BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **PAMELA A. VIRTUE,** **Bar No. 012010** RESPONDENT.	No. 08-1358 **DISCIPLINARY COMMISSION REPORT**

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 May 14, 2010, recommending acceptance of the Tender of Admissions and Agreement for Discipline by Consent ("Tender") and Joint Memorandum ("Joint Memorandum") providing for censure, one year of probation with terms and conditions, and costs.

Decision

Having found no facts clearly erroneous, the seven members[1] of the Disciplinary Commission unanimously recommend accepting and incorporating the Hearing Officer's findings of fact, conclusions of law, and recommendation for censure, one year of probation (MAP), and payment of costs of these disciplinary proceedings including any costs incurred by the Disciplinary Clerk's office.[2] The terms of probation are as follows:

[1] Commissioners Belleau and Horsley did not participate in these proceedings.
[2] The Hearing Officer's Report is attached as Exhibit A. The State Bar's costs total $1,200.00

Terms of Probation

1. Any interest on advanced costs will be disclosed in writing, and signed by the client in contingency fee cases, before they can be accrued and shall state:
   a. the rate:
   b. whether it is compound or simple interest
   c. whether the rate will change over time; and
   d. who is advancing the costs and will receive the interest (Respondent, bank, etc.)

2. All changes to scope of representation or rate of fee must be in writing and in contingency fee cases signed by the client.
Respondent must supply the State Bar with any settlement statements upon request during the period of probation.

3. In the event that Respondent fails to comply with any of the foregoing probation terms, and information thereof is received by the State Bar of Arizona, Bar Counsel shall file a Notice of Noncompliance 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 after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend an appropriate sanction. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the burden of proof shall be on the State Bar of Arizona to prove noncompliance by a preponderance of the evidence.[3]

RESPECTFULLY SUBMITTED this 23rd day of June, 2010.

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

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

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

[3] This standard term of compliance was inadvertently omitted from the consent documents and the Hearing Officer's Report.

Ralph Adams
Respondent's Counsel
Adams & Clark, P.C.
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Thomas E. McCauley, Jr.
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Copy of the foregoing hand delivered
this 24 day of June, 2010, to:

Hon. Louis A. Araneta
Hearing Officer 6U
1501 W. Washington Street
Phoenix, AZ 85007

by: Deann Baker

/mps

EXHIBIT
A

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	08-1358
PAMELA A. VIRTUE, Bar No. 012010	)	**HEARING OFFICER'S REPORT**
Respondent	)	

PROCEDURAL HISTORY

1. This matter began as a direct file of a Tender of Admissions and Agreement for Discipline which were filed on January 12, 2010. A hearing was held on the Agreement on April 14, 2010. In attendance at the hearing were Bar Counsel, Respondent Pamela A. Virtue (hereinafter, Respondent) and her counsel, and this Hearing Officer.

2. The Respondent admits to: (1) charging for estimated rather than actual costs, and by charging unreasonable costs, Rule 42, Ariz. R. Sup. Ct.ER1.5(a);(2) charging compound interest without notifying the client in writing Rule 42, Ariz. R. Sup.Ct., ER 1.5(c); and (3) providing financial assistance to the client, Rule 42, Ariz. R.Sup. Ct, ER 1.8(e).

3. The prior fee arbitrator forwarded this matter to the State Bar. This matter did not arise from a complaint by the former client. No restitution is owed to the former client.

FINDINGS OF FACT

4. At all times relevant, Respondent was a member of the State Bar of Arizona, having been admitted on May 21, 1988.[1]

5. In 2000, Respondent represented her client Irena Jean Ralph in a wrongful death case involving Ms. Ralph's minor son. Transcript of Hearing ("T/H") 39:14 -17. On November 1, 2000, the Attorney-Client Retainer Agreement was signed which included a 40% contingency fee and itemized costs. (Exhibit 1).

6. After Ms. Ralph and Respondent signed the retainer agreement, they discussed further the charging of interest on advanced costs if the case involved prolonged litigation. A week later, Ms. Ralph requested a letter clarifying the charging of interest. Respondent sent Ms. Ralph a

[1] The facts cited herein are taken from the Tender of Admissions unless otherwise noted.

letter dated December 8, 2000 stating that if a case were of longer duration an interest range of 18 to 20% could be charged on advanced costs as previously discussed. (Exhibit 2).

7. The wrongful death case was a complex, contested case with multiple defendants. The case carried on for almost 6 years.

8. On or about October 17, 2006, a mediation session resulted in a settlement of the wrongful death case. The total settlement was for $300,000. Respondent's 40% contingency fee was $120,000.

