BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **HARRY E. CAWOOD,** **Bar No. 003769** RESPONDENT.	Nos. 01-1292, 02-1823 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

The State Bar filed a Complaint in File No. 01-1292 on June 25, 2002. Respondent filed an Answer on July 15, 2002. A hearing was then scheduled for November 20, 2002. On October 31, 2002, the parties filed a Request and Stipulation to Stay the matter. The Commission granted the Request and stayed the matter on November 5, 2002. On November 2, 2004, the parties filed a Request and Stipulation to Lift the Stay. The Commission granted the Request and the stay was lifted on November 8, 2004. The State Bar filed an Amended Complaint on November 22, 2004. Respondent filed an Answer to the Amended Complaint on December 20, 2004. The Settlement Officer conducted a settlement conference on March 25, 2005 and scheduled a second settlement conference for April 15, 2005. Subsequently, the parties reached an agreement and their desire to waive the second settlement conference; the Settlement Officer

then vacated the scheduled settlement conference. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on May 18, 2005. No hearing has been held in this matter.

FINDINGS OF FACT

1. Respondent was at all relevant times an attorney licensed to practice law in Arizona, having been admitted to the State Bar on October 5, 1974.

COUNT ONE – FILE NO. 01-1292

2. Lori Margolis retained Respondent to represent her in a divorce action. The divorce became final on September 15, 1999.

3. The last billing statement Respondent sent to Ms. Margolis reflected a balance due to her in the amount of $194.20.

4. Respondent did not return unearned fees to Ms. Margolis in the amount of $194.20 when the representation ended; Respondent believing that in the future Ms. Margolis wanted him to pursue having her former name restored.

5. Respondent sent a refund check to Ms. Margolis in the amount of $194.20 on August 21, 2001.

6. Respondent was asked to provide the State Bar with copies of: his client trust account bank statements from January 1999 through December 2000, Ms. Margolis's client ledger card, duplicate deposit slip showing the initial

deposit of the retainer into the firm trust account, and the $194.20 refund check. Respondent did not have copies of the requested trust account records due to the termination of his partnership with John McKindles, as discussed in Count Two.

COUNT TWO – FILE NO. 02-1823

7. Respondent first started practicing law in Arizona in 1980, in association with an attorney named John McKindles, first as the Cawood & McKindles partnership and later as Cawood & McKindles, P.C. (hereinafter generally "the firm"). That business relationship was terminated on or about December 31, 2001.

8. During the time that they worked in association with one another, Respondent and Mr. McKindles independently handled the preparation of bills to their separate clients as well as the collection of money and payment of refunds, when appropriate, to their separate clients. Both members had equal access to the firm's books, records and bank accounts.

9. From the start of their association until a few weeks prior to Respondent's departure, the firm's treatment of client funds was not maintained in compliance with ERs 1.15 and 1.16 and Rules 43, 44, and 51, Ariz. R. S. Ct.

10. Client retainers were routinely deposited in the firm's operating account, instead of its trust account. Settlement money and other client funds were deposited into the firm's trust account until the responsible lawyer made a

distribution consistent with the needs of the relevant case. Earned fees were routinely deposited in the firm's trust account and the trust account was used as a savings account. Required trust account records were not correctly maintained. Transactions were not promptly and completely recorded and disbursements were not always made by pre-numbered check. Monthly reconciliations between the trust account bank statements and the appropriate ledgers were not made. *See* Exhibit A to Tender, Staff investigator Leigh Ann Mauger's October 21, 2003 report.

11. Although he failed to ensure that client funds and the firm's trust account were managed in accordance with the governing rules, Respondent did not intentionally misappropriate client funds, and the available records do not show that his conduct caused lasting injury to any client.

12. In 2002, following the dissolution of his association with the Respondent, Mr. Kindles engaged a CPA to review his procedures for maintaining the client trust account. During this review, it was discovered that the following clients may have been owed refunds:

a. Betty Alisouskas;

b. Christopher Allan;

c. Robert Barry;

d. Anne Marie Cylkowski (NKA Heffernan);

e. Debbie Kelly;

f. Nancy Kovalik (NKA Picking);

g. Beverly Lloyd (NKA Conti);

h. Juanita Lombardi;

i. Andrea Moran;

j. Peggy Rector (NKA Power); and,

k. Theresa Stephens.

