

FILED

JAN 8 1 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY CSB

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

**IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA**

Nos. 05-0782, 05-1621,
05-1651, 05-1848, 05-2152,
05-2153, 05-2191, 06-0134,
06-0251, 06-0320, 06-0357

BARRY G. NELSON,
Bar No. 006746
Respondent.

**HEARING OFFICER'S
REPORT**

PROCEDURAL HISTORY

FINDINGS OF FACT

1. At all relevant times, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 16, 1981.
2. By order of the Arizona Supreme Court, Respondent was placed on interim suspension in SB-06-0015-D, effective March 14, 2006, based on many of the factual allegations of this case. Respondent did not object to the Motion for Interim Suspension.
3. A hearing on the Tender of Admissions and Consent for Discipline was held on December 12, 2006.

COUNT ONE: File No. 05-0782/05-1651 (Trust Account)

4. On or about May 2, 2005, a check in the amount of \$600 attempted to pay against Respondent's Bank of America client trust account when the balance in the account was \$50.10. The bank paid the check, leaving the account with a negative balance of \$549.90.
5. On or about June 1, 2005, a check in the amount of \$1,500 attempted to pay against Respondent's Bank of America client trust account when the balance in the account was \$150. The bank paid the check, leaving the account with a negative balance of \$1,350.
6. After the State Bar received the insufficient funds notices on Respondent's client trust account, a screening investigation was opened, and Respondent was requested to provide an explanation of the cause of the overdrafts, along with supporting documentation.
7. Respondent provided some of the requested records, but was unable to provide all of the requested records. Respondent also provided a written response, but did not specifically explain the cause of the overdrafts.
8. In a response dated July 15, 2005, Respondent admitted that his trust account records had not been kept up properly, and admitted that his trust account reconciliation was in disarray.

9. On or about September 7, 2005, while the above trust account matter was still pending, a check in the amount of \$1,000 attempted to pay against Respondent's Bank of America client trust account when the balance in that account was only \$692.50. The bank paid the check, leaving the account with a negative balance of \$307.50. A new screening investigation was opened concerning this subsequent overdraft.
10. In the original matter, Respondent submitted a response to the State Bar dated October 20, 2005, stating he was unable to provide the requested records because he does not follow the strict requirements of the rules as he believes them to be too stringent for a sole practitioner to follow.
11. Respondent later sent an additional letter to the State Bar dated January 14, 2006, concerning both trust account files stating that, due to personal problems, he was having difficulty managing his practice including the management of his trust account. He stated that he had stopped reconciling his trust account, which contributed to the overdrafts.
12. A review of the trust account documents submitted, along with Respondent's explanations, revealed that Respondent:
 - a. failed to properly safeguard client funds; Respondent's trust account was overdrawn three times, and Respondent admits that he has not kept his trust

account records properly; Respondent disbursed earned fees directly from the trust account without the ability to specifically identify for which clients these fees were earned;

b. failed to maintain adequate client ledgers and other trust account records;

c. failed to exercise due professionalism in the performance of his duties as is required by Rule 43(d)(1)(A) and (d)(1)(B), Ariz.R.Sup.Ct., regarding his failure to safeguard client funds, failure to keep proper records, and failure to conduct monthly reconciliations;

d. failed to maintain proper internal controls within his office to adequately safeguard funds on deposit in the trust account as required by Rule 43(d)(1)(C), Ariz.R.Sup.Ct.;

e. failed to make a monthly three-way reconciliation of the client ledgers, trust account general ledger or register, and trust account bank statement as is required by Rule 43(d)(2)(D), Ariz.R.Sup.Ct.; and

f. failed to make all trust account disbursements by pre-numbered check or by electronic transfer; Respondent's records reveal that he transferred funds directly from the client trust account to the firm account with no record of which client the transfer relates.

13. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to safeguard client funds; Respondent failed to comply with the Trust Account Guidelines.
14. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.15, and Rules 43 and 44, Ariz.R.Sup.Ct.

