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Hearing Officer 7Y

FILED

OCT 30 2007

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: *CAW*

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

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

JERRY L. SMITH,
Bar No. 001027

Respondent

Nos 05-0385 and 05-1548

**HEARING OFFICER'S
SECOND REPORT**

PROCEDURAL HISTORY

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

On September 22, 2006, the State Bar of Arizona ("State Bar") and Respondent (acting *pro per*) filed a Tender of Admissions and Agreement for Discipline by Consent (the "Tender") as well as a Joint Memorandum in Support of Agreement for Discipline for Consent ("Joint Memo") The undersigned recommended, with slight modification, acceptance of the Tender and the Joint Memo (*see* initial Hearing Officer's Report, filed October 30, 2006)

The Disciplinary Commission, on February 12, 2007, unanimously recommended acceptance and approval of the initial findings of fact, conclusions of law and recommendation regarding sanctions as included in the initial Hearing Officer's Report. However, the Arizona Supreme Court, by Order dated May 24, 2007, rejected the agreement for discipline by consent

1 and remanded the matter to the undersigned for further proceedings Hearing was scheduled
2 for, and was held on, September 10, 2007

3 The undersigned hearing officer notes that, subsequent to the remand by the Arizona
4 Supreme Court

- 5 (a) Respondent failed to respond (personally or through counsel) to settlement offers
6 proposed by the State Bar,
- 7 (b) Respondent failed to provide (personally or through counsel) the State Bar, and
8 failed to file, a list of witnesses and exhibits as required by a duly issued Case
9 Management Order,
- 10 (c) Respondent failed to appear (personally or through counsel) at a pre-hearing
11 conference scheduled in the matter,
- 12 (d) Respondent failed to appear (personally or through counsel) at the hearing on the
13 merits in the matter,
- 14 (e) Respondent failed to file (personally or through counsel) the post-hearing
15 memorandum requested by the undersigned, and
- 16 (f) The State Bar filed its post-hearing memorandum on October 24, 2007,
17 considerably after the deadline established for its filing (the post-hearing
18 memoranda were to be filed within ten (10) calendar days after receipt of the
19 transcript of the hearing, that transcript was filed with the Disciplinary Clerk's
20 Office on September 25, 2007)

21 **FINDINGS OF FACT**

22 1 At all times relevant hereto, Respondent was an attorney licensed to practice law
23 in the State of Arizona, having been admitted to practice in Arizona on March 20, 1959
24 Complaint, ¶1, Response, ¶1

25 **Count One (05-0385)**

26 **A. Testimony of The Hon. Mark Aspey**

27 2 The Honorable Mark Aspey, federal magistrate, is a former Assistant United
28 States Attorney from Flagstaff, Arizona Complaint, ¶2, Response, second ¶1, Tr 13 8-14 1

29 3 While serving as United States Attorney and during the criminal investigation of
30 Joe Florek Volkswagen/Audi ("Florek VW/Audi"), Mr Aspey received information concerning
31 Respondent's professional conduct Tr 14 2-15 6, SBA Ex 1, 001-008

1 4 Respondent served as the dealership's corporate attorney at the time of the Florek
2 VW/Audi investigation Tr 15 7-23, SBA Ex 1, 001

3 5 The activity being investigated pertained to the sale of Florek VW/Audi to
4 Steven Fiorentino and Jay Wigdore in January of 1998, and the subsequent operation of Florek
5 VW/Audi by Mr Fiorentino and Mr Wigdore SBA Ex 1, 003

6 6 During the Florek VW/Audi investigation, Mr Aspey and a special agent with
7 the FBI interviewed Mr Fiorentino Tr 15 24-17 8, 19 19-20 11, SBA Ex 1, 001-019

8 7 During the investigation, Mr Fiorentino provided information concerning
9 Respondent's use of his trust account for the benefit of Florek VW/Audi Tr 15:24-18 5, SBA
10 Ex 1, 001-031

11 8 Specifically, Respondent utilized his law firm's trust account as a surrogate
12 checking account for Florek VW/Audi's normal business checking account, thereby assisting
13 Florek VW/Audi "in disguising the deposit of business receipts and disbursement of business
14 receipts from his client's creditors " Tr 15 24-18 5, SBA Ex 1, 001-031

15 9 After Florek VW/Audi closed due to the criminal investigation, proceeds from a
16 residual income stream related to in-house financed car contracts were deposited on an ongoing
17 basis into Respondent's trust account Tr 15.17-18 5, SBA Ex 1, 001-031.

18 10 Mr Fiorentino gave Respondent checks between 2001 and 2003 which
19 Respondent deposited into his trust account, and Respondent subsequently wrote checks out of
20 his trust account for the benefit of Florek VW/Audi Tr 15 17-18 5, SBA Ex 1, 001-031

21 11 On January 16, 2003, Mr Fiorentino was indicted on six counts of mail fraud, 11
22 counts of wire fraud, 19 counts of bank fraud, and one count of conspiracy based on his conduct
23 as a co-owner of Florek VW/Audi Tr 14 24-15 6, SBA Ex 1, 008

24 12 On February 25, 2004, Mr Fiorentino pled guilty to various counts and was
25 sentenced to prison

26 / / /

1 **B. Testimony of FBI Agent Marilyn Shefvland**

2 13 Marilyn Shefvland entered the Federal Bureau of Investigation in 1999 and was,
3 at all times material hereto, a special agent with the FBI Tr 66 15-23

