

FILED

SEP 19 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

1
2
3
4
5 IN THE MATTER OF A MEMBER) No. 03-2295
6 OF THE STATE BAR OF ARIZONA,)
7)
8 **ANTONIO D. BUSTAMANTE,**)
9 **Bar No. 007256**)
10)
11) **HEARING OFFICER'S REPORT**
12)
13)
14) **RESPONDENT.**)
15)

PROCEDURAL HISTORY

16
17
18
19
20
21
22
23
24
25

A Probable Cause Order was filed on December 14, 2004. A one-count Complaint was filed on and served by mail on May 16, 2005. Respondent filed an Answer on June 10, 2005. A settlement conference was set for August 1, 2005; however, the parties reached a tentative agreement prior to that date and waived their right to the settlement conference. A 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 Memo) were filed on August 17, 2005. A telephonic hearing on the Tender and Joint Memo was held on August 24, 2005.

1 **FINDINGS OF FACT**

2 1. At all times relevant, Respondent was an attorney licensed to practice
3 law in the State of Arizona, having been admitted to practice in Arizona on May
4 15, 1982.

5
6 2. On December 26, 2003, the State Bar of Arizona received an
7 insufficient funds notice on Respondent's Bank One Arizona Bar Foundation
8 client trust account.

9
10 3. The December 26, 2003 bank notice indicated that on December 23,
11 2003, check number 5235, in the amount of \$300.00, attempted to pay against
12 the trust account when the balance in the account was \$225.50.

13
14 4. Bank One returned the check and charged Respondent a \$28.00
15 overdraft fee, thereby leaving Respondent's trust account with a total balance of
16 \$197.50.

17
18 5. On January 5, 2004, the Records Examiner for the State Bar of Arizona
19 ("Records Examiner") sent Respondent a copy of the insufficient funds notice
20 with a letter requesting an explanation regarding the overdraft on his client trust
21 account.

22
23 6. By letter dated January 23, 2004, Respondent requested an extension to
24 respond, which was granted by the Records Examiner.
25

1 7. Respondent then retained counsel, Stephen Montoya, who requested an
2 additional extension to provide a response.

3 8. The Records Examiner granted a second extension and requested that
4 Respondent provide his response to the inquiry by March 5, 2004.
5

6 9. Respondent submitted his response through counsel by facsimile on
7 March 5, 2004.
8

9 10. Respondent stated in his response that the overdraft in question was a
10 result of a bookkeeping error made on his handwritten trust account ledger.

11 11. Respondent stated in his response that a \$500.00 deposit had
12 erroneously been credited to the account twice. The \$500.00 deposit was an
13 advanced payment for case costs received from Respondent's client Guillermo
14 Cenicerros ("Mr. Cenicerros").
15

16 12. Respondent stated that he wrote check number 5235 to himself as
17 reimbursement for costs advanced to Mr. Cenicerros.
18

19 13. Respondent stated that when he wrote the check to himself, he thought
20 there was more money in the account than was actually present, because
21 Respondent had inadvertently credited the \$500 deposit on July 31, 2003 to the
22 trust account twice.
23

24 14. Respondent stated that he had hired a certified public accountant,
25 Cecilia Francis, to input all of the handwritten records into QuickBooks and to

1 review the trust account on a monthly basis to ensure that the problem would not
2 reoccur.

3
4 15. By letter dated March 8, 2004, the Records Examiner requested
5 additional information including the following: copies of Respondent's client
6 trust account bank statements covering the period of November 1, 2003, through
7 December 31, 2003; copies of corresponding cancelled checks; copies of
8 duplicate deposit slips; and copies of the individual client ledgers.
9

10 16. On March 30, 2004, Respondent provided the requested information
11 with the exception of the individual client ledgers. In his letter, Respondent
12 indicated that he did not maintain individual client ledgers in November 2003 or
13 December 2003. Respondent did, however maintain a master ledger referencing
14 each client's deposits and disbursements.
15

16 17. Review of the records submitted by Respondent confirmed that the
17 dual credit entry that caused the overdraft occurred on July 31, 2003.
18

19 18. Review of the records submitted by Respondent also revealed that
20 check number 5232 in the amount of \$500 was paid to a private investigator,
21 Robert Peter Salazar, on behalf of Mr. Ceniceros at a time when Mr. Ceniceros
22 individual client ledger lacked sufficient funds to cover the check.
23

24 19. By letter dated April 5, 2004, the Records Examiner requested that
25 Respondent submit the following: copies of Respondent's client trust account

1 bank statements from November 1, 2002, through October 31, 2003; copies of
2 the corresponding cancelled checks; copies of duplicate deposit slips; and copies
3 of individual client ledgers.
4

5 20. Through counsel, Respondent submitted the requested records on June
6 14, 2004.

