

**BEFORE A HEARING OFFICER  
OF THE SUPREME COURT OF ARIZONA**

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

**JAMES M. LAGANKE,**  
Bar No. 006913

Respondent.

File No. 07-2049, 08-0024, 08-0180,  
08-0396

**HEARING OFFICER'S REPORT**

(Assigned to Hearing Officer 9J  
Mark S. Sifferman)

**PROCEDURAL HISTORY**

The Complaint was filed in this matter on December 30, 2008, to which Respondent filed an Answer. An evidentiary hearing was set for May 21 and 22, 2009. On April 2, 2009, the State Bar and the Respondent gave notice that a settlement was reached. A Tender of Admissions and Agreement for Discipline by Consent plus a Joint Memorandum in support thereof were filed April 15, 2009. A hearing on the Tender was held April 24, 2009. At that time, Amy Rehm appeared on behalf of the State Bar of Arizona. Respondent appeared personally and through counsel, Kent E. Turley. Based upon the whole record, including the Tender and the evidence adduced at the April 24, 2009 hearing, the following findings of fact and conclusions of law are made:

### FINDINGS OF FACT

1. Respondent has been a lawyer in the State of Arizona since having first been admitted on October 17, 1981. *Tender of Admissions and Agreement for Discipline by Consent ("Tender")*, ¶ 1.

#### COUNT ONE (File No. 07-2049)

2. In early 2007, Linda Janitell and her ex-husband, John Janitell, retained Respondent to represent them in regards to an ongoing lawsuit entitled *Performance Management LLC v. John Janitell and Linda Janitell*, Maricopa County Superior Court Cause No. CV2006-051671 in which the Janitells were being sued for a debt of \$27,000. *Tender*, ¶¶ 2 – 20.

3. The debt was incurred during the time the Janitells were married. It was largely undisputed that the debt was incurred by Mr. Janitell, and Mrs. Janitell's liability arose strictly as a result of the marital community liability. *Id.*

4. At the time Respondent was retained, a judgment had already been entered against Mr. Janitell. *Id.*

5. The Janitells agreed to pay Respondent some amount in legal fees. There is a dispute between Respondent and the Janitells as to the amount agreed upon. *Id.*

6. There was no written fee agreement nor other written document describing the basis or the rate of the fee or the scope of representation. However, Respondent had represented Mr. Janitell in several matters in the past. *Id.*

7. After Respondent was retained, Mr. Janitell paid \$625.00 for legal research. Respondent asserts that this money was paid directly to Attorney Larry Dunleavy who performed the legal research. *Id.*

8. On or about April 10, 2007, a judgment was entered against Linda Janitell in a case after a Motion for Summary Judgment was filed against her based on the default judgment against John Janitell. *Id.*

9. The Janitells contend that Respondent indicated that he would file a Motion for Reconsideration or an appeal of the judgment on their behalf. Respondent contends that he did not make any such indication, but rather indicated that he would attempt to settle the matter. *Id.*

10. After several weeks passed, Ms. Janitell phoned Respondent about the case. At that time, Respondent told Ms. Janitell that he had requested a \$3,000.00 retainer from Mr. Janitell and had only received \$2,000.00. Ms. Janitell agreed to pay the balance. Respondent contends that this was simply the balance due on the original fee agreement. *Id.*

11. Shortly thereafter, Ms. Janitell delivered the additional \$1,000.00 to Respondent's secretary who also worked at the law office of attorney James Rolle. Ms. Janitell was provided a receipt for her payment on letterhead from Respondent's office. Respondent asserts that Ms. Janitell does not know if she paid the funds to Respondent or to Mr. Rolle. *Id.*

12. Respondent contends that he was unaware of any additional payment made by Ms. Janitell. Respondent further contends that during this time period he employed an assistant who regularly misappropriated funds from his practice. At the time, Respondent contends that he was unaware of this problem. Respondent does not know if his assistant took the funds or if they were paid to Mr. Rolle, notwithstanding that the client has a receipt from Respondent's law office for payment of the funds signed by Respondent's former assistant. *Id.*

13. Ms. Janitell became increasingly concerned about the matter as a creditor was attempting to levy her assets to pay the debt. In or about July of 2007, Ms. Janitell spoke to Respondent about her concerns. At that time he advised her to offer to settle the matter for \$5,000.00 to which she agreed. Respondent later informed her that the creditors had rejected her offer because a third party had already offered to pay the creditor \$22,000.00 on behalf of the Janitells. *Id.*

14. In or about July of 2007, Ms. Janitell terminated Respondent's representation of her in the matter. On or about August 16, 2007, Ms. Janitell retained a new lawyer James Rolle to represent her in the matter. Mr. Rolle eventually settled the matter for an amount Respondent believes to be \$22,000. *Id.*

15. Ms. Janitell later sent Respondent a letter concerning his lack of services and requesting a refund of her services. Respondent phoned Ms. Janitell on October 1, 2007, apologized for the result, and offered to refund her moneys. Ms. Janitell accepted

the offer. Respondent contends that he offered the refund as a professional courtesy only, and not as an admission of wrong-doing.