9. During the mediation, Ms. Ralph asked Respondent what the contingency fee would be. Respondent confirmed that the contingency fee was 40% if the case settled by mediation or trial. Ms. Ralph told Respondent that she thought that the agreement was for 30%. After the mediation was over and after Ms. Ralph had agreed to the settlement with the defendants and after releases had been signed, Ms. Ralph asked Respondent to consider reducing the contingency fee. This conversation occurred in the parking lot after the mediation where Ms. Ralph also discussed her financial problems with her landlord. Regarding the contingency fee. Respondent testified that she would review the file and let Ms. Ralph know. About a week to 10 days later, Respondent told Ms. Ralph that she would not reduce the contingency fee. T/H 28:15-29.

10. In her Tender of Admissions and her testimony, Respondent admitted that she provided financial assistance to Ms. Ralph as follows:

    1. $500 emergency check in November 2004 for repairs to a vehicle so Ms. Ralph could meet with respondent;

    2. Payment of one cell phone bill of $150 on June 1, 2006.

    3. $300 pre-mediation cash on October 11, 2006 for Ms. Ralph to buy appropriate clothing for the mediation session and for a hair appointment.

    4. $5000 cash on October 19, 2006 after the mediation settlement was finalized but before distribution. Respondent inferred from Ms. Ralph's statements that the money was for Ms. Ralph to buy a grave marker for her son.

    5. $790 check to Ms. Ralph's landlord on or about October 20, 2006 after settlement to guarantee to Ms. Ralph's landlord that she would not be evicted and that Ms. Ralph would leave her apartment clean and without damage. After Ms. Ralph vacated the apartment and the apartment was inspected, the check was returned to Respondent who then issued the $790 check to Ms. Ralph. No interest was charged on the financial assistance.

11. After the mediated settlement, and after Respondent a few days later affirmed the 40 percent contingency fee, the fee dispute began. Ms. Ralph did not sign the written settlement statement that Respondent sent to her containing an anticipated approval signature date of December 22, 2006 (Exhibit 3).

12. In the settlement statement, Respondent identified the advanced costs of postage, copies, faxes, and mileage including: (a) an estimated $615 (495 + 120 miles) at $1 per mile; and (b) an estimated $180 for 180 faxes at $1 each.(Exhibit 3 at attachment A).

13. In the settlement statement, Respondent charged interest on advanced costs at a compound rate of 13% in a total amount of $15,107. (Exhibit 3 at attachment C). Respondent testified that the interest ultimately was 12 and 1/2%. T/H 67:20 – 68:4.

14. Respondent testified that in addition to including the estimated mileage and fax costs and compound interest in the settlement statement that she prepared, she also identified the financial assistance and checks to Ms. Ralph. Respondent pointed to her inclusion of the financial assistance in the settlement agreement as further evidence that Respondent thought the financial assistance was proper under the ethical rules.

15. About six months after December 19, 2006, Ms. Ralph contacted respondent to claim that more money was due her beyond the amount in the settlement statement. Respondent and Ms. Ralph had a meeting at Respondent's office. Respondent testified that during the one hour meeting, Ms. Ralph did not object to any specific part of the written settlement statement. Instead Ms. Ralph continued to repeat her belief that she had more money coming. T/H 34: 4-14.

16. Given the impasse, Respondent informed Ms. Ralph that the retainer agreement provided for fee arbitration through the State Bar of Arizona if they could not agree on the final settlement statement. Respondent recommended to Ms. Ralph that they use the fee arbitration service. Respondent testified: "And within a few weeks, I received a letter from the State Bar that said Mrs. Ralph wanted to have fee arbitration, would I agree to participate, and I responded that I would, and we had fee arbitration." T/H 34:23 – 35:1.

17. The fee arbitrator made several findings in his fee arbitration award dated July 22, 2008. (Exhibit 4). The arbitrator did not find that the 40% contingency fee was unreasonable. Rather, based on the disputed testimony between Ms. Ralph and Respondent, he found that Respondent had agreed to reduce her fee. He ordered Respondent to pay $50,602 which included $30,000 (10% of the total settlement amount), $5495 estimated costs (mileage, faxes, copies, and postage) and $15,107 (compound interest).

18. Respondent did not keep timesheets to support the entire 40% contingency fee. At the fee arbitration, she guessed that she spent 452 - 500 hours. Later after closer review and in response to the State Bar investigation, Respondent estimated that she spent 1200 – 1700 hours on Ms. Ralph's case.

19. Respondent and State Bar Counsel emphasized to this hearing officer that the fee arbitrator in making his decision imposed obligations on respondent in place at that time of the arbitration in 2008 and not those in place at that time the attorney- client retainer agreement was entered in 2000. Specifically in 2003, ER 1.5 (c) was amended to add and require that a contingency fee agreement be signed by the client. ER 1.5 (c) also amended to add and require that "the agreement must clearly notify the client of any expenses for which the client will be liable ...."

