

**FILED**

AUG 05 2009

DISCIPLINARY COMMISSION OF THE  
SUPREME COURT OF ARIZONA

**BEFORE THE DISCIPLINARY COMMISSION  
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
**DONALD W. HUDSPETH,** )  
**Bar No. 012198** )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

No. 08-0342

**DISCIPLINARY COMMISSION  
REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on July 11, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Amended Hearing Officer's Report filed June 25, 2009, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent ("Joint Memorandum") providing for a 30-day suspension, one year of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), and costs including costs within 30-days of the date of the Supreme Court's final Judgment and Order.

**Decision**

Having found no facts clearly erroneous, the eight<sup>1</sup> members of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for a 30-day suspension, one

<sup>1</sup> Commissioner Flores did not participate in these proceedings.

1 year of probation (LOMAP), and costs of these disciplinary proceedings including any  
2 costs incurred by the Disciplinary Clerk's office within 30-days.<sup>2</sup>

### 3 Terms of Probation

4 1. Within thirty days after reinstatement, Respondent shall contact the director  
5 of LOMAP at (602) 340-7332. Respondent shall submit to a LOMAP examination of his  
6 office's procedures, including, but not limited to, compliance with ER 1.15(a) and (b),  
7 Rules 43(a) and (d), and Rule 44(a) and (b). The director of LOMAP shall develop  
8 "Terms of Conditions of Probation", and those terms shall be incorporated herein by  
9 reference. The probation period will begin to run at the time of Respondent's  
10 reinstatement and will conclude one year from the date that Respondent has signed the  
11 "Terms and Conditions of Probation". Respondent shall be responsible for any costs  
12 associated with LOMAP.

13 2. Respondent shall refrain from engaging in any conduct that would violate  
14 the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

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

25  
26 <sup>2</sup> The Hearing Officer's Report is attached as Exhibit A.

Arizona to prove noncompliance by a preponderance of the evidence.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of August, 2009.

  
Jeffrey Messing, Chair  
Disciplinary Commission

Original filed with the Disciplinary Clerk  
this 5<sup>th</sup> day of August, 2009.

Copy of the foregoing mailed  
this 5<sup>th</sup> day of August, 2009, to:

Neal C. Taylor  
Hearing Officer 8I  
*Burns, Nickerson & Taylor*  
3033 North Central, Suite 555  
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J. Scott Rhodes  
Respondent's Counsel  
*Jennings, Strouss & Salmon, P.L.C.*  
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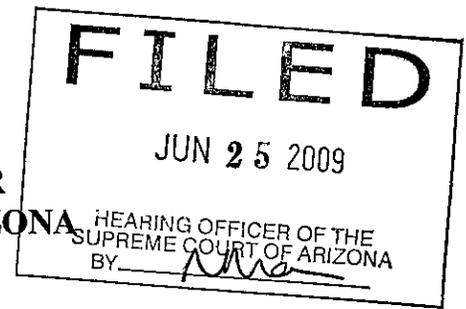
Edward W. Parker  
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by:  \_\_\_\_\_

/cs

# **EXHIBIT**

**A**



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

IN THE MATTER OF A MEMBER )  
OF THE STATE BAR OF ARIZONA, )  
)  
**DONALD W. HUDSPETH,** )  
**Bar No. 012198** )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

No. 08-0342

**AMENDED  
HEARING OFFICER'S REPORT**

**Procedural History**

1. Probable cause was found on this matter on October 1, 2008. A Complaint was filed on November 4, 2008. Respondent was served. Respondent filed an Answer through counsel, J. Scott Rhodes, on December 4, 2008.
2. On February 6, 2009, the parties submitted a Tender of Admissions and Agreement for Discipline by Consent (hereafter, "Tender").
3. On March 13, 2009, a hearing was held on the Tender of Admissions and Agreement for Discipline by Consent. *Reporters Transcript of Proceedings for March 13, 2009* (hereafter, "RTP").<sup>1</sup>

**Findings of Fact**

4. 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 21, 1988.

