BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **KEITH R. LALLISS,** **Bar No. 002293** RESPONDENT.	Nos. 04-1887, 05-1124 **AMENDED DISCIPLINARY COMMISSION REPORT**

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on October 14, 2006, pursuant to Rule 58, Ariz. R. Sup. Ct., for consideration of the Hearing Officer's Report filed August 4, 2006, recommending an informal reprimand and costs. The underlying complaint contains two counts. The first alleges Respondent engaged in conflicts of interest by representing his daughter in post-dissolution divorce proceedings against his former son-in-law who was a former client. The Hearing Officer concluded that Respondent did not represent his former son-in-law in the matters that were the "same or substantially related" to the divorce and thus, there was no violation of E.R. 1.9(a).

The second count alleges Respondent mishandled a $400.00 advance payment for a client in a divorce action and wrongfully retained $2,500.00 the same client had given him to settle an unrelated creditor claim. The Hearing Officer concluded the State Bar failed to carry its burden of proof on the advance payment but did establish that Respondent wrongfully retained the $2,500.00 in violation of E.R. 1.15(d), E.R. 1.16(d) and Rule 44(b)(4). Respondent and the State Bar each filed objections and requested oral argument. Respondent and counsel for the State Bar were present.

Respondent argues that he would have returned the $2,500 to the client, but that he contacted the State Bar's Ethics Hotline, was advised he might be able to exercise a retaining lien for unpaid attorney fees. He then reviewed case law including *National Sales and Service Co. Inc.*, 136 Ariz. 544, 667 P.2d 738 (1983), which he asserts supported that view. Respondent maintains that he was not aware that the advice given by the Ethics Hotline is not binding and that his good faith reliance on the inaccurate advice from ethics counsel should serve as a complete defense.

The State Bar argues that there is no record evidence to support Respondent's assertions regarding the substance of his conversation with the ethics counsel. Respondent did not testify regarding that conversation at the hearing below, only the Bar's notes were admitted, which do not contain the substance of the conversation. The Bar also argues that the Hearing Officer erred in not finding a violation of ER 1.9(a) in Count One and in finding the applicable aggravation and mitigation factors in Count Two. The State Bar asserts that censure is the appropriate sanction.

Decision

The seven members[1] of the Disciplinary Commission by a majority of six,[2] recommend accepting and adopting most of the Hearing Officer's findings of fact and conclusions of law. As discussed below, the majority concludes that the Hearing Officer's findings regarding several of the aggravating and mitigating factors were clearly erroneous and conclude as a matter of law that the appropriate sanction is censure and payment of costs.[3]

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[1].Commissioner Baran did not participate in these proceedings. One public member seat was vacant at the time the Commission considered this matter.

[2] Commissioner Mehrens was opposed. *See* dissenting opinion below.

[3] A copy of the Hearing Officer's Report is attached as Exhibit A.

Discussion

The Disciplinary Commission's standard of review is set forth in Rule 58(b), which states that it applies a clearly erroneous standard to findings, and reviews questions of law *de novo*. Mixed findings of fact and law are also reviewed *de novo*. *State v Blackmore*, 186 Ariz. 630, 925 P.2d 1347 (1996) citing *State v. Winegar*, 147 Ariz. 440, 711 P.2d 579 (1985).

Count One

The Bar argues the Hearing Officer erred in concluding that Respondent's prior representations of Brett Hamel were not substantially related to Respondent's post-dissolution representation of his daughter, Brett Hamel's then ex-wife, against Brett. The Bar concedes Respondent's individual representations of Brett Hamel were not substantially related to the post-dissolution proceedings. Instead, it argues Respondent's ongoing representation of Brett's business interests and more importantly, Brett's father's business interests gave Respondent a detailed picture of the family's finances, which precluded the subsequent adverse representation. As the Bar argues, the comment to E.R. 1.9 provides clear guidance on this issue:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. **For example, a lawyer who has represented a businessperson and has learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.**

E.R. 1.9 Comment (emphasis added).

At the hearing Brett conceded that Respondent's knowledge could well have come from Respondent's conversations with his daughter, Brett's now ex-wife, over the course of their 20-year marriage. Based, in part, on that testimony, the Hearing Officer concluded that the Bar failed to prove that Respondent actually learned extensive private financial information about Brett by virtue of his prior representations. That finding was not clearly erroneous and necessitated the dismissal of Count One.

