

## SANCTIONED ATTORNEYS

### MICHELLE DON CARLOS

Bar No. 024900; File No. 08-1581

Supreme Court No. SB-10-0048-D

By Arizona Supreme Court judgment and order filed April 28, 2010, Michelle Don Carlos, 70 W. Franklin St., Tucson, Ariz., was censured. She also was placed on probation for a period of one year and ordered to pay the expenses of the disciplinary proceedings.

Ms. Don Carlos agreed to represent her former roommate in divorce proceeding *pro bono*. Although e-mails reflected the *pro bono* fee arrangement, Ms. Don Carlos did not provide the roommate with a writing documenting the scope of Ms. Don Carlos' representation.

Ms. Don Carlos and the roommate entered into a business arrangement in which the roommate, who wanted to open a horseback riding stable, pre-paid \$26,000 of rent for property Ms. Don Carlos was purchasing with her father. Although Ms. Don Carlos originally created a rental agreement for the transaction, it was not used because Ms. Don Carlos' name would not be on the title to the property. Instead, the parties executed a promissory note, the terms of which required Ms. Don Carlos to credit the roommate with \$1,500 per month for rent. Ms. Don Carlos did not obtain written informed consent from the roommate prior to her executing the promissory note, nor did Ms. Don Carlos advise her roommate to seek the advice of independent counsel prior to execution of the promissory note.

In the petition for dissolution she drafted for the roommate, Ms. Don Carlos included a request for attorney's fees even though Ms. Don Carlos had agreed to represent the roommate *pro bono*. Ms. Don Carlos also asked for an award of attorney's fees in a petition for *pendente lite* she later filed.

In the roommate's affidavit of financial information filed with the court, it was stated that the roommate's parents had given her a \$5,000 loan for the purpose of paying attorney's fees. This was not true. The affidavit was completed by Ms. Don Carlos' assistant who stamped Ms. Don Carlos' signature on the document. Ms. Don Carlos did not review the document before it was filed with the court and did not authorize her assistant to stamp her signature on the document. Ms. Don Carlos acted negligently.

At the *pendente lite* hearing, Ms. Don Carlos orally requested the court to order the roommate's husband to pay Ms. Don Carlos' attorney's fees. Ms. Don Carlos told the court the roommate had not paid attorney's fees but did not tell the court that she had agreed to represent the roommate *pro bono*. The filed affidavit claimed \$5,000 had been paid. The court ordered the husband to pay \$2,500 to the roommate. Because he did not make the payment within the time ordered by the court, the husband agreed to pay an additional \$300 to the roommate. He eventually paid a total of \$2,800,

which he gave to Ms. Don Carlos. Ms. Don Carlos provided the entire amount to her client.

There were no aggravating factors.

Five mitigating factors were found: absence of a prior disciplinary record, personal or emotional problems, timely good-faith effort to make restitution or rectify consequences of misconduct, full and free disclosure to disciplinary board or cooperative attitude toward proceedings, and inexperience in the practice of law.

Ms. Don Carlos violated Rule 42, ARIZ.R.S.Ct., ERs 1.5(b), 1.8(a), 5.3 and 8.4(d).

### MARK L. JOHNSON

Bar No. 019505; File Nos. 07-1629, 08-1904, 08-2189

Supreme Court No. SB-10-0037-D

By Arizona Supreme Court judgment and order dated May 20, 2010, Mark L. Johnson, 4225 E. Camelback Rd., Phoenix, Ariz., was disbarred. He also was ordered to pay restitution.

Mr. Johnson prepared a will for his client and upon the client's death and after Mr. Johnson was suspended, Mr. Johnson held himself out as the attorney who prepared the will and submitted a claim for legal fees from the estate.

In another matter, Mr. Johnson was paid \$1,100 to prepare trust documents for a client. The client believed the documents had been completed and forwarded to his bank by Mr. Johnson. Upon learning they were not complete, the client tried to contact Mr. Johnson regarding the status of the documents but received no response.

In a third matter, Mr. Johnson was paid \$1,081.87 to assist clients in updating their corporate status. Mr. Johnson failed to complete the task and failed to respond to his clients' numerous attempts to contact him regarding the status of the matter. Consequently, the clients retained new counsel to complete the work.

Mr. Johnson failed to respond to the State Bar's numerous attempts to contact him and did not participate in the disciplinary proceedings.

Six aggravating factors were found: prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, bad-faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, and substantial experience in the practice of law.

There were no mitigating factors.

Mr. Johnson violated Rule 42, ARIZ.R.S.Ct., ERs 1.2, 1.3, 1.4, 1.5, 5.5(a) and 8.1(b), and Rules 31(b) and (c), 32(c)(3), 53(c), (d) and (f) and 72(a) and (c), ARIZ.R.S.Ct.

