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DEC 30 2009

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

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

NICHOLAS A. VAKULA,)
Bar No. 009876)

RESPONDENT.)

No. 09-0516

DISCIPLINARY COMMISSION REPORT

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on December 12, 2009, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed November 18, 2009, recommending censure and costs.

Decision

Having found no facts clearly erroneous, the eight members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.²

RESPECTFULLY SUBMITTED this 30th day of December, 2009.

Jeffrey Messing / mps
Jeffrey Messing, Chair
Disciplinary Commission

Original filed with the Disciplinary Clerk
this 30th day of December, 2009.

¹ Commissioner Osborne did not participate in these proceedings.
² The Hearing Officer's Report is attached as Exhibit A.

Copy of the foregoing mailed
this 31 day of December, 2009, to:

Hon. H. Jeffrey Coker
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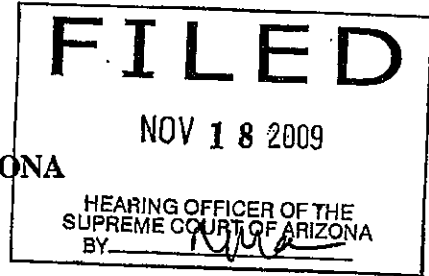
by: Deann Baker

/mps

EXHIBIT

A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA



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

No. 09-0516

NICHOLAS E. VAKULA,)
Bar No. 009876)

HEARING OFFICER'S REPORT

RESPONDENT.)
_____)

PRECEDURAL HISTORY

1. Probable cause was found in this matter on June 3, 2009, and thereafter a Tender of Admissions and Agreement for Discipline by Consent were filed on September 1, 2009. The matter was assigned to the undersigned Hearing Officer on September 8, 2009, and went to hearing on the Tender and Agreement October 2, 2009. Present at the hearing were Bar Counsel, Respondent and his attorney, as well as the undersigned.

FINDINGS OF FACT

2. At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona, having been first admitted to the practice in Arizona on October 20, 1984.¹
3. Respondent is a Certified Specialist in the areas of Personal Injury and Wrongful Death, having first become a Certified Specialist on November 10, 1999.

¹ All facts cited herein are taken from the original Tender of Admissions unless the transcript is cited. Due to some confusion regarding the amounts of the loans to Respondent's clients, the parties were to submit a supplement to the original Tender and Agreement. However, the supplement had not been filed by the date that this Report was due, so it is filed without that information. A supplement to this Report will be filed when the clarification is made.

Count One (File no. 09-0516)

4. At all times material to this matter, Respondent's law practice focused on representation of injury victims (more commonly known as a "plaintiff bodily injury practice").
5. During the pendency of Respondent's client's claims or suits, the clients were often faced with challenging financial circumstances that left them with little choice other than to obtain loans to assist with their living circumstances.
6. Between 2005 and 2007 Respondent had an arrangement with an attorney, Garvey Biggers ("Mr. Biggers"), by which Mr. Biggers loaned money to Respondent's clients ("Client_____") while the client's claims or suits were pending.
7. Respondent arranged loans by Mr. Biggers to the clients since Respondent knew that he was ethically precluded from making direct loans or providing financial assistance to his clients.
8. Mr. Biggers entered into Promissory Notes with Respondent's clients for loans in amounts varying from \$500-\$10,000 per client.
9. On those occasions when Mr. Biggers did not himself have the funds available to make the loans to the clients, Respondent provided Mr. Biggers with the funds from his (Respondent's) personal accounts.
10. Mr. Biggers used the money that Respondent personally provided to cover the loans made to Respondent's clients.
11. Mr. Biggers deposited into his Lawyer Trust Account money he received from the Respondent and "funded" Respondent's client's loans with checks written on his Lawyer Trust Account.