4 14 Special Agent Shefvland received an assignment from the FBI to investigate
5 Florek VW/Audi based on complaints from citizens relayed to the FBI through the Flagstaff
6 Police Department Tr 67 24-68 20

7 15 As part of her investigation, she interviewed Mr Fiorentino Tr 68 21-69 5

8 16 Special Agent Shefvland learned during her investigation that Mr Fiorentino
9 and Jay Wigdore were the co-operators of Florek VW/Audi after acquiring the dealership from
10 Joe Florek Tr 69 6-70 9

11 17 However, the dealership license remained in the name of Joe Florek even after
12 their purchase of it because, due either to criminal or financial background problems, neither Jay
13 Wigdore nor Mr Fiorentino could qualify for a license Tr 70 12-21

14 18 Mr Fiorentino told Special Agent Shefvland that, in mid-2001, he began to take
15 checks that the dealership was receiving to Respondent These checks represented income to
16 the dealership Mr Fiorentino signed the checks over to Respondent and Respondent deposited
17 them into his client trust account Tr 75 9-19, SBA Ex. 1, 003-019

18 19 Mr Fiorentino told Special Agent Shefvland that the reason that Florek
19 VW/Audi used Respondent's trust account was that Florek VW/Audi was unable to maintain
20 bank accounts at any local bank Tr 82 9-16, SBA Ex 1, 003-017

21 20 Respondent used the funds deposited into his trust account to pay Florek
22 VW/Audi business expenses, Florek VW/Audi employee expense reimbursements, Florek
23 VW/Audi payroll, and himself Tr 75 20-76 23

24 21 By so utilizing his trust account, Respondent allowed Florek VW/Audi to control
25 the income from the dealership in such a way as to hide that income from the dealership's
26 creditors and from tax authorities Tr 77 1-25

1 **C. Testimony of Steven Fiorentino**
2 22 Mr Fiorentino met Respondent when Mr Fiorentino became general manager of
3 Florek VW/Audi and Respondent was the attorney for the dealership Tr 24 7-17
4 23 As a result of local banks' discovery of the criminal investigation regarding
5 Florek VW/Audi, the dealership was unable to maintain a bank account in its own name Tr
6 25-2-18, 28 22-29 5
7 24 With no bank account, with accounts receivables still coming in, and with the
8 dealership being party to many lawsuits, Florek VW/Audi used Respondent's trust account as
9 the dealership's business bank account Tr 28 7-18, 29 14-30 25
10 25. Even after Florek VW/Audi was shut down, it had a continuing income stream,
11 the receipts of which were deposited into Respondent's trust account. Tr 30 13-22, 33.22-
12 34:19.
13 26 Even after Florek VW/Audi was shut down, it had continuing debts and ordinary
14 business expenses such as rent, utilities and payroll that were paid for by checks written out of
15 Respondent's trust account Tr 30 23-31 13
16 27 Neither the deposit of Florek VW/Audi income into nor payment of Florek
17 VW/Audi expenses out of Respondent's trust account could have occurred without
18 Respondent's knowledge and cooperation Tr 34 23-35 15
19 28 Mr Fiorentino provided detailed records (that he compiled at or near the time of
20 the transactions described) of Florek VW/Audi income that was deposited into Respondent's
21 trust account and Florek VW/Audi business expenses that were paid out of Respondent's trust
22 account The expenses included Florek VW/Audi's APS (electric company) bills, payroll,
23 phone, rent, mini-storage, a post office box and postage Tr 36 16-44 1, 44 23-46 18, 47.22-
24 57:23; SBA Ex 1, 020-031, SBA Ex 25, pages 993, 1009, 1010, 1040, 1085, 1125, 1131, 1132,
25 1136, 1143, 1145, 1171, 1207, 1233, 1259, 1291, 1324, and 1431
26

1 **D. Initial State Bar Screening**

2 29 On March 4, 2005, Mr Aspey forwarded a bar charge against Respondent to the
3 State Bar of Arizona Tr. 18 6-21 14, SBA Ex 1, 001-031

4 30 On May 13, 2005 and May 20, 2005, bar counsel forwarded the charge to
5 Respondent and requested an explanation regarding the allegations SBA Ex 2, 032-033, SBA
6 Ex 3, 036-037

7 31 On May 20, 2005, bar counsel requested that Respondent also provide copies of
8 bank statements for all IOLTA trust accounts he maintained for the period of January 1998
9 through March 2003, copies of all cancelled checks, deposit slips and individual client ledgers
10 or their equivalent for the referenced time period, as well as copies of the fee agreements or
11 settlement statements for work performed for Mr Fiorentino SBA Ex 3, 036-037

12 32 Respondent did not respond to the State Bar's request for information SBA Ex
13 4, 038

14 33 On June 24, 2005, the State Bar's Staff Examiner ("Staff Examiner") sent
15 Respondent a letter regarding his non-response The Staff Examiner gave Respondent ten
16 additional days to respond to the initial request SBA Ex 4, 038

17 34 By July 11, 2005, the State Bar still had not received a response from
18 Respondent, and the Staff Examiner sent Respondent a second letter regarding his non-response,
19 giving Respondent an additional ten days to respond SBA Ex 6, 041

20 35 On July 11, 2005, the State Bar issued a Subpoena Duces Tecum to Bank One to
21 produce documents regarding Respondent's trust account covering the period that Respondent
22 represented Florek VW/Audi SBA Ex 7, 042-049

