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

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *A. Marton*

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

**J. VINCENT GONZALEZ,
Bar No. 018372**

Respondent

File No. 07-1404

**HEARING OFFICER'S REPORT AND
RECOMMENDATION TO ACCEPT
AGREEMENT FOR DISCIPLINE**

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

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 complaint was filed on March 27, 2008, Respondent filed an answer on April 28, 2008, and a Case Management Order issued on May 13, 2008. A Notice of Settlement was filed July 22, 2008 and a Tender of Admissions and Agreement for Discipline by Consent was filed, with separate supporting Memorandum, on August 14, 2008.

II. FINDINGS OF FACT

The following 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 October 18, 1997

2 On or about August 20, 2007, the State Bar of Arizona received an insufficient funds notice from Washington Mutual Bank ("Washington Mutual") regarding Respondent's Arizona Bar Foundation Attorney Trust Account ("trust account")

3 On or about August 15, 2007, an electronic debit in the amount of \$47.14 attempted to pay against Respondent's Washington Mutual client trust account when the

1 balance of the account was \$17 97 Washington Mutual returned the item and did not
2 charge an overdraft fee, leaving the account with a balance of \$17 97.

3 4 On or about August 23, 2007, State Bar of Arizona's Trust Account Staff
4 Examiner Gloria Barr ("Staff Examiner") sent Respondent a copy of the insufficient funds
5 notice with a letter requesting an explanation

6 5 On or about September 25, 2007, Respondent provided a written explanation
7 concerning the insufficient funds

8 6 Beginning in or about October 2006, Respondent accepted credit card
9 payments, those credit card payments erroneously went directly to Respondent's firm's
10 operating account

11 7 Not all of the money deposited into the firm's operating account from credit
12 card payments were earned fees or retainers As such, some of those payments were
13 required to be deposited directly into Respondent's client trust account, and were not.

14 8 On February 6, 2007, Respondent attended the State Bar of Arizona's Trust
15 Account Ethics Enhancement Program ("TAEEP").

16 9 Among the topics Respondent was instructed on was the manner in which to
17 properly administer a client trust account, including but not limited to instruction on
18 required recordkeeping and accounting, and the type of funds that are required to be
19 deposited into the client trust account

20 10 In or about February 2007, Respondent called Bank of America credit
21 processing to correct the error

22 11 The credit processing error was not corrected

23 12 Despite his instruction at TAEEP, Respondent failed to notice the continuing
24 credit processing error

25 13 On or about October 22, 2007, Respondent supplemented his previous
26 response with copies of billing records for his clients as of August 31, 2007

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1 14. Respondent, or those under his direct supervision, failed to conduct the
2 monthly three-way reconciliation of individual client ledgers, trust account general ledger,
3 and trust account bank statements

4 15 The Staff Examiner conducted a review of the trust account records
5 submitted by Respondent, along with Respondent's explanations, and determined that:

- 6 a Respondent failed to hold property of clients or third persons that was in
7 Respondent's possession in connection with representation separate from
8 the lawyer's own property,
- 9 b Respondent failed to safeguard client property that was in his possession
10 in connection with representation,
- 11 c Respondent failed to keep client funds separate and apart from the
12 lawyer's personal and business accounts;
- 13 d Respondent failed to maintain due professional care in regard to client
14 funds,
- 15 e Respondent failed to maintain internal controls within the lawyer's office
16 that are adequate under the circumstances to safeguard funds or other
17 property held in trust;
- 18 f Respondent failed to deposit unearned funds or funds to which the
19 lawyer has no claim into the client trust account;
- 20 g Respondent failed to make or cause to be made a monthly three-way
21 reconciliation of the client ledger or register, and trust account general
22 ledger or register, and trust account bank statement

23 **III. CONDITIONAL ADMISSIONS**

24 Respondent has conditionally admitted that his conduct, as set forth in the Tender,
25 violated Rule 42, Ariz.R Sup Ct , specifically, E R. 1.15(a), and Rules 43 and 44,
26 Ariz R Sup Ct

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1 **IV. CONDITIONAL DISMISSALS**

2 The State Bar has conditionally agreed to dismiss the allegations concerning
3 Respondent failing to maintain individual client ledgers and failing to remit interest to the
4 Arizona Foundation for Legal Services and Education.

5 The State Bar has conditionally agreed to dismiss the allegation pertaining to the
6 individual client ledgers because, during the formal case, Respondent provided
7 Quickbook printouts of individual client ledgers showing unexpended balances for the
8 period in question. The State Bar has conditionally agreed that it might not be able to
9 prove by clear and convincing evidence that Respondent failed to maintain the records as
10 required by Rule

11 Further, the State Bar has conditionally agreed to dismiss the allegation regarding
12 payment of interest to the Arizona Foundation for Legal Services and Education in
13 consideration of documentation from Washington Mutual, provided by Respondent,
14 indicating the failure to remit the interest to the Foundation was a bank error. The
15 documentation indicates the account is now correctly set up and past interest payments
16 have been correctly credited to the Foundation.

