BEFORE THE PRESIDING DISCIPLINARY JUDGE OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED MEMBER OF THE STATE BAR OF ARIZONA, **STANDFORD E. LERCH, Bar No. 001287,** Respondent.	**PDJ-2011-9061** **REPORT AND ORDER IMPOSING SANCTIONS** [State Bar File No. 11-3768]

On October 12, 2012, the Hearing Panel composed of Bruce M. Brannan, a public member from Maricopa County, Harlan J. Crossman[1], an attorney member from Maricopa County, and the Honorable William J. O'Neil, Presiding Disciplinary Judge ("APDJ") held a one day hearing pursuant to Supreme Court Rule 58(j), Ariz.R.Sup.Ct. Stacy L. Shuman appeared on behalf of the State Bar of Arizona ("State Bar") and Mark Harrison appeared on behalf of Stanford Lerch ("Respondent"). The Panel considered the testimony[2], the admitted stipulated exhibits, the parties' Joint Pre-Hearing Statement, the parties' individual prehearing memorandums and evaluated the credibility of the witnesses. The PDJ and Hearing Panel ("Panel") now issue the following "Report and Order Imposing Sanctions," pursuant to Rule 58(k), Ariz.R.Sup.Ct.

[1] Mr. Crossman disclosed a possible conflict of interest to the parties, which was waived.
[2] Mr. Lerch was prepared to provide additional testimony from witnesses, however, the Panel suggested that live testimony was not necessary and Mr. Lerch agreed to provide that testimony, if any, by way of post hearing memorandum.

I. SANCTION IMPOSED:

ATTORNEY SUSPENDED FOR TWENTY (20) MONTHS RETROACTIVE TO FEBRUARY 16, 2012, THE DATE OF INTERIM SUSPENSION; UPON REINSTATEMENT, TWO YEARS OF PROBATION WITH TERMS AND CONDITIONS TO BE DETERMINED AT THE TIME OF REINSTATEMENT; AND COSTS.

II. PROCEDURAL HISTORY

Mr. Lerch was admitted to the practice of law in Arizona on September 23, 1961. For misappropriating client funds Mr. Lerch stipulated to be placed on interim suspension effective February 16, 2012 and remains suspended. A Probable Cause Order was filed on March 13, 2012. The Complaint was filed on June 26, 2012 alleging violations of ERs 1.15, 8.4(b), 8.4(c) and 8.4(d). The parties filed their Joint Prehearing Statement on October 3, 2012. The State Bar and Mr. Lerch both filed separate Pre-Hearing Memorandums on October 5, 2012. A hearing on the merits was held on October 12, 2012, in Phoenix, Arizona. There is no dispute regarding the factual basis of the underlying factual allegations in the matter. Mr. Lerch requested a six month suspension and the State Bar sought disbarment.

III. FINDINGS OF FACT

1. At all times relevant, Mr. Lerch was a lawyer licensed to practice law in the state of Arizona, having first been admitted to practice in Arizona on September 23, 1961.

2. On February 9, 2012, the Supreme Court of Arizona ordered that Mr. Lerch be suspended from the practice of law effective February 16, 2012 ("Interim Suspension"), and that such suspension shall remain in effect until final disposition of all pending proceedings against him, unless earlier vacated or modified.

3. Effective July 7, 2011, Mr. Lerch and the State Bar of Arizona entered into Agreement for Discipline by Consent (the "Agreement") in PDJ 2011-9010 whereby Mr. Lerch was reprimanded and ordered to pay restitution to Jon and Elizabeth Tucker for violating ER 1.8(a) (conflict of interest).

4. On January 7, 2011, Mr. Lerch's clients, Alan and Linda Levine (the Clients) filed a chapter 11 Bankruptcy petition, Case No. 2:-11-bk-00481-JMM (the Bankruptcy Proceedings). Mr. Lerch and his associate, Joseph Hinrichsen ("Hinrichsen") were counsel of record for the Clients.

5. Mr. Hinrichsen had been very involved in negotiating a settlement for the Clients with one of their major creditors, Michael Kaplan ("Kaplan"). Mr. Kaplan was represented by Attorney Gregory Gillis of Nussbaum, Gillis & Dinner, P.C. (Gillis).

6. Prior to the bankruptcy filing, Mr. Kaplan, through counsel, garnished and froze approximately $200,000.00 that was being held by the Clients in a Charles Schwab account.

7. After the initiation of the Bankruptcy Proceedings and prior to retaining Mr. Gillis, Mr. Kaplan filed a non-dischargeable action. Mr. Kaplan thereafter retained Mr. Gillis to represent his interests in the Bankruptcy Proceedings, including the non-dischargeable action.

8. Mr. Gillis filed a motion with the Bankruptcy Court to have the previously garnished funds transferred from the debtor-in-possession account into Mr. Lerch's Trust Account.

