

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

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

GREG CLARK,
Bar No 009431

Respondent

File No 05-0665, 06-0298, 06-1300,
06-1353

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 9J
Mark S Sifferman)

PROCEDURAL HISTORY

The Complaint was filed in this matter on December 20, 2007, to which Respondent filed an Answer. A settlement conference was held, but no agreement was reached. A duly noticed evidentiary hearing was held April 18, 2008. At that hearing, Respondent appeared personally and through his counsel, Nancy Greenlee. The State Bar appeared through Senior Bar Counsel Roberta L. Tepper. The parties submitted proposed findings and conclusions, along with closing memoranda.

FINDINGS OF FACT

Based on the stipulated facts contained in the Joint Prehearing Statement, the evidence presented at the April 18, 2008 hearing, and the complete record, the following facts are found to exist:

1. Respondent was admitted to practice law in this State on May 12, 1984 and has remained licensed since that time. *Joint Prehearing Statement* Uncontested Fact ("JPS") ¶ 1

COUNT ONE

Introduction: This Count concerns Respondent's representation of two brothers, AH and DSM.¹ The Complaint charges violations of ERs 1.5 and 1.16. Without objection, the State Bar amended the Complaint at the time of the evidentiary hearing to allege a violation of ER 1.4.²

2 The mother of AH and DSM is the one who retained Respondent to represent them. *JPS ¶ 2*

3 Respondent initially was retained to represent AH. Respondent entered into a fee agreement regarding AH which provided for a \$3,500 00 flat fee, earned upon receipt, to be deposited into Respondent's operating account Respondent was paid \$3,500 00 by AH's mother for the representation of AH. *JPS ¶¶ 3, 4.*

4 Respondent subsequently was retained to represent DSM for which Respondent was paid \$4,500 00 by the mother *JPS ¶¶ 5, 6*

5 The Complaint alleges that, in representing AH and DSM, Respondent was continually late to court No evidence supports this allegation

6 The Complaint alleges that Respondent inadequately communicated with both AH and DSM. No evidence was submitted to support this charge as to AH

7 DSM provided very general testimony concerning communications with Respondent which testimony was not convincing. Moreover, DSM's testimony was internally inconsistent in many instances. For example, at one point during the State Bar's direct examination of DSM, he discussed meeting Respondent at Respondent's office *Transcript of Proceedings, April 18, 2008* (hereafter "Transcript"), 69:10 - 19

¹ To protect the privacy of clients and third parties, initials are used in this Report in lieu of names.

² The transcript erroneously describes the amendment as implicating ER 7 4. *Transcript, 12.4 - 16.*

Shortly thereafter, still during direct examination, DSM claimed never to have met Respondent at his office *Transcript*, 72:9 - 13. In addition, again on direct examination, DSM volunteered that, when he first met Respondent, DSM suggested to Respondent that he (DSM) provide a false story to counter the arresting officer's report but that Respondent immediately advised DSM against such an action *Transcript*, 86:13 - 22. Respondent's testimony regarding his communications with DSM was both clear and detailed. *Transcript*, 150:18 - 158:14; *Hearing Exhibits E, G, H, I, J*. Respondent's testimony is more credible. The charge as to inadequate communication with DSM was not proven.

8. Contrary to the allegation of the Complaint, Respondent did provide an accounting regarding attorneys' fees charged for his work on behalf of AH and DSM. *Transcript*, 161:24 - 163:2, *Hearing Exhibit J*.

9. Contrary to the allegation of the Complaint, Respondent did turn over information and documents to DSM. *Transcript*, 160:13 - 161:23, *Hearing Exhibits D, G*.

10. While Respondent's Fee Agreement with AH is not a model of clarity as to the client's right to terminate services and perhaps receive a refund, it is clear that it was conveyed to AH and DSM, and understood by them (and their mother), that Respondent could be terminated and that a refund was possible of the "earned" fee.

COUNT TWO

Introduction: This Count concerns Respondent's representation of RR in a civil forfeiture action. The Complaint alleges violations of ERs 1.2, 1.4, 3.3 and 8.4(d).

