BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **ALLAN BARFIELD,** Bar No. 013148 RESPONDENT.	No. 02-0924 **HEARING OFFICER'S REPORT AND RECOMMENDATION**

PROCEDURAL HISTORY

A Probable Cause Order was filed on December 9, 2002. A three-count Complaint was filed March 18, 2003. Respondent, through his counsel, accepted service of the Complaint. An Answer to the Complaint was filed May 8, 2003. This Hearing Officer initially set a hearing in this matter for August 11, 2003. At the request of counsel for Respondent, the hearing was continued until August 26, 2003. This continued hearing ultimately was vacated as the State Bar and Respondent reached an agreement for discipline by consent.

On September 15, 2003, the State Bar and Respondent submitted a "Tender of Admissions and Agreement for Discipline by Consent" to the Disciplinary Commission. On December 3, 2003, the Disciplinary Commission issued its report rejecting the agreement. Six members of the Commission voted to reject the agreement, stating that the record was insufficient to justify stipulated discipline of censure. Three members of the Commission dissented, believing the stipulated discipline was appropriate.

No petition for review was filed from the Disciplinary Commission report. The Clerk of the Supreme Court, on February 2, 2004, entered an order, remanding this matter to this Hearing Officer.

The State Bar and the Respondent, on April 27, 2004, submitted a Joint Pre-hearing Statement, which included certain stipulated facts. A duly noticed evidentiary hearing in this matter was held May 4, 2004. Respondent was present in person and through counsel, Richard Segal. The State Bar was represented by Shauna R. Miller, Senior Bar Counsel.

At the evidentiary hearing, three witnesses (Brain Murphy, Bradley Jenkins and Respondent) testified. Three exhibits (two of which were letters written by Respondent's counsel) were offered and admitted. The Hearing Officer, with the consent of the parties, took judicial notice of certain facts as noted hereafter.

FINDINGS OF FACT

Based on the stipulated facts contained in the Joint Pre-hearing Statement and the evidence presented at the May 4, 2004 hearing, the following facts are found to exist:

FINDINGS RELEVANT TO ALL COUNTS OF THE COMPLAINT

1. Respondent was admitted to practice law in Arizona on October 27, 1990. See "Uncontested Facts Deemed Material" in *Joint Pre-hearing Statement*, filed April 27, 2004 (hereafter "Stipulated Fact"), *Stipulated Fact 1*.

2. Respondent began his legal career, working in the insurance defense area at the O'Connor Cavanagh law firm. Through work on a matter at O'Connor Cavanagh, Respondent became acquainted with the out-of-state law firm Meyer & Williams, P.C., which firm has

substantial trial experience in plaintiff personal injury cases. *Transcript of May 4, 2004 Hearing* (hereafter "Transcript"), *page 51, lines 11 - 22; page 60, line 22 - page 62, line 21.*

3. Respondent left O'Connor Cavanagh, formed his own law firm known as Allan Barfield, P.C. Respondent would associate with Meyer & Williams, P.C., on plaintiff personal injury matters. The client would sign a retainer agreement with Meyer & Williams, P.C., which agreement would state that Meyer & Williams, P.C., might associate with other counsel. It was through this provision that Respondent would work on cases with Meyer & Williams, P.C. *Transcript, page 61, line 4 - page 62, line 21; page 64, line 6 - page 65, line 4.*

4. Meyer & Williams, P.C., would advance costs on the plaintiff personal injury matters on which Respondent was associated. *Transcript, page 65, lines 2 - 4.*

5. After approximately eight years associating on cases with Meyer & Williams, P.C., Respondent helped form the law firm of Simbro, White & Barfield, P.C., where his personal injury practice could continue, but without the continued need to associate with Meyer & Williams, P.C.. *Transcript, page 63, line 3 - page 64, line 2.*

6. Bradley Jenkins ("Mr. Jenkins") was severely burned in a gasoline explosion on April 24, 1995 while working at a plant owned by National Petroleum Marketing, Inc. ("NPM"). Mr. Jenkins spent three months in the burn unit at Maricopa Medical Center in Phoenix ("MMC"). *Stipulated Fact 2; Transcript, page 24, lines 3 - 9.*

7. Mr. Jenkins incurred approximately $590,000.00 in medical expenses at MMC. *Stipulated Fact 3; Transcript, page 24, lines 6 - 12.*

8. These medical expenses initially were paid to MMC by the State Compensation Fund, but Mr. Jenkins successfully challenged the claim that his injury was covered by worker's

compensation. The State Compensation Fund recovered the funds it paid to MMC. *Transcript, page 10, lines 8 - 23; page 24, line 10 - page 25, line 8.*[1]

