

IN RE: MARK S. CLARK

S.J.C. Order (reciprocal suspension - 3 years) entered by Justice Cordy on January 18, 2002.

SUPREME COURT OF ARIZONA

In the Matter of

Arizona Supreme Court
No. SB-01-0104-D

MARK S. CLARK,
Attorney No. 18280

Disciplinary Commission
Nos. 98-1191 and 99-0018

Respondent.

JUDGMENT AND ORDER

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision and no discretionary review occurring, and the Court having denied the respondent's Petition for Review,

IT IS ORDERED, ADJUDGED AND DECREED that MARK S. CLARK be and is hereby suspended from the practice of law for three (3) years, effective thirty (30) days from the date of this judgment and order, for conduct in violation of his duties and obligations as a lawyer.

IT IS FURTHER ORDERED that MARK S. CLARK shall pay restitution as follows to Robert and Willie West:

\$58,000.00
\$1,500.00
\$1,600.00

TOTAL: \$61,000.00

IT IS FURTHER ORDERED that MARK S. CLARK shall pay in full any and all claims paid by the Client Protection Fund, not to exceed the maximum permissible payment of \$100,000.00.

IT IS FURTHER ORDERED that MARK S. CLARK shall be placed on probation for a period of two (2) years, effective upon reinstatement, under the following terms and conditions:

1. Within six months from the commencement of his probationary term, Respondent shall attend the Ethics Enhancement Program (EEP) sponsored by the State Bar and shall pay all related costs and expenses.
2. Respondent shall participate in the Law Office Management Assistance Program ("LOMAP"),

including a practice monitor, and enter into a Memorandum of Understanding, the terms of which to be incorporated by reference herein.

IT IS FURTHER ORDERED that MARK S. CLARK shall comply with all the provisions of Rule 63, Rules of the Supreme Court of Arizona, including, but not limited to, Rule 63(a), which requires that the Respondent notify all of his clients, within ten (10) days from the date hereof, of his inability to represent them and that they should promptly retain new counsel. Respondent shall promptly inform this court of his compliance with this Order as provided in Rule 63(d).

IT IS FURTHER ORDERED that MARK S. CLARK shall be assessed the costs and expenses of these proceedings together with interest at the legal rate.

DATED this 25th day of October, 2001.

CHARLES E. JONES
Vice Chief Justice

BEFORE THE DISCIPLINARY COMMISSION
OF THE
SUPREME COURT OF ARIZONA

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

Comm. Nos. 98-1191 & 99-0018

MARK S. CLARK,
Bar No. 018280

DISCIPLINARY COMMISSION REPORT

RESPONDENT.

This matter was scheduled before the Disciplinary Commission of the Supreme Court of Arizona on January 13, 2001, pursuant to Rule 53(d), Ariz.R.S.Ct., for consideration of the Hearing Officer's report, filed October 31, 2000, recommending a two (2) year suspension, restitution, costs of these disciplinary proceedings and upon reinstatement, two (2) years probation with the State Bar of Arizona's Law Office Management Assistance Program ("LOMAP"), including a practice monitor (PM), and attend the Ethics Enhancement Program ("EEP"). Respondent filed an objection and requested oral argument. The Respondent, his counsel and the State Bar were present.

Decision

The eight (8) members of the Commission, by a majority of five (5), adopt the Hearing Officer's findings of fact and conclusions of law, but recommend a three (3) year suspension, costs of these disciplinary proceedings and restitution to the Wests as follows:

Robert and Willie West	\$58,000.00
	\$1,500.00
	\$1,600.00
TOTAL:	\$61,000.00

Additionally, upon reinstatement, Respondent shall be placed on two (2) years probation

(LOMAP and EEP).

Discussion of Decision

Based on Respondent's conduct, the Commission, as well as the Hearing Officer, found clear and convincing evidence that Mr. Clark's conduct violated Rule 42 of the Arizona Rules of the Supreme Court, specifically,

ER 1.7 (conflict of interest)	1 Violation
ER 1.8 (conflict of interest/prohibited transaction)	1 Violation
ER 4.1 (truthfulness in statements to others)	1 Violation
ER 8.1 (bar admission/disciplinary matters)	1 Violation
ER 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation)	1 Violation
SCR 31(c)(3) (membership/admission and fees)	1 Violation
SCR 51 (h) (failure to respond to bar inquiry)	1 Violation
SCR 51(i) (refusal to cooperate)	1 Violation

Respondent, while representing elderly clients in their son's estate matter, borrowed \$58,000 for the purchase of a home. Respondent failed to consult with the clients regarding the conflict of interest or to obtain their consent to the conflict or the terms of the loan. The clients were not advised to seek independent counsel and the terms of the loan were not in writing or fully disclosed. Respondent failed to disclose that he was not going to secure or record the deed of trust, that he was paying higher interest on existing loans, or that he was having difficulty meeting his current financial obligations. Respondent also failed to timely respond to the State Bar's investigation of this matter and to advise them of his current address.

