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**FILED**  
JUL 13 2006  
HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY T. H. Guerin, Jr.

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

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
**MICHAEL C. SHAW** )  
Bar No. 014044 )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

Nos. 04-2135, 05-1221

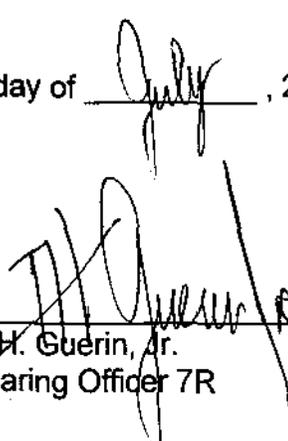
**CORRECTED HEARING  
OFFICER'S REPORT**

**COMES NOW**, Hearing Officer 7R, T. H. Guerin, Jr., and files this corrected copy of a Hearing Officer's Report.

On June 6, 2005, in error, the Hearing Officer signed and filed a draft Hearing Officer's report. That was unintentional.

After being notified by the attorneys in this matter, the undersigned reviewed the file, transcripts and pleadings which provide the necessary information for the Corrected Hearing Officer's Report attached hereto.

**RESPECTFULLY SUBMITTED**, this 11<sup>th</sup> day of July, 2006.

  
\_\_\_\_\_  
T. H. Guerin, Jr.  
Hearing Officer 7R

**Original** filed with the Disciplinary Clerk  
this 11<sup>th</sup> day of July, 2006

Copy of the foregoing mailed  
This 11<sup>th</sup> day of July, 2006 to

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**HEARING OFFICER'S REPORT**

**PROCEDURAL HISTORY**

A Probable Cause Order was filed on December 12, 2005. The State Bar filed a Complaint on December 22, 2005. Respondent filed an answer on January 25, 2006

A settlement conference was not scheduled as the parties had reached a prior agreement waiving their rights to a settlement conference. A Tender of Admissions, Agreement for Discipline by Consent and Joint Memorandum in the support of the Tender of Admissions and Agreement for Discipline by Consent (joint memo) was filed on April 17, 2006.

A review of the file, pleading, and hearing officer notes was conducted.

## **FINDINGS OF FACT**

1. At all times relevant, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice on October 26, 1991.
2. On December 20, 2004, the State Bar of Arizona received an insufficient funds notice on Respondent's Bank One Arizona Foundation Client Trust account.
3. The bank honored the check and charged a \$29.00 overdraft fee and an extended overdraft fee of \$25.00. That left the account with a negative balance of \$97.35.
4. Respondent failed to timely cure the overdraft on the client trust account.
5. On December 29, 2004, the State Bar of Arizona Staff Examiner sent Respondent a copy of the overdraft notice with a letter requesting an explanation.
6. On December 3, 2004, Respondent provided an initial explanation stating that he had disbursed funds from the client trust account to himself for fees that exceeded the actual amount earned.
7. This caused an overdraft of the client account on December 16, 2004.
8. On January 28, 2005, the Staff Examiner sent a request for additional information including his December 2004 bank statement with cancelled checks, duplicate deposit slips and individual client ledgers.
9. On April 26, 2005, the State Bar had to issue a subpoena to Bank One because the Respondent did not provide a timely response.
10. On April 26, 2005, a subpoena was also issued to the Respondent for client trust account documentation, such as client ledgers, check registers, and duplicate deposit slips.
11. On May 9, 2005, the Respondent submitted copies of the trust account bank statements through counsel, Byrl R. Lane.

12. On May 20, 2005, Staff Examiner sent another request for additional information.

13. On June 6, 2005, the Respondent's attorney submitted a partial response to the Staff Examiner's request of May 20, 2005 which included copies of cancelled checks.

14. On June 16, 2005, another request was made concerning a lack of response to the subpoena duces tecum issued on April 26, 2005.

