

FILED
JUN 21 2005
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

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4 IN THE MATTER OF A MEMBER) No. 04-0036
5 OF THE STATE BAR OF ARIZONA,)
6)
7 **JONATHAN J. OLCOTT,**)
8 **Bar No. 014859**)
9)
10) **HEARING OFFICER'S REPORT**
11)
12) **RESPONDENT.**)
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PROCEDURAL HISTORY

The State Bar filed a Complaint on December 22, 2004. Respondent filed an Answer on January 13, 2005. A hearing was then scheduled for April 21, 2005. 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 April 13, 2005. A telephonic hearing was held on April 13, 2005. The parties then filed an Addendum to Tender of Admissions and Agreement for Discipline by Consent on April 18, 2005. A hearing has not been held in this matter.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on May 15, 1993.

1 2. Prior to joining Respondent's law firm in or about November 2001,
2 attorney William Shore ("Mr. Shore") represented Nayeli Pelayo ("Pelayo"), a
3 minor, who had been injured in an accident in a HomeBase store in Phoenix,
4 Arizona. This was a personal injury case.
5

6 3. Respondent and Mr. Shore subsequently became partners in the firm of
7 Olcott and Shore, PLLC.
8

9 4. In or about August 2002, Mr. Shore entered into a stipulation between
10 HomeBase and his client, Pelayo, in which a claim for \$120,000 would be
11 included in HomeBase's plan of reorganization pursuant to its bankruptcy filed in
12 November 2001.
13

14 5. In or about March 2004, Mr. Shore withdrew from the law firm. He
15 provided his new contact information to the bankruptcy management firm.
16

17 6. As the Pelayo matter predated Respondent's and Mr. Shore's
18 partnership, Mr. Shore kept the Pelayo matter after withdrawing from the firm.
19 On or about September 9, 2004, having heard nothing from the bankruptcy
20 management firm about a disbursement of funds under the bankruptcy, Mr. Shore
21 inquired with the bankruptcy management firm as to the status of a first
22 distribution under the bankruptcy.
23

24 7. Mr. Shore was informed that the first settlement distribution for the
25 Pelayo matter was sent to Respondent in or about late June 2004.

1 8. Mr. Shore telephoned Respondent's firm and was informed that a
2 settlement check had been received and that \$4,720 had been deposited into
3 Respondent's operating account.
4

5 9. In or about late June 2004, Respondent had received a check, made
6 payable to "Nayeli Pelayo (a minor) and Olcott and Shore" and had negotiated it
7 without advising Mr. Shore of the receipt of the settlement funds in which
8 Respondent knew, or should have known, Mr. Shore had an interest and without
9 the permission of Mr. Shore. At this time, Respondent and Mr. Shore were
10 engaged in a dispute relating to the law firm's receivables.
11

12 10. Respondent negligently failed to promptly inform the client of the
13 receipt of the settlement check or obtain the client's endorsement on the
14 settlement check. Respondent affirmatively asserts and for purposes of this
15 agreement, the State Bar conditionally does not dispute that this was an oversight
16 and not done with intent to defraud the client or Mr. Shore.
17
18

19 11. If this matter proceeded to hearing, Respondent would testify that he
20 believed that he was entitled to handle the settlement funds in the Pelayo matter
21 and that it was therefore not necessary to obtain Mr. Shore's signature on the
22 check, or inform him of the receipt of the check.
23

24 12. As a result of further communication between Respondent and Mr.
25 Shore, on September 30, 2004, Respondent issued a check to Mr. Shore for the

1 full amount of the Pelayo first distribution check, plus interest in the amount of
2 \$372.38.

3
4 13. Respondent failed to petition the Probate Court to establish a
5 conservatorship as required by statute, before disbursing funds to the law firm in
6 payment of fees.

7
8 14. Respondent failed to ascertain the existence or amounts of the medical
9 liens that had been tracked by Mr. Shore or other claims filed against the
10 settlement funds before disbursing the funds received in the Pelayo matter.

