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2 State Bar of Arizona  
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6 Senior Bar Counsel

7 Richard A. Alcorn  
8 SMITH & FEOLA  
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10 Phoenix, AZ 85004-1019  
11 Telephone (602) 277-7473  
12 Respondent

13 **BEFORE THE DISCIPLINARY COMMISSION**  
14 **OF THE SUPREME COURT OF ARIZONA**

15 IN THE MATTER OF A MEMBER  
16 OF THE STATE BAR OF ARIZONA

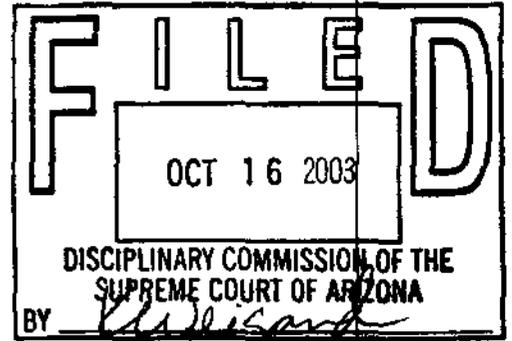
17 **RICHARD A. ALCORN**  
18 **Bar No. 006657,**

19 Respondent.

20 File No. 01-1390

21 **TENDER OF ADMISSIONS**  
22 **AND AGREEMENT FOR**  
23 **DISCIPLINE BY CONSENT**

24 This agreement is entered into between the State Bar of Arizona and  
25 respondent Richard A. Alcorn, who is not represented by counsel, and is  
submitted pursuant to Rule 56(a), Ariz.R.S.Ct. and the guidelines for discipline by  
consent issued by the Disciplinary Commission of the Supreme Court of Arizona.  
Respondent's admissions to the charges are being tendered in exchange for the  
form of discipline stated herein, subject to review and acceptance by the  
Disciplinary Commission.



1 Respondent borrowed money from a client without proper written  
2 disclosure and did not get the clients' consent to the transaction in writing.  
3  
4 Respondent will receive a three-month suspension for his conduct, retroactive to  
5 April 4, 2003, and will be placed on probation for one year upon completing the  
6 reinstatement process and after being reinstated.<sup>1</sup> Restitution is not applicable in  
7 this matter since respondent repaid the loan, with interest, at the agreed upon rate.  
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9 Respondent shall pay all costs and expenses incurred in these discipline matters.  
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11 The joint memorandum in support of the agreement by consent is filed  
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<sup>1</sup> Respondent was suspended in file no. 96-1092 for six months, effective October 3, 2002. Respondent was suspended in file no. 99-2053 for one month, to run consecutively with the six-month suspension, thus making reinstatement necessary under Rule 72, Ariz.R.S.Ct. Respondent was eligible to apply for reinstatement on April 4, 2003. Respondent has voluntarily refrained from applying for reinstatement pending a decision in this matter. For this reason, it is appropriate to make the current suspension retroactive to the date respondent could have applied for reinstatement. As to the term of probation, the firm respondent works for is currently participating in LOMAP and since the firm has already been assessed and has already implemented another LOMAP audit is not necessary. Because respondent has been effectively working under a memorandum of understanding for approximately one year, it is believed that a one-year probation, as ordered in file no. 99-2053, is appropriate.

**FACTS**

1. Respondent was admitted to practice law in Arizona on May 16, 1981.
2. A probable cause order was entered in this matter on June 10, 2002 (Exhibit A). A formal complaint has not been filed.
3. On or about June 28, 1993, Bruce and Wendy Shpillar ("the Shpillers") and Robert Berken ("Berken") formed a L.L.C. Disputes arose between the Shpillers and Berken and in late 1993, the Shpillers retained Smith & Feola ("the firm") to represent them to prosecute claims against Berken. Respondent is an associate with the firm and was primarily responsible for handling the case.
4. On September 1, 1995, during the representation and at respondent's request, the Shpillers loaned respondent the sum of \$3,000.
5. The terms of the loan transaction were not transmitted to the Shpillers in writing and the Shpillers did not consent to the loan terms in writing.
6. If this matter were to go to hearing, the State Bar would present evidence that the Shpillers were not advised to seek independent counsel; respondent would present evidence that the Shpillers were advised to seek independent counsel. For purposes of this agreement, the State Bar does not contest respondent's position.

