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FEB 27 2008

BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

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

File No. 06-1861

EDWARD A. LOSS, III,
Bar No. 016975

HEARING OFFICER'S REPORT
RECOMMENDING ACCEPTANCE
OF AGREEMENT FOR
DISCIPLINE BY CONSENT

Respondent

(Assigned to Hearing Officer 8W,
Thomas M. Quigley)

Pursuant to Ariz R Sup Ct. 56(e), the undersigned hearing officer recommends acceptance of the Tender of Admissions and Agreement for Discipline by Consent and submits the following report

I. PROCEDURAL HISTORY

The State Bar filed a Complaint on September 18, 2007. The complaint alleged one count as discussed further below. Respondent Edward A. Loss, III ("Respondent") filed an Answer on October 16, 2007. A notice of settlement was filed on December 13, 2007, and subsequently the parties filed a Tender of Admissions and Agreement for Discipline by Consent ("Agreement") and a Joint Memorandum in Support of Agreement for Discipline by Consent ("Joint Memorandum") on January 8, 2008. No hearing has been held in this matter.

II. FACTS¹

1 At all times relevant, Respondent was a lawyer licensed to practice law in the state of Arizona having been admitted to practice in Arizona on May 18, 1996.

COUNT ONE (06-1861)

2. On July 28, 2006, Complainant Donna Petersen ("Petersen") hired Respondent to represent her on a matter in the Chandler Municipal Court

3 Respondent made inappropriate comments to Petersen during the course of the representation.

¹ The following facts have been conditionally admitted and form the basis for the hearing officer's recommendation. See Agreement

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16 Withdraw as Counsel of Record from Petersen's case.

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23 14. On November 8, 2006, Petersen filed a charge against Respondent with
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25 15 Respondent has been cooperative with Bar counsel

26 16. Respondent has submitted nine letters from character witnesses Mark J
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28 Kunzelman, Lou Lagomarsino, James P. Leonard, and Mark A Nermyr attesting to

1 Respondent's hard work, integrity and professionalism.

2 **III. DISMISSED ALLEGATIONS**

3 The Complaint in this matter, stated as one Count, alleged that Respondent's fee
4 agreement violated ER 1.5 As part of the Agreement, the State Bar dismissed the
5 allegation that Respondent violated ER 1 5

6 **IV. RESTITUTION**

7 There is no issue of restitution in this matter.

8 **V. THE APPROPRIATE SANCTION**

9 The purpose of lawyer discipline is not to punish the lawyer, but to protect the
10 public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P 2d
11 1315, 1320 (1993) Lawyer discipline should also protect the public, the profession and
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13 another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz*,
14 180 Ariz 20, 29, 881 P.2d 352, 361 (1994).

15 In imposing discipline, it is appropriate to consider the facts of the case, the
16 American Bar Association's *Standards for Imposing Lawyer Sanctions* ("Standards")
17 and the proportionality of discipline imposed in analogous cases *Matter of Bowen*, 178
18 Ariz. 283, 286, 872 P 2d 1235, 1238 (1994).

19 **A. ABA STANDARDS**

20 The *Standards* provide guidance with respect to the appropriate sanction in this
21 matter. The Court and Commission consider the *Standards* a suitable guideline. *In Re*
22 *Rivkind*, 164 Ariz. 154, 157, 791 P 2d 1037, 1040 (1990), *In Re Kaplan*, 179 Ariz 175,
23 177, 877 P 2d 274, 276 (1994).

24 In determining an appropriate sanction, both the Court and the Commission
25 consider the lawyer's mental state, the duty violated, the actual or potential injury
26 caused by the misconduct, and the existence of aggravating and mitigating factors.
27 *Matter of Tarletz*, 163 Ariz 548, 789 P.2d 1049 (1990); ABA Standard 3 0
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1 **1. The duty violated**

2 The parties agree, and this hearing officer finds, that Respondent violated Ariz
3 R. Sup. Ct. 41(g) (“advance no fact prejudicial to the honor or reputation of a party”) and ER 17(a)(2) (conflict of interest). *Standard* 4.33 states, “[Censure] is generally
4 appropriate when a lawyer is negligent in determining whether the representation of a
5 client may be materially affected by the lawyer’s own interests, or whether the
6 representation will adversely affect another client, and causes injury or potential injury
7 to a client ”

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9 Respondent allowed his personal interest in his client to guide his behavior, but
10 Respondent made only a single attempt to physically engage in a sexual relationship
11 with his client, an attempt that immediately ceased when Petersen rejected his advance.

