

1 including any costs incurred by the Disciplinary Clerk's Office² The period of probation
2 will begin immediately upon the issuance of the Judgment and Order and will continue for
3 two-years from the date Respondent signs the probation contract The terms of probation
4 are as follows

5 **Terms of Probation**

6 1 Within 30-days from the date of the final Judgment and Order, Respondent
7 shall contact the Director of Lawyer Assistance Program and schedule an appointment with
8 a member of LOMAP to conduct an assessment of Respondent's office processes and
9 procedures, particularly as they relate to client communication and diligence issues as well
10 as trust account maintenance procedures Respondent shall cooperate with LOMAP staff
11 and will participate in the program for the duration of the period of probation as outlined in
12 the probation contract

13 2 Within 30-days from the date of the final Judgment and Order, Respondent
14 shall contact the Director of MAP to schedule an assessment with either the Director of
15 MAP or Medical Director of MAP Respondent shall comply with the recommendations,
16 if any, resulting from such assessment

17 3 In the event that Respondent fails to comply with any of the foregoing
18 conditions, and the State Bar receives information, bar counsel shall file with the imposing
19 entity a Notice of Non-Compliance, pursuant to Rule 60(a)(5), Ariz R Sup Ct The
20 Hearing Officer shall conduct a hearing within 30-days after receipt of said notice, to
21 determine whether the terms of probation have been violated and if an additional sanction
22 should be imposed In the event there is any allegation that any of these terms have been
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² A copy of the Hearing Officer's Report is attached as Exhibit A The State Bar's costs total
26 \$1,876 40

violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by
clear and convincing evidence

RESPECTFULLY SUBMITTED this 9th day of July, 2008

Daisy Flores

Daisy Flores, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 9th day of July, 2008

Copy of the foregoing mailed
this 9th day of July, 2008, to

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by *C. Fisher*

/mps

FILED

MAY 01 2009

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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
M. Marton

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

**PAUL M. CRANE,
Bar No. 010586**

Respondent

File No. ~~05-0783~~ 05-0336

**HEARING OFFICER'S REPORT AND
RECOMMENDATION**

(Assigned to Hearing Officer 8A,
Kraig J. Marton)

I. PROCEDURAL HISTORY

The complaint was filed on August 15, 2007 and an Answer was then filed on September 18, 2007. A notice of settlement was filed November 9, 2007 and a Tender of Admissions and Agreement for Discipline by Consent was filed, with separate supporting Memorandum, on November 28, 2007. After a telephonic conference with the Hearing Officer on December 3, 2007, the parties filed their Stipulated Amendments to Tender and supplemental supporting Memorandum, on December 17, 2007.

II. FINDINGS OF FACT

The Facts are as stipulated by the parties

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 10, 1986

2 In or about December 2002 or January 2003, Respondent became counsel of record for Douglas Breitbarth ("Mr Breitbarth"), who was charged with the felony of aggravated assault in Maricopa County Superior Court

3 Respondent represented Mr Breitbarth through trial in Superior Court, at the conclusion of which Mr Breitbarth was convicted and ordered jailed pending sentencing

4 In or about May 2003, after Mr Breitbarth was jailed, Respondent

1 obtained from Mr Breitbarth one or more powers of attorney ("POA") so that he could
2 manage some of Mr Breitbarth's financial affairs, specifically relating to his home and to
3 his vehicle

4 5 The financial affairs Respondent was charged with managing for Mr
5 Breitbarth included collecting rent payments from the tenant(s) of Mr Breitbarth's home,
6 making mortgage payments on the same home, making loan payments on Mr. Breitbarth's
7 vehicle and/or arranging for its voluntary repossession and paying various bills related to
8 the maintenance of Mr Breitbarth's home

9 6 Utilizing the POA, Respondent took control of three bank accounts
10 belonging to Mr Breitbarth

11 7 Mr Breitbarth's federal military retirement benefits were automatically
12 deposited into one of the bank accounts over which Respondent took control