9. Mr. Jenkins signed a retainer agreement with Meyer & Williams, P.C., to pursue recovery for his injuries. *Stipulated Fact 4; Transcript, page 26, line 21 - page 27, line 11; page 64, line 6 - page 65, line 1.*

10. In January 1996, Respondent, in association with Meyer & Williams, filed a lawsuit (hereafter the "NPM Lawsuit") on behalf of Mr. Jenkins against NPM and others. *Stipulated Fact 4; Transcript, page 26, line 21 - page 27, line 11.*

11. At the time of his injuries, Mr. Jenkins was covered by a medical insurance policy issued by Cigna. Based on Respondent's concerns regarding Cigna's potential subrogation rights if Cigna paid the medical bills, Mr. Jenkins did not submit his medical bills to Cigna. *Transcript, page 25, line 9 - page 26, line 20.*

12. On July 14, 1998, MMC notified Respondent that it claimed a statutory lien in the amount of $590,000.00 plus interest on any recovery in the NPM Lawsuit. *Stipulated Fact 7.*

13. On July 30, 1998, MMC filed its Notice and Claim of Hospital Lien in the amount of $590,000.00 plus interest. *Stipulated Fact 5.*

14. Respondent advised Mr. Jenkins that MMC's lien was invalid and that proceeds from the NPM Lawsuit, from settlement or otherwise, probably would not be required to pay MMC. *Stipulated Fact 8; Transcript, page 27, line 12 - page 30, line 2.*

---

[1] Mr. Jenkins' ability to file suit for his injuries if those injuries were covered by worker's compensation. *A.R.S. §23-801, et. seq.*

15. In October 1998, after lengthy negotiations, Mr. Jenkins, through the efforts of Respondent, settled the NPM Lawsuit for approximately $3,000,000.00. The settlement demand of Mr. Jenkins exceeded $3,000,000, but Mr. Jenkins agreed to a reduced amount based on the advice from Respondent and others that the MMC lien was invalid and that Mr. Jenkins might not be liable to MMC for any repayment of medical expenses. In an effort to strengthen Mr. Jenkins' position in relation to the MMC lien, the settlement agreement provided that none of the settlement funds were allocated to medical expenses.[2] *Stipulated Fact 6; Transcript, page 30, lines 3 - 11; page 71, line 25 - page 72, line 22; page 79, line 10 - page 81, line 5.*

16. In spite of the belief that the MMC lien was unenforceable, Mr. Jenkins agreed, as part of the NPM Lawsuit settlement, to hold funds in an interest bearing account in case MMC could recover for the medical expenses. *Transcript, page 30, lines 12 - 25; page 31, line 17 - page 32, line 1; page 55, line 16 - page 57, line 3; page 75, line 1 - page 76, line 6.*

17. MMC advised Respondent on January 13, 1999 that it had a lien on the NPM Lawsuit settlement proceeds. *Stipulated Fact 9.*

18. Respondent advised Mr. Jenkins to refuse to honor the MMC lien, as it was untimely and hence invalid, among other reasons. *Stipulated Fact 10; Transcript, page 27, line 12 - page 30, line 2.*

19. Based on Respondent's advice and the advice of others, Mr. Jenkins refused to honor the lien. *Stipulated Fact 11; Transcript, page 27, line 12 - page 30, line 11.*

---

[2] There is an argument that health care liens attach only to that portion of a recovery attributable to medical expenses.

FINDINGS RELEVANT TO COUNT ONE OF THE COMPLAINT

20. In April 1999, MMC filed a lawsuit (hereafter the "MMC Lawsuit") against Mr. Jenkins and his wife. *Stipulated Fact 12; Transcript, page 32, lines 2 - 11; page 33, lines 6 - 14.*

21. Also named as Defendants in the MMC Lawsuit were Respondent and the different law firms with which Respondent had been associated with during Respondent's representation of Mr. Jenkins. *Stipulated Fact 12; Transcript, page 32, lines* 5 - 9.

22. Respondent represented all defendants in the MMC Lawsuit. *Stipulated Fact 13; Transcript, page 32, lines 12 - 17; page 57, line 21 - page 59, line 12; page 78, line 18 - page 79, line 5.*

23. Respondent believed the defense of the MMC Lawsuit was within the scope of the Meyer & Williams, P.C. retainer agreement. *Transcript, page 57, line 21 - page 58, line 4; page 83, lines 8 - 19.* Therefore, no attorneys' fees were charged to Mr. Jenkins for the MMC Lawsuit by Respondent or Meyer & Williams, P.C., beyond the contingency percentage received from the settlement in the NPM Lawsuit. *Transcript, page 44, lines 5 - 23; page 83, lines 8 - 19.*

