BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	File No 03-0062
GREGORY G. GROH, Bar No. 005435	)	**HEARING OFFICER'S REPORT**
RESPONDENT	)	

PROCEDURAL HISTORY

1 Probable Cause was found in this matter on December 15, 2005 Thereafter, the original Tender of Admissions and Agreement for Discipline by Consent, and Joint Memorandum in Support of Discipline by Consent were filed on November 26, 2007 The matter was assigned to Hearing Officer 8T who reviewed the original Tender and Joint Agreement and subsequently, on January 17, 2008, rejected the original Tender and Joint Agreement

2 A new Complaint was filed on January 31, 2008, and the matter was reassigned to the undersigned Hearing Officer on February 7, 2008 After an Initial Case Management Conference the parties advised the undersigned Hearing Officer that they had arrived at an amended settlement in this case An Amended Joint Memorandum in Support of Discipline by Consent, and Amended Tender of Admissions were submitted and a hearing was held on the amended agreement on March 18, 2008

FINDINGS OF FACT

3 At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice in Arizona October 7, 1978

Summary of Facts

4. Respondent is an estate planning attorney that initially worked on a contract basis for companies that sold trust plans As such, Respondent developed a large client list and many of these clients looked to Respondent to fulfill a pledge of lifetime trust work not being fulfilled by the trust companies Respondent also heard from some clients that other entities were approaching them and taking documents out of the client's trust folders In an effort to get greater control over a situation he had no control over, Respondent teamed up with several salesmen that called themselves "paralegals" and gave them his extensive client list The "paralegals" in turn sent out letters signed by Respondent to the clients urging them to have the "paralegals" look at their trust documents The "paralegals", at Respondent's direction, did review the client's trust documents for updates, but then tried to sell them first annuities, and later, an investment called a Universal Lease The Universal Lease turned out to be a bad investment and many clients lost money

COUNT ONE (File No. 03-0062)

5 At all times relevant hereto, Respondent was working as a sole practitioner, practicing mainly in the area of estate planning

6. In addition to generating his own clients through marketing and referrals, Respondent routinely acted as a contract attorney for various trust companies

including American Estate Services ("AES") and Liberty Estate Management ("LEM") These companies were engaged in the business of selling trusts and other financial products to consumers

7 Respondent's contract work with AES and LEM occurred mainly from 1996 through 1998

8 Respondent's duties as the trust contract attorney varied for each company, but generally included preparing the trust documents for clients based on information already gathered by the trust company or reviewing trust documents that were already prepared by someone else Respondent also, on occasion, prepared deeds to transfer assets into the trusts In general, Respondent did not meet with those clients but usually had a telephonic contact with the clients Respondent did not sign separate retainer agreements with the clients but was paid a flat fee by the trust companies for each case he handled Respondent generally had no ongoing client relationship with the trust clients On numerous occasions over the years, however, either the clients or their children contacted Respondent with questions, amendment requests, estate settlement issues or what actions to take when the clients had become incompetent

9 As part of the information that Respondent used to prepare or review the trust documents, Respondent often discussed the client's assets with the client

10 As part of all of the agreements that the clients signed with the respective trust companies, the clients were informed by the trust company that they could have changes made to the trust documents in the future, free of charge However, these agreements were not with Respondent, and did not bind the Respondent in any

way The agreement for future services was solely with the trust companies and did not name Respondent as the future attorney Nevertheless, many of the clients and their children believed that Respondent had a continuing duty and expected him to provide free legal services even when the trust companies no longer existed

11 Respondent kept a list of all clients who used his services through either AES or LEM along with notes about their cases For cases in which Respondent prepared original documents, Respondent also kept copies of those documents Respondent's files included contact information for approximately 1400 clients for whom he had written or reviewed trust documents while working with AES and LEM

12 In general, the clients who Respondent represented through AES and LEM were retired, and most were between the ages of 65 and 85 at the time of the representation

13 While receiving referrals from AES, Respondent became acquainted with an AES salesperson named John Tencza ("Tencza") sometime during 1996 Tencza was not a lawyer