15. On July 11, 2005, the Respondent's attorney admitted that the Respondent did not maintain duplicate deposit slips.

16. On July 25, 2005, the Respondent's attorney stated that check registers and client ledgers were not available.

17. On August 16 and September 22, 2005, the Staff Examiner requested that the Respondent provide client ledgers and check registers even though they were unavailable.

18. On October 20, 2005, additional information was provided to the Staff Examiner with a statement by the Respondent that he did not maintain "formal client ledgers or a checkbook register." Respondent also stated that his checks were on preprinted forms and that after he issues them he then attempts to reconcile them with bank statements.

19. The Staff Examiner performed an audit which revealed that the Respondent:
- a) failed to safeguard the property of clients or third party;
  - b) failed to keep complete records of account funds and other property by failing to maintain client ledgers and checkbook register;

- c) failed to exercise professional care and proper internal controls;
- d) failed to record all transactions promptly;
- e) failed to retain a duplicate deposit slip or the equivalent for each deposit;
- f) failed to maintain client ledgers;
- g) failed to make monthly three-way reconciliations;
- h) failed to deposit funds to pay service or other charges imposed by the financial institution, Bank One.

20. In failing to safeguard the property of clients and third parties, the Respondent violated Rule 42, Ariz.R.S.Ct.,ER 1.15.

21. In failing to maintain professional care regarding trust account requirements, Respondent violated Rule 43(d)(1)(A), Ariz.R.S.Ct.

22. In failing to maintain adequate internal controls regarding safeguard of funds and other property in his trust, the Respondent violated Rule 43(d)(1)(C), Ariz.R.S. Ct.

23. In failing to maintain client ledgers, checkbook registers or complete records of account funds, Respondent violated Rule 43(a), Ariz.R.S.Ct.

24. In failing to record all transactions properly and completely, Respondent violated Rule 43(d)(1) E), Ariz. R.S.Ct.

25. In failing to maintain duplicate deposit slip/equivalent documentation, Respondent violated Rule 43(d)(2)(B), Ariz.R.S.Ct.

26. In failing to make or cause to be made a monthly three-way reconciliation of client ledgers, trust account, ledgers/registers and trust account bank statements, Respondent violated Rule 43(d)(2)(D), Ariz.R.S .Ct.

27. In failing to retain all appropriate records relating to his trust account, Respondent violated Rule 43(d)(2)(E), Ariz.R.S.Ct.

28. In failing to deposit funds reasonably sufficient to pay service or other charges imposed by a financial institution, Respondent violated Rule 44(a)(1), Ariz.R.S.Ct.

29. In failing to respond promptly to the State Bar's requests for information, Respondent violated Rule 53(f), Ariz.R.S.Ct.

**COUNT TWO (File No. 05-1221/Arnold)**

30. In 2002, David Arnold hired Respondent to represent him in a contract fraud matter.

31. Respondent, on behalf of Mr. Arnold filed a complaint in civil case number CV2002-018510, Arnold v Dem Investments, on September 23, 2003, in Maricopa County Superior Court.

32. Mr. Arnold provided complete documentation related to the case to Respondent, and attempted to assist with the litigation in every manner.

33. Respondent failed to meet litigation deadlines and as a result the court dismissed the matter without prejudice in October 2003.

34. Respondent, on behalf of Mr. Arnold, re-filed the complaint civil case number CV2004-010957, Arnold v Dem Investments on June 4, 2004, in Maricopa County Superior Court.

35. Respondent again failed to meet litigation deadlines and as a result the court dismissed the matter without prejudice for lack of prosecution in May 2005.

36. On numerous occasions, Mr. Arnold attempted to contact Respondent regarding the missed deadlines and the dismissals of the case.

37. Respondent repeatedly failed to respond to Mr. Arnold's telephone messages and facsimiles.

38. On July 7, 2005, Mr. Arnold submitted a complaint against Respondent to the State Bar of Arizona.

39. By letter dated August 2, 2005, bar counsel informed Respondent of the changes made by Mr. Arnold. Bar counsel, on behalf of the State Bar, asked Respondent to provide a response addressing the alleged ethical violation within 20 days.