- a. On or about December 29, 2005, check number 4765, in the amount of \$3,000 was written to Client Edwards from Mr. Bigger's Lawyer Trust Account.
 - b. On or about May 16, 2006, check number 4783 in the amount of \$4,000 was written to Client Carpenter from Mr. Bigger's Lawyer Trust Account.
 - c. On or about February 17, 2006, check number 4772 in the amount of \$6,000 was written to Client Carpenter from Mr. Bigger's Lawyer Trust Account.
 - d. On or about August 8, 2006, check number 4792 in the amount of \$4,000 was written to Client Carpenter from Mr. Bigger's Lawyer Trust Account.
 - e. On or about June 23, 2006, check number 4788 in the amount of \$5,000 was written to Client Adolemaiu-Bey from Mr. Bigger's Lawyer Trust Account.
 - f. On or about June 5, 2006, check number 4786 in the amount of \$2,000 was written to Client Thomas from Mr. Bigger's Lawyer Trust Account.
12. Respondent knew that Mr. Biggers "funded" some of Respondent's client's loans with checks written on Mr. Bigger's Lawyer Trust Account.
 13. On or about December 29, 2005, and January 16, 2007, Client Edwards signed two Notes, each in the amount of \$3,000 each for a total of \$6,000 in loans.
 - a. The December 29, 2005, Note had a payment deadline of December 29, 2006, but allowed for pre-payment without penalty and the option to have the time for payment extended.

- b. The loan to Client Edwards was made by check dated December 29, 2005, in the amount of \$3,000.
 - c. By personal check dated December 29, 2005, Respondent gave Mr. Biggers \$3,000 to cover the loan made to Client Edwards.
 - d. The loan repayments are pending the conclusion of Client Edward's litigation.
14. On or about May 19, 2005, Client Sweis signed a Note for \$3,000.
- a. The May 19, 2005, Note had a payment deadline of December 2005, but allowed for prepayment without penalty and the option to have the time for payment extended.
 - b. On December 22, 2005, Respondent made an advance payment on settlement to his client in the amount of \$1,000.
 - c. Client Sweis paid the \$3,000 Note held by Mr. Biggers and the \$1,000 advance payment made by Respondent from his settlement funds.
15. On or about January 31, 2007, and June 27, 2007, Client Chandler-Williams signed two Notes in the amounts of \$1,500 and \$2,500, respectively, for a total of \$4,000 in loans. The Notes did not designate a payment deadline and allowed for prepayment without penalty.
- a. By personal check dated January 31, 2007, Respondent provided Mr. Biggers with \$1,500 to cover the January 31, 2007, loan to Client Chandler-Williams.
 - b. On July 24, 2008, Respondent made an advance payment on settlement to his client in the amount of \$1,000.

- c. On or about February 26, 2008, Mr. Biggers received \$4,000 as payment in full for client Chandler-Williams' Notes after Ms. Chandler-Williams obtained funds from another loan source.
16. On or about April 4, 2007, Client Lemons signed a Note for \$1,000. The Note did not designate a payment deadline and allowed for prepayment without penalty.
- a. The \$1,000 Note held by Mr. Biggers was paid on or about April 12, 2007, from Client Lemon's settlement funds.
 - b. By personal check dated April 12, 2007, Mr. Biggers made a payment to Respondent as "reimbursement of the loan (Lemons)."
17. On or about November 21, 2006, Client Smith signed a Note for \$2,000. The Note did not designate a payment deadline and allowed for prepayment without penalty.
- a. The \$2,000 Note held by Mr. Biggers was paid on or about March 27, 2007, from Client Smith's settlement funds.
18. On or about November 30, 2005, and May 16, 2006, Client Carpenter signed two Notes in the amounts of \$3,000 and \$4,000 respectively for a total of \$7,000 in loans. The Notes did not designate a payment deadline and allowed for prepayment without penalty.
- a. By personal check dated November 30, 2005, Respondent paid Mr. Biggers \$3,000 to cover the November 30, 2005, loan to Client Carpenter.
 - b. The \$3,000 Note held by Mr. Biggers was paid on or about January 26, 2006, from Client Carpenter's settlement funds.