1 7. If this matter were to go to hearing, the State Bar would present evidence  
2 that at the time the loans were made, respondent promised prompt  
3 repayment of the principal balance together with interest on the  
4 Shpillers' loan at ten percent (10%) percent per annum; respondent  
5 would present evidence that the loan agreement was not of a fixed  
6 duration and that respondent promised repayment upon demand of the  
7 principal balances, together with 10% interest per annum. For purposes  
8 of this agreement, the State Bar does not contest respondent's position.  
9

10  
11 8. If this matter were to go to hearing the State Bar would present evidence  
12 that respondent made numerous promises of payments, but no repayment  
13 was made until formal written demand was made upon respondent on  
14 November 23, 1998; respondent would present evidence that repayment  
15 was made by respondent when written demand was made upon  
16 respondent. For purposes of this agreement, the State Bar does not  
17 contest respondent's position.  
18

19  
20 9. Respondent, upon receipt of the demand for repayment, repaid the full  
21 loan amount in December 1998, along with all interest, in the sum of  
22 \$4,000.  
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24  
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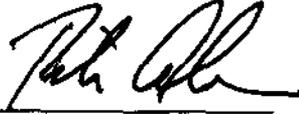


1 the assistance of counsel in these proceedings. Respondent acknowledges that he  
2 has read this agreement and received a copy of it. Respondent is specifically  
3 aware of his need to comply with Rule 63, Ariz.R.S.Ct., and his need to apply for  
4 reinstatement pursuant to Rules 71 and 72, Ariz.R.S.Ct.  
5

6 This tender of admissions and agreement for discipline by consent will be  
7 submitted to the Disciplinary Commission for approval. Respondent realizes that  
8 the Commission may request his presence at a hearing for presentation of  
9 evidence and/or oral argument in support of this agreement. He further recognizes  
10 that the Commission may recommend rejection of this agreement, and that the  
11 Arizona Supreme Court may accept or reject the Commission's recommendation.  
12 If the Arizona Supreme Court or the Disciplinary Commission rejects this  
13 agreement, respondent's conditional admissions are withdrawn.  
14  
15

16 **This agreement, with conditional admissions, is submitted freely and**  
17 **voluntarily and not under coercion or intimidation. I am aware of the Rules**  
18 **of the Supreme Court with respect to discipline and reinstatement.**

19 DATED this 13<sup>th</sup> day of October, 2003.

20  
21   
22 \_\_\_\_\_  
23 Richard A. Alcorn  
24 Respondent  
25

1  
2 DATED this 15<sup>th</sup> day of October, 2003.

3 STATE BAR OF ARIZONA

4   
5 Shauna R. Miller  
6 Senior Bar Counsel

7 Approved as to form and content:

8 

9 Robert Van Wyck  
10 Chief Bar Counsel

11 Original filed this 16<sup>th</sup> day  
12 of October, 2003, with the  
13 Disciplinary Clerk's Office of the  
Supreme Court of Arizona

14 Copy of the foregoing hand delivered  
15 this 16<sup>th</sup> day of October, 2003, to:

16 Lawyer Regulation Records Manager  
17 111 West Monroe St., Suite 1800  
18 Phoenix, AZ 85003

19 Copy of the foregoing mailed  
20 this 16<sup>th</sup> day of October, 2003, to:

21 Richard A. Alcorn  
22 SMITH & FEOLA  
23 2800 N. Central, Ste. 1400  
24 Phoenix, AZ 85004-1019  
25 Respondent

by: Barbara T. Chandler

1 Shauna R. Miller, Bar No. 015197  
2 State Bar of Arizona  
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13 **BEFORE THE DISCIPLINARY COMMISSION**  
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17 **RICHARD A. ALCORN**  
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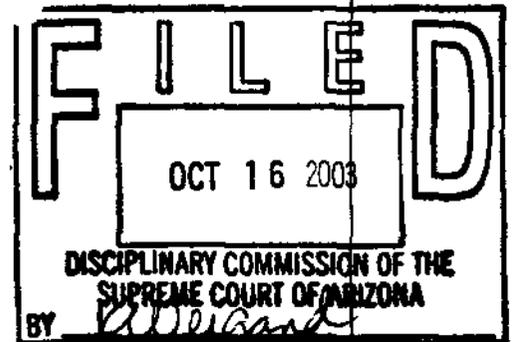
19 Respondent.