The Bar argues that it did not have to prove Respondent misused confidential information because it alleged a violation of E.R. 1.9(a) as opposed to a violation of E.R. 1.9(c). Although true, that argument misses the point. The Hearing Officer found that the dissolution action was not related to any of Respondent's specific prior representations of Brett. The two were only substantially related within the meaning of E.R. 1.9 to the extent Respondent learned extensive private financial information through those prior representations. *Foulke v. Knuck*, 162 Ariz. 517, 784 P.2d 723 (App. 1989), the case the Bar relies on is not on point because it involved a prior representation in the same matter. In that context, the existence of confidential information can and will be presumed. In contrast, here the matters would not be substantially related unless Respondent gained confidential information.

Count Two

The Hearing Officer found that Respondent accepted $2,500 from a client for the specifically designated purpose of funding the settlement of a third party creditor claim and properly placed those funds in his trust account. Respondent was unable to settle the creditor claim but kept the $2,500 in his trust account without telling the client he had been unsuccessful. Approximately six months later the client contacted Respondent when the

creditor sued to enforce its claim. It was only at that point that Respondent called the Bar's Ethics Hotline, conducted independent research and determined, incorrectly, that that he could assert a retaining lien.

The Hearing Officer correctly concluded that a lawyer cannot assert a retaining lien against funds placed in his or her safe keeping for a particular purpose. *E.g., Committee on Professional Ethics v. Nadler*, 445 N.W.2d 358, 361 (Iowa 1989) ("'Funds delivered for a specific purpose by a client to his attorney cannot constitute the subject matter of a retaining lien in favor of such an attorney'") (quoting 7A CJS Attorney & Client, § 377 at 748 (1980) and citing cases from multiple jurisdictions.). Respondent's conduct violated E.R. 1.15(d) (safekeeping property); E.R. 1.16(d) (Protecting client's interest on termination of representation); and Rule 44(b)(4) (Duty to safeguard property).

In mitigation the Hearing Officer found Respondent demonstrated cooperation, candor and contriteness in these proceedings. Hearing Officer's Report, p. 8. That finding was based on Respondent's last minute disclosure of his file notes which contradicted the position he had taken over the prior six months of Bar proceedings. Prior to the hearing, Respondent claimed that his client did not specify a particular purpose when she gave him the $2,500.00. On the last day of the evidentiary hearing, Respondent finally admitted that his client had designated the funds for a specific purpose and produced his notes which documented those discussions with his client.

The Hearing Officer was impressed with Respondent's disclosure, but failed to note that it was neither voluntary nor timely. Rule 11 of the Arizona Rules of Civil Procedure required Respondent to review his file to ensure he had a reasonable factual basis for the position he was taking in his pleadings before he filed them. Similarly,

Supreme Court Rule 57 required Respondent to disclose his file notes during the pretrial discovery, which preceded the hearing itself. Far from expediting the disciplinary process, Respondent's conduct forced the Bar to expend valuable resources litigating a point Respondent should have admitted in his initial Answer. The Hearing Officer ignored Respondent's failure to comply with those mandatory investigation and disclosure requirements and treated Respondent's untimely factual admission and disclosure as a mitigating factor. On this record, that finding was clearly erroneous.

The Commission commends Respondent for eventually contacting the State Bar's Ethics Hotline for advice, but there is no record evidence to support Respondent's assertions regarding the content of those discussions. The Bar's cryptic notes were admitted, but no evidence concerning their meaning or the substance of Respondent's conversations with ethic's counsel. If more substantial evidence had been presented to support Respondent's characterization of the Ethics Hotline advice, the Disciplinary Commission would have been more inclined to consider the evidence as a mitigating factor, as urged by the dissent.

Equally important, the record clearly establishes that Respondent withheld the funds from his client for approximately six months before he ever contacted the Ethics Hotline. The client gave Respondent $2,500 to settle the creditor claim in November 2004. Respondent testified he promptly contacted the client's creditor and learned that he could not settle the claim for that amount. Respondent did not inform the client and simply left the $2,500 in his trust account for approximately six months. It was only when his client called him that Respondent contacted the Ethics Hotline for after-the-fact guidance. Respondent candidly admitted that he retained the money because he did not want to work

for free and deserved to be paid. *See* Commission transcript at 5-7. Given this record, the Hearing Officer's failure to find Respondent's selfish motive as an aggravating factor was clearly erroneous.

The Commission also finds there is insufficient factual basis to support the Hearing Officer's finding of remorse as a mitigating factor. The only evidence in the record is Respondent's agreement with the Hearing Officer's comment that the misconduct alleged in Count Two was the most "troubling." Hearing Officer's Report p. 8 and Hearing Transcript, Volume II, p. 306:07. Even assuming that statement amounted to an apology, standing alone it was insufficient to support a finding of remorse.