17 Respondent's conditional admissions were tendered in exchange for the form of
18 discipline stated below.

19 **V. SANCTIONS**

20 Respondent and the State Bar have agreed that on the basis of the conditional
21 admissions and dismissals, the appropriate disciplinary sanctions are as follows:

22 1. Respondent will receive a 30-day suspension;
23 2. Respondent will be placed on Probation for a period of one year upon
24 reinstatement.

25 3. The Terms and Conditions of Probation will include participation in the
26 State Bar's Trust Account Program ("TAP"). The Court may impose other terms and
27 conditions of probation at the time of reinstatement.

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1 4. Respondent's Probation will commence upon issuance of the order of
2 reinstatement and will continue for one year from the date on which all parties have
3 signed the Trust Account Program ("TAP") Terms and Conditions

4 5 Respondent shall contact the State Bar Staff Examiner within 30 days of the
5 date of reinstatement to schedule a trust account assessment by a State Bar of Arizona
6 Staff Examiner ("Staff Examiner").

7 6 The Staff Examiner shall develop the Terms and Conditions for
8 participation in TAP that include, but are not limited to, the following:

9 a Respondent shall provide quarterly reports on Respondent's trust
10 account,

11 b. Respondent shall timely respond to all State Bar inquiries;

12 c. Respondent shall maintain the specific recordkeeping and trust
13 account requirements set forth in the TAP Terms and Conditions

14 d Respondent shall pay all costs incurred in connection with his
15 participation in TAP

16 7 Respondent shall refrain from engaging in any conduct that would violate
17 the Rules of Professional Conduct or other rules of the Supreme Court of Arizona

18 8. In the event that Respondent fails to comply with any of the foregoing
19 probation terms, and information thereof is received by the State Bar of Arizona, Bar
20 Counsel shall file a Notice of Noncompliance with the imposing entity, pursuant to Rule
21 60(a)(5), Ariz R Sup.Ct. The imposing entity may refer the matter to a hearing officer to
22 conduct a hearing at the earliest practicable date, but in no event later than 30 days after
23 receipt of notice, to determine whether a term of probation has been breached and, if so,
24 to recommend an appropriate sanction. If there is an allegation that Respondent failed to
25 comply with any of the foregoing terms, the burden of proof shall be on the State Bar of
26 Arizona to prove noncompliance by clear and convincing evidence.

27 9 Respondent shall pay all costs and expenses incurred by the State Bar in
28 bringing these disciplinary proceeding in the amount of \$745 39'. In addition, Respondent

1 shall pay all costs incurred in this matter by the Disciplinary Commission, the Supreme
2 Court, and the Disciplinary Clerk's Office

3 ABA STANDARDS

4 The *Standards* are designed to promote consistency in the imposition of sanctions
5 by identifying relevant factors that courts should consider and then applying these factors
6 to situations where lawyers have engaged in various types of misconduct *Standards* 1 3,
7 Commentary The *Standards* provide guidance with respect to an appropriate sanction in
8 this matter The Court and Commission consider the *Standards* a suitable guideline *In re*
9 *Peasley*, 208 Ariz 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz 154,
10 157, 791 P.2d 1037, 1040 (1990). *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276
11 (1994)

12 In determining an appropriate sanction, we consider the duty violated, the lawyer's
13 mental state, the actual or potential injury caused by the misconduct and the existence of
14 aggravating and mitigating factors. *In re Tarletz*, 163 Ariz. 548, 789 P 2d 1049 (1990),
15 ABA *Standard* 3 0

16 Given the conduct in this matter, the most applicable *Standard* is 4 0, Violations of
17 Duties Owed to Clients, and specifically *Standard* 4 1, which addresses failure to preserve
18 client property *Standard* 4 12 states that "(s)uspension is generally appropriate when a
19 lawyer knows or should know that he is dealing improperly with client property and
20 causes injury or potential injury to a client " The parties have conditionally agreed that
21 Respondent acted knowingly in his failure protect the clients' property The parties have
22 conditionally agreed that potential injury to a client existed

23 In deciding the length of the suspension to be imposed the following aggravating
24 and mitigating circumstances were considered:

25 Aggravating Factors:

26 Standard 9.22(1) Substantial experience in the practice of law Respondent was
27 admitted to practice in 1997.

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1 property, commingled personal funds with client funds and disbursed funds from the trust
2 account knowing there were insufficient funds in the account Ryan also applied a
3 client's advance payment for an appeal to the client's unpaid bill without consent from the
4 client Ryan admitted to "knowingly" violating Rule 42, ERs 1.2 and 1.15, and Rules 43
5 and 44, Ariz R Sup Ct Three factors were present in aggravation: prior disciplinary
6 offenses, 9.22(a), a pattern of misconduct, 9.22(c), and substantial experience in the
7 practice of law, 9.22(i) There were four mitigating factors present: timely good faith
8 effort to make restitution or to rectify consequences of misconduct, 9.32(d), full and free
9 disclosure to disciplinary board or cooperative attitude toward proceedings, 9.32(e),
10 character or reputation, 9.32(g), and remorse, 9.32(i) Ryan's conduct caused potential
11 injury to his clients

