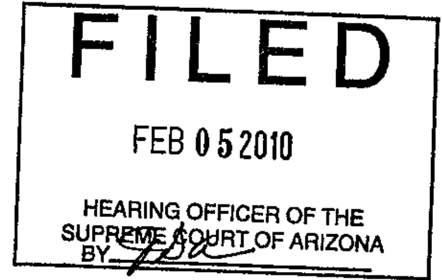
BEFORE A HEARING OFFICER OF
THE SUPREME COURT OF ARIZONA



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

MICHELLE DON CARLOS,
Bar No. 024900

Respondent.

No. 08-1581

HEARING OFFICER'S REPORT

PROCEDURAL HISTORY

The Bar and Respondent entered into an agreement for discipline by consent instead of filing a complaint. The Joint Tender of Admissions and Agreement for Discipline by Consent and the Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent were filed on November 19, 2009. The Hearing Officer was assigned on November 30, 2009. A hearing was held on December 21, 2009.

FACTS[1]

1. At all times relevant, Respondent was an attorney licensed to practice law in Arizona, having been admitted to practice on November 22, 2006.

2. The State Bar received a bar charge in the above referenced matter on September 19, 2008.

3. The Probable Cause Panelist issued a Probable Cause Order on May 6, 2009.

4. The State Bar engaged in additional investigation following the May 6, 2009 Probable Cause Order.

[1] The facts are found in the Joint Tender of Admissions and the Joint Memorandum in Support of the Tender and in the transcript of the hearing.

5. The May 6, 2009 Probable Cause Order was vacated by the Probable Cause Panelist on October 14, 2009.

6. The Probable Cause Panelist entered a new Probable Cause Order on October 14, 2009.

7. A Complaint has not been filed against Respondent in this matter.

COUNT ONE

8. On or about May 2006, Jennifer Strickland (Ms. Strickland) contacted Respondent regarding an ad that Respondent had placed for a roommate. (TR 4:23 through 5:2)

9. Ms. Strickland moved into Respondent's home shortly after she contacted Respondent. (TR 5:3-5)

10. During the time that Ms. Strickland and Respondent were roommates, they developed a close friendship. (TR 5:6-10)

11. At the time that Ms. Strickland and Respondent met, Ms. Strickland was undergoing divorce proceedings. (TR 5:14-19)

12. Ms. Strickland finalized her divorce in late 2006. (TR 5:20-22)

13. Ms. Strickland moved out of Respondent's home on or about January 2007. (TR 5:23-25)

14. Ms. Strickland moved into the home of her then boyfriend, Judd Strickland (Mr. Strickland). (TR 6:1-3)

15. On or about July 2007, Ms. Strickland married Mr. Strickland. (TR 6:4-6)

16. On or about September 2007, Ms. Strickland left Mr. Strickland and moved back into Respondent's home. (TR 6:7-10)

17. Ms. Strickland asked Respondent to represent her as her lawyer and help her file for a divorce from Mr. Strickland. (TR 6:11-14)

18. Respondent agreed to file the divorce and represent Ms. Strickland *pro bono*. (TR 6:21 through 7:2)

19. During the course of Ms. Strickland's matter, Respondent and Ms. Strickland corresponded by emails that reflected the *pro bono* fee arrangement. (TR 7:20-24)

20. Respondent did not provide Ms. Strickland with a writing documenting the scope of Respondent's representation. (TR 7:25 through 8:3)

21. Respondent counseled Ms. Strickland to attempt to reconcile the marriage by attending counseling courses. (TR 8:4-7)

22. Ms. Strickland attended the counseling courses but was unable to reconcile her marriage. (TR 8:8-13)

23. Respondent, on behalf of Ms. Strickland, filed the initial Petition for Dissolution without Children (Petition) on or about November 30, 2007. (TR 8:14-17)

24. The Petition included a prayer for attorney fees. (TR 8:18-20)

25. During the time Ms. Strickland was attending marriage counseling, Respondent was looking for a horse property to purchase jointly with her father. (TR 8:21 through 9:1)

26. Ms. Strickland was interested in opening a horseback riding stable on the new property. (TR 9:2-5)

27. Respondent agreed to allow Ms. Strickland to open her business on the new property. (TR 9:6-9)

28. Ms. Strickland wanted to obtain horse insurance for her new business on the new property. (TR 9:10-13)

29. Ms. Strickland's insurance company of choice required proof that Ms. Strickland had a right of access to the new property. (TR 9:14-17)

30. Ms. Strickland asked Respondent to provide her with a rental agreement that she could provide to the insurance company as proof that Ms. Strickland had access to the new property. (TR 9:18-22)

31. Ms. Strickland also wanted to prepay eighteen (18) months of rent based on the rental agreement. (TR 9:22-25)

32. Respondent agreed to draft a rental agreement (Rental Agreement). (TR 10:1-3)

33. On or before January 1, 2008, Respondent drafted the Rental Agreement. (TR 10:4-7)

34. If this matter were to proceed to a hearing, Respondent would testify that Ms. Strickland was a licensed real estate agent and dictated the terms of the Rental Agreement to Respondent. (TR 10:8-16)

35. For purposes of this agreement only, the State Bar does not dispute Respondent's statement as referenced in paragraph 34, above. (TR 10:17-20)

36. The Rental Agreement provided that Respondent was the "Owner" of the property. (TR 10:21-24)

37. The Rental Agreement provided that Ms. Strickland was the "Tenant" of the property. (TR 10:25 through 11:2)

38. The Rental Agreement provided that Ms. Strickland was to pay Respondent $1,500.00 per month as a rental fee. (TR 12:1-4)

39. The Rental Agreement provided that "upon signing of the rental agreement the first month's rent through the last month's rent shall be prepaid in full: $26,000.00…." (TR 12:5-9)

40. If this matter were to proceed to a hearing, Respondent would testify that she and Ms. Strickland decided not to use the Rental Agreement, but instead document their transaction through a promissory note, because Respondent's name would not be used on the title to the new property. (TR 11:3-25; 12:10-15)

41. For purposes of this agreement only, the State Bar does not dispute Respondent's statement as referenced in paragraph 40, above. (TR 12:17-20)

42. On or about January 1, 2008, Ms. Strickland paid Respondent $26,000.00 for rent. (TR 12:21-23)

43. On or about January 1, 2008, Respondent executed a Promissory Note (Promissory Note). (TR 12:24 through 13:2)

44. The terms of the Promissory Note stated that Respondent would credit Ms. Strickland $26,000.00 in monthly installments of $1,500.00 beginning February 1, 2008. (TR 13:3-7)

45. The purpose of the Promissory Note was for Respondent to credit back the advanced rent, referred to in paragraph 42 above, to Ms. Strickland on a monthly basis. (TR 13:8 through 14:5)

46. Respondent was representing Ms. Strickland in her divorce against Mr. Strickland at the time both the Promissory Note was executed. (TR 16:7-25)

47. Respondent did not obtain written informed consent from Ms. Strickland before executing the Promissory Note. (TR 17:1-4)

48. Respondent did not advise Ms. Strickland in writing to seek the advice of independent counsel prior to the execution of the Promissory Note. (TR 17:6-10)

49. On or about March 19, 2008, Respondent filed a Petition for *Pendente Lite* (*Pendente Lite* Petition) on Ms. Strickland's behalf in the divorce proceedings. (TR 17:11-17)

50. In the *Pendente Lite* Petition, Respondent asked for an award of attorney fees. (TR 17:18-20)

51. During Ms. Strickland's divorce proceedings, she was required to file an Affidavit of Financial Information (Affidavit) and an Inventory of Property and Debts (Inventory). (TR 30:21 through 31:1)

52. Prior to April 3, 2008, Respondent provided Ms. Strickland with blank forms of the Affidavit and Inventory with the understanding that Ms. Strickland would complete the necessary information. (TR 31:2-6)

53. Respondent's secretary was Yolanda Ballesteros. (TR 31:7-10)

54. On or about April 3, 2008, both the Affidavit and Inventory were completed by hand by Ms. Strickland and provided to Ms. Ballesteros. (TR 31:12-16)

55. Neither the handwritten Affidavit nor the handwritten Inventory contained references to loans for the purpose of paying attorney fees. (TR 31:17-21)

56. On or about April 3, 2008, Ms. Ballesteros transcribed the Affidavit and Inventory into printed form and provided drafts to Respondent. (TR 31:22 through 32:1)

57. On or about April 3, 2008, Respondent met with Ms. Strickland and discussed the information contained in the Affidavit and Inventory. (TR 32:2-6)

58. During the meeting, Respondent handwrote notes on the Affidavit indicating where changes were needed, including noting a $5,000.00 loan paid from Ms. Strickland's parents to Ms. Strickland for the purpose of paying attorney fees. (TR 32:7-14)

59. If this matter were to proceed to a hearing, Respondent would testify that she was told by Ms. Strickland at some point that she anticipated getting a loan from her parents to pay Respondent for her services, and that Respondent noted the loan in the Affidavit in anticipation of the loan. (TR 32:15-20)

60. For purposes of this agreement only, the State Bar does not dispute Respondent's statement in paragraph 59, above. (TR 32:21-24)

61. Following the meeting with Ms. Strickland, Respondent provided the copy of the Affidavit with Respondent's notes to Ms. Ballesteros to finalize. (TR 38:16-20)

62. Ms. Ballesteros produced a final Affidavit, in type, in which it was disclosed that Ms. Strickland's parents paid Ms. Strickland a $5,000.00 loan for attorney fees. (TR 38:21 through 39:1)

63. The final Inventory did not document any loan from Ms. Strickland's parents for attorney fees. (TR 39:2-5)

64. Ms. Ballesteros used a signature stamp of Respondent's name to stamp the signature lines of the Affidavit and Inventory. (TR 39:10-15)

65. Ms. Strickland did not provide Ms. Ballesteros with authorization to sign the Affidavit on her behalf. (TR 39:16 through 40:17)

66. The Affidavit and Inventory were filed with the Court on April 8, 2008.

67. If this matter were to proceed to a hearing, Respondent would testify that she did have office policies and procedures in place addressing the proper means for filing documents before a court, which included that Ms. Ballesteros was to provide Respondent with a copy of any such submission for Respondent's review prior to its filing. (TR 47:23 through 48:5)

68. For purposes of this agreement only, the State Bar does not dispute Respondent's statement in paragraph 67, above.

69. Respondent did not review the Affidavit or Inventory prior to their filing.

70. On or about April 10, 2008, Respondent attended the *Pendente Lite* Hearing on behalf of Ms. Strickland where the Affidavit and Inventory were admitted into evidence. (TR 55:12-19)

71. On or about April 10, 2008, Respondent orally requested the Court to order Mr. Strickland to pay Respondent's attorney fees. (TR 55:24 through 56:20)

72. On or about April 10, 2008, Respondent orally told the Court that no attorney fees had been paid by Ms. Strickland. (TR 56:13-20)

73. At no time during Ms. Strickland's divorce proceedings did Respondent tell the Court that she had agreed to represent Ms. Strickland *pro bono*. (TR 57:15-22)

74. On May 13, 2008, the Court ordered Mr. Strickland to pay $2,500.00 in attorney fees to Ms. Strickland pursuant to A.R.S. § 25-324. (TR 65:1-15; 74:22 through 75:2)

75. Mr. Strickland did not timely pay the $2,500.00, and so agreed to pay that amount plus an additional $300.00 to Ms. Strickland. (TR 77:18-24)

76. Mr. Strickland thereafter provided Respondent with $2,800.00 in compliance with the Court's Order for attorney's fees, and his agreement to pay an additional $300.00.(TR 89:18-24)

77. Respondent thereafter provided the entire $2,800.00 to Ms. Strickland.

RESTITUTION

The parties have stipulated that restitution is not at issue in this matter. The Hearing Officer has some concerns in this area. Mr. Strickland was ordered to pay $2500 in attorney fees. Respondent did not tell Commissioner Douglas that she was representing Mrs. Strickland *pro*

bono. Instead Respondent told the court that her client had not paid her and orally asked for an award of attorney fees in court. Commissioner Douglas's May 13, 2008 minute entry merely stated that pursuant to ARS sec. 25-324 after considering the financial resources of the parties Mr. Strickland was ordered to pay $2500 in attorney fees. (TR 65:1-15) Mr. Strickland paid $2800 in attorney fees to Respondent. He added an extra $300 because his payment was after the deadline set by the Commissioner. (TR 89:18-24)

Respondent at the hearing asserted that she did not know whether her client had paid her $5000 for attorney fees when she orally asked the court for an award of attorney fees. (TR 23:24 through 24:19) When asked why she told the court that her client had not paid her any fees, Respondent testified that she was showing the court that her client was destitute; that the client did not have money for food or rent. (TR 28:2-14) Yet, Respondent did not tell the court that her client had paid Respondent $26,000 for "rent" under the Promissory Note. (TR 38:12-15)

The Hearing Officer considered recommending that Respondent be ordered to pay $2800 to Mr. Strickland. However, Respondent did not directly benefit from the $2800. Respondent gave this money to her client, Ms. Strickland. (TR 92:12-17) Counsel for Respondent asserts that Ms. Strickland may have likely used the $2800 to pay her next lawyer in the dissolution, because that lawyer was a "retained fee-for-service counsel". (TR 70:22 through 71:2)

The question remains whether Respondent caused Mr. Strickland to be ordered by the Commissioner to pay attorney fees based on 1) erroneous information in the Affidavit (that Ms. Strickland had paid $5000 in attorney fees) and 2) Respondent omitting to tell the Commissioner that she was representing Ms. Strickland *pro bono*. The Hearing Officer does not know if the Commissioner would have ordered Mr. Strickland to pay any attorney fees if the Commissioner had known that Respondent was representing her client for free. Circumstantial evidence leads to

the conclusion that the Commissioner relied on the $5000 figure in the Affidavit to select one-half of that amount, $2500, as Mr. Strickland's *pendente lite* attorney fee obligation. The Hearing Officer cannot conclude that a restitution order for Respondent to pay Mr. Strickland $2800 would in these unusual circumstances be appropriate. Therefore, none is recommended. The Commission may wish to consider sending a copy of this report to Commissioner Douglas. This might permit the Commissioner to determine if any further order of the Commissioner regarding Mr. Strickland's payment of attorney fees would be appropriate.

CONDITIONAL ADMISSIONS/CONCLUSIONS OF LAW

Respondent conditionally admits that her conduct violated Rule 42, Ariz. R. Sup. Ct. specifically, ERs 1.5(b) [failure to have a written fee agreement covering the scope of the representation], 1.8(a) [doing business with a client without explaining the nature of the business relationship, without advising the client of the right to consult with independent counsel and without getting the client's informed consent in writing], 5.3 [failing to appropriately supervise non-lawyer staff], and 8.4(d) [conduct prejudicial to the administration of justice]. Based on these conditional admissions and on the testimony at the hearing the Hearing Officer finds that the Bar has established the above-referenced violations by clear and convincing evidence.

ABA STANDARDS

The *Standards* provide guidance with respect to an appropriate sanction in this matter. The Supreme Court and Disciplinary Commission consider the *Standards* a suitable guideline. *See In re Peasley*, 208 Ariz. 27, 33, 35, 90 P.2d 764, 770, 772 (2004); *In re Rivkind*, 164 Ariz. 154, 157, 791 P. 2d 1037, 1040 (1990).

In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider 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, Peasley*, 208 Ariz. at 35, 90P.3d at 772; *Standard* 3.0.

For purposes of settlement, the parties have proposed that the most serious conduct in this case is Respondent's failure to properly supervise her office assistant leading to the filing of false information before a tribunal. Perhaps the parties do not think that doing business with her client without following the required procedures in ER 1.8 (a) is the most serious violation, because Respondent has reimbursed her client for the $26,000 the client paid Respondent. Respondent's conduct, in violation of Rule 42, ER 5.3(b), Ariz. R. Sup. Ct. implicates *Standard* 7.0. *Standard* 7.3 provides "[r]eprimand 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 the public or the legal system." Reprimand is the equivalent of a censure in Arizona.

Duty Violated

The Hearing Officer finds that Respondent violated her duty to the profession when she failed to specifically direct her assistant to make sure that Respondent reviewed the Affidavit before it was submitted to the Commissioner. This failure probably led the Commissioner to think that Ms. Strickland had paid $5000 to Respondent for attorney fees.

Mental State

The Hearing Officer finds that Respondent was negligent in not knowing whether her client Ms. Strickland had obtained the loan from her parents and had paid $5000 to Respondent for attorney fees. Respondent was not intending to deceive the court with the Affidavit. Respondent testified that on the draft of the Affidavit she wrote a note in a very large circle that contained the figure,"$5000". Respondent stated that the purpose of the circle was for Respondent's assistant to tell Respondent whether the client had paid the $5000 before the

Affidavit was filed in court. (TR 32:25 through 33:14) However, at the hearing Respondent stated that she told her assistant orally to inform Respondent if the $5000 was paid. Respondent admitted that she did not give her assistant a written instruction to withhold filing of the Affidavit until the assistant had told Respondent whether the client paid the $5000.

The Hearing Officer is concerned with the Bar's reason for not pursuing a violation of ER 3.3 [candor toward tribunal]. Bar counsel stated that there was a lack of clear and convincing evidence that Respondent knowingly misrepresented anything in the Affidavit to the court regarding attorney fees. (TR 52:5 through 53:10) Respondent did not ask her assistant Ms. Ballesteros (when Respondent was preparing for the April 10, 2008 hearing in Family Court) if the client Ms. Strickland had come into the law office and paid the $5000. (TR 53:14-25) However, Respondent also testified that the Affidavit was not required for the April 10, 2008 hearing. Respondent first learned that the Affidavit had even been filed when the Commissioner researched the affidavit through the computer on the bench. (TR 54:2-12) Although the Bar could sustain the argument that Respondent was negligent about whether her client had actually paid her fees, the record supports a conclusion that Respondent knowingly omitted to tell the court that she was representing her client *pro bono*.

ER 3.3 (a) states in part that it is a violation for a lawyer to knowingly make a false statement of fact to a tribunal, or fail to correct a false statement of material fact previously made to the tribunal by the lawyer. Technically this rule does not address the situation presented here, where the lawyer omits to tell the court relevant information. The Hearing Officer notes that the record is silent on whether Respondent subsequently informed the Commissioner that the statement regarding the client's payment of $5000 of attorney fees in the Affidavit was false.

Finally, the Hearing Officer concludes that the sanction agreed to by the parties, a Censure, one year of probation with Law Office Management Assistance Program (LOMAP) terms including a practice monitor and attendance at the courses "Ten Deadly Sins of Conflict", "For Better or For Worse", and "Advanced Family Law", and payment of the costs of the proceeding, would be acceptable to the Hearing Officer even if there had been a finding of a violation of ER 3.3 (a) by Respondent.

Injury

The parties propose and the Hearing Officer agrees that Respondent's omission that she was representing her client *pro bono*, coupled with Respondent's oral request for attorney fees in court and the incorrect information in the Affidavit caused injury to the legal system.

Respondent could have asked the Commissioner for an award of attorney fees if Respondent had explained 1) that she was representing her client *pro bono*, 2) that her client wanted to contribute to fees, but that no fees had been paid, and 3) that Respondent would submit an attorney fee affidavit (sometimes called a China Doll affidavit[2]) demonstrating to the court the amount of time spent by Respondent on the case. Of course Respondent should also have been more careful with the Affidavit of Financial Information.

Respondent testified that she made sure to put a note on the draft of that Affidavit about the $5000 in attorney fees and that she orally instructed her assistant to remove the reference to the attorney fees if the fees had not been paid. Yet, Respondent did not check with her assistant before the Affidavit was filed to find out if the attorney fees had been paid. When Respondent heard the Commissioner refer to the Affidavit in court, Respondent did not ask for a recess so that

[2] *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) (holding that an application for attorney fees must be supported by an affidavit of counsel setting forth in sufficient detail the hours worked on the case and the hourly rate that the client agreed to pay for the services)

she could call her assistant and ask if the assistant had received the $5000 in fees from the client. (TR 55:20-23)

The Hearing Officer agrees with the parties that *Standard* 7.3 applies. The Hearing Officer accepts Respondent's assertion, and for purposes of this agreement the State Bar's agreement not to dispute that assertion, that Respondent did not have personal knowledge of the information contained in the final version of the Affidavit of Financial Information (Affidavit) that was filed with the Court. Respondent acknowledges that she should have but did not ask for or review a copy of the Affidavit prior to its submission to the Court and its acceptance by the Court as evidence. Respondent also acknowledges that she did not inform the Court that she was representing Ms. Strickland *pro bono* in her divorce proceedings. The Hearing Officer agrees with the parties that had Respondent more closely monitored her assistant's activities, the Affidavit would likely have been corrected prior to its submission to the Court.

The presumptive sanction in this matter therefore appears to be censure. Application of the aggravating and mitigating factors assists in determining the appropriate sanction.

Aggravating Factors

The Hearing Officer finds that there are no factors to consider in aggravation.

Mitigating Factors

For purposes of their agreement, the parties propose that the following factors should be considered in mitigation:

Standard 9.32(a): Absence of a Prior Disciplinary Record. Respondent has no prior disciplinary history. The Hearing Officer accepts this factor, but recognizes that at the time of this incident, April, 2008, Respondent had been admitted to practice for 17 months.

Standard 9.32(c): Personal or Emotional Problems. Respondent's father suffered medical problems during the relevant times listed in the Tender of Admissions, and was helping with his care.

Standard 9.32(d): Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct. Respondent has repaid Ms. Strickland monies owed to her under the Promissory Note. (TR 15:13-15) It is interesting to note that the parties have agreed that the most serious conduct in this case (for purposes of the *Standards*) was Respondent's negligence in not appropriately supervising her assistant concerning the need to have Respondent review the Affidavit before it was filed. Yet, this mitigating factor relates to something that the parties either considered less serious; doing business with a client while you represent them without following the rules for informed consent by client (and then owing the client money from that business relationship), or for which the parties could not find a specific *Standard* that applied. As stated above in this report the Hearing Officer could conclude that the parties did not think doing business with her client was more serious that negligently misleading the court, because the client Ms. Strickland ultimately was not out any money from the "business" relationship with Respondent, the Promissory Note. (TR 15:18 through 16:6; 85:5-11)

The Hearing Officer has noted that apparently Respondent did not subsequently inform the Commissioner that the information about Ms. Strickland paying $5000 in attorney fees to Respondent was false. The record is silent as to when Respondent found out that Ms. Strickland had not paid Respondent $5000 in attorney fees.

Of concern to the Hearing Officer is the question of why Respondent gave the $2800 that Mr. Strickland paid in attorney fees under court order to Ms. Strickland? If the award was for attorney fees and the client had not paid her any fees, then Respondent would have been entitled to

keep the $2800 to compensate her for the time she spent on Ms. Strickland's case. Otherwise, Respondent knew that the Commissioner intended the $2800 to compensate Ms. Strickland for the attorney fees Ms. Strickland paid (or owed) to Respondent. Respondent should have known that Ms. Strickland had not paid her any fees. For Respondent to give the $2800 to Ms. Strickland was to give Ms. Strickland a windfall at Mr. Strickland's expense (when that windfall was obtained from the Commissioner under false pretenses). The Commissioner did not intend that any of this money be used to pay any lawyer other than Respondent. If Respondent did not know that Ms. Strickland had not paid her the $5000 and Respondent simply instructed her assistant to forward the $2800 to Ms. Strickland without even checking whether her client had paid her $5000, then Respondent's lapses in managing her law practice were indeed serious.

It is important to note that the friendship relationship (and business relationship) between Respondent and her client Ms. Strickland may well have caused Respondent's more-than-casual attitude toward the attorney fee issue in this case. However, those relationships do not excuse the result in this case that the Commissioner was misled by Respondent's oral presentation and the factual assertions in the Affidavit.

Standard 9.32(e): Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings. Respondent has provided all materials requested by the State Bar and did not seek a delay in the proceedings.

Standard 9.32(f): Inexperience in the Practice of Law. Respondent was licensed to practice law in Arizona on November 22, 2006. She began work on Ms. Strickland's divorce approximately one year after admission to the bar and had little guidance regarding the intricacies of family law.

Standard 9.32(l): Remorse. Respondent is remorseful for her conduct. The Hearing Officer sensed genuine remorse from Respondent in her testimony at the hearing. These proceedings have taught Respondent a serious lesson about not doing business with a client.

But Respondent was too eager to portray her client (and friend) to the Commissioner as destitute. In her description of her client's plight Respondent made the statement that her client had not paid her any fees, without also telling the Commissioner that she was representing her client *pro bono*. The Hearing Officer thinks the sanction agreed to by the parties is a good method for Respondent to build on what she has learned from this experience in the disciplinary system.

Having reviewed the aggravating and mitigating factors, the Hearing Officer agrees with the parties that although mitigating factors exist, they do not justify a sanction less than censure.

PROPORTIONALITY REVIEW

In the past, the Supreme Court has consulted similar cases in an attempt to assess the proportionality of the sanction recommended. *See In re Struthers,* 179 Ariz. 216, 226, 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept or proportionality review is "an imperfect process." *In re Owens,* 182 Ariz. 121, 127, 893 P.3d 1284, 1290 (1995). This is because no two cases "are ever alike." *Id.*

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *Peasley*, *supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the discipline in each case must be tailored to the individual case, as neither perfection nor absolute uniformity can be achieved. *Id.* at 208 Ariz.

at ¶ 61, 90 P.3d at 778 (citing *In re Alcorn,* 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines,* 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)).

The cases set forth below are offered by the parties to demonstrate that Censure is an appropriate sanction in this matter.

In *In re Olcott*, SB-09-0011-D (2009), the lawyer submitted affidavits to the Court containing false information to support his request for attorney fees. The lawyer did not review the affidavits prior to signing and submitting them to the Court. The lawyer received a censure for his conduct. The Joint Memorandum submitted by the parties in the instant case erroneously stated that the Commission considered two aggravating factors: the lawyer's prior disciplinary history and his mental disability or chemical dependence. The Commission considered the former as an aggravating factor, but made no mention of the latter (chemical dependency or mental disability is a mitigating factor). The Commission adopted that portion of the hearing officer's report that considered Olcutt's substantial experience in the practice of law as an aggravating factor. Three mitigating factors were considered: the absence of a dishonest or selfish motive, full and free disclosure and a cooperative attitude, and remorse. While the lawyer was found to have knowingly acted, no actual injury was found.

In *In re Laganke*, SB-09-0081-D (2009), the lawyer failed to provide his clients with a written fee agreement and failed to further supervise his non-lawyer assistant who misappropriated client funds. The lawyer entered into an agreement for a censure that was accepted by the Court. Three aggravating factors were considered: a pattern of misconduct, multiple offenses, and substantial experience in the practice of law. Three mitigating factors were also considered: no prior disciplinary history, the absence of a dishonest or selfish motive, and a cooperative attitude. The lawyer acted negligently, and both actual and potential injuries were found.

In *In re Sorrell*, SB-09-0065-D (2009), the lawyer disbursed funds on behalf of one or more clients when they had no funds on deposit in his trust account, thereby loaning money to his client without obtaining written informed consent. The lawyer also failed to supervise his assistant, who was in charge of maintaining his trust account and did not properly maintain the client trust account according to the trust account rules and guidelines. The lawyer entered into an agreement for a censure and probation. One aggravating factor was considered: a pattern of misconduct. Two mitigating factors were also considered: the absence of a prior disciplinary history and the absence of a dishonest or selfish motive. The lawyer was found to have acted negligently and caused potential injury.

While none of the above referenced cases are on-point on their own, a combined reading establishes grounds to support the agreed upon sanction in this matter. Both *Laganke* and *Sorrell* establish that a censure is appropriate in cases involving various degrees of poor supervision by a lawyer regarding their assistants. The lawyer in *Sorrell* was found to have engaged in a conflict of interest by making loans to his clients and not obtaining written informed consent. The lawyer in *Laganke* failed to provide his clients with a written scope of representation or an agreement on fees, similar to Respondent's conduct in this matter. Finally, the lawyer in *Olcott* submitted affidavits to the Court containing false information without reviewing them, much as Respondent did in this matter. Based on a combined reading of the above cases, and on the specific facts of Respondent's matter, the Hearing Officer agrees with the parties that a censure with one year of probation is an appropriate sanction in this matter.

The Hearing Officers believes that this agreement provides for a sanction that meets the goals of the disciplinary system. The terms of the agreement serve to protect the public, instill

confidence in the public, deter other lawyers from similar conduct, and maintain the integrity of the bar.

RECOMMENDATION

The Hearing Officer recommends that, based on the Standards and relevant case law, censure and one year of probation is an appropriate sanction in this matter. In addition, Respondent shall pay the State Bar's and Court's costs and expenses incurred in this disciplinary proceeding.

The Court and the Commission have repeatedly stated that the purpose of lawyer discipline is not to punish the offender but to protect the public, the profession and the administration of justice. *See Peasley*, 208 Ariz. at 41, 90 P.3d at 778; *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1988). The proposed sanction will accomplish those goals.

SANCTION

The Hearing Officer recommends that the appropriate disciplinary sanctions are as follows:

1. Respondent shall be censured.
2. Respondent shall be placed on one year of probation to begin from the issuance of the Judgment and Order under the following conditions:
   a. Respondent shall contact the director of the State Bar's Law Office Management Assistance Program (LOMAP) within 30 days of the date of the Supreme Court's Final Judgment and Order to schedule a LOMAP consultation and evaluation of her office processes and procedures. Respondent shall submit to the LOMAP consultation and evaluation within 30 days of her contact with LOMAP. The director of LOMAP shall develop probation terms that shall be incorporated herein by reference. Respondent

shall comply with any recommendations resulting from LOMAP's assessment that shall also be incorporated in the probation terms. The probation period will begin at the time of the Supreme Court's Final Judgment and Order, and will conclude one year from the date that all parties have signed the probation terms.

