

**FILED**

JAN 09 2006

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY *William D*

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

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2  
3 IN THE MATTER OF A MEMBER )  
4 OF THE STATE BAR OF ARIZONA, )  
5 )  
6 **RICHARD T. BALL,** )  
7 Bar No. 002029 )  
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RESPONDENT.

No. 05-0597

**HEARING OFFICER'S  
REPORT**

**Relevant Procedural History**

On August 19, 2005, a probable cause order directed the State Bar to file a complaint against Respondent for ethical violations. On August 30, 2005, the State Bar filed a one-count complaint asserting trust account violations arising from a \$41.89 overdraft. In his Answer, Respondent admitted he failed to conduct a monthly three-way reconciliation of his trust account as well as the general underlying factual allegations. The parties were unable to reach a settlement at a conference held October 28, 2005. Apparently, the parties could not agree upon an appropriate sanction. The parties presented their case at a hearing held December 8, 2005. At the hearing, the State Bar withdrew its allegation that Respondent did not have a proper IOLTA interest-bearing trust account. (Tr. 12/8/05, at 9.) The transcript of those proceeding was filed

1 December 15, 2005. The parties each submitted memoranda concerning the  
2 appropriate sanction.

### 3 **Findings of Fact**

4 Based on the admissions in the answer and evidence adduced at the  
5 hearing, the following facts are clearly and convincingly established:

6 1. Respondent's bank notified the State Bar on April 14, 2005, that on  
7 March 10, 2005, it paid a check for \$105.00 drawn against Respondent's client  
8 trust account when the balance in the account was only \$63.11.

9 2. The bank did not charge an overdraft fee leaving a negative account  
10 balance of \$41.89.

11 3. Respondent's answer to the State Bar Record Examiner's request for  
12 an explanation concerning the overdraft was prompt, truthful and candid.

13 4. Respondent has been a member of the Arizona State Bar since  
14 September 23, 1967.

15 5. During the relevant period, Respondent ran his practice without a  
16 clerical staff given its low volume; he rarely had more than one client at time  
17 requiring use of his trust account.

18 6. After his trust account was overdrawn, Respondent intentionally  
19 deposited a \$20,000 personal loan into his trust account and used a significant  
20 portion of the funds to pay arrears due and owing on his home.  
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1 7. Because of the nature and volume of Respondent's limited practice,  
2 he intentionally has not kept client ledgers since January 1999.

3 8. Thus, Respondent has not conducted monthly three-way  
4 reconciliations of his trust account.

5 9. However, the overdraft was caused when Respondent unintentionally  
6 forgot to collect reimbursement of filing fees that he had advanced a client  
7 from his trust account for an expedited transaction.  
8

9 10. Respondent provided the State Bar with the relevant original checks,  
10 but did not submit any deposit slips.  
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12 The State Bar failed to establish by clear and convincing evidence that:  
13 (a) the \$63.11 remaining in the account after the overdraft belonged to a client,  
14 rather than Respondent's own funds used as a "cushion," (2) that any client  
15 was harmed, or (3) Respondent improperly dealt with *client* property causing  
16 potential injury to a client. The State Bar acknowledges Respondent has not  
17 been previously disciplined in his 38 years of practice.  
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### 20 Discussion and Conclusions of Law

21 An attorney shall hold property of clients "or third persons" in the  
22 attorney's possession separate from his own property. ER 1.15(a). An  
23 attorney may not commingle his funds with that of his clients. ER 1.15(b). An  
24 attorney shall maintain an account ledger "or the equivalent" for each client.  
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1 Rule 43(d)(2)(C). Duplicate deposit slips “or the equivalent” must also be  
2 retained for each deposit with sufficient detail. Rule 43(d)(2)(B).

3 While the evidence is overwhelming that Respondent intentionally failed  
4 to comply with his responsibilities concerning trust account verification, the  
5 evidence does not show that he failed to safeguard the property of clients or  
6 third persons in his possession. In the context of this set of facts, I do not find  
7 the State Bar’s argument persuasive that there was potential injury to a client  
8 because of the commingling of funds or lack of records beyond the check  
9 registers and the bank statements.  
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#### 12 Discussion of Sanctions

13 The State Bar believes the appropriate sanction is censure. Such a  
14 recommendation is entitled to serious consideration. *In Matter of Kleindienst*,  
15 132 Ariz. 95, 102, 644 P.2d 249, 256 (1982). Respondent believes the  
16 appropriate sanction is an informal reprimand.  
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#### 19 A.B.A. STANDARDS

20 To promote and maintain confidence in the bar’s integrity, there are two  
21 main purposes for disciplining an attorney: “(1) to protect the public and the  
22 courts and (2) to deter the attorney and others from engaging in the same or  
23 similar misconduct.” *In Matter of Zawada*, 208 Ariz. 232, ¶ 12, 92 P.3d 862  
24 (2004). However, the purpose of State Bar discipline is not to punish the  
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1 offending attorney. *In Matter of Couser*, 122 Ariz. 500, 502, 596 P.2d 26, 28  
2 (1979).

