

FILED
OCT 28 2004
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

IN THE MATTER OF A MEMBER) No. 04-0012
OF THE STATE BAR OF ARIZONA,)
)
BRIAN G. DI PIETRO,)
Bar No. 014769)
) **HEARING OFFICER'S REPORT**
RESPONDENT.)

PROCEDURAL HISTORY

The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on October 13, 2004. The State Bar then filed a Notice of Erratum to Tender of Admissions and Agreement to Discipline by Consent. The Complainant has been notified. No hearing has been held.

FINDINGS OF FACT

Respondent was first admitted to practice in Michigan in 1983, and admitted in Arizona on February 15, 1994.

On March 12, 2003, a new criminal client retained Respondent's firm to represent him, and the case was assigned to Respondent. Shortly before the

1 initial consultation, Respondent's office assistant, Stacey, issued a receipt for the
2 client's \$1500.00 cash earned on receipt fee payment.

3 Client then entered Respondent's office with the receipt in hand and gave
4 the cash to Respondent. Respondent filled out an office "cash receipt form"
5 indicating that Respondent received \$800.00 in cash from the client and gave the
6 form and the \$800.00 to another office assistant, Pat. Respondent retained
7 \$700.00, neither informing the client nor the office assistant.
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10 On March 28, 2003, the client attempted to confirm the status of his
11 account with the firm. The client learned that the firm had credited the client only
12 \$800.00 for the fee deposit. The client presented the office assistant with the
13 receipt indicating that he paid \$1500.00.
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15 Upon direction of Paul Faith, a partner in Respondent's firm, the office
16 assistant confronted Respondent about the missing \$700.00. Later, Respondent
17 left the office, and returned. Mr. Faith then asked Respondent about the missing
18 \$700.00 and Respondent withdrew \$500.00 from his desk drawer and declared
19 that he found \$500.00 of the missing \$700.00 in his in-basket. Respondent
20 claimed that the remaining \$200.00 must have been lost in a file somewhere. Mr.
21 Faith confronted Respondent with the \$800.00 cash receipt form that Respondent
22 had filled out. On April 1, 2003, Mr. Faith terminated Respondent from the firm.
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1 The remaining \$200.00 taken from the client was deducted from Respondent's
2 final paycheck.

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4 In his March 30, 2004 response Respondent admits that "in a moment of
5 bad judgment" he converted \$700.00 of firm funds to his own use. Respondent
6 denies Mr. Faith's allegation that he took the money not intending to return it to
7 the firm. Respondent contends that he intended to return the money to the firm
8 when he received his next paycheck.
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10 CONDITIONAL ADMISSIONS

11 Respondent, in exchange for the stated form of discipline, conditionally
12 admits that the conduct as described in Count One violates Rule 42, Ariz. R. S.
13 Ct., 4.1(a)(truthfulness to others), and 8.4(b)(criminal act reflecting on fitness to
14 practice) and (c)(conduct involving dishonesty).
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16 ABA STANDARDS

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18 In determining the appropriate sanction, the parties considered both the
19 American Bar Association's *Standards for Imposing Lawyer Sanctions*, (1991)
20 ("*Standards*") and Arizona case law. The Standards provide guidance with
21 respect to an appropriate sanction in this matter. The Court and Commission
22 consider the Standards a suitable guideline. *In re Rivkind*, 164 Ariz. 154, 157, 791
23 P.2d 1037, 1040 (1999); *In re Kaplan*, 179 Ariz. 175, 177, 877 P.2d 274, 276
24 (1994).
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1 The *ABA Standards* list the following factors to consider in imposing the
2 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
3 actual or potential injury caused by the lawyer's misconduct, and (4) the
4 existence of aggravating or mitigating circumstances. *ABA Standard 3.0.*

6 Given the conduct in this matter, this Hearing Officer considered *Standard*
7 *5.0 (Violations of Duties Owed to the Public).* The dispositive *ABA Standard*
8 *5.1 (Failure to Maintain Personal Integrity)* provides as follows:
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10 5.12 Suspension is generally appropriate when a lawyer
11 knowingly engages in criminal conduct which does not
12 contain the elements listed in Standard 5.11 and that
13 seriously adversely reflects on the lawyer's fitness to
14 practice.

14 In this matter, Respondent intentionally converted \$700.00 of funds to his
15 own use, prepared a false document to hide the theft, and then lied to his business
16 partner when confronted with the theft.