14 In or about 2000, Tencza formed a company named American Elder Group ("AEG") for the purpose of marketing financial products to individuals On occasion, Respondent reviewed trust documents for AEG clients on a contract basis

15 Sometime during 2000, Tencza approached Respondent with the idea of using Respondent's client contact information gathered from his contract work with AES and LEM to sell financial products, specifically annuities, to the clients

16 Respondent agreed to Tencza's sales plan The plan devised by the Respondent and Tencza called for letters to be sent to the prior clients informing the clients that updates were needed to their trust documents The letter requested that the clients set up a home appointment to have the updates made Tencza would make the home visits and, while there, attempt to sell the clients an annuity

17 Respondent and Tencza agreed that Respondent would receive 40% of any commissions from the sale of any financial products to the clients

18 In order to contact the clients, Respondent drafted a form letter to be sent in batches to his prior trust clients The form letter was written on Respondent's legal letterhead and signed by Respondent as "Attorney at Law " The text of the form letter stated that the purpose of the letter was to prompt the clients to contact Respondent's office in order to set an appointment for a "paralegal from [Respondent's] office" to meet with a client in his or her home to review their trust documents as a precaution due to Respondent's alleged "concern for [the client's] security " The letter further indicates that "the purpose of [Respondent's] contact with [the former client] is to schedule a time at your convenience to check your documents for missing pages, ensure the documents have been properly executed and determine if your estate plan is in need of updating " Respondent further promises that the review will occur at no charge, and that if the client does

not phone in to set up an appointment, the attorney-client relationship is immediately terminated

19 The letter does not mention the prospective sale of any financial product

20 The letter was written to induce clients to call Respondent's client services line so Respondent had the opportunity either to provide the client updated services and continue to guarantee future free legal services, or determine what the clients believed was Respondent's continuing duty to provide free legal services This also provided Tencza and/or his agents or associates the opportunity to sell financial products to the clients

21 Respondent testified at the hearing on the agreement that it was, in his opinion, necessary for many of the former clients to have changes made to their estate planning documents because of recent changes in the law Nonetheless, he admits that the letters did not mention the financial products and thus were incomplete in that regard

22 Although Tencza made suggestions to Respondent concerning the language of the letter, Respondent made all of the final decisions on the wording of the letter

23 Although the letterhead on the letters listed a phone number purporting to be Respondent's client services line, and the letter directed clients to phone that number to set up an appointment, that phone number actually rang to Tencza's office and was answered by someone who was not employed by Respondent Respondent had no supervisory authority over the person answering the phone

24 That receptionist then set up appointments with the caller, Respondent's former trust clients, to meet with one of Respondent's "paralegals "

25 Respondent, in fact, never employed any paralegals

26 In or about May 2001, Tencza proposed selling a different financial product, known as the "Universal Lease", to the former clients under the same plan described above Respondent agreed The Universal Lease was a Mexican timeshare

27 Approximately 1,400 of the letters were sent out to Respondent's former trust clients over approximately two to three years At some point, Tencza suggested that other salesmen also be allowed to make the sales visits based on a high volume of letters sent out Respondent agreed Phillip Ohst and John Donovan also became involved as additional AEG salesmen

28 Respondent knew little about John Donovan prior to entering the agreement with them for sale of the financial products Respondent contends and testified that he had become quite familiar with Tencza and Ohst over the years through their affiliation with the trust companies Both Tencza and Ohst had assisted on numerous occasions with client meetings, execution of documents, funding of the trusts and later amendments

29 Respondent was aware that none of the salesmen were attorneys and none were trained paralegals Respondent had no information as to whether any of them had any legal training Respondent contends and testified that he was aware of their training in trust issues because he provided much of that training during the time they were involved in the trust companies It was not uncommon for Respondent to attend training meetings, sometimes monthly, to train the trust reps in trust law concepts, and he invited the reps to call him with any questions they might have

