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BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA

FILED
MAR 17 2010
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

PAUL M. WEICH,
Bar No. 014089

Respondent.

No. 08-0073, 08-1264

HEARING OFFICER'S REPORT
(REVISED ON REMAND)

(Assigned to Hearing Officer 8W,
Thomas M. Quigley)

The undersigned hearing officer recommends that Respondent Paul M. Weich ("Respondent") be suspended in accordance with the following findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

The State Bar filed its complaint in this matter on September 18, 2008. The complaint was served on Respondent by certified mail/restricted delivery and regular first class mail at his address of record. Because Respondent failed to timely file an answer or otherwise respond to the complaint, the Disciplinary Clerk entered Notice of Default on October 20, 2008. Because Respondent still failed to file an answer or otherwise respond, the Disciplinary Clerk entered default on November 19, 2008. At the request of the State Bar, an aggravation/mitigation hearing was held on December 19, 2008. Respondent was notified of the hearing by mail to his address of record, but did not appear. After the hearing, the State Bar served its Notice of Intent to Use Prior Discipline on December 23, 2008. Pursuant to the Hearing Officer's order, the State Bar submitted proposed findings of fact and conclusions of law on December 30, 2008.

Thereafter, on January 13, 2009, Respondent made his first appearance and requested that he be allowed to submit evidence in mitigation. The proffered evidence was that Respondent was in the process of paying certain funds relevant to Count Two below from his trust account to the owner of the funds.

The State Bar objected to Respondent's late appearance and proffer of evidence

1 on January 21, 2009. In reply, Respondent moved to reopen on January 27, 2009. The
2 undersigned hearing officer denied Respondent's late motions by order dated February 9,
3 2009.

4 **This Hearing Officer filed the original report of February 18, 2009, which**
5 **recommended disbarment. The Disciplinary Commission issued its Order Upon**
6 **Decision on May 11, 2009 adopting its report of the same date which accepted the**
7 **findings of fact, conclusions of law and recommendation for disbarment.**

8 **Respondent file a Petition for Review, which the Supreme Court granted.**
9 **The Supreme Court found that the recommendation for disbarment was based on**
10 **an incorrect presumptive sanction. The Supreme Court remanded by Order dated**
11 **December 7, 2009 "to recommend the appropriate discipline."**

12 **An aggravation/mitigation hearing was set on remand for February 25, 2010.**
13 **Prior to the hearing, the parties submitted a Tender of Admissions and Agreement**
14 **for Discipline by Consent ("Tender") and a Joint Memorandum in Support of**
15 **Tender of Admissions and Agreement for Discipline by Consent ("Joint**
16 **Memorandum").**

17 **The following Findings of Fact include the original findings of fact that were**
18 **established by Respondent's default, and additional findings based on the Tender.**

19 **II. FINDINGS OF FACT¹**

20 1. At all times material hereto, Respondent was a lawyer licensed to practice
21 law in the state of Arizona having been first admitted to practice in Arizona on
22 October 26, 1991. Complaint ¶ 1.

23 2. Respondent was suspended for two years by Order of the Supreme Court
24 of Arizona in SB-07-0156-D (2007) filed on October 30, 2007, effective November 29,

25 _____
26 ¹ ~~Because Respondent failed to file an answer to the State Bar's complaint, or otherwise~~
27 ~~defend, all well pled allegations contained therein are deemed admitted by default. The~~
28 ~~complaint is contradictory concerning the precise time certain payments were negotiated. See~~
~~Complaint ¶¶ 10, 12. As is made clear by the findings of fact below, this discrepancy is not~~
~~material to the ethical violations shown by the allegations deemed admitted.~~

1 2007. Complaint ¶ 2.

2 **COUNT ONE (File No. 08-0073)**

3 3. Respondent served as an attorney for Transport Funding, a Missouri
4 business. Complaint ¶ 3.

