

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER  
OF THE STATE BAR OF ARIZONA,

Nos. 02-0143, 02-2209

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA

**JON R. POZGAY,**  
**Bar No. 003680**

BY *[Signature]*  
HEARING OFFICER'S REPORT AND  
RECOMMENDATION

Respondent.

**A. PROCEDURAL HISTORY**

Respondent is a suspended member of the State Bar, having been admitted to practice in Arizona on April 27, 1974. He was suspended by the Arizona Supreme Court for four years on August 13, 2003, in file numbers 00-0016 and 01-0611.<sup>1</sup>

The State Bar filed its Complaint against Respondent in these matters on December 31, 2002.

The hearing in this case (the "Hearing") was held on July 1 and 2, 2003. The Respondent appeared in person. The State Bar was represented by Maret Vessella. Linda Woodhouse testified in connection with Count 1, and Larry Heartburg and John Jakubczyk testified in connection with Count 2. Christi Seaton, employed by the State Bar, testified as to mailing certain letters, and Leigh Ann Mauger, the State Bar's Staff Examiner and Auditor, testified as to trust account issues in both counts.

**B. COUNT ONE (02-0143) FINDINGS OF FACT**

1. In July 2001, Linda Woodhouse ("Linda"), on behalf of Woodhouse Construction, Inc., retained Respondent to bring a lawsuit against David Beard and Beard's Professional Painting. Linda had been Respondent's legal assistant from 1991 until 1994. Her company had lost an arbitration ruling and she wanted to set aside the award.

<sup>1</sup> At the time of the Hearing, Respondent was under suspension for failure to comply with CLE requirements.

1           2.       In August 2001, Linda gave Respondent a check in the amount of \$1,500.00  
2 for his fees.

3           3.       By minute entry dated September 24,<sup>2</sup> the Court ordered the Woodhouses' to  
4 post a cash bond in the amount of \$5,000.00.

5           4.       On September 26, Linda met with Respondent who requested \$2,500.00 for  
6 payment of his fees. At that same time, Respondent advised Linda that she needed to post a  
7 \$5,000.00 bond with the Court.

8           5.       On September 26, Linda gave Respondent check number 1174 in the amount  
9 of \$2,500.00. The notation on the check indicated it was for Respondent's fees. At that time,  
10 Linda also gave Respondent check number 1172 in the amount of \$5,000.00. The notation on  
11 that check indicated it was for the bond.

12           6.       Linda gave Respondent the \$5,000.00 for the sole purpose of posting the bond.  
13 She did not authorize Respondent to use the \$5,000.00 for any other purpose.

14           7.       That same day, Respondent deposited \$7,500.00 in his operating account. This  
15 amount represented Linda's two checks. Following the deposit of those funds, the balance in  
16 the operating account was \$7,680.03.

17           8.       Again on the same day, Respondent drew check number 2214, in the amount of  
18 \$5,000.00 made payable to cash. The notation on the check was "Whitney Pozgay." She is  
19 Respondent's daughter.

20           9.       From September 26 through October 1, Respondent used the remaining funds  
21 in his operating account for personal disbursements. By October 1, that account had a  
22 negative balance.  
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<sup>2</sup> The dates are in 2001 through paragraph 15, after that in 2002.

1           10.     Respondent did not use any portion of the funds for the Woodhouse bond.

2           11.     Respondent was not entitled to use the bond money for his personal use.

3           12.     By September 26, Respondent had taken a total of \$9,000.00 from Linda, and  
4 by October 1 Respondent had spent this entire amount on his own personal matters.

5           13.     On October 1, Respondent's billing statement to Linda indicated that  
6 Respondent had earned \$4,680.00. (Respondent billed at \$225.00 per hour and had charged  
7 20.8 hours for services rendered as of that date).

8           14.     On November 14, Respondent tried to post a bond for \$5,000 in the  
9 Woodhouse matter with check number 2230 drawn on his operating account. At the time  
10 Respondent tendered the check to the Clerk, his operating account did not contain \$5,000.00.

11           15.     On November 24, Respondent again attempted to post the bond, this time with  
12 check number 1208 drawn on his trust account. At this time, his trust account had a balance  
13 of \$31.86.

14           16.     On February 11, 2002, the Woodhouse matter was heard before Judge Santana.  
15 During the hearing, Judge Santana asked Respondent whether he had posted the bond.  
16 Respondent said he had not; however, he advised the court that the funds were available in his  
17 account. Judge Santana told Respondent that he needed to post the bond. Respondent never  
18 did. In fact, the funds were not available in either Respondent's trust or operating account as  
19 they had been spent months earlier.

20           17.     By minute entry dated February 13, the Woodhouses' appeal was denied.

21           18.     On May 21, Judge Santana entered a judgment in favor of David Beard in the  
22 amount of \$4,390.00.  
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1           19.     Shortly after the judgment was entered, Linda instructed Respondent to pay the  
2 judgment from the \$5,000.00 bond money she thought Respondent was holding.

