BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, JONATHON J OLCOTT, Bar No. 014859 Respondent	No 05-2216 **HEARING OFFICER'S REPORT AND RECOMMENDATION**

PROCEDURAL HISTORY

A Probable Cause Order was filed on May 18, 2007. A one-count Amended Complaint was filed on or about May 13, 2007 On January 29, 2008, the Respondent filed his Answer to the Complaint A settlement conference was held. The parties were unable to reach a settlement The Bar and the Respondent attorneys filed various motions which were heard and decided prior to the hearing A hearing was conducted on May 19, 2008

FINDINGS OF FACT

1. At all times relevant, Respondent was a lawyer licensed to practice law in the State of Arizona, having been first admitted to practice on May 14, 1993 (Respondent's pre-hearing statement)

2 In 2005, Respondent's practice focused primarily in representing homeowner associates (Respondent's pre-hearing statement)

3 Among the services provided by Respondent to the HOA clients were for

homeowners arrearages for association dues and/or assessments. (Respondent's pre-hearing statement)

4 Respondent, during 2005, submitted applications for attorneys fees and costs requesting that the Court award him attorneys fees. (State Bar's pre-hearing statement)

5 The State's first witness was Tracy Lynn Byers, manager for Raintree Gardens and Regency Square Homeowners Association (Tr p 14, ll 10-14; p 15, ll 3-10)

6 Ms Byers was familiar with the fee arrangements that the Respondent had with both associations. (Tr. p.17, ll.4-6)

7 Ms Byers could not remember exactly when a meeting took place in which the fee agreement was discussed (Tr p.18, ll 3-5)

8 Ms Byers' understanding of the agreement was that it was "free legal" (Tr. p.19, ll.5-7)

9. Mr Olcott explained the agreement at a meeting, stating that the association didn't have to pay for collections. (Tr. p.19, ll 15-22)

10 Ms. Byers was aware that there were offices in Tucson and Phoenix. (Tr p 22, ll 1-12)

11 Ms Byers stated that she did see Exhibit 6, which is a contingency fee agreement for Raintree Gardens Park (Tr p 23, ll 1-3)

12 Ms Byers testified that Exhibit 6, page 1 is consistent with her understanding of the arrangements (Tr. p 23, ll.18-25; p.24, ll 1-4)

13. Ms Byers did not remember that the association was responsible if they should collect the assessments (Tr. p24, ll.5-13)

14. Ms. Byers further testified that she hadn't seen any charges from Mr Olcott's firm where the homeowner paid directly to the association. (Tr p 25, ll.2-8)

15. Ms Byers also testified that Raintree Gardens did not waive cost, expenses and attorneys fees. (Tr p 26, ll.1-5)

16. The State then called the Respondent, Jonathon J. Olcott, who testified that in 2005, he supervised collections for the Tucson office and gave legal advice to HOA managers (Tr p 30, ll 15-19)

17 The fee arrangement with B ellair Association and Raintree Gardens was not materially changed in 2005 (Tr. p 33, ll.5-25)

18 A contingency to the fee arrangement where the association would have to pay attorneys fees is when the homeowner paid the assessment in full to the HOA. (Tr p.34, ll.20-25)

19. The reasoning is if a trial was scheduled, the firm could not go to court and ask just for attorneys fees and no assessment (Tr p 35, ll 7-12, p.36, ll 1-4)

20. If the homeowner did not pay their fees/assessment, then the HOA would turn the case over to the firm, who would file a complaint in court. (Tr. p.36, ll.17-25)

21 The Respondent admitted that his signature appeared on Exhibits 5, 9 and 10 (Tr p.38, ll 6-25; p 42, ll 5-25)

22 That the Respondent is aware that an affidavit is a sworn statement (Tr. p 67, ll 11-22)

23 If the Court did not award the Respondent the full amount of legal fees, he did not seek to collect from the homeowners association (Tr p 72, ll 15-22)

24. Mr Olcott testified that HOAs, according to the agreement, would have to pay attorneys fees if the homeowner paid the assessments but not attorneys fees (Tr p 87, ll 22-24)

25 Mr Olcott also testified that if an HOA terminated services on a case in progress, then an HOA would have to pay attorneys fees. (Tr. p.88, ll.2-11)

26 If that occurred, then the HOA was required to pay attorneys fees. (Tr p 35, ll 1-4)

27 Mr. Olcott testified that Exhibit 2 is a form agreement. (Tr p.90, ll 16-22)

28 The Respondent further testified that he does not know how his signature got on Exhibit 2, and that Exhibits 2 and 6 are identical (Tr. p 91, ll 2-10)

