BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	No. 00-1060
	HEARING OFFICER'S REPORT AND RECOMMENDATION
RICHARD E. CLARK State Bar No. 009052	
Respondent.	(Assigned to Hearing Officer 9Q Steven M. Friedman)

PROCEDURAL HISTORY

Having received a complaint against the Respondent, the Probable Cause Panelist of the State Bar, having reviewed the matter, found probable cause and ordered the issuance of a complaint on December 20, 2001. A formal complaint was filed by the State Bar against Respondent, Richard E. Clark, on December 28, 2001. The complaint charged the Respondent in one count of conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 42, Rules of the Arizona Supreme Court, specifically ER 8.4(c). The complaint further charged that Respondent's conduct was prejudicial to the administration of justice in violation of Rule 42, the Rules of the Arizona Supreme Court, specifically ER 8.4(d)

A notice of service of the complaint by mail was submitted to the State Bar on the 10th day of January, 2002 and an attached affidavit of mailing indicated that the complaint had been forwarded to the Respondent by certified mail, restricted delivery on January 8, 2002.

On January 17, 2002, a Notice of Assignment assigning the matter to the undersigned Hearing Officer 9Q was entered.

On January 23, 2002, Respondent filed his answer. The answer admitted the following:

1. Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 15, 1983.

2. Respondent represented Edward Kosac , Jr. as a client.

3. Respondent filed a petition in bankruptcy.

4. The bankruptcy court entered a nondischargeable judgment for Mr. Kosac against Respondent in the sum of Seven Hundred Forty One Thousand Seventy-nine Dollars and Fifty-one Cents ($741,079.50), plus interest and costs.

5. On May 10, 2000 at a debtor's exam, it was revealed that on May 9, 2002, Respondent had formed a professional corporation and transferred his business assets from his sole proprietorship law practice to his professional corporation.

6. On or about September 5, 2000, Mr. Kosac domesticated the judgment from the bankruptcy court in the Maricopa County Superior Court.

As well as admitting some of the allegations of the complaint, Respondent's answer alleged the following:

1. On the date of the formation of his professional corporation, the business assets transferred to the professional corporation had no net value.

2. On December 31, 1999, he was insolvent.

3. The transfer of the business assets to his professional corporation did not preclude the judgment creditor, Mr. Kosac from collecting the judgment from the assets of Respondent's sole proprietorship.

4. Mr. Kosac was free to execute on the shares of stock in the professional corporation, or file an income garnishment against Respondent as an employee of the professional corporation, and await payment in line behind other garnishees.

5. Respondent in his answer further alleged that he had been paying the Internal Revenue Service monthly payments and settled with them by an offer of compromise.

6. He also had been paying a secured creditor pursuant to a reaffirmation agreement entered into with that creditor and filed with the bankruptcy court.

7. Respondent's answer further contradicted a decision entered by Judge Linda H. Miles in which she found that Mr. Clark's actual intent was to hinder, delay or defraud Mr. Kosac, which could be reasonably inferred from the presence of the factors enumerated by Judge Miles in her decision.

8. When he incorporated, there was no actual intent to do other than to protect Respondent's clients from contact with the judgment creditors' attorneys and to create a vehicle to allow for income garnishments and the payments of a judgment creditor which was first in line, and then to pay any other judgment creditor who might file an income garnishment.

9 There were no assets available against which an asset garnishment could have been filed.

10. Finally, Respondent denied that his conduct was in violation of the Arizona Rules of Professional Conduct.

On January 29, 2002, a notice of assignment to a Settlement Officer 7G, Jerry Bernstein, was entered and filed.

On February 4, 2002, undersigned Hearing Officer 9Q, filed a notice of acceptance of appointment.

On March 14, 2002, Settlement Officer 7G, Jerry Bernstein filed a notice of a settlement conference scheduling a settlement conference for March 22, 2002.

On March 14, 2002, undersigned Hearing Officer 9Q filed a notice of hearing scheduling a telephonic prehearing conference for Monday, March 25, 2002 at 4:00 p.m. and further scheduling a hearing on the complaint for Thursday, April 4, 2002 at 9:00 a.m.

On March 26, 2002, the April 4, 2002 hearing date was vacated and the hearing was rescheduled to be conducted on May 30, 2002.