9. The Bankruptcy Court granted the motion, and $183,096.14 was transferred from the Clients' debtor-in-possession account into Mr. Lerch's Trust Account.

10. The parties negotiated a settlement that was ultimately reduced to a written settlement agreement and approved by the Bankruptcy Court as part of the confirmation of the Clients' First Amended Plan of Reorganization.

11. Upon the expiration of the deadline to appeal the Confirmation Order and Order approving Settlement Agreement, $155,000.00 was to be wired from Mr. Lerch's Trust Account to Mr. Gillis's trust account.

12. Mr. Hinrichsen advised Mr. Lerch of the details of the settlement and when the funds were to be transferred from the Trust account and into Mr. Gillis's trust account for transfer to or for the benefit of Mr. Kaplan.

13. On November 10, 2011, Mr. Gillis' legal assistant, Sue Harl ("Harl"), sent Mr. Lerch and Mr. Hinrichsen an email with updated trust account information for the wire transfer.

14. Mr. Lerch responded to the email that day advising that he believed that the funds were to be transferred on November 23, 2011, and not November 22, 2011.

15. On November 18, 2011, Mr. Lerch filled out Check No. 1035 drawn on his Trust account and made it payable to Molever Connelly PLLC and Jon and Elizabeth Tucker in the amount of $81,473.92. On the memo line of the check was written "Re Settlement." Attorney Loren Molever was counsel for the Tuckers. This amount reflected the final payment due under the Agreement for Discipline by Consent in PDJ-2011-9010.

16. On November 21, 2011, Mr. Lerch's office administrator, Margie Shapiro (Shapiro), again requested specific information relating to the wire transfer and acknowledged that "it is my understanding that the wire transfer will be done this Wednesday, November 23rd."

17. Ms. Harl responded to the email that day by again providing wiring instructions. Ms. Shapiro acknowledged the email an hour later, stating "Sue—perfect. Thank you."

18. On November 23, 2011, John Parzych (Parzych), an attorney in Mr. Gillis' office, called Mr. Lerch's office and left a voice mail requesting that the settlement funds be wired to Mr. Gillis' trust account before the 2:00 p.m. wire transfer cut-off deadline.

19. On November 23, 2011, at 11:12 a.m., Mr. Parzych sent Ms. Shapiro an email providing the wiring instructions and stating "I would be appreciative if you could please let me know after the $155,000.00 transfer has been made today so I can follow up and verify receipt with our bank prior to the [Thanksgiving] holiday."

20. At 2:10 p.m. that day, Mr. Gillis called Mr. Lerch's office at which time Ms. Shapiro stated that she had issued a trust fund check and had given the check to Mr. Lerch who would deliver it to Mr. Gillis' office.

21. At 4:41 p.m., Mr. Gillis sent an email to Mr. Lerch and Ms. Shapiro advising that the funds had yet to be wired or a trust check delivered to his office as promised.

22. On November 28, 2011, Mr. Lerch emailed Mr. Gillis, stating that "we will get you the funds today." Mr. Gillis responded and requested that the funds be wired into the trust account rather than delivery of Mr. Lerch's trust check.

23. On November 28, 2011, Mr. Hinrichsen received an email from Mr. Gillis stating that the funds had not been transferred. Mr. Parzych also spoke with Mr. Hinrichsen that day regarding why the settlement funds had not been wired. Mr. Hinrichsen stated that he did not know why the wire transfer had not yet occurred.

24. Mr. Hinrichsen immediately went to Ms. Shapiro, who advised that she had discovered that the funds were missing from the Trust account the previous week and that Mr. Lerch had told her not to tell anyone because Mr. Lerch thought the withdrawn funds would be "covered" by a loan he was negotiating.

25. According to Ms. Shapiro, when it had come time to pay the Clients' settlement, approximately $80,000.00 was missing from the Trust account and the final payment due under the Settlement Agreement could not be made.

26. Mr. Hinrichsen then called Mr. Lerch to confirm what had happened. Mr. Lerch admitted that he had withdrawn the funds in the expectation that replacement funds were imminently forthcoming and in order to satisfy an obligation to pay another party pursuant to a prior settlement agreement. Mr. Hinrichsen told Mr. Lerch that he would be resigning from the Firm and asked about replacement funds to protect the Clients' interests. Mr. Lerch stated that he was in the process of securing the funds necessary to satisfy the obligation to the Levines pursuant to the Settlement Agreement.

27. Also on November 28, 2011, Mr. Gillis called Mr. Lerch's office and spoke to Ms. Shapiro who stated that Mr. Lerch had the flu and that he had left the office for the day. Mr. Gillis requested that Ms. Shapiro contact Mr. Lerch by cell phone. Ms. Shapiro called Mr. Gillis back and reported that Mr. Lerch had indicated that he was too sick to deal with the problem.

