fee arbitration awards. Respondent was financially unable to pay the awards. *Transcript, July 6, 2004*, page 11, line 24 - page 12, line 3; page 16, lines 8 - 19.

Finally, based on discovery conducted during the formal proceedings, the State Bar agrees that the allegations in counts 9 and 41 are not supported by evidence.

As to all dismissed allegations, the State Bar failed to prove those allegations by clear and convincing evidence. *Transcript, July 6, 2004*, page 15, lines 2 - 9.

RESTITUTION

Respondent should provide the following restitution:

Count Three (File No. 02-1863): Restitution in the amount of \$2,000 to Paul Murphy and/or Yvonnee Benavidez.

Count Four (File No. 02-1950): Restitution to Tomas Gutierrez in the amount of \$6,500.

Count Five (File No. 02-1985): Restitution to Angelo Hainsworth in the amount of \$1,002.

Count Six (File No. 02-2069): Restitution to Sean Rogers in the amount of \$6,000.

Count Seven (File No. 02-2084): Restitution to Dian Kuhn in the amount of \$7,000.

Count Eight (File No. 02-2094): Restitution to the Voisins in the amount of \$7,000.

Count Ten (File No. 02-2171): Restitution to Michelle Sanford in the amount of \$6,500.

Count Eleven (File No. 02-2172): Restitution to Patricia Carignan in the amount of \$1,036.20.

Count Twelve (File No. 02-2193): Restitution to Joaquin Sanchez in the amount of \$3,500.

Count Thirteen (File No. 02-2235): Restitution in the amount of \$5,950 to Malikah Shakir.

Count Sixteen (File No. 02-2255): Restitution in the amount of \$14,850 to Regina Mourning-Saiz.

Count Seventeen (File No. 02-2266): Restitution in the amount of \$2,200 to John Klusek.

Count Nineteen (File No. 02-2271): Restitution in the amount of \$1,000 to Bret Womach.

Count Twenty (File No. 02-2308): Restitution in the amount of \$1,000 to James McNamara.

Count Twenty-One (File No. 02-2324): Restitution in the amount of \$3,300 to Jacquelin Pepper.

Count Twenty-Two (File No. 02-2357): Restitution in the amount of \$4,000 to Daniel Renteria.

Count Twenty-Three (File No. 02-2388): Restitution in the amount of \$4,500 to Margaret Dybeck.

Count Twenty-Four (File No. 02-2403): Restitution in the amount of \$2,000 to Maria Tena.

Count Twenty-Eight (File No. 02-2482): Restitution in the amount of \$5,731 to Selena Moyer.

Count Thirty (File No. 03-0063): Restitution in the amount of \$4,500 to Hanh Le.

Count Thirty-One (File No. 03-0078): Restitution in the amount of \$4,500 to Randy Grommet.
Count Thirty-Two (File No. 03-0101): Restitution in the amount of \$2,000 to Coy & Willie Payne.
Count Thirty-Seven (File No. 03-0325): Restitution in the amount of \$3,500 to Johnny Amaro.
Count Thirty-Nine (File No. 03-0421): Restitution in the amount of \$2,000 to Elizabeth McGill.
Count Forty-Two (File No. 03-0539): Restitution in the amount of \$3,500 to Maria Diez.
Count Forty-Four (File No. 03-0614): Restitution in the amount of \$3,295.60 to Phillip Mahoney.
Count Forty-Six (File No. 03-0890): Restitution in the amount of \$6,000 to Deborah Shoemaker.
Count Forty-Seven (File No. 03-1365): Restitution in the amount of \$7,000 to Deanna Sanpetrino.

APPROPRIATE SANCTION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

ABA STANDARDS

In determining the appropriate sanctions, the American Bar Association's *Standards for Imposing Lawyer Sanctions* should be considered. *In re Clark*, __ Ariz. __, 87 P.3d 827, 2004 WL 692139, 422 Ariz. Adv. Rep. 3, n.2 (2004). Those *Standards* counsel that, in determining the proper sanction, four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA *Standard* 3.0. Where there are multiple

acts of misconduct, there should be only one sanction with the multiple instances of misconduct considered as aggravating factors. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992). *Standards* 4.12 and 7.2 are the applicable *Standards*.

The most serious violations present in this matter are those described in the findings under the majority of the counts of the complaint concerning Respondent's failure to timely provide accountings and refunds of advanced fees upon closing his firm. *Standard* 4.12, applicable to matters where an attorney deals improperly with client property in violation of ER 1.15, states: "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." Respondent either knew or should have known that he was dealing improperly with client property in failing to timely refund the clients' advanced fees, and in failing to timely provide the clients with accountings.

Similarly, *Standard* 7.2, applicable to Respondent's violations of Rule 51(h) and ER 1.16(d), states: "Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system."