11. In late 2003 or early 2004, RR retained Respondent for a civil forfeiture action. For this representation, RR paid Respondent \$7,500.00. *JPS ¶¶ 9, 10, Transcript*,

163 3 - 21, *Hearing Exhibit 22*

12. RR claims that Respondent failed to keep him advised of the status of the matter and neglected to provide information he requested. See *JPS ¶¶ 11, 12, 13*. The testimony of Respondent and his assistant regarding how RR was kept reasonably informed and how they reasonably responded to RR's inquiries is more credible than RR's telephonic testimony from prison. *Transcript, 124:1 - 126:2, 130 5 - 11, 165:12 - 167:17, 172:13 - 174:2; Hearing Exhibits L, M, O, P, R, T, U, V, X.*³

13. Any difficulty or delay in communications between attorney and client was due to RR, who had pled guilty to a drug felony, being constantly moved among in-state and out-of-state detention facilities because he had gained a reputation as an informant. *Transcript, 166:6 - 15, 180.20 - 181.4.*⁴

14. RR claimed to Respondent that the seized property was not the product of criminal activity, but resulted from RR's sale of two houses (including one in Mexico) and his operation of a business. The information provided to Respondent by RR turned out to be inaccurate. For example, RR referred Respondent to an accountant who supposedly would provide corroboration. The accountant, in fact, had not heard from RR in years, knew that RR had not filed tax returns for some time, and could not provide support. *Transcript, 175 1 - 20, 176:9 - 180:5, Hearing Exhibits R, S, T, V, X*

³ The State Bar concedes that RR's credibility can be questioned given his felony conviction. *State Bar's Closing Memorandum, 4.1 - 2.* RR's hearing testimony simply was not convincing. He even contradicted himself in statements to the State Bar. For example, RR once told the State Bar that Respondent never informed him of the trial date in the civil forfeiture case. *Hearing Exhibit 14*. Another time, RR said that Respondent had told him of the pending trial. *Hearing Exhibit 17*.

⁴ The State Bar relies heavily on Respondent's prior discipline to prove the alleged violations of ER 1.4 in Counts One and Two. See *State Bar's Closing Memorandum, 1:19 - 3 7*. The State Bar's argument is contrary to law. Evidence of prior discipline is admissible only for limited purposes, such as establishing an aggravating circumstance. *Rule 48(k)(3), Rules of the Supreme Court, see Rule 404, Arizona Rules of Evidence*. Evidence of prior bad acts is never admissible to prove that someone acted in conformity with those prior acts. *Rule 404(b), Arizona Rules of Evidence*.

15 In March 2005, RR advised Respondent that he wished to appear by telephone or video at the forfeiture hearing. *JPS* ¶ 14.

16. By the time of the forfeiture trial, however, Respondent had pled guilty and had disclosed harmful information in a “free talk” conducted in connection with the criminal proceeding. In light of these circumstances plus the absence of evidence to support RR’s claim, Respondent and RR discussed how RR’s civil forfeiture claim could not succeed, how his testimony might affect his plea, and how RR could not invoke any Fifth Amendment rights at the trial. Therefore, RR expressly waived his presence at the May 2005 trial. *Transcript*, 182.7 - 184:20, *Hearing Exhibits Y, Z*⁵

17. Respondent informed RR of the result of the trial. *Transcript*, 185:2 - 188:1.

COUNT THREE

Introduction: This Count concerns Respondent’s handling of a check payable by the City of Gilbert to a client and Respondent’s business dealings with another client. The Complaint alleges violations of ERs 1.8 and 1.15 as well as Rules 43 and 44.

18 Respondent, for many years, represented DF, who had been convicted numerous times of DUI. Because of his numerous violations, DF was in prison, and still needed to answer to charges in the City of Gilbert. In connection with the City of Gilbert matter, a \$10,000.00 bond was posted with the City. *Transcript*, 195.23 - 199.7.

19. A check for \$10,000.00, representing a refund of the bond, was sent by the City of Gilbert to Respondent in late February 2006. Client DF specifically requested that the City of Gilbert’s check not be deposited, but held by Respondent until further

⁵ RR denied signing the waiver. Respondent contradicted RR’s testimony. *Transcript*, 182.7 - 184:20. The signature on the waiver appears similar to RR’s handwriting on other documents about which there is no controversy.

instructions from DF The City of Gilbert check was safeguarded in Respondent's safe. *Transcript*, 132.7 - 14, 133.8 - 136.17, 195:23 - 199.7

20 The City of Gilbert's \$10,000.00 check was finally deposited by Respondent July 21 at Compass Bank, the bank handling Respondent's trust account A Compass Bank representative told Respondent that his trust account would be immediately credited with the deposit. Because of this and because the check was drawn upon a municipality, Respondent issued and mailed Trust Check 4361 for \$10,000 00 to DF. *Transcript*, 132.7 - 14, 133:8 - 136 17, 195:23 - 199:7.

