

FILED

JUN 23 2010

BEFORE THE DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ARIZONA

DISCIPLINARY COMMISSION OF THE
SUPREME COURT OF ARIZONA
BY John Smith

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

No. 09-0342

LES A. BOEGEMANN,
Bar No. 023107

DISCIPLINARY COMMISSION
REPORT

RESPONDENT.

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on June 12, 2010, pursuant to Rule 58, Ariz.R.Sup.Ct., for consideration of the Hearing Officer's Report filed April 27, 2010, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for censure and costs.

Decision

Having found no facts clearly erroneous, the seven members¹ of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure and costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.²

RESPECTFULLY SUBMITTED this 23rd day of June, 2010.

Pamela M. Katzenberg/mps
Pamela M. Katzenberg, Chair
Disciplinary Commission

¹ Commissioners Belleau and Horsley did not participate in these proceedings.

² A copy of the Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total \$1,977.50.

1 Original filed with the Disciplinary Clerk
this 23rd day of June, 2010.

2 Copy of the foregoing mailed
3 this 24 day of June, 2010, to:

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Respondent
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7 Hon. Jeffrey Coker
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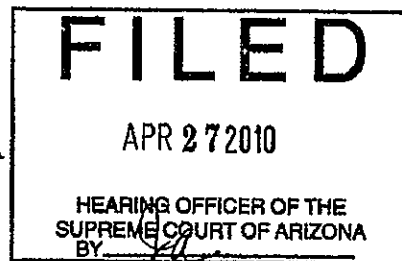
13 by: Deann Barker

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EXHIBIT

A

BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

LES A. BOEGEMANN,
Bar No. 023107

Respondent.

No. 09-0342

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

1. This matter was initiated by the finding of probable cause on September 23, 2009. A Complaint was thereafter filed by the State Bar on November 18, 2009. After a Notice of Transfer and Answer were filed on December 22, 2009, the matter was assigned to the undersigned Hearing Officer on December 28, 2009. A Case Management Conference was held on December 29, 2009, and a Final Hearing date was set on March 17, 2010. Thereafter, on March 4, 2010, the parties advised that they had arrived at a settlement in the matter and the Final Hearing date of March 17, 2010, was used as a hearing on the Agreement.

FINDINGS OF FACT

2. 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 on April 22, 2005.¹

¹ Unless otherwise cited all facts found herein are taken from the Tender of Admissions agreed to by the parties.

COUNT ONE (File No. 09-0342)

3. In or about June 2007, George Peterson ("Mr. Peterson") retained Respondent to prepare estate planning documents.
4. Mr. Peterson was approximately one hundred (100) years old at the time of the representation.
5. On information and belief, Mr. Peterson paid Respondent approximately \$4,100 for the representation.
6. On or about November 15, 2008, Mr. Peterson met with Respondent at Respondent's office to discuss making changes to Mr. Peterson's estate plan.
7. Mr. Peterson listed the beneficiaries he wanted large sums of money to go to.
8. At some point during the meeting, Respondent asked Mr. Peterson something to the effect of, "Do I get a bonus?"
9. Respondent alleges, and for the purposes of the Tender of Admissions the State Bar does not contest, that Respondent's statement was intended to be humorous or intended as a joke.
10. Respondent testified that a man and woman couple, who claimed to be watching out for Mr. Peterson, attended each and every meeting that Respondent had with Mr. Peterson, including this meeting where the "bonus" was talked about, Transcript of Hearing ("T/H") 12:8-15.
11. During the remainder of the meeting, Mr. Peterson made repeated offers to leave \$50,000 to Respondent in his will.
12. Respondent initially declined taking any money from Mr. Peterson.

13. Ultimately, Respondent informed Mr. Peterson that he did not believe he could draft a will leaving himself the funds, but that he would look into the issue.
14. On or about November 17, 2008, Respondent met with Mr. Peterson again at Respondent's office. During this meeting, Mr. Peterson again offered to give Respondent \$50,000.
15. Respondent informed Mr. Peterson that he could not draft the will leaving himself funds, but that he could accept the money as a gift.
16. That same day, Respondent drove Mr. Peterson to Chase Bank to move assets in accordance with the updated estate plan.
17. While at the bank, and with Mr. Peterson's permission, Respondent withdrew \$50,000 from one of Mr. Peterson's accounts.
18. Respondent informed the bank staff to deposit the \$50,000 into a new account, in Respondent's name.
19. Respondent did not advise Mr. Peterson of the desirability of seeking, and giving Mr. Peterson a reasonable opportunity to seek, the advice of independent legal counsel on the transaction.
20. Respondent did not obtain written informed consent from Mr. Peterson to the essential terms of the transaction and Respondent's role in the transaction, including whether Respondent was representing Mr. Peterson in the transaction.
21. On or about March 17, 2009, new attorneys representing Mr. Peterson sent a letter to Respondent demanding he return the \$50,000, plus \$5,000 in costs.
22. After a brief exchange of correspondence, Respondent agreed to return the \$50,000 to Mr. Peterson.