**COUNT TWO**  
**(File No. 08-0024)**

16. In May 2007, Marilyn Diane Harris retained Respondent to represent her in probating her ex-husband's holographic will. *Tender*, ¶¶ 21 – 28.

17. On or about May 11, 2007, Ms. Harris paid \$2,000.00 in legal fees to Respondent for representation in the probate matter. Ms. Harris paid the fees by a check in the amount of \$300.00 and \$1,700.00 in cash which was delivered to Respondent's assistant who was physically located at the Law Office of James Rolle. Ms. Harris received a receipt for the payment of fees on Respondent's office letterhead. *Id.*

18. Respondent asserts that he never received the \$1,700.00 cash payment from Ms. Harris. Respondent contends that he was unaware of any additional payment made by Ms. Harris. Respondent further contends that during this time, he employed an assistant who regularly misappropriated funds from his practice. However, Respondent was not aware of the problem. *Id.*

19. There was no written fee agreement or other writing documenting the basis or rate of the fee, or the scope of the representation. *Id.*

20. At the outset of the representation, Ms. Harris provided some original documents to Respondent for use in the probate case. Respondent contends he was

working on the probate matter at the time his services were terminated by Ms. Harris. He acknowledges that he represented her for only a brief time, approximately 6 days. *Id.*

21. On or about July 26, 2007, Ms. Harris terminated Respondent's services, and retained attorney James Rolle to handle the probate case. Respondent asserts that he returned Ms. Harris' documentation to her new attorney as soon as he located them. *Id.*

**COUNT THREE**  
**(File No. 08-0180)**

22. Prior to October 2005, David Polanco retained Respondent to represent him in a Chapter 7 Bankruptcy. There was no written fee agreement or other writing documenting the basis or rate of the fee, or scope of the representation. However, Respondent had represented Mr. Polanco previously in bankruptcy matters. *Tender*, ¶¶ 25 – 45.

23. On or about March 7, 2006, a discharge was entered in Mr. Polanco's bankruptcy case. However, approximately one month prior to that discharge, Sterling Financial, Inc., filed an adversary complaint in Mr. Polanco's bankruptcy matter seeking an exemption from the discharge. *Id.*

24. On or about April 13, 2006, Respondent filed an answer to the adversary complaint denying liability. *Id.*

25. On or about December 11, 2006, a hearing was held in the adversary proceeding. Respondent failed to appear for the hearing. Respondent asserts he was ill

on the date in question, and believed that someone would stand in for him and explain his absence to the court. *Id.*

26. On or about February 12, 2007, a status conference was held in the adversary proceeding. Respondent failed to appear for the status conference. Respondent again asserts that he was ill at the time of the proceeding, and believed that someone would stand in for him and explain his absence. *Id.*

27. On or about March 13, 2007, Sterling filed a motion for summary judgment in the adversary proceeding and mailed the motion to Respondent. A day later, Sterling filed a notice of hearing on the motion and sent a copy of the notice along with the court's order setting a briefing schedule to Respondent. *Id.*

28. Respondent failed to respond to the summary judgment motion. Respondent asserts that he did not respond because he was unaware of the motion. Respondent believes that his assistant at the time diverted mail from his office to cover up her misdeeds.

29. On or about April 26, 2007, Sterling filed a Certificate of Service and No Objection to plaintiff's motion for summary judgment and mailed those documents to Respondent. On or about May 15, 2007, the court entered judgment against Mr. Polanco and in favor of Sterling declaring \$47,754.13 plus interest to be non-dischargeable. *Id.*

30. Respondent asserts that he informed Mr. Polanco of the judgment when he learned of it, and offered to file a motion to have the judgment set aside. *Id.*

31. Mr. Polanco sued Respondent for malpractice in Maricopa County Superior Court. Respondent defaulted in that case. Judgment was entered against him and in favor of Mr. Polanco on January 15, 2008. Respondent settled this malpractice claim pursuant to a settlement agreement dated August 15, 2008. *Id.*

**COUNT FOUR**  
**(File No. 08-0396)**

32. In March or April, 2007, Stephanie DiMaria retained Respondent to represent her in a Chapter 11 Bankruptcy case. *Tender*, ¶¶ 46 – 68.

