

BEFORE A HEARING OFFICER  
OF THE SUPREME COURT OF ARIZONA

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IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
 )  
GEORGE A. TACKER, )  
Bar No. 019325 )  
 )  
RESPONDENT. )

No. 05-1069

AMENDED  
HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The State Bar filed a Complaint on April 28, 2006. Respondent filed an Answer on or about June 22, 2006.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on January 22, 1999.

Count I:

1. On June 20, 2005, the State Bar of Arizona received an insufficient funds notice on Respondent's Bank of America Arizona Bar Foundation client trust account.
2. On June 9, 2005, check number 1071 in the amount of \$53.99 was presented for attempted payment against the account when the balance at the time was \$.47. The bank paid the check, and did not charge a non-sufficient funds fee, leaving the account with a negative balance of \$53.52.
3. On July 5, 2005, the State Bar's staff examiner sent respondent a copy of the overdraft notice and requested an explanation regarding the overdraft on his client trust account.
4. In his response dated July 7, 2005, Respondent explained that the overdraft was the

1 result of a deposit error and that he first learned of the overdraft on June 15, 2005, when he was  
2 depositing a settlement check in the amount of \$550.00. Respondent immediately deposited the  
3 exact amount of the overdraft into the trust account to ensure that a zero balance would occur once  
4 the client deposited the check for \$550.00.

5 5. Respondent explained that after making the deposit, he reviewed the bank  
6 statements and determined the overdraft was the result of staff error. Specifically, the error occurred  
7 when Respondent received a final payoff check for a garnishment regarding his client Hooper, which  
8 required him to file a satisfaction of judgment. Respondent's staff erroneously assumed Respondent  
9 would charge the client for the service of the satisfaction of judgment, when client Hooper had  
10 actually authorized payment for Respondent's services to come out of the checks received from the  
11 garnishee. Ultimately, this resulted in Respondent's staff depositing the final payoff check into the  
12 operating account instead of into the trust account, which led to the overdraft.

13 6. On July 12, 2005, the staff examiner requested additional information from  
14 Respondent. On August 5, 2005, Respondent submitted the requested information, but with  
15 exceptions. Respondent did not submit individual client ledgers or duplicate deposit slips and the  
16 information he did submit raised additional questions.

17 7. The staff examiner requested additional information on August 15, 2005.  
18 Respondent failed to respond.

19 8. The staff examiner sent a letter regarding Respondent's non-response on September  
20 13, 2005, requesting response within 10 days. Respondent did not respond.

21 9. The staff examiner sent a second non-response letter on September 27, 2005.  
22 Respondent finally submitted the requested information on October 13, 2005, with exceptions.  
23 Respondent did not provide all individual client ledgers that would correspond to the June 2005 trust  
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account bank statements, as had previously been requested by the staff examiner. Respondent did  
1 submit one client ledger, for client Hooper.

2 10. The staff examiner sent a letter regarding respondent's incomplete response on  
3 November 14, 2005. Respondent did not respond.

4 11. Respondent failed to properly safeguard client funds in violation of ER 1.15 and  
5 Rules 43 and 44, Ariz.R.Sup.Ct.

6 a) On two occasions during the period of review, Respondent deposited unearned  
7 funds into his operating account when the funds should have been deposited into  
8 his client trust account. (\$71.55 was deposited on June 15, 2005 on behalf of  
9 client Hooper, of which \$53.66 was unearned, and a settlement check for  
10 \$1,333.00 was deposited on June 10, 2005, on behalf of client Villa, \$500 of  
11 which was unearned. However, Respondent paid both clients shortly after the  
12 mistake and no funds were misappropriated.)

13 b) Respondent did not submit complete ledgers for examination, therefore, the staff  
14 examiner was unable to determine whether unearned client funds were  
15 compromised while on deposit in Respondent's client trust account during the  
16 period of review.

17 c) Respondent did not maintain complete client ledgers, or at least, did not provide  
18 complete client ledgers to the State Bar.

19 d) Respondent did not conduct monthly three-way reconciliations.