21 Later on July 21, Compass Bank called Respondent's office to say that a hold had been placed on the City of Gilbert check Respondent's office immediately contacted DF and advised him not to deposit Trust Check 4361 for seven days. DF agreed. *Transcript*, 126.22 - 128.22, *Hearing Exhibits AA, BB, CC*

22. Trust Check 4361 presented for payment at Compass Bank on August 1, more than seven days later Compass Bank did not pay the check, assessed a \$36.00 overdraft fee, and sent a Notice of Insufficient Funds to the State Bar. *JPS ¶¶ 18, 19, 20*⁶

23 Respondent, in response, deposited his own funds into the trust account and issued a replacement check to DF. *Transcript*, 132.7 - 14, 133:8 - 136.17, 195.23 - 199.7.

24 The funds Respondent deposited to cover the disbursement to DF originated from a car trade between Respondent and Ms M. Cash was paid by Ms M to respondent to offset the difference in value between the cars traded. *JPS ¶¶ 29, 30, Transcript*, 199 15 - 200:16, *Hearing Exhibit 27*.

25. Ms. M is a client of Respondent She also is in the business of wholesaling

⁶ Monthly bank statements from Compass Bank and other documents reflect that, as of August 1, the City of Gilbert check had been credited to Respondent's trust account *Hearing Exhibit 30 [pages SBA000353 - 354], Exhibit 31 [page SBA000377]*. Even the State Bar account reconciliation reflects the credit *Hearing Exhibit 35*. The evidence is unclear why Compass Bank did not honor Trust Check 4361.

automobiles *Transcript*, 199:15 - 200 16

26. The State Bar requested an explanation of the insufficient funds notice, which Respondent provided. Respondent's explanation remained consistent through these proceedings and was corroborated by the documentation.

27. A State Bar records examiner testified that Respondent violated ER 1.15(a), Rule 43(d)(1)(a) and Rule 44(b) by not depositing the \$10,000.00 check until July 21, 2006. *Transcript*, 99.4 - 11; *Hearing Exhibit 34* Testimony, expert or otherwise, as to a legal conclusion is typically not admissible. *Webb v Omni Block, Inc*, 216 Ariz. 349, 166 P.3d 140, 144 - 145, ¶¶ 12 - 17 (App 2007); *Marx & Co v Diners' Club, Inc*, 550 F.2d 505, 509 - 510 (2nd Cir 1977), *Pinal Creek Group v Newmont Mining Corp*, 352 F Supp.2d 1037, 1043 (D. Ariz. 2005). Such testimony, even if admitted, is not binding. *Badia v City of Casa Grande*, 195 Ariz 349, 357, ¶ 30, 988 P 2d 134, 142 (App 1999). Considering the undisputed testimony that the client instructed Respondent not to deposit the check⁷ and that Respondent safeguarded the check by placing it in a safe, there is not clear and convincing evidence that Respondent failed to safeguard property of the client or failed to exercise due professional care.

28. The State Bar records examiner stated that it "appeared" that, in a totally unrelated instance, a withdrawal was made from Respondent's trust account without a pre-numbered check or electronic transfer. *Transcript*, 99.16 - 25. No evidence was presented which specifically identified when or how this alleged violation occurred. The State Bar makes only a passing vague reference to this allegation in its Closing Memorandum. *State Bar's Closing Memorandum*, 5.9 - 10. Without more, it cannot be said that State Bar has shown this violation with clear and convincing evidence.

⁷ Respondent provided the State Bar with contact information for DF. If DF would contradict Respondent's explanation, surely he would have been called to testify.

29 The allegation that Respondent did not conduct a three-way reconciliation of his trust account is not supported with clear and convincing evidence. The State Bar records examiner conceded that Respondent informed her that he does conduct monthly reconciliations of his trust account, but was simply not familiar with the term “three-way” *Transcript*, 100:1 - 21. The State Bar’s witnesses conceded that no particular document or form is required to conduct a proper reconciliation of a trust account nor is there any requirement that written documentation of the reconciliation be retained *Transcript*, 101:15 - 104:13, 121:13 - 18. The State Bar’s allegation rests on Respondent’s failure to immediately recognize the term “three-way” reconciliation plus the lack of a written record of reconciliation. This is not clear and convincing evidence in light of Respondent’s testimony that reconciliations did occur and the fact that there is no indication that the trust account was out of balance.

