

FILED
MAR 05 2007
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *Christina [Signature]*

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

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4 IN THE MATTER OF A MEMBER)
OF THE STATE BAR OF ARIZONA,)
5)
6 **DEAN J. WERNER**)
Bar No. 002004)
7)
8) **RESPONDENT.**)
9)

No. 06-0466

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

10
11 This is another one of those sloppy trust account practice cases
12 uncovered by an NSF check. The Complaint was filed on September 29, 2006.
13 Respondent filed an Answer on October 31, 2006. After a settlement
14 conference, the parties filed a Tender of Admissions and Agreement for
15 Discipline by Consent and Joint Memorandum in Support of Agreement for
16 Discipline by Consent on January 4, 2007. No hearing has been held in this
17 matter.
18

FINDINGS OF FACT

- 19
20
21 1. At all times relevant, Respondent was an attorney licensed to
22 practice law, having been admitted to practice in Arizona on April 7, 1967.
23
24 2. On or about March 17, 2006, Respondent notified the State Bar of
25 insufficient funds in Respondent's trust account in the amount of \$178,964.75, for
an item in that amount drawn one day prior to the availability of the deposited

1 funds. Respondent attempted to withdraw the funds on the 10th day of a hold
2 where the bank released them on the 11th day.

3
4 3. On an ensuing examination of Respondent's trust account it was
5 discovered:

6 a. Respondent's explanation of the error was correct.

7
8 b. There were 8 other instances where respondent withdrew
9 funds in excess of the client's trust balance, the balance was inaccurate, or the
10 trust account entries were inaccurate, resulting in variations from \$45 to \$500
11 from August, 2002 to October, 2005.

12
13 c. Respondent failed to verify funds, failed to consistently back
14 up his computer trust account records, failed to adequately supervise employees
15 handling his trust account, failed to maintain internal controls, failed to make
16 timely and accurate entries, failed to perform three-way reconciliations, all
17 thereby resulting in a failure to safeguard client funds and commingling.

18
19 4. There are, however, no restitution issues in this case.

20
21 5. Respondent's conduct violated Rule 42, *Rules of the Supreme Court*,
22 specifically ER 1.15 and Rules 43 and 44, *Rules of the Supreme Court*, which
23 Respondent conditionally admits.

24 **ABA STANDARDS**

25 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

1 actual or potential injury caused by the lawyer's misconduct, and (4) the
2 existence of aggravating or mitigating circumstances. *ABA Standard 3.0; In re*
3 *Peasley*, 208 Ariz. 27, 90 P.3d 764 (2004).

4
5 *Standard 4.0 (Violations of Duties Owed to Clients)* is the applicable
6 *Standard* in this matter. A review of *ABA Standard 4.1 (Failure to Preserve*
7 *Client's Property)* indicates that reprimand (censure in Arizona) is the
8 presumptive sanction for Respondent's misconduct. *Standard 4.13* specifically
9 provides:

10
11 Reprimand is generally appropriate when a lawyer is
12 negligent in dealing with client property and causes injury
13 or potential injury to a client.

14 AGGRAVATING AND MITIGATING FACTORS

15 Considering the aggravating and mitigating factors in this case, pursuant to
16 *Standards 9.22* and *9.32*, respectively, this Hearing Officer agrees with the parties
17 that the following are applicable.

18
19 As aggravating factors:

20 (a) 9.22(c) – prior disciplinary offense in 1994, unrelated to trust
21 accounting and remote.

22
23 As mitigating factors:

- 24 (a) 9.32(b) – absence of dishonest or selfish motive
25 (b) 9.32(d) – timely good faith effort to rectify errors
(c) 9.32(e) – free and full disclosure and cooperation

1 (d) 9.32(g) – character and reputation.

2 This Hearing Officer also agrees that the aggravating and mitigating factors
3 do not warrant a departure from the presumptive sanction of censure in this case.
4

5 PROPORTIONALITY REVIEW

6 To have an effective system of professional sanctions, there must be
7 internal consistency, and it is appropriate to examine sanctions imposed in cases
8 that are factually similar. *Peasley, supra*, 208 Ariz. at 33, 90 P.3d at 772.
9 However, the discipline in each case must be tailored to the individual case, as
10 neither perfection nor absolute uniformity can be achieved. *Id.* 208 Ariz. at 61,
11 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In*
12 *re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
13
14

15 In addition to the two cases cited by counsel, three other comparable trust
16 account cases are also supportive. *In re Davis*, SB-05-0148-D (2005), and *In re*
17 *Wicks*, SB-05-0140-D (2005), resulted in sanctions of censure and one year
18 probation. *In re Inserra*, SB-02-0144-D (2002), resulted in censure and two years
19 probation.
20

21 RECOMMENDATION

22 The purpose of lawyer discipline is not to punish the lawyer, but to protect
23 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
24 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
25 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.

1 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
2 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
3 (1994).
4

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

10 Upon consideration of the facts, application of the *Standards*, including the
11 aggravating and mitigating factors, and a proportionality analysis, this Hearing
12 Officer recommends acceptance of the Tender of Admissions and Agreement for
13 Discipline by Consent which provides for the following:
14

15 1. Respondent shall receive a censure.

16 2. Respondent shall be placed on probation for one year effective upon the
17 entry of a final judgment and order and ending one year after entry into a TAP
18 contract. The terms of probation are as follows:
19

20 a. Respondent shall complete the TAEEP during probation. To
21 schedule his attendance, Respondent shall contact Barbara Chandler at 602-340-
22 3278 within 20 days of judgment herein.
23

24 b. Respondent shall participate in the TAP for the period of his
25 probation. To schedule his participation, Respondent shall contact Gloria Barr at
602-340-7242 within 20 days of judgment.

1 c. Respondent shall refrain from engaging in any conduct that would
2 violate the Rules of Professional Conduct or other rules of the Supreme Court of
3 Arizona.
4

5 3. Respondent shall pay all costs and expenses incurred in the disciplinary
6 process as stated in the State Bar's Statement of Costs.

7 4. In the event that Respondent fails to comply with any of the foregoing
8 terms, and the State Bar receives notice, Bar Counsel shall file a Notice of Non-
9 Compliance with the Disciplinary Clerk. A Hearing Officer shall conduct a
10 hearing within thirty days after receipt of the notice to determine whether the
11 terms of probation have been violated and, if so, to recommend appropriate action
12 thereon. The burden of proof shall be on the State Bar of Arizona to prove non-
13 compliance by clear and convincing evidence.
14
15

16 DATED this 5th day of March, 2007.

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18 
19 Robert J. Stephan, Jr.
20 Hearing Officer 9R
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22
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24
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1 Original filed with the Disciplinary Clerk
2 this 5th day of March, 2007.

3 Copy of the foregoing was mailed
4 this 1st day of March, 2007, to:

5 Amy K. Rehm
6 Senior Bar Counsel
7 State Bar of Arizona
8 4201 N. 24th Street, Suite 200
9 Phoenix, AZ 85016-6288

10 Dean J. Werner
11 4115 E. Valley Auto Drive, Suite 204
12 Mesa, AZ 85206-0001

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By: Christina Lett