

FILED
MAR - 3 2004
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

IN THE MATTER OF A MEMBER) No. 02-1732
OF THE STATE BAR OF ARIZONA,)
)
RAY HAYES,)
Bar No. 016943)
) **HEARING OFFICER'S REPORT**
)
RESPONDENT.)

PROCEDURAL HISTORY

A Probable Cause Order was filed on April 10, 2003. A Complaint was filed on August 27, 2003. Respondent filed an Answer on September 11, 2003. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Agreement) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memorandum) on January 13, 2004. No hearing has been held.

FINDINGS OF FACT

1. Respondent was admitted to practice law in Arizona on May 18, 1996. Respondent was admitted to practice law in Washington State in 1949.
2. The complainants have been notified of this agreement and restitution is not applicable in this matter.

1 3. Jack Becker was living in an assisted-living facility in Pima County,
2 Arizona when he died in July 2001. Mr. Becker's last will and testament split his
3 estate between his niece, Julie Fronk and his friends, Lois and Earl Mahanes.
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5 4. Respondent was retained by Lois and Earl Mahanes (the Mahaneses)
6 to probate the will of Jack Becker (Mr. Becker). The State Bar alleged that Julie
7 Fronk (Ms. Fronk) also retained Respondent. However, Respondent never
8 considered Ms. Fronk his client.
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10 5. The State Bar has alleged that Respondent went to the assisted-living
11 facility and sorted through Mr. Becker's personal items. Respondent then
12 donated Mr. Becker's personal items to the owner of the assisted-living facility
13 without consulting with Ms. Fronk. Respondent would testify that Mrs.
14 Bagnardi, the owner of the assisted-living facility, went through Mr. Becker's
15 possessions contents with him, and they removed any items having intrinsic or
16 potentially sentimental value from Mr. Becker's suitcases prior to Respondent
17 being retained. The contents were later delivered to Ms. Fronk's new attorney,
18 Carrie Rednour. For purposes of this agreement, the State Bar does not contest
19 Respondent's version of events.
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22 6. The State Bar alleged that Respondent moved a specially equipped
23 handicapped van and two motorized scooters from the assisted-living facility to
24 his house for storage. Ms. Fronk told Respondent he was not to donate the
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1 scooters to charity, but Respondent did so anyway. Respondent would testify that
2 the Mahaneses asked him to remove the van from the assisted-living facility and
3 to store it for them at Respondent's house until a buyer could be found which
4 Respondent did. Respondent will also testify that both scooters were inoperable
5 and he discussed selling them with the Mahaneses. Respondent could not find a
6 buyer, so it was decided that the scooters should be donated and the Mahaneses
7 and Ms. Fronk would take a tax write-off. The Mahaneses later told Respondent
8 they did not itemize deductions and did not want to donate one of the scooters, so
9 Respondent informed the Mahaneses that they could contact the company to
10 which the scooters had been donated and make arrangements to have one of the
11 scooters sent to them. For purposes of this agreement, the State Bar does not
12 contest Respondent's version of events.
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16 7. The State Bar has alleged that Ms. Fronk asked Respondent for a
17 billing detailing his attorney's fees and that Respondent did not provide the
18 requested billing information. Respondent would testify that he had an hourly fee
19 agreement with the Mahaneses and did not expect Ms. Fronk to pay his fee. For
20 purposes of this agreement, the State Bar does not contest Respondent's version
21 of events.
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24 8. The State Bar alleged that after the representation ended April 1,
25 2002, Ms. Fronk notified Respondent that there was a buyer for the specially