24. Respondent discussed with Mr. Jenkins the overall strategy for the defense of MMC Lawsuit. *Transcript, page 59, lines 7 - 12.*

25. Respondent did not perceive any conflict of interest in representing all defendants in the MMC Lawsuit and told Mr. Jenkins that their interests were "linked." *Transcript, page 32, lines 18 - 24; page 57, line 14 - page 60, line 14.*

26. Respondent did not explain the implications of the joint representation in the MMC Lawsuit to Mr. Jenkins and did not obtain Mr. Jenkins' consent to that common representation. *Stipulated Fact 16; Transcript, page 32, line 18 - page 33, line 3.*

27. The State Bar attempted to have witness Brian Murphy render an opinion that there was an unwaivable conflict in representing all defendants in the MMC Lawsuit. That opinion was excluded, not on competency grounds, but on the failure to disclose the opinion in compliance with Rule 26.1. *Transcript, page 17, line 9 - page 19, line 25.*

28. In April 2001, the trial court in the MMC Lawsuit ruled that MMC's lien was invalid under A.R.S. § 33-931. The trial court, however, ruled that Mr. Jenkins was liable for reimbursement to MMC pursuant to A.R.S. § 12-962, therefore the trial court ruled that Mr. Jenkins owed MMC an unsecured indebtedness of $590,000.00 plus accrued interest and attorneys' fees. *Stipulated Fact 14;*[3] *Transcript, page 33, line 9 - page 34, line 2.*

29. The trial court, at the same time, ruled that the defendants other than Mr. and Mrs. Jenkins were not liable to MMC. Therefore, the MMC Lawsuit was dismissed against the other defendants, including Respondent. *Transcript, page 13, line 24 - page 14, line 9; page 33, lines 15 - 22.*

30. Mr. Jenkins appealed the judgment entered against him in the MMC Lawsuit and hired separate counsel to handle the appeal. *Stipulated Fact 15; Transcript, page 34, line 3 - page 35, line 12; page 60, lines 15 - 21.*

---

[3] The parties in their stipulated facts state that the trial court's ruling in the MMC Lawsuit occurred in April 2000. The Hearing Officer may take judicial notice of the Superior Court records from the MMC Lawsuit. *In re Ronwin*, 139 Ariz. 576, 579, 680 P.2d 107, 110 (1983); *In re Horwitz*, 180 Ariz. 20, 23, 881 P.2d 352, 355, note 3 (1994). The parties agreed the Hearing Officer could take judicial notice of those proceedings. *Transcript, page 14 , line 11 - page 15, line 6.* The Superior Court docket reflects that the trial court's ruling was in April 2001.

31. Mr. Jenkins paid $50,000.00 to this appellate counsel. *Transcript, page 43, lines 2 - 16.*

32. While the appeal was pending from judgment entered against Mr. Jenkins in the MMC Lawsuit, the dispute between MMC and Mr. Jenkins was settled for $500,000, which Mr. Jenkins paid from the funds he set aside as part of the NPM Lawsuit settlement. *Transcript, page 35, lines 6 - 12; page 43, lines 17 - 25; page 46, line 24 - page 47, line 15.*

33. There is no allegation in the State Bar Complaint of any ethical violation relating to Respondent's advice regarding MMC's lien rights or right of reimbursement. *Transcript, page 16, lines 12 - 24.*

34. The trial court's ruling in favor of the other defendants was affirmed by the Court of Appeals in a published opinion. *Maricopa County v. Barfield*, 206 Ariz. 109, 75 P.3d 714 (App. 2003). On the request of Respondent, the Hearing Officer took judicial notice of the Court of Appeals' opinion. *Transcript, page 15, lines 1 - 6.*

FINDINGS RELEVANT TO COUNT TWO OF THE COMPLAINT

35. Mr. Jenkins invested the NPM Lawsuit settlement proceeds, net of the attorneys' fee contingent percentage and the agreed-upon hold-back, in a money market account. *Transcript, page 42, lines 2 - 11; page 52, line 13 - page 53, line 4.*

36. Because Mr. Jenkins and Respondent were social acquaintances, Mr. Jenkins would discuss his investments with Respondent. *Transcript, page 35, line 18 - page 36, line 20; page 52, line 13 - page 53, line 4.*

37. Since Meyer & Williams, P.C., advanced the costs on the plaintiff personal injury matters on which Respondent was associated, a new source of advanced costs was needed when Simbro, White & Barfield, P.C., was formed. *Transcript, page 65, lines 2 - 8.*

38. At a social lunch, Respondent mentioned to Mr. Jenkins that Respondent was working on financing for an advanced costs fund at Simbro, White & Barfield, P.C., and that Respondent probably was going to grant a lien on a second home Respondent owned personally in order to secure the financing. Respondent asked Mr. Jenkins if he would be interested in financing the advanced costs fund at a return larger than Mr. Jenkins was obtaining. *Transcript, page 44, line 24 - page 45, line 22; page 52, line 13 - page 53, line 4.*