AGGRAVATING AND MITIGATING FACTORS

Aggravating and mitigating factors, pursuant to *Standards* 9.22 and 9.32, must be considered. This Hearing Officer agrees with the parties that four aggravating factors apply and should be considered in this matter:

- (a) prior disciplinary offenses
- (c) a pattern of misconduct
- (d) multiple offenses

(e) obstruction of the disciplinary proceeding.

In Arizona Supreme Court No. SB-03-0076-D, Respondent was suspended for nine months by order dated July 1, 2003, for violations of ER 1.3, ER 1.4, ER 1.5, ER 1.7, ER 1.15, ER 1.16(d), ER 5.1, ER 5.3, ER 8.1(a), ER 8.4(c) and (d), and Rule 51(h) Ariz.R.S.Ct. It should be noted that many of the violations in that matter happened during the same time period as the violations in this matter. And, in a majority of the files in this complaint, Respondent failed to submit timely responses during the screening investigations and responded inadequately to discovery. However, prior to the conclusion of this matter, Respondent did participate meaningfully in the formal proceedings and cooperated with the State Bar in obtaining access to client files.

This Hearing Officer agrees with the parties that one factor is present in mitigation: (b) absence of a dishonest or selfish motive.

PROPORTIONALITY REVIEW

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52 (1994) (quoting *In re Wines*, supra), *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988).

Respondent's misconduct involved failure to provide accountings, failure to refund unearned advanced fees, and failure to respond to the State Bar's screening investigations. There are a number of prior cases which involve sanctions imposed for violations of ERs 1.16(d) and 1.15(b). However, none of the cases are exactly on point as they involve other violations, and different aggravation and mitigation. None, as well,

involve the specific facts of the present case. Nonetheless, the cases are instructive.

First, there are numerous cases in which a lawyer basically abandoned the practice of law, and failed to make refunds of unearned fees in multiple client matters. See, e.g., *Matter of Hessinger*, SB-99-0082-D (2000), and *Matter of Flynn*, SB-00-0046-D (2000), in which the respondent lawyers were disbarred. Although some of the same rule violations were involved in those matters as in this case, the facts are distinguishable. In the present case, Respondent did not abandon his clients. Respondent notified the clients ahead of time of the firm's closure, and was granted leave to withdraw by the courts in the cases. Respondent assisted in transition of clients to the Schloss Law Firm.

There are also numerous cases involving the same ERs in which a finding of knowing conversion of client funds was present. See, e.g., *Matter of Turnage*, SB-03-0025-D, in which the lawyer was disbarred for converting settlement funds of clients in multiple courts. Again, these cases are distinguishable from the present matter as the Respondent in this case did not knowingly convert client monies that should have been held in trust. Rather, Respondent was negligent in his closure of his law firm. All of the fees charged by Respondent were earned upon receipt. However, Respondent did not protect the clients' interests in failing to make timely refunds after withdrawing from the representation.

Several other cases may be instructive. In *Matter of Silkey*, the lawyer was suspended for four years for misconduct in several client matters. In *Matter of Weisling*, SB-01-0038-D (2001), the attorney received a two-year suspension for misconduct in three matters, including violations of ERs 1.15, 1.16(d), and Rule 51(h). It should be noted that *Weisling* also involved several other violations, and the attorney had a prior suspension.

Based upon the foregoing, a four-year suspension is an appropriate, proportionate sanction. Probation

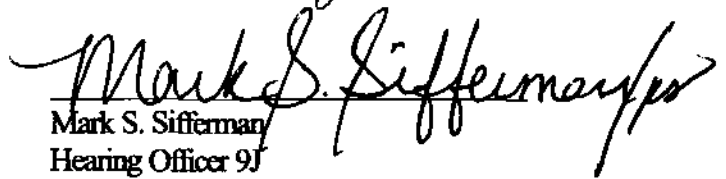
upon any reinstatement is also appropriate.

RECOMMENDATION

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionally analysis, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent providing for the following:

1. Respondent shall be suspended for a period of four years. The suspension should not be retroactive. The suspension, rather, should begin when the final order is issued in this matter.
2. Respondent shall immediately enter into a contract with LOMAP for the limited purpose of monitoring his retention and return of client files. Respondent must contact LOMAP within ten days of the date of the final order.
3. Upon any reinstatement, Respondent shall be placed on additional probation for two years. The terms of that probation shall be determined at the time of Respondent's reinstatement.
4. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information of such a violation, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.
5. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 19th day of August, 2004.


Mark S. Sifferman
Hearing Officer 9J

Original filed with the Disciplinary Clerk
this 19th day of August, 2004.

Copy of the foregoing mailed
this 19th day of August, 2004, to:

Kenneth J. Whitehead
Respondent
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and

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By: P. Williams