30 By letter dated September 14, 2006, Respondent was requested to provide the State Bar with additional trust account information including the individual client ledger for DF. Respondent provided all the requested records except for an individual client ledger for DF. That individual client ledger was not presented until after two additional requests. *JPS ¶¶ 26, 27*

Count Four

Introduction: This Count involves Respondent receiving personal property in lieu of money for his legal fee. The Complaint alleges a violation of ER 1.8.

31 In May 2006, Respondent was retained by DM for representation in a pending felony matter. At the time, DM was being held without bond in Maricopa County Jail. *JPS ¶¶ 32, 33.*

32 Respondent had no funds available to pay for Respondent’s representation. *JPS ¶¶ 35.* It was agreed that DM would give Respondent an automobile for his legal fee

Transcript, 141.16 - 143:3, 200.14 - 208.1.

33. The vehicle was sold in September 2006 for \$25,000. *JPS* ¶ 37

34. Because of DM's complaint to the State Bar, Respondent paid the sales proceeds to DM. *Transcript*, 203:3 - 14.

35. Respondent continued his representation of DM on a *pro bono* basis, ultimately obtaining an acquittal at trial. *JPS* ¶ 37

36 Respondent failed to advise DM in writing of the desirability of seeking independent counsel with regard to the transfer of his vehicle, and Respondent failed to provide DM a reasonable opportunity to seek such counsel. *JPS* ¶ 38.

37 Respondent was negligent is not recognizing that compliance with ER 1.8 is required when an attorney accepts personal property as payment for legal fees.

38 The transaction and its terms were fair and reasonable to DM and were fully disclosed in a writing which could be reasonably understood by the client.

39 There was no evidence that DM was harmed by the non-compliance with ER 1.8.

Aggravating and Mitigating Evidence

40. Respondent has substantial experience in the law. He was admitted to practice in 1984. *JPS*, ¶ 1

41. Respondent has been the subject of prior discipline.

a In File No SB-97-0087 (Order filed December 2, 1997), Respondent was censured pursuant to a consent agreement. During Respondent's representation of a minor, it was determined that Respondent had rendered ineffective assistance of counsel. Respondent's conduct violated ER 1.1 (competence), 1.3 (diligence), 1.4 (communication).

b. In File No. SB-01-0188 (Order filed June 28, 2001), Respondent was

censured pursuant to a consent agreement. Insufficient funds checks were drawn on Respondent's trust account and he failed to provide timely, complete responses to State Bar inquiries. Respondent's conduct violated ER 8.1(d), Rules 43, and Rule 51(h)(1)

c In File No. 02-0356 (Order filed October 8, 2002), Respondent was informally reprimanded for a violation of ER 1.4. Respondent had only one contact visit and only 3-1/2 hours of telephone communications with the client who was a defendant in a serious felony case over a period of 7-1/2 months. Respondent additionally failed to accept a number of telephone calls from the client.

d In File Nos. 02-1830 and 02-1934 (Order filed February 9, 2004), Respondent was informally reprimanded for violations of ER 1.3, 1.4, 1.5 and 1.16(d). Respondent failed to locate the arrest warrant for a client, failed to respond to the client's request for information about her case, charged the client a fee which was not earned, and failed to timely refund the unearned fee.

42 The SB-97-0087 proceeding is temporally remote. All four prior proceedings are substantively remote as they do not involve the misconduct involved here.

43 There was no dishonest or selfish motive.

44. There was a timely good faith effort to rectify the misconduct (*i.e.*, return of automobile sale proceeds to DM)

45 There was full and free disclosure and a cooperative attitude.

CONCLUSIONS OF LAW

Based on the foregoing, this Hearing Officer concludes:

1. On Count Four, Respondent violated ER 1.8 by accepting personal property as his legal fee without advising the client of the desirability of seeking independent counsel and failing to provide the client with a reasonable opportunity to seek such

counsel.