40. Respondent failed to respond.

41. On September 9, 2005, bar counsel sent a second letter to Respondent reminding him of his professional obligation to respond to the State Bar's disciplinary investigation. Bar counsel asked Respondent to respond within 10 days of the letter.

42. Respondent again failed to respond to the State Bar's request for information and bar counsel noticed Respondent's deposition to take place on October 27, 2005.

43. On October 5, 2005, Respondent was personally served, at his office, with a subpoena duces tecum ordering his appearance at deposition.

44. After being served, respondent contacted bar counsel immediately. At bar counsel's direction, in lieu of appearing for the deposition, Respondent submitted a written response on October 18, 2005.

45. In his October 18, 2005 letter, Respondent acknowledged that he had failed to respond to Mr. Arnold's telephone calls and written inquiries. Respondent further acknowledged that Mr. Arnold's case was dismissed twice for failure to comply with deadlines.

46. In failing to abide by a client's decision concerning the objectives of the representation and failing to consult with his client as to the means by which the objectives of the representation were to be pursued, Respondent violated Rule 42, Ariz.R.S.Ct., ER 1.2.

47. In failing to meet filing deadlines and otherwise act with reasonable diligence and promptness in representing a client, Respondent violated Rule 42, Ariz.R.S.Ct., ER 1.3.

48. In failing to expedite litigation consistent with the interest of his client, Respondent violated Rule 42, Ariz.R.S.Ct., ER 3.2.

49. In failing to respond promptly to the State Bar's requests for information, Respondent violated Rule 53(f), Ariz.R.S.Ct.

#### **CONDITIONAL ADMISSIONS**

Respondent conditionally admits, for purposes of this agreement only, his conduct as described above violated Rule 42, Ariz.R.S.Ct., ER 1.2, ER 1.3, ER 1.15(a), ER 3.2, Rules 43, 44, and 53(f), Ariz.R.S.Ct. Respondent's admissions are being tendered in exchange for the form of discipline stated below.

#### **CONDITIONAL DISMISSALS**

The State Bar conditionally agrees to dismiss the allegations that Respondent violated Rule 42, Ariz.R.S.Ct., ER 8.1(b), for the reason that the State Bar conditionally accepts Respondent's assertion that he acted negligently, rather than knowingly, in failing to respond to lawful demands for information for the State Bar.

The State Bar conditionally agrees to dismiss the allegations that Respondent violated Rule 53(d), Ariz.R.S.Ct., for the reason that the same conduct giving rise to these allegations is being sanctioned pursuant to other admissions in this tender. An additional sanction based on the same conduct is not necessary to further the interests of justice in this case.

### **CONCLUSIONS OF LAW**

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, 43, 44 and 53(f) Ariz.R.S.Ct., ER1.15(a) because of his negligent mishandling of his trust account. Respondent also violated Rule 42 and 53(f), Ariz.R.S.Ct., ER 1.2, 1.3 and 3.2 because he failed to diligently and expeditiously pursue litigation on his client's behalf.

### **ABA STANDARDS**

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

The parties indicated that *ABA Standard 4.1 and 4.3 (Violations of Duties Owed to Clients)* indicates that censure is the presumptive sanction for Respondent's misconduct. Respondent violated his duties to clients by failing to properly safeguard client funds and by failing to exercise due professional care in the maintenance of his client trust account.

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

Respondent also failed to abide by a client's decisions concerning the objectives of the representation; failed to consult with his client as to the means by which the objectives of the representation were to be pursued; failed to meet filing deadlines and otherwise act with reasonable diligence and promptness in representing a client; and failed to expedite litigation consistent with the interest of his client. In addition, Respondent initially failed to respond to the State Bar's requests for information.

