

FILED

NOV 15 2004

**BEFORE THE DISCIPLINARY COMMISSION OF THE
OF THE SUPREME COURT OF ARIZONA**
DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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IN THE MATTER OF A SUSPENDED MEMBER)	Nos. 02-1698, 02-1765, 02-1863
OF THE STATE BAR OF ARIZONA,)	02-1950, 02-1985, 02-2069
)	02-2084, 02-2094, 02-2131
)	02 2171, 02-2172, 02-2193
)	02-2235, 02-2236, 02-2243
)	02-2255, 02-2266, 02-2268
)	02-2271, 02-2308, 02-2324
KENNETH J. WHITEHEAD,)	02-2357, 02-2388, 02-2403
Bar No. 011353)	02-2427, 02-2475, 02-2476
)	02-2482, 03-0047, 03-0063
)	03-0078, 03-0101, 03-0105
)	03-0169, 03-0182, 03-0280
)	03-0325, 03-0411, 03-0421
)	03-0459, 03-0467, 03-0539
)	03-0584, 03-0614, 03-0719
)	03-0890, 03-1365
))
)	DISCIPLINARY COMMISSION
RESPONDENT.)	REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on October 16, 2004, pursuant to Rule 58(e), Ariz. R. S. Ct., for consideration of the Hearing Officer's Report filed August 19, 2004, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent (Agreement) and Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memorandum) providing for a four year suspension with terms and conditions, two years of probation upon reinstatement with terms to be determined at the time of reinstatement, restitution, and costs of these disciplinary proceedings. The Commission requested oral argument. Respondent and counsel for the State Bar were present.

Decision

1 The Commission's standard of review is set forth in Rule 58(b), which states that
2 the Commission reviews questions of law *de novo*. In reviewing findings of fact made by
3 a hearing officer, the Commission applies a clearly erroneous standard. Mixed findings of
4 fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347
5 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

6 Therefore, having found no findings of fact clearly erroneous, the nine members of
7 the Commission unanimously recommend adopting and incorporating by reference the
8 Hearing Officer's findings of fact, conclusions of law, and recommendation for a four year
9 suspension with terms and conditions,¹ two years of probation upon reinstatement, with
10 terms to be determined at the time of reinstatement, restitution, and costs of these
11 disciplinary proceedings. Restitution is as follows:

Restitution

12 Count Three (File No. 02-1863): \$2,000.00 to Paul Murphy and/or Yvonee Benavidez

13 Count Four (File No. 02-1950): \$6,500.00 to Tomas Gutierrez

14 Count Five (File No. 02-1985): \$ 1,002.00 to Angelo Hainsworth

15 Count Six (File No. 02-2069): \$6,000.00 to Sean Rogers

16 Count Seven (File No. 02-2084): \$7,000.00 to Dian Kuhn

17 Count Eight (File No. 02-2094): \$7,000.00 to the Voisins

18 Count Ten (File No. 02-2171): \$6,500.00 to Michelle Sanford

19 Count Eleven (File No. 2172): \$1,036.20 to Patricia Carignan

20 Count Twelve (File No. 02-2193): \$3,500.00 to Joaquin Sanchez

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¹ Respondent's suspension shall be effective the date of the final Judgment and Order. Respondent shall contact LOMAP within ten days of the final Judgment and Order and enter into a LOMAP contract for the limited purpose of monitoring retention and return of client files.

1 Count Thirteen (File No. 02-2235): \$5,950.00 to Malikah Shakir.
2 Count Sixteen (File No. 02-2255): \$14,850.00 to Regina Mourning-Saiz.
3 Count Seventeen (File No. 02-2266): \$2,300.00² to John Klusek.
4 Count Nineteen (File No. 02-2271): \$1,000.00 to Bret Womach.
5 Count Twenty (File No. 02-2308): \$1,000.00 to James McNamara.
6 Count Twenty-One (File No. 02-2324): \$3,300.00 to Jacquelin Pepper.
7 Count Twenty-Two (File No. 02-2357): \$4,000.00 to Daniel Renteria.
8 Count Twenty-Three (File No. 02-2388): \$4,500.00 to Margaret Dybeck.
9 Count Twenty-Four (File No. 02-2403): \$2,000.00 to Maria Tena.
10 Count Twenty-Eight (File No. 02-2482): \$5,731.00 to Selena Moyer.
11 Count Thirty (File No. 03-0063): \$4,500.00 to Hanh Le.
12 Count Thirty-One (File No. 03-0078): \$4,500.00 to Randy Grommet.
13 Count Thirty-Two (File No. 03-0101): \$2,000.00 to Coy & Willie Payne.
14 Count Thirty-Seven (File No. 03-0325): \$3,500.00 to Johnny Amaro.
15 Count Thirty-Nine (File No. 03-0421): \$2,000.00 to Elizabeth McGill.
16 Count Forty-Two (File No. 03-0539): \$3,500.00 to Maria Diez.
17 Count Forty-Four (File No. 03-0614): \$3,295.60 to Phillip Mahoney.
18 Count Forty-Six (File No. 03-0890): \$6,000.00 to Deborah Shoemaker.
19 Count Forty-Seven (File No. 03-1365): \$7,000.00 to Deanna Sanpetrino.

22 **TOTAL RESTITUTION DUE: \$121,464.80**

23 Although a copy of the flat fee agreements is not part of the record, the parties
24 advised at oral argument that Whitehead and Associates used a standard written fee
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² At oral argument, the parties stipulated to this corrected amount. See Commission transcript, p. 12.

1 agreement signed by a member of the firm and the clients, including the separate initialing
2 of additional paragraphs. In addition, a paragraph addressing the termination of
3 representation and legal fees was also included in the fee agreements which read: "In the
4 event that our representation is ended prior to completion of the scope of services, whether
5 the client terminates the firm's representation or whether the firm withdraws as attorney of
6 record, the client's file will be closed and the legal fees will be reviewed by Kenneth J.
7 Whitehead. The determination of the final legal fees to be charged, up to, but not more
8 than, the amount of the flat fee shall be made after analyzing various factors including, but
9 not limited to, the length of time spent on the case, the number of hours spent by attorneys
10 and legal assistants on the case. The final fees charged may be less than or equal to the
11 total flat fee, even though the scope of the services has not been completed." See
12 Commission transcript, pp. 6-7.

13 In Counts 14, 15, 18, 27, 36, 38, 40, 43 and 45, bar counsel stated that the files and
14 billing statements were reviewed, and it was determined that no amount of restitution was
15 due as substantial work had been performed in those matters. Clients were informed of the
16 decisions concerning restitution and if they still felt they were due a refund, bar counsel
17 explained that they could pursue Respondent in another forum. *Id.*, p. 9.

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19 RESPECTFULLY SUBMITTED this 15th day of November, 2004.

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23 Craig B. Mehrens, Chair
Disciplinary Commission

24 Original filed with the Disciplinary Clerk
this 15th day of November, 2004.

25 Copy of the foregoing mailed
26 this 15th day of November, 2004, to:

1 Mark S. Sifferman
2 Hearing Officer 9J
3 3101 N. Central Ave., Suite 690
4 Phoenix, AZ 85012-2639

5
6 Kenneth J. Whitehead
7 Respondent
8 P.O. Box 7458
9 Phoenix, AZ 85011-7458

10 and

11 Kenneth J. Whitehead
12 Respondent
13 6070 N. 85th Ave.
14 Glendale, AZ 85305

15 Amy K. Rehm
16 Bar Counsel
17 State Bar of Arizona
18 111 West Monroe, Suite 1800
19 Phoenix, AZ 85003-1742

20 by: K. Weigand

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