BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A NON-MEMBER OF THE STATE BAR OF ARIZONA, **TIMOTHY A. SHIMKO,** RESPONDENT.	)	No. 08-0760 **HEARING OFFICER'S REPORT**

PROCEDURAL HISTORY

A complaint was filed on December 31, 2008. This matter was assigned to this Hearing Officer on January 12, 2009. A Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Admissions were filed on February 11, 2009. A hearing on the Agreement was held on February 17, 2009.

FINDINGS OF FACT

1. At all times relevant, Respondent was an attorney licensed to practice law in Ohio, having been admitted to practice in that state on November 19, 1976. [1]

2. At all times relevant, Respondent was not an attorney licensed to practice law in Arizona.

3. The State Bar received a complaint in the above referenced matter on May 19, 2008.

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[1] The facts are found in the Tender of Admissions and Joint Memorandum in Support of the Tender unless a specific reference to the hearing transcript is made.

4. A formal complaint was filed against Respondent in this matter on December 31, 2008.

COUNT ONE

5. At all times relevant, Paul Woodcock (Dr. Woodcock) owned CORF Services, L.L.C.

6. CORF Services, L.L.C. is domiciled in Arizona.

7. CORF Services, L.L.C. began conducting business in 1999.

8. CORF Services, L.L.C. was first registered with the Arizona Corporation Commission on June 7, 2002.

9. At all times relevant, David Goldfarb (Mr. Goldfarb) was a partner in CORF Services, L.L.C.

10. At all times relevant, Milton Guenther (Mr. Guenther) was a partner in CORF Services, L.L.C.

11. At all times relevant, Richard Ross (Mr. Ross) was a partner in CORF Services L.L.C.

12. Dr. Woodcock, Mr. Goldfarb, Mr. Guenther, and Mr. Ross were each equal partners in CORF Services, L.L.C.

13. CORF Services, L.L.C.'s business was to create a demand for and license business plans to individuals to start up, own, and operate a Medicare recognized Comprehensive Outpatient Rehabilitation Facility.

14. CORF Services, L.L.C. licensed its business plan to many customers nationwide.

15. Beginning in 2001, various customers of CORF Services, L.L.C. were dissatisfied with the licensed business plan as patients were not as numerous as promised, referrals were not as high as promised, staff was not as readily available as promised, and the success stories used by CORF Services, L.L.C. to help sell the license had been fabricated.

16. Respondent was hired to represent Dr. Woodcock, Mr. Goldfarb, Mr. Guenther, and Mr. Ross (collectively "the partners") in 2001.

17. Respondent was retained to address the complaints being filed against the partners in connection with CORF Services, L.L.C.

18. Respondent advised each of the partners they could be found responsible for any fraudulent activities of the other partners.

19. The partners retained Respondent and he was assigned to settle and resolve all claims made against the partners individually and against the CORF entities.

20. Respondent made the professional judgment at the time that there was no conflict of interest, nor potential for conflict of interest that would arise during his representation of the various individual clients.

21. Respondent did not advise the clients about potential conflicts of interest nor did he obtain informed, written consent from any of the partners during Respondent's joint representation of them, regarding any conflicts of interest.

22. Respondent settled approximately 40 of the complaints filed against CORF Services, L.L.C. before 2002. Respondent was representing the clients in Arizona under the

supervision of Arizona counsel for a year before any litigation was filed. (Transcript of the Hearing "TR", page 6, line 10, "6:10")

23. In 2002, CORF Services, L.L.C. ran out of money to settle additional cases and so began to litigate complaints.

24. Respondent began to defend approximately 40 lawsuits filed against CORF Services, L.L.C, and its partners.

25. Respondent did not obtain informed, written consent from CORF Services, L.L.C. to represent any of the individual partners of CORF Services, L.L.C.

26. Respondent did not obtain informed, written consent from the four CORF Services, L.L.C. partners to represent CORF Services, L.L.C. while Respondent represented the four partners individually and simultaneously.