28. On November 29, 2011, Mr. Lerch called Mr. Gillis's office and advised that Ms. Shapiro was out-of-the office, but that he would try to wire the funds that day. Mr. Gillis reminded Mr. Lerch of the 2:00 p.m. wire transfer cutoff deadline.

29. On November 29, 2011, Mr. Hinrichsen wrote a letter of resignation from Mr. Lerch's firm.

30. Mr. Hinrichsen also met with Mr. Lerch that day, at which time Mr. Lerch confirmed what he had previously admitted to Mr. Hinrichsen and admitted that it was a serious mistake. Mr. Lerch also told Mr. Hinrichsen that he would understand whatever action Mr. Hinrichsen believed he should take in light of these events to satisfy Mr. Hinrichsen's ethical obligations.

31. Also on that date at 5:23 p.m., Mr. Gillis filed a Motion to Enforce Settlement Agreement and Notice of Debtors' Default Under Terms of the Confirmed Plan of Reorganization (Motion to Enforce) because Mr. Lerch had not transferred the settlement funds.

32. By letter dated November 30, 2011, Mr. Hinrichsen reported Mr. Lerch's actions to the State Bar. Mr. Hinrichsen told Mr. Lerch what he had done in order to give Mr. Lerch the chance to explain the situation to the Clients and to everyone involved in the situation. At that time, Mr. Lerch told Mr. Hinrichsen that he was still attempting to obtain replacement funds.

33. Also on that date, Mr. Hinrichsen advised the Clients of Mr. Lerch's actions. Client Alan Levine confronted Mr. Lerch later that day, at which time Mr. Lerch admitted that he had taken the funds, but claimed that he expected to be able to replace the funds by the time they were to be paid to Mr. Kaplan. Mr. Lerch told the Client that he had taken the funds out of the Trust account on the 23rd or 25th of November 2011.

34. Mr. Lerch had instituted efforts in October 2011 to obtain a loan from AmeriCapital and expected it to be issued and funded before the date on which payment was due to Mr. Gillis' client.

35. On December 1, 2011, Mr. Hinrichsen called Mr. Gillis, with the Clients' permission, to advise him that approximately $80,000.00 of the money held in Mr. Lerch's trust account on behalf of the Clients had been "borrowed" by Mr. Lerch. Mr. Hinrichsen advised that he had reported the matter to the State Bar. Mr. Hinrichsen also stated that he would be filing a response to the Motion to Enforce Settlement, as well as withdrawing as counsel for the Clients, and that his last day of employment with Mr. Lerch's firm would be December 2, 2011.

36. Also on that day, Mr. Gillis advised Mr. Kaplan regarding the apparent diversion of $80,000.00 of trust fund monies to be paid to or for the benefit of Mr. Kaplan from Mr. Lerch's trust account.

37. On December 1, 2011, Mr. Hinrichsen filed a Response to the Motion to Enforce stating that "Stanford Lerch . . ., the senior partner of Lerch & Associates, had withdrawn a large sum of money out of the Trust Account, totaling roughly $80,000.00. This left Lerch & Associates unable to pay the full $155,000.00 per the settlement agreement."

38. By letter dated December 1, 2011, Bar Counsel sent Mr. Lerch a screening letter regarding the allegations received from Mr. Hinrichsen.

39. On December 2, 2011, Ms. Shapiro emailed Mr. Gillis advising that $75,000.00, which was the balance of the Clients' funds remaining in Mr. Lerch's Trust Account, would be wired to Mr. Gillis's office and that Mr. Lerch ". . . instructed me to let you know that he anticipates the balance of the funds will be received early next week."

40. That day, a wire transfer in the amount of $75,000.00 from Mr. Lerch's trust account was made to Mr. Gillis' trust account, thereby making a partial payment of the $155,000.00 settlement amount due.

41. On December 5, 2011, Mr. Gillis sent an email to Mr. Lerch acknowledging receipt of the $75,000.00 and making a demand for the remaining $80,000.00 due under the terms of the Settlement Agreement.

42. Later that day, Mr. Lerch emailed Mr. Gillis stating "I anticipate the closing, which was to have taken place prior to the 23rd, to take place tomorrow. I will give you a call later to confirm."

43. On December 7, 2011, Mr. Gillis sent Mr. Lerch an email advising that the $80,000.00 had not been received and advising that if it was not received by Thursday, December 8, 2011, by 2:00 p.m., an Emergency Motion Pursuant to 11 U.S.C. § 105 and Local Rule 9013-1 for Expedited Hearing on Creditor Michael Mr. Kaplan's Motion to Enforce Settlement Agreement and notice of Debtor's Default Under Terms of Confirmed Plan of Reorganization (the Emergency Motion) would be filed with the Bankruptcy Court.

44. On December 8, 2011, Mr. Lerch emailed Mr. Gillis asking that he "please hold off until tomorrow. I believe everything is set, however, it would be appreciated if I could have until 2:00 p.m. on Friday the 9th for the funds to be wire transferred." Mr. Gillis, with his client's approval, agreed to the request.