5 4. One of the matters Respondent handled for Transport Funding was a
6 bankruptcy matter, 07-00660, Sada Simmons (the "Simmons bankruptcy"). Complaint
7 ¶ 4.

8 5. The Simmons bankruptcy Trustee issued to Transport Funding c/o
9 Respondent, checks in the amount of \$150.00, each month from July through November
10 2007. Complaint ¶ 5.

11 6. In September 2007, Transport Funding noticed that the July 2007,
12 payment had been sent to Respondent, and the check had been cashed, but that they had
13 not received the funds. Complaint ¶ 6.

14 7. On September 19, 2007, Transport Funding e-mailed Respondent, asking
15 that he send its funds to it. Complaint ¶ 7.

16 8. Respondent failed to do so. Complaint ¶ 8.

17 9. On December 12, 2007, Transport Funding noticed that the Trustee had
18 issued additional \$150 payments to Transport Funding c/o Respondent, in August,
19 September, October and November 2007. Complaint ¶ 9.

20 **10. Transport Funding then learned that the August and September 2007**
21 **checks, of \$150.000 each, made payable to Transport Funding c/o Respondent, had**
22 **been negotiated by Respondent. Tender ¶ 10.**

23 **11. Respondent failed to promptly forward to Transport Funding the**
24 **funds received from negotiating the August and September 2007 checks received**
25 **for the benefit of Transport Funding. Tender ¶ 11.**

26 **12. Transport Funding also learned that although October and**
27 **November 2007 checks had been sent by the trustee to Respondent, they had not**
28 **been negotiated; further, Transport Funding had received neither the checks nor**

1 **the funds they represented. Tender ¶ 12.**

2 13. On December 12, 2007, Transport Funding called Respondent and left a
3 message demanding that Respondent provide to them the \$150.00 from the negotiated
4 July 2007, check, in addition to providing the checks or funds from the August through
5 November payments. Complaint ¶ 13.

6 14. Respondent failed to provide the funds and/or checks to Transport
7 Funding. Complaint ¶ 14.

8 15. On December 19, 2007, Transport Funding called Respondent and left a
9 message, again demanding that Respondent provide the \$150.00 from the negotiated
10 July 2007, check, in addition to providing the checks that had not been negotiated.
11 Complaint ¶ 15.

12 16. Respondent did not provide the funds and/or the checks to Transport
13 Funding. Complaint ¶ 16.

14 17. On December 26, 2007, Transport Funding e-mailed Respondent, again
15 demanding the \$150.00 from the negotiated July 2007, check, in addition to providing
16 the checks that had been received but not negotiated. Complaint ¶ 17.

17 18. Transport Funding subsequently learned that the August and September
18 2007, checks were negotiated by Respondent on or about January 7, 2008,
19 approximately three weeks after Transport Funding had demanded that Respondent
20 forward to them any un-cashed checks. Complaint ¶ 18.

21 19. As of January 8, 2008, Respondent failed to contact Transport Funding
22 about this matter. Complaint ¶ 19.

23 20. By letter dated January 8, 2008, Transport Funding, through their
24 Litigation Manager, Alisa Sobczyk, Esq. notified the State Bar of Arizona of
25 Respondent's misconduct. Complaint ¶ 20.

26 21. By letter dated January 30, 2008, sent to Respondent at his address of
27 record, the State Bar notified Respondent of Transport Funding's allegations and
28 requested that he respond no later than twenty (20) days of the date of the letter.

1 Complaint ¶ 21.

2 22. The State Bar's letter was not returned to the State Bar as undeliverable.

3 Complaint ¶ 22.

4 23. Respondent failed to respond. Complaint ¶ 23.

5 24. By letter dated March 31, 2008, sent to Respondent at his address of
6 record, the State Bar reminded Respondent of his obligation to respond to inquiries of
7 Bar counsel, and that his failure to do so was, in itself, grounds for discipline.

8 Complaint ¶ 24.

9 25. The State Bar's letter was not returned to the State Bar as undeliverable.

