BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	File Nos. 05-2002, 06-0303, 06-1314
JOSEPH W. CHARLES, Bar No. 003038	**HEARING OFFICER'S REPORT**
RESPONDENT.	

PROCEDURAL HISTORY

1. Probable cause was found on these three cause numbers on September 10, 2006. A Complaint was filed on December 14, 2006, and thereafter served on the Respondent on December 15, 2006. Respondent filed his Answer on January 16, 2007.

2. Prior to the hearing, which was originally set on March 27, 2007, Respondent filed three motions for summary judgment on each of these cause numbers. After the original Hearing Officer ruled on the Motions for Summary Judgment, his ruling was appealed to the Disciplinary Commission. The result of that appeal was that on June 29, 2007, the Disciplinary Commission granted Summary Judgment on Count Two. Counts One and Three were remanded for hearing, 05-2002 (Hake) and 06-1314 (Judicial Referral).

3. As a result of the prior Hearing Officer recusing himself on June 30, 2007, this case was ultimately reassigned to the undersigned Hearing Officer on August 11, 2008. The matter was set for an Initial Case Management Conference on August 25, 2008, and a final contested hearing was set and conducted on October 7, 2008.

FINDINGS OF FACT

Factual summary

4. Count One, 05-2002 (Hake), deals with a dispute between Glenda Hake ("Ms. Hake") and Respondent concerning the terms of a fee agreement in a domestic relations action. Ms. Hake feels that she had a flat fee agreement with Respondent, while Respondent claims that there was no flat fee, but rather an initial retainer and then an hourly fee agreement. The State Bar claims that Respondent's fee was unreasonable, that Respondent improperly took payment for his fees out of the proceeds of the sale of the Hake community home, and that Respondent failed to keep proper trust account records or produce them when requested.

5. Count Three, 06-1314 (Judicial Referral), deals with whether the Respondent developed a conflict of interest in a probate matter where he claims to have represented the estate in which there were two Co-Personal Representatives appointed who ultimately developed conflicting interests. The State Bar claims that Respondent represented the Co-Personal Representatives, and once a conflict arose between the Co-Personal Representatives, he should have withdrawn from the case. Respondent responds that one of the Co-Personal Representatives had terminated his services, and so there was no conflict or any impediment to his further representation of the estate.

Count One (File No. 05-2002 Hake)

6. On or about November 18, 2003, Glenda Hake ("Ms. Hake") retained Respondent to represent her in her divorce. Respondent and Ms. Hake entered into a fee arrangement wherein Ms. Hake agreed to pay Respondent $1,500 plus costs.

7. The dispute in this matter is whether the $1,500 plus costs to be paid by Ms. Hake to Respondent was a flat fee for the entirety of Respondent's services (Transcript of Hearing [T/H] 58:21 – 59:7). Ms. Hake's understanding was that the Respondent was agreeing to represent her throughout her divorce for a flat fee of $1,500 plus costs. Respondent testified that although his normal hourly rate is $200 an hour, he reduced that figure to $150 an hour and agreed to give Ms. Hake 10 hours of legal services at that rate, but after the 10 hours were expended, it would then be on an hourly basis at his normal hourly charge of $200 plus costs. Ms. Hake's dissolution was uncontested at first, and it was hoped that it would stay that way and the case could be handled in ten hours (T/H 213:18 – 216:8, 260:25 – 261:6). Thereafter the dissolution became contested and complex and significant work was expended by Respondent on behalf of Ms. Hake (Respondent's Hearing Exhibit [RH/E] 8, RH/E 13 BSN 0360 – 0364 & 0650).

8. Ms. Hake testified that she was concerned about the fee arrangement that was different from what her original understanding was. Ms. Hake testified that she tried to talk to Respondent about the confusion about the flat fee vs. hourly fee, but was told by Respondent that he did not have her file and that he was busy (T/H 75:6 – 76:6). Respondent testified that while Ms. Hake was concerned about

money and individual entries in his billings, she never voiced opposition to his hourly billing rather than a flat fee (T/H 270:12 – 25).

