

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

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

ANDREW R. KLAUSNER,
Bar No. 015852

Respondent.

File No 07-0323, 07-1529, 08-0153

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 9J
Mark S. Sifferman)

PROCEDURAL HISTORY

A Complaint was filed in File No 07-0323 on November 26, 2007. Respondent filed an Answer on December 28, 2007. Prior to an evidentiary hearing, a Tender of Admissions and Agreement for Discipline by Consent ("Tender of Admissions") plus a Joint Memorandum in support thereof were filed. No formal Complaint has been filed in either file 07-1529 or 08-0153, but probable cause orders were entered April 10, 2008 and May 5, 2008, respectively. Those two matters have been included in this proceeding pursuant to the Tender of Admissions. A telephonic hearing on the Tender of Admissions was held May 20, 2008.

FINDINGS OF FACT

Based upon the Tender of Admissions, the telephonic hearing conducted on the Tender of Admissions, and the record herein, the following facts are found:

1. Respondent was first admitted to practice law in Arizona on October 22, 1994, and has remained licensed since that time.

FILE NO. 07-0323

2. On or about February 23, 2007, the State Bar of Arizona received information indicating that Respondent, in or about December 2005, had issued one or more checks for payment of personal expenses from his Bank One (now known as Chase Bank) Arizona Bar Foundation Client Trust Account ("Trust Account")

3. The information received by the State Bar also indicated that Respondent, on other occasions, had written checks for personal expenses from the Trust Account.

4. By a letter dated March 27, 2007 from a Staff Examiner employed by the State Bar, Respondent was asked to address the information received by the State Bar and explain how his conduct did not violate the Ethical Rules.

5. By a letter dated April 25, 2007 from the Staff Examiner, Respondent was asked to provide Trust Account records, including individual client ledgers.

6. Respondent provided some of the information requested, but did not provide individual client ledgers

7. By a letter dated May 18, 2007 from the Staff Examiner, Respondent was again asked to provide records and information about his Trust Account, including the already requested individual client ledgers for the period of June 2005 through December 2005

8. Respondent thereafter requested and received a thirty-day extension for his response. Respondent did not provide the requested documentation within that extension.

9. By a letter dated August 21, 2007 the Staff Examiner again requested copies of individual client ledgers corresponding to his Trust Account for the period under examination

10. Respondent failed, despite promises to reconstruct them from information maintained at his office, to provide client ledgers. In response to the Staff Examiner's

August 21, 2007 letter, Respondent admitted that he did not have individual client ledgers.

11. If an Evidentiary Hearing was held in this matter, Respondent would provide evidence, which the State Bar would not contest, that during this time Respondent was shutting down his office and his office was burglarized. Taken in the burglary was Respondent's computer on which all his trust records were stored and therefore Respondent was unable to reconstruct the individual client ledgers.

12. The records and information provided by Respondent plus the information gathered from other sources reveal that:

- (a) in February 2007, Respondent issued a check from the Trust Account to pay a personal child care expense,
- (b) in May 2005, Respondent deposited in the Trust Account personal funds of \$125,000.00 from the liquidation of a portion of his personal comic book collection,
- (c) after May 2005, Respondent issued approximately 20 Trust Account checks for personal or office expenses, unrelated to any client expense,
- (d) Respondent co-mingled personal and/or business funds with client funds in his Trust Account,
- (e) Respondent failed to maintain or preserve complete records with respect to the client Trust Account, and
- (f) Respondent failed to maintain adequate internal controls

FILE NO. 07-1529

13 On or about September 12, 2007, the State Bar of Arizona received information indicating that on September 10, 2007, Trust Account check 1296 was

presented for payment against the Trust Account, the Bank refused to honor the check, and the Bank charged a \$25.00 overdraft fee to the account, leaving the Trust Account with a negative balance of \$7,196.43

14. By a letter dated September 14, 2007, the Staff Examiner informed Respondent of the overdraft notice and asked for an explanation. Respondent was also asked to provide copies of his August and September 2007 Trust Account bank statements with corresponding cancelled checks, duplicate deposit slips, individual client ledgers, and general ledgers.

15. Respondent explained that the overdraft resulted from the deposit in the Trust Account of a settlement check which had not been endorsed by the client. When the deposit of the check was made, neither the Respondent nor his secretary noticed the lack of endorsement by the client. Chase Bank showed the deposit on the Trust Account's online statement, therefore Respondent began to disburse against it. The issuing bank returned the check for lack of endorsement, causing Chase Bank to remove the credit amount from the account, resulting in the overdraft.

