BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	File No 04-2080
G. TERRIS PORTER, **Bar No. 003493,**	)	**HEARING OFFICER'S REPORT**
Respondent	)	

PROCEDURAL HISTORY

The State Bar filed a Complaint in this matter on May 17, 2007, including File 04-2080. Respondent, through Counsel Ralph Adams, accepted service on May 30, 2007, and thereafter filed an answer on or about June 15, 2007. A Notice of Settlement was filed by Respondent's Counsel on June 27, 2007, and this matter proceeded to hearing on the agreement on July 30, 2007, pursuant to Rule 56(b).

The Joint Memorandum and Tender of Admissions were submitted to the Hearing Officer and they were reviewed with Counsel for the Respondent, Respondent, and State Bar Counsel at the review hearing held on July 30, 2007

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on September 29, 1973

COUNT ONE (File No. 04-2080)

1 Count one deals with the handling by Respondent of a case involving the collection of child support, and the Respondent's accounting of his fees.

2 A Decree of Dissolution of Marriage with Children ("Decree") between Rae Jean Melton ("Ms Melton") and Melvin Ferral Melton ("Mr. Melton") was entered on April 20, 1983, in Apache County Superior Court, Case Number 7148

3 Mr and Ms Melton have two children, Jacob Melton ("Jacob") and Sarah Melton ("Sarah")

4. On August 1, 1995, Ms. Melton hired Respondent to represent her in post-decree issues concerning child support

5 Respondent and Ms Melton signed a fee agreement dated August 1, 1995

6 After Jacob reached the age of majority, Respondent and Jacob signed a fee agreement

7 Both fee agreements contained essentially the same provisions, including the following.

   a Respondent would represent Ms Melton concerning "[c]ollection of all unpaid obligations of enforcement of future obligations of Melvin Melton under Decree of Dissolution of Marriage Apache Co #7148 4-20-83 plus seeking increased future child support and continuation of support for Sarah "

   b Respondent would represent Jacob concerning "[c]ollection of all unpaid obligations of enforcement of future obligations of Melvin Melton under Decree of Dissolution of Marriage, Apache County No 7148, 4/20/83, plus seeking increased future child support and continuation of support for Jacob "

c. Respondent's fee would be 40% of any recovery

d. If Ms Melton or Jacob received a lump sum of money, "the recovery" as defined in the fee agreement meant the gross amount of the monies and value of other benefits received, regardless of what they were recovered for, and before deduction of costs, liens or administrative expense charges

e. If Ms Melton or Jacob received in part a present payment and in part deferred payments, "the recovery" as defined in the fee agreement meant the amount of the present payment plus the present value of the deferred payments computed based on interest and discount rates at the time the settlement was made

f. If the recovery included deferred payments, Respondent had the option to receive his fees, cost reimbursement and administrative expense charges out of the present payment portion of the recovery

8 The portions of Respondent's fee agreements constituting a contingency fee for the establishment of future child support were not allowed by Supreme Court Rule However, the portions constituting a contingency fee for the collection of past due child support and enforcement of such obligations were not prohibited by Supreme Court Rule.

9 In the Dissolution Decree, Mr Melton was ordered to pay Ms Melton child support in the amount of $500 00 per month starting May 1, 1983.

10 On December 19,1995, Ms Melton authorized Respondent to endorse any child support checks received by him on her behalf, to deposit such checks

into his trust account, and then to distribute the funds according to the fee agreement.

11. Mr. Melton began making child support payments to the Court in January 1996, but did not pay regularly or fully comply with the orders. Respondent additionally asserts that, based solely upon his efforts to enforce payments, the Court found Mr. Melton over $60,000 00 delinquent in child support obligations. For the nearly thirteen years before Respondent's involvement, Mr Melton had made minimal sporadic payments totaling approximately $15,000.00 for the entire thirteen-year period. Ms. Melton had been unable to force Mr Melton to meet his obligations The State Bar, for purposes of this Consent Agreement, takes no position as to Respondent's additional information.
12. On April 10, 1996, the Court increased the child support orders to $698.00 per month, commencing January 1, 1996.
13. Mr. Melton's obligation to pay current child support ended as to both children on September 19, 1998
14. As found by the Arbitration Panel, from January 19, 1996, to October 24, 2004, Mr Melton made child support payments totaling $39,591 00 From 1996 to November 1998, the payments were made through the Court Clerk. From December 1998 to October 2004, the payments were made through the Court's Clearinghouse
15. From January 19, 1996, through November 1998, the Court Clerk sent the child support payments to Respondent on Ms. Melton's behalf and after

