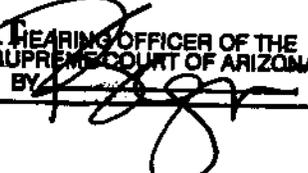


FILED

BEFORE A HEARING OFFICER **DEC 14 2004**
OF THE ARIZONA SUPREME COURT

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY 

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

**JAMES J. EVERETT
Bar No. 011205**

Respondent.

No. 02-1133

**HEARING OFFICER'S FINDINGS OF
FACT AND ORDER SETTING
TELEPHONIC STATUS CONFERENCE**

I. PROCEDURAL HISTORY

1. The State Bar of Arizona ("State Bar") filed a one-count complaint against Respondent James J. Everett ("Everett") on April 15, 2004.

2. Prior to answer, Everett moved to strike certain allegations of prior misconduct ("the Motion to Strike").

3. Prior to responding to the Motion to Strike, the State Bar moved to disqualify Everett's counsel ("the Motion to Disqualify").

4. After briefing, and oral argument, the Hearing Officer denied the Motion to Disqualify, and the State Bar petitioned for special action review to the Arizona Supreme Court.

5. After initially granting a temporary stay, the Arizona Supreme Court dissolved the stay, and ultimately declined to accept jurisdiction of the petition for special action.

6. The Hearing Officer granted the Motion to Strike, and ordered an answer to be filed.

7. Everett answered on July 15, 2004.

8. A settlement conference was held on September 8, 2004, but was not successful.

9. Everett attempted to compel the complaining person, E. Janet Greenwood Reid, D.O. ("Dr. Reid") a Tucson resident, to appear in Phoenix for a deposition

1 pursuant to subpoena, on less than five business days notice. The State Bar objected,
2 and requested a Protective Order.

3 10. The Hearing Officer granted the Protective Order, and Dr. Reid was
4 evidently not deposed prior to hearing.

5 11. Everett requested partial summary judgment on portions of the complaint,
6 which motion was denied.

7 12. On October 28, 2004, a hearing was held concerning the allegations in the
8 complaint.

9 13. In addition to the stipulated facts in the Joint Pre-Hearing Statement, the
10 Hearing Officer considered the testimony of Everett, Dr. Reid, Edward J. Maney
11 ("Maney"), and Susan Freeman ("Freeman"), and considered exhibits 1-36, 40-46 and
12 A-M which were offered and admitted without objection.

13 Based on the stipulations of the parties in the Joint Pre-Hearing Statement and
14 the evidence considered, the Hearing Officer finds as follows:

15 **II. FINDINGS OF FACT¹**

16 14. At all times relevant hereto, Everett was licensed to practice law in
17 Arizona, having first been admitted to practice in Arizona on May 9, 1987. Joint Pre-
18 Hearing Statement ("JPS") ¶ 1.

19 15. Everett represented Dr. Reid in several matters, including Greenwood
20 Reid v. Pinnacle Emergency Medicine, Inc., *et. al.*, Maricopa County Superior Court no.
21 CV2000-018338, ("the Shufeldt matter") and a Chapter 13 bankruptcy proceeding, 00-
22 01161-PHX-RJH ("the Bankruptcy"). JPS ¶ 2.

23 **A. Everett's Motion to Withdraw.**

24 16. In the Shufeldt matter, Dr. Reid sued a medical facility for failing to pay
25 for her services. JPS ¶ 3.

26
27
28 ¹ The State Bar has the burden of establishing the facts necessary to find misconduct by clear and convincing evidence. Ariz. R. S. Ct. 48(d), (e); *In re Curtis*, 184 Ariz. 256, 908 P.2d 472 (1995).)

1 17. An arbitration hearing was scheduled for August 22, 2001 in the Shufeldt
2 matter. JPS ¶ 5.

3 18. Prior to the summer of 2001, Dr. Reid had been pleased with Everett's
4 representation. Transcript of Proceedings dated October 28, 2004 ("TR") at 39:25-40:3.

5 19. Dr. Reid became upset with certain results in the Bankruptcy, and
6 expressed her displeasure to Everett's associate attorney. TR 41:20-24; TR 45:8-46:6.

7 20. Informed of Dr. Reid's displeasure, Everett requested by letter dated
8 June 8, 2001 that Dr. Reid notify him whether she desired Everett's representation
9 going forward. Ex. 33.

10 21. Dr. Reid responded by letter dated June 9, 2001 stating: "As far as I am
11 concerned I would like you to continue to represent my case against Shuffeldt [sic]. I
12 leave the decision in your hands." Ex. 32.

13 22. Everett responded by letter dated June 28, 2001 requesting that Dr. Reid
14 clarify her decision as to Everett's representation going forward. Ex. 31.

15 23. Everett followed up by letter dated July 19, 2001 stating: "we have not
16 heard from you regarding whether you wish to have us continue representing you in the
17 above matters, nor have we received a payment on your account since May. On June
18 28, 2001, a letter was sent to you regarding same. As such, we assume you no longer
19 wish us to represent you in any matters and are, therefore, withdrawing our
20 representation. Ex. 22.

