

FILED

AUG 18 2010

BEFORE THE DISCIPLINARY COMMISSION OF THE
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA

RICHARD L. KEEFE,
Bar No. 001207

RESPONDENT.

No. 09-1665

DISCIPLINARY COMMISSION
REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on August 14, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed July 9, 2010, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for censure, two years of probation with the State Bar's Law Office Management Assistance Program ("LOMAP"), Member Assistance Program ("MAP"), and costs.

Decision

Having found no facts clearly erroneous, the five members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, two years of probation (LOMAP and MAP), and payment of costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.² The terms of probation are as follows:

¹ Commissioners Belleau, Flores, Horsley and Osborne did not participate in these proceedings.

² The Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$1,807.00.

Terms of Probation

1. Respondent shall be placed on probation for a period of two years, under terms and conditions to be developed by LOMAP and bar counsel after a full review of Respondent's trust account records and procedures. Failure to sign the Terms and Conditions of Probation developed by the State Bar will result in the matter being referred to the imposing entity for referral to a hearing officer.
2. The probation will begin when the final judgment and order is entered and will terminate two years from that date.
3. Respondent will meet with the MAP Director, Hal Nevitt, to determine whether a physical or mental exam is necessary to determine fitness to practice.
4. In the event Respondent fails to comply with any of the terms of probation recommended by the Hearing Officer and approved by the Disciplinary Commission and Supreme Court at the time of the reinstatement proceedings, and the State Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the imposing entity, pursuant to Ariz. R. Sup. Ct., Rule 60(a)(5). The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practical date, but in no event later than thirty days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by a

preponderance of the evidence.

RESPECTFULLY SUBMITTED this 18th day of August, 2010.

Pamela M. Katzenberg/mps
Pamela M. Katzenberg, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 18th day of August, 2010.

Copy of the foregoing mailed
this 18 day of August, 2010, to:

Tom Slutes
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Shauna R. Miller
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Copy of the foregoing hand delivered
this 18 day of August, 2010, to:

Hon. Jonathan Schwartz
Hearing Officer 6S
1501 W. Washington Street
Phoenix, AZ 85007

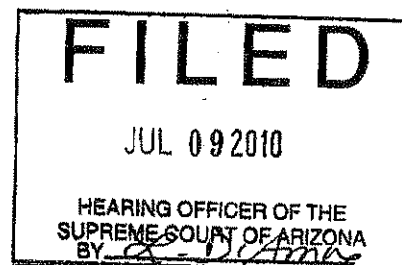
by: Deann Barker

/mps

EXHIBIT

A

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



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

File No. 09-1665

RICHARD L. KEEFE,
Bar No. 001207

HEARING OFFICER'S REPORT

Respondent.

PROCEDURAL HISTORY

On May 3, 2010 the parties filed the Tender of Admissions for Discipline by Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent. No Complaint was filed. The Hearing Officer was assigned on May 6, 2010. The hearing was held on May 28, 2010.

FINDINGS OF FACT¹

1. Respondent is an Arizona attorney who was admitted to practice on October 29, 1960.
(TR 5:5-7)
2. On August 26, 2009, the State Bar received an insufficient funds notice on Respondent's Wells Fargo Arizona Bar Foundation client trust account ("the trust account") indicating that on August 17, 2009, check number 8363 in the amount of \$1,500 attempted to pay against the trust account when the balance was \$11,290.57, but uncollectible. (TR 5:8-16)
3. The bank paid the check and did not charge an overdraft fee, leaving the trust account with an uncollectible balance of \$9,790.57. (TR 5:17-21)
4. On August 27, 2009, the State Bar Staff Examiner sent Respondent a copy of the overdraft notice and requested an explanation of the overdraft and the following

¹ The facts are found in the Tender of Admissions and Agreement for Discipline by Consent and in the transcript of the hearing.

information: Respondent's August 2009 trust account bank statements, corresponding cancelled checks, duplicate deposit slips, individual client ledgers, and general ledger. (TR 5:22 through 6:4)