16. On or about October 11, 2007, the State Bar received additional information indicating that on October 5, 2007, a Trust Check was presented when insufficient funds existed in the Trust Account, the Bank paid the check, and charged a \$32.00 overdraft fee, leaving the account with a negative balance.

17. By letter dated October 12, 2007, the Staff Examiner advised Respondent of the overdraft and asked Respondent for an explanation of the overdraft. Respondent was also asked to provide copies of relevant Trust Account documents by October 22, 2007.

18. By letter dated November 5, 2007, the Staff Examiner reminded Respondent of his obligation to respond and that his failure to cooperate with the disciplinary investigation could, in and of itself, result in discipline.

19. By letter dated November 20, 2007, the Staff Examiner again reminded the Respondent of his obligation to cooperate with the disciplinary investigation and of his Rule 53 obligations.

20. No records were received from Respondent, who would testify that during this time he was not living in Arizona and was relying on the assurance of his then counsel that records sought by the State Bar had been provided to the Bar, that other trust records had been provided thereby causing confusion, and that this failure to provide records was in no way due to his inattention or disregard of requests by the State Bar, nor evidence of an intention to or failure to cooperate with the investigation.

21. By a subpoena issued January 10, 2008, records from the Trust Account for the months of August and September 2007 were obtained by the Staff Examiner. After the Staff Examiner conducted an examination of the records received by subpoena, the Examiner was unable to conclusively determine the cause for the second overdraft due to insufficient records.

22. A review of Respondent's records and the records obtained from Chase Bank reveal that Respondent:

- (a) failed to exercise due professional care in maintaining his Trust Account; and
- (b) failed to maintain adequate internal controls.

FILE NO. 08-0153

23. On or about January 25, 2008, the State Bar received an insufficient funds notice on Respondent's Trust Account. The notice indicated that on January 23, 2008, Trust Account check 1597 attempted to pay against the account when the balance was \$0. Chase Bank paid the check, charged an overdraft fee of \$25.00, leaving the account with a negative balance of \$1,394.42

24. By letter dated January 31, 2008, the Staff Examiner notified Respondent of the overdraft and requested an explanation regarding the apparent overdraft. Included in the letter was a request for additional information to include copies of Respondent's January 2008 Trust Account bank statements with corresponding cancelled checks, duplicate deposit slips, individual client ledgers, and general ledger.

25. On February, 2008, a subpoena duces tecum was issued to Chase Bank for records of Respondent's Trust Account for the months of December 2007 and January 2008.

26. By letter dated February 21, 2008, Respondent stated that the overdraft was a result of a bookkeeping error. Respondent stated that although funds were deposited into his cost account on behalf of a client, the deposit was noted on the Trust Account ledger for the client. The check was then issued to the client from the Trust Account, rather than the cost account. In the process of closing his Trust Account, Respondent noted that the check had not yet cleared and the client was asked not to cash the check and that another check would be issued to the client.

27. Respondent took no steps to stop payment on the check erroneously issued to the client from the Trust Account. Prior to receipt of Respondent's message, the client presented the check for payment, causing an overdraft.

28. Based upon the records provided by Respondent and the records received from Chase Bank, the Staff Examiner determined that Respondent:

- (a) failed to safe keep client property;
- (b) failed to maintain and preserve complete trust account records according to minimum standards, including (i) duplicate deposit slips did not correspond to clients, and (ii) individual client ledgers and general ledger did not include unexpended balances after each transaction;

- (c) failed to exercise due professional care,
- (d) failed to maintain adequate internal controls; and
- (e) failed to conduct monthly three-way reconciliations.

GENERAL FINDINGS

29 No client of Respondent has contended that moneys held in trust by Respondent are due. The State Bar investigation did not uncover any conversion or misappropriation of client funds by Respondent.

30 Respondent's current practice in California does not involve Respondent in handling funds or property of a client and does not require that he maintain a client trust account.

31. Since the beginning of the formal discipline process, Respondent has cooperated with the State Bar. For example, even prior to filing an Answer to the formal Complaint, Respondent contacted Bar Counsel and accepted responsibility for his misconduct relating to the Trust Account. This cooperative attitude is reflected in the Answer filed in this matter.

