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AUG 01 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Christina J. [Signature]*

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

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4 IN THE MATTER OF A MEMBER)
5 OF THE STATE BAR OF ARIZONA,)
6 HUBERT S. SINCHAK,)
7 Bar No. 020682)
8 RESPONDENT.)

No. 06-0707

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

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11 The State Bar filed its complaint in this matter on December 22, 2006. The complaint
12 was served on Respondent by certified mail/delivery restricted to addressee and regular first
13 class mail to Respondent at his address of record as provided by Respondent to the
14 Membership Records Department of the State Bar of Arizona and by certified mail/delivery
15 restricted to addressee at his office street address on December 26, 2006 A signed certified
16 mail receipt was received by the State Bar on December 29, 2006, indicating that Respondent
17 received the Complaint on December 28, 2006 Respondent failed to file an Answer Notice
18 of Default was issued by the Disciplinary Clerk on January 23, 2007, and served on
19 Respondent by mail at his address of record Respondent failed to file an answer, despite
20 requesting and being granted time within which to do so The Disciplinary Clerk filed Entry
21 of Default on March 16, 2007 The allegations of the complaint are deemed admitted.

22 A hearing on aggravation and mitigation was held on April 24, 2007 Respondent and
23 Bar Counsel appeared. The parties were heard on the issue of sanction after a motion to set
24 aside the default filed at the hearing was argued and denied as untimely and without merit

FINDINGS OF FACT

25 The following facts are deemed admitted by default.

1 1 At all times relevant, Respondent was a lawyer licensed to practice law in the
2 state of Arizona having been first admitted to practice in Arizona on October 29, 2001

3 2 In or about November 2005, Martha Madsen ("Ms Madsen") contacted
4 Respondent to assist her in becoming her aunt's ("Ms Connor's") legal representative.

5 3 On or about November 3, 2005, Respondent prepared an Engagement Letter
6 and Fee Agreement, indicating that a consultation was to take place on November 16, 2005,
7 and that Ms Madsen would be charged hourly

8 4 The agreement prepared by Respondent was not signed by Ms Madsen.

9 5 Ms. Madsen retained Respondent, paid him \$520 00 per his request, and
10 Respondent advised her on two occasions regarding the issue of becoming Ms Connor's legal
11 representative

12 6 In or about February/March 2006, Ms Madsen returned to Respondent's office
13 and engaged his services to assist her in probating her aunt's estate

14 7 Ms Madsen paid Respondent a \$330 00 retainer for costs.

15 8 Ms Madsen wrote two checks to Respondent on her account: Check No. 6130,
16 written on December 23, 2005, for 600 00, and check No. 6215, written on March 8, 2006, for
17 \$250 00

18 9 Respondent subsequently prepared the case for an informal probate, based upon
19 Ms. Madsen's possession of Ms. Connor's original Will

20 10 Respondent's preparation of the initial application for an informal probate
21 contained an error based on a scrivener's error in the Will that stated Ms Conner had two
22 children when, in fact, she had no children

23 11 The application for an informal probate was rejected by the Court

24 12 Thereafter, Respondent prepared a corrected pleading that he attempted to file
25 with the Court, but which was not accepted, due to the assumed existence of the "two
children "

1 13. Respondent advised Ms Madsen that he had tried to resolve the issue with the
2 Court, but was told that a hearing needed to be held on the issue of the error

3 14 Ms. Madsen requested that Respondent show her the papers he filed, but
4 Respondent refused to do so

5 15 Respondent demanded another payment of \$1047 00 from Ms Madsen to
6 continue his representation

7 16. By letter dated April 17, 2006, Respondent was informed that Ms Madsen had
8 hired new counsel, Marilee Miller Clarke, and that he had been terminated as counsel

9 17 Respondent was informed in the same letter that Ms Clarke was requesting Ms
10 Madsen's file

11 18. By letter dated April 24, 2006, Respondent informed Ms. Clarke that he
12 possessed only three documents that he intended to send to her, the original Will and two
13 letters/documents from two heirs

14 19 By the same letter, Respondent requested that Ms Clarke have Ms Madsen
15 sign an agreement pertaining to payment of his fees

16 20 The agreement proposed by Respondent instructed the title company handling
17 the sale of Ms Connor's home to pay Respondent \$1047 00 from the estate for legal fees
18 owed