### LOGAN TRAUX JOHNSTON

Bar No. 9484

Supreme Court No. SB-10-0068-D

By Arizona Supreme Court order filed June 10, 2010, Logan Traux Johnston, 1402 E. Mescal Street, Phoenix, Ariz., was placed on interim suspension effective June 30, 2010, pursuant to

## CLIENT PROTECTION FUND QUARTERLY REPORT

The Client Protection Fund was created by the Board of Governors of the State Bar of Arizona in 1961 as required by a rule of the Supreme Court of Arizona. Its purpose is to promote public confidence in the administration of justice and to preserve the integrity of the legal profession by reimbursing clients who have sustained losses caused by the dishonest conduct of lawyers admitted and licensed to practice in Arizona.

The fund is a nonprofit charitable organization governed by a Declaration of Trust and administered by five volunteer trustees appointed by the Bar's Board of Governors. The Fund receives a yearly assessment from each active and inactive member of the State Bar (paid with the annual bar dues). In addition, the fund earns interest on its invested fund balance.

More information about the fund is at [www.azbar.org/cpf](http://www.azbar.org/cpf). Or contact the fund administrator at [karen.weigand@staff.azbar.org](mailto:karen.weigand@staff.azbar.org) or by phone: (602) 340-7286, toll free 866-482-9227.



### Did You Know?

This is the 50th anniversary of the Client Protection Fund. It was established on April 19, 1960, and has been serving Arizona residents since that day. Happy birthday!

#### The following is a brief summary of claims paid in the first quarter of 2010:

##### ANTHONY J. BLACKWELL

Bar No. 014962 (\$2,163)

- ▶ The claimant hired Blackwell to represent her in a civil matter. The claimant states that the only legal work Blackwell performed was to file the initial response to the complaint. The Trustees found that Blackwell did not perform any services of value and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimant \$2,163.

##### JAMES T. GREGORY

Bar No. 021499 (two claims totaling \$7,500)

- ▶ The Trustees reviewed two claims filed by former clients of Gregory, who had retained Gregory to represent them in a criminal matter and an adoption matter, respectively. The claimants both alleged that Gregory did little or no work and then ceased contact with them. For each claim, the Trustees found that Gregory did not perform any services of value and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimants \$5,000 and \$2,500, respectively.

##### M. JOSEPHINE SOTELO

Bar No. 012363 (\$3,500)

- ▶ The claimant retained Sotelo to represent him in a criminal matter. The claimant alleged that Sotelo performed minimal work on his case prior to her death. The Trustees determined that Sotelo performed such an insignificant amount of work for the claimant that the failure to refund the unearned fees constituted a wrongful taking of money, and reimbursed the claimant \$3,500.

#### The following is a brief summary of the claims paid in the second quarter of 2010:

##### JASON C. BESKIND

Bar No. 017131 (\$2,000)

- ▶ The claimant states that he paid Beskind for pre-trial services, and when it became clear that the matter was proceeding to trial, he paid Beskind an additional \$2,000 trial fee. The claimant alleges that Beskind stopped communicating with him soon after. The Trustees found that Beskind did not perform any services of value after the pre-trial services and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimant \$2,000.

##### RAUL GARZA, JR.

Bar No. 021090 (\$1,080)

- ▶ The claimant retained Garza to prepare contract revisions and file two LLCs. The claimant states that Garza did not accomplish any of these services. The Trustees found that Garza did not perform any services of value and that his failure to refund unearned fees

constituted dishonest conduct. The Fund paid the claimant \$1,080.

##### JAMES T. GREGORY

Bar No. 021499 (two claims totaling \$6,900)

- ▶ The Trustees reviewed two claims filed by former clients of Gregory, who had retained Gregory to represent them in a child support matter and divorce matter, respectively. The claimants both alleged that Gregory did little or no work and then ceased contact with them. For each claim, the Trustees found that Gregory did not perform any services of value and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimants \$4,000 and \$2,900, respectively.

##### VICTORIA M. STEVENS

Bar No. 014060 (\$5,000)

- ▶ The claimant retained Stevens to represent him in a collections matter. The claimant alleged that the only work Stevens did on his case was to prepare a draft demand letter, which was potentially never sent, and after this, he had no further contact with her. The Trustees found that Stevens did not perform any services of value and that her failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimant \$5,000.

##### JESSE PAUL SUPLIZIO

Bar No. 022720 (\$395)

- ▶ The claimant retained Suplizio to assist her in conducting a comprehensive trademark search. The claimant alleged that Suplizio failed to perform any work and ceased communication with her. The Trustees found that Suplizio did not perform any services of value and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimant \$395.