13. Respondent went back through his files and reconstructed client billing statements as best he could. Respondent has provided affidavits to support his contention that all funds that were held on behalf of these clients, except for two, were earned. *See* Exhibit B to Tender.

14. The last billing statements Respondent was able to locate indicate that Betty Alisouskas and Anne Marie Cylkowski (NKA Heffernan) had money in Respondent's trust account. Respondent was unable to reconstruct the billings for the time spent on the Alisouskas and Cylkowski cases after the two billings statements were sent. Respondent will pay them restitution of $474.00 and $515.00, respectively.

15. Respondent did not have copies of the requested trust account records due to the termination of his partnership with John McKindles; this was not due to an unwillingness to cooperate with the State Bar.

16. Respondent violated ER 1.15 by failing to ensure that client funds were kept separate from funds belonging to the firm and that complete records were kept and preserved for a period of five years.

17. Respondent violated ER 1.16 by not immediately refunding any advance payment of a fee that had not been earned.

18. Respondent violated Rule 43, Ariz. R. S. Ct., by failing to ensure that client funds were kept in a trust account separate from accounts containing funds belonging to the firm, failing to keep proper records of the firm's trust account, failing to maintain internal controls, failing to disburse from trust account only by pre-numbered check, and failing to conduct monthly reconciliations.

19. Respondent violated Rule 44, Ariz. R. S. Ct., by failing to ensure that all client funds were deposited into a trust account separate from accounts containing funds belonging to the firm.

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, specifically, ERs 1.15 and 1.16, and Rules 43 and 44, Ariz. R. S. Ct.

Because Respondent did not have copies of the requested trust account records due to the termination of his partnership with John McKindles, the State Bar conditionally dismisses the alleged violations of Rule 51, Ariz. R. S.C t.

ABA STANDARDS

The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (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 or mitigating circumstances. ABA *Standard* 3.0.

The parties indicated that *Standard* 4.1 is the most applicable in this matter. A review of ABA *Standard* 4.0 (Violations of Duties Owed to Clients) indicates that censure is the presumptive sanction for Respondent's misconduct. *Standard* 4.13 (Failure to Preserve the Client's Property) specifically provides:

> Reprimand (censure in Arizona) is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Respondent was negligent in failing to be aware of, familiarize himself with, and comply with the rules governing the treatment of client funds by attorneys. Respondent violated his duties to his clients by failing to observe the rules governing the treatment of client funds by attorneys. These rules are designed to ensure that a client's money is not put in jeopardy, or used or taken improperly, by the client's attorney. Although Respondent asserts that he was

merely negligent in failing to realize that his treatment of client funds was improper. He had an affirmative duty to familiarize himself with the rules governing his practice of law in Arizona. Respondent's failure to comply with the rules governing treatment of client funds exposed his clients to potential injury by causing their funds to be held without protection against depletion, and intentional or inadvertent misdirection as provided in ER 1.15 and ER 1.16 and Rules 43, 44, and 51 Ariz. R. S. Ct.

If this matter were to proceed to a hearing, Respondent would take the position that his conduct caused no actual harm to any client and exposed his clients to minimal potential harm at worst, and that he quickly and diligently reported and corrected the non-compliance upon discovering it. The State Bar would take the position that Respondent's failure to be aware of and comply with these rules exposed his clients to significant potential injury. Additionally, there was actual injury to three clients who did not have the use of their funds for a period of time.

AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer agrees with the parties that there are no applicable aggravating circumstances in this matter.

This Hearing Officer agrees with the parties that two factors are present in mitigation:

(a) absence of a prior disciplinary record and (b) absence of a dishonest or selfish motive.

PROPORTIONALITY REVIEW

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135, Ariz. 203, 207 (1983)). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz. 604, 615 (1984).

The leading published Arizona case involving analogous facts is *In re Riggs*, 177 Ariz. 494, 496, 869 P.2d 170, 172 (1994). That case involved a lawyer who, for nearly five years while acting as trustee and personal representative of an estate, deposited trust funds in a non-interest-bearing account that also contained funds belonging to him and to other clients. The Supreme Court adopted the recommended discipline of censure and one year of probation.

