BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	Nos. 08-0477, 09-0468
EDWARD D. FITZHUGH, Bar No. 007138	)	**AMENDED HEARING OFFICER'S REPORT**
Respondent.	)	

PROCEDURAL HISTORY

1. Probable cause was found in 08-0477 on October 15, 2008, and in 09-0468 on September 16, 2009. A Complaint was filed by the State Bar on October 28, 2009. After a Notice of Transfer, the matter was assigned to the undersigned Hearing Officer on December 2, 2009, and an Initial Case Management Conference was held on December 14, 2009. The matter was set for Final Hearing on February 8, 2010, but because of discovery issues the Final Hearing had to be continued until February 22 and 23, 2010. A contested Final Hearing was held on those dates. The matter was remanded to this Hearing Officer by the Disciplinary Commission on a motion to Intervene and Motion for Reconsideration. The Motion for Reconsideration was granted in part and the amendments are set forth herein.

Case Summary:

2. Respondent admitted that he violated various Rules regarding his trust account, specifically, ER's 1.15 and Rule 43, Ariz.R.Sup.Ct., for what was characterized as "sloppy bookkeeping to the extreme". Respondent also admitted that he did not timely nor completely respond to the Bar's request for information, although the

extent of his non-compliance was at issue. The contested issues that were primarily addressed at the hearing in this matter were set forth in Count Two and involved whether Respondent violated ER 1.5(e) (not having a written agreement regarding the division of fees); ER 1.6 (revealing confidential information); ER1.7 (conflict of interest); ER 1.8(e) (providing financial assistance to his clients); and ER 8.4(d) (engaging in conduct prejudicial to the administration of justice).

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 December 22, 1981.[1]

COUNT ONE (File no. 08-0477)

4. On March 17, 2008, the State Bar received an insufficient funds notice from the National Bank of Arizona regarding Respondent's trust account.

5. The notice indicated that on March 14, 2008, check number 3490 in the amount of $25,053.34 attempted to pay against the trust account when the balance was only $8,554.72.

6. The bank paid the check and did not charge an overdraft fee, thereby leaving a negative balance of $16,498.62.

7. On March 20, 2008, the State Bar's Records Examiner forwarded a copy of the overdraft notice to Respondent along with a letter requesting an explanation of the overdraft within 20 days.

[1] Unless otherwise cited, the facts are taken from the Joint Pre-hearing Statement.

8. During the State Bar investigation, it was learned that on March 20, 2008, Respondent transferred $99,900 from a personal investment account into his trust account "to cover any expenses until the matter was clarified."

9. It was also learned during the State Bar investigation that on April 8, 2008, Respondent deposited $575,000 of his personal funds into the trust account.

10. Respondent admitted that depositing $575,000 of his personal funds into the trust account was an error that arose out of his concern about the overdraft and the State Bar investigation and his efforts to make sure there was no client harm.

11. It was discovered during the State Bar investigation that Respondent improperly deposited funds in the amount of $159,414.77 into his trust account on March 2, 2007. This money was from the sale of his mother's residence and should not have been deposited into Respondent's trust account.

12. Respondent admitted that he simply put this money in the wrong account.

13. On February 6, 2008, Respondent wrote a check #3518 for $23,000 from the trust account. Respondent then mistakenly deposited the same check into the trust account, and from that deposit Respondent dispersed $3,000 in cash to himself (making the total balance of the deposit into the trust account $20,000).

14. Respondent was not able to identify with certainty on which client's behalf he dispersed $23,000 to himself.

15. Respondent explained that the $23,000 deposit was erroneously deposited into the trust account because the teller had put the trust account number on the deposit slip instead of the operating account number.

16. It was discovered during the State Bar investigation that on July 12, 2007, Respondent deposited $15,000 into the trust account on behalf of client B. Matthews and then dispersed $5,000 in cash to himself the same day and in doing so, Respondent dispersed funds without using a pre-numbered check or by electronic transfer and did not maintain a record of such disbursements with the requirements.

17. During the State Bar investigation, Respondent submitted bank statements, corresponding canceled checks and general ledgers covering the period of November 21, 2007, through March 31, 2008, however, the information Respondent provided was incomplete and it was necessary for the State Bar to issue subpoenas to National Bank to obtain additional trust account records. The total period of review of Respondent's trust account was extended from May 1, 2007, through September 30, 2008.

18. The investigation of Respondent's trust account revealed the following deficiencies:

a. Respondent failed to safekeep client property;

b. Respondent converted client funds;

c. Respondent commingled personal funds with client funds;

d. Respondent dispersed funds without using a pre-numbered check, or by electronic transfer and did not maintain a record of such disbursements in accordance with the requirements;

e. Respondent failed to maintain individual client ledgers and used settlement/cost statements with no running balances as ledgers;

f. Respondent failed to deposit funds sufficient to pay bank service charges;

g. Respondent was unable to conduct proper monthly three way reconciliations;

h. Respondent failed to provide an adequate explanation of the March 17, 2008, overdraft;

i. Respondent failed to provide a complete breakdown of the May 1, 2007, trust account balance of $557,745.06;

j. Respondent's trust account deposits were done both manually and electronicaly. Respondent did not turn in copies of the actual deposit slips, but rather turned in electronic copies that he obtained from the bank;

k. Respondent did not submit individual client ledgers.

19. Respondent admitted during the State Bar investigation that his current secretary, Barb Dean, had previously worked for him for about eight years. Ms. Dean handled his trust account. However, Ms. Dean left Respondent's employment in approximately 2006. While Ms. Dean was gone, the Respondent admitted the bookkeeping was not properly maintained.

20. Respondent admitted that he does not fully understand trust accounting or even general bookkeeping principles and relied too much on his assistant or secretary for these tasks.

21. Throughout the course of this investigation, Respondent failed to comply with and meet the State Bar's investigator's deadlines on four occasions. Respondent's failure to comply with State Bar deadlines significantly impaired the timeliness of the State Bar's investigation in this case. Additionally, the State Bar had to subpoena bank records on two occasions because it was necessary to confirm

information since Respondent was unable to provide the State Bar with complete information according to minimum standards.