13 8 At the time Respondent obtained the POA from Mr Breitbarth, Respondent
14 believed that Mr Breitbarth owed him approximately \$7,000 for his representation based
15 on the terms of his retention as documented by Respondent's records of unpaid time and
16 expense slips maintained relating to Mr Breitbarth's representation

17 9. Respondent failed to fully and adequately advise Mr Breitbarth of
18 the actual or potential conflicts involved if he held and/or utilized POA over Mr
19 Breitbarth's funds and/or property at a time when Mr Breitbarth owed him a substantial
20 amount of money

21 10 Respondent failed to advise Mr Breitbarth that he was entitled to, or should,
22 seek independent counsel concerning the wisdom of granting Respondent POA over his
23 financial affairs

24 11 In or about mid-May 2003, Mr Breitbarth's mortgage lender warned that
25 they were going to foreclose on Mr Breitbarth's home mortgage as, at that time, two
26 house payments had not been made

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1 12 After obtaining the POA from Mr Breitbarth, Respondent collected funds
2 on Mr Breitbarth's behalf, including rent payments from Mr Breitbarth's tenant(s) but
3 failed to make any mortgage payments on Mr Breitbarth's home

4 13 As a result of the lack of mortgage payments, Mr Breitbarth's mortgage
5 lender foreclosed on Mr Breitbarth's mortgage; Mr Breitbarth's home was sold at a
6 foreclosure sale in or about December 2003

7 14. Mr Breitbarth asserts that Respondent, despite requests from Mr
8 Breitbarth, or others making requests on his behalf, Respondent failed to adequately
9 account to Mr Breitbarth for the monies he disbursed from Mr Breitbarth's bank
10 accounts Respondent affirmatively asserts, and for purposes of their agreement the State
11 Bar conditionally does not contest, that Respondent did provide information to Mr
12 Breitbarth and, later, to Mr. Breitbarth's subsequent attorney about the lack of monies
13 gained from the foreclosure sale of Mr Breitbarth's home

14 15. During the period of time between May 2003 and August 2003, Respondent
15 transferred, by use of the authority granted to him through the POA, at least \$7,300 from
16 Mr Breitbarth's bank account(s) into his own Bank of America account

17 16 Of that \$7,300, the State Bar Staff Examiner identified approximately
18 \$2,200 that was disbursed by Respondent for the benefit of Mr. Breitbarth Respondent
19 affirmatively asserts, and for purposes of their agreement the State Bar conditionally does
20 not contest, that Respondent's records show that approximately \$4,000 was disbursed for
21 Mr Breitbarth's benefit

22 17 Mr Breitbarth did not give Respondent permission, by informed consent, to
23 pay himself fees at the expense of making Mr Breitbarth's mortgage payments during the
24 period of time in which Respondent held POA over Mr Breitbarth's bank account(s)
25 Respondent affirmatively asserts, and for purposes of this agreement, the State Bar
26 conditionally does not contest, that Mr Breitbarth had indicated to Respondent that
27 Respondent should pay himself some of the fees owed to him to the extent possible If
28 called to testify, the State Bar believes that Mr Breitbarth would testify that he did not

1 know, nor did Respondent inform him, that there were insufficient funds with which to
2 make mortgage and other payments if Respondent paid himself out of Mr Breitbarth's
3 funds

4 18. At the time the disbursements were made, Respondent failed to inform Mr
5 Breitbarth that he planned to use, had used or was using any funds from Mr Breitbarth's
6 accounts to pay himself, or specifically that Mr Breitbarth's mortgage was going unpaid

7 19 Respondent, after gaining POA, failed to take effective or appropriate
8 action(s) to avert the foreclosure on Mr Breitbarth's home Respondent affirmatively
9 asserts that he believed that the foreclosure of Mr Breitbarth's home may have been
10 avoided only temporarily, but would have resulted due to the lack of adequate funds and
11 receipts, in the long run, to satisfy both mortgages

12 **III. CONDITIONAL ADMISSIONS**

13 20. Respondent has conditionally admitted to having violated his ethical duties
14 to his client, to the profession and to the legal system Respondent has conditionally
15 admitted that he engaged in a conflict of interest, and failed to adequately safekeep his
16 client's property Respondent has conditionally admitted that his conduct, as described
17 above, violated Rule 42, Ariz R S Ct , specifically, ERs 1.7, 1 8, and 1 15.