29 Exhibits 4 and 6 are the same agreements (Tr. p 92, ll 4-10)

30. Exhibit 7 is consistent with Exhibit 4 (Tr p 92, ll.13-20)

31. The decision to collect or not collect from HOAs was based on the terms of the fee agreements (Tr p 94, ll.1-5)

32 Exhibit 1, a fee application, was prepared in Tucson and is different from the fee application for Raintree Gardens. (Tr. p.94, ll.11-25)

33 The form used for Regency Square and Bellair are not the same form used by the Tucson office (Exhibit 10, and Tr p 95, ll 1-6)

34 Exhibits 1, 5, 9 and 10 list all attorneys in the firm with a Phoenix address

35. The Respondent complied with ER 1 5 regarding reasonable fees (Tr p 96, ll 9-12)

36 The Respondent testified that the Tucson form is different from the Phoenix form in that the Tucson form eliminated unrelevant lawyer's argument and rhetoric (Tr p 96, ll 16-21)

37. The Respondent testified that the applications in Exhibits 5, 9 and 10 are not the forms he would have used if he was responsible for the cases (Tr p.96, ll 16-23)

38. The Respondent has been disciplined once in the State of Arizona, and also in the State of Illinois due to a reciprocal discipline compact with Arizona (Exhibit 10)

39. The contingency fee agreement used by the Respondent since 1999 through the present, stated that if the debt owed by the homeowner becomes uncollectible, the HOA does not have to pay attorney fees. (Exhibits 6, 7, para 2, and Tr p.104, ll 8-14)

40 The Respondent used a marketing program in which he made presentations to HOAs explaining the contingency program (Tr p.107, ll 2-15)

41. That in cases where the Court did not award all of the attorneys fees, the Respondent did not bill the difference to an HOA (Tr p 109, ll 12-15)

42 The Respondent did not know whether Mr Shore or Mr Cannon, former partners, billed the HOAs if the Court did not pay all of their attorneys fees (Tr p 109, ll 24-25, p.110, l.1)

43. In September 2004, under the partnership agreement, Mr. Cannon was the managing partner of the Phoenix office (Exhibit A, para 4 5 2, and Tr p 112, ll 2-6, p 112, ll 25; p 113, ll 1-8)

44 As managing partner of the Phoenix office, Mr Cannon was to supervise all the paralegals, file clerks, and other people in the Phoenix office. (Exhibit A, para 4 5 2, and Tr p 113, ll 12-14)

45. Respondent disagrees with Mr Cannon's previous testimony that he did not work on the Raintree Gardens case. (Tr. p.114, ll 11-25)

46 Between March and May 2005, Mr. Cannon was coming to the office less often. (Tr. p 117, ll 4-19)

47 When the Respondent came to the Phoenix office, a paralegal, Ms. Harrow, requested

that he sign certain fee applications. (Tr. p.117, ll 20-23)

48. On those occasions, the Respondent would look at the stack of documents, confirm that it was one of Mr. Cannon's forms, and sign them under the assumption that they were fine (Tr p.118, ll 2-19) He trusted that Mr Cannon's forms were good (Tr p 119, ll 2-17)

49. That Respondent believes that the fees applications are not misleading or deceitful. He did not intend to mislead, lie or deceive anyone (Tr p 119, ll 7-15)

50 The Respondent did not read any of the fee applications (Exhibits 5, 9 and 10) before he signed them. (Tr. p 121, ll 2-6)

51. In March, April and May 2005, the Respondent was aware that Mr Cannon was not coming to work regularly, but was unaware that he was having problems meeting deadlines. (Tr p.122, ll 20-25)

52 Respondent was aware that Mr. Cannon was not working Saturdays, he was hiring independent contractors, and entering into contracts that exceeded his authority, in violation of the operating agreement. (Exhibit 10, para 3 8 and 7.1 f, and Tr p 123, ll 13-21)

53 The Respondent admitted that he did not carefully read the portion detailing fees and expenses for Exhibits 5, 9 and 10 (Tr p 124, ll.16-25, p.125, l.1)

54 Respondent explained that the request for fees raised an extreme hardship to his clients, as they are a non-profit corporation and the individual homeowners would have to finance the lawsuit (Tr p.125, ll 9-16)

55 The Respondent also admitted that he did not have personal knowledge of the facts as stated in the affidavit for fees (Tr p 126, ll.15-21)