1 equipped handicapped van. Respondent informed Ms. Fronk in an April 1, 2002,
2 letter that he was claiming an attorney's possessory and statutory lien on the van
3 until the issue of his fees was resolved. Respondent would testify that his letter to
4 Ms. Fronk became moot after a telephone conversation with Mr. Mahanes, in
5 which he told Respondent he had found a buyer for the van and arrangements
6 were made to deliver the van to the buyer. Mr. Mahanes also told Respondent
7 that Respondent's fees would be paid. For purposes of this agreement, the State
8 Bar does not contest Respondent's version of events.
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11 9. The State Bar alleged that Respondent knew that Arizona did not
12 provide for an attorney's lien against the van and that he admitted to Ms. Rednour
13 that he knew his statement to Ms. Fronk regarding the attorney's lien was not
14 true. Respondent would testify that he did not know then, and does not know
15 now, whether Arizona law provides for attorney liens and he did not make the
16 alleged statement to Ms. Rednour. For purposes of this agreement, the State Bar
17 does not contest Respondent's version of events.
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20 10. The State Bar alleged that when Ms. Fronk retained Ms. Rednour to
21 represent her, Ms. Rednour sent Respondent a stipulation and order for
22 substitution of counsel, which Respondent refused to sign, and that Ms. Rednour
23 had to file a motion to have Respondent removed as counsel of record.
24 Respondent would testify that he filed his notice of withdrawal as the attorney of
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1 record with the court using a form from the Arizona Practice Manual. For
2 purposes of this agreement, the State Bar does not contest Respondent's version
3 of events.
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5 11. The State Bar alleged that Ms. Rednour repeatedly asked
6 Respondent for copies of Ms. Fronk's file, which Respondent failed to provide.
7 Respondent would testify that he sent the original file to Ms. Rednour. For
8 purposes of this agreement, the State Bar does not contest Respondent's version
9 of events.
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11 12. Respondent provided confidential information concerning Ms. Fronk
12 to various creditors of the estate. For example, he told the funeral home that Ms.
13 Fronk had received life insurance proceeds from Mr. Becker that were sufficient
14 to pay the funeral expense.
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16 13. After withdrawing from representing Ms. Fronk, Respondent
17 represented the assisted-living facility by preparing a creditor's claim for Mrs.
18 Bagnardi and also contacted Bank of America to ensure that the bank had filed its
19 claim with the estate.
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21 DISMISSED ALLEGATIONS

22 The State Bar alleged that Respondent failed to render an accounting to
23 Ms. Fronk, failed to deliver all of Mr. Becker's belongings to Ms. Fronk, failed to
24 timely submit withdrawal documents, failed to provide Ms. Fronk with a copy of
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1 her file after the representation ended, failed to abide by Ms. Fronk's wishes
2 regarding the scooters, and made misrepresentations to Ms. Fronk regarding a
3 possessory lien against the van. Based upon the tendered facts and for purposes
4 of this agreement, the State Bar will dismiss the alleged violations of ERs 1.2(a),
5 1.8(b), 1.15(b), 1.16(d), 8.4(c) and (d).
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7 **CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW**

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9 1. Respondent divulged confidential client information to the funeral
10 home when he informed the owners that Ms. Fronk had received money from a
11 life insurance policy her uncle, Mr. Becker, had taken out.

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13 2. Respondent used information relating to the representation to the
14 disadvantage of Ms. Fronk by preparing claims against the estate for Mrs.
15 Bagnardi after he withdrew from the representation without Ms. Fronk's consent.

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17 3. Respondent conditionally admits that his conduct as described above
18 violated Rule 42, Ariz. R. S. Ct., specifically ERs 1.6(a) and 1.9(b).