22. Gloria Barr, the State Bar's auditor, testified at the hearing in this matter that there were 50 or 60 transactions that remained unidentified at the conclusion of her investigation, Transcript of Record ("T/R") 346:2-3. Ms. Barr also testified that Respondent's trust account could not be reconciled even after an accountant was hired and that there was an outstanding balance of $137,000 that was not identified, T/R 346:12-21. In summary, Ms. Barr described Respondent's trust account issues as "sloppy bookkeeping to the extreme", T/R 357:5.

23. In the Joint Pretrial Statement, Respondent admitted that he did not comply with and meet the State Bar investigator's deadlines on four occasions and his failure to comply with the State Bar deadlines significantly impaired the timeliness of the State Bar investigation such that a subpoena was required on two occasions.

24. Ms. Barr testified that Respondent requested eight extensions of time and the investigation took about a year, which is four times longer than a normal investigation. Ms. Barr also testified that Respondent's responses to the State Bar were not complete because he did not initially provide an explanation for the overdraft, failed to provide individual client ledgers, and could not explain several specific transactions, T/R 335:22-338:11.

25. Ms. Barr also testified that during her investigation she never got a sense that the errors in Respondent's trust account were intended by Respondent to enrich himself, T/R 356:23-357:4.

26. At the hearing in this matter, Respondent admitted that he did not respond as required and provided incomplete responses to the State Bar, T/R 487:2-4. Respondent also testified that his failure to adequately respond was due to the fact that he was undergoing difficulties not only with his staff but he was also involved in a custody dispute that was very emotional and took a lot of his time and attention.

CONCLUSIONS OF LAW REGARDING COUNT ONE

27. There is clear and convincing evidence that Respondent failed to safekeep client property; converted client funds; commingled personal funds with client funds; failed to meet minimum standards in preserving complete records; failed to deposit sufficient funds to pay bank service charges; failed to keep client funds separate and apart from the lawyer's personal and business accounts; failed to preserve complete records for five years after termination of representation; failed to properly supervise employees and others assisting in the performance of his duties; failed to exercise due professional care; failed to maintain adequate internal controls; failed to record all transactions promptly and completely; failed to preserve complete records on a current basis and preserve such records for at least five years after termination of representation; failed to maintain an account ledger or equivalent for each client, person, or entity for whom monies had been received in trust showing the date and amount of each receipt and disbursement of any unexpended balance; failed to make or cause to be made a monthly three way reconciliation of client ledgers, trust account general ledger or register and trust account bank statement, and dispersed funds without using a pre-numbered check

or by electronic transfer and did not maintain a record of such disbursements in accordance with the requirements. Respondent's conduct violated ER 1.15(a), 1.15(b), ER 5.3(c) and Rule 43(a), 43(d), 44(a), 44(b).

28. In addition to the above stated violations, there was clear and convincing evidence that Respondent violated 53(f). Respondent argues that a Rule 53(f) violation should not be found because he was doing the best he could and he reached a point where there just was no more to give the Bar. While Respondent's conduct can be tempered by the personal problems he was going through, he cannot seek refuge in making a huge mess and then saying it's too confusing to figure out.

29. In spite of the numerous and extensive problems with Respondent's trust account, there was no evidence that any client suffered any loss as a result of Respondent's handling of his trust account. Indeed, there was evidence that due to Respondent's sloppy bookkeeping, Respondent overpaid one particular client in the amount of many thousands of dollars.

COUNT TWO (File no. 09-0468)

30. On March 27, 2003, an electrical switchgear explosion occurred seriously injuring Mr. Dharmesh Patel. Mr. Dharmesh Patel and his brothers, Pankaj and Aruna Patel, hired attorney Jay Bansal ("Mr. Bansal") to file a civil lawsuit against GTE Corporation and Tiempo, Incorporated, which he did.

31. Pursuant to A.R.S. Section 23-1023, Mr. Patel could file his lawsuit after the first year of his injury if the claim had been assigned to the worker's compensation carrier (which it had) and only if there was a subsequent reassignment of the claim by the worker's compensation carrier back to Mr. Patel. Whether there was

or was not a reassignment in this matter provides the genesis from which many of the issues in Count Two originate.

32. Sometime in 2006, another attorney, Glynn Gilcrease ("Mr. Gilcrease"), came on board to assist Mr. Bansal with the lawsuit. Mr. Gilcrease provided attorney services and funding for the costs involved in the lawsuit.

33. In late 2007, Respondent, a friend of Mr. Gilcrease was recruited to assist with the lawsuit.

34. Respondent was also to provide funding for costs of the lawsuit because Mr. Gilcrease was experiencing financial problems.

35. There was no written fee agreement setting forth Respondent's participation or fee for assisting in the case. Respondent testified that he thought that Mr. Bansal had taken care of this, and that the Patel's were fully aware of his participation in the case.

36. After Respondent began working on the case, he determined that the Patel's could obtain a significant recovery in the case. For this and other reasons, Respondent decided to take over the case and become the only attorney for the Patels.

37. On September 11, 2008, Respondent and attorney Bansal reached an agreement regarding the outstanding attorney's fees and costs in the case, which was to be paid to Mr. Bansal and Mr. Gilcrease in exchange for Respondent's becoming the only attorney to handle the case.

38. On September 12, 2008, Respondent made a payment of $340,000 to Mr. Bansal. In a letter to Mr. Bansal, Respondent indicated that the $340,000 was payment in

full for attorney time expended by Mr. Bansal, Gilcrease and other attorneys as well as all prior costs incurred.

39. Mr. Bansal agreed to put this money into his trust account until a new fee agreement was signed between Respondent and the Patel's.