23 36 On July 12, 2005, Respondent provided his response to the State Bar's May 13,
24 2005, May 20, 2005 and June 24, 2005 letters SBA Ex 5, 039-040

25 37 Respondent stated in his response that he had closed his Flagstaff office and
26 semi-retired to a remote part of Kansas and that he had destroyed files that would have included

1 documentation responsive to the requests of the State Bar. He requested an additional 30 days
2 to supplement his response. SBA Ex 5, 039-040

3 38 On July 18, 2005, the State Bar granted Respondent's request for a 30-day
4 extension to supplement his answer, and again asked Respondent to submit all documents
5 previously requested by the Staff Examiner. SBA Ex 9, 053

6 39 Respondent's response was due on August 18, 2005 but was not received by that
7 date. On August 30, 2005, the Staff Examiner sent Respondent a letter regarding his non-
8 response, giving Respondent an additional ten days to respond. SBA Ex 11, 061

9 40 Respondent failed to respond to the request for information.

10 **E. Testimony of State Bar Staff Examiner Gloria Barr**

11 41 When the State Bar received the information from Judge Aspey described above,
12 Gloria Barr became involved in the State Bar's investigation of Respondent. Tr 145 5-146 1

13 42 Based on the trust account records received in response to the Subpoena Duces
14 Tecum described above, Ms. Barr drafted a reconstruction of the trust account. Tr 151 4-152 5,
15 SBA Ex 13, 065-105

16 43 Based on her investigation, which included not only the reconstruction but also
17 review of transcripts of the FBI interview of Mr. Fiorentino and the materials Mr. Fiorentino
18 provided to the FBI (SBA Ex 1, 001-030), Ms. Barr concluded that Respondent violated the
19 Arizona Supreme Court rules relating to lawyer trust accounts. Tr 152 2-5, 158 16-22

20 44 Specifically, Ms. Barr reached the following conclusions: Respondent used his
21 trust account for transactions that were not related to client representation [Tr 152 6-22] and
22 Respondent commingled in his trust account money that was not related to client representation
23 with client money validly in his trust account, putting the client money at risk. Tr 152 23-153 2

24 45 Ms. Barr identified many transactions in Respondent's trust account that either
25 clearly violated trust account rules or which she could not determine whether were appropriate
26 or inappropriate because Respondent failed to provide client ledgers necessary to evaluate the

1 propriety of such transactions Tr 153 3-161 24.

2 46 Ms Barr identified deposits into Respondent's trust account that were actually
3 Florek VW/Audi business transactions, from June 10, 1999 through January 10, 2003, totaling
4 \$30,686 11 SBA Ex 13, 069-101

5 47 Ms Barr identified debits from Respondent's trust account that were actually
6 Florek VW/Audi business transactions, from June 10, 1999 through January 10, 2003, totaling
7 \$31,252 67 SBA Ex 13, 069-101

8 48 Ms Barr identified deposits into Respondent's trust account from June 10, 1999
9 through January 10, 2003 totaling \$28,379 12 that she could not determine were appropriate or
10 inappropriate because Respondent failed to provide client ledgers necessary to evaluate the
11 propriety of such transactions SBA Ex 13, 069-094 and 102-105

12 49 Ms Barr identified debits from Respondent's trust account from June 10, 1999
13 through January 10, 2003 totaling \$25,131 47 that she could not determine were appropriate or
14 inappropriate because Respondent failed to provide client ledgers necessary to evaluate the
15 propriety of such transactions SBA Ex 13, 069-094 and 102-105

16 50 Ms Barr also concluded from her investigation that Respondent did not properly
17 safeguard his clients' funds in his trust account, that he commingled funds that were not related
18 to client representation, placing genuine client trust account money at risk of lien, levy, or
19 judgment collection, that he did not exercise proper trust account internal controls, that he did
20 not safekeep client property because he did not produce any client ledgers or general ledgers,
21 and that he lost or destroyed his trust account records Tr 161 25-163 4.

22 51 Ms Barr noted that Respondent had initially claimed that dealership payments
23 went into his trust account because he did collection work for the dealership and had a one-
24 third/two-thirds agreement for these payments He was to receive one-third and the dealership
25 was entitled to two-thirds of the amounts collected Ms Barr's reconstruction of the account did
26 not support a one-third/two-thirds agreement Tr 163 5-164 10

1 **Count Two (05-1548)**

2 **A. Testimony of the Hon. Dan Slayton**

3 52 On August 3, 2005, Respondent appeared in Coconino County Superior Court as
4 both the personal representative of and as counsel for the personal representative of the estate of
5 Tom Parker SBA Ex 14, 109-110, SBA Ex 15, 111-112, SBA Ex 16, 113-120, SBA Ex. 17,
6 121-122, SBA Ex 18, 123-124, SBA Ex 19, 125-132, SBA Ex 20, 133-136, SBA Ex 22, 160-
7 270, Tr 86 9-94 23

8 53 Superior Court Judge Dan Slayton presided over the proceedings SBA Exhibits
9 14, 20, 21, 137-159, and 22, Tr 86 9-94 23

10 54 Respondent represented to the Court that certain real property the decedent had
11 owned needed to be sold to satisfy debts of the estate SBA Exhibits 14-22

12 55 On March 1, 2005, Respondent filed a "Report of Sale of Real Property and
13 Petition for Confirmation of Sale" (the "Petition") in which he requested court approval of the
14 sale of the decedent's property for the gross sales price of \$78,400 00 SBA Ex 16

