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JUL 19 2005

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. 03-0049
OF THE STATE BAR OF ARIZONA,)	
)	
ROBERT E. FEE,)	
Bar No. 007065)	AMENDED
)	HEARING OFFICER'S REPORT
RESPONDENT.)	

PROCEDURAL HISTORY

The State Bar filed a Complaint on December 22, 2004 and a First Amended Complaint on January 6, 2005. Respondent filed an Answer on January 27, 2005. A hearing was then scheduled for May 11 & 12, 2005. The Settlement Officer conducted a settlement conference on March 22, 2005. The parties were unable to reach an agreement; however, progress towards a resolution was made. The parties filed a Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Agreement for Discipline by Consent (Joint Memo) on June 14, 2005. The parties then filed Stipulated Exhibits in Support of Agreement and Motion to Admit Evidence on June 28, 2005. A hearing has not been held in this matter.

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FINDINGS OF FACT

1. At all times relevant hereto, Respondent was and is an attorney admitted to practice law in the State of Arizona, having been admitted to practice in Arizona on or about October 17, 1981.

2. The Probable Cause Panelist, pursuant to Rule 54(b)(4), Ariz. R. S. Ct., found that probable cause existed to issue complaint against Respondent for violations of Rule 42, Ariz. R. S. Ct., including but not limited to ER 8.4. Therefore, a Probable Cause Order was signed by the Panelist on July 19, 2004 and filed August 20, 2004.

3. The formal Complaint in this matter arose out of Respondent's past representation of United HR, Inc. and its corporate officers and employees in 2002.

4. Respondent conditionally admits to having engaged in conduct that violated ER 8.4(a) and ER 8.4(c).

5. In August of 2000, Respondent was retained by Tracy and Frances Cole to assist with their personal estate planning. In April of 2002, Respondent was again contacted by Mrs. Cole for legal advice in regard to a lawsuit filed against Mrs. Cole by Advanced Payroll Management, Inc. Respondent

1 undertook representation of Mrs. Cole in the aforementioned lawsuit, which was
2 ultimately dismissed in June of 2002. ¹

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4 6. During the course of representing Mrs. Cole in the lawsuit with
5 Advanced Payroll Management, Respondent was advised in approximately June
6 of 2002, by Mrs. Cole that she and a business associate, Steven C. Reid, were in
7 the process of forming a new human resources management business (also
8 known as a "professional employment organization" or "PEO") that was named
9 "United HR." Mrs. Cole and Mr. Reid informed Respondent that the terms of
10 the agreement with Mr. Reid were that Mr. Reid would provide \$75,000.00 for
11 capitalization, that Mrs. Cole would operate the business, and that each would
12 hold a 50 percent shareholder interest in United HR, Inc.
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15 7. On August 7, 2002, in response to a request by Mrs. Cole,
16 Respondent met with Mr. Reid and Mrs. Cole in Tucson, Arizona. During the
17 course of this meeting, the discussions focused on the corporate structure of
18 United HR. Respondent understood and it is not disputed that Mrs. Cole was in
19 fact supposed to be a 50 percent owner of stock of United HR. Additionally,
20 during the course of the August 7, 2002, meeting, Respondent was asked if he
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25 ¹ Advanced Payroll Management, Inc. and Richard Jones v. Tracy Cole, et al., Pima County Superior Court No. C2001-5940, filed 12-20-2001 and order for stipulated dismissal with prejudice entered June 4, 2002.

1 would become United HR's statutory agent, and be available to provide legal
2 advice from time to time regarding United HR legal matters.

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4 8. During the course of the aforementioned meeting on August 7,
5 2002, Respondent disclosed to Mr. Reid that he had a prior attorney-client
6 relationship with Mrs. Cole.

7
8 9. After August 7, 2002, Respondent provided legal services to
9 United HR, through Mrs. Cole and Mr. Reid, and was to serve as statutory agent
10 for United HR, Inc.

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12 10. In mid-September of 2002, Respondent discovered that there was no
13 corporate record of Mrs. Cole having been issued any shares in United HR. See
14 infra., paragraphs 7-8. Instead, Respondent determined that all of the issued
15 stock of United HR, was held by an entity named Riste Holdings, LLC, an
16 Arizona limited liability corporation controlled exclusively by Mr. Reid
17 (complainant and president of United HR) and Richard Baumgarten.

18
19 11. Respondent brought to Mrs. Cole's attention, in September of 2002,
20 the discrepancy in the issuance and ownership of the corporate stock of United
21 HR, as compared to what Respondent was told on or about August 7, 2002, by
22 Mrs. Cole and Mr. Reid.