17 As the *Standards* do not account for multiple charges of misconduct, the
18 ultimate sanction imposed should at least be consistent with the sanction for the
19 most serious instance of misconduct among a number of violations. *Standards,*
20 *Theoretical Framework* at pg. 6; *Matter of Redeker*, 177 Ariz. 305, 868 P.2d. 318
21 (1994).
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1 Respondent's conversion of \$700.00 in funds determines the appropriate
2 sanction in this case. This Hearing Officer agrees with the parties that the
3 presumptive sanction for the admitted conduct is suspension.
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5 AGGRAVATING AND MITIGATING FACTORS

6 This Hearing Officer then considered aggravating and mitigating factors in
7 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer
8 agrees with the parties that two aggravating factors apply and should be
9 considered in this matter. (b) Dishonest or selfish motive - A selfish or dishonest
10 motive is inherent to conversion of client funds. Respondent admits that he was
11 wrong to convert firm funds even though he intended to restore the funds in a
12 short time. (i) Substantial experience in the practice of law - Respondent was first
13 admitted to practice in 1983 and admitted to Arizona on February 15, 1994.
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16 This Hearing Officer agrees with the parties that three factors are present in
17 mitigation. (a) absence of a prior disciplinary record - Respondent has no prior
18 disciplinary record, other than the matters that are the subject of this consent. (e)
19 cooperative attitude toward proceedings - Respondent has freely cooperated with
20 the State Bar throughout the screening investigation. (k) imposition of other
21 penalties or sanctions - Respondent was terminated by his law firm. Respondent
22 has been unable to find other employment as a lawyer due to the current
23 complaint.
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1 The salient factors informing the aggravation/mitigation analysis for this
2 matter are that Respondent has no previous disciplinary history, that Respondent's
3 admitted conduct is an isolated incident, and that the conduct did not appear to be
4 premeditated.
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6 Upon examination of the aggravating and mitigating factors, and for the
7 purpose of settling this matter, it appears that the appropriate sanction is a long-
8 term suspension. Respondent has no history of prior discipline. Respondent's
9 conduct appears to be an isolated incident. Respondent's conversion of funds
10 appears to have been an impulsive rather than a premeditated act. Respondent
11 recognizes the wrongfulness of his conduct, and demonstrated a cooperative
12 attitude throughout the State Bar's investigation of this matter. Suspension from
13 the practice of law for two years and requiring Respondent to submit to a
14 Members Assistance Program evaluation during the term of suspension, followed
15 by a two-year term of probation is an appropriate sanction in this matter. It is
16 also noteworthy that the consequences of Respondent's misconduct fell on his
17 firm rather than the client. There is no evidence that Respondent's conduct
18 prejudiced the client. Although the converted funds were quickly restored to the
19 client's account, the firm had to bear the embarrassment of explaining
20 Respondent's misconduct. Although the actual or potential harm arising from
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1 Respondent's conduct was small, intentional conversion of funds is cause of great
2 concern and merits a severe sanction.

3 PROPORTIONALITY REVIEW

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5 To have an effective system of professional sanctions, there must be
6 internal consistency, and it is appropriate to examine sanctions imposed in cases
7 that are factually similar. *In re Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799
8 (1994); *In re Levine*, 174 Ariz. 146, 174-75, 847 P.2d 1093, 1121-22 (1993). To
9 achieve proportionality, discipline must be tailored to the facts of each case. *In re*
10 *Wolfram*, 174 Ariz. 49, 59, 847 P.2d 94, 104 (1993).

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12 The proposed sanction in these matters is consistent with discipline of
13 attorneys for conversion of funds belonging to another.

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15 In *Matter of Camacho*, SB 96-0079-D (1997), the attorney was disbarred
16 after he converted \$3045.75 settlement funds to his own use, intentionally misled
17 a client about disposition of case, and agreed to settlement without client's
18 consent. Although the lawyer repaid the settlement funds to the Medicare, all
19 aggravating factors were found to apply, including prior disciplinary record and
20 failure to cooperate with the State Bar by failure to answer the complaint and
21 requesting a continuance to secure assistance of counsel at the disciplinary
22 proceeding. The mitigating factors were remorse and depression.
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1 In *In re Torosian*, SB-00-0100-D (2001), the lawyer was suspended from
2 the practice of law for four years and given two years of probation for receiving a
3 check for settlement of his sister's personal injury matter and failing to disburse
4 the funds to a third-party medical provider who had a lien on the settlement. The
5 lawyer converted the settlement funds because he had a gambling addiction. The
6 hearing officer recommended disbarment. Although the Disciplinary Commission
7 found that disbarment was appropriate, mitigating factors, including absence of
8 prior disciplinary record, personal and emotional problems, cooperative attitude,
9 and inexperience in the practice of law resulted in imposition of the four-year
10 suspension. The Disciplinary Commission found that suspension was appropriate
11 even though there was no causal connection between the lawyer's emotional
12 problems and the misconduct.
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16 In *In re Riches*, 179 Ariz. 212, 877 P.2d 785 (1994), the lawyer received a
17 three-year suspension after converting substantial amounts in firm funds over a
18 period of five years (although the amount was in dispute, the firm submitted a
19 proof of loss to its insurance carrier for the policy limits of \$250,000). The
20 lawyer conditionally admitted to violations of ERs 8.4(b) and 8.4(c). The
21 presumptive sanction was disbarment under *Standards*, 5.11. The Court
22 determined that the lawyer suffered from manic-depressive episodes that
23 contributed to his conduct.
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1 Disbarment is not appropriate for this matter. Unlike *Camacho*, all of the
2 aggravating factors do not apply to Respondent in this case. Also, *Camacho*
3 intentionally misled his clients and failed to cooperate with the disciplinary
4 process and had a disciplinary history.

