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JAN 18 2006

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

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

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5 IN THE MATTER OF A MEMBER) No. 04-0713
6 OF THE STATE BAR OF ARIZONA,)
7)
8 **ROBERT M. COOK,**)
9 **Bar No. 002628**)
10)
11) **HEARING OFFICER'S REPORT**
12)
13) **RESPONDENT.**)
14)

PROCEDURAL HISTORY

15 A Probable Cause Order was filed on May 11, 2005. A Complaint was
16 filed on September 1, 2005. Respondent filed an Answer on September 30,
17 2005. The parties filed a Tender of Admissions and Agreement for Discipline
18 by Consent (Tender) and Joint Memorandum in Support of Tender of
19 Admissions and Agreement for Discipline by Consent (Joint Memo) were filed
20 on December 16, 2005. No hearing has been held in this matter but the
21 deposition of Respondent of October 25, 2005 was read and considered.

FINDINGS OF FACT

- 22 1. At all times relevant, Respondent was an attorney licensed to
23 practice law, having been admitted to practice in Arizona on September 26, 1970.
24 2. On or about May 1, 2002, Respondent met with Ruth York and
25 Donald Drake concerning legal matters with which they were involved.

1 3. On or about May 1, 2002, Respondent agreed to represent Ms. York
2 in a breach of contract and fraud action filed against Ms. York in Arizona
3 Superior Court (case number J1401CV200200521), protective orders issued
4 against Ms. York in Oklahoma concerning Mr. Drake's mother (case number PO-
5 02-59), and Ms. York's bankruptcy filed in Arizona (case number B-02-00716-
6 YUM-EWH).
7

8 4. On or about May 1, 2002, Respondent and Ms. York discussed how
9 he was to be paid for the representation. They agreed that Ms. York would sell
10 her business and give Respondent the proceeds. They agreed that Ms. York
11 would give Respondent some of her jewelry.
12

13 5. On or about May 1, 2002, Ms. York gave Respondent appraisals for
14 the jewelry, appraised on or about June 29, 2001, that indicated that it had a total
15 estimated retail replacement value of \$44,726.73. The appraisal also indicated
16 that the appraiser, in reaching the retail replacement value, used a "mark-up"
17 range of two to six times the estimated wholesale value of the items "to reflect the
18 broad spectrum of jewelry retailing." Specifically, the mark-up used for Ms.
19 York's appraisal was 2.5.
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22 6. Respondent received \$10,830.00 plus jewelry from Ms. York on or
23 about May 31, 2002.
24
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1 7. On or about June 16, 2002, Respondent signed a Disclosure of
2 Compensation of Attorney for Debtor in which he stated that he had agreed to
3 receive \$32,224.47 for his legal services and that he had already received that
4 sum from Ms. York. In the disclosure, Respondent did not disclose that he had
5 received jewelry, but rather stated the dollar equivalent of the jewelry based on a
6 wholesale value of the jewelry as described in the appraisal, i.e. without the
7 "mark-up."
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10 8. In the bankruptcy pleadings, signed by Ms. York on or about June
11 18, 2002, Respondent listed the value of the jewelry to be \$21,394.47 in the
12 section entitled "9. Payments related to debt counseling or bankruptcy."
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14 9. In Respondent's response to the bar complaint dated September 21,
15 2004, he states that he and Ms. York agreed that he was to be paid "...\$10,830
16 together with her jewelry, no more, no less,..." and that the jewelry was valued at
17 \$21,394.47.
18

19 10. After the within bar complaint was filed, Respondent gave the
20 Bankruptcy Trustee the jewelry to hold until the Court decided whether to
21 liquidate it.
22

23 11. Thereafter, Respondent applied for attorney's fees and costs in the
24 amount of \$38,214.36 and asked that the jewelry be returned to him.
25