39. Mr. Jenkins agreed to finance the new law firm's advance costs fund. The parties orally agreed the total loan would be $100,000, would accrue interest at the rate of 12% per annum and would be due upon demand. This agreement was reached during the period that Respondent represented Mr. Jenkins. *Stipulated Fact 17; Transcript, page 42, lines 12 - 22; page 48, lines 21 - 28; page 52, line 13 - page 53, line 4.*

40. Mr. Jenkins agreed to the loan as the twelve percent (12%) interest promised was higher than he was earning and he thought the loan was advantageous to him. *Transcript, page 42, lines 12 - 22.*

41. Mr. Jenkins is a reasonably sophisticated businessman, being a trader in petroleum markets. *Transcript, page 22, line 18 - page 23, line 2; page 37, line 1 - page 41, line 21; page 55, lines 5 - 15.*

42. The loan agreement was never reduced to writing. *Stipulated Fact 18; Transcript, page 48, lines 18 - 20; page 53, lines 5 - 8.*

43. Respondent explained no written memorial of the loan was made because Respondent and Mr. Jenkins were friends. *Transcript, page 48, lines 18 - 20; page 53, lines 5 - 8.*

44. Respondent never advised Mr. Jenkins to seek independent legal advice regarding the loan agreement. *Stipulated Fact 18.*

45. On or about September 14, 2000, Mr. Jenkins advanced Respondent $55,000.00 under the terms of the oral loan agreement. *Stipulated Fact 19.*

46. On or about September 25, 2000, Mr. Jenkins advanced Respondent $45,000.00 under the terms of the oral loan agreement. *Stipulated Fact 20.*

47. Although Respondent contemplated securing conventional financing with his second residence, Respondent offered no collateral to Mr. Jenkins to secure the repayment of Mr. Jenkins's loan. Mr. Jenkins did not ask for collateral. Respondent did not offer any collateral to Mr. Jenkins. *Transcript, page 46, lines 11 - 13; page 54, line 20 - page 55, line 4.*

48. Because the loan agreement was oral, the obligor of the loan was unclear. It might have been Allan Barfield, P.C., or it might have been Respondent personally. *Transcript, page 46, lines 14 - 20; page 66, lines 1 - 12; page 69, lines 13 - 21.*

49. If the loan was to Allan Barfield, P.C., the oral personal guarantee from Respondent would have been of dubious value as Respondent was (and is) married and the lack of his spouse's joinder would have prevented collection from community assets. *Transcript, page 46, lines 14 - 20; page 66, lines 1 - 17.*

50. The terms of the loan, in fact, were not disputed. However, the fact that the loan agreement was oral created the risk that the terms (e.g., interest rate, maturity) could be disputed. *Stipulated Fact 18; Transcript, page 48, lines 18 - 20; page 53, lines 5 - 8.*

51. The loan proceeds were used to finance Respondent's law firm, in particular the costs which the firm would advance in plaintiff personal injury cases. *Transcript, page 44, line 24 - page 45, line 22; page 46, lines 14 - 20; page 65, lines 18 -25.*

52. There was no evidence that Respondent was undergoing any financial difficulty at the time of the loan from Mr. Jenkins. *Transcript, page 66, line 18 - page 67, line 12.*

53. On or about May 24, 2001, Respondent repaid $50,000.00 plus accrued interest in the amount of $9,750.00. The payment occurred after Respondent has settled a large personal injury case and therefore had the funds readily available to repay Mr. Jenkins. Respondent offered at this time to repay Mr. Jenkins in full, but Mr. Jenkins requested that only half his loan be repaid. *Stipulated Fact 21; Transcript, page 49, lines 1 - 9; page 67, lines 4 - 20; page 69, lines 8 - 12.*

54. On or about July 19, 2002, after Mr. Jenkins filed a malpractice lawsuit against Respondent, Respondent repaid an additional $56,000.00 to Mr. Jenkins, which completely repaid the loan. *Stipulated Fact 22; Transcript, page 49, lines 10 - 13; page 68, line 13 - page 69, line 7; page 69, lines 13 - 21.*

55. Respondent admits his conduct, as alleged in Count Two of the Complaint, violates ER 1.8(a). *Stipulated Fact 23.*

FINDINGS RELEVANT TO COUNT THREE OF THE COMPLAINT

56. As part of the NPM Lawsuit settlement, Mr. Jenkins signed a document entitled "Distribution and Acceptance of Settlement Proceeds and Restrictions Thereon" (hereafter the "Distribution and Acceptance Agreement."). *Stipulated Fact 24; Transcript, page 30, lines 12 - 25; page 55, line 16 - page 57, line 5.*

