

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

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3
4 IN THE MATTER OF A MEMBER) No. 03-1564
5 OF THE STATE BAR OF ARIZONA,)
6) **HEARING OFFICER'S REPORT**
7 **ELLIOT J. PESKIND,**)
8 Bar No. 003096)
9 Respondent.)

10 **PROCEDURAL HISTORY:**

11 The State Bar of Arizona, through undersigned bar counsel, initiated this
12 matter by the filing of a complaint against Respondent Elliot J. Peskind.
13 Respondent filed his Response to the Complaint and a Case Management hearing
14 was conducted on January 27, 2006. On March 30, 2006, the parties filed a Joint
15 Memorandum in Support of Agreement for Discipline by Consent and also filed
16 a Tender of Admissions and Agreement for Discipline by Consent. The Hearing
17 Officer reviewed these documents and determined that a hearing on the Tender
18 of Admissions was not necessary.
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20

21 **FINDINGS OF FACT:**

22
23 1. At all times relevant, Respondent was an attorney licensed to
24 practice law in the State of Arizona, having been admitted to practice in Arizona
25 on September 23, 1972.

1 8. Ms. Robbins told Respondent that the \$5,000.00 was a payment to
2 her from Mr. Rabi and that she had instructed Mr. Rabi to send it to Respondent
3 to be used as the fee advance on her dissolution matter.
4

5 9. In November 2002, Mr. Rabi was arrested by the Securities and
6 Exchange Commission and he remains incarcerated at the present time.
7

8 10. After Mr. Rabi was arrested, Mr. Beckerman no longer represented
9 Mr. Rabi. Respondent was not informed of this prior to the filing of the Bar
10 complaint.
11

12 11. At the end of November 2002, after Mr. Rabi was arrested, Ms.
13 Robbins decided not to pursue the divorce and instructed Respondent not to
14 complete it.
15

16 12. In early December 2002, Respondent agreed to assist Ms. Robbins in
17 forming a corporation and they agreed to use \$850.00 of the money he held in his
18 trust account for the divorce to pay for the fees and costs of forming the
19 corporation. Ms. Robbins told Respondent that the remaining monies in trust
20 were hers and she requested that Respondent form a corporation for her benefit
21 for a fixed fee of \$850.00.
22

23 13. In early December 2002, Ms. Robbins asked Respondent to refund
24 the remaining money he held in his trust account for the divorce to her.
25

1 14. Sometime after November 27, 2002 and before December 10, 2002,
2 Respondent called Mr. Beckerman and left a telephonic message that Ms.
3 Robbins did not want to proceed with the divorce and that he was going to refund
4 the remaining monies to her. Mr. Beckerman did not return that call.
5

6 15. Respondent knew that Mr. Beckerman did not represent Mr. Rabi
7 for purposes of the divorce. Respondent thought Mr. Beckerman was Mr. Rabi's
8 general attorney and that he was unsure whether he could properly contact Mr.
9 Rabi directly rather than through Mr. Beckerman.
10

11 16. Respondent did not contact Mr. Rabi by telephone or by letter to
12 inform him that Ms. Robbins did not want to proceed with the divorce and that
13 he was going to refund the remaining monies to her.
14

15 17. After his arrest in November 2002, Mr. Rabi wrote to Respondent at
16 least four times requesting status regarding the divorce, an accounting and/or
17 refund of the funds. Respondent did not respond to those letters.
18

19 18. Respondent was unsure of whether he could contact Mr. Rabi
20 directly rather than through Mr. Beckerman.
21

22 19. On or about August 12, 2003, Mr. Rabi filed charges with the State
23 Bar of Arizona.
24
25

1 20. By letter dated September 8, 2003, the State Bar directed
2 Respondent to contact Mr. Rabi within fifteen days to discuss the charges.
3 Respondent did not contact Mr. Rabi as directed.
4