40. On September 15, 2008, a new fee agreement was signed by the Patel's and Respondent.

41. October 8, 2008, a Motion to Withdraw was submitted by Mr. Bansal and Mr. Gilcrease in the matter.

42. Carla Lief, a paralegal that worked for both Mr. Gilcrease and Respondent testified that previously, as early as 2007, during a review of the Patel file it was discovered that there was no written reassignment from the worker's compensation carrier. Ms. Lief testified that she looked everywhere but could not find it. She also tried to get a hold of the insurance carrier, but they never returned her calls, T/R 492:3-493:3; 505:16-506:2. When Ms. Lief could not get a hold of the attorney for the worker's compensation insurance carrier, she talked to Mr. Gilcrease, and he said to let Mr. Bonsal take care of it, that Mr. Bansal had not done anything in the case and that he (Mr. Bonsal) would take care of it, 502:19-503:2.

43. There was testimony that Gilcrease and Bansal had no confidence in the Patel case, and Gilcrease was having both emotional and financial problems, such that they both wanted Respondent to take over the handling of the case, T/R 216:8-18; 504:3-9; 540:4-24.

44. Ms. Lief testified that both Gilcrease and Bansal knew that there was a "big problem" not having the written reassignment and also knew that Respondent would not take the case if there was no reassignment, T/R 497:22-498:11. Ms. Lief testified that both Gilcrease and Bonsal acknowledged to her that the paperwork that they had on the reassignment was not valid and that an oral reassignment was not good, 504:11-507:6. Ms. Lief testified that both Gilcrease and Bansal told her to get the Respondent to take the case, but not to tell him about the reassignment issue, and that they would take care of it, T/R 493:4-493:17; 516:9-15, H/Ex 19, BSN 487.

45. Ms. Lief testified that she knew that she was not being honest, but went along with the request of Mr. Gilcrease and Mr. Bansal because she was confident that they would get the reassignment issue resolved, T/R. 493:17-25; 508:4-13.

46. Ms. Lief acknowledges that she prepared a document, H/Ex. 24, BSN 557, which would indicate that she knew that there was a reassignment, because she wanted to pacify Mr. Gilcrease, and Mr. Bonsal had told her he would get the reassignment from the carrier attorney even if it had to be backdated, T/R 513:5-14; final 9:3-15.

47. Mr. Bansal contested Ms. Lief's testimony and affidavit and denied that they ever told her to not divulge to Respondent that there was a problem with the reassignment, T/R 227:12-228:7.

48. While Respondent was preparing for a mediation in the Patel matter, to be held in November 2008, Respondent learned from Mr. Gilcrease and Mr. Bonsal that

there were problems with the reassignment from the worker's compensation carrier.

49. Also at the time of the mediation, Ms. Lief testified that she told Respondent about the fact that there was no reassignment. When the Respondent asked her why she did not tell him earlier, she said that Gilcrease and Bonsal were afraid he would not take the case if he knew there was no reassignment, to which Respondent affirmed that he would not have, T/R 501:7-502:6.

50. Nevertheless, Respondent participated in a mediation held in November 2008. At the mediation, Respondent requested $9,000,000 for the Patels. The defense made an offer of $600,000 which was not even enough to cover Dharmesh Patel's medical expenses, which were estimated to be over $1,000,000.

51. Respondent was very upset that he had expended so much time and paid $340,000 to Mr. Bonsal and Mr. Gilcrease on a case where there was a question whether there was any claim at all, T/R 546:19-547:3.

52. In late December 2008, Respondent confronted Mr. Gilcrease (Mr. Bansal was out of the country during this time period) and here the story really begins to diverge. According to Mr. Gilcrease, he told Respondent that Mr. Bansal had told him that he had obtained the reassignment. Mr. Gilcrease also testified that he told Respondent that he didn't think there was a problem that Mr. Bansal could not find the original of the reassignment because of case law which would support an oral reassignment, T/R 86:20-23; 91:12-92:9. Mr. Gilcrease also testified that he showed Respondent letters which confirmed that there was a reassignment but that the Respondent was "hyper", T/R 97:11-22; 101:18-102:4, H/Ex. 20 BSN 51.

Mr. Gilcrease also testified that he told Respondent to contact attorney Scott Houston, the attorney for the worker's compensation insurance carrier, but that the Respondent was skeptical, T/R 100:2-16.

53. According to Respondent, when he confronted Mr. Gilcrease about there not being a reassignment, Mr. Gilcrease admitted to him that there was no reassignment and that Mr. Bonsal had failed to do the one thing that he was supposed to do, and that was secure the reassignment, T/R 417:8-17. Respondent also testified that he did not try to contact attorney Houston because Mr. Gilcrease had told him that attorney Houston would not return their calls, which was further evidence that there was no oral re-assignment, T/R 422:14-20; 444:25-445:13. Respondent also testified that he saw an additional letter wherein Mr. Bonsal communicated with Mr. Houston, sending him a second reassignment, and this further concerned Respondent in that there was no reassignment, T/R 438:5-14.

54. Tamara Facciola, an attorney and friend of both Mr. Gilcrease and Respondent, and who also helped both lawyers in their practice, testified that she met with Mr. Gilcrease between Christmas and New Year's of 2008, and told Mr. Gilcrease that Respondent was very upset about being deceived. Ms. Facciola testified that Mr. Gilcrease told her that Respondent needed to calm down and that everything was going to work out, T/R. 583:25-544:21.

55. Ms. Facciola testified that Respondent was very concerned at this time for his clients, the Patels, and also about his ethical obligation to disclose the reassignment issue, T/R 546:4-17.

56. Sometime in December 2008, or early January 2009,[2] Respondent met with the Patels and disclosed to them that there was a problem with the reassignment and that he had an ethical obligation to disclose the problem to the Court (and received their permission to do so), and that it could result in their case being dismissed, T/R 525:8-16; 419:25-420:10; 152:7-153:21; 168:15-169:6; 198:3-11; 203:8-12, 200:15-202:15; H/Ex. 27, BSN 614

57. On December 23, 2008, Respondent sent a letter to Mr. Bansal pointing out the fact that he felt that he had been deceived, that he had invested over $150,000 (in addition to the $230,000 paid to Mr. Bansal and Mr. Gilcrease) in the case, that he would not have done so had he known that there was a problem with the reassignment, and demanding the return of the $230,000 that he had paid to Mr. Bansal and Mr. Gilcrease, H/Ex. 38, BSN 656. Because Mr. Bansal was out of the country at the time, Mr. Gilcrease received a copy of the December 23, 2008, letter to Mr. Bansal.

