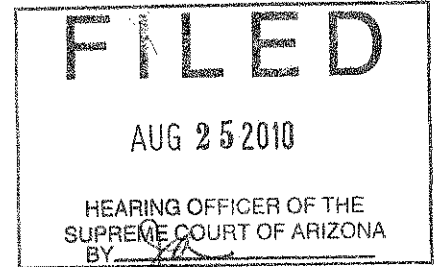


BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



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

No. 09-1490

GREGORY D. GREEN,)
Bar No. 021804)

RESPONDENT.)
_____)

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

1. On July 1, 2010, the parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent. The complaint had been filed on March 30, 2010. On July 23, 2010, a hearing was held regarding the Tender of Admissions and Agreement. In attendance at the hearing were Bar Counsel Stephen P. Little, Respondent Gregory D. Green (hereinafter Respondent) and this Hearing Officer.
2. This case involves charges that Respondent failed to properly safeguard his clients' trust account funds. The facts pertain largely to a six month period in 2009.

FINDINGS OF FACT

3. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on January 7, 2003.¹

¹ The facts cited herein are taken from the Tender of Admissions unless otherwise noted.

4. At all times relevant, Respondent, a Winslow lawyer, maintained an IOLTA trust account (“trust account”) at Bank of America. Transcript of Hearing (“T/H”) 5:2 - 4.
5. On or about February 6, 2009, Respondent deposited an insurance settlement check for \$10,739.61 into the trust account on behalf of client Baker.
6. Respondent failed to have client Baker endorse the \$10,739.61 insurance check.
7. On or about February 10, 2009, Respondent disbursed \$3,696.00 of the insurance check from the trust account to his business operating account as fees.
8. On or about February 18, 2009, the \$10,739.61 insurance check was returned to Respondent for insufficient endorsement and charged back out of the trust account.
9. On or about March 9, 2009, Respondent re-deposited the returned \$10,739.61 insurance check, but did so into his business operating account rather than his trust account.
10. On or about March 16, 2009, Respondent disbursed \$7,465.92 of the insurance money from his business operating account to client Baker.
11. Respondent did not reimburse the trust account for the \$3,696.00 fee he had previously transferred out to his business operating account, leaving the trust account short \$3,696.00 due to the prior chargeback.
12. Respondent spent the funds in his business operating account, leaving him unable to repay the \$3,696.00 owed to the trust account.

13. On or about March 23, 2009, Respondent wrote check number 1053 from the trust account to client Hager in the amount of \$2,000.00.
14. Client Hager did not cash check number 1053.
15. Approximately one month later, on or about April 29, 2009, the balance in the trust account fell below the \$2,000.00 amount still outstanding to client Hager.
16. The balance in the trust account remained below \$2,000.00 until at least August 31, 2009.
17. On or about July 28, 2009, check number 1053 to client Hager, in the amount of \$2,000, finally attempted to pay against the trust account when the balance of the trust account was only \$395.17.
18. Check 1053 caused the trust account to overdraft, leaving it with a negative balance of -\$1,604.83.
19. The following day, the bank registered check number 1053 as an overdraft and returned it as unpayable.
20. Respondent did not have sufficient funds remaining to pay client Hager the \$2,000.00 that he was owed from the trust account.
21. Respondent made an agreement with client Hager to pay the \$2,000.00 in two installments on November 15, 2009 and December 1, 2009. At hearing, Respondent testified that he had paid Client Hager. T/H 53: 2- 3. Subsequent to the hearing, Respondent provided a copy of the cancelled check as proof of payment. Exhibit C.
22. On or about December 15, 2009, Respondent deposited \$2,000.00 to the trust account as partial repayment of the \$3,696.00 shortage.

23. Respondent had not yet repaid the remaining \$1,696.00 shortage to the trust account.
24. State Bar Staff Examiner Gloria Barr (“Staff Examiner Barr”) conducted an examination of Respondent’s trust account that revealed the following additional concerns listed below in paragraphs 25 through 32:
25. Between at least February of 2009 and July of 2009, Respondent did not conduct required monthly three-way reconciliations that would have revealed the deficit of funds in his trust account caused by the returned insurance check of \$10,739.61 relating to client Baker.
26. Between at least February of 2009 and August of 2009, Respondent’s individual client ledgers were inadequate to be used for a monthly three-way reconciliation or to comply with the rules, as not all individual client ledgers included the payor for each deposit, the payee for each disbursement, and/or the year for each transaction.
27. The bank account statement ending balances and Respondent’s general ledger month end balances for the months between February 2009 and August 2009 were different and did not reconcile.
28. Staff Examiner Barr attempted to reconcile the bank account statement ending balances and Respondent’s general ledger month end balances for the months between February 2009 and August 2009 by reconstructing the trust account general ledger and individual client ledgers, but was unable to reconcile the balances.

