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OCT 30 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY CS

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8 **BEFORE A HEARING OFFICER**
9 **OF THE SUPREME COURT OF ARIZONA**

10 **IN THE MATTER OF A MEMBER OF**
11 **THE STATE BAR OF ARIZONA,**

Nos. 05-0385 and 05-1548

12 **JERRY L. SMITH,**
13 **Bar No. 001027**

HEARING OFFICER'S REPORT

14 Respondent.

15 **PROCEDURAL HISTORY**

16 Two Probable Cause Orders were filed, one on November 7, 2005 and the other
17 on December 8, 2005, and a two-count Complaint was filed on April 27, 2006.
18 Respondent filed his Answer on June 7, 2006. A telephonic settlement conference was
19 held on August 30, 2006 and continued on September 5, 2006 but the parties were
20 unable to reach a settlement.

21 On September 22, 2006, the State Bar of Arizona ("State Bar") and Respondent
22 (acting pro per) filed a Tender of Admissions and Agreement for Discipline by Consent
23 (the "Tender") as well as a Joint Memorandum in Support of Agreement for Discipline
24 for Consent ("Joint Memo"). No hearing has been held in this matter.

25 **FINDINGS OF FACT**

26 1. At all times relevant hereto, Respondent was an attorney licensed to
practice law in the State of Arizona, having been admitted to practice in Arizona on
March 20, 1959.

9 5. During the Florek VW/Audi investigation, Mr. Aspey and certain special
10 agents with the FBI interviewed Steven Fiorentino ("Mr. Fiorentino"), one of the main
11 defendants in the Florek VW/Audi investigation and a co-owner of Florek VW/Audi.

12 6. During the investigation, Mr. Fiorentino provided information concerning
13 Respondent's use of his trust account for the benefit of Florek VW/Audi.

14 7. Specifically, Respondent utilized his law firm's trust account as a
15 surrogate checking account for Florek VW/Audi's normal business checking account,
16 thereby assisting Florek VW/Audi "in disguising the deposit of business receipts from
17 [Respondent's] client's creditors."

18 8. Once Florek VW/Audi closed due to the criminal investigation, proceeds
19 from a residual income stream related to in-house financed car contracts were deposited
20 ~~checks out of his trust account for the benefit of Mr. Fiorentino and/or Florek VW/Audi.~~

21 9. Respondent's trust account was used to deposit proceeds from
22 ~~checks out of his trust account for the benefit of Mr. Fiorentino and/or Florek VW/Audi.~~
23 10. On January 13, 2003, Mr. Fiorentino was indicted on six counts of mail
24 fraud, 11 counts of wire fraud, 19 counts of bank fraud, and one count of conspiracy
25 based on his conduct as a co-owner at the dealership.
26

1 11. On February 25, 2004, Mr. Fiorentino pled guilty to one count of mail
2 fraud and one count of conspiracy. The court sentenced Mr. Fiorentino to 36 months in
3 prison.

4 12. On May 13, 2005 and May 20, 2005, bar counsel forwarded the charge to
5 Respondent and requested an explanation regarding the allegations.

6 13. Bar counsel also requested that Respondent provide copies of his complete
7 trust account bank statements for all IOLTA trust accounts maintained for the period of
8 January 1998 through March 2003, copies of all canceled checks, deposit slips and
9 individual client ledgers or their equivalent corresponding to the referenced time period,
10 as well as copies of the fee/written agreements or settlement statements for
11 Mr. Fiorentino.

12 14. Respondent did not respond to the State Bar's request for information.

13 15. On June 24, 2005, the State Bar's Staff Examiner ("Staff Examiner") sent
14 Respondent a letter regarding his non-response. The Staff Examiner gave Respondent
15 ten days to respond to the initial request.

16 16. Respondent failed to respond to the request for information.

17 17. On July 11, 2005, the Staff Examiner sent Respondent a second letter
18 regarding his non-response, giving Respondent an additional ten days to respond.

