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FEB 07 2006
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Williams*

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

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6 IN THE MATTER OF A MEMBER) No. 04-1758
7 OF THE STATE BAR OF ARIZONA,)
8)
9 **ARTHUR B. ALEXANDER,**)
10 **Bar No. 013466**)
11) **HEARING OFFICER'S REPORT**
12)
13 **RESPONDENT.**)
14)

PROCEDURAL HISTORY

15 A Probable Cause Order was filed on August 17, 2005. A Complaint
16 was filed on September 30, 2005. Respondent filed an Answer on October 26,
17 2005. The Settlement Officer held a settlement conference on December 8,
18 2005, at which time the parties were not able to reach an agreement. The State
19 Bar filed a Notice of Settlement on December 15, 2005 indicating the parties
20 had reached an agreement. A Tender of Admissions and Agreement for
21 Discipline by Consent (Tender) and Joint Memorandum in Support of Tender
22 of Admissions and Agreement for Discipline by Consent (Joint Memo) were
23 filed on December 30, 2005. No hearing has been held in this matter.
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25

1 **FINDINGS OF FACT**

2 1. At all times relevant hereto, Respondent was an attorney licensed to
3 practice law in Arizona, having been admitted to practice in Arizona on May 18,
4 1991.

5
6 2. Respondent is an inactive member of the State Bar of California,
7 having been admitted to practice law in California on January 14, 1967, and
8 having become inactive on January 1, 1997.

9
10 3. Respondent represented Billy Underwood in his dissolution action.

11 4. In the Decree of Dissolution of Marriage ("Decree"), signed on
12 January 23, 2004, the Court ordered Mr. Underwood to pay Cynthia K. Burrell,
13 formerly Cynthia K. Underwood, spousal maintenance in the amount of \$925.00
14 per month effective January 2004.

15
16 5. In the Decree, the Court awarded the former family residence to Ms.
17 Burrell and ordered her to pay Mr. Underwood for his interest in the residence
18 within six months of the date of the order.

19
20 6. Mr. Underwood did not pay the spousal maintenance payments
21 directly to Ms. Burrell for the months of June, July, August and September 2004.

22
23 7. For the months of June, July, August and September 2004, Mr.
24 Underwood wrote checks in the amount of the spousal maintenance payments and
25 sent the checks to Respondent, rather than to Ms. Burrell.

1 8. At Mr. Underwood's direction, Respondent deposited the checks each
2 month into his trust account and held the funds in that account. However,
3 Respondent only briefly held the funds in September before sending them to Ms.
4 Burrell's attorney, as described below in paragraph 11.
5

6 9. At the time Respondent received the checks and deposited them into
7 his trust account, he was aware of the court order requiring Mr. Underwood to
8 make monthly payments to Ms. Burrell.
9

10 10. Ms. Burrell filed a post-decree action to enforce the order for spousal
11 maintenance and to request that spousal maintenance be paid by order of
12 assignment.
13

14 11. On or about September 23, 2004, Respondent sent a check in the
15 amount of \$3,700.00 and a letter to Ms. Burrell's attorney, Shannon Bradley,
16 indicating that the check represented four payments (June, July, August and
17 September 2004) of spousal maintenance.
18

19 12. Ms. Burrell filed a written charge with the State Bar of Arizona
20 ("State Bar") on or about October 13, 2004.
21

22 13. Respondent admits that Mr. Underwood sent him the June, July,
23 August and September 2004 payments and that he placed them in his trust account.
24

25 14. Respondent states that he takes full responsibility for retaining the
funds in his trust account until instructed to the contrary by Mr. Underwood.

1 15. Respondent states that he withheld the support payments with his
2 client's consent to exert pressure on Ms. Burrell to timely follow the Court's order
3 to either list the residence for sale or buy-out Respondent's client's share.
4

5 16. Ms. Burrell's matter was heard over a period of two days in the Pima
6 County Superior Court and concluded on February 7, 2005.

7 17. Respondent contacted the State Bar by letter dated March 14, 2005
8 and provided the State Bar with a copy of the Court's ruling filed March 10, 2005.
9

10 18. The Court found that Mr. Underwood, in an effort to obtain
11 compliance by Ms. Burrell with other provisions of the Decree, withheld the
12 spousal maintenance payments for the months of June, July, August and September
13 2004.
14

15 19. The Court found that Mr. Underwood paid the total amount of past
16 due spousal maintenance to Ms. Burrell at the end of September 2004.