23. On or about May 4, 2009, Respondent sent a check for \$50,000 to Mr. Peterson's new attorneys, returning the money to Mr. Peterson.²

CONCLUSIONS OF LAW

24. This Hearing Officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., specifically, ER 1.8(a).

ABA STANDARDS

25. 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

26. Respondent violated a duty that he owed to his client by knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to his client without first advising his client in writing of the desirability of seeking, and giving a reasonable opportunity to seek, the advice of independent legal counsel on the transaction. Respondent did not obtain written informed consent from his client, setting forth the essential terms of the transaction and Respondent's role in the transaction, including whether Respondent was representing his client in the transaction.

The Attorney's Mental State

27. The parties stipulate that, while Respondent "knowingly" acquired the pecuniary interests adverse to his client without first giving his client the opportunity to seek

² Since these occurrences Mr. Peterson has passed away, T/H 18:20-24.

counsel, and getting written informed consent, that Respondent's mental state was negligent in realizing/determining that a conflict existed, T/H 7:7-24; 8:6-9. Respondent testified at the hearing in this matter that he was looking at the comment to another Rule and simply did not realize that there were further steps he needed to take to assure that the gift from Mr. Peterson was not suspect, T/H 8:10-20.

The Injury Caused

28. In that Respondent returned the money to Mr. Peterson voluntarily, the injury caused in this matter was “potential”.

Aggravating and Mitigating Factors

Aggravating Factors:

29. *Standard 9.22(a)* Prior disciplinary offenses:
- a) On April 3, 2008, Respondent received Probation for violating ERs 1.2, 1.3, 1.4, 1.5 and 5.3.³
 - b) On July 17, 2009, Respondent received a Censure for violating ERs 8.4(a) and (d) and Rule 53(c).
30. *Standard 9.22 (b)* Dishonest or selfish motive:
- Respondent's conduct was not dishonest, however, it was for his own pecuniary gain.
31. *Standard 9.22(h)* Vulnerability of victim:
- Mr. Peterson was approximately 100 years old at the time of this incident.

³ Respondent testified, and the Bar concurred, that his probationary term had been timely completed prior to the incidents described herein.

Mitigating Factors:

32. *Standard 9.32(d)* Timely good-faith effort to make restitution:
Respondent refunded the \$50,000 to Mr. Peterson upon demand.
33. *Standard 9.32(e)* Cooperative attitude towards disciplinary proceedings:
Respondent responded to the State Bar's investigation and fully cooperated throughout the formal litigation.
34. *Standard 9.32(f)* Inexperience in the practice of law:
Respondent was admitted to practice on April 22, 2005.

PROPORTIONALITY REVIEW

35. The Supreme Court has held that one of the goals of attorney discipline should be to achieve consistency when imposing discipline. It is also recognized that the concept of proportionality is "an imperfect process" because no two cases are ever all like, *In re Struthers*, 179 Ariz. 216, 887 P.2d 789 (1994), *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983). In order to achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar, *In re Peasley*, 208 Ariz. 90, 90 P.3d 772 (2004). It is also the goal of attorney discipline that the discipline imposed be tailored to the individual case and that neither perfection nor absolute uniformity can be achieved, *Peasley*, *supra*.
36. In this case, the State Bar is recommending, and the Respondent has accepted, a sanction of Censure and payment of all costs.
37. In *In re Eckley*, SB-09-0082-D (2009), Eckley was censured with two years of probation and LOMAP. He engaged in a conflict of interest by failing to advise

his client of his ownership interest in writing and by failing to advise his client to seek independent counsel regarding the ownership interest. He further failed to adhere to trust guidelines regarding the proper handling of client funds in violation of ERs 1.8(a), 5.7 and Rules 43 and 44(a).