December 1998, the Court's Clearing House sent the child support payments to Respondent on Ms Melton's behalf

16 From January 1996 until September 1998, Respondent collected 40% of all payments sent to him If this matter proceeded to a hearing, the State Bar would present evidence that, pursuant to A R S section 25-503(D), as amended 1997, payments received in 1997 and 1998 included money for current monthly child support Respondent would present evidence that none of the payments were allotted to current child support

17 After Mr Melton's obligation for current child support ended in September 1998, all funds received were allotted to past due amounts owed by Mr Melton and thus, after September 1998, Respondent took 40% from arrearage payments only

18 If this matter proceeded to a hearing, the State Bar would present evidence that in September 1997, Ms Melton asked Respondent for an accounting of his services and amounts received by him from the Court's Clearinghouse, but Respondent failed to provide the full requested accounting Respondent would present evidence that he did provide the accounting

19 In the Dissolution Decree, Mr Melton was ordered to maintain a life insurance policy in the amount of $100,000 00 with minor children, Jacob and Sarah Melton, as the sole irrevocable beneficiaries

20 If this matter proceeded to a hearing, the State Bar would present evidence that Ms Melton asked Respondent to make Mr Melton comply with the order that he obtain a $100,000 00 life insurance policy, but Respondent failed to do

so Respondent would present evidence that he sent Ms Melton a letter suggesting alternatives for future actions, but she never responded

21 If this matter proceeded to a hearing, the State Bar would present evidence that from approximately September 11, 1997, to February 2004, Respondent did not perform services on Ms Melton's behalf or attempt to contact her Respondent would present evidence that, after the letter referred to in the preceding paragraph, Ms Melton never contacted Respondent Respondent continued to send Ms Melton her 60% of the funds received Consequently, because she was receiving payments and did not request additional services for nearly seven years, Respondent assumed that Ms Melton was satisfied with the outcome

22 As of October 2004, Respondent had not filed a motion to withdraw from the case because he was still receiving and distributing payments and Ms Melton had not requested that he withdraw

23 Ms Melton officially discharged Respondent as her attorney in November 2004

24 Respondent, or his staff acting on his behalf, failed to provide Ms Melton with her share of five payments sent to him by the Court's Clearinghouse, including but not limited to the following $240 00 from the payment made on December 28, 2000, $238 65 from the payment made on June 7, 2001, $240 00 from the payment made on September 24, 2001, $240 00 from the payment made on February 14, 2003, $240 00 from the payment made on March 18, 2003, $300 00 from the payment made on April 23, 2003, and

$60 00 from the payment made on June 30, 2003 Respondent additionally asserts that it was through his own efforts in reconciling the trust account that he discovered the errors and upon this discovery, he sent funds to Ms Melton.

25 On February 25, 2004, Respondent sent Ms Melton a check in the amount of $1,558 65 as her share of child support payments still owed to her, plus interest

26 On March 25, 2004, Respondent sent a letter to Ms. Melton with a one-page accounting

27 Ms Melton sent Respondent a letter dated April 20, 2004, informing him that she did not believe that he had fully remitted her share of the child support payments, and again asked for a full accounting of all payments received by him.

28 On April 27, 2004, Respondent sent Ms Melton $282 83 as interest on her share of child support payments

29 On October 20, 2004, Respondent directed the Court's Clearinghouse to submit all child support payments directly to Ms Melton instead of to him

30 Respondent and Ms Melton submitted their disputes concerning the amount Respondent owed her from the child support payments to the State Bar's Fee Arbitration Program, Arb No 06-B159

31 The Arbitration Panel determined that a reasonable fee for the legal services provided by Respondent to Ms Melton was $15,836 00, which Respondent had already received

32 The Arbitration Panel determined that Respondent owed Ms Melton an additional $4,814 00 from child support payments previously received and held by Respondent Respondent voluntarily agreed to the arbitration and promptly complied with the Arbitration Panel's Order

33 Respondent failed to abide by his client's decisions concerning the objectives of the representation

34 Respondent failed to act with reasonable diligence and promptness in representing his client

35 Respondent failed to adequately consult with his client as to the means by which the objectives of the representation would be pursued

36 Respondent failed to adequately communicate with his client

37 Respondent improperly entered into an arrangement for a contingent fee from current child support If this matter proceeded to hearing, the State Bar would present evidence that Respondent improperly charged and collected a contingent fee from current child support Respondent would contend that he did not charge or collect a contingent fee from current child support

38 Respondent failed to promptly provide his client with a full accounting

COUNT TWO (File No. 04-2080)

