

FILED

MAY 12 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA

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

BY *[Signature]*

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IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
)
JOHN DUKE HARRIS,)
Bar No. 007407)
)
RESPONDENT.)
_____)

Nos. 04-1246, 05-2151

HEARING OFFICER'S REPORT

RELEVANT PROCEDURAL HISTORY

On December 15, 2005, a probable cause order directed the State Bar to file a complaint against Respondent for ethical violations arising out Respondent's management of his trust fund.

On December 22, 2005, the State Bar filed a two-count complaint. Count One (04-1246) asserted trust violations discovered following notification of \$2.97 overdraft in the summer of 2004. Two days after the notice of the overdraft, Respondent was placed on probation in an unrelated matter. Count Two (05-2151) asserts a violation of that probation.

Following a settlement conference on March 20, 2006, the parties were unable to reach a settlement. Subsequently, Respondent filed two motions: (1) to dismiss or quash improperly obtained evidence, and (2) to require bar counsel to reconsider diversion. The State Bar responded and the motions were taken under advisement. The parties also filed hearing memoranda.

At the five-hour hearing on April 28, 2006, Arthur P. Allsworth represented Respondent and Roberta Tepper represented the State Bar. While the central dispute between the parties is the appropriate sanction, Respondent raised a number of legal issues discussed below.

RELEVANT CONTEXT OF ALLEGATIONS¹

1 1. During the relevant times, Respondent was a sole practitioner whose office was initially
2 located at 1741 E. Morten Avenue, Suite B, in Phoenix and later in his home. While at these
3 locations, Respondent's practice involved commercial litigation. Prior to the hearing,
4 Respondent became associated with the California law firm of Tharpe and Howell in Arizona as
5 an independent contractor involved in insurance defense.
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7 2. On July 29, 2003, Respondent attended a three-hour Trust Account Ethics
8 Enhancement Program ("TAEEP") pursuant to an Order of Diversion in State Bar Matter No.
9 02-2056.

10 3. About a year later, on July 16, 2004, one of Respondent's clients deposited by wire
11 transfer \$2,000 into Respondent's Trust Account at Bank One. After determining that those
12 were earned fees, Respondent wrote check number 1484 to withdraw those monies.
13

14 4. On July 20, 2004, Bank One notified the State Bar that Respondent's IOLTA trust
15 account was insufficient for payment on July 16, 2004, of the check Respondent wrote to
16 withdraw his fees. It was overdrawn by \$2.97 as a result of a domestic wire transfer fee Bank
17 One charged for incoming wire transfers. Three days later the Trust Account was overdrawn by
18 \$31.97, after Bank One assessed its \$29 overdraft fee.

19 5. By July 22, 2004, the overdraft was cured when additional client funds were wire
20 transferred into Respondent's Trust Account. Subsequently, the bank reversed the overdraft
21 charge at the request of Respondent.
22

23 6. Also on July 22, 2004, the State Bar ordered Respondent be placed on probation in
24 State Bar No. 03-1800 as a result of unrelated previous problems with his Trust Account.
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¹ A more extensive chronology is attached to this report.

1 7. On August 6, 2004, in answer to the State Bar's request for "all necessary
2 documentation to support the explanation in your response," Respondent timely provided the
3 State Bar with his Bank One Trust Account statement that identified and confirmed the cause of
4 the \$2.97 overdraft.

5 8. For almost a year, the State Bar and Respondent exchanged information concerning
6 this overdraft with Respondent slowly providing additional records that raised additional
7 questions for the State Bar.

8 9. While this exchange was on going, on September 23, 2004, Respondent executed his
9 probation contract for the Trust Account Program ("TAP") in File No. 03-1800. (Hr. Ex. 27)

10 10. Among other conditions of probation, Respondent agreed to maintain separate ledger
11 or equivalents for each client having funds in his trust account, to reconcile the accounts at least
12 monthly, transfer fees from his trust account within a reasonable time after they are earned, and
13 provide quarterly reports to the State Bar. (Hr. Ex. 27, at 105-7.)