45. On December 9, 2011, Mr. Gillis filed the Emergency Motion when Mr. Lerch failed to wire transfer the remaining funds due under the Settlement Agreement.

46. On December 15, 2011, the Bankruptcy Court entered an order approving the Motion to Enforce, without a hearing, and directed the Clients to cure their default within three (3) days. The Court further ordered that Mr. Kaplan be allowed to file an application for attorney's fees and costs related to the Motion to Enforce.

47. Mr. Gillis sent a copy of the Bankruptcy Court's order to Mr. Lerch and advised that the funds would have to be wire transferred on or before 2:00 p.m. on December 19, 2011, in order to comply with the order. In response, Mr. Lerch sent Ms. Harl an email stating "I intend to have the funds transferred by wire prior to December 19." Mr. Lerch failed to do so.

48. By letter dated December 19, 2011, Mr. Gillis also reported Mr. Lerch's actions to the State Bar.

49. By letter dated December 20, 2011, Attorney Molever, counsel for the Complainants in PDJ-2011-9010, advised Bar Counsel that he was put on notice by the Clients' pre-bankruptcy counsel, William J. Simon, that Mr. Lerch's payment to the Tuckers dated November 18, 2011, and drawn on Mr. Lerch's Trust account, was allegedly sourced with the Clients' funds, which were being held on deposit

pursuant to the order of the Bankruptcy Court. Attorney Molever, who had already deposited the funds into his trust account, did not disburse the funds to the Tuckers pending a resolution of the issue.

50. By letter dated December 21, 2011, Mr. Lerch responded to Bar Counsel's screening letter and admitted that the Clients' funds "were improperly used, although [he] believed that funds from a closing regarding a personal loan would be wire transferred to the account." He further stated that he "was not aware that the closing did not take place," and that he was "seriously negligent in allowing this to happen." Mr. Lerch also provided Bar Counsel with bank statements for his Trust Account including a copy of Check No. 1035, dated November 18, 2011 and made payable to Molever Connelly PLLC and Jon and Elizabeth Tucker in the amount of $81,473.92.

51. Mr. Lerch's payment to Jon and Elizabeth Tucker, made by check no. 1035, was the final payment due under the Agreement for Discipline by Consent effective July 7, 2011 (see item 3, above).

52. On December 27, 2011, Mr. Lerch repaid $39,405.00 of the misappropriated funds. Mr. Lerch wired these funds to Mr. Gillis's trust account.

53. On January 6, 2012, Bar Counsel filed a Motion for Interim Suspension.

54. On or about January 23, 2012, Mr. Lerch filed a Response to Motion for Interim Suspension in which he "acknowledge[d] that he did, in fact, although in the belief that sufficient funds were available in a closing which he believed had taken place, utilized, improperly, a client's funds for his own use." He further asserted that "approximately $40,000.00 of the funds ha[d] been replenished and .

. . the remainder of the funds [were] expected to be funded within two (2) weeks based upon the sale of certain securities."

55. On February 1, 2012, the Presiding Disciplinary Judge conducted a hearing on the Motion for Interim Suspension. At that time, Mr. Lerch consented to the interim suspension, which became effective on February 16, 2012.

56. After the hearing, Mr. Lerch advised Bar Counsel that he had agreed to pay Mr. Kaplan's reasonable attorney's fees incurred as a result of Mr. Lerch's actions. He had advised Mr. Gillis of his intention to pay Mr. Kaplan's "reasonable fees" in an email dated December 15, 2011, and in that email also confirmed his ongoing discussions with bar counsel and his intention "to cooperate fully with the bar association."

57. On March 28, 2012, the Bankruptcy Court entered an order authorizing Attorney Molever to release the funds that he had received from Mr. Lerch.

58. On March 29, 2012, Molever sent the Tuckers a check for $81,473.92.

59. Mr. Lerch satisfied the obligation owed to Mr. Kaplan pursuant to the Settlement Agreement in the amount of $155,405 in payments as follows: $75,000 on December 2, 2011; $39,405 on December 28, 2011; and $41,000 on March 23, 2012.

60. As a result of his actions, Mr. Lerch's former firm and Mr. Hinrichsen were sued *pro per* by Mr. Kaplan in federal district court. Motions to dismiss the case have been filed and are pending. To date, Mr. Hinrichsen has incurred only the cost of filing fees and if the pending motion to dismiss Mr. Hinrichsen from the suit is denied, he has offers to be represented *pro bono* if the suit proceeds against him.

61. Throughout his career, Mr. Lerch has devoted a substantial amount of time to bettering the profession through service in a numerous leadership positions at the state and national level. At the state level, these leadership positions include service as Chair of the Young Lawyers Section of the State Bar; Chair of the Bankruptcy Section of the State Bar (6 years); Secretary, Treasurer and Vice-president of the State Bar and a member of the Board of Governors or the State Bar from 1971to 1977. In addition, Mr. Lerch represented the State Bar in the ABA House of Delegates as State Bar Delegate for 8 years and State Delegate for three years. Mr. Lerch also served as the State Bar representative on the Judicial Selection Advisory committee of the City of Phoenix.