20 File No. 01-1390

21 **JOINT MEMORANDUM IN**  
22 **SUPPORT OF AGREEMENT**  
23 **FOR DISCIPLINE BY**  
24 **CONSENT**

25 The State Bar of Arizona and respondent Richard A. Alcorn, who is not  
represented by counsel, hereby submit their Joint Memorandum in Support of the  
Agreement for Discipline by Consent.

Respondent borrowed money from a client without proper written  
disclosure and respondent did not get the clients' consent in writing. Respondent  
will receive a three-month suspension for his conduct retroactive to April 4, 2003,  
and will be placed on probation for one year upon completing the reinstatement



1 process and after being reinstated.<sup>1</sup> Restitution is not applicable in this matter  
2 because respondent repaid the loan amount and all accrued interest. Respondent  
3 shall pay all costs and expenses incurred in these discipline matters.  
4

5 This agreement serves the purposes of discipline in that it protects the  
6 public and will deter other lawyers from engaging in similar misconduct. The  
7 Tender of Admission and Agreement for Discipline by Consent is filed  
8 contemporaneously herewith.  
9

10 In arriving at the agreed upon sanctions, consideration was given to the ABA  
11 Standards for Imposing Lawyer Sanctions (“ABA Standards”), Rule 52(a)(11), Ariz.  
12 R. S. Ct., and Arizona case law.  
13

#### 14 **ABA STANDARDS**

15 The *ABA Standards* are designed to promote consistency in the imposition of  
16 sanctions by identifying relevant factors that courts should consider and then  
17 applying these factors to situations where lawyers have engaged in various types of  
18 misconduct. *ABA Standard 1.3, Commentary.*  
19

20 In this matter, consideration was given to *ABA Standard 4.32*. Suspension is  
21 appropriate when a lawyer knows of a conflict of interest and does not fully  
22 disclose to a client the possible effect of that conflict, and causes injury or  
23 potential injury to a client.  
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25 <sup>1</sup>See page 4 under prior discipline.

1 In this case, respondent asked his clients to loan him \$3,000. The terms of  
2 the loan transaction were not transmitted to the Shpillers in writing and the  
3 Shpillers did not consent to the loan terms in writing, as required by ER 1.8(a).  
4 The Sphillers sought repayment through their new attorney (Alan H. Susman) and  
5 upon receipt of the letter demanding repayment, respondent repaid the full loan  
6 amount and all accrued interest.  
7

8  
9 In determining an appropriate sanction, both the Court and the Commission  
10 consider the duty violated, the lawyer's mental state, the actual or potential injury  
11 caused by the misconduct, and the existence of aggravating and mitigating factors.  
12 *Matter of Tarletz*, 163 Ariz. 548, 789 P.2d 1049 (1990); ABA *Standard* 3.0.  
13 Respondent knowingly violated his duty to avoid a conflict of interest when he  
14 entered into the loan transaction with the Sphillers without taking the proper steps  
15 to disclose the conflict. The State Bar contends there was client harm due to  
16 respondent's conduct as it led, in part, to the malpractice action filed against  
17 respondent and the firm. Respondent denies that there was any client harm.  
18

19  
20 In deciding what sanction to impose, the following aggravating and  
21 mitigating circumstances should be considered.