1 Count two deals with Respondent's trust account

2 The State Bar asked for Respondent's trust account records for the time period Respondent represented Ms Melton Review of those records reveals the following

a. Respondent commingled his earned funds in his client trust account on several occasions by leaving earned fees in the account, including but not limited to the following. $159 10 from the Clearinghouse payment made on June 7, 2001, $140 00 from the payment made on February 14, 2003, $140 00 from the payment made on March 18, 2003, $200 00 from the payment made on April 23, 2003, and $40 00 from the payment made on June 30, 2003

b. Respondent failed to keep complete records of client funds and other property and failed to preserve complete records for a period of five years after final disposition of all funds Respondent asserts that Rule 42, Ariz R Sup Ct, ER 1.15 and Rule 43, Ariz R Sup Ct, are inconsistent in their file retention requirements Rule 43 allows records to be destroyed after final disposition of the funds and ER 1 15 requires retention until the representation has ended The State Bar does not agree with Respondent's interpretation of ER 1 15 and Rule 43

c. Respondent failed to keep records from 1995 to 1999 concerning Ms Melton's funds and his trust accounts even though the final disposition of all funds had not occurred and Respondent continued to hold funds in his trust account on Ms Melton's behalf until at least the arbitration decision in 2007

3. Respondent improperly commingled personal funds with client funds by maintaining an impermissible surplus of administrative funds in his trust account

   a As of December 31, 1999, Respondent held a balance of administrative funds on deposit in his client trust account of $1,647 53, when the total amount of bank service charges for that year were $10 00

   b As of October 2, 2000, Respondent held a balance of administrative funds on deposit of $1,036.18, when the total amount of bank service charges for that year were $0 00

   c As of November 30, 2001, Respondent held a balance of administrative funds on deposit of $505 84, when the total amount of bank service charges for that year were $15 00

   d As of December 31, 2002, Respondent held a balance of administrative funds on deposit of $1,195 36, when the total amount of bank service charges for that year were $2 00

4. Respondent failed to record all transactions promptly and completely as follows

   a If this matter proceeded to hearing, the State Bar would present evidence that the Melton individual client ledger and the general ledger both indicate that check number 2300, in the amount of $240 00 payable to Jean Melton, was issued on November 14, 2001, however, the bank statement indicates that check number 2299 was issued in the amount of $240.00 and check number 2300 was issued in the amount of $379.68. Check number 2299 indicates that it was issued on November 14, 2001, for $240.00 and was payable to Jean Melton. The general ledger indicates that check number 2299 was issued on November 8, 2001, for $25 for client Murry Respondent would present evidence that the inconsistencies resulted from a batch of computer generated checks printed on check form on which the printed check numbers did not match the computer generated check numbers. The client ledger has the computer generated check number and the bank statement has the printed check number.

b. If this matter proceeded to hearing, the State Bar would present evidence that the Melton individual client ledger and the general ledger both indicate that check number 2634, in the amount of $240 00 payable to Jean Melton, was issued on December 9, 2002; however, the bank statement indicates that check number 2633 was cashed on December 16, 2002, for $240.00 and check number 2634 was not negotiated. The general ledger indicates that check number 2634 was issued on December 9, 2002, in the amount of $426.75 for client Tomlinson A copy of check number 2633 indicates that it was issued on December 9, 2002, for $240.00 and was payable to Jean Melton. Respondent would present evidence that the inconsistencies resulted from a batch of computer generated checks printed on check form on which the printed check numbers did not match the computer generated check numbers The client ledger has the computer generated check number and the bank statement has the printed check number

c Respondent disbursed from the trust account without a pre-numbered check $148 42 on January 5, 1999, $40 00 on May 17, 1999, $482 98 on December 19, 2000, and $50 00 on February 27, 2003 These transactions do not appear on the general ledger.

d If this matter proceeded to hearing, the State Bar would present evidence that check number 2629 was not recorded on the client ledger, although it is reflected on the bank statement Respondent would present evidence that the inconsistencies resulted from a batch of computer generated checks printed on check form on which the printed check numbers did not match the computer generated check numbers The client ledger has the computer generated check number and the bank statement has the printed check number.

e If this matter proceeded to hearing, the State Bar would present evidence that the amounts entered in the client ledger for check numbers 2630, 2631, 2632 and 2633 are not consistent with those reflected on the bank statement Respondent would present evidence that the inconsistencies resulted from a batch of computer generated checks printed on check form on which the printed check numbers did not match the computer generated check numbers The client ledger has the computer generated check number and the bank statement has the prınted check number

f If thıs matter proceeded to hearıng, the State Bar would present evıdence that check number 2634 ıs recorded on the clıent ledger but does not show on the bank statements Respondent would present evıdence that the ınconsıstencıes resulted from a batch of computer generated checks prınted on check form on whıch the prınted check numbers dıd not match the computer generated check numbers The clıent ledger has the computer generated check number and the bank statement has the prınted check number