19 21 The \$1047 00 in fees claimed by Respondent excluded the \$330 00 in costs that
20 Respondent had already obtained from Ms Madsen

21 22. By billing statement dated April 24, 2006, Respondent informed Ms. Madsen
22 that he spent approximately seven and one-half hours on the underlying matter, and that his
23 total fees, inclusive of costs were \$1377.00

24 23 By correspondence dated May 1, 2006, Ms. Madsen filed an inquiry regarding
25 this matter with the State Bar

1 24 By letter dated May 12, 2006, the State Bar informed Respondent of the
2 complaint submitted by Ms Madsen

3 25 By letter dated May 19, 2006, Ms Clarke advised Respondent that it was more
4 than one month since she had originally requested Ms Madsen's file and had not received it

5 26 By the same letter, Ms Clarke informed Respondent that Ms. Madsen had
6 chosen not to sign the agreement he had provided with his letter of April 24, 2006, and that
7 Ms Madsen had filed an inquiry with the State Bar

8 27 Ms. Clarke reminded Respondent that she could not begin the probate action on
9 Ms Madsen's behalf without Ms Connor's Will, and informed him that the mortgage lender
10 had begun foreclosure proceedings on Ms. Connor's home

11 28 Ms. Clarke also informed Respondent that she expected him to deliver Ms
12 Madsen's file to her office by 5:00 p m , May 22, 2006

13 29 Respondent failed to deliver Ms. Madsen's file to Ms Clarke by May 22, 2006

14 30. By email dated May 24, 2006, Respondent informed Ms Clarke that he was
15 entitled to a lien on client documents when an outstanding bill was not paid, as in Ms
16 Madsen's case

17 31 By the same email, Respondent informed Ms Clarke that he had not prejudiced
18 Ms Madsen by his actions, and that, in fact, Ms Madsen had prejudiced her case by her own
19 actions

20 32 By email dated May 24, 2006, Ms Clarke responded to Respondent's email,
21 informing him that his assessment of the situation was incorrect, and that he needed to provide
22 her with the original Will immediately so that the informal probate could be filed

23 33 By letter dated May 26, 2006, Respondent responded to the State Bar's letter of
24 May 12, 2006, and stated that he was entitled to retain Ms. Madsen's file while there was an
25 outstanding bill that had not been paid.

1 34 By the same letter, Respondent requested the State Bar's suggestions regarding
2 the collection of his fees.

3 35 By letter dated May 30, 2006, bar counsel, Roberta Tepper, urged Respondent
4 to promptly provide the original Will, as well as the other documents requested, to Ms. Clarke,
5 and to comply with his ethical obligations, pursuant to ER 1.16, no later than June 2, 2006

6 36 By letter dated May 31, 2006, Respondent informed the State Bar that he was
7 entitled to an attorney's lien on Ms Madsen's case file because Ms Madsen had an
8 outstanding bill for legal services performed, despite bar counsel's previous urging that he
9 provide the original Will to Ms Clarke

10 37 By the same letter, Respondent stated that Ms Madsen had suffered no
11 prejudice as a result of his actions because her case required a formal probate hearing, making
12 the Will, still in his possession, valueless in her case

13 38. By email dated June 2, 2006, Respondent informed Ms Clarke that the
14 scrivener's error in the Will would prevent an informal probate of the estate, as the clerk would
15 not accept the Will.

16 39 By the same email, Respondent requested Ms. Clarke's assistance in arranging
17 payment of his bill by Ms. Madsen.

18 40 By email dated June 2, 2006, Ms Clarke responded to Respondent's email and
19 informed him that Ms Madsen had told her she had already paid Respondent \$1,000 00.

20 41 By the same email, Ms Clarke informed Respondent that she needed the
21 letters/documents signed by Ms Madsen's sister and cousin that he retained in his possession

22 42 Respondent failed to provide the original Will to Ms Clarke by June 2, 2006,
23 despite bar counsel's urging to do so

24 43 By letter dated June 15, 2006, the State Bar notified Respondent that a formal
25 investigation of the matter had been initiated

1 44 On or about June 21, 2006, despite the fact that his representation had been
2 terminated and that he knew Ms Madsen had retained other counsel, Respondent filed a
3 Petition for Formal Probate of (Ms. Connor's) Will and Appointment of Personal
4 Representative ("the Petition") in Maricopa County Superior Court case number PB2006-
5 001456, in which he requested that he be appointed Personal Representative of Ms. Connor's
6 estate.