- c. The \$4,000 Note held by Mr. Biggers was paid on or about May 10, 2007, from Client Carpenter's settlement funds.
19. On or about December 5, 2006, January 24, 2007, and March 1, 2007, Client Sutton signed Notes in the amounts of \$1,500, \$500, and \$1,000, respectively for a total of \$3,500.² The Notes did not designate a payment deadline and allowed for prepayment without penalty.
- a. By personal check dated January 25, 2007, Respondent paid Mr. Biggers \$500 to cover the January 24, 2007, loan to Client Sutton.
- b. On or about December 3, 2007, Respondent paid \$500 from his personal checking account to a medical service provider who had treated Client Sutton.
- c. The \$3,500 note held by Mr. Biggers was paid in full on or about November 26, 2007, from funds obtained by Client Sutton from other loan sources.
- d. The \$1,000 payments made by Respondent in the form of the \$500 payment to Mr. Biggers and the \$500 payment to the medical service provider were reimbursed to Respondent's law firm from Client Sutton's settlement funds.
20. On or about February 16, 2006, and August 9, 2006, Client Russell signed Notes in the amounts of \$6,000 and \$4,000, respectively, for a total of \$10,000 in loans. The Notes did not designate a payment deadline and allowed for prepayment without penalty.
- a. The \$10,000 in Notes held by Mr. Biggers was paid in full from Client Russell's settlement funds.

² These are the Notes for which there is a question, as the figures given in the Tender do not add up.

21. On or about June 23, 2006, Client Adolemaiu-Bey signed a Note in the amount of \$5,000.
 - a. Although the Note does not specifically designate a date when the payment is due, Client Adolemaiu-Bey changed the year to reflect "2007" rather than "2006", and initialed his changes. The Note allowed for prepayment without penalty.
 - b. The repayment of the Note is pending receipt by Respondent of settlement funds.
22. On or about June 6, 2006, Client Thomas signed a Note in the amount of \$2,000.
 - a. The Note designated a payment deadline of December 31, 2007. The Note allowed for prepayment without penalties.
 - b. By personal check dated June 5, 2006, Respondent paid Mr. Biggers \$2,000 to cover the \$2,000 loan made to Client Thomas.
 - c. The \$2,000 Note held by Mr. Biggers was paid in full on or about March 29, 2007, from Client Thomas' settlement funds.
23. Respondent testified at the hearing in this matter that while he knew that he could not directly loan money to his clients, he thought that what he and Mr. Biggers were doing was okay, Transcript of Hearing "T/H" 9:16-9:23.
24. Respondent further testified that by the date of the hearing all loans by Mr. Biggers to Respondent's clients have been repaid by the clients except for Mr. Edwards, T/H 17:16-22.

CONCLUSIONS OF LAW

25. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically ERs 1.7, 1.8, and 8.4(a).

ABA STANDARD

26. ABA *Standard* 3.0 provides that four criteria should be considered: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

27. This Hearing Officer finds that Respondent's conduct violated: His duty to his clients, *Standard* 4.0; His duty owed as a professional, *Standard* 7.0; and he failed to avoid conflicts of interest, *Standard* 4.3.
28. As set forth in the Joint Memorandum submitted in this matter, the parties stipulate that the presumptive sanction is a Censure pursuant to a "negligent" state of mind under *Standards* 4.33 and 7.3. However, *Standard* 4.32 provides that Suspension is the appropriate sanction when a lawyer "...knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Similarly, *Standard* 7.2 provides that Suspension is the appropriate sanction when a lawyer "...knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system".

The Lawyer's Mental State

29. The parties stipulated, and the Hearing Officer could find no evidence to the contrary, that Respondent knowingly engaged in the conduct described herein and that he knew his conduct was in violation of the Rules of Professional Conduct, see Joint Memorandum p.4:4. There is a very fine line drawn by the parties in this matter in that the parties stipulate that Respondent knew that he could not make loans directly to his client. However, the parties submit that Respondent was "negligent" in believing that as long as he went through Mr. Biggers it would pass muster under the Rules, T/H 9:16-9:23.

