

SANCTIONED ATTORNEYS

MARK F. BRINTON

Bar No. 007674; File Nos. 02-1473, 03-0042 and 03-0440

By Supreme Court judgment and order dated Feb. 20, 2004, Mark F. Brinton, 1745 S. Alma School Rd., Suite H-102, Mesa, AZ 85210, was suspended for 30 days by consent. Upon reinstatement, Mr. Brinton will be placed on two years of probation, to include participation in the Member Assistance Program and Law Office Management Assistance Program. Mr. Brinton must pay the State Bar's costs and expenses of \$705.15, together with interest at the legal rate.

Mr. Brinton's conduct in the first matter included making a false statement to a tribunal; failing to be truthful in statements made to others; engaging in conduct involving a misrepresentation; and engaging in conduct prejudicial to the administration of justice. Mr. Brinton's conduct in the second matter included failing to maintain proper trust account records by failing to maintain a client ledger and failing to disburse funds from the account with only pre-numbered

checks. Mr. Brinton's conduct in the third matter included failing to abide by his client's decisions concerning the scope of the representation, failing to act diligently and failing to adequately communicate with the client.

One aggravating factor was found: substantial experience in the practice of law. Four mitigating factors were found: absence of a dishonest or selfish motive; personal or emotional problems; full and free disclosure to disciplinary board and cooperative attitude toward proceeding; and remorse.

Mr. Brinton violated ERs 1.2, 1.3, 1.4, 1.15 3.3, 4.1 and 8.4(c) and (d), Rule 42, ARIZ.R.S.C.T., and Rules 41(c), 43(d) (Guidelines 2c and d) and 44, ARIZ.R.S.C.T.

DAVID W. COUNCE

Bar No. 010822; File Nos. 02-1649, 02-1949, 03-0058 and 03-0217

By Supreme Court judgment and order dated Feb. 12, 2004, David W. Counce, 15201 N. 19th Way, Phoenix, AZ 85022, was disbarred. Mr. Counce must pay the State Bar's costs and expenses of \$1,059.63, together with interest at the legal rate.

Mr. Counce failed to file an answer in

this proceeding and a default was entered. Mr. Counce abandoned his clients, failed to competently represent his clients; failed to abide by the clients' decisions concerning the scope of the representation; failed to act with reasonable diligence for his clients; failed to adequately communicate with his clients; failed to return a client's file when the representation was terminated; failed to expedite the litigation for his clients; knowingly made a false statement to a tribunal; failed to fulfill his obligations under the rules of a tribunal; knowingly made a false statement of material fact to a third person; failed to respond to a lawful demand for information from the State Bar; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; engaged in conduct that was prejudicial to the administration of justice; willfully disobeyed an order of a court; failed to furnish information or to respond promptly to a request from bar counsel; and failed to cooperate with State Bar staff.

Mr. Counce violated ERs 1.1, 1.2, 1.3, 1.4, 1.16(d), 3.2, 3.3, 3.4, 4.1, 8.1(b) and 8.4(c) and (d), Rule 42, ARIZ.R.S.C.T., and Rule 51(e), (h), (i) and (k), ARIZ.R.S.C.T.

(now Rule 53(c), (d) and (f), ARIZ.R.S.CT.).

ROBERT G. FOYTACK

Bar No. 011208; File No. 03-4002

By Supreme Court judgment and order dated Jan. 7, 2004, Robert G. Foytack, 4320 Yale Ave., La Mesa, CA 91941, was disbarred effective Feb. 6, 2004, pursuant to Rule 58(c), ARIZ.R.S.CT., for reciprocal discipline. Mr. Foytack must pay the State Bar's costs and expenses of \$600, together with interest at the legal rate.

Mr. Foytack's misconduct involved holding himself out as being entitled to practice and practicing while suspended; engaging in acts of dishonesty by filing two false declarations with the State Bar Court of California; failing to competently perform legal services; and failing to communicate with and provide adequate representation to a client.

Pursuant to Rule 58(d), ARIZ.R.S.CT., reciprocal discipline was imposed.

WILLIAM B. FORTNER

Bar No. 004923; File Nos. 00-1999, 02-0790, 02-2093 and 03-0097

By Supreme Court judgment and order dated Dec. 8, 2003, William B. Fortner, 634 Schemmer, Suite 301, Prescott, AZ 86301, was censured by consent. Mr. Fortner was placed on two years of probation including participating in the Law Office Member Assistance Program. Mr. Fortner must pay the State Bar's costs and expenses of \$1,263, together with interest at the legal rate.

Mr. Fortner's misconduct consisted of failing to competently handling clients' matters, failing to abide by his clients' decisions concerning the scope of the representation, failing to diligently represent his clients, failing to adequately communicate with his clients about the status of their cases, revealing information relating to the representation of a client without that clients' consent, failing to protect client property in his possession, failing to take steps reasonably necessary to protect the client's interest on termination of the representation, failing to be fair to opposing party, failing to properly supervise his non-attorney staff, engaging in conduct prejudicial to the administration of justice and failing to properly manage his trust account.