30. The salesmen were not employed by Respondent in any way.

31 Respondent never paid the salesmen for their time spent in visiting the clients The only compensation any of them received was by selling an annuity or Universal Lease to the client Respondent was not aware of how much Tencza paid Donovan or Ohst for their involvement

32 Respondent provided the salesmen with only 30 to 60 minutes of legal training prior to their sales visits with the clients where they were to review the legal documents previously drafted by Respondent for updates That training was specifically directed at the type of documents he was sending out to the clients, why they were being sent, how to execute them and the specific sections and issues he wanted them to look for as they reviewed the clients' documents

33 The salesmen automatically brought new financial documents with them on the sales calls consisting of a new financial power of attorney and in most cases, a new health care power of attorney For married individuals, the salesmen also brought an amended Article III of the trust

34. The salesmen were responsible for explaining these documents to the clients, and having them execute the documents, even though they were not lawyers

35 Respondent did not charge the clients for the services even though he was under no legal obligation to provide any updates to the documents

36 According to Respondent, approximately 600 former clients responded to the letter sent to them but not all scheduled home visits

37 All of the visits were made by one of the three salesmen Respondent did not make any home visits

38. The salesmen represented to the clients that they were paralegals from Respondent's law firm All the salesmen had business cards that they provided to the clients identifying themselves as Respondent's paralegals, and at least one of the salesmen also wore a name tag identifying himself as Respondent's paralegal Respondent was aware of these representations. It is the State Bar's position that these representations were misleading Respondent's position is that he believed it was proper to refer to the salesmen as paralegals, as they had been instructed by him as to how to review the estate planning documents. Thus, Respondent contends that any misrepresentations in that regard were negligent, not knowing

39 At the visits, the salesmen reviewed the trust documents, provided and explained the updated documents, and asked if any further additions or edits needed to be made These actions constituted the unauthorized practice of law

40 After reviewing the documents, the salesmen attempted to sell the clients the annuity product and/or the Universal Lease product The clients were never told prior to the appointments that this would be a sales call

41 The clients were never informed that the salesmen worked for AEG and not Respondent Respondent concedes that some of the clients were not informed of the "paralegals" employment, however, he contends that the information was normally provided to the client Moreover, all financial products purchased by the client had an AEG business card attached to the paperwork for the product

42 The clients were never informed that Respondent was receiving a commission from their purchase of any product. Respondent contends he believed that, based on statements from Ohst and Tencza, the salesmen would inform the clients of his

commission as part of the sales presentations Respondent acknowledges, however, that the information may not have been consistently conveyed to the clients by the salesmen

43 At times, the clients were informed that Respondent had purchased a Universal Lease in order to further induce the clients to purchase the product. The clients were never informed that Respondent had made only the minimum investment allowable of $5,000.

44 Respondent failed to provide any sort of writing to the client to ensure that they were informed of the sales agreement and of his commission Respondent would testify that he had instructed the salesmen to convey to the clients his involvement in the sale

45 Respondent did not conduct any investigation in order to determine whether the Universal Lease was a viable or sound financial investment. Respondent contends that, prior to offering the Universal Lease, he reviewed an opinion letter from the law firm of Baker and McKenzie in Dallas, Texas, concerning the securities aspect of the product and relied on that opinion letter.

46 Respondent never considered the suitability of the Universal Lease for any of his clients, all of whom were elderly, prior to mailing the letters and authorizing the salesmen to conduct home visits

47 The Universal Lease was not a sound financial investment

48 Respondent was aware that the salesmen promised the clients that the Universal Lease was a contractually-guaranteed investment with a guaranteed return of

between 9% and 11% annually Other than contractual remedies, there was no guaranteed return

49 The State Bar contends that the salesmen routinely provided false, misleading, or incomplete information to the clients concerning the Universal Lease in order to induce the clients into purchasing the lease For instance, some of the clients were informed that the Universal Lease was insured when it was not Respondent contends that he was unaware of the misleading statements

50 The Universal Lease was initially designed, promoted and operated by Yucatan Resorts, and later by Resort Holdings Michael Kelly was the founder, president and owner of Yucatan Resorts