COUNT THREE: File No. 05-1848 (Verdugo)

13. In May, 2005, Rosalina Verdugo retained Respondent to represent her in filing a motion to have the spelling of her name corrected on her separation decree.
14. Ms. Verdugo paid Respondent \$100 on May 17, 2005, to file the motion.
15. Ms. Verdugo requested Respondent to file the motion promptly as she was scheduled for surgery and wished to have her paperwork in order prior to that time.
16. Thereafter, Ms. Verdugo was unable to contact Respondent regarding the matter. Respondent failed to return Ms. Verdugo's numerous telephone calls regarding the matter.
17. Ms. Verdugo went to Respondent's office and discovered that his office had closed. Respondent failed to inform Ms. Verdugo of his relocation.
18. Respondent did not file the motion.
19. Respondent has not refunded the fees.

20. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely refund unearned fees.
21. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT FOUR: File No. 05-2152 (Huerta)

22. Respondent represented Mary Huerta in a domestic relations matter involving her divorce.
23. During the representation, Respondent failed to adequately communicate with Ms. Huerta. On numerous occasions, Respondent failed to return phone messages left with Respondent's staff. Respondent's staff informed Ms. Huerta several times that Respondent was working from home due to health reasons, but that they were forwarding her phone messages to him.
24. Though Respondent initially represented Ms. Huerta regarding the temporary orders issue, he failed to diligently pursue the case thereafter. He failed to specifically pursue the spousal maintenance and attorneys' fees issue.
25. In response to the bar charge, Respondent admitted that he did not diligently

finalize the case. Respondent also admitted that he had not refunded Ms. Huerta's unearned fees in the approximate amount of \$2,000.

26. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely refund unearned fees.
27. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT FIVE: File No. 05-2153 (Curtis)

28. In or about March of 2005, Greg Curtis retained Respondent to represent him in a child support adjustment matter, and in obtaining additional parental time. Mr. Curtis paid Respondent a \$3,000 retainer fee for the representation on March 10, 2005.
29. Despite Respondent's earlier advice that he believed Mr. Curtis' child support obligation would not increase, the adjusted child support order was much higher than the original order.
30. Thereafter, Mr. Curtis decided not to pursue additional parenting time. On or about August 22, 2005, Mr. Curtis sent Respondent an e-mail informing him

not to pursue the parenting time issue, and requesting a refund of his unearned retainer.

31. After receiving no response to his email, Mr. Curtis sent a second email to Respondent on October 3, 2005, as well as sending a letter and leaving a phone message, requesting the unearned portion of his retainer.
32. On or about October 12, 2005, Respondent left a message for Mr. Curtis indicating that he was moving his office, and would settle Mr. Curtis' file within a few days.
33. Thereafter, Mr. Curtis has been unable to contact Respondent regarding the refund, and has received no further communication from him regarding the issue.
34. Mr. Curtis' last billing statement showed that there was \$2,145 of unearned fees remaining.
35. In response to the bar charge, Respondent admitted that he owed Mr. Curtis a refund.
36. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to adequately communicate with his client; and Respondent failed to timely refund unearned fees.

37. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT SIX: File No. 05-2191 (Simpson)

38. In September, 2005, Amanda Simpson retained Respondent to represent her in terminating a wage garnishment in her spousal maintenance matter.

39. In October, 2005, Ms. Simpson paid Respondent \$700 for the representation.

40. Thereafter, Ms. Simpson made numerous attempts to contact Respondent regarding the status of her case. Respondent failed to return her calls or otherwise communicate with her.

41. Respondent did not perform the services for which he was retained by Ms. Simpson.

42. Respondent did not refund any unearned fees to Ms. Simpson.

43. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely refund unearned fees.

44. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT SEVEN: File No. 06-0134 (Banales)

45. In 2005, Respondent represented John Trojanovich in a child support, custody and visitation matter.
46. Attorney Paul Banales represented the opposing party, Annie Garrigan, in the same matter.
47. In September, 2005, the parties negotiated a settlement of the case. Thereafter, Respondent submitted a proposed stipulation and order to Mr. Banales for review. Mr. Banales made changes to the proposed order, but not to the stipulation, and sent the documents back to Respondent.
49. On November 28, 2005, Respondent sent the revised proposed order to Mr. Banales for review. Mr. Banales immediately informed Respondent that the proposed order was acceptable. The stipulation had already been signed by both parties. Respondent informed Mr. Banales that he would file the stipulation and proposed order within the week.
50. Respondent failed to file the documents.
51. Thereafter, Mr. Trojanovich and Mr. Banales made numerous attempts to contact Respondent. Respondent failed to communicate with either of them.
52. Respondent did no further work on the case.
53. Respondent failed to withdraw from the case.

54. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely withdraw from the case and make any refunds due.

55. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT EIGHT: File No. 06-0251 (Dillof/Villicana)

56. On or about July 27, 2005, Carlos Villicana retained Respondent to represent him in a divorce. Mr. Villicana paid Respondent \$3,000 for the representation.

57. Mr. Villicana terminated the representation in or about November of 2005.

58. During the period of representation, Respondent failed to adequately communicate with Mr. Villicana about the case, and failed to adequately respond to his questions about the case.

59. At the conclusion of the representation, Respondent failed to timely refund unearned fees.

60. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to adequately communicate with his client; and Respondent failed to timely make any refunds due.

61. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT NINE: File No. 06-0320 (Nowak)

62. In September, 2005, Brenda Nowak retained Respondent to represent her in post-dissolution matters. Ms. Nowak paid Respondent \$1,300 to handle the matters.

63. Thereafter, Ms. Nowak had difficulty communicating with Respondent. She often left phone messages for him that were not returned.

64. Respondent did not diligently pursue the case, and did not earn the fees paid.

65. In response to the bar complaint, Respondent admits that he owes Ms. Nowak a refund of \$1,300.

66. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely withdraw from the case and make any refunds due.

67. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

COUNT TEN: File No. 06-0357 (Jacobs)

68. On or about September 20, 2005, Katherine Jacobs had an initial consultation with Respondent regarding a potential case against her former husband.
69. On or about September 21, 2005, Ms. Jacobs sent Respondent \$1,500 as a retainer for the matter.
70. On or about October 12, 2005, Ms. Jacobs had a telephone conversation with Respondent regarding her hesitation to proceed with the legal action. At that time, Respondent informed her that he would handle the matter for a flat fee of \$1,500 and it would take two to four months to conclude. Respondent sent Ms. Jacobs a letter *confirming that agreement*.
71. Thereafter, Ms. Jacobs heard nothing from Respondent despite her repeated attempts to contact him.
72. Ms. Jacobs finally reached Respondent in late November of 2005. At that time, he informed her that he was no longer practicing law, and would refund her monies.
73. Since that time, Ms. Jacobs has been unable to contact Respondent, and has received no refund.
74. Respondent violated one or more of the Rules of Professional Conduct as follows: Respondent failed to abide by his client's objectives; Respondent

failed to diligently represent his client; Respondent failed to adequately communicate with his client; and Respondent failed to timely withdraw from the case and make any refunds due.

75. Respondent's conduct as described in this count violates Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.2, ER 1.3, ER 1.4, ER 1.15, and ER 1.16(d).

CONDITIONAL ADMISSIONS & DISMISSALS

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, Ariz.R.Sup.Ct., specifically, ERs 1.2, 1.3, 1.4, 1.15 and 1.16(d), and Rules 43 and 44, Ariz.R.Sup.Ct. Respondent's admissions are being tendered in exchange for the form of discipline stated below.

The State Bar has agreed to dismiss the factual allegations of Count Two in exchange for the settlement in this matter and in light of evidentiary concerns. Respondent asserts that he did diligently represent Mr. Badilla, as well as adequately communicate with him. As the addition or deletion of this particular count does not affect the sanction recommendation, the parties have agreed for purposes of settlement to conditionally dismiss this count. Respondent has agreed to participate in fee arbitration with Mr. Badilla, if Mr. Badilla wishes to do so.

ABA STANDARDS

The ABA *Standards* 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 *Standard 4.0 (Violations of Duties Owed to Clients)* is the most applicable in this matter.

Standard 4.12 states:

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

A review of *ABA Standard 4.4 (Lack of Diligence)* indicates that suspension is the presumptive sanction for Respondent's misconduct. *Standard 4.42* specifically provides:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Based on the conditional admissions, the presumptive sanction for the admitted conduct is suspension.

Respondent violated his duty to his clients by repeatedly failing to perform services requested by the client, failing to communicate with clients, failing to timely

refund unearned fees, failing to timely withdraw from representation and failing to comply with Trust Account Guidelines.

The lawyer is not required to accept all clients, but, having agreed to perform services for a client, the lawyer has duties that arise under ethical rules, agency law, and under the terms of the contractual relationship with the individual client... [T]he lawyer must be competent to perform the services requested by the client and be diligent in performing those services.”

Standard 4.0, Introduction.