##### ANDREW TODD WIRTH

Bar No. 022317 (\$1,900)

- ▶ The claimant retained Wirth to represent her in a divorce matter. The claimant alleged that Wirth did no work on her case and did not file her divorce petition. The Trustees found that Wirth did not perform any services of value and that his failure to refund unearned fees constituted dishonest conduct. The Fund paid the claimant \$1,900.

##### WINTON D. WOODS, III

Bar No. 019374 (\$8,000)

- ▶ The claimants hired Woods to represent them in a personal injury matter. The claimants state that Woods deducted funds from their settlement in order to pay costs associated with hiring expert witnesses, however, Woods failed to pay these costs prior to his death and the claimants had to pay them. The Trustees found that Woods' failure to pay the costs after deducting funds from the settlement constituted dishonest conduct. The Fund paid the claimants \$8,000.

rule 53(h)(2)(A). The suspension shall continue in effect until final disposition of all pending proceedings against Mr. Johnston, unless earlier vacated or modified.

**SIDNEY WOLITZKY**

Bar No. 003195; File No. 09-0197  
Supreme Court No. SB 10-0046-D

By Arizona Supreme Court judgment and order dated April 28, 2010, Sidney F. Wolitzky, 291 N. Meyer Ave., Tucson, Ariz., was censured. He

also was placed on probation and assessed the costs and expenses of the disciplinary proceedings.

Mr. Wolitzky was appointed to represent a defendant charged with first-degree hindering prosecution arising out of a homicide the client witnessed. The client, at Mr. Wolitzky's urging, delivered to Mr. Wolitzky a bloody shirt worn by him on the night of the homicide. The shirt, covered with the victim's blood, was evidence in the homicide case.

**BAR COUNSEL INSIDER**

*Bar Counsel Insider provides practical and important information to State Bar members about ethics and the disciplinary process.*



**Discipline for Non-Lawyer Conduct**

Can a lawyer be disciplined if he is acting as a businessperson and not as a lawyer? Yes.

A lawyer can be disciplined for professional misconduct even if no lawyer-client relationship exists. In *In Lurie*, 546 P.2d 1126, 1131 (Ariz. 1976), the Arizona Supreme Court held that the misappropriation of funds entrusted to an attorney as secretary-treasurer of closed corporation warranted suspension for six months. The Supreme Court stated, "[I]t makes no difference whether he was acting as attorney or as a businessman. There is nothing to prevent an attorney from engaging in a business or other activities, but when he does so he does not abandon his professional ethics if he wishes to remain a member of his profession." The Supreme Court noted that when dealing with a situation involving nonprofessional misconduct by a lawyer, he is not immune to disciplinary action when he has violated either the ethical rules or a positive rule of court. *Id.*

In *In Zussman*, 344 P.2d 1021, 1024 (Ariz. 1959), the Arizona Supreme Court found the lawyer guilty of deceit and misrepresentation in connection with a purchase of a hotel. The Court noted, "We are dealing with a situation involving non-professional misconduct by respondent, i.e., there is no evidence that respondent was ever employed by complainant Ruth G. Marks as her attorney, nor was any attorney's fee ever paid to him by her or anyone else in connection with the hotel venture." *Id.* The Court found that disciplinary action may be taken for "any action or omission, either related or unrelated to the practice of law." *Id.* The lawyer's actions were found to warrant a public reprimand.

In *In Grimble*, 759 P.2d 594, 597-600 (Ariz. 1988), the Arizona Supreme Court found that an attorney serving as the director of State Drug Control District could be disciplined for slipshod and sloppy accounting practices even though he was not acting as an attorney. The Court determined that these poor accounting practices raised questions of his fitness to practice law and were not acceptable conduct for an attorney in any capacity. The Court reasoned, "It can be reasonably expected that a person trained as a lawyer will keep his books and records in such order as to not cast doubt on his competency and his honesty." *Id.* at 600. The Court also was troubled by the manner in which the lawyer purchased items for his personal use because he had used the state agency's credit card for his purchases and then reimbursed the state agency. The sanction was a censure.

A lawyer also may be disciplined for misconduct in his role as personal representative of an estate. In *In Riley*, SB 06-1193 (2008), the lawyer was appointed co-personal representative of the estate of his mother. The lawyer was also one of the beneficiaries of the estate. The lawyer was disciplined for taking funds from the estate in the amount of \$156,632 without having obtained the authorization from the probate court or the consent from the other estate beneficiaries to take the funds. The lawyer, when making the unauthorized withdrawal of funds, reasonably believed that at the closing of the estate, he would stand to inherit at least the amount that he had withdrawn. The lawyer ultimately paid back the money he unlawfully took. Even though his actions did not involve duties owed to a client, the lawyer was disciplined for conduct involving deceit and conduct considered prejudicial to the administration of justice in violation of ER 8.4 (c) and (d). The lawyer was suspended for two years, followed by one year of probation and restitution.