9. Respondent further testified that he agreed with Ms. Hake that he would reduce his attorney fees from $11,000 to $7,000 and write off the rest (T/H 271:22 – 272:10).

10. The issue of what the agreement specifically was between Ms. Hake and Respondent turns to a very large degree on a written fee agreement submitted by the Respondent. Ms. Hake testified that she did not sign the fee agreement (T/H 63:16 – 17), and the Respondent is adamant that Ms. Hake signed the fee agreement in his presence (T/H 255:15 – 257:2).

11. The fee agreement is critical because the terms of the written plea agreement support the Respondent's contention that the $1,500 that Ms. Hake was to pay him was merely a retainer, and that after 10 hours of legal services Ms. Hake would pay an hourly fee to the Respondent (State Bar Hearing Exhibit [SBH/E] 2).

12. There was a letter to Ms. Hake from Respondent dated November 19, 2003, (SBH/E 1) which states that the $1,500 fee is a flat fee, but it also states that Respondent's hourly rate is $200 per hour, thus having an internal conflict. There is also a financial affidavit filled out by Ms. Hake that lists fee information that is inconclusive (SBH/E 3, p.3) which puts greater focus on the Fee Agreement.

13. The State Bar retained an expert forensic document examiner, Mr. Bill Flynn, who examined the signature on the fee agreement and testified at the hearing that it was his opinion that it was "inconclusive" whether the signature on page two of the fee agreement was Ms. Hake's or not (T/H 22:16 – 24). Mr. Flynn testified

that due to the variations in everyone's signatures there were equal measures of authenticity and forgery (T/H 22:20 – 22) such that he simply could not say whether the signature was Ms. Hake's or not (T/H 34:18 – 22, 39:14 – 20, 41:13 – 19, 54:15 – 19. See also RH/E 14).

14. Respondent called a forensic document examiner, Rosemarie Urbanski, who testified that she found no telltale signs that the document had been forged (T/H 174:4 -7), and that due to the unique nature of Ms. Hake's signature, it would take a highly skilled forger to be able to forge her signature (T/H 176:17 – 20, 177:21– 178:1).

15. Rosemary Urbanski testified that due to the unusual nature of Ms. Hakes signature, the fluidity of the signature and the consistencies she noticed in the exemplars that she examined, that it was "highly probable" that Ms. Hake signed the fee agreement (T/H 172:1 – 6, 180:11 – 18, 184:6 – 8, RH/E U).

16. Therefore, we have one Forensic expert saying that he can't tell, and another expert testifying that it was highly probable that Ms. Hake signed the agreement.

17. Although Ms. Hake does not remember signing the fee agreement, there are some indicia that the agreement between the parties was not a flat fee. Respondent sent Ms. Hake a letter, dated July 21, 2004, (RH/E 7) during the course of his representation of her, pointing to the fact that she had used up the $1,500 retainer, and that while he looked to her for payment, he would try and get her husband to make a contribution. Ms. Hake testified that Respondent told her that he would try and get her husband to pay her attorney fees (T/H 85:9 -11). See also SBH/E J, a letter to Ms. Hake from Respondent dated November 8, 2004, confirming that Ms.

Hake was incurring attorney's fees at an hourly rate. There is also some indicia that Ms. Hake felt that the $1,500 was a flat fee and that she expressed that to Respondent in a letter to Respondent on November 29, 2004, (RH/E O).

18. Ms. Hake testified that she did try to contact the Respondent concerning his fees. Ms. Hake testified that she was unsuccessful in being able to talk to the Respondent about his fees and that he referred her to the bookkeeper.

19. Respondent testified that at some point during his representation of Ms. Hake, it was agreed that he would not press her for the attorney's fees she owed him, and that there would be no interest charged on those fees, in exchange for him receiving his fees from the sale of the community home (223:14 – 224:24, 262:1 – 6). Ms. Hake also acknowledged that any further payments of attorney fees would have to come from the proceeds from the sale of the house (T/H 273:3 – 21).