Four aggravating factors were found: prior disciplinary offenses, pattern of misconduct, multiple offenses and substantial experience in the practice of law. Five mitigating factors were found: absence of dishonest or selfish motive, timely good faith effort to rectify the consequences of his misconduct, full and free disclosure/coopera-

tion toward the proceedings, remorse and remoteness of the prior offenses.

Mr. Fortner violated ERs 1.1, 1.2, 1.3, 1.4, 1.6, 1.15, 1.16(d), 3.4(e), 5.3 and 8.4(d) (Rule 42, ARIZ.R.S.C.T.) and Rules 43 and 44, ARIZ.R.S.C.T.

PATRICK J. GEARE

Bar No. 015748; File Nos. 00-1635, 00-2128, 00-2212, 00-2286, 00-2491 and 01-1001

By Supreme Court judgment and order dated Dec. 5, 2003, Patrick J. Geare, 1721 W. Cochran St., Tucson, AZ 85746, was suspended for 90 days by consent, effective the date of the order. Upon reinstatement, Mr. Geare will be placed on one year of probation to include, in the event he returns to the private practice of law, his participation in both the Law Office Management Assistance Program and Member Assistance Program. Mr. Geare must pay the State Bar's costs and expenses of \$1,351.25, together with interest at the legal rate.

Mr. Geare received and disbursed substantial workers' compensation benefits for the benefit of his clients. In so doing, although no client funds were lost, for a period of time Mr. Geare failed to maintain a trust account for the safekeeping of the worker's compensation benefits. During the period at issue, Mr. Geare failed to competently represent his clients, failed to abide by his client's decisions concerning the scope of the representation, failed to diligently represent his clients, failed to adequately communicate with his clients, failed to take appropriate steps to safeguard his clients' property, failed to take appropriate steps to protect his clients' interests upon termination of the representation, failed to expedite his clients' matters and engaged in conduct prejudicial to the administration of justice.

Three aggravating factors were found: pattern of misconduct, multiple offenses and vulnerability of victims. Nine mitigating factors were found: absence of prior discipline, absence of dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or to rectify the consequences of his misconduct, full and free disclosure to a disciplinary board or cooperative attitude towards the proceedings, character or reputation, mental disability or chemical dependency, delay in the disciplinary proceedings and remorse.

Mr. Geare violated ERs 1.1, 1.2, 1.3, 1.4, 1.15, 1.16, 3.2 and 8.4 (Rule 42, ARIZ.R.S.C.T.) and Rules 43 and 44, ARIZ.R.S.C.T.

STEVEN E. HILL

Bar No. 018023; File Nos. 02-0117, 02-0305, 02-2319, 02-2377, 03-0005, 03-0052 and 03-0211

By Supreme Court judgment and order dated Feb. 12, 2004, Steven E. Hill, 1642 McCulloch Blvd., PMB 427, Lake Havasu, AZ 86403, was suspended for two years retroactive to May 8, 2003, by consent. Upon reinstatement, Mr. Hill will be placed on two years of probation. Mr. Hill was ordered to enter into binding fee arbitration with two clients. Mr. Hill must pay the State Bar's costs and expenses of \$1,112, together with interest at the legal rate.

Mr. Hill represented clients with potentially adverse interests in one matter, asserted frivolous claims in another matter, failed to diligently pursue matters, failed to adequately communicate with his clients, charged excessive fees in light of the work performed on two matters, failed to protect a client's interests upon withdrawal on a matter, failed to abide by the scope of the representation in a matter and committed a criminal act (attempted aggravated assault) that reflected adversely on him and the legal profession.

Three aggravating factors were found: pattern of misconduct, multiple offenses and vulnerability of victim. Four mitigating factors were found: absence of prior discipline, personal or emotional problems, inexperience in the practice of law and imposition of other penalties or sanctions.

Mr. Hill violated ERs 1.2, 1.3, 1.4, 1.5, 1.7(b) and 3.1, Rule 42, ARIZ.R.S.C.T., and Rules 51(a) and 57(a), ARIZ.R.S.C.T.

LYNN M. PEARLSTEIN

Bar No. 002374; File Nos. 01-1005 and 02-1359

By Supreme Court judgment and order dated Feb. 18, 2004, Lynn M. Pearlstein, 4545 E. Shea Blvd., #258, Phoenix, AZ 85028, was suspended for 60 days by consent. Upon reinstatement, Mr. Pearlstein will be placed on two years of probation, including participation in the Member Assistance Program and the Law Office Member Assistance Program. Mr. Pearlstein must pay the State Bar's costs and expenses of \$1,455.11, together with interest at the legal rate.