29. Staff Examiner Barr asked Respondent to reconcile the differences between the bank account statement ending balances and Respondent's general ledger month end balances for the months between February 2009 and August 2009.
30. Respondent provided explanations for the differences between balances, but Respondent's explanations did not fully account for the differences and did not reconcile the balances.
31. There were multiple instances of Respondent depositing earned fees into the trust account and then withdrawing the fees the same day, including:
 - a. A \$700.00 earned fee was deposited on February 17, 2007 on behalf of Client Glen and was then disbursed to Respondent on the same day.
 - b. \$1,100.00 was deposited On November 14, 2007 on behalf of Client Morgan, \$500 of which was earned upon receipt. Respondent disbursed the full \$1,100.00 to himself the same day.
32. Several client balances in the trust account fell negative at times, including:
 - a. Client Mathre's balance showed a negative balance of -\$22.75 on or about December 29, 2006 to January 06, 2007.
 - b. Client Rolow's balance showed a negative balance of -\$30.00 on or about December 29, 2006 to January 06, 2007.
 - c. Client Shihady's balance showed a negative balance of -\$180.00 on or about September 12, [Year Unknown] to December 13, [Year Unknown].
 - d. Client Carr's balance showed a negative balance of -\$337.50 from April 29, 2009 to July 16, 2009.

33. When Staff Examiner Barr asked Respondent to explain these negative client balances, Respondent indicated that he had disbursed or transferred the full attorney fees owed by each client from the trust account rather than the amounts the clients actually held on deposit in trust, which was less. Respondent also informed Ms. Barr that when he discovered the negative balances in Fact Paragraph No. 31 above, he immediately corrected the mistakes and reconciled the accounts. Exhibit A, unnumbered third page, Nos. 7, 8, and 9.
34. Ms. Barr testified that Respondent satisfactorily explained matters in other cases. T/H 42:11 – 19. She described him as “very cooperative, very accommodating and [he] did the best he could with the record that he had.” T/H 44: 1 – 3.
35. Ms. Barr stated that the great concern with negative balances in trust account or client ledgers is the potential of harm to other clients that is, that a lawyer uses another client’s funds to pay someone else’s bill. T/H 27:21 – 28:5.
36. Ms. Barr did not consider Respondent’s misconduct and situation with the trust accounts to indicate any attempt by him to defraud or steal money from clients. T/H 46: 3 – 8.
37. Respondent testified to his legal background that upon admission to practice in 2003, he had worked at the Navajo County Attorney Office until 2006. In July, 2006, he had the opportunity to, and did purchase the law practice of retiring attorney Dale. K. Patton in Winslow. T/H 48: 22 – 49: 10. The practice was primarily family law. T/H 54: 7 – 12.

38. Respondent's wife had worked as a bank teller and took on the accounting and trust account part of Respondent's law practice. TH 49: 10 – 15. Respondent testified that for the first few years things were going very well regarding "keeping the books [trust accounts] balanced." T/H 49: 16 - 18.
39. Respondent testified that in retrospect, during the time period of approximately February, 2009 to August 2009, his wife was suffering from depression and anxiety which was undiagnosed at the time. She stopped informing him about the condition of client trust accounts, and at the same time, he "stopped checking the books to make sure she had done them right every month." T/H 56: 5 – 8, 23 – 57:7; 49: 16 - 23.
40. Respondent acknowledged that he was responsible for his wife as his employee and that he did not diligently or properly supervise her to insure the safeguarding of client trust funds. T/H 50: 2- 6.
41. Since the misconduct came to his attention, Respondent has personally taken over the responsibility of reconciling the client trust accounts to insure compliance with the ethical rules. This includes totalling the running client trust ledger and the individual client trust ledgers and then comparing them to the bank statement to make sure they are the same T/H 50:6 -10; Exhibit A, unnumbered fifth page at Paragraphs A, B, C and D.