57. The Distribution and Acceptance Agreement provided that Mr. Jenkins would keep $450,000.00 in an investment account in the event that Mr. Jenkins became liable to MMC for any medical expenses relating to the April 24, 1995 accident. *Stipulated Fact 24; Transcript, page 30, lines 12 - 25.*

58. In addition, the Distribution and Acceptance Agreement provided that Mr. Jenkins would indemnify Meyer & Williams P.C. for any sums for which they were held responsible should any medical liens be enforced against Meyer & Williams P.C. or any other entity Meyer & Williams P.C. promised to indemnify. *Stipulated Fact 25.*

59. The Distribution and Acceptance Agreement, never being offered as evidence, was not admitted as an exhibit. This Hearing Officer never viewed the Distribution and Acceptance Agreement. *Transcript, page 20, lines 6 - 25.*

60. The State Bar attempted to have witness Brian Murphy explain the effect of the Distribution and Acceptance Agreement. That testimony was excluded after objection. *Transcript, page 20, lines 6 - 25.*[4]

61. Mr. Jenkins was asked what he thought the Distribution and Acceptance Agreement required of him. Mr. Jenkins testified only that the Distribution and Acceptance Agreement required him to hold a certain amount of funds from the NPM Lawsuit settlement in order to pay MMC if MMC needed to be paid. Mr. Jenkins, in his testimony, did not mention any indemnification requirement. *Transcript, page 30, lines 12 - 25.*

---

[4] Expert witnesses generally may not testify as to the legal effect of an agreement. *Marx & Co., Inc., v. Diners 'Club*, 550 F.2d 505, 509 - 510 (2nd Cir. 1977)

62. Since Mr. Jenkins testified that the Distribution and Acceptance Agreement required him to hold funds to pay MMC, *Transcript, page 30, lines 12 - 25*, it is clear that Respondent advised Mr. Jenkins, at the time of the NPM Lawsuit settlement that there was a possibility that Mr. Jenkins would need to reimburse MMC for his medical care.

63. Respondent did not draft the indemnity provision of the Distribution and Acceptance Agreement. That provision was drafted by co-counsel Robert Williams of Meyer & Williams. *Transcript, page 56, lines 11 - 16.*

64. Mr. Jenkins was not advised to obtain independent representation before entering into the Distribution and Acceptance Agreement. *Stipulated Fact 26; Transcript, page 31, lines 1 - 4; page 57, lines 9 - 16.*

65. Respondent explained to Mr. Jenkins the meaning and effect of the Distribution and Acceptance Agreement, including the indemnity provision of that agreement. Respondent explained to Mr. Jenkins that the indemnity provision posed no risk to Mr. Jenkins because there were no situations where the indemnity provision would be applicable. *Transcript, page 56, lines 11 - page 57, line 20.*

66. The Distribution and Acceptance Agreement obligated Mr. Jenkins to "indemnify Meyer & Williams P.C. for any sums they may be held responsible for should any medical liens be enforced be enforced against Meyer & Williams P.C. or any other entity Meyer & Williams P.C. promised to indemnify." *Stipulated Fact 25.* There was no evidence that Respondent was a person or "entity Meyer & Williams P.C. promised to indemnify."

FINDINGS RELEVANT TO AGGRAVATION AND MITIGATION

67. Respondent fully cooperated with the State Bar during the pre-Complaint investigation and during these disciplinary proceedings. *Transcript, page 81, lines 6 - 20; State Bar Post Hearing Memorandum, page 13, lines 7 - 9.* For example, Respondent immediately admitted a violation of ER 1.8 relating to the loan from Mr. Jenkins. See *Hearing Exhibit 1.*

68. Respondent has no record of prior discipline. *State Bar Post Hearing Memorandum, page 12, lines 20 - 22*

69. Respondent had no dishonest or selfish motive. *Transcript, page 42, lines 9 - 23; page 65, line 5 - page 69, line 25; State Bar Post Hearing Memorandum, page 12, line 22 - page 13, line 6.*

FINDING RELEVANT TO RESTITUTION

70. There is no basis in this record to order restitution other than payment of the costs of the disciplinary process. *Transcript, page 86, lines 10 - 12.*

CONCLUSIONS OF LAW

PRELIMINARY DISCUSSION

Count One of the Complaint alleges that, in representing all defendants in the MMP Lawsuit, Respondent violated ER 1.7(b), which, prior to its recent amendment, provided:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved.

Count Two of the Complaint alleges that in the loan transaction by which Respondent arranged financing from Mr. Jenkins, Respondent violated ER 1.8(a) which, in its pre-amendment version, provided:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (a) the transaction and the terms on which the lawyer acquires the interest as fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.