11
12 15. The State Bar filed a formal complaint in this matter on December 22,
13 2004, alleging violations of Rule 42, specifically ERs 1.3, 1.4, 1.15, 3.4(c), 8.4 (c)
14 and (d) and Rules 41(b) and 53(c). Respondent, through counsel, filed his answer
15 on January 12, 2005, admitting violations of ERs 1.3, 1.4 and 1.15 and denying
16 the remaining violations.

17
18 16. Respondent violated one or more of the Rules of Professional Conduct
19 as follows: Respondent failed to act with reasonable diligence; Respondent failed
20 to reasonably communicate with the client; Respondent failed to reasonably
21 safeguard funds and failed to notify those with an interest in the funds and/or
22 render an accounting; and Respondent engaged in conduct that is prejudicial to
23 the administration of justice.
24
25

1 17. Respondent's practice at Olcott and Shore, and thereafter, focused
2 exclusively on the representation of homeowner's associations.

3
4 18. Respondent had never handled a personal injury case or a case involving
5 a minor. Respondent was unaware of any special requirement related to
6 settlement funds for minors.

7
8 19. To the best of his current recollection, Respondent was made aware of
9 the receipt of the check by his staff and informed them that Olcott and Shore were
10 due fees pursuant to a contingency fee agreement. The check was deposited into
11 the client trust account. The fees due pursuant to the contingency agreement were
12 then transferred from the client trust account into the firm's operating account.

13
14 20. This action was in accord with the firm's operating procedure for
15 handling fees pursuant to contingent fee agreements.

16
17 21. Respondent asserts, and the State Bar conditionally does not dispute,
18 that he believed that, as the division of the law firm receivables had not yet been
19 completed, he was entitled to withdraw the amount due to the firm for attorney's
20 fees.

21
22 22. Based on further communication from Mr. Shore, Respondent consulted
23 his personal attorney who advised that a conservatorship proceeding was
24 necessary before the settlement could be disbursed, and that he should forward
25 the entire amount received, plus interest to Mr. Shore. Respondent was advised

1 by his attorney that any dispute over the attorney's fees could be resolved later.
2 Respondent promptly forwarded to Mr. Shore the entire amount that had been
3 received, plus interest to date.
4

5 CONDITIONAL ADMISSIONS

6 Respondent conditionally admits that, for purposes of this agreement only,
7 his conduct as described above violated Rule 42, Ariz. R. S. Ct., specifically,
8 ER 1.3, ER 1.4, ER 1.15, and ER 8.4(d).
9

10 CONDITIONAL DISMISSALS

11 The State Bar conditionally agrees, for purposes of this agreement only, to
12 dismiss the alleged violations of Rule 42, specifically ERs 3.4(c), and 8.4(c) and
13 Rules 41(b) and 53(c), Ariz.R.S.Ct., based on Respondent's affirmative assertions
14 regarding his state of mind.
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

22 A review of *ABA Standard 4.0 (Violations of Duties Owed to Clients)*
23 indicates that censure is the presumptive sanction for Respondent's misconduct.
24 *Standard 4.43 (Lack of Diligence)* specifically provides:
25

1 Reprimand (censure in Arizona) is generally appropriate
2 when a lawyer is negligent and does not act with reasonable
3 diligence in representing a client, and causes injury or
potential injury to a client.

4 Respondent conditionally admits that he negligently failed to advise another
5 attorney, Mr. Shore, that he had received and negotiated a personal injury settlement
6 check in which he knew Mr. Shore had an interest. Respondent also conditionally
7 admits that he negligently failed to petition the Probate Court to establish a
8 conservatorship, as required by statute, and negligently failed to address the medical
9 liens and other claims filed against the settlement funds before distributing the
10 funds to the law firm.
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12

13 AGGRAVATING AND MITIGATING FACTORS

14 This Hearing Officer then considered aggravating and mitigating factors in
15 this case, pursuant to *Standards* 9.22 and 9.32, respectively.
16

17 This Hearing Officer agrees with the parties that three aggravating factors
18 apply and should be considered in this matter:

