

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

IN THE MATTER OF A SUSPENDED MEMBER)
OF THE STATE BAR OF ARIZONA,)

No. 03-1704

YVONNE J. STROUF,)
Bar No. 006981)

**HEARING OFFICER'S
REPORT**

RESPONDENT.)
_____)

PROCEDURAL HISTORY

A Probable Cause Order was filed on July 21, 2004. The State Bar filed a Complaint on July 29, 2004. Respondent did not file an answer. The Disciplinary Clerk filed an Entry of Default on September 15, 2004.

Pursuant to the State Bar's request for Aggravation/Mitigation Hearing, undersigned officer having deemed that the allegations set forth in the Complaint had been deemed admitted, a hearing on mitigation and aggravation was set for Friday, October 15, 2004. However, on scheduled date, neither Bar Counsel nor Respondent failed to appear.

On October 20, 2004, this Hearing Officer requested that the parties file post-hearing memoranda no later than October 29, 2004. On October 27, 2004, the State Bar filed its Proposed Hearing Officer's Report and Recommendation. Respondent Strouf did not file a proposed report.

On December 20, 2004, a telephonic conference call was held as undersigned hearing officer was concerned that Respondent had not responded at all. Particularly, undersigned hearing officer was concerned about Respondent's state of

health. Despite Respondent being faxed a notice of the telephonic conference call, she failed to appear. Upon speaking with Michael Harrison, counsel for the State Bar, Bar counsel agreed to send an investigator to Respondent's office to determine her whereabouts and well-being. Another telephonic conference was scheduled for December 22, 2004.

On December 22, 2004, Bar Counsel and Respondent appeared telephonically. At that telephonic hearing, Respondent advised she had been further hospitalized even after the 2003 hospitalizations. Respondent further stated that due to her declining health, she virtually had no client base, and particularly, she had only one case, which is a probate matter. Hearing Officer ordered Respondent to provide documentation on her hospitalizations. Respondent complied with that order on December 27, 2004. Exh. G.

On December 29, 2004, another telephonic conference call was held. At that time Respondent advised that she had reviewed the Complaint and the Proposed Hearing Officer's and Recommendation submitted by State Bar Counsel. Respondent stated that she did not dispute the report but disagreed with the recommendation. Respondent advised that she felt that a reprimand and probation were more appropriate sanctions in her case.

FINDINGS OF FACT

At all times relevant hereto, Respondent was a member of the State Bar of Arizona, having been admitted on October 17, 1981. Respondent was summarily suspended for non-compliance with Mandatory Continuing Legal Education on August 20, 2004 and remains suspended.

On September 12, 2003, the State Bar of Arizona received a non-sufficient funds notice on Respondent's Wells Fargo Arizona Bar Foundation client trust account no. 71-9414344. The notice indicated that on September 3, 2003, check no. 2100 for \$800.00 attempted to pay against the account when the balance in the account at the time was \$584.75. It appears the bank paid check no. 2100, charged a \$29.00 overdraft fee, thereby overdrawing Respondent's trust account for a total of \$244.25.

On September 16, 2003, the Staff Investigator sent Respondent the initial screening letter with a copy of the non-sufficient funds notice, requesting an explanation as to the apparent overdraft on her client trust account.

By fax dated October 25, 2003, Respondent wrote and advised she had been in and out of the hospital for the past six weeks and could not respond to the September 16, 2003 letter. She requested a short extension to the October 25 letter to provide her response. Exh. A.

By fax dated November 7, 2003, Respondent responded and explained that the overdraft on her trust account was the result of a calculation error in regards to a real estate transaction in which her trust account was used as an escrow account. Respondent further stated that since May 1, 1999, she received the buyers' monthly mortgage payment and then remitted the same to the sellers less any deductions for property taxes and insurance payments. Respondent further explained that the buyers paid \$460 per month, with \$400 being for principal and interest and the remaining \$60 to be held to cover taxes and insurance. Respondent also explained that upon receipt of payment from the buyers she would deposit the funds into her trust account and then provide a trust account check to the sellers for \$400.

Respondent explained that when the buyers received the bills for the taxes and insurance, they would provide them to her and she then, in turn, would pay the bills from her trust account. Exh. B.