58. On January 4, 2009, Respondent sent an even more strident letter to attorney Gilcrease threatening to file a lawsuit for legal malpractice against attorney's Gilcrease and Bansal if they did not return all of the money Respondent had paid them. The letter stated, "I want the 340 thousand [sic] I paid immediately returned. If paid now I will continue the case to its end... If the money isn't paid immediately I will explain the situation to the Patels, disclose it in my Motion to Dismiss and represent them in their malpractice claim." Respondent closes the

[2] The exact date of this meeting could never be determined with any certainty, although numerous witnesses testified that the meeting did take place.

letter with the question "Does Jay (Bansal) have nine million malpractice coverage?" H/Ex. 24, BSN 540.

59. On January 4, 2009, Mr. Gilcrease sent Respondent a letter requesting that he wait to disclose the information to the Court until Mr. Gilcrease had an opportunity to review the file. In the letter, Mr. Gilcrease also argued that there was an actual reassignment that could be proven by extrinsic evidence, that the carrier would confirm that there was a reassignment, and that the reassignment was no longer necessary during the two-year period. Mr. Gilcrease also opined that it would be inappropriate for Respondent to divulge in any way any opinion that he had that there was no reassignment because he felt it to be erroneous, premature and harmful to the Patels. Mr. Gilcrease informed Respondent that he would be commencing a medical malpractice trial in Tucson, and therefore, did not have time to write a detailed and full response to Respondent's letter, H/Ex. 24, BSN 552.

60. Mr. Gilcrease also notified Respondent that Mr. Bansal was in India and Mr. Gilcrease could not reach him.

61. On January 5, 2009, Respondent sent another letter to Mr. Gilcrease. In this letter, Respondent informed Mr. Gilcrease that he must inform the Court that there was no reassignment unless a refund (of the money paid to Mr. Bansal) was made. In addition to expressing his dismay at being deceived, Respondent points out that there is imminent discovery that needed to be completed, including out-of-state depositions, making his report to the Court necessary sooner than later.

Respondent again referenced a malpractice claim against Gilcrease and Bansal, H/Ex. 24, BSN 554.

62. By this time, Mr. Gilcrease had retained his malpractice insurance attorney, Donald Wilson, and Mr. Wilson sent Respondent a letter dated January 12, 2009, in response to a letter from Respondent on that same date, advising Respondent that after reviewing the evidence he felt that there was a reassignment and asked that Respondent take no efforts to prejudice his clients.

63. On January 12, 2009, in a telephone call, Respondent informed opposing defense counsel, Dustin Christner, a lawyer representing GTE, about the problems regarding the reassignment, T/R 258: 20-22. Attorney Christner felt that Respondent was asking him to file a motion in the Patel case to bring the issue up so that it could be resolved, otherwise there might be a waiver, T/R 258:23-259:14.

64. Attorney Christner decided not to file a motion because he had no hard information on the reassignment except what the Respondent had told him, T/R 263:3-21. Instead, Attorney Christner sent Respondent a letter dated January 14, 2009, H/Ex. 15, BSN 463. In this letter, Attorney Christner points out that if there was no reassignment, Mr. Patel's claim should be dismissed, and requested from Respondent that he provide him with an explanation within 10 days.

65. Respondent responded to Attorney Christner's January 14, 2009, letter in a letter dated January 15, 2009, wherein he corrects Attorney Christner stating that he had been informed that a standard reassignment had not been obtained, but that a reassignment had been given. He also states that he had tried to get more

information to support the reassignment but that he had had no response. Respondent also stated that he felt that it was his ethical duty to inform Mr. Christner of the situation and get it resolved by the Court, H/Ex. 15, BSN 4634.

66. On January 16, 2009, during a regularly scheduled hearing in the Patel matter, Respondent informed the Court (Judge Kreamer) that he had reason to believe that the worker's compensation carrier may **not** have reassigned the right to pursue this section to Mr. Dharmesh Patel.

67. As a result of Respondent's revelation to the Court, on January 16, 2009, the Court ordered Mr. Gilcrease, Mr. Bansal and Mr. Levine (also assisting the plaintiff) to provide the Court, on or before February 6, 2009, a statement regarding whether there had been a reassignment to Mr. Patel from the worker's compensation carrier. The Court further ordered that "remaining council" file a response on or before February 20, 2009, H/Ex. 18, BSN 477.

68. On February 3, 2009, Respondent filed a "Declaration" with the Court detailing how he learned there was no reassignment, H/Ex. 19, BSN 483.

69. Respondent's "Declaration" surprised Judge Kreamer because he received it before he received anything from Mr. Gilcrease, Mr. Bansal or Mr. Levine, and that it argued that there was no reassignment before anyone else had responded, T/R 49:5-50:2.

70. On February 6, 2009, the attorneys representing Mr. Gilcrease and Mr. Bansal provided affidavits with supporting documents and argued that there was a valid reassignment, H/Ex. 20, BSN 488. On February 13, 2009, Gilcrease and Bansal filed a "Further" statement after learning of Respondent's "Declaration", H/Ex.

21, BSN 521. In the "Further" statement Mr. Gilcrease and Mr. Bansal call into question Mr. Fitzhugh's motives in filing the "Declaration", suggesting that either Respondent is having difficulty with the case, or is wishing to tank his own client's case and supplant it with a case for malpractice against Mr. Gilcrease and Mr. Bansal.

