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3 **BEFORE A HEARING OFFICER**
4 **OF THE SUPREME COURT OF ARIZONA**

5 IN THE MATTER OF A MEMBER) No. 02-1106
6 OF THE STATE BAR OF ARIZONA,)
7 **DAVID B. APKER,**)
8 **Bar No. 004741**)
9 Respondent.) **HEARING OFFICER'S REPORT**

10 **PROCEDURAL HISTORY**

11 A Probable Cause Order was filed on July 15, 2003. On or about October
12 2, 2003, The State Bar filed a Complaint on October 2, 2003 and sent it via
13 certified mail to Respondent's address of record with the State Bar Membership
14 Department. Respondent did not file an answer to the Complaint. An Entry of
15 Default was filed by the Disciplinary Clerk on November 28, 2003. The
16 allegations in the Complaint therefore are deemed admitted. An
17 aggravation/mitigation hearing was held on January 6, 2004.
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20 **FINDINGS OF FACT**

21 1. At all times relevant, Respondent was an attorney licensed to
22 practice law in the State of Arizona, having been admitted to practice in Arizona
23 on December 7, 1976.
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1 2. In 1998, Respondent was retained by MidAmerican Investments, a
2 mortgage company located in Boca Raton, Florida, to close the sale of real
3 property located in Mohave County, Arizona at Lot 17, Block one (1), Colorado
4 Riverfront Terrace, Tract 4082. This property was sold to Complainant Dobsa.
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6 3. MidAmerican Investments sent Respondent approximately \$1,200
7 for closing costs related to this mortgage including the recording of the deed and
8 the mortgage, and ensuring the issue of a title insurance policy.
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10 4. Respondent knowingly did not record the deed or mortgage and
11 failed to have a title insurance policy issued.

12 5. Respondent knowingly did not return the \$1,200 to MidAmerican
13 Investments or to the purchaser of the real property, Complainant Dobsa.
14

15 6. Respondent knowingly did not inform MidAmerican Investments or
16 Complainant Dobsa that neither the deed nor the mortgage had been recorded or
17 that the title insurance policy had not been issued.
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19 7. On or about 2001, Complainant Dobsa attempted to sell the real
20 property and, following a title search, was informed that she did not own the
21 property. Complainant Dobsa was told that the property had been sold in lien
22 foreclosure proceedings because the foreclosure notices had been sent to the
23 previous owner, since the public records did not disclose Complainant Dobsa as
24 the owner.
25

1 8. The State Bar of Arizona sent an initial screening letter to
2 Respondent's address of record on August 13, 2002, directing him to submit a
3 written response to the allegations of misconduct.
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5 9. The initial screening letter dated August 13, 2002 was returned as
6 "not deliverable as addressed."
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8 10. Bar Counsel subsequently obtained an address from the State Bar of
9 Colorado and resent the initial screening letter by mail to Respondent's address in
10 Colorado on December 12, 2002.

11 11. Respondent did not respond to the State Bar of Arizona's second
12 request for a written response to the allegations of misconduct.
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14 12. Complainant Dobsa was damaged by Respondent's misconduct in
15 the amount of at least \$1,200.00 and with high probability by an even greater
16 amount. However, the record in this proceeding on the question of greater
17 damages was to a significant extent vague or conflicting and insufficient to
18 establish either the exact cause or causes of greater loss that may have ensued and
19 insufficient to establish any greater amount with sufficient certainty.
20

21 13. Respondent has previously been sanctioned for violations of the Rules
22 of Professional Conduct. Specifically, in File No. 85-1933, Respondent received an
23 informal reprimand by order filed on June 13, 1986, for violation of Rule 42, ERs
24 3.3(a)(1),(2), and 8.4(a),(c),(d), Ariz. R. S. Ct.
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1 reasonably necessary in this case as evidenced by his failure to record the deed or
2 mortgage, or to have a title insurance policy issued, thereby violating ER 1.1.

3
4 4. Respondent knowingly failed to abide by his client's decisions
5 concerning the scope of the representation as evidenced by his failure to record
6 the deed or mortgage, or to have a title insurance policy issued, thereby violating
7 ER 1.2.