In determining the appropriate sanction, our Supreme Court considers the American Bar Association's Standards for Imposing Lawyer Sanctions ("Standards") a suitable guideline. In *re Kaplan*, 179 Ariz. 175, 877 P.2d 274 (1994). The Supreme Court and the Commission are consistent in utilizing the Standards to determine appropriate sanctions for attorney discipline. In imposing a sanction after a finding of misconduct, consideration is given to 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 Standard 3.0.

Standard 5.1 addresses Failure to Maintain Personal Integrity, with 5.11(b) specifically providing:

Disbarment is generally appropriate when:
a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 4.6 addresses Lack of Candor, with 4.62 providing:

Suspension is generally appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to a client.

The Hearing Officer, as well as the Commission, determined the loan Respondent accepted from his clients, was based on misrepresentation. Respondent indicated to the clients that repayment would not be a problem. He then failed to even pay the first payment due approximately 30 days after the loan. Respondent further misrepresented to the clients that

the loan would be secured by a deed of trust and then intentionally failed to record the deed to prevent his employer from finding out about the loan, in violation of ERs 4.1 and 8.4(c). Respondent's knowing misconduct also caused injury to the clients.

Standard 4.3 address Failure to Avoid Conflicts of Interest, with 4.31 providing:

Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or ...

The Commentary to Standard 4.31 further states:

The courts generally disbar lawyers who intentionally exploit the lawyer client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client's understanding or consent.

Standard 4.32 provides:

Suspension is generally appropriate when an attorney 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 failed to discuss the conflict with the clients, even though one client specifically asked if it was a conflict, and failed to comply with the requirements of entering into a business transaction of a client, in violation of ERs 1.7 and 1.8. Respondent also caused actual injury to those clients. Respondent further failed to timely respond to the State Bar's investigation of this matter and to advise them of his current address in violation of ER 8.1 and SCR 31(c)(3) and 51(h) and (i). The Commission, having concluded that disbarment or a long-term suspension is warranted, reviewed Standards 9.22 and 9.32, aggravating and mitigating factors, respectively.

The Commission, as well as the Hearing Officer, found the presence of seven (7) aggravating factors, that is, 9.22(b) (dishonest or selfish motive), (c) (pattern of misconduct), (e) (bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency), (g) (refusal to acknowledge wrongful nature of conduct), (h) (vulnerability of victim), (i) (substantial experience in the practice of law), and (j) (indifference to making restitution). The Commission also agrees two (2) factors are present in mitigation, that is, 9.32(a) (absence of a prior disciplinary record) and (c) (personal and emotional problems). The Commission further determined the Hearing Officer gave these factors the appropriate weight. Respondent also listed several mitigating factors in his proposed findings of fact; however, they are not reflected in the Standards and are not considered otherwise considered mitigating by the Commission. The Commission, as well as the Hearing Officer, determined the aggravation present substantially outweighs the mitigation

The Commission then considered the proportionality analysis provided and found that the cases offered in support of censure or a short-term suspension do not involve a selfish or dishonest motive, a fraudulent intent, and the attorney was not attempting to gain at the expense of the client. The Respondent offered Matter of Neville 147 Ariz. 106, 708 P.2d 1297 (1985) in support of censure and stated at oral

argument that a suspension would severely limit the Respondent's ability to repay; however, Neville is distinguishable from this instant matter in that there was no injury to the client. Additionally, in Matter of Shannon, 179 Ariz. 528, 76 P.2d 548 (1994) the Supreme Court held that the effects of sanctions on an attorney's livelihood and practice should not be considered a mitigating factor. Indeed a person does not need to be a lawyer to pay restitution.

The Commission did however find the following cases offered instructive: in Matter of Breen, 171 Ariz. 250, 830 P.2d 462 (1992), the respondent was suspended for two (2) years with conditions of reinstatement for violating DR 1-102, DR 1-104, DR 5-105(A), DR 5-105(B), DR 5-105(C), DR 7-101 and DR 7-102; in Matter of Farrer, SB-97-0024-D (1997), the respondent was suspended for five (5) years and ordered to pay restitution for violating ERs 1.2, 1.5, 1.7, 1.7, 1.8, 3.3, 4.1 and 8.4; in Matter of Pappas, 159 Ariz. 516, 768 P.2d 1161 (1989), the respondent was suspended for five (5) years for violating DR 5-101, DR 5-505, DR 5-104(A), and DR 6-101(A)(3); in Matter of Spears, 160 Ariz. 545, 774 P.2d 1335 (1989), the respondent was suspended for five (5) years for violating DR 1-102(A)(4), DR 4-101(B)(3), DR 5-104(A); and lastly in Matter of Jones, 175 Ariz. 141, 854 P.2d 775 (1993), the respondent was disbarred for violating ER 1.8(a). The more severe sanction of disbarment was ordered in Jones because the respondent had been previously disbarred in 1991 for similar misconduct. Based on the mitigation present in this matter, the Commission determined a three (3) year suspension to be an appropriate disposition.