10 Complaint ¶ 25.

11 26. Respondent was asked to respond within ten (10) days of the date of the
12 letter. Complaint ¶ 26.

13 27. Respondent failed to timely respond. Complaint ¶ 27.

14 28. An Order of Probable Cause was filed in this matter on May 5, 2008; a
15 copy of the order was mailed to Respondent at his address of record on the same day.

16 Complaint ¶ 28.

17 29. Respondent did contact the State Bar after the entry of the probable cause
18 order but before the service of the complaint and offered an explanation for his
19 misconduct in Count One. Respondent also informed Bar counsel that he had paid
20 Transport Funding the monies owed to it. Transport Funding confirmed receipt of the
21 funds prior the aggravation/mitigation hearing. Transcript of hearing dated
22 December 19, 2008 at p. 3, l. 15- p. 4, l. 17; Proposed findings of fact and conclusions
23 of law at p. 11, n. 1.

24 **COUNT TWO (File No. 08-1264)**

25 30. Respondent represented Presto Auto Loans, Inc., aka MV Acceptance;
26 ("Presto") an automotive finance company located in Phoenix, Arizona, in Chapter 13
27 bankruptcy proceedings. Complaint ¶ 34.

28 31. Presto retained Respondent for representation as a creditor in a Chapter 13

1 bankruptcy case filed by Glen and Laurie Converse (“the Converses”). Complaint ¶ 32.

2 32. After the bankruptcy plan was confirmed, Presto began receiving
3 payments from the Converses through the bankruptcy trustee (“Trustee”). Complaint
4 ¶ 33.

5 33. Initially, when the Trustee sent payments to, and in care of, Respondent,
6 payable to MV Acceptance, Respondent would forward either the check or the payment
7 to Presto. Complaint ¶ 34.

8 34. Respondent received check 122451, from the trustee, payable to MV
9 Acceptance, in the amount of \$2,095.70. This amount reflected the payment amount
10 due, plus interest. Complaint ¶ 35.

11 35. Presto learned that Respondent had negotiated the check, Respondent,
12 however, did not forward the payment of \$2,095.70, to Presto. Complaint ¶ 36.

13 **36. Respondent did not make Presto aware of the receipt of the payment,
14 nor communicate with them in any way about that payment. Tender ¶ 36.**

15 37. On March 31, 2008, after the effective date of Respondent’s disciplinary
16 suspension, Respondent received another check, number 129659, in the amount of
17 \$70.12, from the Trustee in the Converse bankruptcy, payable to MV Acceptance.
18 Complaint ¶ 38.

19 38. Respondent negotiated that check, but did not forward payment of \$70.12,
20 to Presto. Complaint ¶ 39.

21 39. Respondent did not make Presto aware of the receipt of the payment nor
22 communicate with them in any way about the payment. Complaint ¶ 40.

23 40. Presto learned of the two checks referenced in Paragraphs 34 and 37
24 through means other than information received from Respondent. Complaint ¶ 41.

25 41. Presto, through its Vice President John Goodman, telephoned Respondent
26 on more than one occasion, demanding the funds resulting from the two checks
27 negotiated by Respondent. Complaint ¶ 42.

28 42. Respondent did not respond to Mr. Goodman, or Presto, or provide

1 payment of the funds. Complaint ¶ 43.

2 43. Mr. Goodman referred this matter to the State Bar of Arizona by letter
3 dated July 18, 2008. Complaint ¶ 44.

4 44. Respondent received, and negotiated, two additional checks from the
5 Converse bankruptcy; check number 631287 in the amount of \$699.40, issued July 30,
6 2007; and check number 630485 in the amount of \$644.12, issued June 28, 2007.
7 Complaint ¶ 45.

8 45. Respondent provided neither check to Presto, did not advise Presto of the
9 receipt of those funds, nor did he forward payment of either amount to Presto.
10 Complaint ¶ 46.

11 46. Respondent failed to respond to phone calls and/or messages from Presto
12 relating to these amounts. Complaint ¶ 47.