51. Mr. Kelly had been the subject of numerous cease and desist orders, and other administrative actions in multiple other states regarding the Universal Lease product based on securities violations and fraud Respondent was unaware of these actions

52 Approximately 100 former clients purchased either an annuity or a Universal Lease from the salesmen The amount paid by the clients varied widely, from approximately $10,000 to over $220,000

53 Respondent failed to comply with the requirements of the ER 1 8(a)

54 Respondent continued in the above-stated conduct until May of 2003, when the Arizona Corporation Commission issued a cease and desist order concerning Yucatan, Michael Kelly and the Universal Lease product

55 During the approximate three-year span that Respondent participated, he received between $300,000 and $350,000 in commissions

56 The Arizona Corporation Commission has pursued a regulatory action against Respondent and others based on the sale of unregistered securities. An Order to Cease and Desist, Order of Restitution, Order of Administrative Penalties and Consent thereto was filed on August 13, 2007, resolving that action (See ex A attached to the Amended Tender) Pursuant to that order, Respondent will pay restitution in the amount of $300,998 86 (the amount of his commissions from the sales) as well as a penalty of $75,000

57 Previously, there had been an Arizona Corporation Commission action against Michael Kelly involving the sale of the Universal Lease That matter settled with the requirement that Mr Kelly make full restitution to the persons who purchased the lease

CONCLUSIONS OF LAW

58 The Hearing Officer concludes that the State Bar has proven, by clear and convincing evidence, that Respondent violated the following ethical rules

A) Respondent participated in the unauthorized practice of law by allowing the AEG salesmen to review and execute a legal document with clients in violation of ER 5 5

B) Respondent failed to adequately supervise the salesmen, as well as the receptionist setting the appointments for the clients in violation of ER 5 3.

C) Respondent engaged in a conflict of interest with the clients as the representation was materially limited by his personal interest, in violation of ER 1 7

D) Respondent engaged in a conflict of interest by entering into an impermissible business transaction with the clients in violation of ER 1 8

E) Respondent impermissibly revealed confidential information about the clients to the AEG salesmen in violation of ER 1 6

59 Of serious concern to the undersigned Hearing Officer is whether the following conduct was an intentional or negligent misrepresentation

1) Sending letters to the clients for the misleading reason of updating their documents,

2) Referring to the AEG salesmen as "paralegals" and inducing the clients into believing that they had an employee relationship with his office,

3) Providing the updated documents to the clients,

4) Failing to disclose his interest in the sale of the financial products,

5) The degree of Respondent's participation in the AEG salesmen's false representations about the product and in the circumstances surrounding the sale of the Universal Lease product to the client

60 Respondent asserts that any misrepresentations were done negligently, not knowingly

61 The State Bar acknowledges that it is not in possession of any direct evidence that Respondent knowingly acted dishonestly Respondent testified that the reason for contacting the clients was that over the years many of the estate documents had become deficient and needed updating, numerous clients had informed him that persons claiming to be his agents (who had no connection to his law practice), had contacted them and attempted to review their documents, many clients informed

him that those persons had removed important documents from their portfolios, and numerous clients had called demanding free legal services that had been guaranteed by the trust companies, which Respondent had no legal obligation to render Although Respondent had no contractual obligation, he viewed this method of contact as a way to cut off the client demands for free services if they did not agree to allow him to review their documents The agreement to allow the offering of financial products served as a way to fund the otherwise extremely costly lifetime services to these trust clients

62 A review of the statement of Bar Counsel at the hearing in this matter shows that, while it appears Respondent knew or should have known what was going on, there simply is no evidence that he did (See Transcript of Record T/R pg 7 8 – pg 18 14) Further, the evidence offered by the salesmen is consistent with that of Respondent (T/R pg. 15 2 -15 20)

63 Based upon the testimony at the hearing in this matter, it was also clear that, at least at first, everyone thought the Universal Lease was a good investment and had initially paid the return that was expected. While in retrospect it is easy to judge that this whole investment scheme was a bad idea, at the time it was not quite so clear

64 Based on this state of the evidence, the Hearing Officer must conclude that there is simply not evidence that the Respondent acted other than negligently.

