

FILED

MAY 17 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. 03-1477
OF THE STATE BAR OF ARIZONA,)
)

MICHAEL J. WICKS,)
Bar No. 010522)

) **HEARING OFFICER'S REPORT**
)
RESPONDENT.)

PROCEDURAL HISTORY

Following the January 2004 issuance of a Probable Cause Order, the State Bar filed a single-count Complaint on December 28, 2004. Respondent filed an Answer on January 31, 2005. A hearing was scheduled for April 25, 2005 but the parties notified the Settlement Officer that an agreement had been reached and waived the settlement conference. The parties thereafter 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 14, 2005. No hearing has been held in this matter.

FINDINGS OF FACT

1. At all times relevant hereto, Respondent was an attorney licensed to practice law in Arizona, having been admitted to practice in Arizona on November 9, 1985.

2. On or about August 8, 2003, the State Bar of Arizona received an insufficient funds notice from Wells Fargo Bank ("Wells Fargo") regarding Respondent's client trust account.

3. Wells Fargo's notice indicated that, on August 6, 2003, check no. 5019 in the amount of \$190.00 attempted to clear Respondent's client trust account when the balance in

1 that account was only \$169.55.

2 4. Wells Fargo nonetheless paid check no. 5019 and charged Respondent a \$29.00
3 overdraft fee, thereby overdrawing Respondent's trust account a total of \$49.45.

4 5. By letter dated August 14, 2003, the State Bar's Trust Account Staff Examiner
5 sent Respondent a copy of the insufficient funds notice with a letter requesting that Respondent
6 submit an explanation for the overdraft of the trust account within twenty (20) days.

7 6. By letter dated October 10, 2003, Respondent, through counsel, explained that
8 the overdraft was the result of a combination of bookkeeping and deposit errors, as detailed
9 below.

10 7. On June 15, 2003, Respondent received a \$3,000.00 earned upon receipt fee
11 from a client ("Tom O.") for representation in a DUI matter.

12 8. Respondent deposited the \$3,000.00 into his client trust account. Respondent
13 believed that there was a possibility that Tom O. would seek alternate counsel and, if that were
14 the case, that he would thereby be required to refund the fee to the client.

15 9. On August 1, 2003, Respondent determined that Tom O. was not going to obtain
16 alternate counsel and issued client trust account check no. 5018 in the amount of \$1,810.00 to
17 himself.

18 10. During that same time period, Respondent made several disbursements from his
19 trust account that were not related to Tom O. The disbursements were for costs that
20 Respondent advanced for other clients.

21 11. Check no. 5019 in the amount of \$190.00 was one such disbursement made for
22 another client matter.

23 12. On or about July 2, 2003, Respondent received a \$1,300.00 "earned upon
24 receipt" fee from a client ("Brad G.") for representation in a DUI matter.

1 13. Respondent believed that there was a chance that Brad G. might not be
2 prosecuted and, since there was a chance that Respondent would have to make a refund of all or
3 a part of the fee, he decided to deposit the \$1,300.00 into his client trust account.

4 14. On or about July 2, 2003, Respondent, intending to deposit the funds into his
5 client trust account, in fact deposited the \$1,300.00 into his operating account.

6 15. Subsequently, the DUI charge against Brad G. was dismissed.

7 16. On or about July 26, 2003, Respondent issued a refund to Brad G. by disbursing
8 trust account check no. 5014 to in the amount of \$300.00.

9 17. Given that Respondent erroneously deposited the funds into his operating
10 account, Respondent did not realize that the offsetting funds were not on deposit in the client
11 trust account resulting in a \$300.00 shortage in the client trust account.

12 18. In or about mid-June 2003, Respondent accepted a \$3,000.00 fee from a client
13 ("Larry T.") to file a special action.

14 19. Respondent believed that the likelihood of prevailing on the special action was
15 relatively low and, therefore, Respondent believed that there was the potential for a client
16 refund.

17 20. Respondent deposited the fee from Larry T. into his client trust account.

18 21. On July 18, 2003, Respondent issued check no. 5012 in the amount of \$140.00
19 as costs to the Court of Appeals in the Larry T. special action but failed to record it in any
20 check register.

21 22. Subsequently, the Court of Appeals declined jurisdiction in the special action.

22 23. On July 30, 2003, Respondent issued Larry T. a partial refund of \$1,000.00 by
23 check no. 5016 from the client trust account.

24 24. On July 30, 2003, Respondent issued himself check no. 5017 in the amount of

1 \$2,000.00 as earned fees in the Larry T. matter.