5 21. By letter dated October 7, 2003, the State Bar again directed
6 Respondent to contact Mr. Rabi to discuss the charges and requested him to
7 provide the State Bar with information within fifteen days of the date of the
8 letter. Respondent did not contact Mr. Rabi as directed nor respond to the State
9 Bar.
10

11 22. The State Bar spoke to Respondent by telephone on or about
12 February 23, 2004. Respondent claimed that most of the funds had been used for
13 the divorce and after Ms. Robbins instructed him to stop the divorce, he gave her
14 the balance of the fee. Respondent further agreed to send the State Bar a copy of
15 his billing statements concerning his representation of Ms. Robbins and evidence
16 that he sent Mr. Rabi a refund check.
17

18 23. By letter dated June 9, 2004, the State Bar again requested a copy of
19 the billing statements and evidence of refund to Mr. Rabi within ten days of the
20 date of the letter.
21

22 24. On or about July 20, 2004, the State Bar contacted Respondent's
23 office by telephone and, at their request, faxed the June 9, 2004 letter to
24 Respondent.
25

1 25. On or about September 19, 2004, the State Bar contacted
2 Respondent by email and attached a copy of the June 9, 2004 letter.

3 26. On or about September 22, 2004, Respondent sent the State Bar a
4 copy of a letter to Mr. Rabi and a check stub, but not a copy of an actual check
5 issued to Mr. Rabi.
6

7 27. The State Bar called Respondent on or about October 15, 2004 and
8 he returned the call on or about October 21, 2004, but he still did not send the
9 documents.
10

11 28. The State Bar called Respondent again on November 10, 11, 16 and
12 17, 2004 and December 2 and 3, 2004 requesting the documents. Respondent
13 returned many of the calls but that the State Bar representative was unavailable.
14

15 29. On or about December 13, 2004, Respondent sent the State Bar a
16 copy of his billing statements, another copy of the check stub and a letter in
17 which he claimed that the \$5,000.00 was a payment to Ms. Robbins and that she
18 had instructed that it be sent to Respondent for her divorce.
19

20 30. Respondent's billing statements reflect the following: he received
21 \$5,000.00 on November 14, 2002; he incurred \$990.00 for work performed in
22 November 2002 related to the divorce; he gave Ms. Robbins \$2,500.00 on
23 December 4, 2002 but did not record that withdrawal until February 3, 2003; he
24 transferred \$850.00 out of the divorce matter on December 10, 2002; and he held
25

1 \$660.00 in his trust account from December 4, 2002 until March 5, 2003 when
2 he sent those funds to Ms. Robbins.

3
4 31. By letter dated January 10, 2005, Mr. Beckerman contacted the State
5 Bar by letter in which he stated that the \$5,000.00 was sent to Respondent as a
6 retainer for a matrimonial matter and was not a general payment of money to Ms.
7 Robbins.

8
9 32. By letter dated January 18, 2005, the State Bar asked Respondent to
10 respond to charges of ethical rules violations within twenty days of the date of
11 the letter.

12
13 33. Respondent filed his response to the charges on or about February
14 11, 2005.

15
16 34. On or about May 23, 2005, a Subpoena *Duces Tecum* for records,
17 including a request for a copy of the check issued to Mr. Rabi, was filed on May
18 23, 2005 and Respondent's deposition set for June 16, 2005. This deposition was
19 heard over several days across several months.

20
21 35. On or about July 20, 2005, the State Bar again requested that
22 Respondent provide a copy of the check issued to Mr. Rabi.

23
24 36. On or about August 25, 2005, Respondent provided to the State Bar
25 a copy of the check issued to Mr. Rabi.