71. On February 20, 2009, Defendant GTE, through its attorney Christner, filed its statement concerning the status of the claim, and on February 24, 2009, Defendant Tiempo filed its statement concerning the status of the claim, H/Ex. 22, BSN 525 and H/Ex. 23, BSN 537. Both pleadings point out the conflicts raised by Respondent's "Declaration" and the pleadings filed by Mr. Gilcrease and Bansal. Attorney Christner testified that Respondent's telephone call and pleadings filed with the Court provided them with "a lot more to work with", T/R 271:16-22.

72. On February 24, 2009, Respondent authored and then filed on March 3, 2009, a "Response" wherein he comments on the fact that Gilcrease and Bansal: "... have produced evidence that he had repeatedly requested (without success) for months prior to his disclosure to the Court." as well as other issues, H/Ex. 25, BSN 558.

73. On February 27, 2009, in response to Respondent's February 24, 2009, Response, Mr. Gilcrease and Mr. Bansal filed a Reply with the Court that included the letters dated January 4 between Respondent and Mr. Gilcrease, Respondent's letter to Mr. Gilcrease dated January 5, 2009, as well as Carla Lief's April 8, 2008, memoranda, H/Ex.'s 24, BSN 550-557.

74. Judge Kreamer testified that he felt that Respondent's actions in bringing the issue to the Court's attention were appropriate, but had concerns about Respondent's

actions both before and after he raised the issue with the Court were problematic, because it "aired out" information that could easily have been interpreted to mean that the Plaintiff's attorneys did not believe that they had a strong case, T/R 50:19-51:12; 63:3-11. Judge Kreamer was also concerned that the statement by Respondent in his letters to Mr. Gilcrease and Mr. Bansal, wherein he threatened that if he wasn't paid back he would disclose the issue, and that by implication, if he was paid, he wouldn't, T/R 51:13-52:9.

75. Judge Kreamer was also concerned that Respondent's statements in his letters looked like he was saying that he would tell the Patels if he was not paid, and by implication, that he would not tell the Patels if he was paid, T/R 52:10-17. It was Judge Kreamer's conclusion that Respondent did not properly investigate the issue of the reassignment before jumping in and saying things that were potentially harmful to his clients on the issue, T/R 54:6-56:11.

76. Judge Kreamer testified that he thinks that Respondent should have asked the previous attorneys for everything on the reassignment issue before acting, T/R 53:19-54:5, and that Respondent did not just raise the issue, he made statements that were detrimental to his clients' case, T/R 58: 20-25.

77. Respondent testified that he felt that he had tried to get this information from Mr. Gilcrease and Mr. Bansal and that he did not wait any longer because they quit talking to him, Mr. Gilcrease had told him that there was no reassignment, and he had looming out-of-state depositions that mandated that the reassignment issue needed to be addressed quickly, T/R 461:23-462:20; 472:16-473:7. Respondent

testified that he did not try to contact attorney Houston because he had been told by Mr. Gilcrease that attorney Houston would not return their phone calls.

78. Attorney Houston testified that the Respondent did not try to contact him, T/R 171:15-172:11. Attorney Houston also testified that he was pretty certain there was a signed letter about the reassignment that no one ever asked him to find, and that the Worker's Compensation carrier had told him that it would make the reassignment, T/R 179:10-24; 181:15-122:8.

79. Judge Kreamer testified that it appeared to him, based upon Respondent's filing of two unnecessary statements which gave arguments to opposing counsel that there had been no reassignment, that Respondent had moved to a mode, or was at least contemplating a mode, early in January that the underlying case was going to be gone and he was going to pursue a malpractice claim, T/R 80:10-80:19. The judge also felt that Respondent's "coming out" with the reassignment issue was based on his failure to get his money back, T/R 83:21-84:6.

80. On March 4, 2009, the Court issued a Minute Entry regarding the reassignment issue, H/Ex. 26, BSN 561. The Court found that there was a reassignment and resolved the issue in the Patels favor.

81. The Court also stated in its March 4, 2009, Minute Entry that the Judge had significant problems with Respondent's actions both before and after he raised the issue with the Court.

82. The Judge specified that he had issues with Respondent's correspondence that clearly stated if he wasn't paid $340,000, he would not disclose the reassignment issue to the defendants or the Court.

83. The Court also noted that letters written by Respondent indicated that Respondent was not going to tell the Patels of this potentially dispositive issue if he was paid.

84. The Court also remarked in its Minute Entry that Respondent filed two statements with the Court, neither of which were necessary, not only reciting his version of the facts, but providing ammunition for GTE's subsequent argument that the case should be dismissed.

85. On March 23, 2009, Respondent filed a "Notice of Filing Affidavit" wherein he disagrees with some of the conclusions of the Court, specifically the note by the Court that Respondent was not going to notify his clients, the Patels. Respondent attaches the affidavit of his client, Dharmesh Patel, which acknowledges that Respondent did tell them about the problem with the reassignment and his ethical obligation to disclose it to the Court, H/Ex. 27, BSN 614. Again, the timing of this notification of the Patels is somewhat vague in that the affidavit states that it was in December or early January of 2009. Respondent insists that he notified his clients prior to his threatening letters to Mr. Gilcrease and Mr. Bansal, and there is no evidence to the contrary other than the fact that nobody can place a specific date as to the time when Respondent met with his clients H/Ex. 27, BSN 612, line 7.

86. Attorney Christner, GTE's attorney, and Greg Fairbourn, Mr Bansal's malpractice attorney, both testified that they felt that Respondent's actions delayed the underlying action of Patel vs. GTE, T/R 273:13-274:14.

87. When Mr. Gilcrease, and later Respondent, decided to assist with the Patel case, a new fee agreement, showing the division of fees between the lawyers who are not

in the same firm was required to be signed by the client and all of the lawyers involved in the case. However, there was no writing showing the division of fees signed by the Patels or the other lawyers involved in the case.

88. Respondent admitted in his statements filed with the Court that he provided facts which provided ammunition for GTE's subsequent argument that the case should be dismissed.