21 24. With the July 19, 2001, letter, Respondent enclosed a motion to withdraw,
22 also dated July 19, 2001 that was signed by his associate. JPS ¶ 4.

23 25. Dr. Reid did not understand that Everett was seeking to withdraw until she
24 received the motion to withdraw, most probably because she had been working out of
25 town and did not receive the June 28, 2001 letter when sent. TR 44:6-19.

26 26. On July 25, 2001 Everett, through his associate attorney, filed an amended
27 motion to withdraw² that stated: "Counsel and Plaintiff are not in agreement as to how
28

² No evidence was presented of the contents of the original motion to withdraw.

1 to best proceed in this matter. Counsel, undersigned cannot continue, in good faith, to
2 represent the Plaintiff herein." JPS ¶ 5; Ex. 28; Ex. 29.

3 27. The arbitrator evidently granted the amended motion to withdraw, without
4 response from Dr. Reid or the opposing counsel, within one day of the filing of the
5 amended motion to withdraw. Ex. 27.

6 28. During the State Bar's investigation prior to this complaint, Everett stated:
7 "my firm worked the case from its inception, and only after repeated unsuccessful
8 attempts to communicate with Dr. Reid, were we forced to withdraw." Ex. 6 at p. 4.

9 29. Everett further explained:

10 As to my statement that "counsel and plaintiff were not in
11 agreement as to how to best proceed in this matter", I
12 believe it is a matter of professional courtesy and decorum
13 to state that, than it is to attempt to lay blame in some
14 fashion in an effort to vindicate myself with respect to the
Court and/or an arbitrator appointed in a pending matter. I
assume that if there was any difficulty with respect to said
statement, the Arbitrator would have required additional
information/documentation from me.

15 Ex. 1 at p. 8.

16 30. After Everett withdrew, Dr. Reid obtained the services of other counsel
17 and obtained a favorable result at the arbitration. Ex. 26; TR 61:5-8.

18 31. Dr. Reid accepts assignments throughout Arizona, and indeed on Indian
19 Reservations throughout the United States. As such, her out-of-town assignments may
20 last as long as a year. TR 72:9-12; TR 78:20-25.

21 32. At the time Everett withdrew from representing Dr. Reid, she owed
22 Everett "a couple of thousand" in fees. TR 170:23-171:3.

23 33. At the hearing, Everett explained his thought process on withdrawing
24 from the Shufeldt matter:

25 Q: When you didn't get a response from Dr. Reid, what did
26 you do?

27 A: Well, by that time, I was a bit concerned because I had
28 had some issues with [a staff member] and I had let [her] go,
I knew that Dr. Reid and [the staff member] were very close,
and I even referenced that in the letter. And I had not heard
from Dr. Reid and I was concerned about the short time line.

1 I was not getting paid. I had a client who was complaining
2 about the fact that I had never done anything worthwhile for
3 her, and I made a decision to file a motion to withdraw in
4 the arbitration matter to see if I could withdraw my
5 representation of her.

6 TR 172:8-20.

7 34. Everett explained his choice of language in the motion to withdraw:

8 Years ago, when I . . . had cases where opposing counsel in
9 litigation matters would file a motion to withdraw, and
10 they'd say in there I haven't been paid in six months, the
11 client is a bum. And we'd read this and think, oh, my God,
12 can you believe attorneys are putting this stuff in the motion.

13 But you have to have some kind of cause, so how do you
14 give the court a basis without denigrating your client saying
15 I think my client has a loser case or some such thing. And
16 so, you know, we kind of drafted this innocuous language,
17 in our opinion, that said we don't agree as to what we want
18 to do with this case. And if the court, whoever it is, wants
19 to have a hearing on it, we can have a hearing and go down
20 and discuss it with the court.

21 TR 173:2-25.

22 **B. The Petition for Dr. Reid's Bankruptcy.**

23 35. On Dr. Reid's Chapter 13 bankruptcy petition, Everett listed 5515 N.
24 Seventh St., #5-170, Phoenix, Arizona, 85014 as Dr. Reid's address. Although the form
25 used by Everett provides a separate box for Dr. Reid's mailing address, no mailing
26 address was listed.³ Ex. 23.

27 36. The address of 5515 N. Seventh St., #5-170, Phoenix, Arizona, 85014 is a
28 private mailbox in Phoenix which Everett rents ("the mailbox"). TR 29:13-25.

37. Everett controls the mailbox, keeping the key and checking its contents.

TR 232:24-233:23.

38. Everett uses the mailbox as the address for his bankruptcy clients who live
out of the Phoenix area so that he does not have to travel outside the area for any
meetings of creditors or court hearings. Everett uses the mailbox:

Almost exclusively for any bankruptcies I file, using that

³ There is an address listed for a "joint debtor" although there was no joint debtor in Dr. Reid's
bankruptcy.

1 address for purposes of receiving notices from the court or
2 creditors to forward to the clients who are not within
3 Maricopa County—well, are not—who are in such a county
where the hearings or court scheduling might be someplace
other than Phoenix.