14 11. At the time of the July 2004 overdraft, Respondent apparently considered his client
15 billing statements equivalent to client ledgers. In October 2004, the State Bar advised
16 Respondent that his client billing statements did not qualify as an equivalent to a client ledger.
17 Thereafter, Respondent used a form provided by the State Bar, although not correctly.
18

19 12. Over a year later, in a letter dated August 4, 2005, the State Bar notified Respondent
20 that based on its overdraft investigation, Respondent had failed to maintain individual client
21 ledgers, that he had earned fees deposited into his trust account, and he had failed to conduct a
22 three-way reconciliation. (Hr. Ex. 17.)
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13. On the same day, the State Bar filed a Notice of Non-Compliance asserting Respondent materially breached his probation conditions in No. 03-1800 for failure to file complete quarterly reports.

FINDINGS OF FACT

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

1. The July 2004 overdraft was caused by an unanticipated incoming wire transfer \$12 fee being assessed by Bank One.
2. Respondent withdrew earned fees from his Trust Account within a reasonable time period.
3. Respondent failed to properly maintain individual client ledgers for his Trust Account.
4. Respondent failed to conduct a three-way reconciliation.
5. Respondent materially breached his probation conditions by failing to file timely complete quarterly reports.
6. There is no evidence of fraud, embezzlement, or conversion of funds.
7. There is no evidence that any client suffered a loss, a potential loss, or was injured or harmed in any way.
8. There is no clear and convincing evidence of a realistic potential harm to a client given the facts of this case.

MOTIONS

Motion to Dismiss or Quash: Respondent contends that the State Bar violated the requirements of Supreme Court Rule 43(c)(1) and conducted an unauthorized "fishing expedition" after receiving Respondent's July 2004 bank statement that explained the overdraft.

1 Rule 43(c)(1) permits the Court to order an audit of a lawyer's trust account upon a showing of
2 "good cause" that ER 1.15 "may have been violated." A Supreme Court justice must authorize
3 the audit. The scope of the audit is set forth in Rule 43(c)(2). Rule 43(f) provides a means to
4 pay for such an audit.

5 What occurred here was not an "audit" within the meaning of Rule 43(c), so no good
6 cause needed to be shown nor Supreme Court authorization obtained. In a sense, the subsequent
7 requests for documentation appears to be a "fishing expedition," perhaps out of concern for
8 Respondent's history of problems with maintaining his trust account. Nevertheless, Bar
9 Counsels, supervising staff examiners, are obligated to investigate "all information" coming to
10 their attention that, if true, would be grounds for discipline. Rule 51(b)(1), Ariz. Sup. Ct. R.
11 And, without any preliminary showing, members of the Arizona Bar are required to cooperate
12 with any State Bar investigation or be disciplined for their failure to do so. Rule 53(d) and (f),
13 Ariz. Sup. Ct. R. Thus, there is no legal basis for suppressing the evidence obtained from
14 Respondent following his initial response. Moreover, by late September 2004, Respondent had
15 additional obligations to cooperate and provide information pursuant to his probation agreement.
16

17 Diversion Motion: Respondent sought an Order to require Bar Counsel to consider
18 diversion as an alternative to discipline. At the conclusion of the hearing, Respondent
19 acknowledged that this motion is moot. Moreover, it would be inappropriate for a hearing
20 officer to order Bar Counsel to consider or reconsider diversion or any particular sanction.
21

22 **DISCUSSION AND CONCLUSIONS OF LAW**

23 An attorney shall hold his client's property separate from his own property. ER 1.15(a).
24 Client funds shall be kept in a separate account. *Id.* Complete records of such account shall be
25 kept for 5 years. *Id.* For purposes of paying bank service charges, an attorney *may* deposit his
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1 own funds into a client trust account. ER 1.15(b) (emphasis added). An attorney must deposit
2 into a client trust account advanced legal fees and expenses to be withdrawn as the attorney earns
3 them or incurs the expenses. ER 1.15(c). Earned funds, however, shall not be deposited in a
4 trust fund account. Rule 43(d)(2)(B). Funds belonging in part to the attorney and to the client
5 shall *initially* be deposited into the attorney's trust account. *Id.* (emphasis added).