On March 28, 2002, counsel for the State Bar filed a motion to continue the hearing because an attorney the Bar wished to retain and call as an expert witness would be unavailable on the date set for the hearing.

On April 9, 2002, Hearing Officer 9Q undersigned entered an order vacating the hearing of May 30, 2002 and rescheduling the hearing for June 3, 2002 at 8:30 a.m.

On April 9, 2002, Settlement Officer 7G, Jerry Bernstein, entered an order stating that the parties had met for purposes of a settlement conference on March 22, 2002, but were unable to reach an agreement. The matter was therefore referred to Hearing Officer 9Q for further proceedings.

On April 10, 2002, counsel for the State Bar filed another motion to continue the hearing in which he mistakenly asked for postponement of the May 30, 2002 hearing and also asked for postponement of the June 3, 2002 hearing. The reason given was that the State Bar's expert witness, who was then identified as Michael McGrath, attorney at law, would be out of the country on both May 30 and June 3, 2002. At this point, C. Alan Bowman, Chair of the Disciplinary Commission, entered an order granting the State Bar's motion to postpone the hearing.

On April 18, 2002, Hearing Officer 9Q through an Order issued over the Hearing Officer's signature by the Office of the Disciplinary Clerk filed a notice vacating the hearing date of June 3, 2002 and resetting the hearing to begin on Tuesday, June 25, 2002 at 8:30 a.m.

On May 24, 2002, Hearing Officer 9Q personally issued an order vacating the hearing and scheduling a status conference. The hearing date vacated by Hearing Officer 9Q undersigned's order of May 24, 2002 vacated the hearing date of June 3, 2002 and scheduled a telephonic conference call at 10:00 a.m. on Friday, May 31, 2002. Counsel for the State Bar was instructed to initiate the conference call.

On May 30, 2002, Hearing Officer 9Q undersigned issued an order vacating the status conference of May 31, 2002 and reconfirmed the hearing date of June 25, 2002.

On June 20, 2002, Hearing Officer 9Q undersigned having received a motion to postpone the hearing filed by the Respondent, the State Bar having voiced no objection to the motion, Hearing Officer, Respondent and counsel for the State Bar having conducted a telephone conference to discuss the motion, the Hearing Officer

found good cause to postpone the hearing as the Respondent had a conflict in his schedule on the date previously set for this hearing that precluded his attendance at the hearing. The hearing date of June 25, 2002 was therefore vacated and the matter was rescheduled for a hearing to be conducted commencing 9:00 a.m. on Tuesday, July 26, 2002.

On June 25, 2002, the State Bar filed a Motion for Determination of Applicability of Doctrine of Collateral Estoppel.

On July 16, 2002, Respondent filed a Motion to Preclude Testimony of Expert witness and Finding of Facts in Judge Miles' decision.

On July 10, 2002, Respondent filed a Response to Determination of Applicability of Doctrine of Collateral Estoppel.

On July 16, 2002, Respondent filed a Hearing Memorandum of Law.

On July 25, 2002, the Hearing Officer filed a notice of further hearings to be held on Wednesday, July 31, 2002, commencing at 1:30 p.m., and again on Wednesday, August 21, 2002 at 8:00 a.m.

On August 1, 2002, Hearing Officer 9Q undersigned issued an order confirming that a conflict had arisen with the time of the hearing previously scheduled to reconvene on August 21, 2002. The parties, counsel and the witness, Michael McGrath, consulted by a telephone conference call on August 1, 2002 and agreed to change the time, but not the date of that further hearing. The Order continued and rescheduling further hearings in this matter to begin on August 21, 2002 at 1:30 p.m.

Hearings were conducted in the matter commencing on July 16, 2002, continuing on July 31, 2002, and scheduled to conclude on August 21, 2002.

At the hearing on July 16, 2002, Steven W. Cheifetz attorney at law, complainant Edward Kosac, and expert witness Michael McGrath all testified.

At the continued hearing on July 31, 2002, expert witness Michael McGrath testified.

At the continued hearing on August 21, 2002, expert witness Michael McGrath and Respondent Richard E. Clark testified.

On the 9th day of September, 2002, Hearing Officer 9Q undersigned entered an order scheduling a further hearing in the matter for Friday, September 13, 2002, commencing at 9:30 a.m.