CONCLUSIONS OF LAW

42. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated the rules relating to his duty to properly maintain and safeguard his clients' trust account funds. Specifically, Respondent violated Rule 42, Ariz. R. Sup. Ct.², ERs: 1.15(a) safekeeping property, 1.15(d) prompt delivery of funds to client, 1.16(d) timely transfer/surrender of funds to client; Rule 43(a) keeping funds of client separate and apart from lawyer's business account; Rule 43(b)(1)(A) failure to exercise due professional care regarding trust accounts; Rule 43(b)(1)(B) failure to properly supervise employee in the performance of trust account compliance; Rule 43(b)(1)(C) failure to exercise adequate internal office controls to safeguard trust funds; Rule 43(b)(2)(B) failure to properly maintain individual client account ledger; Rule 43(b)(2)(C) failure to properly maintain monthly three way reconciliation; and Rule 43(b)(4) improper disbursement against uncollected funds. Since some of the trust account violations occurred before 2009, the Rule designations prior to January 1, 2009 were: former Rule 43(a), former Rule 43(d)(1)(A), former Rule 43(d)(1)(B), former Rule 43(d)(1)(C), former Rule 43(d)(2)(B), former Rule 43(d)(3), and former Rule 44(b). Under the Tender of Admissions and Agreement no other counts were dismissed and no ERs were dismissed.

² Ariz. R. Sup. Ct. will hereafter be referenced with "Rule" followed by the relevant rule's numerical designation.

RESTITUTION

43. No specific clients are due restitution. Respondent understands that as part of his participation in LOMAP, he will be required to reimburse his Trust Account to cure any discovered shortages or deficiencies.

ABA STANDARDS

44. 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; and (4) the existence of aggravating and mitigating factors.
45. This Hearing Officer finds that Respondent through his trust account misconduct violated his duty to clients.

4.0 Violation of Duty to Clients

46. *Standard* 4.13 provides that "Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client." The presumptive sanction, then, for the admitted conduct under the Standards is Censure.

The Lawyer's Mental State

47. This Hearing Officer finds that Respondent was negligent in failing to properly safeguard funds as required by the ethical rules. Negligence is defined as the failure "to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *ABA Standards For Imposing Lawyer Sanctions* at page 6. Respondent failed to be aware that his wife as an

employee of his law practice was failing to keep current on the required trust account entries and three way reconciliations. In the process, Respondent, as he admitted, failed to be diligent and to properly supervise his wife in the performance of those duties.

Actual or Potential Injury

48. This Hearing Officer finds that the delay to client Hager in receiving monies due to insufficient funds in the trust account caused actual injury to the client. The negative balances in the trust accounts created potential harm that one client's funds could be used to pay someone else's bill.

Aggravating and Mitigating Factors

Aggravating Factors:

49. The parties state that no aggravating factors apply and this Hearing Officer agrees.

Mitigating Factors:

50. *Standard* 9.32(d): good faith effort to make restitution. Upon learning of the overdraft, Respondent contacted client Hager and made an effort to pay back the shortage.
51. *Standard* 9.32(e): cooperative attitude towards disciplinary proceedings. Respondent responded to the State Bar's investigation and fully cooperated throughout the formal proceedings.

PROPORTIONALITY REVIEW

52. The Arizona Supreme Court has held that one goal in imposing attorney discipline is internal consistency. *In re Struthers*, 179 Ariz. 216, 887 P. 2d 789 (1994). In seeking internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 90, 90 P.3d 772(2004). It is also recognized that the concept of proportionality is “an imperfect process” because no two cases are ever alike. *In re Owens*, 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved. *Struthers, supra*.
53. In this case the State Bar is recommending and the Respondent has accepted: (1) a Censure; (2) two years of probation with applicable terms; and (3) that Respondent pay all costs incurred by the State Bar, the Disciplinary Commission and the Supreme Court in these disciplinary proceedings.
54. In *In re Stoltman*, SB-10-0006-D (2010), the Respondent violated ER 1.15 and Rules 43 and 44 in that she failed to adhere to trust account rules and guidelines in managing her client trust account. Specifically, Respondent failed to safeguard client funds, and to maintain complete records of the handling, maintenance and disposition of all client funds. Respondent also failed to conduct monthly three way reconciliations of the trust accounts. There was no actual injury to a client. There were no aggravating factors. Mitigating factors were: 9.32(a) absence of prior discipline; 9.32(b) absence of dishonest or selfish motive; and 9.32(e) cooperative attitude toward proceedings. Respondent received a Censure and one year of probation.

