

FILED

OCT 03 2007

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

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

File No 06-0741

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY DA 270

**ROSVAL A. PATTERSON,
Bar No. 018872**

**HEARING OFFICER'S REPORT
RECOMMENDING ACCEPTANCE
OF AGREEMENT FOR
DISCIPLINE BY CONSENT**

Respondent.

(Assigned to Hearing Officer 8W,
Thomas M. Quigley)

Pursuant to Ariz. R. Sup. Ct 56(e), the undersigned hearing officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and submits the following report.

I. PROCEDURAL HISTORY

The State Bar filed a Complaint on May 4, 2007. The complaint alleged one count as discussed further below. Respondent Rosval A Patterson ("Patterson" or "Respondent") filed an Answer on May 29, 2007. A notice of settlement was filed on August 6, 2007, and subsequently the parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") on August 22, 2007. No hearing has been held in this matter.

II. FACTS¹

1 At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 16, 1998.

COUNT ONE (File no. 06-0741)

2 On May 4, 2006, the State Bar of Arizona ("State Bar") received an insufficient funds notice on Respondent's client trust account ("trust account")

3. The notice indicated that on May 2, 2006, a charge against the account in the amount of \$1,011 36, attempted to pay when the balance was \$420 45

¹ The following facts have been conditionally admitted and form the basis for the hearing officer's recommendation. See Agreement

1 4 The bank allowed the debit, charged a \$32.00 overdraft fee, leaving the
2 trust account with a negative balance of \$622.91.

3 5. By letter dated May 8, 2006, the State Bar's Staff Examiner ("Staff
4 Examiner") provided to Respondent a copy of the overdraft notice and requested that
5 Respondent explain the overdraft of his trust account.

6 6. At Respondent's direction, Respondent's office manager, Sherry L.
7 Nickels ("Ms. Nickels") provided a response dated May 31, 2006.

8 7. The response stated that Ms. Nickels had contacted NOVA Information
9 Systems to set up a Merchant Credit Card and Check Swipe service for the law firm.
10 The fee for this service was to have come out of Respondent's firm's operating account.
11 However, NOVA erroneously deducted the fee from Respondent's trust account,
12 resulting in the overdraft referenced above. Upon notice of the overdraft, Ms. Nickels
13 contacted NOVA and steps were taken to ensure that the fee was deducted from the
14 correct account, Respondent's firm's operating account

15 8. By letter dated June 8, 2006, the Staff Examiner asked Respondent to
16 review the response provided by Ms. Nickels and indicate whether he agreed with her
17 explanation of the overdraft

18 9. By separate letter dated June 8, 2006, the Staff Examiner asked
19 Respondent to provide, within 20 days of the date of the letter, additional information
20 relating to his client trust account

21 10. By letter dated June 14, 2006, Respondent informed the Staff Examiner
22 that he agreed "in all respects" with Ms Nickels' explanation regarding the overdraft of
23 his client trust account.

24 11. By fax, on or about July 21, 2006, Respondent provided some of the
25 records requested by the Staff Examiner in her letter of June 8, 2006, but did not
26 provide copies of duplicate deposit slips, individual client ledgers and bank
27 fee/administrative funds ledger, or the general ledger/check register for his client trust
28 account.

1 12. By letter dated July 26, 2006, the Staff Examiner again requested that
2 Respondent provide within 10 days of the date of her letter, copies of duplicate deposit
3 slips, individual client ledgers and bank fee/administrative funds ledger, or the general
4 ledger/check register for his client trust account.

5 13. The Staff Examiner also requested that Respondent provide copies of the
6 March 2006, through May 2006, monthly three-way reconciliations of his trust account.

7 14. Respondent, on or about August 9, 2006, by a telephone call to the Staff
8 Examiner by Ms Nickels, requested an extension of time to provide the requested
9 records.

10 15. An extension until August 17, 2006, was granted to Respondent to provide
11 the records requested on or about June 8, 2006, and again requested on or about July 26,
12 2006.

13 16. An extension until August 21, 2006, was granted to Respondent to provide
14 copies of duplicate deposit slips for March 2006, through May 2006.

15 17 Respondent provided some financial records, but failed to provide copies
16 of the general ledger/check register corresponding to the March 2006, through May
17 2006 bank statements, and bank fee/administrative funds ledger, previously requested
18 on June 8, 2006, July 26, 2006, and August 11, 2006.

19 18. By letter dated August 18, 2006, the Staff Examiner again requested that
20 Respondent provide, within 20 days of the date of her letter, copies of the general
21 ledger/check register for his trust account and specific individual client ledgers.