22  
23 In aggravation:

24 Standard 9.22(a) prior discipline. In file number 86-1388 respondent was  
25 censured on January 26, 1988, for violation of ER 8.4 (b), Ariz.R.S.Ct, and was

1 placed on probation for one year. In file no. 96-1092 respondent was suspended  
2 for six (6) months on March 11, 2002 for violation of ERs 3.3 and 8.4. In file no.  
3 99-2053, respondent was suspended for ERs 1.3, 1.4, 1.5, 3.2, and 3.4. The  
4 suspension in file no. 96-1092 was for one (1) month, which runs consecutively  
5 with his six-month suspension, making it necessary for respondent to apply for  
6 reinstatement. Respondent was ordered to pay costs and will be placed on one  
7 year probation when he returns to practice.  
8  
9

10 Standard 9.22(i) substantial experience in the practice of law. Respondent  
11 has been in practicing law in Arizona for twenty-two years, since 1981. He was  
12 admitted to practice law in the State of Washington in 1977.  
13

14 In mitigation:

15 Standard 9.32(e) full and free disclosure and a cooperative attitude toward  
16 the proceedings. Respondent cooperated with the State Bar during its  
17 investigation.  
18

19 Standard 9.32(m) remorse. Respondent contends that he is genuinely  
20 remorseful for his conduct and states that he did personally apologize to the  
21 Shpillers even prior to the Bar proceeding being initiated. Respondent also made  
22 full repayment to the client prior to the initiation of the State Bar proceeding.  
23  
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1 Respondent contends that his conduct was less culpable than in *Merrill*. In  
2 *Merrill*, the attorney represented a ninety-year (90) old client. Merrill asked for  
3 and took two separate loans, one in the amount of \$3,500 and another loan in the  
4 amount of \$3,000, taken seven (7) months later. Merrill did not repay the loans  
5 until *after* disciplinary proceedings had been commenced against him.  
6

7 Here, there was a single loan to respondent in the amount of \$3,000. The  
8 Shpillers were approximately fifty (50) years old. When the Shpillers retained  
9 new counsel Alan H. Susman, they asked Mr. Susman to send respondent a  
10 demand letter to repay the loan. Upon receipt of the letter demand, respondent did  
11 promptly repay the full loan amount (\$3,000) and all accrued interest. Respondent  
12 also paid Mr. Susman \$4,000 in attorneys' fees which Mr. Susman claimed were  
13 owed for his collection efforts. The loan therefore was fully repaid before any  
14 State Bar proceeding was commenced.  
15  
16

17 The State Bar contends this matter is similar to *Merrill* in that both *Merrill*  
18 and respondent violated ER 1.8(a) by accepting loans from a client without proper  
19 disclosure and advice. Although *Merrill* violated ER 1.15, he also had six  
20 mitigating factors that mitigated the violation to some extent.  
21  
22

23 In *Matter of Miranda*, 170 Ariz. 270, 823 P.2d 1278 (1992), *Miranda*  
24 entered into a business transaction with a client without communicating the terms  
25 of the transaction in writing to the client in a manner that the client could

1 reasonably understand, and without obtaining the clients prior written consent to  
2 the transaction. Miranda intentionally failed to respond to numerous requests for  
3 information from the State Bar and intentionally failed to comply with the terms  
4 and conditions of a previously imposed probation. Miranda was found to have  
5 violated ERs 1.8(a), 8.1 and SCR 51(h) and (i). The three aggravating factors  
6 included prior discipline, a pattern of misconduct, and violation of current  
7 probation terms. The two mitigating factors included no selfish or dishonest  
8 motive, and Miranda had a reputation for being an attorney of high character and  
9 competence in the area of criminal law. Miranda was suspended for three months  
10 and was placed on two years probation, which included additional hours of  
11 continuing legal education.  
12  
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15 Respondent contends that his conduct also was less culpable than the  
16 attorney's misconduct in *Miranda*. In *Miranda*, the attorney also was being  
17 sanctioned for his failure to abide by the terms of his probation in an unrelated  
18 disciplinary matter; his failure to respond to the State Bar's request for documents  
19 in an unrelated disciplinary matter; his lack of diligence in representing a client in  
20 a criminal matter; his failure to communicate with a client; and, his failure to  
21 respond to the State Bar's request for information. None of these violations apply  
22 to respondent in this matter.  
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25