2 25. Respondent did not remember that he had previously issued a trust account
3 check to the Court of Appeals in the amount of \$140.00 on Larry T's behalf.

4 26. Given Respondent's failure to record the trust account check no. 5012 in the
5 amount of \$140.00, Respondent was unaware that his client trust account had a shortage of
6 \$140.00 for the Larry T. matter.

7 27. By letter dated October 16, 2003, the State Bar Staff Examiner requested
8 additional documentation and information from Respondent.

9 28. Respondent, through counsel, provided a response dated November 18, 2003.
10 The response was incomplete due to the fact that Respondent's bookkeeping system was not
11 maintained properly.

12 29. Respondent reported that he was unclear as to the balance of any personal funds
13 being maintained in the client trust account to cover bank service charges.

14 30. Respondent was unable to completely account for the total balance of funds in
15 the trust account.

16 31. The records that were available reflect that the total balance in the trust account
17 fell below what should have been on account for clients Coberly, Ceausu and Nalls.

18 32. Respondent failed to properly safeguard client funds; failed to keep his funds
19 separate from that of his clients on deposit in his trust account by depositing earned client funds
20 into the trust account; failed to maintain complete trust account records for a period of five
21 years; failed to exercise due professional care in the maintenance of his client trust account;
22 failed to maintain proper internal controls; failed to record all transactions to the trust account
23 promptly and completely and to conduct a monthly reconciliation as required by the rules.

24

1 **CONDITIONAL ADMISSIONS**

2 1. Respondent conditionally admits his conduct as outlined above violates Rule 42,
3 Ariz.R.S.Ct., specifically, ER 1.15 and Rules 43 and 44.

4 2. The Complaint in this matter included an allegation that Client Petersen
5 advanced costs in his case and provided Respondent with a check in the amount of \$800.00 for
6 an expert witness. The Complaint alleged that Respondent failed to deposit the advance cost
7 payment from client Petersen into his client trust account and that Respondent negotiated the
8 check rather than deposit it into his client trust account.

9 3. The State Bar conditionally admits that it cannot prove the foregoing allegation
10 by clear and convincing evidence. Respondent asserts that he agreed to represent Mr. Peterson
11 for a flat fee. However, Mr. Peterson was unable to pay the flat fee in full and, rather, made
12 periodic payments. Mr. Peterson was also responsible for advancing an expert witness fee to
13 Forensic Alcohol Science and Technology in the sum of \$300.00, the amount Respondent
14 estimated would be charged. As one of Mr. Peterson's periodic payments, he submitted a
15 check in the amount of \$800.00 and, in the memo line of the check, wrote "attorney fees."
16 Respondent negotiated the check believing the full amount was owed as fees. Respondent later
17 learned that the check included the \$300.00 for the expert fees, along with the \$500.00 balance
18 of fees owed. Respondent paid the actual expert witness fees of \$330.00 with funds he had
19 earned from another client. Consequently, the fees were earned and the expert was paid.

20 **ABA STANDARDS**

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

1 The parties indicate that *Standard 4.1* is the most applicable in this matter and this
2 Hearing Officer agrees.

3 A review of ABA *Standard 4.0* (Violations of Duties Owed to Clients) indicates that
4 censure is the presumptive sanction for Respondent's misconduct. *Standard 4.13* (Failure to
5 Preserve the Client's Property) specifically provides:

6 Reprimand (censure in Arizona) is generally appropriate when a
7 lawyer is negligent in dealing with client property and causes injury or
potential injury to a client.

8 Respondent's misconduct with his trust account was negligent.

9 **AGGRAVATING AND MITIGATING FACTORS**

10 This Hearing Officer then considered aggravating and mitigating factors in this case,
11 pursuant to *Standards 9.22* and *9.32*, respectively. This Hearing Officer agrees with the parties
12 that two aggravating factors apply and should be considered in this matter:

13 (a) *Prior disciplinary offenses*: Respondent received an informal reprimand in 1993
14 for conduct unrelated to the conduct in the instant matter. Although it is identified
15 as an aggravating factor, the prior discipline should not bear on the ultimate
16 sanction in this case given the remoteness of the offense.

17 (i) *Substantial experience in the practice of law*: Respondent has been licensed to
18 practice law in Arizona for twenty years. His experience in practice may serve as
19 an aggravating factor in that he should have known the requirements for the proper
20 use and maintenance of his trust account and its corresponding records.