20 12. Respondent failed to exercise due professional care and maintain internal controls in  
21 violation of Rules 43 and 44, Ariz.R.Sup.Ct.  
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- 1 a) Respondent failed to remedy the overdraft that occurred on June 3, 2005, until  
2 June 15, 2005.
- 3 b) The overdraft was the result of a deposit error in that a settlement check was  
4 deposited to the operating account when it should have been deposited to the  
5 client trust account. Respondent should have taken the necessary precautions to  
6 avoid deposit errors such as these.
- 7 c) Respondent did not maintain complete client ledgers, or at least, did not provide  
8 complete client ledgers to the State Bar.
- 9 d) Respondent did not conduct monthly three-way reconciliations.

10 13. Respondent failed to properly supervise his employees assisting him in performing

11 trust account duties required by Rule 43, Ariz.R.Sup.Ct.

- 12 a) When respondent received the final payment from the garnishee, his staff  
13 erroneously believed a balance was owed by client Hooper for attorney fees for  
14 filing the satisfaction of judgment, so the final check was deposited into the  
15 operating account instead of the client trust account. Client Hooper had actually  
16 authorized the payment to be made out of the final garnishment payments.  
17 Respondent should properly supervise and review the activities of his staff.
- 18 b) It appears that the amount disbursed to client Hooper on June 15, 2005 was  
19 miscalculated. The letter to client Hooper dated June 14, 2005, indicates that a  
20 check in the amount of \$71.55 was received and 25% was deducted for attorney  
21 fees. The check remitted to client Hooper was for \$64.39 when it should have  
22 been \$53.66.  
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14. Respondent failed to retain duplicate deposit slips and failed to make all trust  
1 account disbursements by pre-numbered check or by electronic transfer.

2 15. In addition to not responding promptly to the staff examiner's requests for  
3 information, respondent failed to furnish copies of requested records such as the individual client  
4 ledgers and bank fee/administrative funds ledgers as requested by the staff examiner on five different  
5 occasions.

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7 16. Respondent's conduct as described in this count violated Rule 42, Ariz.R.Sup.Ct.,  
8 specifically, ER 1.15, 8.1(b) and Rules 43, 44 and 53(f), Ariz.R.Sup.Ct.

#### 9 10 **CONDITIONAL ADMISSIONS**

11 Respondent conditionally admits that his conduct, as set forth above, violated Rule 42,  
12 Ariz.R.Sup.Ct., specifically ERs 1.15, 8.1(b), and Rules 43, 44, and 53(f), Ariz.R.Sup.Ct.  
13 Respondent's admissions are being tendered in exchange for the form of discipline recommended  
14 below.

#### 15 16 **CONCLUSIONS OF LAW**

17 Respondent's conduct as described in this count violated Rule 42, Ariz.R.Sup.Ct.,  
18 specifically, ER 1.15, 8.1(b) and Rules 43, 44 and 53(f), Ariz.R.Sup.Ct.

#### 19 20 21 **ABA STANDARDS**

22 ABA *Standard* 3.0 provides that four criteria should be considered in imposing  
23 sanctions: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential  
24 injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating  
25 factors.  
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1 This Hearing Officer considered *Standard 4.1* (failure to preserve client's property) in  
2 determining the appropriate sanction warranted by Respondent's conduct. Specifically, *Standard*  
3 *4.1* provides:

4 4.1 Failure to Preserve Client's Property

5 4.12: Suspension is generally appropriate when a lawyer  
6 knows or should know that he is dealing improperly with client  
7 property and causes injury or potential injury to a client.

8 4.13: Reprimand [censure in Arizona] is generally  
9 appropriate when a lawyer is negligent in dealing with client  
10 property and causes injury or potential injury to a client.

11 This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant  
12 to *Standards 9.22* and *9.32*, respectively. One aggravating factor is present in aggravation: *9.22(d)*,  
13 multiple offenses. Respondent failed to respond to the staff examiner's requests on at least five  
14 occasions, and, as referenced above, the *Standards* suggest that we first determine the sanction for the  
15 most serious offense and then consider the other offense(s) in aggravation. There are three (3)  
16 mitigating factors in mitigation, *9.32(a)* absence of a prior disciplinary record, (b) absence of a  
17 dishonest or selfish motive, (c) personal or emotional problems.