Respondent reported that in early September 2003 she received a phone call from the sellers regarding the status of the payments. Respondent indicated that due to her illness and extended time out of the office, she did not know the exact status of the payments so she called the buyers and they indicated they were current on the payments. Respondent indicated she subsequently learned that the buyers had not paid the July 2003 mortgage payment. Respondent reported that buyers paid taxes and insurance payments directly and then deducted those taxes and insurance payments from what they owed on the mortgage. Respondent explained that based on the buyers' statement that they were current on their payments, she disbursed a check from her trust account in which the offsetting funds were not on deposit in the trust account, which resulted in an overdraft. Exh. B.

A review of the bank records submitted by Respondent indicated that at the time of the overdraft, Respondent's trust account contained only funds belonging to Respondent and her escrow payment client. Funds belonging to no third party or other client were endangered or compromised by the overdraft. Exh. C.

Review of the submitted records revealed that the overdraft was most likely caused by Respondent's failure to conduct a monthly reconciliation of her trust account. Exh. C.

Based on the recommendation of bar counsel, on May 6, 2004, the Probable Cause Panelist issued an Order of Diversion requiring Respondent to participate in

the State Bar's Trust Account Ethics Enhancement Program. The Order of Diversion was mailed to Respondent on May 12, 2004.

The Order of Diversion specifically required Respondent to contact Barbara Chandler, Coordinator of the State Bar's Trust Account Ethics Enhancement Program, within 20 days of the date of mailing of the Order of Diversion. The State Bar has no record that Respondent contacted anyone at the State Bar regarding the Order of Diversion. Exh. D.

State Bar Counsel attempted to contact Respondent by phone several times; however, Respondent's voice message system was full and bar counsel was unable to contact her or leave her a message.

On June 10, 2004, bar counsel sent Respondent a certified letter to Respondent's address of record with the State Bar instructing her to contact the State Bar regarding the Order of Diversion. The State Bar received the return receipt bearing Respondent's signature and indicating delivery of the letter on June 12, 2004. Exh. E.

Nonetheless, Respondent failed to respond to the State Bar's certified letter of June 12, 2004. As of the time of filing the Complaint and since the date of mailing the Order of Diversion, there was no record of any communication by Respondent with the State Bar.

On June 29, 2004, bar counsel recommended that the Probable Cause Panelist vacate the Order of Diversion and enter an Order of Probable Cause.

CONCLUSIONS OF LAW

This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. S. Ct., specifically: ER 1.15(a), 3.4(c), Rule 43(d), Rule 44(b) and Rule 53(d) (e) and (f).

Respondent failed to properly safeguard client funds as is required by Supreme Court Rules 42, ER 1.15(a), Rules 43(d) (requiring lawyers to manage their trust accounts according to the trust account guidelines) and 44(b) (obligating lawyers to maintain complete trust account records), Ariz.R.S.Ct., by failing to maintain client ledgers.

By disbursing funds from the account solely upon her client's representation that they were current on their remittances, Respondent failed to maintain proper internal controls within her office to adequately safeguard funds on deposit in the trust account as is required by Supreme Court Rule 43(d), Ariz.R.S.Ct. and State Bar of Arizona Trust Guideline 1(c) (adequate internal controls).

Respondent failed to conduct a monthly reconciliation of her trust account as is required by the Supreme Court Rule 43(d), Ariz.R.S.Ct. and State Bar of Arizona Trust Account Guideline 2(e) (monthly reconciliation).

By failing to contact the State Bar as required in the May 6, 2004 Order of Diversion, Respondent violated Rule 42, ER 3.4(c) (violation of an order of a tribunal).

By failing to respond to the State Bar's written inquiries about Respondent's failure to comply with the terms of the Order of Diversion, Respondent violated Rule 53(d) and (f), Ariz.R.S.Ct., (failure to cooperate with or furnish information to the State Bar).

ABA STANDARDS

ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state and (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

This Hearing Officer considered *Standard* 4.0 (Violations of Duties Owed to Clients) in determining the appropriate sanction warranted by Respondent's conduct. Specifically, *Standard* 4.14 (Failure to Preserve the Client's Property) provides that: "Admonition (informal reprimand in Arizona) is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client."