3 While not required for determining attorney discipline, the ABA's  
4 *Standards for Imposing Lawyer Sanctions* (1992 rev.) ("*Standards*"), can be a  
5 useful starting point in deciding an appropriate and just sanction. *See In Matter*  
6 *of Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840 (1996). In applying the  
7 *Standards* the Supreme Court considers (a) the type of duty violated; (b)  
8 Respondent's mental state; (c) the injury or potential injury to the client,  
9 public, administration of justice; and (d) any aggravating or mitigating  
10 circumstances. *See In Matter of Spear*, 160 Ariz. 545, 555, 774 P.2d 1335,  
11 1345 (1989).

12 Because Respondent's conduct in not complying with the trust  
13 verification rules was at least knowing, the State Bar believes the appropriate  
14 *Standard* is 4.12 (requiring suspension). However, given the mitigation, the  
15 State Bar argues that the appropriate sanction is censure. Respondent argues  
16 that because the act that caused the overdraft was negligent, the appropriate  
17 *Standard* is 4.14 (permitting an informal reprimand). Because the evidence  
18 does not demonstrate that Respondent dealt with *client* property or caused  
19 actual or potential injury to a *client*, I do not find either *Standard* particularly  
20 helpful. Moreover, generally the *Standards* do not adequately address the  
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1 situation here where the mental state is intentional, but there is no actual or  
2 serious potential risk to a client or the administration of justice. While the  
3 State Bar is certainly correct that without properly maintained trust account  
4 records, it is difficult, or in some cases impossible, to determine whether a  
5 client has been injured. However, on this record, there is no hint of  
6 mishandling client property or client injury. It would not be proper to base a  
7 sanction on mere speculation of some future happening.  
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9 **Aggravating and Mitigating Factors**

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11 The record supports the State Bar's contention of a pattern of  
12 misconduct. *Standard 9.22(c)*. Given Respondent's lack of a prior record, I do  
13 not find his substantial experience in the practice of law to be aggravating. *See*  
14 *In Matter of Shannon*, 179 Ariz. 52, 68, 876 P.2d 548, 552 (1994).  
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16 The parties agree substantial mitigation exists: (1) absence of a prior  
17 disciplinary record; (2) absence of a dishonest or selfish motive; (3) full and  
18 free disclosure to disciplinary board or cooperative attitude toward  
19 proceedings; (4) remorse. *Standards 9.32(a)(b)(e)(l)*. Additionally,  
20 Respondent submits, and I find, timely good faith effort to rectify the  
21 consequences of the misconduct. *Standard 9.32(d)*.  
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## PROPORTIONALITY REVIEW

1           Although not required by rule, in the past the Arizona Supreme Court  
2 often consulted similar cases in an attempt to assess the proportionality of the  
3 sanction. *See In Matter of Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799  
4 (1994). More recently, the Arizona Supreme Court has criticized the concept  
5 of proportionality review as “an imperfect process.” *In Matter of Owens*, 182  
6 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). This is because no two cases “are  
7 ever alike.” *Id.*; *see also State v. Salazar*, 173 Ariz. 399, 417, 844 P.2d 566,  
8 584 (1992) (abandoning proportionality review in death penalty cases).

9           Each party submitted three cases that resulted in a Respondent either  
10 being censured or informally reprimanded for trust account violations. None of  
11 the cases perfectly match the factual circumstances of this case, or the  
12 aggravation and mitigation present in this case.

### **Sanction**

13           Considering the unique circumstances of this case, the *Standards*, the  
14 aggravation and mitigation, and the six submitted cases, it is ORDERED:  
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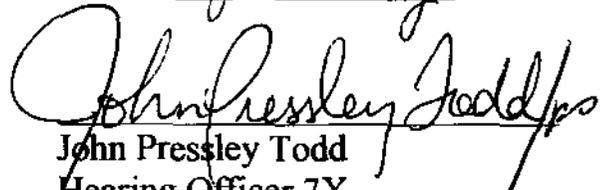
16           1. Pursuant to Rule 60(a)(4) of the Arizona Supreme Court, Respondent  
17 is informally reprimanded.  
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19           2. Pursuant to Rule 60(a)(5) of the Arizona Supreme Court, Respondent  
20 is placed on one-year probation, and as a condition of that probation  
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1 Respondent is FURTHER ORDERED to participation in Trust Account Ethics  
2 Enhancement Program ("TAEPP") and in the Membership Assistance Program  
3 ("MAP").

4 3. Pursuant to Rule 60(b) of the Arizona Supreme Court, it is  
5 FURTHER ORDERED that Respondent shall be assessed the costs and  
6 expenses related to this disciplinary proceeding.  
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8 DATED this 9<sup>th</sup> day of January, 2006.

9  
10   
11 John Pressley Todd  
12 Hearing Officer 7X

13 Original filed with the Disciplinary Clerk  
14 this 9<sup>th</sup> day of January, 2006.

15 Copy of the foregoing mailed  
16 this 9<sup>th</sup> day of January, 2006, to:

17 David D. Dodge  
18 Respondent's Counsel  
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by: P. Williams