12 Respondent also exacerbated his violation when he attacked Petersen’s character
13 both verbally and in writing *Standards* 5 13/5 14 are instructive on this issue, and
14 would also indicate that censure is appropriate.

15 **2. The lawyer’s mental state**

16 Respondent asserts, and the State Bar accepts that Respondent was negligent in
17 ascertaining the likely effect of his actions Negligence includes. “the failure to heed a
18 substantial risk that circumstances exist or that a result will follow, which failure is a
19 deviation from the standard of care that a reasonable lawyer would exercise in the
20 situation.” *Standards* Definitions This hearing officer accepts that Respondent’s initial
21 conduct was negligent within this definition.²

22 **3. The potential or actual injury caused by Respondent’s conduct**

23 Respondent’s conduct caused actual and potential injury to Petersen
24 Respondent’s loyalty to Petersen and her interests was impaired by Respondent’s desire
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26 ² The more difficult question is whether Respondent’s subsequent conduct in attacking
27 Petersen’s character can be termed negligent. However, because the presumptive
28 sanction under *Standard* 5 13 would still be censure, this issue does not impact the
ultimate recommendation Censure is generally appropriate when a lawyer knowingly
engages in conduct that involves misrepresentation that adversely reflects on the
lawyer’s fitness to practice law. *Id*

1 for a sexual relationship with her

2 **4. The aggravating and mitigating circumstances**

3 The parties agreed, and the hearing officer finds, two factors in aggravation:

4 *Standard 9 22(b)* (selfish motive). Respondent allowed his personal interest to
5 interfere with his duty to his client.

6 *Standard 9 22(i)* (substantial experience in the practice of law) Respondent was
7 admitted to the practice over 10 years prior to the events

8 The parties submitted five mitigating factors, only three of which this hearing
9 officer can find

10 *Standard 9 32(a)* (lack of prior disciplinary history) Respondent has no prior
11 disciplinary history

12 *Standard 9 32(d)* (timely good faith efforts to rectify the consequences). This
13 hearing officer declines to find this factor Rather, it appears that Respondent's initial
14 instinct was to attempt to discredit Petersen by attacking her character.

15 *Standard 9 32(e)* (cooperation with disciplinary proceedings). Respondent has
16 been cooperative with the State Bar's investigation

17 *Standard 9.32(g)* (good character and reputation) Respondent has submitted
18 ample evidence of good character.

19 *Standard 9 32(l)* (remorse) This hearing officer finds insufficient evidence of
20 remorse to find this factor.

21 Although the above aggravating/mitigating factors exist, none, either individually
22 or in combination, are sufficient to change the presumptive sanction of censure

23 **B. PROPORTIONALITY REVIEW**

24 To have an effective system of professional sanctions, there must be internal
25 consistency, and it is appropriate to examine sanctions imposed in cases that are
26 factually similar. *Peasley, supra*, 208 Ariz at ¶ 33, 90 P 3d at 772. However, the
27 discipline in each case must be tailored to the individual case, as neither perfection nor
28 absolute uniformity can be achieved. *Id* at 208 Ariz at ¶ 61, 90 P 3d at 778 (citing *In*

1 *re Alcorn*, 202 Ariz. 62, 76, 41 P 3d 600, 614 (2002), *In re Wines*, 135 Ariz 203, 207,
2 660 P.2d 454, 458 (1983))

3 The parties submit, and the hearing officer finds, *In Re Moore*, SB-02-0043-D
4 (2002) to be sufficiently similar to support a finding of proportionality. The respondent
5 in *Moore* was censured for persistent sexual comments and invitations to his client.

6 **VI. RECOMMENDATION**

7 Upon consideration of the facts, application of the *Standards*, including
8 aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer
9 recommends acceptance of the Tender of Admissions and Agreement for Discipline by
10 Consent and the Joint Memorandum in Support of Agreement for Discipline by Consent
11 providing for the following:

12 1 Respondent shall receive a Censure.

13 2 Respondent shall pay all costs and expenses incurred by the State Bar in
14 these proceedings within thirty (30) days of the Supreme Court's Final Judgment and
15 Order

16 3. Respondent shall serve a term of probation for one (1) year under the
17 following conditions:

18 a. Respondent shall contact the State Bar's Law Office Management
19 Assistance Program (LOMAP) within thirty (30) days of the date of the Supreme
20 Court's Judgment and Order. The director of LOMAP shall develop a probation
21 contract, and its terms shall be incorporated herein by reference. The probation
22 period will begin to run on the date of the final Judgment and Order in this case,
23 and will conclude one (1) year from the date that all parties have signed the
24 probation contract;

25 b. Respondent shall undergo an assessment in connection with MAP,
26 and any recommendations resulting from such assessment shall also be
27 incorporated in the probation contract. Respondent shall attend and complete
28 anti-sexual harassment or sensitivity training, as recommended by the Director

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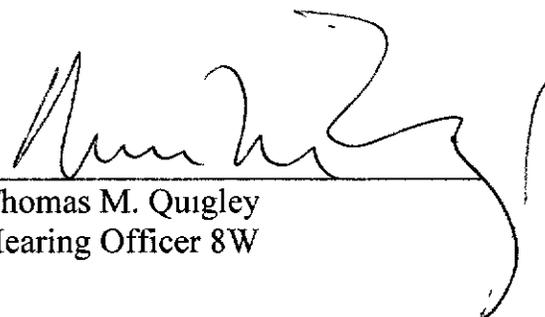
of MAP,

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 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). 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 thirty (30) days after receipt of notice, to determine whether a term of probation has been breached and, if so, to recommend appropriate action and response. If there is an allegation that Respondent failed to comply with any of the foregoing terms, the State Bar of Arizona bears the burden of proof to prove noncompliance by clear and convincing evidence.

Respondent shall also pay the costs and expenses of this action during the period of probation.

DATED this 21st day of February, 2008.

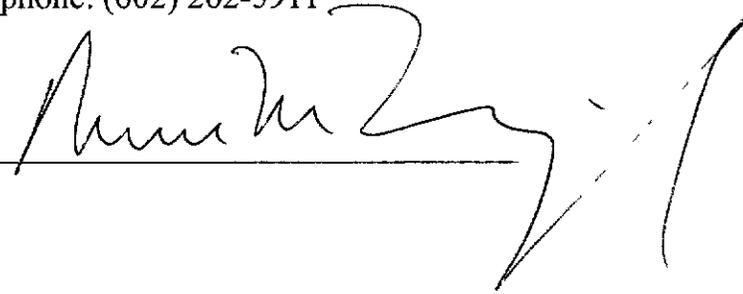

Thomas M. Quigley
Hearing Officer 8W

Original filed this 21st day of February, 2008 with the Disciplinary Clerk of the Supreme Court

Copy of the foregoing mailed this 21st day of February, 2008, to:

Matthew E. McGregor
Staff Bar Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 200
Phoenix, Arizona 85016-6288
Telephone (602) 340-7250

1 J. Scott Rhodes
Mia K. Jaksic
2 **JENNINGS, STROUSS & SALMON, P.L.C.**
A Professional Limited Liability Company
3 The Collier Center, 11th Floor
201 East Washington Street
4 Phoenix, Arizona 85004-2385
Telephone: (602) 262-5911

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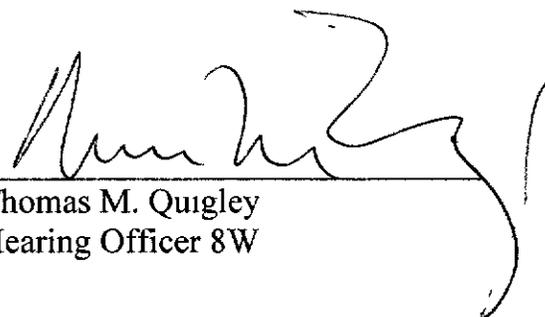
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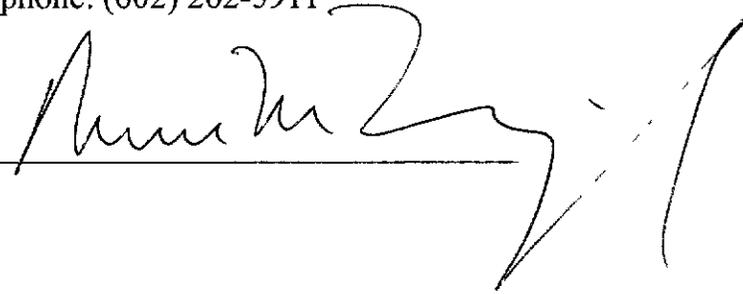

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1 J. Scott Rhodes
Mia K. Jaksic
2 **JENNINGS, STROUSS & SALMON, P.L.C.**
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