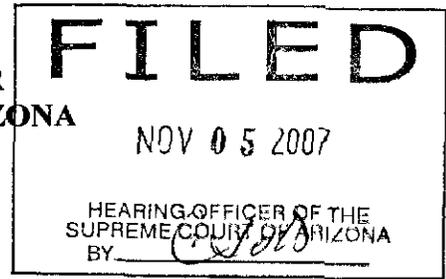


BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)

File No 04-0495

J. MARK HELDENBRAND,)
Bar No. 011790)

HEARING OFFICER'S REPORT

RESPONDENT)
_____)

PROCEDURAL HISTORY

1 This matter was initiated as a result of a direct file by the Conflict Case Committee of a Tender of Admissions and Agreement, and Joint Memorandum in Support of Discipline by Consent on August 1, 2007. The matter was assigned to the undersigned on August 8, 2007, and set for hearing on the Agreement on September 14, 2007. A continuance was necessary and the matter proceeded to hearing on the Agreement on October 4, 2007.

FINDINGS OF FACT

- 2 At all times relevant hereto, Respondent was a member of the State Bar of Arizona having been admitted in 1988.
3. As of 2002, Dr. and Mrs. Larry J. Davis owned a house in Tucson, Arizona, which the Davis' rented to others.
- 4 The Davis' retained a property management company known as Equity IV to manage the property in question for them.

5. In 2002, a tenant in a house owned by the Davis' and managed by Equity IV defaulted on her rent
6. Equity IV retained Respondent to sue the defaulting tenant. Equity IV did so in its capacity as the Davis' agent. Respondent filed suit against the tenant, naming Equity IV as plaintiff
7. The tenant filed a counterclaim alleging, among other things, that misrepresentations had been made about the property
8. When handling the lawsuit in question, Respondent acted as attorney for both Equity IV and the Davis'
9. At the trial of the lawsuit in question, Respondent requested that the Davis' be added or substituted as real parties in interest. He did not communicate with the Davis' about the merits of such a step before doing so
10. During trial, the lawsuit that Respondent was handling for the Davis' and Equity IV was resolved by a decision on the merits, neither party being successful on their respective claims.
11. At least from the time that the tenant filed a counterclaim, Respondent had a conflict of interest in representing both Equity IV and the Davis'. The representations to the tenant had been made by Equity IV as the Davis' agent, not by the Davis' directly. The Davis' had potential claims against Equity IV for indemnity in connection with the tenant's claims. There was the potential for Respondent's representation of the Davis' to be materially limited by his responsibilities to Equity IV

12. Respondent nonetheless proceeded to represent both clients. By doing so, he violated ER 1.7(a), Rule 42, Arizona Rules of the Supreme Court. Respondent did not disclose the conflict of interest to the Davis'. He maintains that he did not recognize the conflict
13. At the trial of the lawsuit in question, Respondent requested that the Davis' be added or substituted as real parties in interest. He did not communicate with the Davis' about the merits of such a step. Respondent contends that he wanted the Davis' added as parties so that if the tenant's claims were dismissed, as he expected, the ruling would be res judicata as to the Davis' and the tenant could not thereafter bring a separate claim against the Davis'.
14. The addition of the Davis' as parties to a case where the tenant was pursuing a counterclaim, however, exposed the Davis' to a risk of liability. For that reason, it may arguably have been in Equity IV's interest for the Davis' to be added but not in the Davis' interest. Respondent, therefore, had a conflict of interest in deciding to add the Davis' as parties.

CONCLUSIONS OF LAW

15. The Hearing Officer finds by clear and convincing evidence that Respondent's conduct violated Rule 42 Ariz.R Sup.Ct as follows:

ER 1.7(a) – conflict of interest

ER 1.4(a) and (b) – communication (with client)

ABA STANDARDS

16 ABA *Standard* 3.0 provides that four criteria should be considered: (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 factors

17 This Hearing Officer considered the following *Standards*:

Standard 4.32:

"Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client."

Standard 4.33:

"Reprimand [or what is known in Arizona as a censure] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."

Standard 4.34:

"Admonition [or what is known in Arizona as an informal reprimand] is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client."