4 TR 29:20-25.

5 39. Everett further testified:

6 And so that's the purpose of doing that, was to allow me to
7 be able to file these bankruptcies, give somebody the benefit
8 of my expertise with the tax and the bankruptcy background,
not have to pay me to go Kingman and spend the night and
go to a five-minute hearing.

9 TR 220:25-221:5.

10 40. Everett first began using the mailbox as the address for his out-of-
11 Phoenix-area bankruptcy clients in 1990 or 1991. TR 218:11-17.

12 41. Dr. Reid's bankruptcy petition did not disclose that the address listed as
13 her address was, in fact, Everett's mailbox. JPS at 9; Ex. 23.

14 42. Everett uses a different mailing address for his firm, giving the appearance
15 that his address as attorney for Dr. Reid is different than the address for the debtors such
16 as Dr. Reid. Ex. 23.

17 43. Dr. Reid's home and mailing addresses are now and were at the time
18 Everett filed her bankruptcy petition in February 2000 in Tucson, Arizona. TR 38:6-13.

19 44. The mailbox is not and never was Dr. Reid's mailing or home address. TR
20 51:7-16.

21 45. Because Everett listed his mailbox as Dr. Reid's address, the bankruptcy
22 was administered in Phoenix by a Phoenix-area Chapter 13 trustee and was assigned to
23 a bankruptcy judge in Phoenix, as opposed to a Tucson Chapter 13 trustee and a
24 bankruptcy judge in Tucson. TR 103:13-25.

25 46. The bankruptcy petition requires a correct debtor's address for several
26 purposes: to establish that jurisdiction is proper in the district of Arizona; to assist in
27 assigning the case to the correct clerk's office within Arizona; to properly assign the
28 case to a trustee; and to properly assign the case to a judge. TR 99:20-100:11.

1 47. Bankruptcy procedure also contemplates that Chapter 13 debtors will
2 receive bankruptcy case notices directly—at the address listed in the petition, or his/her
3 mailing address if different. TR 105:5-20; 119:9-120:22.

4 48. Because Everett used his own mailbox as Dr. Reid's address, Dr. Reid was
5 reliant on Everett to receive notices that she otherwise would have received
6 independently. TR 53:8-13.

7 49. The District of Arizona is divided into bankruptcy divisions for the
8 convenience of the debtors, potential creditors and all parties in interest. TR 146:6-
9 147:17.

10 50. Local Bankruptcy Rule 1071-1 specifies that bankruptcy petitions should
11 be filed in and will be maintained by the division in which the debtor resides. Local
12 Bankruptcy Rule 1071-1 provides that cases arising in Pima County should be filed in
13 the Tucson Division of the U.S. District Court for the District of Arizona. Ex. 40. Rule
14 1071-1 has been in effect since 1996. TR 136:23-25.

15 51. A petition that should be filed in the Tucson division may be filed in the
16 Phoenix division, but would then ordinarily be transferred to the Tucson division for
17 administration. TR 101:9-22. The bankruptcy clerk for the division in which the
18 petition was filed would ordinarily know that the petition should be transferred by
19 referring to the debtor's address on the petition. TR 102:4-8; TR 142:24-143:15.

20 52. If a debtor wants to transfer a case from the division in which the debtor
21 resides, the proper procedure is a motion to change venue. Whether the court grants the
22 motion is discretionary. Ex. 40; TR 106:9-20.

23 53. Since the early 1990s, however, the bankruptcy judges in Tucson have
24 denied most motions to transfer to Phoenix. TR 106:21-107:22; TR 151:5-8.

25 54. In Dr. Reid's Bankruptcy, the Chapter 13 trustee initially filed an
26 objection to Dr. Reid's homestead claim because the mailbox address did not match the
27 property for which she claimed a homestead (her residence in Tucson). TR 112:2-15;
28 Ex. A.

1 55. To explain the discrepancy, Everett wrote: "[t]here is no value [in the
2 mailbox address] for the purpose of the bankruptcy, it is simply a matter of
3 convenience, since Dr. Reid works throughout the state of Arizona. . . . With respect to
4 Dr. Reid, the city of Phoenix was determined as the situs for bankruptcy filing for
5 purposes of legal representation, expedience, and convenience." Ex. B.

6 56. The Chapter 13 trustee withdrew the objection to the homestead
7 exemption, and therefore, the Bankruptcy Court never ruled on the objection. TR
8 114:2-18.

9 **C. Everett's Handling of the Refund Check.**

10 57. In March 2003, Dr. Reid learned from the Chapter 13 Trustee's office that
11 she had made an extra payment on her Chapter 13 bankruptcy plan. TR 54:3-16.

12 58. The Trustee sent the appropriate refund check to the mailbox because the
13 Trustee's office had not received a proper notice of change of address for Dr. Reid. TR
14 118:2-14.

15 59. When Everett received the refund check, he wrote Dr. Reid by letter dated
16 April 9, 2003 and requested direction as to the disposition of the funds. Everett
17 reminded Dr. Reid of unpaid fees, and suggested a compromise wherein Everett would
18 accept the amount of the refund check in satisfaction of the unpaid fees. Ex. 9.