In the instant case, the one-time overdraft occurred because Respondent negligently relied on the declaration of her clients that sufficient funds were in the account to cover check no. 2100, and because Respondent failed to conduct a monthly reconciliation of her trust account. Because all of the funds in the account belonged either to Respondent or to the clients in whose behalf withdrawal causing the overdraft occurred, Respondent's conduct caused little or no actual or potential injury to a client. This Hearing Officer found that Respondent's declining health, which caused her to be hospitalized in the year 2003 and in 2004, contributed to Respondent's negligent mental state. This Hearing Officer also found that upon discovering the overdraft, Respondent acted as promptly as she could in light of the circumstances to rectify the matter.

This Hearing Officer then considered aggravating and mitigating factors in this case, pursuant to *Standards* 9.22 and 9.32, respectively. One (1) factor is present in aggravation: 9.22 (i) substantial experience in the practice of law. There are six (6) factors in mitigation: 9.32(a) absence of a prior disciplinary record, (b) absence of a dishonest or selfish motive, (c) personal or emotional problems, (d) timely good faith effort to make restitution or to rectify consequences of misconduct, (h) physical disability, and (l) remorse. No other aggravating or mitigating factors are found.

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionality when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993).

This Hearing Officer considered three cases to achieve proportionality in the instant case.

In Sando, John M., DC No. 98-2305, the State Bar received overdraft notices on Respondent's IOLTA. Respondent could not explain the cause of the overdrafts as he had changed secretaries and account records were not kept with great accuracy. Overall, Respondent failed to maintain complete records of the handling, maintenance and disposition of all funds that came into his possession, including client ledger cards and check registers, failed to perform monthly reconciliation of the trust accounts and bank statements and failed to maintain adequate funds in the trust account. Respondent also failed to supervise his staff adequately. Respondent was found in

violation of ER1.2, ER 1.3, ER1.4, ER1.15, ER 8.1(b), ER 8.4, SCR 43, SCR 44, SCR 51(h), and SCR 51(i). Respondent was issued an informal reprimand.

In Suzenski, Robert, DC No. 98-0114, Respondent was retained in a collection matter. Thereafter, he failed to communicate with his client and to diligently pursue his case. Additionally, Respondent engaged in sloppy and negligent bookkeeping practices and poor procedures. Respondent was found in violation of ER 1.3, ER 1.4, ER 1.15(b), SCR 43, SCR 44, SCR 51(h), and SCR 51(i). Respondent was issued an informal reprimand and placed on one year probation (LOMAP and EEP).

In 98-06-25-0, Attorney X was informally reprimanded by order of the Disciplinary Commission of the Supreme Court of Arizona. The Commission, upon review of the record on appeal, rejected the Hearing Committee's recommendation of informal reprimand and recommended censure. On appeal and by Memorandum Decision, the Supreme Court reduced the recommendation of censure to an informal reprimand. No costs were assessed against Attorney X. Attorney X was arguably negligent in failing to properly supervise or arrange supervision of non-legal staff to ensure that clients' funds were properly segregated, applied and protected. The Commission agreed that behavior by Attorney X constituted a violation of the Rules of the Supreme Court, Rule 42, specifically ER 1.15(a), ER 5.1(a), 5.3(a), 5.3(b), ER 8.4(a), and SCR 43(a) and 44 (a).

RECOMMENDATION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d

1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

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

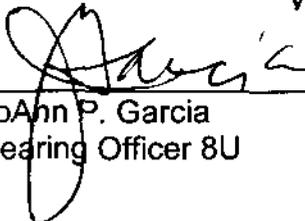
Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionally analysis, this Hearing Officer recommends the following:

1. Respondent shall receive an informal reprimand.
2. Respondent shall be placed on probation for a period of one year, effective upon the signing of the probation contract, with the following terms and conditions:
 - a.) Respondent shall meet with the Director of the Member Assistance Program (MAP), who will conduct an assessment. Respondent thereafter will enter into a MAP contract and shall comply with all recommendations of the MAP director; and
 - b.) Respondent shall complete the Trust Account Ethics Enhancement Program (TAEHP) offered by the State Bar within the one-year period of probation and shall pay all required fees.

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

3. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings. Exh. F.

DATED this 22 day of February, 2005.


JoAnn P. Garcia
Hearing Officer 8U

Original filed with the Disciplinary Clerk
this 22nd day of February, 2005.

Copy of the foregoing mailed
this 22nd day of February, 2005, to:

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