19 18. Respondent did not respond.

20 19. On July 11, 2005, the State Bar issued a Subpoena Duces Tecum to Bank
21 One to produce the relevant documents regarding Respondent's trust account covering
22 the period that Respondent represented Florek VW/Audi.

23 20. On July 12, 2005, Respondent provided his response to the State Bar's
24 May 13, 2005, May 20, 2005 and June 24, 2005 letters.

25 21. Respondent requested an additional 30 days to supplement his response.

26 22. On July 18, 2005, the State Bar granted Respondent's request for a 30-day

1 extension to supplement his answer, and again asked Respondent to submit all
2 documents previously requested by the Staff Examiner.

3 23. Respondent's response was due on August 18, 2005 but Respondent did
4 not respond.

5 24. On August 30, 2005, the Staff Examiner sent Respondent a letter regarding
6 his non-response, giving Respondent ten days to respond.

7 25. Respondent failed to respond to the request for information.

8 26. Respondent used his trust account to deposit funds from Mr. Fiorentino
9 and Florek VW/Audi for matters that were unrelated to legal representation.

10 27. Respondent's trust account bank statements received from Bank One
11 pursuant to the subpoena reflect activity for the benefit of Mr. Fiorentino and Florek
12 VW/Audi from June 10, 1999 through January 10, 2003.

13 28. Respondent's trust account records received from Bank One show that
14 numerous checks were received from Mr. Fiorentino, which Respondent deposited into
15 his trust account. Respondent then disbursed funds from his trust account for the benefit
16 of Mr. Fiorentino and/or Florek VW/Audi.

17 29. Respondent's trust account records received from Bank One affirm that the
18 balance in Respondent's IOLTA trust account for the benefit of Mr. Fiorentino and/or
19 Florek VW/Audi as of January 10, 2003 was -\$565.96. Therefore, Respondent
20 converted other clients' funds for the benefit of Mr. Fiorentino and/or Florek VW/Audi.
21 The State Bar did not receive any complaint from an existing client regarding the above-
22 stated conversion.

23 30. By failing to safeguard the property of clients or third persons that were in
24 Respondent's possession, and by commingling funds unrelated to legal representation
25 with client funds, Respondent violated ER 1.15(a), Rule 42, Ariz.R.S.Ct.

26 31. By knowingly failing to respond to a lawful demand for information from

1 a disciplinary authority in connection with a disciplinary matter, Respondent violated ER
2 8.1(b), Rule 42, Ariz.R.S.Ct.

3 32. By failing to maintain records that covered the entire time from receipt to
4 the time of final disposition by Respondent of such funds and by failing to preserve these
5 records for a period of five years after final disposition by Respondent of such funds,
6 Respondent violated ER 1.15(a), Rule 42, Ariz.R.S.Ct., and Rules 43(a), 43(d)(1)(E),
7 43(d)(2)(C), 43(d)(2)(E) and 44(b)(3) , Ariz.R.S.Ct.

8 33. By failing to cooperate with officials and staff of the State Bar acting in the
9 course of those person's duties and by failing to respond promptly or to furnish
10 information pursuant to a lawful demand for information from a disciplinary authority in
11 connection with its investigation, Respondent violated Rules 53(d) and (f), Ariz.R.S.Ct.

12 34. Respondent's conduct as described in this count violated ERs 1.15(a) and
13 8.1(b), Rule 42, Ariz.R.S.Ct., Rules 43, 44, 53(d) and 53(f) , Ariz.R.S.Ct.

14 **COUNT TWO (05-1548)**

15 35. On August 31, 2005, the State Bar received a charge from Judge Pro
16 Tempore Dan Slayton, Coconino County Superior Court, concerning Respondent.

17 36. Respondent appeared before Judge Slayton as the personal representative
18 and counsel for the personal representative in *In the Matter of the Estate of Tom Parker*,
19 Case No. PB 2001-0093.