19 60. The refund check was in the amount of \$737.15 and made out to "Debtor
20 Janet Reid." The refund check was endorsed in the name of Everett's law firm and
21 deposited into Everett's trust account on April 18, 2003. Ex. 20; JPS ¶ 10.

22 61. Everett sent a second letter dated May 5, 2003 to Dr. Reid requesting
23 direction regarding the funds. Ex. 8.

24 62. Dr. Reid does not believe she received either the April 9, 2003, or the
25 May 5, 2003 letters from Everett. TR 58:22-59:10.

26 63. Dr. Reid notified the State Bar by letter dated May 26, 2003, that Everett
27 had received the refund check without her knowledge and had negotiated it without her
28 permission. Ex. 3.

1 64. When Everett received notice from the State Bar that Dr. Reid wanted all
2 of the funds returned to her, he issued her a check from his trust account. Ex. 2; TR
3 226:24-228:1; JPS ¶ 12.

4 65. By letter dated June 5, 2003, the State Bar asked Respondent to explain
5 his conduct with regard to the check:

6 Enclosed is a May 26, 2003 letter from Dr. Reid. Please
7 address the main issue she raises regarding the check for
8 \$737.15 that was made out to her but which you cashed. I
9 would particularly like to know why you believed you were
 entitled to cash that check, and why you did not advise Dr.
 Reid that you had received it and cashed it.

10 Ex. 2.

11 66. Everett responded to the State Bar by letter dated June 26, 2003,
12 explaining that he did not "cash" the check, but, rather, had deposited the check to his
13 trust account. Ex. 1.

14 **III. Conclusions of law**

15 The parties presented 6 issues relating to Everett's conduct:

16 1. Whether Everett violated ER 1.4(a) and ER 1.15(d), Ariz. R. S. Ct.,
17 regarding the refund check.

18 2. Whether Everett violated ER 8.4(c) by negotiating the refund check that
19 was made solely out to Dr. Reid and without Dr. Reid's consent.

20 3. Whether, assuming that Everett was entitled to the funds because of his
21 claim for unpaid fees, Everett violated Rules 43 and 44 by depositing the allegedly
22 earned fees into his trust account.

23 4. Whether Everett violated ER 8.1(a) and ER 8.4(c) by fabricating April 9,
24 2003 and May 5, 2003 letters to Dr. Reid. Alternatively, if Everett did not fabricate the
25 April 9, 2003 and May 5, 2003 letters to Dr. Reid, whether Everett violated ER 8.1(b)
26 by failing to disclose to the State Bar a fact necessary to correct a misapprehension.

27 5. Whether Everett violated ERs 3.3(a), 4.1(a), 8.4(c) and 8.4(d) by stating
28 the mailbox as Dr. Reid's address on her bankruptcy petition and by failing to disclose

1 on the petition that he or his law firm actually rented or otherwise obtained the use of
2 the mailbox.

3 6. Whether Everett violated ERs 3.3(a), 4.1(a) 8.4(c) and 8.4(d) by making
4 the statement in the motion to withdraw or directing that it be made regarding the reason
5 for his withdrawal. JPS at pp. 14-15.

6 At the conclusion of the hearing, the hearing officer granted judgment, as a
7 matter of law, on issue "4".

8 **A. The Statement in the Motion to Withdraw**

9 Everett moved to withdraw from representing Dr. Reid in the Shufeldt case out
10 of at least three concerns: (1) Dr. Reid had recently expressed great disappointment with
11 Everett; (2) Dr. Reid had not paid recent invoices; and (3) Everett had not received a
12 clear, unequivocal response as to Dr. Reid's wishes going forward.

13 The State Bar argues, without citation to any authority, that Everett's statement
14 that: "Counsel and Plaintiff are not in agreement as to how to best proceed in this
15 matter" implied that Dr. Reid perhaps wanted Everett to do something unsavory,
16 unethical or illegal. The State Bar further argues that Everett's statement falsely
17 implied that Everett had been in communication with Dr. Reid, when in fact Everett's
18 concern was that he had not received an unequivocal direction as to his continue
19 representation.

20 The State Bar concludes that because Everett implied a conflict with Dr. Reid
21 where none existed, Everett made a misrepresentation to the arbitrator in violation of
22 ER 3.3(a)(1) ("A lawyer shall not knowingly make a false statement of fact or law to a
23 tribunal"); ER 4.1 (a) ("In the course of representing a client a lawyer shall not
24 knowingly make a false statement of material fact or law to a third person"); ER 8.4(c)
25 ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty,
26 fraud, deceit or misrepresentation...") and ER 8.4(d) ("It is professional misconduct for a
27 lawyer to engage in conduct that is prejudicial to the administration of justice").

28 This hearing officer concludes that there is insufficient evidence to establish a

1 violation of any of the cited rules by clear and convincing evidence. Either Everett and
2 Dr. Reid were at an impasse caused by Dr. Reid's failure to unequivocally affirm
3 Everett's duties going forward, or Dr. Reid had left the decision as to ongoing
4 representation in Everett's hands, while indicating a preference that the representation
5 continue forward. Under the circumstances, Everett's statement was accurate, and this
6 hearing officer is unable to glean any of the negative implications the State Bar would
7 attribute to Everett's statement.