27. In late 2002, Mr. Ross telephoned Respondent and told Respondent that Mr. Ross did not have enough money to make the payroll for CORF Services, L.L.C.

28. During the telephone conversation, Mr. Ross asked Respondent to loan CORF Services, L.L.C. $250,000.00 for payroll purposes.

29. Respondent agreed and loaned Mr. Ross $250,000.00, interest free, to be repaid over the next month with five post dated checks provided by Mr. Ross and the other partners.

30. Respondent did not obtain informed, written consent from Mr. Ross, the other partners, or CORF Services, L.L.C. regarding the $250,000.00 loan.

31. Respondent did not advise Mr. Ross, the other partners, or CORF Services, L.L.C. to seek the advice of independent legal counsel regarding the $250,000.00 loan.

32. In late 2002, Respondent invested in a project that intended to start up and operate a tissue bank facility in Mexico City and in Florida with Dr. Woodcock, Mr. Ross, Mr. Goldfarb, and Mr. Guenther, and a half dozen other investors.

33. The name of the tissue bank facility was Aztec Medical, L.L.C. which was incorporated by Respondent with the Florida Division of Corporations on October 11, 2002, but operations for the company never commenced.

34. No partnership or ownership agreement was executed among the investors. Respondent invested his money with the rest of the investors.

35. Respondent did not advise Dr. Woodcock, Mr. Ross, Mr. Goldfarb, or Mr. Guenther to seek the advice of independent legal counsel regarding the Respondent's investment in and the formation of Aztec Medical, L.L.C.

36. Respondent did not obtain informed, written consent from Dr. Woodcock, Mr. Ross, Mr. Goldfarb, or Mr. Guenther regarding his investment in Aztec Medical, L.L.C.

37. Respondent's monthly invoices detailing his fees and costs of representation were mailed to CORF Services, L.L.C. beginning December 5, 2001 and ending April 23, 2003.

38. CORF Services LLC became delinquent on its account for Respondent's fees in the summer of 2002. CORF made its last payment on Respondent's invoices in January

or February 2003. Respondent's account for services rendered after October 2, 2002 remained unpaid.[2]

39. Respondent withdrew from representing the partners in April 2003 based on the nonpayment of his invoices.

40. Respondent's invoices from December 5, 2001 through April 23, 2003 totaled $854,709.35.

41. Respondent's invoices from December 5, 2001 through April 23, 2003 include charges totaling $121,485.00 for 347.1 hours of work performed by David Welling (Mr. Welling).

42. Respondent billed the work performed by Mr. Welling at $350.00 per hour.

43. The $350.00 per hour billing rate referred to in paragraph 42, above, was a rate for licensed, practicing attorneys in Respondent's law firm.

44. Mr. Welling was a law clerk and not a licensed, practicing attorney in Respondent's firm for the work referred to in paragraph 41, above.

45. Mr. Welling's work, as referenced in paragraph 41, above, should have been billed at a rate of $125.00 per hour for a total of $43,387.50.

46. Respondent over-billed a total of $78,097.50 for Mr. Welling's work as referenced in paragraph 41, above.

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[2] The parties stipulated that the facts in this paragraph differ from the same paragraph in the Tender of Admissions. The paragraph in the Tender of Admissions was in error. See Stipulation.

47. Respondent's April 23, 2003 invoice showed a balance owed to Respondent by CORF Services, L.L.C. totaling $354,949.00

48. Respondent's $354,949.00 balance included the $78,097.50 overcharge referred to in paragraph 46, above.

49. Respondent filed a collection suit in U.S. District Court against Mr. Goldfarb, Mr. Ross, and Mr. Guenther and their respective spouses, CIV-04-78-PHX-FJM.