62. Mr. Lerch was elected by his peers at the state and national level to represent them in the ABA House of Delegates for nearly 20 years--as the delegate from the Young Lawyers Section of the ABA; the State Bar of Arizona, as Assembly ("at-large") Delegate and the Family Law Section of the ABA.

63. Mr. Lerch served on the Council of the Family Law Section of the ABA and ultimately served as Chair of the Section which was comprised of approximately 14,000 members at the time. Mr. Lerch then was elected to serve on the Council of the General Practice Section of the ABA and in addition to these significant leadership positions, he served as a member and Chairman of the By-Laws Committee of the ABA and as a member and Chairman of the ABA Committee on Scope and Correlation of Work.

64. Mr. Lerch's civic and charitable service includes involvement in the Active 20-30 Young Man's Service organization in which he ultimately became the International President. Mr. Lerch served for approximately 12 years on the YMCA

Youth in Government Committee--this Committee conducted a program in which young leaders simulated leadership positions in state government and conducted legislative sessions. Mr. Lerch served on the University of Arizona Alumni Board for 8 years and received the A. Louis Slonaker Award for the Outstanding Alumnus who had graduated less than ten years prior to receiving the award. He also served as a Founding Member and member of the Board of Directors of the PAK Foundation which was established to train high school students to become leaders and have alternatives to drugs and delinquency.

65. In service of his church, Mr. Lerch served on committees at All Saints Episcopal Day School where his children attended school and taught Sunday school for four years at St. Barnabas before moving from Scottsdale to Phoenix.

66. In service of his country, Mr. Lerch served in the U.S. Army from 1953-1956 during the Korean War. He was stationed in Thule, Greenland, assigned to anti-aircraft artillery and was ultimately given an honorable discharge.

Testimony of Witnesses

Testimony of Stanford Lerch

Mr. Lerch described the facts underlying the Agreement entered into with the State Bar in 2011. He had borrowed $100,000 from his clients the Tuckers, signing two promissory notes, one in the amount of $30,000 and one in the amount of $70,000. He needed the loan to make payments on obligations related to his property in Jerome, Arizona. At the time the loan was made the Tuckers owed Mr. Lerch approximately $96,000 in fees. Mr. Lerch failed to make payments on the notes when due, although he believes that there was never any intention that he repay the loans because they offset the fees owed to him. However the Tuckers

sued Mr. Lerch to recover the money, and also filed a Bar complaint. The Bar complaint was resolved with restitution ordered, and the law suit was eventually settled. The Tuckers agreed to participate in fee arbitration for what were now legal fees owed to Mr. Lerch of $126,000.

The terms of restitution included payment to the Tuckers of $7,000 plus interest in ten days, followed by $70,000 plus accrued interest not later than October 9, 2011. In September of 2011 with the final payment approaching, Mr. Lerch did not have the funds to satisfy the payment. He approached Brian Winski of AmeriCapital, with whom he had conducted previous financing transactions for a $100,000 loan. Collateral considered for the proposed loan was accounts receivable and certain stock holdings. Although he was never promised a date certain, Mr. Lerch believed that the loan would be available in time to satisfy his required payment to the Tuckers. A problem then developed with the collateral, delaying the loan. As of October 9, 2011, the due date of his payment to the Tuckers, Mr. Lerch still did not have the funds to satisfy the required payment.

As weeks without payment to the Tuckers slipped by, Mr. Lerch continued pressing Mr. Winski to get the loan, and remained encouraged that the funds would be imminently available. The Tuckers' attorney was threatening to go to the Bar and disclose that Mr. Lerch had not made the $70,000 payment called for by the Agreement. Mr. Lerch tried to settle the legal fee counterclaim with the Tuckers. When no settlement could be reached, Mr. Lerch took the money from his client trust fund and paid the Tuckers. The money in the client trust fund belonged to another client, Al Levine, and was to settle Chapter 11 proceedings in favor of a Mr. Mr. Kaplan.

Mr. Lerch's bookkeeper noticed that money was missing from the client trust fund, and questioned him about it, as a payment was imminently due to Mr. Kaplan. Mr. Lerch told his bookkeeper he was planning to replace the funds and told her not to say anything to anyone. The bookkeeper informed Mr. Lerch's associate Mr. Henrickson about the improper withdrawal of the funds, who advised Mr. Lerch that he was resigning from the law firm and would report the incident to the Bar.

Mr. Lerch met with Al Levine that same day and informed him he did not have the funds to make the payment due to Mr. Kaplan because he had improperly used those funds. He told Mr. Levine that he knew that this was a serious violation, for which he could be disbarred or suspended. Mr. Lerch told Mr. Levine he would do everything he could to make sure that all the funds were replaced and no harm was suffered.