20 37. As personal representative and counsel for the personal representative,
21 Respondent filed a motion to confirm the sale of a home located at 38 Pine Circle,
22 Flagstaff, Arizona (the "Parker Home"). The Parker Home was the largest single asset
23 of the estate.

24 38. Respondent informed the court that the sale was necessary to pay debts and
25 taxes owed by the estate and that he had located a buyer, Jerry Bennett.

26 39. Several heirs to the estate objected to the sale of the home, and Judge

1 Slayton set a hearing on the matter.

2 40. In their Objection to Confirmation of Sale of Real Estate, the heirs argued
3 that Respondent was not authorized to sell the Parker Home, that there were no debts or
4 taxes owed on the Parker Home, and that they wished to have Respondent removed as
5 the personal representative.

6 41. Testimony given during an August 3, 2005 hearing regarding the sale
7 established that Respondent had secured the removal of two of the decedent's daughters
8 as co-personal representatives, leaving Respondent as the only personal representative;
9 that the heirs had no knowledge of the potential sale of the Parker Home until
10 Respondent filed his motion seeking approval of the sale; that Respondent had no
11 contact with the heirs for the eighteen months preceding the motion to approve the sale;
12 and that Respondent was attempting to sell the home at approximately \$20,000 below its
13 appraised value.

14 42. At the August 3, 2005 hearing, the heirs' attorney presented his case
15 during the morning session.

16 43. When it was time for Respondent to present his position, Respondent
17 informed the court that his "client" no longer wanted to buy the Parker Home, and he
18 moved to withdraw his petition for sale of the Parker Home.

19 44. Respondent referred to Jerry Bennett (the putative buyer of the Park
20 Home) as his "client" at least three times during the hearing.

21 45. The August 3, 2005 hearing was the first time the court or the beneficiaries
22 became aware that Respondent represented the prospective buyer of the Parker Home.

23 46. Respondent had always represented himself as the personal representative
24 and attorney for the estate, without informing the court or the beneficiaries that he also
25 represented the prospective buyer of the Parker Home.

26 47. As the personal representative of the estate, Respondent owed a duty of

1 care to the estate heirs.

2 48. As the attorney for the estate, Respondent owed a duty of care to the estate
3 heirs.

4 49. Respondent's conduct in this matter was a conflict of interest because he
5 represented both the buyer and the sellers of the Parker Home, and because he stood to
6 benefit financially from the sale of the home.

7 50. The simultaneous representation of the buyer and sellers of the Parker
8 Home created a situation where the representations were directly adverse, and a situation
9 where there was a significant risk that the representation of the sellers of the home would
10 be materially limited by Respondent's responsibilities to the buyer or Respondent's own
11 personal interest.

12 51. Respondent failed to get the informed consent of the beneficiaries of the
13 estate regarding the conflict of interest.

14 52. The court denied Respondent's motion to confirm the sale of the home and
15 removed him as the personal representative of the estate.

16 53. On September 19, 2005, the State Bar forwarded the charge and initial
17 screening letter to Respondent and requested that he submit a response within twenty
18 days.

19 54. Respondent failed to respond.

20 55. On October 19, 2005, bar counsel sent a second letter to Respondent
21 requesting a response to the charges.

22 56. Respondent did not respond to the State Bar's October 19, 2005 letter
23 within the time requested.

24 57. On December 3, 2005, a State Bar Probable Cause Panelist found probable
25 cause to believe Respondent violated the Rules of Professional Conduct based on his
26 conduct in this matter.

1 58. On December 19, 2005, Respondent provided a belated response to the
2 charges.

3 59. By failing to obtain the informed consent in writing of the heirs of the
4 Parker estate to a concurrent conflict of interest, Respondent violated ER 1.7, Rule 42,
5 Ariz.R.S.Ct.

6 60. By engaging conduct that was prejudicial to the administration of justice,
7 Respondent violated ER 8.4(d), Rule 42, Ariz.R.S.Ct.

