

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

FILED
APR 01 2008
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA

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

MICHAEL NEUMANN,)
Bar No. 018859)

RESPONDENT.)

File Nos. 05-1642, ~~05-2091, 06-0712~~

**AMENDED
HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

1. Probable Cause was found in these cases as follows: Cause numbers 05-2091 (Sauer) and 06-0712 (Weiner) on December 6, 2006, and Cause number 05-1642 (Freeman) on July 25, 2007. A direct file of a Tender of Admissions and Joint Memorandum occurred on December 28, 2007. The matter was assigned to the undersigned Hearing Officer on January 18, 2008, and a hearing on the Tender and Joint Memorandum was held on February 25, 2008.

FINDINGS OF FACT

2. 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 16, 1998.

Summary of Facts

3. This case involves a young lawyer that misused client funds. The Respondent's actions occurred during the course of a severe bout of depression that affected his

judgment, but the Respondent knew or should have known that his actions were improper.

COUNT ONE (File No. 05-1645, Freeman)

4. In or about October 2003, Respondent worked at the law firm of Hahn, Howard & Green ("HH&G").
5. While at HH&G, Respondent was assigned to Dr. Steven Wiener's ("Dr. Wiener") case (See Count Three, File No. 06-0712).
6. While at HH&G, Respondent became friends with co-worker, Karl Sauer ("Mr. Sauer") (See Count Two, File No. 05-2091).
7. In July 2004, Respondent tendered his resignation to HH&G.
8. Notwithstanding his departure from HH&G, Respondent continued to represent Dr. Wiener, and transferred Dr. Wiener's files to Respondent's subsequent solo practice, The Neumann Law Offices.
9. While practicing as a solo practitioner, Respondent began representing a Mr. Sauer.
10. Effective January 1, 2005, Respondent was hired on as an associate with DeConcini, MacDonald, Yetwin & Lacy, P.C. ("DeConcini").
11. Upon gaining employment with DeConcini, Respondent transferred Dr. Wiener's and Mr. Sauer's cases to the firm.
12. In July 2005, Respondent began experiencing significant absences from the firm.
13. During this same time period, Respondent suffered a mental health breakdown.
14. Based on Respondent's absences and his lack of communication with DeConcini, Respondent's employment with the firm was terminated on July 2005.

15. Upon termination from DeConcini, Respondent failed to inform his clients that he would no longer be representing them; however, Respondent contends that the firm informed his clients that Respondent was no longer representing them.
16. Subsequent to Respondent's departure, the firm learned that Respondent had failed to attend client meetings.
17. Subsequent to Respondent's departure from DeConcini, the firm received client complaints regarding Respondent's lack of communication and client funds.
18. Subsequent to Respondent's departure, the firm learned that Respondent had maintained a client trust account from his prior solo practice and had retained funds in his trust account during his employment at DeConcini.
19. Funds belonging to Dr. Wiener and Karl Sauer were not transferred to DeConcini trust account after Respondent joined the firm.
20. As a result of inquiries regarding Respondent's trust account while a solo practitioner, a conservatorship was opened on October 17, 2005, with regard to Respondent's professional and trust accounts.
21. On April 14, 2006, Respondent was placed on interim suspension.
22. On July 10, 2006, DeConcini provided the names of seven clients that had been represented by Respondent while employed at the firm and who had reported their concerns regarding the representation they received and/or fees paid to Respondent.
23. Two of these clients, Mr. Sauer in Dr. Wiener, submitted their own complaints to the State Bar.

24. During the course of its investigation, the State Bar contacted the other five clients, none of whom indicated they wished to submit complaints of their own.
25. Some of these clients reported that Respondent failed to adequately communicate with them.
26. According to information received by the State Bar, these client's cases were either assigned to other attorneys at DeConcini or referred to new counsel.

COUNT TWO (File No. 05-2091, Sauer)

27. Respondent began representing Mr. Sauer while practicing as a solo practitioner, before joining DeConcini.
28. Respondent counseled Mr. Sauer on several financial matters, the potential of filing bankruptcy, and specifically, the issues of a lawsuit that was eventually filed against Mr. Sauer.
29. In early December 2004, Mr. Sauer gave Respondent a check, made payable to the Neumann Law Offices Trust Account, for \$15,000.
30. Thereafter, on December 10, 2004, Respondent deposited Mr Sauer's check into the Neumann Law Offices trust account.
31. According to Respondent, he withdrew \$2,000 on December 20, 2004, for services rendered prior to receipt of Mr. Sauer's check.
32. According to Respondent, he withdrew another \$2,000 on January 7, 2005, for additional services rendered.
33. Effective January 1, 2005, Respondent joined DeConcini and transferred Mr. Sauer's file to the firm.