During the summer of 2011 when Mr. Lerch entered into the State Bar Agreement for Discipline by Consent on the loan matter with the Tuckers, he was also diagnosed with advanced prostate cancer. Doctors recommended a treatment course of Lupron injections followed by cryonic surgery. Mr. Lerch was prescribed Ativan, a drug generally used for the relief of anxiety[3]. The surgery was conducted either the same day or the day after Mr. Lerch's Interim Suspension (for taking client funds) became effective in February of 2012. Mr. Lerch believes that from the time he was diagnosed with cancer his decisions were not well-founded, and he was not functioning as well as he had previously. He believes he was clinically depressed and that his doctor shared that opinion, but acknowledges he was never

[3] According to the U.S National Library of Medicine at the National Institutes of Health website, at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000560/ (last visited October 25, 2012).

depressed and that his doctor shared that opinion, but acknowledges he was never diagnosed as such. The withdrawal of the trust funds occurred in November at the time when he was aggressively dealing with his cancer.

Mr. Lerch does not recall ever saying that the withdrawal was accidental. It was intentional, and he knows that it was an ethical violation. He also admits that he made an untrue statement to the State Bar in his December 2011 informal response to charges by claiming that he believed the funds he misappropriated were covered by a wire transfer from a loan closing, and that he was unaware that the loan closing had not taken place. He does not understand why he didn't call his attorney when confronted by the realization that he could not make his payment under the Agreement. Mr. Lerch also cannot explain why a lawyer of his experience and background would commit a violation of this kind. He has been trying to figure out since he inappropriately used the funds why he would do such a thing. He always felt that the loan funds would be forthcoming any day, but in retrospect acknowledges that this was wholly unrealistic.

Mr. Lerch believes that mitigating factors in the Agreement for Discipline by Consent on the loan matter from last summer were remorse, full and free disclosure, cooperative attitude towards proceedings, willingness to repay loans, and character. All of these factors he asserts again today in the instant matter. Bar counsel queries how often a person should be allowed to assert the same mitigating factors to explain unethical behavior. Mr. Lerch notes that he feels the same way now, and is remorseful. He recognizes that he would not be able to continue to commit violations.

Mr. Lerch described his support of church and civic activities, including many years with his church, the YMCA student government program, the alumni association of the University of Arizona, the State Bar, and 20-30 International Service Club, ultimately becoming International President of the latter organization with approximately 100,000 members.

Over his years of legal practice, Mr. Lerch has also been very active in the State Bar of Arizona. He served as chairman of the Young Lawyers section, resurrected the bankruptcy section, was elected to the Board of Governors where he served six years as in various roles of Treasurer, Secretary and First Vice President. Mr. Lerch also served as a delegate for eight years for the State Bar, the State delegate for three years, and the assembly delegate for nine years. He became very active in certain sections of the American Bar Association, including Young Lawyers, chairing the 14,000 member Family Law section, and the general practice section where he served on the counsel. Mr. Lerch chaired several committees of the ABA.

Mr. Lerch stated that the events of the past year have been very difficult. He is a paralegal now and finds it difficult to explain to his family. It has been embarrassing. He feels deep remorse, humiliation, and shame. He cannot see his friends. He feels he has been depressed. He still cannot explain how he was able to improperly use funds. He does want to practice again if he is able to reinstate because he wants to pay for his mistakes and improper conduct. He has no estate to speak of; his home equity is gone, he has no retirement plan as such. If he is able to reinstate he will work for Mr. Goodson, for whom he now works as a

paralegal, and will have no access to or responsibility for client trust funds. He loves the practice of law.

Testimony of Robert Kennedy, Esq.

Mr. Kennedy established his credentials as a 30 year member of the State Bar of Arizona, and his extensive history with Mr. Lerch as a colleague, friend and mentor. He noted that he too had been through prostate cancer and was aware that Mr. Lerch was quite anxious about his diagnosis in 2011. In over thirty years he has never known Mr. Lerch to commit any other unethical or dishonest act. He continues to stand by his support of Mr. Lerch, feeling that the behavior was an aberration and out of character with his values. Mr. Kennedy would refer clients to him in the future without fear that Mr. Lerch would again take money from a trust account.

Testimony of Alan Wilson, Esq.

Mr. Wilson established that he worked with Mr. Lerch directly for ten years, and has known him for thirty years. He neither condones nor excuses Mr. Lerch's conduct, but believes it occurred out of the circumstances Mr. Lerch was going through at the time. He too continues to stand by his support of Mr. Lerch, initially expressed in June of 2011. He believes that Mr. Lerch's conduct was completely out of character, and that Mr. Lerch would not engage in that type of conduct again. He found Mr. Lerch to be a tireless supporter of his clients and to put their interests first. He believes that the stress and anxiety of the cancer diagnosis and the medications he was on, as well as the financial stress occurring at that time, led to the unethical actions of Mr. Lerch. He believes that sanctions are warranted but

believes that the sanction should be appropriate. He believes disbarment is not appropriate under the circumstances.