Contact the State Bar's Ethics Hotline at (602) 340-7284.

**CAUTION!** Nearly 16,000 attorneys are eligible to practice law in Arizona. Many attorneys share the same names. All discipline reports should be read carefully for names, addresses and Bar numbers.

Mr. Wolitzky lost the shirt shortly after receiving it and was not able to relocate it. He was listed as a witness in the homicide case and was removed as the attorney for his client by the Superior Court.

Mr. Wolitzky later voluntarily submitted to a defense interview in the homicide case, during which he negligently disclosed information learned from his client about the shirt and the homicide. Mr. Wolitzky did not have his former client's consent to disclose such information. During the interview there was discussion about whether Mr. Wolitzky was violating the attorney-client privilege or an ethical rule. Mr. Wolitzky negligently failed to realize his mistake and continued to answer questions concerning his representation of the client. Mr. Wolitzky later asked the judge to suppress his comments, and the judge did so. Mr. Wolitzky's actions did not adversely impact either his client or the homicide defendant.

One aggravating factor was found: substantial experience in the practice of law.

Five mitigating factors were found: absence of a prior disciplinary record, absence of a dishonest or selfish motive, timely good-faith effort to rectify the consequences of his misconduct, character or reputation, and remorse.

Mr. Wolitzky violated Rule 42, ARIZ.R.S.Ct., ERs 1.6, 1.9, 1.15 and 8.4(d).

**ETHICS OPINIONS**

**Opinion 10-01 (June 2010)**

A lawyer may not ethically participate in a not-for-profit lawyer referral service if, as a condition of such participation, the lawyer is required to pay the service a percentage of the fees earned on the case.

**Disclaimer:** In anticipation of the formal release of this opinion, the Maricopa County Bar Association (MCBA) petitioned the Arizona Supreme Court to change, on an emergency basis, ERs 5.4 and 7.2 to resolve the problems this opinion identifies. The Court granted that request and adopted the MCBA's proposed rule changes on an emergency basis, effective April 6, 2010. The Court is considering whether to adopt the MCBA's proposed rule change permanently. Comments on the MCBA's petition were due June 1, 2010. The State Bar has filed a comment supporting the MCBA's rule change. As a result of the MCBA's emergency petition and the Court's order, the rules currently in effect on an emergency basis are different from the rules at issue in this opinion. Under those emergency rules, lawyers may continue participating in the MCBA's referral program.

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**Opinion 10-02** (March 2010)

When a lawyer's employment with a firm is terminated, both the firm and the departing lawyer have ethical obligations to notify affected clients, avoid prejudice to those clients, and share information as necessary to facilitate continued representation and avoid conflicts. These ethical obligations can best be satisfied through cooperation and planning for any departure.

**Opinion 10-03** (June 2010)

Provided that the overall fee is reasonable, it is ethically permissible to charge a minimum fee that may be designated "earned upon receipt" or "non-refundable" with the language required by ER 1.5(d), for a specified number of hours or through completion of the matter, whichever occurs first, and also to include a provision that, under certain reasonably defined changed circumstances, the lawyer reserves the right to charge the client on an hourly basis for the remainder of the matter.

**Opinion 10-04** (June 2010)

An Arizona lawyer may divide a fee with a lawyer admitted in another United States jurisdiction if the client consents to the arrangement in writing, each lawyer receiving any portion of the fee assumes joint responsibility for the representation, and the total fee is reasonable. In addition to complying with these general rules regarding fee division, the out-of-state lawyer must be in good standing, admitted in a United States jurisdiction, and providing services to the Arizona client in association with a lawyer who is admitted to practice in Arizona and who actively participates in the matter. The client must consent in writing to the fee division, acknowledge the out-of-state lawyer is not admitted in Arizona, and consent to the out-of-state lawyer's representation. The out-of-state lawyer must either ensure that he or she is admitted *pro hac vice* in order to provide legal services that require *pro hac vice* admission or be eligible to provide temporary legal services in Arizona pursuant to ER 5.5.

**Need an Opinion?**

Check out the State Bar Web site at [www.myazbar.org/Ethics](http://www.myazbar.org/Ethics) for a listing of the ethics opinions issued between 1985 and the present, as well as Arizona's Rules of Professional Conduct.

If you are an Arizona attorney and have an ethics question, call our ethics counsel, Patricia A. Sallen, at the ethics hotline: (602) 340-7284.