56 Respondent stated that it would have taken more than an hour or two to review the

affidavits. (Tr. p.129, ll.10-20)

57. Another day would have made a significant difference (Tr p 129, ll 22-25)

58 The Respondent did not have authority to forgive any fees with respect to Raintree, Regency and Bellair, as Mr Cannon had those cases. (Tr. p.131, ll.22-25; p.132, ll.1-12)

59 Respondent assumed that Mr. Cannon's practice and procedures would lead to accurate and acceptable affidavits for an application for attorneys fees (Tr p 132, ll 20-25)

60 Respondent had no reason to believe that the statements in the three applications related to cost were inaccurate (Tr. p.133, ll 6-9)

61. The Respondent did not think of signing for Mr Cannon (Tr p.118, l 25, p 119, ll 1-2)

62. Respondent had no reason to believe that the paralegal who prepared the cost statement was inaccurate. (Tr. p 134, ll 6-11)

63 The Respondent called Lisa J Harrow, paralegal (Tr p 74, ll.1-8)

64. Ms. Harrow had formerly worked in the Phoenix office of various firms which Respondent was an attorney (Tr p 74, ll.6-14)

65. Ms. Harrow's job responsibility was to draft pleadings, letters, various documents for review, and signature (Tr p 74, ll 16-19)

66. Ms. Harrow was aware that the firm had offices in Phoenix and Tucson (Tr p 74, ll 20-23)

67 Ms Harrow worked out of the Phoenix office (Tr. p.74, ll.24-25)

68. In 2005, the two offices were not fully integrated electronically (Tr p 75, ll 3-5)

69 They both worked a program called Time Manners, but each office had their own data

base. (Tr. p.75, ll.6-10)

70 Part of Ms Harrow's job responsibility was to prepare attorney fee applications (Tr p 75, ll 11-14)

71. The applications that she prepared were for clients of Sean Cannon (Tr. p.75, ll 15-17)

72. All forms were approved and provided by Mr. Cannon (Tr. p 75, ll 21-22)

73 Mr. Cannon was solely responsible for the Phoenix office. (Tr. p.76, ll 2-5)

74 Ms. Harrow worked under the direction of Mr Cannon, who also provided the forms with specific instructions (Tr p 76, ll.4-11)

75 Ms Harrow prepared the application for attorneys fees for Raintree Gardens pursuant to instructions from Mr Cannon (Tr. p 76, ll.18-25)

76. Ms. Harrow testified that Mr Cannon worked on the Raintree Gardens and Regency Square (Tr p 77, ll 1-10)

77 Ms Harrow prepared the attorneys fees applications for Mr Cannon. (Tr. p 77, ll 6-12)

78 On occasion, Ms. Harrow asked the Respondent to sign an attorneys fees application (Tr p.78, ll 5-7)

79 The two applications were prepared for Mr Cannon's review and signature, however, he did not appear in the office as he was frequently out. (Tr. p.78, ll 11-15)

80 When Mr. Cannon did appear, he did not sign the documents and they sat on his desk (Tr p 78, ll 14-16)

81 Ms Harrow asked the Respondent to sign the documents as the clients were getting

agitated and wanted their documents processed (Tr p.78, ll 17-23)

82 Mr. Cannon did not regularly appear in the office once he was made a partner (Tr p 79, ll 8-10)

83 Sometimes Mr Cannon would tell Ms Harrow that he would be at the office and then not appear. (Tr. p.79, ll 16-18)

84 In 2005, complaints from HOAs started because Mr Cannon was not responding to their telephone calls or correspondence. (Tr. p.81, ll.12-21)

85. In 2005, Ms. Harrow testified that Mr. Cannon was unreliable (Tr. p 83, ll 15-17) and he did not come to work. (Tr. p 83, ll.18-19)

86 Ms Harrow had difficulty getting Mr Cannon to sign documents or do other work when he did come to the office (Tr p 83, ll 20-25)

87 When the Respondent did appear in Phoenix, she informed him that the documents had been prepared for weeks and that the clients were getting agitated because the documents were not being timely processed. (Tr. p.84, ll.9-12)

88. Ms Harrow has an in-law who is a relative of the Respondent (Tr. p 85, ll.3-6)

89. In 2005, Ms Harrow worked on between 100 and 200 cases (Tr p 85, ll 13-23)

90 The State called Sean Cannon, who appeared by phone (TR p 45, ll 5-12, p 47, ll 18-20)

91. From January through mid-November 2005, Mr Cannon was a partner with Jonathon J Olcott, with two offices, one in Tucson and one in Phoenix. (TR p.48, ll 10-16)