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9 5. Respondent knowingly failed to act with reasonable diligence and
10 promptness in representing his client as evidenced by his failure to record the
11 deed or mortgage, or to have a title insurance policy issued, thereby violating
12 ER 1.3.

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14 6. Respondent knowingly failed to keep his client reasonably informed
15 about the status of this matter in that he did not inform his client that neither the
16 deed nor the mortgage had been recorded, and the title insurance policy was not
17 issued, thereby violating ER 1.4.

18
19 7. Respondent knowingly failed to respond to a lawful demand for
20 information from a disciplinary authority as evidenced by his failure to respond to
21 requests by the State Bar of Arizona for information, thereby violating ER 8.1(b).

1 8. Respondent knowingly committed a criminal act, under ARS § 13-
2 1802.A.2,¹ that reflects adversely on Respondent's honesty, trustworthiness and
3 fitness as a lawyer by accepting \$1,200.00 from his client and not utilizing it for
4 the purposes for which it was intended and not returning the money to his client
5 or to Complainant Dobsa, thereby violating ER 8.4(b).
6

7 9. Respondent knowingly engaged in conduct that is prejudicial to the
8 administration of justice, thereby violating ER 8.4(d).
9

10 10. Respondent knowingly practiced law or held himself out as one who
11 may practice law in Arizona and was not an active member of the State Bar of
12 Arizona or was suspended, disbarred, or on disability inactive status, thereby
13 violating Rule 31(c), Ariz. R. S. Ct.
14

15 11. Respondent refused to cooperate with the State Bar in the
16 investigation of this matter, thereby violating Rule 53(d), Ariz. R. S. Ct.
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18 12. Respondent knowingly failed to furnish information or to respond
19 promptly to an inquiry or request from bar counsel made pursuant to the Arizona
20 Rules of the Supreme Court for information relevant to the complaint, grievance,
21 or matter under investigation concerning the conduct of Respondent or failure to
22 assert the ground for refusing to do so, thereby violating Rule 53(f), Ariz. R. S. Ct.
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25 ¹ Pursuant to this statute, a person commits theft: If, without lawful authority, the person knowingly "converts for an unauthorized term or use services of property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use."

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ABA STANDARDS

In determining the appropriate sanction in a disciplinary matter, the analysis should be guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but to set a standard by which other lawyers may be deterred from such conduct while protecting the interests of the public and the profession. *In re Kersting*, 151 Ariz. 171, 726 P. 2d 587 (1986).

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.

Given the intentional nature of Respondent's conduct in this matter, it is appropriate to consider *Standards* 4.4, 4.5, and 6.1.

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* 4.41 (Lack of Diligence) provides that: Disbarment is generally appropriate when: (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client. Respondent knowingly failed to abide by his client's decisions, failed to perform services for his client and failed to keep his client reasonably informed

1 thereby causing serious injury to his client. Under any of the applicable
2 Standards, disbarment is the presumptive sanction.

3 AGGRAVATING AND MITIGATING FACTORS

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5 This Hearing Officer then considered aggravating and mitigating factors in
6 this case, pursuant to *Standards* 9.22 and 9.32, respectively. The following
7 aggravating factors are present:

8 9.32(a) prior discipline

9 9.32(b) dishonest or selfish motive

10 9.32(c) pattern of misconduct

11 9.32(e) bad faith obstruction

12 9.32(g) refusal to acknowledge wrongful nature of conduct

13 9.32(h) vulnerability of the victim

14 9.32(i) substantial experience in the practice of law

15 9.32(j) indifference to making restitution

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19 There are no mitigating factors present.

20 PROPORTIONALITY REVIEW

21 To have an effective system of professional sanctions, there must be
22 internal consistency, and it is appropriate to examine sanctions imposed in cases
23 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
24 (1994) (quoting *In re Wines*, 135, Ariz. 203, 207 (1983)). However, the
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1 discipline in each case must be tailored to the individual case, as neither
2 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
3 604, 615 (1984).