18. **Lawyer's Mental State**

The parties submitted, and the Hearing Officer concurs, that Respondent's conduct was negligent. To further quote from the Joint Memorandum, "The conflict in this case, while real, was not glaringly apparent. The known facts indicate that it never occurred to Heldenbrand that representing both clients at the same time was problematic

Heldenbrand's negligence created the potential for injury to the client but no injury resulted" (Joint Memorandum page 3 line 20 – page 4 line 1)

19 **Actual or Potential Injury Caused by the Lawyer's Conduct**

The parties submit, and the Hearing Officer concurs, that there was the potential for injury but no injury resulted

20. **Aggravating and Mitigating Factors**

The Hearing Officer finds two aggravating factors, prior discipline and substantial experience in the practice of law

21. Prior discipline: By Supreme Court Judgment and Order dated January 23, 2000, Respondent was censured and placed on two years of probation with LOMAP for violation of his duties and obligations as a lawyer, by consent agreement. The majority of Respondent's practice consisted of preparing and filing special detainer actions in Justice Court. In June 1993, Respondent entered into a business agreement with a company called Landlord Services to assist in the collection, garnishment and eviction of tenants for landlords and property management companies. Respondent negligently failed to supervise Landlord Services and, as a result, Landlord Services was (a) not returning client telephone calls, (b) not providing accountings to clients who so requested, and c) failed to forward client funds to the clients. There were no aggravating factors found and there were five mitigating factors found. When Respondent became aware of the problems with Landlord Services, he addressed those concerns and retained an independent accounting firm to audit his accounts. Respondent acknowledged that he should not have delegated administrative responsibility of his client files and accounts

Respondent was prepared to provide full restitution to his clients but, to the best of his recollection, no claims for restitution were made

22 Respondent was also informally reprimanded on June 25, 1999, for improperly supervising an associate who was handling a case and for inadequate communication with a client.

23. Experience in the practice of law Respondent has practice law since 1988

24. The Hearing Officer finds two mitigating factors, absence of selfish or dishonest motive and cooperation.

25 Absence of a selfish or dishonest motive The Hearing Officer finds that Respondent did not recognize the conflict. He further claims to have taken steps to assure that there are no similar lapses in the future

26 Cooperation with the Conflict Case Committee Respondent cooperated fully with the Conflict Case Committee's investigation, supplying documents and making himself available for questioning when asked

PROPORTIONALITY

27. The parties submitted the following relevant cases to support the proposed sanction in this case:

28. In *Matter of Neville*, 147 Ariz. 106, 114, 708 P.2d 1297, 1305 (1985), the respondent had represented two clients with conflicting interests at the same time. The respondent in that case committed other ethical violations as well. The Court, finding the conduct to have been isolated, imposed a censure

- 29 In *Matter of Owens*, 182 Ariz 121, 893 P.2d 1284 (1995), the respondent represented a client under circumstances in which his own interests were in conflict with the client's interests. The Court again found the misconduct to be isolated and imposed a censure.
30. In *re Ockrassa*, 165 Ariz 576, 799 P.2d 1350 (1990), involved an attorney who prosecuted a client whom he had previously defended, even after the client asked him to withdraw. The Court determined that the respondent had a conflict of interest with a former client in violation of ER 1.9. The respondent had been disciplined before and there was no substantial mitigation. The Court observed that "respondent has demonstrated an insensitivity to conflicts of interest evidenced by a pattern of misconduct." *Id* at 580, 799 P.2d at 1354. A suspension of ninety days was imposed.
31. In *Matter of Shannon*, 179 Ariz 52, 876 P.2d 548 (1994), the respondent had represented clients with conflicting interests. He had also failed to keep clients informed and engaged in other misconduct. The misconduct in *Shannon* was distinct in that it was knowing misconduct and the attorney had a selfish motive for ignoring the conflict. A suspension from practice for one year was imposed.
- 32 Respondent's conduct appears similar to the conduct of the attorneys in the cases that resulted in censures.

RECOMMENDATION

33. 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) In addition to protecting the public, lawyer discipline also has the objective of protecting 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)

34 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)

35. The parties submit that the appropriate sanction in this matter is a censure and that the Respondent pay all costs. Under the heading of "other considerations" the Joint Memorandum states the following:

36 "In the Conflict Case Committee's view, an informal reprimand would not be sufficient sanction in this case, particularly in light of Heldenbrand's prior discipline. Suspension, however, would be too harsh a sanction for errors that appear to have involved no knowing misconduct, and which caused no discernible injury to the client. A censure therefore appears most appropriate."

37. As this Hearing Officer was listening to the Respondent present his case at the hearing on the agreement, the Hearing Officer found the Respondent to have valid reasons for making the decisions he did. If this was the first time Respondent was before the State Bar for discipline, this Hearing Officer would have found an informal reprimand to have been more appropriate as the error was negligent and no actual harm occurred. (See *Standard 4.34*) However, in light of Respondent's prior discipline (a censure in 2000 and informal reprimand in 1999), the Hearing Officer finds that the proposed censure and payment of costs is appropriate in this matter

DATED this 5th day of November 2007

H. Jeffrey Coker / s/
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 5th day of November 2007

Copy of the foregoing mailed
this 6th day of November, 2007, to:

J Mark Heldenbrand
Respondent
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Phoenix, AZ 85013

Copy of the foregoing hand-delivered
this 6th day of November, 2007, to:

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Volunteer Bar Counsel
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by. 