13 47. By letter dated July 31, 2008, sent to Respondent at his address of record,
14 the State Bar advised Respondent of Presto's allegations and requested that he respond
15 within 20 days of the date of the letter. Complaint ¶ 48.

16 48. The State Bar's letter was not returned to the State Bar as undeliverable.
17 Complaint ¶ 49.

18 49. Respondent failed to respond. Complaint ¶ 50.

19 50. By letter dated August 29, 2008, sent to Respondent at his address of
20 record, the State Bar reminded Respondent of his obligation to respond to the State Bar
21 and that failure to do so was, in itself, grounds for discipline. Complaint ¶ 51.

22 51. Respondent was requested to respond within ten (10) days of the date of
23 the letter. Complaint ¶ 52.

24 52. The State Bar's letter was not returned to the State Bar as undeliverable.
25 Complaint ¶ 53.

26 53. Respondent failed to respond. Complaint ¶ 54.

27 54. ~~Respondent's counsel now asserts that Transport Funding has been paid.~~
28 ~~Ex. 1 to Respondent's Response dated January 27, 2009.~~

1 **55. Full restitution has been made to Transport Funding and Presto**
2 **Auto.**

3 **56. Jack L. Potts, M.D., a psychiatrist, evaluated Respondent on June 18,**
4 **2009. Affidavit dated October 20, 2009.**

5 **57. Dr. Potts concluded that, beginning in 2006 until well into 2009,**
6 **Respondent was “physically and mentally incapable” of responding appropriately**
7 **to the State Bar’s inquiries. *Id.***

8 **III. CONCLUSIONS OF LAW**

9 Based on the findings of fact, above, **the Tender and the Joint Memorandum,**
10 **the parties agree and** the Hearing Officer finds as follows:

11 **COUNT ONE:** Respondent’s conduct as described in this count violated ERs
12 1.3, 1.4, 1.15, 8.1, 8.4(c) and 8.4(d) Ariz. R. Sup. Ct. 53(d) and (f).

13 **COUNT TWO:** Respondent’s conduct as described in this count violated ERs
14 1.3, 1.4, 1.15, 8.1, 8.4(c) and 8.4(d), and Ariz. R. Sup. Ct. 53(d) and (f).²

15 **IV. RECOMMENDED SANCTION**

16 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
17 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d
18 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the
19 profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297
20 (1985). Yet another purpose is to instill public confidence in the bar’s integrity. *Matter*
21 *of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

22 In imposing discipline, it is appropriate to consider the facts of the case, the
23 American Bar Association’s *Standards for Imposing Lawyer Sanctions* (“Standards”)
24

25 ² ~~The State Bar also argued that the admitted facts demonstrated violation of ERs 1.2 (both~~
26 ~~Counts) and ER 8.4(b) (Count Two). This hearing officer declines to find such additional~~
27 ~~violations by clear and convincing evidence. However, given the seriousness of the violations~~
28 ~~demonstrated by clear and convincing evidence, such additional ethical violations, if supported~~
~~by clear and convincing evidence, would not change the recommendations of this hearing~~
~~officer.~~

1 and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178
2 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).

3 **A. The ABA Standards for Imposing Lawyer Sanctions**

4 ABA *Standard* 3.0 provides that four criteria should be considered when
5 imposing discipline: (1) the duty violated; (2) the lawyer's mental state and (3) the
6 actual or potential injury caused by the lawyer's misconduct; and (4) the existence of
7 aggravating or mitigating factors. The ABA *Standards* indicate that the "ultimate
8 sanction imposed should at least be consistent with the sanction for the most serious
9 instance of misconduct among a number of violations; it might well be and generally
10 should be greater than the sanction for the most serious." *Matter of Taylor*, 180 Ariz.
11 290, 292; 883 P.2d 1046 (1994).

12 1. The Duty Violated.