7 21. Upon receipt of the records, the Records Examiner reconstructed a
8 general account ledger and individual client ledgers.
9

10 22. On June 18, 2004, the Records Examiner sent Respondent a copy of
11 the reconstructed general ledger and individual client ledgers and requested
12 explanations and documentation for several of the balances. The Records
13 Examiner requested that Respondent explain a deposit of personal funds into the
14 client trust account on August 4, 2003, and what appeared to be the subsequent
15 withdrawal of a portion of those funds in December 2003, with check number
16 5235.
17

18 23. On August 6, 2004, Respondent responded through counsel and
19 explained that the deposit of personal funds was made to cover bank charges on
20 the account and that the subsequent withdrawal with check number 5235 was to
21 reimburse Respondent for costs advanced to his client, Mr. Cenicerros.
22

23 24. On September 7, 2004, the Records Examiner sent a request for
24 additional information to Respondent's counsel. Specifically the letter requested
25

1 a) an explanation regarding the note written on check number 5235 that reads
2 "ADB's own funds-draw"; b) an accounting of the costs advanced to Mr.
3 Cenicerros; and c) identification of the account from which the costs were
4 advanced. The letter also requested documentation to support the respective
5 explanations and documentation verifying that the negative \$459.55 balance in
6 Mr. Cenicerros' individual client ledger had been corrected.
7

8
9 25. On October 20, 2004, the State Bar received the records and
10 explanations requested on September 7, 2004.

11 CONDITIONAL ADMISSIONS

12 Respondent conditionally admits that his conduct, as set forth above,
13 violated the following Rules of Professional Conduct and the Rules of the
14 Supreme Court:
15

16 1. By continuing to use trust account funds to pay the costs of a client with
17 an insufficient balance and thereby failing to properly safeguard client funds,
18 therefore Respondent violated ER 1.15(a), Rule 42, Ariz.R.S.Ct., and Rule 44(b),
19 Ariz.R.S.Ct. Specifically, on November 21, 2003, Respondent disbursed check
20 number 5232 in the amount of \$500.00 to Robert Peter Salazar for Respondent's
21 client, Guillermo Cenicerros. At that time Mr. Cenicerros' client balance in the
22 trust account was insufficient to cover the \$500.00 check. Although the check
23 cleared, the disbursement caused Mr. Cenicerros' individual client ledger to
24
25

1 become negative, which resulted in the use of other trust account funds for the
2 benefit of Mr. Cenicerros.

3
4 2. By failing to maintain complete trust account records for a period of five
5 years, Respondent violated ER 1.15(a), Rule 42 Ariz.R.S.Ct., and Rules 43(a),
6 43(d)(1)(D) and (E), and 43(d)(2)(C) and (E), Ariz.R.S.Ct., and Rule 44(b)(3)
7 Ariz.R.S.Ct. Specifically, Respondent failed to maintain individual client ledgers
8 or the equivalent and failed to maintain a ledger for administrative funds held in
9 the trust account.

10
11 3. By failing to exercise due professional care in the maintenance of his
12 client trust account, Respondent violated Rule 43(d)(1)(A) Ariz.R.S.Ct.
13 Respondent failed to perform monthly three-way reconciliations in violation of
14 Rule 43(d)(2)(D) Ariz.R.S.Ct., and failed to maintain proper internal controls
15 within his office to adequately safeguard funds on deposit in the client trust
16 account in violation of Rule 43(d)(1)(C) Ariz.R.S.Ct.