18 21 The State Bar has conditionally agreed to dismiss the allegation that
19 Respondent violated ER 8 4(c), Rule 42, Ariz R Sup Ct The State Bar conditionally
20 agreed that based on Respondent's anticipated testimony it would or might be unable to
21 prove that Respondent knowingly, rather than negligently engaged in conduct involving
22 dishonesty, fraud, deceit or misrepresentation The State Bar therefore conditionally
23 agreed to dismiss this allegation for purposes of the agreement

24 **IV. SANCTIONS**

25 The State Bar and Respondent have conditionally agreed that Respondent will be
26 censured and placed on probation The period of probation will begin immediately upon
27 the issuance of the judgment and order in this matter and will continue for two years from
28 the date Respondent signs the probation contract The terms of probation shall include

1 participation in the State Bar's Law Office Management Assistance Program ("LOMAP")
2 and the State Bar's Member's Assistance Program ("MAP"). The terms of probation shall
3 also include successful completion of the State Bar's continuing legal education course
4 entitled "Ten Deadly Sins of Conflict "

5 The State Bar and Respondent have further agreed that Respondent shall, within 30
6 days of the date of the judgment and order in this matter, contact the Director of Lawyer
7 Assistance Programs, to schedule an appointment with a member of LOMAP to conduct
8 an assessment of Respondent's office processes and procedures, particularly as they relate
9 to client communication and diligence issues as well as trust account maintenance
10 procedures. Respondent shall cooperate with the staff of LOMAP and will participate in
11 the program for the duration of the period of probation as outlined in the probation
12 contract

13 Respondent shall, within 30 days of the date of the judgment and order in this
14 matter, contact the Director of MAP to schedule an assessment with either the Director of
15 MAP or Medical Director of MAP Respondent shall comply with the recommendations,
16 if any, resulting from such assessment

17 The failure to comply with the terms and conditions of probation will result in the
18 filing of a notice of non-compliance by the State Bar with the Hearing Officer and a
19 hearing will be held within thirty (30) days to determine whether the respondent has
20 breached the agreement A finding that the respondent has breached the terms and
21 conditions of probation may result in the imposition of sanctions Rule 56(c)(2),
22 Ariz R.Sup Ct

23 Respondent shall also pay the costs and expenses of this action in the amount of
24 \$1,876 40

25 ABA STANDARDS

26 In determining an appropriate sanction, our disciplinary system considers the facts
27 of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions*
28 ("*Standard*" or "*Standards*") and the proportionality of discipline imposed in analogous

1 cases. *In re Kaplan*, 179 Ariz 175, 177, 877 P 2d 274, 276 (1994), *In re Bowen*, 178
2 Ariz 283, 286, 872 P 2d 1235, 1238 (1994), *In re Rivkind*, 164 Ariz 154, 157, 791 P 2d
3 1037, 1040 (1990)

4 **A. ABA Standards**

5 The *Standards* are designed to promote consistency in sanctions by identifying
6 relevant factors that should be considered and then applying those factors to situations in
7 which lawyers have engaged in various types of misconduct *Standard 1 3*, Commentary
8 In determining an appropriate sanction, these factors should be considered 1) the duty
9 violated, 2) the lawyer's mental state, 3) the potential or actual injury caused by the
10 lawyer's conduct, 4) the existence of aggravating or mitigating factors *Standard 3 0*

11 Respondent's violations implicate more than one Standard "The Standards do not
12 account for multiple charges of misconduct The ultimate sanction imposed should at least
13 be consistent with the sanction for the most serious instance of misconduct among a
14 number of violations, it might well be and generally should be greater than the sanction
15 for the most serious conduct" *Standards*, p 6, *In re Redeker*, 177 Ariz 305, 868 P 2d
16 318 (1994)

17 One of the most serious items of misconduct involves Respondent's failure to
18 determine that a conflict of interest would result from his obtaining power of attorney
19 from Mr Breitbarth at a time when Mr Breitbarth owed him a considerable sum for
20 Respondent's representation Respondent has contended that his failure to recognize the
21 conflict was negligent on his part, and for purposes of their agreement, the State Bar did
22 not contest that contention.