50. Respondent's collection suit was originally filed in Ohio but later transferred to Arizona.

51. A trial was held in CV-04-78-PHX-FJM on May 17, 2005.

52. Respondent testified at trial that his law firm was owed $359,668.00 plus interest.

53. The $359,668.00 included the $78,097.50 overcharge referenced in paragraph 46, above.

54. Respondent testified at trial that CORF Services, L.L.C. had paid him a total of $153,572.00.

55. Respondent also introduced records that indicated his law firm had been paid approximately $360,000.00

56. Respondent received funds from CORF Services, L.L.C. totaling $603,826.80, including $250,000 in checks that may have been part of repayment on the loan made by Respondent, described above.

57. Relying on Respondent's testimony at trial, the U.S. District Court awarded Respondent $359,668.00 against Mr. Guenther.

58. The U.S. District Court's judgment, referred to in paragraph 57, above, was reversed and remanded by the Ninth Circuit Court of Appeals in *Shimko v. Guenther*, 505 F.3d 987, 992 (9th Cir. 2007).

59. The U.S. District Court then awarded Respondent one-fourth of his requested fees and costs, totaling $59,945.00, against Mr. Guenther pursuant to the Ninth Circuit decision referenced in paragraph 58, above.

60. The U.S. District Court relied on Respondent's pleadings in ordering Mr. Guenther to pay Respondent.

61. Respondent filed a collection suit in U.S. District Court against Dr. Woodcock and his wife, CV-05-1387-PHX-FJM.

62. By Memorandum dated March 3, 2008, Respondent argued again to the Court that his law firm was owed $359,668.00 in CV-05-1387-PHX-FJM.

63. The $359,668.00 included the $78,097.50 overcharge referenced in paragraph 46, above.

64. CV-04-78-PHX-FJM and CV-05-1387-PHX-FJM were consolidated.

65. By Order dated September 16, 2008, the United States District Court found that Respondent failed to notify the Court that he did not reduce the $359,668.00 he was requesting in fees and costs by the overcharged amount for Mr. Welling's work referenced in paragraph 46, above.

66. By Order dated September 16, 2008, the United States District Court found that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically, ER 3.3. However, Respondent testified at both trials and at his deposition that the rate charged for Mr.

Welling's time was a mistake and should have been reduced to $125.00/hr. (TR 32:23 to 34:2) Respondent, however, did not correct his pleadings. The State Bar is dismissing that portion of Count One that refers to an alleged violation of ER 3.3, candor toward tribunal, while retaining that portion of Count One that alleges a violation of ER 1.5 (a), overcharging a client. (TR 34:3)

67. By Order dated September 16, 2008, the United States District Court found that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.7.

68. By Order dated September 16, 2008, the United States District Court found that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically ER 1.8.

69. By Order dated September 16, 2008, the United States District Court vacated its Order against Mr. Guenther as referenced in paragraph 58, above.

70. Respondent has not collected the outstanding balance of his fees and costs from CORF Services, L.L.C. or its four partners.

71. Respondent's outstanding balance exceeds the amount of the overcharged fees referred to in paragraph 46, above.

72. Respondent paid opposing counsel's attorney fees, totaling $57,000.00.

73. Respondent is currently the subject of a disciplinary investigation by the Ohio State Bar also addressing the facts of this matter. (TR 9:23, 12:15)

RESTITUTION

74. Restitution is not an issue in this matter because the evidence does not

establish that Respondent received any fees in excess of fees he was owed for his representation of the partners and Respondent did not collect on his outstanding balance.

CONDITIONAL ADMISSIONS

75. Respondent conditionally admits that his conduct violated Rule 42, Ariz.R.Sup.Ct. (2003), specifically, ERs 1.5(a), 1.7, 1.8(a), 1.8(e), 1.13(e), and 8.4(a). Respondent conditionally admits that his conduct violated Rule 42, Ariz.R.Sup.Ct. (2008), specifically, ER 8.4(a). Respondent's admissions are being tendered in exchange for the form of discipline stated below.