Count Three of the Complaint concerns the execution of the agreement entitled "Distribution and Acceptance of Settlement Proceeds and Restrictions Thereon," and alleges a violation of ER 1.8(a).

CONCLUSIONS

Based on the foregoing facts and as explained hereafter, this Hearing Officer concludes:

1. As to Count One of the Complaint, there is clear and convincing evidence that Respondent violated Rule 43, Ariz. R. S. Ct., ER 1.7(b). See *Findings 6 through 34.*

2. As to Count Two of the Complaint, there is clear and convincing evidence that Respondent violated Rule 43, Ariz. R. S. Ct., ER 1.8(b). See *Findings 2, 3, 4, 5, 6, 10, 15, 16, 35 through 55.*

3. As to Count Three of the Complaint, there is not clear and convincing evidence that Respondent violated Rule 43, Ariz. R. S. Ct., ER 1.8(b). See *Findings 56 through 66.*

4. Because of the determination of unethical conduct on two counts of this Complaint, multiple offenses are present. American Bar Association's *Standards for Imposing Lawyer*

Sanctions (hereafter "ABA Standard"), Standard 9.22(d); see *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

5. Substantial experience in the law or lack thereof is irrelevant. The misconduct in this case is not the type of misconduct which is less likely to occur the more experienced the lawyer is. *Matter of Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995); *ABA Standard 9.22(i)*.

EXPLANATION OF CONCLUSIONS

As to former ER 1.7(b), which is applicable to Count One, the initial determination is whether representation of Mr. Jenkins in the MMC Lawsuit was "materially limited" by Respondent's own interests. Even if the representation of Mr. Jenkins would be "materially limited" by Respondent's own interests, representation by Respondent of Mr. Jenkins in the MMC Lawsuit could occur if Respondent reasonably believed that the representation of Mr. Jenkins would not be adversely affected and Mr. Jenkins consented after consultation. That consent after consultation requires an explanation of the implications of the common representation and the advantages and risks involved.

This Hearing Officer believes that Respondent's representation of Mr. Jenkins was "materially limited" by Respondent's own interests. *Matter of Owens*, 182 Ariz. 121, 125, 893 P.2d 1284, 1288 (1995); *In re Shannon*, 179 Ariz. 52, 876 P.2d 548, 556-558 (1994). No matter the validity of the claims made by MMC against Respondent and his law firms in the MMC Lawsuit, the presence of Respondent and his law firms as defendants provided a source of funds of some magnitude for payment to MMC, which might have reduced MMC's claim against Mr. Jenkins. With no intent to comment on the validity of the malpractice claims presently asserted by Mr. Jenkins against Respondent, the attorney representing Mr. Jenkins in the MMC Lawsuit might

be inclined to investigate possible cross-claims by Mr. Jenkins against other defendants, including Respondent.

While Respondent's representation of Mr. Jenkins in the MMC lawsuit was "materially limited" by Respondent's own interests, Respondent still could represent Mr. Jenkins in that lawsuit as long as Mr. Jenkins consented after proper disclosure and consultation. ER 1.7(b); *Matter of Owens*, supra. A thorough explanation of the advantages and disadvantages of joint representation was required. ER 1.7(b); *Matter of Owens*, supra. While Respondent discussed with Mr. Jenkins the overall strategy for the joint defense of the MMC Lawsuit, Respondent agrees that he did not explain the implications of the joint representations. *Stipulated Fact 16; Transcript, page 32, line 18 - line 33, line 3.*

While this Hearing Officer finds a violation of ER 1.7(b) as to Count One, this Hearing Officer can find no evidence of potential harm or actual harm arising from that violation. The State Bar argued that Mr. Jenkins was compelled to settle the MMC Lawsuit on appeal because he could not afford a supersedeas bond. *State Bar Post Hearing Memorandum, page 7, lines 7 - 11.* While Mr. Jenkins testified that he was unable to post the required supersedeas bond and that he settled with MMC on appeal, *Transcript, page 34, line 22 - page 35, line 12*, there is no evidence to support the finding that the settlement was forced on Mr. Jenkins because he could not post the supersedeas bond. There was no evidence of any collection attempts by MMC. The settlement by Mr. Jenkins could have been based on his appellant counsel's determination that the trial court's finding of liability against Mr. Jenkins under A.R.S. § 12-962 stood a substantial chance of being affirmed on appeal. In other words, Mr. Jenkins was required to pay MMC because MMC could force him to pay it under A.R.S. § 12-962. That requirement had nothing to do with the joint representation in the MMC Lawsuit, and had everything to do with the advice Respondent gave

Mr. Jenkins during the NPM Lawsuit. Respondent, however, is not alleged to have committed any ethical violation during the MMC Lawsuit. See *Finding 33.* To be sure, Mr. Jenkins had to pay $50,000.00 in legal fees to separate counsel for his appeal from the judgment in the MMC Lawsuit. But those legal fees appear to be caused by advice given and actions taken in the NPM Lawsuit, not the joint representation, without sufficient informed consent, in the MMC Lawsuit.