23 Standard 4 33 is therefore most applicable, and it provides for censure if the
24 attorney was "negligent in determining whether the representation of the client may be
25 materially affected by the lawyer's own interest and . . . causes injury or potential injury "

26 Equally serious, however, is Respondent's failure to safeguard client property
27 entrusted to him This conduct, in violation of ER 1 15, implicates *Standard 4 1* *Standard*
28 *4 13* provides that reprimand (censure in Arizona) is generally appropriate when the

1 lawyer is negligent in dealing with client property and causes injury (or potential injury)
2 to the client *Standard* 4.12 provides for suspension when the lawyer knows, or should
3 know, that he is dealing improperly with client property

4 The parties have conditionally agreed that Respondent's conduct with respect to
5 the property was also negligent, and that *Standard* 4.13 applies Respondent has
6 affirmatively asserted, and the State Bar has conditionally not contested, that although
7 Respondent's payment of his own fees was a conflict of interest, there were, in the long
8 run, insufficient funds from receipts and deposits, available to service the mortgage debt
9 on Mr Breitbarth's home Respondent's negligent failure to preserve his client's property
10 is inextricably tied to his negligent failure to determine that a conflict of interest existed
11 due to the legal fees owed to him by Mr Breitbarth

12 Having determined that the presumptive sanction in this matter is censure, the
13 *Standards* require a review of the possible aggravating and mitigation factors

14 **B. Aggravating Factors**

15 The facts admitted conditionally establish the following aggravating factors

16 • *Standard* 9.22(h) Vulnerability of the victim Mr Breitbarth was jailed,
17 awaiting imposition of an active sentence when he granted the power of attorney to
18 Respondent Although Mr Breitbarth would not have otherwise been considered
19 vulnerable, the fact that he was not at liberty at the time made him vulnerable under the
20 facts of this case This factor, while present, is not given great weight

21 • *Standard* 9.22(i) Substantial experience in the practice of law Respondent
22 was admitted to the practice of law in 1986 Respondent's failures to identify a conflict of
23 interest and to safeguard client's property are incidents of misconduct that should have
24 been better avoided by an experienced practitioner

25 **C. Mitigating Factors**

26 The parties conditionally agreed that the following factors should be considered in
27 mitigation

28

1 • **Standard 9 32(a) Absence of a disciplinary record** Respondent has no prior
2 disciplinary history

3 **D. Proportionality/Case Law**

4 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
5 public and to deter future misconduct *In re Fioramonti*, 176 Ariz. 182, 187, 859 P 2d
6 1315, 1320 (1993) When imposing lawyer sanctions, the court is guided by the principle
7 that an effective system of professional sanctions must have internal consistency *In re*
8 *Pappas*, 159 Ariz. 516, 526, 768 P 2d 1161, 1171 (1998) Therefore, a review of cases
9 that involve conduct of a similar nature is warranted

10 A review of prior similar disciplinary cases implies a censure, rather than
11 suspension, is the appropriate remedy for negligent conflicts of interest

12 In *In re Clark*, DC-99-2285 (2002), the lawyer engaged in a conflict of interest
13 without having discussed the potential conflict with the client In addition, the lawyer
14 provided inaccurate or incomplete information to clients and made misrepresentations to
15 the Bar A censure by consent was imposed after violations of ERs 1 7, 8 1, 8 4(c) and (d)
16 and a negligent state of mind were found