17 20. The Court found that, given the conduct of both Mr. Underwood and
18 Ms. Burrell, it was not appropriate to enter a judgment for attorney's fees.
19 However, the Court granted judgment for Ms. Burrell against Mr. Underwood for
20 any costs she incurred in bringing the proceeding.
21

22 **CONDITIONAL ADMISSIONS & DISMISSALS**
23

24 Respondent conditionally admits that his conduct, as set forth above,
25 violated Rule 42, Ariz. R. S. Ct., ERs 1.15(d), 1.16(a) and 8.4(d).

1 The State Bar conditionally agrees to dismiss the allegation in Count One
2 that Respondent violated ER 4.4.

3 ABA STANDARDS

4
5 The ABA *Standards* list the following factors to consider in imposing the
6 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
7 actual or potential injury caused by the lawyer's misconduct, and (4) the
8 existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.

9
10 The parties indicated that *Standard* 4.0 (Violations of Duties Owed to
11 Clients) and *Standard* 7.0 (Violations of Other Duties Owed as a Professional)
12 are the most applicable in this matter. A review of ABA *Standard* 4.1 (Failure to
13 Preserve the Client's Property) indicates that censure is the presumptive sanction
14 for Respondent's misconduct. *Standard* 4.13 specifically provides:

15
16 Reprimand (censure in Arizona) is generally appropriate
17 when a lawyer is negligent in dealing with client property
18 and causes injury or potential injury to a client.

19
20 *Standard* 7.3 specifically provides:

21 Reprimand (censure in Arizona) is generally appropriate
22 when a lawyer negligently engages in conduct that is a
23 violation of a duty owed as a professional, and causes injury
or potential injury to a client, the public, or the legal system.

24 Respondent knowingly counseled and assisted his client to not pay spousal
25 support in violation of a court order for four months on the negligent assumption

1 that it was an appropriate means to induce the opposing party to comply with a
2 different court order to pay the client for his share of the family residence;
3 Respondent negligently placed his client's funds into his trust account for four
4 months and negligently failed to contact the opposing party who had an interest in
5 the funds held in his trust account; and Respondent caused injury or potential
6 injury to his client, the opposing party and the legal system.
7

8 AGGRAVATING AND MITIGATING FACTORS

9
10 This Hearing Officer then considered aggravating and mitigating factors in
11 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
12

13 This Hearing Officer agrees with the parties that there are two applicable
14 aggravating factors in this matter:

- 15 (d) multiple offenses; and,
- 16 (i) substantial experience in the practice of law.

17 This Hearing Officer agrees with the parties that three factors are present in
18 mitigation:
19

- 20 (a) absence of a prior disciplinary record;
 - 21 (e) full and free disclosure to disciplinary board or cooperative attitude
22 toward proceedings; and,
 - 23 (g) character or reputation.
- 24
25

1 Respondent argues that he withheld the funds in his trust account per his
2 client's instructions. Per *Standard 9.4*, agreeing to the client's demand for certain
3 improper behavior or result is neither an aggravating nor mitigating factor.
4

5 PROPORTIONALITY REVIEW

6 To have an effective system of professional sanctions, there must be
7 internal consistency, and it is appropriate to examine sanctions imposed in cases
8 that are factually similar. *Peasley, supra*, at ¶ 33, 90 P.3d at 772. However, the
9 discipline in each case must be tailored to the individual case, as neither
10 perfection nor absolute uniformity can be achieved. *Id.* at ¶ 61, 90 P.3d at 778,
11 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135
12 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). The cases set forth below demonstrate
13 that a censure is an appropriate disciplinary response.
14
15

16 Where, as here, Respondent's conduct is knowing but negligent, a censure
17 is usually ordered. Similar cases include the following.
18

19 In *In re Mirescu*, SB No. 01-1534 (2003), Mirescu consented to a censure
20 for violations of ERs 1.2(d), 3.4(c) and 8.4(a) and (d). Mirescu told her client,
21 the father in a child custody dispute, that he should use "self-help" to obtain
22 visitation with the child instead of waiting for the resolution of the custody
23 mediation and court hearing. She knowingly counseled her client to remove his
24 child from the mother while the court's order (temporary custody to mother and
25