<sup>1</sup> Page numbers are to the left of the colon; line numbers are to the right of the colon.

5. On February 25, 2008, the State Bar received notice from Bank of America noting that on February 19, 2008 two insufficient funds checks had been presented for payment on Respondent's trust account. This resulted in a negative balance of \$1,943.86.

6. On March 4, 2008, the State Bar received another notice concerning an insufficient funds check presented on February 25, 2008 from Respondent's trust account. This resulted in a negative balance of \$2,494.86.

7. The State Bar asked Respondent to explain the overdrafts, addressing Rule 42, ER 1.15 and Rules 43 & 44, Ariz.R.Sup.Ct., and to provide documentation in support of the explanation, including his relevant trust account records.

8. By letters dated April 4, May 8, May 29, and June 26, 2008, the Bar requested further information; Respondent provided the information requested in response to each letter.

9. The month of July, 2007 was the first month following the State Bar's earlier review of Respondent's trust account records as part of matter #06-1031.

10. As a result of the Bar's investigation in the earlier matter, #06-1301, Respondent agreed to attend the Bar's Trust Account Ethics Enhancement program ("TAEEP").

11. Respondent attended TAEEP on May 1, 2007.

12. Because of the overdrafts, Respondent hired Susannah Sabnekar, C.P.A., to perform a forensic audit of the Trust Account of the Law Offices of Donald W.

Hudspeth P.C. Respondent requested that the audit use a date range of July 1, 2007 through February 29, 2008.

13. The C.P.A.'s report, dated April 30, 2008, concluded that \$44,176.37 was required to be deposited into the trust account. To resolve the deficiencies as of February 29, 2008.

14. The C.P.A. identified three causes for the trust account deficiencies as of February 2008.

15. The first identified cause was that the firm's credit card merchant bank furnished a device that allowed selection between the operating account and the trust account for depositing the proceeds of credit card transactions; however, Respondent was unaware that American Express transactions do not have a dual-account option, as a result of which all American Express transactions, totaling \$26,500, were being deposited only into the operating account.

16. The second identified cause was that Respondent failed to maintain sufficient funds in the trust account to cover merchant fees, which totaled \$1,256 for the period reviewed.

17. As the third identified cause, there were a small number of non-material errors resulting from typographical errors. None of these amounted to more than a few cents.

18. Respondent's explanation for the remainder of the trust account shortage, totaling \$16,420.37, is that checks were issued from the trust account that were not

recorded within the firm's time and billing system; as a result, when requesting a disbursement, an attorney could be led to believe that the client had more funds in trust than the client actually had.

19. By letter dated May 5, 2008, Respondent, through counsel, notified the Bar that he had deposited the sum of \$44,176.37 into his trust account, in accordance with the C.P.A.'s instructions.

20. All acts and conduct complained of herein occurred between July 1, 2007 and February 29, 2008.

21. This Hearing Officer finds:

A. That Respondent failed to maintain and preserve required record related to Respondent's trust account, including maintaining an administrative ledger as a matter of course.

B. That Respondent failed to safekeep client property.

C. That Respondent failed to deposit into the trust account unearned funds, funds to which Respondent had no claim, or funds belonging in part to the client and in part to Respondent or his firm.

D. That Respondent failed to deposit Respondent's own funds into the trust account sufficient to pay bank service charges.

E. That Respondent converted client funds and commingled personal funds with client funds in his bank accounts.

F. That Respondent used, endangered, or encumbered money held in trust for a client or third person without permission of the owner.

G. That Respondent failed to make or cause to be made monthly three-way reconciliations of Respondent's trust account.

H. That Respondent failed to properly supervise employees and other persons assisting Respondent in the performance of his duties in managing his trust account.

