

FILED

JAN 13 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *William*

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

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| IN THE MATTER OF A MEMBER |) | No. 02-1505 |
| OF THE STATE BAR OF ARIZONA, |) | |
| |) | |
| JOHN M. McKINDLES, |) | |
| Bar No. 006401 |) | |
| |) | HEARING OFFICER'S REPORT |
| RESPONDENT. |) | |

PROCEDURAL HISTORY

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 November 5, 2004. The Acting Disciplinary Clerk assigned this matter to this Hearing Officer on November 10, 2004. After reviewing the Tender and Joint Memo, this Hearing Officer filed an Order on December 17, 2004 ordering the parties to submit evidence in support of the mitigating factor of character and reputation. Evidence in response to that Order was filed on January 10, 2005. No hearing has been held.

FINDINGS OF FACT

1. Respondent was at all relevant times an attorney licensed to practice law in Arizona, having been admitted to the State Bar on October 4, 1980.

1 2. A Probable Cause Order was filed on August 13, 2004. A copy of
2 the order is attached to the Tender as Exhibit A. No formal complaint has been
3 filed.
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5 3. Respondent first started practicing law in Arizona in 1980, in
6 association with an attorney named Harry Cawood, first as the Cawood &
7 McKindles partnership and later as Cawood & McKindles, P.C. (hereinafter
8 generally "the firm"). That business relationship was terminated on or about
9 December 31, 2001.
10

11 4. During the time that they worked in association with one another,
12 Respondent and Mr. Cawood independently handled the preparation of bills to
13 their separate clients as well as the collection of money and payment of refunds,
14 when appropriate, to their separate clients. Both members had equal access to the
15 firm's books, records and bank accounts.
16

17 5. From the start of their association until a few weeks prior to Mr.
18 Cawood's departure, the firm's treatment of client funds was not maintained in
19 compliance with the ER 1.15 and Rules 43 and 44, Ariz. R. S. Ct. Client retainers
20 were routinely deposited in the firm's operating account, instead of its trust
21 account. Settlement money and other client funds were deposited into the firm's
22 trust account until the responsible lawyer made a distribution consistent with the
23 needs of the relevant case. Earned fees were routinely deposited in the firm's
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1 trust account and the trust account was used as a savings account. Required trust
2 account records were not maintained. Transactions were not promptly and
3 completely recorded and disbursements were not always made by pre-numbered
4 check. Monthly reconciliations between the trust account bank statements and
5 the appropriate ledgers were not made. (Exhibit A, Leigh Ann Mauger's October
6 21, 2003 report).

7
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9 6. Although he failed to ensure that client funds and the firm's trust
10 account were managed in accordance with the governing rules, Respondent did
11 not intentionally misappropriate client funds, and the available records do not
12 show that his conduct actually injured any client.

13
14 7. In 2002, following the dissolution of his association with Mr.
15 Cawood, Respondent engaged a CPA to review his financial management
16 practices and ensure that they were in accord with the governing rules.

17
18 8. Upon learning that his management of client funds had contravened
19 the rules, Respondent self-reported his non-compliance through the oral statement
20 of his attorney in July of 2002.

21
22 9. Respondent has cooperated with the Bar in its investigation.
23 Respondent personally reviewed every client's file going back twenty years,
24 tracking every billing and every payment reflected in the records – a process that
25 involved hundreds of banker's boxes full of files, took hundreds of hours, and

1 frequently kept Respondent in the office until midnight. At the conclusion of this
2 review, Respondent provided the Bar with a comprehensive accounting of client
3 funds that filled a banker's box.
4

5 10. Respondent began setting up a new trust account management
6 system upon learning that the firm's handling of its trust accounts had been
7 improper. Respondent hired a new CPA who reviews all account documents,
8 checks, and statements, and provides Respondent with comprehensive quarterly
9 reports. From 2002 to the present, Respondent and his new CPA have rigorously
10 adhered to the new funds-handling procedures to ensure full compliance with the
11 applicable rules.
12

13
14 11. Respondent violated ER 1.15 by failing to ensure that client funds
15 were kept separate from funds belonging to the firm and that complete records
16 were kept and preserved for a period of five years.
17

18 12. Respondent violated Rule 43, Ariz. R. S. Ct. by failing to ensure that
19 client funds were kept in a trust account separate from accounts containing funds
20 belonging to the firm, failing to keep proper records of the firm's trust account,
21 failing to maintain internal controls, failing to disburse from trust account only by
22 pre-numbered check, and failing to conduct monthly reconciliations.
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1 Reprimand [censure in Arizona] is generally appropriate when a
2 lawyer is negligent in dealing with client property and causes injury
3 or potential injury to a client.