Great weight is to be given to the recommendations of the hearing officer. Matter of Owens, 182 Ariz. 121, 126, 893 P.2d 1284 (1995). However, upon consideration of Respondent's misconduct and his repeated failure to respond to the State Bar's investigation, the Commission determined a suspension of more than two (2) years is warranted.

Conclusion

One purpose of discipline is to protect the public and deter similar conduct by other lawyers. Matter of Kersting, 151 Ariz. 171, 726 P.2d 587 (1986). Another purpose is to instill public confidence in the bar's integrity. Matter of Horwitz, 180 Ariz. 20, 29, 881 P.2d, 352, 362 (1994). Yet another purpose is to maintain the integrity of the legal system. In re Fioramonti, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). Therefore, having considered Respondent's misconduct, application of the Standards, including factors present in aggravation and mitigation, and a proportionality analysis, the Commission recommends a three (3) year suspension, restitution and costs of these disciplinary proceedings and upon reinstatement, two (2) years probation (LOMAP and EEP).

RESPECTFULLY SUBMITTED this 12th day of March, 2001.

William L. Rubin, Chair
Disciplinary Commission

Commissioners Funkhouser and Carson dissenting:

We respectfully dissent from the conclusion that a 3-year suspension is a sufficient sanction and believe that disbarment is necessary to protect the public.

At the time Mr. Clark received \$58,000 from his clients Mr. and Mrs. West, a retired couple, Mr. Clark owned two houses in Massachusetts, which he could not sell. He was unable to keep up with the mortgage payments. (R.T. of July 11, 2000 at 63.)

He owed the Internal Revenue Service \$40,000. (Id. at 64.) He borrowed approximately \$45,000 from Robert LaFlamme, a Massachusetts client, taking money from a trust account set up for Mr. LaFlamme's young daughter. (Id. at 72, 85.) He did not repay that loan to Mr. LaFlamme. (Id. at 72.) Mr. Clark disclosed none of these financial problems to the Wests. (R.T. of July 11, 2000 at 17, 32)

Mr. LaFlamme reported this conduct to the Massachusetts and Arizona Bars. At the time he was borrowing money from the Wests, Mr. Clark was working with his attorney in Arizona to respond to allegations that he had borrowed money from Mr. LaFlamme in violation of ER 1.8. (Id. at 73, 76.) When Mrs. West asked him whether it was unethical to borrow money from her, he told her it was not going to be a problem. (Id. at 22-24.)

Mr. Clark did not record the West's deed of trust in a timely manner because he was afraid of losing his job if his employer found this public record. (Id. at 92-93) He did not make the first two payments on the loan to the Wests. (Id. at 24, 61.) In short, Mr. Clark obtained money from the Wests fraudulently by way of material omissions.

The most troubling aspect of this case is Mr. Clark's continuing refusal to recognize the wrongfulness of putting his personal interests over those of his clients. He testified, "Although I have to say that I regret in retrospect how I handled the West loan, I have no regrets about focusing on my family." (Id. at 83.) He also testified that he did not make any connection between the allegations of misconduct in the LaFlamme case and his conduct with the Wests. (Id. at 78, 83.)

The hearing officer, in his thoughtful and thorough report, found that the aggravating factors outweighed the mitigating factors. He also correctly noted that "it could certainly be argued that Standard 4.31, calling for disbarment, applies to the facts of this case." Report and Recommendation at 17. Standard 4.31 provides:

Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client;

The following language from Matter of Jones, 175 Ariz. 141, 142, 854 P.2d 775, 776 (Ariz., 1993) is analogous to the facts of our case:

The Commission believes this conduct is egregious enough, on its own, to warrant the imposition of a serious sanction. Respondent engaged in conduct involving a clear conflict of interest without seeking to protect his client, and he knowingly injured his client by failing to repay the loan, then listing the client as a creditor on the bankruptcy. The serious nature of Respondent's misconduct, combined with his cavalier attitude toward his client and these proceedings, lead the Commission to conclude that disbarment is appropriate.

Mr. Clark argued before the Disciplinary Commission that he should receive a censure or he would be unable to repay the Wests the money he owes them. The likelihood that the Wests will ever see repayment is quite slim. This is a lawyer who still does not understand that there is never a justification for placing personal interests ahead of those of the clients. It is for this reason that we believe disbarment is necessary to protect the public.

Copies of the foregoing were mailed this 13th day of March, 2001, to:

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KENDRA. DIEGAN
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By _____

Please direct all questions to webmaster@massbbo.org.
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