33. Ms. DiMaria paid Respondent \$6,000.00 for the filing fee and for representation. There was no written fee agreement or other writing documenting the basis or rate of the fee, or the scope of the representation. Respondent asserts that he believed that an “Application to Employ” him as counsel for the debtor had been filed in the case which would have disclosed the fee agreement. However, Respondent failed to file such an Application or a Rule 2013 Disclosure of Compensation. *Id.*

34. On or about May 1, 2007, Respondent filed the Bankruptcy Petition for the client, but did not attach the Statement of Financial Affairs or the Schedules. On or about May 16, 2007, Respondent filed a Motion to Extend the Time to File the Statements and Schedules, which was granted. Respondent filed the Statements and Schedules on or about May 30, 2007. *Id.*

35. Ms. DiMaria’s initial debtor interview was held on June 11, 2007. Respondent did not appear for the interview but sent his paralegal. Respondent asserts

that such a setting does not require the presence of a lawyer, and that it is common practice for paralegals to attend or for clients to attend without their lawyers. At the interview, the analyst had numerous questions about inconsistencies in the schedules and statements. The analyst requested that the schedules and statements be amended prior to the 341 Creditors' Meeting. *Id.*

36. Respondent failed to amend the schedules and statements or otherwise address the discrepancies prior to the 341 Creditors' Meeting. On or about June 19, 2007 the 341 Creditors' Meeting was held. Respondent failed to appear, but sent attorney David DeLozier to appear in his place. Respondent asserts that he terminated his assistant two days before and was attempting to move telephone lines, secure his computer and hire a new assistant. *Id.*

37. Although Mr. DeLozier is a bankruptcy attorney, he had only been contacted by Respondent two hours prior to the scheduled meeting, was not familiar with DiMaria's case. Respondent asserts that Mr. DeLozier is an experienced bankruptcy lawyer and was competent to handle the proceeding that was set that day. Because of the failure to amend the schedules and statements, and because of Respondent's failure to appear, the 341 Creditors' Meeting was rescheduled to July 13, 2007. *Id.*

38. On or about June 22, 2007, the Trustee sent Respondent a letter advising him of the continued date for the creditors' meeting, and requesting that amended

schedules and statements be provided by July 3, 2007. Respondent failed to provide the amended schedules and statements by July 3, 2007. *Id.*

39. A status hearing was held in the matter on July 3, 2007. The Respondent did not appear and instead sent attorney Sylvia L. Thomas in his place. Ms. Thomas does not practice bankruptcy law, was not familiar with the facts of the case, and had never represented a client previously in a Chapter 11 proceeding. Respondent asserts that he had adequately prepared Ms. Thomas for the limited proceeding that was to occur that day. At the July 3, 2007 status hearing, Ms. DiMaria appeared with new counsel, Allan NewDelman. *Id.*

40. During the course of the representation, Ms. DiMaria made numerous attempts to contact the Respondent, to which there was not an adequate response. Respondent asserts that he is unaware of any attempts by Ms. DiMaria to contact him which were unanswered. He concedes that it is possible that any lack of communication could have occurred during the time he fired his assistant and was trying to have the telephone company transfer his office line back to him. *Id.*

41. The Trustee in the Chapter 11 proceeding filed a Motion for Disgorgement of Attorneys' Fees requesting that the court order the fees paid by Respondent by Ms. DiMaria be disgorged. Respondent did not file a Response to the Motion. A hearing was held on the Motion on August 30, 2007. Respondent failed to appear at the hearing.

42. By an Order dated September 5, 2007, Respondent was ordered to disgorge attorneys' fees in the amount of \$4,961.00 to Ms. DiMaria by September 10, 2007.

Respondent complied with the Court's Order. *Id.*

### CONCLUSIONS OF LAW

1. There is clear and convincing evidence that, as to Count One, the Respondent violated ER 1.5 and 5.3.
2. There is clear and convincing evidence that, as to Count Two, Respondent violated ER 1.5 and 5.3.
3. There is clear and convincing evidence that, as to Count Three, Respondent violated ER 1.3, 1.5 and 5.3.
4. There is clear and convincing evidence that, as to Count Four, Respondent violated ER 1.5 and 5.3.
5. Respondent's conduct caused harm and created the potential for harm to clients. *Joint Memorandum in Support of Tender of Admissions and Agreement for Discipline by Consent* ("Joint Memorandum"), p. 4, ll. 23 – 25.
6. Respondent's mental state for all the violations was negligent. *Joint Memorandum*, p. 3, lines 7 – 12.<sup>1</sup>
7. The following aggravating factors are present: pattern of misconduct, multiple offenses, and substantial experience in the practice of law.
8. The following mitigating factors are present: absence of a prior disciplinary record, absence of a dishonest or selfish motive, plus full and free disclosure to the disciplinary authorities.