The Arizona Supreme Court and the Disciplinary Commission consistently use the Standards to determine appropriate sanctions for attorney discipline. *In re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Standards are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying these factors to situations in which lawyers have engaged in various types of misconduct. *Standard 1.3, Commentary*.

In determining an appropriate sanction, the court and the commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *In re Taretz*, 163 Ariz. 548, 789 P.2d 1049 (1990); *Standards, Theoretical Framework* at 5; *Standard 3.0*. The parties agree that Respondent's clients suffered no actual injury.

### **AGGRAVATING AND MITIGATING FACTORS**

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

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

- (a) multiple disciplinary offenses resolved herein, 9.22(d);

- (b) substantial experience in the practice of law 9.22(i);
- (c) bad faith obstruction by intentional failure to cooperate, 9.22(e).

This Hearing Officer also agrees with the parties that three factors are present in mitigation:

- (a) absence of a dishonest or selfish motive, 9.32(b);
- (b) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (c) remorse.

### **PROPORTIONALITY REVIEW**

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135 Ariz. 203, 207, 660 P.2d454 (1983)).

There are two cases resulting in censure involved more trust account violations, including commingling of personal funds and multiple overdrafts, than the violations in Respondent's case

In the case, *In re Glanville*, Supreme Court No. SB-04-00007-D, Disciplinary Commission No. 00-1727 (2204), the Respondent, pursuant to an agreement for discipline by consent, was censured and was placed on probation for a period of one year and as a term and condition of probation was ordered to participate in LOMAP. Glanville's trust account became overdrawn compromising client funds that should have been contained therein. Glanville commingled earned funds and personal funds in his trust account.

In *In re Hall*, Supreme Court No. SB-02-0122-D (2002), Hall was censured and placed on one year of probation. Hall failed to adequately monitor his clients' funds, receiving multiple overdraft notices which were on deposit in his trust account, resulting in the overdrafts. Hall failed to maintain sufficient records for his trust account. Hall failed to establish internal controls to properly monitor his clients' funds.

The facts in Respondent's case are distinguishable in that Respondent had only one notice of insufficient funds. Commingling was not present in Respondent's case. Otherwise, the violations appear to be similar in that sufficiency of record keeping and lack of internal controls were at issue.

Respondent did not cause actual harm to his clients' funds, although he does acknowledge that client funds were at risk by virtue of his accounting error. However, it is remote and was not a trust account investigation. Respondent has other significant mitigating factors that balance his disciplinary history and justify imposition of an informal reprimand in this case.

### **RECOMMENDATION**

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

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and

the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer strongly recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent which generally provides for the following:

1. Respondent shall receive a public censure;
2. Respondent will be placed on probation for a period of one year effective within thirty days of the Arizona Supreme Court's final order and judgment. The State Bar will notify the Disciplinary Clerk of the exact date of commencement of probation.

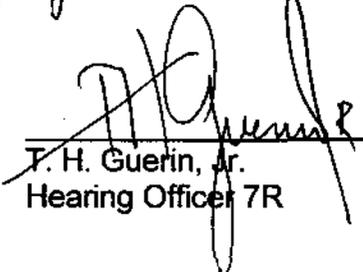
Further:

a. The Respondent shall sign a contract and participate in the Trust Account Program (TAP) for a period of at least one year and attendance and participation in TAEPP, LMOP and MPA.

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

3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings of \$943.19.

DATED this 11<sup>th</sup> day of July, 2006.

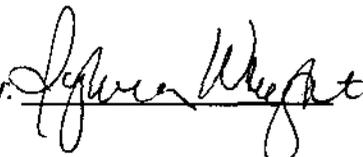
  
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T. H. Guerin, Jr.  
Hearing Officer 7R

Original filed with the Disciplinary Clerk  
this 11<sup>th</sup> day of July, 2006.

Copy of the foregoing mailed  
this 11<sup>th</sup> day of July, 2006, to:

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