> [W]e agree with the Commission that "[t]hose seeking mitigation relief based upon remorse must present a showing of more than having said they are sorry···· [T]he best evidence of genuine remorse is affirmative and, if necessary, creative efforts to make the injured client whole." For this reason, we think that respondent's late apology, standing alone, is insufficient to support a finding of remorse.

Matter of Augenstein, 178 Ariz. 133, 137, 871 P.2d 254, 258. (1994)(quoting Commission Report). The record in this case contains no such evidence. The Hearing Officer therefore erred in finding remorse as a mitigating factor.

Neither the Hearing Officer's Report nor the parties' briefs contained a discussion of sanctions imposed in similar types of cases. Although the Commission did not find any Arizona cases on point, in *Oklahoma Bar v. Cummings*, 863 P.2d 1164 (OK 1993), an attorney with prior discipline was suspended for a period of one year for asserting a lien against money entrusted by the client for a specific purpose and applying it to the payment of attorney fees. In *Committee on Professional Ethics v. Nadler*, 445 N.W.2d 358, 361

(Iowa 1989), a one year suspension was imposed for the improper assertion of a retaining lien against funds intended to settle suit and the commission of an assault.

Respondent had no prior discipline and the only misconduct found relates to the handling of the client funds. Thus, the Commission concludes this case does not warrant a suspension. The Hearing Officer found Respondent's violations were negligent. The client was deeply in debt and was being pursued by creditors. Her former spouse had already filed bankruptcy eliminating his responsibility for community debts. Respondent's actions clearly caused or had the potential to cause injury to his clients. Censure is therefore the presumptive sanction under *Standard* 4.13 and is appropriate in this case.

Conclusion

The purposes of discipline are to protect the public and deter similar conduct by other lawyers, *Matter of Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986); instill public confidence in the bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d, 352, 362 (1994); and maintain the integrity of the legal system, *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).

Therefore, based on the facts, application of the ABA *Standards*, including aggravating and mitigating factors, and a proportionality analysis, the Commission recommends censure and costs of these disciplinary proceedings.

RESPECTFULLY SUBMITTED this 5th day of February 2007.

Barbara A. Atwood

Barbara A. Atwood, Chair
Disciplinary Commission

Commissioner Mehrens dissenting:

I respectfully dissent for the reason that the Commission and the Hearing Officer refused to allow, as a mitigating factor, Respondent's contacting the State Bar's Ethics Hotline for advice. In writing this dissent I am completely aware that the law is clear in that an opinion from the Ethics Hotline is advisory in nature only and does not prohibit a lawyer from being disciplined. I am not suggesting that Respondent avoid discipline but rather such seeking of advice be a mitigating factor. The majority mentions this contact but refuses to give it credence because "there is no record evidence to support Respondent's assertions regarding the content of those discussions", p. 6. However, the State Bar kept a record of Respondent's contact with the Ethics Hot Line [ethics counsel Karen Clark] on June 6, 2005. The telephone summary report of that contact [made part of the record in this case] sets forth the exact issue before us and notes that the Bar referred him to Ethics Opinions 04-02 and 04-03. There is nothing in the record to dispute Respondent's version of the discussions he had with the State Bar's Ethic Counsel.

The State Bar, presumably with the Supreme Court's blessing, actively promotes the Ethics Hotline. For example, in the November 2006 *Arizona Attorney*, the Bar sponsored a full page ad urging lawyers to call the Bar's Ethics Hotline before they make inappropriate ethical mistakes.[4] It seems to me that a lawyer ought to have the right to put some credence in the advice he is given when he calls this service. I am not suggesting that a lawyer can avoid discipline (and my understanding is that the Bar tells the caller so) but it does seem to me that a lawyer ought to be greatly rewarded with something more than a pat on the back.

[4] Interestingly, the ad does not suggest that the advice given is only informative and that a lawyer cannot rely upon it to avoid discipline.

Although not directly in point, our Supreme Court has found as an aggravating factor the failure of a Judge to request an advisory opinion from the Judicial Ethics Advisory Committee. See *Fleischman*, 188 Ariz. 106 933 P.2d 5 63 (1997) at pgs. 5, 6, 7, 110. Surely, when a lawyer seeks such assistance and heeds the Ethics Hotline advice, he should be given more than a commendation. It should be an absolute mitigating factor. Because the majority refuses to allow this as a mitigating factor, I respectfully dissent.

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