18 *Standard 9.32(a)*: Absence of a prior disciplinary record. However, Respondent has only  
19 practiced for about six years so this factor should be weighed accordingly.

20 *Standard 9.32(b)*: Absence of a dishonest or selfish motive. Respondent did not act out of  
21 a dishonest or selfish motive.

22 *Standard 9.32(c)*: Personal or emotional problems. At the time of the check overdraft,  
23 Respondent was having marital problems, which culminated in a petition for divorce filed May  
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1, 2006.<sup>1</sup> Respondent has children, which makes such problems more difficult. Further, his wife  
1 formerly worked in his law office. Consequently, the marital discord also affected the  
2 workplace. Respondent was experiencing stress and depression during the time period of his  
3 failures to respond to the State Bar.

#### 4 PROPORIONALITY REVIEW

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6 The Supreme Court has held in order to achieve proportionality when imposing discipline, the  
7 discipline in each situation must be tailored to the individual facts of the case in order to achieve the  
8 purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz.  
9 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal  
10 consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *In re*  
11 *Peasley*, , 208 Ariz. 27 ¶ 33, 90 P.3d 764, 772, (2004). However, the discipline in each case must be  
12 tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at  
13 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re*  
14 *Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

15  
16 The most serious instance of misconduct in this case involves Respondent's failure to be aware  
17 of, familiarize himself with, and comply with, the rules governing the treatment of client funds. It is  
18 also relevant that Respondent's cooperation with the Bar was less than stellar. The following cases are  
19 instructive concerning these types of misconduct.

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21 In *In re Lee*, SB-06-0001-D (2006), Lee received censure and one year of probation for  
22 violations of trust account rules, failure to act with reasonable diligence in representing a client and  
23 failures to respond to State Bar requests for information. Lee disbursed funds from his client trust

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Upon information and belief, the Disciplinary Commission usually expects independent evidence in support of  
this factor, aside from only the respondent's statement. The divorce filing may be verified on the Maricopa  
County Superior Court website, case number FC2006-051565. Additionally, the commentary to *Standard 9.32*  
notes that marital problems are one of the most common types of personal and emotional problems.

1 account when the balance was not sufficient to cover the check. Lee failed to maintain complete  
2 client trust account records, failed to keep his funds separate from those of his clients on deposit,  
3 and failed to conduct monthly reconciliations of the client trust account, just as Respondent has in  
4 this matter. Lee also failed to timely disburse settlement proceeds to pay liens for a client and failed  
5 to inform a third party in interest upon receipt of the funds.

6 Lee's conduct was found to be negligent. One aggravating factor was found: a pattern of  
7 misconduct. Four mitigating factors were found: absence of a prior disciplinary record, absence of  
8 dishonest or selfish motive, personal or emotional problems, and remorse. In this case, Respondent  
9 has similar trust account violations and failures to respond to the State Bar, without the lien issue.  
10 However, Lee had a lengthier history of practice (over 20 years) so his lack of prior discipline was  
11 accorded more weight, and his personal problems, while sealed from the public, were also more  
12 significant. Consequently, censure appears proportional here.

13 In *In re Johnson*, SB-02-0005-D (2002), Johnson received censure and two years probation  
14 for violations of the trust account rules combined with a lack of cooperation with the State Bar's  
15 investigation. Johnson also failed to communicate with a client and to return that client's retainer  
16 timely, which is different than in the case at hand—however, overall this case is very similar.  
17 Johnson had an overdraft on his trust account and failed to file responses to the Staff Examiner's  
18 inquiries. He personally appeared in response to a subpoena *duces tecum*, but neglected to bring the  
19 requested documents, and failed to produce them at a later date as promised. He finally produced the  
20 requested documentation at a settlement conference approximately seven months later.