In one matter, Mr. Pearlstein subjected a client to unwelcome commentary of a sexual nature, thereby engaging in a conflict of interest between his interests and his client's interests. In a second matter, Mr. Pearlstein failed to keep his client informed about the status of a matter and failed to promptly comply with requests from the client for information; failed to provide the client with

a full accounting when the client requested one; failed to take steps reasonably necessary to protect the client's interests when he withdrew from the representation; failed to properly supervise his non-attorney staff; failed to maintain complete records of the handling, maintenance and disposition of all funds that came into his possession from the client failed to promptly pay the unused portion of the client's advance fee when the representation terminated; and unintentionally failed to furnish information to the State Bar when the information was requested.

Five aggravating factors were found: dishonest or selfish motive, pattern of misconduct, refusal to acknowledge the wrongful nature of the conduct, vulnerability of victim and substantial experience in the practice of law. Five mitigating factors were found: absence of prior discipline, timely good faith effort to make restitution or rectify the consequences of the misconduct, full and free disclosure to disciplinary board and cooperative attitude toward proceeding, imposition of other penalties or sanctions and remorse.

Mr. Pearlstein violated ERs 1.4, 1.7(b), 1.15(b), 1.16(d), 5.3 and 8.4(d), Rule 42, ARIZ.R.S.C.T., and Rules 43(a), 44(b)(4) and 51(h), ARIZ.R.S.C.T.

STUART J. REILLY

Bar No. 005275; File No. 02-1867

By Supreme Court Judgment and order dated Feb. 20, 2004, Stuart J. Reilly, P.O. Box 80410, Phoenix, AZ 85060, was censured by consent. Mr. Reilly was placed on two years of probation, to include participation in the Member Assistance Program and Law Office Management Assistance Program. Mr. Reilly must pay the State Bar's costs and expenses of \$720.20, together with interest at the legal rate.

Mr. Reilly's conduct included failing to competently represent his client; failing to adequately communicate the status of the case to his client; failing to expedite the litigation for his client; failing to provide discovery as ordered by the court; failing to notify the court, his client and opposing counsel that he was on suspension from April 26, 2002 until Dec. 30, 2002; and engaging in conduct that was prejudicial to the administration of justice.

Two aggravating factors were found: prior disciplinary offenses and substantial experience in the practice of law. Five mitigating factors were found: absence of a dishonest or selfish motive; personal or emotional problems; timely good-faith effort to make restitution or to rectify the consequences of his misconduct; full and free dis-

ETHICS OPINIONS

Opinion 04-01

(January 2004)

An attorney may not assert a retaining lien against any items in a client's file that would prejudice the client's rights. Although an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file that the attorney asserts are subject to the retaining lien, and that would not prejudice the client's interests if withheld from the client.

Opinion 04-02

(March 2004)

Arizona, unlike some other states, does not allow a lawyer to be paid a fee merely for recommending another lawyer or referring a case. Instead, Arizona allows "referral fees" only in the sense that lawyers who are not in the same firm may divide a fee as provided in ER 1.5(e). That rule allows lawyers to divide a single billing to a client if three conditions are met: (1) each lawyer receiving any portion of the fee assumes joint responsibility for the representation; (2) the client agrees, in a signed writing, to the participation of all the lawyers involved; and (3) the total fee is reasonable. "Joint responsibility" requires, at the least, that the referring attorney accept vicarious liability for any malpractice that occurs in the representation. Although the client must consent to the respective roles of the lawyers in the ongoing representation, ER 1.5(e) does not require that the client consent to the particular division of the total fee among the lawyers.

The referral fee that does not satisfy ER 1.5(e) violates ER 7.2(b), which generally prohibits lawyers from paying others for channeling professional work. ER 7.2(b) is not violated, however, by a lawyer giving or receiving a "de minimis" gift that is not a "quid pro quo" for another lawyer's referring a particular client.

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closure to disciplinary board and cooperative attitude toward proceeding; and remorse.

Mr. Reilly violated ERs 1.1, 1.4, 3.2, 3.4 and 8.4(d), Rule 42, ARIZ.R.S.Ct., and Rule 63, ARIZ.R.S.Ct.

PHIL J. ROGERS

Bar No. 012333; File Nos. 94-0437, 94-2381 and 95-0020

By Supreme Court judgment and order dated Jan. 6, 2004, Phil J. Rogers, 4160 E. Camino, Mesa, AZ 85205, was censured by consent. Mr. Rogers must pay the State Bar's costs and expenses of \$845.74, together with interest at the legal rate.