Respondent has admitted that his conduct, taken as a whole, violated his duty to his clients. The parties agree that some of Respondent’s misconduct was committed knowingly, and some of his misconduct was committed negligently. There was actual or at least potential injury to the clients involved as a result of Respondent’s rule violations.

AGGRAVATING AND MITIGATING FACTORS

This Hearing Officer then considered the parties Joint Memorandum in determining aggravating and mitigating factors in this case.

This Hearing Officer agrees with the parties tender that there are three applicable aggravating factors in this matter pursuant to *Standards 9.22*:

- (a) prior disciplinary offenses (Respondent was previously censured by Order of the Supreme Court on March 20, 2006 in file No. 04-1761);
- (c) a pattern of misconduct;

- (d) multiple offenses; and
- (i) substantial experience in the practice of law.

This Hearing Officer agrees with the parties that two factors are present in mitigation pursuant to *Standards* 9.32: (c) personal or emotional problems; and 9.32(e) full and free disclosure to the disciplinary board and cooperative attitude toward proceedings.

Respondent has indicated and submitted evidence he was suffering from personal and emotional problems at the time the misconduct occurred. (Attachments to Tender of Admissions; pg 8-9, Transcript of Hearing 12/12/06.) The State Bar has indicated Respondent was "extremely cooperative." in transferring files to a conservator and in providing information. (Pg 7, Transcript of Hearing 12/12/06.)

PROPORTIONALITY REVIEW

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).

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. *Peasley, supra*, 208 Ariz. at 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* 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 Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The Hearing Officer agrees this matter is analogous to *Mankowski*, DC No. 03-0310 et al., SB-0005-02-D, who received a suspension for six months and one day, plus requirements upon reinstatement. As in *Mankowski*, the most serious duty Respondent violated was that owed to his clients. As in *Mankowski*, Respondent should be required to demonstrate his fitness to practice law and his rehabilitation through a reinstatement requirement.

RECOMMENDATION

This Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent which provides for the following:

Respondent be suspended for a period of six months and one day retroactive to March 14, 2006.

Upon compliance by Respondent with formal reinstatement proceedings pursuant to Rule 72, the following should be required, in addition to any other

requirements by the reinstatement hearing officer:

Respondent be placed on probation for a period of two years to begin when all parties have signed the probation contract.

The State Bar would be required to notify Disciplinary Clerk of the exact date of commencement of probation. The term of probation would be as follows:

a. Respondent would be required, within 30 days of successful formal reinstatement, contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) to schedule an audit of his law office. The LOMAP director or his/her designee will conduct an audit of Respondent's law office no later than 60 days thereafter. Following the audit, Respondent shall enter into a probation contract that will be effective for a period of two years from the date upon which all parties have signed the probation contract. Respondent shall comply with all recommendations of the LOMAP director or his/her designee.

b. Respondent shall contact the director of the State Bar's Member Assistance Program (MAP) within 30 days of successful formal reinstatement and submit to an assessment. Respondent thereafter will enter into a MAP contract based upon recommendations made by the MAP director or designee. Any recommendations by MAP shall be incorporated into the probation contract.

c. Respondent shall follow all the Rules of Professional Conduct and all

Trust Account Guidelines. Respondent shall pay all costs incurred by the State Bar in connection with these proceedings, including the assessment by LOMAP and MAP.

d. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. Sup.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.

e. Respondent shall pay restitution in the following amounts to the following individuals:

Rosalina Verdugo	\$ 100.00
Mary Huerta	\$2,000.00
Greg Curtis	\$2,145.00
Amanda Simpson	\$ 700.00
John Trojanovich	\$1,290.00
Carlos Villicana	\$2,500.00
Brenda Nowak	\$1,300.00
Katherine Jacobs	\$1,500.00

In addition, based on his agreement to do so, Respondent shall participate

in fee arbitration with Mr. Badilla should Mr. Badilla request such through the State Bar's fee arbitration program.

Respondent shall pay the costs and expenses incurred in this disciplinary proceeding.

DATED this 31st day of January, 2007.

Denice R. Shepherd /cs
Denice R. Shepherd
Hearing Officer 7Q

Original filed with the Disciplinary Clerk
this 31st day of January, 2007.

Copy of the foregoing was mailed
this 31st day of January, 2007, to:

Barry G. Nelson
Respondent
12520 Broadmoor
Overland Park, Kansas 66209

Amy K. Rehm
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: Christina A. [Signature]