20. In this matter, Ms. Ralph did sign the 2000 retainer agreement. (Exhibit 1). Respondent did provide Ms. Ralph with her clarifying letter of December 8, 2000 (Exhibit 2) which described an interest range on costs of 18 to 20%. Respondent candidly informed the fee arbitrator and the State Bar that she did not notify Ms. Ralph in writing: (a) of the specific expenses for postage, faxes, or copying charges or the specific charge per mile as part of travel expenses; and (b) that interest charged on advanced costs would be compound. T/H 17:11-19.

21. Respondent has no prior disciplinary record. In support of her good character and reputation, Respondent attached several letters from lawyers and non-lawyers who have known Respondent for many years.

CONCLUSIONS OF LAW

22. This hearing officer finds that there is clear and convincing evidence that Respondent violated Rule 42, Ariz. R. Sup.Ct., specifically ERs 1.5(a), by charging unreasonable costs; 1.5(c), by charging compound interest without notifying the client in writing, and 1.8(e), providing financial assistance to the client.

ABA STANDARDS

23. 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; and (4) the existence of aggravating and mitigating factors.

The Duty Violated

24. This hearing officer finds that Respondent violated duties she owed to her client (failure to notify of the compound interest under ER 1.5 (c), and providing financial assistance under ER 1.8). Respondent also violated her duty as a professional under ER 1.5(a) (charging unreasonable costs).

4.0 Violation of Duties Owed to the Client

25. Standard 4.6 Lack of candor provides: "Reprimand [Censure in Arizona] is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information and causes injury or potential injury to a client."

26. The second applicable Standard is Standard 4.3, Failure to Avoid Conflicts of Interest, in particular Standard 4.33 which states: "Reprimand [Censure in Arizona] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client."

7.0 Violation of Duties owed to the Profession

Standard 7.3 provides: "Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to any client, the public, or the legal system."

27. The presumptive sanction then for the admitted conduct under the Standards is censure.

The Lawyer's Mental State

28. This Hearing Officer finds that although Respondent confirmed to Ms. Ralph the range of interest regarding advanced costs (Exhibit 2), Respondent was negligent in not notifying Ms. Ralph that it was compound interest. As a result, interest accrued from year to year.

29. This Hearing Officer also finds that Respondent was negligent in providing financial assistance to Ms. Ralph. Although well intended, Respondent's financial help to fix a vehicle so Ms. Ralph could meet with Respondent, payment of a cell phone bill so that Respondent could contact Ms. Ralph, and money for Ms. Ralph to buy appropriate clothing for the mediation session were repeated negligent violations of the conflict of interest rule against financial assistance. Respondent negligently and erroneously thought that it was ethical for her to financially assist Ms. Ralph similar to how a lawyer may ethically provide advanced court costs and litigation expenses. Respondent failed to be aware of the substantial risk behind the ban on financial assistance in ER 1.8. That risk is that such assistance could give Respondent too great a financial stake in the litigation.

30. This Hearing Officer also finds that Respondent negligently charged unreasonable costs. Although Respondent identified various expenses in her retainer agreement that would likely be incurred including travel expenses, and other out-of-pocket expenses, her charges for mileage and faxes were unreasonable.

Actual or Potential Injury

31. This Haring Officer finds that the negligent conduct of Respondent in not disclosing compound interest caused actual injury to the client in the form of the higher accrued amounts. The financial assistance caused potential injury to the client. Respondent's charging of unreasonable costs caused injury to the profession.

Aggravating and Mitigating Factors

Aggravating Factors

32. Standard 9.22(b): dishonest or selfish motive. Responded charged unreasonable costs and was receiving 13% compound interest for the costs that Respondent advanced.

33. Standard 9.22(i): substantial experience in the practice of law. Respondent has been practicing law for almost 22 years having been admitted to practice in Arizona on May 21, 1988.

Mitigating Factors:

34. Standard 9.32(a): absence of a prior disciplinary record.

35. Standard 9.32(d) timely good faith effort to make restitution or rectify consequences of misconduct. Upon meeting with Ms. Ralph in an effort to resolve the fee dispute when it became apparent that there was an impasse, Respondent recommended fee arbitration. Respondent had voluntarily included the fee arbitration provision when she originally drafted the retainer agreement. Upon receipt of the arbitrator's decision, Respondent immediately paid the award to Ms. Ralph. Respondent acted quickly to rectify the consequences of her misconduct.

36. Standard 9.32(g) character and reputation. Various letters were submitted by lawyers and non-lawyers in support of this mitigating factor.

37. In evaluating the aggravating and mitigating factors, this hearing officer agrees with the parties that the factors are consistent with and support the presumptive sanction of censure.