1           The State Bar contends this matter is similar to *Miranda* in that there was a  
2 conflict in dealing with a client and *Miranda*, like respondent, had extensive prior  
3 discipline.  
4

5           Respondent also asks that the Disciplinary Commission consider the recent  
6 case of *In re Susman*, Supreme Court No. SB-03-0005-D (January 23, 2003). In  
7 *Susman*, attorney Alan H. Susman received a censure for obtaining three (3)  
8 separate loans totaling \$70,000 from his client during a seven-month period. Two  
9 of the loans were reflected in unsecured promissory notes; the third loan (\$10,000)  
10 was not reflected in any writing. Susman failed to comply with ER 1.8 regarding  
11 the loan transactions and defaulted on all of the loans. When the client sued  
12 Susman to collect, Susman filed bankruptcy and obtained a discharge of the  
13 client's debt. After the State Bar commenced disciplinary proceedings, Susman  
14 agreed to make full restitution to the client at the rate of at least \$500 per month  
15 on the judgment amount of \$121,793.83. Susman was given a censure for his  
16 violation of ER 1.8 in the three (3) loan transactions. Mitigating factors were:  
17 absence of prior disciplinary record, personal or emotional problems, full  
18 disclosure to the disciplinary agencies, remorse, and, "good character."  
19  
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23           In this case, respondent obtained a single \$3,000 loan from a client and  
24 failed to disclose the potential conflict of interest and failed to obtain the client's  
25 consent in writing. Respondent admits that the loan was not properly documented

1 under ER 1.8(a). Yet, unlike *Susman*, respondent did promptly repay the full loan  
2 amount with interest as soon as respondent received a letter of demand from his  
3 former clients' new attorney. Respondent fully repaid the loan many months prior  
4 to the time that the State Bar commenced its *sua sponte* investigation of  
5 respondent's conduct. There are two aggravating factors and two mitigating  
6 factors in respondent's case. Respondent fully acknowledges and has expressed  
7 remorse for his misconduct in this matter.  
8  
9

10 The discussion of *Susman* is provided for the purposes of proportionality  
11 analysis. Respondent does not ask for the same sanction as in *Susman* (that is, a  
12 censure). Respondent does acknowledge he has a prior disciplinary record that  
13 constitutes an aggravating factor.  
14

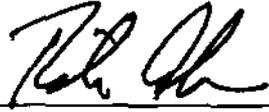
15 Based on the aforementioned, the State Bar and respondent agree that  
16 respondent's conduct in this matter warrants a three-month suspension retroactive  
17 to April 4, 2003, one year probation upon reinstatement, and the costs and  
18 expenses incurred in these disciplinary matters and respectfully request the  
19 imposition of the same herein.  
20

## 21 CONCLUSION

22 Recognizing that it is the prerogative of the Disciplinary Commission to  
23 determine the appropriate sanction, it is nevertheless the belief of the State Bar  
24 and respondent that the objectives of discipline will be met by the imposition of a  
25

1 three-month suspension retroactive to April 4, 2003, one year of probation upon  
2 reinstatement, and the costs and expenses incurred in these disciplinary matters.

3 DATED this 13<sup>th</sup> day of October, 2003.

5 

6 Richard A. Alcorn  
7 Respondent

8 DATED this 15<sup>th</sup> day of October, 2003.

9 STATE BAR OF ARIZONA

10 

11 Shauna R. Miller  
12 Senior Bar Counsel

13  
14 Approved as to form and content:

15 

16 Robert Van Wyck  
17 Chief Bar Counsel

18 Original filed this 16<sup>th</sup> day  
19 of October, 2003, with the  
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Supreme Court of Arizona

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22 this 16<sup>th</sup> day of October, 2003, to:

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1 Copy of the foregoing mailed  
2 this 16th day of October, 2003, to:

3 Richard A. Alcorn  
4 **SMITH & FEOLA**  
5 2800 N. Central, Ste. 1400  
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7 Respondent

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by: Barbara T. Chandler