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JUL 14 2006

**BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA**

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY *M. Smith*

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2
3 IN THE MATTER OF AN INACTIVE MEMBER) No. 05-0273
OF THE STATE BAR OF ARIZONA,)

4
5 **HENRY B. LACEY,**)
Bar No. 013921)

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7) **DISCIPLINARY COMMISSION**
8) **REPORT**
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This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 10, 2006, pursuant to Rule 58, Ariz. R. Sup. Ct., for consideration of the Hearing Officer's Report filed April 5, 2006, recommending a six month suspension and costs of these disciplinary proceedings. Respondent filed an objection but did not request oral argument.

In his Opening Brief filed May 8, 2006, Respondent asserts that censure or a reduced period of suspension is appropriate. Respondent states that the Hearing Officer erred in finding that Respondent committed an act of embezzlement. Respondent maintains he had no prior notice of any allegations of theft or embezzlement thereby violating procedural due process rights. Respondent asserts that the crime of embezzlement was not charged in the complaint or raised at the hearing and the Hearing Officer's reliance on *State v. Mackey*, 15 Ariz. App. 417, 419n.1, 489 P.2d 80, 82n.1 (Ct. App. 1971) is misplaced.

Respondent further asserts that the Hearing Officer erred in finding aggravating factor 9.22(f) engaging in deceptive practices during the disciplinary proceedings; erred in not finding mitigating factor 9.32(c) personal or emotional problems; erred in not finding that

1 restitution was made prior to the filing of the complaint, mitigating factor 9.32(d); and erred
2 in not finding interim rehabilitation as a mitigating factor.

3 Respondent also contends he should not be required to pay the State Bar's costs in
4 procuring an expert handwriting analysis and requests that the Commission find that the
5 misconduct caused little or no injury, or little potential injury.

6 In its Response filed May 30, 2006, the State Bar asserts that Respondent had ample
7 notice that he was being charged with converting Inn Court funds to his own use. Pursuant to
8 A.R.S. § 13802, the statutory definition of theft in Arizona incorporates embezzlement and
9 embezzlement is merely a form of conversion or theft. Respondent had a fiduciary duty to the
10 funds and was not entitled to convert the funds for his own personal use without
11 authorization.

12 The State Bar further argues that the Hearing Officer appropriately balanced the
13 applicable aggravating and mitigating factors and correctly found that the appropriation of
14 funds caused potential harm. The State Bar requests that the Commission uphold the Hearing
15 Officer's recommendation of a six month suspension and costs of the disciplinary
16 investigation.
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18 Decision

19 The eight members¹ of the Disciplinary Commission by a majority of seven,²
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22 ¹ Commissioner Nelson did not participate in these proceedings.

23 ² Commissioner Choate was opposed and concluded that a lengthier suspension requiring formal reinstatement
24 proceedings is warranted. Commissioner Choate determined that based on the holding in *Matter of Arrotta*, 208
25 Ariz. 509, 96 P.3d 213 (2004), this Respondent should be required to demonstrate that he has identified the
26 reasons for his fraudulent misconduct; and moreover, that he has overcome those weaknesses. Commissioner
Choate also determined that clear and convincing evidence was present to support that Respondent fabricated the
promissory note after the fact. Respondent initially withdrew funds in July of 2003 without documenting the
withdrawal by a promissory note or in any other manner, and then later withdrew additional funds on August 6,
2003. The promissory note was dated August 6, 2003. See Hearing Officer's Report, pp. 7-11, and the State
Bar's Exhibit 9.

1 recommend accepting and adopting the Hearing Officer's findings of fact, conclusions of law,
2 and recommendations for a six month suspension and costs of these disciplinary proceedings.³
3 Pursuant to A.R.S. §13-802(2), as it existed at the time of Respondent's misconduct, defined
4 the offense of theft as:

5 ..."converting for an unauthorized term or use services or property of another
6 entrusted to the defendant or placed in the defendant's possession for a limited authorized
7 term of use." The record clearly supports that Respondent converted the H. Karl Magnum Inn
8 of Court funds for his own personal use.

9 RESPECTFULLY SUBMITTED this 14th day of July, 2006.

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11
12 Barbara A. Atwood
13 Barbara A. Atwood, Chair
14 Disciplinary Commission

15 Original filed with the Disciplinary Clerk
16 this 14th day of July, 2006.

17 Copy of the foregoing mailed
18 this 14th day of July, 2006, to:

19 Richard N. Goldsmith
20 Hearing Officer 71
21 *Lewis and Roca, L.L.P.*
22 40 North Central Avenue
23 Phoenix, AZ 85004-4429

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26 ³ The Hearing Officer's Report is attached as Exhibit A. Pursuant to Rule 60(b) Ariz. R. Sup. Ct., the State Bar shall file a Statement of Costs and Expenses upon the conclusion of the disciplinary proceedings. Respondent may file an objection to any specific costs assessed at that time.

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11 by: M. Smith

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