Mr. Rogers was placed on disability inactive status on July 15, 1995 due to a serious stroke and was reinstated to active status on May 31, 2001. Mr. Rogers' misconduct took place prior to the stroke and involved him

ailing to diligently represent and adequately communicate with clients. Mr. Rogers also failed to properly manage his trust account by failing to maintain client ledgers; not withdrawing earned fees from the trust account; failing to record all transactions completely and promptly; failing to maintain proper internal controls within his office to adequately safeguard funds; and failing to maintain proper trust account records.

Three aggravating factors were found: pattern of misconduct, multiple offenses and substantial experience in the practice of law. Eight mitigating factors were found: absence of prior discipline, absence of dishonest or selfish motive, personal or emotional problems, timely good faith effort to make restitution or to rectify the consequences of misconduct, full and free disclosure to a disciplinary board or cooperative attitude towards

the proceedings, character or reputation, delay in the disciplinary proceedings and remorse.

Mr. Rogers violated ERs 1.3, 1.4, 1.15, 3.4 and 8.4(d), Rule 42, ARIZ.R.S.Ct., and Rules 43 and 44, ARIZ.R.S.Ct.

RANDALL M. SAMMONS

Bar No. 005811; File Nos. 01-0065, 01-1700 and 01-1808

By Supreme Court judgment and order dated Dec. 29, 2003, Randall M. Sammons, 2941 N. Swan Rd., Suite 1, Tucson, AZ 85712, was censured by consent. Mr. Sammons was placed on two years of probation to include his participation in both the Law Office Management Assistance Program and Member Assistance Program. Mr. Sammons must pay the State Bar's costs and expenses of \$728.40, together with interest at the legal rate.

For a period of time, Mr. Sammons failed to diligently represent clients and failed adequately communicate with his clients. In another matter, while acting as a conservator, Mr. Sammons failed to take appropriate steps to manage the financial affairs of a conservatorship and engaged in conduct prejudicial to the administration of justice.

Three aggravating factors were found: pattern of misconduct, multiple offenses and substantial experience in the practice of law. Five mitigating factors were found: absence of prior discipline, absence of dishonest or selfish motive, full and free disclosure to a disciplinary board or cooperative attitude towards the proceedings, character or reputation and remorse.

Mr. Sammons violated ERs 1.3, 1.4, 1.15 and 8.4(d) (Rule 42, ARIZ.R.S.Ct.) and Rule 51(k), ARIZ.R.S.Ct.

MAX C. TANNER

Bar No. 007802; File No. 03-4004

By Supreme Court judgment and order dated Feb. 12, 2004, Max C. Tanner, 2950 E. Flamingo, Ste. G, Las Vegas, NV 89121, was disbarred. Mr. Tanner must pay the State Bar's costs and expenses of \$600, together with interest at the legal rate.

Mr. Tanner was disbarred by consent in Nevada and, pursuant to Rule 58(c), ARIZ.R.S.Ct., the Arizona Supreme Court imposed reciprocal discipline. Mr. Tanner engaged in a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, violating ERs 8.4(b) and (c), Rule 42, ARIZ.R.S.Ct.

ROBERT J. TRAICA

Bar No. 006505; File No. 01-1392

By Supreme Court judgment and order dated Feb. 18, 2004, Robert J. Traica, 2800 N. Central Ave., Ste. 1400, Phoenix, AZ 85004, was censured for entering into an agreement to settle a lawsuit that included a broad release for any future claim for malpractice liability with unrepresented former clients without first advising the former clients in writing to seek independent representation. Mr. Traica must pay the State Bar's costs and expenses of \$666.90, together with interest at the legal rate.

Mr. Traica violated ER 1.8(h), Rule 42, ARIZ.R.S.Ct.

TIMOTHY J. WITTGES

Bar No. 012945; File No. 01-1535

By Supreme Court judgment and order dated Oct. 29, 2003, Timothy J. Wittges, 2425 S. 10th Ave., Tucson, AZ 85713, was suspended for six months and one day, effective the date of the order. Mr. Wittges must pay restitution of \$2,500 to one client. Mr. Wittges must pay the State Bar's costs and expenses in the amount of \$1,248, together with interest at the legal rate.

Mr. Wittges failed to consult with a client and abide by the client's decisions concerning the objectives of the representation and the means by which those objectives were to be accomplished; failed to exercise diligence in representing a client; failed to keep the client reasonably informed; failed to promptly comply with the client's reasonable requests for information; and engaged in conduct prejudicial to the administration of justice. Mr. Wittges also failed to cooperate with the State Bar during its investigations.

Five aggravating factors were found: prior disciplinary offenses, pattern of misconduct, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, vulnerability of victim and substantial experience in the practice of law. No mitigating factors were found.

Mr. Wittges violated ERs 1.2, 1.3, 1.4, 3.3, 8.1(b) and 8.4(d) (Rule 42, ARIZ.R.S.Ct.) and Rules 51(h) and (i) and 63, ARIZ.R.S.Ct. ▀

CAUTION:

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