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

9 Respondent violated his duties to his clients by failing to observe the rules
10 governing the treatment of client funds by attorneys. These rules are designed to
11 ensure that a client's money is not put in jeopardy, or used or taken improperly,
12 by the client's attorney. Although Respondent asserts that he was merely
13 negligent in failing to realize that his treatment of client funds was improper, he
14 did have an affirmative duty to familiarize himself with the rules governing his
15 practice of law in Arizona.
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18 Respondent was negligent in failing to be aware of, familiarize himself
19 with, and comply with the rules governing the treatment of client funds by
20 attorneys.
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22 If this matter were to proceed to a hearing, Respondent would take the
23 position that his failure to be aware of these rules was merely negligent, that his
24 conduct caused no actual harm to any client and exposed his clients to minimal
25 potential harm at worst, and that he quickly and diligently reported and corrected

1 the non-compliance upon discovering it. The State Bar would take the position
2 that Respondent's failure to be aware of and comply with these rules exposed his
3 clients to significant potential injury.
4

5 Respondent's failure to comply with the rules governing treatment of client
6 funds exposed his clients to potential injury by causing their funds to be held
7 without the protections against intentional or inadvertent misdirection or
8 depletion that are provided through strict compliance with ER 1.15 and Rules 43
9 and 44, Ariz. R. S. Ct.
10

11 AGGRAVATING AND MITIGATING FACTORS

12 This Hearing Officer then considered aggravating and mitigating factors in
13 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
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15 There are no aggravating factors. Respondent had substantial experience
16 in the practice of law during much of the time in question, but when considered
17 in conjunction with his clean disciplinary record, this does not constitute an
18 aggravating factor. *See Matter of Riggs*, 177 Ariz. 494, 496, 869 P.2d 170, 172
19 (1994).
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21 In mitigation, the Hearing Officer agrees with the parties that the following
22 factors are present: *Standard* 9.32(b) – Absence of a dishonest or selfish motive.
23 Respondent was simply negligent and did not act out of any dishonest or selfish
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1 motive. Respondent did not intentionally misappropriate client funds. In fact,
2 there is no evidence that Respondent ever misappropriated any client funds.

3
4 *Standard 9.32(d)* – Timely good faith effort to make restitution or to
5 rectify consequences of misconduct. When he realized that his treatment of
6 client funds might have been improper, Respondent hired a new CPA to examine
7 the matter closely. When he learned that the system under which he had operated
8 for handling client funds was improper, Respondent promptly self-reported to the
9 Bar, modified his money-handling practices, and cooperated fully and
10 extensively with the Bar in its investigation into the past handling of client funds.
11 Respondent worked diligently with his new CPA to set up rigorous new systems
12 for processing client funds, and has adhered to these systems since early 2002 to
13 ensure that his handling of client funds is in strict compliance with the rules.

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16 *Standard 9.32(e)* – Full and free disclosure to disciplinary board or
17 cooperative attitude toward proceedings. Respondent cooperated with the State
18 Bar in this matter. Respondent personally reviewed every client's file going back
19 twenty years, tracking every billing and every payment reflected in the records –
20 a process that involved hundreds of banker's boxes full of files, took hundreds of
21 hours, and frequently kept Respondent in the office until midnight. Respondent
22 provided the Bar with his accounting of client funds. Respondent also hired a
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1 In terms of proportionality, the following cases are instructive: In *Matter*
2 *of Hall*, SB-02-0122-D (September 2002), Hall advanced funds from his firm's
3 operating account and placed those funds into the trust account to cover client
4 costs. Records obtained by the State Bar revealed that Hall's trust account
5 records were deficient for individual client accounts. The trust account records
6 reflected negative balances during this period for a total of twelve clients. Hall
7 failed to adequately monitor his clients' funds, which were on deposit in his trust
8 account and as a result of this failure, overdrafts occurred on the account. He
9 failed to establish sufficient internal controls in order to properly monitor his
10 client's funds. Hall was censured and placed on one year of probation.

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14 In *Matter of Inserra*, SB-02-0144-D (October 2002), Inserra failed to keep
15 his earned fees separate from that of his client funds held in the trust account,
16 failed to transfer fees from the trust account when earned, and commingled his
17 own funds with those of his clients. Inserra also failed to maintain complete trust
18 account records for a period of five years, failed to exercise due professional care
19 in the maintenance of his trust account, failed to only disburse from his trust
20 account with pre-numbered checks, and failed to conduct a monthly
21 reconciliation of his trust account. Inserra and the State Bar submitted a consent
22 agreement, agreeing that a censure, two years probation and costs were the
23 appropriate sanction. The Disciplinary Commission unanimously recommended
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1 accepting the agreement and the Supreme Court accepted the recommendation of
2 the Disciplinary Commission without discretionary review.