1 mediation concerning visitation pending) was in effect but did not intend to
2 violate the court order or the ethical rules. There appears to be little actual
3 injury, although there was significant potential injury. This case is similar to
4 Respondent's case in that Respondent knowingly counseled his client to violate
5 court orders but he did so negligently based upon his belief that such actions
6 were warranted by the opposing party's failure to abide by a different court
7 order. Respondent's conduct caused little actual injury but there was potential
8 injury.
9
10

11 In *In re Estrada*, SB-02-0044-D (2002), Estrada received a censure and
12 probation for violations of ERs 1.3, 1.4, 1.15, 1.16, 5.1 and 8.1 and Rule 51(h)
13 and (i). In a personal injury action, Estrada's client received settlement funds in
14 December but Estrada did not release the funds because the client was going
15 through a divorce and did not want his spouse to receive any of them. Estrada
16 negligently violated his duties and caused little or no actual or potential injury.
17
18 Similar to *Estrada*, in Respondent's case, Respondent acted knowingly, but he
19 negligently believed that it was appropriate to withhold funds from the opposing
20 party based upon his client's instructions to do so. Unlike *Estrada*, he caused
21 little actual injury, but caused potential injury.
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23

24 In *In re Hineman*, SB 03-1581 (2004), Hineman received an informal
25 reprimand for violations of ERs 1.15(d) and (e). In a divorce proceeding,

1 Hineman received money from the sale of one of the community assets and
2 placed the funds into his trust account. Hineman gave his client her share but did
3 not give the opposing party his share until the opposing counsel threatened to file
4 a bar complaint. The case of *Hineman* is less egregious than Respondent's case.
5 Hineman did not violate a court order as Respondent did. Additionally, unlike
6 *Hineman*, Respondent's case involves multiple offenses. Respondent helped to
7 violate the spousal support orders four times over four months. He also violated
8 the trust account rules by his conduct, unlike in *Hineman*.

11 RECOMMENDATION

12 The purpose of lawyer discipline is not to punish the lawyer, but to protect
13 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
14 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
15 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
16 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
17 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
18 (1994).

19 In imposing discipline, it is appropriate to consider the facts of each case,
20 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
21 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
22 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

1 Upon consideration of the facts, application of the *Standards*, including
2 aggravating and mitigating factors, and a proportionality analysis, this Hearing
3 Officer recommends acceptance of the Tender of Admissions and Agreement for
4 Discipline by Consent and the Joint Memorandum in Support of Agreement for
5 Discipline by Consent which provides for the following:
6

7 1. Respondent shall receive a censure.

8 2. Respondent will be placed on probation for a period of one year
9 effective upon the signing of the probation contract. The State Bar will notify the
10 Disciplinary Clerk of the exact date of commencement of probation. The term of
11 probation is as follows:
12

13 a. Respondent shall complete the State Bar's Ethics Enhancement
14 Program (EEP). Probation will terminate upon completion of the program.
15

16 b. In the event that Respondent fails to comply with any of the
17 foregoing conditions, and the State Bar receives information, bar counsel shall
18 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule
19 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty
20 days after receipt of said notice, to determine whether the terms of probation have
21 been violated and if an additional sanction should be imposed. In the event there is
22 an allegation that any of these terms have been violated, the burden of proof shall be
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1 on the State Bar of Arizona to prove non-compliance by clear and convincing
2 evidence.

3
4 3. Respondent shall pay the costs and expenses incurred in this
5 disciplinary proceeding.

6 DATED this 7th day of February, 2006.

7
8 Lowell E. Rothschild/pr
9 Lowell E. Rothschild
10 Hearing Officer 7Z

11 Original filed with the Disciplinary Clerk
12 this 7th day of February, 2006.

13 Copy of the foregoing was mailed
14 this 7th day of February, 2006, to:

15 Dean C. Christoffel
16 Respondent's Counsel
17 *West, Christoffel and Zickerman, P.L.L.C.*
18 2870 North Swan Road, Suite 100
19 Tucson, AZ 85712

20 Denise K. Tomaiko
21 Bar Counsel
22 State Bar of Arizona
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25 by: Williams