8 61. By failing to furnish information to or respond promptly to an inquiry or
9 request from Bar counsel made pursuant to the Rules of the Supreme Court for
10 information relevant to matters under investigation, Respondent violated Rule 53(f),
11 Ariz.R.S.Ct.

12 62. Respondent's conduct as described in this count violated ER 1.7 and ER
13 8.4(d), Rule 42, Ariz.R.S.Ct. and Rule 53(f), Ariz.R.S.Ct.

14 **CONDITIONAL ADMISSIONS**

15 Respondent conditionally admits that his conduct, as set forth above, violated the
16 following Rules of Professional Conduct and the Rules of the Supreme Court: Rule 42,
17 Ariz.R.S.Ct., ER 1.7, ER 1.15, ER 8.1(b) and ER 8.4(d), and Rules 43, 44, 53(d) and
18 53(f), Ariz.R.S.Ct.

19 **CONDITIONAL DISMISSED ALLEGATIONS**

20 As part of the negotiated Tender, and in light of evidentiary concerns, the State
21 Bar conditionally agrees to dismiss allegations that, by his actions, Respondent violated
22 Rule 42, Ariz.R.S.Ct., ER 1.2(d) and ER 8.4(c).

23 **ABA STANDARDS**

24 The Supreme Court and the Disciplinary Commission consistently use the
25 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards" or
26 "Standard ___") to determine appropriate sanctions for attorney discipline. *See In re*

1 *Clark*, 207 Ariz. 414, 87 P.3d 827 (2004); *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, ¶¶ 23,
2 33 (2004). The *Standards* are designed to promote consistency in sanctions by
3 identifying relevant factors the court should consider and then applying those factors to
4 situations in which lawyers have engaged in various types of misconduct. *Standard* 1.3,
5 Commentary.

6 In determining an appropriate sanction, the court and the Disciplinary
7 Commission consider the duty violated, the lawyer's mental state, the presence or
8 absence of actual or potential injury, and the existence of aggravating and mitigating
9 factors. *In re Tarletz*, 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990); *Standard* 3.0.

10 Given Respondent's conduct in this matter, the parties agree that it is most
11 appropriate to consider *Standards* 4.0 (Violations of Duties Owed to the Client) and 4.3
12 (Failure to Avoid Conflicts of Interest) when determining the appropriate sanction.

13 Standard 4.0 provides, in relevant part:

14 4.1 Failure to Preserve Client's Property

15 4.12 Suspension is generally appropriate when a lawyer knows or should
16 know that he is dealing improperly with client property and causes injury
or potential injury to a client.

17 Standard 4.3 provides, in relevant part:

18 4.32 Suspension is generally appropriate when a lawyer knows of a
19 conflict of interest and does not fully disclose to a client the possible effect
of that conflict, and causes injury or potential injury to a client.

20 **A. The duty violated**

21 Respondent violated duties to his clients by failing to observe the rules governing
22 the treatment of client funds by attorneys. These rules are designed to ensure that a
23 client's money is not used or taken improperly by the attorney or put in jeopardy by the
24 attorney's actions. Respondent failed in his duties by placing funds in his IOLTA trust
25 account that were unrelated to a legal representation. Respondent's conduct jeopardized
26 the funds of other clients that were maintained in his trust account by subjecting the

1 funds to possible lien, levy or garnishment by creditors of either Mr. Fiorentino or
2 Florek VW/Audi. Additionally, Respondent violated his duties owed to the Parker estate
3 beneficiaries by engaging in a conflict of interest when he attempted to sell a home
4 owned by the estate to another client at less than fair market value. Finally, Respondent
5 failed to fully cooperate or respond to the State Bar's requests for information during its
6 investigation of these matters. Respondent admits that his conduct, taken as a whole, has
7 violated his duty to clients, the profession and the legal system.