20. On December 17, 2004, Ms. Hake took Certified Court Watcher, Crystal Nuttle ("Ms. Nuttle"), with her to a meeting with Respondent at his office to discuss issues concerning her dissolution (attorney fees, child visitation, the wording of the Decree of Dissolution). Ms. Nuttle testified that Respondent referred Ms. Hake to Respondent's wife, the temporary bookkeeper for his firm, to address the issues concerning the attorney's fees. Ms. Nuttle also testified that there was friction between the parties that it was a difficult time for Ms. Hake, but that she does remember a discussion between Ms. Hake and Respondent talking about the Respondent getting paid from proceeds from the sale of the community home. It was Ms. Nuttle's observation that the parties discussed that the Respondent's fees would be paid from the proceeds from the sale of the house and that Respondent

would try and get the husband to pay the fees (T/H 121:14 – 122:9). Ms. Nuttle also observed that there was a discussion and an acknowledgment by Ms. Hake that there was a fee agreement, but Ms. Hake thought that it was a set fee. At the conclusion of the meeting, Ms. Nuttle observed that Ms. Hake was still upset about the course of her dissolution and upset with Respondent's representation (T/H 121:5 – 10, 125:4 – 13).

21. Respondent testified that while Ms. Hake had some disagreement with specific entries in his billing, she never questioned until near the very end of the dissolution process the fact that the $1,500 which she was supposed to have paid him as an initial retainer, was just that, an initial retainer and not a flat fee (T/H 270:12 – 25).

22. Respondent's wife, Rhonda Charles, acting as the firm's temporary bookkeeper, testified that she had several conversations with Ms. Hake in November 2004 about specific billing entries that Ms. Hake objected to. The result was that Respondent gave Ms. Hake a $1,500 reduction in her fee. Rhonda Charles testified that that accommodation seemed to satisfy Ms. Hake (T/H 295:1 – 296:13). Rhonda Charles also testified to conversations with Ms. Hake about the firm's understanding of Ms. Hake's difficult financial circumstances and that Ms. Hake need not worry about paying the monthly billings, the fees would be taken out of the proceeds from the sale of the house. "Ms. Hake "...seemed to be fine with that." (T/H 296:14 – 297:3).

23. There was an error in Ms. Hake's original billings which reflected a flat fee and that was, according to Rhonda Charles, changed in the August 2004 billing. The

error was explained to Ms. Hake by Rhonda Charles in November 2004 and Ms. Hake never brought it up with her again (T/H 299:13 – 25, 301:13 – 25, 302:19 – 304:14).

24. At the conclusion of the dissolution, the community home was sold and the net result was that Respondent's attorney's fees were discounted substantially (approximately $4,000) and paid out of Mrs. Hake's **husband's** share of the equity in the community home. The home was sold for $52,000 and Ms. Hake received approximately $31,000 (out of which $7,000 was paid to Respondent) while her husband received $21,000 (T/H 107:22 – 108:3). The bottom line is that Ms. Hake only paid a total of $750 toward the original $1,500 retainer, and the balance of the Respondent's fees, $7,000, were paid by Ms. Hake's husband.

Trust Account Issue

25. Regarding the Count One trust account issue, the State Bar claims that because Respondent charged an unreasonable fee (flat fee vs. retainer and hourly), and then took payment of that fee out the proceeds from the sale of the house which were in his trust account, he violated trust account rules. The State Bar also claims that Respondent received a check from opposing counsel in the Hake matter and rather than depositing the check in his trust account, simply signed the check over to Ms. Hake. Finally, early in these proceedings the State Bar made a request from Respondent that he provide trust account records that Respondent did not completely comply with.

26. The first claim rests on the unreasonableness of the fees and is dealt with later herein. The second claim is responded to by Respondent that he knew Ms. Hake

was desperate for money and just wanted to get her the money as quickly as possible so he simply endorsed the check over to Ms. Hake. Although there was an initial problem, Mrs. Hake did receive the money.