34. Respondent did not transfer Mr. Sauer's remaining funds in the Neumann Law Offices trust account to DeConcini's trust account.
35. According to Respondent, other withdrawals made from Mr. Sauer's account by Respondent after joining DeConcini, but not withdrawn for services rendered to Mr. Sauer prior to joining the firm are as follows: \$2,000 on March 24, 2005; \$5,000 on May 11, 2005; \$1,600 on August 18, 2005; and \$2,100 on October 31, 2005.
36. According to Respondent, while at DeConcini and thereafter, he and other attorneys at the firm provided legal services to Mr. Sauer, sufficient to deplete the \$15,000 originally paid to Respondent.
37. DeConcini terminated Respondent on July 2005 due to significant absences from the firm.
38. During that time, Respondent suffered a mental health breakdown.
39. On October 17, 2005, when the conservatorship was opened with regard to the Neumann Law Offices trust account, the remaining balance in Respondent's trust account was \$976.13. According to Respondent, due to a balance of \$676.13 in the account on the date Respondent originally deposited Mr. Sauer's \$15,000 check, Mr. Sauer only had \$300 in Respondent's trust account when the account was closed.
40. Upon his termination from DeConcini, Respondent failed to inform Mr. Sauer that he would no longer be representing him. However, Respondent contends that the firm informed Mr. Sauer that Respondent would no longer be representing him.

COUNT THREE (File No. 06-0712, Weiner)

41. In 1999, Dr. Wiener's business partner, Dr. Gitt, initiated a lawsuit against him in Maricopa County Superior Court case number CV1999-14138.
42. As part of the settlement in CV1999-14138, Dr. Wiener agreed to the entry of a Stipulated Judgment, which was to serve as security for Dr. Wiener's performance of the Settlement Agreement.
43. In or about March 2003, a dispute arose over the performance of the Settlement Agreement and Dr. Gitt sought to enforce the Stipulated Judgment
44. In October 2003, Dr. Wiener retained HH&G to represent him in connection with said dispute, after which HH&G assigned Dr. Wiener's matter to Respondent.
45. In an attempt to enforce the Stipulated Judgment, Dr. Gitt caused a Writ of Garnishment to be issued against certain of Dr. Wiener's bank accounts.
46. Respondent filed a motion to quash the garnishment order. Subsequently, Dr. Wiener and Dr. Gitt entered into a stipulation for the entry of a court order, which resolved the garnishment action.
47. By stipulated order in Maricopa County Superior Court case number CV1999-14138, the garnished funds were to be placed in an interest-bearing trust account and retained in said account pending either an agreement between the parties or further order of the Court.
48. Respondent and Dr. Gitt's council agreed to have Dr. Wiener's bank disperse the garnished funds to HH&G.

49. Following the Court's order, Dr. Wiener's bank transferred the garnished funds totaling approximately \$21,946.58 to HH&G.
50. HH&G then deposited the funds into a trust account at Northern Trust Bank on June 1, 2004.
51. In July 2004, Respondent tendered his resignation to HH&G..
52. Respondent, thereafter, established his own firm, The Neumann Law Offices.
53. Respondent continued to represent Dr. Wiener in his lawsuit against Dr. Gitt and transferred Dr. Wiener's file to the Neumann Law Offices.
54. HH&G transferred Dr. Wiener's funds, held in trust, to Respondent by check.
55. Respondent deposited the check received from HH&G, totaling \$21,963.27 into a business market rate savings account at Wells Fargo Bank on August 31, 2004.
56. On or about January 1, 2005, Respondent joined DeConcini and transferred Dr. Wiener's file to the firm.
57. Respondent never informed DeConcini of the funds Respondent held for Dr. Wiener; nor did Respondent ever transfer the funds to DeConcini's trust account.
58. DeConcini terminated Respondent in July 2005.
59. At that time, Respondent suffered a mental health breakdown.
60. On being terminated by DeConcini, Respondent failed to inform Dr. Wiener that he was leaving the firm and that he would no longer be representing him; however, Respondent contends that the firm informed Dr. Wiener he was no longer representing him.