15 56 Certain heirs of the estate objected to the sale, claiming (a) that Respondent was
16 not authorized to sell the property, (b) that there were no debts or taxes owed by the estate,
17 (c) that they had twice asked Respondent to remove himself as personal representative of the
18 estate, (d) that Respondent had secured the removal of two heirs as co-personal representatives
19 of the estate leaving Respondent as the sole personal representative, (e) that those heirs
20 acquiesced in their removal based on what turned out to be false representations made by
21 Respondent, (f) that the heirs had no knowledge of the potential sale of the property until
22 Respondent filed the pleading indicating such intentions, (g) that the heirs had no contact with
23 Respondent for at least 18 months prior to the time Respondent filed the Petition (SBA Ex 16,
24 113), and (h) that Respondent was attempting to sell the property at approximately \$20,000
25 under value SBA Ex 14

26 57 On May 10, 2005, Respondent filed a "Motion for Summary Judgment and

1 Supplemental Memo to Confirmation for Sale of Real Estate” in which he alleged that “this
2 property must be sold to help pay for attorney fees of Perry Parker, one of the heirs of the
3 decedent, incurred by Perry Parker, for a Public Defender in Criminal Case No 2004-1241,
4 Coconino County, Arizona ” SBA Ex 20. No written consent of the other heirs was attached to
5 Respondent’s Motion, or elsewhere provided

6 58 At the hearing on August 3, 2005, Respondent appeared by telephone from
7 Kansas as personal representative of the decedent and as attorney for the estate SBA Ex 22,
8 161

9 59 Respondent was sworn as a witness and testified as to his relationship with the
10 buyer of the property SBA Ex 22, 165-167

11 60 Respondent described his relationship with the buyer, Jerry Bennett, as “a person
12 who I have met I consider him a friend, an arm’s-length friend, not a close friend And I have
13 been observant of his financial dealings ” SBA Ex 22, 167

14 61 Respondent had represented the buyer in legal matters in the past SBA Ex. 22,
15 167-168

16 62 Respondent admitted that he enjoyed a close enough relationship with
17 Mr Bennett that he appointed Mr Bennett as an attorney-in-fact to handle certain matters
18 regarding the real property involved in the probate SBA Ex 22, 168

19 63 Respondent considered Mr Bennett a good businessman and trusted him *Id*

20 64 Respondent denied that he had a conflict of interest acting as both personal
21 representative of the decedent and counsel for the same estate. SBA Ex 22, 171-172

22 65 Respondent did not recall when he first met the heirs, how many of the heirs he
23 met, which of the heirs he met, what he discussed with whichever of the heirs he met, what fee
24 he quoted them, what documents he asked them to sign or whether he explained to them the
25 consequences of renouncing their rights to serve as co-personal representatives SBA Ex 22,
26 174-178

1 66 At the August 3, 2005 hearing, it was established that no debts or taxes were
2 owed on the property, that Respondent had been fired by the heirs, that Respondent had not
3 consulted with the heirs regarding whether to sell the property, or for how much, that the heirs
4 believed the probate of the estate had concluded, that Respondent contended he owed the heirs
5 no duty, and that Respondent contended that the sale price of \$78,000, when compared to a
6 professionally appraised value of \$97,000 and the tax assessor's full appraised value of
7 \$108,000, was fair to the estate SBA Ex 22, 178-258 and 264-265

8 67 Judge Slayton expressed his puzzlement as to (a) why there was even a court
9 proceeding in progress given that the property had already been distributed to its rightful
10 owners, and (b) why Respondent contended that he remained personal representative of the
11 estate when there was no longer an open probate SBA Ex 22, 254-258

12 68 Following a lunch break, Respondent addressed the court as follows

13 Mr Smith Thank you, your Honor May it please counsel and the Court
14 and the parties, I have talked to **my client** over the lunch hour,
15 **Mr. Bennett**, and discussed with him what has arisen in the Judge's mind
16 and in the file I certainly was not aware of that in the file, but I have
17 forgotten or may have moved from Kansas – from Arizona to Kansas
18 about the 3rd of October '02 But, in any event, he gave me approval to
19 withdraw or to have you rule that the Proffered Sale of Real Property and
20 Petition of Confirmation of Sale should be denied

18 The Court All right.

19 Mr Smith And I have no further evidence to present based on that
20 approval from **my client, Mr. Bennett**

21 The Court Um, all right Mr Morris, do you have any questions for
22 Mr Smith?

23 Mr Morris Only one, your Honor He just referred to Mr Bennett as his
24 client That's a horrible conflict of interest in this whole matter

24 Mr Smith This isn't a forum for conflict of interest, your Honor It's a
25 forum to approve sale, and we just gave you permission to rule against
26 us * * * This isn't the time and place It's the time for the Court to rule
on the approved sale And we've agreed – **my client has instructed me**

1 to tell the Court he would not object to rejection of the report of sale
2 SBA Ex 22, 259-260 and 262 (emphases added)

3 69 Judge Slayton thereafter referred the matter to the State Bar for investigation of
4 the Respondent's "questionable practices" SBA Ex 22, 267, Tr 86 11-94 23

5 **B. Testimony of Attorney Dan Morris**

6 70 Dan Morris is an attorney licensed to practice in Arizona with 37 years
7 experience in estate planning Tr 96 21-97 6

8 71 Mr Morris was retained by some of the heirs in the matter of the Estate of Tom
9 Parker regarding a possible sale of their property that they believed was about to be approved by
10 the court Tr 97 22-98 10