CONDITIONAL DISMISSALS

76. The State Bar conditionally agrees, for purposes of this agreement only, with respect to Count One, to dismiss the alleged violation of Rule 42, Ariz.R.S.Ct. (2003), specifically ER 8.4(d), based on evidentiary concerns and in exchange for this agreement. The State Bar further conditionally agrees, for purposes of this agreement only, with respect to Count One, to dismiss the alleged violation of Rule 42, Ariz.R.Sup.Ct. (2008), specifically ERs 3.3(a), 8.4(c), and 8.4(d). The reasons for these dismissals are set forth in the facts section, above, and evidence provided by Respondent to the State Bar subsequent to the filing of the formal complaint in this matter.

CONCLUSIONS OF LAW

76. The hearing officer finds that there is clear and convincing evidence that Respondent violated ERs 1.5(a) overcharging a client, 1.7(b) representing clients with potential conflicts of interest without obtaining informed consent in writing, 1.13(e) and (g) representing an organization as the client without approval from a member, 1.8(a) going into business with a client without obtaining informed consent from the client in writing and without advising the client of the desirability of seeking the advice of independent legal counsel and 1.8(e) lending a client money. The conduct described in this paragraph is also a violation of ER 8.4(a).

ABA STANDARDS

77. The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. See *In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.3d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990).

78. In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. See *Peasley,* 208 Ariz. at 35, 90 P.3d at 772; *Standards* 3.0. The parties agree and the hearing officer finds that Respondent's representation of clients with conflicting interests in violation of ER 1.8 implicates *Standard* 4.3.

79. Standard 4.32 states "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. Respondent loaned $250,000 to his clients when he was informed that CORF needed the money to cover payroll. At the time of the loan Respondent was representing both the partners and CORF. The potential for injury existed when Respondent made himself a creditor of his clients at a time when CORF was financially in trouble.

THE DUTY VIOLATED

80. In overcharging, in representing clients with conflicts of interest without obtaining informed consent, in entering into a business transaction with clients without obtaining informed consent and without notifying clients of the opportunity to seek the advice of independent counsel, in lending money to clients and in representing a business entity without the approval of a member of the entity, Respondent violated duties to clients.

THE LAWYER'S MENTAL STATE

81. Respondent was negligent in overcharging the client. (TR 32:23 and 36:8) He testified at the hearing that he did not realize he had made a mistake in billing for the time of his law clerk Mr. Welling until his opposing counsel in the collection lawsuits informed Respondent of the error. (TR 32:23 to 34:2) Even though the United States District Court found that Respondent violated ER 3.3, candor toward tribunal, the State Bar at the hearing of this matter stated that Respondent did correct the error of overcharging in both his trial testimony and deposition testimony in the collection cases. Respondent did not amend his complaint to change the total amount of unpaid legal fees for which he was bringing a suit.

82. Respondent knowingly represented the partners even though he advised them that each could be held responsible for the allegedly fraudulent acts of the others. (TR 37:9-24) Respondent knowingly represented the organization CORF without obtaining permission of its members. Respondent knowingly entered into a business transaction with his clients, the tissue bank facility, and knowingly loaned his clients $250,000. (TR 38:24 to 39:15)

THE ACTUAL OR POTENTIAL INJURY

83. Respondent did not cause actual injury to his client. The record does not show that one client suffered because that client's interests were sacrificed for the interests of another client. (TR 41:9 to 42:21) However the potential for injury existed whenever the individuals were defendants in lawsuits alleging misrepresentations. The clients could have been in a situation where the acts of one client could be argued to be so wrongful the other clients should not be held responsible. At the least the potential for conflict should have been explained in writing and informed consent to the representation obtained. Overcharging the clients did not result in actual injury to them. The Federal Court eventually ruled for the clients on Respondent's collection claim. (TR 40:15) The potential for injury in Respondent lending the clients money is that disagreements between the attorney as creditor and the clients as debtors would interfere with the relationship of the attorney as counselor and advisor to the clients. If the loan had not been repaid the attorney would have a conflict between his personal financial interest in the clients and his disagreement with them over the money owed and his duty to assist and advise them as their attorney. In this case the Respondent was given checks to repay

him for the loan. Apparently the checks were sufficient to repay the loan. Although Respondent testified in the hearing that he still was not sure that all the checks were sufficient to repay him.