22 19 In the same letter, the Staff Examiner requested that Respondent provide,
23 within 20 days of the date of her letter, specific information about several transactions,
24 including a negative balance for client Caviness on March 29, 2006, and a disbursement
25 for client Zimmerman that appeared on the client ledger but not on the trust account
26 bank statement.

27 20. On or about September 7, 2006, Respondent provided some of the
28 information requested, but again did not provide a bank fees/administrative funds

1 ledger.

2 21. On or about September 14, 2006, the Staff Examiner again requested that
3 Respondent provide a copy of his bank fees/administrative funds ledger or an
4 acknowledgment that Respondent did not maintain such a ledger.

5 22. The Staff Examiner requested a response within 10 days of the date of her
6 letter.

7 23. Respondent provided a Quickbooks Ledger Report in response.

8 24. The Staff Examiner conducted an examination of the records provided by
9 Respondent and discovered that additional information was required to complete her
10 investigation

11 25. By letter dated September 29, 2006, the Staff Examiner requested
12 information regarding transactions for three individual clients, Gilder, Caviness and
13 William Dee Consulting, LLC, be provided within 10 days of her letter.

14 26 By letter dated October 11, 2006, the Staff Examiner reminded
15 Respondent of his duty to respond to the inquiry and reminded Respondent that his
16 failure to respond might, in itself, be grounds for discipline pursuant to the provisions of
17 Ariz. R. Sup. Ct 53

18 27 On or about October 18, 2006, by facsimile transmission date-stamped
19 October 18, 2006, Respondent provided the information requested in the Staff
20 Examiner's letter of September 29, 2006.

21 28 By letter dated October 23, 2006, the Staff Examiner requested that
22 Respondent provide within five days of her letter, an explanation of a "Trust Account
23 Overage" expense relating to his trust account, including the nature and purpose of the
24 funds, and documentation to support Respondent's explanation

25 29. By letter dated November 6, 1006 (sic), mailed to Respondent on or about
26 November 6, 2006, the Staff Examiner reminded Respondent of his obligation to
27 provide information in the State Bar's investigation and that failure to promptly respond
28 and provide information might, in itself, be grounds for discipline.

1 30 Respondent provided a response by facsimile transmission on or about
2 November 7, 2006.

3 31. Respondent stated that the "Trust Overage Expense" in his trust account
4 consisted of earned fees that had accumulated in his trust account and stated that there
5 was no corresponding ledger for those funds

6 32. All of the records provided by Respondent, and all of Respondent's
7 responses were reviewed by the Staff Examiner and revealed that Respondent:

8 a. Failed to safeguard client property in his possession as required
9 when he disbursed funds on behalf of three clients when there were insufficient funds in
10 his trust account for those clients;

11 b. Failed to exercise due professional care in the performance of his
12 duties by converting client funds and by failing to maintain proper internal controls; by
13 commingling personal funds in his trust account; and by failing to conduct proper
14 monthly three-way reconciliations;

15 c Failed to adequately maintain proper internal controls in that
16 procedures were not in place to find bookkeeping errors;

17 d. Failed to record all transactions promptly and completely,

18 e. Failed to maintain or cause to be maintained a proper account
19 ledger or the equivalent for each client, person or entity for whom monies were received
20 in trust;

21 f. Failed to make or cause to be made a monthly three-way
22 reconciliation as provided by Rule 43

23 **III. DISMISSED ALLEGATIONS**

24 As part of the Agreement, the State Bar dismissed the allegation that Respondent
25 violated Ariz. R. Sup. Ct. 53(f).

26 **IV. RESTITUTION**

27 There is no issue of restitution in this matter.
28

1 **V. THE APPROPRIATE SANCTION**

2 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
3 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d
4 1315, 1320 (1993) It is also the objective of lawyer discipline to protect the public, the
5 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297
6 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter*
7 *of Horwitz*, 180 Ariz. 20, 29, 881 P 2d 352, 361 (1994)

8 In imposing discipline, it is appropriate to consider the facts of the case, the
9 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards")
10 and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178
11 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

12 **A. ABA Standards**

13 The Supreme Court and the Disciplinary Commission consistently use the
14 American Bar Association Standards for Improving Lawyer Sanctions ("Standards") to
15 determine appropriate sanctions for attorney discipline. *See In re Clark*, 207 Ariz. 414,
16 87 P.3d 827 (2004); *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, §§ 23, 33 (2004). The
17 *Standards* are designed to promote consistency in sanctions by identifying relevant
18 factors and then applying those factors to situations in which lawyers have engaged in
19 various types of misconduct. *Standard 1.3, Commentary*

20 In determining an appropriate sanction, the court and the Disciplinary
21 Commission consider the duty violated, the lawyer's mental state, the presence or
22 absence of actual or potential injury, and the existence of aggravating and mitigating
23 factors *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990); *Standard 3.0*.