3           20.     Respondent did not do so.

4           21.     On July 1, Linda transmitted a cashier's check in the amount of \$4,390.00 to  
5 Mr. Beaird's lawyer to satisfy the judgment.

6           22.     By cashier's check dated July 2, Respondent paid Linda \$4,390.00.

7           23.     Respondent's client ledger did not accurately reflect or record the transactions  
8 concerning the funds Linda paid to Respondent.

9           24.     In January 2002, the State Bar of Arizona received two non-sufficient funds  
10 notices on Respondent's Bank of America client trust account.

11           25.     By letter dated January 24, Respondent was advised by the State Bar of its  
12 receipt of the overdraft notification and requested certain information.

13           26.     On April 1, Respondent responded to that request.

14           27.     By letter dated April 4, the State Bar's Staff Examiner requested additional  
15 supporting documentation within 15 days.

16           28.     The State Bar's letter was sent to Respondent's address of record as maintained  
17 in Membership Records.

18           29.     Respondent did not provide any response or documentation within the  
19 requested timeframe.

20           30.     By letter dated May 14, the State Bar again requested that Respondent provide  
21 additional documentation. Respondent was given 10 additional days to respond, and also  
22 advised that his failure to respond could be grounds for discipline.  
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1           31.     The State Bar's letter dated May 14 was sent to Respondent's address of record  
2 as maintained by Membership Records. Respondent did not respond to this letter.

3           32.     By letter dated June 16, Respondent advised the Staff Examiner that he was  
4 having difficulty locating the checks requested in her April 4, letter, and that he would order  
5 the requested items if he could not locate them. Respondent did not answer the questions  
6 asked by the Staff Examiner in her letter of April 4.

7           33.     By letter dated June 26, the Staff Examiner requested that Respondent provide  
8 a receipt of request or other documentation from the bank confirming that Respondent had  
9 ordered the requested item, and that he answer the questions originally posed in the State  
10 Bar's letter dated April 4. Respondent was given another 10 days to do so.

11           34.     The State Bar's letter dated June 26, was sent to Respondent's address as  
12 maintained by Membership Records. Respondent did not respond to this letter.

13           35.     On July 2, the Staff Examiner called Respondent's office and left a message  
14 requesting a status update on obtaining the requested records. Respondent did not respond.  
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16           36.     On July 17, the Staff Examiner again called Respondent's office and left a  
17 message requesting an update. Respondent did not respond.

18           37.     By letter dated July 18, the Staff Examiner again requested the information  
19 requested in the letter dated June 26. Respondent was asked to respond within 10 days of the  
20 date of the letter, and was again advised that failure to respond could be grounds for  
21 discipline.  
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23           38.     The State Bar's letter dated July 18 was sent to Respondent's address of record  
24 as maintained in Membership Records.  
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1           39.     Respondent did not respond to the July 18 letter within the timeframe set forth  
2 in the letter.

3           40.     By letter erroneously dated April 1, received by the State Bar on August 7,  
4 Respondent provided some additional documentation.

5           41.     On August 9, the State Bar had to request a subpoena to both Bank of America  
6 and Respondent due to Respondent's failure to provide requested information.

7 **C.     COUNT TWO (02-2209) FINDINGS OF FACT**

8           42.     From the mid-1990's through 2000, Respondent represented Larry Heartburg  
9 ("Larry") in various matters.

10           43.     In May 2000, Jean Heartburg ("Jean") filed for divorce from Larry.

11           44.     Respondent did not represent Larry in the divorce.

12           45.     An issue arose in the divorce proceeding as to the sale of Semi-System stock.  
13  
14 Shortly before September 26, 2000, Larry approached Respondent and asked him if he would  
15 assist in obtaining the proceeds from the stock sale.

16           46.     On September 26, Respondent wrote a letter to Judge Reinstein with respect to  
17 a telephonic conference scheduled that day during which the parties would discuss the  
18 proceeds from the stock sale. Respondent stated that he was, "willing to receive the subject  
19 funds in [my] trust account to be distributed in accordance with the partnership agreement  
20 and/or subject or court order."

21           47.     On September 26, Respondent appeared by telephonic before Judge Reinstein  
22 in the Heartburg divorce. Judge Reinstein ordered that "Mrs. Heartburg shall receive  
23 \$25,000.00 on a temporary basis, subject to reallocation at trial. The remaining \$25,000.00  
24 shall be held in the trust account of Jonathan Pozgay..."  
25

1           48.     Pursuant to the Court's September 26 order, Respondent received \$25,000.00  
2 representing a portion of the proceeds from the stock sale.

3           49.     On October 13, Respondent deposited the check for \$25,000.00 in his trust  
4 account.

5           50.     Between October 13 through December 4, Respondent withdrew the entire  
6 \$25,000.00 from his trust account. On December 4, Respondent's trust account had a balance  
7 of \$31.86.

8           51.     Respondent, without authorization, used the \$25,000.00 for his own purposes.