PROPORTIONALITY REVIEW

38. The Arizona Supreme Court has held that the issue of lawyer sanctions is guided by the principle of internal consistency. *In re Struthers,* 179 Ariz. 216 887 P. 2d 789 (1994). To achieve internal consistency, it is appropriate to examine sanctions imposed in cases that are factually similar. *In re Peasley*, 208 Ariz. 90, 90P.3d 772, (2004). However, the concept of

proportionality remains "an imperfect process" because no two cases are identical. *Struthers,* supra. Therefore, the discipline in each situation must be tailored to the individual case as neither perfection nor absolute uniformity can be achieved. *In re Riley,* 142 Ariz. 604, 691 P.2d 695(1984).

39. In this case, the State Bar is recommending and the Respondent has agreed to accept a censure and one year of probation and payment of all costs and expenses incurred in these disciplinary proceedings.[2]

40. In *In re Gorey,* SB 08-0117-D, the Supreme Court accepted an agreement for censure and one year of probation involving CLE. Respondent engaged in a conflict of interest by providing financial assistance to a client in connection with pending litigation. Respondent also failed to obtain the client's informed written consent to the conflict. ERs 1.7 and 1.8(e). There was one aggravating factor: substantial experience. The mitigating factors were absence of discipline, full disclosure and remorse. The mental state was negligent and no injury was proven.

41. In *In re Abram,* SB -08-0113-D, censure was imposed or the Respondent engaged in a conflict of interest when he failed to transmit in writing the terms on which he acquired an interest in a parcel of land from his client, failed to advise the client to seek Indie pendant advice, and failed to obtain informed consent in writing. The mental state was negligence. The aggravating factors were pattern of misconduct, multiple offenses and substantial experience. There were seven mitigating factors including but not limited: to lack of prior discipline, absence of dishonest or selfish motive, personal and emotional problems and cooperative attitude.

42. In *In re Shimko,* SB-09-0061-D, the Respondent received a censure where the Respondent overcharged the client, failed to obtain written consent from the client regarding the representation and loaned the client money. The mental state was negligence. The two aggravating factors were selfish or dishonest motive and substantial experience. There were four aggravating factors: absence of discipline, good faith effort to rectify, cooperative attitude, and imposition of other penalties.

[2] At the hearing, the parties recognized that that payment of costs and expenses was omitted from the Tender of Admissions and Agreement for Discipline. T/H 50: 8-16. The Memorandum In Support of The Agreement for Discipline by Consent does acknowledge such payment.

RECOMMENDATION

43. 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 (1994).

44. During the hearing in this matter, this Hearing Officer found Respondent to be candid and genuinely remorseful regarding her professional conduct violations. Her charging of unreasonable costs and her failure to notify Ms. Ralph of compound interest were a selfish motive. Respondent came to realize that despite good intentions, her financial assistance was negligent and that such negligence can lead to self interest for the lawyer in a litigated case. Respondent testified: "But mostly what I have recognized that no matter how much I like a client, how much you want to help a client, you cannot give them any money .... And I feel really bad that it's been this long process to bring me to that realization that these rules are there for a reason and if someone violates it for a suit [of clothing] they'll violate it for a Cadillac." T/H 70:16 - 71:1.

45. This Hearing Officer has weighed the Standards and the proportionality cases and the proposed terms of probation. The terms of the one year probation agreed to between the State Bar and Respondent require Respondent to: (1) comply with the existing provisions of the ERs for fees and expenses and conflict of interest, especially 1.5. and 1.8(e); and (2) supply the State Bar with any settlement statements upon request during probation. The agreement serves the purposes of discipline in that it protects the public and will deter other lawyers from engaging in similar misconduct.

46. Based on consideration of the facts, application of the Standards, including aggravating and mitigating factors, as well as the proportionality analysis, this Hearing Officer recommends the following:

    1. Respondent be censured;

    2. Respondent pay all costs of this proceeding; and

    3. Respondent be placed on one year probation to include:

        a. Any interest on advanced costs will be disclosed in writing, and signed by the client in contingency fee cases, before they can be accrued and shall state:

            i. the rate:

            ii. whether it is compound or simple interest

            iii. whether the rate will change over time;

iv. Who is advancing the costs and will receive the interest (Respondent, bank, etc.)

b. All changes to scope of representation or rate of fee must be in writing and in contingency fee cases signed by the client;

c. Respondent must supply the State Bar with any settlement statements upon request during the period of probation.

DATED this 14th day of May, 2010

Louis A. Araneta

Honorable Louis A. Araneta
Hearing Officer 6U

Original filed with the Disciplinary Clerk
this 14th day of May, 2010.

Copy of the foregoing mailed
this 17 day of May, 2010 to:

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By: Deana Baker