ABA STANDARDS

65 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, 4) the existence of aggravating and mitigating factors.

The Duty Violated

66 The Hearing Officer finds that the Respondent violated his duty to his clients, as well as to the legal profession *Standard* 4 3 addresses the failure to avoid conflicts of interest and clearly applies to the Respondent's failure to comply with the requirements of ER 1.8(a) and ER 1 7. *Standard* 4 31 provides that disbarment is generally appropriate when a lawyer, without the informed consent of his clients, engages in representation of a client knowing that the lawyer's interests are adverse to the clients with the intent to benefit the lawyer or another and causes serious or potentially serious injury to the client *Standard* 4 32 states that suspension is generally appropriate 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

67 It could certainly be argued that either one of these standards applies in this case The State Bar and the Respondent submit that *Standard* 4 32 (suspension) is more applicable to the facts of this case

The Lawyer's Mental State:

68 The lawyer's mental state is really the crux of this case Respondent submits that he was simply negligent in not supervising the "paralegals" and not making sure

what they were representing to the clients As stated, while a case could be made for an argument that he must have known, there simply is not sufficient evidence to prove that. His failure to supervise the "paralegals" was knowing, and his failure to assure that he knew what they were saying to the clients was at least negligent

The Actual or Potential Injury:

69 Had the investment in the Universal Lease turned out to be a good investment, the damages would be fairly minimal Respondent did update the client's trust documents, and so they received some benefit from that. However, there is no question but that Respondent participated in a process whereby many clients ultimately suffered financial harm Respondent has been ordered to pay restitution in the amount of $300,998 86 (the amount of his commissions) plus a penalty of $75,000 by the Arizona Corporation Commission

70 Respondent's conduct caused injury not only to his clients, but to the profession as well

Aggravating and Mitigating Factors:

71 *Standards* 9 2 and 9 3 provide the aggravating and mitigating factors to be considered in this matter.

Aggravating Factors

72 *Standard* 9 22(b), Selfish Motive Respondent claims, and the State Bar cannot prove otherwise, that he did not act with a dishonest motive It is agreed that Respondent's conduct was selfish and that he desired to make a commission

73 *Standard* 9 22(c), Pattern of Misconduct This case involves numerous clients, and/or former clients and occurred over a period of years,

74 *Standard* 9 22(i), Substantial Experience in the Practice of Law Respondent was first admitted to the practice of law in 1978

Mitigating Factors

75 *Standard* 9 32(a), Absence of a Prior Disciplinary Record Respondent has been practicing since 1978 and has no prior disciplinary record.

76 *Standard* 9 32(e), Full and Free Disclosure Respondent was forthcoming and cooperative throughout the investigative stage of these proceedings, timely providing all information requested.

77 *Standard* 9.32(i), Delay in Disciplinary Proceedings. The State Bar acknowledges that there was a delay in processing this matter over several years

78 *Standard* 9 32(k), Imposition of Other Penalties As previously noted, the Respondent has entered into a consent agreement with the Arizona Corporation Commission for restitution as well as an administrative penalty Respondent has paid $50,000 toward this agreement.

79 The parties submit that in weighing the aggravating and mitigating factors, together with the *Standards*, the imposition of the presumptive sanction of suspension is justified

PROPORTIONALITY REVIEW

80 The Supreme Court has held that in order to achieve the purpose of discipline, the discipline in each situation must be tailored to the individual facts of the case and yet be proportional to other cases with similar factual circumstances *In re Wines,*

135 Ariz 2003, 660 P 2d 454 (1983) and *In re Wolfram*, 174 Ariz 49, 847 P 2d 94 (1993)

81 Violations of ER 1 8(a) range from censure to disbarment In this case, we have a proposed sanction of suspension for two years. The cases that deal with short-term suspensions seemed to turn on whether the attorney had a selfish motive and was not achieving some gain as a result of his conduct Those cases involving a longer-term suspension do involve the attorney having received some gain as a result of his misconduct