9           52.     Respondent never advised Larry that he believed Larry owed him any money  
10 for prior legal work, or provided any documentation of any amounts supposedly owed by  
11 Larry.  
12

13          53.     A Judgment and Decree of Dissolution of the Heartburg marriage was entered  
14 on April 5, 2001.

15          54.     In April 2001, Larry contacted Respondent to arrange the release of the funds.

16          55.     Respondent advised Larry that the funds could not be released without a Court  
17 order, and that if he obtained an opinion from another lawyer indicating that the funds should  
18 be released, Respondent would release the funds.

19          56.     Larry contacted John Jakubczyk for an opinion letter. Mr. Jakubczyk wrote  
20 Respondent on April 17 detailing Larry's interest in the funds he thought were being held by  
21 Respondent. In addition to the letter, Mr. Jakubczyk provided a release and hold harmless  
22 agreement.  
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1           57.     By letter dated July 7, Jean, through counsel, advised Respondent that she had  
2 a claim to some portion of the funds she believed Respondent was holding in his trust  
3 account.

4           58.     Respondent did not respond to Mr. Jakubczyk's April 17 letter.

5           59.     On July 20, Mr. Jakubczyk again wrote reminding Respondent that Larry had  
6 previously made a demand for the \$25,000.00 Respondent was to be maintaining in his trust  
7 account. Mr. Jakubczyk's letter further detailed a situation involving the Heartburg's son,  
8 Rolf Heartburg. Rolf was asserting a claim against both Jean and Larry for sums charged by  
9 them on an American Express account. Mr. Jakubczyk asked Respondent to respond within a  
10 few days to resolve the matter.  
11

12          60.     Respondent did not respond to Mr. Jakubczyk's July 20 letter.

13          61.     By letter dated October 15, Mr. Jakubczyk sent Respondent a stipulation and  
14 agreement signed by Jean and Larry. The stipulation directed Respondent to prepare a check  
15 from his trust account made payable to John Jakubczyk's trust account for \$25,000.00. Both  
16 Jean and Larry stipulated that the funds be used to resolve an outstanding judgment obtained  
17 by American Express against Rolf.

18          62.     By letter dated October 17, Respondent wrote to Mr. Jakubczyk and advised  
19 that he "...was directed to receive the funds pursuant to an Order of the Court. Since there  
20 has been no order allowing or directing [me] to pay over any funds, [I] believe it could be  
21 problematic for me to do so. In addition, there have been various demands placed on the  
22 sums which the stipulation does not resolve."  
23

24          63.     Respondent's letter caused Mr. Jakubczyk to believe that Respondent was still  
25 holding the \$25,000.00 in his trust account.

1           64.     By letter dated October 18, Mr. Jakubczyk wrote to Respondent in response to  
2 Respondent's letter of October 17. Mr. Jakubczyk advised Respondent that under the  
3 circumstances he should interplead the funds so the parties could distribute them.

4           65.     By letter dated November 29, Mr. Jukubczyk again requested that Respondent  
5 either release the \$25,000.00 to Jukubczyk's trust account or interplead the funds so a judge  
6 could determine how they should be disbursed. Respondent did not respond.

7           66.     Respondent intended to deceive Mr. Jakubczyk by making him believe that he  
8 was still holding the \$25,000.00 and that Respondent was trying to determine how to resolve  
9 the issue of distribution.

10           67.     On November 8, Larry filed a complaint with the State Bar of Arizona  
11 regarding Respondent's professional conduct.

12           68.     By letter dated November 13, Respondent was advised of these allegations.  
13 The State Bar's letter was sent to Respondent's address of record. There was no response.

14           69.     By letter dated November 27, Respondent was advised that the State Bar had  
15 not received a response to the November 13 letter. Respondent was advised that he had 10  
16 additional days to respond and that a failure to respond would be grounds for discipline.

17           70.     Respondent did not respond to the State Bar's November 27 letter.

18           71.     Respondent did not maintain complete trust account records including  
19 duplicate deposit slips or the equivalent as well as individual client ledgers or their equivalent.  
20

21           72.     With respect to the records Respondent provided, Respondent did not promptly  
22 and completely record all transactions.

23           73.     Respondent has engaged in similar acts, which resulted in a disciplinary  
24 proceeding (see footnote page 15). Respondent knowingly converted client funds and  
25

1 willfully disobeyed the court order in favor of the client. Additionally Respondent engaged in  
2 dishonest conduct in the conversion of the clients' funds and the failure to repay the client.

3 **D. COUNT ONE CONCLUSIONS OF LAW**

4 1. Respondent converted client funds. Specifically, Respondent converted the  
5 \$5,000.00 costs advanced by Linda for the court bond in violation of Rule 42 (all Rule  
6 references are to Ariz.R.S.Ct.), specifically, ER 1.15 and Rule 43.

7 2. Respondent engaged in conduct involving dishonesty when converting Linda's  
8 property. Respondent's conduct violated Rule 42, specifically, ER 8.4(c).