The Injury Caused

30. The parties submit that, while there was the potential for harm, no actual harm occurred to Respondent's clients, T/H 13:15-13:21. The parties further submit that: "Respondent's violations stemmed from his concern for the welfare of his clients during times that the clients were facing financial difficulties." (Joint Memorandum p5:6)

Aggravating and Mitigating Factors

Aggravating Factors:

31. *Standard 9.22(a)*: Prior disciplinary offense. Respondent received an Informal Reprimand in 1995 when he failed to honor a lien, in violation of ER 1.15, Rule 42, Ariz.R.Sup.Ct.
32. *Standard 9.22(d)*: Multiple offenses. Respondent participated in ten (10) loans to clients over the course of approximately 4 years.
33. *Standard 9.22(h)*: Vulnerability of victims.

34. *Standard 9.22(i)*: Substantial experience in the practice of law. Respondent has practiced law since 1984 and has been a Certified Specialist in the field of Personal Injury and Wrongful Death since 1999.

Mitigating Factors:

35. *Standard 9.32(b)*: Absence of dishonest or selfish motive. Respondent's actions were based on concern for the well-being of his clients. At the hearing in this matter, Bar Counsel stated that he was convinced that Respondent was trying to help his clients and his remorse is genuine, T/H 5:25-6:18, and Respondent affirmed that position.

36. *Standard 9.32(e)*: Full and free disclosure to a disciplinary board or cooperative attitude toward proceedings. Respondent self-reported his conduct and provided information and documents corroborating the charges, thereby rendering "full" disclosure to the State Bar. Respondent's self-report followed exposure of his behavior in discovery proceedings pertinent to certain civil litigation regarding Mr. Biggers, rendering it questionable whether his self-report to the State Bar was genuinely "free". For the purpose of these proceedings, the State Bar accepts that Respondent's self-report, and disclosure, were both "full" and "free".

37. *Standard 9.32(g)*: Character or reputation. Respondent is a Certified Specialist in the field of Personal Injury and Wrongful Death.

38. *Standard 9.32(l)*: Remorse.

39. *Standard 9.32(m)*: Remoteness of prior offenses. Respondent's previous misconduct occurred approximately 14 years ago.

PROPORTIONALITY REVIEW

40. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality “is an imperfect process” because no two cases are ever alike, *In re Struthers*, 179 Ariz. to 16, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasley* supra.
41. In this case, the parties submit that the Respondent should receive a Censure, pay all costs incurred in these proceedings and refrain from engaging in any further conduct that would be a violation of the Rules of Professional Conduct. The parties submit the following cases as “Proportionality Cases”.
42. In *In re Shimko*, SB-09-0061-D (June 23, 2009), Shimko, an attorney not licensed in the state of Arizona, entered into an agreement for discipline by consent for a Censure and payment of costs. Shimko admitted to violations ERs 1.5, 1.7, 1.8(a), 1.8(e), 1.13(e), and 8.4(a). Shimko overcharged clients, represented clients with potential conflicts of interest, represented an organization as a client without approval from a member, went into business with the client without obtaining informed consent or advising the client of the desirability of seeking the advice of independent legal counsel, and lending a client money. A selfish or dishonest motive, *Standard* 9.22(b), and substantial experience in the practice of law,

Standard 9.22(i), were found as aggravating factors. Four factors were founded in mitigation: *Standard 9.32(a)*, absence of prior disciplinary record; *Standard 9.32(d)*, good-faith effort to rectify the consequences of misconduct; *Standard 9.32(e)*, cooperative attitude towards proceedings; and *9.32(k)*, imposition of other penalties or sanctions. There was no actual injury to the clients, but the potential for injury existed. Shimko's mental state was negligent in overcharging his client (ER 1.5), but knowing as to the violation of ERs 1.7, 1.8 and 8.4(a). The Hearing Officer found that a Censure or Suspension were appropriate in the case. However, since Shimko was not an Arizona attorney, Censure was the appropriate sanction.