7 45 On or about June 22, 2006, Respondent provided a copy of the original Will to
8 the Court, despite knowing that he had been discharged as Ms Madsen's attorney and that Ms
9 Clarke needed the original Will to proceed

10 46 By letter dated July 3, 2006, Respondent informed the State Bar that he was in
11 the process of contacting all of the heirs in an attempt to gain their approval for an informal
12 probate, and that he had applied to become a Special Administrator of the estate.

13 47 On or about July 11, 2006, Respondent, despite the fact that he was no longer
14 Ms Madsen's attorney, submitted the following documents, related to Ms Connor's estate, to
15 the Court in PB 2006-001456 an Application for Informal Appointment of Special
16 Administrator, and Acceptance of Appointment of Special Administrator of Decedent's estate

17 48 Respondent claimed he had a fiduciary duty to all of the heirs of Ms Connor's
18 estate, despite the loyalty he owed to Ms Madsen, his former client (see Reporter's Transcript
19 of Proceedings, April 24, 2007, page 25, lines 10-13)

20 49. Respondent recognized he had a conflict of interest as a result of the duty he
21 erroneously claimed to have to the heirs of Ms Connor's estate, and the duty he had to Ms.
22 Madsen, his former client (see Reporter's Transcript of Proceedings, April 24, 2007, page 25,
23 lines 10-13)

24 50 Respondent did not inform Ms Madsen, Ms Clarke, or Arizona Bank and Trust
25 Company, the successor to the named Personal Representative in Ms. Connor's Will, Colonial

1 Trust Company, that he was filing, or had filed, any pleadings regarding Ms Connor's estate
2 or probate

3 51 Despite Respondent's representation to Ms Clarke that the Will would not be
4 accepted for an informal probate, the Will was accepted for the purpose of informally
5 appointing Respondent as Special Administrator after he filed an Application for Informal
6 Appointment of Special Administrator.

7 52 On or about July 13, 2006, Respondent was appointed Special Administrator of
8 Decedent's (Ms Connor's) Estate in PB 2006-001456

9 53. Ms Clarke contacted Arizona Bank and Trust Company, Colonial Trust
10 Company's successor, regarding Ms Madsen's wish to become Ms Connor's Personal
11 Representative

12 54 Thereafter, Arizona Bank and Trust Company declined to serve as Personal
13 Representative, and appointed Ms Madsen as Personal Representative, consistent with the
14 language of the Will

15 55 Respondent ignored statutory requirements in having himself appointed as
16 Personal Representative and Special Administrator by alleging in his petition that he had
17 priority for appointment over Arizona Bank and Trust Company, and Ms Madsen (see A R S
18 § 14-3615, and A R S. § 14-3203)

19 56 Respondent ignored statutory requirements by not timely giving notice to Ms.
20 Madsen or Ms Clarke of the hearing on the Petition scheduled for August 7, 2006 (see A R.S
21 §14-3403, and A R S §14-1401)

22 57 By letter dated July 31, 2006, the State Bar provided Ms Madsen's and her
23 counsel's Reply to Respondent and requested that Respondent submit additional comments
24 concerning the matter within fifteen days of the date of the State Bar's correspondence,
25 however no further correspondence from Respondent was ever received by the State Bar

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CONCLUSIONS OF LAW

Respondent failed to provide competent representation to Ms Madsen by failing to give her competent advice Respondent represented Ms Madsen at a time when he had a conflict of interest and a significant risk existed that the representation was materially limited by Respondent's own interests regarding his fees Respondent, after formerly representing Ms Madsen and being terminated as Ms Madsen's lawyer, used information relating to the representation to her disadvantage, when he petitioned the Court to be appointed the Personal Representative and Special Administrator of Ms. Connor's estate Respondent took a position that was materially adverse to Ms Madsen's interests by claiming he had a duty to protect the interests of Ms Connor's estate and/or the heirs of the estate without obtaining Ms Madsen's informed consent to do so in writing Respondent, upon being terminated from representation, failed to take steps reasonably practicable to protect Ms Madsen's interests by not surrendering documents to which she was entitled, and in so doing, prejudiced Ms Madsen's rights Respondent's conduct was prejudicial to the administration of justice as a result of filing a petition to become the Personal Representative and the Special Administrator of Ms. Connor's estate after being terminated from representation by Ms Madsen. Respondent's conduct has violated Rule 42, *Ariz R Sup Ct.*, specifically ERs 1.1, 1.7, 1.9, 1.16, and 8.4(d)