9 3. Respondent engaged in conduct involving dishonesty when he knowingly  
10 tendered checks to the clerk when his account did not contain sufficient funds to pay the  
11 checks. Respondent's conduct violated Rule 42, specifically ER 8.4(c).

12 4. Respondent failed to properly safeguard client funds by failing to deposit a cost  
13 advanced by the client into the trust account. Specifically, Respondent failed to deposit the  
14 \$5,000.00 Linda provided for the court bond into his trust account in violation of Rule 42,  
15 specifically, ER 1.15(a), Rule 43(d), Rule 44(b) and Trust Account Guideline 1(c).

16 5. Respondent commingled his personal funds and client funds when he deposited  
17 advanced costs from Linda into his operating account in violation of Rule 42, specifically, ER  
18 1.15(a), Rule 43(a) and 44(a).

19 6. Respondent failed to promptly deliver funds to another party at the direction of  
20 his client, in violation Rule 42, specifically ER 1.15(b).

21 7. Respondent failed to promptly and completely record the transactions  
22 occurring in the Woodhouse matter in violation of Rule 42, specifically, ER 1.15, Rule  
23 44(b)(3) and Trust Account Guideline 1(d).  
24  
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1           8.       Respondent failed to maintain proper internal controls within his office to  
2 adequately safeguard funds on deposit in the trust account in violation of Rule 43(d), Trust  
3 Account Guideline 1(c).

4           9.       Respondent failed to respond to a lawful demand for information from a  
5 disciplinary authority in connection with it's investigation in violation of Rule 42, specifically  
6 ER 8.1, Rule 51(h) and (i).

7 **E.     COUNT TWO CONCLUSIONS OF LAW**

8           10.      Respondent converted client funds. Specifically, Respondent converted the  
9 \$25,000.00 he received pursuant to a court order in violation of Rule 42, specifically, ER 1.15  
10 and Rule 43.

11          11.      Respondent engaged in conduct involving dishonesty when converting the  
12 property of Larry. Respondent's conduct violated Rule 42, specifically ER 8.4(c).

13          12.      Respondent failed to properly safeguard client funds in violation of Rule 42,  
14 specifically, ER 1.15(a), Rule 43(d), Rule 44(b) and Trust Account Guideline 1(c).

15          13.      Respondent failed to deliver property belonging to his client in violation of  
16 Rule 42, specifically ER 1.15(b).

17          14.      Respondent failed to promptly and completely record the transactions  
18 occurring in the Heartburg matter in violation of Rule 42, specifically, ER 1.15, Rule 44(b)(3)  
19 and Trust Account Guideline 1(d).

20          15.      Respondent failed to maintain proper internal controls in his office to  
21 adequately safeguard funds on deposit in the trust account in violation of Rule 43(d) and Trust  
22 Account Guidelines 1(c).

1           16.       Respondent failed to maintain complete trust account records for a period of  
2 five years in violation of Rule 42, specifically, ER 1.15(a), and Rule 43(a) and (d), Trust  
3 Account Guidelines 1(e), 2(b),(d) and (f).

4           17.       Respondent failed to only disburse from his trust account with pre-numbered  
5 checks in violation of Rule 43(d), Trust Account Guideline 2(c).

6           18.       Respondent failed to conduct a monthly reconciliation of his trust account in  
7 violation of Rule 43(d), Trust Account Guideline 2(e).

8           19.       Respondent failed to exercise due professional care in the maintenance of his  
9 client trust account in violation of Rule 43(d), Trust Account Guideline 1(a).

10          20.       Respondent failed to respond to his clients' reasonable requests for information  
11 concerning the resolution of the distribution of funds Respondent was to be holding in  
12 violation of Rule 42, specifically, ER 1.4.

13          21.       Respondent knowingly disobeyed an obligation to maintain client funds in trust  
14 based on an order of the court in violation of Rule 42, specifically ER 3.4(c).

15          22.       Respondent failed to respond to a lawful demand for information from a  
16 disciplinary authority in connection with an investigation in violation of Rule 42, specifically  
17 ER 8.1, Rule 51(h) and (i).

18          23.       Respondent engaged in conduct involving dishonesty and deceit when he  
19 advised Mr. Jakubczyk through a series of letters advising that he was holding the subject  
20 funds pursuant to the court's order pending an appropriate resolution of the claims made  
21 against those funds. Respondent's conduct was in violation of Rule 42, specifically ER 8.4(c).

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24 **F.    PROPOSED SANCTION**

1 Based on the evidence presented, the ABA Standards for Imposing Lawyer Sanctions,  
2 and Arizona case law, I recommend that Respondent be disbarred and ordered to pay  
3 restitution to the Linda and Larry. Respondent should also be assessed the costs associated  
4 with this matter.