12 In *In re Clarke*, SB-01-0192-D (2002), Clarke was suspended for six months¹,
13 placed on two years of probation the terms of which included participation in LOMAP,
14 participation in the State Bar's Member's Assistance Program ("MAP"), and completion
15 of continuing legal education, for violations of Rule 42, ER 1.15, and Rules 43 and 44,
16 Ariz.R Sup Ct Clarke commingled funds in order to cover shortfalls that resulted from
17 an overdrawn trust account Clarke self-reported additional trust account discrepancies
18 during the State Bar's investigation and reported that he had converted client trust account
19 funds for personal use The Commission found Clarke's conduct to be "knowing" and
20 determined that Clarke's conduct caused potential injury to the clients Four aggravating
21 factors were present: dishonest or selfish motive, 9.22(b), pattern of misconduct 9.22(c);
22 multiple offenses, 9.22(d), and substantial experience in the practice of law, 9.22(i). Six
23 mitigating factors were present: absence of a prior disciplinary record, 9.32(a), personal
24 or emotional problems, 9.32(c); timely good faith effort to make restitution or to rectify
25 consequences of misconduct, 9.32(d), full and free disclosure to disciplinary board or
26

27 ¹ Hearing Officer had recommended a three-month suspension The Disciplinary Commission
28 found disbarment to be the presumptive sanction, but determined that a six-month suspension and
probation was appropriate given Respondent's mitigation

1 cooperative attitude toward proceedings, 9.32(e), character or reputation, 9 32(g); and
2 remorse, 9 32(l)

3 Finally, in *In re Diodati*, SB-07-0197-D (2008), Diodati, who had previously been
4 ordered to complete TAEPP as a condition of diversion and had prior discipline as well,
5 entered into an agreement for discipline by consent that provided for a sixty-day
6 suspension, and one-year probation upon reinstatement. The probation terms included
7 participation in MAP, LOMAP, and the State Bar's Trust Account Program. Diodati
8 admitted knowingly dealing improperly with client property and that his conduct caused
9 injury or potential injury to the clients. Diodati admitted that his conduct violated Rule
10 42, ERs 1 3, 1 15, 3.4, 8 1(b) and 8 4(d), and Rules 43, 44 and 53, Ariz R Sup Ct Four
11 aggravating factors were present prior disciplinary offenses, 9 22(a), pattern of
12 misconduct, 9 22(c), bad faith obstruction of the disciplinary process, 9.22(e), and
13 substantial experience in the practice of law, 9 22(j) There were three mitigating factors
14 absence of a selfish or dishonest motive, 9 32(b); personal or emotional problems,
15 9 32(c), and character or reputation, 9.32(g)

16 These listed cases all relate to failure to protect client property and maintain client
17 trust accounts in accordance with the Supreme Court Rules and Trust Account Guidelines
18 The misconduct in the cases discussed above was similar to that found in the instant case,
19 but more severe sanctions were appropriate in those matters either by virtue of the
20 conduct itself or after a consideration of the relevant aggravating factors

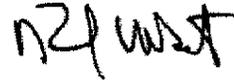
21 **V. RECOMMENDED SANCTION**

22 After reviewing all of the facts of this matter, the applicable *Standards*, including
23 the relevant aggravating and mitigating factors, as well as the proportional case law, this
24 Hearing Officer recommends that the Tender of Admissions and Agreement for Discipline
25 by Consent be accepted.

26 Based on the *Standards* and all factors, this Hearing Officer believe that suspension
27 for thirty days and probation for one year is the appropriate sanction in this case and will
28 serve the purposes of lawyer discipline The sanction will serve to protect the public,

1 instill confidence in the public, deter other lawyers from similar misconduct, and maintain
2 the integrity of the bar

3 DATED this 23rd day of September, 2008

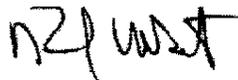
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6 Kraig J Marton
7 Hearing Officer 8A

8 Original filed with the Disciplinary Clerk
9 of the Supreme Court this 23rd day
of September, 2008 and copy mailed to

10 J Vincent Gonzalez
11 The Gonzalez Law Group
12 123 E Baseline Road, Suite D-108
Tempe, Arizona 85283
v.gonzalezlaw@gmail.com

13 Jason B Easterday
14 Bar Counsel
15 State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6288
jason.easterday@staff.azbar.org

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18 By _____

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