55. In *In re Sorrell*, SB-09-0065-D (2009), Respondent violated ERs 1.8(a), 1.8(e), 1.15 and Rules 43 and 44. Respondent loaned funds to clients without obtaining informed consent. Respondent failed to supervise his non-lawyer employee and failed to maintain his client trust account according to trust account rules. Respondent disbursed funds belonging to one client to another client. Aggravating factor was: 9.22(c) pattern of misconduct. Mitigating factors were 9.32(a) absence of prior discipline and 9.32(b) absence of dishonest or selfish motive. Respondent received a Censure and two years of probation.
56. In *In re Cochran*, SB-07-0204-D (2008), the Respondent violated ERs 1.15, 5.1 and Rules 43 and 44. Respondent failed to properly manage and supervise other lawyers in the firm and failed to safeguard client property in the firm's possession which resulted in considerable funds being embezzled by his law partner. Respondent also failed to adhere to trust account rules in the overall management of the trust accounts. There was actual injury to clients. Aggravating factors were: 9.22(a) prior disciplinary offenses; and 9.22(i) substantial experience in the law. Mitigating factors were: 9.32(b) absence of dishonest or selfish motive; 9.32(d) timely good faith effort to make restitution or to rectify consequences of misconduct; and 9.32(e) full and free disclosure and cooperative attitude toward proceedings. Respondent received a Censure and two years of probation.

RECOMMENDATION

57. Respondent has recognized that as the lawyer he is responsible for the actions or inactions of employees in his law firm even when that employee is his wife. The

State Bar's letter to Respondent in early August 2009, asking him to explain the Bank's overdraft notice involving the \$2000 check to his client Joshua Hager and to provide other trust account information was a clear call for Respondent to take corrective action. To Respondent's credit he did so. He personally took over the duties to insure trust account compliance.

58. Respondent is now doing what he should have made sure his wife was doing to properly maintain client trust accounts. While the facts do not excuse his lack of diligence, they do explain how despite earlier compliance his neglect of the trust account requirements occurred. The facts support Respondent's statement that for the first few years of his private practice from mid-2006 through 2008, the trust accounts were largely kept in good order based on the communication between his wife and himself. There were the instances in 2007 when Respondent disbursed earned attorney fees from the client Mathre, Rolow and Shihady accounts without checking the amount available in the trust account. Even then, Respondent's wife would bring the shortage to Respondent's attention. They would reconcile the account and correct the mistake. Exhibit A, third page, #s 7, 8, and 9.
59. However, the maintenance of the trust accounts adversely changed between February and July, 2009. As Respondent stated what happened in 2009 plus this subsequent disciplinary proceeding has caused Respondent to fully realize his professional responsibility for client trust accounts: "So I had no reason to believe that [in 2009], if there were problems with the client trust account, that she [wife] wouldn't bring that to me and bring that to my attention and we would make sure that things were done right. She didn't come to me with any problems so I assumed

that there were no problems. I found out the hard way that my obligation goes beyond simply waiting for a staffer to come to me but [to] check and make sure there's no problems." T/H 56:14 -22

60. Respondent has acknowledged his responsibility for the misconduct. He has acted to insure that his law practice will comply with the trust account requirements. The probation terms will include Law Office Management Assistance Program (LOMAP) examination of trust accounting policies and procedures and the Trust account Ethics Enhancement Program (TAEHP). Therefore, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent because it serves the purposes of attorney discipline to protect clients and the public, the profession and the justice system.
61. This Hearing Officer recommends:
 1. Respondent shall receive a Censure:
 2. Respondent shall be placed on probation for a period of two years, under the following terms and conditions:
 - a. The term of probation shall begin at the time of the Final Judgment and Order and shall end two years from the Final Judgment and Order.
 - b. Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP), at 602-340-7332, within 30 days of the date of the final judgment and order. Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to, trust accounting policies and procedures. The director of LOMAP shall develop "Terms and Conditions of Probation", and those terms shall be

incorporated herein by reference. Respondent shall be responsible for any costs associated with LOMAP.

- c. Respondent shall attend a half-day Trust Account Ethics Enhancement Program (TAEED). If Respondent plans on having another person or assistant manage his trust account, Respondent should schedule for that person to also attend TAEED with him. Respondent must contact the TAEED Program Coordinator, State Bar of Arizona, at (602) 340-7278, within 20 days from the date of the Final Judgment and Order to schedule attendance. Respondent shall be responsible for the cost of attending the program.
 - d. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance 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 date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. 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 of Arizona to prove noncompliance by preponderance of the evidence.
3. Pursuant to Rule, Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings within thirty (30) days of the Supreme Court's Final Judgment and Order. An Itemized Statement of Costs and

Expenses is attached and incorporated herein. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's Office in this matter.

DATED this 25th day of August, 2010.

Louis A. Araneta
Honorable Louis Araneta *mp*
Hearing Officer 6U

Original filed with the Disciplinary Clerk
this 26 day of August, 2010.

Copy of the foregoing mailed
this 26 day of August, 2010, to:

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/jsa