17 In *In re Hineman*, DC-99-1374, et al (2003), the lawyer entered into a business
18 relationship with a client to satisfy unpaid legal fees The lawyer failed to obtain the
19 client's written consent to proceed with the transaction and a violation of ER 1 8 was
20 found For that violation, as well as others relating to excessive fees and failure to
21 communicate the rate and basis of his fee to clients, the lawyer was censured and placed
22 on probation for one year

23 As for the failure to safeguard property, there are cases where the negligent failure
24 to safeguard property was found to justify a censure A good example is *In re Ellett*, DC-
25 04-0666 (2006) (censure for negligent failure to identify a potential conflict of interest
26 coupled with failure to safeguard client's property by using trust funds to pay that
27 lawyer's legal fees)

28

1 This Hearing Officer was initially concerned with *In re Brown*, DC-05-0098, SB-
2 07-0011-D (2007) but ultimately agrees with the parties that it does not exactly apply In
3 *Brown*, the lawyer was in possession of funds belonging to his client He also engaged in a
4 business transaction with his client. Without obtaining permission to do so, the lawyer
5 removed a portion of the funds held in trust for the client in payment of his own fees and a
6 five month suspension was ultimately imposed In *Brown*, unlike the instant matter, the
7 lawyer was explicitly informed by the client that she did not wish him to use the funds in
8 that manner and, in fact, demanded that the lawyer release all funds held for her In the
9 instant matter, the parties agree that Respondent would testify that he honestly believed
10 that Mr Breitbarth had authorized Respondent to pay himself for outstanding fees and
11 expenses as Mr Breitbarth and he had discussed the matter Also, unlike *Brown*, Mr.
12 Breitbarth had granted Respondent a general power of attorney that provided that
13 Respondent was authorized to settle any claim against him and did not protest the
14 payment of Respondent's fees In addition, the lawyer in *Brown* had committed other
15 misconduct that included violations of the rules relating to client trust accounts

16 Even with the application of Standard 4 13 to the instant matter, the presumptive
17 sanction remains censure Given the specific facts and circumstances present in this case,
18 the proposed sanction is both proportional and appropriate and serves the multiple
19 purposes of discipline, including the protection of the public and maintaining the integrity
20 of the profession

21 IV. RECOMMENDED SANCTION

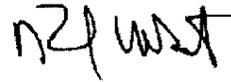
22 The purpose of discipline is "to protect the public from further acts by respondent,
23 to deter others from similar conduct, and to provide the public with a basis for continued
24 confidence in the Bar and the judicial system " *In re Hoover* 155 Ariz 192, 197, 745 P 2d
25 939, 944 (1987)

26 After reviewing all of the facts of this matter, the applicable *Standards*, including
27 the relevant aggravating and mitigating factors, as well as the proportional case law, this
28

1 Hearing Officer recommends that the Tender of Admissions and Agreement for Discipline
2 by Consent, as amended, be accepted

3 It is therefore recommended that Respondent receive a censure and probation. The
4 terms and conditions of probation will include Respondent's participation in the State
5 Bar's Members Assistance Program ("MAP") and the State Bar's Law Office
6 Management Assistance Program ("LOMAP"). Respondent will complete the State Bar's
7 continuing legal education course entitled "Ten Deadly Sins of Conflict" by attending a
8 live presentation or by ordering and viewing it on-line through the State Bar's Continuing
9 Legal Education Department. Respondent will also pay the costs and expenses of the
10 discipline proceedings, in the amount of \$1,876.40.

11 DATED this 1st day of May, 2008

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Craig J. Marton
Hearing Officer 8A

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17 Original filed with the Disciplinary Clerk
18 of the Supreme Court this 1st day
19 of May, 2008 and copy delivered to.

20 Lawyer Regulation Records Manager
21 State Bar of Arizona
22 4201 N 24th Street, Suite 200
Phoenix, Arizona 85016-6288

23 Copy of the foregoing mailed
24 this 1st day of May, 2008 to

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By _____