I. That Respondent failed to have adequate internal controls for Respondent's trust account.

J. That Respondent failed to record all transactions promptly and completely.

K. Respondent's prior cooperation with the State Bar and his good-faith belief that all trust account management issues had been resolved through reliance on his prior accounting firm. Respondent has since terminated from this prior firm;

L. The extremely rapid growth of Respondent's firm during the relevant time period, caused Respondent's practice to evolve from that of a sole practitioner (which he had been for many years) to that of a managing attorney of a firm with multiple lawyers. Said growth required Respondent to manage his practice, manage new attorneys and staff, expand the physical space of the firm, and manage firm business operations. As a result of said growth, Respondent relied on others to assist with the trust account management.

M. That upon discovering the matters at issue in the Complaint, Respondent immediately engaged multiple professionals to assist with the trust account management. These professionals included a forensic accountant, Susannah Sabnekar, *RTP*, 5:19-23; Lynda Shely for staff training, *RTP*, 6:2-7, 11:8-16, and another accountant consultant, *RTP* 15:14-19.

N. That Respondent fully and completely cooperated with the State Bar.

O. That Respondent expressed true remorse for his actions. *RTP*, 21:8 – 22:4

### **Conclusions of Law**

22. Respondent's conduct violated Rule 42, Ariz.R.Sup.Ct., specifically ER 1.15(a) & (b), and Rules 43(a) & (d) and 44(a) & (b).

### **ABA Standards**

23. In determining the appropriate sanctions, Respondent and the State Bar considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards" or "Standard \_\_\_\_\_") and applicable case law. The ABA *Standards for Imposing Lawyer Sanctions* are designed to promote consistency in the imposition of sanctions by identifying relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. *Standard* 1.3, Commentary. The court and commission consider the

*Standards* a suitable guideline. *In re Peasley*, 427 Ariz. Adv. Rep. 23, 90 P.3d 764, §§ 23, 33 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

24. The ABA *Standards* list the following factors to consider in imposing the appropriate sanction: (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 or mitigating circumstances. ABA *Standard* 3.0.

25. **The Duty Violated.** The Respondent's conducted in this matter violated his duty to his clients.

26. **The Lawyer's Mental State.** The *Standards* defines "knowledge" as the "conscious awareness of the nature or attendant circumstance of the conduct but without the conscious objective or purpose to accomplish a particular result." Considering that the Respondent had recently attended the State Bar's Trust Accounts Ethic Enhancement Program. (May 1, 2007) the Respondent's mental state in this matter is "knowing".

27. **Actual or Potential Injury.** This Hearing Officer finds that there was no actual injury. However there was a substantial risk of injury to Respondent's clients. Accordingly, potential injury was present.

### **Applicable Standards**

28. The applicable *Standard* is *Standard* 4.12. *Standard* 4.12 provides, "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."

29. Having determined the presumptive sanction is suspension, the applicable aggravating and mitigating circumstances are then considered.

### **Aggravating Factors**

30. This Hearing Officer finds the following aggravating factors:

*Standard 9.22(d) Multiple Offenses.* Respondent violated multiple ethical rules and duties in this matter on multiple occasions.

*Standard 9.22(i) Substantial Experience in the Practice of Law.*

Respondent has been an attorney in Arizona since 1988.

### **Mitigating Factors**

31. This Hearing Officer finds

32. the following mitigating factors:

*Standard 9.32(a) Absence of a Prior Disciplinary Record.* Respondent has no prior formal discipline. However, the weight of this factor is somewhat diminished by his prior informal history in State Bar case #06-1031.

*Standard 9.32 (b) Absences of a Dishonest or Selfish Motive.* The parties agree and this Hearing Officer finds that Respondent did not have a dishonest or selfish motive. This factor was further emphasized through the totality of Respondent's testimony at the hearing on March 13, 2009.

*Standard 9.32 (d) Timely of Good Faith Effort to Rectify Consequences of Misconduct.* Respondent took immediate action to notify the State Bar. Respondent

also expended considerable funds to hire several professionals to correct the problems in his trust account.