21 The Commission found two aggravating factors: bad faith obstruction of the disciplinary  
22 process and substantial experience in the law, and four mitigating factors: absence of prior discipline;  
23 absence of dishonest/selfish motive; personal/emotional problems (alcohol and depression); and  
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remorse. In his terms of probation, Johnson was required to have a practice monitor in addition to attending the TAEEP, and was also to consult with the Member Assistance Program (MAP). In this case, Respondent will also attend TAEEP. Because Respondent here does not have the added violation concerning client communication and delay in returning a retainer, or the same level of emotional and personal problems, the parties agree that Respondent does not need a practice monitor or MAP, and one year of probation is recommended rather than two.

The respondent in *In re Buffenstein*, SB-01-0171-D (2002), received a 30-day suspension and one-year probation for trust account violations and failure to cooperate with the State Bar. Buffenstein, commingled his own funds with those of his clients, failed to keep individual client ledgers or any proper accounting records of his trust account and failed to respond to the Bar until his Answer to the Formal complaint. The Commission found that suspension under ABA Standard 4.12 was the presumptive sanction, as Buffenstein's conduct with regard to his trust account was grossly negligent. Two factors were present in aggravation: bad faith obstruction and substantial experience in the practice of law. Two factors were found in mitigation: no prior discipline and no dishonest/selfish motive. Two other mitigating factors were alleged--personal problems and character and reputation -- but the Commission found that Respondent had not provided sufficient evidence to support those factors.

The Commission noted that Buffenstein could possibly have received a censure, but for the multiple instances of failure to respond to the State Bar, which borders on contempt,<sup>2</sup> and the fact that there were no remedial measures taken or remorse shown. This matter may be distinguished in that Respondent here did provide some responses to the Bar's inquiries, and the majority of the requested

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<sup>2</sup> It is noted that failure to cooperate with a discipline investigation, standing alone, could warrant a censure. In *In re Anderson*, SB-01-0173 (2001), the attorney received a censure for failing to respond to the discipline investigation in two cases. There was no other misconduct in that matter. See also *In re Shaw*, Nos. 03-0263, et al., Disciplinary Commission Report (March 11, 2005) (citing *In re Galusha*, 164 Ariz. 503, 794 P.2d 136 (1990)).

information was produced. As it turns out, Respondent did not know what some of the requested information was, and, while he should have simply admitted that fact, Respondent's conduct does not rise to the level of gross negligence shown in *Buffenstein*. Further, Respondent corrected his overdraft situation relatively quickly, and also has evidence of personal problems as mitigation, which was not present in *Buffenstein*.

Straight trust account cases also support censure and probation as the appropriate sanction. In *In re Inserra*, SB-02-0144-D (2002), the respondent failed to keep his earned fees separate from client funds held in his trust account, failed to transfer fees from his trust account when earned, and commingled his own funds with those of his clients. He also failed to maintain complete trust account records for a period of five years, failed to exercise due professional care in the maintenance of his trust account, failed to only disburse from his trust account with pre-numbered checks, and failed to conduct a monthly reconciliation of his trust account. There was one aggravating factor present: multiple offenses. There were five (5) mitigating factors present: absence of a prior disciplinary record; absence of dishonest or selfish motive; timely and good faith effort to rectify consequences of misconduct; full and free disclosure; and remorse. *Inserra* received a censure, with two years of probation and costs.

In *In re Randall*, SB-02-0146-D (2002), *Randall* failed to conduct proper monthly reconciliations, failed to use pre-numbered checks as required by the Guidelines, and also deposited and commingled his own separate funds, including earned fees, with client funds in his trust account. He failed to maintain adequate funds in the trust account resulting in the account being overdrawn on two occasions. There was one aggravating factor in *Randall*: substantial experience in the practice of law. There were five (5) mitigating factors present: absence of a prior disciplinary record; timely good faith effort to rectify consequences of misconduct; full and free disclosure to the disciplinary board;