17
18
19 In exchange for the admissions set forth above, the State Bar conditionally
20 dismisses alleged violations as follows:

21
22 1. By failing to keep his personal funds separate from client funds on
23 deposit in the client trust account, Respondent violated ER 1.15(b), Rule 42
24 Ariz.R.S.Ct., and Rules 43(a) and 44(a), Ariz.R.S.Ct. Specifically, on August 4,
25 2003, Respondent deposited \$375.22 into the account purportedly to cover

1 “administrative fees,” then, on December 23, 2003, by check numbered 5235,
2 disbursed \$300.00 to himself noting on the check “for ‘ADB’s own funds-
3 draw.’”
4

5 2. By making a misrepresentation to the State Bar in connection with the
6 trust account investigation, Respondent violated ERs 8.1 and 8.4(c), Rule 42,
7 Ariz.R.S.Ct. Specifically Respondent stated that he disbursed check number
8 5235 to himself for reimbursement of costs advanced to Mr. Ceniceros, when the
9 note on check 5235 demonstrates that those funds were drawn for Respondent’s
10 own funds.
11

12 ABA STANDARDS

13
14 The *ABA Standards* list the following factors to consider in imposing the
15 appropriate sanction: (1) the duty violated, (2) the lawyer’s mental state, (3) the
16 actual or potential injury caused by the lawyer’s misconduct, and (4) the
17 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*
18

19 The parties indicated that *Standard 4.1* is the most applicable in this matter.
20 A review of *ABA Standard 4.0* (Violations of Duties Owed to Clients) indicates
21 that censure is the presumptive sanction for Respondent’s misconduct. *Standard*
22 *4.13* (Failure to Preserve the Client’s Property) specifically provides:
23

24 Reprimand (censure in Arizona) is generally appropriate
25 when a lawyer is negligent in dealing with client property
and causes injury or potential injury to a client.

1 Respondent violated his duties to clients by failing to properly safeguard
2 client funds and by failing to exercise due professional care in the maintenance of
3 his client trust account.
4

5 The parties agree that Respondent's mental state was that of negligence.
6 The accounting errors, the failure to maintain certain records in the manner
7 required by the applicable Rules of the Arizona Supreme Court, and the
8 handwritten method of bookkeeping all suggest that Respondent was making
9 good-faith efforts, but that those efforts were deficient and therefore in violation
10 of the high standards set forth in the rules of professional conduct.
11

12 The parties agree that due to the accounting error and failure to reconcile
13 the account, there was a potential for injury to Respondent clients who had funds
14 on deposit in Respondent's client trust account. Despite a negative balance on an
15 individual client ledger, the trust account itself never went into overdraft because
16 the bank refused payment on the insufficient funds check. Moreover, the
17 insufficient funds check was made payable to Respondent to reimburse for
18 advanced costs, so no client or vendor was delayed in receiving payment.
19 Therefore, the parties agree that Respondent's clients suffered no actual injury.
20
21

22 **AGGRAVATING AND MITIGATING FACTORS**
23

24 This Hearing Officer then considered aggravating and mitigating factors in
25 this case, pursuant to *Standards* 9.22 and 9.32, respectively.

1 This Hearing Officer agrees with the parties that there are two applicable
2 aggravating factors in this matter:

- 3 (a) prior disciplinary offenses;¹ and,
4
5 (i) substantial experience in the practice of law.²

6 This Hearing Officer agrees with the parties that five factors are present in
7 mitigation:

- 8 (b) absence of a dishonest or selfish motive;
9
10 (d) timely good faith effort to make restitution or to rectify consequences
11 of misconduct;
12
13 (g) character or reputation;
14
15 (l) remorse; and
16
17 (m) remoteness of prior offenses.

18 PROPORTIONALITY REVIEW

19 To have an effective system of professional sanctions, there must be
20 internal consistency, and it is appropriate to examine sanctions imposed in cases
21 that are factually similar. Peasley, supra, at ¶ 33, 90 P.3d at 772. However, the
22 discipline in each case must be tailored to the individual case, as neither
23 perfection nor absolute uniformity can be achieved. Id. at ¶ 61, 90 P.3d at 778,

24
25 ¹ See Exhibit A to the Joint Memo.

² Respondent was admitted in 1982.

1 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135
2 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

3
4 Cases set forth below demonstrate that both censure and informal
5 reprimand are appropriate disciplinary responses within the range of possible
6 sanctions. However, the two cases resulting in censure involved more trust
7 account violations, including commingling of personal funds and multiple
8 overdrafts, than the violations in Respondent's case. And despite several
9 mitigating factors in each of those two cases, Respondent's mitigation coupled
10 with fewer violations justifies a downward departure from the presumptive
11 sanction of censure to an informal reprimand. The third case provided is a good
12 example of facts and mitigation substantially similar to those set forth in
13 Respondent's case.
14
15

16 In the case, *In re Glanville*, Supreme Court No. SB-04-0007-D,
17 Disciplinary Commission No. 00-1727 (2004), the Respondent, pursuant to an
18 agreement for discipline by consent, was censured and was placed on probation
19 for a period of one year and as a term and condition of probation was ordered to
20 participate in LOMAP. The misconduct conditionally admitted included findings
21 that Glanville violated ER 1.15, Rule 42, Ariz.R.S.Ct., and Rules 43 and 44.
22 Glanville's trust account became overdrawn compromising client funds that
23
24
25

1 should have been contained therein. Glanville commingled earned funds and
2 personal funds in his trust account.