5 **G. ABA STANDARDS**

6 In determining the appropriate sanction in a disciplinary matter, the analysis should be  
7 guided by the principle that the ultimate purpose of discipline is not to punish the lawyer, but  
8 to set a standard by which other lawyers may be deterred from such conduct while protecting  
9 the interests of the public and the profession. *In re Kersting*, 151 Ariz. 171, 726 P. 2d 587  
10 (1986). The American Bar Association Standards for Imposing Lawyer Sanctions are a  
11 "useful tool in determining the proper sanction." *In re Cardenas*, 164 Ariz. 149, 791 P.2d 95  
12 (1990).

13  
14 In drafting the ABA Standards, the Committee developed a model which requires the  
15 body imposing sanctions to answer the following questions as set out in §3.0:

- 16 1. What ethical duty did the lawyer violate?  
17 2. What was the lawyer's mental state?  
18 3. What was the extent of the actual or potential injury caused by the lawyer's  
19 misconduct?  
20 4. Are there any aggravating or mitigating factors?

21 The ABA Standards identify four distinct categories where a lawyer has a specific duty  
22 to either his client, the general public, the legal system or to the profession. Taking the  
23 questions in the order in which they are posed, the ethical duties violated by Respondent are  
24 his duties to the client, to the public to the legal system, and the profession.  
25

1 The most important ethical duties and obligations are those duties to the client. *See,*  
2 *ABA Standards* at pg. 5. The ABA Standards recognize a violation of ER 1.15, and Rules 43  
3 and 44, as a violation of a duty to the client.

4 Respondent also violated his duty to the general public. "Members of the public are  
5 entitled to be able to trust lawyers to protect their property, liberty, and their lives. The  
6 community expects lawyers to exhibit the highest standards of honesty and integrity, and  
7 lawyers have a duty not to engage in conduct involving dishonesty..." *See, ABA Standards* at  
8 pg. 5.

9  
10 Further, Respondent violated a duty to the legal system. The Standards indicate that  
11 violations of ER 3.4 violate the duty the lawyer has to the legal system. "Lawyers are  
12 officers of the court, and must abide by the rules of substance and procedure which shape the  
13 administration of justice. Lawyers must always operate within the bounds of the law and  
14 cannot create or use false evidence, or engage in any other illegal or improper conduct." *ABA*  
15 *Standards* at pg. 5.

16 Finally, Respondent also violated his duty to the profession. These duties are not  
17 inherent in the relationship between the professional and the community. They are duties  
18 relating to the legal profession itself. *See, ABA Standards* at pg. 5. Respondent's failure to  
19 comply with lawful requests for information concerning a disciplinary matter is a violation of  
20 ER 8.1 and Rule 51(h) and (i), and is recognized by the ABA Standards as a failure to  
21 maintain the integrity of the profession.

22  
23 The second prong of the analysis questions the lawyer's mental state when engaging in  
24 misconduct. Respondent's mental state in reference to all of the underlying allegations is  
25 either intentional or knowing. Respondent's testimony established the basis for finding that

1 Respondent's actions were intentional and knowing. The most culpable mental state is that  
2 of intent. *Standards* pg. 6. "When a lawyer acts with the conscious objective or purpose to  
3 accomplish a particular result." *Standards* at pg. 6. Knowing is defined as "the conscious  
4 awareness of the nature or attendant circumstances of the conduct without the conscious  
5 objective or purpose to accomplish a particular result." *See, ABA Standards* at pg. 7.

6 The third component of the model inquiry is directed to the extent of actual or potential  
7 injury caused by the lawyer's misconduct. Respondent's conduct resulted in injury to the  
8 clients. The actual harm to both Linda and Larry is quantifiable in monetary terms. The legal  
9 profession and the legal system are also harmed when lawyers engage in dishonest conduct  
10 such as that demonstrated by Respondent.

11 The *ABA Standards* suggest a recommended sanction for various types of conduct.  
12 That recommended sanction may increase or decrease depending on the evidence of  
13 aggravation or mitigation. §9.21 states that "[a]ggravation or aggravating circumstances are  
14 any considerations or factors that may justify an increase in the degree of discipline to be  
15 imposed." §9.22 sets forth the following factors that may be considered in aggravation:

- 16  
17 a. prior disciplinary offenses;<sup>3</sup>  
18 b. dishonest or selfish motives;  
19 c. pattern of misconduct;  
20 d. multiple offenses;  
21 e. bad faith obstruction of the disciplinary proceedings by intentionally failing to  
22 comply with rules or orders of the disciplinary agency;

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22 <sup>3</sup> After the Hearing, on August 13, 2003, the Supreme Court issued a final judgment and  
23 order suspending Respondent for four years. I did not read the Hearing Officer's Report and  
24 Recommendation in 00-0016 and 01-0611 until preparing this report. Respondent was  
25 suspended for trust account violations and conduct equally if not more egregious than in these  
matters. Unlike the previous case, Respondent cannot claim the significant mitigating factors  
that he could there (specifically, personal and emotional problems and a long period of practice  
without disciplinary action), reducing the presumptive sanction of disbarment to a lengthy  
suspension.