8 **B. The Respondent's mental state**

9 The parties agree that Respondent knowingly misused his IOLTA trust account by
10 depositing funds into the account that were unrelated to his legal representation of
11 Mr. Fiorentino and Florek VW/Audi. Additionally, Respondent knowingly engaged in a
12 conflict of interest during his representation of the Parker estate. Finally, Respondent
13 knowingly failed to fully cooperate and respond to the State Bar during its investigation
14 of these matters.

15 **C. The potential or actual injury caused by respondent's conduct**

16 The parties agree that there was potential injury to clients as a result of
17 Respondent's rule violations. Respondent's failure to comply with the rules governing
18 treatment of client funds exposed his clients to potential injury by causing client funds to
19 be held without the protections against intentional or inadvertent misdirection or
20 depletion that are provided through strict compliance with ER 1.15 and Rules 43 and 44,
21 Ariz.R.S.Ct. Additionally, the beneficiaries of the Parker estate were forced to expend
22 financial resources to object to Respondent's request to sell the Parker Home and to have
23 Respondent removed as the personal representative of the estate.

24 **D. Aggravating and mitigating circumstances**

25 When determining the an appropriate sanction, it is appropriate to evaluate
26 aggravating and mitigating factors enumerated in the *Standards* that would justify an

1 increase or decrease in the presumptive sanction. See *In re Scholl*, 200 Ariz. 222, 225-
2 26, ¶ 20, 25 P.3d 710, 713-14 (2001); *In re Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239
3 (1995). The presence of aggravating and mitigating factors assists in determining which
4 sanction applies.

5 The parties agree that the following five aggravating factors should be considered
6 in this matter:

7 (1) **Standard 9.22(a) (prior disciplinary offenses):** Respondent has
8 previously received two informal reprimands for violations of the ethical rules. In
9 Comm. Nos. 93-1475 and 94-2026, Respondent was found to have inadvertently
10 overcharged a client; threatened to, and did, charge his client for his response to
11 her State Bar complaint; and charged fees for which he could not fully account.
12 The Commission found that Respondent's conduct violated ER 1.4(a), ER
13 1.5(a)(3), ER 1.15(a), and ER 8.4(d), Rule 42, Ariz.R.S.Ct.

14 In File Nos. 95-0920 and -1603, the hearing officer found that Respondent
15 violated ER 3.3(d) when, in a probate matter in which he represented a potential
16 beneficiary, he failed to disclose to the court the existence of a will that left the
17 decedent's property to a charitable organization and named a banking institution
18 as the personal representative. Respondent filed documents with the court
19 seeking to have his client named as "Special Administrator" and represented to
20 the court that there was no other personal representative qualified to represent the
21 estate. Respondent also attempted to probate a subsequent will, again without
22 informing the court of the existence of the prior will.

23 (2) **Standard 9.22(b) (dishonest or selfish motive):** In File No. 05-0385,
24 Respondent received compensation in the form of legal fees for his misuse of his
25 IOLTA trust account for the benefit of Mr. Fiorentino and Florek VW/Audi. In
26 File No. 05-1548, Respondent's attempt to sell the Parker Home for less than fair
market value was for the purpose of paying debts allegedly owed by the estate.
One of the debts allegedly owed by the estate was Respondent's legal fees in the
matter. At the hearing to approve the sale of the Parker Home, Respondent
testified that the beneficiaries had not paid him for his services; however, the
beneficiaries presented evidence that they had paid Respondent for services
rendered.

(3) **Standard 9.22(c) (pattern of misconduct):** Respondent's current
disciplinary case involves two legal matters in which Respondent violated his

1 ethical duties. Respondent's violations include his misuse of his IOLTA trust
2 account and his involvement in a conflict of interest. In addition, Respondent
3 failed to fully cooperate with the State Bar during its investigation.

4 (4) **Standard 9.22(d) (multiple offenses):** In File No. 05-0385, Respondent's
5 misuse of his trust account continued for a period of several years and involved
6 multiple deposits and withdrawals for the benefit of Mr. Fiorentino and/or Florek
7 VW/Audi.