19 (a) prior disciplinary offenses
20

21 (h) vulnerability of victim
22

23 (i) substantial experience in the practice of law
24
25

1 This Hearing Officer agrees with the parties that two factors are present in
2 mitigation¹:

3 (d) timely good faith effort to make restitution or to rectify consequences
4 of misconduct

5 (e) full and free disclosure to disciplinary board or cooperative attitude
6 toward proceedings
7

8 **PROPORTIONALITY REVIEW**
9

10 To have an effective system of professional sanctions, there must be
11 internal consistency, and it is appropriate to examine sanctions imposed in cases
12 that are factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772.
13 However, the discipline in each case must be tailored to the individual case, as
14 neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶
15 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002);
16 *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).
17
18

19 The two cases discussed below involve attorneys' failures to act
20 appropriately in connection with their representation of minors with regard to
21 guardianships and/or conservatorships.
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¹ This Hearing Officer did not consider factor (l) remorse, as the parties did not provide any evidence in the record in support of this factor.

1 In *In re Sammons*, SB-03-0150-D (2003), the respondent agreed to a
2 censure, probation and assessment of costs for violating Rule 42, Ariz.R.S.Ct.,
3 ERs 1.3, 1.4, 1.15 and 8.4(d) and Rule 51(k)², Ariz.R.S.Ct. Sammons was
4 appointed by the Pima County Superior Court to act as the conservator and
5 guardian to a victim of an automobile accident who was left with the mental
6 capacity of a child. Sammons was found to have failed to comply with state law
7 that required that he register as a private fiduciary. Sammons also failed to file
8 tax returns for the conservatorship, failed to communicate or pay the CPA for
9 preparing the returns, and failed to appropriately manage the financial affairs of
10 the conservatorship. In other matters, Sammons admitted to missing court
11 hearings, failing to keep a client informed about his case and failing to
12 communicate with his clients. There were three aggravating factors found:
13 pattern of misconduct, *Standard 9.22(c)*; multiple offenses, *Standard 9.22(d)*; and
14 substantial experience in the practice of law, *Standard 9.22(i)*. Mitigating factors
15 included absence of a prior disciplinary history, *Standard 9.32(a)*; absence of
16 dishonest or selfish motive, *Standard 9.32*; full and free disclosure to disciplinary
17 board and cooperative attitude towards proceedings, *Standard 9.32(e)*; character
18 and reputation, *Standard 9.32(g)*; and remorse, *Standard 9.32(l)*.
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² Re-numbered as Rule 53(c), Ariz. R. S. Ct., effective December 1, 2003.

1 Similarly, in *In re Allen*, 2000 Ariz. LEXIS 138 (2000), Allen received a
2 censure and 18-month probation after admitting that he failed to provide diligent
3 and competent representation in two separate matters involving a
4 guardianship/conservatorship matter and a criminal case. Allen admitted to
5 violating Rule 42, Ariz.R.S.Ct., ERs 1.2, 1.3, 1.4, 1.15, 1.16, 3.2, 3.4, and 8.4(c)
6 and (d). Allen had a history of prior discipline that included three informal
7 reprimands and a censure for similar ER violations. The Disciplinary
8 Commission found that censure is an appropriate sanction when a lawyer is
9 negligent and does not act with reasonable diligence or competence when
10 representing a client, demonstrates a failure to understand relevant legal doctrines
11 or procedures, engages in conduct that is a violation of a duty owed to the
12 profession and causes injury or potential injury to a client, the public or the legal
13 system. There were four factors found in aggravation: prior disciplinary offenses,
14 *Standard 9.22(a)*; dishonest or selfish motive, *Standard 9.22(b)*; multiple
15 offenses, *Standard 9.22(d)*; and substantial experience in the practice of law,
16 *Standard 9.22(i)*. In mitigation, the Commission found five factors: personal or
17 emotional problems, *Standard 9.32(c)*; timely good-faith effort to make
18 restitution or to rectify consequences of misconduct, *Standard 9.32(d)*; full and
19 free disclosure to a disciplinary board or cooperative attitude toward a
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1 proceeding, *Standard 9.32(e)*; imposition of other penalties or sanctions, *Standard*
2 *9.32(k)*; and remorse, *Standard 9.32(l)*.