11 72 Mr Morris learned that Respondent had drafted Mr Parker's will and was the
12 personal representative of Mr Parker's estate as well as counsel for the estate Tr 98 11-99 10

13 73 Mr Morris further learned that Respondent had procured the renunciation of two
14 of the heirs from their role as co-personal representative Tr 99 14-100 5

15 74 Mr Morris further learned that Respondent had sought approval of the sale of the
16 estate property for a sum less than its appraised fair market value Tr 98 18-22, 101 16-22

17 75 Mr Morris further learned that Respondent had been discharged as counsel for
18 the estate Tr 98 23-25

19 76 Mr Morris further learned that the probate of the estate had already ended Tr
20 102 1-12

21 77 Mr Morris further learned that the estate did not owe any money to anyone Tr
22 102 13-103 23

23 78 Mr Morris further learned that Respondent failed to obtain a conflict of interest
24 waiver from all of the heirs by which they consented to the sale of the property for the benefit of
25 only one of the heirs Tr 103 24-104 20

26 79 Mr Morris represented the heirs in the Coconino County Superior Court

1 proceedings described above Tr 100 6-14

2 80 During the proceedings, Mr Morris witnessed Respondent describe the
3 prospective buyer of the real property as his client Tr 104 23-106 19

4 81 Respondent had not previously disclosed to the heirs or Mr Morris that the buyer
5 was his client Tr 106 20-107 2

6 82 Mr Morris also observed Respondent claim that Respondent was owed money
7 for legal services from the estate Tr 107 3-22

8 **C. Testimony of Jerry Bennett**

9 83 Jerry Bennett owns several companies, including a real estate business focusing
10 on residential rentals Tr 113 1-25

11 84 Mr Bennett retained Respondent to represent him in connection with a collection
12 matter that spanned from 2001-2004 Tr 114 1-116:11.

13 85 Mr Bennett became involved as the proposed buyer of the estate property as the
14 result of discussions with Respondent regarding Mr Bennett's real estate business Tr 116 22-
15 117 5

16 86 Respondent granted Mr Bennett a power of attorney to secure the estate property
17 and change the locks on it Tr 118 2-21

18 87 At the time of the hearing regarding the possible sale of the property,
19 Mr Bennett did not consider Respondent to be his counsel Tr 126 4-13

20 **D. Testimony of Alice Faye Parker Henry**

21 88 Alice Faye Parker Henry is a daughter of Tom Parker, deceased, and an heir of
22 Mr Parker's estate Tr 129 4-130 10

23 89 Ms Henry and her siblings hired and paid Respondent to arrange transfer title to
24 the real property to them Tr 130 4-131 10, 132:5-17, 137 11-17

25 90 After the goal of representation was supposedly accomplished, Ms Henry and
26 her siblings discharged Respondent Tr 131 11-20

1 91 Ms Henry notified Respondent that he was discharged in writing Tr 131 21-
2 132 4

3 92 Ms Henry and her siblings learned other than through Respondent that
4 Respondent was trying to sell the estate property Tr 132 18-133 20

5 93 Ms Henry then retained Mr Morris to represent her and her siblings in order to
6 “get their property back” from Respondent Tr 133:21-23

7 94 Ms Henry learned that Respondent had never actually completed the transfer of
8 title of the estate property and, consequently, the property remained in the name of the estate,
9 and she and her siblings could not obtain a loan to renovate the property Tr 135 8-25

10 95 When Respondent was trying to sell the estate property, there were no estate or
11 property taxes, or other estate debts, owed Tr 139 23-140 15

12 96 Ms Henry and her siblings sold the property in approximately February or
13 March of 2006 for more than twice the price Respondent petitioned the Court to approve Tr
14 142 9-143 14

15 **E. State Bar’s Investigation**

16 97 The State Bar received the charge from Judge Slayton on September 2, 2005
17 Ex 14

18 98 On September 19, 2005, the State Bar forwarded the charge and initial screening
19 letter to Respondent and requested that he submit a response within 20 days SBA Ex 23, 271-
20 272

21 99 Respondent failed to respond and, on October 19, 2005, bar counsel sent a
22 second letter to Respondent requesting a response to the charges SBA Ex 24, 277

23 100 Respondent did not respond to the State Bar’s October 19, 2005 letter within the
24 time requested

25 / / /

26 / / /

1 **CONCLUSIONS OF LAW**

2 **Count One (05-0385)**

3 1. By counseling a client, or by assisting a client, to engage in conduct that
4 Respondent knew was criminal or fraudulent, Respondent violated ER 1.2(d), Rule 42,
5 Ariz R Sup Ct

6 2. By engaging in conduct involving dishonesty, fraud, deceit or misrepresentation,
7 Respondent violated ER 8 4(c), Rule 42, Ariz R Sup Ct

8 3 By failing to safeguard the property of clients or third persons that were in
9 Respondent's possession, and by commingling funds unrelated to legal representation with
10 client funds, Respondent violated ER 1 15(a), Rule 42, Ariz R Sup Ct

11 4. By knowingly failing to respond to a lawful demand for information from a
12 disciplinary authority in connection with a disciplinary matter, Respondent violated ER 8 1(b),
13 Rule 42, Ariz R Sup Ct

14 5 By failing to maintain adequate records and by failing to preserve these records
15 for a period of five years after final disposition by Respondent of such funds, Respondent
16 violated ER 1 15(a), Rule 42, Ariz R Sup Ct , Rule 43(a), Ariz R Sup Ct , Rule 43(d)(1)(E),
17 Ariz R Sup Ct , Rule 43(d)(2)(C), Ariz R Sup Ct , Rule 43(d)(2)(E), Ariz R Sup Ct , and Rule
18 44(b)(3), Ariz R Sup Ct

19 6. By failing to cooperate with officials and staff of the State Bar and failing to
20 respond promptly or to furnish information pursuant to a lawful demand for information from a
21 disciplinary authority in connection with its investigation, Respondent violated Rule 53(d) and
22 (f), Ariz R Sup Ct

23 **Count Two (05-1548)**

24 7. As the personal representative of a decedent, Respondent owed fiduciary duties
25 of fairness and impartiality to the decedent's heirs *In re Fogelman*, 197 Ariz 252, 3 P 3d 1172
26 (App 2000).