1 37. Respondent left \$660.00 in his trust account from December 4, 2002
2 until he reviewed the accounts in February 2003. Respondent communicated that
3 he held \$660.00 in his trust account to Ms. Robbins and did not return it to her
4 sooner as she did not request it.
5

6 38. Respondent's conduct violated one or more of the Rules of
7 Professional conduct as follows: Respondent failed to properly safekeep
8 property of third persons until the interests of the third party and Respondent's
9 client in the property were severed and/or their dispute resolved, failed to render
10 a proper accounting regarding the property and failed to deliver the property to
11 the third party when requested; Respondent failed to properly withdraw from
12 representation when the client demanded Respondent act in violation of the rules
13 and laws of Arizona; Respondent failed to properly maintain trust account
14 records and failed to perform monthly three-way reconciliations; Respondent
15 failed to fully cooperate with the State Bar's disciplinary investigation; and
16 Respondent failed to furnish information and promptly respond to inquiries and
17 requests from the State Bar during its investigation.
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21 **CONCLUSIONS OF LAW:**

22 Respondent's misconduct involved violations of Rule 42,
23 Ariz.R.S.Ct., specifically ER 1.15, ER 1.16 and ER 8.1(b), and Rules 43, 44
24 and 53(d) and (f), Ariz.R.S.Ct.
25

1 **ABA STANDARDS:**

2 In determining the appropriate sanction, the parties considered both the
3 American Bar Association's Standards for Imposing Lawyer Sanctions
4 ("Standards" or "Standard ___") and Arizona case law.
5

6 The Supreme Court and the Disciplinary Commission consistently use
7 the *Standards* to determine appropriate sanctions for attorney discipline. *In re*
8 *Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994).
9

10 In determining an appropriate sanction, the court and the commission
11 consider the duty violated, the lawyer's mental state, the actual or potential
12 injury caused by the misconduct and the existence of aggravating and
13 mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990);
14 *Standards*, Theoretical Framework at 5; *Standard 3.0*.
15

16 The following standards are implicated by Respondent's conduct:

17 ***Standard 5.0 - Violations of Duties Owed to the Public***

18 **5.1 Failure to Maintain Personal Integrity**

19 **5.13**

20 [Censure] is generally appropriate when a lawyer
21 knowingly engages in any other conduct that involves
22 dishonesty, fraud, deceit, or misrepresentation and that
23 adversely reflects on the lawyer's fitness to practice
24 law.
25

1 **Standard 7.0 - Violations of other Duties Owed as a Professional**

2 Absent aggravating or mitigating circumstances, upon
3 application of the factors set out in *Standard 3.0*, the
4 following sanctions are generally appropriate in cases
5 involving ...improper withdrawal from
6 representation...:

7 **7.3**

8 [Censure] is generally appropriate when a lawyer
9 negligently engages in conduct that is a violation of a
10 duty owed as a professional, and causes injury or
11 potential injury to a client, the public, or the legal
12 system.

13 **I. DUTY VIOLATED**

14 Respondent violated his duties to his clients by not adhering to the trust
15 account rules. He commingled \$660.00 in his trust account with other client
16 funds for a couple of months even though the \$660.00 did not apply to pending
17 legal services. Further, Respondent failed to maintain client ledgers,
18 checkbook registers, or complete records of account funds and other property;
19 failed to record all transactions promptly and completely; failed to retain a
20 duplicate deposit slip or the equivalent for each such deposit; and failed to
21 make, or cause to be made, a monthly three-way reconciliation of the client
22 ledgers, trust account general ledger or register, and trust account bank
23 statement.
24

1 Respondent violated his duties to the public and the legal system when
2 he failed to provide a full accounting to Mr. Rabi; failed to properly safeguard
3 funds in which Mr. Rabi had an interest; failed to withdraw from the
4 representation when his client demanded that he act improperly; failed to
5 properly maintain his trust account and client records; and failed to fully
6 cooperate with the State Bar's investigation.
7

8 **2. *LAWYER'S MENTAL STATE***

9
10 Respondent was negligent in his failure to safeguard property in dispute
11 and failure to properly maintain trust account records and perform monthly
12 three-way reconciliations. Respondent was negligent in his failure to fully
13 cooperate with the State Bar's investigation and to fully respond to the State
14 Bar's requests for information.
15