27. The third claim deals with what was requested by the Bar and when. Early in these proceedings, on August 30, 2006, the State Bar requested: Ms. Hake's "client ledger card"; "Copies of all deposits made to your trust account (pertaining to Ms. Hake)"; "Copies of all checks written to your trust account (pertaining to Ms. Hake)"; "Copy of your general ledger (from 11/03 – 3/06)"; and "Copies [of] your trust account bank statements (from 11/03- 3/06)" (SBH/E 12). Respondent provided Ms. Hake's client ledger (SBH/E 12, BSN 126), copies of two checks (BSN 124 &125), and a bank statement (BSN 122), but failed to provide duplicates of his trust account deposit slips, his trust account general ledger, and all the requested bank statements.

28. Respondent admitted that this was an incomplete response to Bar Counsel's request, but testified it was all he could get "in a timely fashion" (T/H 204:20 – 24). Respondent testified that he asked his staff to get what they could "timely" because Bar Counsel was going before the Probable Cause Panelist, and that he told Bar Counsel if she needed anything else, he would need more time (T/H 206:3 – 10, 205:12 – 19). The State Bar did not follow up on Respondent's incomplete response until two years later, in September of 2008 (T/H 206:16 – 207:3).

29. Respondent testified that when he received the September 2008 request for production of the documents not provided back in August 2006, he felt that the request was not timely as the scheduling order in this case had set a deadline which had passed (T/H 207:6 – 11).

Count Three (File No. 06-1314 Judicial Referral)

30. On or about December 6, 2004, Respondent filed an Application for Informal Probate of Will and Appointment of Co-Personal Representatives on behalf of Dennis G. Chase ("Mr. Chase") and Patricia A. Todd, a.k.a. Patricia Duncan ("Ms. Duncan"), the son and daughter of the decedent in *In the Matter of the Estate of Edna Lucille Thurman*, PB 2004-070864.[1]

31. In or about December 2004, Ms. Duncan and her son Todd Meland ("Mr. Meland") lived in the decedent's house, which was the estate's primary asset. Mr. Chase and Ms. Duncan initially agreed that Mr. Chase would purchase Ms. Duncan's share of the decedent's house and allow Ms. Duncan and her son to remain in the house.

32. In or about January 2006, Ms. Duncan informed Respondent that she was unhappy with Mr. Chase' proposed conditions for the purchase of the house.

33. In a February 9, 2006, letter, Respondent informed Ms. Duncan and Mr. Chase that due to their inability to reach settlement the house should be sold.

34. On or about February 14, 2006, Respondent filed a Motion for Appointment of Special Commissioner for Sale of Real Property on behalf of the estate.

[1] Unless otherwise stated, these facts are taken from the stipulated facts set forth in the Joint Pre-Hearing Statement.

35. On or about March 14, 2006, the Court ordered the appointment of a special commissioner, Robert B. Hunter ("Mr. Hunter") to sell the house.

36. In a letter dated March 27, 2006, and then in another letter dated March 30, 2006, Ms. Duncan sent Respondent letters notifying him that she discharged him (RH/E AJ). On or about June 2, 2006, Respondent filed a Motion to Remove Co-Personal Representative Duncan from the administration of the Estate because of her refusal to cooperate in the sale of the home. Respondent filed the motion on behalf of Mr. Chase (SBH/E 23).

37. The State Bar initially contended that Respondent used information obtained from Ms. Duncan to her disadvantage without her consent when he tried to have her replaced as Co-Personal Representative. Respondent responded that Ms. Duncan had terminated his services and that he was representing the estate and not the Personal Representatives individually when he sought to have Ms. Duncan removed as one of the Co-Personal Representatives. Respondent also contends that he used no information obtained from Ms. Duncan to her disadvantage when he tried to have her replaced as Co-Personal Representative.