1 12. As stated in the Memorandum Decision Re: Attorney's Fees and
2 Costs filed February 22, 2005, the Bankruptcy Court denied Respondent's request
3 to be paid by a transfer of the jewelry held by the Trustee and ordered the jewelry
4 liquidated.
5

6 13. Respondent improperly entered into a business transaction and
7 acquired an improper interest with regard to Ms. York's jewelry and she did not
8 give informed, written consent.
9

10 14. Respondent failed to advise Ms. York to seek advice of independent
11 counsel concerning the transaction.
12

13 15. Respondent failed to give Ms. York a reasonable opportunity to seek
14 the advice of independent legal counsel with regard to the transaction.
15

16 16. Respondent knew that Ms. York was represented in other matters by
17 another attorney, Harry Longbottom, who had referred Ms. York to Respondent.
18 Respondent assumed that Ms. York discussed the arrangements she made with
19 Respondent with Mr. Longbottom before paying Respondent.
20

CONDITIONAL ADMISSIONS

21 Respondent conditionally admits that his conduct, as set forth above,
22 violated the following Rules of Professional Conduct and the Rules of the
23 Supreme Court:
24

25 ER 1.8(a): 1 charge (Count 1)

1 Admonition (informal reprimand in Arizona) is generally
2 appropriate when a lawyer engages in an isolated instance of
3 negligence in determining whether the representation of a
4 client may be materially affected by the lawyer's own
5 interests, or whether the representation will adversely affect
another client, and causes little or no actual or potential
injury to a client.

6 Respondent's conduct was an isolated instance that only appears negligent
7 in retrospect. Respondent contends that he did not know that it was improper to
8 accept his client's jewelry as partial payment of his fees without giving his client
9 a reasonable opportunity to seek the advice of independent legal counsel as to the
10 transaction and that no harm came to his client because the Court had to approve
11 the amount of his fees and the manner of payment of those fees.
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14 As Ms. York was involved in bankruptcy proceedings, the Court reviewed
15 the amount that Ms. York had been charged overall and the arrangements
16 Respondent had with Ms. York concerning payment of fees. The Court could
17 order the jewelry liquidated, as was done in this case, or funds returned if it felt
18 that Respondent had been overpaid. Thus, the parties agree and the record
19 reflects that little or no actual or potential injury was caused to Ms. York.
20

21 **AGGRAVATING AND MITIGATING FACTORS**
22

23 Considering the aggravating and mitigating factors in this case, pursuant to
24 *Standards* 9.22 and 9.32, respectively, this Hearing Officer agrees with the parties
25 that there is one potentially applicable aggravating factor in this matter:

1 (i) substantial experience in the practice of law.¹

2 This Hearing Officer also agrees with the parties that five factors are
3 present in mitigation:
4

5 (a) absence of a prior disciplinary record;

6 (d) timely good faith effort to make restitution or to rectify consequences
7 of misconduct;

8 (e) full and free disclosure to disciplinary board or cooperative attitude
9 toward proceedings;

10 (g) character or reputation; and,

11 (l) remorse.
12
13

14 PROPORTIONALITY REVIEW

15 To have an effective system of professional sanctions, there must be
16 internal consistency, and it is appropriate to examine sanctions imposed in cases
17 that are factually similar. *Peasley, supra*, 208 Ariz. at 33, 90 P.3d at 772.
18 However, the discipline in each case must be tailored to the individual case, as
19 neither perfection nor absolute uniformity can be achieved. *Id.* 208 Ariz. at 61,
20 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In*
21 *re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
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¹ Respondent was admitted September 26, 1970.