CONCLUSIONS OF LAW

1. There is clear and convincing evidence the Respondent violated E.R. 1.15, and Rules 43 and 44, Rules of the Supreme Court.

2. On acceptance of the Tender of Admissions, the alleged violations of E.R.s 3.3, 4.2, 8.4(c) and (d), plus Rule 53(d) and (f) are dismissed.

3. The following aggravating factors are present: (i) substantial experience in the law and (ii) multiple offenses

4. The following mitigating factors are present: (i) absence of prior disciplinary record, (ii) absence of selfish or dishonest motive, and (iii) cooperation with the State Bar. As the last mitigating factor came only after the formal discipline process began, this factor is not given as much weight as the other two mitigating factors.

However, it is given some weight as cooperation with the State Bar is to be encouraged even when it is belated.

RESTITUTION

Restitution is not indicated.

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* Where there are multiple charges of misconduct, there should only be one sanction with the multiple instances of misconduct considered as aggravating factors See *In re Cassali*, 173 Ariz. 372, 843 P 2d 654 (1992).

The applicable standard concerns duties owed to the client. *ABA Standard 4 0*. There is no express stipulation regarding Respondent's mental state Rather, the parties imply that either a knowing or negligent mental state may be involved *Joint Memorandum*, page 4, lines 20 - 25. Based upon the record presented, the mental state seems to be negligent, although the evidence indicates the potential for gross negligence. The presumptive sanction is censure. *ABA Standard 4 13* Considering the mitigating circumstances, the fact that no client was injured and Respondent does not pose a current threat of repetitive conduct, censure is an 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 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)

In the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline Consent filed by the State Bar and Respondent, the following cases were provided for guidance in the proportionality analysis: *In re Romero*, SB-07-0059 and *In re Harris*, SB-06-0150-D Both cases resulted in a censure *Romero* had additional circumstances not present here, namely false statements to lien holders and the failure to advise parties of the receipt of funds. *Harris* involved a respondent who did not maintain separate client ledgers and did not conduct a monthly three-way reconciliation, even after being placed on probation for a previous trust account violation and after attending the State Bar's Trust Account Ethics Enhancement Program. *Romero* and *Harris* show that a censure is an appropriate sanction in this case.

CONCLUSION

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

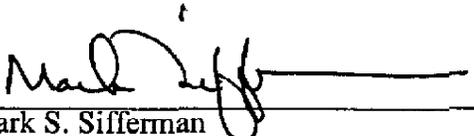
1. Respondent will be subject to a censure.

2. Respondent must pay all costs incurred by the State Bar and the Disciplinary Clerk in connection with these proceedings.
3. Respondent will be placed on probation under the following terms and conditions.
 - (a) The period of probation shall commence on the date of the issuance of the Supreme Court's final Judgment and Order, and will continue for one (1) year.
 - (b) Respondent shall complete six hours of continuing legal education offered by the State Bar of Arizona on the topic of trust accounts and the proper maintenance of trust accounts. If Respondent wishes to complete continuing legal education courses on the topic of trust accounts not offered by the State Bar, he must first obtain approval from Bar counsel of the proposed course.
 - (c) Respondent shall provide to Bar Counsel prior to expiration of the period of probation proof of attendance and completion of these courses required in the preceding paragraph in the form of a certificate of completion of courses attended in person, or a copy of the invoice for payment of online or video courses, as well as a copy of handwritten notes taken during viewing of the course.
 - (d) Respondent shall pay the costs and expenses of this matter.
 - (e) Pursuant to Rule 60(a)(5) of the Rules of the Supreme Court, the term of probation may be renewed for an additional two-year period
 - (f) Respondent must follow all the rules of professional conduct and Trust Account guidelines
 - (g) Upon successful completion of six hours of continuing legal education on trust accounts, receipt by Bar Counsel of satisfactory

proof of completion and upon Respondent's payment of the costs and expenses of this disciplinary proceeding, which may include costs incurred by the Disciplinary Clerk, Respondent's probation shall be terminated.

- (h) In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance pursuant to Rule 60(a)(5) Rules of the Supreme Court. The matter may be referred to a hearing officer to conduct a hearing at the earliest practical date but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the terms of probation, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

DATED this 24th day of May, 2008.


Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this
30th day of May, 2008, to

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