---

<sup>1</sup> Respondent's mental state is more appropriately a question of fact.

9. Contingent on approval of the Tender, the State Bar has agreed to dismiss the allegations in Count One that Respondent violated E.R. 1.2, 1.3, 1.4, 1.7, 1.15 and 1.16(d), the allegations in Count Two that Respondent violated E.R. 1.2, 1.3, 1.4, 1.15 and 1.16(d); the allegations in Count Three that Respondent violated E.R. 1.2, 1.4, 1.15 and 1.16(d); and the allegations in Count Four that Respondent violated E.R. 1.2, 1.4, 1.15 and 1.16(d). The State Bar is agreeing to dismiss these allegations since its investigation has revealed that it is debatable whether the State Bar would be able to prove the allegation with clear and convincing evidence or it has determined that the violation to which Respondent agrees sufficiently or more accurately covers the situation.

### **RESTITUTION**

#### **Count One**

Respondent agrees to pay \$1,000.00 to Ms. Janitell. No restitution is due and owing to Mr. Janitell.

#### **Count Two**

Respondent also agrees to pay \$1,700.00 to Ms. Harris.

#### **Count Three**

Respondent will make the payments required by the settlement agreement reached in the Superior Court lawsuit referenced in that Count. *Tender*, p. 17, ll 1 – 5.

#### **Count Four**

No restitution is due and owing on Count Four as the fees ordered to be disgorged have been paid. *Tender*, p. 17, ll 6 – 9.

### **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. Where there are multiple charges of misconduct, there should only be one sanction with the multiple instances of misconduct considered as aggravating factors. See *In re Cassali*, 173 Ariz. 372, 843 P.2d 654 (1992).

The duties violated by Respondent were ones owed to the profession. ABA *Standard* 7.0 is the *Standard* applicable to the most serious of Respondent's misconduct. Since the relevant mental state is negligence, the presumptive sanction is censure. *Standard* 7.3. The aggravating and mitigating factors do not dislodge the presumptive sanction from the range of appropriate sanctions.

#### **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 provide the following cases for guidance: *In re Collins*, SB-97-0058-D (July 2, 1997) and *In re Heldenbrand*, SB-99-0089-D (January 13, 2000). This Hearing Officer has reviewed those decisions and agrees that they support the agreed-upon sanction. This Hearing Officer's independent search of the Disciplinary Cases Matrix reveals no other comparable cases.

### 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 be censured.
2. Respondent will pay the restitution set forth previously.
3. Respondent will be placed on probation for a period of one year.

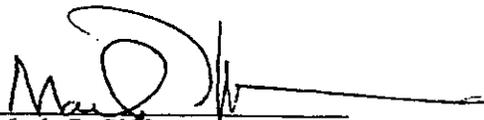
Respondent shall contact the Director of the State Bar's Law Office Management Assistant Program (LOMAP) at 602-349-7313 within 30 days of the Final Judgment and Order in this matter. Respondent shall submit to a LOMAP examination of his office procedures, including but not limited to, compliance with ER 1.5 and 5.3. The Director of LOMAP or her designee will 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 Final Judgment and Order, and will conclude one year from the date that the Respondent has signed the "Terms and Conditions of Probation." The Terms and Conditions of Probation shall include that (i) Respondent will refrain from engaging in any conduct that would violate the Rules of Professional Conduct or other Rules of the Supreme Court of Arizona and (ii) in the event that Respondent fails to comply with any of the 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 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 of probation, the burden of proof shall be on the State Bar of Arizona to prove non-compliance by clear and convincing evidence.

4. Respondent shall be responsible for any costs associated with LOMAP.

5. Respondent shall pay all costs and expenses of the disciplinary proceeding, which include the costs and expenses of the State Bar of Arizona, the Disciplinary Clerk, the Disciplinary Commission, and the Supreme Court.

DATED this 28<sup>th</sup> day of April, 2009.

  
Mark S. Sifferman  
Hearing Officer 9J

**COPY** of the foregoing mailed this  
24<sup>th</sup> day of April, 2009, to:

Kent E. Turley  
**TURLEY, SWAN, CHILDERS, RIGHI & TORRENS, P.C.**  
3101 North Central Avenue, Suite 1300  
Phoenix, AZ 85012-2656  
Attorney for Respondent

Amy K. Rehm  
Senior Bar Counsel  
**STATE BAR OF ARIZONA**  
4201 North 24<sup>th</sup> Street, Suite 200  
Phoenix, Arizona 85016-6288

  
\_\_\_\_\_