1 One of the most factually similar cases is that of *In re Redondo*, SB-92-
2 0055-D (1993), however, the conduct in that case is more egregious than in the
3 case at hand. Redondo received a two-year suspension for many ethical
4 violations, including conflicts with his client. A divorce client asked Redondo to
5 buy her wedding rings. Redondo sent her to pawn shops and jewelry stores, but
6 the client did not like the price offered to her. Redondo then bought the rings for
7 \$500. He did not obtain his client's written consent to the transaction, nor did he
8 provide his client with the opportunity and notice to seek independent legal
9 counsel. He knew or should have known that he violated the ethical rules, but his
10 conduct was unintentional. There was no evidence that his client was injured.
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14 In addition, in contrast to Respondent's case, Redondo engaged in other
15 more serious misconduct with additional clients. For example, he received
16 money on behalf of a second client, deposited it into his general account and did
17 not fully pay the client the money owed to that client for about four years;
18 borrowed money from a third client without giving him advice or opportunity to
19 seek the advice of independent counsel; and failed to take any steps on behalf of
20 some other clients and failed to communicate with them.
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23 In addition, Redondo, unlike Respondent, had received two previous
24 informal reprimands and failed to cooperate with the disciplinary proceedings.
25

1 In another conflicts case, *In re Clark*, 2002 Ariz. LEXIS 21, DC No. 99-
2 2285 (2002), Respondent received a censure for violations of ER 1.7, 8.1 and
3 8.4(c) and (d). Respondent prepared answers for two tenants of a current client,
4 resulting in multiple conflicts of interest. His negligence caused actual or
5 potential injury. He was found to have a dishonest or selfish motive, a prior
6 disciplinary history and substantial experience in the practice of law. Mitigating
7 factors were remorse and remoteness of the prior offense. The facts in *Clark* are
8 clearly more egregious than those in Respondent's matter.

11 A third instructional case is that of *Matter of Owens*, 182 Ariz. 121, 893
12 P.2d 1284 (1995). Owens received a censure for failing to properly consult with
13 his bankruptcy client concerning the dischargeability of his unpaid legal fees
14 from prior representation – creating a conflict between the lawyer and the client
15 very similar to the one here. The court noted this singular non-consequential
16 violation appeared in an otherwise spotless disciplinary record of 44 years.

19 In light of these cases, an informal reprimand is appropriate for
20 Respondent. His mitigating factors far outweigh the aggravating factor, and his
21 misconduct involved one narrow violation of ER 1.8(a).

22 RECOMMENDATION

24 The purpose of lawyer discipline is not to punish the lawyer, but to protect
25 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859

1 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
2 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
3 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
4 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
5 (1994).
6

7 In imposing discipline, it is appropriate to consider the facts of each case,
8 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
9 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
10 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
11

12 Upon consideration of the facts, application of the *Standards*, including
13 aggravating and mitigating factors, and a proportionality analysis, this Hearing
14 Officer recommends acceptance of the Tender of Admissions and Agreement for
15 Discipline by Consent and the Joint Memorandum in Support of Agreement for
16 Discipline by Consent which provides for the following:
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- 18 1. Respondent shall receive an informal reprimand.
- 19 2. Respondent will be placed on probation for a period of one year
20 effective upon the signing of the probation contract. The State Bar will notify the
21 Disciplinary Clerk of the exact date of commencement of probation. The terms of
22 probation are as follows:
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1 a. Respondent shall attend and complete the State Bar's Ethics
2 Enhancement Program (EEP).

3 b. Respondent shall request an Ethics Opinion from the State Bar's
4 Ethics Counsel and abide by the resulting opinion on the following: "When an
5 advance, earned-upon receipt fee is paid against services in a bankruptcy matter
6 and which is subject to subsequent approval of the court, must the lawyer hold the
7 funds in his or her trust account until court approval?"
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10 c. In the event that Respondent fails to comply with any of the
11 foregoing conditions, and the State Bar receives information, bar counsel shall
12 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule
13 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty
14 days after receipt of said notice, to determine whether the terms of probation have
15 been violated and if an additional sanction should be imposed. In the event there is
16 an allegation that any of these terms have been violated, the burden of proof shall be
17 on the State Bar of Arizona to prove non-compliance by clear and convincing
18 evidence.
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