8 **B. Respondent's Misrepresentations on Dr. Reid's Bankruptcy Petition**

9 The State Bar has proven by clear and convincing evidence that Everett made a
10 knowing and intentional misrepresentation by listing his mailbox as Dr. Reid's address
11 on Dr. Reid's Chapter 13 bankruptcy petition.

12 Everett repeatedly conceded that his purpose in using the mailbox was to avoid
13 otherwise applicable venue provisions.⁴

14 Everett used the mailbox as Dr. Reid's street address solely to ensure that her
15 bankruptcy petition was handled in the Bankruptcy Court's Phoenix division, rather than
16 in the Tucson division, where it should have been handled, because Dr. Reid's residence
17 was in Tucson. Dr. Reid had no control or authority over the mailbox. By using the
18 mailbox address as Dr. Reid's address, Everett effectively precluded Dr. Reid from
19 independently receiving notice of proceedings in the Bankruptcy.

20 Everett's arguments that the use of the mailbox benefitted Dr. Reid seem
21 misplaced for two reasons: (1) the use of the mailbox subverted the requirement that Dr.
22 Reid be served directly with various notices; and (2) the use of the mailbox subverted
23 the administrative operations of the Chapter 13 Trustee, the Bankruptcy Court Clerk,
24 and the Bankruptcy Court.

25 The parties directed much of their argument, and a good deal of their questions to
26 Maney and Freeman, to whether Everett violated any particular Bankruptcy Court rule.

27 _____
28 ⁴ Everett also counseled Dr. Reid to acquiesce in the deception. TR 51:25-52:12. Everett's
instructions to Dr. Reid constitutes a violation of ER 3.4(b) as the Bankruptcy Petition was then
signed by Dr. Reid under penalty of perjury. Ex. 23.

1 However, it is neither necessary nor sufficient to establish a violation of Court rule in
2 order to establish a violation of an ethical rule. Stated another way, many violations of
3 Court rules are not ethical violations; many ethical violations do not violate the letter of
4 Court rules.

5 What is important here is Everett's concessions that he used the mailbox for the
6 purpose of avoiding otherwise applicable venue provisions. Neither Everett, nor
7 Freeman, offered any rationale for use of the mailbox other than to mislead the Clerk of
8 Bankruptcy Court as to the proper venue for Dr. Reid's Bankruptcy.

9 While a debtor may use a mailing address different than the debtor's address, that
10 is clearly not what occurred here. It is immaterial that Dr. Reid could have chosen any
11 address she wished as a mailing address⁵ at which to receive Bankruptcy Court notices;
12 Everett intentionally created a fictitious address to avoid venue provisions.

13 In addition, Everett's letter to the Chapter 13 Trustee explaining the discrepancy
14 between Dr. Reid's address on her petition and the residence for which she claimed a
15 homestead exemption may well have perpetuated rather than clarified the deception,
16 Everett stated the mailbox was used by Dr. Reid because she "works throughout the
17 state of Arizona." That statement was clearly not true: The sole reason for the use of
18 the mailbox was to avoid filing the Bankruptcy in Tucson.

19 By intentionally creating the mailbox to use as the "address" for Dr. Reid and
20 other out-of-town clients, Everett violated ER 3.3(a)(1) ("A lawyer shall not knowingly
21 make a false statement of fact or law to a tribunal"); ER 4.1 (a) ("In the course of
22 representing a client a lawyer shall not knowingly make a false statement of material
23 fact or law to a third person"); ER 8.4(c) ("It is professional misconduct for a lawyer to
24 engage in conduct involving dishonesty, fraud, deceit or misrepresentation") and ER
25 8.4(d) ("It is professional misconduct for a lawyer to engage in conduct that is
26 prejudicial to the administration of justice"). *See In re Davis*, 614 A.2d 116 (Pa. 1992)
27 (misconduct to counsel divorce clients to use improper addresses for venue purposes).

28 _____
⁵ Presumably including the mailbox.

1 **C. The Handling of Dr. Reid's Refund Check.**

2 The State Bar failed to prove by clear and convincing evidence that Everett failed
3 to communicate with Dr. Reid about the refund check or that depositing the check into
4 an appropriate trust account violated any ethical duty.⁶

5 ER 1.15(b) provided, at the time this conduct occurred:⁷

6 Upon receiving funds or other property in which a client or
7 third person has an interest, a lawyer shall promptly notify
8 the client or . . . *a lawyer shall promptly deliver to the client*
9 *or third person any funds or other property that the client or*
 third person is entitled to receive and, upon request by the
 client or third person, shall promptly render a full
 accounting of such funds.

10 (Emphasis added.) ER 1.15(c)⁸ at the time provided:

11 When in the course of representation a lawyer is in
12 possession of property in which both the lawyer and another
13 person claim interests, the property shall be kept separate by
14 the lawyer until there is an accounting and severance of their
 interests. If a dispute arises concerning their respective
 interests, the portion in dispute shall be kept separate by the
 lawyer until the dispute is resolved.