CONCLUSIONS OF LAW REGARDING COUNT TWO

89. ER 1.5(e) Written Agreement by Client

The first issue in Count Two is the alleged violation of ER 1.5(e) in that there was no written fee agreement with the Patels when Respondent initially came on board to assist in the case. Both Mr. Bansal and Mr. Gilcrease received an Order of Diversion and CLE as a result of this failure to have a written fee agreement outlining Respondent's participation and fee when he initially joined in the representation of the Patels. Respondent's defense that he thought that Mr. Bansal had taken care of this issue, and that the Patels were fully aware of his participation and contribution to their case is unpersuasive. There is clear and convincing evidence that there was no written fee agreement as required by ER 1.5(e), and while Respondent may have expected Mr. Bansal to take care of this, Respondent shares in some of the responsibility for not making sure it was done. Therefore, there is clear and convincing evidence that Respondent violated ER 1.5(e).

90. More troubling are Respondent's actions following his discovery that Mr. Bansal and Mr. Gilcrease had failed to obtain a reassignment of the worker's

compensation claim. Respondent's conduct brings into question whether he violated ER 1.6 by revealing confidential information; ER 1.7 by engaging in a conflict of interest; ER 1.8(e) providing financial assistance to his clients; and ER 8.4(d) by engaging in conduct prejudicial to the administration of justice.

91. ER 1.6 Confidentiality of Information

The State Bar argues that Respondent had no duty to advise the Court of the question about the reassignment and therefore essentially the entirety of Respondent's conduct violated ER 1.6, disclosing confidential information. This Hearing Officer disagrees, Respondent did have an obligation to bring this issue to the attention of the Court, but agree with Judge Kreamer, that Respondent went much farther than simply telling the Court that there might be a problem with the reassignment, he actively took a role in filing two pleadings that provided substantially more information than was necessary to simply raise the issue with the Court.

92. This Hearing Officer finds that Respondent did violate ER 1.6 in that, while he had an obligation to bring the issue up with the Court, and he did get the consent of his clients to do so, his anger at being deceived by Mr. Gilcrease and Mr. Bansal, and having paid them $340,000 on a case where there was perhaps a significant flaw, caused him to say much more than he needed to, which then led to Gilcrease and Bansal to file copies of the threatening correspondence.

93. A review of Respondent's filings with the Court shows that not much of a confidential nature was disclosed by Respondent that would not have come out eventually. The problem is that in Respondent's rush to tell the Court how

deceitful Gilcrease and Bansal were, he unduly complicated the issue and unnecessarily raised his own ethics as an issue.

94. It is hard to tell if, as Judge Kreamer suspects, Respondent really believed that he could turn the Patels' product liability case into a malpractice case against his former attorneys, or whether Respondent was simply trying to use his arguments as leverage to get his $340,000 back. The fact that Mr. Patel had such serious injuries in a case valued by Respondent at $9,000,000, while Mr. Gilcrease had limited malpractice insurance coverage[3] would seem to indicate that it was the goal of the Respondent in making his threats to simply get his money back from Mr. Bansal.

95. ER 1.7 Conflict of Interest

ER 1.7(a)(2) states that a lawyer shall not represent a client if there is a concurrent conflict of interest, and a concurrent conflict of interest exists if there is a conflict between the interests of the client and the interest of the lawyer. A review of Respondent's letters to Mr. Bansal and Mr. Gilcrease in late December 2008 and early January of 2009, represent far more than simply Respondent dealing with "those rats" (Respondent's reference to Mr. Gilcrease and Mr. Bansal). Respondent's comments reflect that his primary aim is recovering the $340,000 he paid to Mr. Bansal and Mr. Gilcrease. Respondent then held good to his threats by filing two unsolicited documents with the Court. Respondent did this in spite of at least two people telling him to slow down, that there was sufficient evidence of a reassignment and that he should not run off to the Court until he had reviewed all that information. Respondent counters that he had been trying to get

[3] There was no evidence regarding Mr. Bansal's malpractice insurance limits.

the information from Mr. Gilcrease and Mr. Bansal and that they had quit talking to him.

96. While this Hearing Officer can certainly understand the pressure on Respondent due to the eminent out-of-state discovery that need to be completed, as well as his feeling that he needed to tell the Court and opposing counsel of the reassignment issue, that does not explain away Respondent's gratuitous document filing that went beyond notifying the Court and counsel that there is an issue. Respondent's actions betray an anger at the perceived deception by Gilcrease and Bansal that caused him on multiple occasions to press forward when he should have just stood pat.

97. Respondent responds that he had no intention to not tell his clients or the Court, that he would essentially say anything in dealing with those "rats", Mr. Gilcrease and Mr. Bansal, T/R 412:19-413:7; 469:4; 470:6, and that he owed to them no honesty or integrity after what they had done to him, T/R 413:8-14. Unfortunately, these statements by Respondent betray a lack of his own professionalism and integrity.

98. Respondent also argues that he had essentially reached a dead end in dealing with Mr. Gilcrease and Mr. Bansal: that Mr. Gilcrease and Bansal both had told him there was no reassignment, that they had quit communicating with him, and it was only after he brought the matter to the attention of the Court that they finally came forward with the evidence necessary to show that there was in fact a reassignment. While Respondent felt that Mr. Gilcrease and Mr. Bansal had not been honest with him in order to get him to take over the case, Respondent must

recognize how his own inflammatory words, threats and accusations made their cooperation and communication with him unlikely.

99. For these reasons, this Hearing Officer finds that Respondent violated ER 1.7 by elevating his own interests above those interests of his clients.

100. ER 1.8(e) Providing Financial Assistance to a Client

The State Bar argues that Respondent violated ER 1.8(e) when he paid Mr. Gilcrease and Mr. Bansal $340,000 as reimbursement for attorney's fees and costs that had been expended to date. The Hearing Officer has reviewed the Rules as well as the circumstances in this matter, and considered the opinions of the experts submitted by the parties, and concludes that the payment by Respondent of $340,000 to Mr. Gilcrease and Mr. Bansal was not a violation of ER 1.8(e).

