BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	No. 03-0109
JOSEPH P. ROCCO, Bar No. 009284	)	**HEARING OFFICER'S REPORT**
RESPONDENT.	)	

PROCEDURAL HISTORY

The State Bar filed a two-count Complaint on September 10, 2004. Respondent filed an Answer on October 7, 2004. The Settlement Officer held a settlement conference on December 14, 2004 at which the parties were unable to reach a settlement. Hearings were held on February 4, 2005 and February 8, 2005, Bar Counsel, Respondent's Counsel and Respondent were present.

FINDINGS OF FACT

Count I: Violation of Ariz. R. S. Ct. specifically ER 1.4 (failure to communicate with client regarding status of the case), ER 1.15 (a) failure to safeguard client funds (b) failure to promptly return client funds (c) failure to safeguard funds subject to competing claims and Rules 43 and 44, Ariz.R.S.Ct.

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on October 15, 1983.

Beverly Peterson retained Respondent to represent her in a personal injury action growing out of an automobile accident in December 1999.

The tortfeasor was uninsured. Ms. Peterson had uninsured motorist coverage through Travelers but no medical pay. Her health insurer was Starmark

Respondent settled the case with Travelers for $50,000, the policy limits, and because of a personal friendship with Ms. Peterson reduced his fee from 33 1/3 % to 25%.

Respondent deposited the funds from the settlement in his trust account in the Wells Fargo Bank and distributed her share to Ms. Peterson. He retained $3212.84 in the trust account to pay outstanding medical liens and other expenses growing out of the accident.

Ms. Peterson moved back to Minnesota and began to get bills from creditors, which, in her opinion, should have been paid out of the funds held by respondent in his trust account.

Further it was her understanding that respondent, as part of his representation, was obliged to try to get restitution from the tortfeasor growing out of the criminal charges pending in the City of Phoenix Municipal court. Also, she was further of the opinion, that respondent was to deal with Starmark her health insured to pay the medical claims. Starmark did make some payments but they have been slow in coming when they came.

A review of the fee arrangement between respondent and Ms. Peterson and the hearing officer's own experience as a judge and representing Plaintiffs and insurers in personal injury matters was that Ms.Peterson was mistaken in her aforementioned understanding. Also respondent, in fact, did attempt to get payment for Ms. Peterson from both sources.

In October 2002 Ms. Peterson informed respondent that she had paid a bill in the amount of $677.98 to one of the medical providers after the claim had been referred for collection.

Ms. Peterson had filed for Chapter 7 bankruptcy before the accident and was trying to reestablish her credit ratings and was unhappy that the aforementioned bill had become a part of her credit record and she so advised respondent in a letter of Oct. 16, 2002.

On January 14, 2003 Ms. Peterson filed a formal bar complaint against the respondent.

From time to time respondent's professional and personal life has been in turmoil. He has been in various professional arrangements since he arrived in Arizona. The one during most of the Peterson saga was with an individual named Jeff King. Mr. Rocco testified that Mr. King was the so-called managing partner and by an unjustified conclusion ultimately responsible for the trust account. The respondent was the rainmaker. This relationship dissolved and King and respondent are in the courts battling over the dissolution.

Respondent had a long-term relationship with Pierette Idoyaga, who is the mother of his child. She has worked with respondent in the office for quite sometime even after their personal relationship terminated. She was the quasi office manager/paralegal and a friend of Ms. Peterson.

There was a computer crash that allegedly destroyed many of the records. The hard copies were in a storage arrangement and mislabeled and not cross-referenced so they were difficult to obtain when needed.

In March 2000 Respondent deposited Ms. Peterson's settlement in his trust account with Wells Fargo bank. Because of alleged problems with Wells Fargo, in May 2000 another trust account was opened in Compass Bank with a deposit of $100. In October 2000 the account at Wells Fargo was overdrawn the offsetting funds having been deposited in the Compass account.

Because of the bar complaint respondent, in Jan 2004, hired a CPA, Dorothy Moore. She had been doing respondent's personal income tax returns over the years. She testified that there was no doubt that, prior to her coming on board, from time to time the trust account dipped below the amount necessary to cover the Peterson expenses. She and her assistant have now taken charge of the accounting for the office including and most particularly the trust account. Her testimony was also verified by Leann Maugen, who is an expert witness on trust accounts and had worked, during the Peterson period, with the trust account compliance department of the State Bar. She did testify that she had had no problem with respondent's cooperation in this matter.

As of the date of this writing the respondent has the sum of $1245 in his trust account which is either owed to the Ms. Peterson or a radiologist.

Respondent immediately before the hearing in this matter attended a State Bar seminar on trust funds.

Count II: Failure to timely respond to Request by the State Bar for Information

In March 2003 the State Bar, pursuant to Ms. Peterson's complaint, sent a screening letter to respondent. Approximately 17 days later respondent replied. There was an exchange of letter with enclosures from respondent between respondent, the State Bar and Ms. Peterson. From approximately April 22, 2003 to October 2003 there was no activity by either side.