19 **ABA STANDARDS**

20 In determining the appropriate sanction in a disciplinary matter, the
21 analysis should be guided by the principle that the ultimate purpose of discipline
22 is not to punish the lawyer but to set a standard by which other lawyers may be
23 deterred from such conduct while protecting the interests of the public and the
24 profession. *In re Kersting*, 151 Ariz. 171, 726 P. 2d 587 (1986).
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1 ABA *Standard* 3.0 provides that four criteria should be considered: (1) the
2 duty violated; (2) the lawyer's mental state; (3) the actual or potential injury
3 caused by the lawyer's misconduct; and (4) the existence of aggravating or
4 mitigating factors.
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6 In this matter, consideration was given to ABA *Standards* 4.33 and 4.23.
7 Censure is generally appropriate when a lawyer negligently reveals information
8 relating to the representation of a client or is negligent in determining whether
9 there is a conflict of interest and causes injury or potential injury to a client.
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11 In the present matter, Respondent provided confidential information
12 concerning his client to creditor of the estate. He told the funeral home that Ms.
13 Fronk had received life insurance proceeds from her deceased uncle that were
14 sufficient to pay the funeral expense. After withdrawing from the representation,
15 Respondent represented a creditor of the estate by preparing a creditor's claim for
16 the owner of an assisted-living facility. Respondent also advised the Bank of
17 America to serve a copy of its claim with the estate's new attorney, Carrie
18 Rednour. Respondent was negligent when he informed a creditor of the estate
19 that his client had received life insurance proceeds and when he prepared claims
20 against the estate for creditors.
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1 The following cases are instructive. In *Matter of Allen*, SB-00-0025-D
2 (2000), Allen was suspended for thirty days for violation of ERs 1.1, 1.4, 1.6, 1.7,
3 and 1.8. While assisting clients with their estate planning needs, Allen used their
4 confidential information to identify prospective investors for a business
5 relationship he had with investment solicitors offering a loan program. Allen
6 invited his clients to attend an informational meeting without the requisite
7 competence to counsel the clients. Additionally, Allen failed to ensure that his
8 clients' investments were properly secured and failed to disclose to his clients his
9 relationship and possible compensation with the investment solicitors. Allen
10 failed to inform the clients of the mishandling of their investments. There were
11 no aggravating factors and four mitigating factors.

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15 In *Matter of Smith*, SB-01-0124-D (2001), Smith was censured and placed
16 on one year of probation for failing to correctly identify the appropriate
17 authorized representative of his corporate client, failing to advise the corporate
18 client of the risks of joint representation and failing to obtain written to the joint
19 representation. Smith also failed to adequately communicate with successor
20 counsel and failed to turn over complete billing records. Smith violated ERs
21 1.8(a)(3), 1.13(b)(3) and 1.16. There were six mitigating factors and one
22 aggravating factor.
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1 In *Matter of Kloberdanz*, SB-01-0169-D (2001), Kloberdanz received a
2 censure for representing clients at a time when his own interests materially
3 affected his representation of his clients. Kloberdanz agreed to make videotapes
4 in exchange for reimbursement of expenses and the opportunity to go on trips
5 where nudity and other activities could be videotaped. Kloberdanz also entered
6 into a business transaction with clients without disclosing the terms in writing,
7 without providing them with a reasonable opportunity to seek independent
8 counsel and without their written consent. Kloberdanz's conduct was negligent;
9 there were four aggravating factors and two mitigating factors.
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12 In *Matter of Marce*, 177 Ariz. 275, 867 P.2d 845 (1993), Marce received a
13 censure for becoming a lien holder of client property without first advising the
14 client to obtain independent counsel. Marce and the client entered into a written
15 contract, but the contract left out several important terms. Marce violated DR5-
16 104(A) and ER 1.8(a). Marce's conduct was negligent but did not result in client
17 harm. There were four mitigating factors and one aggravating factor.
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20 In this case, Respondent provided confidential information concerning Ms.
21 Fronk to a creditor of the estate. He told the funeral home that Ms. Fronk had
22 received life insurance proceeds that were sufficient to pay the funeral expense.
23 After withdrawing from the representation, Respondent represented a creditor
24 against the estate by preparing a creditor's claim for her. Respondent also
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1 contacted Bank of America to ensure that it had filed its claim with the estate.
2 Respondent's conduct was negligent but did not result in client harm. There are
3 three mitigating factors and one aggravating factor. Respondent's conduct was
4 not as egregious and the conduct in *Allen* and appears to be more in line with the
5 conduct in *Smith, Kloberdanz, and Marce*. Proportionally, Respondent's conduct
6 should result in the imposition of a censure.
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8 RECOMMENDATION

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10 The purpose of lawyer discipline is not to punish the lawyer but to protect
11 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
12 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
13 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
14 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
15 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
16 (1994).
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19 In imposing discipline, it is appropriate to consider the facts of the case, the
20 American Bar Association's *Standards for Imposing Lawyer Sanctions*
21 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
22 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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