38. In its closing Memorandum Bar Counsel concedes that it did not prove by clear and convincing evidence that Respondent violated ER 1.8(b), using information related to representing a client to the disadvantage of the client without the client's permission. However, the State Bar contends that Respondent did violate ER 1.9(a), a lawyer who previously represented a client (Duncan) may not represent another person (Chase) in the same or substantially related matter in which the other person's interests are materially adverse to the former client

without the client's written consent. The State Bar then claims that because Respondent filed the motion to have Ms. Duncan removed even though he had a conflict, that conduct was prejudicial to the administration of justice in violation of ER 8.4(d).

39. Mr. Dennis Chase testified at the hearing in this matter that at some point during the administration of the estate his sister, Ms. Duncan, not only refused his offer to purchase her interest in their mother's home, she then obstructed his efforts to sell the home (T/H 152:16 – 153:3, 145:12 – 23, 146:9 – 16).

40. Mr. Chase testified that the fact that his sister was not being cooperative was not something that Ms. Duncan told Respondent, it was something that Mr. Chase told Respondent (T/H 161:12 – 162:6).

41. The motion filed by Respondent to have Ms. Duncan removed as Co-Personal Representative was filed on June 2, 2006, two months after she terminated his services (SBH/E 23).

42. On July 26, 2006, a hearing on the Motion to Remove Co-Personal Representative was held. The Court denied Respondent's Motion because Respondent "has a conflict in this matter as it appears he is representing both the estate and the other Co-Personal Representative, Dennis Chase."

43. After terminating Respondent's services, and after Respondent's motion to have her removed, Ms. Duncan, with her son Mr. Meland acting as her attorney, attempted to have Mr. Chase removed as Co-Personal Representative of the estate (T/H 147:22 – 149:2).

44. After the Court hearing in July, Respondent withdrew from his representation of the estate, and Mr. Chase hired another attorney. Ultimately, the Court appointed a "fiduciary" who had to forcibly evict Ms. Duncan and her son from the home in August of 2007, almost three years after the probate began, and as of the date of the hearing, the home still had not sold (T/H 150:3 – 11).

45. Mr. Chase testified that by attempting to have his sister removed as Co-Personal Representative, he felt that Respondent was trying to move the administration of the estate along so that the probate could be completed (T/H 155:19 – 156:4). As a result of Ms. Duncan's refusal to vacate the home and allow the home to be sold, the probate of the estate has been prolonged now over four years, and the primary asset has decreased substantially in value (T/H 149:22 – 150:11, 156:5 – 8).

46. The focus of the State Bar initially was that the Respondent used information that he had gathered from Ms. Duncan to her detriment, specifically that she was being uncooperative in the sale of the primary estate asset, her mother's home. However, the Co-Personal Representative, Dennis Chase, testified that the fact that his sister was being uncooperative was commonly known by just about everyone involved, including: Mr. Chase, the Judge, Special Commissioner (to sell the house) Robert Hunter, "...the whole neighborhood knew it" (T/H 160:8 – 161:3).

47. In a May 16, 2008, letter to Respondent, the Maricopa County Public Fiduciary recited the subsequent difficulties of having Ms. Duncan removed from the home, and her continued intransigence in leaving the home after Respondent's

withdrawal, and her slowing the completion of the probate of the estate (RH/E AL). This fact is cited to show that Ms. Duncan's conduct was not a unique response to either her brother or the Respondent.

CONCLUSIONS OF LAW

Count One (Hake)

48. It has been the experience of this Hearing Officer that clients, especially in dissolutions where emotions are very raw, sometimes hear and remember things differently than they actually are. The State Bar has failed to persuade this Hearing Officer by clear and convincing evidence that Ms. Hake's signature on the Fee Agreement is not authentic. Certainly Respondent could have had better communication with Ms. Hake about his fees, but it is apparent that Respondent spent a substantial amount of time on Ms. Hake's complex divorce, she knew that he was billing her by the hour, and she agreed that he could take his fees out of the proceeds from the sale of the house.