23
24 12. On or about November 19, 2002, a meeting was held in Tucson
25 between Mrs. Cole, Mr. Reid, Respondent and Respondent's paralegal, Victoria

1 King. The purpose of this meeting was to discuss, with Mrs. Cole and Mr. Reid
2 the following: (a) their respective shareholder interests in United HR; and (b) the
3 status of Richard Baumgarten as a shareholder, director and officer of United HR
4 and (c) the possible conflict of interest issue arising from Richard Baumgarten's
5 separate business relationship with United HR.
6

7 13. Throughout 2002, Mr. Baumgarten was serving concurrently as the
8 owner and principal agent for R.M.B. Insurance Services, LLC. ("RMB Ins.")
9

10 14. RMB Ins. was understood by Respondent to be a corporate entity
11 established and entirely owned by Mr. Baumgarten. Respondent believed at the
12 time of the aforementioned meeting on November 19, 2002, that RMB Ins. was
13 the sole insurance broker issuing insurance coverage for the employees and/or
14 clients of United HR.
15

16 15. Prior to the November 19, 2002 meeting between the above-
17 referenced individuals (i.e., infra., para. 13), Respondent was informed by Mrs.
18 Cole that she was contacted by representatives of AFLAC, Inc., an insurance
19 entity, who had questioned whether RMB Ins. was affiliated with United HR,
20 and that such an affiliation constituted a conflict of interest or a breach of
21 fiduciary duties.
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23 16. During the course of the meeting on November 19, 2002, with
24 Respondent, Mrs. Cole and Mr. Reid, the issue of the legal propriety of
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1 Mr. Baumgarten, being a corporate officer and substantial shareholder of United
2 HR, while also serving as the exclusive insurance broker through RMB Ins., was
3 discussed by Respondent.
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5 17. Respondent concluded and expressed the legal opinion to Mrs. Cole
6 and Mr. Reid on November 19, 2002, and in a subsequent legal opinion letter
7 that the shared ownership interest of Mr. Reid and Mr. Baumgarten in United
8 HR, through the Riste Holdings, LLC coupled with Mr. Baumgarten's ownership
9 interest in RMB Ins., as the sole insurance provider to employees and/or clients
10 of United HR, did constitute a conflict of interest for Mr. Baumgarten and for
11 United HR. Respondent was of the opinion that Mr. Baumgarten's business and
12 investment interests in United HR could put United HR in possible violation of
13 state insurance laws, due to potential breach of corporate fiduciary duties.
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16 18. During the aforementioned meeting on November 19, 2002, Mr.
17 Reid expressed his disagreement with the legal opinion offered by Respondent
18 regarding the potential conflict of interest resulting from Mr. Baumgarten
19 holding a financial interest in both his insurance company, RMB Ins., and in
20 United HR.
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22 19. At the November 19, 2002 meeting with the aforementioned
23 individuals, the Respondent was asked by Cole and Reid to conduct additional
24 legal research into the legal consequences of Mr. Baumgarten's simultaneously
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2 22. After Respondent issued his December 11, 2002, opinion letter to
3 Mrs. Cole, Mr. Reid received Respondent's legal opinion letter (on or about
4 December 12, 2002) and those draft corporate documents prepared and submitted
5 for approval by Respondent and referenced in his letter of December 11, 2002.
6 See stipulated exhibit, *infra*, at p.3, fn. 1.
7

8 23. Because there had never been a formal meeting of the United HR's
9 board of directors on August 5, 2002, as indicated in the documents submitted in
10 draft form by Respondent, those documents could be construed as
11 misrepresenting past corporate activities and ownership of United. HR
12

13 24. On December 18, 2002, Respondent received an e-mail
14 communication from Mr. Reid, as president of United HR, demanding that
15 Respondent deliver to Mr. Reid copies of Respondent's billing statements to date
16 to United HR for legal services. Respondent complied with Mr. Reid's request
17 by letter dated December 19, 2002.
18

19 25. The aforementioned corporate documents in draft form (see, *infra*,
20 para. 22) were not approved or signed by Mr. Reid or by the United HR board of
21 directors.
22

23 26. By letter dated December 20, 2002, Respondent wrote to Mr. Reid,
24 as president of United HR, and specifically addressed Mr. Reid's concerns as to
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1 the motivation and substantive correctness of the Respondent's prior legal
2 opinion letter (dated December 11, 2002). See stipulated exhibit, *infra*, at p. 3,
3 *ft.* 1.
4

5 27. Respondent next sent a letter to Mr. Reid and Mrs. Cole, dated
6 December 26, 2002, withdrawing from representation of both United HR and
7 Mrs. Cole.
8

9 29. On or about January 9, 2003, the State Bar of Arizona received a
10 complaint signed by Mr. Reid, as president of United HR and submitted against
11 Respondent.
12