6 Long-term suspension is appropriate for Respondent. The conduct in the
7 instant case is similar to that in *Torosian*. The presumptive sanction in *Torosian*
8 was disbarment. Although the hearing officer recommended disbarment, the
9 Disciplinary Commission recommended that *Torosian* be suspended for four
10 years on one count of conversion of client funds. Neither *Torosian* nor
11 Respondent engaged in a pattern of misconduct. *Riches* is also instructive as
12 court imposed a three-year suspension for theft of a substantial amount of firm
13 funds over a period of years. Although *Riches*' conduct resulted in substantial
14 harm, the Court determined that the lawyer's mental disability was a substantial
15 mitigating factor. Contrast the instant case in which Respondent converted a
16 small amount of firm funds for a short period of time. Under the circumstances, a
17 two-year period of suspension is proportional to Arizona case law.

21 For the purposes of settlement, the State Bar recognizes that the conversion
22 of funds in this case, while intentional, was an isolated incident, and that
23 Respondent intended to restore the funds to the client's account within a few days
24 had the conduct not been discovered. In the instant case, the converted funds
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1 were soon restored to the client's account. Therefore, neither the client nor
2 Respondent's law firm was substantially prejudiced. The client continued
3 representation with Respondent's firm after Respondent was terminated.
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5 In view of the absence or real or potential of harm to the victim,
6 Respondent's lack of disciplinary history, and his willingness to settle this matter
7 short of hearing, the agreed sanction of suspension from the practice of law for
8 two (2) years from the date of the order of the court in this matter. During the
9 period of suspension Respondent shall participate in the State Bar's Member
10 Assistance Program and pay costs incurred herein. Upon reinstatement and
11 according to such terms and conditions as may be imposed by the Supreme Court,
12 Respondent shall serve a two-year term of probation.
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15 RECOMMENDATION

16 The purpose of lawyer discipline is not to punish the lawyer, but to protect
17 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
18 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
19 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
20 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
21 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
22 (1994).
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1 In imposing discipline, it is appropriate to consider the facts of the case, the
2 American Bar Association's *Standards for Imposing Lawyer Sanctions*
3 (*"Standards"*) and the proportionality of discipline imposed in analogous cases.
4 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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6 Upon consideration of the facts, application of the *Standards*, including
7 aggravating and mitigating factors, and a proportionality analysis, this Hearing
8 Officer recommends acceptance of the Tender of Admissions and Agreement for
9 Discipline by Consent and the Joint Memorandum in Support of Agreement for
10 Discipline by Consent providing for the following:
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12 1. Respondent shall be suspended for a period of two years.

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14 2. Respondent shall participate in the State Bar's Member Assistance
15 Program during the term of suspension and shall demonstrate payment of all costs
16 that are or will be due and owing to the State Bar as a result of these proceedings.
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18 3. Respondent shall be placed on probation for a period of two years upon
19 reinstatement. The terms and conditions to be determined at the time of
20 reinstatement.
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1 4. Respondent shall pay the costs and expenses incurred in this
2 disciplinary proceeding.

3 DATED this 28th day of October, 2004.

4
5 Robert J. Lord
6 Robert J. Lord
7 Hearing Officer 6L
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10 Original filed with the Disciplinary Clerk
11 this 28th day of October, 2004.

12 Copy of the foregoing was mailed
13 this 28th day of October, 2004, to:

14 J. Scott Rhodes
15 Respondent's Counsel
16 *Jennings, Strouss & Salmon, P.L.C.*
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25