5. Respondent did not submit all of the requested information, but did explain that the overdraft was the result of an extended deposit hold. (TR 6:5-9)
6. On August 5, 2009, Respondent deposited a draft from Church Mutual Insurance Company in the amount of \$15,236.51 into his trust account on behalf of client G. Church Mutual Insurance Company is not licensed to do business in Arizona, therefore the deposit was not a limited risk deposit as defined in Ariz. R. Sup. Ct., Rule 43(b)(4). (TR 6:10-25)
7. On August 12, 2009, the bank called him and told him that the draft had cleared, but said nothing to him about a partial hold on the funds. (TR 7:1-5)
8. On August 13, 2009, Respondent wrote five checks against the August 5, 2009, deposit: check 8360 for \$6,530.91, check 8361 for \$1,300, check 8362 for \$4,087.35, check 8363 for \$1,500 and check 8364 for \$1,487.25. (TR 7:6-10)
9. The bank paid all five checks; however, an overdraft notice was sent to the State Bar because at the time the fourth check cleared there was still a hold on a portion of the deposit that would not be released until August 19, 2009. (TR 7:11-19)
10. Respondent submitted settlement statements in lieu of client ledgers, but the statements did not contain the date, amount, payor/payee of each transaction and a running balance for each of the client's funds held in trust. (TR 7:20 through 8:1)
11. Respondent failed to maintain an administrative funds ledger, making it impossible for Respondent to conduct a proper monthly three-way reconciliation. (TR 8:2-6)

12. Bar counsel asked Respondent for some additional information concerning the documents he had provided and in response Respondent admitted that he gave his clients, Mr. and Mrs. G, money to keep them from losing their apartment and he disbursed money for costs on behalf of a client P when he did not have funds for that client in the account. (TR 8:7 through 9:7)
13. On November 4, 2009, because Respondent did not have all of the appropriate trust account records, the State Bar subpoenaed Respondent's trust account records from Wells Fargo Bank. (TR 9:8-14)
14. The records revealed that Respondent negligently converted client funds as follows:
- a. Respondent disbursed \$361.50 to client C on September 17, 2007 when there were insufficient funds in trust for client C. Respondent disbursed \$370.00 for costs on behalf of client C when there were no funds in trust for client C.
 - b. Respondent disbursed \$194.00 for costs on August 10, 2007 on behalf of client G when there were no funds in trust for client G.
 - c. Respondent disbursed \$951.00 in costs on behalf of client M when there were no funds in trust for client G.
 - d. Respondent disbursed \$125.00 for costs on behalf of client O when there were no funds in trust for client O.
 - e. Respondent disbursed \$220.00 for costs on behalf of client R when there were no funds in trust for client R. (TR 9:15 through 10:10)

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that his conduct, as set forth above, violated Rule 42, ERs 1.15, Ariz. R. Sup. Ct and Rule 43, Ariz. R. Sup. Ct.

Respondent's conduct violated:

- (a) Rule 42, ER 1.15(a) - Respondent failed to safekeep client property, converted client funds and failed to maintain and preserve complete records according to the minimum standards. (TR 10:11-21)
- (b) Rule 43(b)(1)(a) – Respondent failed to exercise due professional care in the performance of the lawyer's duties. (TR 10:22 through 11:3)
- (c) Rule 43(b)(1)(C) – Respondent failed to maintain adequate internal controls under the circumstances to safeguard funds or other property held in trust. (TR 11:4-9)
- (d) Rule 43(b)(2)(B) - Respondent failed to maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for which funds have been received in trust, showing: (i) the date, amount and payor of each receipt of funds; (ii) the date, amount and payee of each disbursement; and (iii) any unexpended balance. (TR 11:10-19)

CONDITIONAL DISMISSAL

The State Bar has conditionally agreed not to charge Respondent with a violation of ER 1.8(e) for providing financial assistance to his clients for non-legal related expenses. (TR 20-24)

RESTITUTION

Restitution is not an issue in this matter. No actual injury occurred to a client.

ABA STANDARDS

In determining the appropriate sanction, the Hearing Officer considered both the American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards" or "Standard ____") and

Arizona case law. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

In determining an appropriate sanction, both the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at 35, 90 P.3d at 772; *Standard* 3.0.

Duty Violated

Respondent overdrew his trust account and during the investigation of the overdraft it was discovered that Respondent negligently converted client funds, did not maintain the required trust account records and did not perform the duties prescribed in Rule 43. Accordingly, *Standard* 4.0 (Duties to clients), is the appropriate *Standard* to consider.

Standard 4.13 provides: Censure is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Mental State

The parties agree and the Hearing Officer determines that the record supports a conclusion that Respondent acted negligently in this matter. (TR 10:11-21)

Injury

There was no proof of actual injury to any client. (TR 26:21-25) The potential for injury existed. When trust accounts are overdrawn clients' money may not be preserved.