2 Clear and convincing evidence does not exist that Respondent violated ERs 1.4, 1.5 or 1.16 on Count One, ERs 1.2, 1.4, 3.3 and 8.4(d) on Count 2, or ERs 1.8⁸ and 1.15 and Rules 43 and 44 on Count Three⁹

3. Negligence was the mental state involved in the ER 1.8 violation

RESTITUTION

There is no basis to order restitution

RECOMMENDATION

CONSIDERATION OF THE ABA STANDARDS

In determining the appropriate sanction, the American Bar Association's *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). Those *Standards* counsel that, in determining the proper sanction, four criteria should be considered: (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 and/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); *ABA Standard 3.0*.

The duty violated by Respondent was one owed to the client (ABA Standard 4.0). The applicable standard in this case is ABA Standard 4.3. A censure is generally appropriate when a lawyer negligently violates ER 1.8, and causes injury or potential injury to the client. *ABA Standard 4.3.3*. An informal reprimand is generally appropriate when a lawyer negligently violates ER 1.8 in an isolated instance and causes little or no actual or potential injury to a client. *ABA Standard 4.3.4*.

⁸ As Ms. M wholesales automobiles, the trade between Ms. M and Respondent need not meet the requirements of ER 1.8. See *Comment 1 to ER 1.8*.

⁹ The Rule 43(d)(3)(a) safe harbor covers Respondent's issuance of Trust Check 4361

Respondent was negligent in not going beyond the general statement in ER 1.8 to learn that its Comment 1 states specifically that the Rule applies to payment of fees with personal property¹⁰ Respondent was not motivated to harm the client Indeed, he turned the sale proceeds over to DM once the transaction was questioned Instead of abandoning DM or being resentful toward him, Respondent defended DM for free through a trial which resulted in an acquittal. DM's subsequent letters to the State Bar, *Hearing Exhibits KK* and *LL*, while not exonerating or excusing the ER 1.8 violation, demonstrate that Respondent acted admirably to protect DM's rights even though DM's actions resulted in State Bar entanglements for Respondent. The handwritten note which Respondent wrote to DM prior to closing argument in DM's criminal trial, *see* attachment to *Hearing Exhibit LL*, is compelling evidence that Respondent acted honorably and treated his client with compassion and respect under very difficult circumstances for both lawyer and client The evidence does not support a finding other than that this was an unthinking violation of ER 1.8. Considering the lack of injury to the client, and that the mitigating factors substantially outweigh the aggravators, an informal reprimand is, *at most*, the appropriate sanction.

PROPORTIONALITY ANALYSIS

The purpose of professional discipline is twofold (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in similar misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985), *In re Swartz*, 141 Ariz. 266, 277, 686 P.2d 1236, 1247 (1984). Disciplinary proceedings are not to punish the attorney *In re Peasley*, 208 Ariz. 27, 39, 90 P 3d 764, 776 (2004); *In re Beren*, 178 Ariz. 400, 874 P 2d 320 (1994) The discipline in each situation must be

¹⁰ The clarity in the ER 1.8 comment is diminished by the equivocal language appearing in Comment 4 to ER 1.5, which states that "a fee paid in property instead of money *may* be subject to the requirements of ER 1.8(a)."

tailored to the individual facts of the case in order to achieve the purposes of discipline *In re Wines*, 135 Ariz 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P 2d 94 (1993). To have an effective system of professional sanctions, there must be internal consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52 (1994); *In re Pappas*, 159 Ariz 516, 768 P.2d 1161 (1988).

Relevant cases for a proportionality analysis include *In re Cook*, 04-0713 (filed January 18, 2006) and *In re Barfield*, 02-0924 (filed June 11, 2004). Like the present case, *Cook* involved an isolated instance of negligent noncompliance with ER 1.8 when attorneys fees were paid with the transfer of personal property. That misconduct resulted in an informal reprimand *Barfield* involved a negligent violation of ER 1.8 when an attorney borrowed money from a client *Barfield*, however, involved a separate violation of ER 1.7 as to another client. The result was a censure. The recommended sanction in this case is appropriate in light of these other decisions

CONCLUSION

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer hereby recommends that Respondent.

- 1 be subject to an informal reprimand for one violation of ER 1.8.
- 2 pay all costs of the State Bar and the Disciplinary Clerk incurred in connection with violation of ER 1.8.

Absent an appeal by the State Bar, Counts One, Two and Three of the Complaint will be dismissed with prejudice

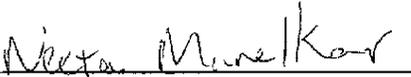
DATED this 11th day of June 2008.


Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this
12th day of June 2008, to

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