8 (5) **Standard 9.22(i) (substantial experience in the practice of law):**
9 Respondent was first admitted to the practice of law in Arizona in 1959.

10 The parties agree that no mitigating factors enumerated under the *Standards*
11 should be considered in this matter.

12 The parties agree, and this Hearing Officer concurs, that Respondent's mental
13 state was "knowing." As such, suspension is the presumptive sanction. The parties
14 further agree, and this Hearing Officer concurs, that the existing aggravating factors and
15 the absence of any mitigating factors do not warrant a departure from the presumptive
16 sanction of suspension.

17 PROPORTIONALITY REVIEW

18 To have an effective system of professional sanctions, there must be internal
19 consistency, and it is appropriate to examine sanctions imposed in cases that are
20 factually similar. *Peasley*, 208 Ariz. at 35, ¶ 33, 90 P.3d at 772. However, the discipline
21 in each case must be tailored to the individual case, as neither perfection nor absolute
22 uniformity can be achieved. *Id.* at 208 Ariz. at 41, ¶ 61, 90 P.3d at 778 (citing *In re*
23 *Alcorn*, 202 Ariz. 62, 76, ¶ 49, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207,
24 660 P.2d 454, 458 (1983)).

25 The most serious instances of misconduct in this case involves Respondent's
26 misuse of his IOLTA trust account for the benefit of Mr. Fiorentino and/or Florek
VW/Audi and his engagement in an obvious conflict of interest. The following cases

1 are instructive concerning these types of misconduct.

2 In *In re Turley*, SB-02-0042-D (2002), Turley was suspended for six months and
3 one day, in part, for violations of the trust account rules. In Count One of the complaint,
4 which was deemed admitted by default, the Commission found that Turley knowingly
5 deposited personal funds in his trust account, thereby commingling personal funds with
6 client funds. Turley also failed to properly maintain his client trust account, as
7 evidenced by the trust account reaching negative balances on three separate occasions in
8 that amount of \$18.00, \$160.00 and \$4.00. Further, Turley withdrew client funds from
9 the account and converted those funds for the benefit of himself and other clients.

10 In Count Two of the complaint, Turley failed to respond to the State Bar's
11 requests for information and failed to appear at his properly noticed deposition. The
12 Commission found that Turley violated ER 1.15, ER 8.1(b) and Rules 43, 44, and 51(h)
13 and (i),¹ Ariz.R.S.Ct. Five aggravating factors were found: dishonest or selfish motive, a
14 pattern of misconduct, bad faith obstruction of the disciplinary proceeding by
15 intentionally failing to comply with rules or orders of the disciplinary agency, refusal to
16 acknowledge wrongful nature of conduct and substantial experience in the practice of
17 law. One mitigating factor was found: absence of a prior disciplinary record.

18 In *In re Clarke*, SB-01-0192-D (2002), the evidence established that Clarke
19 knowingly violated the trust account rules by converting clients' funds for his own
20 personal use, which caused potential injury to his clients. At one point, Clarke's trust
21 account was deficient by almost \$34,000. The Commission found that Clarke's conduct
22 included multiple trust account violations over a period of several months, and that each
23 offense required a conscious decision on the part of Clarke. Four aggravating factors
24 were found: dishonest or selfish motive, a pattern of misconduct, multiple offenses and
25

26 ¹ Rules 51(h) and (i), Ariz.R.S.Ct. have been renumbered as Rules 53(f) and (d), Ariz.R.S.Ct., respectively.

1 substantial experience in the practice of law. Six mitigating factors were found: absence
2 of a prior disciplinary record, personal and emotional problems, timely good faith effort
3 to make restitution or to rectify consequences of misconduct, full and free disclosure to
4 disciplinary board or cooperative attitude toward proceedings, character or reputation
5 and remorse. Based on the numerous mitigating factors, the Commission found it
6 appropriate to reduce the sanction from the presumptive sanction of disbarment to
7 suspension. Clarke was suspended for six months and placed on probation for two
8 years.