49. What is also clear is that Ms. Hake only paid a total of $750 toward her fees and costs. That Ms. Hake's husband paid the $7,000 balance, and that Respondent discounted his fees by approximately $5,000 ($1,500 forgiveness plus $4,000 reduction at the conclusion of the case) was firmly established by the evidence.

50. While Ms. Hake testified that she was confused about the billings, her testimony was ambiguous at best about direct discussions with Respondent about the flat fee vs. hourly issue. In the end, the fee agreement defines the agreement between the parties and that agreement resolves the issue: Respondent had a retainer, then

hourly fee agreement with Ms. Hake. The Hearing Officer finds no violation of ER 1.5 or ER 1.15.

Trust Account Issue

51. In Count One the State Bar also alleges that Respondent failed to provide trust account records when requested. As noted, there was an early request for extensive trust account records in the Hake matter that Respondent only partially complied with because, he says, Bar Counsel wanted them "timely" prior to going before the Probable Cause Panelist. Respondent gave Bar Counsel what his staff could get together and then qualified his response saying that if Bar Counsel needed more he would need more time.

52. It is clear that Respondent's response to the initial request was not complete. Apparently the Bar felt that what Respondent provided was sufficient at the time because it did not follow up on asking for the remainder of the information until two years later, just weeks from the final hearing in this matter.

53. Normally this Hearing officer does not abide excuses for not providing trust account information when requested. The Rules are clear that they must be kept, and they must be provided when requested. However, this case has secondary considerations that make the issue less cut and dried. Yes, Respondent only provided some of the records, but there appears to have been some time pressures to get the information to Bar Counsel before she went to the Probable Cause Panelist. Respondent testified that he got the information his staff could assemble to Bar Counsel within that time frame and said that if more was needed he would need more time. In that no objection was heard from Bar Counsel for two years

until just before this case went to final hearing, this Hearing Officer can see where Respondent felt he had complied.

54. Respondent should have followed up with the rest of the requested records, and the State Bar should have followed up when he did not. The Hearing Officer does not find that there is sufficient evidence to prove by clear and convincing evidence that Respondent violated Rules 43 and 44.

Count Three (Judicial Referral)

55. The essence of Count Three is that, after being terminated by Ms. Duncan, Respondent brought an action adverse to her interests which used information that Respondent gained from Ms. Duncan while he represented her. Respondent has persistently and consistently asserted that he gained no information from Ms. Duncan that was used in the motion to have her removed as Co-Personal Representative.

56. Based on the testimony offered (Ms. Duncan was not called) and upon reviewing the motion (SBH/E 23) the Hearing Officer concludes that the motion to have Ms. Duncan removed was based on her recalcitrance in disposing of the primary estate asset, the home that she and her son were living in. Ms. Duncan's conduct was widely known, told to Respondent by the brother and not Ms. Duncan, and it is a real stretch to say that Respondent used information garnered from Ms. Duncan as a basis for his motion. It is even more of a stretch to say, as the State Bar originally claimed, that Respondent's conduct violated ER 1.8(b). The State Bar concedes as much in its Post Hearing Memorandum wherein it concedes that no 1.8(b) violation has been proven.

57. The focus of the case then moves to whether Respondent's conduct violated any other ER's. ER 1.9(a) states:

> (a) A Lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent, confirmed in writing.

58. Respondent contends that he represented the estate and not the individual Personal Representatives and so his conduct was not a violation of ER 1.9(a) and further that it was the conduct of Ms. Duncan, not his, that held up the probate of the estate.

59. While Respondent rightfully focused on the issue of the allegation that he used client information in filing the motion to have Ms. Duncan removed, he does not directly address the second allegation that he violated ER 1.9(a). Respondent points out that ER 1.9(c) allows a lawyer to use information about a former client once that information becomes generally known and that this allows his conduct. However, ER 1.9(c) does not negate ER 1.9(a) if the same or substantially related matter is the forum. Clearly the probate of the mother's estate is the same action that Respondent began with Ms. Duncan and then on behalf of the other Co-Personal Representative attempted to have her removed from. There was no evidence that Respondent obtained Ms. Duncan's informed written consent.