character and reputation; and remorse. The hearing officer recommended that Randall receive a  
1 censure for his misconduct, which was accepted by the Disciplinary Commission and the Supreme  
2 Court. Randall was not placed on probation, presumably because he was no longer working as a sole  
3 practitioner and was employed by a medium-size firm where he was not in charge of any accounting  
4 procedures. See also *In re Davis*, SB-05-0148-D (2005) (censure for violations of ER 1.15 and Rule  
5 43 and 44); *In re McKindles*, SB-05-0065-D (2005) (censure for violations of ER 1.15 and Rule 43  
6 and 44).  
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8 In this case, Respondent failed to safeguard client funds; failed to exercise due professional  
9 care and maintain internal controls; failed to properly supervise his employees assisting him in  
10 performing trust account duties; failed to maintain the required client trust account records and failed  
11 to respond to lawful demands for information from a disciplinary authority. The Supreme Court "has  
12 long held that 'the objective of disciplinary proceedings is to protect the public, the profession and the  
13 administration of justice and not to punish the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600,  
14 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). The Hearing  
15 Officer believes that the sanctions proposed here are consistent with these principles.  
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## 17 18 RECOMMENDATION

19 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and  
20 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is  
21 also the objective of lawyer discipline to protect the public, the profession and the administration  
22 of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill  
23 public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361  
24 (1994).  
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1 In imposing discipline, it is appropriate to consider the facts of the case, the American  
2 Bar Association's *Standards for Imposing Lawyer Sanctions* ("*Standards*") and the  
3 proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286,  
4 872 P.2d 1235, 1238 (1994).

5 Upon consideration of the facts, application of the *Standards*, including aggravating and  
6 mitigation factors, and a proportionality analysis, this Hearing Officer recommends the  
7 following:

- 8 1. Respondent will receive a public censure for violating Rule 42, Ariz.R.Sup.Ct.,  
9 specifically ERs 1.15 and 8.1(b), and Rules 43, 44, and 53(f), Ariz.R.Sup.Ct.
- 10 2. Respondent shall complete the Trust Accounts Ethics Enhancement Program  
11 (TAEPP) during the probationary period.<sup>3</sup>
- 12 3. Respondent shall pay all costs incurred by the State Bar in connection with these  
13 proceedings. A statement of costs and expenses incurred by the State Bar to date in  
14 this disciplinary proceeding is attached hereto as Exhibit A.
- 15 4. In the event Respondent fails to comply with any of the foregoing terms, and the State  
16 Bar receives information about his failure, bar counsel will file a Notice of Non-  
17 Compliance with the disciplinary clerk. A hearing officer will conduct a hearing at  
18 the earliest practical date, but in no event later than 30-days following receipt of the  
19 notice, and will determine whether the terms have been breached and, if so, will  
20 recommend appropriate actions in response to the breach. The State Bar shall have  
21 the burden of proving non-compliance by clear and convincing evidence  
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25 <sup>3</sup>In most trust account cases, probation would include the requirement that Respondent contact the State Bar's  
26 Law Office Management Assistance Program (LOMAP) to develop a contract for LOMAP oversight of trust  
account maintenance. However, because Respondent has left private practice, Hearing Officer does not

DATED this 4 day of December, 2006.

Sandra Slaton   
Sandra Slaton  
Hearing Officer 8A

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4 Original filed with the Disciplinary Clerk  
5 this 4 day of December, 2006.

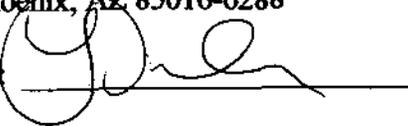
6 Copy of the foregoing mailed  
7 this 4 day of December, 2006, to:

8 Sandra L. Slaton  
9 **Hearing Officer 8S**  
10 6619 North Scottsdale Road  
11 Scottsdale, AZ 85250

12 George A. Tacker  
13 Tacker & Associates  
14 1657 East Cotton Gin Loop, Suite 102  
15 Phoenix, AZ 85040-0001  
16 (Respondent)

17 Copy of the foregoing hand-delivered  
18 this 4 day of December, 2006, to:

19 Denise M. Quinterri  
20 Bar Counsel  
21 State Bar of Arizona  
22 4201 North 24<sup>th</sup> Street, Suite 200  
23 Phoenix, AZ 85016-6288

24  
25  
26 by 

recommend that here. If Respondent ever decides to re-enter private practice, it is recommended that he contact the LOMAP for assistance.