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

5 In determining an appropriate sanction, the court and the Disciplinary Commission
6 consider the duty violated, the lawyer's mental state, the presence or absence of actual or
7 potential injury, and the existence of aggravating and mitigating factors *In re Tarletz*, 163 Ariz
8 548, 554, 789 P 2d 1049, 1055 (1990), *Standard 3 0*.

9 Given Respondent's conduct in this matter, the undersigned has considered *Standards*
10 4 1 (Failure to Preserve Client's Property), 4 3 (Failure to Avoid Conflicts of Interest), and 7 0
11 (Violations of Duties Owed as a Professional) when determining the appropriate sanction
12 Those standards provide, in relevant part

13 • *Standard 4 1* – Failure to Preserve Client's Property

14 4 12 Suspension is generally appropriate when a lawyer knows or should
15 know that he is dealing improperly with client property and causes injury or
16 potential injury to a client

16 • *Standard 4 3* – Failure to Avoid Conflicts of Interest

17 4 31 Disbarment is generally appropriate when a lawyer, without the
18 informed consent of client(s) * * *

19 (b) Simultaneously represents clients that the lawyer knows have
20 adverse interests with the intent to benefit the lawyer or another, and causes
21 serious or potentially serious injury to a client * * *

22 4 32 Suspension is generally appropriate when a lawyer knows of a conflict
23 of interest and does not fully disclose to a client the possible effect of that
24 conflict, and causes injury or potential injury to a client

23 • *Standard 7 0* – Violations of Duties Owed as a Professional

24 7 1 Disbarment is generally appropriate when a lawyer knowingly engages
25 in conduct that is a violation of a duty owed as a professional with the intent
26 to obtain a benefit for the lawyer or another, and causes serious or potentially
serious injury to a client, the public, or the legal system

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A. The duty violated

In Count One, Respondent violated duties to his clients and as a professional by failing to observe the rules governing the treatment of client funds by attorneys. These rules are designed to ensure that a client's money is not used or taken improperly by the attorney or put in jeopardy by the attorney's actions. Respondent failed in his duties by placing funds in his IOLTA trust account that were unrelated to a legal representation and by using his trust account as a surrogate business account for Florek VW/Audi. Respondent's conduct jeopardized the funds of other clients that were maintained in his trust account by subjecting those funds to possible lien, levy, seizure, forfeiture or garnishment by creditors of Florek VW/Audi. Furthermore, Respondent assisted Florek VW/Audi in concealing its income and assets, evading its taxing authorities and defrauding its creditors.

In Count Two, Respondent violated his duties owed to his clients (the Parker estate beneficiaries) by engaging in a conflict of interest when he attempted to sell a home owned by the estate to someone he deemed to be another client at less than fair market value, and by attempting to sell the real property to benefit one heir over others without their knowledge or consent¹

By his actions as described in each Count, Respondent violated his duty to the legal system by failing to fully cooperate or respond to the State Bar's requests for information during its investigation of these matters and by, after the remand, utterly failing to meaningfully take part in these proceedings.

B. The Respondent's mental state

The use of Respondent's trust account as a surrogate for a Florek VW/Audi general checking account could not possibly have occurred without Respondent's knowledge and active

¹ The undersigned also believes that Respondent violated his duty to his clients by failing to complete the work for which he was originally retained by the heirs of Mr Parker. Such failure brings *Standard 4.4 (Lack of Diligence)* into consideration. The State Bar did not, however, allege such a failure and, as such, the undersigned considers this violation to be outside the scope of the pleadings.

1 participation Such knowing and intentional misuse of his trust account was without question
2 unrelated to his legal representation of the dealership Additionally, Respondent knowingly
3 engaged in conflicts of interest during his representation of the Parker estate Finally,
4 Respondent knowingly failed to fully cooperate and respond to the State Bar during its
5 investigation of these matters and knowingly failure to meaningfully take part in the disciplinary
6 process following the remand

7 **C. The potential or actual injury caused by Respondent's conduct**

8 There were both actual and potential injuries to clients as a result of Respondent's
9 violations of his various duties and of the Supreme Court rules

10 In Count One, Respondent's failure to comply with the rules governing treatment of
11 client funds exposed his clients to potential injury by causing client funds to be held without the
12 protections against intentional or inadvertent misdirection or depletion that are provided through
13 strict compliance with ER 1 15 and Rules 43 and 44, Ariz R S.Ct By commingling client funds
14 with Florek VW/Audi funds, Respondent exposed his client's funds to lien, levy, seizure,
15 forfeiture and garnishment by the creditors of Florek VW/Audi and by the taxing authorities
16 with jurisdiction over the assets and income of the dealership