13 30. In response to Bar Counsel's investigation of Mr. Reid's complaint,
14 Respondent disclosed, in his letter of July 31, 2003, to Ms. Vessella, Deputy
15 Chief Bar Counsel, additional reasons for having suggested that Mr. Reid, as
16 president of United HR and Mrs. Cole and Mr. Baumgarten follow his legal
17 advice. See, stipulated exhibit listed at p. 3, *infra*, *fn.* 1.
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19 31. By preparing misleading corporate documents which were submitted
20 with his written legal advise, Respondent violated Rule 42, Ariz. R. S. Ct.,
21 specifically, ER 8.4(a). Respondent prepared drafts of corporate documents that
22 could be construed as misrepresenting past corporate activities and ownership of
23 United HR, Inc. Respondent intended the corporate documents for examination,
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1 discussion and consideration by all of the then corporate directors, officers and
2 shareholders of United HR.

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4 32. Having considered the State Bar's Notice of Filing Stipulated
5 Exhibits in Support of Agreement; and, Motion to Admit in Evidence, it is
6 hereby ordered granting the Motion.

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8 **CONDITIONAL ADMISSIONS**

9 Respondent conditionally admits his conduct violated ERs 8.4(a) and (c),
10 Rule 42, Ariz. R. S. Ct.

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12 **CONDITIONAL DISMISSALS**

13 The State Bar conditionally agrees, for purposes of this agreement only, to
14 dismiss the alleged violation of ER 1.2(d), Rule 42, Ariz. R. S. Ct.

15
16 **ABA STANDARDS**

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

21 A review of *ABA Standard 5.0 (Violations of Duties Owed to the Public)*
22 indicates that censure is the presumptive sanction for Respondent's misconduct.
23 *Standard 5.13 (Failure to Maintain Personal Integrity)* specifically provides:

24
25 Reprimand (censure in Arizona) is generally appropriate
when a lawyer knowingly engages in any other conduct that

1 involves dishonesty, fraud, deceit, or misrepresentation and
2 that adversely reflects on the lawyer's fitness to practice law.

3 Respondent violated his duties to clients, the public, the legal system and
4 the profession by preparing false and misleading corporate documents and
5 records for the client's consideration, in violation of ERs 8.4(a) and (c), Rule 42,
6 Ariz. R. S. Ct.

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8 The parties agree that Respondent's conduct was not motivated by desire
9 for personal gain or intent to defraud. The State Bar asserts, and Respondent
10 conditionally agrees, that Respondent prepared what could be construed as
11 misleading corporate records which Respondent submitted to the corporate
12 officers, with supporting written legal opinion letters.

13
14 Respondent and State Bar take the position that Respondent's conduct was
15 not intended to deceive the client or to benefit himself. Respondent takes the
16 position that he did not cause actual harm to his client (United HR, Inc.). The
17 State Bar takes the position that Respondent's conduct exposed his client to
18 potential harm (e.g., potential corporate officer or company liability for
19 misrepresenting relevant facts in corporate documents). While the parties
20 disagree as to the extent of harm, this Hearing Officer finds that Respondent's
21 conduct exposed his client to potential harm.
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1 In *In re Duckworth*, 176 Ariz. 199, 202, 859 P.2d 1332, 1335 (1993), the
2 lawyer admitted to violating ERs 1.15(b), 8.4(a) and 8.4(c). The Supreme Court
3 and Disciplinary Commission found that Duckworth's conduct was not merely
4 negligent, but involved intentional dishonesty, deceit, and misrepresentation.
5 Duckworth knowingly prepared and submitted to an escrow officer written
6 instruction, concerning the distribution of corporate funds, contrary to the
7 instruction of another party to the agreement. The Supreme Court held that the
8 lawyer's conduct warranted a ninety (90) day suspension. Because the conduct
9 of the lawyers in *Duckworth* and *Charles* involved more egregious misconduct,
10 as compared to Respondent, the sanction agreed to herein is most appropriate.
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14 In this case, Respondent submitted documents to his client that
15 misrepresented the relevant facts in the corporate records that he drafted.
16 Respondent sought to: (1) retrospectively reconcile the actual record of
17 stockholder ownership versus that declared and filed by the corporation's
18 president in an I.R.S. form 2553, electing subchapter "S" corporation status and
19 (2) retrospectively trying to eliminate a potential conflict of interest for a
20 corporate officer and principal shareholder (i.e., Mr. Baumgarten) that might
21 cause the corporation to be in violation of state insurance regulation (i.e., A.R.S.
22 § 20-485). The end did not justify the means. The manner chosen by Respondent
23 to handle the legal problem(s) faced by United HR, Inc., and its corporate officers
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1 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002);
2 *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