16 **3. *EXTENT OF INJURY***

17 Respondent's conduct caused potential as well as actual injury to his
18 clients, the public (including Mr. Rabi) and the legal system.
19

20 Respondent held funds in his trust account for a couple of months after
21 his representation of Ms. Robbins was complete without determining who had
22 the right to said funds or returning them to either Ms. Robbins or Mr. Rabi. As
23 such, Respondent exposed all of his clients to potential injury from potential
24 claims of creditors.
25

1 Mr. Rabi was actually harmed, as well as potentially harmed, when
2 Respondent took his money and gave it to Ms. Robbins. Respondent gave
3 \$3,160.00 of the funds to Ms. Robbins and allowed her to use \$850.00 of the
4 funds for other legal services although he was aware that Mr. Rabi claimed an
5 interest in the funds.
6

7 Respondent caused harm to the State Bar's ability to quickly and
8 properly resolve the investigation in this matter by his failure to fully cooperate
9 with the State Bar's investigation and to provide full information concerning
10 the matter.
11

12 **4. AGGRAVATING AND MITIGATING FACTORS**

13 The following aggravating and mitigating circumstances should be
14 considered in determining the appropriate sanction.
15

16 In aggravation:

17 *Standard 9.22(h)* – vulnerability of victim. Mr. Rabi's incarceration
18 prevented him from easily dealing with Respondent's failure to return the
19 funds or to provide full information concerning the funds and the divorce
20 matter.
21

22 *Standard 9.22(i)* - substantial experience in the practice of law.
23

24 Respondent was admitted to practice in Arizona on September 23, 1972.
25

1 *Standard 9.22(j)* – indifference to making restitution. Respondent
2 failed to make full restitution to Mr. Rabi and returned only a small portion of
3 the funds after the State Bar became involved in the matter. Until the State
4 Bar intervened, Respondent failed to respond to Mr. Rabi’s inquiries
5 concerning the funds and the divorce matter.
6

7 In mitigation:

8 *Standard 9.32(a)* - absence of a prior disciplinary record. Respondent
9 has practiced law for thirty years and has not been disciplined before.
10

11 **PROPORTIONALITY**

12 The cases reflect that a censure is an appropriate and proportional
13 sanction under these circumstances.
14

15 The most serious misconduct in this matter is that Respondent failed to
16 properly safeguard funds in which a third party had an interest. Many cases
17 hold that a censure and probation are appropriate sanctions where the attorney
18 acts negligently and fails to properly safeguard funds in which a third party has
19 an interest. *See, e.g., In re Estrada*, 2002 Ariz. LEXIS 31, SB-02-0044-D
20 (2002). (Among several counts, Estrada failed to release settlement funds
21 because his client was going through a divorce and did not want his spouse to
22 receive any of them.); *In re Vingelli*, SB-03-0161-D (2004) (Vingelli held
23 disputed money in his trust account for almost three years and did not resolve
24
25

1 the dispute timely. The full amount of the disputed funds did not always
2 remain in the trust account and he did not have all of the trust account records
3 he was required to maintain.); *In re Olcott*, SB -05-0149-D (2005) (Olcott
4 failed to advise another attorney that he received and negotiated a personal
5 injury settlement check in which he knew the attorney had an interest. He
6 failed to address the medical liens and other claims filed against the settlement
7 funds before disbursing the funds to the law firm in payment of fees.); and *In*
8 *re Schwartz*, SB-03-0078-D (2003) (Schwartz failed to promptly render a full
9 accounting regarding settlement proceeds to a medical lien holder and failed to
10 promptly pay him.)

11
12
13
14 Further, in *In re Cawood*, SB-05-0147-D, Cawood received a censure
15 due to his negligent failure to adhere to the rules concerning trust accounts and
16 records and failure to timely refund advance fee payments that had not been
17 earned.