4
5 The following cases are instructive in arriving at the appropriate sanction:

6 *Matter of Kobashi*, 181 Ariz. 253, 889 P.2d 611 (1995), Kobashi was
7 disbarred and ordered to pay restitution for converting his client's money for his
8 own use, failing to communicate with his client and failing to respond to the
9 State Bar's inquiries in violation of ERs 1.2, 1.3, 1.4, 1.15, 8.1(b), 8.4 and SCR
10 51(h) and (i).

11
12 *Matter of Woltman*, 178 Ariz. 548, 875 P.2d 781 (1994), Woltman was
13 disbarred and ordered to pay restitution for converting funds, failing to pursue
14 cases with diligence and competence and failing to maintain communication
15 with clients in violation of ERs 1.1, 1.2, 1.3, 1.4, 1.5, 1.15, 1.16, 3.2, 3.3, 3.4,
16 4.2, 4.4, 5.5, 8.1, 8.4 and SCR 41(e),(f),(g),(h),(i).

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19 *Matter of Engan*, 170 Ariz. 409, 825 P.2d 468 (1992), Engan was
20 disbarred and ordered to pay restitution for failing to communicate with and
21 diligently handle client cases, failing to return clients' funds, failing to appear at
22 client's hearing and failing to respond to State Bar inquiries in violation of ERs
23 1.1, 1.2, 1.3, 1.4, 1.15, 1.16(d), 8.1(b) and SCR 51(h) and (i).

1 *Matter of Grant*, 169 Ariz. 498, 821 P.2d 159 (1991), Grant was
2 disbarred and ordered to pay restitution for failing to return the unused portion
3 of a retainer, failing to competently and diligently pursue claims and represent
4 clients, failing to communicate with clients, failing to deliver files and a retainer
5 to clients, failing to surrender property to a client after the client retained new
6 counsel, knowingly disobeying a court order, making misrepresentations to
7 clients, and failing to respond to the State Bar's inquiries in violation of DR 9-
8 102, ERs 1.1, 1.2, 1.3, 1.4, 1.15, 1.16(d), 3.4(c), 3.4(d), 8.1, 8.4 and SCR 51.
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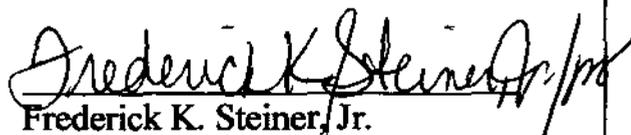
10 *Matter of Jones*, 169 Ariz. 19, 816 P.2d 916 (1991), Jones was disbarred
11 and ordered to pay a lower amount of restitution for failing to remit and
12 converting client funds, failing to safeguard a client's property and failing to
13 respond to the State Bar's inquiries in violation of DRs 1-102(A)(3) and (6), 9-
14 102(B) and ERs 1.15(b) and 8.4(b) and (c).
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16 *Matter of Nefstead*, 163 Ariz. 518, 789 P.2d 385 (1990), Nefstead was
17 disbarred for failing to keep a client informed, failing to comply with client
18 requests for information, failing to return a client's file and failing to provide an
19 accounting in violation of ERs 1.3, 1.4, 1.16(d) and SCR 44(b)(3).
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1 **RECOMMENDATION**

2 Based on the nature of Respondent's misconduct, the ABA Standards,
3 and the relevant case law, Respondent should be disbarred and should be
4 ordered to pay Complainant Dobsa restitution in the amount of \$1,200.00.
5

6 DATED this 2nd day of March, 2004.

7
8 
9 Frederick K. Steiner, Jr.
10 Hearing Officer 8T

11 Original filed with the Disciplinary Clerk
12 this 2nd day of March, 2004.

13 Copy of the foregoing was mailed
14 this 2nd day of March, 2004, to:

15 David B. Apker
16 Respondent
17 P. O. Box 10280
18 Phoenix, AZ 85064-0280

19 and

20 David B. Apker
21 Respondent
22 2111 E. Highland, Suite 230
23 Phoenix, AZ 85064-0280

24 Robert A. Clancy, Jr.
25 Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

by: 