Respondent's violation of ER 1.8(a) as alleged in Count Two is so clear that Respondent rightfully admitted that violation immediately upon being contacted by the State Bar. See *Hearing Exhibit 1.* Mr. Jenkins, of course, was a personal friend of Respondent, and was reasonably sophisticated in financial affairs. *Findings 36, 38 and 41; Respondent's Post Hearing Memorandum, page 1, lines 13 - 21.* Those factors, however, do not impact whether a violation of ER 1.8(b) has occurred, those factors only being relevant as to the appropriate sanction.

A lawyer's obligation when a business transaction occurs between the lawyer and client bears repeating. Transactions between lawyers and clients are disfavored. *Matter of Spear*, 160 Ariz. 545, 774 P.2d 1335 (1989); *Matter of Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988); *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1397 (1995); see *6 Arizona Practice, Corporate Practice § 2.25.* As the Superior Court stated in *Spear*:

> When a lawyer accepts a client, he accepts that client's trust; he becomes not only the client's advisor but his protector as well. The better rule may be to prohibit entirely lawyer client business dealings. The practical difficulties with such an absolute bar, however, prevent its enactment. As a general rule, and to minimize ethical problems, no lawyer should allow a client to invest or otherwise participate in the lawyer's business ventures unless the client obtains independent legal advice. Nothing else will protect our profession's integrity and the public interest.

Matter of Spear, supra, 160 Ariz. at 554, 774 P.2d at 1344. Indeed, the involvement of a lawyer in a business transaction with a client, without adequate independent representation and written consent, is so serious that generally a lawyer is disbarred where the lawyer intentionally engages in the ethical violation. *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988); *Commentary to ABA Standard 4.1.*

No matter the education level or the sophistication of the client, it is always the attorney's duty to comply with the requirements of ER 1.8(b). *Matter of Breen*, 171 Ariz. 250, 830 P.2d 462 (1992). "In other words, the lawyer cannot rely on the client's ability to understand the potential conflicts, regardless of how well acquainted the client is with the particular business setting, nor does the fact that the client is not harmed by the transaction lessen the requirement of full and fair disclosure." *6 Arizona Practice Series Corporate Practice § 2.24.*

Mr. Jenkins was repaid his loan, including interest. While no actual harm came to Mr. Jenkins, there was substantial potential risk. While not the only source of repayment, the profit of Respondent's new law firm was contemplated as a source of repayment. Considering the variability of a legal profession, especially those applicable to plaintiff personal injury practice, Mr. Jenkins' investment in Respondent's law firm hardly could be labeled risk-free. Independent counsel for Mr. Jenkins may have suggested obtaining collateral for the loan. Indeed, it is troubling that while Respondent was inclined to offer his second residence as collateral to a conventional lender, Respondent did not make the same offer of collateral to his good friend and client, Mr. Jenkins. While Mr. Jenkins may have declined the offer of collateral, independent counsel may have at least recommended that protection. Furthermore, had the loan by Mr. Jenkins not be repaid, it is extremely probable that collection of the loan by Mr. Jenkins would have been impaired by the lack of a written loan. See *Findings 47, 48, 49 and 50.*

A lawyer's obligation to a client is not lessened because the client is also a social friend. Indeed, it may be more prudent and required for an attorney to make an extensively detailed disclosure to clients who are also social acquaintances of the attorney so that a client makes an informed decision and does not simply defer to the attorney's judgment on account of the social relationship.

As to Count Three of the Complaint, a violation of ER 1.8(a) is alleged. That ethical rule applies whenever the attorney acquires an "ownership, possessory, security or other pecuniary interest adverse to a client." The State Bar failed to show that Respondent was within the protection of the indemnity provision of the Distribution and Acceptance Agreement. Considering that the Distribution and Acceptance Agreement never was offered as an exhibit and considering the State Bar bears a clear and convincing burden of proof, this Hearing Officer concluded that no violation occurred on Count Three and that Count should be dismissed.