92 Mr. Cannon believes that he generally refused to work on home foreclosure cases for individuals (TR. p 49, ll.11-17)

93 Mr Cannon was requested by the State Bar to review Exhibit 5; he then testified that he did not prepare documents, direct their preparation, or work on a case involving Raintree Gardens, Park v Marquez (TR. p.51, ll 2-11)

94 Mr. Cannon testified, however, that he doesn't remember the case and that this is a case that Mr. Olcott did with his paralegal (TR. p.51, ll 12-18)

95 Mr. Cannon reviewed Exhibit 9 regarding Regency Square, in which he testified that he did not prepare documents, have documents prepared at his direction, or personally work on the case because he has no memory of it and this is the type of case that Mr Olcott worked on (TR p 52, ll 16-25, p 53, ll.1-2)

96 Mr Cannon reviewed Exhibit 10, and again stated that he did not prepare the documents, had not had them prepared at his direction, or personally worked on the case for Bellair Association (TR p 53, ll 5-16)

97 His name appears on the last page of the affidavits and on page 1 and page 2 of the Exhibits (Exhibits 5, 9 and 10)

98 Mr Cannon did some work on the case involving Exhibits 5, 6 and 9

99 Mr Cannon testified that he and Mr Olcott are currently involved in litigation with each other, however, he doesn't believe that Mr Olcott sued him. (TR. p.54, ll 12-16)

100 Mr Cannon could not testify to the managerial authority regarding the Phoenix office because he did not have the agreement in front of him, and he doesn't remember what the agreement said. (TR. p 56, ll 10-19)

101. It was Mr Cannon's understanding that he had the authority over the Phoenix office that was granted to him by the agreement (Exhibit A, para 4 5 2, and TR p 56, ll 20-25)

102 Exhibits 5 and 9 contain a "detail work in progress," which indicates that Mr Cannon did review and revise legal documents involving those cases (TR p.58, ll 1-10)

103 Mr Cannon testified that in April 2005, he appeared at the office during regular work hours on a regular basis (TR p 59, ll 12-18)

104 Mr Cannon could not remember which billing statements he reviewed or didn't review. (TR. p.64, ll 5-9)

105 Mr. Cannon further testified that he has "no recollection" of reviewing Exhibit 9 billing statement in 2005 (TR p 65, ll 12-15)

106. Mr Cannon testified that he may not have reviewed a billing statement in 2005 from the Phoenix office because either Mr. Olcott was handling the case or he missed something (TR p 65, ll 18-20, p.66, ll.2-10)

107 The State concurs that the Respondent cooperated fully with the S tate Bar's investigation. (Tr. p.120, ll 6-9)

CONCLUSIONS OF LAW

ER 3 1 (Meritorious Claims) states that a lawyer shall not bring or defend an action or assertion or controvert an issue unless there is a good faith basis in law and fact for doing so . The State has failed by clear and convincing evidence that the Respondent violated this ER

ER 3 3 (Candor Towards the Tribunal) states that a lawyer shall not knowingly make a false statement of fact or law or offer evidence that the lawyer knows to be false The State proved that there was a false statement of fact to the Tribunal knowingly made by the Respondent He had not reviewed the documents

ER 8 4 (Misconduct) The State failed to prove by clear and convincing evidence that the

Respondent's conduct involved dishonesty, fraud, deceit or misrepresentation. The Respondent had trusted his partner to have the facts accurate.

The State did not prove by clear and convincing evidence that the Respondent engaged in conduct that could be prejudicial to the administration of justice The Respondent attempted to provide a service for his clients on behalf of his partner.

In fact, the Respondent did attempt to act with reasonable diligence in pursuing a matter on behalf of the firm's client in that fee applications had been waiting for signature for a long time

ER 1.0(a) defines belief when the person involved actually supposes the fact in question to be true, the person may infer that from circumstances Subparagraph (I) defines reasonable belief when the lawyer believes that the manner in question and the circumstances are such that his belief is reasonable

"Reasonably should know," subparagraph (j), defines when a lawyer of reasonable prudence and competency could assert the matter in question.

All of these definitions conclude that a lawyer may conclude or believe something is accurate based upon the circumstances surrounding a case.

ABA STANDARDS

ABA *Standard 3.0* provides that 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 or mitigating factors.