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RECOMMENDED SANCTION

This recommendation is based on the applicable *ABA Standards for Imposing Lawyer Sanctions* ("Standards"), 1991 edition, including the relevant aggravating and mitigating factors, as well as a review of the applicable case law regarding proportionality of the proposed sanction

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APPLICABLE STANDARDS

The Standards provide guidance with respect to an appropriate sanction in this matter The Supreme Court and Disciplinary Commission consider the Standards a suitable guideline

1 *In re Peasley*, 208 Ariz 27, ¶ 23, ¶ 33, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz
2 154, 157, 791 P 2d 1037, 1040 (1990).

3 The Supreme Court and the Disciplinary Commission consistently use the Standards to
4 determine appropriate sanctions for attorney discipline See *In re Clark*, 207 Ariz 414, 87
5 P 3d 827 (2004) The Standards are designed to promote consistency in sanctions by
6 identifying relevant factors the court should consider and then applying these factors to
7 situations in which lawyers have engaged in various types of misconduct Standard 1 3,
8 *Commentary*

9 In determining an appropriate sanction, the Court and the Disciplinary Commission
10 consider the duty violated, the lawyer's mental state, the presence or absence of actual or
11 potential injury, and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz at
12 ¶ 33, 90 P 3d at 772, ABA Standard 3 0

13 The Standards identify four distinct categories in which a lawyer has specific duties to
14 his client, to the general public, to the legal system and as a professional. Respondent's duties
15 to his client and as a professional are the duties implicated in this matter.

16 "The Standards do not account for multiple charges of misconduct The ultimate
17 sanction imposed should at least be consistent with the sanction for the most serious instance
18 of misconduct among a number of violations, it might well be and generally should be greater
19 than the sanction for the most serious conduct" Standards, p 6; *In re Redeker*, 177 Ariz 305,
20 868 P.2d 318 (1994)

21 Respondent's misconduct, specifically relating to a conflict of interest, implicates
22 Standard 4 3

23 Standard 4 32 provides

24 Suspension is generally appropriate when a lawyer knows of
25 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.

1 Respondent's failure to cooperate with the State Bar during the course of their
2 investigation of this matter, including his failure to promptly return the Will and Ms Madsen's
3 file to her when strongly suggested by the State Bar and his failure to fully participate in the
4 proceeding implicate Standard 7 0

5 Standard 7 2 provides:

6 Suspension is generally appropriate when a lawyer
7 knowingly engages in conduct that is a violation of a duty owed as
8 a professional, and causes injury or potential injury to a client, the
public, or the legal system

9 Respondent's conduct in this matter was "knowing" During the State Bar's
10 investigation, Respondent was strongly urged to return Ms. Madsen's file and Ms Connor's
11 Will to Ms Madsen, yet, he disregarded the State Bar's suggestion, taking the position that the
12 State Bar provided no guidance to him (See attached Exhibit A) Additionally, Respondent
13 testified that the evidence showed that he had a conflict when he chose to represent the heirs of
14 the estate, rather than maintain his duty of loyalty to Ms Madsen, his prior client Respondent
15 became the Special Administrator of Ms. Connor's estate and attempted to become the
16 Personal Representative, as well, in order to obtain payment of his fees As to Respondent's
17 lack of participation in the proceeding, Respondent knew that he had an obligation to
18 participate as he requested an extension of time to file his Answer and yet, failed to do so

19 The presumptive sanction in this matter is, therefore, suspension

20 **AGGRAVATION AND MITIGATION**

21 Once the presumptive range of sanction has been determined, to determine where in
22 that range the sanction should fall, it is appropriate to review the aggravating and mitigating
23 factors

24 The following aggravating factors, set forth in Standard 9 22, apply
25

1 Standard 9 22(b)- Dishonest or selfish motive Respondent's misconduct was
2 motivated by his desire to obtain payment of his fees, Respondent's argument at the hearing to
3 the contrary was not credible
4

5 Standard 9 22(e)- Bad faith obstruction of the disciplinary proceeding by intentionally
6 failing to comply with rules and orders of the disciplinary agency Respondent failed to fully
7 participate in the formal disciplinary proceedings and did not take these proceedings seriously

8 Standard 9.22(g)- Refusal to acknowledge wrongful nature of conduct Respondent, to
9 date, has not acknowledged his wrongful conduct and has instead, attempted to justify his
10 actions.