Aggravating and Mitigating Factors

In deciding what sanction to impose the following aggravating and mitigating circumstances should be considered:

Aggravating Factors:

ABA Standard 9.22:

(a) Prior disciplinary offenses:

Informal Reprimand, State Bar File No. 08-0891 (July 2008), for trust account violations. Ariz. R. Sup. Ct., Rule 43.

(i) Substantial experience in the practice of law.

Respondent has been practicing law in Arizona since 1960.

Mitigating Factors:

ABA Standard 9.32:

- (c) Personal or emotional problems; Respondent is over 70 and his health isn't good. It is believed that Respondent suffered a stroke, however, it is unknown when the stroke occurred. Respondent testified that he suffered the stroke in December, 2007. (TR 13:19-21)

In evaluating the aggravating and mitigating factors, the Hearing Officer determines that they do not justify varying from the presumptive sanction of censure with a two-year probation as the appropriate sanction in this matter.

PROPORTIONALITY ANALYSIS

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004). However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.*

208 Ariz. at 61, 90 P.3d at 778, (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

In re Patterson, SB-08-0006-D (January 24, 2008). Mr. Patterson failed to adhere to rules and guidelines in administering and maintaining his client trust account. Mr. Patterson commingled personal funds with client funds and converted client funds by failing to maintain proper internal controls. Respondent further failed to maintain proper ledgers and conduct a proper monthly three-way reconciliation of his trust account. A censure was ordered for violation of ER 1.15 and Ariz. R. Sup. Ct., Rules 43 and 44. Mr. Patterson was also placed on one year of Probation (TAEPP/LOMAP). There was one factor in aggravation: 9.22(i) and one factor in mitigation: 9.32(a). Mr. Patterson's mental state was deemed negligent and there was the potential for injury.

In re Fealk, SB-08-0179-D (December 31, 2008). Mr. Fealk violated ERs 1.5, 1.15 and Rules 43 and 44 when he failed to adhere to the rules and guidelines governing the treatment of client trust account funds by transferring unearned fees to himself and by failing to maintain adequate trust account and timekeeping records. Mr. Fealk further failed to memorialize his fee agreement in writing. A censure with one year of probation to include TAP and TAEPP was ordered. Two aggravating factors were present: 9.22(a) prior disciplinary offenses (non-trust account related) and (i) substantial experience in the practice of law. Five mitigating factors were present: 9.32(c) absence of a prior disciplinary record (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings (g) character or reputation (h)

physical disability (m) remoteness of prior offenses.² Mr. Fealk's mental state was negligent with actual injury.

In re Gutierrez, SB-08-0147-D (October 29, 2008). Mr. Gutierrez violated ER 1.15 and Rules 43 and 44 when he failed to exercise due professional care in the operation and maintenance of his trust account. Mr. Gutierrez failed to safeguard client property and failed to promptly disperse funds belonging to a client or third party. A censure was ordered. Three aggravating factors were present: 9.22(c) a pattern of misconduct (d) multiple offenses and (i) substantial experience in the practice of law. Three mitigating factors were present: 9.32(b) absence of a prior disciplinary record (c) personal or emotional problems and (g) character or reputation. Mr. Gutierrez' mental state was negligent with potential injury.

RECOMMENDATION

Based on the *Standards* and case law, the Hearing Officer believes that a censure with a two-year probation is within the range of appropriate sanctions in this case. Respondent will be placed on probation with terms as set forth in the Sanctions section below. This sanction will serve the purposes of lawyer discipline, which is to protect the public, instill confidence in the public, deter other lawyers from similar misconduct, and maintain the integrity of the bar.

The Hearing Officer was concerned that Respondent was sanctioned with an informal reprimand in July 2008 for trust account violations. Now he is before the disciplinary process for more trust account violations. Why is a censure and probation appropriate? Respondent's stroke may be affecting his ability to understand the requirements of Rule 43. (TR 22:22) He may well have participated in the Trust Account Ethics Enhancement Program (TAEEP) in the 2008 matter. But he did not learn the proper management of his trust account well enough. (TR 17:9) The

² The Joint Memorandum incorrectly listed *Standard* 9.32 (a) absence of a prior disciplinary record as a mitigating factor in *In re Fealk*. Although Fealk did not have a prior disciplinary offense for a trust account matter, he had a prior disciplinary offense that was cited as an aggravating factor.

LOMAP terms of the probation are broad enough to allow for Respondent to be required to repeat TAEPP.