This Hearing Officer considered *Standard 6 1* (False Statements, Fraud, and Misrepresentation) in determining the appropriate sanction warranted by Respondent's conduct. Specifically, *Standards 6 11, 6 2, 6 3 and 6 14.* This Hearing Officer also considered *Standard 6 2*

(Abuse of the Legal Process), more specifically *Standards 6.21, 6.22, 6 23 and 6 24* *Standards 7 1, 7 2, 7 3 and 7 4* (Violations of Duty Owed as a Profession) were further factors considered by this Hearing Officer

This Hearing Officer then considered aggravating and mitigating factors in this case pursuant to *Standards 9 22 and 9 32.* More specifically, *Standard 9 22(a)* prior disciplinary offenses, *Standard 9 22(l)* substantial experience in the practice of law The mitigating factors considered pursuant to Standards 9 32 or 9 32(a), 9 32(b), 9 32(e), 9 32(l) No other aggravating or mitigating circumstances are found

PROPORTIONALITY REVIEW

The Supreme Court has held in order to achieve proportionally when imposing discipline, the discipline in each situation must be tailored to the individual facts of the case in order to achieve the purpose of discipline *In re Wines*, 135 Ariz 203, 660 P.2d 454 (1983) and *In re Wolfram*, 174 Ariz 49, 847 P 2d 94 (1993). The Supreme Court has further recognized that the concept of proportionality review is "an imperfect process " *In re Owens*, 182 Ariz 121, 893 P 3d 1284 (1995). The reasoning is that no two cases are alike To have an efficient system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar *In re Peasley*, 208 Ariz 33, 98 P.3d 772 Discipline must be tailored to each individual case because neither perfection nor absolute uniformity can be achieved *In re Alcorn*, 202 Ariz. 62, 41 P 3d 600 (2002). The standards regarding sanctions should be consistent for the most serious instance of misconduct among a number of violations *In re Redeker*, 177 Ariz 305, 868 P 2d 318 (1994) The factors in this case are to a certain extent unique Factors 35, 36, 42, 46, 47, 63, 68, 70, 71, 77 and 79.

RECOMMENDATION

In considering the sanction appropriate in this matter, the purpose of discipline must be considered The purpose of discipline is "to protect the public from further acts by Respondent, to deter others from similar conduct, and to provide the public a basis for continued confidence in the Bar and the judicial system." *In re Hoover*, 155 Ariz 192, 745 P 2d 939 (1987) The Respondent was very clear in his testimony that he had made a mistake Facts 22, 23, 46, 47, 49, 53, 54, 56, 58, 59 and 85 This conduct was based upon the Respondent's attempt to provide a long awaited service to the clients (HOAs), and to render assistance to a partner

Disbarment, suspension and reprimand are not warranted in this case Under *Standard 7 0* (Violation of Duties Owed as a Professional), a lawyer must knowingly engage in the conduct with the intent to obtain a benefit and cause a serious or potential injury to a client, the public or the legal system

The same holds true for *Standard 6 2* (Abuse of the Legal Process) A lawyer must knowingly violate a rule with the intent to obtain a benefit, and cause serious injury or potentially serious injury and cause serious or potential serious inference with the legal proceeding

Standard 4 6 (Lack of Candor) requires a lawyer knowingly deceives a client by engaging in fraud, deceit or misrepresentation directed toward a client Therefore, *Standard 4 6* is inapplicable

In the three incidences raised by the State Bar, potential or actual injury was not proven nor was intent to benefit himself In fact, the testimony provided that the Respondent signed the applications for the benefit of the client and Mr Cannon

This does not mean that the Respondent should have ignored the requirements for signing

the attorneys fees affidavit As testimony provided, he assumed that his partner had the documents prepared correctly and accurately, facts 47, 48 and 49 The Rules provide a framework for the ethical practice of law, Rules of Professional Conduct Preamble A(16)

The Rules are rules of reason, (A)(14) as no worthwhile human activity can be defined totally by legal rule.

Upon consideration of testimony, exhibits, facts, and application of the Standards, including aggravating and mitigating factors, and a proportionality analysis, this Hearing Officer recommends that the Respondent receive an informal reprimand

DATED this 28th day of July, 2008

Hearing Officer #7R

Original filed with the Disciplinary Clerk
this 28th day of July, 2008

Copy of the foregoing mailed this
29th day of July, 2008, to:

Respondent/Respondent's Counsel

J. Scott Rhodes
201 East Washington, 11th Floor
Phoenix, AZ 85004

Bar Counsel
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

by Neeta Markhar