15 When Everett received the refund check, he had had no communication with Dr.
16 Reid for some 18 months. Under the circumstances, safeguarding the funds while
17 attempting to gain direction from Dr. Reid was reasonable.

18 Moreover, depositing the check in a trust account cannot be termed conversion –
19 Everett simply did not take any action inconsistent with Dr. Reid's rights in funds. The
20 State Bar argues that Everett essentially attempted to "strong-arm" Dr. Reid into
21 compromising her unpaid legal fees. While attorneys must be vigilant not to leverage
22 their position, Everett's letters, written 18 months after the representation ended,
23 especially in light of Dr. Reid's testimony that she makes every effort to pay her bills,
24 (TR 43:19-44:5) do not provide clear and convincing evidence of an effort to leverage
25 his position.

26 _____
27 ⁶ Because Everett did not assert a lien on the refund check, the State Bar conceded that there is
no evidence supporting the allegation that he deposited allegedly earned fees into his trust
account.

28 ⁷ As of December 1, 2003, this provision was re-codified, with minor changes, as ER 1.15(d).

⁸ Now re-codified and amended (as of December 1, 2003) as ER 1.15(e).

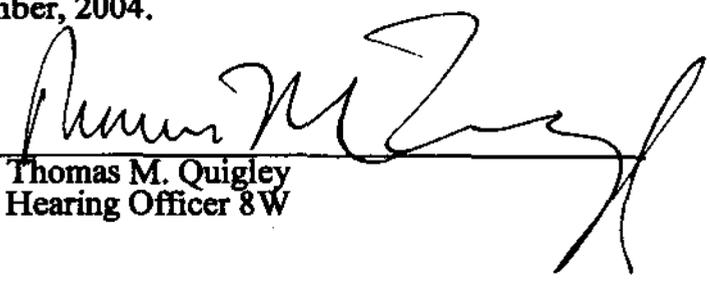
1 The State Bar failed to provide clear and convincing evidence that Everett
2 fabricated the April 9, 2003 and May 5, 2003 letters to Dr. Reid. Indeed, Everett's
3 actions in depositing the refund check into the trust account are consistent with the
4 letters, and inconsistent with any attempt to convert the funds.

5 Finally, Everett's response to the State Bar's inquiry regarding the handling of
6 the refund check appears to fairly respond to the State Bar's inquiry. *Compare* Ex. 1
7 with Ex. 2.

8 **IV. ORDER**

9 Because the State Bar has established, by clear and convincing evidence an
10 ethical violation by Everett, a hearing on aggravation and mitigation will be set. It is
11 ordered setting a telephonic scheduling conference for Wednesday, December 15, 2004
12 at 3:00 p.m. and requesting the Disciplinary Clerk to initiate the conference.

13 DATED this 13th day of December, 2004.

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17 Thomas M. Quigley
18 Hearing Officer 8W

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Original filed with the Disciplinary Clerk
this 14th day of December, 2004.

Copy of the foregoing hand-delivered
this 14th day of December, 2004, to:

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FILED

JAN 14 2005

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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

No. 02-1133

**JAMES J. EVERETT,
Bar No. 011205**

RECOMMENDED SANCTION

Respondent.

Pursuant to the Hearing Officer's Findings of Fact ("FF") dated December 13, 2004, an aggravation and mitigation hearing was scheduled for January 7, 2005.

I. EVERETT'S MOTION TO STAY.

Prior to the evidentiary portion of the aggravation/mitigation hearing, Respondent James J. Everett ("Everett") orally presented a motion requesting that the Hearing Officer stay further proceedings while ordering the State Bar to file an amended complaint, allowing Everett to respond to the same, and presumably scheduling a continued evidentiary hearing. The underlying concern by Everett is footnote 4 in the FF, which states in material part: "Everett also counseled Dr. Reid to acquiesce in the deception. TR 51:25-52:12. Everett's instructions to Dr. Reid constitute a violation of ER 3.4(b) as the Bankruptcy Petition was then signed by Dr. Reid under penalty of perjury. Ex. 23."

The State Bar responded to the oral motion on January 10, 2005, and Everett replied in support of his motion also on January 10, 2005.

Having considered the oral motion, the response, and the reply, as well as the applicable authorities, the Hearing Officer hereby denies Everett's motion.

Everett, as the Respondent in this disciplinary proceeding, is entitled to the procedural guarantees of fundamental due process. As such: "Respondent may not be charged with one violation and then, without opportunity for hearing or presentation of evidence, be disciplined for another." *In re Myers*, 164 Ariz. 558, 561-62, 795 P.2d

1 201, 204-05 (1990). In this case, the State Bar has not filed any amended complaint nor
2 made a motion to amend to conform to the evidence. Therefore, any violation of ER
3 3.4(b) will play no part in the recommended sanction discussed below. *See, e.g., Matter*
4 *of Levine*, 174 Ariz. 146, 159-60, 847 P.2d 1093, 1116-17 (1993) (absent proper
5 amendment and opportunity to respond, sanction cannot be based on unplead violation).