17 In Count Two, the beneficiaries of the Parker estate were forced to expend financial
18 resources to object to Respondent's inappropriate request to sell the real property and to have
19 Respondent removed as the personal representative of the estate

20 **D. Aggravating and mitigating circumstances**

21 When determining an appropriate sanction, it is appropriate to evaluate aggravating and
22 mitigating factors enumerated in the *Standards* that would justify an increase or decrease in the
23 presumptive sanction See *In re Scholl*, 200 Ariz 222, 225-26, ¶ 20, 25 P 3d 710, 713-14
24 (2001), *In re Savoy*, 181 Ariz 368, 371, 891 P 2d 236, 239 (1995) The presence of aggravating
25 and mitigating factors assists in determining which sanction applies

26 The undersigned finds that the following five aggravating factors should be considered

1 in this matter

2 (1) **Standard 9.22(a) (prior disciplinary offenses)** Respondent has previously
3 received two informal reprimands for violations of the ethical rules. In Comm Nos 93-
4 1475 and 94-2026, Respondent was found to have inadvertently overcharged a client,
5 threatened to, and did, charge his client for his response to her State Bar complaint, and
6 charged fees for which he could not fully account. The Commission found that
Respondent's conduct violated ER 1.4(a), ER 1.5(a)(3), ER 1.15(a), and ER 8.4(d), Rule
42, Ariz R S Ct

7 In File Nos 95-0920 and -1603, the hearing officer found that Respondent violated ER
8 3.3(d) when, in a probate matter in which he represented a potential beneficiary, he
9 failed to disclose to the court the existence of a will that left the decedent's property to a
10 charitable organization and named a banking institution as the personal representative.
11 Respondent filed documents with the court seeking to have his client named as "Special
Administrator" and represented to the court that there was no other personal
representative qualified to represent the estate. Respondent also attempted to probate a
subsequent will, again without informing the court of the existence of the prior will.

12 (2) **Standard 9.22(b) (dishonest or selfish motive)** In Count One, Respondent
13 received compensation in the form of legal fees for his misuse of his IOLTA trust
14 account for the benefit of Florek VW/Audi and assured that funds would be available to
15 pay his fees prior to the payment of other dealership expenses by controlling the
16 dealership assets himself. In Count Two, Respondent's attempt to sell the real property
17 for less than fair market value was supposedly to pay debts allegedly owed by the estate
(including his own legal fees in the matter). At the hearing to approve the sale of the
property, Respondent testified that the beneficiaries had not paid him for his services,
but the beneficiaries presented evidence that they had paid him in full.

18 (3) **Standard 9.22(c) (pattern of misconduct)** Respondent's abuse of his trust
19 account (Count One) continued for a several year period and his activity as complained
20 of in Count Two demonstrates repeated conflicts of interest. In addition, Respondent
failed to fully cooperate with the State Bar during its investigation into each of the
matters.

21 (4) **Standard 9.22(d) (multiple offenses)**

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

24 The undersigned finds no mitigating factors.

25 This Hearing Officer finds that Respondent's mental state was "intentional" and
26 "knowing." As such, either disbarment or suspension is the presumptive sanction.

1 PROPORTIONALITY REVIEW

2 To have an effective system of professional sanctions, there must be internal
3 consistency, and it is appropriate to examine sanctions imposed in cases that are factually
4 similar *Peasley*, 208 Ariz at 35, ¶ 33, 90 P 3d at 772 However, the discipline in each case
5 must be tailored to the individual case, as neither perfection nor absolute uniformity can be
6 achieved. *Id* at 208 Ariz at 41, ¶ 61, 90 P 3d at 778 (citing *In re Alcorn*, 202 Ariz 62, 76, ¶ 49,
7 41 P 3d 600, 614 (2002), *In re Wines*, 135 Ariz 203, 207, 660 P 2d 454, 458 (1983))

8 The Standards do not account for multiple charges of misconduct as is present here
9 “The ultimate sanction imposed should at least be consistent with the sanction for the most
10 serious instance of misconduct among a number of violations, it might well be and generally
11 should be greater than the sanction for the most serious conduct” *In re Redeker*, 177 Ariz 305,
12 868 P.2d 318 (1994) (emphasis added)

13 The undersigned believes that the most serious instance of misconduct in this case
14 involves Respondent’s longstanding misuse of his trust account for the benefit of Florek
15 VW/Audi but also believes that his repeated engagement in obvious conflicts of interest and his
16 failure to cooperate with the disciplinary process must be considered The following cases are
17 instructive concerning these types of misconduct

18 In *In Re Bryn*, SB-06-0127-D, the respondent failed to comply with trust account rules
19 and guidelines and also failed to respond to and cooperate with the State Bar’s investigation
20 Additionally, he failed to diligently represent clients, failed to meet deadlines, accepted fees
21 from clients but failed to accomplish work for which he was retained, regularly provided empty
22 promises of action and, when confronted by clients, declined to return unearned fees
23 Respondent violated ERs 1 1, 1 2, 1 3, 1 4, 1 5, 1 15, 1 16, 3 2, 8 1(b), 8 4(d) and Rules 43, 44,
24 53(d) and (f) There were eight factors in aggravation and none in mitigation His mental state
25 was “knowing” and/or “intentional” and there was actual injury found The respondent was
26 disbarred

1 In *In re Clarke*, SB-01-0192-D (2002), the evidence established that Clarke knowingly
2 violated the trust account rules by converting clients' funds for his own personal use, which
3 caused potential injury to his clients. At one point, Clarke's trust account was deficient by
4 almost \$34,000. The Commission found that Clarke's conduct included multiple trust account
5 violations over a period of several months, and that, as here, each offense required a conscious
6 decision on the part of Clarke. Four aggravating factors and six mitigating factors were found.
7 Based on the numerous mitigating factors (none of which are found here), the Commission
8 found it appropriate to reduce the sanction from the presumptive disbarment to suspension.
9 Clarke was suspended for six months and placed on probation for two years.