21 This Hearing Officer also agrees with the parties that three factors are present in
22 mitigation:

23 (b) *Absence of a dishonest or selfish motive*: Respondent's conduct was negligent
24 and was not the product of a selfish or dishonest motive. There is no evidence

1 indicating that Respondent intended to misappropriate any client funds.

2 (e) *Full and free disclosure to disciplinary board or cooperative attitude toward*
3 *proceedings:* Respondent was forthcoming and cooperative throughout the
4 investigative stage of these proceedings and continued to be cooperative after the
5 filing of a formal complaint. In addition, Respondent timely provided all trust
6 account records requested during the investigation.

7 (m) *Remoteness of prior offenses:* Respondent received an informal reprimand in 1993
8 for unrelated conduct.

9 PROPORTIONALITY REVIEW

10 To have an effective system of professional sanctions, there must be internal
11 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
12 similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567 (1994) (quoting *In re Wines*, 135
13 Ariz. 203, 207 (1983)). However, the discipline in each case must be tailored to the individual
14 case, as neither perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
15 604, 615 (1984).

16 In terms of proportionality, the following cases are instructive: In *Matter of Vingelli*,
17 SB-03-0161-D (January 13, 2004), Mr. Vingelli represented a minor client in a personal injury
18 matter. After the matter settled, Mr. Vingelli agreed to contest the claim by the parents' insurer
19 for reimbursement. Mr. Vingelli notified the insurer that the client was contesting the claim
20 and that the disputed money would be held in his client trust account until the matter was
21 resolved. The dispute continued for almost three years. The disputed funds did not always
22 remain in the client trust account and the balance dipped below the disputed amount on some
23 occasions. Mr. Vingelli also did not have all of the trust account records he was required to
24 maintain. Mr. Vingelli was found to have violated ER 1.15, Rule 42, Ariz.R.S.Ct., and Rules

1 43 and 44, Ariz.R.S.Ct., and was censured by consent and placed on two years of probation,
2 including participation in the Law Office Member Assistance Program.

3 Similarly, in *Matter of Delozier*, SB 04-0034-D, (March 25, 2004), Mr. Delozier
4 received a censure and probation for trust account violations. In that matter, Mr. Delozier
5 failed to safeguard client funds, and commingled personal funds with client funds. He also
6 failed to conduct monthly reconciliations, and failed to maintain complete records.

7 Other recent trust account cases also support the imposition of a censure and probation
8 in this matter. See *Matter of Randall*, SB-02-0146-D (November 2002); *Matter of Hall*, SB 02-
9 0122-D (September 2002); and *Matter of Inserra*, SB 02-0144 (October 2002).

10 RECOMMENDATION

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

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

21 Upon consideration of the facts, application of the *Standards*, including aggravating and
22 mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance
23 of the Tender and the Joint Memo providing for the following:

- 24 1. Respondent shall receive a censure.

3 on which the probation begins. The terms of probation are as follows:

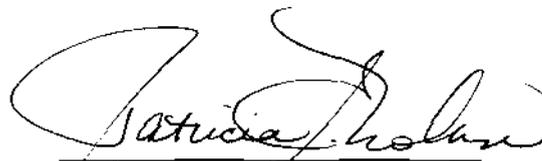
4 a. Respondent shall contact the director of the State Bar's Law Office
5 Management Assistance Program (LOMAP) within 30 days of the date of the final judgment
6 and order. Respondent shall submit to a LOMAP audit of his office's trust account procedures.
7 The Director of LOMAP shall develop a probation contract, and its terms shall be incorporated
8 herein by reference.

9 b. Respondent shall refrain from engaging in any conduct that would violate
10 the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

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

18 4. Respondent shall pay the costs and expenses incurred in this disciplinary
19 proceeding.

20 DATED this 17th day of May, 2005.

21 
22 Patricia E. Nolan
23 Hearing Officer 7Y

24 ORIGINAL filed with the Disciplinary
Clerk this 17th day of May, 2005.

1 COPY of the foregoing was mailed
this 17th day of May, 2005, to:

2
3 Ralph W. Adams, Esq.
4 714 N. Third Street, Suite 7
5 Phoenix, Arizona 85004-0001
6 *Respondent's Counsel*

7
8 Maret Vessella
9 Deputy Chief Bar Counsel
10 State Bar of Arizona
11 4201 N. 24th Street, Suite 200
12 Phoenix, Arizona 85016-6288

13
14 By: *P. Meloserdoff*

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