3
4 The facts in Respondent's case now before the hearing officer are
5 distinguishable from those set forth in Glanville in that commingling of funds is
6 not an issue. Again, fewer violations and mitigation in Respondent's case and
7 support a mitigated sanction from the otherwise presumptive sanction of censure.

8
9 In In re Hall, Supreme Court No. SB-02-0122-D (2002), Hall was censured
10 and placed on one year of probation. Hall received multiple overdraft notices
11 regarding his trust account. Hall failed to adequately monitor his clients' funds,
12 which were on deposit in his trust account, thereby resulting in the overdrafts.
13 Hall failed to maintain sufficient records for his trust account. Hall failed to
14 establish internal controls to properly monitor his clients' funds.

15
16 Again, the facts in Respondent's case are distinguishable in that
17 Respondent had only one notice of insufficient funds and in Hall multiple
18 overdrafts occurred. Commingling was a violation in Hall not present in
19 Respondent's case. Otherwise, the violations appear to be similar in that
20 sufficiency of record keeping and lack of internal controls are at issue in both
21 cases.
22

23
24 In an informal case, In Re Schelstraete, file no 05-0139 (2005),
25 Schelstraete attempted to pay for a CLE class with a trust account check.

1 Subsequent investigation revealed that Respondent failed to safeguard client
2 funds and failed to keep complete records. Respondent also failed to maintain
3 internal controls and failed to record all transactions. Respondent failed to
4 conduct a monthly three-way reconciliation and failed to disburse by pre-
5 numbered check. Respondent received an informal reprimand and was required
6 to participate in TAEEP. The presumptive sanction, censure, was mitigated to an
7 informal reprimand, because Respondent had no prior discipline, fully cooperated
8 with the staff examiner, and compromised no client funds.
9
10

11 Respondent did not cause actual harm to his clients' funds, although he
12 does acknowledge that client funds were at risk by virtue of his accounting error.
13 Unlike Schelstraete, Respondent does have a history is discipline. However, it is
14 remote and was not a trust account investigation. Respondent has other
15 significant mitigating factors that balance his disciplinary history and justify
16 imposition of an informal reprimand in this case.
17
18

19 RECOMMENDATION

20 The purpose of lawyer discipline is not to punish the lawyer, but to protect
21 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
22 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
23 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
24 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
25

1 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
2 (1994).

3 In imposing discipline, it is appropriate to consider the facts of each case,
4 the American Bar Association's *Standards for Imposing Lawyer Sanctions*
5 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
6 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
7

8 Upon consideration of the facts, application of the *Standards*, including
9 aggravating and mitigating factors, and a proportionality analysis, this Hearing
10 Officer recommends acceptance of the Tender of Admissions and Agreement for
11 Discipline by Consent and the Joint Memorandum in Support of Agreement for
12 Discipline by Consent which provides for the following:
13
14

- 15 1. Respondent shall receive an informal reprimand.³
- 16 2. Respondent will be placed on probation for a period of two years
17 effective upon the signing of the probation contract. The State Bar will notify the
18 Disciplinary Clerk of the exact date of commencement of probation. The term of
19 probation is as follows:
20

- 21 a. Respondent shall participate in the Trust Account Program (TAP) for
22 a period of at least one year and attendance and participation in TAEEP.
23

24 ³ Pursuant to Rule 56(e)1, if an agreement is accepted by the hearing officer it shall be final
25 unless the sanction to be imposed includes disbarment, suspension or censure; therefore, if
neither party files a notice of appeal pursuant to Rule 58(a), this Hearing Officer will file an
order of informal reprimand, probation and costs.

1 Angela M. B. Napper
2 Bar Counsel
3 State Bar of Arizona
4 4201 North 24th Street, Suite 200
5 Phoenix, AZ 85016-6288

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
by: *P. Williams*