9 In *In re Buffenstein*, SB-01-0171-D (2002), the State Bar learned of an overdraft
10 on Buffenstein's client trust account. During its investigation, the State Bar learned that
11 Buffenstein did not keep individual client ledgers or duplicate deposit slips, and that he
12 failed to include adequate information on his check register and his checks to identify the
13 purpose and the particular client for whom the money was received or disbursed.
14 Buffenstein also deposited earned funds and personal funds into the client trust account
15 to cover expenses in connection with personal litigation and his own contractual
16 liabilities to a client that was unrelated to the legal representation for that client. Further,
17 Buffenstein failed to respond or fully comply with requests for information from the
18 State Bar during its investigation. Buffenstein was found to have violated ER 1.15(a),
19 ER 8.1(b), and Rules 43, 44 and 51(h) and (i). Two aggravating factors were found: bad
20 faith obstruction of the disciplinary proceeding by intentionally failing to comply with
21 rules or orders of the disciplinary agency and substantial experience in the practice of
22 law. Two factors in mitigation were found: absence of a prior disciplinary record and
23 absence of a dishonest or selfish motive. The Commission found that Buffenstein was
24 grossly negligent, and it suspended him for thirty days and placed him on probation for
25 one year.

26 In *In re Carrasco*, SB-04-0149-D (2005), Carrasco represented his cousin

1 ("Ramon") on charges of sexual abuse of a minor. Ramon had been charged with
2 sexually abusing his two minor stepdaughters and their fifteen-year-old friend. The
3 minor stepdaughters were removed from the family home and placed in Child Protective
4 Services ("CPS") custody. During his investigation, Carrasco went to the CPS shelter
5 where one of the children was located and represented to the CPS worker there that he
6 was the child's attorney. Believing that Carrasco represented the child, the worker
7 allowed Carrasco to visit with her. The CPS worker testified that she would not have
8 allowed Carrasco to speak to the child if he had not told her that he represented the child.
9 Carrasco then told the child that she should not talk to the police or CPS. Carrasco was
10 arrested, charged and convicted of obstructing a criminal investigation or prosecution.
11 During Carrasco's trial, the child testified that she believed that Carrasco was
12 representing her in the matter. Carrasco also admitted talking to the child on numerous
13 occasions while she was in CPS custody and that he was aware that CPS did not want
14 there to be any such contact. The hearing officer found that there was clear and
15 convincing evidence that Carrasco knowingly violated ER 1.7, ER 4.1, ER 8.4(b), (c)
16 and (d) and Rule 53(h). Four aggravating factors were found: prior disciplinary
17 offenses, a pattern of misconduct, multiple offenses and substantial experience in the
18 practice of law. The hearing officer found no mitigating factors. The hearing officer
19 recommend a two-year suspension with two years of probation upon reinstatement.

20 In reducing the hearing officer's recommendation to six months and one day, the
21 Commission cited the emotional nature of the case and the fact that Carrasco was
22 representing his cousin under difficult circumstances. The Commission also found the
23 imposition of other penalties and sanctions as a mitigating factor.

24 In this case, in File No. 05-0385, Respondent misused his IOLTA trust account by
25 depositing funds in the account that were unrelated to any legal representation.
26 Respondent then provided the funds on request to Mr. Fiorentino to pay the debts of

1 Florek VW/Audi. Respondent's misconduct continued over a substantial period of time
2 and involved multiple transactions. Respondent did this for the benefit of Mr. Fiorentino
3 and/or Florek VW/Audi. In doing so, Respondent put other client funds in the account
4 in jeopardy. In addition, at one point during the relevant time frame, the amount of
5 funds on deposit for the benefit of Steven Fiorentino and/or Florek VW/Audi was
6 -\$565.96. Therefore, Respondent converted other client funds for the benefit of
7 Mr. Fiorentino and/or Florek VW/Audi.