101. ER 8.4 Conduct Prejudicial to the Administration of Justice

The State Bar argues that Respondent violated ER 8.4(d) by:

1. Requesting that Defense Counsel Dustin Christner file a Motion to Dismiss the Patel lawsuit;

2. Threatening to sue Mr. Gilcrease and Mr. Bansal for malpractice if they did not return the $340,000 payment;

3. Filing misleading pleadings with the Court;

4. Providing ammunition for the Defense's position that there was no reassignment;

5. Providing confidential information to defense counsel without obtaining the informed consent of his clients;

6. Respondent's conflict of interest in putting his own interests in the recovery of $340,000 above those interests of his client;

7. Respondent's failure to delay the disclosure of the reassignment issue to the Court until a thorough investigation could be completed.

102. Based upon the evidence provided to this Hearing Officer, there is clear and convincing evidence that Respondent, in his rage over the perceived deception by Mr. Gilcrease and Mr. Bansal, and his personal interest to recover the $340,000 paid to Mr. Gilcrease and Mr. Bansal, not only threatened Mr. Gilcrease and Mr. Bansal, he ignored efforts to have him wait until the issue could be properly researched, jumped the gun in notifying the Court of the issue, and went overboard in his gratuitous filings with the Court. There is insufficient evidence to prove that Respondent violated ER 8.4 as set forth in numbers 1, 3 and 5 set forth above.

ABA STANDARDS

103. 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.

104. The ABA *Standards* indicate that the ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations and that it might well be, and generally should be, greater than the sanction for the most serious conduct.

The Duty Violated:

105. This Hearing Officer finds that the most serious misconduct in this matter is Respondent's violation of ER 1.7 Conflict of Interest and ER 1.6 Confidentiality of Information.

106. *Standards* 4.2 Client Confidences, and 4.3 Conflict of Interest would appear to be the most applicable *Standards*. Under these *Standards*, the deciding issue of whether Respondent should receive a suspension or an admonition (Censure in Arizona) turns upon Respondent's state of mind.

The Lawyer's Mental State:

107. The testimony by those most closely associated with Respondent, his fellow attorney, Ms. Facciola, his paralegal Carla Lief, and his secretary, Barbara Dean, all supported the notion that Respondent was very committed to his clients, would never abandon the Patels, was conscientious in his responsibilities to his clients, very ethical, and would not put his own interests above those interests of his client, T/R 549:6-550:8; 503:11-504:9; 529:13-531:11.

108. Respondent comes across as being a very intense and yet caring person, who dedicates himself very much to the best interests of his clients. There was no evidence, and it is hard to believe that Respondent intentionally set out to harm the Patels, rather, he got wound up in his anger towards Mr. Gilcrease and Mr. Bansal for their deception and lost sight of the negative effect that his actions were having on his clients in his efforts to get his money back. Respondent,

although admitting that his language was inappropriate, and perhaps his methods a little extreme, felt that he was complying with his ethical duty to the Court, and his clients. As stated previously, there is simply insufficient evidence to show that Respondent's conduct was aimed at hurting his clients. Rather, Respondent negligently went on a rampage, wherein he lost sight of the fact that he was potentially causing his clients harm.

109. Accordingly, under *Standard* 4.23 and 4.33 the presumptive sanction is a Reprimand (Censure in Arizona).

The Actual or Potential Injury:

110. With the trust account violations, there was the potential for harm to the clients. In Count Two, there was a possibility of significant injury to the Patels when Respondent went on his quest to recover his $340,000. It was not the fact that the reassignment issue needed to be raised, it was, as Judge Kreamer stated, Respondent's actions before and after it was raised that are problematic. Fortunately, the judge found that there was a reassignment and so there was no harm to the Patels.

111. It is argued by the State Bar that there was also injury in the delay of the proceedings. Admittedly, the underlying civil case was delayed while the issue of the reassignment was addressed, but the issue needed to be raised, and it is hard to say that it was delayed even more by Respondent's conduct and if so by how much.

Aggravating and Mitigating Factors

Aggravating factors:

112. *Standard* 9.22(i) Substantial experience in the practice of law. Respondent has been practicing law for over 30 years

113. *Standard* 9.22(d) Multiple offenses. Respondent had not only multiple trust account violations, but also other violations as well.

114. *Standard* 9.22(g) Refusal to acknowledge the wrongful nature of his conduct. While Respondent acknowledged that he was responsible for his trust account violations, throughout the proceedings he refused to acknowledge or accept that his conduct in attacking Mr. Bansal and Mr. Gilcrease in an attempt to recover the $340,000 potentially harmed his clients or betrayed their confidences.

Mitigating Factors:

115. *Standard* 9.32(a) Absence of a prior disciplinary record.

116. *Standard* 9.32(c) Personal or emotional problems. Respondent and others testified that, during the period that the trust issues arose, Respondent was undergoing a difficult and tumultuous custody battle over his son.

117. *Standard* 9.32(g) Character or reputation. Paralegal Carla Lief, Secretary Barbara Dean and attorney Tamara Facciola all testified to Respondent's reputation for hard work, conscientious attention to the needs of his clients, commitment to the best interests of his clients, and willingness to sacrifice for his clients.

118. *Standard* 9.32(l) Remorse. The Hearing Officer can find this factor as a mitigating factor in relationship to the trust account issues. While Respondent does have some reasons why his trust account was in such a mess, he fully accepts responsibility for it, and acknowledges that in the end he is the one responsible to make sure that his trust account is in compliance.

PROPORTIONALITY REVIEW

119. They Supreme Court has held that one of the goals of attorney discipline should be to achieve internal consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever alike, *In re Struthers,* 179 Ariz. to 16, 887 P.2d 789 (1994), *In re Wines,* 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley,* 208 Ariz. 35, 90 P.3d 772, (2004). 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, *Peasley*, supra.

120. Respondent's violations are in two broad areas, his trust account violations, and then his violations regarding his obligation to his clients. As to the trust account violations, it is clear that the proportionality cases cited by both the State Bar as well as Respondent provide that in trust account cases similar to this case, Censure is appropriate.