38. In *In re Johnson*, SB-09-0175-D (2009), Johnson was censured with one year of probation, and CLE. She engaged in a conflict of interest by drafting a will for her client in which she was the beneficiary. Johnson intended to use the will as a vehicle to hold property for the benefit of her client's children, and not as a benefit to herself, in violation of ERs 1.8 and 8.4(d).
39. In *In re Sorrell*, SB-09-0065-D (2009), Sorrell was censured with two years of probation, LOMAP and TAEPP. He loaned funds to clients without first obtaining written informed consent. He further failed to properly supervise his non-lawyer employee, and failed to properly maintain his trust account according to trust guidelines, in violation of ERs 1.8(a), 1.8(e), 1.15 and Rules 43 and 44.
40. Based on the above cited cases, the parties submit that the proposed sanction of Censure and payment of all costs is appropriate in this matter. Probation is not being recommended in that the State Bar sees this as an isolated incident and not symptomatic of deeper problems in Respondent's practice, T/H 9:6-10

RECOMMENDATION

41. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public, the profession, the administration of justice and to deter future misconduct, *In re Fioramonti*, 176 Ariz. 182, 859 P.2d 1315 (1993), *In re Neville*,

147 Ariz. 106, 708 P.2d 1297 (1985). It is also the purpose of attorney discipline to instill public confidence in the Bar's integrity, *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d 352 (1994).

42. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions* and the proportionality of discipline imposed in analogous cases, *Matter of Bowen*, 178 Ariz. 283, 872 P.2d 1235 (1994).
43. Upon first review, this case is very unsettling. The image of an attorney charged with the responsibility of having the best interests of his client at heart at first making a joke about receiving a "bonus", and then thereafter assisting his elderly client in the transfer of \$50,000 to his own benefit, is fraught with all kinds of negative implications and questions.
44. Upon examination of the Respondent, he felt that Mr. Peterson willingly and knowingly wanted to give the Respondent the money. In defense of his actions, Respondent points out that he insisted that Mr. Peterson's friends, the ones that allegedly looked after his interests, were always present at every meeting that he had with Mr. Peterson. While it is conceivable that Mr. Peterson not only knowingly, but also with the capacity to do so, intended and legitimately wanted to give the Respondent a gift of \$50,000, the negative implications are glaring. That is the reason why ER 1.8 insists that attorneys in this situation, make sure that the client understands what his rights are and that he should seek outside advice. While Respondent knowingly participated in the exchange of money from Mr. Peterson to himself, the evidence is that he was negligent in realizing what his

duties to his client were. The State Bar offers this, as well as the willingness of Respondent to return the money to Mr. Peterson and his cooperation with the Bar, as an explanation of why a more serious sanction is not appropriate in this case.

45. A review by this Hearing Officer of the ABA *Standards*, specifically 4.32, which calls for Suspension, and 4.33, which calls for a Reprimand (Censure in Arizona), and the Commentary thereto, shows that the difference between receiving a Censure and Suspension is: The mental state of the Attorney in conducting himself to the clear detriment of his client, and the degree of harm to the client. Reading the examples set forth in the Commentary, this case fits more appropriately under *Standard* 4.33 as an isolated incident of misconduct involving a conflict of interest, where the attorney is acting negligently in determining his responsibilities to his client, and there was no overreaching or serious injury to the client.
46. It is now clear to the Respondent that he simply cannot engage in these kinds of dealings with his clients without first protecting his client and himself. Based upon this, as well as the State Bar's conclusion that this was a one-time matter and not an indication of systemic problems in the Respondent's law practice, no probation is being recommended.
47. This Hearing Officer examined the Respondent in some detail about his prior Censure and Probation and is satisfied that those incidences were unique to the circumstances in those matters, and had nothing to do with the issues raised herein, T/H 8:22-9:11; 13:20-18:10.

48. This is one of those cases where this Hearing Officer has to rely on Bar Counsel's greater ability to investigate Mr. Peterson and the circumstances under which he made this gift to Respondent. The Bar is satisfied that the circumstances which occurred in this matter entail no more nefarious or inappropriate motive than is set forth herein, and so the proposed sanction of Censure and costs is adequate. Absent more evidence to the contrary, this Hearing Officer accepts this recommendation.
49. Based upon the facts submitted, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends the following:
1. That Respondent shall be Censured;
 2. Respondent shall pay all costs of these proceedings including the State Bar costs, as well as the costs incurred by the Disciplinary Commission, the Supreme Court and the Disciplinary Clerk's office in this matter.

DATED this 27th day of April, 2010.

Hon. H. Jeffrey Coker / ja
H. Jeffrey Coker,
Hearing Officer

Original filed with the Disciplinary Clerk
this 27th day of April, 2010.

Copy of the foregoing mailed
this 29 day of April, 2010, to:

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by: Deann Barker