3
4 Finally, *In re Kirkorsky*, SB-01-0125-D (2001), is a case factually similar
5 to the instant matter. The respondent, Kirkorsky, received a censure, one (1) year
6 probation and six hours of CLE, having admitted to violating ERs 1.1, 1.5, 1.15
7 and 8.4 in failing to competently represent minor children by releasing settlement
8 funds to their parents prior to the establishment of a conservatorship; failing to
9 safeguard client property; failing to reduce to writing amendments to the fee
10 agreement; failing to advise the court that the conservatorship funds had been
11 released and failing to timely file proof of the establishment of the conservator
12 account. Two aggravating factors were found: vulnerability of the victims,
13 *Standard 9.22(h)*, and substantial experience in the practice of law, *Standard*
14 *9.22(i)*. In mitigation there were four factors found: absence of disciplinary
15 record, *Standard 9.32(a)*; full disclosure/cooperative attitude, *Standard 9.32(e)*;
16 imposition of other penalties, *Standard 9.32(k)*; and remorse, *Standard 9.32(l)*.
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20 A respondent's mental state can both determine whether an ethical
21 violation occurs and affect the appropriate discipline for a violation. *In re Clark*,
22 207 Ariz. 414, 417, 87 P.3d 827, 830 (2004). In the instant case, Respondent
23 conditionally admits that the charged ethical violations involved a single case.
24 Respondent affirmatively asserts, and for purposes of this agreement only the
25

1 State Bar does not dispute, that his conduct was negligent rather than willful in
2 that Respondent did not deliberately fail to communicate with the client, to notify
3 Mr. Shore about the receipt of the settlement funds, to petition for the required
4 conservatorship or to ascertain the existence of, or satisfy the outstanding medical
5 liens or claims.
6

7 RECOMMENDATION

8
9 The purpose of lawyer discipline is not to punish the lawyer, but to protect
10 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
11 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
12 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
13 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
14 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
15 (1994).
16

17
18 In imposing discipline, it is appropriate to consider the facts of the case, the
19 American Bar Association's *Standards for Imposing Lawyer Sanctions*
20 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
21 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
22

23 This is a case where the Respondent let his anger over the financial dispute
24 with his former partner control his better judgment. Respondent hired counsel to
25 assist in the resolution of the partnership dissolution issues, but failed to seek

3
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 six months
12 effective upon the signing of the probation contract. Bar Counsel will notify the
13 Disciplinary Clerk of the date on which the probation term begins. The term of
14 probation is as follows:
15

16 a. Respondent shall contact the State Bar's Trust Account Ethics
17 Enhancement Program (TAEPP) within 30 days from the date of the final
18 judgment and order to participate in TAEPP.
19

20 b. In the event that Respondent fails to comply with any of the
21 foregoing conditions, and the State Bar receives information, bar counsel shall
22 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule
23 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty
24 days after receipt of said notice, to determine whether the terms of probation
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1 have been violated and if an additional sanction should be imposed. In the event
2 there is an allegation that any of these terms have been violated, the burden of
3 proof shall be on the State Bar of Arizona to prove non-compliance by clear and
4 convincing evidence.
5

6 3. Respondent shall pay the costs and expenses incurred in this
7 disciplinary proceeding.
8

9 DATED this 21st day of June, 2005.

10
11 
12 Stanley R. Lerner
13 Hearing Officer TV

14 Original filed with the Disciplinary Clerk
15 this 21st day of June, 2005.

16 Copy of the foregoing was mailed
17 this 21st day of June, 2005, to:

18 Nancy A. Greenlee
19 Respondent's Counsel
20 821 East Fern Drive North
21 Phoenix, AZ 85014

22 Roberta L. Tepper
23 Bar Counsel
24 State Bar of Arizona
25 4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288

by: PWilliam