5 Respondent faıled to safeguard clıent property, faıled to promptly delıver to Ms Melton all funds that she was entıtled to receıve, and faıled, upon request by Ms Melton, to promptly render a full accountıng regardıng such property

6 Respondent faıled to exercıse due professıonal care ın the performance of hıs dutıes ın that he overlooked payments due to Ms Melton, overlooked payments due to hım as earned fees from Ms Melton, faıled to properly supervıse employees and others assıstıng hım ın the performance of hıs dutıes, and faıled to maıntaın proper ınternal controls

7 Respondent faıled to properly supervıse employees and others assıstıng hım ın performance of hıs dutıes

8 Respondent faıled to maıntaın ınternal controls wıthın hıs office that were adequate under the cırcumstances to safeguard funds or other property held ın trust

CONDITIONAL ADMISSIONS

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, Ariz R.Sup Ct , specifically, ER 1 2(a), ER 1 3, ER 1 4, ER 1 5(d), ER 1 15 and ER 5 3 and Rules 43 and 44, Ariz R Sup Ct

CONCLUSIONS OF LAW

The Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Arizona Rules of Supreme Court as follows

ER 1 2(a) Scope of Representation

ER 1 3 Diligence

ER 1 4 Communication

ER 1 5(d) Contingency Fee in Domestic Relations matter

ER 1 15 Safekeeping property (trust account)

ER 5 3 Responsibility of non-lawyer assistants

Rules 43 (trust account verification) and 44 (trust account) Ariz R Sup Ct.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and Arizona case law The *Standards* provide guidance with respect to an appropriate sanction in this matter The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline See *In re Peasley,* 208 Ariz 27, 33, 35, 90 P 2d 764, 770, 772 (2002), *In re Rivkind,* 164 Ariz 154, 157, 791 P 2d 1037, 1040 (1990) The

Standards do not account for multiple charges of misconduct The ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations *Standards*, p 6, *In re Redeker*, 177 Ariz 305, 868 P 2d 318 (1994)

In determining the appropriate sanction, the Supreme Court and the Disciplinary Commission consider 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 *See Peasley*, 208 Ariz. at 35, 90 P 3d at 772, *Standard 3 0*

The Hearing Officer has reviewed the conduct in this matter and finds that *Standards* 4 1, failure to preserve the client's property, and 4 4, lack of diligence, as the appropriate standards

Standard 4 13 provides

> Reprimand [Censure in Arizona] 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

Standard 4 43 provides

> Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client

Based upon the conditional admissions in this matter and the ABA *Standards*, the presumptive sanction with regard to the most serious admissions of misconduct in this matter is a censure

A. The Duty Violated

For purposes of this agreement, Respondent admits that his conduct, taken as a whole, violated his duties to his clients, the profession and the legal system

Respondent violated his duties when he entered into an improper fee agreement in which he agreed to take 40% of both arrearages and current child support Respondent appears to have taken 40% of at least some of current child support payments

Respondent's fee agreement allowed him to be paid up front from any source, but in reality, he took 40% and gave his client 60% of what he received of all but about five payments

Respondent stopped pursuing the father in the underlying domestic relations matter for payment of support even though he did not withdraw from the case and the fee agreement appeared to be unlimited In 1997, Respondent sent a letter to Ms Melton listing several possible legal alternatives When she did not respond or request additional services, although she continued to accept her share of payments for several years, Respondent assumed that Ms Melton did not wish further legal action

Due to lack of appropriate record keeping and lack of supervision of his staff, Respondent failed to send his client her share of five different payments Eventually, he discovered the errors and worked with his client and the State Bar's Fee Arbitration Program to determine exactly how much was owed to her Respondent has paid the amount deemed owed

In addition, Respondent kept too much of his own funds in his trust account to cover expenses and did not keep accurate trust account records

B. Lawyer's Mental State

The Hearing Officer finds that, based upon the pleadings and the comments made at the hearing. that Respondent acted negligently when he violated the rules set forth herein

C. The Extent of Injury

The Hearing Officer finds that Respondent's conduct caused actual injury to his client in that she did not receive her full share of five support payments for up to thirty-six months Respondent's conduct also caused potential injury to his client due to the inappropriate provisions in the fee agreement and Respondent's failure to actively pursue the father in the underlying case for further payment of support and arrearages