61. October 17, 2005, Robert Van Wyck, Chief Bar Counsel, was appointed as conservator for Respondent's professional and trust accounts, including the business market savings account in which Dr. Wiener's funds were being held.
62. A review of Respondent's withdrawals from the business market rate savings account was as follows: \$2,000 on November 8, 2004; \$2,000 on December 1, 2004; \$2,000 on December 7, 2004; \$3,000 on June 6, 2005; \$2,000 on September 15, 2005; and \$500 on November 21, 2005.
63. Respondent transferred all of the funds from the business market rate savings account into his business checking account.
64. As of November 21, 2005, after the \$500 withdrawal by Respondent, the balance in the business market savings account was \$10,571.36.
65. On April 28, 2006, Respondent paid the conservator \$2,000 of the funds Respondent had withdrawn from the business market savings account.

CONCLUSIONS OF LAW

66. The Hearing Officer finds that there is clear and convincing evidence that Respondent violated the following Rules and ER's:
COUNT ONE (File No. 05-1642, Freeman)
67. Respondent's conduct, as described in this count, violated Rule 42, Ariz.R.Sup.St., specifically ER 1 4, ER 1.15, and Rules 43 and 44, Ariz.R.Sup.Ct.

COUNT TWO (File No. 05-2091, Sauer)

68. Respondent's conduct, as described in this count, violated Rule 42, Ariz.R.Sup.Ct., specifically ER 1.4, ER 1.15, ER, 8.4(d), and Rules 43 and 44, Ariz.R.Sup.Ct

COUNT THREE (File No. 06-0712, Weiner)

69. Respondent's conduct, as described in this count, violated Rule 42 Ariz.R.Sup.Ct., specifically ER 1.4, ER 1.15, ER 8.4(c), and 8 4(d), and Rules 43 and 44, Ariz.R.Sup.Ct.

ABA STANDARDS

70. ABA *Standard* 3 0 provides that 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; (4) the existence of aggravating and mitigating factors.

The Duty Violated:

71. The most serious misconduct in this case is Respondent's failure to preserve his client's property and conversion of the client's funds for personal use. Therefore, *Standard* 4.1, Failure to Preserve the Client's Property, is the most applicable *Standard* to the Respondent's misconduct in this case.
72. *Standard* 4.1 provides, Absent aggravating and mitigating circumstances, upon application of the factors set out in *Standard* 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:
- 73 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

- 74 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
75. Based upon the misconduct found by the Hearing Officer, the presumptive sanction with regard to the most serious misconduct under *Standard 4.1* appears to be disbarment or suspension.
76. Respondent violated his duties to his clients as a professional and to the legal system. Respondent failed to communicate sufficiently with his clients, but more importantly, Respondent failed to protect his client's funds, which had been entrusted to his care. In so doing, Respondent did not demonstrate the loyalty he owed to his clients. Instead, he caused at least some clients to lose confidence in the legal profession.

The Lawyer's Mental State:

77. The Hearing Officer had an opportunity to view the evidence and the Respondent's testimony. The Hearing Officer finds that Respondent did have a mental breakdown, but that Respondent knew or should have known that he was dealing improperly with his client's property. Respondent's disability did affect his judgment to some extent with respect to carrying out his duties to his clients.

The Actual or Potential Injury:

78. Respondent's client, Dr. Wiener, was actually injured in the amount of \$9,500 plus interest (originally \$11,500, but Respondent paid \$2,000 to the conservator towards the restitution owed). There is no restitution owed in Count One and, because Carl Sauer has been provided services, either by Respondent or the

DeConcini law firm sufficient to deplete the \$15,000 payment for legal services, there is no restitution due to Mr Sauer.

Aggravating and Mitigating Factors:

79. The aggravating and mitigating factors to be considered are set forth in *Standards* 9.2 and 9.3.

Aggravating Factors

80. *Standard* 9.22(b), Dishonest or selfish motive. Respondent misappropriated \$11,500 of his client's funds.
81. *Standard* 9.22(d), Multiple offenses. Respondent committed violations of several ER's with regard to several clients.
82. *Standard* 9.22(i), Substantial experience in the practice of law. Respondent was admitted to practice in May 1998.
83. *Standard* 9.22(k), Illegal conduct. Respondent misappropriated his client's funds.

Mitigating Factors

84. *Standard* 9.32(a), Absence of a prior disciplinary record.
85. *Standard* 9.32(c), Personal or emotional problems. Respondent suffered a nervous breakdown.
86. *Standard* 9.32(e), Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. Respondent has been cooperative with the State Bar.
87. The parties submit that after weighing the aggravating and mitigating factors a three-year suspension is appropriate in this matter, with probation to begin upon Respondent's successful reinstatement to active status. It is further their

recommendation that Respondent be required to undergo a MAP assessment, and continue the necessary treatment concerning his mental health issues.