6 An attorney shall maintain an account ledger "or the equivalent" for each client whose
7 funds are in his trust account. Rule 43(d)(2)(C). An attorney is required to monthly reconcile his
8 client ledgers, trust account general ledger and the trust account bank statement. Rule
9 43(d)(2)(D).

10 Respondent testified that the overdraft was caused because of an unexpected bank fee for
11 incoming wire transfers. He testified that previously he had lowered the amount of his funds in
12 the trust account for bank fees on advice of the State Bar.

13 Respondent argues that there are ambiguities in the texts of ER 1.15(b), (c) and (d), and
14 the ambiguity was intended because common sense demands that these rules be applied
15 considering the individual circumstances of the law practice of each lawyer while achieving the
16 purpose of protecting client funds. I agree to the extent that not every overdraft in a trust account
17 violates Rules 43 and 44 or that an attorney must keep sufficient funds in his trust account to
18 cover all bank fees. I also agree it is proper to have client funds deposited into a trust account if
19 the attorney withdraws his earned fees within a reasonable time. There is no evidence that
20 Respondent deposited his operating account monies into his trust account. Thus, I do not find
21 any violation of ER 1.15. I find that Respondent adequately protected his client funds under the
22 circumstances.
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1 Respondent also contends that his billing records were the equivalent to client ledgers for
2 common sense purposes of being able to reconcile his trust account records. The State Bar's
3 expert disagreed. From the billing statements one could not reconcile the trust account because
4 there was no way of knowing at any given time who owned the funds in the trust account. Thus,
5 I find a violation of Rule 43(d)(2)(C).

6 Respondent does not assert that he in fact conducted monthly reconciliation, and the
7 State Bar established he could not based on the billing statements. This is a violation of Rule
8 43(d)(2)(D).

9 Finally, Respondent argues that he has purged his failure to file his quarterly reports by
10 handing the reports to the State Bar counsel on the day of the hearing. (Hr. Ex. 39.) His signed
11 probation agreement, however, states that failure to "fully comply" with any of the terms of this
12 agreement "constitutes a material breach." (Hr. Ex. 27, at 108.) Term A(2) requires filing of
13 quarterly reports on specific dates. Thus, I find that on this basis alone Respondent violated his
14 terms of probation.
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16 DISCUSSION OF SANCTIONS

17 The State Bar believes the appropriate sanction is suspension of six months to be
18 followed by two years of probation upon reinstatement. Such a recommendation is entitled to
19 serious consideration. *In Matter of Kleindienst*, 132 Ariz. 95, 102, 644 P.2d 249, 256 (1982).
20 Respondent believes the counts should be dismissed and, if not, the appropriate sanction is an
21 informal reprimand.
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ABA STANDARDS

1 ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty
2 violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the
3 lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

4 To promote and maintain confidence in the bar's integrity, there are two main purposes
5 for disciplining an attorney: "(1) to protect the public and the courts and (2) to deter the attorney
6 and others from engaging in the same or similar misconduct." *In Matter of Zawada*, 208 Ariz.
7 232, ¶ 12, 92 P.3d 862 (2004). However, the purpose of State Bar discipline is not to punish the
8 offending attorney. *In Matter of Couser*, 122 Ariz. 500, 502, 596 P.2d 26, 28 (1979). In
9 deciding upon an appropriate sanction, the Supreme Court does not consider the impact upon
10 Respondent's livelihood or any resulting psychological pain. *See In re Alcorn*, 202 Ariz. 62, ¶
11 41, 41 P.3d 600 (2002); *In re Scholl*, 200 Ariz. 222, ¶10, 25 P.3d 710 (2001).

12 While not required for determining attorney discipline, the ABA's *Standards for*
13 *Imposing Lawyer Sanctions* (1992 rev.) ("*Standards*"), can be a useful starting point in deciding
14 an appropriate and just sanction. *See In Matter of Brady*, 186 Ariz. 370, 374, 923 P.2d 836, 840
15 (1996). In applying the *Standards* the Supreme Court considers (a) the type of duty violated; (b)
16 Respondent's mental state; (c) the injury or potential injury to the client, public, administration of
17 justice; and (d) any aggravating or mitigating circumstances. *See In Matter of Spear*, 160 Ariz.
18 545, 555, 774 P.2d 1335, 1345 (1989).