18
19 In *In re Cord*, DC Nos. 03-1743 et al., (2005), the parties agreed to a
20 six-month suspension and two-year probation. Cord admitted, among other
21 ethical violations, that he failed to respond to his client's request for an
22 explanation of her billing invoices and failed to return funds held in trust for
23 the benefit of the client (unearned retainer). Cord also failed to respond to the
24 State Bar's investigation. Three factors were found in aggravation: prior
25

1 disciplinary offenses, 9.22(a); a pattern of misconduct, 9.22(c); and, bad faith
2 obstruction of the disciplinary proceeding by intentionally failing to comply
3 with rules or orders of the disciplinary agency. There were no mitigating
4 factors. Cord acted with a "knowing" mental state and there was actual serious
5 injury to the clients.
6

7 The instant case is less egregious than *Cord*. In this case, unlike in
8 *Cord*, Respondent's failure to refund the funds was negligent and based on his
9 belief that he was properly complying with his client's instructions on how the
10 funds were to be disbursed. Respondent, unlike *Cord*, ultimately cooperated
11 with the State Bar and has no prior disciplinary offenses.
12

13 Respondent's conduct in the instant case is similar to *Cawood* and the
14 others listed above. In this case, Respondent failed to adhere to the trust
15 account rules and failed to return client and third party money. Actual as well
16 as potential injury existed due to Respondent's failure to safeguard the property
17 of clients and third persons until the dispute was resolved.
18

19 Therefore, the parties contend that the relevant case law supports a
20 sanction of censure and probation in this matter.
21

22 **III. CONCLUSION**

23 Based on the *Standards* and relevant case law this Hearing Officer
24 recommends that the Respondent receive the following sanction: censure, one
25

1 year probation with specific terms, and payment of the costs and expenses of
2 the disciplinary proceedings.

3
4 The purpose of lawyer discipline is not to punish the offender but to
5 protect the public, the profession and the administration of justice. *In re*
6 *Neville*, 147 Ariz. 106, 708 P.2d 1297 (1988). The proposed sanctions will
7 accomplish those goals.

8 **RECOMMENDATION:**

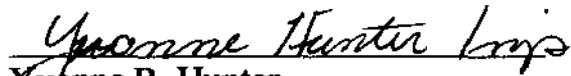
9
10 1. Respondent shall receive a public censure and a one-year term of
11 probation, with specific terms and conditions, for violation of Rule 42,
12 Ariz.R.S.Ct., specifically ER 1.15, ER 1.16 and ER 8.1(b) and Rules 43, 44 and
13 53(d) and (f), Ariz.R.S.Ct..

- 14
15 2. The terms and conditions of probation will include the following:
- 16 a. The term of probation shall be for one year, to commence on the
17 date of the final judgment and order entered in this matter.
 - 18 b. Respondent shall pay restitution in the amount of \$3,160.00 to
19 David Rabi within 90-days from the date of the final judgment
20 and order entered in this matter.
 - 21 c. Respondent shall complete the Trust Account Ethics
22 Enhancement Program ("TAEPP") within one year from the date
23 of the final judgment and order entered in this matter.
24
25

1 d. Respondent's failure to comply with any of the foregoing terms
21 and conditions will result in the filing of a Notice of Non-
32 Compliance by the Bar with the hearing officer. A hearing will
43 then be held within thirty (30) days to determine whether
54 Respondent has breached the agreement. A finding that
65 Respondent breached the terms and conditions of probation may
76 result in the imposition of sanctions.
87
98

10 3. Respondent shall pay all costs and expenses incurred by the State
11 Bar in these proceedings.
12

13 **DATED** this 10th day of May, 2006.
14

15 
16 Yvonne R. Hunter
17 Hearing Officer 8P

18 Original filed with the Disciplinary Clerk
19 this 10th day of May, 2006

20 Copies of the foregoing mailed
21 *hand-delivered March 11th, 2006, to:
22

23 Denise K. Tomaiko
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by: *Christina Sob*