60. The Hearing Officer finds that Respondent violated ER 1.9(a), but does not find that his actions in filing the motion to have Ms Duncan removed violated ER 8.4(d). Respondent, albeit in error, thought that he represented the estate, that his responsibility was to the estate and that he was doing what he thought to be the right thing to have an impediment to the closing of the estate removed.

Respondent violated his duty of loyalty to his client under 1.9(a). Once the conflict was pointed out to Respondent by the Judge, Respondent withdrew and Mr. Chase retained a new attorney.

ABA STANDARDS

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

The Duty Violated

62. The Hearing Officer finds that Respondent's conduct represents a conflict of interest in representing two clients with adverse interests. Respondent therefore violated his duty of loyalty to his former client. Given that Respondent's conduct is a conflict of interest, *Standard* 4.3 is implicated. After reviewing 4.31 Disbarment, 4.32 Suspension, 4.33 Reprimand and 4.34 Admonition, this Hearing Officer concludes that 4.33 Reprimand is the most applicable.

> 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and cause injury or potential injury to a client.

The Lawyer's Mental State

63. There was no evidence that Respondent was aware of the conflict and withheld that information from Ms. Duncan, or that she suffered any actual injury as a result of Respondent's conduct. There is also no evidence that Respondent was acting in his own interests. Rather, it is clear that the Respondent was trying to

facilitate the resolution of the probate of the estate. Therefore, the Hearing Officer finds that Respondent's mental state was negligent.

Actual or Potential Injury

64. There was no evidence that Respondent caused Ms. Duncan any injury.

Aggravating and Mitigating Factors

65. Unfortunately, Respondent, neither in the hearing in this matter nor in his Post Hearing Memoranda, offered any comment concerning aggravating or mitigating factors. The State Bar, on the other hand, submitted the Respondent's significant, albeit somewhat old, disciplinary history, *Standard* 9.22, as an aggravating factor. Except for the fact that the Respondent is currently in diversion in a separate file for an ER 1.4 (communication) violation, all of his fairly numerous prior interactions with the disciplinary process occurred between the years 1993 and 1997, over 10 years ago. A review of those prior cases shows a fairly wide ranging subject matter of his prior infractions, but no infractions for a "conflict of interest" such as we have in this case. The question is how much weight to give to these prior infractions.

66. The impression this Hearing Officer gleaned from the substantial testimony offered in this case was that the Respondent is an extremely busy attorney working in the difficult area of domestic relations as well as probate. Respondent presents himself on the stand as genuinely concerned for his clients as evidenced by the substantial amount of work he did for Ms. Hake, the substantial reduction he made in his billing to her, as well as the assistance he helped her with that was not billed. In the probate matter it does not appear that the Respondent's motives

were selfish, he simply wanted to remove an impediment to the conclusion of the probate.

67. Given Respondent's prior disciplinary cases, one would think that the Respondent would be hyper-vigilant to the conflict issue. It should be a common understanding of all lawyers that they cannot on one-day represent a client, and then, shortly thereafter in the same matter even though they had been discharged, turn on that former client and act in a way that is adverse to her interests. Apparently, that is not knowledge that the Respondent knew or thought of, and he needs to be reminded of it. While this Hearing Officer can understand Respondent's feeling that he represented the "Estate" rather than the Personal Representatives individually, that is not the law and if Respondent is going to practice in the area of probate, he needs to make sure he is aware of the law in that area as well as his ethical responsibilities to his clients.

68. An additional aggravating factor is *Standard* 9.22(i) substantial experience in the practice of law. Respondent has been an Arizona attorney since September 23, 1972, over 35 years.

PROPORTIONALITY

69. The Supreme Court has held that, while discipline in each case must be tailored to the individual facts of the case, proportionality in cases with similar facts is one of the goals of the disciplinary system, *In Re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983).