On September 10, 2002, Hearing Officer 9Q undersigned entered an amended order re: further hearings rescheduling the hearing to commence on September 13, 2002 at 8:30 a.m.

The final portion of the hearing was conducted on September 13, 2002. at that session of the Hearing Respondent Richard Clark testified as did expert Michael McGrath. The parties then argued their respective positions and the matter was deemed submitted subject only to filing of the transcripts of the hearing.

At the commencement of the hearing, the Hearing Officer denied the Motion for Determination of Applicability of Doctrine of Collateral Estoppel. (Reporter's transcript of hearing, hereinafter "RT", July 16, 2002, pgs. 13 and 14).

The hearing officer also denied the Respondent's motion to preclude testimony. (RT, July 16, 2002, pgs. 16 through 28).

Transcripts were received in this matter and it has been under advisement since.

FINDINGS OF FACT

In summarizing the testimony and exhibits below, this Hearing Officer finds the facts to be as stated. Transcripts were received in this matter, this Hearing Officer requested and was granted a number of extensions to file this report.

STEVEN W. CHEIFITZ

Steven W. Cheifetz testified that he is an attorney licensed to practice law in the State of Arizona and has been so licensed since the Spring of 1988. He practices civil litigation. (RT1, July 16, 2002, pgs. 47 and 48). He was hired by Edward Kosac in the Spring of 2000. (Id). Mr. Kosac hired Mr. Cheifetz to collect a judgment against Mr. Clark. (Id., pgs. 48 and 49). The judgment had apparently been entered in the bankruptcy court, but domesticated in Maricopa County Superior Court. (Id., pg. 49).

Mr. Cheifetz attempted to negotiate a resolution of the judgment with Mr. Clark to no avail. (Id., pgs. 50 and 51). Mr. Cheifetz then caused a judgment debtor's examination and a subpoena to be served upon Mr. Clark, requiring Clark to bring to Mr. Cheifeitz's offices records concerning clients who owed him money, as well as other financial information concerning his legal practice. The judgment debtors exam/deposition was to take place and the subpoena was returnable in May of 2000. (Id., pg. 51).

When Mr. Clark appeared for the judgment debtor's exam, he advised Mr. Cheifetz that the day before, he had formed a professional corporation, Richard Clark, P.C., and his receivables and assets were transferred to the corporation and thus all of the assets were then owned by the corporation and were no longer Mr. Clark's personal assets. (Id., pgs. 51 and 52).

At the judgment debtor's exam, Mr. Cheifetz attempted to lay a foundation for a claim that the transfer of assets to the corporation by Mr. Clark had been fraudulent. (Id., pg. 53). Mr. Cheifetz testified that he had substantial experience in fraudulent transfer issues, and that he started questioning Mr. Clark at the debtor's exam about what consideration was provided to the corporation. (Id., pg. 53).

Mr. Cheifetz testified that Mr. Clark testified that the corporation had assumed an obligation due from him personally. The transcript of the judgment debtor's exam was received in evidence at the hearing in this case. (Id., pg. 54). (See Exhibit 5 in evidence).

Thereafter, Mr. Cheifetz served a writ of garnishment on Richard Clark, P.C. The garnishment had been issued where the judgment against Mr. Clark had been obtained, in the United States Bankruptcy Court for the District of Arizona. (Id., pg. 59). Mr. Cheifetz testified that he was unaware that he could domesticate the bankruptcy court judgment in the Superior Court. (Id., pg. 59).

Mr. Clark filed objections to the writ of garnishment in the bankruptcy court and the bankruptcy judge, Judge Haines, after argument abstained and suggested that the case be transferred to the Superior Court. Mr. Cheifetz domesticated the judgment in Superior Court and again proceeded with garnishment proceedings. (Id., pgs. 59-60).

After the domestication of the judgment in Superior Court, issues concerning the garnishment, Mr. Clark's objections, and whether or not there had been fraudulent transfers by Mr. Clark to the corporation, were heard by then Superior Court Commissioner Linda Miles. (Id., pgs. 59, 60, 61).

In the interim, however, Mr. Clark had ceased operating his professional corporation and had obtained a job on an indian reservation. (Id., pg. 61). Mr. Cheifetz testified that he was unable to garnish Mr. Clark's wages in Tribal Court. (Id., pg. 61).