APPROPRIATE SANCTION

In determining the appropriate sanctions, the American Bar Association's *Standards for Imposing Lawyer Sanctions* should be considered. *In re Clark*, __ Ariz. ___, 87 P.3d 827, 2004 WL 692139, 422 Ariz. Adv. Rep. 3, n.2 (2004). Those *Standards* counsel that, in determining the proper sanction, 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/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P.2d 1335, 1345 (1989); ABA *Standard* 3.0. Where there are multiple acts of misconduct, there should only be one sanction with the multiple instances of misconduct considered as aggravating factors. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

ABA *Standard* 4.3 is applicable. The ABA *Standards* provide:

> Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the possible effect of that conflict, and causes injury or potential injury to a client.

ABA *Standard* 4.32.

The ABA *Standards* also provide:

> Reprimand [censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABA *Standard* 4.33.

As pled in the Complaint, Respondent's conduct potentially fits into either Standard. Based on the evidence presented, this Hearing Officer concludes that Respondent was negligent in determining whether a conflict existed, and that Respondent did not actually know of or perceive the conflict. With the presumptive sanction of censure determined, aggravating and mitigating circumstances are reviewed along with sanctions imposed on other lawyers in similar situations to determine whether the presumptive sanction should be modified. *Matter of Owens*, 182 Ariz. 121, 126 - 127, 893 P.2d 1284, 1289 - 1290 (1995).

AGGRAVATING AND MITIGATING FACTORS

The Hearing Officer finds the following aggravating factor: *Standard 9.22(d)*: multiple offenses. See *Conclusion 4.* The Hearing Officer does not find "experience in the law" to be relevant as either an aggravating or mitigating factor. See *Conclusion 5.* The misconduct in this case is not the type of misconduct which is less likely to occur the more experienced the lawyer is. *Matter of Savoy*, 181 Ariz. 368, 371, 891 P.2d 236, 239 (1995). Every lawyer, even those freshly admitted, should be aware of the rules applicable when entering transactions with clients.

The Hearing Officer finds three mitigating factors: *Standard 9.32(b)*: absence of a dishonest or selfish motive, *Standard 9.32(e)*: full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings, and *Standard 9.32(a)*: absence of prior discipline. *Findings 67, 68 and 69.*

PROPORTIONALITY

The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983); *In re Wolfram*, 174 Ariz. 49, 847 P2.d 94 (1993). Most relevant to the proportionality analysis is *Matter of Susman*, SB-03-005D (2003), Disciplinary Commission 01-1455. There, an attorney obtained three separate loans from a client over a seven month period. Two of the loans, totaling $60,000, were documented in two unsecured promissory notes. A short time thereafter, the attorney contacted his client and borrowed another $10,000. This $10,000 loan was not evidenced by a writing. The attorney never advised the client in writing that the client should seek the advice of independent counsel and the attorney did not reduce the terms of the last loan to writing. The attorney failed to make all the payments required, and defaulted on the loans. Five mitigating factors (including no prior record, full disclosure and cooperation, remorse) and two aggravating factors (selfish motive, substantial experience in the law) were found. The attorney received a censure. The sanction imposed in *Susman* is consistent with prior decisions which involved isolated instances of transactions with a client, coupled with some or all of the following circumstances: no harm, no dishonest motive, no prior discipline, and cooperation in the disciplinary process. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985); *Matter of Owens*, supra; *Matter of Marce*, 177 Ariz. 275, 867 P.2d 845 (1993).

Of course, suspension is more appropriate where aggravating circumstances of dishonesty and a particularly vulnerable victim is involved. *In re Merrill*, supra; *Matter of Mark S. Clark*, SB-01-0104-D (2001). Those factors do not exist here. A censure is appropriate and proportional.

RECOMMENDATION

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

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigation factors, and a proportionality analysis, this Hearing Officer recommends the following:

1. That Respondent be censured.

2. Respondent be placed on probation for one year effective from the date of a final judgment, with the following terms and conditions of probation:

a. Respondent shall not commit any ethical violations during the probationary period;

b. Respondent shall respond promptly and completely to any bar inquiries or requests for information;

c. Respondent shall maintain malpractice insurance; and

d. Respondent, at his expense, shall attend the Ethics Enhancement Program.

e. In the event that Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information, bar counsel shall file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a

hearing within thirty days after receipt of said notice, to determine whether the terms of probation have been violated and if an additional sanction should be imposed. In the event there is an allegation that any of these terms have been violated, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

3. Respondent be ordered to pay the costs and expenses incurred in these disciplinary proceedings.

DATED this 11th day of June, 2004.

Mark S. Sifferman
Hearing Officer 9J

Original filed with the Disciplinary Clerk
this 11th day of June, 2004.

Copy of the foregoing mailed
this 11th day of June, 2004, to:

Richard A. Segal
Respondent's Counsel
Gust Rosenfeld, P.L.C.
201 East Washington, Suite 800
Phoenix, AZ 85004-2327

Shauna R. Miller
Senior Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

by: