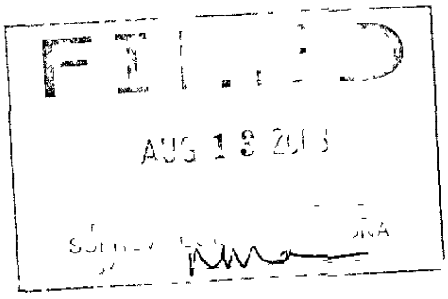

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA **SEAN CANNON,** Bar No. 022137 Respondent.	File No 06-0929 **HEARING OFFICER'S REPORT** (Assigned to Hearing Officer 9J Mark S Sifferman)

PROCEDURAL HISTORY

The Complaint was filed in this matter on March 14, 2008. Respondent filed an Answer on April 15, 2008. Prior to an evidentiary hearing, the State Bar and the Respondent submitted a Tender of Admissions and Agreement for Discipline by Consent ("*Tender*") plus a Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent ("*Joint Memorandum*"). A hearing on the Tender was held on August 11, 2008 At that hearing, additional evidence and supporting information was presented Based upon the Tender of Admissions and the complete record, the following facts are found to exist:

FINDINGS OF FACT

1. Respondent was admitted to practice in Arizona on June 14, 2004, and has been licensed to practice law since that time. *Tender*, pg. 2, ll. 16 - 19

2. Respondent and Jonathan Olcott were members of Olcott & Cannon, PLLC (the "Firm") *Tender*, pg 2, ll. 24 -25.

3. The Firm had offices in Tucson and Phoenix. *Tender*, pg. 3, ll 1 - 2

4. Mr Olcott managed the affairs of the Firm's Tucson office. *Tender*, pg. 2, ll. 3 - 4.

5. Respondent was a manager of the Phoenix office, and was responsible for directing the day-to-day affairs of the non-lawyer employees in that office. *Tender*, pg. 2, ll. 6 - 8.

6 A Complaint and an Application for Appointment of Receiver (the "Receiver Application") were filed on August 12, 2005 in Maricopa County Superior Court in the matter entitled *J.M Financial Capital, LLC v Olcott & Cannon, PLLC, et al.*, Cause No. CV2005-012871 (the "Civil Action"). *Tender*, pg. 2, ll. 10 - 13.

7 A hearing on the Receiver Application was held August 15, 2005 with Judge Peter C. Reinstein presiding. *Tender*, pg. 2, ll. 15 - 18.

8 Respondent was present at the August 15, 2005 hearing. *Tender*, pg. 2, ll. 19 - 20.

9. At that hearing, Judge Reinstein signed an Order Appointing a Receiver (the "Receivership Order") granting the Receiver Application. *Tender*, pg. 2, ll 20 - 22

10 The Receivership Order appointed Mark Lassiter as Receiver with such appointment to be effective upon the filing of a Certificate of Receiver. The Receivership Order directed the Receiver to take possession of all the inventory, chattel paper, accounts, equipment and general intangibles (hereinafter "Collateral") belonging to the Phoenix office of the Firm. *Tender*, pg. 3, ll. 1 - 14

11. The Receivership Order prohibited Respondent from expending, disbursing, transferring, assigning, selling, conveying, devising, pledging, mortgaging, creating a security interest, or disposing of the whole or any part of the Collateral without prior written consent of J.M. Financial Capital. *Id*

12. Respondent left the August 15, 2005 hearing, returned home to retrieve some medicine, and then met with his doctor concerning a scheduled sinus surgery. *Tender*, pg. 4, ll. 15 - 17.

13. On August 17, 2005, Respondent deposited five checks drawn on the Firm's Phoenix office account The checks, totaling $9,000.00, were all issued before August 15, 2005 receivership hearing. Four of the checks were issued more than 25 days prior to the hearing The remaining check was issued four days before the hearing. *Tender*, pg. 4, l. 19 - pg 5, l. 11

14. Also on August 17, 2005, the payee (other than Respondent) on four checks drawn on the Firm's Phoenix account negotiated those checks at the Firm's bank. All the checks were issued by Respondent more than one month prior to the receivership hearing. *Tender*, pg. 5, ll. 12 - pg. 6, l 12.

15. All of the aforementioned checks were deposited without the written permission of J.M. Capital *Tender*, pg 6, ll. 14 - 16

16 The Certificate of Receiver was filed in the Civil Action on August 18, 2005. *Tender*, pg. 4, ll. 11 - 14

17. Mr. Olcott, learning that checks had been negotiated after the Receivership Order was signed, requested an Order to Show Cause directing the Respondent to appear and explain why he should not be held in contempt. The OSC hearing was scheduled for September 16, 2005. *Tender*, pg. 6, ll 17 - 19

18. On September, 15, 2005, Respondent paid into the Firm's bank account the sum of the nine checks He did so without admitting any wrongdoing *Tender*, pg. 6, ll. 22 - 24

19. Judge Reinstein did not find Respondent in contempt. *Tender*, pg 6, ll. 24 - 25.

20. Upon his appointment as Receiver, Mr. Lassiter found that the Firm's Phoenix office employed paralegal-collectors who benefitted from a compensation program which paid a bonus based partly on the attorneys' fees that the paralegal-collector actually collected. The "bonus" was a part of the non-lawyers' take-home pay and livelihood. *Tender*, pg. 7, ll 1 - 8

21. This compensation program was originated by senior, more experienced attorneys of the Firm long before Mr. Cannon became an attorney with the Firm The Firm continued the incentive compensation program after Respondent became a member of the firm and a manager of the Phoenix office. *Tender*, pg 7, ll 10 - 16

22 Respondent discontinued the incentive compensation program after he had become aware that the program might violate Ethical Rule 5 4. *Tender*, pg 7, ll. 17 - 18.

23 If an evidentiary hearing was held on the complaint, the Respondent would testify that as the paralegal compensation plan had been in place for so long and was set up by experienced, senior attorneys, it simply did not occur to him that the plan might bode ethical issues. For purposes of the Tender of Admissions, the State Bar does not contest this proffer of testimony *Tender*, pg 8, ll. 15 - 23

24. If an evidentiary hearing was held on the Complaint, the Respondent would testify that the checks written to himself were already in his possession before the Receivership Order was signed, which caused him to believe that the money was his and that he was free to deposit the checks Respondent further would testify that he negotiated the checks in question, in an attempt to prepare the office for the Receivership and to get them into the bank before he was going to be absent from the office for a period of time due to medical treatment As for the checks issued to the third party, Respondent would testify that he gave the checks to the recipient on the same day or near the same day he wrote them. The Respondent had no control of when the recipient

negotiated the check. For purposes of the Tender of Admissions, the State Bar does not contest this proffer of testimony. *Tender*, pg. 7, l 25 - pg. 8, l. 15.

25. Respondent's mental state was negligent. *Joint Memorandum*, pg. 2, ll. 2 - 10

26. The parties have stipulated that the following aggravated circumstances exist: (a) pattern of misconduct, and (b) multiple offenses. *Joint Memorandum*, pg. 5, ll 1 - 5 This Hearing Officer questions whether the evidence is sufficient to establish a pattern of misconduct, but in considering this Tender, this Hearing Officer accepts the parties' stipulation.

27. The following mitigating factors exist (a) absence of a prior disciplinary record, (b) timely good-faith effort to rectify consequences of misconduct, (c) inexperience in the practice of law,[1] (c) physical disability,[2] (d) absence of dishonest or selfish motive, and (e) full and free disclosure and cooperative attitude *Joint Memorandum*, pg 5, l. 10 - pg 6, l 19

28 Based upon observing Respondent at the Hearing on the Tender, this Hearing Officer also would find that the Respondent is remorseful.

CONCLUSIONS OF LAW

1 There is clear and convincing evidence the Respondent violated ER 5 4 and ER 8 4(d), Rule 42, Rules of the Supreme Court.

2. Contingent upon the acceptance of the Tender of Admissions, the allegations that Respondent violated ER 8 4(c) and Rule 53(c) are dismissed

3. The mitigating factors substantially outweigh the aggravating factors

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[1] Respondent was admitted to practice law in June, 2004. The conduct in question occurred in 2005 *Joint Memorandum*, pg 5, ll. 20 - 22.

[2] This mitigating factor was proven by medical records and testimony. Such evidence is sealed pursuant to Rule 70(g)

RESTITUTION

Restitution is not at issue.

RECOMMENDATION

CONSIDERATION OF THE ABA STANDARDS

In determining the appropriate sanction, the American Bar Association's *Standards for Imposing Lawyer Sanctions* are considered. *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). Those *Standards* counsel that, in determining the proper sanction, 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/or mitigating factors. *In re Spear*, 160 Ariz. 545, 555, 774 P 2d 1335, 1345 (1989), ABA *Standard* 3.0

The negligent violation of ER 5 4 makes relevant ABA Standard 7.3 (applying a censure) and 7.4 (applying a private reprimand) The negligent violation of ER 8.4(d) makes relevant ABA Standard 6.23 (applying a censure) and 6.24 (applying a private reprimand) Considering the overwhelming mitigating factors plus the lack of any actual injury, the agreed upon sanction, censure, is well within the range of appropriate sanction.

PROPORTIONALITY ANALYSIS

The purpose of professional discipline is twofold: (1) to protect the public, the legal profession, and the justice system, and (2) to deter others from engaging in similar misconduct. *In re Neville*, 147 Ariz. 106, 116, 708 P 2d 1297, 1307 (1985); *In re Swartz*, 141 Ariz 266, 277, 686 P 2d 1236, 1247 (1984) Disciplinary proceedings are not to punish the attorney *In re Peasley*, 208 Ariz. 27, 39, 90 P.3d 764, 776 (2004), *In re Beren*, 178 Ariz. 400, 874 P.2d 320 (1994). The discipline in each situation must be tailored to the individual facts of the case in order to achieve the purposes of discipline. *In re Wines*, 135 Ariz. 203, 660 P.2d 454 (1983), *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (1993). To have an effective system of professional sanctions, there must be internal

consistency and it is therefore appropriate to examine sanctions imposed in cases that are factually similar. *In re Shannon*, 179 Ariz. 52 (1994); *In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988)

In the Joint Memorandum, the parties refer to the following cases: *In re Abernathy*, SB-05-01710D (2006); *In re Mirescu,* SB-03-0114D (2003), and *In re Gottesman*, SB-92-0048D (1992). The latter case involved a *knowing* sharing of legal fees with a non-lawyer, which resulted in a censure *Mirescu* involved *knowingly* assisting a client in violating a visitation order. In light of the presence of mitigating factors quite similar to the mitigating circumstances in this case, a censure was deemed justified. *Abernathy* involved a censure and a violation of a court order, but it also involved numerous other serious ethical violations The result in *Abernathy* suggests that the stipulated sanction in this case is at the high end of the range of appropriate sanctions.[3]

CONCLUSION

Upon consideration of the facts, application of the *Standards*, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent which generally provides for the following:

1. Respondent shall receive a censure

2 Respondent must pay all costs incurred by the State Bar, the Disciplinary Clerk, the Disciplinary Commission and the Supreme Court in connection with these proceedings

3. Respondent shall be placed on probation for a period of two years under the following terms and conditions.

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[3] The parties also refer to *In re Rantz* (1989) That decision is of limited use considering the very different violations occurring there.

(a) Respondent shall contact the Director of the State Bar's LOMAP at (602) 340-7313 within thirty (30) days of the date of the final judgment and order issued by the Arizona Supreme Court The Respondent shall submit to a LOMAP examination of his office's procedures, including, but not limited to compliance with ER 5.4 and 8.4(d) The Director of LOMAP shall develop "Terms and Conditions of Probation" and those terms shall be incorporated herein by reference. The probation period will begin to run at the time that the Judgment and Order and will conclude two (2) years from the date that the Respondent has signed the "Terms and Conditions of Probation " Respondent shall be responsible for any costs associated with LOMAP

(b) Respondent shall contact the Director of the State Bar's MAP at (602) 340-7334 within thirty (30) days of the date of the final judgment and order. Respondent shall submit to a MAP assessment The Director of MAP shall develop "Terms and Conditions of Probation" if he determines that the results of the assessment so indicate, and the terms shall be incorporated herein by reference. The probation period shall begin to run at the time of the judgment and order and will conclude two (2) years from the date that the Respondent has signed the "Terms and Conditions of Probation " Should the Director of MAP conclude that no MAP probation terms are necessary, probation shall conclude as noted in the paragraph 3(a) above Respondent shall be responsible for any costs associated with MAP

(c) Respondent shall refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other rules of the Supreme Court of Arizona

(d) In the event either the Director of LOMAP or MAP recommends early termination from probation, Bar counsel shall review the recommendation to ascertain whether early termination of probation is appropriate. If early termination of probation is appropriate, Bar counsel shall file a Notice of Successful Completion of Probation

4 In the event 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 Non-Compliance with the imposing entity, pursuant to Rule 60(a)(5), Arizona Rules of the Supreme Court. The imposing entity may refer the matter to a hearing officer to conduct a hearing at the earliest practical date, but in no event later than thirty (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 non-compliance by clear and convincing evidence.

DATED this 13th day of August, 2008

Mark S. Sifferman
Hearing Officer 9J

COPY of the foregoing mailed this
14th day of August, 2008, to:

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