19 The appropriate *Standard* is 4.14 ("a lawyer is negligent in dealing with client property
20 and causes little or not actual or potential injury to a client"). Because the evidence does not
21 demonstrate that Respondent dealt with *client* property or caused actual or potential injury to a
22 *client*, I do not find this *Standard* particularly helpful. Moreover, generally the *Standards* do not
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adequately address this type of situation where, according to the State Bar, no particular mental state is required in conjunction with the act or omission, and there is no actual or serious potential risk to a client or the administration of justice. On this record, there is no hint of mishandling client property or client injury. It would not be proper to base a sanction on mere speculation of some future happening.

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. The record supports the State Bar's contention of a prior record (98-2365; 02-0528; 03-1800), a pattern of misconduct (02-0528; 03-1800), multiple offenses, and substantial experience in the practice of law. *Standard* 9.22(a)(c)(d)(i). After careful review of the correspondence, while a close question, I do not find that the State Bar established bad faith obstruction of the disciplinary proceeding.

The record supports the following mitigation: (1) absence of a dishonest or selfish motive; (2) personal or emotional problems; (3) delay in disciplinary proceedings. *Standards* 9.32(b)(e)(j) Respondent closed his law office at the end of 2004 and spent the first part of 2005 searching for employment. This disruption may have contributed to his failure to timely file his quarterly reports.

PROPORTIONALITY REVIEW

Although not required by rule, in the past the Arizona Supreme Court often consulted similar cases in an attempt to assess the proportionality of the sanction. *See In Matter of Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994). More recently, the Arizona Supreme Court has criticized the concept of proportionality review as "an imperfect process." *In Matter of Owens*, 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995). This is because no two cases "are

2 Each party submitted a number of cases in support of their recommended sanction. None
3 of the cases perfectly match the factual circumstances of this case, or the aggravation and
4 mitigation present in this case. Thus, I do not find any of them so persuasive to be controlling.

5 RECOMMENDATION

6 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public
7 and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320
8 (1993). It is also the objective of lawyer discipline to protect the public, the profession and
9 the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another
10 purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20,
11 29, 881 P.2d 352, 361 (1994).

12 In imposing discipline, it is appropriate to consider the facts of the case, the American
13 Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards") and the
14 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283,
15 286, 872 P.2d 1235, 1238 (1994).

16 The most troubling aspect of this case is the number of prior problems Respondent has
17 had with his trust account and the failure to file timely his quarterly reports in accordance with
18 his probation agreement. Thus, it is understandable why the State Bar was very concerned with
19 Respondent's Trust Account transactions.

20 Balanced against this is the finding that the overdraft that triggered this prolonged
21 investigation was not a violation and the timing of his probation in relationship to that event.
22 Moreover, other than pure speculation there was no realistic potential harm to a client's funds
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1 resulting from the found violations. Considering the unique circumstances of this case, the
2 *Standards*, the aggravation and mitigation, it is recommended:

3 1. Pursuant to Rule 60(a)(3), that Respondent be censured.

4 2. Pursuant to Rule 60(a)(5), Respondent be again placed on one-year probation, and as
5 a condition of that probation Respondent participate in Trust Account Ethics Program ("TAP")
6 and in the Membership Assistance Program ("MAP") with the terms of the program adjusted to
7 his current responsibilities.

8 3. Pursuant to Rule 60(b), Respondent be assessed the costs and expenses related to this
9 disciplinary proceeding.

10 DATED this 12th day of May, 2006.

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14 _____
John Pressley Todd
Hearing Officer 7X

15 Original filed with the Disciplinary Clerk
16 this 12th day of May, 2006.

17 Copy of the foregoing mailed
18 this 12th day of May, 2006, to:

19 Arthur P. Allsworth
20 Respondent's Counsel
21 P.O. Box 14576
Scottsdale, AZ 85267-4576

22 Roberta L. Tepper
23 Bar Counsel
24 State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

25 by: K Weigand
26 _____