3
4 Two cases are relevant to Respondent's conduct and provide support that a
5 censure is an appropriate sanction. In *In re Charles*, 174 Ariz. 91, 847 P.2d 592
6 (1993), the lawyer's conduct involved misrepresentation and dishonesty that
7 violated ER 8.4(c). Charles knowingly presented a power of attorney to a bank
8 twelve days after his client and signor of the power of attorney had died. In
9 addition, it was found that Charles signed his name on powers of attorney
10 (naming himself as attorney in fact) which was dishonest, even if that lawyer
11 intended no personal gain. The evidence did not establish criminal intent but
12 Charles' apparent belief that "the end justifies the means" did not relieve him of
13 his responsibility to maintain his professional integrity. Upon review by the
14 Supreme Court and Disciplinary Commission, it was found that the appropriate
15 sanction fell between a period of suspension and a censure. Charles' poor
16 judgment and the serious consequences that resulted from his conduct made a
17 sanction lesser than censure inappropriate. The Supreme Court and Disciplinary
18 Commission found that censure was the appropriate sanction because there were
19 no aggravating factors and in mitigation found that Charles had no prior
20 discipline and no selfish motive.
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1 and/or shareholders had to be reconciled with his duties and responsibilities as a
2 lawyer.

3 Respondent and State Bar conditionally agree that there is no evidence that
4 Respondent's conduct constituted actual dishonesty, deceit or fraud. Instead, the
5 parties conditionally agree that Respondent drafted corporate documents that
6 misstated relevant facts. This distinction in conjunction with the mitigating
7 factors presented in this matter support the stipulated sanctions, as opposed to
8 more severe sanctions.
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11 RECOMMENDATION

12 The purpose of lawyer discipline is not to punish the lawyer, but to protect
13 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
14 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
15 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
16 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
17 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
18 (1994).
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21 In imposing discipline, it is appropriate to consider the facts of the case, the
22 American Bar Association's *Standards for Imposing Lawyer Sanctions*
23 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
24 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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1 This is a case where the Respondent let his anger over the financial dispute
2 with his former partner control his better judgment. Respondent hired counsel to
3 assist in the resolution of the partnership dissolution issues, but failed to seek
4 advice prior to disbursing the client's funds. The proportionality analysis leads
5 the Hearing Officer to the conclusion that 6 month probation is appropriate.
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7 Upon consideration of the facts, application of the *Standards*, including
8 aggravating and mitigating factors, and a proportionality analysis, this Hearing
9 Officer recommends acceptance of the Tender of Admissions and Agreement for
10 Discipline by Consent and the Joint Memorandum in Support of Agreement for
11 Discipline by Consent providing for the following:
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- 13 1. Respondent shall receive a censure.
- 14 2. Respondent shall be placed on probation for a period of six months
15 effective from the date of entry of the final judgment and order, with the
16 requirement that Respondent attend and complete the State Bar's Ethics
17 Enhancement Program within the six month period of probation.
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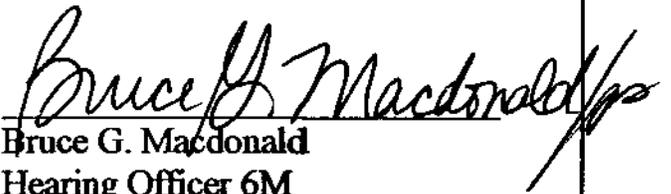
- 19 3. In the event that Respondent fails to comply with any of the foregoing
20 conditions, and the State Bar receives information, bar counsel shall file with the
21 Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S.
22 Ct. The Hearing Officer shall conduct a hearing within thirty days after receipt of
23 said notice, to determine whether the terms of probation have been violated and if
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1 an additional sanction should be imposed. In the event there is an allegation that
2 any of these terms have been violated, the burden of proof shall be on the State Bar
3 of Arizona to prove non-compliance by clear and convincing evidence.
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5 4. Respondent shall pay restitution within thirty days of the final judgment
6 and order in the amount of \$630.00 to United HR, Inc.

7 5. Respondent shall pay the costs and expenses incurred in this
8 disciplinary proceeding.
9

10 DATED this 19th day of July, 2005.

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12 
13 Bruce G. Macdonald
14 Hearing Officer 6M

15 Original filed with the Disciplinary Clerk
16 this 19th day of July, 2005.

17 Copy of the foregoing was mailed
18 this 19th day of July, 2005, to:

19 Thomas A. Zlaket
20 Respondent's Counsel
21 310 South Williams Boulevard, Suite 170
Tucson, AZ 85711-4446

22 Michael N. Harrison
23 Bar Counsel
24 State Bar of Arizona
25 4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: P. Williams