13 The *Standards* identify four distinct categories in which a lawyer has specific
14 duties: to his client; to the general public; to the legal system; and, to the profession.
15 Respondent's duties to his clients, to the general public, to the legal system and to the
16 profession are all implicated by his misconduct in this matter.

17 The Arizona Supreme Court found the two correct *Standards* to be applied to
18 this fact pattern are *Standard* 4.12 and 7.2, given that there is no evidence that
19 Respondent intended to obtain a benefit and there was no factual finding that
20 Respondent's failure to remit funds promptly was motivated by dishonesty or
21 selfishness.

22 *Standard* 4.12 provides that suspension is generally appropriate when the lawyer
23 knows, or should know, that he is dealing improperly with client property and causes
24 injury or potential injury to the client.

25 *Standard* 7.2 provides that suspension is generally appropriate when a lawyer
26 knowingly violates a duty owed to the profession and causes serious or potentially
27 serious injury to a client, the public or the legal system.

28 2. The Lawyer's Mental State.

1 The facts deemed admitted by default and in the Tender demonstrate that
2 Respondent knew or should have known that his clients did not receive property owned
3 by the clients and the clients were injured thereby.

4 3. Actual or Potential Injury.

5 It is beyond dispute that Respondent's conduct caused actual injury to his clients,
6 to the legal system and to the profession. While Respondent's clients may have
7 received their funds now, they were deprived of the use of such funds for at least several
8 months.

9 4. Aggravating and Mitigating Factors.

10 Based on the facts of this matter, the following aggravating factors exist, which
11 the parties also stipulate to in the Joint Memorandum:

12 *Standard 9.22(a)* Prior discipline. Respondent was suspended from the practice
13 of law by order of the Supreme Court of Arizona effective November 29, 2007. The
14 fact that Respondent received and negotiated checks on behalf of clients after that date
15 is a likely violation of his duties upon suspension.

16 *Standard 9.2(c)* Pattern of misconduct. The facts demonstrate two separate
17 instances of failure to properly account for client funds and two instances of failure to
18 cooperate with the State Bar.

19 *Standard 9.22(d)* Multiple offenses.

20 *Standard 9.22(i)* Substantial experience in the practice of law. Respondent was
21 admitted to practice in 1991.

22 The parties agreed to a mitigating factor of personal or emotional problems
23 pursuant to *Standard 9.22(c)*, and submitted the affidavit of Jack L. Potts, M.D. to
24 provide the factual foundation for that mitigating factor. After considering Dr. Potts'
25 affidavit dated October 20, 2009, this hearing officer finds it to be sufficient factual
26 predicate for finding personal and emotional problems. In addition, Dr. Potts' affidavit
27 makes clear that the prior finding of bad faith obstruction of the disciplinary proceeding
28 by intentionally failing to comply with the rules governing this action cannot stand.

1 The mental state of intentional requires a conscious objective or purpose to
2 accomplish a particular result – i.e., that Respondent had a conscious objective to
3 obstruct the disciplinary proceedings.

4 Based on Dr. Potts' evaluation of Respondent, no such finding is warranted.
5 Therefore, this hearing officer rejects the parties' stipulation to the aggravating factor of
6 *Standard 9.22(e)*.

7 The presumptive sanction in this matter is suspension. The parties have
8 stipulated to a two year suspension, beginning December 29, 2009.

9 **B. PROPORTIONALITY**

10 To have an effective system of professional sanctions, there must be internal
11 consistency, and it is appropriate to examine sanctions imposed in cases that are
12 factually similar. *In re Peasley*, 208 Ariz. 27, 35, ¶ 33, 90 P.3d 764, 772 (2004).
13 However, the discipline in each case must be tailored to the individual case, as neither
14 perfection nor absolute uniformity can be achieved. *Id.* at 41, ¶ 61, 90 P.3d at 778
15 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz.
16 203, 207, 660 P.2d 454, 458 (1983)).

17 Respondent negotiated checks for his clients' benefit; retained these funds and
18 failed to account for them while suspended.