i. Respondent's terms of probation shall include use of the services of a practice monitor. The practice monitor shall be an attorney approved by the State Bar and shall be selected by Respondent from a list of potential practice monitors provided to her by the State Bar.

ii. Respondent's terms of probation shall include completion of the State Bar's continuing legal education course entitled "Ten Deadly Sins of Conflict."

iii. Respondent's terms of probation shall include completion of the State Bar's continuing legal education course entitled "For Better or For Worse."

iv. Respondent's terms of probation shall include completion of the State Bar's continuing legal education course entitled "Advanced Family Law."

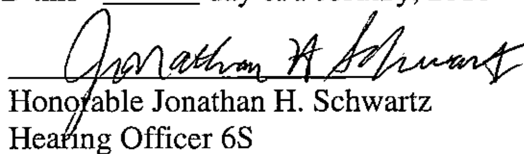
v. All continuing legal education required of Respondent pursuant to this agreement may be counted in satisfaction toward, not in addition to, her Mandatory Continuing Legal Education required pursuant to Rule 45, Ariz. R. Sup. Ct.

vi. Respondent shall pay all fees and costs incurred by LOMAP in supervising Respondent's probation, including, but not limited to, the costs of the practice monitor and required continuing legal education programs.

3. Respondent shall pay all costs incurred by the State Bar in bringing these disciplinary proceedings within thirty (30) days of the Supreme Court's Final Judgment and Order. An Itemized Statement of Costs and Expenses is attached as Exhibit A and incorporated herein by reference. In addition, Respondent shall pay all costs incurred by the Disciplinary Commission, the Supreme Court, and the Disciplinary Clerk's office in this matter.

4. 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.

DATED this 5th day of February, 2010



Honorable Jonathan H. Schwartz
Hearing Officer 6S

Original filed with the Disciplinary Clerk
this 8 day February, 2010.

Copy of the foregoing mailed
this 8 day of February, 2010, to:

Gregory D. D'Antonio
P. O. Box 43306
Tucson, AZ 85733-3306

Russell Anderson
4201 N. 24th Street, Suite 200
Phoenix, AZ 85016-6288

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EXHIBIT
A

Statement of Costs and Expenses

In the Matter of a Member of the State Bar of Arizona,
Michelle Kathryn Don Carlos, Bar No. 024900, Respondent

File No(s). 08-1581

Administrative Expenses

The Board of Governors of the State Bar of Arizona with the consent of the Supreme Court of Arizona approved a schedule of general administrative expenses to be assessed in disciplinary proceedings. The administrative expenses were determined to be a reasonable amount for those expenses incurred by the State Bar of Arizona in the processing of a disciplinary matter. * An additional fee of 20% of the general administrative expenses will be assessed for each separate file/complainant that exceeds five, where a violation is admitted or proven.

General administrative expenses include, but are not limited to, the following types of expenses incurred or payable by the State Bar of Arizona: administrative time expended by staff bar counsel, paralegals, legal assistants, secretaries, typists, file clerks and messengers; postage charges, telephone costs, normal office supplies, and other expenses normally attributed to office overhead. General administrative expenses do not include such things as travel expenses of State Bar employees, investigator's time, deposition or hearing transcripts, or supplies or items purchased specifically for a particular case.

General Administrative Expenses for above-numbered proceedings = **$1200.00**

Additional costs incurred by the State Bar of Arizona in the processing of this disciplinary matter, and not included in administrative expenses, are itemized below.

Staff Investigator/Miscellaneous Charges

08/19/09	Review file	$70.00
08/20/09	Call to Jennifer Strickland	$17.50
08/25/09	Memo to Bar Counsel	$17.50
09/22/09	Computer investigation; Attempt to locate Yolanda Ballesteros	$17.50
09/28/09	Letter to Maria Ballesteros	$8.75
10/02/09	Attempt to contact Marie Ballesteros	$8.75
10/05/09	Call from Yolanda Ballesteros	$17.50
10/08/09	Memo to Bar Counsel	$52.50

1 Total for staff investigator charges $210.00

2 ***TOTAL COSTS AND EXPENSES INCURRED*** ***$1,410.00***

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4 Sandra E. Montoya 11-19-09

Sandra E. Montoya Date

5 Lawyer Regulation Records Manager

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