10 In *In Re Gabroy*, SB-06-0124-D, the respondent misused her client trust account, failed
11 to respond or cooperate with the State Bar's investigation and failed to comply with court
12 orders. She was found to have violated ERs 1.15, 3.4(c) and Rules 43, 44 and 53(c), 53(d) and
13 53(f). There were six factors in aggravation and two factors in mitigation. Her mental state was
14 determined to be "knowing" and there was actual and potential injury. She was suspended for
15 two years.

16 In *In Re Miranda*, SB-06-0044-D, the respondent engaged in a conflict of interest by
17 entering into a business arrangement with a client, wrote a check from his trust account to pay
18 prior disciplinary costs, failed to respond and cooperate with the State Bar's investigations,
19 solicited to have fraudulent loan documents prepared, engaged in self-dealing, failed to
20 diligently represent clients, charged an unreasonable fee, failed to return unearned fees and
21 other client property, failed to satisfy a medical lien, and failed to protect the client's rights
22 upon termination of representation. Respondent was found to have violated ERs 1.7(a), 1.8,
23 1.15, 8.1(b), 8.4(c), 8.4(d) and Rules 43, 44, 53(d) and 53(f). There were eight factors in
24 aggravation and none in mitigation. The mental state was "knowing" if not "intentional," and
25 there was actual and serious injury. The respondent was disbarred.

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1 In *In Re Nomura*, SB-06-0003-D, the respondent engaged in a conflict of interest by
2 undertaking a joint representation without discussing or disclosing the conflict with the clients,
3 Respondent failed to properly maintain his trust account and converted client funds for personal
4 use, and Respondent failed to respond to the State Bar's investigation. Respondent also charged
5 unreasonable fees and failed to comply with bankruptcy requirements. He violated ERs 1.1, 1.2,
6 1.3, 1.4, 1.5, 1.7, 1.15, 8.1 and Rules 43, 44, 53(f). There were seven factors in aggravation and
7 only one in mitigation. The mental state was "knew or should have known" and there was
8 actual injury. The respondent was suspended for three years.

9 In *In Re Watkins*, SB-07-0062-D, while representing a client in a patent infringement
10 matter, the respondent failed to disclose a conflict of interest to his client and demonstrated a
11 lack of candor to the client and to the United States Patent and Trademark Office. The
12 respondent also shared legal fees with a non-lawyer and was found to have violated several
13 ethical rules. There were three aggravating factors and one mitigating factor. The mental state
14 was "intentional" and there was actual injury. The respondent was disbarred.

15 In this case, in Count One, Respondent misused his trust account by repeatedly
16 depositing funds into the account that were unrelated to any legal representation. Respondent
17 then provided the funds upon request to pay the debts of Florek VW/Audi. Respondent's
18 misconduct continued over a substantial period of time and involved multiple transactions.
19 Respondent took these actions for the benefit of Florek VW/Audi and, in doing so, Respondent
20 put other client funds in the trust account in jeopardy.

21 In Count Two, Respondent engaged in a conflict of interest by attempting to sell the
22 subject real property to someone who he deemed to be another client and by purporting that the
23 sale proceeds would be used to benefit one heir over others. Although Respondent asserted that
24 the sale was necessary because taxes were owed on the property and other estate debts were due,
25 testimony during the probate matter established that all taxes had been paid and that no other
26 estate obligations were outstanding. Respondent failed to get the consent of the beneficiaries for

1 either conflict

2 The Supreme Court "has long held that "the objective of disciplinary proceedings is to
3 protect the public, the profession and the administration of justice and not to punish the
4 offender "" *In re Alcorn*, 202 Ariz 62, 74, 41 P 3d 600, 612 (2002) (quoting *In re Kastensmith*,
5 101 Ariz 291, 294, 419 P.2d 75, 78 (1966))

6 **RECOMMENDATION**

7 The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and
8 deter future misconduct *In re Fioramonti*, 176 Ariz 182, 187, 859 P 2d 1315, 1320 (1993) It
9 is also the objective of lawyer discipline to protect the public, the profession and the
10 administration of justice *In re Neville*, 147 Ariz 106, 708 P 2d 1297 (1985) Yet another
11 purpose is to instill public confidence in the bar's integrity *Matter of Horwitz*, 180 Ariz 20, 29,
12 881 P 2d 352, 361 (1994)

13 In imposing discipline, it is appropriate to consider the facts of each case, the *Standards*
14 and the proportionality of discipline imposed in analogous cases *Matter of Bowen*, 178 Ariz
15 283, 286, 872 P 2d 1235, 1238 (1994)

16 Upon consideration of the facts, the application of the *Standards* (including aggravating
17 and mitigating factors) and the proportionality analysis set forth above, this Hearing Officer
18 recommends the following

- 19 1) Respondent should be disbarred, and
20 2) Respondent should pay all costs incurred by the State Bar in connection with
21 these proceedings

22 DATED this 30th day of October, 2007

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24 Patricia E Nolan
25 Hearing Officer 7Y

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By *C. Sand*