11 The only applicable mitigating factor is Standard 9 32(a)- Absence of a disciplinary
12 history

13 PROPORTIONALITY

14 In the past, the Supreme Court has consulted similar cases in an attempt to assess the
15 proportionality of the sanction recommended. See *In re Struthers*, 179 Ariz 216, 226, 887
16 P 2d 789, 799 (1994). The Supreme Court has recognized that the concept of proportionality
17 review is "an imperfect process" *In re Owens*, 182 Ariz 121, 127, 893 P.3d 1284, 1290
18 (1995) This is because no two cases "are ever alike." *Id*

19 To have an effective system of professional sanctions, there must be internal
20 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
21 similar. *Peasley*, supra, 208 Ariz at ¶ 33, 90 P 3d at 772 However, the discipline in each case
22 must be tailored to the individual case, as neither perfection nor absolute uniformity can be
23 achieved *Id* at 208 Ariz at ¶ 61, 90 P 3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41
24 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz 203, 207, 660 P.2d 454, 458 (1983))

25 Cases in which lawyers have failed to cooperate with the State Bar have resulted in
sanctions for suspension for six months and one day

1 In *In re Bryn*, SB-05-0098-D (2005), the lawyer, in addition to trust account violations,
2 was found to have abandoned multiple clients after having agreed to and been paid for
3 representation. The respondent lawyer failed to cooperate with the State Bar during the
4 investigation of the three pending charges, and then failed to participate in the formal
5 discipline process until after default was entered against him. The lawyer did appear at the
6 aggravation and mitigation hearing, and did present evidence relating to three mitigating
7 factors. Bryn was suspended for six months and one day.

8 In *In re Merchant*, SB-00-0057-D (2000), the lawyer knowingly failed to comply with
9 the rules of the tribunal, failed to comply with the Court's order and failed to appear at the
10 Order to Show Cause hearing. The lawyer also failed to comply with requests for information
11 from the State Bar and failed to cooperate with the State Bar in the disciplinary matter. Two
12 factors were found in aggravation: 9 22(d), multiple offenses and (e), bad faith obstruction of
13 the disciplinary proceeding by intentionally failing to comply with rules or orders of the
14 disciplinary agency. Two factors were found in mitigation: 9 32(a), absence of a prior
15 disciplinary record, and (k), imposition of other penalties or sanctions. Merchant was
16 suspended for six months and one day.

17 RECOMMENDED SANCTION

18 In considering the sanction appropriate in this matter, the purpose of discipline must be
19 considered. The purpose of discipline is "to protect the public from further acts by respondent,
20 to deter others from similar conduct, and to provide the public with a basis for continued
21 confidence in the Bar and the judicial system." *In re Hoover*, 155 Ariz. 192, 197, 745 P.2d
22 939, 944 (1987).

23 After consideration of the Standards and proportional case law, the State Bar
24 respectfully recommends that Respondent be suspended from the practice of law for six
25 months and one day. Should Respondent be reinstated, the State Bar recommends that
Respondent be placed on probation for two years, be required to participate in the State Bar's

1 Law Office Management Assistance Program and in the State Bar's Member's Assistance
2 Program pursuant to the terms of a memorandum of understanding to be developed at that
3 time, and to comply with any additional terms and conditions imposed upon reinstatement

4 DATED this 27th day of July, 2007

5 
6 Robert J. Stephan, Jr
7 Hearing Officer 9R

8 Original filed with the Disciplinary Clerk
9 this 1st day of August, 2007

10 Copy of the foregoing was mailed
11 this 1st day of August, 2007, to:

12 Patricia J. Ramirez
13 Senior Bar Counsel
14 State Bar of Arizona
15 4201 N 24th Street, Suite 200
16 Phoenix, AZ 85016-6288

17 Hubert S. Sinchak
18 Respondent
19 8767 E. Via de Ventura, Suite 190
20 Scottsdale, AZ 85258-3379

21 By: 