Mr. Cheifetz testified that he could not appear in Tribal Court to proceed and garnish Mr. Clark there, and that he referred Mr. Kosac to people admitted to practice in Tribal Court. But Mr. Kosac was unable to proceed to collect this judgment in Tribal Court proceedings. (Id., pgs. 62-64).

In the interim, Mr. Kosac filed a bar complaint against Mr. Clark. (Id., pg. 62). That complaint is the complaint that led to these proceedings.

Mr. Cheifetz testified that part of his motivation in proceeding in the hearing before Commission Miles was so that he could establish a record for use by the State Bar, to establish a ruling that Mr. Clark had acted with fraudulent intent in transferring his assets. He testified that he proceeded in part so that the State Bar would have the record to present in the complaint against Mr. Clark in bar proceedings. (Id., pgs. 62-65).

Mr. Clark's professional corporation had been subjected to a writ of garnishment prior to Mr. Kosac's garnishment. The prior writ of garnishment was served by Celmins, Margraves & Verburg, P.C., a law firm that had previously represented Mr. Clark. The garnishment was based upon a judgment that the law firm had obtained against Mr. Clark for fees that had been owed to that law firm by Mr. Clark and thereafter by the professional corporation. Mr. Cheifetz did not challenge that garnishment in the proceedings before Commissioner Miles. (Exhibit 6, pg. 6).

In the proceedings before Commissioner Miles, Mr. Clark testified that he had four reasons for forming the professional corporation, first, to stop garnishments against him personally; second, to stop what he characterized as unethical contacts by Mr. Cheifetz with Mr. Clark's clients; third, because of tax concerns; fourth, to form a medical reimbursement plan. (Exhibit 6, pgs. 44-47).

Mr. Clark testified that there was no value in the corporation. His position, stated in the proceedings before Judge Miles, was that there was no value in any property transferred to the corporation. (Exhibit 6, pgs. 54-58).

Mr. Cheifetz, before Commissioner Miles, argued that Mr. Clark's conduct was fraudulent because it was in violation of A.R.S. §44-1004. His argument was that it was fraudulent because it was intended hinder or delay or a creditor, Mr. Kosac, in collecting a debt. (Exhibit 6, pgs. 70-73).

Mr. Cheifetz claimed to have established six badges of fraud under A.R.S. §44-1004. First, he claimed that there was a transfer to an insider; second, he claimed that the debtor retained possession or control of the property transferred after the transfer; third, that the fourth badge of fraud applies because the transfer was made when the debtor had been sued or threatened with a suit; fourth, that the fifth badge of fraud was met because the transfer was of substantially all of the debtor's assets; fifth, that the eighth badge of fraud was met because there was no value or consideration received equivalent to the value of the obligation transferred; and sixth and finally, the ninth badge of fraud was met because the debtor was insolvent, became insolvent after the transfer was made. (Exhibit 6, pgs. 77-79).

(Parenthetically, we note a peculiar comment by Mr. Cheifetz, during the course of the proceedings before Commissioner Miles. He said:

> To a certain extent, one reason we believe these proceedings are so necessary, however, is because the State Bar has indicated that they would defer to the determination by this Court as to whether there was fraudulent intent and that such a determination may provide our client with a remedy against – for his recovery fund.

(Exhibit 6, pg. 81).

This Hearing Officer feels it necessary to comment that, though he considered the evidence and argument before the bankruptcy judge, and although he considered the argument and evidence offered before Commissioner Miles, and although he considered the decisions of both the bankruptcy judge and Commissioner Miles, he felt compelled to make his own findings as to the facts in this case.)

Commissioner Miles entered a minute entry in which she made findings of fact and conclusions of law on June 20, 2001. (State Bar Exhibit 2 in evidence).

Commissioner Miles entered the following findings:

THE COURT FINDS that Mr. Clark's actual intent to hinder, delay or defraud can be reasonably inferred from the presence of these factors.

> By reason of the foregoing, garnishee Richard E. Clark, P.C. is obligated for the debt of judgment debtor Richard E. Clark to the extent of the fraudulent transfer. In this case, however, the judgment creditor provided no evidence to the court as to the value of the assets transferred. The judgment creditor having had the opportunity to present such evidence and having failed to do so, no judgment can be entered against the garnishee on the writ of garnishment.