Thereafter there were requests by the State Bar for various trust account information and correspondence between Ms. Peterson and the respondent. There were telephone calls, emails etc. Respondent blamed computer crashes, the banks, and a former partner for failure to provide the information and eventually enough of the documentation was in the hands of State Bar for them to proceed with the litigation of the complaint.

CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 1.4 (Communication), ER 1.15(a)(b) and (c) (Safekeeping Property), Rule 43 (Trust Account Verification), Rule 44 (Trust Accounts Interest Thereon), and Rule 53(f) (Failure to Furnish Information).

Count 1: A. Rule 42: Respondent admits to a violation of ER 1.15A (failure to keep safe property) and Rule 43 failure to maintain trust account records and Guideline 1 A –failure to exercise due professional care, 1 C failure to properly safeguard client's money.

Count II:

There was s a substantial time period between the last contact with the respondent by the State Bar occasioned in part by the file going to another attorney in the Bar office.. Eventually after much correspondence, emails and telephone calls all the needed paperwork was in the possession of the State Bar. Respondent caused some of the delay but also some blame must be laid at the feet of the State Bar.

The Hearing Officer finds that the State Bar has failed to establish by clear and convincing evidence that respondent failed to communicate and cooperate with the State Bar in the prosecution of this matter.

Therefore, it is recommended dismissing Count 2.

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

This Hearing Officer considered *Standard* 4.0 (Violations of Duties Owed to Clients) in determining the appropriate sanction warranted by Respondent's conduct. Specifically, *Standard* 4.13 (Failure to Preserve the Client's Property) provides that: "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."

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. One (1) factor is present in aggravation: 9.22 (i) substantial experience in the practice of law. [1] Respondent was admitted to practice law in Arizona on October 15, 1983. There are 2 (two) factors in mitigation, 9.32 (a) absence of a prior disciplinary record, (b) absence of a dishonest or selfish motive. No other aggravating or mitigating factors is found.

[1] The aggravating factor of substantial experience in the practice of law is often offset by the corresponding factor of an unblemished disciplinary record during the same time period. *Matter of Shannon*, 179. Ariz. 52, 68 (1994).

Although censure is the presumptive sanction based on the misconduct in this matter, based upon the presence of only one aggravating factor and the presence of two mitigating factors, including absence of a prior disciplinary record, to which this Hearing Officer gives great weight, a reduction in the presumptive sanction is justified. An informal reprimand is an appropriate sanction based on the circumstances of this case. Respondent's negligent management of his trust account and failure to safeguard client funds caused some injury to the client.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, 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) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

In the Matter of Robert Suzenski DC 98-0114 received an informal reprimand + 1 year probation. This gentleman, like the respondent in the instant case, had no priors, but also failed to communicate with his client and engaged in sloppy and negligent bookkeeping practices.

In the Matter of John M. Sando DC 98-2305 he also received an informal reprimand. His violations consisted of mishandling and poor maintenance of funds coming into his possession and had a prior violation which is absent in the instant case.

It appears to the Hearing Officer that there were expectations by Ms. Peterson regarding her representation by the respondent, which were not justified by usage and custom in the personal injury field and, more especially, the wording of the fee agreement. Also respondent went beyond

the call of duty to try to negotiate with the City of Phoenix re restitution and with Starmark, the health insurer, who was less than diligent in making payments that they were required to make under the terms of the health coverage of Ms. Peterson. It should be noted that this "beyond the call of duty" is quite common in the personal injury practice. He even discounted his fee by 8 1/3%.

On the other hand respondent is the "captain of the ship" regarding the operation of his law practice. The fact there were partner problems, lover problems, computer problems, storage problems, problems with various banks in which he had located the trust account(s) he simply was letting the trust business side of the practice slide along on its own inertia. The fact that there was only one complaint, the Peterson problem, is remarkable in itself.

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 the 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). All of which this Hearing Officer has tried to do.

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent shall receive an informal reprimand.

2. Respondent shall be placed on probation for one year, effective upon the signing of the probation contract, with the following terms and conditions:

a.) Respondent shall submit to a law office audit by the State Bar's Law Office Management Assistance Program (LOMAP) director or her designee, and shall comply with all recommendations of the LOMAP director or her designee;

b.) Respondent shall participate in the State Bar's Trust Account Program (TAP); and

c.) Respondent shall complete the Trust Account Ethics Enhancement Program (TAEEP) offered by the State Bar within the one-year period of probation and shall pay all required fees.

d.) 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. The Hearing officer is non-plussed as to how to properly distribute the $1245. Certainly one way of proceeding to contact the medical practice/and/or their collection agent if any and give them a date certain to reply as to whether they have been paid or how they wish to proceed.

Absent any reply then the money should be sent forthwith to Mrs. Peterson. This is merely a suggestion.

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

DATED this 17th day of March, 2005.

Honorable Edward C. Rapp
Hearing Officer 6P

Original filed with the Disciplinary Clerk
this 21st day of March, 2005.

Copy of the foregoing mailed
this 21st day of March, 2005, to:

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