82 In *In re Breen*, 171 Ariz 250 (1992), the Respondent was suspended for two years for entering into a business transaction with a client. The Court found that Respondent benefited from the transaction, and that the transaction was not an isolated incident

83 In *In re Murphy*, 188 Ariz. 375 (1997), the Respondent was suspended for a period of one year in part for violation of ER 1.8(a) involving his investment in a business deal with a client, and promoting other clients to likewise invest

84. In *In re Pappas*, 159 Ariz 516, 768 P 2d 1161 (1988), and *In re Spear*, 160 Ariz. 545, 774 P 2d 1335 (1989), the attorneys who entered improperly into business transactions with their clients also received long-term suspension or disbarment

RECOMMENDATION

85 As stated previously, the crux of this case is whether the Respondent was complicit in a scheme to take advantage of his clients or whether he simply made a very serious mistake which then snowballed out of control The Hearing Officer

had an opportunity to witness the Respondent as he gave his testimony as well discuss the "proof" problems with Bar Counsel and get her perspective gained after her many months of working with the victims and the Respondent in trying to resolve this case

86 The undersigned Hearing Officer has also read the previous Hearing Officer's blunt assessment of the case, and I can't say that I disagree with him. On the surface this case repels However, our job is to look beyond what appears on the surface and evaluate the facts

87 In retrospect, it is easy to judge the Respondent's conduct and judge it harshly because it turned out bad for everyone. Certainly Respondent should have used not only better judgment in even considering this plan, but then not to follow up and make sure that everyone was acting appropriately compounded his sins

88 Some weight must be given to Respondent's very great concern that the trust companies, who had hired him to review their customer's plans, were not stepping up (one was not even around anymore) and fulfilling their pledge of lifetime trust counsel Right or wrong, the customers were looking to Respondent to fulfill this commitment and this was becoming increasingly burdensome to him. Some weight must also be given the fact that Respondent, through the "paralegals", was able to update some people's trust documents at no charge to them

89 However, taken as a whole, it is hard to escape the bad smell of it all Respondent does seem to realize this, and his remorse and regret appear to be sincere The decision to get involved in this enterprise is, in his words, "the greatest mistake of my life "

90 The recommended sanction in this matter is for a long-term suspension of two years Is this enough or should the Respondent be disbarred? A weighing of the aggravating factors (3) and the mitigating factors (4) perhaps tilts the scale a bit toward suspension It cannot be ignored that Respondent has been sanctioned very heavily by the Arizona Corporation Commission. He must give up all of the commissions that he earned plus a $75,000 penalty, and he will lose his ability to practice law for a substantial period of time Looking at the proportionality cases, it appears that the disbarment cases are when an attorney enters into a transaction with criminal intent, whereas suspension cases are the one's where bad judgment was used This case seems to this Hearing Officer to be closer to the latter than the former.

91 Not with enthusiasm but with an acceptance that not all cases can be tied up as neat as we would like, this Hearing Officer recommends acceptance of the tendered sanction

1) Respondent shall be suspended for two years retroactive to the date that he stops practicing law

2) Respondent shall pay restitution consistent with the consent order of the Arizona Corporation Commission action, Docket No S-20483A-06-0661

3) Respondent shall be placed on probation for no less than two years to begin upon his reinstatement under terms to be determined at the time of his reinstatement

4) In the event Respondent fails to comply with any of the foregoing terms, and the State Bar receives information about his failure, Bar Counsel will

filed a Notice of Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Ariz R Sup Ct The imposing entity may refer the matter to a Hearing Officer to conduct a hearing at the earliest practicable date, but in no event later than 30 days following the receipt of the notice, and determine whether the terms have been breached and, if so, will recommend appropriate action in response to the breach The State Bar shall have the burden of proving non-compliance by clear and convincing evidence.

5) Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's Office in this matter

DATED this 11th day of April, 2008

H Jeffrey Coker /NM
H Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 11th day of April, 2008

Copy of the foregoing mailed
this 11th day of April, 2008, to

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