(Exhibit 2 in evidence, pg. 4).

At the judgment debtor's examination, his deposition, Mr. Clark did bring certain of his financial records, though not records of his accounts receivable. (RT, pgs. 98-117).

Mr. Cheifetz acknowledged that he did not pursue all remedies to collect the judgment for Mr. Kosac in that he did not attempt to take control of Mr. Clark's professional corporation. He did not believe that Mr. Kosac could own the stock in Mr. Clark's professional corporation, because of ethical and legal limitations prohibiting ownership of stock in a professional corporation by non-lawyers. However, he did not pursue any attempt to have the stock in the corporation placed in the hands of a receiver so that he could, for Mr. Kosac, get control of the corporation's receivables. (RT, pgs. 138-140).

Mr. Cheifetz acknowledged that he was supplied by Mr. Clark with numerous financial documents in response to the subpoena that was served on Mr. Clark. (RT, pgs. 142, 144).

Mr. Cheifetz acknowledged that he never obtained a court order directing Mr. Clark to produce any documents he had failed to produce in response to subpoenas that were served on him, either in the bankruptcy court or in Superior Court. (RT, pgs. 175, 176).

Edward Kosac, Jr.

Edward Kosac hired Mr. Clark as his defense attorney in a lawsuit arising out of a real estate claim. (Mr. Clark has been reprimanded for his conduct during the course of his representation of Mr. Kosac in State Bar File No. 94-1098 in which an informal reprimand was entered on September 3, 1996). In the lawsuit in which Mr.

Clark represented Mr. Kosac, a judgment was entered against Mr. Kosac in the sum of One Million Two Hundred Seventy Thousand Four Hundred Six and 75/100 Dollars ($1,270,406.75). (RT 1 July 16, 2002, pg. 181).

Mr. Kosac was forced to file Chapter 11 bankruptcy proceeding, but eventually apparently paid off his creditors and paid out, including attorneys' fees, a sum he estimates was approximately Nine Hundred Thousand Dollars ($900,000) to resolve the claims against him. (RT 1 July 16, 2002, pgs. 182, 183).

Mr. Clark personally filed Chapter 7 bankruptcy proceedings. (RT 1 July 16, 2002, pg. 183).

Mr. Kosac obtained a judgment against Mr. Clark in the bankruptcy proceedings for a principal sum he estimates to be Six Hundred Eighty Thousand Dollars ($680,000). (RT 1 July 16, 2002, pgs. 183, 184). The financial burdens on Mr. Kosac as a result of the money he had to pay has significantly changed his lifestyle. (RT 1 July 16, 2002, pg. 190-193).

Mr. Kosac first testified that he spent approximately Five Thousand to Six Thousand Dollars ($5000 to $6000) trying to collect from Mr. Clark. (RT 1 July 16, 2002, pgs. 195, 196). However, he later testified that he paid the law firm of Streich Lang approximately Two Hundred Thousand Dollars ($200,000) in attempts to collect from Mr. Clark. (RT 1 July 16, 2002, pg. 197, 198).

Mr. Kosac testified that, at some point, there was an offer made by Mr. Clark to settle the claim against him for Fifty Thousand Dollars ($50,000). (RT 1 July 16, 2002, pg. 209). Mr. Kosac rejected that offer. (Id.)

Michael McGrath

Beginning on July 16, 2002, Michael McGrath was called to testify as an expert witness by the State Bar. Mr. McGrath testified that he is a certified specialist in bankruptcy law, who does commercial matters, debtor and creditor matters, commercial litigation and commercial transactions. (RT 1 July 16, 2002, pg. 229). He teaches bankruptcy and ethics courses, has published, was on the Disciplinary Commission of the Supreme Court, was Chair of the Disciplinary Commission, and is special counsel to the State Bar to review ethical complaints. (See also Exhibit 7 in evidence). (RT 1 July 16, 2002, pgs. 233, 234).

Mr. McGrath testified that, had he been representing Mr. Clark, he would have advised Mr. Clark to form a professional corporation, as Mr. Clark did. However, he testified that the difference in what he would have counseled Mr. Clark to do if Mr. Clark had been his client, is that he would have done it somewhat differently in that he would have arranged for payment of fair consideration to Mr. Clark for transfer of the assets to the corporation. (RT 1, July 16, 2002, pgs. 242-244). The hearing was then recessed.

The hearing resumed on July 31, 2002. (References to the hearing of July 31, 2002 will be to RT 2).

At the hearing on July 31, 2002, Mr. McGrath testified further . (RT 2, pg. 5). First, he laid additional foundation for his expertise and testimony. (RT 2, pgs. 6-8). Then, he again said that he had no qualms with the establishment by Mr. Clark of his professional corporation. (RT 2, pg. 8). However, he said that the transfer of assets had to be for fair consideration. (RT 2, pg. 8).

Mr. McGrath concluded that the transfer of assets from Mr. Clark to his newly formed professional corporation constituted a fraudulent conveyance, without adequate value. (RT 2, pgs. 16-18). Mr. McGrath acknowledged that the reasons given by Mr. Clark were valid reasons for the establishment of his professional corporation. (RT 2, pg. 20). However, because of the timing of the formation of the corporation, Mr. McGrath concluded that the creation of the corporation and the transfer of Mr. Clark's assets was intended to delay and hinder the judgment creditor Mr. Kosac. Mr. McGrath concluded, as had Commissioner Miles, that Mr. Clark violated A.R.S. §44-1004 in that his conduct established a number of the badges of fraud enumerated in that statute. (RT 2, pgs. 26-29). Mr. McGrath concluded that the assets Mr. Clark transferred to the corporation did have monetary value. (RT 2, pgs. 30-45). The hearing was then recessed.

The hearing resumed on August 21, 2002. (References to the hearing of August 21, 2002 will be to RT 3).

Mr. McGrath testified that the creation of a preference for one creditor, as Mr. Clark did for his prior law firm, over another creditor, Mr. Kosac, was punitive against Mr. Kosac. His opinion was that this conduct was unethical and was prejudicial to the administration of justice. (RT 3, pgs. 20-25).

Mr. McGrath, at one point during his testimony, acknowledged that he has no evidence of the value of the assets that Mr. Clark transferred. (RT 3, pgs. 25, 26).

RICHARD E. CLARK

Mr. Clark testified on his own behalf. Mr. Clark testified that he was concerned for the ethical considerations of the rights of his clients, other than Mr. Kosac, because Mr. Cheifetz had been contacting his clients. (RT 3, pgs. 74-81). He reiterated the reasons why he formed the professional corporation, to establish a medical reimbursement plan, to facilitate payment of income taxes, (RT 3, pg. 90), to limit what he believed were unethical contacts by Mr. Cheifetz with his clients. (RT 3, pg. 91).

He again said that he believed that there was no value in any of the assets that were transferred by him personally to the corporation. (RT 3, pgs. 93-99). (RT 3, pgs. 101-117). The hearing was then recessed.

The hearing resumed on September 13, 2002. (References to the hearing of September 13, 2002 will be to RT 4). At that hearing, Mr. Clark concluded his testimony and Mr. McGrath was again called.

Mr. Clark continued testifying. He went to work on October 1, 2000 with the Salt River Pima Maricopa Indian Tribe. (RT 4, pg. 27).

Mr. Clark testified that the assets he transferred to the corporation had no value, that the garnishments Mr. Cheifetz served on his clients were intended only to harass his clients and him, Mr. Clark. He testified that he did not intend to defraud anyone as everything he did was done in the open and was disclosed to Mr. Kosac and his attorneys. (RT 4, pgs. 36-40).

Mr. McGrath was the final witness. In response to questions by the Hearing Officer, Mr. McGrath testified that forming the professional corporation was an

absolutely correct thing for Mr. Clark to do. What he did wrong was not to create, for example, a promissory note, not giving consideration. (RT 4, pg. 81).

Mr. McGrath testified that the value of the assets Mr. Clark transferred to the corporation for which he should have received full value, for example, a promissory note, was Twelve Thousand One Hundred Forty One and 16/100 Dollars ($12,141.16). However, he also agreed that there is wide latitude in the calculation of the value of the assets he did, because he was utilizing information from financial records which were subjective. (RT 4, pg. 83).

Mr. McGrath finally acknowledged that Mr. Clark's personal assets had been pledged as collateral for a bank loan, but, he pointed out, by the time of the transfer, the bank loan only had an outstanding balance of One Thousand Three Hundred Dollars ($1,300). (RT 4, pgs. 85, 86).

CONCLUSIONS

The Hearing Officer concludes that the evidence offered by the State Bar in this matter does establish by clear and convincing evidence a violation of the Rules of Professional Conduct by the Respondent. However, as Mr. McGrath, the expert witness for the State Bar said in the final session of testimony, the Hearing Officer has no doubt but that "in his heart of hearts" Mr. Clark believes that the property he transferred to the corporation when he established his professional corporation had no value. (RT 4, pgs. 83, 84)

Nevertheless, this Hearing Officer is forced to conclude that Respondent fell afoul of A.R.S. §44-1004, in that his conduct constituted a fraudulent transfer, as the

conduct was sufficient to meet the requirements of that statute, in that the badges of fraud exist. I conclude that Mr. Clark did not engage in conduct that involved dishonesty, deceit or misrepresentation, but his conduct constituted fraud in violation of ER 8.4(c). Moreover, his conduct was prejudicial to the administration of justice in violation of ER 8.4(d).

RECOMMENDATIONS

This Hearing Officer has carefully considered the voluminous exhibits and extensive testimony offered in this matter. I have found that the State Bar has borne its burden in that it has proven, by clear and convincing evidence, that the Respondent's conduct is in violation of ER 8.4(c) in that he engaged in conduct involving fraud, and that his conduct was in violation of ER 8.4(d), in that his conduct was prejudicial to the administration of justice. However, I did find mitigating factors in that the Respondent has not been previously publically disciplined or sanctioned, except for the informal reprimand resulting from the underlying conduct when dealing with this same client in the same set of transactions that led to the complaint here, the conduct that lead to the judgment the client obtained against Respondent.

I have reviewed the standards for imposing lawyer sanctions published by the American Bar Association. I have reviewed the factors to be considered in imposing sanctions, the duty violated, the lawyer's mental status, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. He negligently violated a duty to the courts and to his former client in that he should not have made a fraudulent transfer. As the State Bar's expert testified, and

as I find, his mental state did not demonstrate a state of mind of maliciousness or avarice.

The potential or actual injury caused by the lawyer's misconduct was that he may have deprived the former client of partial recovery on his judgment. I find no aggravating circumstances, but I do find mitigating circumstances in that, though there was a fraudulent transfer, Respondent did not conceal what he was doing and acted in the open. In fact, his conduct was patently transparent to the former client's later attorneys.

I refer to and have considered ABA Standard 4.63 that provides that reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client. Likewise, Standard 6.13 provides that reprimand is generally appropriate when a lawyer is negligent, either in determining whether statements or documents are false, or in taking remedial action where material information is being withheld, and causes injury or potential to a party in a legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

I therefore, conclude that a reprimand (censure in Arizona), one year of probation and an order of restitution are the appropriate sanctions to be imposed upon Respondent. The amount of restitution here should be in the amount that Mr. Kosac lost by virtue of the fraudulent transfer. I do find it interesting, and somewhat peculiar, that no one seems to have attempted to determine the value of the assets fraudulently transferred until this hearing officer asked Mr. McGrath to give us his opinion and calculation as to the value of the assets transferred. I rely on his expertise and

calculation in finding that the amount of restitution that Mr. Clark should be required to pay to Mr. Kosac is in the sum of Twelve Thousand One Hundred Forty One and 16/100 Dollars ($12,141.16) less the One thousand Three Hundred Dollars ($1,300) still due on the bank loan for which the assets were collateral at the time of the transfer. That sum I recommend should be paid within one year of the entry of the final decision in this matter.

I have reviewed other cases to determine whether this sanction is proportional. In Re Edward H. Laber, Disciplinary Cause No. 98-1985, decided May 29, 2002, the Respondent had made a representation by notarizing a quit claim deed, knowing that no signature had been affixed to the deed at the time of the notarization. That action was a violation of a criminal statute. The signor actually eventually did sign the deed. There was an agreement for an informal reprimand.

In Re Arnold M. Sodikoff, Disciplinary Cause Nos. 90-1967 and 92-0178, Respondent filed frivolous pleadings that unreasonably expanded the proceedings and failed to conform to the rules. The pleadings contained imprecise statements that could have mislead the court. There was an agreement for censure and probation for one year.

In Re Kevin Schwartz, Disciplinary Cause No. 93-1952, Respondent "looked the other way" while a teenage client's friend forged the client's mother's name on settlement documents. He was censured.

In Re Roger S. Aurbach, Disciplinary Cause No. 94-0201, Respondent accepted an agreement for censure in a situation in which his conduct involved filing of a false affidavit concerning the existence or nonexistence of evidence.

In Re John H. Cotton, Disciplinary Cause No. 98-0412, Mr. Cotton was censured and placed on twelve months probation when he had on several occasions negligently submitted unauthorized charges to his firm, and submitted excessive per diem charges to a client without proper approval.

In Re Neil J. Harrington, Disciplinary Cause No. 99-2020, Respondent was censured when he filed a public document he knew to be false, because it lacked a genuine signature.

In Re Ronald E. Huser, Disciplinary Cause No. 96-1818 Mr. Huser was censured and received six months probation when he negligently entered an appearance for a client and signed a stipulation on behalf of the client without the client's knowledge or consent.

In Re Robert E. Kersting, 151 Ariz. 171, 726 P.2d 587 (1986), Mr. Kersting was suspended for nine months. In *Kersting*, the Respondent participated in, organized and orchestrated a series of transactions that resulted in harm to investors who considered him to be their attorney.

In Re Richard A. Nulle, 127 Ariz. 299, 620 P.2d 214 (1980), Mr. Nulle was also suspended. However, in *Nulle* the Respondent advised the client to file a false liquor license application and used information obtained in the course of representation of a client to the disadvantage and detriment of his clients. The conduct there was surely more egregious than that engaged in by Mr. Clark in this case.

In Re Kenneth P. Bemis, 189 Ariz. 119, 938 P.2d 1120 (1997), Mr. Bemis attempted to have ex parte communications with a judge and submitted an inappropriate order. The conduct there was intentional. The proposed order was

found by the Hearing Officer to be sarcastic and worded to make the judge look bad. Mr. Bemis was placed on probation for one year and censured.

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

1. Respondent shall receive a censure;
2. Respondent shall be placed on probation for one year, with the following terms and conditions:
    (a) Respondent shall attend and complete the State Bar's professionalism course;
    (b) In the event Respondent leaves his job with the Salt River Maricopa Pima Indian Tribe during the term of his probation, he shall work with a Practice Monitor during the term of his probationary period; the practice monitor shall monitor Mr. Clark's practice and assist him in the selection of his clients and cases; and
    (c) In the event Respondent fails to comply with any of the foregoing conditions, and the State Bar receives information of non-compliance, bar counsel shall file with the Hearing Officer a Notice of Non-compliance, pursuant to Rule 51j; (in the event there is an allegation that any of these terms have been breached, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by a preponderance of the evidence);

3. Respondent shall pay to Mr. Kosac restitution in the sum of Twelve Thousand One Hundred Forty One and 16/100 Dollars ($12,141.16) less One Thousand Three Hundred Dollars ($1,300.00), or in other words the sum of Ten Thousand Eight Hundred Forty-one Dollars and Sixteen Cents ($10,841.16).

4. Respondent shall pay the costs and expenses incurred in these disciplinary proceedings.

DONE this 14th day of January 2003.

Steven M. Friedman
Hearing Officer 9Q
111 West Monroe
Suite 1400
Phoenix, AZ 85003-1787

ORIGINAL of the foregoing mailed this 14th day of January, 2003, to:

Disciplinary Clerk of the
Supreme Court of Arizona
Certification & Licensing Division
1501 West Washington, Suite 104
Phoenix, AZ 85007-3329

COURTESY COPY of the foregoing mailed even date to:

Patricia Seguin
Hearing Coordinator
Certification & Licensing Division
1501 West Washington, Suite 104
Phoenix, AZ 85007-3329

COPY of the foregoing hand-delivered even date to:

Jacqueline Schesnol, Esq.
State Bar of Arizona
111 W. Monroe, Suite 1800
Phoenix, AZ 85003-1742
Bar Counsel

COPY of the foregoing sent
via first-class mail even date to:

Richard E. Clark, Esq.
10005 East Osborn
Scottsdale, AZ 85256
Respondent