- f. submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- g. refusal to acknowledge wrongful nature of conduct;
- h. vulnerability of victim;
- i. substantial experience in the practice of law; and/or,
- j. indifference to making restitution.

In reference to this matter, several aggravating factors are present. Respondent's actions were dishonest and selfish. *See, Standard 9.22(b)*. Specifically, Respondent's conversion of client funds is inherently selfish and dishonest. Respondent's concerted effort to continually advise John Jakubczyk that he was holding the funds pending the resolution of the claims made against the \$25,000.00 should be considered both selfish and dishonest acts. Respondent's knowing failure to abide by the court's order to hold the Heartburg funds is also dishonest and motivated by self-interest.

This case also demonstrates a pattern of misconduct. *See, Standard 9.22(c)*. Not only is there a consistent pattern within the context of this particular complaint and proceeding, Respondent has engaged in prior conduct, which essentially demonstrated the same type of misconduct. In this matter Respondent converted the funds of two separate clients as he did in the prior matter. Respondent has failed to abide by court orders in both this case and the prior disciplinary case. Further, Respondent's conduct has been dishonest in both this as well as the prior disciplinary proceeding.

This matter also involves multiple offenses in several distinct areas. *See, Standard 9.22(d)*. This complaint involves the conversion of client funds in two separate matters. Respondent's conduct in both instances relates to the misuse of his trust account and the failure to maintain the corresponding records. Additionally, Respondent failed to produce information requested in the investigation of both of these matters. When multiple offenses are present that factor should be considered to aggravate the presumptive sanction.

1 Respondent's continual failure to provide requested information and documentation  
2 throughout both the investigation and the formal process obstructed the disciplinary process.  
3 Respondent received the requests of the State Bar in the investigation of this matter and  
4 intentionally failed to comply with the requests for information. Upon the initiation of the  
5 formal proceeding Respondent received the case management order directing the timely  
6 disclosure of information. The State Bar made numerous requests for documents prior to  
7 filing a motion to compel, which I granted. Respondent's conduct served as an attempt to  
8 obstruct the disciplinary process. *See, Standard 9.22(e)*  
9

10 Further, Respondent's refusal to acknowledge the wrongful nature of his conduct  
11 should be considered in aggravation. *See, Standard 9.22(g)*. Without any evidence to  
12 substantiate that he had a claim to any of the \$25,000.00, Respondent just decided to keep all  
13 of it. Respondent's testimony was that he was entitled to do so. Rather than just come out  
14 and say this (it if were true), Respondent engaged in a concerted effort to conceal that he had  
15 removed the funds when others were making claims against them. If Respondent thought he  
16 had the right to do what he did, he should have simply told Mr. Jakubczyk that he had  
17 asserted a retaining lien and that the funds were gone.

18 Respondent also used a \$5,000.00 cost advanced by Linda without any authorization to  
19 do so. If Respondent's testimony was credible as to his belief that all \$9,000.00 provided by  
20 Linda was for fees, at the time Respondent used all \$9,000.00 he had only earned \$4,680.00  
21 (less any discount Respondent was giving Linda). Throughout this process, Respondent has  
22 failed to recognize that using this money was wrong. Respondent also does not acknowledge  
23 that his letters regarding the Heartburg funds were deceptive or that his failure to comply with  
24 the court's order was wrong. There was no allegation made in this matter to which  
25

1 Respondent conceded that his conduct was improper. Instead, there have been a million  
2 irrelevant (at best) excuses.

3 Respondent also has substantial experience in the practice of law. *See, Standard*  
4 *9.22(i)*. This factor should also be considered in aggravation. When a lawyer has been  
5 practicing for nearly thirty years, it is presumed that misconduct is not the product of  
6 inexperience. Therefore, the presumptive sanction for specific misconduct is aggravated by  
7 the experience of the lawyer.

8  
9 Furthermore, Respondent is entirely indifferent to making restitution when it is clear  
10 that his actions have resulted in monetary damage to the clients. *See, Standard 9.22(j)*  
11 Respondent's testimony was clear. It appears Respondent has no intention of ever returning  
12 any money to Larry.

13 The *ABA Standards* set forth factors, which may be considered in mitigation. ABA  
14 Standard 9.32(c) provides for investigation for personal or emotional problems. Respondent  
15 testified as to such problems. Based on the testimony, Respondent has been the subject of  
16 depression and has had various marital difficulties. While these factors can be considered in  
17 mitigation, under the circumstances Respondent's testimony detailed little more than the  
18 normal stresses and difficulties of life. Respondent urged the use of Dr. Korsten's testimony  
19 in the prior disciplinary proceeding; however, Dr. Korsten's testimony focused on  
20 Respondent's health in 1997 through 1999; the misconduct in this case involved the time  
21 period between September 2000 and June 2002. Respondent admitted in his testimony that  
22 Dr. Korsten testified in the prior proceeding that in late 2000 Respondent had returned to a  
23 normal level of functioning. Frankly, Respondent's testimony should not be given any  
24 substantial weight, and does not justify a decrease in the presumptive sanction.  
25

1 The above factors are now considered in conjunction with the standard that addresses  
2 the particular conduct. "The Standards do not account for multiple charges of misconduct.  
3 The ultimate sanction imposed should at least be consistent with the sanction for the most  
4 serious instance of misconduct among a number of violations; it might well be and generally  
5 should be greater than the sanction for the most serious misconduct." *Standards* at pg. 6.  
6 ABA Standards 4.1, 6.2 and 7.0 address violations of ER's 1.15, 3.4 and 8.1 which are all  
7 appropriately considered in this matter.  
8

9 *Standard 4.1* sets forth that "absent aggravating or mitigating circumstances, upon  
10 application of the factors set out in 3.0, the following sanctions are generally appropriate in  
11 cases involving the failure to preserve client property:"

12 **4.1 Failure to Preserve Client Property**

13 **4.11** "Disbarment is generally appropriate when a lawyer knowingly  
14 converts client property and causes injury or potential injury to a client.

15 *Standard 6.2* sets forth that "absent aggravating or mitigating circumstances, upon  
16 application of the factors set out in 3.0, the following sanctions are generally appropriate in  
17 cases involving failure to obey any obligation under the rules of a tribunal:"

18 **6.2 Abuse of the Legal Process**

19 **6.21** "Disbarment is generally appropriate when a lawyer knowingly violates  
20 a court order or rule with the intent to obtain a benefit for the lawyer or  
21 another, and causes serious injury or potentially serious injury to a  
party, or causes serious or potentially serious interference with a legal  
proceeding."

22 **7.0 Violations of Other Duties Owed as a Professional**

23 **7.1** "Disbarment is generally appropriate when a lawyer knowingly  
24 engages in conduct that is a violation of a duty owed as a professional  
25 with the intent to obtain a benefit for the lawyer or another, and caused  
serious or potentially serious injury to a client, the public of the legal  
system."

1 The *ABA Standards* suggest that disbarment is appropriate under the circumstances of  
2 this case. However, the *ABA Standards* were always intended as a guide and not a rigid set of  
3 rules.  
4

5 **H. PROPORTIONALITY ANALYSIS**

6 In the imposition of lawyer sanctions, the court is guided by the principle that an  
7 effective system of professional sanctions must have internal consistency. *In re Pappas*, 159  
8 Ariz. 516, 768 P.2d 1161 (1988). Therefore, a review of cases that involve conduct of a  
9 similar nature is warranted. To achieve internal consistency, it is appropriate to examine  
10 sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52, 876 P.2d  
11 548 (1994). However, the discipline in each situation must be tailored for the individual case,  
12 as neither perfection or absolute uniformity can be achieved. *In re Riley*, 142 Ariz. 604  
13 (1984). Because Respondent's acts of misconduct are varied, it is difficult to find cases  
14 entirely consistent with the facts presented in the underlying matter. However, the following  
15 cases are nevertheless instructive.  
16

17 In *In re Haglund*, SB-99-0064-D (1999), the lawyer was disbarred for  
18 misappropriating trust account funds and converting interpled funds for personal use.  
19 Huglund was the attorney for a client in a matter, which was ultimately settled. Interpled  
20 funds were released by the Clerk to Haglund in March 1997. In or about April or May 1997,  
21 Respondent received on behalf of the client approximately \$25,450.00. Respondent failed to  
22 advise his client of the receipt of the funds and thereafter knowingly and intentionally  
23 converted them to his own use.  
24

25 The Hearing Officer found only one factor in aggravation; that Haglund's conduct was  
dishonest and selfish. *See, Standard 9.22(b)*. No mitigation was present in the record,

1 however, Haglund's lawyer alluded to the fact that Haglund was suffering from depression  
2 and as a result his judgment was impaired. The Hearing Officer found that the statements  
3 alone could not be considered in mitigation and that the criteria had not been met for  
4 consideration under *Standard 9.32(i)*. Haglund was disbarred for violations of ER 1.4, ER  
5 1.15, ER 8.4, and Rules 43 and 44. The Commission adopted the recommendation that  
6 Haglund make restitution to his injured client in the amount of \$25,450.00 plus interest, and  
7 pay costs of the disciplinary proceeding.

8  
9 In *Matter of Kobashi*, 181 Ariz. 253, 889 P.2d 611 (1995), the lawyer was disbarred  
10 and ordered to pay restitution in the amount of \$15,000.00. Kobashi was retained by a client  
11 to assist in clearing title to a house that she co-owned with her deceased husband's children.  
12 The lawyer suggested that the client offer \$15,000 to the children for their ownership interest.  
13 The client gave the lawyer \$15,000 for that purpose. The lawyer did not deliver the money to  
14 the children and did not return it to the client. Additionally, the lawyer failed to maintain  
15 adequate communication with his client or respond to her requests for information during the  
16 representation. The lawyer also failed to respond to the State Bar in its inquiries. Kobashi  
17 did not participate in the formal proceedings.

18 Kobashi's conduct was found to have violated ER 1.2, ER 1.3, ER 1.4, ER 1.15, ER  
19 8.1(b), and ER 8.4, and Rule 51(h) and (i). In aggravation the conduct was seen as being  
20 motivated by dishonesty or selfishness. Kobashi obstructed the disciplinary process, refused  
21 to acknowledge the wrongful nature of his conduct, had substantial experience in the practice  
22 of law and was indifferent to making restitution.

23  
24 **I. RESTITUTION**  
25

1           There is no Supreme Court rule that addresses the level of evidence that must be  
2 produced before a restitution order can be imposed. Moreover, there is no Arizona Supreme  
3 Court case law that discusses that issue as well. However, Division One of the Arizona  
4 Court of Appeals, in the context of a criminal proceeding, has stated that a court must be  
5 presented with "some evidence" that the amount of restitution "bears a reasonable  
6 relationship to the victim's loss before restitution can be imposed." *State v. Scroggins*, 168  
7 Ariz. 8, 9, 810 P.2d 631, (App. 1991) (citations omitted). Subsequently, in another criminal  
8 proceeding, Division One cited *State v. Scroggins*, "Restitution does not require proof  
9 beyond a reasonable doubt." *State v. Reynolds*, 171 Ariz. 678, 683, 832 P.2d 695, (App.  
10 1992). The *Reynolds* court also stated that "[t]he determination of restitution is part of the  
11 sentencing function of the court and is bound by different rules than the adjudication of  
12 guilt." *State v. Reynolds*, 171 Ariz. 678, 683, 832 P.2d 695, (App. 1992) (citing *State v.*  
13 *Francher*, 169 Ariz. 266, 268, 818 P.2d 251, 253 (App. 1991).

15           Because the Arizona Supreme Court has held that the standard of proof in a  
16 disciplinary proceeding need not be any higher than that in a criminal proceeding, it seems  
17 that the same should hold true for the standard of proof relating to the imposition of  
18 restitution (i.e., the standard of proof applicable in a disciplinary proceeding should be the  
19 same as that in criminal proceedings). Therefore, the State Bar need only provide "some  
20 evidence" that the amount of restitution requested bears a reasonable relationship the client's  
21 loss in order to impose restitution in a specific amount. The State Bar has provided "some  
22 evidence" of the appropriate amount of restitution to be ordered in this case.

24           The State Bar presented the testimony of both Linda and Larry. Linda testified that  
25 the \$5,000.00 check represented an advanced cost. Ultimately, Respondent converted those

1 funds and never posted a bond with that \$5,000.00. Respondent did however pay Linda,  
2 \$4,390.00, the amount of the judgment, which she paid directly to the opposing counsel.  
3 Therefore, Linda is entitled to receive the remaining \$610.00 that Respondent kept from the  
4 advanced cost.

5 Moreover, Respondent converted \$25,000.00, which was to be held pending the  
6 resolution of the Heartburg dissolution. Respondent provided no evidence that he was  
7 entitled to retain any of this money. Under the circumstances, the record established that the  
8 funds represented proceeds from the sale of Semi-System stock that belonged to the  
9 Heartburgs. Larry and Jean both made a claim for those funds. Therefore, an order of  
10 restitution should be entered in the amount of \$25,000.00 for Larry. Jean then can make a  
11 claim for any portion she believes she is still entitled.  
12

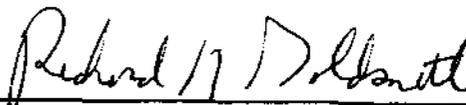
13 Based on the foregoing, an order of restitution should be entered in favor of Linda for  
14 \$610.00 and Larry in the amount of \$25,000.00.

15 **J. CONCLUSION**

16 There is clear and convincing evidence that supports a finding that Respondent  
17 violated ER 1.4, ER 1.15(a) and (b), ER 3.4(c), ER 8.1(b), ER 8.4(c) and Rules 43, 44 and  
18 51(h) and (i). The *ABA Standards* (especially the previous four year suspension) and Arizona  
19 case law indicate that the appropriate sanction is disbarment.

20 The recommended sanction is not disproportionate to sanctions in cases involving  
21 similar conduct under the cited circumstances. This sanction is not recommended in order to  
22 punish Respondent. This sanction is recommended in order to set a standard by which other  
23 lawyers may be deterred from similar conduct, while protecting the interest of the public and  
24 the profession.  
25

1 DATED this 2<sup>nd</sup> day of September, 2003.

2  
3   
4 Richard N. Goldsmith  
5 Hearing Officer 71

6 ORIGINAL filed with the Disciplinary Clerk  
7 of the Supreme Court of Arizona this 2<sup>nd</sup>  
8 day of September, 2003.

9  
10 COPY of the foregoing mailed this 4<sup>th</sup>  
11 day of September, 2003, to:

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