*Standard 9.32(e) Full and Free Disclosure and Cooperative Attitude Towards the Proceedings.* Respondent was cooperative in both the screening and formal proceeding.

*Standard 9.32 (l) Remorse.* Respondent's testimony on March 13, 2009 demonstrated Respondent's sincere and genuine remorse regarding this matter.

### **Proportionality Review**

32. Sanctions against lawyers must have internal consistency to maintain an effective and enforceable system; therefore, the court looks to cases that are factually similar to the case before it. *In re Pappas*, 159 Ariz. 516, 526, 768 P.2d 1161, 1171, (1988). However, the Supreme Court has noted that the concept of proportionality review is an imperfect process because no two cases "are ever alike". *Matter of Owens*, 182 Ariz. 121, 127, 893 P.2d 1284, 1290 (1995).

33. In *In re McDonald*, 8/13/08, D.C. No. 07-1812, SB-08-0109-D, the attorney used funds held in trust to pay his firm's operating costs and payroll. He further failed to supervise employees and failed to maintain and preserve complete trust account records pursuant to minimum standards, in violation of ER 1.15 and Rules 43 and 44. Mr. McDonald accepted a censure and one year of Probation (TAP/TAEEP). In aggravation: 9.22(i); In mitigation: 9.32(a) and (d). Mental state: negligent. Injury not discussed.

34. In *In Steven Allen*, 8/30/01, DC No. 99-1247, SB-01-112-D, the attorney failed to maintain client ledger cards; failed to sufficiently identify deposited funds; failed to keep client funds separate from his own by depositing earned fees into his trust account and mixing those with tax payments, as well as personal funds; failed to identify clients associated with payments to himself; and failed to maintain adequate funds in his trust account related to it being overdrawn, in violation of ER 1.15 and Rules 43 & 44. Mr. Allen accepted a 30-day suspension plus probation for one year (MAP/LOMAP). In aggravation: 9.22(a), (c) & (i); in mitigation: 9.32(b), (e) & (1). No actual client harm. Mental state was not mentioned.

35. In *In re Finn*, 9/26/00, DC No. 97-1248, Mr. Finn commingled his own funds with his clients' funds for a period of years; placed client funds at risk based on his failure to comply with mandated trust account guidelines; failed to reference client files; failed to maintain client ledgers appropriately; and did not conduct a monthly reconciliation. Finn received a 30-day suspension plus a 2-year probation (LOMAP).

### **Recommendation**

36. The objective of lawyer discipline is to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

37. This Hearing Officer has considered the facts of this case, the duty violated, the aggravating and mitigating factors as well as proportionality cases. This

officer agrees that the stipulated discipline contained in the Tender in this case is appropriate. Therefore, it is recommended that:

1. Respondent shall receive a suspension from the practice of law for a period of 30 days beginning 30 days after the entry of judgment and order of the Supreme Court;

2. Respondent shall upon his reinstatement, be placed on probation for a period of one year under the following terms and conditions:

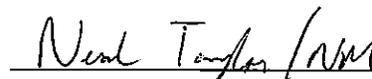
a) Within thirty days after reinstatement, Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) at (602) 340-7332. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, compliance with ER 1.15(a) & (b), and Rules 43(a) & (d) and 44(a) & (b). The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be incorporated herein by reference. The probation period will begin to run at the time of Respondent's reinstatement and will conclude one year from the date that Respondent has signed the "Terms and Condition of Probation." Respondent shall be responsible for any costs associated with LOMAP.

b) Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

c) 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 an appropriate sanction. 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 a preponderance of the evidence.

3. Respondent shall pay all costs and expenses incurred by the State Bar within thirty (30) days of entry of judgment and order. Respondent shall also pay all costs incurred by the disciplinary commission, the Supreme Court and the Disciplinary Clerk's office in this matter.

DATED this 25<sup>th</sup> day of June, 2009.



Neal C. Taylor  
*Hearing Officer 8I*