6 **II. RECOMMENDED SANCTION.**

7 The purposes of the lawyer discipline system are to protect the public, to
8 maintain confidence in the legal system, to deter future misconduct, and to install public
9 confidence in the bar's integrity. *See, e.g., In re Fioramanti*, 176 Ariz. 182, 187, 859
10 P.2d 1315, 1320 (1993); *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985); *Matter of*
11 *Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994). To achieve the purposes of
12 discipline, the sanction imposed must be tailored to each case, although like sanctions
13 should be imposed for like conduct. *See, e.g., In re Wolfram*, 174 Ariz. 49, 59, 847 P.2d
14 94, 104 (1993).

15 Four criteria should be considered in determining the appropriate sanction: (1)
16 the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused
17 by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.
18 *American Bar Ass'n Standards for Imposing Lawyer Sanctions (Standards) 3.0.*

19 **A. The Duty Violated.**

20 The FF included findings that Respondent used a mailbox address he owned as
21 the address for Dr. Reid. The conclusions based on the findings included that Everett
22 violated ER 3.3(a)(1) (false statement of fact to tribunal); ER 4.1(a) (false statement of
23 material fact to a third person); ER 8.4(c) (conduct involving misrepresentation) and ER
24 8.4(d) (conduct prejudicial to the administration of justice).

25 In short, the duty violated here was a duty to the Bankruptcy Court system – not
26 Everett's client or to the public as a whole. This is significant in evaluating the sanction
27 necessary to achieve the purposes of discipline.

1 **B. Everett's Mental State.**

2 Here, the parties agree that the gravamen of the findings by the Hearing Officer
3 implicates Standard 6.0, violations of duties owed to the legal system. However, the
4 parties then quickly diverge in their analysis of the presumptive sanction, with the State
5 Bar arguing for disbarment or suspension pursuant to Standard 6.11 or Standard 6.12,
6 while Everett argues that censure is the presumptive starting point based on Standard
7 6.13. Here, the Hearing Officer has found that Everett inserted misleading information
8 into the bankruptcy petition for the purpose of avoiding either having to file in the
9 Tucson division of the Bankruptcy Court or having the case transferred to the Tucson
10 division of the Bankruptcy Court. Arguably, therefore, Standard 6.12 providing for a
11 presumptive sanction of suspension is applicable (knowingly submitting false
12 information to the court that causes potentially adverse effect on legal proceeding).
13 However, a reading of the commentary to Standard 6.12 and 6.13 indicates that
14 reprimand is the more appropriate presumptive sanction. For instance, the commentary
15 to Standard 6.12 discusses a case in which an attorney knowingly failed to disclose to
16 the court or opposing counsel that property ostensibly subject to settlement discussions
17 had already been conveyed to somebody else. In contrast, Standard 6.13 discusses
18 reprimand in instances where a lawyer did not follow proper procedures, but his actions
19 "were not grounded on any intent of self benefit, nor was anyone harmed as a result of
20 his actions." Commentary, Standard 6.13.

21 Here, the Hearing Officer concludes, after hearing the evidence and observing
22 the demeanor of Respondent Everett, that he was attempting to help his clients and
23 rationalized his behavior as being of assistance to the client without violating an express
24 directive of the court.

25 **C. The Injury Caused by Everett's Misconduct.**

26 Here, there is no proof of harm or even potential harm to Everett's client or any
27 adversary. The harm was to the orderly administration of the Bankruptcy Court itself.

28 TR 99:20 – 100:11.

1 The actual and potential injuries caused by Everett are less serious than the actual
2 and potential injuries caused in cases warranting disbarment or suspension. However,
3 the Hearing Officer cannot conclude that Everett's misconduct was *de minimus* as urged
4 by Everett. Knowingly misleading the Bankruptcy Court Clerk cannot be termed *de*
5 *minimus*.

6 **D. Aggravating and Mitigating Factors.**

7 The State Bar argues for a finding of prior disciplinary offenses pursuant to
8 Standard 9.22(a). In this aspect, the State Bar submitted Exhibit 47 demonstrating an
9 order of informal reprimand in No. 97-0010 "in that the tribunal charged with
10 administering the Bankruptcy Code and Rules was unintentionally misled;" and Exhibit
11 48, consisting of an informal reprimand in No. 98-0160 because "the tribunal charged
12 with administering the Bankruptcy Code and Rules was unintentionally misled by your
13 conduct. Further, this conduct violated a rule of the court requiring the Respondent to
14 do an act connected with or in the course of his profession." Based on these exhibits,
15 the Hearing Officer does find an aggravating factor of prior disciplinary offenses.

16 The State Bar also argues for aggravating factors of: patterns of misconduct
17 (Standard 9.22(c)), refusal to acknowledge wrongful nature of conduct (Standard
18 9.22(i)), and substantial experience in the practice of law (Standard 9.22(g)). The
19 Respondent does have substantial experience in the practice of law. However, the
20 Hearing Officer does not find this to be an aggravating factor in this case. Respondent
21 has freely acknowledged what he did and why he did it. In essence, Respondent has
22 justified his conduct to himself by arguing that there is no express prohibition against
23 using a fictitious address for purposes of the debtor's bankruptcy petition. Although the
24 Hearing Officer has rejected that contention, it is worthy of note that the Respondent
25 produced a qualified expert in bankruptcy law practice in Arizona who essentially
26 supports Everett's position. TR 176:25 – 177:23; TR 214:13 – 215-:13; TR 213:10-13.
27 Experience in the practice of law is not an inoculation to the rationalization engaged in
28 by Respondent. Similarly, the Hearing Officer declines to find that either Everett's long

1 term use of the fictional address or his failure to acknowledge his conduct as wrongful
2 to be significant aggravating factors in this case.

3 On the other hand, the Hearing Officer finds as a mitigating factor, full and free
4 disclosure and a cooperative attitude towards the proceedings. Standard 9.32(e). Given
5 the purposes of lawyer discipline, on balance, it is more important that Everett has fully
6 complied with these proceedings and has openly acknowledged his actions than that he
7 has failed to acknowledge the wrongfulness of his actions or that he has been engaging
8 in such actions for a long period of time. At least one accepted bankruptcy law expert
9 finds Everett's actions arguably proper.

10 Finally, contrary to the State Bar's argument, this Hearing Officer finds that
11 Everett's motive was not dishonest or selfish. As noted above, the Hearing Officer
12 finds that Everett was motivated by a desire to more efficiently serve his clients.

13 Everett also argues that he has established the mitigating factors of good
14 character or reputation, citing Exhibit M-1, his curriculum vitae. This Hearing Officer
15 concludes that Everett failed to establish this factor, and that this purported additional
16 mitigating factor, if it existed, would not affect the recommendation below.

17 On balance, the Hearing Officer finds that the mitigating factors outweigh the
18 aggravating factors of prior disciplinary offenses and substantial experience in the
19 practice of law. Everett is attempting to fulfill his obligations as an attorney and the
20 purpose of the discipline system do not require suspension in this case.

21 **III. PROPORTIONALITY REVIEW.**

22 Care must be taken to distinguish Everett's conduct from the conduct of
23 respondents who have received lengthy suspensions or even disbarment. Here, Everett
24 was not manipulating the system to gain any financial advantage for himself, or any
25 tactical advantage for his client over an adversary. Therefore, cases such as *In re Moak*,
26 205 Ariz. 351, 71 P.3d 343 (2003) and *In re Rosenzweig*, 172 Ariz. 511, 838 P.2d 1272
27 (1992), are inapposite. Moreover, Everett's manipulation of the judicial system does
28 not rise to the level, in terms of actual or potential damage, of the "sham" trial discussed

1 in *In re Alcorn and Feola*, 202 Ariz. 62, 41 P.3d 600 (2002).

2 *In re Huser*, Disciplinary Commission No. 96-1818, supplies a more apt
3 comparison. In *Huser*, the respondent in an insurance defense matter entered an
4 appearance, filed an answer, and signed a stipulation on behalf of an insured without the
5 insured's knowledge or consent. Respondent had not had any contact with the client.
6 Even after respondent realized his mistake, he continued to represent the client as if he
7 matter was contested. Respondent failed to withdraw and failed to disclose the true
8 state of facts to either the court or to opposing counsel. In addition, respondent
9 supervised the filing of the misleading disclosure statement. Based on this factual
10 background, the Disciplinary Commission found violations of ER 3.2, 3.3, 3.4, 4.1, 4.4,
11 5.1(b), 8.4(c), and 8.4(d), and Huser was censured.

12 Although Respondent's conduct in this case does not warrant disbarment, or a
13 lengthy suspension, it does warrant a censure. An informal reprimand will not
14 accomplish the purposes of discipline.

15 RECOMMENDATION

16 Upon consideration of the evidence, application of the Standards, consideration
17 of aggravating and mitigating factors as they apply to Everett's specific conduct, and a
18 proportionality analysis, it is recommended:

- 19 1. Respondent James J. Everett be censured.
- 20 2. Respondent James J. Everett be placed on probation for a period of one
21 year, effective upon the signing of the probation contract, the terms of such probation to
22 include the following:
 - 23 a. Discontinue the use in the practice of law of any address that is not
24 clearly designated as his law firm's address.
 - 25 b. Correct the bankruptcy petitions of any pending bankruptcy in
26 which he has designated his address as the address of the petitioner, without identifying
27 the address clearly.
 - 28 c. Complete no less than nine hours of ethics continuing legal

1 education.

2 3. Respondent James J. Everett pay the costs and expenses incurred in this
3 disciplinary proceeding.

4 DATED this 14th day of January, 2005.

5
6 
7 Thomas M. Quigley
Hearing Officer 8W

8
9 Original filed with the Disciplinary Clerk
10 this 14th day of January, 2005.

11 Copy of the foregoing mailed
12 this 14th day of January, 2005, to:

13 Ralph W. Adams
14 Respondent's Counsel
15 714 N. Third St., Suite 7
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16 Patricia A. Sallen
17 Senior Bar Counsel
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19 111 West Monroe, Suite 1800
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20 by: K Weigand
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