24 **1. The duty violated**

25 The Respondent has admitted facts that constitute a violation of ER 1.15 and
26 Rules 43 and 44 (safekeeping client property and trust fund administration). *Standard*
27 4.1 deals with the failure to preserve client property and is identified by the parties as the
28 governing standard

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2. The lawyer’s mental state

The parties agree that Respondent acted negligently—“the failure to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.” *Standards Definitions*.

3. The potential or actual injury caused by Respondent’s conduct

Respondent’s misconduct subjected his clients to potential injury—the loss of their property.

4. The aggravating and mitigating circumstances

The parties stipulated to, and the hearing officer finds, the following factor in aggravation:

Standard 9 22(1) – Substantial experience in the practice of law. Respondent was admitted to practice in 1998.

The parties also stipulate to, and the hearing officer finds, the following factors in mitigation:

Standard 9.32(a) - Absence of a prior disciplinary record.

Standard 9.32(b) - Absence of a dishonest or selfish motive It does not appear that Respondent’s negligent misconduct was motivated by dishonesty or selfishness

Standard 4 13 provides that “(r)eprimand (censure in Arizona) is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury . . . The presumptive sanction in this matter is, therefore, censure.

Having reviewed the aggravating and mitigating factors, censure remains the appropriate sanction in this matter

B. 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. *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

1 can be achieved. *Id* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62,
2 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983))

3 The parties identify *In re Bendalín*, SB-06-0175-D (2006) as a recent case
4 demonstrating proportionality. In *Bendalín*, the lawyer was censured and placed on
5 probation for one year and ordered to complete TAEPP for trust account violations that
6 included commingling funds, and the failure to have adequate procedures in place for the
7 maintenance of his client trust account. The lawyer's mental state was found to have been
8 negligent. A greater number of aggravating and mitigating factors were found, but on
9 examination of those, the facts of the case and proportional case law, it was determined
10 that censure, with probation, was the appropriate sanction.

11 The parties also identify *In re Larson*, SB-06-0099-D (2006) as a similar case. In
12 *Larson*, by the terms of an agreement for discipline by consent, the lawyer was censured
13 and placed on probation with the condition that he complete TAEPP. The lawyer failed to
14 maintain complete trust account records, and failed to conduct monthly three-way
15 reconciliations among other trust account violations. Only one aggravating factor applied
16 (substantial experience), there was only one mitigating factor and the lawyer was found to
17 have had a negligent mental state. This hearing officer accepts these cases as appropriate
18 demonstrations of proportionality.

19 **VI. RECOMMENDATION**

20 Upon consideration of the facts, application of the *Standards*, including
21 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer
22 recommends acceptance of the Tender of Admissions and Agreement for Discipline by
23 Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent
24 providing for the following

25 Respondent shall be censured and shall be placed on probation. The period of
26 probation will begin immediately upon the issuance of the judgment and order in this
27 matter and will continue for one year from the date Respondent signs the probation
28 contract. During the period of probation, Respondent shall complete the State Bar's

1 Trust Account Ethics Enhancement Program ("TAEEP") and shall participate in the
2 State Bar's Law Office Management Assistance Program ("LOMAP") to assure that he
3 has established adequate internal processes relating to his client trust account, that he is
4 properly maintaining records and that he is properly administering his client trust
5 account.

6 Respondent shall, within 30 days of the date of the judgment and order, contact
7 Patti Lesser to enroll in the next available TAEEP

8 Respondent shall, within 30 days of the date of the judgment and order in this
9 matter, contact the Director of Lawyer Assistance Programs, to schedule an appointment
10 with a member of LOMAP to conduct an assessment of Respondent's office processes
11 and procedures relating to the maintenance and use of his client trust account and
12 records of such account. Respondent shall cooperate with the staff of LOMAP and will
13 participate in the program for the duration of the period of probation as outlined in the
14 probation contract

15 Respondent shall also pay the costs and expenses of this action during the period
16 of probation. A statement of costs and expenses by the State Bar is attached as Exhibit

17 1

18 **DATED** this 5th day of October, 2007

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Thomas M. Quigley / es
Thomas M. Quigley
Hearing Officer 8W

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Original filed this 3rd day of October,
2007 with the Disciplinary Clerk of the Supreme Court

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Copy of the foregoing mailed this 3rd
day of October, 2007, to.

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