In *In re Hall,* SB-02-0122-D (September 2002), Hall advance funds from his firm's operating account and placed those funds into the trust account to cover

client costs. Records obtained by the State Bar revealed that trust account records were deficient for individual client accounts. The trust account records reflected negative balances during this period for a total of 12 clients. The attorney failed to adequately monitor his clients' funds, which were on deposit in his trust account and as a result of this failure, overdrafts occurred on the account. He failed to establish sufficient internal controls in order to properly monitor his client's funds. Hall was censured and placed on one year of probation.

In *In re Inserra,* SB-02-0144-D (October 2002), Inserra failed to keep his earned fees separate from that of his client funds held in the trust account, failed to transfer fees from the trust account when earned, and commingled his own funds with those of his clients. He also failed to maintain complete trust account records for a period of five years, failed to exercise due professional care in the maintenance of his trust account, failed to only disburse from his trust account with pre-numbered checks, and failed to conduct a monthly reconciliation of his trust account. Inserra and the State Bar submitted a consent agreement, agreeing that a censure, two years of probation and costs were the appropriate sanction. The Disciplinary Commission unanimously recommended accepting the agreement and the Supreme Court accepted the recommendation of the Disciplinary Commission without discretionary review.

In *In re Leiber,* SB-01-0122-D (July 2, 2001), Leiber was charged with failing to comply with trust account guidelines and with causing a check in the amount of $8,000.00 to be returned for insufficient funds because the attorney's trust account only had a balance of $5,859.00. Leiber's client, a long-time friend and lawyer, had agreed to deposit $8,000.00 in Leiber's California branch of his trust account but only deposited $5,000.00. Leiber also commingled funds over a period of years by placing earned fees and other personal funds into his trust account. The Supreme Court accepted the Disciplinary Commission's recommendation for censure and one year of probation.

In *In re Randall,* SB- 02-0146-D (November 2002), Randall failed to conduct a proper monthly reconciliation. He used numerous counter checks to withdraw money from his trust account instead of using pre-numbered checks as required by the Guidelines. He also deposited and commingled his own separate funds, including earned fees, with client funds in his trust account. Randall failed to maintain adequate funds in the trust account resulting in the account being overdrawn on two occasions. He failed to establish adequate internal controls to safeguard client funds. The hearing officer recommended that Randall receive a censure for his misconduct, which was accepted by the Disciplinary Commission and the Supreme Court. Randall was not placed on probation, presumably

because he was no longer working as a sole practitioner and was employed by a medium-size firm where he was not in charge of any accounting procedures.

In this case, Respondent failed to safeguard client funds by keeping unearned fees in the operating account and my commingling earned fees with client funds in the trust account. Respondent failed to maintain complete trust account records and failed to exercise due professional care in dealing with client funds. The Supreme Court "has long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the administration of justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)).

RECOMMENDATION

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, 187, 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).

In imposing discipline, it is appropriate to consider the facts of each case, the American Bar Association's *Standards for Imposing Lawyer Sanctions*

("Standards") and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality 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 which provides for the following:

1. Respondent shall receive a censure.

2. Respondent shall be placed on probation for a period of two years effective upon the signing of the Memorandum of Understanding (MOU). Bar Counsel will notify the Disciplinary Clerk of the date on which the probation begins. The terms of probation are as follows:

a. Respondent shall, within 30 days of the Supreme Court's final judgment and order, contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) to schedule an audit of his trust account. Following the audit, Respondent shall enter into a Memorandum of Understanding. Respondent shall comply with all recommendations of the LOMAP director or her designee. Respondent shall pay probation costs, including the assessment by LOMAP and applicable monitoring of the MOU.

b. Respondent shall pay $474.00 restitution to Betty Alisouskas and to $515.00 restitution to Anne Marie Cylkowski within 30 days of the Supreme Court's final judgment and order,

c. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, 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.

3. Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 9th day of June, 2005.

T.H. Guerin, Jr
Hearing Officer 7R

Original filed with the Disciplinary Clerk
this 9th day of June, 2005.

Copy of the foregoing was mailed
this 9th day of June, 2005, to:

Frederick G. Gamble
Law Offices of Frederick G. Gamble
Respondent's Counsel
2800 South Mill Avenue, Suite 201
Tempe, AZ 85282-3645

Shauna R. Miller
Senior Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: P Williams