121. *In re Fealk*, SB-08-0179-D (2008), Mr. Fealk failed to adhere to the rules and guidelines governing the treatment of client trust account funds by transferring unearned fees to himself and in failing to maintain adequate trust account and timekeeping records, in violation of ERs 1.5, 1.15, and Rules 43 and 44. Mr. Fealk further failed to memorialize his fee agreement in writing. There were two

aggravating factors: 9.22(a) and (i) and five mitigating factors, 9.32(c) (e) (g) (h) and (m). Mr. Fealk received a Censure.

122. *In re White-Steiner*, No. SB 08-0119-D, Respondent was Censured for negligent trust account violations. Respondent had serious issue with her client ledgers, the negative balances, and failure to properly three-way reconcile client accounts. Respondent also had a previous discipline action, and yet received a Censure.

123. Regarding the ER 1.5, 1.6, 1.7 and 8.4 violations, the State Bar submits three cases in support of a suspension: *In re Groh*, SB-08-0095-D, *In re Shannon*, 179 Ariz. 52, 876 P.2d 548 (1994), and *In re Allen*, SB 00-25 (2000). A review of the facts in those cases show that the conduct in those cases was much more serious than the conduct in this case.

124. Respondent's attorney submits several cases that individually deal with a violation of: ER's 1.7 and/or 4.3, *In re Aaron*, 07-0185 (2007) Censure; *In re Walker*, 200 Ariz. 155, 24 P.3d 602 (2001) Censure for ER 1.7 violation; *In re Moore*, SB 02-0043 (2002) Censure for ER 1.7 violation; *In re Herbert*, 02-0041 (2002) Censure for ER 1.7 violation.

125. This Hearing Officer has looked at the Matrix and can find no cases that have the unique combination of violations that we have in this case. Respondent's trust account violations were numerous and significant, but as the Bar investigator testified, none were intended by Respondent to enrich himself, and no client suffered any loss as a result. Respondent's trust violations were the result of a key employee leaving Respondent's employ, and Respondent, like most lawyers, thought that he is smarter than he really is and made a real mess of it. From the

testimony, Respondent has been appropriately humbled by his trust account experience, has rehired the key employee, and taken other actions to assure that he does not have these problems in the future.

126. As to the other violations, they are more problematic. While Respondent's actions were intentional, they were focused on trying to recover money that he felt was obtained from him by deception, rather than trying to hurt his clients. Respondent felt that Gilcrease and Bansal did not tell Respondent of the reassignment problem, and took affirmative steps to keep that from the Respondent so that he would take over what they considered to be a weak case and get them out of it. On top of that, Respondent paid them a substantial amount of money to reimburse them for their costs and fees, and they still were not honest with him.

127. This Hearing Officer also believes that Respondent always intended to tell both the Court as well as his clients about the problem, in spite of his ranting and threats. While this Hearing Officer can understand Respondent's umbrage, what cannot be understood or excused is Respondent's overt actions in filing the gratuitous Declaration and Memo. While these pleadings don't reveal much in the way of any confidences, the fact that he filed them, as well as the chain of events that then resulted, calls into question Respondent's motives. Either Respondent was blinded by his rage or, as Judge Kreamer suspected, Respondent was trying to convert his clients' case from a products liability case to a legal malpractice case. The latter doesn't make much sense because Respondent did not know if Gilcrease and Bansal had enough liability insurance to even cover Mr. Patel's medical bills. It appears that Respondent simply let his rage run wild and did not

think it through. This appears to be a classic case of an attorney intentionally doing something for one reason, but losing sight of the fact that his actions potentially could hurt his clients.

128. This Hearing Officer could find no cases to cite in proportionality that are even close to these unique facts.

RECOMMENDATION

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

130. 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, 8721235 (1994).

131. As stated, this Hearing Officer can find no proportionality cases to give guidance as to what to do in a case where an otherwise conscientious, hard-working and loyal attorney, who has been focused on the interests of his clients for almost 30 years of practicing law without incident, becomes blinded by his anger about his perception of being deceived. While the Respondent had some arguments about why he could not wait any longer to bring the issue up with the Court, his gratuitous filings and the unseemly threatening of Mr. Gilcrease and Mr. Bansal

are inexcusable. Fortunately, as things turned out, there was no harm to the Patels.

132 A review of the American Bar Association's *Standards* shows that in many cases the difference between a suspension and a Censure with probation turns on the intent of the attorney and whether there was harm to the client. While this Hearing Officer finds Respondent's conduct to be offensive and unprofessional, there is simply insufficient evidence to show by a clear and convincing standard that Respondent intended to harm his clients.

133. Upon consideration of the facts, application of the *Standards,* including aggravating and mitigating factors, and the proportionality analysis, this Hearing Officer recommends the following:

1) Respondent shall be Censured.

2) Respondent shall be placed on probation for two years, to commence on the date of the final Judgment and Order entered in this matter.

3) Respondent shall contact the Director of the Law Office Management Assistance Program within 30 days of the final Judgment and Order and submit to an assessment. Respondent shall thereafter enter into a contract based upon the recommendation made by the LOMAP Director or designee. Respondent shall comply with all recommended terms.

4) Respondent and his staff shall successfully complete any programs of assistance and/or training to not only resolve the outstanding issues of his trust account, but to assure that Respondent and his staff are properly trained in the requirements to appropriately maintain and administer his trust account.

5) Respondent shall successfully complete any programs on ethics and obligations to clients as deemed appropriate by the Programs Manager of the State Bar.

6) 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 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 time, 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 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 noncompliance by clear and convincing evidence.

7) Respondent shall pay all costs and expenses incurred in these disciplinary proceedings, including the costs of the State Bar, the Disciplinary Commission, the Disciplinary Clerk, and the Supreme Court.

DATED this 10 day of January, 2011.

H. Jeffrey Coker

H. Jeffrey Coker, Hearing Officer 6R

Original filed with the Disciplinary Clerk
this 10 day of January, 2011.

Copies of the foregoing mailed
this 10 day of January, 2011, to:.

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