8 In File No. 05-1548, Respondent engaged in a conflict of interest while
9 representing the Parker estate and the estate beneficiaries by attempting to sell the Parker
10 Home to another client at less than fair market value. Although Respondent asserted that
11 the sale was necessary because taxes were owed on the home, testimony during the
12 probate matter established that all taxes had been paid. Respondent failed to get the
13 consent of the beneficiaries for the conflict. Respondent's request to sell the home was
14 denied and the court ordered Respondent to complete the final decree of distribution,
15 which he did.

16 The Supreme Court "has long held that 'the objective of disciplinary proceedings
17 is to protect the public, the profession and the administration of justice and not to punish
18 the offender.'" *In re Alcorn*, 202 Ariz. 62, 74, 41 P.3d 600, 612 (2002) (quoting *In re*
19 *Kastensmith*, 101 Ariz. 291, 294, 419 P.2d 75, 78 (1966)). The State Bar and
20 Respondent believe, and this Hearing Officer concurs, that the sanctions proposed here
21 are consistent with these principles.

22 RECOMMENDATION

23 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
24 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d
25 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the
26 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297

1 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter*
2 *of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

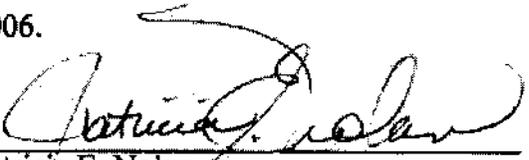
3 In imposing discipline, it is appropriate to consider the facts of each case, the
4 *Standards* and the proportionality of discipline imposed in analogous cases. *Matter of*
5 *Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

6 Upon consideration of the facts, application of the *Standards*, including
7 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer
8 recommends acceptance of the Tender and the Joint Memo, with a slight modification to
9 make clear the two-year probationary period, which provide for the following:

- 10 1) Respondent should be suspended for a period of six months and one day;
- 11 2) Following reinstatement, Respondent should be placed on probation for a
12 period of two years under the following terms and conditions:
 - 13 (a) Within 30 days of the Supreme Court's order of reinstatement,
14 Respondent shall contact the director of the LOMAP to schedule an
15 audit of his law office. The LOMAP director or his/her designee
16 will conduct an audit of Respondent's law office no later than sixty
17 days thereafter.
 - 18 (b) Following the audit, Respondent shall enter into a Memorandum of
19 Understanding that will be effective for a period of two years from
20 the date upon which all parties have signed the Memorandum.
 - 21 (c) Respondent shall comply with all recommendations of the LOMAP
22 director or his/her designee.
 - 23 (d) Respondent shall follow all the Rules of Professional Conduct and
24 all Trust Account Guidelines.
- 25 3) Respondent should pay all costs incurred by the State Bar in connection
26 with these proceedings, including the cost of the LOMAP assessment and
applicable monitoring of the Memorandum.
- 4) In the event Respondent fails to comply with any of the foregoing terms,
and the State Bar receives information about his failure, bar counsel will
file a Notice of Non-Compliance with the disciplinary clerk. A hearing
officer will conduct a hearing at the earliest practical date, but in no event
not later than 30 days following receipt of the notice, to determine whether

8 following conditions to such reinstatement: (a) a determination regarding restitution and
9 (b) payment of any restitution determined to be due.

10 DATED this 30th day of October, 2006.

11
12 
13 Patricia E. Nolan
Hearing Officer 7Y

14 ORIGINAL filed with the
15 Disciplinary Clerk of the Supreme
16 Court of Arizona this 30th day
of October, 2006.

17 COPY mailed this 30th day
of October, 2006, to:

18 Clarence E Matherson Jr.
19 Staff Bar Counsel
20 State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

21 Jerry L. Smith
22 LAW OFFICES OF JERRY L. SMITH
23 P. O. Box 517
Tribune, KS 67879-0517
24 Respondent

25 By: 
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