PROPORTIONALITY REVIEW

88. The Supreme Court has held that, while discipline must be tailored to the individual facts of the case, there should be proportionality with other cases with similar facts. *In Re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).
89. *In Matter of Rose*, SB 03-0003-D (2003), the lawyer was convicted of theft, a class 3 felony. The lawyer had been appointed trustee for her brother's trust funds. She and her husband misappropriated approximately \$103,000 of her brother's funds. The lawyer admitted to violations of ER 8.4, Rule 51(a), and Rule 57. Eight mitigating factors outweighed one aggravating factor. Although disbarment was warranted, the lawyer received a three-year suspension and a one-year term of probation.
90. *In Matter of Hegberg*, SB-02-0089-D (2006), the lawyer was disbarred for violations of ERs 1.4, 1.5, 1.15, 1.16, 8.1(b), 8.4, and Rule 51(h) and (j). The lawyer misappropriated client funds in excess of \$150,000; he fraudulently drew checks in an approximate amount of \$100,000 for which insufficient funds existed; and he failed to respond to the State Bar's investigation. The misappropriated funds were used for gambling purposes. In aggravation, the following were found: dishonest or selfish motive; pattern of misconduct; multiple offenses (four counts); bad-faith obstruction of disciplinary proceeding;

refusal to acknowledge wrongful conduct; and illegal conduct. In mitigation, absence of a prior disciplinary record and inexperience in the practice of law were found.

91. *In Matter of Worischek*, SB-06-0139-D (2006), the lawyer was voluntarily disbarred for converting approximately \$225,000 in the clients trust for his personal use.

RECOMMENDATION

92. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice, as well as deter future misconduct and instill public confidence in the Bar's integrity. *In Re Fioramonti*, 176 Ariz.182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985) and *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994)
93. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Associations *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases *Matter of Bowen*, 178 Ariz 283, 872 P.2d 1235 (1994).
94. A review of the record shows that Dr. J.C Van Doren, Psychiatrist, treated the Respondent and Dr. Van Doren indicates in his April 12, 2006, report that Respondent suffered a bout of "severe depression" that started over two years previously. (See Stipulation Re: Previously Sealed Documents, filed December 28, 2007.) According to Dr. Van Doren, the depression gradually eroded the Respondent's drive and perspective. He became completely incapacitated,

became withdrawn and eventually left his position as an attorney. A review of the Doctor's progress notes indicates that with the assistance of medication, the Respondent has made progress towards accepting that he suffers from depression and is dealing with it more successfully.

95. Based upon a weighing of the circumstances of this case, the aggravating and mitigating factors, and considering the proportionality cases cited, the recommended suspension of the Respondent for a period of three years appears to be an appropriate sanction. Respondent's suspension will be retroactive to April 14, 2006, the date of his Interim Suspension.

96. Upon reinstatement, Respondent will be placed on two years of probation under the following terms and conditions:

- A) The probation period will begin to run at the time of the reinstatement and will include two years from the date that all parties have signed the probation contract.
- B) Respondent shall contact the Director of the State Bar's Law Office Management Assistance Program (LOMAP) within 30 days of the date of reinstatement. Respondent shall submit to a LOMAP audit of his office's calendaring and client communication procedures. The Director of LOMAP shall develop a probation contract. Respondent shall also undergo an assessment in connection with the State Bar's Member Assistance Program (MAP), and any recommendations resulting from such assessment shall also be incorporated in the probation contract.

- C) As part of Respondent's probation, Respondent agrees to attend the Trust Account Ethics Enhancement Program ("TAEEP"), enter into a Trust Account Program ("TAP") contract and participate in the programs during the period of probation
- D) Respondent agrees to pay all costs associated with probation, including costs of his participation in LOMAP, MAP, TAEEP, and Tap.
- E) Respondent shall pay restitution to Dr. Wiener in the amount of \$9,500.
- F) Respondent shall pay all costs and expenses incurred by the State Bar in this disciplinary proceeding.
- G) Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other Rules of the Arizona Supreme Court.
- 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 with the imposing entity, pursuant to Rule 60(a)(5), Ariz R.Sup.Ct.. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practicable 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 appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by clear and convincing evidence.

DATED this 13th day of April, 2008,

Hon. H. Jeffrey Coker
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 13th day of April, 2008.

Copy of the foregoing mailed,
this 13th day of April, 2008, to:

Michael R. Walker
Respondent's Counsel
Schian Walker, P.L.C.
3550 North Central, Suite 1700
Phoenix, AZ 85012-2115

Patricia J. Ramirez
Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: 