Respondent's conduct concerning his trust accounts and the improper provisions in his fee agreement also caused potential injury to the profession and the legal system Respondent's conduct concerning his trust account and records could have exposed other clients to injury as he commingled too much of his own funds with client funds Respondent also exposed his clients to harm by failing to accurately account for their funds held in the account

D. Aggravating and Mitigating Circumstances

Aggravating Circumstances

The Hearing Officer finds the following aggravating circumstances per 9 22

(d) Multiple Offenses

(i) Substantial experience in the practice of law Respondent has been licensed to practice law in the State of Arizona since 1973.

Mitigating Circumstances

The Hearing Officer finds the following mitigating circumstances per 9 32.

(a) Absence of a prior disciplinary record

(b) Absence of dishonest motive

(d) Timely good faith effort to make restitution or to rectify consequences of misconduct

(e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings

(g) Character and reputation

(l) Remorse

Respondent demonstrated his remorse by admitting his error to Ms Melton when he discovered it, voluntarily paying interest on the funds prior to the State Bar's involvement, and, voluntarily participating in fee arbitration

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 *In re Wines,* 135 Ariz 203, 660 P 2d 454 (1983) and *In re Wolfram,* 174 Ariz 49, 847 P.2d 94 (1993)

The parties have agreed and submit that the facts of this case, when compared to similar cases set forth below, support a censure and two-year probation contract The Hearing Officer Agrees.

In *In re Struthers,* 179 Ariz 216, 877 P 2d 789 (1994), Struthers was disbarred for committing 143 violations of the ethical rules, including Rule 42, Ariz R Sup Ct , ER 1 2, ER 1 3, ER 1 4, ER 1 5, ER 1 15, ER 1.16, ER 5 3, ER 5 4, and ER 8 1, and Rules 43, 44 and 51, Ariz R Sup Ct As in our case, Struthers failed to properly supervise employees handling his trust accounts and failed to properly maintain his trust accounts (although to a much more egregious degree than in our case) As in the case at hand, Struthers' fee agreement allowed him to take a contingency fee from current support payments as well as arrearages Struthers' fee contract allowed him to receive his full contingency fee based on the total arrearage amount ordered before any money was sent to his clients, and allowed him a double recovery – once from the contingency and also by a separate award of attorneys' fees As in our case, Struthers failed to notify his clients when payments were received by him Struthers was not diligent in his representation of his clients It is not clear whether Struthers was found to have acted knowingly or with a pattern of neglect It is not clear from the opinion if there were any mitigating or aggravating factors specifically found

In *In re Swartz* 141 Ariz 266, 686 P 2d 1236 (1984), Swartz was suspended for six months for charging unreasonable fees Swartz had been censured previously Although applying former ethical rules, the violations included at least the equivalent of Rule 42, Ariz R Sup Ct , ERs 1 5 and 8 4(d) Unlike our case, Swartz involved a contingency fee that resulted in an amount the court felt was unreasonable Similar to our case, however, the fee arrangement in Swartz was also unreasonable, sufficient to support a sanction *See also* discussion in Ethics Opinion 93-04

In a case most closely on point, *In re Bendalin* SB-06-0175-D, the attorney was censured and placed on one-year probation The case involved trust account management issues, a fee contract that violated statutes governing fees, and communication issues much the same as in the instant matter

The sanctions in recent cases involving trust account issues range from informal reprimand to suspension In situations where the respondent attorney does not completely abandon the cases, the sanctions in the cases range from informal reprimand to censure *See e g , In re Davis,* SB-05-0148-D (2005) (censure by agreement, 1 year probation, TAEEP), *In re McKindles,* SB-05-0065-D (2005) (censure by agreement, 1 year probation, LOMAP), *In re Miranda,* SB-05-0129-D (2005) (censure by agreement, 1 year probation, LOMAP), *In re Thur,* DC-04-1968 (2005) (IRP by agreement, 6 months probation, TAEEP), and *In re Wicks,* SB-05-0140-D (2005) (censure by agreement, 1 year probation, LOMAP)

Thus, the sanctions are within the range supported by the case law

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)

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

That Respondent be censured with a two-year probation contract Probation will commence when Respondent signs the Memorandum of Understanding Probation shall include a complete audit by LOMAP Respondent agrees to comply with any and all recommendations made by LOMAP. In addition, Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 31 day of Aug, 2007

H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 7th day of September, 2007

Copy of the foregoing mailed
this 7th day of September, 2007, to

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