Testimony of Brian R. Winski[4]

Mr. Winski has known Mr. Lerch for approximately fifteen years, and was at one time a partner of his. Mr. Winski is now a mortgage banker. He believes he was contacted by Mr. Lerch in September or early October of last year regarding a loan. Mr. Lerch was not required to submit an application because of Mr. Winski's familiarity with Mr. Lerch and because it was to be a "different type of loan." Mr. Winski's understanding was that Mr. Lerch owed money he needed to repay. Although he initially believed that the loan would be available in the time period requested by Mr. Lerch, it became apparent that there was a technical problem with title to the stock which would be the collateral for the loan. The loan was finally approved in mid to late December using other collateral (the Jerome property).

Mr. Winski believes that Mr. Lerch had a good faith basis for some period of time to justify his belief that he would get the loan in time, but that at some point in time it became clear that the collateral would not work. Mr. Lerch began to explore other types of collateral that could support the loan and in late December the loan did close with the Jerome property serving as collateral.

IV. CONCLUSIONS OF LAW

Mr. Lerch violated the ethical rules by misappropriating approximately $80,000.00 from his client trust account, which belonged to his client Al Levine, and converting those funds for his own benefit. Mr. Lerch used his client's funds to

[4] The Panel notes that Mr. Winski was suspended from the practice of law in Arizona on September 30, 2002.

make the final payment due the Tuckers under the Agreement for Discipline by Consent filed in separate matter PDJ-2011-9010.

Mr. Lerch violated ERs 1.15 (safekeeping property); 8.4(b) (commission of a criminal act); 8.4(c) (knowingly engaged in conduct involving dishonesty, fraud, deceit or misrepresentation); and ER 8.4(d) (conduct prejudicial to the administration of justice).

V. SANCTIONS

ABA *STANDARDS FOR IMPOSING LAWYER SANCTIONS*

In determining an appropriate sanction, the hearing panel shall consult the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*"). Rule 58(k), Ariz. R. Sup. Ct. Consideration is given to the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770 (2004); *Standard* 3.0. A Hearing Panel also may conduct a proportionality analysis "if appropriate." Rule 58(k), Ariz. R. Sup. Ct.

Standard 4.1, Failure to Preserve the Client's Property is applicable to Mr. Lerch's violation of ER 1.15. *Standard* 4.11 provides that Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

Standard 5.1, *Failure to Maintain Personal Integrity* provides that absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty,

fraud deceit, or misrepresentation. This applies to Mr. Lerch's violations of ERs 8.4(b) and 8.4(c).

Standard 5.11 (a) provides that Disbarment is generally appropriate when: a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft: or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

Standard 5.11(b) provides that Disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 5.12 provides that Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Standard 6.0 is applicable to Mr. Lerch's violation of ER 8.4(d), conduct prejudicial to the administration of justice. 6.1 False Statements, Fraud, and Misrepresentation provides that Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes serious or potentially serious adverse effect on the legal proceeding.

Standard 6.12 provides that Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Panel determined that Disbarment is the presumptive sanction and there was actual injury to clients and the legal system.

Aggravating and Mitigating Factors

The Panel finds that aggravating factors under *Standard* 9.22 are: (a) prior disciplinary offense in 2011 in which Mr. Lerch was ordered to pay restitution to Jon and Elizabeth Tucker; (b) a dishonest or selfish motive; and (i) substantial experience in the practice of law.

Mitigating factors are: *Standard* 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to the disciplinary board and cooperative attitude toward proceedings, and (l) remorse.

While we recognize that Mr. Lerch was experiencing the stress of his recent cancer diagnosis, there is no evidence of a direct causation and therefore this factor is classified under mitigating factor 9.32(c), personal and emotional problems. In consideration of non-ABA mitigating factors, the Panel finds and gives great weight to the fact that Mr. Lerch practiced law for over 50 years without incident and his many and significant contributions to the profession.

The Panel determined that a reduction in the presumptive sanction of Disbarment to Suspension is justified.

VI. DISCUSSION

Under the *Standards*, the Panel finds that the presumptive sanction in this matter is disbarment. The *Standards* are a model of lawyer discipline that intentionally leave room for flexibility, and require that the particular circumstances of each case be considered. *Standards*, I. Preface. The sanction imposed in a particular matter must address the purposes of lawyer discipline, and the aggravating and mitigating factors. *Id.* The model is built upon an analysis of the duty owed, and to whom; in conjunction with consideration of the lawyer's mental state in committing the unethical act and the extent of injury caused. *Id.* Therefore we examine the duties violated, the impact to clients and the profession, the mental state of Mr. Lerch at the time he committed the ethical infractions, and the aggravating and mitigating factors present in this matter.