3
4 In *Matter of Leiber*, SB-01-0122-D (July 2, 2001), Leiber was charged
5 with failing to comply with trust account guidelines and with causing a check in
6 the amount of \$8,000.00 to be returned for insufficient funds because the
7 attorney's trust account only had a balance of \$5,859.00. Leiber's client, a long
8 time friend and lawyer, had agreed to deposit \$8,000.00 in Leiber's California
9 branch of his trust account but only deposited \$5,000.00. Leiber also
10 commingled funds over a period of years by placing earned fees and other
11 personal funds into his trust account. The Arizona Supreme Court accepted the
12 Disciplinary Commission's recommendation for censure and one year probation.
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14
15 In *Matter of Randall*, SB- 02-0146-D (November 2002), Randall failed to
16 conduct a proper monthly reconciliation. He used numerous counter checks to
17 withdraw money from his trust account instead of using pre-numbered checks as
18 required by the Guidelines. He also deposited and commingled his own separate
19 funds, including earned fees, with client funds in his trust account. Randall failed
20 to maintain adequate funds in the trust account resulting in the account being
21 overdrawn on two occasions. He failed to establish adequate internal controls to
22 safeguard client funds. The hearing officer recommended that Randall receive a
23 censure for his misconduct, which was accepted by the Disciplinary Commission
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1 and the Arizona Supreme Court. Randall was not placed on probation,
2 presumably because he was no longer working as a sole practitioner and was
3 employed by a medium size firm where he was not in charge of any accounting
4 procedures.
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6 In this case, respondent failed to safeguard clients by keeping unearned
7 fees in the operating account and by commingling earned fees with client funds in
8 the trust account. Respondent failed to maintain complete trust account records
9 and failed to exercise due professional care in dealing with client funds. The
10 Supreme Court of Arizona “has long held that ‘the objective of disciplinary
11 proceedings is to protect the public, the profession and the administration of
12 justice and not to punish the offender.’” *Matter of Alcorn*, 202 Ariz. 62, 74, 41
13 P.3d 600, 612 (2002) (quoting *In re Kastensmith*, 101 Ariz. 291, 294, 419 P.2d
14 75, 78 (1966)).
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17 RECOMMENDATION

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19 The purpose of lawyer discipline is not to punish the lawyer, but to protect
20 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
21 P.2d 1315, 1320 (1993).
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23 In imposing discipline, it is appropriate to consider the facts of the case, the
24 American Bar Association’s *Standards for Imposing Lawyer Sanctions*
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1 (“Standards”) and the proportionality of discipline imposed in analogous cases.
2 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

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4 Upon consideration of the facts, application of the *Standards*, including
5 aggravating and mitigating factors, and a proportionality analysis, this Hearing
6 Officer recommends acceptance of the Tender of Admissions and Agreement for
7 Discipline by Consent and the Joint Memorandum in Support of Agreement for
8 Discipline by Consent providing for the following:
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- 10 1. Respondent shall receive a censure.
- 11 2. Respondent shall be placed on probation for a period of one year, upon

12 the signing of the probation contract, with the following terms:

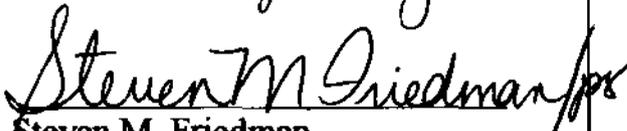
- 13 a.) Respondent shall, within thirty (30) days of the Supreme Court’s
14 final judgment and order, contact the director of the State Bar’s Law
15 Office Management Assistance Program (LOMAP) to schedule an
16 audit of his trust account. Following the audit, Respondent shall
17 enter into a Memorandum of Understanding that will be effective for
18 a period of one-year from the date Respondent signs the
19 Memorandum. Respondent shall comply with all recommendations
20 of the LOMAP director or her designee.
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1 b.) Respondent shall pay all costs incurred in the assessment by
2 LOMAP and any applicable monitoring of the Memorandum of
3 Understanding.
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5 c.) In the event that Respondent fails to comply with any of the
6 foregoing conditions, and the State Bar receives information, bar
7 counsel shall file with the Hearing Officer a Notice of Non-
8 Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing
9 Officer shall conduct a hearing within thirty days after receipt of said
10 notice, to determine whether the terms of probation have been
11 violated and if an additional sanction should be imposed. In the
12 event there is an allegation that any of these terms have been violated,
13 the burden of proof shall be on the State Bar of Arizona to prove non-
14 compliance by clear and convincing evidence.
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18 3. Respondent shall pay the costs and expenses incurred in this
19 disciplinary proceeding.

20 DATED this 13th day of January, 2005.

21 
22 Steven M. Friedman
23 Hearing Officer 9Q

24 Original filed with the Disciplinary Clerk
25 this 13th day of January, 2005.

1
2 Copy of the foregoing was mailed
3 this 13th day of January, 2005, to:

4 Mark I. Harrison
5 Daniel L. Kaplan
6 Respondent's Counsel
7 *Osborn Maledon, P.A.*
8 2929 North Central Avenue, Suite 2100
9 Phoenix, AZ 85012-2794

8 Shauna R. Miller
9 Senior Bar Counsel
10 State Bar of Arizona
11 111 West Monroe, Suite 1800
12 Phoenix, AZ 85003-1742

12 by: *P. Williams*