43. In *In re Gorey*, SB-08-0117-D (September 2, 2008), Gorey engaged in a conflict of interest by providing financial assistance to a client in connection with pending litigation. Gorey further failed to obtain his clients informed written consent to the conflict in violation of ERs 1.7 and 1.8(e). Gorey received a Censure and one year of probation, with CLE terms. *Standard 9.22(i)*, substantial experience in the practice of law was found to be the only aggravating factor. Three factors were found in mitigation: *9.32(a)*, absence of prior disciplinary record; *9.32(e)* full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and *9.32(l)* remorse. There was no injury to the clients and Gorey acted with a negligent mental state.
44. In *In re Wickland*, SB-05-0049 (December 12, 2005), Wickland provided financial assistance to a client for the client's personal use during the course of the representation in violation of ER 1.7. In addition, Wickland allowed his father to

make a loan to the client, thereby acquiring an interest in the outcome of the litigation, in violation of ER 1.8. Wickland received an Informal Reprimand and Probation, with Ethics Enhancement Program terms.

45. In *In re Siirtola*, SB-07-1794 (May 28, 2008), Siirtola failed to maintain adequate communication with the client, and provided financial assistance to the client that was neither court costs nor expenses of litigation, in violation of ERs 1.4 and 1.8(e). Siirtola received an Informal Reprimand for his misconduct.

RECOMMENDATION

46. The purpose of attorney discipline is not punish the lawyer, but to protect the public, the profession, the administration of justice, and deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill public confidence in the Bar's integrity, *Matter of Horvitz*, 180 Ariz. 20, 881 P.2d 352 (1994).
47. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).
48. As mentioned previously, the parties draw a very fine line between the "knowing" funding of, and arranging for, loans to his clients who are in need of funds to last them until their litigation has been completed, and the "negligent" belief that

allowing a third party to do the same thing while occasionally he provided money to make the loans was okay.

49. At the hearing in this matter, this Hearing Officer found the Respondent to be not only very remorseful and sincerely so, but, at the time the loans were made, had an honestly held, albeit erroneous, opinion that what he and Mr. Biggers were doing was okay. In hindsight, both he, as well as this Hearing Officer, would judge his conduct much more harshly, and it is hard to see how he thought having someone else do what he could not do was okay if he was providing the money for Mr. Biggers to do it.
50. Several things persuade this Hearing Officer that Respondent was indeed acting negligently. By Mr. Biggers using his trust account, it was very easy to follow a paper trail on what they were doing. Had Respondent "knowingly" intended to violate the Rules, the fact that he was using a fellow attorney's trust account, was not a very good cover, and there does not appear to be deception intended. Also, once he became aware that what he was doing was a violation of the Rules, he reported himself to the Bar and cooperated fully in the investigation, T/H 14:6-16:6. Finally, there was not much benefit to the Respondent by him and Mr. Biggers loaning money to Respondent's clients interest free. It was pointed out at the hearing that people in the businesses of loaning money to people like Respondent's clients in advance of receipt of personal injury settlement funds, do so at an extremely high rate of interest, T/H 10:25-11:25, and what Respondent was attempting to do was allow his clients to financially remain above water until their case was resolved, to no benefit (in the way of interest) to the Respondent,

other than it allowed his clients to not be forced, because of economic hardship, to settle their case early for a lesser amount. To misquote an old saying: "The road to trouble is paved with good intentions".

51. The sanction called for in the parties agreement is not as severe as the sanction in some of the proportionality cases cited, but then, Respondent's conduct is not as egregious as the conduct in those cases. Similarly, the sanction given to at least one lawyer in a similar situation was less than that called for in this case.
52. When asked why probation was not added as an additional term to the sanction recommended by the parties, Bar Counsel commented that he simply felt that this was not an ongoing problem which required further monitoring of the Respondent, and that the Bar could not come up with much that probation would accomplish, T/H 12:15-13:14.
53. When all the factors are considered in this case, this Hearing Officer must conclude that the Respondent did act with a "negligent" state of mind in thinking that arranging for someone else to make loans to his clients was not a violation of the Rules, and therefore the recommended sanction of a Censure and the imposition of costs and expenses of these proceedings is sufficient to protect the public, as well as the integrity of the profession and the administration of justice.
54. Therefore, it is recommended that:
 - 1) Respondent be Censured;
 - 2) Respondent pay the costs and expenses of these disciplinary proceedings.

DATED this 18th day of November, 2009.

H. H. Jeffrey Coker (W/M)
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 18th day of November, 2009.

Copy of the foregoing mailed
this 19 day of November, 2009, to:

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by: Deann Barber