The Duty Violated

Mr. Lerch violated his duty to his clients, the public, and the legal system. The most important duty is the duty owed to clients. *Standards*, II. Theoretical Framework. Mr. Lerch's conversion of a significant amount of client funds is weighty; however he used the Levine's funds with the intent of replacing them before they were needed. In other words this was never intended to be a permanent conversion or theft, and the funds were repaid at the earliest possible opportunity. The Panel does not view the repayment as diminishing the wrongful nature of Mr. Lerch's act; it simply notes that repayment was intended from the outset.

Mental State

Mr. Lerch's mental state is examined to determine if the ethical violation was committed intentionally, knowingly, or negligently. In this matter Mr. Lerch acted intentionally or knowingly in each instance. Regarding the conversion of client funds, the Panel finds that this action was an intentional violation. Mr. Lerch however did not have the intent to permanently deprive client of those funds but he intentionally misled both the Tuckers and the State Bar regarding the impending payment of restitution under that agreement.

Injuries Caused

Mr. Lerch's action resulted in a five month delay in the Tucker's receipt of restitution funds, a delay in Mr. Kaplan's receipt of full bankruptcy settlement proceeds, additional legal fees being incurred by several parties, and the need for Mr. Henrickson to find new employment. Mr. Lerch has now made full restitution to the Tuckers; Mr. Kaplan has received the full bankruptcy settlement; and Mr. Henrickson has secured other employment. In addition Mr. Lerch has paid, refunded, or waived legal fees for all parties, with the exception of the fees to Mr. Kaplan which await a reasonability determination by the bankruptcy court.

CONCLUSION

We do not minimize the actions of Mr. Lerch. The wrongful taking of monies from a client strikes at the heart of the trust relationship between a lawyer and that client and the profession itself. While each individual attorney brings unique attributes to the profession there is a single culture of ethics that each attorney must follow. The Code of Professional Conduct is not discretionary. Ethics are a matter of action.

At the same time we measure a person by more than a moment's lapse. The object of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice. *Peasley, supra* at ¶ 64, 90 P.3d at 778. Both aggravation and mitigation offer what too often is over looked in life; perspective. If there is conduct that is egregious, we consider it in aggravation. If there is other conduct that demonstrates an ethical lifestyle, we consider that in mitigation. It is an unfortunate aspect of human frailty that one may abandon reasoning impulsively or thoughtlessly for a myriad of reasons. Such impulsivity or thoughtlessness does not lessen the ethical violation. However, we do not overlook for simplicity's sake the demonstrable benefit of a history of common sense, ethical behavior and decisions proven over time.

Mr. Lerch has not dodged the responsibility of his own disobedience. To the contrary he acknowledged his wrongdoing. Some attorneys need encouragement to think before they act. Others need encouragement to act after they think. Mr. Lerch failed in the former, not the latter. Regardless, the natural propensity to bend ethics in favor of impulsiveness is removed by training impulsivity into transformational instinct through discipline. An ethical life is accomplished only through a series of moral choices. We are convinced, as wrong as his actions were, that the actions of Mr. Lerch were aberrational. It is noteworthy that his client is of the same opinion.

Mr. Lerch believed he could remove the monies and replace them before being caught. He nearly did. It may be humiliating to fail to make a payment and to suffer financial loss. Uncertainty in difficult circumstances should always be resolved by obedience to the code of ethics not submission to the will. The Code of

Professional Responsibility does not keep us from temptation, however adherence to it sustains in the midst of such temptation. That this misappropriation of funds appears to be a onetime panic of the moment does not lessen its grievous error. It does however offer perspective. Mr. Lerch for reasons he acknowledges are inexplicable more than stumbled. It is not a lack ethical experience that led to his failure, but a lack of obedience and a breakdown that kept his eyes from being focused on the right goal; service to his client, the public and the profession.

The Hearing Panel considered the appropriate sanction using the facts admitted, the *Standards*, the aggravating and mitigating factors, and the goals of the attorney discipline system. The Panel finds that the mitigating factors merit sanctions as follows:

IT IS ORDERED:

1. Mr. Lerch shall be suspended from the practice of law for a period of twenty (20) months, retroactive to the date of the interim suspension of February 16, 2012.
2. Upon reinstatement Mr. Lerch shall be placed on two (2) years probation, conditions to be determined at such time.
3. Mr. Lerch shall pay all costs and expenses incurred by the State Bar and the Office of the Presiding Disciplinary Judge in this proceeding.
4. A Final Judgment and Order will be issued.

DATED this 8 of November.

The Honorable William J. O'Neil
Presiding Disciplinary Judge

CONCURRING:

Hanan J. Crossman, Volunteer Attorney Member

Bruce M. Brannan, Volunteer Public Member

Original filed with the Disciplinary Clerk this 8 day of November, 2012.

Copies of the foregoing mailed/emailed
this 8 day of November, 2012, to:

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