19 The parties Bar proffered several cases for proportionality review. *See, In re*
20 *Jenkins*, SB-09-0105-D (2009) (lawyer engaged in misconduct including failing to
21 diligently represent clients, failing to remit funds when representation ended, failing to
22 respond to State Bar's investigation; 18 month suspension); *In re Ware*, SB-08-0009-D
23 (2008) (lawyer suspended for two years after he abandoned clients, failed to provide
24 competent and diligent representation, failed to return unearned fees, failed to cooperate
25 with State Bar's investigation); *In re Neumann*, SB-08-0089-D (2008) (lawyer
26 suspended for three years (retroactive) for failing to communicate with clients, failing to
27 adhere to rules and guidelines governing trust accounts and converting client funds).

28 Of these, both *Ware* and *Jenkins* are sufficiently similar to support the

1 proportionality of a two year suspension. Both *Ware* and *Jenkins* involved a knowing
2 mental state and actual injury to clients through failure to account for client funds or to
3 safeguard client property.

4 Based on the *Standards* and case law, the parties believe that in this matter,
5 suspension from the practice of law for two years followed by probation with terms to
6 include participation in MAP upon reinstatement are within the range of appropriate
7 sanction in this case and will serve the purposes of lawyer discipline. The sanction will
8 serve to protect the public, instill confidence in the public, deter other lawyers from
9 similar misconduct, and maintain the integrity of the bar.

10 The sanction of a two year suspension is supported by proportional case law, as
11 well as the *Standards*.

12 **V. CONCLUSION**

13 This Hearing Officer hereby recommends the following:

14 1. Respondent shall be suspended from the practice of law for two years.
15 This term of suspension shall begin upon the expiration of the term of suspension
16 imposed in SB-07-0156-D (2007), which expiration date was December 29, 2009.

17 2. Should Respondent seek and be granted reinstatement to the practice of
18 law, he shall be placed on probation for two years.

19 3. The terms and conditions of probation shall be determined at the time of
20 reinstatement, but shall include the following:

21 a. Probation period will commence upon the filing of the final
22 judgment and order by the Supreme Court of Arizona;

23 b. Respondent shall contact the Director of the State Bar's Member
24 Assistance Program (MAP) within 30 days of the date of the filing
25 of the final judgment and order of the Supreme Court.

26 c. Respondent shall submit to a MAP assessment as scheduled by the
27 MAP Director.

28 d. The director of MAP shall develop "Terms and Conditions of

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Probation” based on the assessment and the terms shall be incorporated herein by reference.

e. Respondent shall comply with any other terms and conditions deemed appropriate by the Director of MAP, which shall be incorporated herein by reference.

f. Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona.

If Respondent fails to comply with any of the foregoing conditions and the State Bar receives information about non-compliance, Bar Counsel shall file with the imposing entity a Notice of Noncompliance. The matter may be referred to a hearing officer to conduct a hearing at the earliest applicable date, but in no event later than 30 days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing conditions, the burden of proof shall be on the State Bar to prove noncompliance by a preponderance of the evidence.

4. Respondent shall pay the costs and expenses of this action, including the costs and expenses of the State Bar, the Disciplinary Clerk and the Supreme Court of Arizona.

5. Should Respondent seek and be granted reinstatement, he should be placed on probation for two years, with the terms and conditions to be determined at the time of reinstatement.

DATED this 17th day March, 2010.

Thomas M. Quigley / ja
Thomas M. Quigley
Hearing Officer 8W

Original filed this 17th day of March, 2010 with the Disciplinary Clerk of the Supreme Court.

1 Copies of the foregoing mailed this 18
2 day of March, 2010, to:

3 Roberta L. Tepper
4 Senior Bar Counsel
5 State Bar of Arizona
6 4201 North 24th Street, Suite 200
7 Phoenix, Arizona 85016-6288

8 Nancy A. Greenlee
9 821 E. Fern Drive North
10 Phoenix, Arizona 85014

11 By: 

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