84. The record does not show that the client suffered an actual injury because of Respondent's investment in business with them. Instead Respondent lost his investment in the tissue bank facility along with the clients and other investors. (TR 48:12) The potential for injury was the same as that set forth above involving lending money to clients. Although business transactions are permissible under ER 1.8(a) Respondent did not transmit the terms of the transaction in writing to the clients, did not in writing advise them of the desirability of seeking the advice of independent legal counsel on the transaction and did not obtain informed consent in writing from the client to the business transaction. The potential for injury is that the lawyer is wearing two hats. He is acting as the client's advisor and counselor and also as the client's business partner. Disputes may arise in the business relationship that will cause the client to distrust the lawyer and cause the lawyer to distrust the client. ER 1.8 also requires that the terms of the transaction be fully disclosed and that the terms be fair and reasonable to the client. The potential for injury is that the lawyer will use the relationship of trust that he has with a client in his role as counselor to influence the client to accept the lawyer in a vastly different role as business partner.

AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors

85. *Standard* 9.22(b) Selfish or Dishonest Motive. Respondent sought the full reimbursement of his attorney fees though they were inflated by overcharging for work done by a non-lawyer at lawyer rates. Respondent did not adequately correct his pleadings in the record after the inflated amount was brought to his attention. The U.S. District Court relied on Respondent's pleadings and motions to order that one of Respondent's clients first be jointly and severally liable for the entire amount, and then solely responsible for one quarter of the entire amount.

86. *Standard* 9.22(i) Substantial Experience in the Practice of Law. Respondent was admitted to the practice of law in Ohio in 1976.

Mitigating Factors

87. *Standard* 9.32(a) Absence of a Prior Disciplinary Record. Respondent has no prior formal disciplinary history in either Ohio or Arizona. (TR 53:23 to 54:5)

88. *Standard* 9.32(d) Good Faith Effort to Rectify Consequences of Misconduct. Respondent immediately acknowledged overcharging for his fees when the errors were pointed out to him by opposing counsel. Respondent testified that he had mistakenly charged too much for the non-lawyer when Respondent testified in the Federal Court collection cases in May 2005, August 2005, and April 2008. However Respondent failed to amend his pleadings in the Federal Court actions.

89. *Standard* 9.32(e) Cooperative Attitude toward Proceedings. Respondent has cooperated at all times with the State Bar's investigation and has made good-faith efforts to resolve the matter. (TR 56:24 to 57:10)

90. *Standard* 9.32(k) Imposition of other Penalties or Sanctions. After the U.S. District Court found that Respondent was not entitled to any fees from his former clients, and after negotiations between counsel for respondent and counsel for his former clients, the Court ordered Respondent to pay the attorney fees of his opposing counsel in the collection litigation for a total of $57,000. (TR 58:1-14) Respondent is also currently undergoing investigation by the Ohio State Bar regarding the same facts addressed in this matter.

PROPORTIONALITY REVIEW

91. To have an effective system of professional sanctions, there must be internal consistency and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley, supra,* 208 Ariz. at 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id* at 208 Ariz. at 61, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983).

92. *In re Gorey*, SB-08-0117-D (2008) involved attorney Gorey representing clients in a personal injury matter. Cory paid $9 699.68 for his client's rental car. Gorey was given a censure and one year of probation. Gorey had no prior disciplinary record.

He had practiced law in California where paying for a rental car for a client did not violate ethical rules. Gorey was reimbursed $8000. The client suffered no actual injury because he received a benefit in retaining the rental car. Gorey's mitigation included that he gave a full and free disclosure **to** the Bar and displayed a cooperative attitude toward proceedings. Gorey's case is distinguishable from Respondent's because Gorey was found to have acted negligently not knowingly. This finding implicated *Standard* 4.33 [reprimand] instead of *Standard* 4.32 [suspension]. In Respondent's case the loan was for a much larger sum, $250,000. However, Respondent was repaid most, if not all, of the loan. (TR 48:20 to 51:10) Therefore the financial result was very similar to Gorey.