70. In *In Re Kimberly Pugh,* 04-1782 (2007), Respondent represented the wife in a probation revocation proceeding then later represented the husband in a dissolution proceeding against the wife. The Disciplinary Commission found that the presumptive sanction for an ER 1.9(a) violation under the facts of the case was a censure, but because there were four mitigating factors and no aggravating factors, the presumptive sanction of censure was reduced to an informal reprimand.

71. In *In Re Sinchak,* 06-707, SB-07-0191-D (2007), Respondent, after having a disagreement with his client, the niece of a deceased person whose probate he was starting, and then after having been terminated by the niece, initiated probate proceedings adverse to the interests of his former client. Due to the factors in the case, especially that Respondent's conduct was knowing, harm to the client, failure to cooperate with the State Bar, dishonest or selfish motive, and refusal to acknowledge wrongful nature of his conduct, Respondent was suspended for six months and one day.

72. In *In Re Michael Aaron,* 06-0083 (2007), Respondent, while having a personal relationship with his client, represented her in a dissolution action against her husband. After the divorce was final, Respondent represented the husband in an unrelated debt collection matter. Respondent was found to have had a conflict of interest. Two aggravating factors, prior discipline and substantial experience, were found while three mitigating factors were found, remoteness, character and reputation, and full and free disclosure. Respondent was censured and required to pay the costs of the proceedings.

73. In *In Re Joseph Herbert*, DC 00-0241, SB 02-0041 (2002), Respondent represented the husband and wife in a civil claim regarding renovation of their home. Subsequently, Respondent's LLC. leased the home from the husband, while the husband and wife were estranged, without obtaining the wife's signature or consent. When the wife later contested the lease, Respondent, while still representing the husband and wife in the underlying case relating to the renovation, through his LLC., attempted to have the wife evicted from the home. A conflict of interest was found and Respondent was Censured, placed on probation for six months, ordered to attend to the State Bar's Ethics Enhancement Program, complete an additional three hours of CLE in the area of conflict of interest, and ordered to pay the costs of the proceedings.

RECOMMENDATION

74. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession and the administration of justice, deter future misconduct, and instill public confidence in the Bar's integrity, *In Re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147Ariz. 106, 708 P.2d 1297 (1985), *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

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

76. This case represents a somewhat unique situation wherein the lawyer, while trying to assist one of two clients in a probate matter, committed a breach of the conflict

of interest between himself and one of his former clients. Added to that is the fact that the Respondent has a fairly extensive prior disciplinary history, although most of it is over 10 years old.

77. This Hearing Officer did not find Respondent to be devious, or motivated by self-interest. Rather, this Hearing Officer found Respondent to be a concerned and conscientious attorney who does care for his clients and wants to do well by them. It appears to this Hearing Officer that Respondent has too many irons in the fire and trying to do too much for too many clients. In reviewing cases for the proportionality analysis, it appears that the focus of these discipline proceedings should be on Respondent's motives, the effect his conduct had on his client, and what we need to do to assure that Respondent learns from this experience and has no further contact with the disciplinary system.

78. After weighing all of these factors, the Hearing Officer recommends the following:

1) That Respondent receive a Censure;

2) That Respondent be placed on probation for one year;

3) That Respondent be required to complete an ethics course that will not only give him a better understanding of his obligation in conflict of interest situations, but also an overview of his professional responsibilities under the ethics rules;

4) That Respondent be required to pay the costs and expenses incurred in these disciplinary proceedings;

5) In the event that Respondent fails to comply with the terms of probation and information thereof is received by the State Bar, Bar Counsel shall file a Notice of

Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz.R.Sup.Ct. The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable time, but in no event later that thirty days after receipt of notice, to determine whether a term of probation had been breached, and, if so, to recommend an appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar to prove non-compliance by clear and convincing evidence.

DATED this 20th day of November, 2008.

Hon. H. Jeffrey Coker /NM
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 20th day of November, 2008.

Copy of the foregoing mailed
this 21st day of November, 2008, to:

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