For most of his 50 years in practice he has had an unblemished record. (TR 25:20) The proposed probation contains a specific provision that Respondent meet with Hal Nevitt, Director of the Bar's Member Assistance Program to determine if a physical or mental exam is necessary on the issue of Respondent's fitness to practice law. In the 2008 informal reprimand Respondent did not have someone from the Law Office Management Assistance Program (LOMAP) to assist in managing his trust account issues. (TR 17:18-22) In the proposed probation he will be monitored and assisted by LOMAP. (TR 26:13-20) Respondent did not intentionally violate trust account procedures. (TR 25:23 through 26:3) Thankfully he did not cause actual injury to any client.

The Hearing Officer concludes that with Respondent the current disciplinary case is better resolved as a training matter with a check in place for any significant physical or mental health issues.

CONCLUSION

The objective of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, and the administration of justice. *Peasley, supra*, at ¶ 64, 90 P.3d at 778. Recognizing that determination of the appropriate sanction is the prerogative of the hearing officer, the Disciplinary Commission and the Supreme Court, the Hearing Officer asserts that the objectives of discipline will be met by the imposition of the proposed sanction of a censure and two years probation and the imposition of costs and expenses of these proceedings.

SANCTION

The Hearing Officer recommends that the following disciplinary sanctions shall be imposed:

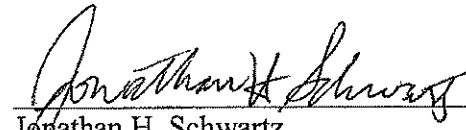
1. Respondent shall be censured.
2. Respondent shall be placed on probation for a period of two years, under terms and conditions to be developed by LOMAP and bar counsel after a full review of Respondent's trust account records and procedures. Failure to sign the Terms and Conditions of Probation developed by the State Bar will result in the matter being referred to the imposing entity for referral to a hearing officer.
3. The probation will begin when the final judgment and order is entered and will terminate two years from that date.³
4. Respondent will meet with the State Bar's Member Assistance Program Director, Hal Nevitt, to determine whether a physical or mental exam is necessary to determine fitness to practice⁴.
5. In the event Respondent fails to comply with any of the terms of probation recommended by the Hearing Officer and approved by the Disciplinary Commission and Supreme Court at the time of the reinstatement proceedings, and the State Bar receives information about his failure, bar counsel will file a Notice of Non-Compliance with the imposing entity, pursuant to Ariz. R. Sup. Ct., Rule 60(a)(5). The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practical date, but in no event later than thirty days following receipt of the notice, and will determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach. The State Bar shall have the burden of proving non-compliance by a preponderance of the evidence.

³ The Tender of Admissions stated that the probation would end two years from the signing of the probation agreement. The parties agreed at the hearing that the probation should end two years from the date the probation began, the signing of the judgment and order. (TR 12:10-24)

⁴ See Respondent's mitigation in the Joint Memorandum in Support of Agreement for Discipline by Consent.

6. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter. An itemized Statement of Costs and Expenses is attached as Exhibit "A" and incorporated herein.

Dated this 9th day of July, 2010


Jonathan H. Schwartz
Hearing Officer 6S

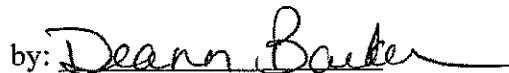
Original filed with the Disciplinary Clerk
this 9 day of July, 2010

Copies of the foregoing mailed
this 13 day of July, 2010 to:

Tom Slutes
SLUTES SAKRISON & ROGERS
4801 E Broadway Blvd Suite 301
Tucson, AZ 85711-0001
Respondent' counsel

Copy of the foregoing hand-delivered
this 13 day of July, 2010 to:

Shauna Miller
Senior Bar Counsel
State Bar of Arizona
4201 N. 24th St., Suite 200
Phoenix, Arizona 85016-6288

by: 

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EXHIBIT A

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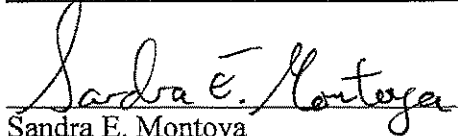
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1 12/11/09 Subpoena foundation trust documents \$89.50
2 12/21/09 Identify unknown transactions; Request additional information
from Wells Fargo \$187.50
3 Total for staff investigator charges \$607.00
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5 **TOTAL COSTS AND EXPENSES INCURRED** **\$1,807.00**

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7 Sandra E. Montoya
8 Lawyer Regulation Records Manager
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4-20-10
Date