93. *In re Brown*, SB-07-0011-D (2007) involved Brown receiving a suspension for five months for entering into a business transaction with his client. Brown received furniture from his client to pay for a portion of the legal fees. Brown did not follow the requirements of ER 1.8 (a). Brown was also sanctioned for removing client funds from his trust account to pay himself attorney fees that the client owed. Brown removed the funds without receiving client approval.

94. *In re Alcorn*, SB-04-0011-D (2004) involved Alcorn's suspension for 90 days for knowing violations of rules by doing business with his client. Alcorn borrowed $3000 from his clients without putting the terms in writing or advising his clients to seek the advice of independent counsel. Of course Alcorn's matter is distinguishable because the lawyer borrowed money from the client. Respondent loaned $250,000 to his clients. However Respondent also did not place the terms of his transaction with his client in

writing and did not advise the client to seek the advice of independent counsel. (TR 52:22 to 53:1)

95. The above-referenced cases are not the same as Respondent's matter. They demonstrate that either censure or suspension could be appropriate in this situation. Since Respondent is not a member of the Bar in Arizona suspension or disbarment are not options. *In re Olsen*, 180 Ariz. 5, 881 P.2d 337 (1994) Therefore, the agreed upon sanction of censure is appropriate.

96. Respondent did not conceal his actions from his clients, with the exception of the mistake in billing for the law clerk's time. His clients knew that he was representing them as individuals and that he also represented CORF Services LLC. The clients knew Respondent was investing with them in Aztec Medical LLC, the tissue bank facility. Nothing in the record supports a conclusion that Respondent's actions in Aztec caused the loss of his clients' (and his own) investments.

97. The clients approached Respondent for the $250,000 loan. This money helped the clients meet their payroll. (TR 47:8) The loan was interest free. (TR 61:24)

98. Bar counsel acknowledged that it would have been impossible for Respondent to have obtained the consent of a member of CORF Services LLC for Respondent to represent both the organization and its members. ER 1.13 (g) requires that the consent be given by an organization official other than the individual who was to be represented. (TR 43:8-19) The only officials of CORF Service LLC were the individuals who were being represented by Respondent. There were no other officials or stockholders other than Dr. Woodcock, Mr. Goldfarb, Mr. Guenther and Mr. Ross.

99. Respondent testified in two trials and in a deposition in the Federal Court collection lawsuits that he had mistakenly overcharged his clients for the law clerk's work. Respondent may have thought that his testimony would clarify his request for relief. Although Respondent should have amended his complaint to reflect an appropriate amount of requested relief, the Bar agreed to dismiss its allegation that Respondent violated ER 3.3 (a) for a lack of candor to the Federal Court, in spite of a finding by the U.S. District Court Judge that Respondent violated ER 3.3 (a).

RECOMMENDATION

100. The State Bar and Respondent submit that the following disciplinary sanction is appropriate and this Hearing Officer concurs:

1. Respondent will receive a censure for violating Rule 42, Ariz.R.Sup.Ct., specifically ER 1.5(a), 1.7(b) 1.13(e) and (g), 1.8(a) and (e) and 8.4(a).

2. Respondent shall pay all costs incurred by the State Bar in connection with these proceedings. Costs to date are $600.00. Respondent will be responsible for any further costs incurred in this matter, and costs will be paid by Respondent within 30 days of the Supreme Court's final Judgment and Order pursuant to Ariz.R.Sup.Ct., 60(b).

DATED this 2nd day of March, 2009.

Jonathan H. Schwartz

Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 2nd day of March, 2009.

Copy of the foregoing mailed
this 3rd day of March, 2009, to:

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